A WHITE PAPER

ON

THE PROPOSED AMENDMENTS TO THE UNIFORM CODE OF MILITARY JUSTICE

Professor David A. Schlueter
Hardy Professor of Law &
Director of Advocacy Programs
St. Mary's University School of Law

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I. Purpose

This white page addresses the proposed amendments to the Uniform Code of Military Justice and recommends that they not be adopted.

Although I am currently a law professor at St. Mary's University School of Law in San Antonio, Texas, I have over 40 years of experience with the military justice system — as an active duty and reserve, and now retired, Army JAGC. While on active duty from 1972 to 1981, I served as an appellate counsel, a prosecutor, and an instructor at the Army's Judge Advocate General Legal Center and School. I have authored or co-authored four treatises on military crimes, procedures, and evidence and frequently speak to military lawyers and judges on those topics.

I have carefully reviewed the proposed legislation and in my view, its implementation would be a severe, and unnecessary, blow to the military. As I outline below, I conclude that for a variety of reasons those proposals, although well intended, are ill advised. They may ultimately result in less protection for both the accused and the victim and undermine military good order and discipline.

II. The Purpose and Function of the Military Justice System – Discipline

It is critical that Congress, in considering any amendments to the Uniform Code of Military Justice, recall that the primary function and purpose of the military justice system is to enforce good order and discipline in the armed forces. I recently published a law review article on that subject, relying on two hundred years of history, commentary, and case law. *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1 (2013), available at https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.NSF/20a66345129fe3d885256e5b00571830/17ecb457e9eff74285257bf0005a5903/$FILE/By%20David%20A.%20Schlueter.pdf.

Those who view military justice as primarily a system of justice tend to see the role of the commander as a hindrance to justice and a relic of the past. Those who view the system as primarily a system for maintaining good order and discipline, see the commander's role as indispensable. Most of the governing rules and regulations in the military justice system attempt to balance those competing views. I concluded that despite the views of some commentators that

the military justice system is primarily a system of justice, the system's function and purpose have not changed since the original Articles of War were adopted in the 1700's. It was, and remains, a system designed to enforce discipline and good order.

III. The UCMJ, the Manual for Courts-Martial and Regulations Recognize the Critical Role of the Commander in the Military Justice System

The Uniform Code of Military Justice and the Manual for Courts-Martial entrust the responsibility for the military justice system to commanders, at all levels in the chain of command.

A. Under the Current System the Commander's Prosecutorial Discretion is Broad

The military courts have recognized that the commander is vested with broad discretion to decide how to best deal with discipline problems in his or her command. The commander's options range from a written letter of reprimand in the service member's file, nonjudicial punishment, an administrative discharge, or court-martial charges. Those decisions are made after consulting with the Staff Judge Advocate or a military prosecutor, who are members of the command. The staff judge advocate is expected to provide sound legal advice based on the nature and extent of the alleged criminal activity, the availability and admissible of evidence against the accused, the needs of the command, the time necessary to investigate and prosecute the case, and the likely outcome of a trial on the merits. Those are the types of decisions that local district attorneys and United States Attorneys make on a daily basis.

However, in the military the decision is the commander's to make, not the lawyer's. That is because it is the commander, not the lawyer, who is responsible for the good order and discipline and morale within the command.

B. Under the Current System it is Critical that the Commander Have Trust and Confidence in His or Her Legal Advisors

Under the current system, Staff Judge Advocates serve as legal advisors for the commanders of major commands, and for the subordinate commands. It is critical that the commanders trust and confide in those legal advisors on matters involving military justice, which in turn impact morale, and good order and discipline. That trust and confidence inures to the overall benefit of the command when the command is deployed and commanders must count on their legal advisors in matters far beyond military justice, such as operational law, international agreements, and important military and civilian personnel matters.

The proposed amendments — which would remove the commander's legal advisor from the important decision-making process of dealing with serious offenses — will undermine that critical relationship, not only in regards to military justice matters, but also the broader legal issues commanders face at home and when deployed.

IV. The Proposed Amendments Would Unnecessarily Limit the Commander's Initial Decision to Prosecute or Not Prosecute

A. Comparison to Civilian Prosecutorial Decisions

The proposed amendments to Article 30, UCMJ, would undermine the commander's broad prosecutorial discretion. The proposed change would transfer the local commander's decision to some unspecified command structure, outside the commander's chain of command, and require the recommendations of a senior armed forces lawyer, disconnected in time and space from the command. That amendment would be tantamount to informing a district attorney that the decision to prosecute or not prosecute serious cases would be made in the state capital, or in Washington D. C. — and that the decision would be binding on local authorities. Not only would that system undermine the effectiveness of the district attorney's offices, it would undermine the populace's confidence in the ability of local authorities to take care of local crime. So too, with commanders. Once the members of a command discover that the decision regarding court-martial charges is being made by a person with no connection to the command, the members of the command will view the commander as powerless to deal with serious offenses in a quick and efficient manner.

B. An Academic or Ivory Tower Decision

Because a high-ranking lawyer outside the command will be routinely making decisions concerning court-martial charges, some may view that exercise as primarily "academic," which is disconnected from the real-world problems of the command. Or worse yet, an "ivory tower" decision.

The decision to prosecute almost always involves an armed forces prosecutor personally interviewing potential witnesses, reviewing the law enforcement reports, speaking personally to the commanders in the chain of command, and providing an informed "on the ground" assessment of the strengths and weaknesses of the case against an accused.

Most of those critical elements in the decision-making process would be missing, if the primary decision authority rests in a high ranking officer, separated from the real world problems of that particular command. Not all of the memos, e-mails, and electronic evidence can be an adequate substitute for a decision made by the local commander, after a careful assessment by the commander's legal advisor.

C. Undermining the Chain of Command

Under the current system, it is the unit, or company commander, who usually initiates the charging process by preparing a charge sheet, i.e.. "preferring charges." That decision is made after consulting the prosecutor assigned to that unit. Each commander in the chain of command is charged with considering the possible charges and providing another level of assessment before it reaches the desk of the commander, who would be the convening authority on the case.

The amendments are clearly intended to disrupt the normal chain of command. The decision to prosecute or not prosecute is made completely out of the chain of command, from the very people who are in the best position to make decisions that directly affect good order and discipline in that command.

D. There is No Distinction Between Common Law Offenses and Military Offenses

In stripping the commander of the discretion to dispose of serious offenses, the amendment appears to distinguish what some refer to as "common-law" crimes from military crimes. For purposes of the military justice system, that distinction is meaningless. Service members who commit crimes such as larceny (Art. 121), sexual assault (Art. 120), and murder (Art. 118), pose as significant a threat to good order and discipline as do the crimes of desertion (Art. 85), disobedience of an order (Art. 90), and conduct unbecoming an officer and a gentleman (Art. 133).

E. The Problem of Mixed Offenses

The proposed amendments create another issue where the accused has committed multiple offenses – some of which are in the excluded list of offenses (military offenses) and some which are on the included list (common-law offenses). Who will make the ultimate decision to proceed with court-martial charges? For example, an accused may be charged with sexual assault, conduct unbecoming an officer and a gentleman, and disobedience of an order of a superior officer to avoid contact with the sexual assault victim. Is that a decision for the commander? Or the senior legal officer, unconnected with the command? Under the current system, that decision is made efficiently by the local command without regard to whether the offense is military in nature or a civilian-type offense.

The proposed system creates a needless and complicated bifurcated system that is bound to present unintended consequences.

F. The Amendments Threaten the Ability to Hold the Commander Responsible for the Offenses of Members of the Command

There is still another reason for not stripping prosecutorial authority from the commander. Recently, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia overturned the conviction of a man named General Markač, a commander of a Special Police unit during the Croatian War of Independence in the 1990's. The appellate court noted that although General Markač had some control over his subordinate commanders, his authority to discipline them for their misdeeds was not within his power because any crimes committed by members of his command fell under the jurisdiction of civilian prosecutors. Thus, the court said, he could not be held liable for crimes committed by his subordinates. The same result could occur under the proposed amendments, where someone outside the chain of command is making a binding decision to prosecute or not prosecute crimes occurring within the commander's command.

Every CEO for a large organization knows that responsibility for the organization must be accompanied by the authority to manage the organization. The same holds true, to an even greater extent, in the military.

V. The Amendments Apparently Reinstitute Procedures Long-Since Abandoned for Appointing the Participants to a Court-Martial

Under the current system, the convening authority appoints the members who will serve as the finder of fact on the court-martial. They are the military's counterpart to jurors for a state or federal criminal case. The military judge is assigned to the case by the service's trial judiciary command. The defense counsel is assigned to represent an accused by an independent chain of command for defense counsel. The trial counsel (prosecutor) is selected by the staff judge advocate.

The proposed amendments appear to reinstate a system that has not existed in many years. It would apparently require the chiefs of staff to create an office to select not only the court-martial members but also the military judge, the prosecutor and the defense counsel. That leaves a clear impression with the accused, and members of the public, that the system has reverted to the day when it appeared that the court-martial was stacked against the accused.

This scheme would be particularly problematic insofar as it would be perceived as impacting on the impartiality and independence of the military judge. It would certainly be attacked in the courts as depriving an accused of due process.[1]

VI. The Amendments Would Limit the Commander's Options for Dealing with Charges Where the Decision is Made Not to Prosecute

A. Inability to Impose Nonjudicial Punishment or Convene Summary Court-Martial

Under the proposed amendments to Article 30, a decision by the lawyer not connected to the command, would undermine the ability of the commander to deal with the alleged offenses in some other forum. For example, the amendment indicates that a decision not to proceed with court-martial charges would not limit the ability of the commander to proceed with a summary court-martial (Art. 24) or nonjudicial punishment (Art. 15). But that creates potential problems with actual implementation. Article 15 provides that unless a service member is attached to a vessel, the service member can turn down the commander's proposed Article 15 procedures and demand a court-martial. The same is true for a summary court-martial; the accused must consent, whether or not the accused is assigned or attached to a vessel. If the centralized legal authority

[1] United States v. Weiss, 510 U. S. 163 (1994) (holding that current system of appointing judges does not violate due process).

decides not to prosecute and the commander offers the accused an Article 15, or prefers summary court-martial charges, the accused can refuse to proceed, and thus put the commander in the "check-mate" position of not being able to conduct a summary court-martial or impose nonjudicial punishment under Article 15.

B. Deciding Whether to Impose Pretrial Confinement

Under the current system, a commander may place an accused in pretrial confinement pending disposition of the charges. The system provides for both command review and judicial review of that decision by a military magistrate or judge. The current system is an integrated and coordinated decision by the chain of command, which in large part depends on the probable disposition of the charges. The proposed scheme — which takes the decision to refer a case to trial out of the chain of command — creates uncertainty as to whether that current system of dealing with pretrial confinement issues can be maintained.

C. The Proposed Scheme Will Present Speedy Trial Problems

The military justice system currently recognizes several speedy trial protections — constitutional, statutory, and regulatory. Those protections are triggered by preferral of court-martial charges and/or pretrial confinement of the accused. Under the current system the commanders and legal advisors work together to ensure that the case moves in a timely and efficient manner. Vesting the decision to refer charges to a court-martial in a legal office, separated by time and distance, poses speedy trial concerns, and could eventually make it impossible or impractical for a local commander to impose pretrial confinement.

D. Plea Bargaining Adversely Affected

Another example. As in the civilian community, the military justice system depends heavily on the ability of a convening authority and an accused to enter into a pretrial agreement. Those agreements typically require the accused to enter a plea of guilty in return for reduction of charges, dismissal of some of the charges, or a sentence limitation. The proposed amendments fail to address that critical feature of the system. If the centralized legal authority decides to proceed with court-martial charges, that decision is binding on any convening authority. Does that mean that a convening authority could not subsequently enter into plea bargaining with the accused, which resulted in the dismissal of a serious charge?

The answer to that question does not lie in drafting additional statutory language nor in directing the President to solve the problem through myriad amendments to the Manual for Courts-Martial or existing service regulations. That would simply add a level of bureaucracy to a system that currently operates efficiently and fairly.

E. The Proposed Amendments May Adversely Affect Agreements with Local Civilian Prosecutors

At many installations there are agreements with local prosecutors (state and federal) as to which office – military or civilian – will prosecute an accused. Those agreements are very beneficial in promoting good community relations between the local command and the surrounding civilian community. The proposed amendments make no provision for such agreements. Is it intended that after the O-6 legal advisor decides to prosecute a case, the local agreements are no longer operative? Would the O-6 be bound by such agreements? Is the O-6 required to contact the local civilian prosecutor and decide on the next best steps? In either event, the local command has no say in resolving the issues, even though the decision could have an impact on local military-civilian relations.

VII. Congress Should Not Look to Other Countries' Systems as Models for American Military Justice

The proposed amendments seem to rest on the view that first, military commanders are not to be trusted in exercising prosecutorial discretion and that second, Congress should follow the lead of other countries and adopt procedures used in countries such as Canada and Great Britain. That argument is reminiscent of the debate over whether other countries' laws should serve as a model for American legal systems. In hearings on those proposals, some commentators have urged Congress to go further and apply this approach to the prosecution of all cases by civilian prosecutors. The argument is that the United States' military justice system is an "outlier" and that it is somehow deficient.

The American military justice system is exceptional. There is no need to look to other countries for guidance. Commanders are well trained and highly educated. Those who fail to perform are usually removed from command or denied valued promotions. The lawyers who advise them are also well trained and highly educated. And there are consequences if they fail to perform. Before Congress gives any serious consideration to adopting the procedures used in other countries, it should compare those systems in terms of size of the military force, the world-wide and geographical disbursement of military personnel, the purpose of those military justice systems, the history and experience of those systems, and the country's expectations for its commanders in enforcing good order and discipline.

VIII. The Proposed Amendments Will Adversely Affect the Delicate Balance Between Justice and Discipline

There is a danger that in rushing to "fix" what some consider to be problems in the military justice system, the delicate balance between discipline and justice will be thrown off—to the detriment of the command structure, those accused of committing offenses, and victims of the alleged offenses.

The UCMJ was enacted in 1950 as a response to complaints and concerns about the operation of the existing Articles of War during World War II. In enacting the UCMJ, Congress struggled with the issue of balancing the need for command control and discipline against the view that the military justice system could be made fairer. The final product was considered a compromise. On the one hand, there was concern about the ability of the commander to maintain discipline within the ranks. On the other hand, there was concern about protecting the rights of service members against the arbitrary actions of commanders. Although the commander remained an integral part of the military justice structure, the statute expanded due process protections to service members and created a civilian court to review courts-martial convictions. Since its enactment, the UCMJ has been amended numerous times, sometimes to favor the prosecution of offenses and at other times to expand the protections to the accused.

The proposed amendments clearly undermine the commander's authority. Thus, whether intended or not, the balance tips in favor of the accused, even though the apparent intent is to ensure that more cases go to trial. In doing so, it affects the very core of the military justice system—the role of the commander. And it adversely affects anyone associated with the alleged offenses in the command: witnesses, counsel, and even victims. Currently, the commander and his or her legal advisor consider all of those interests in deciding whether to prosecute a case or choose some other route for dealing with the issue. Placing that decision in some distant office creates the possibility that those diverse interests are not adequately considered or balanced.

IX. Congress Should Reaffirm the Critical Role of the Commander

If Congress is to make any changes to the Uniform Code of Military Justice, it should be to first, reaffirm the view that the primary purpose of the military justice system is to enforce good order and discipline and second, retain the commander's critical role in that system, without limitation.

The Supreme Court of the United States has stated that the purpose of the military is to fight and win wars.[2] To that end, it is absolutely essential that commanders — who are ultimately responsible for accomplishing that mission — be vested with the authority and responsibility for maintaining good order and discipline within their command. To that end, I recommend that the UCMJ be amended by adding the following language:

> The purpose of military law is to assist in maintaining good order and discipline in the armed forces, to provide due process of law, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

[2] United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955).

That proposed language, which is a variation on similar language in the preamble to the Manual for Courts-Martial,[3] reflects the long-standing and tested view that the military justice system is designed primarily to promote good order and discipline.

X. Conclusion

I understand the frustration and anger that many feel towards the military's initial response to what appeared to be systemic problems in dealing with sexual assault cases. As someone who appreciates and defends the current system, it is difficult to justify some of the decisions that have been made by both commanders and lawyers.

But the answer to that problem does not rest in removing or reducing the commander's role. This is not the first time that the military has faced problems and it will not be the last. One feature of the military is that it does respond and adapt and can issue orders to fix the problems. I am confident that it is now doing so and will ultimately reflect well on the military justice system.

I recommend that the proposed amendments to the UCMJ be rejected.

XI. Contact Information

If I can provide any additional assistance, please feel free to contact me at the following address:

Professor David A. Schlueter
Hardy Professor of Law & Director of Advocacy Programs
St. Mary's University School of Law
San Antonio, Texas 78228-8603
[redacted]

[3] The Preamble to the Manual for Courts-Martial lists the due process language first, before the language concerning good order and discipline. In my view, the order of those purposes is critical. Listing the discipline purpose first more accurately reflects the function and purpose of the military justice system.