
David A. Schlueter

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ARTICLE

REFORMING MILITARY JUSTICE:
AN ANALYSIS OF THE MILITARY JUSTICE
ACT OF 2016

DAVID A. SCHLUETER*

Abstract. The Uniform Code of Military Justice (UCMJ), 10 USC §§ 801–946, is the statutory template for the United States’ military justice system. The UCMJ addresses topics such as court-martial jurisdiction, and pretrial, trial, and appellate procedures. It also includes punitive articles which proscribe, not only common law offenses, but also offenses unique to the military. Congress made significant changes to the UCMJ in the Military Justice Act of 2016. The legislation not only amended a significant number of existing articles, but also added many new articles. In addition, Congress completely reorganized the punitive articles. In this article, Professor Schlueter addresses the Military Justice Act and provides an analysis of those changes, noting that not since its enactment in 1950, has the UCMJ been amended in such a dramatic fashion. The article includes a chart as an appendix which lists the amended and new provisions to the UCMJ, the substance of each change, the legislative source for those changes, and comments about the changes.

* Professor of Law, St. Mary’s University School of Law. The author is deeply indebted to Mr. Luke Harle, Comment Editor, St. Mary’s Law Journal, Mr. Devin deBruyn, JD 2017, Mrs. Linda Schlueter, Professor Michael S. Ariens, and the Editorial Board of the St. Mary’s Law Journal, volume 49, for their excellent and invaluable editorial assistance on this article. S.D.G.
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The 2016 amendments to the Uniform Code of Military Justice\(^1\) amounted to a sea of change in American military justice. The Military Justice Act of 2016—a major reform of the Uniform Code of Military Justice (UCMJ)—is set out in Division E of the National Defense Authorization Act for Fiscal Year 2017, and was signed into law by the President on December 23, 2016.\(^2\)

This article addresses the amendments effected by the Act. Part II examines the background of the Uniform Code of Military Justice, from the Articles of War through the enactment of the UCMJ in 1950, and the subsequent changes to that statute up to 2016. Part II also provides a brief summary of the structure of the UCMJ, which contains both procedural and substantive components.

Part III recounts the path of reform to the 2016 amendments, noting that three components merged to force changes in the military justice system: the lack of any major reforms since the 1983 amendments, repeated calls for reform and increasing pressures from Congress to fix the system vis a vis sexual assault cases, and the formation of the Military

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Justice Review Group. Part IV focuses on the 2016 changes to the UCMJ regarding court-martial jurisdiction and the changes to pretrial investigations and procedures. Part V discusses the changes to those provisions in the UCMJ, which address the subjects of apprehension and restraint. Part VI addresses the amendments made to Article 15 UCMJ, which permits commanders to impose non-judicial punishment. Part VII focuses on the changes Congress made to the jurisdiction and classification of courts-martial, including the significant changes to the size of courts-martial panels. Part VIII addresses the issues of selection of court-martial members, the detailing of military judges and counsel to all general and special courts-martial, and the creation of the position of military magistrate.

Part IX addresses reforms to the pretrial processing of cases, including the ability of military judges and military magistrates to dispose of issues before charges are referred to a court-martial. Part X focuses on the changes to trial procedures in the military, including the changes to the number of votes required to convict an accused and the role of military judges in reviewing negotiated pretrial agreements between the accused and the convening authority. The reforms to sentencing are addressed in Part XI, and Part XII focuses on the amendments, which resulted in significant changes to the post-trial procedures and appellate review by the Courts of Criminal Appeals. Part XIII discusses the major changes to the punitive articles in the UCMJ. Part XIV addresses the amendments which are intended to provide, in part, more transparency for the military justice system, and Part XV addresses the effective date of the amendments. I offer some concluding thoughts in Part XVI. Finally, I have added an appendix that references the amended UCMJ articles.

It is important to note that most of the amendments to the UCMJ addressed in this article will not become effective for some time—perhaps not until January 1, 2019. In the interim, the current provisions of the UCMJ will continue to apply. In this article, I attempt to make it clear as to what the current law is (as of July 2017) and what the amended provisions will require. It is also important to note that this article addresses only the 2016 amendments to the UCMJ. The issue of the effective date of the amendments is discussed in more detail at Part XV.

It is difficult to find the right words to describe the breadth and depth

of the 2016 amendments to the UCMJ. Not since its initial adoption in 1950 have there been so many substantial and far-reaching changes. Before the 2016 amendments, the UCMJ consisted of 161 articles. The 2016 Act added sixty-seven new articles and amended ninety-six articles. As noted in the following discussion and in the conclusion, there are at least three important aspects of the changes. First, the amendments expand and solidify the role of military judges in the American military justice system. Although commanders continue to play a critical role in military justice, military judges will not only be able to address issues raised before charges are referred to a court-martial, but will also have the final say in the disposition of the court-martial by issuing the “judgment” in a case, after the convening authority completes his or her limited review of the court-martial. Second, the changes demonstrate the continuing view that the military justice system should more closely parallel the federal criminal justice model. Throughout, it is clear that new procedures, and even terminology, mirror federal practice. And third, Congress completely reorganized the punitive articles, amended a significant number of those articles, and “migrated” a large number of offenses from coverage under Article 134, to new punitive articles. Collectively, these changes, and others, signal an extreme makeover of American military justice.

II. THE STRUCTURE AND PURPOSE OF THE UNIFORM CODE OF MILITARY JUSTICE

The statutory framework for American military justice is the Uniform Code of Military Justice (UCMJ). Congress’s authority to promulgate the UCMJ is derived from Article 1, Section 8 of the Constitution, which authorizes Congress to enact rules and regulations for the governance of the armed forces.

The UCMJ, which is Chapter 27 of Title 10, is divided into twelve subchapters:

- **Subchapter I:** General Provisions
- **Subchapter II:** Apprehension and Restraint
- **Subchapter III:** Non-Judicial Punishment

Article 36 of the UCMJ,\textsuperscript{17} in turn, provides that the President may adopt procedures for the conduct of courts-martial:

Article 36. President may prescribe rules.

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not, except as provided in chapter 47A of this title, be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable, except insofar as applicable to military commissions established under chapter 47A of this title.\textsuperscript{18}

More detailed guidance on those procedures is spelled out in the Manual...
for Courts-Martial.\textsuperscript{19} The Department of Defense, the service Secretaries, and commanders promulgate regulations to provide further guidance.\textsuperscript{20}

In addition, rules of procedure and practice are prescribed by the trial and appellate judiciary.\textsuperscript{21}

Under the UCMJ and Manual for Courts-Martial, courts-martial are only temporary tribunals,\textsuperscript{22} which are created to determine the guilt or innocence of persons accused of committing offenses while subject to the jurisdiction of the Armed Forces.

### III. THE PATH TO THE 2016 REFORMS

#### A. In General

In discussing the Military Justice Act of 2016, it is important to address those changes in the context of a history of reforms and changes to the military justice system since its inception in 1775.\textsuperscript{23}

The governing body of laws for the military justice system originally rested in the 1775 Articles of War\textsuperscript{24} and the Articles Governing the Navy.\textsuperscript{25} The system relied on non-lawyers to carry out the procedures set out in those rules.\textsuperscript{26} Following World War I, there were calls for reform...
to the military justice system based on concerns about the lack of due process protections for service members. Post-war changes to the Articles of War focused on pretrial investigation, the addition of a law member to the court-martial, and Boards of Review. Following World War II, Congress reformed the system again, because of widespread complaints about injustices in the military justice system during wartime.

In 1948, Congress passed the Elston Act, as part of the Selective Service Act of 1948, which amended the Articles of War. The Uniform Code of Military Justice was enacted on May 5, 1950, and became effective on May 31, 1951. Key elements in the creation of the UCMJ focused on the prohibitions on unlawful command influence, the right against self-incrimination, replacing the law member with a law officer exercising judicial powers, and the creation of an independent civilian court, the Court of Military Appeals.

In 1968, Congress created the military judiciary, provided for judge-alone trials, and required that judges and counsel be appointed for special courts-martial. In 1980, the President amended the Manual for Courts-Martial to adopt the Military Rules of Evidence, and in 1984, the President amended the Manual to convert it into a rules-based format.


27. Id. at 156–58.
28. Id. at 156–58.
29. Id. at 158–60.
33. Id. at 107; see also Exec. Order No. 10,214, 16 Fed. Reg. 1303 (Feb. 8, 1951).
34. MILITARY JUSTICE REVIEW GRP., supra note 23, at 70–85.
39. The Act modified the selection and appointment process for counsel and judges, permitted prosecution appeal of certain rulings by a military judge, and provided for certiorari review of the Court of Military Appeals, now the United States Court of Appeals for the Armed Forces, by the Supreme Court. 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 1-6[D]. The Act also established a commission to consider the issue of tenure for military judges, Article III status for
was completely revised from a treatise format to a rules-based format. In response to deep concerns about the military’s handling of sexual assault cases, Congress again amended the UCMJ in 2013, 2014, 2015. Congress has also established several advisory committees to study that problem and issue reports and recommendations on their findings. Those congressional actions are addressed in Part III.B.

Although, in theory, the formal process of making amendments to the UCMJ can originate with formal proposals from the Department of Defense, in recent years, Congress has taken the lead in amending the UCMJ.

B. The Push for Reforms

Three components combined to provide the impetus for the push for major reforms in 2016. First, as noted above, since 1950, Congress has periodically amended the UCMJ. Most of those changes were piecemeal. Neither Congress nor the Executive Branch had conducted a thorough review of the system since 1983. Second, in the last several decades, a large number of commentators have recommended changes to features or procedures in the military
Commentators have proposed reforms to virtually every aspect of the military system, including jurisdiction of courts-martial, the role of military lawyers, pretrial processing of court-martial charges, pretrial confinement, the process of selecting court members, the rules...
of evidence applicable to courts-martial, sentencing, post-trial processing, and appellate review of court-martial convictions. There have also been proposals for changing the methods for making changes to the Manual for Courts-Martial. One of the most frequent targets for proposed reforms has been on the role of commanders in the military justice system—in particular, the role of the commander in preferring court-martial charges and in exercising post-trial clemency. One proposal is to vest prosecutorial discretion in a separate military command structure. Another is to place prosecutorial discretion in the hands of commanders.

55. See, e.g., Captain David E. Grogan, Stop the Madness: It's Time to Simplify Court-Martial Post-Trial Processing, 62 NAVAL L. REV. 1, 17–28 (2013) (exploring complex post-trial procedures and concluding that those procedures are outdated and ultimately provide no real benefit to a military accused; recommending several reforms, including abandonment of the staff judge advocate's post-trial review and making court-martial sentences self-executing).
56. See, e.g., John F. O'Connor, Fiduciary Consistencies and the Appellate Review of Courts-Martial, 41 AKRON L. REV. 175, 230 (2008) (recommending that convicted service members decide whether to appeal their convictions and to permit them to waive appellate review as part of a pretrial agreement with the convening authority).
59. In 2013, Senator Gillibrand sponsored the Military Justice Improvement Act (MJIA) which proposed that commanders would no longer have jurisdiction over specified offenses and the convening authority's power to grant post-trial clemency would be limited. S. 967, 113th Cong. (2013). Senator Gillibrand's bill had bipartisan support, but it eventually failed in the Senate by a close vote. Laura Bassett, Senators Shoot Down Gillibrand's Military Sexual Assault Reform Bill, THE HUFFINGTON POST (Dec. 11, 2014, 2:10 PM), http://www.huffingtonpost.com/
armed forces lawyers. And still another proposal would place the
decision to prosecute in the hands of civilian prosecutors. Other
commentators have responded to the calls for reforms.

The third component contributing to the 2016 reforms was Congress’s
deep concerns about the ability of the military to deal with sexual assault
offenses. That concern was reflected in amendments to the UCMJ in
on sexual assaults, e.g., the rights of victims and whether an accused’s
good military character could be considered by the court. The

discussed, infra, at Part XII.B, some limitations on the convening authority’s post-trial powers were
included in the 2016 amendments.

https://archive.nlg.org/sites/default/files/MLTF%20recs%20to%20DoD.pdf) (recommending
that prosecutorial discretion be placed in the hands of independent prosecutors).

in other countries’ military justice systems); E. Sherman, Military Justice Without Military Control,
82 YALE L.J. 1398, 1400 (1973) (arguing for an evaluation of other countries’ approaches, which are
“especially relevant,” in considering potential changes to the military justice system).

that changes made by Congress, the President, and the DoD are laudable but have compromised the
due process rights of an accused); Greg Rustico, Overcoming Overcorrection: Towards Holistic Military
Sexual Assault Reform, 102 VA. L. REV. 2027, 2031 (2016) (noting that reforms to military justice to
combat problem of sexual assaults were incomplete and potentially counterproductive).


67. MCM, supra note 19, MIL. R. EVID. 404 (admissibility of character evidence); see generally
STEPHEN A. SALTZBURG, LEE D. SCHINASI, DAVID A. SCHLUETER & VICTOR HANSEN, MILITARY RULES OF EVIDENCE MANUAL § 404.02(2)[b] (8th ed. 2015) [hereinafter MILITARY RULES OF EVIDENCE MANUAL] (discussing limitations on the admissibility of “good military character”
evidence).
amendments also transformed the Article 32 investigation into an Article 32 preliminary hearing. In addition, Congress directed the Secretary of Defense to establish several federal advisory committees to study the military justice system and provide recommendations for change to the system: the Response Systems to Adult Sexual Assault Crimes Panel, the Judicial Proceedings Panel, and the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces. In 2012, the Secretary of Defense voluntarily established the Legal Policy Board. That Board studied the military justice system in combat zones and reported its findings in May 2013. Finally, in February 2016, the Department of Defense established the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces. The Committee is charged with providing the Department of Defense with advice on the “investigation, prosecution, 

68. See infra Part IX.E.
and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.”

C. The Military Justice Review Group

The Military Justice Act of 2016 had its genesis in an August 2013 memo from General Martin Dempsey, Chairman of the Joint Chiefs of Staff, on behalf of the Joint Chiefs of Staff, to Secretary of Defense Chuck Hagel. The Joint Chiefs—undoubtedly aware of increasing congressional pressures on the military to resolve the sexual assault issues—took a proactive approach and recommended that the Secretary of Defense direct the General Counsel of the Department of Defense to conduct a “holistic review” of the UCMJ and military justice system, noting that much had changed since the 1983 amendments to the UCMJ.

In October 2013, Secretary Hagel directed the General Counsel of the Department of Defense to conduct a comprehensive review of the UCMJ, the Manual for Courts-Martial, and the country’s military justice system and to file its report within twelve months. Secretary Hagel’s directive also included a requirement to consider the recommendations by the Response Systems to Adult Sexual Assault Crimes Panel. The General

77. Gen. Dempsey Memorandum, supra note 75, app. A 1262–63. In his memorandum, General Dempsey noted that his memorandum should “not be taken to signal among the JCS that the UCMJ has proved inadequate to its purpose, or as a measure to forestall criticism of the manner in which any case or cases are handled within the military justice system.” Id.
78. Memorandum from Chuck Hagel, Sec’y of Def., to Chairman of the Joint Chiefs of Staff et al. (Oct. 18, 2013), in MILITARY JUSTICE REVIEW GRP., supra note 23, app. B 1266–67.
79. Id. The Response Systems to Adult Sexual Assault Crimes Panel was established by the Secretary of Defense, as required by Section 576(a)(1) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239) and in accordance with the Federal Advisory Committee Act of 1972 (FACA). National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576(a)(1), 126 Stat. 1632, 1768 (2013); 5 U.S.C. app. §§ 1–16 (2012); 41 C.F.R. § 102-3.50(a) (2010). This panel was established to conduct a study of the “effectiveness of the systems used to investigate, prosecute, and adjudicate sexual assault offenses, including the role of the commander in the military
Counsel to the Department of Defense established the Military Justice Review Group to conduct the required study and appointed Andrew S. Effron, who had served as the Chief Judge of the United States Court of Appeals for the Armed Forces, as chair of the Group. In January 2014, the General Counsel also directed that the Military Justice Review Group should apply five guiding principles in its study:

- Use the current UCMJ as a point of departure for baseline reassessment.
- Where they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice.
- To the extent practicable, UCMJ articles and Manual for Courts-Martial provisions should apply uniformly, across the military services.
- Consider any recommendations, proposals, or analysis relating to military justice issued by the Response Systems Panel.
- Consider, as appropriate, the recommendations, proposals, and analysis in the report of the Defense Legal Policy Board, including the report of that Board’s Subcommittee on Military Justice in Combat Zones.

In September 2014, the General Counsel of the Department of Defense requested that the Military Justice Review Group consider 14 of the 132 recommendations, submitted by the Response Systems to Adult Sexual Assault Crimes Panel, for reforming military justice. Following its extensive review, the Military Justice Review Group submitted an initial report on the UCMJ to the Department of Defense General Counsel in March 2015. The Department of Defense conducted an internal review of
that report and, in September 2015, the Military Justice Review Group submitted a revised report to the Department of Defense, which circulated it to the Office of Management and Budget for an interagency review.\textsuperscript{83}

The Military Justice Review Group considered the comments generated during that interagency review and submitted to Congress its final report and recommendations on December 22, 2015.\textsuperscript{84} The report is massive—it runs about 1,300 pages—and provides a "Legislative Report," which includes an article-by-article review of the UCMJ and proposed legislation to amend the UCMJ. That proposed legislation was submitted to Congress as the official administration proposal.\textsuperscript{85} On September 21, 2015, the Military Justice Review Group submitted its report on proposed amendments to the Manual for Courts-Martial.\textsuperscript{86}

In its report, the Group listed seven major categories of reform:

1. Strengthen the Structure of the Military Justice System;
2. Enhance Fairness and Efficiency in Pretrial and Trial Procedures;
3. Reform Sentencing, Guilty Pleas, and Plea Agreements;
4. Streamline the Post-Trial Process;
5. Modernize Military Appellate Practice;
6. Increase Transparency and Independent Review of the Military Justice System;
7. Improve the Functionality of Punitive Articles and Proscribe Additional Acts.\textsuperscript{87}

The Military Justice Review Group's Report is extremely thorough.\textsuperscript{88} It addresses each article of the UCMJ in some detail, discussing the history of each article, how the article has been construed and applied, and whether any change should be made. Although the Report and the resulting

\textsuperscript{83} MILITARY JUSTICE REVIEW GRP., supra note 23, at 15.
\textsuperscript{84} Id.
\textsuperscript{86} MILITARY JUSTICE REVIEW GRP., supra note 23, at 96–97.
\textsuperscript{87} Id. at 23–24 (2015).
\textsuperscript{88} Those doing research on the American military justice system will benefit greatly by consulting the report.
legislation left a number of the articles unchanged, many articles were amended in some form. In addition, the legislation added thirty-six new articles, many of those as punitive articles.\footnote{89}

Congress considered the recommended changes, without holding any formal hearings on the legislation.\footnote{90} On December 23, 2016, the President signed the National Defense Authorization Act for Fiscal Year 2017.\footnote{91} Subchapter E of that legislation contains the Military Justice Act of 2016.

IV. REFORMING THE GENERAL PROVISIONS IN THE UCMJ

A. In General

Subchapter I of the UCMJ covers Articles 1 to 6b. Technical amendments were made to Article 1, Definitions,\footnote{92} Article 6, Judge Advocates and Legal Officers,\footnote{93} and Article 6a, Investigation and Disposition of Matters Pertaining to the Fitness of Military Judges.\footnote{94} Two substantive amendments were made to Article 2, Persons Subject to the Code,\footnote{95} and Article 6b, Rights of Victim of an Offense Under This Chapter.\footnote{96}

B. Reforming Personal Jurisdiction Over Reservists

Jurisdiction is the power of a court to hear a case.\footnote{97} There are three

\footnote{89. See infra Part XIII.B.}

\footnote{90. The Group’s Report explains that extensive consultations were held with a wide range of groups interested in military justice or with those who had prior experience in the system. The public was invited to submit suggestions to the Group for its consideration. Apparently, Congress was content that the DoD had sufficiently vetted the proposals and believed that hearings would not provide any additional benefit, except for publicity purposes.}


\footnote{97. See 1 MILITARY CRIMINAL JUSTICE, supra note 35, § 4-1 (discussing the issue of court-martial jurisdiction).}
prerequisites to court-martial jurisdiction: the court must have personal jurisdiction over the accused, subject matter jurisdiction, and the court must be properly constituted.

Articles 2 and 3 of the UCMJ list the categories of individuals who are subject to court-martial jurisdiction. That list includes not only those service members who are on active duty, but also retired service members, cadets, and civilians who are working with the military in a declared war or “contingency operation.”

Article 2 provides that reservists are subject to court-martial jurisdiction while on active duty or on inactive-duty for training (IDT). While a service member is on IDT, the service is not necessarily continual or uninterrupted, where for example, the service member participates in unit training assembly (UTA). If the service member commits an offense between a UTA, such as overnight or during lunch, personal jurisdiction will be lacking. For example, in United States v. Wolpert, the accused was charged with committing a sexual assault in his motel room, between

98. Id. § 4-4.


periods of scheduled UTA. The court concluded that the IDT, for purposes of Article 2(a)(3), does not include periods before signing in and signing out, while away from home, not under orders, and while staying in in-kind lodging. Thus, the court concluded that “he was not serving with the armed forces for purposes of personal jurisdiction.”

In the Military Justice Act of 2016, Congress amended Article 2(a)(3) to address that jurisdictional gap. Under the amendments, a court-martial will have jurisdiction over a reservist, during the period of inactive-duty training, throughout the entire drill period, including after working hours and while the reservist is in transit pursuant to orders or regulations.

C. Reforming Victims’ Rights

Article 6b, which provides rights to victims, was added to the UCMJ in 2013. It was intended to mirror, in part, the Federal Crime Victims’ Rights Act and expand the rights of victims in military criminal justice proceedings. It establishes a long list of rights available to victims, including the right to be heard. It also includes a provision which authorizes a military judge to appoint a representative for the victim, if the victim is not capable of representing herself. In 2015, Congress amended Article 6b by adding subdivision (e) to provide that victims could seek extraordinary relief from the services’ Courts of Criminal Appeals.

In 2015, a number of provisions in the Manual for Courts-Martial were added to implement protections and rights of victims, for example,
providing timely notice\textsuperscript{117} of a preliminary hearing under Article 32.\textsuperscript{118}

The Military Justice Act of 2016 made three changes to Article 6b.\textsuperscript{119} First, Article 6b(c) was amended to provide that in cases where a victim is “under 18 years of age (but who is not a member of the armed forces), incompetent, incapacitated or deceased,” the “legal guardians of the victim or the representatives of the victim’s estate, family members, or any other person designated as suitable by the military judge, may assume the rights of the victim under this section.”\textsuperscript{120} The Report of the Military Justice Review Group indicates that the slight change in language recognizes that in some cases, there may already be an assigned legal representative of the victim—who may assume the rights of the victim.\textsuperscript{121} If there is no one to fill that need, the military judge may, but is not required to, designate another suitable person.\textsuperscript{122}

Second, Article 6b was amended by adding Article 6b(d)(3),\textsuperscript{123} which provides the article may not be construed to impair a commander’s discretion under Articles 30 (preferring and disposing of court-martial charges)\textsuperscript{124} and Article 34 (advice of the staff judge advocate and referral to trial).\textsuperscript{125} That amendment addresses the issue of whether a victim should have any say in how the military disposes of charges against an accused.\textsuperscript{126} The change reflects similar language in the federal Crime Victims’ Rights Act, which states that a victim’s rights must not “impair

\textsuperscript{117} MCM, \textit{supra} note 19, R.C.M. 405(j)(2).
\textsuperscript{120} UCMJ art. 6b(c) (2016), 10 U.S.C. § 806b(c) (Supp. IV 2016).
\textsuperscript{121} MILITARY JUSTICE REVIEW GRP., \textit{supra} note 23, at 177.
\textsuperscript{122} UCMJ art. 6b(c) (2016), 10 U.S.C. § 806b(c) (Supp. IV 2016).
\textsuperscript{125} UCMJ art. 34 (2016); 10 U.S.C. § 834 (Supp. IV 2016).
\textsuperscript{126} See Major Robert E. Murdough, Barracks, Dormitories, and Capitol Hill: Finding Justice in the Divergent Politics of Military and College Sexual Assault, 223 MIL. L. REV. 233, 289 (2015) (noting “the substantive rights given to victims in the military justice system are not significantly different than similar rights afforded in federal civilian court[]” but arguing that allowing the victim to become too involved with the prosecution confuses the mission of criminal prosecutions, which is to seek justice on behalf of society at large and not solely for the victim). \textit{But see} Paul G. Cassell et. al., \textit{Crime Victims’ Rights During Criminal Investigations? Applying the Crime Victims’ Rights Act Before Criminal Charges Are Filed}, 104 J. CRIM. L. & CRIMINOLOGY 59, 103 (2014) (advocating the view that crime victims’ rights attach before formal charging and discussing that state statutes are moving in that direction).
the prosecutorial discretion of the [United States] Attorney General or any officer under his direction.”127 The amendment is an indirect response to the argument that a victim should have the discretion to demand that an accused be tried in a civilian court, rather than by a court-martial.128

Third, a new subdivision (f) was added to Article 6b.129 The new provision requires a defense counsel to make a request to interview any victim to the Special Victims’ Counsel or any other counsel for the victim.130 This provision, which currently appears in Article 46(b),131 applies to victims of sex-related offenses; the new provision will extend that requirement to interviews of any alleged victim.132 In any event, that requirement poses potential due process and confrontation problems for an accused.133 The requirement that defense counsel go through an intermediary is well-intentioned; it is designed to reduce the chance that defense counsel’s interview of a victim is viewed as harassment or intimidation.134 But if the counsel for the victim is too aggressive in limiting a defense counsel’s pretrial access to the victim—who may be a critical witness for the prosecution—an accused’s ability to effectively gather potential exculpatory evidence or prepare for cross-examination may be severely hampered.135

128. See Margaret Garvin & Douglas E. Beloof, Symposium, Emerging Issues in Crime Victims’ Rights, 13 OHIO ST. J. CRIM. L. 67, 86 (2015) (arguing prosecutors may honor victims’ rights where the victims’ interests coincide with the government’s but “the State is under no legal obligation to defend victims’ rights in the way the victim desires”).
130. Id.
133. Erin Gardner Schenk & David L. Shakes, Into the Wild Blue Yonder of Legal Representation for Victims of Sexual Assault: Can U.S. State Courts Learn from the Military?, 6 U. DENV. CRIM. L. REV. 1, 27 (2016) (citing U.S. Const. amend. VI) (reasoning that allowing victims to be represented by Special Victims Counsel may “diminish the right of the accused to confront the victim under the Sixth Amendment to the Constitution”).
134. See MILITARY JUSTICE REVIEW GRP., supra note 23, at 411 (noting Article 46(b) places restrictions on defense counsel’s ability to interview a victim of a sex-related crime).
135. See Daniels v. Kastenberg, No. 2013-05, 2013 WL 1874790, at *5 n.7 (A.F.C.C.A. 2013) (noting the SVC represents “the victim—and only the victim” and explaining that “[t]he objective is not for SVC to establish an adversarial relationship with [trial counsel] or the defense counsel”).
V. REFORMING APPREHENSION AND RESTRAINT PROCEDURES

A. In General

Articles 7 through 14 of the UCMJ address the issue of apprehension and restraint of individuals. For example, Article 7 defines the term "apprehension," the legal standard for making an apprehension, and finally who is authorized to make an apprehension. The Military Justice Act of 2016 amended only two of those articles: Article 10, which covers restraint of persons charged with offenses, and Article 12, which prohibits the government from placing a service member in confinement with enemy prisoners.

B. Restraint of a Person

Article 10 requires that once a person has been arrested or placed in pretrial confinement, the command must take immediate steps to inform the person of the specific charges and take steps to try the person or dismiss the charges. Congress amended Article 10 by including a requirement, formerly found in Article 33, that court-martial charges be promptly forwarded. However, instead of incorporating the requirement in Article 33 that the charges and allied papers be forwarded within eight days after an accused is placed under arrest or in confinement, the amended Article 10(b)(2) requires the President to promulgate regulations concerning the prompt referral of charges, including forwarding of charges and when applicable, the hearing report required under Article 32.

142. UCMJ art. 10 (2011), 10 U.S.C. § 810 (2012) (amended 2016). This provision, in conjunction with Article 33, has been viewed as a statutory speedy trial provision in the military. Although Article 10 includes no specific time table for bringing an accused to trial, the military courts have used Article 10 to provide more speedy trial protections than those provided by the Sixth Amendment. See 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 13-3(D)(3) (discussing speedy trial protections under Articles 10 and 33 of the UCMJ).
144. The MCM already contains provisions addressing these issues. See, e.g., MCM, supra note 19, R.C.M. 707 (establishing the 120-day speedy trial rule).
The amendments to Article 10, which were intended to reflect current practices in the military, should result in no real change in the operation of military justice.

Article 12 also addresses the issue of restraint of persons by the military. It currently provides that "[n]o member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals who are not members of the armed forces." The 2016 amendments modified Article 12 slightly. The amended article will prohibit confinement of service members with foreign nationals to those instances where the foreign nationals are not members of the United States Armed Forces and are detained under the law of war. This amendment should address the current problem where a service member is confined with other foreign nationals and it is not clear whether they are enemy combatants.

VI. REFORMING NON-JUDICIAL PUNISHMENT

One of the valuable disciplinary tools available to military commanders is non-judicial punishment under Article 15. That article provides the authority for commanders to impose minor punishments for minor disciplinary infractions. In the Army and Air Force, this procedure is referred to as an "Article 15." In the Marine Corps it is referred to as "Office Hours" and as "Captain's Mast" in both the Navy and Coast Guard. While Article 15 itself provides some guidance on imposing

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145. See MILITARY JUSTICE REVIEW GRP., supra note 23, at 197 ("Section 201 would amend Article 10 to conform the language of the statute to current practice . . . ").


147. Id.


149. See generally United States v. Wilson, 73 M.J. 404, 405–06 (C.A.A.F. 2014) (imposing no Article 12 violation where confinement facility could not determine which prisoners were foreign nationals and instead confined the prisoner alone); United States v. McPherson, 73 M.J. 393 (C.A.A.F. 2014) (finding Article 12 applies without geographic limitation, that an accused must first exhaust his administrative remedies before seeking judicial relief, and rejecting the government's argument that Article 12 conflicted with Article 58, which requires that confined service members be treated equally to confined civilians in the same facility). Cf United States v. Escobar, 73 M.J. 871 (A.F. Ct. Cnm. App. 2014) (insisting Articles 12 and 13 are not applicable to situations where a foreign sovereign confines a military member for violations of that sovereign's laws).


151. See 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 3-1 (introducing non-judicial punishment); Captain Harold L. Miller, A Long Look at Article 15, 28 MIL. L. REV. 37 (1965) (providing an analysis of Article 15).
non-judicial punishments, each service has established specific Article 15 procedures in its service regulations. 152

One of the authorized punishments listed in Article 15 is confinement on bread and water. 153 That punishment is authorized only in those instances where the service member is attached to or embarked on a vessel. 154 Before 1995, a court-martial could impose the punishment of confinement on bread and water for up to three days on enlisted service members, if they were attached to or embarked on a vessel. 155 The 2016 amendments removed that punishment as an option under Article 15. 156 In proposing the deletion of this punishment, the Military Justice Review Group simply stated that the proposal to eliminate the punishment reflects confidence in the ability of commanders in a modern era to administer effective discipline through other Article 15 punishments. 157 In effect, the Group viewed the punishment to be a relic of the past, which could no longer be justified.

The 2016 amendments to Article 15 did not address three important issues: first, whether a single standard of burden of proof should be applied; 158 second, whether some reforms should be applied to minimize

152. For example, Army Regulation 27-10, Legal Services—Military Justice, provides detailed guidance for Army commanders. U.S. DEPT OF ARMY, REG. 27-10, MILITARY JUSTICE (11 June 2016) [hereinafter AR 27-10].
154. Id.
155. A 1995 amendment to R.C.M. 1003(b)(9) removed the punishment. The Drafters’ Analysis for the amendment explained that:

Punishment of confinement on bread and water or diminished rations [R.C.M. 1003(d)(9)], as a punishment imposable by a court-martial, was deleted. Confinement on bread and water or diminished rations was originally intended as an immediate, remedial punishment. While this is still the case with non-judicial punishment (Article 15), it is not effective as a court-martial punishment. MCM, supra note 19, app. 21, at A21–69.

The punishment was originally included in Article 15 because the Navy had argued successfully that simply confining a service member at sea merely operated to relieve him of his duties and that some additional form of punishment was required to enforce discipline. See also Major Dwight H. Sullivan, Overhauling the Vessel Exception, 43 NAVAL L. REV. 57, 85 n.16 (1996) (noting the legislative history of Article 15 in the 1950 UCMJ).
158. The Army, for example, requires that the commander find the service member guilty beyond a reasonable doubt. AR 27-10, supra note 152, para. 3-16(d)(4), 3-18(f). The Air Force
the impact of non-judicial punishment on a service member’s record;\textsuperscript{159} and, third, whether to clarify those cases where the vessel exception would apply.\textsuperscript{160} The Military Justice Review Group indicated that those three issues, although not part of recommended changes to Article 15, would be addressed in its recommended changes to the Manual for Courts-Martial.\textsuperscript{161}

VII. REFORMING COURT-MARTIAL JURISDICTION AND THE CLASSIFICATION AND COMPOSITION OF COURTS-MARTIAL

A. In General

Congress made several significant changes to the articles in Subchapter IV of the UCMJ, which address the classification and jurisdiction of the three types of courts-martial.\textsuperscript{162} Article 16 outlines the classifications and composition of courts-martial; Article 17 (which Congress did not amend) sets out, in general, the jurisdiction of courts-martial; Article 18 addresses the jurisdiction of general courts-martial; Article 19 defines the jurisdiction of special courts-martial; and Article 20 sets out the jurisdiction of summary courts-martial.

\textsuperscript{159} MILITARY JUSTICE REVIEW GRP., supra note 23, at 213. Each service provides detailed guidance on when and where the report of the non-judicial punishment should be filed. Non-judicial punishment, although intended to be non-judicial, can have a devastating impact on a service member’s record. See 1 SChLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 3-8 (discussing the consequences of non-judicial punishment).

\textsuperscript{160} MILITARY JUSTICE REVIEW GRP., supra note 23, at 213.

\textsuperscript{161} Id.

B. Classification of Courts-Martial

1. In General

Article 16 lists and describes the three types of courts-martial in the American military justice system: general courts-martial, special courts-martial, and summary courts-martial. For each of the three courts-martial, Article 16 addresses first, the composition of each court, for example, whether a military judge is required and whether officers or enlisted members will serve, and second, the number of members on each. The issue of the jurisdiction of each court is addressed in Articles 18 (general court-martial), 19 (special court-martial), and 20 (summary court-martial). Articles 25 and Article 25a address questions of who appoints the members and who may serve on each court-martial.

In 2016, Congress amended Article 16 by dramatically changing the composition of general and special courts-martial. It did not make any changes to Article 16 regarding summary courts-martial.

2. Reforming the Composition of General Courts-Martial

The first court-martial addressed in Article 16 is the general court-martial, which is typically convened to try felony-level offenses. Since the 1920 Articles of War, general courts-martial have consisted of at least five members on the court-martial panel. As amended in 2016, Article 16(b)(1) provides that a non-capital general court-martial consists of a military judge and eight members; the number of members in a capital case are determined by Article 25a.

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164. Id.
169. See generally 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 1-8(D)(4) at 55 (indicating the different obligations of court-martials).
170. MILITARY JUSTICE REVIEW GRP., supra note 23, at 218.
171. As noted, infra at Part VIII.F, under Article 29(d), if any members are removed through challenges, the number of members may not fall below six. UCMJ art. 29(d) (2016), 10 U.S.C. § 829(d) (Supp. IV 2016).
172. UCMJ art. 25a (2016), 10 U.S.C. § 825a (Supp. IV 2016). Subject to some exceptions, the number of members in a general court-martial case, referred as “capital,” is twelve. See id. ("In a case
Although the Military Justice Review Group did not provide reasons for selecting the number eight, the idea of eight members on a general court-martial is not a new one. In 1919, General Samuel T. Ansell, proposed that the general court-martial consist of eight members.\textsuperscript{173} He was apparently concerned that a convening authority could make changes in the number of members during the court-martial.\textsuperscript{174} That proposal was part of a larger package of proposed amendments initially presented to the Senate in 1919 by Senator George Chamberlain of Oregon, in Senate Bill 64.\textsuperscript{175} After extensive hearings, a Senate Subcommittee reported a revision to the Articles of War, which was more to the liking of the War Department and eventually enacted as Chapter II of the Army Reorganization Act of 1920.\textsuperscript{176} The eight-person general court-martial was not part of the final legislation. In a law review article several years later, General Ansell lamented that “departmental opposition,” i.e. the War Department, had blocked his attempts at providing real reform to the military justice system.\textsuperscript{177}

Increasing the number of members on a general court-martial is a significant change. The Supreme Court of the United States has held that a service member has no constitutional right to a petit jury, or panel, of any size.\textsuperscript{178} As a practical matter, however, most convening authorities currently appoint more than five members to each general court-martial to allow for removal of one or more members because of an excusal, a challenge for cause or a peremptory challenge.\textsuperscript{179} That practice, however, creates an anomaly because all of the members appointed to the court-martial are impaneled to allow for the possibility that one or more members will be removed. Thus, if the convening authority appoints nine
members to allow for removal, but none were removed, all nine members serve on the panel.\textsuperscript{180} In addition, because a vote of at least two-thirds of the members is currently required for a verdict of guilty, the number of members required to support a finding of guilty depends on how many members actually sit on the panel.\textsuperscript{181} That leads to what has been referred to as the “numbers game,”\textsuperscript{182}

Increasing the number of members and requiring a set number in each case is a welcomed change and will bring the size of courts-martial panels in closer alignment with accepted civilian practice. Requiring a minimum of only five members for general courts-martial was a relic of the past and it was time for a change.

To account for the case where a court-member is removed and the number of members falls below the statutory minimum of eight, Congress also amended Article 29(d) to permit the convening authority to appoint additional members to the court-martial, to meet the statutory minimum.\textsuperscript{183}

3. Reforming the Composition of Special Courts-Martial

Article 16(c) recognizes two types of special courts-martial.\textsuperscript{184} The first, reflected in Article 16(c)(1), is a special court-martial consisting of a military judge and four members.\textsuperscript{185} Currently, a special court-martial must be composed of at least three members.\textsuperscript{186} Under the 2016 amendments, each special court-martial composed of members, will have a set number of members—four.\textsuperscript{187} As noted in the discussion regarding the increase in numbers of members on a general court-martial, supra, this change will remove an anomaly that exists in court-martial practice and

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\textsuperscript{180} See MILITARY JUSTICE REVIEW GRP., supra note 23, at 221 (finding the system was inefficient because members, exceeding the statutory minimum of five, were not permitted to return to their duties).

\textsuperscript{181} Id. at 220 (discussing the anomaly).

\textsuperscript{182} See generally 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 15-11, at 94 (discussing council’s decision as to how many members to challenge in order to obtain the optimum number of members).


\textsuperscript{184} UCMJ art. 16(c) (2012), 10 U.S.C. § 816(c) (2012) (amended 2016).


\textsuperscript{186} UCMJ art. 16(c) (2012), 10 U.S.C. § 816(c) (2012) (amended 2016).

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will provide some consistency.\textsuperscript{188}

The second type of special court-martial, reflected in amended Article 16(c)(2), will continue the current practice of permitting the accused to be tried by a special court-martial composed of a military judge alone.\textsuperscript{189} The 2016 amendments deleted the special court-martial without a military judge.\textsuperscript{190}

C. Jurisdiction of General Courts-Martial

According to Article 18, general courts-martial have jurisdiction to try any person subject to the UCMJ for any offense proscribed by the UCMJ.\textsuperscript{191} General courts-martial may try persons under the law of war.\textsuperscript{192} In response to concerns about the military’s handling of sexual assault offenses, Congress amended Article 18 in 2013 to provide that only general courts-martial could try certain specified sexual offenses\textsuperscript{193} as listed in Article 56(b)(2), which dealt with maximum punishments.\textsuperscript{194} In 2016, Congress moved the list of the specified offenses to Article 18(c).\textsuperscript{195} The Military Justice Review Group explained that the amendment conforms Article 18 to align the statute with the revised descriptions of types of courts-martial under Articles 16.\textsuperscript{196}

D. Jurisdiction of Special Courts-Martial

Congress also amended Article 19, which addresses the jurisdiction of special courts-martial.\textsuperscript{197} The amendment conforms that article to a provision in Article 16, which will recognize a special court-martial

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\textsuperscript{188} See supra Part VII.B.2.
\textsuperscript{190} UCMJ art. 16(c) (2016), 10 U.S.C. § 816(c) (Supp. IV 2016).
\textsuperscript{192} UCMJ art. 18(c) (2012), 10 U.S.C. § 818(c) (2012) (amended 2016).
\textsuperscript{196} See MILITARY JUSTICE REVIEW GRP., supra note 23, at 230 ("Recommendation 18: Amend Article to conform the statute to the proposed changes to Article 16 concerning the types of general courts-martial . . .").
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consisting of a judge alone. If the convening authority refers the charges to a special court-martial composed of only a military judge, that court-martial may not adjudge a bad-conduct discharge, confinement of more than six months, nor forfeiture of pay for more than six months. In addition, Congress added Article 19(c), which provides that the military judge, with the consent of the parties, will be able to designate a military magistrate to preside over the court-martial. The qualifications of military magistrates are set out in new Article 26a, discussed infra.

On the other hand, if the case will be referred to a special court-martial with a military judge and members, then the special court-martial’s jurisdiction will remain unchanged.

These changes reflect a commendable effort to mirror federal criminal practice where United States Magistrate Judges try petty offenses, and create a court-martial that can efficiently try petty offenses. The amendment should pose no Sixth Amendment problems because the Supreme Court of the United States has held that the Sixth Amendment right to trial by jury does not apply to trial of petty offense crimes where the punishment does not exceed six months confinement.

E. Jurisdiction of Summary Courts-Martial

The 2016 amendments to Article 20, which addresses the jurisdiction of

200. Id.
201. See infra Part VIII.D.
202. UCMJ art. 19 (2016), 10 U.S.C. § 819 (Supp. IV 2016). A special court-martial with members may currently impose the punishments of a bad-conduct discharge, confinement for up to one-year, hard labor without confinement for up to three months, and forfeiture of pay not exceeding two-thirds pay for a month for up to one year. Id.
203. Compare UCMJ art. 19(c) (2016), 10 U.S.C. § 819(c) (Supp. IV 2016) (allowing a special court-martial to be referred to a magistrate judge if both parties consent), with FED. R. CRIM. P. 58(b)(2)–(3) (detailing the tasks designated to a magistrate judge during a defendant’s initial appearance and arraignment).
204. See MILITARY JUSTICE REVIEW GRP., supra note 23, at 235 (noting the recommended changes to Article 19 would reflect “federal civilian practice” to allow a magistrate judge to “preside over cases that adjudicate petty offenses level charges”).
205. See Baldwin v. New York, 399 U.S. 66, 73 (1970) (“Where the accused cannot possibly face more than six months’ imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive non-jury adjudications.”); see also Reid v. Covert, 354 U.S. 1, 37 n.68 (1957) (noting the Fifth Amendment exception providing “that a grand jury indictment is not required in cases subject to military trial” has been applied to the Sixth Amendment “so that the requirements of jury trial are inapplicable”).
summary courts-martial,\textsuperscript{206} codified several court decisions, which held a summary court-martial conviction is not a criminal conviction.\textsuperscript{207} In its report, the Military Justice Review Group noted that the designation “summary court-martial” may lead potential employers to treat a summary court-martial conviction as a criminal prosecution.\textsuperscript{208}

VIII. REFORMING THE SELECTION AND DETAILING OF COURT-MARTIAL MEMBERS, JUDGES AND COUNSEL

A. In General

Subchapter V of the Uniform Code of Military Justice addresses the composition of courts-martial.\textsuperscript{209} Congress made a minor technical amendment to Article 22, which addresses the authority to convene general courts-martial,\textsuperscript{210} but made no changes to Articles 23 and 24, which address the authority to convene special and summary courts-martial.\textsuperscript{211} Nor did Congress make any changes to Article 28, which provides guidance on detailing or employing reporters or interpreters for courts-martial.\textsuperscript{212}

Congress made significant changes to the remaining articles in the Subchapter, which address the selection and appointment of the court members, the military judge, and the trial and defense counsel.\textsuperscript{213} Congress also created the position of military magistrate.\textsuperscript{214}

B. Selecting Court Members

One of the most controversial aspects of military justice has been the

\textsuperscript{208} MILITARY JUSTICE REVIEW GRP., supra note 23, at 239.
role of commanders in selecting and appointing the court members. Despite repeated calls to reform the selection process, Congress left the commander in charge.

Congress made other significant changes, however. The 2016 amendments to Article 25—which concerns the subject of who may serve as a member on a court-martial and the method of selecting those members—effected a significant change to the assignment of enlisted members to a court-martial. Currently, a convening authority normally does not appoint enlisted members to a court-martial for an enlisted accused unless an accused has requested, in writing or orally, that the convening authority do so. In that case, the court-martial is composed of at least one-third enlisted members. But none of those enlisted members can be of the same unit as the accused, and when it can be avoided, no enlisted member on the court may be junior in rank to the accused. Article 25(c)(1) will provide that a convening authority may

215. See United States v. Smith, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring) (noting the role of a commander in selecting members for court "is the most vulnerable aspect of the court-martial system; the easiest for the critics to attack. A fair and impartial court-martial is the most fundamental protection that an accused service member has from unfounded or unprovable charges"); see also David A. Schlueter, The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect, 133 MIL. L. REV. 1, 19–20 (1991) (addressing criticism of the role of the commander in selecting members).

216. See Major Guy P. Glazier, He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice, 157 MIL. L. REV. 1, 68 (1998) (recommending the use of a computer-based system for selecting members); Victor Hansen, Avoiding the Extremes: A Proposal for Modifying Court Member Selection in the Military, 44 CREIGHTON L. REV. 911, 940–44 (2011) (criticizing the court member selection process and proposing change to the military's panel selection system by using the accused's peremptory challenges to address the unfairness of stacking a court-martial panel); Major James T. Hill, Applying Transparency in the Military Panel Selection Process with the Preselection Method, 205 MIL. L. REV. 117, 131 (2010) (recommending the use of the Electronic Personnel Office (MILPO) by the convening authority to preselect the panel's qualifications); Major Stephen A. Lamb, The Court-Martial Panel Selection Process: A Critical Analysis, 137 MIL. L. REV. 103, 159–62 (1992) (recommending an elimination of the variable number of members who sit, the repeal of the accused's right to have an enlisted panel, the establishment of neutral panel commissioner and random selection, and the use of alternate members on the panel).


218. Id.


220. Id.

221. Id. The prohibition was not absolute; it stated that, "[w]hen it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade." Id.
appoint enlisted members to the court, whether requested or not. An enlisted accused will be able to request that the court consist of only officers or at least one-third enlisted personnel—whether or not enlisted members were originally appointed to the court. While the junior-in-rank prohibition was left in place, Congress removed the limitation which prohibited enlisted members in the same unit as the accused from serving on the court. That current limitation creates an unnecessary distinction between accused who are enlisted and those who are officers.

The 2016 changes will permit a convening authority greater latitude in appointing a broader cross-section of service members to a court-martial. They recognize that in many cases enlisted personnel can bring a wealth of education, experience, and judicial temperament to the court.

The amendments to Article 25 also added a new provision that will permit, with some exceptions for capital cases, that an accused in a court-martial with a military judge and members will be able to request that he or she be sentenced by the members. That request may be made in writing, or orally on the record, after the findings are announced and before any matters are presented in the sentencing phase. As noted at Part XI, infra, under amendments to Articles 52, 53, and 56, the current default rule, which is sentencing by members, will be changed to default sentencing by the military judge. So, for the first time in the military justice system, a court-martial will be able to determine the findings, but a military judge will impose the sentence.

225. See MILITARY JUSTICE REVIEW GRP., infra note 23, at 255 (finding that any potential problems of bias, for example, arising from the case where a member is in the same unit, can be addressed during voir dire of the members).
226. See id. (discussing Article 25’s effect of eliminating “unnecessary distinctions between enlisted members and officers”).
228. MILITARY JUSTICE REVIEW GRP., infra note 23, at 254–55 (indicating that change will enhance the convening authority’s ability to appoint “blue ribbon” panels).
229. In a capital case, the accused will be sentenced by the members for all offenses for which the penalty is death, as provided in Article 53. UCMJ art. 25(d)(2) (2016), 10 U.S.C. § 825(d)(2) (Supp. IV 2016).
231. Id.
Article 25 was also amended by adding language, which provides that a convening authority must appoint at least the number of members required for each court—twelve members in a capital case, eight in a non-capital general court-martial, and four in a special court-martial.\textsuperscript{232}

Congress also amended Article 25a, which concerns the number of members in a capital case.\textsuperscript{233} The amendments provide that the number of members must be twelve.\textsuperscript{234} But, if the case has been referred as a capital case, and after the members are impaneled, the accused may no longer be sentenced to death. The number of members must remain at twelve.\textsuperscript{235} If it is determined that the accused may not be sentenced to death before the members are impaneled, then the number of members must be eight.\textsuperscript{236}

C. Detailing of Military Judges

Several changes were made to Article 26, which addresses the issue of detailing military judges to courts-martial.\textsuperscript{237} As amended, Article 26 specifies that a military judge must be appointed for every general and special court-martial,\textsuperscript{238} provides that the Judge Advocates General must designate a chief trial judge,\textsuperscript{239} establishes uniform selection criteria for military judges, and states that pursuant to regulations prescribed by the President, the assignment of military judges must be for appropriate minimum periods.\textsuperscript{240} The amendments will provide for statutory authority for a military judge from one service to preside over a court-martial in another service.\textsuperscript{241}

These changes are commendable. In particular, the provision addressing minimum tours—what some might call “tenure” for military

\textsuperscript{234} Military Justice Act § 5185, 130 Stat. 2000, 2901–02 (codified as UCMJ art. 25(a) (2016), 10 U.S.C. § 825(a) (Supp. IV 2016)).
\textsuperscript{238} UCMJ art. 26(a) (2016), 10 U.S.C. § 826(a) (Supp. IV 2016).
\textsuperscript{239} UCMJ art. 26(g) (2016), 10 U.S.C. § 826(g) (Supp. IV 2016).
\textsuperscript{240} UCMJ art. 26(c)(4) (2016), 10 U.S.C. § 826(c)(4) (Supp. IV 2016); see also AR. 27-10, supra note 152, para. 1–1 to 1–4 addressing the issue of fixed terms of assignment for military judges).
judges—\(^{242}\) has been the subject of legal commentary\(^{243}\) and several military cases.\(^{244}\) It is important to note that the new statutory language does not specify what an appropriate length of tour would be. While the change may assuage those who are concerned that military judges can be removed from an assignment by an unhappy command structure, minimum tours of duty may unnecessarily bind the command from making important personnel changes in the judiciary. Once those minimum tours are established, the question is sure to arise as to what, if any, remedies would be available to an accused if a particular military judge was detailed, or not detailed, to that accused’s court-martial because of a change in assignments.\(^{245}\) It is hard to imagine that an appellate court would reverse a court-martial conviction because a military judge was reassigned before the period of the tour ended. An accused is not entitled to any particular military judge. Thus, an accused would not have standing to complain that the military judge was reassigned before her tour as a judge was scheduled to end.

D. Creating the Position of Military Magistrate

One of the most significant changes to the UCMJ in 2016 was the addition of Article 26a, which creates the position of military magistrate. For years, the Army has used and managed military magistrates through

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\(^{242}\) See, e.g., 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 8-3(B)(3) (discussing the issue of tenure for military judges).


\(^{244}\) See United States v. Graf, 35 M.J. 450, 455 (C.M.A. 1992) (discussing extensively the issue of whether the Due Process Clause requires a fixed term of office for military judges and concluding that UCMJ provides requisite independence for military judges); United States v. Coffman, 35 M.J. 591, 592 (N.M.C.M.R. 1992) (citing Graf, the court summarily rejected the argument that a lack of fixed term of office violates due process).

\(^{245}\) See David A. Schlueter, The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990’s—A Legal System Looking for Respect, 133 MIL. L. REV. 1, 24 (1991) (noting the slippery slope of protecting the players in the military justice system who are called upon to make difficult decisions and recommending that the answer in protecting these people from retribution lies not in granting tenure, but rather in taking appropriate action against any lawyer or commander who attempts to interfere with a trial or appellate judge’s independence).
AR 27-10. They have been used, for example, to review a commander's decision concerning pretrial confinement of an accused. They are also used to issue search authorizations.248

The new article establishes the minimum qualifications for military magistrates and specifies that the service Secretaries may also assign a military magistrate non-judicial duties, in addition to the duties established by amended Article 19 (acting as the military judge in certain judge-alone special courts-martial) and in Article 30a (acting as a military judge in pre-referral matters). The position is intended to mirror the office of United States Magistrate Judges. The Military Justice Review Group envisioned that a military magistrate could serve as a pretrial confinement review officer, a preliminary hearing officer, or a summary court-martial officer.

It is important to note that there is no provision in Article 26a that would ensure some level of minimum tours of duty for magistrate judges—something that military judges will have under amended Article 26.

E. Detailing Trial Counsel and Defense Counsel to a Court-Martial

Congress made several minor amendments to Article 27, which addresses the qualifications and appointment of trial counsel and defense counsel. First, Article 27(a)(2) currently identifies who is disqualified from acting as counsel at a court-martial.

246. AR 27-10, supra note 152.
247. AR 27-10, supra note 152, para. 5-13.
248. AR 27-10, supra note 152, para. 9-7.
250. See, e.g., MILITARY JUSTICE REVIEW GRP., supra note 23, at 273 (indicating that the addition of Article 26a will incorporate "positive aspects of the federal civilian judicial system into the current military justice structure").
251. Id. at 274 (2015).
253. In the military justice system, the term "trial counsel" refers to the prosecutor in a court-martial. See Dwight Stirling & Alex Lindgren, Actually, Sir, I’m Not a California Attorney: The California National Guard, the State Bar Act, and the Nature of the Modern Militia, 43 W. ST. L. REV. 1, 40 n.207 (2015) (equating serving as trial counsel with being a prosecutor in a general court-martial); see also WALTER B. HUFFMAN & RICHARD D. ROSEN, MILITARY LAW: CRIMINAL JUSTICE AND ADMINISTRATIVE PROCESS § 7:47 (2016 ed.) ("By statute, the trial counsel serves in a role similar to civilian prosecutors: The trial counsel of a general or special court-martial shall prosecute in the name of the United States.").
amended the provision to include magistrate judges and appellate judges who have previously acted in the case.  

Second, Article 27(b) was amended to require that all trial counsel, defense counsel, and assistant defense counsel at a general court-martial must meet the qualifications set out in Article 27(b). The amendment leaves open the possibility that the services might detail someone not qualified under Article 27(b) to serve as an assistant trial counsel at a general court-martial. In its report, the Military Justice Review Group indicated that this might include law students who are preparing to become judge advocates.

Third, amended Article 27(c)(1) will require that defense counsel and assistant defense counsel detailed to a special court-martial must have the qualifications set out in Article 27(b). On the other hand, trial counsel and assistant trial counsel, and assistant defense counsel detailed to a special court-martial must be found to be “competent” by the Judge Advocate General. They do not need to meet the qualifications set out in Article 27(b). Again, this will permit the services to appoint non-JAGs and even non-lawyers to serve as counsel in a special courts-martial, as long as they meet the qualifications required by each service.

Finally, a new subdivision (d) was added to Article 27, which will require that, to the greatest extent practicable, in a capital case, at least one

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256. UCMJ art. 27(b)(1) and (2) provide that counsel:

(1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.


257. MILITARY JUSTICE REVIEW GRP., supra note 23, at 275. This might include, for example, law students who are serving summer internships with a service JAG office. Many law schools have clinics, used to provide real world training for law students.

258. UCMJ art. 27(b) (2016), 10 U.S.C. § 827(b) (Supp. IV 2016).


261. MILITARY JUSTICE REVIEW GRP., supra note 23, at 278. The Military Justice Review Group noted that the changes to Article 27 would not preclude non-lawyers, such as investigators, defense paralegals, and law students from assisting counsel assigned to a case. Id.

262. The procedures for referring a case to a trial as a capital case are set out in R.C.M. 201.
defense counsel should be “learned in the law applicable to such cases.” 263 That provision also provides that, if necessary, defense counsel may be a civilian counsel who may be compensated for his or her services. 264 This change will bring the military practice in line with federal criminal practice. 265 There is no similar requirement regarding a trial counsel assigned to a capital case.

F. Assembling and Impaneling Court Members and Alternate Members

Congress made several significant changes to Article 29, 266 which was originally entitled “Absent and Additional Members.” 267 First, the amended article now makes a clear distinction between the assembly of the court and impaneling the court. 268 Amended Article 29(a) addresses the “assembly” of a general or special court-martial. 269 It will provide that after the court-martial is assembled, no member may be absent unless the member has been “excused as a result of a challenge,” 270 has not been impaneled, 271 or has been “excused by the military judge” or the convening authority for good cause. 272 Amended Article 29(b) states that, under regulations promulgated by the President, the military judge in a general or special court-martial must impanel the court after the judge has ruled on any challenges; the military judge must then excuse any members who were assembled, but not impaneled. 273 In a general court-martial, the judge must impanel twelve members for a capital case and eight

MCM, supra note 19, R.C.M. 201.
264. See id. (“If necessary, this counsel may be a civilian and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.”).
265. MILITARY JUSTICE REVIEW GRP., supra note 23, at 278 (noting the amendment conforms military practice with the requirements in 18 U.S.C. § 3500).
268. See UCMJ art. 29 (2016), 10 U.S.C. § 829 (Supp. IV 2016) (subdividing the article into “assembly” and “impaneling”).
269. UCMJ art. 29(a) (2016), 10 U.S.C. § 829(a) (Supp. IV 2016). In its report, the Military Justice Review Group noted that the UCMJ does not directly address the issue of “assembly” of the court. MILITARY JUSTICE REVIEW GRP., supra note 23, at 284.
members for a non-capital case. In a special court-martial, the military judge must impanel four members.

The second change focuses on the ability of the convening authority to detail alternate members to a court-martial. This parallels federal practice and potentially provides an efficient system for replacing any members who are excused from the court during the trial. In the alternative, amended Article 29(d) addresses the issue of detailing new members to replace any members removed after the court has been impaneled with the exception for going down to six members for general courts-martial in certain circumstances.

The third change focuses on the method for presenting evidence that has already been presented in the case to a newly-detailed court member or military judge; the amendment removes the requirement that a written verbatim account of the evidence, or a stipulation to that evidence, must be read to the new members or military judge. The amendment now permits use of an audio tape or similar recording.

### IX. REFORMING PRETRIAL PROCEDURES

#### A. In General

Subchapter VI of the UCMJ addresses pretrial procedures and covers topics such as preferral and forwarding of charges, advice of the staff judge advocate, preliminary hearings, and service of charges on the accused.

#### B. An Overview of Court-Martial Pretrial Procedures

To better understand the 2016 reforms to the UCMJ dealing with

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277. See FED. R. CRIM. P. 24(c) (outlining the court’s power to impanel alternate jurors “to replace any jurors who are unable to perform or who are disqualified from performing their duties”).
280. Id. This expressly includes videotapes.
pretrial procedures, it is important to describe those procedures briefly. Upon receiving information that a service member in his command has committed an offense, the commander is responsible for conducting an investigation into the allegations.\textsuperscript{286} The process involves obtaining legal advice from a judge advocate—an armed forces lawyer.\textsuperscript{287} In some circumstances, a commander may impose pretrial restraints, including pretrial confinement, on the service member.\textsuperscript{288}

A commander has a variety of options for dealing with allegations of misconduct.\textsuperscript{289} First, the commander may decide to simply counsel the service member or issue a written or oral reprimand.\textsuperscript{290} Second, the commander may begin administrative proceedings to discharge the service member.\textsuperscript{291} Third, the commander may decide to impose Article 15, non-judicial punishment.\textsuperscript{292} Fourth, the commander may decide to initiate court-martial proceedings by formally preferring charges against the service member.\textsuperscript{293}

If the commander decides to prefer charges, he or she prepares and signs a charge sheet, and moves it and accompanying materials up the chain of command with a recommendation that the charges be tried by a summary, 

\textsuperscript{286} See MCM, supra note 19, R.C.M. 303 (requiring the immediate commander to “make or cause to be made a preliminary inquiry into the charges or suspected offenses”).

\textsuperscript{287} UCMJ art. 34 (2016), 10 U.S.C. § 834 (Supp. IV 2016) (listing the requirement that before convening a general court-martial, the convening authority must consider the advice of the staff judge advocate). This is generally referred to as the “pretrial advice.” See MCM, supra note 19, R.C.M. 406 (specifying the term “pretrial advice” as the advice provided by a staff judge advocate before any charge is “referred for trial by a general court-martial”); see also WALTER B. HUFFMAN & RICHARD D. ROSEN, MILITARY LAW: CRIMINAL JUSTICE AND ADMINISTRATIVE PROCESS § 8:79 (2016 ed.) (referring to advice provided by a staff judge advocate as pretrial advice).


\textsuperscript{289} See generally 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 1-8 (listing various options available to a military commander).

\textsuperscript{290} See generally id. § 1-8(B) (listing non-punitive measures that the commander may impose).

\textsuperscript{291} See generally id. (discussing the use of administrative measures).

\textsuperscript{292} UCMJ art. 15 (2012), 10 U.S.C. § 815 (2012) (amended 2016). Non-judicial punishment is used for “minor” offenses; the commander decides whether the service member is guilty and, if so, adjudges the punishment. Id. Unless the service member is assigned to a vessel, the service member may demand a court-martial in lieu of the non-judicial punishment. Id. The term “vessel” is defined in 1 U.S.C. § 3 (2012): “The word ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” 1 U.S.C. § 3 (2012).

\textsuperscript{293} UCMJ art. 30 (2012), 10 U.S.C. § 830 (2012) (amended 2016). Any person subject to the UCMJ, not just commanders, may prefer court-martial charges. See UCMJ art. 30 (2012), 10 U.S.C. § 830 (2012) (observing the charges and specifications “may be preferred only by a person subject to this chapter”).
special, or general court-martial.\textsuperscript{294} If the commander believes that the charges are serious enough to warrant a general court-martial, which is roughly equivalent to a civilian felony trial, the commander orders an Article 32 preliminary hearing.\textsuperscript{295} At that hearing the accused is entitled to be present, to have the assistance of counsel, to cross-examine witnesses, and to have witnesses produced.\textsuperscript{296}

If the commander decides to refer the charges to a court-martial, the convening authority—a commander authorized by the UCMJ to "convene" a court-martial—selects the court members, but does not select either the counsel or the military judge.\textsuperscript{297} The UCMJ specifies the number of persons who must be assigned to each court.\textsuperscript{298} In many cases the accused and the convening authority engage in plea bargaining and execute a pretrial agreement.\textsuperscript{299} Typically, those agreements require the accused to plead guilty in return for a guaranteed maximum sentence.\textsuperscript{300}

C. Preferring Charges and Specifications

The 2016 amendments to Article 30, which addresses preferral of charges and specifications, were technical in nature.\textsuperscript{301} Congress reorganized the article into three subdivisions. Article 30(a) specifies who may prefer court-martial charges\textsuperscript{302} and that the charges must be written and sworn to before a commissioned officer.\textsuperscript{303} Article 30(b) will require that the person preferring the charges state that he or she has personal

\textsuperscript{296} \textit{See generally} 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 7-2(C) (discussing and analyzing features of the accused's rights under an Article 32 preliminary hearing).
\textsuperscript{297} \textit{See} UCMJ art. 25 (2012), 10 U.S.C. § 825 (2012) (amended 2016) (detailing which court members may be selected by the convening authority).
\textsuperscript{299} \textit{See generally} 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 9-2 (discussing the process of entering into pretrial agreements, i.e., plea bargaining).
\textsuperscript{300} \textit{See id. at} § 9-2(A) (defining a pretrial agreement as "an agreement between the accused and the convening authority that the accused will plead guilty or waive certain rights in return for some form of specified relief from the convening authority").
\textsuperscript{302} UCMJ art. 30(a)(1) (2016), 10 U.S.C. § 830(a)(1) (Supp. IV 2016). Any person subject to the UCMJ may prefer charges against another. In current practice, however, the preferral is almost always accomplished by the service member's immediate commander. In contrast, only a commander may actually prefer charges to a court-martial.
knowledge of the matters set out in the charges and specify that they are true, to the best of the signer's knowledge. Finally, amended Article 30(c) states that, when charges are preferred, the proper authority must first, as soon as practical, inform the accused of the charges, and second, determine, as soon as practical, the appropriate disposition of the charges. "in the interest of justice and discipline." The amendments were intended to clarify the sequence of preparing and forwarding charges and to reflect current practice.

Over the years, there have been proposals to eliminate or limit the commander's role in military justice in preferring and otherwise disposing of court-martial charges. One proposal is to vest prosecutorial discretion in a separate military command structure. Another is to

307. Id. Originally, Article 30 required the proper authority to take immediate steps to determine what disposition should be made of the charges. See UCMJ art. 30(c)(1) (2012), 10 U.S.C. § 830(c)(1) (2012) (amended 2016) ("Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline. . .").
308. UCMJ art. 30(c)(2) (2016), 10 U.S.C. § 830(c)(2) (Supp. IV 2016). The language regarding justice and discipline was added to make it clear that discipline is a key element of the military justice system. See MILITARY JUSTICE REVIEW GRP., supra note 23, at 293–94 (citing David A. Schlueter, The Military Justice Conundrum: Justice of Discipline?, 215 MIL. L. REV. 1 (2013)) (observing that the American military system has had the dual-purpose of promoting "justice while maintaining discipline within the ranks").
309. See MILITARY JUSTICE REVIEW GRP., supra note 23, at 299 ("This reorganization of the statutory provisions under Article 30 would clarify the relationship and sequencing of related requirements for preferral of charges and specifications against a military accused, better aligning the statute's provisions with current practice and the President's implementing rules.").
place prosecutorial discretion in the hands of armed forces lawyers.\textsuperscript{312} It is very important to note that despite those repeated and persistent calls for removing the commander from the court-martial process, Congress maintained the critical role of the commander in the decision regarding preferral of charges. In addressing that point, the Military Justice Review Group noted the role of the commander had been the subject of considerable debate and that the Response Systems Panel had concluded that the commander's role be retained.\textsuperscript{313} Thus, the Group stated, its focus was on improving the current process, rather than revisiting a "fundamental policy so soon after the Response Systems Panel completed its thorough and careful treatment of the issue."\textsuperscript{314}

\section*{D. Proceedings Conducted Before Referral of Charges to a Court-Martial}

A common problem in courts-martial is that some important pretrial decisions, requiring a ruling by a military judge, may not be made until the charges are referred to a court-martial and a military judge assigned to the case.\textsuperscript{315} Such decisions may involve inquiries into an accused's mental capacity or responsibility,\textsuperscript{316} requests for individual military counsel to represent the accused,\textsuperscript{317} and issuing subpoenas.\textsuperscript{318} New Article 30a is designed to address that problem.\textsuperscript{319}

\begin{itemize}
\item \textsuperscript{313} See MILITARY JUSTICE REVIEW GRP., supra note 23, at 24 (citing COMPARATIVE SYSTEMS SUBCOMMITTEE, REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 6--7, 22--23, 167--71, 173--76 (2014) (recommending the "retention of the commander's role in exercising disposition discretion").
\item \textsuperscript{314} MILITARY JUSTICE REVIEW GRP., supra note 23, at 300.
\item \textsuperscript{315} Id. at 304.
\item \textsuperscript{316} MCM, supra note 19, R.C.M. 705.
\end{itemize}
The new article provides welcomed statutory authority for military judges and military magistrates to review matters pretrial, without waiting for formal referral of charges, in specified circumstances pre-referral investigative subpoenas, pre-referral warrants or orders regarding electronic communications, and pre-referral matters referred by an appellate court. The new article furthers delegates to the President the task of promulgating regulations concerning the procedures for reviewing the military judge’s or military magistrate’s decisions and any limitations for relief granted under the article. The service Secretaries are responsible for promulgating regulations concerning the detailing of military judges for these proceedings. Importantly, the new article permits military judges to designate a military magistrate to preside over the proceeding, except for matters involving pre-referral warrants or orders for electronic communications.

Amended Article 30a(a)(3) provides, however, that if the matter under pretrial review relates to an issue that is the subject of court-martial charges that have been referred to trial, the matter must be transferred to the military judge who is assigned to the case.

This new provision is bound to provide a more efficient way of dealing with pretrial matters that require some level of judicial involvement. As the Military Justice Review Group pointed out in its report, using military magistrates for pretrial proceedings will serve as a training ground to prepare those officers for possible certification as military judges. But providing for judicial rulings and relief before the referral of charges may actually delay the proceedings if the parties are permitted to appeal a judge’s pre-referral ruling through extraordinary writs to a service appellate court. Astute defense counsel may litigate key issues pre-referral in the hopes of dissuading the convening authority from referring the

325. UCMJ art. 30a(b) (2016), 10 U.S.C. § 830a(b) (Supp. IV 2016).
326. UCMJ art. 30a(c) (2016), 10 U.S.C. § 830a(c) (Supp. IV 2016).
328. See MILITARY JUSTICE REVIEW GRP., supra note 23, at 307–08 (observing “military magistrates would function much like military judges” and “magistrates would augment the military judiciary and serve to relieve the resource burden on military judges to address a myriad of pretrial matters”).
charges to trial.

E. The Article 32 Preliminary Hearing

As noted supra, before charges may be referred to a general court-martial, a commander must direct that an Article 32 preliminary hearing be conducted. The proceeding conducted under Article 32 used to be referred to as an “Article 32 Investigation.” Those proceedings provided expansive rights to an accused that were not found in a civilian grand jury proceeding; one of the key features of those proceedings was the ability of the accused to obtain discovery of the government’s evidence. Congress amended Article 32 in the National Defense Authorization Acts of Fiscal Year 2014 and Fiscal Year 2015 to convert that investigation into a preliminary hearing. As revised, the purposes of the hearing are limited to (1) deciding whether there was probable cause to believe that the accused committed the offense, (2) deciding whether there was jurisdiction over the accused, (3) considering the form of the charges, and (4) recommending the disposition of the charges. The language of Article 32 seems to suggest that the preliminary hearing officer’s report is expected to be relatively brief. But R.C.M. 405 in the Manual for Courts-Martial, the rule implementing Article 32, lists eleven points that the hearing officer has to address in his or her report.

In the 2016 amendments, Congress again amended Article 32. As amended, the preliminary hearing officer will be charged with (1) deciding whether the specification alleges an offense under the UCMJ, (2) determining whether there is probable cause to believe that the accused committed the alleged offense, (3) determining whether or not the convening authority has court-martial jurisdiction over the offense and the

329. See supra Part IX.B.
330. See generally 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 7-2(A) (discussing the original purpose and function of an Article 32 investigation, now a hearing).
333. See generally 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 7-2 (A) at 454 (addressing the purpose and function of the Article 32 preliminary hearing).
335. MCM, supra note 19, R.C.M. 405(6).
accused, and (4) providing a recommendation for disposition to the convening authority.\footnote{337}

While these purposes tend to mimic the purposes established by Congress in earlier amendments, the 2016 amendments added two key features. First, the parties and any victims may submit additional materials for the preliminary hearing officer's consideration.\footnote{338} Second, the preliminary hearing officer will have to submit a much more detailed report which, according to the Military Justice Review Group,\footnote{339} is intended to provide more detailed assistance to the staff judge advocate and the convening authority on the appropriate disposition of the charges.\footnote{340} It appears that the new language of Article 32 envisions a more complete report, mirroring the list of contents spelled out in R.C.M. 405.\footnote{341}

F. Providing Guidance on Disposition of Charges

One feature currently absent from the UCMJ is any guidance to commanders and judge advocates of factors that should be considered in deciding how to dispose of court-martial charges.\footnote{342} Article 33, which now spells out the requirements for forwarding charges, was completely revised in the 2016 amendments to address that problem.\footnote{343} In its report, the Military Justice Review Group noted that the new article is intended to fill a gap between the probable cause standard for referring charges to a court-martial and the beyond a reasonable doubt standard needed for a

\footnotesize\begin{itemize}
  \item \textsuperscript{337} UCMJ art. 32 (2016), 10 U.S.C. § 832 (Supp. IV 2016).
  \item \textsuperscript{338} UCMJ art. 32(c)(3) (2016), 10 U.S.C. § 832(c)(3) (Supp. IV 2016).
  \item \textsuperscript{339} MILITARY JUSTICE REVIEW GRP., supra note 23, at 323–24 (indicating the preliminary hearing officer is in a unique position to organize and assess the charges and the available evidence).
  \item \textsuperscript{340} UCMJ art. 32 (2016), 10 U.S.C. § 832 (Supp. IV 2016). The amended article requires the preliminary hearing officer to provide, for each specification, a report on the determinations of the four functions for the hearing, noted supra, a summary of relevant witness testimony and documentary evidence, and any observations regarding the witnesses' testimony and the admissibility of the evidence at trial. UCMJ art. 32(c)(1) (2016), 10 U.S.C. § 832(c)(1) (Supp. IV 2016). The hearing officer is also required to provide an assessment on any materials submitted by the parties and any victims. UCMJ art. 32(c)(3) (2016), 10 U.S.C. § 832(c)(3) (Supp. IV 2016).
  \item \textsuperscript{341} MCM, supra note 19, R.C.M. 405(j).
  \item \textsuperscript{342} See generally Rachel E. VanLandingham, Acoustic Separation in Military Justice: Filling the Decision Rule Vacuum with Ethical Standards, 11 OHIO ST. J. CRIM. L. 389, 391 (2014) (noting absence of guidance on decisions to prosecute, to enter into plea agreements, and to approve courts-martial findings).
\end{itemize}
conviction. The new article will require the military to establish factors to be considered in disposing of charges, to the end that justice and discipline will be furthered. The revised article requires the President to direct the Secretary of Defense to issue non-binding guidance regarding factors that commanders, judge advocates, and the convening authority should take into account in exercising their duties regarding disposition of charges. That guidance must take into account:

...military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases in accordance with the principles of fair and evenhanded administration of Federal criminal law.

While this new provision provides only general guidance on the factors to be considered, implementing amendments to the Manual for Courts-Martial will no doubt provide more detailed guidance. The guiding principle will be that those factors focus on the interest of justice and discipline, as referenced not only in Article 33, but also in Article 30, discussed supra.

G. Staff Judge Advocate's Pretrial Advice

Article 34 provides that before the convening authority may refer charges to a general court-martial, he or she must receive legal advice from his or her staff judge advocate. The 2016 amendments to that article were intended to first, clarify some ambiguities in the article's language, in particular, use of the term "refer" in reference to sending charges to a court-martial. That ambiguity was addressed by adding Article 34(d), which defines "referral" as the convening authority's order "that charges and specifications against an accused be tried by a

344. MILITARY JUSTICE REVIEW GRP., supra note 23, at 338.
346. Id.
347. See supra Part IX.C.
349. MILITARY JUSTICE REVIEW GRP., supra note 23, at 345.
350. See UCMJ art. 34(d) (2016), 10 U.S.C. § 834(d) (Supp. IV 2016) (defining the word "referral").
specified court-martial.”

Second, the article was amended to require the staff judge advocate to conclude “there is probable cause to believe that the accused committed the offense charged[.]” This is a change from the previous requirement that the staff judge advocate must conclude the specification is warranted by the evidence indicated in the Article 32 preliminary hearing.

Third, Congress amended Article 34(b) to expressly link the staff judge advocate’s advice to the “in the interest of justice and discipline” standard set out in Article 30(b), discussed supra. Third, Article 34(b) was amended to require that a convening authority consult with a judge advocate before referring a case to a special court-martial—something that occurs in some commands and is already addressed in the Manual for Courts-Martial. Finally, Article 34(c) was amended to clarify that formal corrections may be made to the charges and specifications before referral for trial in both general and special courts-martial.

H. Serving Charges on the Accused

The amendments to Article 35, which requires the trial counsel to serve a copy of the charges on the accused, were non-substantive. Congress divided the article into two subsections and revised the language of the two provisions: serving the charges on the accused, and specifying the waiting period between the service of the charges and the start of the trial.

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351. UCMJ art. 34(d) (2016), 10 U.S.C. § 834(d) (Supp. IV 2016); accord MILITARY JUSTICE REVIEW GROUP, supra note 23, at 345 (explaining the need to define the word “referral” and providing a sample definition for such word).
355. See supra Part IX.C.
357. MCM, supra note 19, R.C.M. 406–07, 601; see also MILITARY JUSTICE REVIEW GRP., supra note 23, at 341–42 (describing contemporary practice).
358. UCMJ art. 34(c) (2016), 10 U.S.C. § 834(c) (Supp. IV 2016).
361. UCMJ art. 35(b) (2016), 10 U.S.C. § 835(b) (Supp. IV 2016).
X. REFORMING TRIAL PROCEDURES

A. In General

Subchapter VII of the UCMJ covers the subject of trial procedures; the subchapter is composed of Articles 36 through 54, and covers a range of subjects, some technical and others substantive. The discussion in this section focuses on the amendments made to many of those articles. Before addressing the specifics of those amendments, it is helpful to provide a brief summary of trial procedures in a court-martial.

At a court-martial trial, an accused service member is entitled to virtually the same procedural protections he or she would have in a state or federal criminal court. Article 36(a) requires the President to promulgate rules of procedure for military courts which—to the extent the President considers practical—mirror procedures used in federal criminal courts. For example, a military accused has the right to the assistance of an assigned military defense counsel, the right to a speedy trial (under the Sixth Amendment and under a 120-day speedy trial provision in the Manual for Courts-Martial), the right to extensive discovery, the right to production of evidence for examination and testing, the right to request witnesses, including expert witnesses at Government expense, the right to request the assistance of experts at Government expense in preparing for trial, the right to confront witnesses, the right to notice of the


363. See UCMJ art. 38 (2012), 10 U.S.C. § 838 (2012) (amended 2016) (establishing the duties of the military defense counsel and noting "the accused has the right to be represented in his defense").

364. See UCMJ art. 10 (2012), 10 U.S.C. § 810 (2012) (amended 2016) (requiring immediate steps be taken “when a person subject to this chapter is ordered into arrest or confinement before trial”); see also MCM, supra note 19, R.C.M. 707 (detailing the speedy trial rule). The 120-day rule does not include delays requested by the defense; thus, a case may take much longer than 120 days if the defense requests delays. See id. (omitting from the 120-day rule delays requested by the defense).

365. UCMJ art. 46 (2016), 10 U.S.C. § 846 (Supp. IV 2016); see also MCM, supra note 19, R.C.M. 701 (setting out rules for discovery by both prosecution and defense counsel).

366. Id. R.C.M. 701(a)(2)(B).

367. MCM, supra note 19, R.C.M. 703(d)(B)(i) (providing the right to request employment of expert witness at government expense).

368. Id. R.C.M. 702.
charges, and the right to challenge the military judge for cause, and the right to file motions in limine, motions to suppress and motions to dismiss the charges on a wide range of grounds.

If an accused enters a guilty plea to any charges, the military judge is required to conduct a detailed "providency" inquiry to ensure that the accused is pleading guilty voluntarily and knowingly, and to ensure that any pretrial agreement accurately reflects the intent of both the convening authority and the accused and is consistent with public policy. If the accused pleads not guilty, and the case is tried on the merits, the Military Rules of Evidence apply during the trial.

Sentencing, which typically occurs immediately after a finding of guilty, is a separate phase of the court-martial. That subject is

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369. U.S. CONST. amend. VI.
372. MCM, supra note 19, R.C.M. 905. See generally 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 13 (addressing motions practice in courts-martial).
373. MCM, supra note 19, R.C.M. 910; see United States v. Care, 40 C.M.R. 247, 251-57 (C.M.A. 1969) (discussing the requirements for what has become known as the Care inquiry).
374. See United States v. King, 3 M.J. 458, 459 (C.M.A. 1977) (stating the trial judge has the responsibility of securing from defense counsel and the prosecutor "their assurance that the written agreement encompasses all of the understandings of the parties and that the judge's interpretation of the agreement comports with their understanding of the meaning and effect of the plea bargain" (quoting United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976))).
375. See MCM, supra note 19, R.C.M. 910 (listing provisions, which may make a pretrial agreement impermissible).
376. See generally MILITARY RULES OF EVIDENCE MANUAL, supra note 67 (explaining the military rules of evidence, providing commentary and an analysis on the rules, and annotating cases which have applied the rules). Those rules generally mirror the Federal Rules of Evidence but include a number of rules not found in the federal model. Compare MCM, supra note 19, MIL. R. EVID. 101-514, with FED. R. EVID. 101-1103. For example, Section III of the Military Rules includes very specific guidance on searches and seizures (including evidence seized during military inspections), confessions, eyewitness identification, and interception of oral and wire communications. See generally MCM, supra note 19, MIL. R. EVID. 301-21 (detailing Military Rules of Evidence under Section III). Section V contains fourteen detailed rules governing privileges. See generally id., MIL. R. EVID. 501-14 (establishing Military Rules of Evidence under Section V). In particular, Military Rule of Evidence 505 provides very detailed guidance on disclosure of classified information, and Rule 506 provides equally specific guidance of disclosure of government information that would be detrimental to the public interest. See id., MIL. R. EVID. 505-06 (discussing Rules 505 and 506).
377. See generally 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 16 (discussing sentencing procedures at courts-martial).
addressed in Section XI, infra.

B. Duties of Trial and Defense Counsel

Article 38 addresses the duties of trial and defense counsel. The 2016 amendments changed Article 38(e) to provide that assistant defense counsel, who must be certified in accordance with Article 27(b), discussed supra, whether serving in a general, special, or summary court-martial, can perform any duty for the accused imposed by law, regulation, or custom of the service.

C. Article 39(a) Sessions

Article 39(a) provides that after charges have been referred to a court-martial, the military judge may convene sessions to handle a variety of issues: hearing and deciding motions, hearing and ruling on any matter that can be ruled on by the judge, holding arraignments and taking pleas, and performing any other procedural function that does not require the presence of the court members. These sessions, which are commonly called “Article 39(a) sessions,” can be held before the trial, during the trial, and after the trial. During these sessions, the military judge, the accused, defense counsel, and trial counsel are all present. The court-martial “members,” the counterpart to civilian jurors, are absent.

The 2016 amendments made a conforming change in Article 39(a) by adding a new paragraph (4), which addresses a sentencing proceeding.
conducted by the military judge.\textsuperscript{389} That new provision recognizes the change made to Article 25, discussed \textit{supra},\textsuperscript{390} which now authorizes a military judge to sentence an accused in a non-capital case with a military judge and members, unless the accused requests that he or she be sentenced by the members.\textsuperscript{391} The issue of judge-alone sentencing as the default forum for court-martial sentencing, which is a major change to military practice, is discussed \textit{infra} at Part XI.B.

The Military Justice Review Group had recommended that Article 39(a) be amended to address the authority of the judge to conduct arraignments and take pleas.\textsuperscript{392} The purpose of the amendment, the Group stated, was to establish conforming changes made to Articles 16 and 19, and to expressly recognize "the long-standing practice of using military judges" to conduct arraignments.\textsuperscript{393} Congress did not adopt that proposal.\textsuperscript{394}

D. \textit{Continuances}

Article 40 addresses the issue of continuances in courts-martial.\textsuperscript{395} The 2016 amendment made a technical change to the article—changing the language "a court-martial without a military judge" to "summary court-martial."\textsuperscript{396} The change reflects amendments to Article 16, which removed the possibility of a special court-martial without a military judge.\textsuperscript{397}

E. \textit{Challenges to Military Judge and Court-Martial Members}

Congress made two minor technical, conforming changes to Article 41, which addresses peremptory challenges and challenges for cause to the court members.\textsuperscript{398} First, the reference to the possibility of a court-martial


\textsuperscript{390} \textit{See supra} Part VIII.B.

\textsuperscript{391} UCMJ art. 25(d) (2016), 10 U.S.C. § 825(d) (Supp. IV 2016).

\textsuperscript{392} MILITARY JUSTICE REVIEW GRP., \textit{supra} note 23, at 370.

\textsuperscript{393} Id.

\textsuperscript{394} Id.


\textsuperscript{397} UCMJ art. 16 (2016), 10 U.S.C. § 816 (Supp. IV 2016).

without a military judge was removed. Following the 2016 amendments, the only court-martial without a military judge will be a summary court-martial. And second, the reference to a minimum number of members was removed in light of the changes to Article 16, which now establish a set number of members in both general and special courts-martial.

F. Statute of Limitations

The 2016 amendments made several major changes to Article 43, which addresses the statute of limitations. First, the statute of limitations for child abuse offenses was increased from five to ten years. Second, the limitations period for the offense of fraudulent enlistment or appointment will run for the period of the enlistment or appointment, or five years, whichever is longer. Third, if DNA testing implicates an accused for an offense punishable by confinement for more than one year, no statute of limitations period will preclude prosecution until a period of time has elapsed since the DNA testing, which equals the applicable limitation period.

G. Former Jeopardy

Article 44 establishes a statutory right to be free from "former jeopardy," which correlates to double jeopardy protections recognized in federal criminal cases under the Fifth Amendment. As originally promulgated in 1950, the military's statutory right paralleled the federal civilian practice, which was governed by case law. In 1978, the

399. Id.
Supreme Court held that jeopardy attaches when the jury is sworn. The military courts held, however, that the provisions in Article 44, which stated that jeopardy attached at the introduction of evidence, was constitutional.

The 2016 amendments to Article 44 bring it into conformity with federal civilian practice. Article 44(a) provides that “no person may, without his consent, be tried a second time for the same offense.” As amended, Article 44(c)(1) provides that in a court-martial by a military judge alone, jeopardy attaches after the introduction of evidence and the case is ended or dismissed for lack of evidence or witnesses. In contrast, in a court-martial with members, jeopardy will attach when the members take their oath under Article 42, after challenges have been completed, and the members are impaneled.

H. Pleas of the Accused

Congress made several key amendments to Article 45, which governs the entries of the accused’s pleas. First, as amended, Article 45(b) will permit an accused to enter a guilty plea in a capital case in which the death penalty is not mandatory. Second, the amendments removed the provision that permitted the services to authorize entry of a finding of guilty without a vote by the members, accepting the guilty plea, after the military judge has already accepted the accused’s pleas of guilty. Third, Congress added Article 45(c), which codifies the harmless error standard

432 U.S. 161, 165 (1977) (analyzing a court-created rule to prevent double jeopardy).
416. Id; see MILITARY JUSTICE REVIEW GRP., supra note 23, at 399 (finding all the services had enacted regulations, which permitted entry of a finding of guilty without a vote by the members).
I. **Opportunity to Obtain Witnesses and Other Evidence**

Article 46 governs the ability of the parties to obtain witnesses and evidence. Article 46(a) specifies that the defense counsel, trial counsel, and military judge have an equal opportunity in cases referred to trial to obtain witnesses and evidence. The 2016 amendments to Article 46 resulted in several key changes—which will certainly have the beneficial effect of permitting greater access to evidence and witnesses pretrial. First, Congress amended Article 46 to clarify the authority to issue and enforce subpoenas for witnesses and evidence. Second, the amendments will expand the trial counsel's authority to use investigative subpoenas duces tecum before charges are referred to a court-martial, when authorized by a general court-martial convening authority. Third, the amendments will permit the military judge to issue warrants and orders for production of stored electronic communications in accordance with the Stored Communications Act. Fourth, a new provision will authorize military judges to hear requests for relief from persons who have received a subpoena. Fifth, the provision in former Article 46(b), which addressed the issue of defense counsel interviews of sexual assault victims, was deleted and moved to Article 6b.

J. **Refusal to Appear, Testify, or Produce Evidence**

Under Article 47(a), if a military authority issues a subpoena under

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417. UCMJ art. 45(c) (2016), 10 U.S.C. § 845(c) (Supp. IV 2016); see MILITARY JUSTICE REVIEW GRP., supra note 23, at 399 (proposing the UCMJ be amended so that any errors made during the guilty plea process be held as harmless error).


421. UCMJ art. 46(b) (2016), 10 U.S.C. § 846(b) (Supp. IV 2016); MILITARY JUSTICE REVIEW GRP., supra note 23, at 411.


425. UCMJ art. 6b, discussed supra at Part IV.C.
Article 46 to a civilian witness who fails to comply, that witness is guilty of a federal offense and may be prosecuted in United States District Court. The 2016 amendments to Article 47 were minor; they retained the current law in Article 47 and were intended to clarify the relationships between Articles 46 and 47.

K. Contempt

Military judges have contempt power under Article 48 for conduct, such as using a menacing sign or gesture in the presence of the judge during a proceeding or willfully disobeying a law order or with respect to a proceeding. Congress made two minor amendments to Article 48. First, Congress extended the contempt power to pre-referral proceedings. As discussed, supra Part IX.D, new Article 30a will provide authority for military judge and military magistrates to conduct a variety of proceedings before charges are referred to trial. Second, Article 48 was amended to clarify the authority of the judges on the service Courts of Criminal Appeals: the United States Court of Appeals for the Armed Forces do not need to be detailed to a case in order to exercise contempt powers. Third, the amendment will shift the review powers of a finding of contempt from the convening authority to judicial officers. If a military judge or a military magistrate has imposed punishment for contempt, that decision will be reviewed by a Court of Criminal Appeals. A punishment of contempt imposed by a judge on a Court of Criminal Appeals is reviewable by the United States Court of Appeals for the Armed Forces and/or the Supreme Court of the United States.

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428. MILITARY JUSTICE REVIEW GRP., supra note 23, at 419.


434. UCMJ art. 48(c) (2016), 10 U.S.C. § 848(c) (Supp. IV 2016).


L. Depositions

The subject of authorizing and taking depositions in military practice is set out in Article 49.437 The 2016 amendments to that article reorganized the article and deleted some provisions that were considered procedural in nature and could more aptly be covered in the Manual for Courts-Martial.438 As amended, Article 49 provides that a convening authority or military judge may order a deposition if the requesting party shows that "due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness be preserved for use at a court-martial, military commission, court of inquiry, or other military court or board."439 A deposition may not be taken to preserve the testimony of a witness for use at an Article 32 preliminary hearing.440 The amended article also provides that the deposition officers should be judge advocates certified under Article 27(b), whenever practicable441 and that the parties will be represented at the deposition in the same manner that defense counsel and trial counsel are detailed under Article 27.442 Finally, language spelling out in detail when depositions are admissible at a court-martial was replaced with language that simply notes that the admissibility of depositions is governed by the Military Rules of Evidence.443

437. UCMJ art. 49 (2012), 10 U.S.C. § 849 (2012) (amended 2016); see generally 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 11-3 (discussing procedures for taking depositions); Colonel Mark L. Allred, Depositions and a Case Called Savard, 63 A.F. L. REV. 1 (2009) (analyzing the use of depositions in courts-martial); Robinson O. Everett, The Role of the Deposition in Military Justice, 7 MIL. L. REV. 131 (1960) (reviewing depositions in military proceedings); Lieutenant Peter J. McGovern, The Military Oral Deposition and Modern Communications, 45 MIL. L. REV. 43 (1969) (suggesting the use of modern communication methods to take depositions where participants are in different locations); Lieutenant Dale Read, Jr., Depositions in Military Law, 26 JAGJ. 181, 184–85 (1972) (noting use of depositions in the military is a reflection of the fact that, in a military environment, a military witness may not be available at the time of trial).


440. MILITARY JUSTICE REVIEW GRP., supra note 23, at 439.


442. UCMJ art. 49(b) (2016), 10 U.S.C. § 849(b) (Supp. IV 2016). That provision also states that an accused will have the opportunity to obtain counsel in the same manner as counsels are provided under Article 38(b). Id.

443. UCMJ art. 49(c) (2016), 10 U.S.C. § 849(c) (Supp. IV 2016).
M. Admissibility of Records of Courts of Inquiry

Article 50 addresses the admissibility of recorded testimony given at a court of inquiry. The 2016 amendment to this article is relatively minor. Formerly, the article provided that the recorded testimony had to be read into evidence. Article 50(d), a new provision, will provide that counsel may also introduce an audiotape, videotape, or similar recording of the testimony. Although courts of inquiry have been replaced by other investigative proceedings, it is still possible that they would be conducted; they are specifically mentioned in Military Rule of Evidence 804(b)(1), as a method of introducing a witness’s former testimony.

N. Defense of Lack of Mental Responsibility

The 2016 amendments to Article 50a, which addresses the defense of lack of mental responsibility, were technical. The language was changed to reflect that there are no longer any courts-martial conducted without a military judge.

O. Voting and Rulings

Article 51 addresses the process of voting and making rulings in a court-martial. The amendments to this article were technical; the references

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448. See MILITARY JUSTICE REVIEW GRP., supra note 23, at 445–46 (noting the infrequency with which testimony from a court of inquiry is offered into evidence).
449. MCM, supra note 19 MIL. R. EVID. 804(b)(1).
453. See UCMJ art. 51 (2012), 10 U.S.C. § 851 (2012) (amended 2016) (spelling out such topics as the manner of voting by the court members in paragraph (a), the rulings by the military judge on questions of law in paragraph (b), and the military judge’s instructions to the members in paragraph (c)).
to a trial by members, without a military judge, were deleted. These amendments reflect the changes to Article 16, supra, which eliminated the former practice that a special court-martial could be held without a military judge. Under the amendment, military judges will have to be appointed to all general and special courts-martial; a summary court-martial consists of one commissioned officer.

P. Number of Votes Required

The amendments to Article 52, which addresses the number of votes required for a conviction or sentencing, were significant. Article 52 currently requires that two-thirds of the members must concur in a finding of guilty in a general and special court-martial. For sentencing, three-fourths of the members have to concur to impose a sentence of more than ten years. For a sentence of less than ten years, two-thirds of the members must concur. In the case of a sentence of death, the vote has to be unanimous.

In its Report, the Military Justice Review Group noted the anomalies in that structure and the fact that there was no set number of members in a court-martial; a general court-martial had to consist of at least five members, but often consisted of more. Depending on the number of members, the actual percentage of members required for a verdict can vary. That could lead to what some have termed a "numbers game," where counsel will challenge members based on what they considered to be the optimum number of members for obtaining an acquittal or conviction.

455. See supra Part VII.B.3.
462. MILITARY JUSTICE REVIEW GRP., supra note 23, at 458.
463. Id. (noting anomalies). The Report contains a chart demonstrating the variances in the actual number of votes required, depending on the number of members on the court-martial. For example, in a general court-martial with five members, 80 percent of the members had to vote for a conviction. But if six members served on the court, only 67 percent had to concur. Id.; see generally Dwight H. Sullivan, Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty, 158 MIL.
The 2016 amendments will require that for a finding of guilty, at least three-fourths of the members must concur.464 Because a general court-martial with members will consistently have eight members,465 at least six members will have to concur. In a special court-martial, at least three members will have to concur. For sentencing, a sentence of death requires unanimity.466 All other sentences will require that at least three-fourths of the members must concur on a sentence.467

The Military Justice Review Group also recommended that Article 52 be conformed to its proposed amendments to Article 53, infra, which would have created a judge-alone sentencing protocol for all non-capital cases.468 Congress modified those proposals to provide the accused with the option of electing sentencing by the members.469

Q. Court to Announce Action

Perhaps one of the most significant changes to the UCMJ occurred in amendments to Article 53.470 In one sentence, that article addresses the process for announcing the findings of the court-martial.471 Before the 1968 amendments to UCMJ, which created the position of military judge,472 the members always imposed the sentence.473 With the advent of military judges, the court members continued to impose the sentence, unless the accused requested that the complete trial, including both

L. REV. 1, 3-11 (1998) (discussing the “numbers game” in capital cases); 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 15-10(D)(4) (analyzing the “numbers game,” which favors the defense when there are 5, 8, or 11 members, and the prosecution when there 6, 9, or 12 members).
467. Id.
469. UCMJ art. 52(b)(2) (2016), 10 U.S.C. § 852(b)(2) (Supp. IV 2016) (indicating that the accused can elect to be sentenced by members due to the codes’ voting requirements).
findings and sentencing, be conducted by the military judge. The accused did not have the option of having the members adjudge the findings followed by sentencing by the military judge.

Congress completely rewrote Article 53 and included specific guidance on the sentencing process in general and special courts-martial. Under Article 53(b)(1), the military judge will sentence an accused—unless the accused requests that the members sentence him. The Military Justice Review Group had proposed that the military justice system mirror the federal civilian system and make the military judge the sole sentencing authority in non-capital cases. The Group made a compelling case for the change, citing a number of commentators and advisory bodies who had recommended that change. Although Congress rejected a wholesale change to sentencing by military judges, it did make sentencing by military judges the default rule. As a result, the accused no longer will be precluded from obtaining judicial sentencing when the members adjudge the findings. It may very well be that this is but one more step toward judge-alone sentencing in the military.

R. Plea Agreements

Congress added a new provision, Article 53a. That new article addresses the subject of plea agreements. In the military, an accused may negotiate a plea agreement with the convening authority regarding charges and sentence limits, in return for the accused entering a plea of guilty to some or all of the charges. Although the practice is firmly entrenched
in military practice, there has never been a specific provision in the UCMJ authorizing an accused and the convening authority to reach a plea agreement. If an accused pleads guilty pursuant to a plea agreement, the military judge conducts a “providency inquiry,” by personally addressing the accused, into not only the guilty plea itself, but also into the terms of the plea agreement. The former inquiry focuses on the accuracy and voluntariness of the guilty plea. The second inquiry focuses on the terms of the plea agreement and whether it contains any impermissible terms.

The new article addresses several key points. First, the new article recognizes that at “any time before the announcement of findings” an accused and a convening authority “may enter into a plea agreement” regarding charges, specifications, and limitations on the sentence that may be adjudged. Although the article is silent on the issue, military case law has recognized the ability of the accused and the convening authority to enter into post-trial agreements, which may, for example, address a reduction in the sentence.

Second, Article 53a(a)(2) will provide that a military judge may not participate in any plea discussions between the accused and the convening authority. Article 60a, infra at Part XII.B.2.

(discussing plea agreements in the military).

484. See generally id. § 9 (analyzing the current effect of the plea-bargain process within the military system).

485. See generally id. § 14-3 (examining the entering of guilty pleas in courts-martial).

486. MCM, supra note 19, R.C.M. 910(c). This inquiry is often referred to as the Care inquiry. United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

487. MCM, supra note 19, R.C.M. 910(f). This is sometimes referred to as the King-Green inquiry, after U.S. v. King, 3 M.J. 458 (C.M.A. 1977) and U.S. v. Green, 1 M.J. 453 (C.M.A. 1976).

488. Military case law has recognized post-trial agreements, which may address limitations on a sentence. See generally 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 17-2(C)(7).


491. See, e.g., U.S. v. Lonetree, 31 M.J. 849 (N.M.C.M.R. 1990) (highlighting a post-trial agreement to submit to polygraph in return for reduction of sentence). However, such sentence reductions and other potential terms of a post-trial agreement may be limited by Article 60a, infra at Part XII.B.2.
authority. This parallels a similar provision in the Federal Rules of
Criminal Procedure which bars federal judges from participating in plea
discussions. 492

Third, under the amendments the military judge will be required to
reject a plea agreement if it “contains a provision that has not been
accepted by both parties,” 493 contains a provision that the accused does
not understand, 494 or “contains a provision for a sentence that is less than
the mandatory minimum sentence” set out in Article 56(b)(2). 495 That
article establishes minimum sentences for various sexual offenses. 496
However, there are two exceptions to that rule. If the plea agreement
provides for a sentence less than one of those minimum sentences, the
military judge will be able to approve an agreement that provides for
imposition of a bad-conduct discharge. 497 Additionally, with the
recommendation of the trial counsel, the military judge will be able to
approve a sentence less than the mandatory minimum in return for an
accused’s substantial assistance on another case. 498

Finally, Article 53a(d) states that when the military judge accepts the
plea agreement, the agreement is binding on the parties. 499 This final
provision is another reminder that the 2016 amendments to the UCMJ
solidified the role of the military judge. 500

S. Record of Trial

The trial counsel is responsible for overseeing the production of the
record of trial by the court reporter. 501 The current practice is that when
the record is complete, the military judge “authenticates” the record. 502
The 2016 amendments to Article 54 shifted this responsibility to the court

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492. FED. R. CRIM. P 11(c)(1).
the authority of the military judge).
502. MCM, supra note 19, R.C.M. 1104(a)(2)(A). If the military judge is not able to
authenticate the record, the trial counsel may do so. Id., R.C.M. 1104(a)(2)(B).
reporter.\textsuperscript{503} The amendment will require that a court reporter “certify” the record, except when a court reporter is not available.\textsuperscript{504} In that case, an official designated by the President will certify the record.\textsuperscript{505} The amendment seems to indicate that any court reporter may certify the record, but not necessarily the court reporter assigned to the court-martial. The amendments also state that a complete record must be prepared in a general court-martial or special court-martial if the sentence includes death, dismissal, discharge, forfeitures, or confinement for greater than six months.\textsuperscript{506} Finally, the amendments will require that upon request of any victim who testifies at a court-martial, the victim will have access to the record of trial.\textsuperscript{507}

XI. REFORMING COURT-MARTIAL SENTENCING

A. In General

Sentencing at a court-martial is a separate phase of the court-martial and typically occurs immediately after a finding of guilty.\textsuperscript{508} During sentencing, the accused is entitled to present witnesses and other evidence for the court’s consideration and to challenge the prosecution’s evidence.\textsuperscript{509} The Military Rules of Evidence apply at the sentencing phase,\textsuperscript{510} unlike the practice in federal criminal trial sentencing where the Federal Rules of Evidence do not apply at the sentencing phase.\textsuperscript{511}

Under current rules, if a court-martial with members finds an accused guilty, the members determine the accused’s sentence.\textsuperscript{512} On the other hand, if the accused has entered a plea of guilty, the members detailed to the court impose the sentence, unless the accused has elected the complete

\textsuperscript{504} UCMJ art. 54(a) (2016), 10 U.S.C. § 854(a) (Supp. IV 2016).
\textsuperscript{505} Id.
\textsuperscript{507} UCMJ art. 54(e) (2016), 10 U.S.C. § 854(e) (Supp. IV 2016).
\textsuperscript{508} 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 16 (discussing sentencing procedures at courts-martial).
\textsuperscript{509} MCM, supra note 19, R.C.M. 1001(e); 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 16 (discussing sentencing procedures at courts-martial).
\textsuperscript{510} MCM, supra note 19, R.C.M. 1001; MCM, supra note 19, MIL. R. EVID. 1101.
\textsuperscript{511} FED. R. EVID. 1101.
trial be conducted by the military judge.\textsuperscript{513}

In the military, sentencing is currently unitary.\textsuperscript{514} That is, the court-martial currently imposes a single sentence for all of the offenses of which the accused has been found guilty.\textsuperscript{515} This form of sentencing has been referred to as an “aggregate” or “gross” sentence.\textsuperscript{516}

B. \textit{Sentencing by Military Judges and Members}

Currently, Article 56 addresses maximum limits on the sentences which may be imposed by a court-martial.\textsuperscript{517} The 2016 amendments made significant changes to the article and restructured court-martial sentencing.\textsuperscript{518} First, as amended, Article 56(c)(1) states:

In sentencing an accused . . . a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to promote good order and discipline in the armed forces, taking into consideration [a list of factors].\textsuperscript{519}

The Military Justice Review Group’s recommendation to require the President to promulgate “sentencing parameters” for general and special courts-martial was not adopted by Congress.\textsuperscript{520} The Group’s

\textsuperscript{513} See generally 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 16 (sentencing by military judge or members).

\textsuperscript{514} See MCM, supra note 19, R.C.M. 1002(b) (stating sentencing by a court-martial is unitary). This provision was added to the MCM by Executive Order 13730, May 20, 2016. Exec. Order No. 13730, 81 Fed. Reg. 33331 (May 26, 2016). A similar provision was included in the 1951 MCM, at Appendix 8, which was a procedural guide for courts-martial. MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 8 (1951). The term was not carried forward into Appendix 8 in the 1984 Manual for Courts-Martial. MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 8 (1984).

\textsuperscript{515} MCM, supra note 19, R.C.M. 1002(b).

\textsuperscript{516} See Jackson v. Taylor, 353 U.S. 569, 570 n.1 (1957) (using the terms “gross” and “aggregate” to describe sentencing by a court-martial).

\textsuperscript{517} UCMJ art. 56 (2013), 10 U.S.C. § 856 (Supp. I 2013) (amended 2016). Article 56(a) states that no court-martial may impose a punishment which exceeds the limits prescribed by the President. Article 56(b) also states that for specified sexual offenses, the punishment must include, at a minimum, a dismissal or discharge, with some exceptions. UCMJ art. 56(b) (2013), 10 U.S.C. § 856 (Supp. I 2013) (amended 2016).


\textsuperscript{519} UCMJ art. 56(c)(1) (2016), 10 U.S.C. § 856 (Supp. IV 2016).

\textsuperscript{520} MILITARY JUSTICE REVIEW GRP., supra note 23, at 511–14. The Senate version of the bill included the provision for sentencing parameters, but the House version did not. The House version of the amendments to Article 56 regarding parameters prevailed. See CONF. COMM., 114TH CONG., CONF. REP. TO ACCOMPANY S.2943 3054 (2016). Although the Conference Report did not
recommendation that all sentencing should be done by military judges, was also rejected by Congress.\textsuperscript{521} As noted, the amendments to Article 53, discussed \textsuperscript{supra},\textsuperscript{522} provide that the military judge will sentence the accused unless the accused requests that the detailed members impose the sentence.\textsuperscript{523}

Second, Congress replaced the concept of unitary sentencing in the military with segmented sentencing when the military judge is imposing the sentence.\textsuperscript{524} In that case, the military judge will be required to specify any terms of confinement and the amount of any fines, for each offense of which the accused was found guilty.\textsuperscript{525} If more than one term of confinement is imposed, the military judge will have to specify whether the terms will run consecutively or concurrently.\textsuperscript{526} The Military Justice Review Group noted that the change is rooted in the federal criminal justice system, where federal judges impose the sentence.\textsuperscript{527} It listed a number of reasons for adopting segmented sentencing: transparency,\textsuperscript{528} increasing efficiency of appellate review of sentences,\textsuperscript{529} and providing policy makers and practitioners with more accurate information on court-martial sentencing.\textsuperscript{530} In contrast, under the 2016 amendments, if the court-martial members impose the sentence, then the unitary sentencing

\textsuperscript{521.} See \textsuperscript{supra} Part X.Q.
\textsuperscript{522.} Id.
\textsuperscript{524.} UCMJ art. 56(c)(2) (2016), 10 U.S.C. § 856 (Supp. IV 2016). As noted \textsuperscript{supra}, the 2016 amendments state that the default position is sentencing by the military judge, unless the accused requests sentencing by the detailed members. See UCMJ art. 53(b)(1) (2016), 10 U.S.C. § 853 (Supp. IV 2016).
\textsuperscript{525.} UCMJ art. 56(c)(2) (2016), 10 U.S.C. § 856(c)(2) (Supp. IV 2016).
\textsuperscript{526.} Id.
\textsuperscript{527.} MILITARY JUSTICE REVIEW GRP., supra note 23, at 510.
\textsuperscript{528.} See id. at 509 (indicating transparency, in the form of allowing the public and the victims to see the specific punishments, will increase confidence in courts-martial).
\textsuperscript{529.} See id. at 510 (noting the effect of an appellate court setting aside a charge and reassessing the sentence: a simplification of the burden of deciding what an appropriate sentence might be). See, e.g., United States v. Winnckelman, 73 M.J. 11, 17 (C.A.A.F. 2013) (addressing the question of whether the service appellate courts should order a rehearing on a sentence or reassess the sentence on appeal). See generally 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 17-15(C) (discussing the problems encountered by service appellate courts in reassessing sentences where they have set aside one or more charges).
\textsuperscript{530.} MILITARY JUSTICE REVIEW GRP., supra note 23, at 510.
remains and the court members will announce a single sentence for all offenses.\footnote{531}{UCMJ art. 56(c)(3) (2016), 10 U.S.C. § 856(c)(3) (Supp. IV 2016).}

The third major change to Article 56 focuses on the ability of the government to appeal a court-martial sentence.\footnote{532}{UCMJ art. 56(d) (2016), 10 U.S.C. § 856(d) (Supp. IV 2016).} Article 56(d) will permit the government, with the approval of the Judge Advocate General, to appeal a sentence to the Court of Criminal Appeals on grounds that the sentence violates the law\footnote{533}{UCMJ art. 56(d)(1)(A) (2016), 10 U.S.C. § 856(d)(1)(A) (Supp. IV 2016).} or that the sentence is plainly unreasonable.\footnote{534}{UCMJ art. 56(d)(1)(B) (2016), 10 U.S.C. § 856(d)(1)(B) (Supp. IV 2016).} The appeal must be filed within 60 days of the date the judgment of the court-martial is entered under Article 60c.\footnote{535}{UCMJ art. 56(d)(2) (2016), 10 U.S.C. § 856(d)(2) (Supp. IV 2016).}


The changes to military sentencing will present challenges, which should be addressed in amendments to the Manual for Courts-Martial. First, under the new regime, which requires military judges to impose segmented sentences, there is a real risk that the new system will result in higher sentences against an accused, a danger recognized by the Military Justice Review Group in its report.\footnote{539}{See MILITARY JUSTICE REVIEW GRP., supra note 23, at 510 (noting “the sentence could be overly severe”).} Second, providing for government appeals of sentences—another feature of federal practice incorporated into military practice—could complicate appellate review of a court-martial conviction where a service court is presented with two simultaneous appeals; one by the accused and another by the government. Third, the Military Justice Review Group had recommended adoption of a provision dealing with government appeals,\footnote{540}{Id. at 530.} but that proposal was contingent on
the establishment of sentencing parameters and was rejected by Congress. Without such sentencing parameters or guidelines, the service appellate courts will not have any statutory guidance on a standard of review for court-martial sentences. That issue can be addressed in the Manual for Courts-Martial.

C. Effective Dates of Sentences

The complicated issue of the effective dates of court-martial sentences is currently addressed in three different articles: Articles 57 (effective date of sentences), 57a (deferment of sentences), and 71 (execution of sentences and suspension of sentences). The 2016 amendments consolidated provisions from Articles 57a and 71 into Article 57, and deleted Articles 57a and 71. The substance of Article 57a, which addresses deferment of sentences, will be located in Article 57(b) and the substance of Article 71 will be located in Article 57(a). The provision in current Article 71(d), which addresses the authority of a convening authority to suspend a sentence, has been moved to Article 60a, discussed infra.

Congress made no changes to Article 58, which deals with the execution of a sentence to confinement and Article 58b, which addresses sentences of forfeitures of pay and allowances during confinement.

While consolidating the various provisions regarding the effective date of sentences into Article 57 will make it easier for courts and practitioners to locate the relevant statutory guidance, the subject will remain complicated because there will still be different rules for the various components of a sentence: the death penalty, confinement, fines, forfeitures, and reductions in grade.

541. Apparently, the Military Justice Review Group anticipated that the government appeals would be modeled after 18 U.S.C. § 3742 (2012). Id. This issue may be addressed in the implementing amendments to the MCM.
547. See infra XII.B.2.
D. Reductions in Grade for Enlisted Accused

Article 58a currently provides that, unless the service Secretaries provide otherwise, a court-martial sentence including a punitive discharge, confinement, or hard labor without confinement will automatically reduce an enlisted member to the lowest enlisted pay grade, E-1.548 The services applied this provision in different fashions. The Army applied this article whenever the sentence included a punitive discharge or confinement in excess of six months.549 The Navy and Marine Corps applied it whenever the convening authority approved a punitive discharge or confinement in excess of three months.550 And the Air Force551 and Coast Guard552 applied the provision only if the adjudged sentence included a reduction in pay grade.

The 2016 amendments removed these inconsistencies by amending Article 58a553 to provide that in all cases where the sentence includes a punitive discharge, any confinement, or any hard labor without confinement, an enlisted accused will be reduced to the pay grade of E-1. The service Secretaries will not have the option of applying or not applying the article. The Military Justice Review Group had recommended that Article 58a be deleted upon the adoption of proposed sentencing parameters, under Article 56, and military judge sentencing in all cases, under Article 53.554 Both of those proposals were rejected by Congress. So Article 58a remains, and the amendment will have the beneficial effect of mandating consistency in the operation of the automatic pay reduction among the services.

549. AR 27-10, supra note 152, para. 5-29(e).
550. JAGINST 5800.7F, supra note 158, sec. 0512(c).
552. COMMANDANT INSTR. M5810.1E, supra note 158, art. 4.E.1.
554. MILITARY JUSTICE REVIEW GRP., supra note 23, at 546.
XII. REFORMING POST-TRIAL PROCEDURES AND REVIEW
OF COURTS-MARTIAL

A. In General

Subchapter IX of the UCMJ provides procedural rules governing first, post-trial procedures at the trial level, and second, appeals to the Courts of Criminal Appeals, the United States Court of Appeals for the Armed Forces, and finally to the Supreme Court.

Before addressing the specific changes to the articles in the Subchapter, it is important to briefly review the current system. The current post-trial procedures following a court-martial are extremely detailed. A copy of the record of trial is provided to the accused, at no cost. Depending on the level of punishment imposed, a formal legal review of the proceedings is prepared. The staff judge advocate submits a post-trial review and recommendations to the convening authority for consideration. During that process, the accused has the right to present clemency matters. The convening authority has limited authority to disapprove any findings of guilt and to suspend or reduce the sentence. The convening authority’s written action on the case, which must be signed

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556. See generally 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, §§ 17.1–17.21 (addressing post-trial review and appeals of courts-martial convictions).
559. MCM, supra note 19, R.C.M. 1106.
560. MCM, supra note 19, R.C.M. 1105.
561. Before 2014, convening authorities had very broad powers to act on the findings and sentence of a court-martial. In 2014, Congress greatly limited those powers by amending Article 60. National Defense Authorization Act Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954 (2013). Currently, the convening authority can only modify a courts-martial’s findings if all four of the following requirements are met: (1) the authorized maximum confinement that could have been adjudged by the court-martial does not exceed two years; (2) the adjudged sentence does not include dismissal, a dishonorable or bad-conduct discharge; (3) the adjudged confinement is not more than six months; and (4) the offense for which the accused was convicted was not a violation of the sexual offenses in Articles 120(a)–(b), 120b, 125, or any other offense specified by the Secretary of the Defense. UCMJ art. 60 (2013), 10 U.S.C. § 860 (Supp. I 2013) (amended 2016).
562. UCMJ art. 60 (2013), 10 U.S.C. § 860 (Supp. I 2013) (amended 2016); MCM, supra note 19, R.C.M. 1107. The convening authority may not modify any punitive discharge or a sentence to confinement for more than six months, unless there is a pretrial agreement, which requires modification of the adjudged sentence, or in cases where the accused provides substantial assistance in another case. UCMJ art. 60(c)(4)(B), (C) (2012), 10 U.S.C. §§ 860(c)(4)(B), (C) (2012).
personally by the convening authority,\textsuperscript{563} ends the case at the trial level.\textsuperscript{564}

For certain courts-martial, appellate review is automatic to a service Court of Criminal Appeals.\textsuperscript{565} The subject of appellate review of courts-martial is addressed, \textit{infra}, at Part XII.C.

B. Reforming Post-Trial Processing

The 2016 amendments made significant changes to the post-trial processing of courts-martial convictions. The changes are intended to mirror procedures for federal criminal proceedings and to simplify and expedite processing of court-martial convictions.\textsuperscript{566}

1. Post-Trial Processing in General and Special Courts-Martial

Currently, Article 60 is the sole provision dealing with the convening authority’s powers to review a court-martial conviction. Congress amended Article 60\textsuperscript{567} by retitling it “Post-Trial Processing in General and Special Courts-Martial” and amending the provision in two respects. First, the military judge in a general or special court-martial must enter into the record a “Statement of Trial Results.”\textsuperscript{568} That document must contain each plea entered by the accused and the court-martial findings,\textsuperscript{569} any sentence imposed,\textsuperscript{570} and any other information required by the President.\textsuperscript{571} The new article requires that the statement of the trial results must be provided promptly to the convening authority, the accused, and any victim.\textsuperscript{572} Second, the amended article now provides that a military judge must address all post-trial motions and any other post-trial matters which affect a “plea, a finding, the sentence, the Statement of

\begin{itemize}
  \item \textsuperscript{563} MCM, \textit{supra} note 19, R.C.M. 1107(f).
  \item \textsuperscript{564} See generally MCM, \textit{supra} note 19, R.C.M. 1107.
  \item \textsuperscript{565} UCMJ art. 66 (2012), 10 U.S.C. § 866 (2012).
  \item \textsuperscript{566} MILITARY JUSTICE REVIEW GRP., \textit{supra} note 23, at 560-63.
  \item \textsuperscript{568} UCMJ art. 60(a) (2016), 10 U.S.C. § 860(a) (Supp. IV 2016). It does not appear that the military judge must actually prepare the statement.
  \item \textsuperscript{571} UCMJ art. 60(a)(1)(C) (2016), 10 U.S.C. § 860(a)(1)(C) (Supp. IV 2016).
  \item \textsuperscript{572} UCMJ art. 60(a)(2) (2016), 10 U.S.C. § 860(a)(2) (Supp. IV 2016). The provision does not indicate who must distribute the copies. Presumably, that issue will be addressed in the implementing changes to the MCM.
\end{itemize}
Trial Results, the record of trial, or any other post-trial action by the convening authority" which can be resolved by the military judge before he or she enters the judgment in the case. This could include, for example, resolving post-trial allegations of misconduct by the court members or considering new evidence in the case. This provision is apparently based in part on R.C.M. 1102, which currently permits the military judge to inquire into and resolve any issues which arise after trial and substantially affect the sufficiency of the evidence or the sentence.

This provision should clarify statutorily the authority of a military judge to conduct post-trial proceedings, which have been addressed in the Manual for Courts-Martial, but not in the UCMJ.

2. Convening Authority’s Limited Authority to Act in Certain Cases

The guidance regarding the convening authority’s powers to act on a court-martial, currently in Article 60, has been moved to new Article 60a. That new article contains several key features. First, the convening authority will not be permitted to act on the findings of a general or special court-martial in which (1) the authorized maximum confinement that could have been adjudged by the court-martial exceeds two years; (2) the adjudged sentence includes a dismissal, a dishonorable or bad-conduct discharge; (3) the adjudged confinement for all offenses running consecutively is more than six months; or, (4) the offense for which the accused was convicted of is a violation of the sexual offenses listed in Articles 120(a)-(b), 120b, 125, or any other offense specified by the Secretary of Defense. If the court-martial does

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574. UCMJ art. 60(b)(2). The 2016 amendments also included a new Article 60c, which now requires the military judge to enter a judgment in the case. See infra Part XII.B.4.
575. See, e.g., United States v. Wallace, 28 M.J. 640, 642 (A.F.C.M.R. 1989) (determining that the military judge should have sua sponte conducted an Article 39(a) post-trial session when he heard allegations of court member misconduct).
577. MCM, supra note 19, R.C.M. 1102.
578. Id.
not include any of these four conditions, then the convening authority’s powers to act on the findings are addressed in new Article 60b, infra.\(^\text{584}\)

Second, the general rule, spelled out in new Article 60a(b), is that the convening authority may not reduce, commute, or suspend any of the following sentences: (1) a sentence of confinement, if the total confinement involved, running consecutively, exceeds six months;\(^\text{585}\) (2) a sentence of dismissal, dishonorable discharge or bad-conduct discharge;\(^\text{586}\) or (3) a sentence of death.\(^\text{587}\) The convening authority may reduce, commute, or suspend any sentence not covered in that list.\(^\text{588}\)

Third, the new article provides limited authority to the convening authority to suspend a sentence of confinement\(^\text{589}\) or a sentence of dismissal, dishonorable or bad-conduct discharge in two instances.\(^\text{590}\) The convening authority may suspend a sentence if the military judge has recommended that the sentence be suspended,\(^\text{591}\) but the military judge must include facts supporting that recommendation, in the Statement of Trial Results.\(^\text{592}\) The convening authority may not, however, suspend a mandatory minimum sentence nor suspend a sentence in excess of the suspension recommended by the military judge.\(^\text{593}\) The second instance is where the accused provides—either after sentencing and before the entry of the judgment, or after entry of judgment\(^\text{594}\)—substantial assistance in the prosecution of another person.\(^\text{595}\) In that case, the convening authority may reduce, commute, or suspend the sentence, in whole or in part, including a mandatory minimum sentence.\(^\text{596}\) This provision is

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\(^\text{584}\) See infra Part XII.B.3.
\(^\text{589}\) UCMJ art. 60a(d) (2016), 10 U.S.C. § 860a(d) (Supp. IV 2016).
\(^\text{590}\) UCMJ art. 60a(b)(c) (2016), 10 U.S.C. § 860a(b)(c) (Supp. IV 2016).
\(^\text{592}\) Id.
\(^\text{593}\) UCMJ art. 60a(c)(2) (2016), 10 U.S.C. § 860a(c)(2) (Supp. IV 2016).
\(^\text{594}\) Article 60a(d)(3) provides that, in deciding whether the accused provided substantial assistance, the convening authority may consider pre-sentence assistance provided by the accused. UCMJ art. 60a(d)(3) (2016), 10 U.S.C. § 860a(d)(3) (Supp. IV 2016).
\(^\text{595}\) UCMJ art. 60a(d) (2016), 10 U.S.C. § 860a(d) (Supp. IV 2016). The trial counsel must recommend the suspension. UCMJ art. 60a(d) (2016), 10 U.S.C. § 860a(d) (Supp. IV 2016). This is consistent with current practice.
\(^\text{596}\) UCMJ art. 60a(d) (2016), 10 U.S.C. § 860a(d) (Supp. IV 2016).
modeled after Federal Rule of Criminal Procedure 35(b)\textsuperscript{597} and is consistent with current practice.\textsuperscript{598}

Fourth, the convening authority must consider written matters submitted by both the accused and any victim.\textsuperscript{599} However, the convening authority cannot consider any matters related to the victim’s character, unless those matters were introduced at trial.\textsuperscript{600} This is consistent with current practice.

Fifth, the new article makes a significant shift in terms of who has the final say on a court-martial conviction at the trial level. As noted, supra, the current practice requires the convening authority to reflect his decision on the case in a written action.\textsuperscript{601} Article 60a will require the convening authority to forward his decision on the case to the military judge, who will include that decision in the judgment, entered by the military judge under new Article 60c,\textsuperscript{602} discussed, infra.\textsuperscript{603} If the convening authority has modified the sentence, he must explain his action in writing.\textsuperscript{604} This change is one of several in the 2016 amendments signaling Congress’s intent to provide military judges with new and expanded powers.

Finally, it is important to note that the former requirement that the staff judge advocate provides a post-trial recommendation to the convening authority has been deleted.\textsuperscript{605} That requirement posed significant issues over the years,\textsuperscript{606} and after congressional amendments to the UCMJ in 2013 and 2014, the need for that recommendation was reduced considerably. What is missing from the new article is any reference to how a convening authority is supposed to know what his options are for acting on a case. It is reasonable to assume that a convening authority will ask his staff judge advocate for advice on what action to take, or not take.

\textsuperscript{597} FED. R. CRIM. P. 35(b).
\textsuperscript{598} The current provision in Article 60(c)(4)(A) makes no reference to a timing requirement for when the assistance must have been provided. UCMJ art. 60(a)(4)(A) (2016), 10 U.S.C. § 860a(c)(4)(A) (Supp. IV 2016).
\textsuperscript{599} UCMJ art. 60a(c)(1) (2016), 10 U.S.C. § 860a(c)(1) (Supp. IV 2016).
\textsuperscript{600} UCMJ art. 60a(c)(2) (2016), 10 U.S.C. § 860a(c)(2) (Supp. IV 2016).
\textsuperscript{601} See supra Part XII.B.2.
\textsuperscript{602} UCMJ art. 60a(f) (2016), 10 U.S.C. § 860a(f) (Supp. IV 2016).
\textsuperscript{603} See infra Part XII.B.4.
\textsuperscript{605} See generally 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 17-8(B) (discussing post-trial recommendations).
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Hopefully that issue will be addressed in the Manual for Courts-Martial.

3. Post-Trial Actions in Summary Courts-Martial and Certain General and Special Courts-Martial

While new Article 60a reflects, for the most part, provisions in current Article 60 regarding limits on the convening authority’s post-trial powers on certain cases, new Article 60b addresses those powers in cases not otherwise covered in Article 60a, including summary courts-martial. The new article provides that in cases not described in Article 60a, the convening authority will be able to modify the court-martial findings and the sentence. Article 60b establishes limitations on the convening authority’s powers to order rehearings, requires the convening authority to consider matters submitted by the accused and the victim, and requires the convening authority to submit his decision to the military judge for inclusion in the judgment. Unlike current practice, where a convening authority may approve or disapprove the findings or sentence, this new article only addresses decisions by the convening authority that modify the findings or sentence. The new article contains no guidance on the procedures for transmitting the convening authority’s decision to modify the findings or sentence. Nor is there guidance for informing the military judge that the convening authority will not be modifying the findings or sentence.

4. Entry of Judgment in Court-Martial

As noted supra, under the current rules, the convening authority has the final word on post-trial actions in a court-martial. New Article 60c changes all of that. Under the new article, the military judge will be required to enter a “judgment” in the case into the record of trial. The judgment must include (1) the Statement of Trial Results, and

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609. Id.
612. Id.
613. See supra Part XII.B.2.
614. See generally 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 17-10 (discussing a convening authority’s promulgating order, which reports the results of trial, and a convening authority’s action on the case).
(2) modifications or supplements to the Statement of the Trial Results, stemming from post-trial actions by the convening authority or rulings or actions by the military judge which affect pleas, findings, or sentences.616

5. Waiver of Right to Appeal

Under current practice, a convicted accused can waive appellate review of his case,617 if the case will be reviewed by either the service Court of Criminal Appeals, under Article 66,618 or by the Office of the Judge Advocate General, under Article 69.619 An accused cannot waive an appeal if the sentence includes the death penalty.620 Article 61 provides that the accused must do so within ten days after the convening authority takes action in the case; the waiver must be in writing and signed by both the accused and his defense counsel, and submitted to the convening authority.621 The 2016 amendments to Article 61 were technical in nature; Congress amended the language of the article to conform to other changes in Articles 60, 65, and 69.622 The amended article provides that the accused will be able to waive the right to appeal his case after the military judge enters a judgment in the case,623 that waiver will have to be signed by both the accused and the defense counsel and attached to the record of trial.624

6. Appeal by the United States

Article 62 currently provides that the government may appeal specified rulings by the military judge625 in a court-martial in which a punitive

617. See generally 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, supra note 35, § 17-12(B) (discussing procedures for waiving appellate review of a court-martial conviction).
621. Id.
624. Id.
625. Article 62(a)(1) lists six rulings which may be appealed to the Court of Criminal Appeals: "(A) An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification; (B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding; (C) An order or ruling which directs the disclosure of classified information; (D) An order or ruling which imposes sanctions for nondisclosure of classified information; (E) A refusal of the military judge to issue a protective order sought by the United
discharge may be imposed. The procedural rules for doing so are set out in the Manual for Courts-Martial. Congress amended Article 62 by adding a provision that the government will be able to appeal a decision, made pretrial, in any general or special court-martial, regardless of whether a discharge may be adjudged. It also added a provision which will permit a government appeal in those cases where the military judge has entered a finding of not guilty on a charge or specification after the court members returned a finding of guilty. The amended article also provides that the government will be permitted to appeal a ruling by a military magistrate in the same manner that it may appeal a ruling by a military judge, the appeal would be made in the first instance to the military judge in the case. Finally, Congress added a new provision to the article that provides: “The provisions of [Article 62] shall be liberally construed to effect its purposes.” These amendments were intended to mirror federal civilian practice.

7. Rehearings

The subject of rehearings is covered in Article 63. The current law is that under that article, if a rehearing is held in a case, the general rule is that the sentence imposed at the rehearing may not exceed that which was approved by the convening authority in the original trial. The 2016 amendments to Article 63 removed those sentence limitations for

States to prevent the disclosure of classified information; (F) A refusal by the military judge to enforce an order described in subparagraph (E) that has previously been issued by appropriate authority. UCMJ art. 62(a) (2012), 10 U.S.C. § 862(a) (2012).

627. MCM, supra note 19, R.C.M. 908.
629. UCMJ art. 62(a)(1) (2016), 10 U.S.C. § 862(a)(1) (Supp. IV 2016). This addition to Article 62 conforms to new Article 30a. That article provides a military judge or military magistrate with the authority to make pretrial rulings before the convening authority refers a case to trial. See supra Part IX.D.
634. MILITARY JUSTICE REVIEW GRP., supra note 23, at 585.
636. Id.
The change is intended to conform military practice to federal civilian practice. The Military Justice Review Group observed the Supreme Court’s holding that “neither the double jeopardy provision nor the Equal Protection Clause impose[] an absolute bar to a more severe sentence upon reconviction.” Congress also added language to reflect the possibility of a sentence rehearing, following a successful government appeal of the original sentence, under amended Article 56(d). In that case, the court-martial on rehearing will be able to impose “any sentence that is in accordance with the order or ruling setting aside the adjudged sentence, subject to such limitation as the President may prescribe by regulation.”

8. Judge Advocate Review of Summary Courts-Martial

Currently, Article 64 spells out detailed requirements for post-trial legal review by a judge advocate of the findings of guilty in summary courts-martial and special courts-martial, in which no bad conduct discharge was adjudged. The 2016 amendments to that article restrict the legal review to only summary courts-martial. All general and special courts-martial, which are not otherwise eligible for review by a Court of Criminal Appeals, will be subject to a legal review under amended Article 65.

9. Transmittal and Review of Records

Currently, Article 65 simply provides that in courts-martial which are subject to appellate review by the Court of Criminal Appeals, under either Article 66, or the Office of the Judge Advocate General under Article 69, must be transmitted to the Judge Advocate General for appropriate action. The 2016 amendments made substantial changes to Article 65. First, all general and special courts-martial records in which

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640. Id.


643. MILITARY JUSTICE REVIEW GRP., supra note 23, at 592.


there is a finding of guilty will be sent to the Judge Advocate General.\footnote{UCMJ art. 65(a)(1) (2016), 10 U.S.C. § 865(a)(1) (Supp. IV 2016).} If the court-martial judgment is eligible for automatic review by the Court of Criminal Appeals under Article 66,\footnote{UCMJ art. 66 (2012), 10 U.S.C. § 866 (2012) (amended 2016). See infra Part XII.C.2, for a discussion of the Court of Criminal Appeals and the cases over which it has jurisdiction.} the Judge Advocate General will forward the record to the Court of Criminal Appeals, as under current practice.\footnote{UCMJ art. 65(b)(2) (2016), 10 U.S.C. § 865(b)(2) (Supp. IV 2016). The accused may request that a copy of the record of trial be forwarded to a civilian counsel.} If the court-martial judgment is eligible for review upon filing an appeal by the accused, the Judge Advocate General will forward the record to appellate defense counsel, who will review the record, and upon request of the accused, represent the accused before the Court of Criminal Appeals.\footnote{UCMJ art. 65(b)(2)(A) (2016), 10 U.S.C. § 865(b)(2)(A) (Supp. IV 2016). That may be a judge advocate in the field. See MILITARY JUSTICE REVIEW GRP., supra note 23, at 597 (indicating that legal review may include field review by the designated attorney).} In addition, if the judgment is eligible for review upon filing of an appeal by the accused, the Judge Advocate General must notify the accused, by mail, of the right to file an appeal with the Court of Criminal Appeals.\footnote{UCMJ art. 65(d)(1) (2016), 10 U.S.C. § 865(d)(1) (Supp. IV 2016). That may be a judge advocate in the field. See MILITARY JUSTICE REVIEW GRP., supra note 23, at 597 (indicating that legal review may include field review by the designated attorney).}

Second, if the court-martial is not subject to direct review by the Court of Criminal Appeals,\footnote{UCMJ art. 65(c) (2016), 10 U.S.C. § 865(c) (Supp. IV 2016).} a legal review of the conviction will be conducted by an attorney in the office of the Judge Advocate General or an attorney assigned to do so.\footnote{UCMJ art. 65(d)(2) (2016), 10 U.S.C. § 865(d)(2) (Supp. IV 2016).} A similar legal review will be conducted in general and special courts-martial cases where the accused waives the right to appeal or withdraws his appeal.\footnote{UCMJ art. 65(d)(3) (2016), 10 U.S.C. § 865(d)(3) (Supp. IV 2016).} If the attorney conducting this legal review concludes that corrective action is required, new Article 65(e) provides for permissible remedies, including rehearings.\footnote{UCMJ art. 65(e) (2016), 10 U.S.C. § 865(e) (Supp. V 2016).}

C. Reforming Appellate Review of Courts-Martial

1. In General

The service Courts of Criminal Appeals are the first level of appellate review of special and general courts-martial convictions. Currently, the Judge Advocate General is required to forward all records to those courts,
in which the sentence extends to death, dismissal of a commissioned
officer, cadet or midshipman, a sentence of a dishonorable or bad-conduct
discharge, or a sentence of confinement for one year or more.\textsuperscript{655} Those
courts, which are composed of high-ranking military officers,\textsuperscript{656} have fact-
finding powers\textsuperscript{657} and have the authority to reassess a court-martial
sentence.\textsuperscript{658} Appellate counsel is provided to a convicted service member
free of charge.\textsuperscript{659}

An accused may petition for further review of his or her case by the
United States Court of Appeals for the Armed Forces (CAAF), which sits
in Washington, D.C.\textsuperscript{660} That court is composed of five civilian judges,
who are appointed by the President for fifteen-year terms.\textsuperscript{661} The entire
process from the initial trial to review by the Court of Appeals for the
Armed Forces can take several years.\textsuperscript{662} In certain cases, both the
government and the accused service member may seek certiorari review
by the Supreme Court of a decision by the Court of Appeals for the Armed
Forces.\textsuperscript{663}

2. Review by the Courts of Criminal Appeals

Article 66 currently establishes procedures for the service Courts of
Criminal Appeals.\textsuperscript{664} It establishes the qualifications of the military
officers sitting on the courts,\textsuperscript{665} the jurisdiction of the courts,\textsuperscript{666} and the


appointed to service appellate courts if there is statutory authority to do so. \textit{See} Edmund v. United
States, 520 U.S. 651, 665 (1997) (holding the Secretary of Transportation had statutory authority
under 49 U.S.C. § 323(a) to appoint employees of the Department of Transportation to Coast Guard
Court of Criminal Appeals). \textit{Cf.} United States v. Jansen, 73 M.J. 221, 225 (2014) (finding the
Secretary of Defense had no statutory authority to appoint retired Air Force officers to the Air Force
Court of Criminal Appeals). \textit{See generally} 2 \textsc{Schlueter}, \textsc{Military Criminal Justice}, \textit{infra} note 35,
§ 17–15(A) (discussing appointment of civilians to service appellate courts).

\textsuperscript{657}. MCM, \textit{infra} note 19, R.C.M. 1203(b).

\textsuperscript{658}. \textit{Id.}

\textsuperscript{659}. UCMJ art. 70 (2012), 10 U.S.C. § 870 (2012) (finding an accused may be represented by
counsel without reference to cost).


\textsuperscript{661}. \textit{Id.}

\textsuperscript{662}. \textit{See generally} 2 \textsc{Schlueter}, \textsc{Military Criminal Justice}, \textit{infra} note 35, § 17–11 at 1150–
60 (discussing post-trial and appellate delays).


scope of the courts’ authority to review courts-martial convictions, including de novo factual review of those cases.\textsuperscript{667} Congress made several significant changes to Article 66.\textsuperscript{668} First, Congress amended Article 66(a) to provide that the Judge Advocate General will be required to certify that military judges are qualified by reason of education, training, experience, and judicial temperament, and that the President must enact regulations that will provide for the appointment of military appellate judges to the service courts for minimum periods, subject to any exceptions authorized by those regulations.\textsuperscript{669} This proposal mirrors a similar amendment to Article 26, which addresses minimum tours of assignment, i.e., “tenure,” for military judges.\textsuperscript{670}

Second, the amendments adjusted the cases subject to automatic review by the service appellate courts by increasing the amount of adjudged confinement, which triggers automatic review, from one year to two years.\textsuperscript{671} The Military Justice Review Group had recommended the provision for automatic review of non-capital courts-martial be deleted from Article 66 and replaced with an appeal of right for all cases with a sentence that included either a dismissal, a bad-conduct discharge, a dishonorable discharge, or more than six months confinement.\textsuperscript{672} Congress rejected that recommendation.

Third, the amendments expanded the authority for review of Article 66 to provide an accused with an opportunity to appeal a court-martial conviction that is not automatically subject to the jurisdiction of the Court of Criminal Appeals.\textsuperscript{673} The accused will be able to file an appeal to a court-martial conviction when: (1) the sentence to confinement adjudged by the court-martial is more than six months;\textsuperscript{674} (2) the government has


\textsuperscript{669} UCMJ art. 66(a) (2016), 10 U.S.C. § 866(a) (Supp. IV 2016).

\textsuperscript{670} See supra Part VII.C, for a discussion of minimum tours of duty for military judges.


appealed a ruling by the military judge under Article 62,\textsuperscript{675} (3) the government has appealed a court-martial sentence under new Article 56(d);\textsuperscript{676} or, (4) the accused has filed for an application for review of the Judge Advocate’s action on the case under Article 69 and review is granted by the Court of Criminal Appeals.\textsuperscript{677} The amended article requires that an appeal under one of these provisions must be timely.\textsuperscript{678}

Fourth, the amended article expressly states that the Courts of Criminal Appeals may provide appropriate relief if the accused can demonstrate error or excessive delay in the post-judgment processing of his or her case.\textsuperscript{679} Currently, only military case law addresses this type of relief.\textsuperscript{680}

Fifth, the amended Article 66 includes specific statutory guidance on the courts’ consideration of sentences appealed by the government.\textsuperscript{681} The Courts of Criminal Appeals will be authorized to consider whether the adjudged sentence violates the law\textsuperscript{682} and whether the sentence is plainly unreasonable.\textsuperscript{683}

Sixth, Congress amended Article 66 to provide specific guidance on the

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\textsuperscript{677} UCMJ art. 66(b)(1)(D) (2016), 10 U.S.C. § 866(b)(1)(D) (Supp. IV 2016). Review under an Article 69 situation is very different from a direct appeal or an automatic review. Appellate review of a decision by the Judge Advocate General under Article 69 involves: first, an accused’s application for review by the Judge Advocate General under Article 69; second, action by the Judge Advocate General on that application; third, an accused’s application to the Court of Criminal Appeals for review of the Judge Advocate General’s decision; and fourth, the decision by the Court of Criminal Appeals to grant review. Article 69 is discussed, infra, at Part XII.C.5.

\textsuperscript{678} UCMJ art. 66(c) (2016), 10 U.S.C. § 866(c) (Supp. IV 2016). Under Article 66(c)(1)(A) or (B), appeals based on a sentence for more than six months, or in a case where the government has filed an appeal of a military judge’s ruling under Article 62, must be filed within ninety days of the date that the accused is provided notice of his appellate rights under Article 65(c) or by a date set by the Court of Criminal Appeals. UCMJ art. 66(c)(1)(A) (2016), 10 U.S.C. § 866(c)(1)(A) (Supp. IV 2016). If the appeal is in a case involving a government appeal of a sentence, under Article 56, the appeal must be filed within ninety days of the date that the accused is notified that an application for review has been granted. UCMJ art. 66(c)(2) (2016), 10 U.S.C. § 866(c)(2) (Supp. IV 2016).


rehearings or dismiss charges.\textsuperscript{685}

Seventh, the amended Article 66 provides that if the court decides that additional proceedings are justified, it will be authorized to order a hearing to address a substantial issue subject to any limitations set by the court. This change codifies the established practice of the courts ordering DuBay hearings to resolve issues that arise during the appellate process.\textsuperscript{686} This will generally comport with federal civilian practice.\textsuperscript{687}

Finally, one of the current debates concerning the powers of the Courts of Criminal Appeals focuses on the power of the courts to conduct a \textit{de novo}, \textit{sua sponte}, factual review of the evidence submitted at trial.\textsuperscript{688} That power reflects what some have termed a paternalistic view toward an accused service member. The debate has heightened over concern that the Courts of Criminal Appeals might overturn sexual assault convictions.\textsuperscript{689}

In its report, the Military Justice Review Group proposed that Congress amend Article 66 to adopt a requirement that the accused make a specific showing of deficiencies in the evidence, and, further, that the Court of Criminal Appeals could set aside the conviction only if it was clearly


\textsuperscript{687} See FED. R. APP. P. 12.1 (allowing a circuit court to remand a case to the district court for further proceedings on a substantial issue).

\textsuperscript{688} See generally John Powers, Fact Finding in the Courts of Military Review, 44 BAYLOR L. REV. 457 (1992) (discussing fact-finding powers allocated to the service appellate court under UCMJ Article 66, and concluding that what occurs in military appellate courts is not bona fide, traditional, or fact-finding).

\textsuperscript{689} See generally Major Mark D. Sameit, When a Convicted Rape is Not Really a Rape: The Past, Present, and Future Ability of Article 120 Convictions to Withstand Legal and Factual Sufficiency Reviews, 216 MIL. L. REV. 77 (2013) (providing an extensive review and analysis of all military sexual assault convictions overturned from 2000 until 2012, on grounds that they lacked factual sufficiency).
convinced that the finding was against the weight of the evidence. Congress rejected that proposal and left the current fact-finding powers of the Courts of Criminal Appeals intact.

3. Review by the United States Court of Appeals for the Armed Forces

Congress made several amendments to this article. First, Article 67(a)(2) was amended to include a reference to the Commandant of the Marine Corps. Second, Article 67(a)(2) was amended to require notification to the Judge Advocate General and the Staff Judge Advocate to the Commandant of the Marine Corps, prior to certifying cases to the court. Finally, Article 67(c) was changed to reflect that with the adoption of Article 60c and the abolishment of convening authority's actions, the military appellate courts will be reviewing court-martial judgments entered by the military judge.

4. Review by the Supreme Court of the United States

Article 67a currently provides that both the government and an accused may seek certiorari review from the Supreme Court. Congress made a technical amendment to Article 67a(1) by changing the reference to the name of the United States Court of Appeals for the Armed Forces. In its report, the Military Justice Review Group noted that, unlike the civilian practice, the ability of an accused service member to seek review by the Supreme Court is limited. It indicated that, although legislation has been introduced to conform military practice to civilian procedures regarding Supreme Court review, no action has been taken. The

690. MILITARY JUSTICE REVIEW GRP., supra note 23, at 610. The Group noted its proposal was based on New York state practice. Id.
693. Id.
694. See supra Part XII.B.4 for a discussion of new Article 60c.
695. See supra Part XII.B.3 for a discussion regarding Article 60b, which now addresses the convening authority's post trial powers.
696. UCMJ art. 67(c) (2016), 10 U.S.C. § 867(c) (Supp. IV 2016).
699. MILITARY JUSTICE REVIEW GRP., supra note 23, at 628.
700. EQUAL JUSTICE FOR OUR MILITARY ACT OF 2013, H.R. 1435, 113th Cong., 1st
Group recommended that the executive, legislative, and judicial branches consult on that issue.\textsuperscript{701}

5. Review by the Judge Advocate General

Currently, Article 69 provides for the legal review for courts-martial in the Office of the Judge Advocate General,\textsuperscript{702} which are not otherwise reviewable by the service Courts of Criminal Appeals under Article 66, discussed \textit{supra}.\textsuperscript{703} There are currently two forms of review under Article 69. First, under Article 69(a), legal review by the Judge Advocate General is automatic for any general court-martial conviction, unless the accused waives or withdraws the right to an Article 69(a) review in which the sentence does not include a punitive discharge, confinement for more than one year, or capital punishment.\textsuperscript{704} If the Judge Advocate General determines the findings and sentence are unsupported, he may modify or set aside the findings, or sentence, or both.\textsuperscript{705}

Second, under Article 69(b), the Judge Advocate General may conduct a legal review of cases not falling under Article 69(a) or otherwise not reviewable by the Courts of Criminal Appeals. This usually applies to summary courts-martial and special courts-martial. This review is triggered through a request by the accused within two years of the convening authority approving the conviction.\textsuperscript{706}

Under either of these forms of review, the Judge Advocate General may certify the case to the Court of Criminal Appeals for review and action.\textsuperscript{707}

The amendments to Article 69 effected several changes.\textsuperscript{708} First, the amendments combined the two current forms of Article 69 review, which are outlined, \textit{supra}.\textsuperscript{709} Under the amendments, for those courts-martial that are not otherwise reviewable directly by the Courts of Criminal Appeals—summary courts-martial, special courts-martial, and general courts-martial where the sentence did not reach the statutory minimum for

\textsuperscript{701.} MILITARY JUSTICE REVIEW GRP., \textit{supra} note 23, at 628.
\textsuperscript{703.} \textit{See supra} Part XII.C.
\textsuperscript{705.} \textit{Id.}
\textsuperscript{709.} \textit{See Part XII.C.5.}
review by those courts or cases in which the accused waived appellate review—the accused will be able to apply for review by the Judge Advocate General.\textsuperscript{710} The accused must file the request within one year after the completion of the review set out in Articles 64\textsuperscript{711} and 65.\textsuperscript{712} The Judge Advocate General may extend the time, but not beyond three years.\textsuperscript{713} The automatic review provision in current Article 69(a) was eliminated.

Second, the Court of Criminal Appeals will be able to review the Judge Advocate General’s action, if any, if the case is sent to the court by the Judge Advocate General or if the accused applies for review by the court.\textsuperscript{714} The court may grant the accused’s application only if the application shows a substantial basis for concluding that the action by the Judge Advocate General constituted prejudicial error.\textsuperscript{715} The accused must file the application within sixty days after the accused is notified of the Judge Advocate General’s decision or within sixty days after the date that the copy of the decision by the Judge Advocate General is deposited in the mails,\textsuperscript{716} whichever is the earlier date.\textsuperscript{717} As under current law, the Court of Criminal Appeals may take action only on matters of law.\textsuperscript{718} Thus, unlike review under Article 66, infra,\textsuperscript{719} the court may not engage in \textit{de novo} review of the evidence presented at trial.\textsuperscript{720}

These changes will benefit an accused whose court-martial would not be otherwise reviewable by a Court of Criminal Appeals.

6. Appellate Defense Counsel in Death Penalty Cases

Article 70 addresses the assignment of appellate counsel.\textsuperscript{721} Congress added Article 70(f),\textsuperscript{722} which will require that to the greatest extent

\textsuperscript{710} UCMJ art. 69 (2016), 10 U.S.C. § 869 (Supp IV 2016).
\textsuperscript{711} UCMJ art. 64 (2016), 10 U.S.C. § 864 (Supp IV 2016).
\textsuperscript{712} UCMJ art. 69(a) (2016), 10 U.S.C. § 869(a) (Supp IV 2016).
\textsuperscript{713} UCMJ art. 69(b) (2016), 10 U.S.C. § 869(b) (Supp IV 2016).
\textsuperscript{714} UCMJ art. 69(d) (2016), 10 U.S.C. § 869(d) (Supp IV 2016).
\textsuperscript{718} UCMJ art. 69(e) (2016), 10 U.S.C. § 869(e) (Supp IV 2016).
\textsuperscript{719} \textit{See infra} Part XII.C.2.
\textsuperscript{720} \textit{Compare} UCMJ art. 69 (2016), 10 U.S.C. § 869 (Supp IV 2016), with UCMJ art. 66 (2016), 10 U.S.C. § 866 (Supp IV 2016) (discussing the powers of review and limiting the court under Article 69 to review only of matters of law).
practicable, in any capital case, at least one of the appellate defense counsel must be “learned in the law applicable to [death penalty] cases.” The new provision further states that if necessary, that counsel may be a civilian who may be compensated for his or her work on the case.

7. Hearing on a Vacation of a Suspended Sentence

Article 72 addresses the procedures for vacating a suspended sentence. Currently, that article states that the special court-martial convening authority is responsible for holding the hearing and then reporting the results of that hearing to the general court-martial convening authority. Congress amended Article 72 to state that the special court-martial convening authority may appoint a judge advocate, qualified under Article 27(b), to conduct the hearing. The Military Justice Review Group pointed out that this change will permit the special court-martial convening authority to delegate his or her responsibilities to an officer who is experienced in conducting hearings.

8. Time for Petitioning for a New Trial

Under Article 73, an accused may petition for a new trial within two years after the convening authority acts on the case on grounds of newly discovered evidence or fraud on the court. The 2016 amendments to Article 73 will provide that an accused may file a petition for a new trial within three years after the military judge enters the judgment in the case under new Article 60(c). Extending the time to file the petition to three years conforms military practice to civilian practice.

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724. Id.
729. MILITARY JUSTICE REVIEW GRP., supra note 23, at 650.
9. Restoration

Article 75 addresses the ability of an accused to recoup all "rights, privileges, and property" affected by an executed portion of a court-martial sentence.\(^{732}\) Congress amended that article by adding new subsection Article 75(d), which requires the President to promulgate regulations concerning the eligibility of pay and allowances for the period of time after the date on which the executed portion of a court-martial sentence was set aside.\(^{733}\)

10. Required Leave Pending Review of Certain Court-Martial Convictions

Congress made several minor technical, conforming amendments, to Article 76a,\(^{734}\) which addresses the question of what to do with service members who have been convicted, but whose cases are still pending review.\(^{735}\) The 2016 amendments to this article were technical and conformed the language of the article to changes in Article 60,\(^{736}\) and the adoption of new Article 60c.\(^{737}\)

XIII. REFORMING THE PUNITIVE ARTICLES

A. In General

Subchapter X of the UCMJ sets out the "punitive articles" applicable to the military.\(^{738}\) Those punitive articles not only proscribe conduct that is considered a civilian or common law offense, such as robbery, but also purely military offenses, such as disobedience of an order.\(^{739}\) Finally, the UCMJ contains two general articles—Articles 133,\(^{740}\) and 134.\(^{741}\)

The 2016 amendments made significant changes to the punitive articles.

\(^{735}\) MILITARY JUSTICE REVIEW GRP., supra note 23, at 661–62.
\(^{736}\) See supra Part XII.B.1 for changes to Article 60.
\(^{737}\) See supra Part XII.B.4 for a discussion on the adoption of new Article 60c, which requires a military judge to enter the judgment in the case.
Congress added four new offenses, "migrated" a number of offenses that were formerly punishable under Article 134 to new punitive articles, rearranged the numbering of the punitive articles, and made amendments to other punitive articles. This section addresses those four categories of changes.

B. New Offenses

The following new offenses were added in the Military Justice Act of 2016. As distinguished from the "migrated" offenses discussed in the next section, the following offenses are not currently covered in either the UCMJ or the Manual for Courts-Martial. The article numbers and titles are the amended versions of the punitive articles assigned in the Act.

1. Article 93a, Prohibited Activities with Military Recruit or Trainee by Person in Position of Special Trust

Article 93a is a new punitive article. The article is intended to provide greater accountability for sexual misconduct by recruiters and trainers during the recruiting and military training environments.

2. Article 121a, Fraudulent Use of Credit Cards, Debit Cards, and Other Access Devices

Congress added a new offense in Article 121a. It prohibits the fraudulent use of credit cards, debit cards, and other access devices. The new provision is similar to 18 U.S.C. § 1029, which prohibits fraud and related activity in connection with access devices. In its report, recommending the addition of this new article, the Military Justice Review Group noted that nearly every state, the District of Columbia, and the federal government have a similar offense in their penal codes.

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742. The term "migrated" is the term used by the Military Justice Review Group. MILITARY JUSTICE REVIEW GRP., supra note 23, at 37.
744. MILITARY JUSTICE REVIEW GRP., supra note 23, at 735-38.
748. MILITARY JUSTICE REVIEW GRP., supra note 23, at 894.
3. Article 123, Offenses Concerning Government Computers

Article 123 currently sets out the offense of forgery. The 2016 amendments moved that offense to Article 105. In its place, Congress added the new offense of using government computers for illegal purposes. The new offense is modeled after 18 U.S.C. § 1030 which prohibits fraud and related activities in connection with computers.

4. Article 132, Retaliation

Currently, Article 132 addresses the offense of fraud against the United States. Congress moved that offense to Article 124 and in its place created a new Article 132 offense—retaliation. In its report, the Military Justice Review Group noted that the new offense would provide added protection for witnesses, victims, and other persons who report criminal activity. The Group’s report continues by noting that Article 132 would not preempt prosecution of retaliatory conduct under other punitive articles. Congress extended the Military Justice Review Group’s punitive article to include reports of “protected communications.”

C. Article 134 Offenses Migrated to Enumerated Punitive Articles

Article 134, the General Article, is a catch-all punitive article for any offenses that are not expressly listed in the punitive articles. The scope

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752. MILITARY JUSTICE REVIEW GRP., supra note 23, at 909.
756. MILITARY JUSTICE REVIEW GRP., supra note 23, at 981.
757. Id. at 981 (listing Article 109 (destruction of property), Article 93 (cruelty and maltreatment), Article 128 (assault), Article 131b (obstructing justice), Article 130 (stalking), and Article 134 (general article)).
of Article 134 is broad, owing to the special needs of the military.\textsuperscript{760} That article, which consists of three distinct clauses, provides:

Article 134. General article

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.\textsuperscript{761}

Part IV of the Manual for Courts-Martial lists a long list of offenses that are punishable under Article 134. Each offense is spelled out, along with the elements that the government must prove to convict an accused.\textsuperscript{762} Those elements include a "terminal element," which in the words of clause one of Article 134, require the government to prove that: (1) the offense was prejudicial to good order and discipline in the armed forces; (2) the offense brought discredit on the armed forces; or (3) that the crime was not a capital offense.\textsuperscript{763} In United States v. Fosler,\textsuperscript{764} the United States Court of Appeals for the Armed Forces held that the government must both plead and prove a terminal element.\textsuperscript{765} The court reasoned that each of the three clauses in Article 134 is a distinct offense and that the accused is entitled to notice as to which of the clauses he must defend against.\textsuperscript{766}

In amending the punitive articles of the UCMJ, Congress "migrated"\textsuperscript{767} many,\textsuperscript{768} but not all,\textsuperscript{769} of the Article 134 offenses currently listed in

\textsuperscript{760} See Parker v. Levy, 417 U.S. 733, 758 (1974) (noting that both the fundamental necessity for obedience and consequent necessity for imposition of discipline render acts, which would be constitutionally permissible outside the military, impermissible within the military).


\textsuperscript{762} MCM, supra note 19, pt. IV, ¶¶ 61-113.


\textsuperscript{764} United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011).

\textsuperscript{765} Id. at 230.

\textsuperscript{766} Id.

\textsuperscript{767} The term "migrated" is the term used by the Military Justice Review Group. See generally MILITARY JUSTICE REVIEW GRP., supra note 23 (using the word "migrated" to indicate that an article has moved from an existing article).

\textsuperscript{768} Id. at 985 (noting the Group had recommended migrating 36 of the 53 offenses listed by the President in Part IV of the MCM).

\textsuperscript{769} Id. at 987 n.13 (recommending 17 Article-134 offenses not be migrated).
Part IV of the Manual for Courts-Martial to existing punitive articles or to new punitive articles. The Military Justice Review Group reasoned that those offenses are well-recognized as either being prejudicial to good order and discipline, or bringing discredit on the armed forces. Thus, the Government should not have to plead and prove those terminal elements, as required by Article 134. For each of the migrated offenses in its Report, the Group addressed that reasoning.

Using that rationale, Congress migrated many offenses, currently covered under Article 134, into new punitive articles or existing punitive articles. In several instances, Congress migrated more than one Article 134 offense into a single enumerated punitive article. The following discussion briefly addresses each of those migrated offenses.

1. Article 82, Soliciting Commission of Offenses

Currently, Article 82 proscribes solicitation of four specified offenses: desertion under Article 85, mutiny or sedition under Article 94, and misbehavior before the enemy under Article 99. Congress amended Article 82 by including the general offense of soliciting someone to commit any offense in violation of any of the punitive articles in the UCMJ. The offense is currently covered in the Manual for Courts-Martial under Article 134.

2. Article 84, Breach of Medical Quarantine

Currently, Article 84 proscribes unlawful enlistment, appointment, or
separation.\textsuperscript{779} As noted, \textit{infra},\textsuperscript{780} Congress moved this offense to Article 104.\textsuperscript{781} In its place, it inserted the offense of breach of medical quarantine.\textsuperscript{782} This offense is currently listed in the Manual for Courts-Martial as an offense under Article 134.\textsuperscript{783}

3. Article 87, Missing Movement

Article 87 currently covers only the offense of missing movement.\textsuperscript{784} The 2016 amendments added the offense of jumping from a vessel into the water, an offense currently addressed in Article 134.\textsuperscript{785}

4. Article 87b, Offenses against Correctional Custody and Restriction

Article 87b is a new punitive article, which proscribes several offenses involving correctional custody or restriction.\textsuperscript{786} The provision is drawn from the offense of breaking restriction\textsuperscript{787} and offenses against correctional custody,\textsuperscript{788} which are currently treated as Article 134 offenses.

5. Article 95, Offenses by Sentinel or Lookout

Currently Article 95 covers the offenses of resistance, flight, breach of arrest, and escape.\textsuperscript{789} As noted, \textit{infra},\textsuperscript{790} that article will be re-designated as Article 87a.\textsuperscript{791} In its place, Congress migrated the offenses committed by a sentinel or lookout, currently covered by Article 134.\textsuperscript{792}

\begin{itemize}
  \item \textsuperscript{780} See \textit{infra} Part XIII.E.
  \item \textsuperscript{781} See Military Justice Act § 5401(1), 130 Stat. 2000, 2938 (re-designating articles 83 and 84 as 104a and 104b, respectively).
  \item \textsuperscript{783} MCM, \textit{supra} note 19, pt. IV, \textit{¶} 100.
  \item \textsuperscript{785} MCM, \textit{supra} note 19, pt. IV, \textit{¶} 91.
  \item \textsuperscript{786} Military Justice Act § 5407, 130 Stat. 2000, 2941 (codified as UCMJ art. 87b (2016), 10 U.S.C. § 887b (Supp. IV 2016)).
  \item \textsuperscript{787} MCM, \textit{supra} note 19, pt. IV, \textit{¶} 102.
  \item \textsuperscript{788} Id. pt. IV, \textit{¶} 70.
  \item \textsuperscript{790} See \textit{infra} Part XII.E.
  \item \textsuperscript{791} Military Justice Act § 5401(2), 130 Stat. 2000, 2938 (codified as UCMJ art. 87a (2016), 10 U.S.C. § 887a (Supp. IV 2016)).
\end{itemize}
6. Article 95a, Disrespect toward Sentinel or Lookout

Article 95a, which proscribes the offense of disrespect toward a sentinel or lookout, is a newly enumerated punitive article.\textsuperscript{793} It is currently covered by Article 134 and was migrated from Part IV of the Manual for Courts-Martial.\textsuperscript{794}

7. Article 96, Release of Prisoner without Authority; Drinking with Prisoner

Congress maintained the offense of releasing a prisoner without authority in Article 96,\textsuperscript{795} but it transferred into that article the offense of drinking with a prisoner as Article 96(b).\textsuperscript{796} That offense is currently covered by Article 134.\textsuperscript{797} The article was retitled to reflect the addition of that offense.\textsuperscript{798}

8. Article 104, Public Records Offenses

Currently, Article 104 covers the offense of aiding the enemy.\textsuperscript{799} Congress relocated that offense into Article 103b.\textsuperscript{800} In its place, Congress also migrated the offense of altering, concealing, removing, mutilating, obliterating, or destroying a public record, into Article 104.\textsuperscript{801} That offense is currently covered by Article 134 in the Manual for Courts-Martial.\textsuperscript{802}

9. Article 105a, False or Unauthorized Pass Offenses

The offense of false or unauthorized pass is currently addressed under

\textsuperscript{794} MCM, supra note 19, pt. IV, ¶ 104(b)(1).
\textsuperscript{796} Military Justice Act § 5413, 130 Stat. 2000, 2944 (codified as UCMJ art. 96(b) (2016), 10 U.S.C. § 896(b) (Supp. IV 2016)).
\textsuperscript{797} MCM, supra note 19, pt. IV, ¶ 74.
\textsuperscript{798} See Military Justice Act § 5413, 130 Stat. 2000, 2944 (codified as UCMJ art. 96 (2016), 10 U.S.C. § 896 (Supp. IV 2016)) (renaming the provision as "Release of Prisoner Without Authority; Drinking with Prisoner").
\textsuperscript{800} Military Justice Act § 5401(S), 130 Stat. 2000, 2938 (codified as UCMJ art. 103 (2016), 10 U.S.C. § 903b (Supp. IV 2016)).
\textsuperscript{802} MCM, supra note 19, pt. IV, ¶ 99.
Article 134. Congress moved that offense into a new punitive article, Article 105a.

10. Article 106, Impersonation of Officer, Noncommissioned or Petty Officer, or Agent or Official

Article 106 currently covers the offense of spies. As noted, infra, the 2016 amendments renumbered that offense as Article 103. In its place, Congress transferred the offense of impersonating an officer, noncommissioned or petty officer, or agent or official—an offense currently covered in Article 134. In its Report, the Military Justice Review Group recommended that transferring the offense of impersonating an officer to its own punitive article, Article 106, would align it with other similar offenses under the UCMJ, i.e., wearing unauthorized insignia, which will appear as new Article 106a. That Report also states that the term “officer” in new Article 106a(1) will have the same meaning given to it in 18 U.S.C. § 101(b)(1).

11. Article 106a, Wearing Unauthorized Insignia, Decoration, Badge, Ribbon, Device, or Lapel Button

Article 106a currently covers the offense of espionage. Congress moved that offense to Article 103a as noted, infra. In its place, Congress transferred the offense of wearing an unauthorized insignia, decoration, badge, ribbon, device, or lapel button, which is currently

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803. Id. pt. IV, ¶ 77.
806. See infra Part XIII.E.
809. MCM, supra note 19, pt. IV, ¶ 86.
810. MILITARY JUSTICE REVIEW GRP., infra note 23, at 790.
811. Id. at 792.
814. See infra Part XIIIE.
treated as an Article 134 offense.\textsuperscript{816}

12. Article 107, False Official Statements; False Swearing

The current version of Article 107 covers the offense of false statements.\textsuperscript{817} The 2016 amendments added the offense of false swearing to the article.\textsuperscript{818} That offense is currently covered under Article 134.\textsuperscript{819}

13. Article 107a, Parole Violation

Congress transferred the current offense of parole violations to new Article 107a.\textsuperscript{820} That offense is currently covered under Article 134.\textsuperscript{821}

14. Article 109a, Mail Matter; Wrongful Taking, Opening, etc.

The current offense of taking, opening, secreting, destroying, or stealing mail is currently covered under Article 134.\textsuperscript{822} The 2016 amendments transferred that offense to new Article 109a.\textsuperscript{823}

15. Article 111, Leaving Scene of Vehicle Accident

Currently, Article 111 addresses the offense of drunken or reckless operation of a vehicle or aircraft, or vessel.\textsuperscript{824} As noted, \textit{infra},\textsuperscript{825} Article 111 was renumbered as Article 113.\textsuperscript{826} The amendments transferred the offense of leaving the scene of a vehicle accident—currently covered under Article 134\textsuperscript{827}—into a new Article 111.\textsuperscript{828}

\textsuperscript{816} MCM, supra note 19, pt. IV, § 113.
\textsuperscript{819} MCM, supra note 19, pt. IV, § 79.
\textsuperscript{821} MCM, supra note 19, pt. IV, § 97a.
\textsuperscript{822} Id. pt. IV, § 94.
\textsuperscript{825} See infra Part XIII.E.
\textsuperscript{826} Military Justice Act § 5401(9), 130 Stat. 2000, 2939 (codified as UCMJ art. 113 (2016), 10 U.S.C. § 913 (Supp. IV. 2016)).
\textsuperscript{827} MCM, supra note 19, pt. IV, § 82.
16. Article 112, Drunkenness and Other Incapacitation Offenses

The familiar offense of being drunk on duty is covered in Article 112. The 2016 amendments transferred the Article 134 offenses of incapacitation for the performance of duties and drunk prisoner into the article, and retitled it.

17. Article 114, Endangerment Offenses

The current Article 114 covers only the offense of dueling. The amended article contains three additional offenses currently addressed by Article 134: reckless endangerment, discharge of a firearm/endangering human life, and carrying a concealed weapon.

18. Article 115, Communicating Threats

Currently, Article 115 proscribes malingering. Congress moved that offense to Article 83. In its place, Congress substituted a new Article 115, which will contain two Article 134 offenses—the offense of communicating a threat and the offense of communicating a false threat concerning use of an explosive, weapon of mass destruction, biological or chemical agent, or other hazardous material.

19. Article 119b, Child Endangerment

Article 119b is a new punitive article. It proscribes the offense of child endangerment, an offense currently covered under Article 134.

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830. MCM, supra note 19, pt. IV, ¶ 76.
831. Id. pt. IV, ¶ 75.
835. MCM, supra note 19, pt. IV, ¶ 81.
836. Id. pt. IV, ¶ 112.
839. MCM, supra note 19, pt. IV, ¶ 110.
840. Id. pt. IV, ¶ 109.
842. MCM, supra note 19, pt. IV, ¶ 68a.
its report, the Military Justice Review Group noted that moving the offense to Article 119b will align it with Article 119a, which covers the offense of death or injury of an unborn child.843

20. Article 120a, Mails, Deposit of Obscene Matter

Article 120a currently addresses the offense of stalking.844 That offense is being relocated to Article 130.845 In its place, Congress included the offense of depositing or causing to be deposited obscene materials in the mails.846 That offense is currently covered in Article 134.847

21. Article 121b, False Pretenses to Obtain Services

Congress created new punitive article, Article 121b,848 for the offense of using false pretenses to obtain services, an offense currently covered by Article 134.849

22. Article 122a, Receiving Stolen Property

Article 122a is a new punitive article, which covers the offense of receiving stolen property.850 That offense is currently covered in Article 134.851

23. Article 124a, Bribery

Congress promulgated a new punitive article, Article 124a, for the offense of bribery,852 which is currently covered by Article 134.853

843. MILITARY JUSTICE REVIEW GRP., supra note 23, at 868.
847. MCM, supra note 19, pt. IV, ¶ 94.
849. MCM, supra note 19, pt. IV, ¶ 78.
851. MCM, supra note 19, pt. IV, ¶ 106.
853. MCM, supra note 19, pt. IV, ¶ 66.
24. Article 124b, Graft

The offense of graft is currently covered by Article 134 in the Manual for Courts-Martial. The 2016 amendments moved that offense to new Article 124b.

25. Article 125, Kidnapping

Article 125 currently covers the offenses of forcible sodomy and bestiality. In its Report, the Military Justice Review Group recommended that the offense of forcible sodomy be moved to Article 120, which covers the offense of rape and other sexual assaults. The Group also recommended that the offense of bestiality be covered as a new offense under Article 134. In their place, Congress substituted the offense of kidnapping, an offense which is currently covered by Article 134.

26. Article 126, Arson; Burning Property with Intent to Defraud

Congress amended Article 126, which sets out the offense of arson, by including the offense of burning property with the intent to defraud, an offense currently covered under Article 134. The amendment also re-titled the offense to reflect the addition of that offense in Article 126.

27. Article 128, Assault

The 2016 amendments to Article 128, which covers the offense of assault, resulted in two changes. First, Congress adopted the
aggravated assault provision in 18 U.S.C. § 113(a)(3), which focuses on the intent of the accused, rather than on the "likelihood of harm:" the standard currently used in Article 128.865 The change also added a third tier of harm to Article 128(b), "substantial bodily harm," removed the specific intent requirement, and substituted the mens rea requirement in 18 U.S.C. § 113 that the accused intended to cause bodily harm.866 Second, Congress migrated the general offense of assault to commit murder, voluntary manslaughter, rape, robbery, sexual assault, arson, burglary, or housebreaking, currently covered by Article 134,867 into Article 128.868

28. Article 129, Burglary; Unlawful Entry

Article 129 currently addresses the offenses of burglary.869 The 2016 amendments removed the common law elements that the entering be (1) at a private dwelling; and (2) during the nighttime.870 In addition, the amendments added the unlawful entry offense in Article 134.871

29. Article 131a, Subornation of Perjury

Congress moved the offense of subornation of perjury, which is currently covered under Article 134,872 to new Article 131a.873

30. Article 131b, Obstructing Justice

The offense of obstructing justice is currently covered under Article 134.874 Congress moved that offense to new punitive Article 131b.875

865. MILITARY JUSTICE REVIEW GRP., supra note 23, at 938.
866. Id.
867. MCM, supra note 19, pt. IV, ¶ 64.
868. MILITARY JUSTICE REVIEW GRP., supra note 23, at 938.
871. MCM, supra note 19, pt. IV, ¶ 111.
872. Id. pt. IV, ¶ 98.
874. MCM, supra note 19, pt. IV, ¶ 96.
31. Article 131c, Misprision of Serious Offense

New punitive Article 131c addresses the offense of misprision of a serious offense, which is currently treated as an Article 134 offense. In recommending this amendment, the Military Justice Review Group noted that addressing the offense in Article 131c would align it with similar subject matter offenses related to obstruction of justice.

32. Article 131d, Wrongful Refusal to Testify

The offense of wrongful refusal to testify is currently considered an Article 134 offense. Congress moved that offense to new Article 131d.

33. Article 131e, Prevention of Authorized Seizure of Property

New punitive Article 131e addresses the offense of prevention of the authorized seizure of property. That offense is currently covered under Article 134.

34. Article 131g, Wrongful Interference with Adverse Administrative Proceeding

The current offense of wrongful interference with an adverse administrative proceeding is currently addressed in Article 134. Congress migrated that offense into new punitive Article 131g.

D. Other Amendments to the Punitive Articles

1. Article 79, Conviction of Lesser-Included Offense

Congress amended Article 79, which addresses lesser-included offenses,
to define a lesser included offense as one that is necessarily included in the charged offense, and any lesser offense that is designated by regulation as being such by the President.\textsuperscript{885} New Article 79(c) provides that any designation of a lesser-included offense in a Presidential regulation must be reasonably included in the greater offense.\textsuperscript{886} This list will certainly improve military justice by, \textit{inter alia}, permitting commanders to refer charges to trial that capture the essence of the accused's misconduct without charging alternative offenses in the hopes that the court-martial will find the accused guilty of one of those offenses.\textsuperscript{887}

2. Article 83, Malingering

The offense of malingering is currently covered in Article 115.\textsuperscript{888} Congress re-designated that offense as Article 83 and made a technical change by substituting the words "for the purpose of avoiding," with the words, "with the intent to avoid."\textsuperscript{889} The Military Justice Review Group explained that the change was intended to better address the issue of \textit{mens rea}.\textsuperscript{890}

3. Article 89, Disrespect toward Commissioned Officer; Assault of Superior Commissioned Officer

Currently, Article 89 addresses only the offense of disrespect of a commissioned officer.\textsuperscript{891} Congress added the offense of assault on a commissioned officer, transferring that offense from Article 90.\textsuperscript{892} The Military Justice Review Group noted that the change would align the closely related offenses into one punitive article.\textsuperscript{893}

\textsuperscript{886} UCMJ art. 79(c) (2016), 10 U.S.C. § 883 (Supp. IV 2016).
\textsuperscript{887} MILITARY JUSTICE REVIEW GRP., supra note 23, at 680.
\textsuperscript{889} Compare id. ("Any person subject to this chapter who, for the purpose of avoiding work, duty, or service...."), with Military Justice Act § 5402, 130 Stat. 2000, 2939 (codified as UCMJ art. 883 (2016), 10 U.S.C. § 883 (Supp. IV 2016)) ("Any person subject to this chapter who, with the intent to avoid work, duty, or service....").
\textsuperscript{890} MILITARY JUSTICE REVIEW GRP., supra note 23, at 852.
\textsuperscript{893} MILITARY JUSTICE REVIEW GRP., supra note 23, at 721.
4. Article 90, Disobeying Superior Commissioned Officer

Article 90 currently contains two offenses: assaulting a superior commissioned officer and disobeying a superior commissioned officer.\textsuperscript{894} The 2016 amendments transfer the assault component from Article 90 to Article 89, and retitle the Article.\textsuperscript{895}

5. Article 110, Improper Hazarding of Vessel or Aircraft

Article 110 makes it an offense to improperly hazard a vessel.\textsuperscript{896} The 2016 amendments added the new offense of improperly hazarding an aircraft to that article.\textsuperscript{897} In proposing the addition of that offense to Article 110, the Military Justice Review Group noted that: “No punitive article currently addresses the potential for catastrophic loss of life and property, as well as harm to the strategic interests of the United States, caused by the improper hazarding of an aircraft.”\textsuperscript{898}

6. Article 113, Drunken or Reckless Operation of Vehicle, Aircraft, or Vessel

Currently, Article 111 prohibits the drunken or reckless operation of a vehicle or aircraft.\textsuperscript{899} The current version of that article specifies a blood alcohol content (BAC) limit of .10.\textsuperscript{900} The 2016 amendments renumbered Article 111 as 113,\textsuperscript{901} and lowered that BAC limit to .08,\textsuperscript{902} to make the military provision consistent with state and federal practice.\textsuperscript{903}

7. Article 118, Murder

Congress made only a technical amendment to Article 118, which

\textsuperscript{898} MILITARY JUSTICE REVIEW GRP., supra note 23, at 818.
\textsuperscript{901} Military Justice Act § 5401(9), 130 Stat. 2000, 2939.
\textsuperscript{903} MILITARY JUSTICE REVIEW GRP., supra note 23, at 822.
covers the offense of murder. The words “forcible sodomy” were deleted from Article 118(4), to make it clear that the offense of forcible sodomy is covered under Article 120.

8. Article 120, Rape and Sexual Assault Offenses

Congress amended Article 120, which addresses the offense of rape and sexual assault offenses, in several regards. First, the amendment changed the definition of “sexual act” in Article 120(g)(1) to conform to the definition of that term in the comparable federal criminal code provision, 18 U.S.C. § 2246(2). Second, Congress removed the element of committing a sexual assault on another person in Article 120(g)(8), by wrongfully using one’s position, rank, or authority to coerce the acquiescence of the victim. That offense is located in new Article 93a. Third, the amendments deleted the definition of “bodily harm” in Article 120(g)(3) and changed the definition of “sexual contact” in Article 120(g)(2).

9. Article 120b, Rape and Sexual Assault of a Child

Article 120b addresses the offense of rape and sexual assault of a child. Congress amended that article to conform the definition of “sexual act” to 18 U.S.C. § 2246(2).

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905. MILITARY JUSTICE REVIEW GRP., supra note 23, at 862; see also id. at 871 (citing JUDICIAL PROCEEDINGS PANEL, INITIAL REPORT p. 14–15 (2015)) (discussing the Panel’s “extensive examination of Article 120”).
907. MILITARY JUSTICE REVIEW GRP., supra note 23, at 873.
911. See Military Justice Act § 5430(b)(2), 130 Stat. 2000, 2950 (codified as UCMJ art. 120, 10 U.S.C. § 920 (Supp. IV 2016)) (providing a more specific list of potential sexual contact areas).
913. MILITARY JUSTICE REVIEW GRP., supra note 23, at 902.
10. Article 122, Robbery

The 2016 amendments changed the offense of robbery in Article 122, by removing the requirement that the government prove that the taking was with the intent to deprive a person of their property permanently.\textsuperscript{914} The change conforms the punitive article to a similar offense found in 18 U.S.C. § 2111\textsuperscript{915} and was made because the gravamen of the offense is the forcible taking of someone's property in their presence.\textsuperscript{916}

11. Article 130, Stalking

The offense of stalking, which is currently covered in Article 120a,\textsuperscript{917} was moved to Article 130.\textsuperscript{918} In addition, Congress amended the article to include cyberstalking and threats to intimate partners.\textsuperscript{919}

12. Article 134, General Article

As noted, \textit{supra}, Article 134 prohibits a wide range of misconduct not otherwise expressly addressed in the enumerated punitive articles.\textsuperscript{920} Under this article, an accused may be prosecuted for committing an offense that is (1) "prejudicial to the good order and discipline of the armed forces," (2) "bring[s] discredit upon the armed forces," or (3) violates a non-capital federal civilian offense.\textsuperscript{921} The 2016 amendment to Article 134 will cover all non-capital federal crimes, regardless of where they were committed.\textsuperscript{922} The Military Justice Review Group noted that this amendment will make military practice uniform throughout the world and better align Article 134 with the Military Extraterritorial Jurisdiction Act.\textsuperscript{923}

\textsuperscript{915} MILITARY JUSTICE REVIEW GRP., \textit{supra} note 23, at 901.
\textsuperscript{916} \textit{Id.} at 902.
\textsuperscript{918} Military Justice Act § 5401(11), 130 Stat. 2000, 2939.
\textsuperscript{920} See \textit{supra} Part XIII.C.
\textsuperscript{921} MILITARY JUSTICE REVIEW GRP., \textit{supra} note 23, at 985.
\textsuperscript{923} 18 U.S.C. § 3261. MILITARY JUSTICE REVIEW GRP., \textit{supra} note 23, at 989. See generally 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, \textit{supra} note 35, § 4–7(D) at 224–25 (discussing the
E. Renumbered Offenses

In amending the punitive articles, Congress renumbered a significant number of offenses. It is not clear from the Report by the Military Justice Review Group that the changed numbering was of critical importance to improve the military justice system. In fact, a researcher looking for cases or commentary on the offense of spies in the UCMJ, currently covered in Article 106, for example, will have difficulty finding those sources by using the article number. Instead the researcher will need to use the term, "spies" and even then will need to focus the search to the UCMJ or military justice.

The following current articles will be renumbered:

- Article 83, Fraudulent Enlistment, Appointment, or Separation, will be Article 104a.\(^{924}\)
- Article 84, Unlawful Enlistment, Appointment or Separation, will be Article 104b.\(^{925}\)
- Article 95, Resistance, Flight, Breach of Arrest, and Escape, will be Article 87a.\(^{926}\)
- Article 98, Noncompliance with Procedural Rules, will be Article 131f.\(^{927}\)
- Article 103, Captured or Abandoned Property, will be Article 108a.\(^{928}\)
- Article 104, Aiding the Enemy, will be Article 103b.\(^{929}\)
- Article 105, Misconduct as Prisoner, will be Article 98.\(^{930}\)
- Article 106, Spies, will be Article 103.\(^{931}\)
- Article 106a, Espionage, will be Article 103a.\(^{932}\)

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\(^{925}\) Id.
• Article 111, Drunken or Reckless Operation of a Vehicle or Aircraft, will be Article 113. 933
• Article 113, Misbehavior of Sentinel, will be Article 95. 934
• Article 120a, Stalking, will be Article 130. 935
• Article 123, Forgery, will be Article 105. 936
• Article 124, Maiming, will be Article 128a. 937
• Article 130, Housebreaking, will be Article 129a. 938
• Article 132, Frauds Against the United States, will be Article 124. 939

XIV. PROVIDING FOR TRAINING AND TRANSPARENCY IN THE MILITARY JUSTICE SYSTEM

A. In General

Subchapter XI of the UCMJ covers a number of miscellaneous provisions. 940 Those articles cover topics such as courts of inquiry, 941 the requirement that the UCMJ be explained to enlisted service members, 942 and filing complaints against a commanding officer. 943 Subchapter XII covers the organization of the Court of Appeals for the Armed Forces 944 and the appointment of a Code Committee to annually review the military justice system. 945 Congress amended several of those

932. Id.
938. Military Justice Act § 5401(10), 130 Stat. 2000, 2939. However, section 5442 states that Article 129 and Article 129a (the offense of housebreaking), as re-designated by section 5401(10), are combined in Article 129 to cover the offenses of burglary and unlawful entry. Thus, under the amendments there will be no offense of housebreaking.
provisions. This section addresses the substantive changes made to those articles.

B. Courts of Inquiry

Article 135 currently addresses the procedures and rights of parties before courts of inquiry. The 2016 amendments to that article extend the protections set out in that article to employees of the Department of Homeland Security—the department in which the Coast Guard operates.946 The intent behind the amendment is to ensure consistent application of that article to all military services.947

C. Articles to Be Explained

Under Article 137, all enlisted personnel in the armed forces are to be trained on provisions in the UCMJ.948 That training must occur no later than fourteen days after they enter active duty.949

The 2016 amendments made two key changes to that article.950 First, the amended article will require that such training be given to all officers; for officers with the authority to impose non-judicial punishment or to convene a court, the training must be specialized.951 The Military Justice Review Group stated that the change took into account the recommendation of the Response System to Adult Sexual Assault Crimes Panel: that all officers preparing to assume senior command positions received dedicated legal training, which will fully prepare them to exercise their authority under the UCMJ.952 This is a very important change, which reflects the need for the military justice system to be proactive in focusing on the responsibility of leaders, at all levels, to understand the legal requirements of the UCMJ and to stem the tide of sexual assaults in

946. MILITARY JUSTICE REVIEW GRP., supra note 23, at 993.
947. Id. at 994.
950. See MILITARY JUSTICE REVIEW GRP., supra note 23, at 993 (proposing to amend Article 135 to encompass employees of the Department of Homeland Security, which includes employees of the Coast Guard).
952. MILITARY JUSTICE REVIEW GRP., supra note 23, at 1000 (citing REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 23 (June 2014) (Recommendation 31)).
the military.

Second, the article will require that the UCMJ and regulations prescribed by the President under the UCMJ, i.e., the Manual for Courts-Martial, be available in electronic formats that are updated periodically and made available on the Internet. This too is a welcomed change for anyone researching military justice issues or attempting to determine the most recent amendments to both the UCMJ and the Manual for Courts-Martial.

D. Case Management and Data Collection

A new article, Article 140a, addresses the critical subject of determining trends and issues across all of the services. Currently, there is no UCMJ requirement that the services maintain data and records, outside the information required under Article 146. Each service maintains separate data collections for military justice cases. The new article is based on an observation by the Response Systems to Adult Sexual Assault Crimes Panel that there is a lack of uniform, offense-specific sentencing data from military courts, which makes meaningful comparison and analysis of military and civilian courts “difficult, if not impossible.”

In addition, the amendments will require the government to facilitate the public’s access to all court-martial filings and records. That means that court-martial filings will be available to the public in a manner similar to what exists in the PACER system, currently used in the federal civilian court system.

E. Military Justice Review Panel

Currently, Article 146 addresses the “Code Committee,” a committee composed of the judges of the United States Court of Appeals for the


956. MILITARY JUSTICE REVIEW GRP., supra note 23, at 1011–12.

957. Id. at 1012 (quoting Report of the Response Systems to Adult Sexual Assault Crimes Panel 136–37 (June 2014)).

Armed Forces; the Judge Advocate General of the Army, Navy, and Air Force; the Chief Counsel to the Coast Guard; the Staff Judge Advocate of the Marine Corps; and two civilian members appointed by the Secretary of Defense, for a term of three years.\textsuperscript{959} That Committee is charged with submitting annual reports on various issues within the military justice system.\textsuperscript{960}

The 2016 amendments moved most of the current Article 146 to new Article 146a, with the exception that the Code Committee will no longer exist.\textsuperscript{961} In its place, Congress amended Article 146 to provide for the formation of a "Military Justice Review Panel," which will conduct an in-depth review of the military justice system every eight years (after its initial review in 2020).\textsuperscript{962} This is a critical step toward ensuring that a designated body, apart from Congress, will conduct thorough reviews of the system and offer proposed changes to the Department of Defense.

F. Annual Reports

Congress added a final article to the UCMJ Article 146a.\textsuperscript{963} That new article, which was formerly Article 146 before the 2016 amendments, requires the Court of Appeals for the Armed Forces to present an annual report based on information provided by the services on specified issues, such as the competency of judge advocates to serve in the military justice system.\textsuperscript{964} These annual reports will provide those responsible for managing the military justice system with annual snapshots of how the system is working and where changes or improvements should be made.

XV. EFFECTIVE DATE

Congress specified that the amendments to the UCMJ must take effect on the date set by the President, which must be no later than "the first day of the first calendar month that begins two years after the date of the

\textsuperscript{960} See id. (requiring a committee to build annual reports containing information on pending cases, the appellate review process, and other various military justice topics).
\textsuperscript{964} UCMJ art. 146a (2016), 10 U.S.C. § 946a (Supp. IV 2016).
enactment of this Act."\textsuperscript{965} On July 11, 2017, the Department of Defense published, for public comment, its proposed implementing changes to the Manual for Courts-Martial.\textsuperscript{966} The proposed Executive Order contains two annexes. Annex 1 contains proposed amendments to selected Rules for Courts-Martial and the Military Rules of Evidence.\textsuperscript{967} Those proposed amendments would go into effect on the date of the Executive Order.\textsuperscript{968} Annex 2 contains the proposed amendments to the remainder of the Manual for Courts-Martial, which would be effective on January 1, 2019, along with all of the amendments to the UCMJ.\textsuperscript{969} That should provide ample time to promulgate implementing regulations and directives, and to educate those involved in military justice about the substantial and important changes.

XVI. CONCLUDING OBSERVATIONS

A. The Big Picture

The Military Justice Act of 2016 made significant statutory changes to the American military justice system. Not since 1950 has the military justice system received a stem to stern analysis of, and changes to, the UCMJ.\textsuperscript{970} As the Act takes effect and is implemented, courts and commentators will certainly measure the depth and breadth of the changes. In his remarks in the Conference Report on the National Defense Authorization Act, Senator John McCain summarized the changes regarding military justice. He said that the Act:

- Strengthens the structure of the military justice system.
- Enhances fairness and efficiency in pretrial and trial procedures.
- Reforms sentencing, guilty pleas, and plea agreements.
- Streamlines the post-trial process.
- Modernizes military appellate practice.
- Increases transparency and independent review of the military

\textsuperscript{965} Military Justice Act § 5542(a), 130 Stat. 2000, 2967.
\textsuperscript{968} Id.
\textsuperscript{969} Id.
justice system.
- Improves the functionality of punitive articles and proscribes additional acts.
- Incorporates best practices from federal criminal proceedings where applicable.971

His remarks provide a starting point for analyzing the 2016 legislative changes. But rather than commenting on each of his points, the following sections focus on several key areas of reform, or lack of reform, in the Military Justice Act.

B. Will the Reforms Make the Military Justice System More Efficient?

A point made throughout the Report of the Military Justice Group, and noted in the discussion in this article, is that the reforms were intended to simplify and streamline the military justice system.972 In reviewing the amended provisions in the UCMJ there are certainly examples of features that will streamline the process. For example, the Staff Judge Advocate’s post-trial recommendation has been completely jettisoned.973 Permitting military judges and magistrates to dispose of important issues pretrial, before charges have been referred to a court-martial, will undoubtedly permit early resolution of legal issues. On the other hand, the changes to the composition of courts-martial, which will require a set number of members in general and special courts-martial, may actually slow things down.974 As noted at the discussion at Part VII, supra, if the convening authority appoints exactly those set numbers of members to a court-martial, there could be delays in finding replacement members if members are challenged or excused.975 The answer to that particular problem will

972. See, e.g., MILITARY JUSTICE REVIEW GRP., supra note 23, at 7 (stating that one of the major legislative proposals of the Act is to streamline the post-trial process).
973. See id. at 562 (recommending the elimination of “the requirement for a Staff Judge Advocate Recommendation”).
974. See id. at 220 (proposing a “standard panel size in all courts-martial: eight members in a general court-martial (subject to the requirements of Article 25a in capital cases), and four members in a special court-martial”).
need to be addressed in the amendments to the Manual for Courts-Martial. One possible solution is for the convening authority to appoint the requisite number—eight members in a general court-martial and four in a special court-martial—and then appoint alternate members, with instructions that if any of those members are excused, the alternates will be empaneled in the order in which they appear on the convening order.976

Another example of where the reformed system may actually be slower is in the appellate process where a convicted service member will be able to appeal a conviction not otherwise automatically reviewable by the Court of Criminal Appeals.977 In those cases, the accused will receive a notice from the Office of the Judge Advocate General and the appellate defense counsel of the service member's appellate rights.978 Sending the notices and waiting for responses from the service member may actually add time to the appellate processing times. Because the 2016 amendments will permit the government to appeal a court-martial sentence, in any given case, an appellate court may review not only an appeal by the accused, but also an appeal by the government, and perhaps a petition for extraordinary relief from one or more victims in the case.979

C. Increasing the Role and Power of the Military Judge

A number of the amendments in the Military Justice Act send a clear signal that the military judge will have a more prominent role in the American military justice system.980 Two examples demonstrate this point. First, military judges will have the authority to hear and dispose of certain matters pretrial: a power that is currently triggered only with referral of charges.981 Perhaps just as important is the fact that the military judge may be able to delegate his or her authority to a military

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978. Cf. Randolph v. HV, 76 M.J. 27, 31 (C.A.A.F. 2017) (holding the court lacked jurisdiction to consider the accused's petition for review of a decision by the Court of Criminal Appeals, which had granted extraordinary writ from the victim); EV v. Martinez, 75 M.J. 331, 334 (C.A.A.F. 2016) (finding the court lacked jurisdiction to consider the merits of the victim's petition for mandamus regarding a military judge's ruling on disclosure of her mental health records).
979. Cf. Randolph, 76 M.J. at 27 (indicating a lack of jurisdiction); Martinez 75 M.J. at 331 (noting the inability of the court to consider the merits of the victim's petition for mandamus).
981. MILITARY JUSTICE REVIEW GRP., infra note 23, at 303.
magistrate to handle those pretrial matters, and if necessary, act as a judicial reviewer of the military magistrate’s decision.\textsuperscript{982} In effect, that new structure will provide military judges with subordinates who will undoubtedly be under the direct supervision of military judges.\textsuperscript{983} While this will be new to military justice, it has been the norm for decades in federal courts.\textsuperscript{984} However, there are potential problems with the ability of judges to delegate their powers to military magistrates. It will be important for the services to ensure that the military magistrates acting on pretrial matters have the training, skills, and judicial temperament to dispose of important issues that may arise pretrial, and not give the appearance that the level of competence has been in any way compromised.

A second example of the increased role of military judges is the new role they will have in entering judgments in each court-martial: a procedure used in federal criminal trials.\textsuperscript{985} Currently, the convening authority has the final word on the post-trial disposition of a court-martial conviction when he or she issues the promulgating order in the case.\textsuperscript{986} In theory, a military judge could order a hearing after the convening authority issues that order, but in the normal flow of events, the promulgating order ends the case at the local level.\textsuperscript{987} At that point any judicial review of the case will be reserved for the appellate courts. Under the procedure, the convening authority’s post-trial action of the case will be essentially advisory in nature and will be forwarded to the military judge who, in theory, would have the option of rejecting the convening authority’s action.\textsuperscript{988} That would create a potential conflict concerning who would have the final say about the post-trial disposition of the case.

D. Maintaining the Critical Role of Commanders

As noted in several places in this article, there have been repeated calls for removing the commander from the military justice system.\textsuperscript{989} It is

\textsuperscript{982} Id. at 303.
\textsuperscript{983} Id. at 307–08.
\textsuperscript{984} Id. at 306–07.
\textsuperscript{985} Id. at 560.
\textsuperscript{988} MILITARY JUSTICE REVIEW GRP., supra note 23, at 563.
critical to note that, despite those occasionally heated proposals, the 2016 amendments maintain the traditional role of the commander.\textsuperscript{990} The commander, \textit{inter alia}, still prefers charges, refers charges to a court-martial, selects the court members, plea bargains with the accused, and reviews the case post-trial.\textsuperscript{991} The commander's authority to take final action on the case has been reduced, as discussed supra.\textsuperscript{992} In the greater scheme of things, however, the commanders remain an essential element in the system, as they should.\textsuperscript{993}

E. Reorganizing and Expanding the Punitive Articles

One of the most significant changes in the 2016 amendments was the complete reorganization of the punitive articles. First, Congress wisely added new punitive articles to cover misconduct that the original drafters of the UCMJ could not have imagined. Second, Congress "migrated" a significant number of offenses currently covered under Article 134 into the enumerated articles.\textsuperscript{994} The reason for doing so rested in large part on the Military Justice Review Group's view that the effects of those offenses are so well-known to be prejudicial to good order and discipline, or service discrediting, that there was no reason to continue to treat them as Article 134 offenses. That approach is commendable. If there is one punitive article that has drawn heavy criticism over the years, it has been Article 134.\textsuperscript{995} Although the Supreme Court has held that it is


\textsuperscript{992} See supra Part IX.

\textsuperscript{993} See generally David A. Schlueter, \textit{American Military Justice: Responding to the Siren Songs of Reform}, 73 A.F. L. REV. 193 (2015) (analyzing the proposals and reforms to the military justice system).

\textsuperscript{994} See supra Part XIII.

\textsuperscript{995} See, e.g., Wing Commander D. B. Nichols, \textit{The Devil's Article}, 22 MIL. L. REV. 111, 112 (1963) (quoting 5 J. ARMY HISTORICAL RESEARCH SOC'Y 202 (1926)) (noting Lord Harding, in his evidence to the Royal Commission on Military Punishments in 1836, stated that Article 134 was commonly known in the British Army as the "Devil's Article," and indicating that for centuries, the court-martial has been the "censor morum," making it possibly incompatible with the appellate function of court-martial appeal courts and with the advent of professionals that the Article should
constitutional, commentators have called for its removal—and rightfully so. While Article 134 can serve as a helpful catch-all punitive article, there is no longer any compelling reason to use it in a broad fashion. The 2016 amendments demonstrate that any offenses currently covered by both Articles 133 and 134, can be spelled out in enumerated punitive articles.

F. Still a Separate System?

Despite the large number of changes to the military justice system, in the 2016 amendments to the UCMJ, the system remains separate. Separate crimes. Separate procedures. Not necessarily unique, but separate. That point was recognized in *Parker v. Levy*, where the Supreme Court wrote: "Just as military society has been a society apart from civilian society, so '[m]ilitary law...is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.' That truism was not changed in any way by the Military Justice Act of 2016.

G. Reflecting Federal Civilian Practices

Throughout the Military Justice Review Group's report, it is clear that many of the amendments in the Military Justice Act of 2016 are based on procedural models found, for example, in the Federal Rules of Criminal Procedure. Following federal criminal procedure norms is commendable and reflects the approach taken by Congress countless times when amending the UCMJ.
H. Reinforcing Justice and Discipline in the System

Throughout its massive report, the Military Justice Review Group repeatedly emphasized that the amendments were designed to promote justice, and good order and discipline, in that order.\textsuperscript{1002} While it would be more appropriate to list the good order and discipline component first,\textsuperscript{1003} the real test for the 2016 amendments will be how the military leadership implements the amendments, and, further, their implementation of the amendments to the Manual for Courts-Martial, ensuring that both justice and discipline will be preserved and furthered.

I. The Inevitable Tide of Change to Reflect Civilian Models

Although the 2016 amendments resulted in a sea of change in military justice, they reflect the timeless principle that there has always been change in the system. The question is not whether there should be change in the UCMJ. The questions instead are: when will the changes be made, and how significant will they be? The most recent amendments reflect what has traditionally been a purpose of amendments in the past—model military justice procedures on due process norms. That process has been referred to as an evolution of military justice\textsuperscript{1004} and a civilianization of military justice.\textsuperscript{1005} The labels are not important. What is important is that the procedures and protections in the UCMJ keep pace with emerging notions of due process in federal and state criminal justice systems.\textsuperscript{1006}

\begin{itemize}
  \item \textsuperscript{1002} See, e.g., MILITARY JUSTICE REVIEW GRP., supra note 23, at 15 (stating that the purpose of the proposed amendments is “[t]o promote justice, to assist in maintaining good order and discipline in the armed forces . . .”) (quoting MCM, supra note 19, pt. I, ¶ 3 (2016)).
  \item \textsuperscript{1003} See David A. Schlueter, The Military Justice Conundrum: Justice of Discipline?, 215 MIL. L. REV. 1, 24-25 (2013) (arguing that the primary purpose of the military justice system is protecting good order and discipline).
  \item \textsuperscript{1005} See Delmar Karlen, Civilianization of Military Justice: Good or Bad, 60 MIL. L. REV. 113, 114 (1973) (counseling against the blind application of the civilian system to military justice); Edward F. Sherman, Civilianization of Military Justice, 22 ME. L. REV. 3, 35-36 (1970) (describing how the military justice system has been civilianized through the years).
  \item \textsuperscript{1006} See Captain (P) David A. Schlueter, The Court-Martial: An Historical Survey, 87 MIL. L. REV. 129, 165 (1980) (noting changes to the military justice system have kept pace with similar innovations in civilian courts); see also David A. Schlueter, American Military Justice: Responding to the Siren Songs of Reform, 73 A.F. L. REV. 193, 212-14 (2015) (rejecting arguments that the United States
military justice system should emulate military justice systems in other countries).
APPENDIX

THE MILITARY JUSTICE ACT OF 2016

SUMMARY OF CHANGES TO THE UNIFORM CODE OF MILITARY JUSTICE

The following chart provides a summary of the amendments made to the UCMJ by the Military Justice Act of 2016. The chart lists each article of the UCMJ which was amended, the title of the article amended, a summary of the changes made to that article, comments about the changes, and, finally, the cite to the provision in the Military articles.

Articles of the UCMJ, which were not affected by the Military Justice Act are not included in this chart.

The author gratefully acknowledges the assistance of Mr. Luke Harle, Comment Editor, St. Mary's Law Journal, volume 49, for his invaluable assistance on this chart.

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<th>UCMJ Provision</th>
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<tr>
<td>Article 1</td>
<td>Definitions</td>
<td>The term “Air Force Judge Advocate General’s Department” was changed to “Air Force Judge Advocate General’s Corps.” The term “military judge” was changed to conform to amendments in Article 26a (military magistrates) and Article 30a (certain pretrial proceedings).</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5101, 130 Stat. 2000, 2894.</td>
<td>These amendments were non-substantive.</td>
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<tr>
<td>Article 2</td>
<td>Persons Subject to This Chapter</td>
<td>Para. (3) was changed to clarify court-martial jurisdiction over reservists on inactive duty training.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5102, 130 Stat. 2000, 2894–95.</td>
<td>This change addresses the jurisdictional gap recognized in United States v. Wofford, 75 M.J. 777 (A. Ct. Crim. App. 2016) and in other cases.</td>
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<td>Article 6</td>
<td>Judge Advocates and Legal Officers</td>
<td>The article was amended to expand the list of those who are disqualified to act in a case because of their prior roles in the same case.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5103, 130 Stat. 2000, 2895.</td>
<td>These amendments were non-substantive.</td>
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<tr>
<td>Article 6a</td>
<td>Investigation and Disposition of Matters Pertaining to the Fitness of Military Judges</td>
<td>Conforming amendments were made to the article to reference military magistrates and appellate judges.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5104, 130 Stat. 2000, 2895.</td>
<td>These amendments were non-substantive.</td>
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<td>Article 6b</td>
<td>Rights of the Victim of an Offense Under This Chapter</td>
<td>The amendments will authorize military judges to appoint representatives for victims, to clarify victim's rights regarding disposition of charges, and to set out procedures for defense counsel interviews of victims.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5105, 130 Stat. 2000, 2895–96.</td>
<td>The requirement that defense counsel go through the trial counsel to interview victims' was moved to Article 6b from Article 46.</td>
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**SUBCHAPTER II: APPREHENSION AND RESTRAINT**

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<td>Article 10</td>
<td>Restraint of Persons Charged with Offenses</td>
<td>The amendment reflects current practice regarding arrest or confinement of an accused; it also requires that when a person is arrested or placed in confinement that the charges, and when applicable, the preliminary hearing report, are forwarded, a requirement formerly appearing in Article 33.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5121, 130 Stat. 2000, 2896.</td>
<td>The requirement in Article 33 that charges be forwarded within eight days was deleted.</td>
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<td>Article 12</td>
<td>Confinement with Enemy Prisoners Prohibited</td>
<td>The amendment will limit the prohibition of confining military members with foreign nationals to those cases where the foreign nationals are detained under the law of war and are not members of the armed forces.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5122, 130 Stat. 2000, 2896–97.</td>
<td>The amendment addresses the problems of applying Article 12 any time a service member is confined with foreign nationals.</td>
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## SUBCHAPTER III: NON-JUDICIAL PUNISHMENT

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<td>Article 15</td>
<td>Commanding Officer’s Non-judicial Punishment</td>
<td>The non-judicial punishment of being placed on “bread and water or diminished rations” will be eliminated.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5141, 130 Stat. 2000, 2897.</td>
<td>The punishment of being placed on diminished rations was considered a relic of the past.</td>
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### Subchapter IV: Court-Martial Jurisdiction

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<td>Article 16</td>
<td>Courts-Martial Classified</td>
<td>The number of court members on a general court-martial was increased from five to eight and the number of members on a special court-martial, from three to four. Every special court-martial will include a military judge; the article will provide the military justice system with the option for judge-alone special courts-martial, with confinement limited to six months or less.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5161, 130 Stat. 2000, 2897.</td>
<td>The changes to structure and composition of court-martial are among the more significant changes to the UCMJ. The special court-martial with members only has been deleted.</td>
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<td>Article 19</td>
<td>Jurisdiction of Special Courts-Martial</td>
<td>The amendments conform the article to provisions in Article 16 regarding types of court-martial; it authorizes referral to a special court-martial by military judge alone and also authorizes a military judge to designate a military magistrate to preside over the trial, if the parties consent.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5161, 130 Stat. 2000, 2898.</td>
<td>The ability of magistrate judges to conduct special court-martial is a significant change to the UCMJ and is intended to mirror federal practice where United States magistrate judges may try petty offenses.</td>
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<td>Article 20</td>
<td>Jurisdiction of Summary Courts-Martial</td>
<td>The amendment makes it clear that a summary court-martial is not a criminal proceeding and that a finding of guilt is not a criminal conviction.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5164, 130 Stat. 2000, 2898-99.</td>
<td>The amendment codifies case law which has held that a summary court-martial conviction is not a criminal conviction.</td>
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<td>Article 22</td>
<td>Who May Convene General Courts-Martial</td>
<td>The words &quot;in chief&quot; were removed to conform the article to language used for a commander of a naval fleet.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5181, 130 Stat. 2000, 2899.</td>
<td>The amendments were non-substantive.</td>
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<tr>
<td>Article 25</td>
<td>Who May Serve on Courts-Martial</td>
<td>The amendment permits the accused to request trial by a court consisting of only officers or a court comprised of at least one-third enlisted members; an accused may request sentencing by members in a non-capital case; the convening authority must detail enough members to meet the provisions in Article 29; the amendment deletes the prohibition from appointing enlisted members from the accused's unit.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5182, 130 Stat. 2000, 2899-900.</td>
<td>The Military Justice Review Group had recommended that military judges impose the sentence in all cases. The amendment sets sentencing by military judges as a default position; the accused may request sentencing by members.</td>
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<td>Article 25a</td>
<td>Number of Court-Martial Members in Capital Cases</td>
<td>The amendment retains the requirement that in capital cases there must be twelve members. But it provides that if the case has been referred as capital and after the members are impaneled the accused may no longer be sentenced to death, the panel must remain at twelve. If before the members are impaneled it is</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5183, 130 Stat. 2000, 2901.</td>
<td>The amendment recognizes that it is the possibility of a death sentence that dictates the size of the court-martial panel.</td>
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<td>determined that the accused may not be sentenced to death, the panel must consist of eight members.</td>
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<td>Article 26</td>
<td>Military Judge of a General or Special Court-Martial</td>
<td>The amendment conforms the article to current practice of detailing military judges to every general and special court-martial, permitting cross-service detailing of military judges, to require a chief trial judge in each armed force, sets out criteria for service as military judge, and authorizes the President to set uniform regulations regarding minimum tour lengths for military judges.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5184, 130 Stat. 2000, 2901.</td>
<td>One of the significant changes to Article 26 is the provision which will require the President to set uniform standards for minimum tour of duty for military judges.</td>
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<td>Article 26a</td>
<td>Military Magistrates</td>
<td>This is a new provision. It establishes the qualifications for military magistrates and states that in addition to performing duties under Articles 19 and 30a, magistrates may be assigned to perform other non-judicial duties.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5185, 130 Stat. 2000, 2901–02.</td>
<td>This new provision is intended to mirror the office of United States magistrate judges in the federal system.</td>
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<td>Article 27</td>
<td>Detail of Trial and Defense Counsel</td>
<td>The amendment provides that, while the defense counsel and assistant defense counsel in a special court-martial must be qualified under Article 27(b), trial counsel and defense counsel in a special court-martial and an assistant trial counsel</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5186, 130 Stat. 2000, 2902.</td>
<td>The amendments will permit the services to appoint non-JAGs and even non-lawyers to serve as trial counsel, assistant trial counsel, and assistant defense counsel to special</td>
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<td>in a general court-martial may serve if they are determined to be competent by the Judge Advocate General; in capital cases, to the greatest extent possible, one of the defense counsel must be learned in the law of capital cases.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5187, 130 Stat. 2000, 2902-03.</td>
<td>The change, which will authorize the convening authority to appoint alternate members, will parallel federal civilian practice.</td>
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<td>Article 29</td>
<td>Assembly and Impaneling of Members; Detail of New Members and Military Judges</td>
<td>The article has been amended to clarify the function of empanelment and assembly of general and special courts-martial with members; it identifies those cases where members may be excused; it provides for impaneling of twelve members in a capital case, eight members in non-capital general courts-martial and four members in special courts-martial; it provides that a convening authority may detail alternate members; it authorizes a general court-martial with six members if members are excused after assembly; and it addresses those instances where members are added or a judge replaced, after evidence has been presented.</td>
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<td>Article 30</td>
<td>Charges and</td>
<td>The amendment reorganizes the article and sets out the mode for preferring charges and the oath requirement, the required statement by the person who signs the charges, and the duty to notify the accused of the charges and to dispose of the charges in the interest of justice and discipline; the amendment also clarifies the notification and sequence requirements, which must take place as soon as practicable.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5201, 130 Stat. 2000, 2904.</td>
<td>The article notes that in disposing of charges, the commander is to consider the interests of justice and discipline, a theme represented in other provisions.</td>
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<td>Article 30a</td>
<td>Certain</td>
<td>This new article provides statutory authority for military judges and military magistrates to review and decide certain matters prior to referral of charges.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5202, 130 Stat. 2000, 2904-05.</td>
<td>This change was intended to expedite pre-referral disposition of issues by military judges and military magistrates.</td>
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<td>Article 32</td>
<td>Preliminary</td>
<td>The amendments require the preliminary hearing officer to provide an analysis and recommendations on the charges, which will assist the staff judge advocate and the convening authority to decide on the disposition of the charges.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5203, 130 Stat. 2000, 2905-06.</td>
<td>The changes to Article 32 will require the hearing officer to provide a more detailed report to the convening authority.</td>
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<td>Article 33</td>
<td>Disposition</td>
<td>Guidance</td>
<td>This article currently addresses the requirement to promptly forward the charges; that requirement will be moved to Article 10. As amended, the article will require the Secretary of Defense to establish non-binding guidance, which commanders, staff judge advocates, and convening authorities should consider in deciding disposition of the charges in the interest of justice and discipline.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5204, 130 Stat. 2000, 2906-07.</td>
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<td>Article 34</td>
<td>Advice to</td>
<td>Convening</td>
<td>The amendment clarifies the relationship between the staff judge advocate's pretrial advice under this article with the general standard of disposition of charges under Article 33. The amendment also requires the convening authority to consult with a judge advocate before referring charges and specifications to special courts-martial.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5205, 130 Stat. 2000, 2907-08.</td>
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## SUBCHAPTER VII: TRIAL PROCEDURE

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<tr>
<td>Article 38</td>
<td>Duties of Trial Counsel and Defense Counsel</td>
<td>The amendment requires that all defense counsel and assistant defense counsel be qualified under Article 27(b).</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5221, 130 Stat. 2000, 2909.</td>
<td>The amendment is designed to insure that defense counsel are qualified to represent accused service members.</td>
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<td>Article 39</td>
<td>Sessions</td>
<td>The amendment removes the requirement that a judge may hold an arraignment and take the accused's pleas, if approved by the Secretary concerned; the amendment also conforms to an amendment to Article 53, which authorizes judicial sentencing in all non-capital general courts-martial and all special courts-martial.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5222, 130 Stat. 2000, 2909.</td>
<td>The amendment makes a conforming change, which will recognize sentencing proceedings conducted by the military judge.</td>
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<td>Article 41</td>
<td>Challenges</td>
<td>The amendment conforms this provision to the amendments to Article 16 regarding fixed-sized panels; it also removes reference to special courts-martial</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5224, 130 Stat.</td>
<td>The amendment recognizes that there will no longer be any courts-martial without a military judge.</td>
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<td>Article 43</td>
<td>Statute of Limitations</td>
<td>The amendment extends the statute of limitations for child abuse cases, fraudulent enlistment cases, and in cases where DNA implicates an identified person.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5225, 130 Stat. 2000, 2909-10.</td>
<td>The statute of limitations for child abuse cases was increased from five to ten years.</td>
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<td>Article 45</td>
<td>Pleas of the Accused</td>
<td>The amendment permits an accused in a capital case to plead guilty if a sentence of death is not mandatory, removes the reference to a court-martial without a military judge, eliminates the need for service regulations authorizing entry of findings following a guilty plea, and adds a new provision providing for harmless error review in guilty plea cases.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5227, 130 Stat. 2000, 2911.</td>
<td>One of the significant changes is that an accused will be permitted to plead guilty in a capital case where the death penalty is not mandatory.</td>
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<td>Article 46</td>
<td>Opportunity to Obtain Witnesses and Other Evidence in Trial by Court-Martial</td>
<td>The amendment clarifies the authority to issue and enforce subpoenas for witnesses and evidence. The amendment also allows investigative</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 3228,</td>
<td>One of the key changes in this article will permit the trial counsel to issue investigative subpoenas before</td>
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<td>Subpoenas. <em>dues tecum</em>, authorizes military judges to issue warrants and orders for stored electronic communications, and authorizes judges to hear requests for relief from persons served with the subpoenas. The provision addressing defense counsel interviews of victims has been moved to Article 6b.</td>
<td>130 Stat. 2000, 2911-13.</td>
<td>referral of charges.</td>
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<td>Article 47</td>
<td>Refusal of Person Not Subject to Chapter to Appear, Testify or Produce Evidence</td>
<td>The changes update and clarify this article and the relationship between this article and Article 46.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5229, 130 Stat. 2000, 2913.</td>
<td>This amendment was intended, in part, to clarify the relationships between Articles 46 and 47.</td>
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<td>Article 48</td>
<td>Contempt</td>
<td>The amendment extends contempt powers to pre-referral proceedings and clarifies that judges on the Court of Appeals for the Armed Forces and the service appellate courts to not need to be detailed to a case or proceeding in order to exercise contempt power. The amendment also clarifies that the president of a court of inquiry has contempt power and provides for appellate review of contempt punishments.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5230, 130 Stat. 2000, 2913-14.</td>
<td>The amendment expands the list of those who may exercise contempt powers.</td>
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<td>Article 49</td>
<td>Depositions</td>
<td>The article was completely revised. The amendment moves the procedural aspects of taking depositions to R.C.M. 702. The amendment clarifies that a convening authority or military judge may authorize a deposition in exceptional circumstances and when necessary to preserve testimony for use at trial. The amendment recognizes that a deposition may not be used to preserve the testimony of a witness at an Article 32 hearing. It also addresses who may represent the parties at a deposition and that in capital cases only the defense may introduce a deposition.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5231, 130 Stat. 2000, 2914-15.</td>
<td>The amendments were intended to more closely align the article with Fed. R. Crim. P. 15(a)(1), which governs depositions in federal criminal proceedings.</td>
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<td>Article 51</td>
<td>Voting and Rulings</td>
<td>The amendment deletes the reference to courts-martial without a military judge.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5234, 130 Stat. 2000, 2915–16.</td>
<td>This was a non-substantive change which recognizes that there will no longer be any special courts-martial composed of only members.</td>
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<td>Article 52</td>
<td>Votes Required for Conviction, Sentencing, and Other Matters</td>
<td>The amended article will provide that in special courts-martial and non-capital general courts-martial, three-fourths of the members must concur in a finding of guilty. In capital cases, the finding of guilt must be unanimous. Because there are no longer any members-only special courts-martial under Article 16, the language regarding votes on challenges, motions, etc., has been deleted.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5235, 130 Stat. 2000, 2916.</td>
<td>The changes to Article 52, which changes the number of votes required to convict an accused, along with other amendments intended to require a fixed number of members on courts-martial are intended to remove current anomalies, and the &quot;numbers game,&quot; that counsel may currently play in exercising challenges to the panel.</td>
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<td>Article 53</td>
<td>Findings and Sentencing</td>
<td>The amendment completely revises the article; it provides that in courts-martial with members, a military judge will impose the sentence unless the accused requests sentencing by the members. The amended article also includes provisions dealing with sentencing for capital offenses and provides</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5236, 130 Stat. 2000, 2917.</td>
<td>The Military Justice Review Group had recommended that all sentences be imposed by military judges. Congress instead amended the UCMJ to provide that the default rule is that military judges will impose sentences but that an accused may request sentencing</td>
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<td>that in a summary court-martial, the court-martial will impose the sentence.</td>
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<td>by members.</td>
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<td>Article 53a</td>
<td>Plea Agreements</td>
<td>This new article addresses plea agreements. It sets out the authority of the convening authority and accused to negotiate a plea agreement; it sets out limitations on the military judge's acceptance of plea agreements; and permits the military judge, under certain circumstances, to accept a plea agreement for a sentence lower than the mandatory minimums for certain offenses. It also provides that once the military judge accepts the plea agreement, it is binding on the military judge and the parties.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5237, 130 Stat. 2000, 2917-18.</td>
<td>New Article 53a provides helpful statutory guidance on plea agreements, which have become a common part of military justice proceedings.</td>
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<td>Article 54</td>
<td>Record of Trial</td>
<td>As amended, the article requires court reporters to certify the record and requires a complete record if the sentence includes death, dismissal, discharge, confinement, or forfeiture of pay for more than six months. It also requires that a copy of the record be provided to any victim who testified in the case.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5238, 130 Stat. 2000, 2918-19.</td>
<td>The amendment will shift the burden of certifying the record of trial from the military judge to the court reporter.</td>
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### SUBCHAPTER VIII: SENTENCES

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<td>Article 56</td>
<td>Sentencing</td>
<td>The amendment completely revises sentencing in the military justice system. As amended, the article addresses maximum punishments, minimum punishments in sex offenses, the punishment of life without parole, factors to be considered in sentencing, and repeals Article 56a. The article also provides that sentencing will be imposed by the military judge—unless the accused requests sentencing by members. The amendment maintains unitary sentencing if members impose the sentence. If the military judge imposes the sentence, the military judge must specify any terms of confinement, and the amount of any fines, for each offense of which the accused was found guilty. If more than one term of confinement is imposed, the military judge must specify whether the terms will run consecutively or concurrently.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5301, 130 Stat. 2000, 2919–20.</td>
<td>The Military Justice Review Group, the DoD, and the Senate proposed that all sentencing be by a military judge. The proposal was not included in the final amendments. A new provision grants the government the right to appeal the sentence. Congress also replaced the current rule of unitary sentencing when the military judge imposes the sentence.</td>
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<td>Article 57</td>
<td>Effective Date of Sentences</td>
<td>The amendment consolidates provisions in Article 57 and 57a, which govern deferment of sentences, and portions of Articles 57 and 71, which govern the effective date of sentences. It makes a conforming change to remove the convening authority's power to suspend a sentence under Article 71(d). It deletes Articles 57 and 71.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5302, 130 Stat. 2000, 2921-23.</td>
<td>The amendments consolidate several articles, which address the effective dates of punishments and deferrals of punishments.</td>
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<td>Article 58a</td>
<td>Sentences: Forfeiture of Pay and Allowances During Confinement</td>
<td>The amendment requires reduction of enlisted members to E-1 when the approved sentence includes a punitive discharge, confinement, or hard labor without confinement.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5303, 130 Stat. 2000, 2923.</td>
<td>The amendments are intended to create a uniform statutory rule for all of the services regarding automatic reductions in grade.</td>
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**SUBCHAPTER IX: POST-TRIAL PROCEDURE AND REVIEW OF COURTS-MARTIAL**

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<td>Article 60</td>
<td>Post-Trial Processing in General and Special Courts-Martial</td>
<td>The amendment provides for distributing the trial results and authorizes post-trial motions to be filed with the military judge in general and special courts-martial; the amendment also authorizes the military judge to conduct post-trial proceedings.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5321, 130 Stat. 2000, 2924.</td>
<td>Clarification of the military judge's authority to conduct post-trial proceedings is a welcomed change.</td>
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<td>Article 60a</td>
<td>Limited Authority to Act on Sentence in Specified Post-Trial Circumstances</td>
<td>This new article consolidates current limits on the convening authority's post-trial powers in general and special courts-martial; it provides for limited authority to suspend the sentence, and provides power to adjust an adjudged sentence in instances where the accused has provided substantial assistance regarding the investigation or prosecution of another accused; the amendment also provides, in effect, that the military judge will have the final say in the court-martial.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5322, 130 Stat. 2000, 2924-26.</td>
<td>The provision dealing with the power of the convening authority to adjust a sentence for an accused, who has provided substantial assistance, is modeled after Fed. R. Crim. P. 35. There is no requirement that the staff judge advocate provide post-trial advice to the convening authority.</td>
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<td>Article 60b</td>
<td>Post-Trial Actions in Summary Courts-Martial and Certain General and Special Courts-Martial</td>
<td>This new provision addresses a convening authority's post-trial powers in general and special courts-martial,</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5323,</td>
<td>The article requires the convening authority to inform the military judge of his action, which is...</td>
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<td>Special Courts-Martial</td>
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<td>where the sentence falls outside the range of punishments covered by Article 60a, and in summary courts-martial.</td>
<td>130 Stat. 2000, 2926-27.</td>
<td>then included in the judgment of the court-martial.</td>
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<td>Article 60c</td>
<td>Entry of Judgment</td>
<td>This is a new provision, which requires a military judge to enter a judgment in general and special courts-martial, in the record of trial. The provision sets out what must be contained in the judgment, which includes certain post-trial actions by the convening authority.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5324, 130 Stat. 2000, 2927-28.</td>
<td>The requirement that the military judge enter a judgment is modeled after Fed. R. Crim. P. 32(k). The amendment shifts to the military judge the final word in a court-martial; currently, that power rests with the convening authority.</td>
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<td>Article 61</td>
<td>Waiver of Right to Appeal; Withdrawal of Appeal</td>
<td>The amendment conforms this provision to the amendments to Articles 60, 65, and 69.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5325, 130 Stat. 2000, 2928.</td>
<td>The amendments were non-substantive.</td>
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<td>Article 62</td>
<td>Appeal by the United States</td>
<td>The amendment authorizes the government to appeal a military judge’s decision, based on a defense motion, to set aside a panel’s finding of guilty because there was insufficient evidence, unless doing so violates the double jeopardy protections in Article 44. The amendment also conforms the provision to amendments to</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5326, 130 Stat. 2000, 2928-29.</td>
<td>The provision authorizing a government appeal parallels a similar rule regarding interlocutory appeals in federal civilian courts.</td>
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<td>Articles 66 and 69.</td>
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<td>Article 63</td>
<td>Rehearings</td>
<td>The amendment removes the sentence limitations in cases where the accused has changed a plea from guilty to not guilty, fails to comply with a pretrial agreement, or after an appellate court has set aside a sentence based on a government appeal.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5327, 130 Stat. 2000, 2929.</td>
<td>The amendments remove any sentence limitation protections an accused might have on a rehearing.</td>
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<td>Article 65</td>
<td>Transmittal and Review of Records</td>
<td>The amendment expands the coverage of the article and sets out when records of trial must be transmitted to appellate counsel and to the Courts of Criminal Appeals, because the case is subject to automatic review or is eligible for direct appeal rule.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5329, 130 Stat. 2000, 2930-31.</td>
<td>The changes to Article 65 were substantial.</td>
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<td>Article 66</td>
<td>Courts of Criminal Appeals</td>
<td>The amendment establishes an appeal as of right in non-capital cases and expands the</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328,</td>
<td>Despite some calls for removing the fact-finding powers from the service</td>
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<td>opportunity for direct review of cases. It also sets out statutory authority for factual sufficiency review, sentence appropriateness review, and review of allegations of post-trial delay. The amendment also addresses appeals of sentences by the United States.</td>
<td>§ 5330, 130 Stat. 2000, 2932–34.</td>
<td>appellate courts, Congress retained those powers.</td>
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<td>Article 67</td>
<td>Review by the Court of Appeals for the Armed Forces</td>
<td>The amendment conforms this article to the creation of entries of judgments in Article 60c and related amendments to Articles 60 and 66. It also requires a Judge Advocate General to notify the other Judge Advocates General prior to certifying a case to the court.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5331, 130 Stat. 2000, 2934–35.</td>
<td>The amendments to this article were largely non-substantive.</td>
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<td>Article 67a</td>
<td>Review by the Supreme Court</td>
<td>The amendment changed the name of the Court of Military Appeals to the Court of Appeals for the Armed Forces.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5332, 130 Stat. 2000, 2935.</td>
<td>The amendments are non-substantive.</td>
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<td>Article 70</td>
<td>Appellate Counsel</td>
<td>The amendment requires that to the greatest extent possible, in cases where the death penalty has been adjudged, at least one appellate defense counsel with experience in capital cases should be assigned to the case.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5334, 130 Stat. 2000, 2936.</td>
<td>This amendment reflects the view that in death penalty cases, appellate counsel with specialized knowledge and experience in death penalty litigation will be available to assist an accused.</td>
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<td>Article 72</td>
<td>Vacation of Suspension</td>
<td>The amendment authorizes a special court-martial convening authority to detail a judge advocate to conduct a hearing on vacating a suspended sentence.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5335, 130 Stat. 2000, 2936–37.</td>
<td>The amendment provides an important change to suspension proceedings by insuring that lawyers will be reviewing the evidence.</td>
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<td>Article 75</td>
<td>Restoration</td>
<td>The amendment requires the President to establish rules concerning the eligibility for pay and allowances during the period after a court-martial is set aside or disapproved.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5337, 130 Stat. 2000, 2937.</td>
<td>A new provision in this article will provide additional procedural guidance on a service member’s post-trial eligibility for pay and allowances.</td>
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<td>Article 76a</td>
<td>Leave Required to be Taken Pending Review of Certain Court-Martial Convictions</td>
<td>The amendment makes technical changes to conform the article to the amended Article 60 and new Article 60c.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5338, 130 Stat. 2000, 2937.</td>
<td>The amendments are non-substantive.</td>
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### SUBCHAPTER X: THE PUNITIVE ARTICLES

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<tr>
<th>UCMJ Provision</th>
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<tr>
<td>Article 79 Conviction of Offense Charged; Lesser Included Offenses and Attempts</td>
<td>The amendment authorizes the President to promulgate an authoritative, but non-exhaustive list of lesser-included offenses for each punitive article, as well as judicially created lesser-included offenses.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5402, 130 Stat. 2000, 2939.</td>
<td>Providing a list of lesser-included offenses for each punitive article will be a welcomed improvement.</td>
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<tr>
<td>Article 83 Malingering</td>
<td>The offense of malingering is currently covered in Article 115. The original Article 83 is now Article 104a.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5404, 130 Stat. 2000, 2940.</td>
<td>Redesignating this article was part of the realignment of the punitive articles.</td>
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<tr>
<td>Article 84 Breach of Medical Quarantine</td>
<td>This is a new punitive article. The original Article 84 is now Article 104b.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5405, 130 Stat. 2000, 2940.</td>
<td>The offense of breach of quarantine is covered under Article 134, MCM, Part IV, para. 100.</td>
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<tr>
<td>Article 87 Missing Movement; Jumping from Vessel</td>
<td>The amendment adds the offense of jumping from a vessel into the water.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328,</td>
<td>The offense of jumping from a vessel into the water is covered under</td>
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<tr>
<td>Article 87a</td>
<td>Resistance, Flight, Breach of Arrest, and Escape</td>
<td>This offense is currently covered in Article 95.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(2), 130 Stat. 2000, 2938.</td>
<td>Redesignating this article was part of the realignment of the punitive articles.</td>
</tr>
<tr>
<td>Article 87b</td>
<td>Offenses Against Correctional Custody and Restriction</td>
<td>This is a new punitive article, which combines the offenses of violating several forms of custody and restriction.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5407, 130 Stat. 2000, 2941.</td>
<td>This article is drawn from the offenses of breaking restriction and offenses against correctional custody, which are currently covered under Article 134, MCM, Part IV, paras. 102 and 70, respectively.</td>
</tr>
<tr>
<td>Article 89</td>
<td>Disrespect Toward Superior Commissioned Officer; Assault of Superior Commissioned Officer</td>
<td>The amendment expands this article to include the offense of assaulting a superior commissioned officer.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5408, 130 Stat. 2000, 2941.</td>
<td>The amendment aligns similar offenses under Article 89.</td>
</tr>
<tr>
<td>Article 90</td>
<td>Willfully Disobeying Superior Commissioned Officer</td>
<td>The amendment removes the offense of assaulting a superior commissioned officer, which is now covered in Article 89.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5409, 130 Stat. 2000, 2942.</td>
<td>This amendment aligns similar offenses under Article 89.</td>
</tr>
<tr>
<td>Article 93a</td>
<td>Prohibited Activities with Military Recruit or Trainee by Person in Position of</td>
<td>This is a new punitive article which concerns the abuse of a training leadership position.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5410,</td>
<td>The amendment is intended to provide enhanced accountability for</td>
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<td>Article 95</td>
<td>Offenses by Sentinel or Lookout</td>
<td>This offense is currently covered in Article 113. Current Article 95 is covered</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5411, 130 Stat. 2000, 2943.</td>
<td>The offenses by a sentinel or lookout are covered under Article 134, MCM, Part IV, para. 104(b)(2).</td>
</tr>
<tr>
<td>Article 95a</td>
<td>Disrespect Toward Sentinel or Lookout</td>
<td>This is a new punitive article.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5412, 130 Stat. 2000, 2943.</td>
<td>This offense is covered under Article 134, MCM, Part IV, para. 104(b)(1).</td>
</tr>
<tr>
<td>Article 96</td>
<td>Release of Prisoner Without Authority; Drinking with Prisoner</td>
<td>The amendment adds the offense of drinking with a prisoner and has been retitled.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5413, 130 Stat. 2000, 2944.</td>
<td>The offense of drinking with a prisoner is currently covered under Article 134, MCM, Part IV, para. 74.</td>
</tr>
<tr>
<td>Article 98</td>
<td>Misconduct as Prisoner</td>
<td>This offense is currently covered in Article 105.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(6), 130 Stat. 2000, 2938.</td>
<td>Redesignating this article was part of the realignment of the punitive articles.</td>
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<tr>
<td>Article 103</td>
<td>Spies</td>
<td>This offense is currently covered in Article 106. The amendment replaces the mandatory sentence of death with a discretionary</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5414, 130 Stat.</td>
<td>Redesignating this article was part of the realignment of the punitive articles.</td>
</tr>
<tr>
<td>Special Trust</td>
<td>abuse of position as a recruiter, the issue of consent, and definitions.</td>
<td>130 Stat. 2000, 2942–43.</td>
<td>sexual misconduct.</td>
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<td>death penalty, similar to the provisions in Article 103a and for all other capital offenses in the UCMJ.</td>
<td>2000, 2944.</td>
<td></td>
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<tr>
<td>Article 103a</td>
<td>Espionage</td>
<td>The offense of espionage is currently covered in Article 106a.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(7), 130 Stat. 2000, 2938.</td>
<td>Redesignating this article was part of the realignment of the punitive articles.</td>
</tr>
<tr>
<td>Article 103b</td>
<td>Aiding the Enemy</td>
<td>This offense is currently covered in Article 104.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(5), 130 Stat. 2000, 2938.</td>
<td>Redesignating this article was part of the realignment of the punitive articles.</td>
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<tr>
<td>Article 104</td>
<td>Public Records Offenses</td>
<td>This is a new punitive article, which establishes the offense of altering, removing, mutilating, concealing, obliterating, or destroying a public record. Currently, Article 104 covers the offense of aiding the enemy; that offense is now located in Article 103b.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5415, 130 Stat. 2000, 2944.</td>
<td>The offense is currently covered under Article 134, MCM, Part IV, para. 99.</td>
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<tr>
<td>Article 104a</td>
<td>Fraudulent Enlistment, Appointment, or</td>
<td>This article was formerly Article 83.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328,</td>
<td>Redesignating this article was part of the realignment of the</td>
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<td>Article 104b</td>
<td>Unlawful Enlistment, Appointment, or Separation</td>
<td>This article was formerly Article 84.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(1), 130 Stat. 2000, 2938.</td>
<td>Redesignating this article was part of the realignment of the punitive articles.</td>
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<tr>
<td>Article 105</td>
<td>Forgery</td>
<td>The offense of forgery is currently covered under Article 123.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(12), 130 Stat. 2000, 2939.</td>
<td>Redesignating this article was part of the realignment of the punitive articles.</td>
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<tr>
<td>Article 105a</td>
<td>False or Unauthorized Pass Offenses</td>
<td>This is a new punitive article, which covers the offenses involving false or unauthorized passes.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5416, 130 Stat. 2000, 2944–45.</td>
<td>The offense of false or unauthorized pass is currently covered under Article 134, MCM, Part IV, para. 77.</td>
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<tr>
<td>Article 106</td>
<td>Impersonation of Officer, Noncommissioned or Petty Officer, or Agent or Official</td>
<td>This is a new provision. Currently, Article 106 covers the offense of spying. The new provision establishes the offense of impersonating various officers, agents or officials. The amendment also conforms the article to the definition of</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5417, 130 Stat. 2000, 2945.</td>
<td>The offense of impersonating the specified persons is currently covered under Article 134, MCM, Part IV, para. 86.</td>
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<td>Article 106a</td>
<td>Wearing Unauthorized Insignia, Decoration, Badge, Ribbon, Device, or Lapel Button</td>
<td>This is a new punitive article, which establishes the offense of wearing unauthorized ribbons, devices, decorations, badges, or lapel buttons.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5418, 130 Stat. 2000, 2945–46.</td>
<td>This offense is currently covered under Article 134, MCM, Part IV, para. 113.</td>
</tr>
<tr>
<td>Article 108a</td>
<td>Captured or Abandoned Property</td>
<td>This offense is currently covered under Article 103.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(4), 130 Stat. 2000, 2939.</td>
<td>Redesignating this article was part of the realignment of the punitive articles.</td>
</tr>
<tr>
<td>Article 109a</td>
<td>Mail Matter; Wrongful Taking, Opening, etc.</td>
<td>This a new punitive article.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5421, 130 Stat. 2000,</td>
<td>This offense is currently covered under Article 134, MCM, Part IV, para. 93.</td>
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<td>Article 110</td>
<td>Improper Hazarding of Vessel or Aircraft</td>
<td>The amendment adds the offense of improper hazarding of an aircraft.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5422, 130 Stat. 2000, 2947.</td>
<td>This amendment was intended to fill a gap in military practice.</td>
</tr>
<tr>
<td>Article 111</td>
<td>Leaving Scene of Vehicle Accident</td>
<td>This is a new punitive article. Former Article 111 will be Article 113a.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5423, 130 Stat. 2000, 2947.</td>
<td>The offense of &quot;fleeing from an accident,&quot; is currently covered under Article 134, MCM, Part IV, para. 82.</td>
</tr>
<tr>
<td>Article 112</td>
<td>Drunkenness and Other Incapacitation Offenses</td>
<td>The title has been changed and the coverage extended.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5424, 130 Stat. 2000, 2947–48.</td>
<td>The offenses of &quot;drunkenness&quot; and &quot;drunk prisoner&quot; are currently covered under Article 134, MCM, Part IV, paras. 76 and 75, respectively.</td>
</tr>
<tr>
<td>Article 113</td>
<td>Drunken or Reckless Operation of a Vehicle, Aircraft, or Vessel</td>
<td>This offense is currently covered in Article 111. It has been amended to reduce the blood alcohol standard from 0.10 grams to 0.08 grams of alcohol per 100 milliliters of blood and to permit the service secretaries to prescribe lower levels, if those lower limits are based on scientific developments.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5425, 130 Stat. 2000, 2948.</td>
<td>Redesignating this article was part of the realignment of the punitive articles.</td>
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<td>Article 114</td>
<td>Endangerment Offenses</td>
<td>This article is currently limited to the offense of dueling. It now includes the offenses of reckless endangerment, dueling, discharge of a firearm which endangers human life, and carrying a concealed weapon.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5426, 130 Stat. 2000, 2948.</td>
<td>The offenses of reckless endangerment, discharging a firearm, and carrying a concealed weapon are covered under Article 134, MCM, Part IV, paras. 100a, 81, and 112, respectively.</td>
</tr>
<tr>
<td>Article 115</td>
<td>Communicating Threats</td>
<td>This is a new punitive article. This article formerly covered the offense of malingering.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5427, 130 Stat. 2000, 2948–49.</td>
<td>The offenses of threats or hoaxes designed to cause panic or public fear and the offense of communicating a threat are covered under Article 134, MCM, Part IV, paras. 109 and 110, respectively.</td>
</tr>
<tr>
<td>Article 118</td>
<td>Murder</td>
<td>The amendment to the Article is technical; the words “forcible sodomy” were deleted from Article 118(4).</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5428, 130 Stat. 2000, 2949.</td>
<td>The amendment is a non-substantive change.</td>
</tr>
<tr>
<td>Article 120</td>
<td>Rape and Sexual Assault Offenses</td>
<td>The amendment conforms the definition of “sexual</td>
<td>Military Justice Act of 2016, Pub. L.</td>
<td>This amendment is a non-substantive, conforming change.</td>
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<td>Article 120a Mails: Deposit of Obscene Matter</td>
<td>This is a new punitive article. Current Article 120a will be Article 130.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5430, 130 Stat. 2000, 2949–50.</td>
<td>The offense of depositing obscene materials is currently covered under Article 134, MCM, Part IV, para. 94.</td>
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<tr>
<td>Article 121a Fraudulent Use of Credit Cards, Debit Cards, and Other Access Devices</td>
<td>This is a new punitive article, which makes it a crime to commit larcenies using credit or debit cards, or other devices.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5432, 130 Stat. 2000, 2951.</td>
<td>This new article is intended to avoid some of the ambiguities regarding prosecution for misuse of credit cards under Article 121, which proscribes larceny.</td>
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<tr>
<td>Article 121b False Pretenses to Obtain Services</td>
<td>This is a new punitive article.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5433, 130 Stat. 2000, 2951.</td>
<td>The offense of obtaining services under false pretenses is currently covered under Article 134, MCM, Part IV, para. 78.</td>
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<tr>
<td>Article 122 Robbery</td>
<td>The Act amended the existing provision to conform to</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328,</td>
<td>The amendment eliminates the requirement that the prosecution must</td>
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<td>18 U.S.C. § 2111, by removing the words</td>
<td>§ 5434, 130 Stat. 2000, 2951–52.</td>
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<td>prove that the accused intended to permanently deprive the victim of his or her property.</td>
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<td>&quot;with the intent to steal.&quot;</td>
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<td>Article 124</td>
<td>Frauds Against the United States</td>
<td>This was formerly Article 132. Current Article 124, which covers the offense of maiming, will be moved to Article 128a.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(14), 130 Stat. 2000, 2939.</td>
<td>Redesignating this article was part of the realignment of the punitive articles.</td>
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<td>Article 125</td>
<td>Kidnapping</td>
<td>This is a new punitive article. This article formerly covered the offense of forcible sodomy and bestiality. That offense is now covered in Article 120.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5439, 130 Stat. 2000, 2953.</td>
<td>The offense of kidnapping is covered in Article 134, MCM, Part IV, para. 92.</td>
</tr>
<tr>
<td>Article 126</td>
<td>Arson; Burning Property With Intent to Defraud</td>
<td>The Act amended the existing punitive article to include the offense of burning property with the intent to defraud.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5440, 130 Stat. 2000, 2953–54.</td>
<td>The offense of burning property with an intent to defraud is covered in Article 134, MCM, Part IV, para. 67.</td>
</tr>
<tr>
<td>Article 128</td>
<td>Assault</td>
<td>The Act amended the existing punitive article to align the offense with 18 U.S.C. § 113 and to include the offense of assault with the intent to commit specified offenses.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5441, 130 Stat. 2000, 2954.</td>
<td>The offense of assault with the intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking is covered under Article 134, MCM, Part IV, para. 64.</td>
</tr>
<tr>
<td>Article 128a</td>
<td>Maiming</td>
<td>The offense is currently in Article 124.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(13), 130 Stat. 2000, 2939.</td>
<td>Redesignating this article was part of the realignment of the punitive articles.</td>
</tr>
<tr>
<td>Article 129</td>
<td>Burglary; Unlawful Entry</td>
<td>The Act amended the existing punitive article to include the</td>
<td>Military Justice Act of 2016, Pub. L.</td>
<td>The offense of unlawful entry is covered under</td>
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<td>Article 130</td>
<td>Stalking</td>
<td>This offense is currently covered under Article 120a. It will include stalking through use of technology and includes threats to intimate partners.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5443, 130 Stat. 2000, 2955-56.</td>
<td>Redesignating this article was part of the realignment of the punitive articles.</td>
</tr>
<tr>
<td>Article 131d</td>
<td>Wrongful Refusal to Testify</td>
<td>This is a new punitive article.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5447, 130 Stat.</td>
<td>The offense of wrongful refusal to testify is covered under Article 134, MCM, Part IV, para. 96.</td>
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<td>Article 131f</td>
<td>Noncompliance with Procedural Rules</td>
<td>This was formerly Article 98.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(3), 130 Stat. 2000, 2938.</td>
<td>Redesignating this article was part of the realignment of the punitive articles.</td>
</tr>
<tr>
<td>Article 132</td>
<td>Retaliation</td>
<td>This is a new punitive article, which criminalizes retaliation against victims and witnesses of a crime. Former Article 132, which covered frauds against the United States, is now Article 124.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5450, 130 Stat. 2000, 2957–58.</td>
<td>This new article will parallel a similar offense in 18 U.S.C. § 1513(a) (retaliating against a witness, victim, or an informant).</td>
</tr>
<tr>
<td>Article 134</td>
<td>General Article</td>
<td>This article was amended to establish extraterritorial jurisdiction over offenses charged</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5451, 130 Stat.</td>
<td>This amendment is intended to provide worldwide application of the UCMJ, consistent with congressional intent.</td>
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<td>under clause 3, which in turn covers “all federal crimes not capital.”</td>
<td>2000, 2958.</td>
<td>reflected in Article 5.</td>
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"Reflected in Article 5."
### SUBCHAPTER XI: MISCELLANEOUS PROVISIONS

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<tr>
<th>UCMJ Provision</th>
<th>Title of Provision</th>
<th>Change Effected</th>
<th>Source</th>
<th>Comments</th>
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<tbody>
<tr>
<td>Article 135</td>
<td>Courts of Inquiry</td>
<td>This article was amended to include persons in the Coast Guard when they are employed by the department in which the Coast Guard is operating, when it is not operating as a service in the Navy.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5501, 130 Stat. 2000, 2960.</td>
<td>This amendment was intended to extend the protections currently available to employees of the DoD to employees of the Department of Homeland Security.</td>
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<td>Article 136</td>
<td>Authority to Administer Oaths</td>
<td>The title to this provision was amended by deleting the words “and to act as notary” from the title.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5502, 130 Stat. 2000, 2960.</td>
<td>These were non-substantive amendments.</td>
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<td>Article 137</td>
<td>Articles to be Explained</td>
<td>This article was amended to first, include officers in the group of service members who must have the UCMJ explained to them; second, require all officers who have authority to convene courts-martial or impose non-judicial punishment, to receive periodic training on purpose and administration of the UCMJ; and third, require the Secretary of Defense to maintain copies of the</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5503, 130 Stat. 2000, 2960-61.</td>
<td>The amendment takes into account a recommendation from the Response System to Adult Sexual Assault Crimes Panel that officers at the grade of O-6 and above to receive legal training, which will prepare them to exercise their authority under the UCMJ.</td>
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<td>Article 140a</td>
<td>Case Management; Data Collection and Accessibility</td>
<td>This is a new provision which requires the Secretary of Defense to first, establish and maintain uniform standards for monitoring effectiveness and efficiency of military justice system and second, establish a uniform case management system.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5504, 130 Stat. 2000, 2961–62.</td>
<td>The amendments increase the ability of the public to access military justice case files, similar to the system used for federal criminal cases.</td>
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<td>Article 146</td>
<td>Military Justice Review Panel</td>
<td>This provision was formerly entitled &quot;Code Committee&quot; and has been amended to require that the Military Justice Review Panel conduct reviews of the military justice system on dates specified in the Act.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5521, 130 Stat. 2000, 2962–64.</td>
<td>The establishment of a Military Justice Review Panel is intended to enhance the effectiveness and efficiency of the UCMJ by creating a &quot;blue ribbon&quot; body to review the military justice system.</td>
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<td>Article 146a</td>
<td>Annual Reports</td>
<td>This is a new provision which requires the Court of Appeals for the Armed Forces, the Judge Advocates General, and the Staff Judge Advocate to the Marine Corps, to make annual reports on matters specified in the Act.</td>
<td>Military Justice Act of 2016, Pub. L. No. 114-328, § 5522, 130 Stat. 2000, 2964–65.</td>
<td>This new provision, which was formerly covered in Article 146, will provide an annual summary of military justice issues.</td>
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