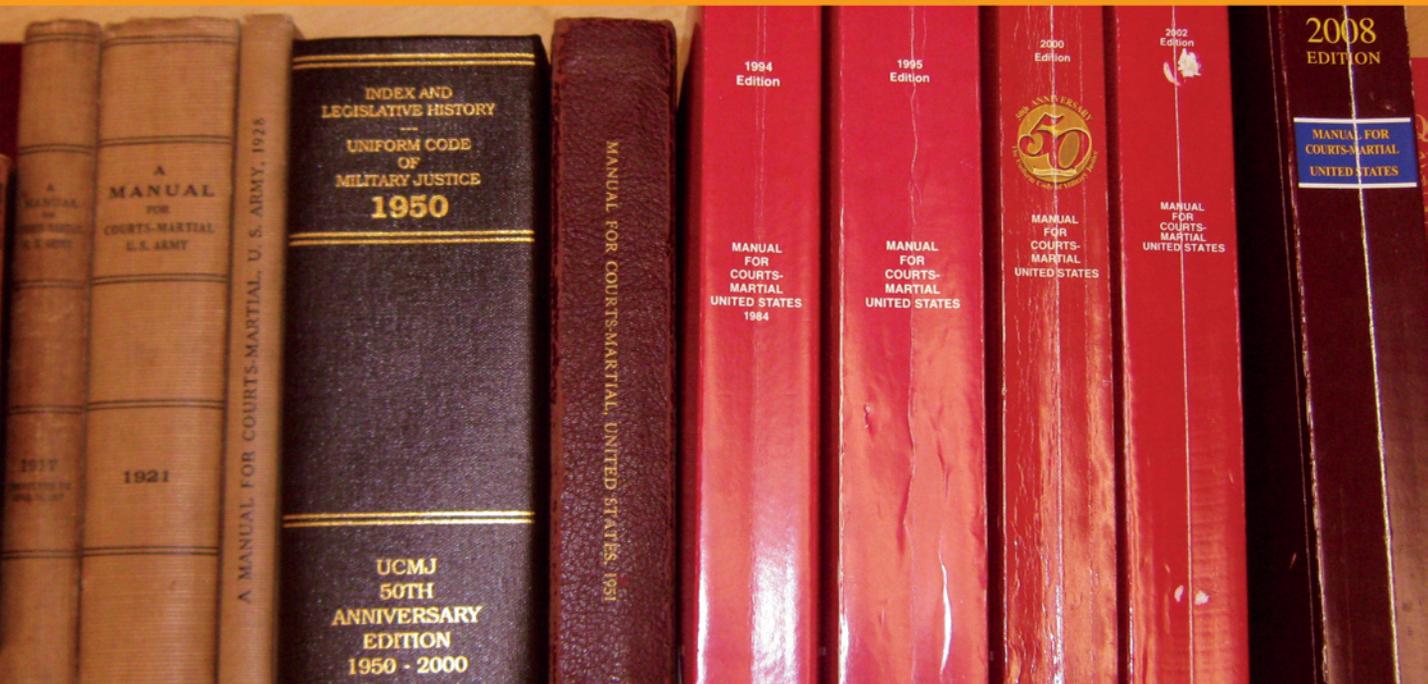


Report of the Commission on Military Justice

October 2009



sponsored by the National Institute of Military Justice and the
Military Justice Committee, Criminal Justice Section of the
American Bar Association



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Acknowledgements

The Commission gratefully acknowledges the support of the National Institute of Military Justice (NIMJ) at American University Washington College of Law, the Military Justice Committee of the Criminal Justice Section of the American Bar Association, and the George Washington University School of Law.

NIMJ and the Military Justice Committee covered the travel expenses of the members of the Commission and its reporters, who were otherwise not compensated for their services, for the hearings held in June 2009 in Washington, D.C. The George Washington University School of Law provided rooms for the public hearing and for the commissioners' deliberations.

The staff at NIMJ, especially Assistant Director Jonathan Tracy and Program Coordinator Irina Vayner, provided critical, and brilliant, administrative support. Michelle Lindo McCluer, Director, was invaluable in organizing the commission and producing this report.

Executive Summary

In 2009, a quarter-century since Congress last acted to alter the structure of military justice, the United States military and its justice system stand fast in a time of great challenge and change. Eight years ago, the first Cox Commission assessed the state of military justice in the United States and urged elected officials, policymakers, civilians, and scholars to pay more attention to the quality and substance of the criminal law and procedure to which servicemembers are subjected. That first Cox Commission sought to trigger debate and reform not because the system was broken, but because too few elected officials, attorneys, and policymakers seemed aware of the importance, consequences, and distinctiveness of military justice.

Today, debate over military justice reform is much in evidence, in Washington, D.C., and around the world. Many critical areas of military law and operations – including interrogation methods, detention practices, military commissions, bomb-targeting practices, claims of foreign governments and people, environmental hazards, the “don’t ask/don’t tell” policy, servicemembers’ access to the Supreme Court, and the extent of court-martial jurisdiction—have been the subject of official inquiry, media attention, and non-profit advocacy. This scrutiny presents both challenges and opportunities for practitioners and policymakers in the field of military justice.

The core of American military justice, the Uniform Code of Military Justice (UCMJ), has proven resilient, its viability evident through nearly six decades of operation. Since Congress adopted the UCMJ in 1950, countless deployments, far-flung theaters of operation, and high-profile courts-martial have demanded flexibility and accountability from military justice. In recent years, the system created and governed by the UCMJ has continued to operate effectively through the increased tempo of operations and distinctive legal challenges of the ongoing wars in Iraq and Afghanistan. The Code has been adapted to new challenges and concerns. Its application to civilians has been broadened, its rules of evidence updated, its substantive provisions, including those related to sexual assault, extended.

After taking a hard look at the UCMJ, we believe it has weathered the test of time in impressive fashion. United States military criminal law and procedure constitutes a body of law of which Americans can be proud. It protects the rights of servicemembers, permits robust access to counsel, and grants commanders the latitude to pursue operational objectives, yet promote fairness and justice in military courts.

The United States departs from the UCMJ, and from its longstanding commitment to just and transparent procedures in military courts, at its peril. Consider, for example, the case of the new military commissions. The U.S. government set aside the UCMJ's legacy of success when planning for the investigation and trial of suspected terrorists after the attacks of 9/11/2001. Instead, it opted for a novel approach that has generated tremendous criticism, much of it well deserved. Too often, political leaders have turned away from the wise counsel of experienced judge advocates and neglected the vast expertise accumulated under the UCMJ. We urge the advocates of a military commission system, and all policymakers who face issues related to the law of war and military operations, to respect the values and longevity of the nation's existing military justice system.

Our focus in this Report is on that system. Despite periodic updates to the UCMJ and the Manual for Courts-Martial, the United States has yet to perfect the delicate, integrated system of justice and discipline on which commanding officers, and the American people, depend. There remains room for improvement, especially with respect to subjects—such as the extent of appellate review, and the conduct of criminal investigations—that fail to generate the media attention and popular debate that other issues attract.

With the assistance of many astute observers who submitted suggestions and criticisms, this eight-member commission, whose members have served the American people not only at bench and bar, but in the Army, Navy, Air Force, National Guard, and elected office, considered how the structure and practice of American military justice might be re-drawn to better meet the demands of military operations and legal standards of the 21st century. Appendix B captures the breadth of responses our call for input elicited; it includes more than 600 pages of information, suggestions, and ideas about modern American

military justice. We reviewed all of these submissions, though they covered far more territory than we do in this Report, and are grateful for the insight and attention of their authors. We are also grateful to the witnesses who testified in person before the Commission during our hearings on June 16, 2009, at George Washington University.

We recommend seven steps be taken to advance principles of justice, equity, and fairness in American military justice. Each recommendation is elaborated further in the second section of this Report. The first three seek to make the appellate review process fairer and more effective; the next three to improve pre-trial, trial, and investigative processes; the final one to eliminate an archaic and redundant military crime:

1. Expand appeal to the Courts of Criminal Appeals and Court of Appeals for the Armed Forces (CAAF) to make appellate review a matter of right in every contested court-martial.

2. Enact the Equal Justice for Our Military Act of 2009, now pending in the House of Representatives, to permit direct appeal to the Supreme Court by convicted servicemembers, regardless of whether CAAF grants certiorari.

3. Consider permitting accused servicemembers to waive their right to appellate review in pre-trial agreements.

4. Improve access of defense counsel to expert assistance during case investigation and trial.

5. Prohibit trial counsel from attacking the credentials of an expert witness if the government provided that specific expert to the defense as an adequate substitute for an expert consultant requested by the defense.

6. Require military law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at law enforcement offices, detention centers, or other places where suspects are held for questioning, or, where videotaping is not practicable, to audiotape the entirety of such custodial interrogations.

7. Repeal Uniform Code of Military Justice, 10 U.S.C. § 925, (Article 125, sodomy).

We also identified areas of concern about which we are not prepared to make specific recommendations but urge further review and careful consideration by the Department of Defense and Congress. They involve UCMJ jurisdiction over civilians accompanying the force and the abuse of animals overseas. In addition, the Commission recognizes the critical role played by the convening authority and urges further attention to adequate training to ensure that commanders actively protect the rights of accused servicemembers while controlling the prosecution. We also note ongoing concerns about both the influence of rank and grade on military justice outcomes and the importance of prosecuting, and reducing, domestic violence within the services.

A. Jurisdiction over civilians. The Commission notes the recent change to Article 2(a)(10) of the UCMJ, expanding UCMJ jurisdiction over civilians accompanying the forces in contingency operations. This amendment to Article 2(a)(10) has the potential of significantly expanding UCMJ jurisdiction over civilians. In Operation Iraqi Freedom and Operation Enduring Freedom, the military has dramatically increased the use of civilian contractors to conduct those military operations. While the Commission did not hear evidence on this issue directly, it is aware that such an expansion of UCMJ jurisdiction over civilians raises a number of challenging issues. The Commission encourages the military services and Congress to consider carefully a number of points that require further attention. Specifically, the Commission notes the following issues which should be carefully considered: the constitutionality of exercising UCMJ jurisdiction over civilians; the need to have civilians serve on court-martial panels when a civilian is being tried; the kinds of crimes with which a civilian may be charged under the UCMJ; a civilian's right to appellate review; and the potential criminal liability of a military commander for the misconduct of civilians.

B. Animal abuse and abandonment overseas. The Commission received a large number of letters from people overseas on the issue of animal abuse and abandonment by service members of their domestic animals while stationed

overseas. Currently there is not an adequate mechanism for holding these service members criminally accountable when they abuse or abandon these non-public animals. Article 134, para. 60, codifies the crime of abusing a public animal, but there is no similar provision for abuse of a pet or other non-public animal. Because this abuse and abandonment often takes place overseas and is beyond the reach of local civilian authorities, service members can go unpunished for this conduct. The Commission believes that this loophole should be closed and has submitted a letter to the Department of Defense asking that appropriate action be taken to address this problem (Appendix C).

Recommendations

1. Expand appeal to the Courts of Criminal Appeals and Court of Appeals for the Armed Forces (CAAF) so that appellate review is a matter of right in every contested court-martial.

The automatic appeal provisions of the UCMJ have been celebrated as a keystone of U.S. military justice, and the Commission recognizes the UCMJ's long-standing commitment to providing convicted servicemembers appropriate avenues of appeal and relief. However, the Commission urges that Congress remedy a troubling gap in military appellate jurisdiction that makes it impossible for some convicted servicemembers to seek review of legal error. If servicemembers are convicted and sentenced to anything less than death, a punitive discharge, or one year of confinement, they are barred from review by military appellate courts.¹

We recommend that Article 66(b) of the UCMJ be amended to require that the Judge Advocates General refer to the Courts of Criminal Appeals any case in which a servicemember is convicted at a general or special court-martial after a plea of not guilty and that conviction is approved by the convening authority. A verbatim record of trial should be prepared in such cases and the servicemember granted the opportunity for appellate redress. This measure is unlikely to increase substantially the workload of appellate courts and would eliminate both the perception and reality that some court-martial convictions cannot be reviewed even when errors of law exist and could be corrected by a superior court.

There are far more misdemeanor prosecutions in civilian courts than felony prosecutions, and the typical definition of a civilian felony is a crime punishable by more than a year in prison or death. Civilian jurisdictions routinely provide for an appeal by a convicted misdemeanant in recognition of the fact that even a misdemeanor conviction can result in devastating consequences to a defendant, such as loss of employment, loss of suitability for a security clearance, debarment from contracting opportunities, loss of a license, reputational injury, and

¹ We note that it is possible, though exceedingly rare in practice, for such a case to be subjected to appellate review if the Judge Advocate General specifies an issue for consideration under Article 69(d).

incarceration. The consequences to a servicemember of a general or special court-martial conviction are no less serious, even when the penalty is less than death, a punitive discharge or one year of confinement, and include termination of employment, harm to reputation, and loss of liberty. In addition, loss of military status and benefits accompany court-martial, but not civilian criminal, convictions. Thus, the case for an appellate opportunity for all contested general and special court-martial convictions is strong.²

2. Enact the Equal Justice for Our Military Act of 2009, now pending in the House of Representatives, to permit direct appeal to the Supreme Court by convicted servicemembers, regardless of whether CAAF grants certiorari.

In the Military Justice Act of 1983, Congress granted convicted servicemembers the opportunity to appeal decisions of CAAF to the Supreme Court, correcting a key deficiency in the appellate review processes available to servicemembers, as compared to civilians. Today, Congress is considering whether it ought to take the next step toward treating Americans in uniform the same as those in civilian clothes by permitting convicted military members to appeal directly to the Supreme Court of the United States, regardless of whether CAAF grants certiorari.

The Commission urges the passage of the pending Equal Justice for Our Military Act so that those persons convicted at court-martial share the same footing as those convicted in federal or state courts in terms of seeking review from the nation's highest court. As it stands now, the discretionary jurisdiction of CAAF serves as an unnecessary and unwise gatekeeper to Supreme Court review. Servicemembers (and civilians) convicted at court-martial should have the same opportunity to petition the Supreme Court as those convicted in civilian criminal courts.

² Below we suggest consideration of permitting waiver of appeal by an accused servicemember who pleads guilty. Any increase in the number of appeals that occurs as a result of this first recommendation might well be offset by a decrease in appeals by servicemembers who waive their right to appeal when pleading guilty. We conclude that, whether or not the recommendation to consider permitting waiver of appeal in guilty pleas is favorably considered, an appeal opportunity should be provided for all general and special court-martial convictions that result from contested proceedings.

3. Consider permitting accused servicemembers to waive their right to appellate review in pre-trial agreements.

In addition to improving access to appellate review for servicemembers convicted at court-martial, the Commission recommends further study regarding whether accused servicemembers should be able to waive the right to appellate review in a pretrial agreement. This change would bring military criminal procedure in line with federal criminal procedure, which permits knowing and intelligent waivers of appellate review.³ It has the potential to relieve pressure on the military appellate review system by eliminating cases that raise no issues of law or fact during pretrial negotiations. As one expert witness pointed out to the Commission, the bar on waiver of appellate review may even have the negative effect of forcing expensive capital trials in cases where the accused and the people would be better served by a guilty plea. In short, permitting waiver of appellate review is most likely a win-win situation for both the government and the defense.⁴

R.C.M. 705(c)(1)(B) could be amended, or superseded by an amendment to the UCMJ, to permit the waiver of appellate review to become part of a pretrial agreement. The change would also move the military justice system toward the elimination of “no-issue” appeals, which do little to promote justice but consume scarce resources that slow down a system that has not operated as quickly or effectively as it could and should.⁵ We have stopped short, however, of recommending this change be made without further study. We recognize that automatic appeal was adopted by the drafters of the UCMJ to guarantee appellate review to persons convicted by a military, rather than a civilian, court. Permitting an accused to negotiate a waiver of that right does not undercut the grant of this right. Rather, it builds more flexibility into the military justice system

³ See, e.g., Fed. R. Crim. P. 11(b)(1)(N).

⁴ See, e.g., John F. O'Connor, *Foolish Consistencies and the Appellate Review of Courts-Martial*, 41 AKRON L. REV. 175 (2008).

⁵ See, e.g., SENATE ARMED SERVICES COMMITTEE, REPORT ON THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2010, S. Rep. No. 111-35 at 131 (2009) (noting “longstanding problems with the post-trial processes for preparation of records of courts-martial and for appellate review of court-martial convictions within the Department of the Navy”); see also *Toohy v. United States*, 60 M.J. 100 (C.A.A.F. 2004); *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005); *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006); *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006); *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006) (demonstrating the extent of undue appellate delay).

to promote both the accused's and the government's interests. We think it likely that the military justice system has matured to the point that such a guarantee is no longer required, but we recommend that the President amend the rule only after careful consideration of the overall military appellate structure.

4. Improve access of defense counsel to expert assistance during case investigation and expert witness assistance during trial.

Article 46 of the UCMJ states that the trial counsel, the defense counsel and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Rule for Court-Martial 703 states that requests for expert witness funding by either party must be made to the convening authority with notice to the opposing party. The rules would seem to create a fair and open process for access by either party to expert assistance.

Yet in practice, the process often places the defense at a profound disadvantage. Witnesses brought evidence to the Commission that showed the defense does not have independent access to funding for experts. Equally troubling is that the defense must often disclose its theory of the case to the convening authority and government counsel in order to make a showing of necessity for expert assistance. If the defense is requesting expert assistance in order to prepare for trial, it may also be required to show specifically how the expert will aid the defense—before it can even determine if the expert assistance will ultimately benefit the accused. If the defense consults informally with an expert before that expert's assistance has been approved by the convening authority, that consultation may not be protected by the attorney-client privilege, in which case the information is discoverable by the government.

The current system creates needless delay and inefficiency by requiring the defense to wait until the case is referred before making a request to the military judge. Even if the military judge ultimately orders the government to provide expert assistance once the case is referred for trial, the defense is still required to disclose key aspects of its case to the government. Witnesses before the Commission also reported that convening

authorities routinely deny defense requests for expert assistance and expert witnesses because of funding constraints; the convening authority often prefers to conserve scarce resources for other funding priorities.

By contrast, the government does not face any of these obstacles. If the government wants expert assistance in preparation for trial, it simply tasks the requisite government agency or it contracts for that assistance and obtains the necessary funding from the convening authority. The government is not required to divulge its theory of the case to the defense, the convening authority, or the military judge before obtaining expert assistance.

The Commission believes that this system puts the defense at a significant and unreasonable disadvantage. Witnesses before the Commission offered a number of possible solutions to this inequity. One proposal is to create separate and independent funding sources for defense counsel so that they would not have to go through the government or the convening authority to obtain funding for expert assistance and expert witnesses. However, this proposal would create different funding constraints that might prove just as untenable. Once the separate defense budget was spent, defense counsel could be left with no resources whatsoever, and the allocation of limited funding could place the defense in the position of evaluating competing needs amongst various defense counsel, creating conflicts of interest.

The Commission believes that the best way to resolve the inequity in expert assistance is to expand the authority of the military judge before the case is referred to trial. We recommend that once a military accused is furnished appointed military counsel, the chief military judge for the region in which the accused will be tried be granted authority to entertain *ex parte* requests from the defense for expert assistance and expert witnesses. If the military judge determines that expert assistance or the granting of an expert witness for the defense is warranted, that opinion will be provided to the convening authority through the staff judge advocate. At the pre-referral stage, the military judge's opinion would not be binding on the convening authority. However, the opinion would provide guidance to the convening authority from a neutral arbiter about both the appropriate allocation of government resources

to the defense and the types of defense experts that are needed.

This proposed structure has several advantages over the current system. By allowing for *ex parte* hearings, the defense would no longer be forced to disclose its theory of the case to the government before obtaining expert assistance. Placing the military judge into the process pre-referral ensures that a neutral party will fully and fairly evaluate the requests for legal sufficiency. On the one hand, this places a check on the defense from making unwarranted and unjustified requests. On the other hand, an opinion that funding for expert assistance is warranted gives the convening authority useful guidance from a source that has no stake in the outcome of the case. Finally, allowing the military judge to become involved in these matters pre-referral eliminates the inefficiencies of the current system that preclude the military judge's involvement until the case is referred to trial.⁶ The Commission recommends that the President make these changes by amendments to the Rules for Court-Martial or by Executive Order.

5. Prohibit trial counsel from attacking the credentials of an expert witness if the government provided that specific expert to the defense as an adequate substitute for an expert consultant requested by the defense.

Under established precedent, if the convening authority or the military judge determines that the defense counsel is entitled to expert assistance for consultation and case preparation, the

⁶ One suggestion offered to the Commission was that standing courts replace ad hoc military courts, with a chief judge supervising each circuit. Such an organization would address the issue of defense experts, as well as many other collateral matters that take place outside the four walls of a court-martial trial itself, including post-trial attacks, petitions for extraordinary writs, *habeas corpus* claims, and the like. However, the Commission found that each service is currently organized *de facto* in such a fashion and staffed with experienced, highly trained and motivated military judges. Given that the military justice system must be highly mobile and responsive worldwide to its mission and is, indeed, functioning well, the Commission decided not to recommend changes to the basic structure of the system. Notwithstanding our reluctance to advocate such a major overhaul of the current system, we believe structural improvements should still be considered, and we urge the service Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps to be vigilant and open to suggestions to alter the system when and where warranted.

defense is not entitled to consult with a specific expert.⁷ If the government can provide an adequate substitute who has the requisite expert credentials and qualifications, the defendant must either accept the substitute or waive the right to government-funded expert assistance.

Witnesses at the hearing informed the Commission of a practice sometimes engaged in by government counsel whereby the government provides the defense with substitute expert assistance for trial preparation and if that government-substituted expert testifies for the defense at trial, the government attacks the expert's qualifications. We are troubled by a practice that allows the government to attack the credentials of the very expert that the government had previously offered to the defense as an adequate substitute for a defense-requested expert. The Commission recommends a change in the Rules for Court-Martial to prevent the government from attacking the credentials of an expert witness whom the government had previously made available to the defense as an adequate substitute for a defense-requested expert. This would not, of course, preclude the government from challenging the defense expert witness's methodology or other aspects of the witness's testimony.

6. Require military law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at law enforcement offices, detention centers, or other places where suspects are held for questioning, or, where videotaping is not practicable, to audiotape the entirety of such custodial interrogations.

The Commission heard testimony and received evidence regarding the value of requiring military law enforcement agencies to record the entirety of all stationhouse custodial interrogations. In the military, *Miranda* warnings are required in all custodial interrogations. In addition, Article 31 of the UCMJ requires all suspects to be advised of their right not to make a statement before any interrogation is conducted. These protections are designed to ensure the voluntariness of any subsequent statements obtained from a military suspect. Yet

⁷ *United States v. Garries*, 22 M.J. 288, 290-91 (C.M.A. 1986); *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996).

even with these significant protections in place, the risk of a suspect making an involuntary statement, or falsely confessing to criminal conduct, remains. Research indicates that false confessions are a major cause of wrongful convictions, since interrogation techniques designed to elicit true confessions can also have the effect of inducing a false confession, particularly from a vulnerable suspect: one who is intoxicated, overly eager to cooperate, is hindered by mental deficiencies, or hails from a cultural background different from his or her interrogators.

The courtroom presents a number of challenges for assessing the truthfulness and voluntariness of a confession. Factual disputes inevitably focus on who said what, who did what, and what body language and facial expressions accompanied those statements and actions. To support or challenge the truthfulness and voluntariness of confessions, the testimony of the criminal suspect is usually pitted against the testimony of law enforcement officials. In these "swearing contests," the statements of law enforcement officers usually carry an imprimatur of truth, while the statements of the criminal suspect are frequently seen by judges and juries as self-serving and untruthful. Because these issues are so fact bound, significant time and resources are often required to litigate these issues.

To address these concerns, a number of jurisdictions have adopted practices requiring the video or audio recording of law enforcement office custodial interrogations. These recording practices have come about in some cases by court order, in some cases by statutory changes, and in some cases by a change in police policy. Currently 14 states and over 700 state and local police departments require recording of stationhouse interrogations. Law enforcement agents, after initial skepticism, have become universal proponents of recording, joining courts and litigants in approving a practice that resolves critical factual disputes fairly and efficiently.

The Commission recommends that the military adopt recording requirements. The Commission notes that the NCIS and AFOSI are now conducting pilot programs of recording suspect interviews. We deem the cost of recording negligible, compared to the cost and harm of litigating issues related to custodial interrogations that are not recorded. The law enforcement agencies of all the services should immediately begin

videotaping, or, in cases where that is not practicable, audiotaping, all custodial interrogations conducted in law enforcement offices in their entirety. This will provide a much stronger factual predicate for military judges to assess the admissibility of challenged confessions. It will also both give military panel members better insight into police practices, allowing them more accurately to determine the reliability of a suspect's pre-trial confessions, and conserve judicial resources by streamlining, or avoiding altogether, litigation over issues related to interrogation methods and confessions.

7. Repeal Uniform Code of Military Justice, 10 U.S.C. § 925 (Article 125, sodomy).

In 2001, the first Cox Commission considered the issue of prosecuting consensual sex offenses within the military.⁸ It recommended the passage of a comprehensive Criminal Sexual Conduct Article to standardize and codify military law in this area. In the years since, a complete revision of Article 120, the rape statute of the UCMJ, took a step in this direction. It also recommended the repeal of Article 125, which criminalizes sodomy. To date, this step has not been taken.

The changes in Article 120, effective 1 October 2007, represent a major change in the way rape, sexual assault, and other sexual misconduct is prosecuted. The new Article 120 categorizes various degrees of non-consensual sexual conduct into a number of offenses; brings crimes formerly prosecuted under Article 134, such as indecent liberties with a child, indecent acts, and indecent exposure, under Article 120; and creates two new offenses, forcible pandering and wrongful sexual contact. Most relevant to our considerations here, the new Article also incorporates and punishes acts of forcible sodomy, nonconsensual sodomy, and sodomy with an underage person.

Because of these statutory changes, and in light of the changes in sexual behavior that have occurred since the creation of the UCMJ, there is no need for a separate provision making sodomy a military crime. The new Article 120, combined with the availability of Articles 92, 128, and 134, provides an adequate

⁸ See Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice, p. 11.

basis to prosecute any criminal sexual misconduct. The Committee further notes that most acts of consensual sodomy committed by consenting military personnel are not prosecuted, creating a perception that prosecution of this sexual behavior is arbitrary. Finally, the Committee notes that, in light of the Supreme Court's ruling in *Lawrence v. Texas*⁹, the constitutionality of the provision of Article 125 that punishes consensual sodomy is in doubt. For these reasons, we echo the conclusions of the first Cox Commission and urge Congress to repeal Article 125 as an offense under the UCMJ.

Respectfully submitted to the National Institute of Military Justice and the American Bar Association, Criminal Justice Section, Military Law Committee.

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Chairman

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Donald J. Guter
William L. Nash
Joyce E. Peters
Stephen A. Saltzburg
Scott L. Silliman
William W. Wilkins
Commissioners

Appendix A, Biographies of Commissioners
Appendix B, Submissions to the Commission
Appendix C, Letter to Code Committee re animal abuse issues

⁹ 539 U.S. 558 (2003); *see also* United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004).

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