



# *MILITARY JUSTICE REVIEW*

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## ***TRANSFORMING MILITARY JUSTICE***

A BRIEFING FOR  
THE JUDGE ADVOCATE GENERAL

12 APR 2004

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## **BACKGROUND:**

CLEAR TREND IN MILITARY JUSTICE LEGISLATION SINCE 1950 HAS BEEN TO INCREASE LAWYER/JUDGE INVOLVEMENT WHILE RETAINING CERTAIN ASPECTS OF COMMAND CONTROL

- GOAL OF UCMJ DRAFTER EDMUND MORGAN WAS TO “JUDICIALIZE” THE MILITARY JUSTICE SYSTEM
  - SENATOR ERVIN’S GOAL IN 1968 WAS SIMILAR
    - CREATED JUDGES
    - REQUIRED QUALIFIED COUNSEL
  - 1968 REVISIONS CONTINUED THE TREND
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## **RESULT:**

COMMANDERS' EXPERIENCE WITH AND KNOWLEDGE OF THE COURT-MARTIAL SYSTEM HAS DECLINED SINCE 1950

CONCURRENTLY, COMMANDERS' JOBS HAVE BECOME MORE COMPLEX, LEAVING LITTLE TIME TO LEARN NUANCES OF MILITARY JUSTICE SYSTEM

**THE SYSTEM MUST SERVE THE NEEDS OF THE COMMANDER—WITHOUT REQUIRING HIM TO BE A LAWYER OR A JUDGE**

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## **THE FUTURE:**

OPERATIONAL COMMANDERS MORE FOCUSED  
ON OPERATIONAL MISSIONS

TRANSFORMATION WILL MAKE MILITARY  
JUSTICE ISSUES AND ACTIONS MORE DIFFICULT

## **THE CHALLENGE:**

COMMANDERS AND CONVENING AUTHORITIES MUST  
HAVE A SENSE OF OWNERSHIP OF THE SYSTEM IN  
ORDER TO MAKE IT A PRIORITY

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## **OTHER CONSTITUENCIES/INTERESTS:**

- ✓ CONGRESS
- ✓ THE PUBLIC
- ✓ THE MEDIA
- ✓ VICTIMS' ADVOCATES
- ✓ FAMILY MEMBERS

**HOW DO WE CONVEY CONFIDENCE IN THE MILITARY JUSTICE SYSTEM TO THESE GROUPS?**

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## **THE REVIEW PROCESS:**

- CONVENED AN AD HOC GROUP OF MILITARY JUSTICE EXPERTS AND CHALLENGED THEM TO THINK CRITICALLY ABOUT OUR SYSTEM
  - NOTHING “OFF THE TABLE” BUT CHANGES MUST WORK IN GARRISON AND OPERATIONAL SETTINGS
  - NO “CHANGE FOR CHANGE’S SAKE”
  - JUSTIFY CHANGES TO ALL CONSTITUENCIES
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## METHODOLOGY:

- INDIVIDUAL MEMBERS OR SUBGROUPS EXAMINE PRIOR STUDIES, ARTICLES, REPORTS, ETC.
  - EVALUATE PROPOSALS AND MAKE RECOMMENDATIONS TO WHOLE COMMITTEE
  - “SENSE OF COMMITTEE” TO TRIAGE PROPOSALS, FOLLOWED BY DRAFTING PROPOSED REVISIONS
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## CONDUCTED IN THREE PHASES:

- PHASE 1 (5 Jan – 6 Feb)
    - ✓ GATHER AND RESEARCH IDEAS FOR CHANGE
    - ✓ APPLYING CHARTER CRITERIA, TRIAGE PROPOSALS
      - “EASY FIXES”
      - REQUIRE FURTHER STUDY
      - DO NOT ADOPT
      - TRANSFER OF SOME ISSUES BEYOND THE SCOPE OF COMMITTEE
  
  - PHASE 2 (3 Feb – 26 Feb)
    - ✓ APPROVE DRAFTS OF “EASY FIXES”
    - ✓ DISCUSS AND EVALUATE MORE COMPLEX PROPOSALS
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## CONDUCTED IN THREE PHASES:

- PHASE 3 (6 Feb – 23 Mar)
    - ✓ CONTINUE TO DISCUSS AND EVALUATE PROPOSALS
    - ✓ REPEATED REDRAFTS
    - ✓ SECURE BG WRIGHT'S CONCURRENCE ON FINAL RECOMMENDATIONS
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## SCOPE OF WORK:

- ✓ COMMITTEE INITIALLY CONSIDERED OVER 100 PROPOSALS FOR CHANGE
  - ✓ TRANSFERRED 12 ISSUES
    - VICTIM-WITNESS ISSUES
    - LEGAL CENTER & TRANSFORMATION ISSUES
    - EJUSTICE ISSUES
  - ✓ RECOMMENDED AGAINST ADOPTION OF APPROXIMATELY 45 PROPOSALS
  - ✓ RECOMMENDED ADOPTION, IN WHOLE OR PART, OF APPROXIMATELY 35 PROPOSALS
  - ✓ REMAINDER MERGED OR DECISION DEFERRED
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## TIMELINE (to date):

- 5 Jan 2004 – Initial Committee Meeting
  - 5 Jan – 19 Jan 2004 – Receive Proposals, Locate Previous Studies, Make Tentative Workload and Subcommittee Assignments
  - 12 Jan 2004 – Revised Assignment List to Committee Members
  - 20 Jan 2004 – Revised Assignment List and Initial Report Format to Committee Members
  - 21 Jan 2004 – 5 Feb 2004 – Receive, Collate, and Format Initial Reports of Individual Committee Members
  - 30 Jan 2004 – Initial Assessments Due to Subcommittee Chairs
  - 3 Feb 2004 – VTC Committee Meeting
  - 3 Feb -5 Feb 2004 – Format and Finalize Committee Recommendations
  - 6 Feb 2004 – IPR with BG Wright
  - 6 Feb 2004 – In-progress report from BG Wright to TJAG
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## TIMELINE (to date):

- 6 Feb - 20 Feb 2004 – Committee Members Researching and Drafting Phase 2 Proposals
  - 6 Feb - Present – Committee small groups work on Phase 3 (long term) proposals
  - 20 Feb 2004 – Phase 2 Proposals Due to Assistant Director
  - 20-23 Feb – Phase 2 Proposals Formatted
  - 23 Feb 2004 – Phase 2 Proposals sent to Committee Members
  - 23-26 Feb 2004 – Committee Member Review of Proposals
  - 26 Feb 2004 – VTC Committee Meeting
  - 26 Feb -2 Mar 2004 – Redraft of some Proposals
  - 3 Mar 2004 -- VTC IPR with BG Wright
  - 3 Mar 2004 – Draft Survey of Deployed Justice Issues Approved by BG Wright; BG Wright In-Progress Report to TJAG
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## TIMELINE (to date):

- 4 Mar -11 Mar 2004 -- Circulation of Phase 3 Proposals and Redraft of some Phase 2 Proposals to Committee Members
  - 10 Mar 2004 – BG Wright Approves Proposal to Draft Military Justice Survey for Convening Authorities
  - 12 Mar 2004– VTC Committee Meeting (begin with Army Redesign Update) to Discuss Phase 2 and Phase 3 Proposals
  - 12 Mar -16 Mar 2004 – Continued Circulation and Refinement of Phase 2-3 Proposals; Consider CA Survey
  - 16 Mar 2004 – CA Survey Drafted and Circulated to Committee Members
  - 17 Mar 2004 – VTC Committee Meeting to Discuss Phase 2 and Phase 3 Proposals and Survey
  - 17 Mar - 23 Mar 2004 – Corrections and Editing of Proposals
  - 19 Mar 2004 – Draft Survey Coordinated with ARI
  - 24 Mar 2004 -- VTC IPR with BG Wright
  - 24 Mar – 9 Apr – Preparation of Final Report and TJAG Briefing
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## **RECOMMENDED CHANGES**

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## PRETRIAL AUTHORITY OF MILITARY JUDGE

INCREASE THE AUTHORITY OF THE MILITARY JUDGE OVER CASES BEGINNING WITH THE IMPOSITION OF PRETRIAL RESTRAINT OR PREFERRAL OF CHARGES THROUGH RECEIPT OF ROT BY APPELLATE AUTHORITIES:

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GRANT BROADER CONTEMPT  
POWERS TO MILITARY JUDGE

REPEAL ART. 98 AND INCLUDE  
SUBSTANTIAL PORTIONS OF IT IN A  
REVISED ART. 48 GRANTING MILITARY  
JUDGES CONTEMPT POWERS SIMILAR TO  
BUT MORE LIMITED THAN FEDERAL  
JUDGES.

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EXPAND SUBPOENA POWERS

GIVE ARTICLE 32 INVESTIGATING  
OFFICERS AND GOVERNMENT COUNSEL  
AT SUCH PROCEEDINGS THE POWER TO  
ISSUE SUBPOENAS

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## REVISE SUMMARY COURT-MARTIAL PROCESS

REVISE SCM PROCEDURES TO SIMPLIFY  
THEIR USE AS A DISCIPLINARY TOOL AND  
MINIMIZE LEGAL INVOLVEMENT:

- RULES OF EVIDENCE DO NOT APPLY
  - REASONABLY AVAILABLE WITNESSES  
MUST BE CALLED
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ADOPT “SEMI-RANDOM” SELECTION  
OF COURT PERSONNEL

TWO PROPOSALS, EACH CREATING A POOL  
OF ELIGIBLE MEMBERS FROM WHICH  
MEMBERS FOR A SPECIFIC CASE OR TIME  
PERIOD WOULD BE RANDOMLY  
GENERATED

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## ➤ PROPOSAL 1:

- USES CURRENT ARTICLE 25 CRITERIA FROM WHICH CA CREATES A POOL OF MEMBERS
  - REGULATIONS ISSUED UNDER SECRETARIAL AUTHORITY WOULD PERMIT EXCUSALS FOR OPERATIONAL OR OTHER REASONS
  - EXIGENT CIRCUMSTANCES WOULD PERMIT CA TO PICK MEMBERS AS IS DONE CURRENTLY
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## ➤ PROPOSAL 2:

- USES TIME IN SERVICE (6 YEARS) AS BASE SELECTION CRITERIA
  - REGULATIONS ISSUED UNDER SECRETARIAL AUTHORITY WOULD PERMIT EXCUSALS FOR OPERATIONAL OR OTHER REASONS, SUCH AS RECORD OF ADVERSE ACTION.
  - EXIGENT CIRCUMSTANCES WOULD PERMIT CA TO PICK MEMBERS AS IS DONE CURRENTLY
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## ADOPT VIDEO ARRAIGNMENTS

SO LONG AS ACCUSED AND DEFENSE  
COUNSEL ARE CO-LOCATED, ACCUSED  
COULD BE ARRAIGNED BY VIDEO  
TELECONFERENCE WITH MILITARY  
JUDGE

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PERMIT MJ TO ENTER NG FINDING IN  
ABSENCE OF DEFENSE MOTION

CORRECTS AN ANOMOLY IN CURRENT  
RULE THAT PERMITS A MJ TO GRANT  
SUCH MOTIONS SUA SPONTE AT TRIAL  
OR UPON DEFENSE MOTION AT ANY TIME  
UNTIL AUTHENTICATION, BUT DOES NOT  
PERMIT SUA SPONTE ACTION AFTER  
TRIAL IN ABSENCE OF DEFENSE MOTION  
AT TRIAL.

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ELIMINATE THE *CARE* INQUIRY BY  
AMENDING ART. 45

MODIFIES FED. R. CRIM. PRO. 11 FOR  
MILITARY PRACTICE. THE DETAILED  
INTERROGATION OF THE ACCUSED  
WOULD BE REPLACED BY A STIPULATION  
OF FACT OR A RECITATION OF FACTS TO  
WHICH THE ACCUSED AGREES

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MAKE HQDA APPROVAL A  
REQUIREMENT FOR CONDITIONAL  
GUILTY PLEAS

CHANGES 27-10 TO REQUIRE APPROVAL  
OF CHIEF, GAD, BEFORE A CONDITIONAL  
GUILTY PLEA MAY BE ACCEPTED

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## ADD OFFENSES TO MCM PARA 60 (ART 134 OFFENSES)

- BAD CHECK OFFENSES
  - ARSON AND BURNING WITH INTENT TO DEFRAUD
  - LARCENY AND FALSE PRETENSES
  - HOUSEBREAKING AND UNLAWFUL ENTRY
  - SOLICITATION TO COMMIT CRIMES
  - AGGRAVATED MAIMING
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## MERGE CERTAIN ART. 134 OFFENSES WITH OTHER PUNITIVE ARTICLES

- ABUSE OF PRIVATE OR STRAY ANIMALS
  - IDENTITY THEFT
  - CHILD PORNOGRAPHY
  - CHILD NEGLECT
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## REVISE SEXUAL OFFENSES

COMMITTEE RECOMMENDS ADOPTION OF  
PROPOSAL TO AMEND MILITARY SEX  
OFFENSES ALONG THE LINES OF THE  
FEDERAL SEXUAL ASSAULT STATUTE

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CHANGE EFFECTIVE DATES OF  
SENTENCES

MAKE ALL SENTENCES, OTHER THAN  
DEATH OR PUNITIVE DISCHARGE,  
EFFECTIVE THE DATE SENTENCE IS  
ADJUDGED

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## INCREASE MAXIMUM PUNISHMENTS FOR CERTAIN CRIMES OF VIOLENCE

- BATTERY
- BATTERY OF A CHILD
- ASSAULT WITH A LOADED WEAPON
- MAIMING

GENERALLY FOLLOWS FEDERAL  
SENTENCE LIMITATIONS

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## CHANGE ROT REQUIREMENTS

- VERBATIM RECORD NOT REQUIRED UNLESS CCA REVIEW AUTHORIZED
  - MAKE TYPE OF ROT (VERBATIM OR SUMMARIZED) CONTINGENT ON APPROVED, NOT ADJUDGED, SENTENCE
  - IN CASES OF ADMIN DISCHARGE AFTER PROCEEDINGS BEGIN, AQUITTAL-TYPE RECORD ONLY
  - AUTHORIZE ELECTRONIC ROTS
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## REVISE POST-TRIAL PROCESS

- SENTENCE IS AUTOMATICALLY EXECUTED UNLESS CA GRANTS CLEMENCY
  - NO REVIEW BY CA OF ANY CLAIMS OF LEGAL ERROR (BUT MAY DISAPPROVE/MODIFY FINDINGS AS CLEMENCY)
  - NO SJAR (CA MAY ASK FOR ADVICE ON CLEMENCY REQUESTS)
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## OTHER MISCELLANEOUS CHANGES

- COMMITTEE RECOMMENDS A REQUIREMENT TO RECORD CONFESSIONS IN FELONY OFFENSE; CIDC STRONGLY OPPOSES
  - RELOOK THE PROCESS BY WHICH FINAL ORDERS ARE ISSUED, WITH A VIEW TOWARD MOVING RESPONSIBILITY TO CLERK OF COURT
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## OTHER MISCELLANEOUS CHANGES

- REQUIRE FG OFFICERS TO COMPLETE  
COMMANDER'S REPORT OF  
DISCIPLINARY ACTION TAKEN
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## RECOMMENDATIONS

- REVIEW NAVY PROPOSALS TO LIMIT APPEALS
  - SURVEY CAs ABOUT THEIR VIEWS ON MILITARY JUSTICE SYSTEM AND JAGC SUPPORT
  - RELOOK SPEEDY TRIAL AND DETENTION RULES IF MILITARY JUDGE OVERSIGHT NOT ADOPTED
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## CONSIDERED BUT NOT RECOMMENDED

- RETIREE/RESERVE JURISDICTION CHANGE
  - REVAMPING DEFENSE WITNESS  
PRODUCTION SYSTEM
  - NJP MODIFICATIONS
  - RULES OF EVIDENCE CHANGES
  - MANY SENTENCING REVISIONS,  
INCLUDING SENTENCING ONLY BY MJ,  
ABOLISHING PAROLE, RESTITUTION
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## SUMMARY

- PROPOSALS REQUIRE REGULATORY, MCM, AND STATUTORY CHANGES.
  - SOME REG CHANGES INCORPORATED IN THE CURRENT 27-10, CHANGE 1
  - SUBSTANTIAL REVISIONS TO ROLE OF MILITARY JUDGE (OWNERSHIP AT RESTRAINT CONTINUES TO RECEIPT OF ROT BY APPELLATE AUTHORITY)
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## SUMMARY

- CHANGES IN SCM TO MAKE IT MORE OF A DISCIPLINARY TOOL
  - MODIFY GUILTY PLEA RULES
  - MODIFY MANY SUBSTANTIVE OFFENSES
  - SUBSTANTIALLY ALTER POST-TRIAL SYSTEM (CA ACTION, ROT REQUIREMENTS)
  - RECOGNIZED NEED TO SURVEY COMMANDERS ABOUT MJ EXPERIENCE AND DESIRES
-