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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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I. INTRODUCTION

The 2016 amendments to the Uniform Code of Military Justice¹ 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

1. UCMJ (2012), 10 U.S.C. §§ 801–946 (2012).

2. National Defense Authorization Act for Fiscal Year 2017, Public Law No. 114-328, 130 Stat. 2000 (2016).

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, 2019.³ 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

3. *See* Military Justice Act of 2016, Pub. L. No. 114-328, § 5542, 130 Stat. 2935 (2016) (noting the President will decide the effective date of the amendments).

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).⁴ 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 ⁵
Subchapter II:	Apprehension and Restraint ⁶
Subchapter III:	Non-Judicial Punishment ⁷

4. UCMJ art. 1–146 (2012), 10 U.S.C. §§ 801–946 (2012).

5. UCMJ art. 1–6 (2012), 10 U.S.C. §§ 801–806 (2012).

6. UCMJ art. 7–14 (2012), 10 U.S.C. §§ 807–814 (2012).

7. UCMJ art. 15 (2012), 10 U.S.C. § 815 (2012).

Subchapter IV:	Court-Martial Jurisdiction ⁸
Subchapter V:	Composition of Courts-Martial ⁹
Subchapter VI:	Pretrial Procedure ¹⁰
Subchapter VII:	Trial Procedure ¹¹
Subchapter VIII:	Sentences ¹²
Subchapter IX:	Post-Trial Procedure and Review of Courts-Martial ¹³
Subchapter X:	Punitive Articles ¹⁴
Subchapter XI:	Miscellaneous Provisions ¹⁵
Subchapter XII:	United States Court of Appeals for the Armed Forces ¹⁶

Article 36 of the UCMJ,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.¹⁸

More detailed guidance on those procedures is spelled out in the Manual

8. UCMJ art. 16–21 (2012), 10 U.S.C. §§ 816–821 (2012).

9. UCMJ art. 22–29 (2012), 10 U.S.C. §§ 822–829 (2012).

10. UCMJ art. 30–35 (2012), 10 U.S.C. §§ 830–835 (2012).

11. UCMJ art. 36–54 (2012), 10 U.S.C. §§ 836–854 (2012).

12. UCMJ art. 55–58a (2012), 10 U.S.C. §§ 855–58(a) (2012).

13. UCMJ art. 59–76b (2012), 10 U.S.C. §§ 859–76(b) (2012).

14. UCMJ art. 77–134 (2012), 10 U.S.C. §§ 877–934 (2012).

15. UCMJ art. 135–140 (2012), 10 U.S.C. §§ 935–40 (2012).

16. UCMJ art. 141–146 (2012), 10 U.S.C. §§ 941–46 (2012).

17. UCMJ art. 36 (2012), 10 U.S.C. § 836 (2012) (amended 2016).

18. UCMJ art. 36 (2012), 10 U.S.C. § 836 (2012) (amended 2016).

for Courts-Martial.¹⁹ The Department of Defense, the service Secretaries, and commanders promulgate regulations to provide further guidance.²⁰ In addition, rules of procedure and practice are prescribed by the trial and appellate judiciary.²¹

Under the UCMJ and Manual for Courts-Martial, courts-martial are only temporary tribunals,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 1775.²³

The governing body of laws for the military justice system originally rested in the 1775 Articles of War²⁴ and the Articles Governing the Navy.²⁵ The system relied on non-lawyers to carry out the procedures set out in those rules.²⁶ Following World War I, there were calls for reform

19. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 1(2016) [hereinafter MCM].

20. In addition to the general authority to issue regulations under Article 36, the legislation provides broad authority for the issuance of specific regulations on many of the provisions. Because many of the legislative items are written in broad terms, there is substantial discretion in developing the substance of implementing regulations, i.e., the MCM, which in turn will provide the public with a significant opportunity to shape the effect of the 2016 amendments.

21. Article 66(f) requires the Judge Advocates General to promulgate uniform rules of procedure for the service appellate courts. UCMJ art. 66(f) (2012), 10 U.S.C. § 866(f) (2012) (amended 2016).

22. *McClaghry v. Deming*, 186 U.S. 49, 63 (1902) (citing 3 Greenl. Ev. § 470).

23. In its report, the Military Justice Review Group provided an extensive and detailed history of the American military justice system. MILITARY JUSTICE REVIEW GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP 41–86 (2015).

24. Captain (P) David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 145–50 (1980) (examining the Articles of War from 1775 to 1800, which were originally based on the 1775 Massachusetts Articles of War). The Articles of War governed courts-martial in the Army. Captain Brian C. Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for Hamdan v. Rumsfeld*, 186 MIL. L. REV. 1, 21 n.107 (2005).

25. Navy courts-martial were governed by the Rules for the Regulation of the Navy of the United Colonies of North America. Lieutenant Michael J. Marinello, *Convening Authority Clemency: Is It Really an Accused's Best Chance of Relief?*, 54 NAVAL L. REV. 169, 174–76 (2007) (discussing early regulations governing the navy).

26. Captain (P) David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 144–56 (1980).

to the military justice system based on concerns about the lack of due process protections for service members.²⁷ 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.²⁸ Following World War II, Congress reformed the system, again, because of widespread complaints about injustices in the military justice system during wartime.²⁹ In 1948, Congress passed the Elston Act,³⁰ as part of the Selective Service Act of 1948, which amended the Articles of War. The Uniform Code of Military Justice³¹ was enacted on May 5, 1950,³² and became effective on May 31, 1951.³³ 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.³⁴

In 1968, Congress created the military judiciary, provided for judge-alone trials, and required that judges and counsel be appointed for special courts-martial.³⁵ In 1980, the President amended the Manual for Courts-Martial to adopt the Military Rules of Evidence,³⁶ and in 1984, the President amended the Manual to convert it into a rules-based format.³⁷

In the Military Justice Act of 1983,³⁸ Congress provided for Supreme Court review of courts-martial convictions, interlocutory appeals, and simplified post-trial processing.³⁹ In 1984 the Manual of Courts-Martial

27. *Id.* at 156–58.

28. *Id.* at 156–58.

29. *Id.* at 158–60.

30. Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 627. The Act was named after the Act's sponsor, Representative Charles Elston of Ohio.

31. UCMJ art. 1–146 (2012), 10 U.S.C. §§ 801–946 (2012) (amended 2016).

32. Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 (1950).

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.

35. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968); 1 DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE, § 1-6[D] (9th ed. 2015) [hereinafter SCHLUETER, MILITARY CRIMINAL JUSTICE].

36. Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (Mar. 12, 1980).

37. Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (Apr. 13, 1984).

38. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983).

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.⁴⁰

In response to deep concerns about the military's handling of sexual assault cases, Congress again amended the UCMJ in 2013,⁴¹ 2014⁴² and 2015.⁴³ 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,⁴⁴ in recent years, Congress has taken the lead in amending the UCMJ.⁴⁵

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 1983.⁴⁶

Second, in the last several decades, a large number of commentators have recommended changes to features or procedures in the military

the Court of Military Appeals, and a retirement program for judges of that court. *Id.*

40. Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (Apr. 13, 1984); see Colonel George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Judge and Brigadier General (Retired) Wayne Alley (U.S. Army 1952–1954, 1959–1981)*, 208 MIL. L. REV. 213, 277–78 (2011) (discussing changes in the 1980s to align military justice procedures with those used in federal criminal trials).

41. National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, 126 Stat. 1632 (2013).

42. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, tit. XVII, 127 Stat. 672, 950 (2013).

43. National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §§ 531–47, 128 Stat. 3292 (2014).

44. See OLC DETAILED GUIDELINES FOR PREPARATION OF LEGIS. PROPOSALS FOR THE FISCAL YEAR 2016 DOD LEGIS. PROGRAM, DEP'T OF DEF., http://www.acq.osd.mil/dpap/Docs/new/Detailed_Guidelines_for_Preparing_Proposals_FY16.pdf (explaining the DoD's internal procedure for proposing legislative amendments).

45. See generally Major John W. Brooker, *Improving Uniform Code of Military Justice*, 222 MIL. L. REV. 1, 15–42 (2014) (discussing the institutions that collaborate with the DoD in amending the UCMJ and the processes for developing amendments).

46. Memorandum from Gen. Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, to Chuck Hagel, Sec'y of Def. (Aug. 5 2013), in MILITARY JUSTICE REVIEW GRP., *supra* note 23, app. A (2015).

justice system.⁴⁷ Commentators have proposed reforms to virtually every aspect of the military system, including jurisdiction of courts-martial,⁴⁸ the role of military lawyers,⁴⁹ pretrial processing of court-martial charges,⁵⁰ pretrial confinement,⁵¹ the process of selecting court members,⁵² the rules

47. Apparently, that has not always been the case. In his 1967 law review article, Chief Judge Robert Quinn, the presiding judge of the Court of Military Appeals, observed that, with the possible exception of theses in the service schools, military commentators had not been particularly helpful in offering solutions or new approaches in military justice issues. Robert E. Quinn, *The Role of Criticism in the Development of Law*, 35 MIL. L. REV. 47, 52 (1967). He also noted that he and his fellow judges appreciated the views of commentators who could provide alternatives of law available to the court. *Id.*

48. See, e.g., Captain David A. Schlueter, *The Enlistment Contract: A Uniform Approach*, 77 MIL. L. REV. 1, 56–60 (1977) (recommending that Congress amend the UCMJ to codify the constructive enlistment doctrine to permit court-martial jurisdiction over service members whose enlistment contracts may be invalid); David L. Snyder, *Civilian Military Contracts on Trial: The Case for Upholding the Amended Exceptional Jurisdiction Clause of the Uniform Code of Military Justice*, 44 TEX. INT'L L.J. 65, 68, 96 (2008) (arguing that subjecting civilian contractors to court-martial is the only way to ensure discipline and accountability on the battlefield); Alan F. Williams, *The Case for Overseas Article III Courts: The Blackwater Effect and Criminal Accountability in the Age of Privatization*, 44 U. MICH. J.L. REFORM 45, 60–64, 72–77 (2010) (proposing Congress create an Article III court overseas in order to hold private civilian contractors criminally accountable).

49. See, e.g., Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 177 (2014) (proposing military lawyers obtain prosecutorial discretion over disposition of offenses).

50. See J. Corn & V. Hansen, *If It Ain't Broke, Why Not Fix It? Three Proposed Amendments to the Uniform Code of Military Justice*, 6 J. NAT'L SECURITY L. & POL'Y 447, 469–73 (2013) (proposing that an Article 32 proceeding be converted into a preliminary hearing, to mirror federal practice); Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivated Prosecution: Moving Military Justice Back to the Cutting Edge*, 19 REGENT U. L. REV. 173, 196–98 (2006) (recommending a congressional amendment to Article 32 of the UCMJ to require an independent determination of probable cause).

51. See, e.g., Major Ryan W. Leary, *Serious Offense: Considering the Severity of the Charged Offense When Applying the Military Pre-Trial Confinement Rules*, 221 MIL. L. REV. 131, 143–51 (2014) (recommending changes in pretrial confinement procedures).

52. 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 a 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); 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 convening authorities to preselect panel's qualifications); Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 159–62 (1992) (recommending the elimination of a variable number of members on a court, repeal of accused's right to have an enlisted panel, establishment of neutral panel commissioner and random selection, and the use of alternate members on the panel).

of evidence applicable to courts-martial,⁵³ sentencing,⁵⁴ post-trial processing,⁵⁵ and appellate review of court-martial convictions.⁵⁶ There have also been proposals for changing the methods for making changes to the Manual for Courts-Martial.⁵⁷ 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.⁵⁸ One proposal is to vest prosecutorial discretion in a separate military command structure.⁵⁹ Another is to place prosecutorial discretion in the hands of

53. See, e.g., Elizabeth Hillman, *The Good Soldier Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 900 (1999) (recommending the use of good military character evidence be limited).

54. See Lieutenant Colonel Bradford D. Bigler, *Rebalancing Military Sentencing: An Argument to Restore Utilitarian Principles Within the Courtroom*, 225 MIL. L. REV. 1, 2 (2017) (recommending the adoption of a new court-martial sentencing rule be adopted which would consider the recidivism risks); Colin A. Kisor, *The Need for Sentencing Reform in the Military Courts-Martial*, 58 NAVAL L. REV. 39, 57–59 (2009) (recommending UCMJ changes to reforming court-martial sentencing procedures).

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, *Foolish 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).

57. See Captain Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237, 264 (2000) (offering suggestions for modernizing the procedures for amending the *Manual for Courts-Martial (MCM)*); Kevin J. Barry, *A Reply to Captain Gregory E. Maggs's 'Cautious Skepticism' Regarding Recommendations to Modernize the Manual for Courts-Martial Rule-Making Process*, 166 MIL. L. REV. 37, 61–64 (2000) (recommending changes to how the rules are promulgated and addressing criticism to those recommendations); Captain Gregory E. Maggs, *Cautious Skepticism About the Benefit of Adding More Formalities to the Manual for Courts-Martial Rule-Making Process: A Response to Captain Kevin J. Barry*, 166 MIL. L. REV. 1, 11–16 (2000) (criticizing proposed reforms to the *MCM* rule-making process).

58. See Lindsay Nicole Alleman, *Who is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT'L L. 169, 170–81 (2006) (comparing the American military system with those of Canada and Israel); Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is It Time for a Change?*, 19 AM. J. CRIM. L. 395, 408–09 (1992) (recommending changes in how court-martial charges are handled).

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 Basset, *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.⁶⁰ And still another proposal would place the decision to prosecute in the hands of civilian prosecutors.⁶¹ Other commentators have responded to the calls for reforms.⁶²

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 2013,⁶³ 2014,⁶⁴ 2015,⁶⁵ and 2016.⁶⁶ Those amendments largely focused on sexual assaults, e.g., the rights of victims and whether an accused's good military character could be considered by the court.⁶⁷ The

2014/12/11/gillibrands-military-sexual-assault_n_6309108.html; see also Eugene R. Fidell, *What Is to Be Done? Herewith a Proposed Ansell-Hodson Military Justice Reform Act of 2014*, GLOBAL MIL. JUST. REFORM (May 13, 2014), <http://globalmjreform.blogspot.com/2014/05/what-is-to-be-done-herewith-proposed.html> (proposing the "Ansell-Hodson Military Justice Reform Act of 2014"). As discussed, *infra*, at Part XII.B, some limitations on the convening authority's post-trial powers were included in the 2016 amendments.

60. See Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in The Court-Martial Process*, 220 MIL. L. REV. 129, 175 (2014) (suggesting that military lawyers obtain prosecutorial discretion over disposition of offenses); Letter from Heidi Boghosian, Exec. Dir., Nat'l Lawyers Guild, to Paul S. Koffsky, Deputy Gen. Counsel, Dep't of Defense (June 30, 2014) (*available at* <https://archive.nlg.org/sites/default/files/MLTF%20recs%20to%20DoD.pdf>) (recommending that prosecutorial discretion be placed in the hands of independent prosecutors).

61. See generally Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195, 197 (2000) (recommending that the American military justice system study developments 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).

62. See Heidi L. Brady, *Justice Is No Longer Blind: How the Effort to Eradicate Sexual Assault in the Military Unbalanced the Military Justice System*, 2016 UNIV. OF ILL. L. REV. 193, 198 (2016) (maintaining 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).

63. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013).

64. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

65. National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014).

66. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015).

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.⁶⁸ 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,⁶⁹ the Judicial Proceedings Panel,⁷⁰ and the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces.⁷¹ 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 2013.⁷² 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.⁷³ The Committee is charged with providing the Department of Defense with advice on the “investigation, prosecution,

68. See *infra* Part IX.E.

69. Congress directed the Secretary of Defense to establish the Response Systems to Adult Sexual Assault Crimes Panel. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576(a)(1), 126 Stat. 1632, 1758 (2013). It did so in accordance with the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., Appendix, as amended) and 41 C.F.R. Section 102-3.50(a). The Panel submitted its report in June 2014, *available at*, <http://responsesystemspanel.whs.mi>.

70. The Secretary of Defense established the Judicial Proceedings Panel, as required by the National Defense Authorization Act for Fiscal Year 2013, § 576(a)(1) and in accordance with the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., appendix, as amended) and 41 C.F.R. Section 102-3.50(a). National Defense Authorization Act 2013, § 576(a)(1), 126 Stat. at 1768; 5 U.S.C. app. §§ 1–16 (2012); 41 C.F.R. § 102-3.50(a) (2010). The Panel was instructed to conduct an independent review and assessment of judicial proceedings conducted under the UCMJ regarding adult sexual assault and related offenses and to report on its findings. National Defense Authorization Act 2013, § 576(a)(1), 126 Stat. at 1768. Additional information about the Panel and copies of its reports are available at <http://jpp.whs.mil/>.

71. National Defense Authorization Act 2016, 129 Stat. 726 (2015).

72. See DEFENSE LEGAL POLICY BOARD, REPORT ON MILITARY JUSTICE IN COMBAT ZONES (May 2013), *available at* <http://www.caaflog.com/wp-content/uploads/20130531-Subcommittee-Report-REPORT-OF-THE-SUBCOMMITTEE-ON-MILITARY-JUSTICE-IN-COMBAT-ZONES-31-May-13-2.pdf> (discussing findings and recommendations “that will improve training, reporting, and investigations” in cases dealing with service members who have been accused of a crime against a civilian in a combat zone).

73. See Charter Establishment of DoD Federal Advisory Committees, 81 Fed. Reg. 8944 (Feb. 23, 2016) (stating that the committee’s charter was established pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015 and section 537 of the National Defense Authorization Act for Fiscal Year 2016).

and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.”⁷⁴

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.⁷⁵ The Joint Chiefs—undoubtedly aware of increasing congressional pressures on the military to resolve the sexual assault issues⁷⁶—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.⁷⁷

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.⁷⁸ Secretary Hagel’s directive also included a requirement to consider the recommendations by the Response Systems to Adult Sexual Assault Crimes Panel.⁷⁹ The General

74. Charter Establishment of DoD Federal Advisory Committees, 81 Fed. Reg. 8944 (Feb. 23, 2016).

75. Memorandum from Gen. Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, to Chuck Hagel, Sec’y of Def. (Aug. 5, 2013), in *MILITARY JUSTICE REVIEW GRP.*, *supra* note 23, app. A 1262–63 [hereinafter Gen. Dempsey Memorandum].

76. See Don Christensen, *Commanders Flunk on Military Justice Reforms*, THE HUFFINGTON POST (Dec. 3, 2014, 8:34 AM), http://www.huffingtonpost.com/don-christensen/commanders-flunk-on-milit_b_6258554.html (proposing reform); Arlette Saenz & Brian Thurow, *Sen. Kirsten Gillibrand Renews Push for Senate Vote on Military Sexual Assault*, ABC NEWS (Dec. 2, 2014, 1:28 PM), <http://abcnews.go.com/Politics/sen-kirsten-gillibrand-renews-push-senate-vote-military/story?id=27308547> (reporting the push for reforms to the military justice system).

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.⁸⁰

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.⁸¹

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.⁸² 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

justice system.” MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 22, available at <http://response.systemspanel.whs.mil/>.

80. TERMS OF REFERENCE FOR THE MILITARY JUSTICE REVIEW COMMITTEE (Jan. 24, 2014); and ADDENDUM (Mar. 12, 2014), available at http://www.dod.gov/dodgc/images/report_part1.pdf.

81. *Id.*

82. Memorandum from Stephen W. Preston, Gen. Counsel, Dep't of Def., to Dir. Military Justice Review Grp. (Sept. 29, 2014), in MILITARY JUSTICE REVIEW GRP., *supra* note 23, app. F 1297–1300.

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.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, 2015.⁸⁴ 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.⁸⁵ On September 21, 2015, the Military Justice Review Group submitted its report on proposed amendments to the Manual for Courts-Martial.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.⁸⁷

The Military Justice Review Group’s Report is extremely thorough.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

83. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 15.

84. *Id.*

85. See Press Release, Department of Defense, Department of Defense Forwards to Congress Proposed Changes to the Uniform Code of Military Justice (Dec. 28, 2015), <https://www.defense.gov/News/News-Releases/News-Release-View/Article/638095/departments-of-defense-forwards-to-congress-proposed-changes-to-the-uniform-code/> (discussing recommendations generated from the Report of the Military Justice Review Group).

86. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 96–97.

87. *Id.* at 23–24 (2015).

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.⁸⁹

Congress considered the recommended changes, without holding any formal hearings on the legislation.⁹⁰ On December 23, 2016, the President signed the National Defense Authorization Act for Fiscal Year 2017.⁹¹ 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,⁹² Article 6, Judge Advocates and Legal Officers,⁹³ and Article 6a, Investigation and Disposition of Matters Pertaining to the Fitness of Military Judges.⁹⁴ Two substantive amendments were made to Article 2, Persons Subject to the Code,⁹⁵ and Article 6b, Rights of Victim of an Offense Under This Chapter.⁹⁶

B. *Reforming Personal Jurisdiction Over Reservists*

Jurisdiction is the power of a court to hear a case.⁹⁷ There are three

89. *See infra* Part XIII.B.

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.

91. National Defense Authorization Act for Fiscal Year 2017, Public Law 114-328, 130 Stat. 2000 (2016).

92. Military Justice Act of 2016, Pub. L. No. 114-328, § 5101, 130 Stat. 2000, 2894 (codified as UCMJ art. 1 (2016), 10 U.S.C. § 801 (Supp. IV 2016)).

93. Military Justice Act § 5102, 130 Stat. at 2895 (codified as UCMJ art. 6 (2016), 10 U.S.C. § 806 (Supp. IV 2016)).

94. Military Justice Act § 5104, 130 Stat. 2000, 2895 (codified as UCMJ art. 6a (2016), 10 U.S.C. § 806a (Supp. IV 2016)).

95. Military Justice Act § 5102, 130 Stat. 2000, 2894–95 (codified as UCMJ art. 1 (2016), 10 U.S.C. § 801 (Supp. IV 2016)).

96. Military Justice Act § 5103, 130 Stat. 2000, 2895–96 (codified as UCMJ art. 6b (2016), 10 U.S.C. § 806b (Supp. IV 2016)).

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,⁹⁸ subject matter jurisdiction,⁹⁹ and the court must be properly constituted.¹⁰⁰

Articles 2 and 3 of the UCMJ list the categories of individuals who are subject to court-martial jurisdiction.¹⁰¹ That list includes not only those service members who are on active duty, but also retired service members,¹⁰² cadets,¹⁰³ and civilians who are working with the military in a declared war or “contingency operation.”¹⁰⁴

Article 2 provides that reservists are subject to court-martial jurisdiction while on active duty¹⁰⁵ or on inactive-duty for training (IDT).¹⁰⁶ 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*,¹⁰⁷ the accused was charged with committing a sexual assault in his motel room, between

98. *Id.* § 4-4.

99. Regarding the second element, the subject matter jurisdiction requirement, in *O'Callahan v. Parker*, 395 U.S. 258 (1969), the Supreme Court required the prosecution to show that the charged offense was “service-connected.” The Supreme Court abolished the service connection requirement in *Solorio v. United States*, 483 U.S. 435 (1987). In *Solorio*, the Supreme Court said that the jurisdiction of a court-martial depends entirely on the *status* of the defendant as a member of the armed forces. *Solorio*, 483 U.S. at 439. It does not depend on service connection. *Id.* Nonetheless, there are continuing calls for reinstating that requirement in the UCMJ. See Eugene R. Fidell, *What Is to Be Done? Herewith a Proposed Ansell-Hodson Military Justice Reform Act of 2014*, GLOBAL MIL. JUST. REFORM (May 13, 2014), <http://globalmjreform.blogspot.com/2014/05/what-is-to-be-done-herewith-proposed.html> (proposing the “Ansell-Hodson Military Justice Reform Act of 2014”); Michael I. Spak, *Military Justice: The Oxymoron of the 1980's*, 20 CAL. W. L. REV. 436, 450 (1984) (proposing that court-martial jurisdiction be limited to purely military offenses). See generally 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, *supra* note 35, § 4-10 (discussing jurisdiction over the offense).

100. The three elements are sometimes broken down into five elements. See Jan H. Horbaly, *Court-Martial Jurisdiction* (June 10, 1986) (unpublished S.J.D. dissertation, Yale Law School) at https://www.loc.gov/rr/frd/Military_Law/CM-Jurisdiction_Horbaly.html [<https://perma.cc/6S4E-7LE9>] (presenting an exhaustive discussion on court-martial jurisdiction and noting that court-martial jurisdiction contains five elements).

101. UCMJ art. 2 (2012), 10 U.S.C. § 802 (2012) (amended 2016); UCMJ art. 3 (2012), 10 U.S.C. § 803 (2012) (amended 2016).

102. UCMJ art. 2(a)(4)–(5) (2012), 10 U.S.C. § 802(a)(4)–(5) (2012) (amended 2016).

103. UCMJ art. 2(a)(2) (2013), 10 U.S.C. § 802 (Supp. I 2013) (amended 2016).

104. UCMJ art. 2(a)(10) (2012), 10 U.S.C. § 802 (2012) (amended 2016).

105. UCMJ art. 2(d) (2013), 10 U.S.C. § 802 (Supp. I 2013) (amended 2016).

106. UCMJ art. 2(a)(3) (2013), 10 U.S.C. § 802 (Supp. I 2013).

107. *United States v. Wolpert*, 75 M.J. 777 (A. Ct. Crim. App. 2016).

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.”¹⁰⁸

In the Military Justice Act of 2016, Congress amended Article 2(a)(3) to address that jurisdictional gap.¹⁰⁹ 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.¹¹⁰

C. *Reforming Victims’ Rights*

Article 6b, which provides rights to victims, was added to the UCMJ in 2013.¹¹¹ It was intended to mirror, in part, the Federal Crime Victims’ Rights Act¹¹² 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.¹¹³ 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.¹¹⁴ 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.¹¹⁵ In 2015, a number of provisions in the Manual for Courts-Martial were added to implement protections and rights of victims,¹¹⁶ for example,

108. *Id.* at 782; *see also* United States v. Morita, 74 M.J. 116 (C.A.A.F. 2015) (holding reservist, who forged orders for inactive duty training, was not subject to court-martial jurisdiction; his status as reservist, in itself, was insufficient to establish jurisdiction); United States v. Spradley, 41 M.J. 827 (N-M. Ct. Crim. App. 1995) (holding UCMJ jurisdiction extends to reservists only when they are actually serving on inactive duty training).

109. Military Justice Act of 2016, Pub. L. No. 114-328, § 5102, 130 Stat. 2000, 2894–95 (codified as UCMJ art. 2 (2016), 10 U.S.C. § 802 (Supp. IV 2016)).

110. *Id.* Jurisdiction will not happen automatically; orders or regulations must exist to establish jurisdiction. *Id.*

111. National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 1701, 127 Stat. 672, 952 (2013).

112. 18 U.S.C. § 3771.

113. UCMJ art. 6b(a) (2014), 10 U.S.C. § 806b(a) (Supp. II 2014).

114. UCMJ art. 6b(c) (2014), 10 U.S.C. § 806b(c) (Supp. II 2014).

115. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 531, 129 Stat. 726, 814 (2015).

116. Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (June 22, 2015).

providing timely notice¹¹⁷ of a preliminary hearing under Article 32.¹¹⁸

The Military Justice Act of 2016 made three changes to Article 6b.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.”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.¹²¹ If there is no one to fill that need, the military judge may, but is not required to, designate another suitable person.¹²²

Second, Article 6b was amended by adding Article 6b(d)(3),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)¹²⁴ and Article 34 (advice of the staff judge advocate and referral to trial).¹²⁵ That amendment addresses the issue of whether a victim should have any say in how the military disposes of charges against an accused.¹²⁶ The change reflects similar language in the federal Crime Victims’ Rights Act, which states that a victim’s rights must not “impair

117. MCM, *supra* note 19, R.C.M. 405(i)(2).

118. UCMJ art. 32 (2012), 10 U.S.C. § 832 (2012) (amended 2016).

119. Military Justice Act of 2016, Pub. L. No. 114-328, § 5105, 130 Stat. 2000, 2895–96 (codified as UCMJ art. 6b (2016), 10 U.S.C. § 806b (Supp. IV 2016)).

120. UCMJ art. 6b(c) (2016), 10 U.S.C. § 806b(c) (Supp. IV 2016).

121. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 177.

122. UCMJ art. 6b(c) (2016), 10 U.S.C. § 806b(c) (Supp. IV 2016).

123. Military Justice Act § 5105, 130 Stat. 2000, 2895–96 (codified as UCMJ art. 6b(d)(3) (2016), 10 U.S.C. § 806b(d)(3) (Supp. IV 2016)).

124. UCMJ art. 6b(d)(3) (2016), 10 U.S.C. § 806b(d)(3) (Supp. IV 2016); UCMJ art. 30 (2016), 10 U.S.C. § 830 (Supp. IV 2016).

125. UCMJ art. 34 (2016); 10 U.S.C. § 834 (Supp. IV 2016).

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). *But see* Paul G. Cassell et. al., *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

127. 18 U.S.C. § 3771(d)(6) (2012).

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”).

129. Military Justice Act of 2016, Pub. L. No. 114-328, § 5105(c), 130 Stat. 2000, 2895, 2906 (codified as UCMJ art. 6b (2016), 10 U.S.C. § 806b (Supp. IV 2016)).

130. *Id.*

131. Congress added this provision to Article 46 in the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 (2013).

132. Military Justice Act § 5105(c), 130 Stat. 2000, 2906 (codified as UCMJ art. 6b (2016), 10 U.S.C. § 806b (Supp. IV 2016)).

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.¹³⁶ For example, Article 7 defines the term “apprehension,”¹³⁷ the legal standard for making an apprehension,¹³⁸ and finally who is authorized to make an apprehension.¹³⁹ The Military Justice Act of 2016 amended only two of those articles: Article 10, which covers restraint of persons charged with offenses,¹⁴⁰ and Article 12, which prohibits the government from placing a service member in confinement with enemy prisoners.¹⁴¹

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.¹⁴² Congress amended Article 10 by including a requirement, formerly found in Article 33, that court-martial charges be promptly forwarded.¹⁴³ 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 32.¹⁴⁴

136. UCMJ art. 7–14 (2012), 10 U.S.C. §§ 807–14 (2012).

137. UCMJ art. 7(a) (2012), 10 U.S.C. § 807(a) (2012) (amended 2016).

138. UCMJ art. 7(b) (2012), 10 U.S.C. § 807(b) (2012) (amended 2016).

139. UCMJ art. 7(c) (2012), 10 U.S.C. § 807(c) (2012) (amended 2016).

140. UCMJ art. 10 (2016), 10 U.S.C. § 810 (Supp. IV 2016).

141. UCMJ art. 12 (2016), 10 U.S.C. § 812 (Supp. IV 2016).

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).

143. Military Justice Act of 2016, Pub. L. No. 114-328, § 5121, 130 Stat. 2000, 2896 (codified as UCMJ art. 10 (2016), 10 U.S.C. § 810 (Supp. IV 2016)).

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,¹⁴⁵ 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.¹⁴⁶ 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.”¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹

VI. REFORMING NON-JUDICIAL PUNISHMENT

One of the valuable disciplinary tools available to military commanders is non-judicial punishment under Article 15.¹⁵⁰ 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.¹⁵¹ While Article 15 itself provides some guidance on imposing

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 . . .”).

146. UCMJ art. 12 (2012), 10 U.S.C. § 812 (2012) (amended 2016).

147. *Id.*

148. UCMJ art. 12 (2016), 10 U.S.C. § 812 (Supp. IV 2016).

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. McPhearson*, 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. Crim. 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).

150. UCMJ art. 15 (2012), 10 U.S.C. § 815 (2012).

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].

153. UCMJ art. 15(b)(2)(A) (2012), 10 U.S.C. § 815(b)(2)(A) (2012) (amended 2016).

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).

156. Military Justice Act of 2016, Pub. L. No. 114-328, § 5111, 130 Stat. 2000, 2897 (codified as UCMJ art. 15 (2016), 10 U.S.C. § 815 (Supp. IV 2016)).

157. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 213; *see also* Major Dwight H. Sullivan, *Overhauling the Vessel Exception*, 43 NAVAL L. REV. 57, 83–85 (1996) (discussing application of the punishment of confinement on bread and water).

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(l). The Air Force

the impact of non-judicial punishment on a service member's record;¹⁵⁹ and, third, whether to clarify those cases where the vessel exception would apply.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.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.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.

encourages commanders to apply the beyond a reasonable doubt standard. U.S. DEP'T OF AIR FORCE, INSTR. 51-202, NONJUDICIAL PUNISHMENT para. 3-4 (31 Mar. 2015). The Navy, Marine Corps, and Coast Guard apply a preponderance of the evidence standard. U.S. DEP'T OF NAVY, JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) sec. 0110(b) (26 June 2012) [hereinafter JAGINST 5800.7F]; U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 5810.1E, NONJUDICIAL PUNISHMENT art. 1.D.1.f. (13 April 2011) [hereinafter COMMANDANT INSTR. M5810.1E]. See generally Captain Shane Reeves, *The Burden of Proof in Nonjudicial Punishment: Why Beyond a Reasonable Doubt Makes Sense*, ARMY LAW, Nov. 2005, at *28 (recommending beyond a reasonable doubt as the burden of proof standard).

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).

160. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 213.

161. *Id.*

162. Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5161-64, 130 Stat. 2000, 2897-99 (codified as UCMJ art. 16-21 (2016), 10 U.S.C. §§ 816-21 (Supp. IV 2016)).

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.¹⁶³ 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.¹⁶⁴ 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 25¹⁶⁵ and Article 25a¹⁶⁶ 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.¹⁶⁷ It did not make any changes to Article 16 regarding summary courts-martial.¹⁶⁸

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.¹⁶⁹ Since the 1920 Articles of War, general courts-martial have consisted of at least five members on the court-martial panel.¹⁷⁰ As amended in 2016, Article 16(b)(1) provides that a non-capital general court-martial consists of a military judge and eight members;¹⁷¹ the number of members in a capital case are determined by Article 25a.¹⁷²

163. UCMJ art. 16(a) (2012), 10 U.S.C. § 816(a) (2012) (amended 2016).

164. *Id.*

165. UCMJ art. 25 (2012), 10 U.S.C. § 825 (2012) (amended 2016).

166. UCMJ art. 25(a) (2012), 10 U.S.C. § 825(a) (2012) (amended 2016).

167. Military Justice Act § 5161, 130 Stat. 2000, 2897 (codified as UCMJ art. 16 (2016), 10 U.S.C. § 816 (Supp. IV 2016)).

168. UCMJ art. 16(d) (2016), 10 U.S.C. § 816(d) (Supp. IV 2016).

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.¹⁷³ He was apparently concerned that a convening authority could make changes in the number of members during the court-martial.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 64.¹⁷⁵ 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 1920.¹⁷⁶ 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.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.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.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

in which the accused may be sentenced to death, the number of members shall be 12.”).

173. See Major Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1, 20–22 (1967) (recounting General Ansell’s proposed change to the membership of general courts-martial).

174. See *id.* (noting the basis for General Ansell’s proposal).

175. See *id.* at 14 (discussing the filing of Senate Bill 64 to amend Articles of War).

176. Act of June 4, 1920, ch. 2, 41 Stat. 759, 787.

177. See S.T. Ansell, *Some Reforms in Our System of Military Justice*, 32 YALE L.J. 146, 151 (1922) (“Remedial legislation could not be had in the face of departmental opposition.”).

178. See *Ex parte Quirin*, 317 U.S. 1, 17 (1942) (“Such cases are expressly excepted from Fifth Amendment, and are deemed excepted by implication from the Sixth.”). See generally 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, *supra* note 35, § 8-3(D)(4) (indicating the Supreme Court’s conclusion not to give the military a right to a jury trial).

179. See UCMJ art. 29(a) (2016), 10 U.S.C. § 829(a) (Supp. IV 2016) (addressing the excusal of members from the court).

members to allow for removal, but none were removed, all nine members serve on the panel.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.¹⁸¹ That leads to what has been referred to as the “numbers game.”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.¹⁸³

3. Reforming the Composition of Special Courts-Martial

Article 16(c) recognizes two types of special courts-martial.¹⁸⁴ The first, reflected in Article 16(c)(1), is a special court-martial consisting of a military judge and four members.¹⁸⁵ Currently, a special court-martial must be composed of at least three members.¹⁸⁶ Under the 2016 amendments, each special court-martial composed of members, will have a set number of members—four.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

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).

181. *Id.* at 220 (discussing the anomaly).

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).

183. Military Justice Act of 2016, Pub. L. No. 114-328, § 5187, 130 Stat. 2000, 2902–03 (codified as UCMJ art. 29(d) (2016), 10 U.S.C. § 829(d) (Supp. IV 2016)).

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

185. UCMJ art. 16(c)(1) (2012), 10 U.S.C. § 816(c)(1) (2012) (amended 2016).

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

187. Military Justice Act § 5161, 130 Stat. 2000, 2897 (codified as UCMJ art. 16 (2016), 10 U.S.C. § 816 (Supp. IV 2016)).

will provide some consistency.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.¹⁸⁹ The 2016 amendments deleted the special court-martial without a military judge.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.¹⁹¹ General courts-martial may try persons under the law of war.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 offenses¹⁹³ as listed in Article 56(b)(2), which dealt with maximum punishments.¹⁹⁴ In 2016, Congress moved the list of the specified offenses to Article 18(c).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 16.¹⁹⁶

D. *Jurisdiction of Special Courts-Martial*

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

188. See *supra* Part VII.B.2.

189. UCMJ art. 16(c)(2) (2012), 10 U.S.C. § 816(c)(2) (2012) (amended 2016).

190. UCMJ art. 16(c) (2016), 10 U.S.C. § 816(c) (Supp. IV 2016).

191. UCMJ art. 18(a) (2012), 10 U.S.C. § 818(a) (2012) (amended 2016).

192. UCMJ art. 18(e) (2012), 10 U.S.C. § 818(e) (2012) (amended 2016).

193. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632, 1758 (codified as UCMJ art. 18 (2013), 10 U.S.C. § 818 (Supp. I 2013)).

194. See UCMJ art. 56(b)(2) (2013), 10 U.S.C. § 856(b)(2) (Supp. I 2013) (setting the maximum and minimum limits allowed in sentencing).

195. Military Justice Act of 2016, Pub. L. No. 114-328, § 5162, 130 Stat. 2000, 2898 (codified as UCMJ art. 18(c) (2016), 10 U.S.C. § 818(c) (Supp. IV 2016)).

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 . . .”).

197. Military Justice Act § 5163, 130 Stat. 2000, 2898–99 (codified as UCMJ art. 19 (2016), 10 U.S.C. § 819 (Supp. IV 2016)).

consisting of a judge alone.¹⁹⁸ 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.¹⁹⁹ 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.²⁰⁰ The qualifications of military magistrates are set out in new Article 26a, discussed *infra*.²⁰¹

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.²⁰²

These changes reflect a commendable effort to mirror federal criminal practice where United States Magistrate Judges try petty offenses,²⁰³ and create a court-martial that can efficiently try petty offenses.²⁰⁴ 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.²⁰⁵

E. *Jurisdiction of Summary Courts-Martial*

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

198. UCMJ art. 16(c)(2)(A) (2016), 10 U.S.C. § 816(c)(2)(A) (Supp. IV 2016).

199. UCMJ art. 19(b) (2016), 10 U.S.C. § 819(b) (Supp. IV 2016).

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,²⁰⁶ codified several court decisions, which held a summary court-martial conviction is not a criminal conviction.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.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.²⁰⁹ Congress made a minor technical amendment to Article 22, which addresses the authority to convene general courts-martial,²¹⁰ but made no changes to Articles 23 and 24, which address the authority to convene special and summary courts-martial.²¹¹ Nor did Congress make any changes to Article 28, which provides guidance on detailing or employing reporters or interpreters for courts-martial.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.²¹³ Congress also created the position of military magistrate.²¹⁴

B. *Selecting Court Members*

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

206. UCMJ art. 20 (2012), 10 U.S.C. § 820 (2012) (amended 2016).

207. *See, e.g.*, *Middendorf v. Henry*, 425 U.S. 25, 32 (1976) (quoting *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, ¶ 79a (1969)) (proposing a summary court-martial is not a criminal prosecution).

208. *MILITARY JUSTICE REVIEW GRP.*, *supra* note 23, at 239.

209. UCMJ art. 22–29 (2012), 10 U.S.C. §§ 822–29 (2012).

210. Military Justice Act of 2016, Pub. L. No. 114-328, § 5181, 130 Stat. 2000, 2899 (codified as UCMJ art. 22 (2016), 10 U.S.C. § 822 (Supp. IV 2016)) (striking the words “in chief” from Article 22(a)(6), which refers to the office of “commander in chief of a fleet”).

211. UCMJ art. 23–24 (2012), 10 U.S.C. §§ 823–24 (2012).

212. UCMJ art. 28 (2012), 10 U.S.C. § 828 (2012) (amended 2016).

213. Military Justice Act §§ 5181–87, 130 Stat. 2000, 2900–02 (codified as UCMJ art. 25–27a (2016), 10 U.S.C. §§ 825–27a (Supp. IV 2016)).

214. Military Justice Act § 5185, 130 Stat. 2000, 2901–02 (codified as UCMJ art. 26a (2016), 10 U.S.C. § 826a (Supp. IV 2016)).

role of commanders in selecting and appointing the court members.²¹⁵ Despite repeated calls to reform the selection process,²¹⁶ Congress left the commander in charge.²¹⁷

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 members²¹⁸—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.²¹⁹ In that case, the court-martial is composed of at least one-third enlisted members.²²⁰ 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.²²¹ 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).

217. Military Justice Act § 5182, 130 Stat. 2000, 2899–900 (codified as UCMJ art. 25 (2016), 10 U.S.C. § 825 (Supp. IV 2016)).

218. *Id.*

219. UCMJ art. 25(d)(1) (2012), 10 U.S.C. § 825(d)(1) (2012) (amended 2016).

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.²²² An enlisted accused will be able to request that the court consist of only officers²²³ or at least one-third enlisted personnel—whether or not enlisted members were originally appointed to the court.²²⁴ 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.²²⁵ That current limitation creates an unnecessary distinction between accused who are enlisted and those who are officers.²²⁶

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 temperament²²⁷ to the court.²²⁸

The amendments to Article 25 also added a new provision that will permit, with some exceptions for capital cases,²²⁹ 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.²³⁰ 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.²³¹ 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.

222. UCMJ art. 25(c)(1) (2016), 10 U.S.C. § 825(c)(1) (Supp. IV 2016).

223. UCMJ art. 25(c)(2)(A) (2016), 10 U.S.C. § 825(c)(1)(A) (Supp. IV 2016).

224. UCMJ art. 25(c)(2)(B) (2016), 10 U.S.C. § 825(c)(2)(B) (Supp. IV 2016).

225. See MILITARY JUSTICE REVIEW GRP., *supra* 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").

227. These are among the qualities listed in renumbered Article 25(e)(2), formerly Article 25(d)(2). UCMJ art. 25(e)(2) (2016), 10 U.S.C. § 825(e)(2) (Supp. IV 2016).

228. MILITARY JUSTICE REVIEW GRP., *supra* 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).

230. UCMJ art. 25(d)(1) (2016), 10 U.S.C. § 825(d)(1) (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.²³²

Congress also amended Article 25a, which concerns the number of members in a capital case.²³³ The amendments provide that the number of members must be twelve.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.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.²³⁶

C. *Detailing of Military Judges*

Several changes were made to Article 26, which addresses the issue of detailing military judges to courts-martial.²³⁷ As amended, Article 26 specifies that a military judge must be appointed for every general and special court-martial,²³⁸ provides that the Judge Advocates General must designate a chief trial judge,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.²⁴⁰ The amendments will provide for statutory authority for a military judge from one service to preside over a court-martial in another service.²⁴¹

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

232. UCMJ art. 25(e)(3) (2016), 10 U.S.C. § 825(e)(3) (Supp. IV 2016).

233. Military Justice Act of 2016, Pub. L. No. 114-328, § 5183, 130 Stat. 2000, 2900 (codified as UCMJ art. 25 (2016), 10 U.S.C. § 825 (Supp. IV 2016)).

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)).

235. UCMJ art. 25(a)(b)(1) (2016), 10 U.S.C. § 825(a)(b)(1) (Supp. IV 2016).

236. UCMJ art. 25(a)(b)(2) (2016), 10 U.S.C. § 825(a)(b)(2) (Supp. IV 2016).

237. UCMJ art. 26 (2016), 10 U.S.C. § 826 (Supp. IV 2016).

238. UCMJ art. 26(a) (2016), 10 U.S.C. § 826(a) (Supp. IV 2016).

239. UCMJ art. 26(g) (2016), 10 U.S.C. § 826(g) (Supp. IV 2016).

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).

241. UCMJ art. 26(f) (2016), 10 U.S.C. § 826(f) (Supp. IV 2016).

judges—²⁴² has been the subject of legal commentary²⁴³ 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

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

243. See generally Walter T. Cox III, *The Twenty-Seventh Annual Kenneth J. Hodson Lecture: Echoes and Expectations: One Judge's View*, 159 MIL. L. REV. 183, 201 (1999) (commending AR 27-10, which sets terms of office); Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195, 203 (2000) (noting the world-wide problem of independence of military judges in criminal justice systems); see generally Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629 (1994) (arguing for the independence of 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 27-10.²⁴⁶ They have been used, for example, to review a commander's decision concerning pretrial confinement of an accused.²⁴⁷ 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).²⁴⁹ The position is intended to mirror the office of United States Magistrate Judges.²⁵⁰ 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.²⁵¹

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 26.²⁵²

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 counsel²⁵³ and defense counsel. First, Article 27(a)(2) currently identifies who is disqualified from acting as counsel at a court-martial.²⁵⁴ Congress

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.

249. UCMJ art. 26a (2016), 10 U.S.C. § 826a (Supp. IV 2016).

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).

252. UCMJ art. 26(e) (2016), 10 U.S.C. § 826(e) (Supp. IV 2016).

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.’” (quoting UCMJ art. 38(a) (2013), 10 U.S.C. § 838(a) (Supp. I 2013))).

254. UCMJ art. 27 (2012), 10 U.S.C. § 27 (2012) (amended 2016).

amended the provision to include magistrate judges and appellate judges who have previously acted in the case.²⁵⁵

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).²⁵⁶ 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.²⁵⁷

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).²⁵⁸ 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.²⁵⁹ They do not need to meet the qualifications set out in Article 27(b).²⁶⁰ 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.²⁶¹

Finally, a new subdivision (d) was added to Article 27, which will require that, to the greatest extent practicable, in a capital case,²⁶² at least one

255. Military Justice Act of 2016, Pub. L. No. 114-328, § 5186, 130 Stat. 2000, 2902 (codified as UCMJ art. 27(a)(2) (2016), 10 U.S.C. § 827(a)(2) (Supp. IV 2016)).

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.

UCMJ art. 27(b)(1)–(2) (2016), 10 U.S.C. § 827(b)(1)–(2) (Supp. IV 2016).

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).

259. UCMJ art. 27(b)(2) (2016), 10 U.S.C. § 827(b)(2) (Supp. IV 2016).

260. UCMJ art. 27(c)(1) (2016), 10 U.S.C. § 827(c)(1) (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.

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

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).

266. Military Justice Act of 2016, Pub. L. No. 114-328, § 5187, 130 Stat. 2000, 2902–03 (codified as UCMJ art. 29 (2016), 10 U.S.C. § 829 (Supp. IV 2016)).

267. UCMJ art. 29 (2012), 10 U.S.C. § 829 (2012) (amended 2016).

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.

270. UCMJ art. 29(a)(1) (2016), 10 U.S.C. § 829(a)(1) (Supp. IV 2016). *See generally* 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, *supra* note 35, § 15-10 (discussing voir dire of members, challenges to the panel, challenges for cause, and peremptory challenges).

271. UCMJ art. 29(a)(2), (b)(1) (2016), 10 U.S.C. § 829(a)(2), (b)(1) (Supp. IV 2016).

272. UCMJ art. 29(a)(3) (2016), 10 U.S.C. § 829(a)(3) (Supp. IV 2016).

273. UCMJ art. 29(b) (2016), 10 U.S.C. § 829(b) (Supp. IV 2016).

members for a non-capital case.²⁷⁴ In a special court-martial, the military judge must impanel four members.²⁷⁵

The second change focuses on the ability of the convening authority to detail alternate members to a court-martial.²⁷⁶ This parallels federal practice²⁷⁷ 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.²⁷⁸

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.²⁷⁹ The amendment now permits use of an audio tape or similar recording.²⁸⁰

IX. REFORMING PRETRIAL PROCEDURES

A. *In General*

Subchapter VI of the UCMJ addresses pretrial procedures and covers topics such as preferral²⁸¹ and forwarding of charges,²⁸² advice of the staff judge advocate,²⁸³ preliminary hearings,²⁸⁴ and service of charges on the accused.²⁸⁵

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

To better understand the 2016 reforms to the UCMJ dealing with

274. UCMJ art. 29(b)(2) (2016), 10 U.S.C. § 829(b)(2) (Supp. IV 2016).

275. UCMJ art. 29(b)(3) (2016), 10 U.S.C. § 829(b)(3) (Supp. IV 2016).

276. UCMJ art. 29(c) (2016), 10 U.S.C. § 829(c) (Supp. IV 2016).

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").

278. UCMJ art. 29(d) (2016), 10 U.S.C. § 829(d) (Supp. IV 2016).

279. UCMJ art. 29(f) (2016), 10 U.S.C. § 829(f) (Supp. IV 2016).

280. *Id.* This expressly includes videotapes.

281. UCMJ art. 30 (2012), 10 U.S.C. § 830 (2012) (amended 2016).

282. UCMJ art. 33 (2012), 10 U.S.C. § 833 (2012) (amended 2016).

283. UCMJ art. 34 (2012), 10 U.S.C. § 834 (2012) (amended 2016).

284. UCMJ art. 32 (2012), 10 U.S.C. § 832 (2012) (amended 2016).

285. UCMJ art. 35 (2012), 10 U.S.C. § 835 (2012) (amended 2016).

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.²⁸⁶ The process involves obtaining legal advice from a judge advocate—an armed forces lawyer.²⁸⁷ In some circumstances, a commander may impose pretrial restraints, including pretrial confinement, on the service member.²⁸⁸

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

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”).

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).

288. UCMJ art. 9 (2012), 10 U.S.C. § 809 (2012) (amended 2016).

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

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

291. See generally *id.* (discussing the use of administrative measures).

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).

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.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.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.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.²⁹⁷ The UCMJ specifies the number of persons who must be assigned to each court.²⁹⁸ In many cases the accused and the convening authority engage in plea bargaining and execute a pretrial agreement.²⁹⁹ Typically, those agreements require the accused to plead guilty in return for a guaranteed maximum sentence.³⁰⁰

C. *Preferring Charges and Specifications*

The 2016 amendments to Article 30, which addresses referral of charges and specifications, were technical in nature.³⁰¹ Congress reorganized the article into three subdivisions. Article 30(a) specifies who may prefer court-martial charges³⁰² and that the charges must be written and sworn to before a commissioned officer.³⁰³ Article 30(b) will require that the person preferring the charges state that he or she has personal

294. UCMJ art. 30 (2012), 10 U.S.C. § 830 (2012) (amended 2016).

295. UCMJ art. 32 (2012), 10 U.S.C. § 832 (2012) (amended 2016).

296. *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).

297. *See* UCMJ art. 25 (2012), 10 U.S.C. § 825 (2012) (amended 2016) (detailing which court members may be selected by the convening authority).

298. UCMJ art. 16 (2012), 10 U.S.C. § 816 (2012) (amended 2016).

299. *See generally* 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, *supra* note 35, § 9-2 (discussing the process of entering into pretrial agreements, i.e., plea bargaining).

300. *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”).

301. Military Justice Act of 2016, Pub. L. No. 114-328, § 5201, 130 Stat. 2000, 2904 (codified as UCMJ art. 30 (2016), 10 U.S.C. § 830 (Supp. IV 2016)).

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 referral is almost always accomplished by the service member’s immediate commander. In contrast, only a commander may actually prefer charges to a court-martial.

303. UCMJ art. 30(a)(2) (2016), 10 U.S.C. § 830(a)(2) (Supp. IV 2016). The military uses a “charge sheet” DD Form 458.

knowledge of the matters set out in the charges³⁰⁴ and specify that they are true, to the best of the signer's knowledge.³⁰⁵ 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,³⁰⁶ and second, determine, as soon as practical, the appropriate disposition of the charges³⁰⁷ "in the interest of justice and discipline."³⁰⁸ The amendments were intended to clarify the sequence of preparing and forwarding charges and to reflect current practice.³⁰⁹

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.³¹⁰ One proposal is to vest prosecutorial discretion in a separate military command structure.³¹¹ Another is to

304. UCMJ art. 30(b)(1) (2016), 10 U.S.C. § 830(b)(1) (Supp. IV 2016).

305. UCMJ art. 30(b)(2) (2016), 10 U.S.C. § 830(b)(2) (Supp. IV 2016).

306. UCMJ art. 30(c)(1) (2016), 10 U.S.C. § 830(c)(1) (Supp. IV 2016).

307. *Id.* Originally, Article 30 required the appropriate 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 referral of charges and specifications against a military accused, better aligning the statute's provisions with current practice and the President's implementing rules.').

310. See Lindsay Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT'L L. 169, 170–81 (2006) (comparing the American military system with those of Canada and Israel); Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is It Time for a Change?*, 19 AM. J. CRIM. L. 395, 408–09 (1992) (recommending changes in how court-martial charges are handled).

311. In 2013, Senator Gillibrand sponsored the Military Justice Improvement Act (MJIA) which proposed that commanders would lose jurisdiction over specified offenses and the commander's power to grant post-trial clemency would be limited. S. 967, 113th Cong. (2013). Senator Gillibrand's bill had bipartisan support, but it failed in the Senate by a close vote. See Laura Basset, *Senators Shoot Down Gillibrand's Military Sexual Assault Reform Bill*, THE HUFFINGTON POST (Dec. 11, 2013, 2:10 PM), http://www.huffingtonpost.com/2014/12/11/gillibrands-military-sexual-assault_n_6309108.html (discussing the public's response to Senator Gillibrand's Military Sexual Assault Reform bill); see also Eugene R. Fidell, *What Is to Be Done? Herewith a Proposed Ansell-Hodson Military Justice Reform Act of 2014*, GLOBAL MIL. JUST. REFORM (May 13, 2014) <http://globalmjreform.blogspot.com/2014/05/what-is-to-be-done-herewith-proposed.html>

place prosecutorial discretion in the hands of armed forces lawyers.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.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."³¹⁴

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.³¹⁵ Such decisions may involve inquiries into an accused's mental capacity or responsibility,³¹⁶ requests for individual military counsel to represent the accused,³¹⁷ and issuing subpoenas.³¹⁸ New Article 30a is designed to address that problem.³¹⁹

(proposing the "Ansell-Hodson Military discretion Justice Reform Act of 2014").

312. See Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 175 (2014) (suggesting military lawyers should have prosecutorial power over disposition of offenses); Letter from Heidi Boghosian, Exec. Dir., Nat'l Lawyers Guild, to Mr. Paul S. Koffsky, Deputy Gen. Counsel, Dep't of Defense (June 30, 2014), <http://www.nlg.org/news/releases/national-lawyers-guild-submits-comments-improving-military-justice-system-department> (recommending prosecutorial discretion be placed in the hands of independent prosecutors).

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").

314. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 300.

315. *Id.* at 304.

316. MCM, *supra* note 19, R.C.M. 705.

317. UCMJ art. 38(b)(3)(B) (2016), 10 U.S.C. § 838(b)(3)(B) (Supp. IV 2016).

318. See UCMJ art. 46 (2016), 10 U.S.C. § 846 (Supp. IV 2016) (discussing subpoenas for witnesses); see also UCMJ art. 47 (2016), 10 U.S.C. § 847 (Supp. IV 2016) (discussing refusal to appear or testify).

319. See Military Justice Act of 2016, Pub. L. No. 114-328, § 5202, 130 Stat. 2000, 2904 (codified as UCMJ art. 30a (2016), 10 U.S.C. § 830a (Supp. IV 2016)) (establishing how proceedings conducted before referral should be conducted).

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,³²⁰ pre-referral warrants or orders regarding electronic communications,³²¹ and pre-referral matters referred by an appellate court.³²² The new article further delegates to the President the task of promulgating regulations concerning the procedures for reviewing the military judge's or military magistrate's decisions³²³ and any limitations for relief granted under the article.³²⁴ The service Secretaries are responsible for promulgating regulations concerning the detailing of military judges for these proceedings.³²⁵ 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.³²⁶

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.³²⁷

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.³²⁸ 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

320. UCMJ art. 30a(a)(1)(A) (2016), 10 U.S.C. § 830a(a)(1)(A) (Supp. IV 2016).

321. UCMJ art. 30a(a)(1)(B) (2016), 10 U.S.C. § 830a(a)(1)(B) (Supp. IV 2016).

322. UCMJ art. 30a(a)(1)(C) (2016), 10 U.S.C. § 830a(a)(1)(C) (Supp. IV 2016).

323. UCMJ art. 30a(a)(2)(A) (2016), 10 U.S.C. § 830a(a)(2)(A) (Supp. IV 2016).

324. UCMJ art. 30a(a)(2)(B) (2016), 10 U.S.C. § 830a(a)(2)(B) (Supp. IV 2016).

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).

327. UCMJ art. 30a(a)(3) (2016), 10 U.S.C. § 830a(a)(3) (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*,³²⁹ 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.³³⁰ Congress amended Article 32 in the National Defense Authorization Acts of Fiscal Year 2014³³¹ and Fiscal Year 2015³³² 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.³³³ The language of Article 32 seems to suggest that the preliminary hearing officer’s report is expected to be relatively brief.³³⁴ 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.³³⁵

In the 2016 amendments, Congress again amended Article 32.³³⁶ 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).

331. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954 (codified as UCMJ art. 32 (2013), 10 U.S.C. § 832 (Supp. I 2013)).

332. National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 531, 128 Stat. 3292, 3362–66 (codified as UCMJ art. 32 (2014), 10 U.S.C. § 830a (Supp. II 2014)).

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).

334. UCMJ art. 32(c) (2012), 10 U.S.C. § 832(c) (2012) (amended 2016).

335. MCM, *supra* note 19, R.C.M. 405(j).

336. Military Justice Act of 2016, Pub. L. No. 114-328, § 5203(a)–(d), 130 Stat. 2000, 2905–06 (codified as UCMJ art. 32 (2016), 10 U.S.C. § 832 (Supp. IV 2016)).

accused, and (4) providing a recommendation for disposition to the convening authority.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.³³⁸ Second, the preliminary hearing officer will have to submit a much more detailed report which, according to the Military Justice Review Group,³³⁹ is intended to provide more detailed assistance to the staff judge advocate and the convening authority on the appropriate disposition of the charges.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. 405.³⁴¹

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.³⁴² Article 33, which now spells out the requirements for forwarding charges, was completely revised in the 2016 amendments to address that problem.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

337. UCMJ art. 32 (2016), 10 U.S.C. § 832 (Supp. IV 2016).

338. UCMJ art. 32(c)(3) (2016), 10 U.S.C. § 832(c)(3) (Supp. IV 2016).

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).

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).

341. MCM, *supra* note 19, R.C.M. 405(j).

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).

343. Military Justice Act of 2016, Pub. L. No. 114-328, § 5204, 130 Stat. 2906 (codified as UCMJ art. 33 (2016), 10 U.S.C. § 833 (Supp. IV 2016)).

conviction.³⁴⁴ 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.³⁴⁵ 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.³⁴⁶

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*.³⁴⁷

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.³⁴⁸ 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.³⁴⁹ That ambiguity was addressed by adding Article 34(d),³⁵⁰ 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.

345. UCMJ art. 33 (2016), 10 U.S.C. § 833 (Supp. IV 2016).

346. *Id.*

347. *See supra* Part IX.C.

348. UCMJ art. 34 (2016), 10 U.S.C. § 834 (Supp. IV 2016). *See generally* Captain Gary E. Felicetti, *The SJA's Article 34 Veto: A Force Awakening?*, 224 MIL. L. REV. 289 (2016) (discussing the staff judge advocate's statutory and ethical responsibilities).

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.”³⁵¹

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[.]”³⁵² 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.³⁵³

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),³⁵⁴ discussed *supra*.³⁵⁵ 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-martial³⁵⁶—something that occurs in some commands and is already addressed in the Manual for Courts-Martial.³⁵⁷ 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.³⁵⁸

H. *Serving Charges on the Accused*

The amendments to Article 35,³⁵⁹ 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,³⁶⁰ and specifying the waiting period between the service of the charges and the start of the trial.³⁶¹

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).

352. UCMJ art. 34(a)(1)(B) (2016), 10 U.S.C. § 834(a)(1)(B) (Supp. IV 2016).

353. UCMJ art. 34(a)(2) (2012), 10 U.S.C. § 834(a)(2) (2012) (amended 2016).

354. UCMJ art. 34(a)(2) (2016), 10 U.S.C. § 834(a)(2) (Supp. IV 2016).

355. See *supra* Part IX.C.

356. UCMJ art. 34(b) (2016), 10 U.S.C. § 834(b) (Supp. IV 2016).

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).

359. UCMJ art. 35 (2016), 10 U.S.C. § 835 (Supp. IV 2016).

360. UCMJ art. 35(a) (2016), 10 U.S.C. § 835(a) (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.³⁶² For example, a military accused has the right to the assistance of an assigned military defense counsel,³⁶³ the right to a speedy trial (under the Sixth Amendment and under a 120-day speedy trial provision in the Manual for Courts-Martial),³⁶⁴ the right to extensive discovery,³⁶⁵ the right to production of evidence for examination and testing,³⁶⁶ the right to request witnesses, including expert witnesses at Government expense,³⁶⁷ the right to request the assistance of experts at Government expense in preparing for trial,³⁶⁸ the right to confront witnesses,³⁶⁹ the right to notice of the

362. UCMJ art. 36(a) (2012), 10 U.S.C. § 836(a) (2012) (amended 2016). The UCMJ provides some guidance on trial matters. *See* UCMJ art. 36–54 (2012), 10 U.S.C. §§ 836–54 (2012) (establishing rules and standards for trial procedure). For the most part, however, the MCM contains more detailed guidance on court-martial procedures. *See generally* MCM, *supra* note 19, R.C.M. 901–24 (setting out detailed rules and expectations for trial procedures and further explaining some of the UCMJ provisions dealing with trial procedure).

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,³⁷⁰ the right to challenge the military judge for cause,³⁷¹ and the right to file motions *in limine*, motions to suppress and motions to dismiss the charges on a wide range of grounds.³⁷²

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,³⁷³ and to ensure that any pretrial agreement accurately reflects the intent of both the convening authority and the accused³⁷⁴ and is consistent with public policy.³⁷⁵ If the accused pleads not guilty, and the case is tried on the merits, the Military Rules of Evidence apply during the trial.³⁷⁶

Sentencing, which typically occurs immediately after a finding of guilty,³⁷⁷ is a separate phase of the court-martial. That subject is

369. U.S. CONST. amend. VI.

370. UCMJ art. 35 (2012), 10 U.S.C. § 835 (2012) (amended 2016).

371. MCM, *supra* note 19, R.C.M. 902. Article 26 discusses grounds for possible challenges to the military judge. UCMJ art. 26 (2016), 10 U.S.C. § 826 (Supp. IV 2016); MCM, *supra* note 19, R.C.M. 502–03, 902.

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.³⁷⁸ 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*,³⁷⁹ 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.³⁸⁰

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:³⁸¹ hearing and deciding motions,³⁸² hearing and ruling on any matter that can be ruled on by the judge,³⁸³ holding arraignments³⁸⁴ and taking pleas,³⁸⁵ and performing any other procedural function that does not require the presence of the court members.³⁸⁶ 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.³⁸⁷ The court-martial “members,” the counterpart to civilian jurors, are absent.³⁸⁸

The 2016 amendments made a conforming change in Article 39(a) by adding a new paragraph (4), which addresses a sentencing proceeding

378. UCMJ art. 38 (2012), 10 U.S.C. § 838 (2012) (amended 2016).

379. *See supra* Part VIII.E.

380. *See* Military Justice Act of 2016, Pub. L. No. 114-328, § 5221, 130 Stat. 2000, 2909 (codified as UCMJ art. 38 (2016), 10 U.S.C. § 838 (Supp. IV 2016)); *see also* MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 367 (noting this requirement reflects current practices in all of the services).

381. UCMJ art. 39(a) (2012), 10 U.S.C. § 839(a) (2012) (amended 2016). *See generally* 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, *supra* note 35, ch. 12 (discussing Article 39(a) sessions).

382. UCMJ art. 39(a)(1) (2012), 10 U.S.C. § 839(a)(1) (2012) (amended 2016).

383. UCMJ art. 39(a)(2) (2012), 10 U.S.C. § 839(a)(2) (2012) (amended 2016).

384. UCMJ art. 39(a)(3) (2012), 10 U.S.C. § 839(a)(3) (2012) (amended 2016).

385. *Id.*

386. UCMJ art. 39(a)(4) (2012), 10 U.S.C. § 839(a)(4) (2012) (amended 2016).

387. UCMJ art. 39(b) (2012), 10 U.S.C. § 839(b) (2012) (amended 2016).

388. *Id.* In contrast, Article 39(c) specifies that when the members of a court-martial deliberate or vote, only the members may be present. UCMJ art. 39(c) (2012), 10 U.S.C. § 839(c) (2012) (amended 2016).

conducted by the military judge.³⁸⁹ That new provision recognizes the change made to Article 25, discussed *supra*,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.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 *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.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.³⁹³ Congress did not adopt that proposal.³⁹⁴

D. Continuances

Article 40 addresses the issue of continuances in courts-martial.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.”³⁹⁶ The change reflects amendments to Article 16, which removed the possibility of a special court-martial without a military judge.³⁹⁷

E. 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.³⁹⁸ First, the reference to the possibility of a court-martial

389. Military Justice Act of 2016, Pub. L. No. 114-328, § 5222, 130 Stat. 2000, 2909 (codified as UCMJ art. 39(a) (2016), 10 U.S.C. § 839(a) (Supp. IV 2016)).

390. See *supra* Part VIII.B.

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

392. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 370.

393. *Id.*

394. *Id.*

395. UCMJ art. 40 (2012), 10 U.S.C. § 40 (2012) (amended 2016).

396. Military Justice Act of 2016, Pub. L. No. 114-328, § 5223, 130 Stat. 2000, 2909 (codified as UCMJ art. 40 (2016), 10 U.S.C. § 840 (Supp. IV 2016)).

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

398. Military Justice Act § 5224, 130 Stat. 2000, 2909 (codified as UCMJ art. 41 (2016), 10 U.S.C. § 841 (Supp. IV 2016)).

without a military judge was removed.³⁹⁹ Following the 2016 amendments, the only court-martial without a military judge will be a summary court-martial.⁴⁰⁰ 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.⁴⁰¹

F. *Statute of Limitations*

The 2016 amendments made several major changes to Article 43, which addresses the statute of limitations.⁴⁰² First, the statute of limitations for child abuse offenses was increased from five to ten years.⁴⁰³ 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.⁴⁰⁴ 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.⁴⁰⁵

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.⁴⁰⁶ As originally promulgated in 1950, the military’s statutory right paralleled the federal civilian practice, which was governed by case law.⁴⁰⁷ In 1978, the

399. *Id.*

400. UCMJ art. 16 (2016), 10 U.S.C. § 816 (Supp. IV 2016).

401. Military Justice Act § 5224, 130 Stat. 2000, 2909 (codified as UCMJ art. 41 (2016), 10 U.S.C. § 841 (Supp. IV 2016)); Military Justice Act § 5161, 130 Stat. 895, 898–99 (codified as UCMJ art. 16 (2016), 10 U.S.C. § 816 (Supp. IV 2016)).

402. Military Justice Act § 5225, 130 Stat. 2000, 2909–10 (codified as UCMJ art. 43 (2016), 10 U.S.C. § 843 (Supp. IV 2016)). The amendments changed headings in the article for stylistic consistency.

403. Military Justice Act § 5225(a), 130 Stat. 2000, 2909–10 (codified as UCMJ art. 43(b)(2)(A) (2016), 10 U.S.C. § 843(b)(2)(A) (Supp. IV 2016)).

404. Military Justice Act § 5225(b), 130 Stat. 2000, 2909–10 (codified as UCMJ art. 43(h) (2016), 10 U.S.C. § 843(h) (Supp. IV 2016)).

405. Military Justice Act § 5225(c), 130 Stat. 2000, 2910 (codified as UCMJ art. 43(i) (2016), 10 U.S.C. § 843(i) (Supp. IV 2016)).

406. U.S. CONST. amend. V; UCMJ art. 44 (2012), 10 U.S.C. § 844 (2012) (amended 2016).

407. UCMJ art. 44 (2012), 10 U.S.C. § 844 (2012) (amended 2016); *see, e.g.*, *Brown v. Ohio*,

Supreme Court held that jeopardy attaches when the jury is sworn.⁴⁰⁸ The military courts held, however, that the provisions in Article 44, which stated that jeopardy attached at the introduction of evidence, was constitutional.⁴⁰⁹

The 2016 amendments to Article 44 bring it into conformity with federal civilian practice.⁴¹⁰ Article 44(a) provides that “no person may, without his consent, be tried a second time for the same offense.”⁴¹¹ 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.⁴¹² 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.⁴¹³

H. *Pleas of the Accused*

Congress made several key amendments to Article 45, which governs the entries of the accused’s pleas.⁴¹⁴ 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.⁴¹⁵ 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.⁴¹⁶ 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).

408. *Crist v. Betz*, 437 U.S. 28, 35 (1978).

409. *See United States v. Easton*, 71 M.J. 168, 176 (C.A.A.F. 2012) (upholding the constitutionality of jeopardy attaching at introduction of evidence); cf. Major Robert D. Merrill, *The Military’s Dilution of Double Jeopardy: Why United States v. Easton Should be Overruled*, 219 MIL. L. REV. 176 (2014) (criticizing *United States v. Easton* as providing flimsy reasoning that ignores the Supreme Court’s interpretation of a core constitutional right).

410. Military Justice Act § 5226, 130 Stat. 2000, 2910–11 (codified as UCMJ art. 44(c) (2016), 10 U.S.C. § 844(c) (Supp. IV 2016)); *see* MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 392 (recommending that Congress bring the UCMJ to more closely align with federal civilian practice).

411. UCMJ art. 44(a) (2012), 10 U.S.C. § 844(a) (2012) (amended 2016).

412. UCMJ art. 44(c)(1) (2016), 10 U.S.C. § 844(c)(1) (Supp. IV 2016).

413. UCMJ art. 44(c)(2) (2016), 10 U.S.C. § 844(c)(2) (Supp. IV 2016).

414. Military Justice Act of 2016, Pub. L. No. 114-328, § 5227, 130 Stat. 2000, 2911 (codified as UCMJ art. 45 (2016), 10 U.S.C. § 845 (Supp. IV 2016)).

415. UCMJ art. 45(b) (2016), 10 U.S.C. § 845(b) (Supp. IV 2016).

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).

for any errors in the entries of an accused's plea.⁴¹⁷

I. *Opportunity to Obtain Witnesses and Other Evidence*

Article 46 governs the ability of the parties to obtain witnesses and evidence.⁴¹⁸ 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.⁴¹⁹ 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.⁴²⁰ First, Congress amended Article 46 to clarify the authority to issue and enforce subpoenas for witnesses and evidence.⁴²¹ 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.⁴²² 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.⁴²³ Fourth, a new provision will authorize military judges to hear requests for relief from persons who have received a subpoena.⁴²⁴ 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.⁴²⁵

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

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

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).

418. UCMJ art. 46 (2012), 10 U.S.C. § 846 (2012) (amended 2016).

419. UCMJ art. 46(a) (2012), 10 U.S.C. § 846(a) (2012) (amended 2016).

420. Military Justice Act of 2016, Pub. L. No. 114-328, § 5228, 130 Stat. 2000, 2911–13 (codified as UCMJ art. 46 (2016), 10 U.S.C. § 846 (Supp. IV 2016)).

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

422. UCMJ art. 46(d)(2) (2016), 10 U.S.C. § 846(d)(2) (Supp. IV 2016).

423. UCMJ art. 46(d)(3) (2016), 10 U.S.C. § 846(d)(3) (Supp. IV 2016). Conforming amendments were also made to the Stored Communications Act, 18 U.S.C. §§ 2703, 2711(3), to extend the coverage of that Act to courts-martial and other proceedings where a military judge has been detailed. Military Justice Act of 2016, Pub. L. No. 114-328, § 5228(b)(1)(A)-(B), 130 Stat. 2000, 2913, 2967 (2016).

424. UCMJ art. 46(e) (2016), 10 U.S.C. § 846(e) (Supp. IV 2016).

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.⁴²⁶ The 2016 amendments to Article 47 were minor;⁴²⁷ they retained the current law in Article 47 and were intended to clarify the relationships between Articles 46 and 47.⁴²⁸

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 proceeding⁴²⁹ or willfully disobeying a law order or with respect to a proceeding.⁴³⁰ Congress made two minor amendments to Article 48.⁴³¹ 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.⁴³² 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.⁴³³ Third, the amendment will shift the review powers of a finding of contempt from the convening authority to judicial officers.⁴³⁴ If a military judge or a military magistrate has imposed punishment for contempt, that decision will be reviewed by a Court of Criminal Appeals.⁴³⁵ 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.⁴³⁶

426. UCMJ art. 47(a) (2013), 10 U.S.C. § 847(a) (Supp. I 2013) (amended 2016); *see* UCMJ art. 47(a)(2)(A)(ii) (2016), 10 U.S.C. § 847(a)(2)(A)(ii) (Supp. IV 2016) (declaring the witness must have been provided a means for reimbursements from the Government for fees and mileage).

427. Military Justice Act of 2016, Pub. L. No. 114-328, § 5229, 130 Stat. 2000, 2913 (codified as UCMJ art. 47 (2016), 10 U.S.C. § 847 (Supp. IV 2016)).

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

429. UCMJ art. 48(a)(1)(A) (2016), 10 U.S.C. § 848(a)(1)(A) (Supp. IV 2016).

430. UCMJ art. 48(a)(1)(C) (2012), 10 U.S.C. § 848(a)(1)(C) (2012) (amended 2016).

431. Military Justice Act § 5230, 130 Stat. 2000, 2913–14 (codified as UCMJ art. 48 (2016), 10 U.S.C. § 848 (Supp. IV 2016)).

432. UCMJ art. 30a (2016), 10 U.S.C. § 830a (Supp. IV 2016).

433. Military Justice Act § 5230, 130 Stat. 2000, 2913–14 (codified as UCMJ art. 48 (2016), 10 U.S.C. § 848 (Supp. IV 2016)).

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

435. UCMJ art. 48(c)(1) (2016), 10 U.S.C. § 848(c)(1) (Supp. IV 2016).

436. UCMJ art. 48(c)(2) (2016), 10 U.S.C. § 848(c)(2) (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 JAG J. 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).

438. Military Justice Act § 5231, 130 Stat. 2000, 2914–15 (codified as UCMJ art. 49 (2016), 10 U.S.C. § 849 (Supp. IV 2016)); MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 439.

439. UCMJ art. 49(a)(2) (2016), 10 U.S.C. § 849(a)(2) (Supp. IV 2016).

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

441. UCMJ art. 49(a)(4)(A) (2016), 10 U.S.C. § 849(a)(4)(A) (Supp. IV 2016); *see* UCMJ art. 49(a)(4)(B) (2016), 10 U.S.C. § 849(a)(4)(B) (Supp. IV 2016) (“In exceptional circumstances, an impartial civil or military officer authorized to administer oaths” may serve as the deposition officer).

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.⁴⁴⁴ The 2016 amendment to this article is relatively minor.⁴⁴⁵ Formerly, the article provided that the recorded testimony had to be read into evidence.⁴⁴⁶ Article 50(d), a new provision, will provide that counsel may also introduce an audiotape, videotape, or similar recording of the testimony.⁴⁴⁷ Although courts of inquiry have been replaced by other investigative proceedings, it is still possible that they would be conducted;⁴⁴⁸ they are specifically mentioned in Military Rule of Evidence 804(b)(1), as a method of introducing a witness's former testimony.⁴⁴⁹

N. *Defense of Lack of Mental Responsibility*

The 2016 amendments to Article 50a,⁴⁵⁰ which addresses the defense of lack of mental responsibility, were technical.⁴⁵¹ The language was changed to reflect that there are no longer any courts-martial conducted without a military judge.⁴⁵²

O. *Voting and Rulings*

Article 51 addresses the process of voting and making rulings in a court-martial.⁴⁵³ The amendments to this article were technical; the references

444. UCMJ art. 50 (2012), 10 U.S.C. § 850 (2012).

445. Military Justice Act § 5232, 130 Stat. 2000, 2914–15 (codified as UCMJ art. 50 (2016), 10 U.S.C. § 850 (Supp. IV 2016)).

446. UCMJ art. 50 (2012), 10 U.S.C. § 850 (2012) (amended 2016).

447. UCMJ art. 50(d) (2016), 10 U.S.C. § 850(d) (Supp. IV 2016).

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).

450. UCMJ art. 50a (2016), 10 U.S.C. § 850a (Supp. IV 2016); *see generally* 1 DAVID A. SCHLUETER, CHARLES H. ROSE, III, VICTOR HANSEN & CHRISTOPHER BEHAN, *MILITARY CRIMES AND DEFENSES* § 3-4[20] (2d ed. 2012) [hereinafter *MILITARY CRIMES AND DEFENSES*] (discussing lack of mental responsibility).

451. Military Justice Act of 2016, Pub. L. No. 114-328, § 5233, 130 Stat. 2000, 2915 (codified as UCMJ art. 50a (2016), 10 U.S.C. § 850a (Supp. IV 2016)).

452. UCMJ art. 50a (2016), 10 U.S.C. § 850a (Supp. IV 2016); Military Justice Act § 5232, 130 Stat. 2000, 2915 (codified as UCMJ art. 50a (2016), 10 U.S.C. § 850a (Supp. IV 2016)).

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.⁴⁵⁴ 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.⁴⁵⁵ 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.⁴⁵⁶

P. *Number of Votes Required*

The amendments to Article 52, which addresses the number of votes required for a conviction or sentencing, were significant.⁴⁵⁷ Article 52 currently requires that two-thirds of the members must concur in a finding of guilty in a general and special court-martial.⁴⁵⁸ For sentencing, three-fourths of the members have to concur to impose a sentence of more than ten years.⁴⁵⁹ For a sentence of less than ten years, two-thirds of the members must concur.⁴⁶⁰ In the case of a sentence of death, the vote has to be unanimous.⁴⁶¹

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.⁴⁶² 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.⁴⁶³

454. Military Justice Act § 5234, 130 Stat. 2000, 2915–16 (codified as UCMJ art. 51 (2016), 10 U.S.C. § 851 (Supp. IV 2016)).

455. *See supra* Part VII.B.3.

456. UCMJ art. 16(d) (2016), 10 U.S.C. § 816(d) (Supp. IV 2016).

457. Military Justice Act § 5235, 130 Stat. 2000, 2916 (codified as UCMJ art. 52 (2016), 10 U.S.C. § 852 (Supp. IV 2016)).

458. UCMJ art. 52(a)(2) (2012), 10 U.S.C. § 852(a)(2) (2012) (amended 2016).

459. UCMJ art. 52(b)(2) (2012), 10 U.S.C. § 852(b)(2) (2012) (amended 2016).

460. UCMJ art. 52(b)(3) (2012), 10 U.S.C. § 852(b)(3) (2012) (amended 2016).

461. UCMJ art. 52(b)(1) (2012), 10 U.S.C. § 852(b)(1) (2012) (amended 2016).

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).

464. UCMJ art. 52(a)(3) (2016), 10 U.S.C. § 852(a)(3) (Supp. IV 2016).

465. UCMJ art. 16 (2016), 10 U.S.C. § 816 (Supp. IV 2016).

466. UCMJ art. 52(b)(2) (2016), 10 U.S.C. § 852(b)(2) (Supp. IV 2016).

467. *Id.*

468. *MILITARY JUSTICE REVIEW GRP.*, *supra* note 23, at 459–60.

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).

470. Military Justice Act of 2016, Pub. L. No. 114-328, § 5236, 130 Stat. 2000, 2916–17 (codified as UCMJ art. 53 (2016), 10 U.S.C. § 853 (Supp. IV 2016)).

471. *See* UCMJ art. 53 (2016), 10 U.S.C. § 853 (Supp. IV 2016) (“A court-martial shall announce its findings and sentence to the parties as soon as determined.”).

472. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, 1336–38 (codified as UCMJ art. 36 (1968), 10 U.S.C. § 836 (1970)). Before then, law officers would assist the court-members, but did not preside over the proceedings; the president of the court-martial was responsible for maintaining order and making rulings. *See* UCMJ art. 26, 36, 39 (1964), 10 U.S.C. §§ 826, 36, 39 (1964) (amended 2016) (describing the role of the law officer).

473. *See* UCMJ art. 39 (1964), 10 U.S.C. § 839 (1964) (amended 2016) (allowing only members of the court to be present for a vote).

findings and sentencing, be conducted by the military judge.⁴⁷⁴ The accused did not have the option of having the members adjudge the findings followed by sentencing by the military judge.⁴⁷⁵

Congress completely rewrote Article 53 and included specific guidance on the sentencing process in general and special courts-martial.⁴⁷⁶ Under Article 53(b)(1), the military judge will sentence an accused—unless the accused requests that the members sentence him.⁴⁷⁷ 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.⁴⁷⁸ The Group made a compelling case for the change, citing a number of commentators and advisory bodies who had recommended that change.⁴⁷⁹ Although Congress rejected a wholesale change to sentencing by military judges, it did make sentencing by military judges the default rule.⁴⁸⁰ As a result, the accused no longer will be precluded from obtaining judicial sentencing when the members adjudge the findings.⁴⁸¹ 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.⁴⁸² 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.⁴⁸³ Although the practice is firmly entrenched

474. See generally 2 SCHLUETER, *MILITARY CRIMINAL JUSTICE*, *supra* note 35, §§ 16-1, 16-4(A) (discussing sentencing by military judges or court members).

475. *Id.* § 16-4(A).

476. Military Justice Act § 5236, 130 Stat. 2000, 2916–17 (codified as UCMJ art. 53 (2016), 10 U.S.C. § 853 (Supp. IV 2016)).

477. UCMJ art. 53(b)(1)(B) (2016), 10 U.S.C. § 853(b)(1)(B) (Supp. IV 2016).

478. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 475–76.

479. *Id.* at 463–79; see generally Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 20 (1998) (noting benefits of judge-alone sentencing); Major James Kevin Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1, 57–66 (1994) (offering a cost-benefit analysis in support of judge-alone sentencing).

480. UCMJ art. 53 (2016), 10 U.S.C. § 853 (Supp. IV 2016).

481. *Id.*

482. Military Justice Act of 2016, Pub. L. No. 114-328, § 5237, 130 Stat. 2000, 917–18 (codified as UCMJ art. 53a (2016), 10 U.S.C. § 853a (Supp. IV 2016)).

483. See generally 1 SCHLUETER, *MILITARY CRIMINAL JUSTICE*, *supra* note 35, § 9-2(A)

in military practice,⁴⁸⁴ 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.⁴⁸⁵ The former inquiry focuses on the accuracy and voluntariness of the guilty plea.⁴⁸⁶ The second inquiry focuses on the terms of the plea agreement and whether it contains any impermissible terms.⁴⁸⁷

The new article addresses several key points. First, the new article recognizes that at “any time before the announcement of findings”⁴⁸⁸ an accused and a convening authority “may enter into a plea agreement” regarding charges, specifications, and limitations on the sentence that may be adjudged.⁴⁸⁹ 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,⁴⁹⁰ which may, for example, address a reduction in the sentence.⁴⁹¹

Second, Article 53a(a)(2) will provide that a military judge may not participate in any plea discussions between the accused and the convening

(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).

489. UCMJ art. 53a(a) (2016), 10 U.S.C. § 853a(a) (Supp. IV 2016).

490. See *U.S. v. Dawson*, 51 M.J. 411 (C.A.A.F. 1999) (holding post-trial agreement between accused and convening authority was valid; accused agreed to waive arguments in the post-trial processing of her case in return for convening authority dismissing desertion charges arising out of accused's post-trial absence); *U.S. v. Pilkington*, 48 M.J. 523, 523 (N-M. Ct. Crim. App. 1998) (finding a pre-trial negotiated agreement to be valid when it was fair and voluntarily entered into). Ironically, the defense counsel in *Pilkington* had strongly advised the accused not to enter into the agreement. *U.S. v. Pilkington*, 48 M.J. 525 n.2. (N-M. Ct. Crim. App. 1998). For a sample post-trial agreement form see 1 KENNETH V. JANSEN, DAVID A. SCHLUETER, KEVIN J. BARRY & KENNETH A. ARNOLD, MILITARY CRIMINAL PROCEDURE FORMS, § 11-13 (3d ed. 2009).

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

492. FED. R. CRIM. P 11(c)(1).

493. UCMJ art. 53a(b)(1) (2016), 10 U.S.C. § 853a(b)(1) (Supp. IV 2016).

494. UCMJ art. 53a(b)(2) (2016), 10 U.S.C. § 853a(b)(2) (Supp. IV 2016).

495. UCMJ art. 53a(b)(3) (2016), 10 U.S.C. § 853a(b)(3) (Supp. IV 2016).

496. UCMJ art. 56(b)(2) (2016), 10 U.S.C. § 856(b)(2) (Supp. IV 2016).

497. UCMJ art. 53a(c)(1) (2016), 10 U.S.C. § 853a(c)(1) (Supp. IV 2016).

498. UCMJ art. 53a(c)(2) (2016), 10 U.S.C. § 853a(c)(2) (Supp. IV 2016).

499. UCMJ art. 53a(d) (2016), 10 U.S.C. § 853a(d) (Supp. IV 2016).

500. *C.f.* UCMJ art. 53a(d) (2016), 10 U.S.C. § 853a(d) (Supp. IV 2016) (expanding the authority of the military judge).

501. UCMJ art. 38(a) (2012), 10 U.S.C. § 838(a) (2012) (amended 2016).

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.⁵⁰³ The amendment will require that a court reporter “certify” the record, except when a court reporter is not available.⁵⁰⁴ In that case, an official designated by the President will certify the record.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.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.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.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.⁵⁰⁹ The Military Rules of Evidence apply at the sentencing phase,⁵¹⁰ unlike the practice in federal criminal trial sentencing where the Federal Rules of Evidence do not apply at the sentencing phase.⁵¹¹

Under current rules, if a court-martial with members finds an accused guilty, the members determine the accused’s sentence.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

503. Military Justice Act of 2016, Pub. L. No. 114-328, § 5238, 130 Stat. 2000, 2918–19 (codified as UCMJ art. 54 (2016), 10 U.S.C. § 854 (Supp. IV 2016)).

504. UCMJ art. 54(a) (2016), 10 U.S.C. § 854(a) (Supp. IV 2016).

505. *Id.*

506. UCMJ art. 54(a)(2) (2016), 10 U.S.C. § 854(a) (Supp. IV 2016).

507. UCMJ art. 54(e) (2016), 10 U.S.C. § 854(e) (Supp. IV 2016).

508. 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, *supra* note 35, § 16 (discussing sentencing procedures at courts-martial).

509. MCM, *supra* note 19, R.C.M. 1001(c); 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, *supra* note 35, § 16 (discussing sentencing procedures at courts-martial).

510. MCM, *supra* note 19, R.C.M. 1001; MCM, *supra* note 19, MIL. R. EVID. 1101.

511. FED. R. EVID. 1101.

512. UCMJ art. 51 (2012), 10 U.S.C. § 851 (2012) (amended 2016). *See generally* 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, *supra* note 35, § 16 (sentencing by members)

trial be conducted by the military judge.⁵¹³

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

B. *Sentencing by Military Judges and Members*

Currently, Article 56 addresses maximum limits on the sentences which may be imposed by a court-martial.⁵¹⁷ The 2016 amendments made significant changes to the article and restructured court-martial sentencing.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].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.⁵²⁰ The Group’s

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

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).

515. MCM, *supra* note 19, R.C.M. 1002(b).

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).

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).

518. Military Justice Act of 2016, Pub. L. No. 114-328, § 5301, 130 Stat. 2000, 2919–20 (codified as UCMJ art. 56 (2016), 10 U.S.C. § 856 (Supp. IV 2016)).

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

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.⁵²¹ As noted, the amendments to Article 53, discussed *supra*,⁵²² provide that the military judge will sentence the accused unless the accused requests that the detailed members impose the sentence.⁵²³

Second, Congress replaced the concept of unitary sentencing in the military with segmented sentencing when the military judge is imposing the sentence.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.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.⁵²⁶ The Military Justice Review Group noted that the change is rooted in the federal criminal justice system, where federal judges impose the sentence.⁵²⁷ It listed a number of reasons for adopting segmented sentencing: transparency,⁵²⁸ increasing efficiency of appellate review of sentences,⁵²⁹ and providing policy makers and practitioners with more accurate information on court-martial sentencing.⁵³⁰ In contrast, under the 2016 amendments, if the court-martial members impose the sentence, then the unitary sentencing

adopt sentencing parameters, the report expressly required that the Military Justice Review Panel, established under Article 146 on military justice, collect sentencing data and address sentencing reform in its first report under Article 146(f)(2).

521. *See supra* Part X.Q.

522. *Id.*

523. UCMJ art. 53 (2016), 10 U.S.C. § 853 (Supp. IV 2016).

524. UCMJ art. 56(c)(2) (2016), 10 U.S.C. § 856 (Supp. IV 2016). As noted *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).

525. UCMJ art. 56(c)(2) (2016), 10 U.S.C. § 856(c)(2) (Supp. IV 2016).

526. *Id.*

527. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 510.

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).

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).

530. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 510.

remains and the court members will announce a single sentence for all offenses.⁵³¹

The third major change to Article 56 focuses on the ability of the government to appeal a court-martial sentence.⁵³² 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 law⁵³³ or that the sentence is plainly unreasonable.⁵³⁴ The appeal must be filed within 60 days of the date the judgment of the court-martial is entered under Article 60c.⁵³⁵

The final change to Article 56 is the incorporation of the content of current Article 56a—which addresses the issue of a sentence for life with eligibility for parole⁵³⁶—into new Article 56(c)(4).⁵³⁷ There were no changes to the substance of that provision. A conforming amendment repealed Article 56a.⁵³⁸

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.⁵³⁹ 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,⁵⁴⁰ but that proposal was contingent on

531. UCMJ art. 56(c)(3) (2016), 10 U.S.C. § 856(c)(3) (Supp. IV 2016).

532. UCMJ art. 56(d) (2016), 10 U.S.C. § 856(d) (Supp. IV 2016).

533. UCMJ art. 56(d)(1)(A) (2016), 10 U.S.C. § 856(d)(1)(A) (Supp. IV 2016).

534. UCMJ art. 56(d)(1)(B) (2016), 10 U.S.C. § 856(d)(1)(B) (Supp. IV 2016).

535. UCMJ art. 56(d)(2) (2016), 10 U.S.C. § 856(d)(2) (Supp. IV 2016).

536. Act of Nov. 18, 1997, Pub. L. No. 105-85, § 581(a)(1), 111 Stat. 1759, *repealed by* Military Justice Act of 2016, Pub. L. No. 114-328, § 5301, 130 Stat. 2000, 2919–20 (codified as UCMJ art. 56 (2016), 10 U.S.C. § 856 (Supp. IV 2016)).

537. UCMJ art. 56(c)(4) (2016), 10 U.S.C. § 856(c)(4) (Supp. IV 2016).

538. Military Justice Act of 2016, Pub. L. No. 114-328, § 5301(b), 130 Stat. 2000, 2919 (codified as UCMJ art. 56 (2016), 10 U.S.C. § 856 (Supp. IV 2016)).

539. *See* MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 510 (noting “the sentence could be overly severe”).

540. *Id.* at 530.

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.⁵⁴¹ 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),⁵⁴² 57a (deferment of sentences),⁵⁴³ and 71 (execution of sentences and suspension of sentences).⁵⁴⁴ The 2016 amendments consolidated provisions from Articles 57a and 71 into Article 57,⁵⁴⁵ and deleted Articles 57a and 71.⁵⁴⁶ 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*.⁵⁴⁷

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.

542. UCMJ art. 57 (2012), 10 U.S.C. § 857 (2012) (amended 2016).

543. UCMJ art. 57a (2012), 10 U.S.C. § 857a (2012) (amended 2016).

544. UCMJ art. 71 (2012), 10 U.S.C. § 871 (2012) (amended 2016).

545. Military Justice Act of 2016, Pub. L. No. 114-328, § 5302, 130 Stat. 2000, 2921–23 (codified as UCMJ art. 57 (2016), 10 U.S.C. § 857 (Supp. IV 2016)).

546. Military Justice Act § 5302(b), 130 Stat. 2000, 2922 (codified as UCMJ art. 57(b) (2016), 10 U.S.C. § 857(b) (Supp. IV 2016)).

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.

548. UCMJ art. 58a (2012), 10 U.S.C. § 858a (2012) (amended 2016). This article was added to the UCMJ in 1960. Act of July 12, 1960, Pub. L. No. 86-633, § 1(1), 74 Stat. 468 (codified as amended UCMJ art. 57(b) (2016), 10 U.S.C. § 857(b) (2012)).

549. AR 27-10, *supra* note 152, para. 5-29(e).

550. JAGAINST 5800.7F, *supra* note 158, sec. 0512(c).

551. U.S. DEPT OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE para. 9.26.3 (3 Aug. 2016).

552. COMMANDANT INSTR. M5810.1E, *supra* note 158, art. 4.E.1.

553. Military Justice Act of 2016, Pub. L. No. 114-328, § 5302, 130 Stat. 2000, 2923 (codified as UCMJ art. 58a (2016), 10 U.S.C. § 858a (Supp. IV 2016)).

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 UCMJ⁵⁵⁵ 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.⁵⁵⁶ A copy of the record of trial is provided to the accused, at no cost.⁵⁵⁷ Depending on the level of punishment imposed, a formal legal review of the proceedings is prepared.⁵⁵⁸ The staff judge advocate submits a post-trial review and recommendations to the convening authority for consideration.⁵⁵⁹ During that process, the accused has the right to present clemency matters.⁵⁶⁰ The convening authority has limited authority to disapprove any findings of guilt⁵⁶¹ and to suspend or reduce the sentence.⁵⁶² The convening authority's written action on the case, which must be signed

555. UCMJ art. 59–76b (2012), 10 U.S.C. §§ 859–876b (2012).

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).

557. UCMJ art. 54(c) (2012), 10 U.S.C. § 854(c) (2012) (amended 2016); MCM, *supra* note 19, R.C.M. 1104 (2016).

558. UCMJ art. 60(d) (2014), 10 U.S.C. § 860(d) (Supp. II 2014) (amended 2016); MCM, *supra* note 19, R.C.M. 1104.

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,⁵⁶³ ends the case at the trial level.⁵⁶⁴

For certain courts-martial, appellate review is automatic to a service Court of Criminal Appeals.⁵⁶⁵ The subject of appellate review of courts-martial is addressed, *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.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 60⁵⁶⁷ 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."⁵⁶⁸ That document must contain each plea entered by the accused and the court-martial findings,⁵⁶⁹ any sentence imposed,⁵⁷⁰ and any other information required by the President.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.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

563. MCM, *supra* note 19, R.C.M. 1107(f).

564. *See generally* MCM, *supra* note 19, R.C.M. 1107.

565. UCMJ art. 66 (2012), 10 U.S.C. § 866 (2012).

566. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 560–63.

567. Military Justice Act of 2016, Pub. L. No. 114-328, § 5321, 130 Stat. 2000, 2924 (codified as UCMJ art. 60 (2016), 10 U.S.C. § 860 (Supp. IV 2016)).

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.

569. UCMJ art. 60(a)(1)(A) (2016), 10 U.S.C. § 860(a)(1)(A) (Supp. IV 2016).

570. UCMJ art. 60(a)(1)(B) (2016), 10 U.S.C. § 860(a)(1)(B) (Supp. IV 2016).

571. UCMJ art. 60(a)(1)(C) (2016), 10 U.S.C. § 860(a)(1)(C) (Supp. IV 2016).

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.

Trial Results, the record of trial, or any other post-trial action by the convening authority⁵⁷³ which can be resolved by the military judge before he or she enters the judgment in the case.⁵⁷⁴ This could include, for example, resolving post-trial allegations of misconduct by the court members⁵⁷⁵ or considering new evidence in the case.⁵⁷⁶ 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.⁵⁷⁷

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,⁵⁷⁸ 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.⁵⁷⁹ 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,⁵⁸⁰ (2) the adjudged sentence includes a dismissal, a dishonorable or bad-conduct discharge,⁵⁸¹ (3) the adjudged confinement for all offenses running consecutively is more than six months,⁵⁸² 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.⁵⁸³ If the court-martial does

573. UCMJ art. 60(b)(1) (2016), 10 U.S.C. § 860(b)(1) (Supp. IV 2016).

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).

576. *See, e.g.*, United States v. Williams, 37 M.J. 352, 354 (C.M.A. 1993) (noting the military judge held a post-trial hearing to consider newly discovered evidence).

577. MCM, *supra* note 19, R.C.M. 1102.

578. *Id.*

579. Military Justice Act of 2016, Pub. L. No. 114-328, § 5322, 130 Stat. 2000, 2924–25 (codified as UCMJ art. 60a (2016), 10 U.S.C. § 860a (Supp. IV 2016)).

580. UCMJ art. 60a(a)(2)(A) (2016), 10 U.S.C. § 860a(a)(2)(A) (Supp. IV 2016).

581. UCMJ art. 60a(a)(2)(B) (2016), 10 U.S.C. § 860a(a)(2)(B) (Supp. IV 2016).

582. UCMJ art. 60a(a)(2)(C) (2016), 10 U.S.C. § 860a(a)(2)(C) (Supp. IV 2016).

583. UCMJ art. 60a(a)(2)(D) (2016), 10 U.S.C. § 860a(a)(2)(D) (Supp. IV 2016).

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*.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;⁵⁸⁵ (2) a sentence of dismissal, dishonorable discharge or bad-conduct discharge;⁵⁸⁶ or (3) a sentence of death.⁵⁸⁷ The convening authority may reduce, commute, or suspend any sentence not covered in that list.⁵⁸⁸

Third, the new article provides limited authority to the convening authority to suspend a sentence of confinement⁵⁸⁹ or a sentence of dismissal, dishonorable or bad-conduct discharge in two instances.⁵⁹⁰ The convening authority may suspend a sentence if the military judge has recommended that the sentence be suspended,⁵⁹¹ but the military judge must include facts supporting that recommendation, in the Statement of Trial Results.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.⁵⁹³ The second instance is where the accused provides—either after sentencing and before the entry of the judgment, or after entry of judgment⁵⁹⁴—substantial assistance in the prosecution of another person.⁵⁹⁵ In that case, the convening authority may reduce, commute, or suspend the sentence, in whole or in part, including a mandatory minimum sentence.⁵⁹⁶ This provision is

584. *See infra* Part XII.B.3.

585. UCMJ art. 60a(b)(1)(A) (2016), 10 U.S.C. § 860a(b)(1)(A) (Supp. IV 2016).

586. UCMJ art. 60a(b)(1)(B) (2016), 10 U.S.C. § 860a(b)(1)(B) (Supp. IV 2016).

587. UCMJ art. 60a(b)(1)(C) (2016), 10 U.S.C. § 860a(b)(1)(C) (Supp. IV 2016).

588. UCMJ art. 60a(b)(2) (2016), 10 U.S.C. § 860a(b)(2) (Supp. IV 2016).

589. UCMJ art. 60a(d) (2016), 10 U.S.C. § 860a(d) (Supp. IV 2016).

590. UCMJ art. 60a(b)(c) (2016), 10 U.S.C. § 860a(b)(c) (Supp. IV 2016).

591. UCMJ art. 60a(c)(1) (2016), 10 U.S.C. § 860a(c)(1) (Supp. IV 2016).

592. *Id.*

593. UCMJ art. 60a(c)(2) (2016), 10 U.S.C. § 860a(c)(2) (Supp. IV 2016).

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).

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.

596. UCMJ art. 60a(d) (2016), 10 U.S.C. § 860a(d) (Supp. IV 2016).

modeled after Federal Rule of Criminal Procedure 35(b)⁵⁹⁷ and is consistent with current practice.⁵⁹⁸

Fourth, the convening authority must consider written matters submitted by both the accused and any victim.⁵⁹⁹ However, the convening authority cannot consider any matters related to the victim's character, unless those matters were introduced at trial.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.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,⁶⁰² discussed, *infra*.⁶⁰³ If the convening authority has modified the sentence, he must explain his action in writing.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.⁶⁰⁵ That requirement posed significant issues over the years,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.

597. FED. R. CRIM. P. 35(b).

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. 60a(c)(4)(A) (2016), 10 U.S.C. § 860a(c)(4)(A) (Supp. IV 2016).

599. UCMJ art. 60a(e)(1) (2016), 10 U.S.C. § 860a(e)(1) (Supp. IV 2016).

600. UCMJ art. 60a(e)(2) (2016), 10 U.S.C. § 860a(e)(2) (Supp. IV 2016).

601. *See supra* Part XII.B.2.

602. UCMJ art. 60a(f) (2016), 10 U.S.C. § 860a(f) (Supp. IV 2016).

603. *See infra* Part XII.B.4.

604. UCMJ art. 60a(f)(1) (2016), 10 U.S.C. § 860a(f)(1) (Supp. IV 2016).

605. *Compare* UCMJ art. 60b(1) (2012), 10 U.S.C. § 860b(1) (2012) (requiring a written action by the convening authority), *with* UCMJ art. 60 (2016), 10 U.S.C. § 860 (Supp. IV 2016) (allowing a military judge to include the convening authority's decision in the judgment).

606. *See generally* 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, *supra* note 35, § 17-8(B) (discussing post-trial recommendations).

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.⁶⁰⁷ 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.⁶⁰⁸ Article 60b establishes limitations on the convening authority's powers to order rehearings,⁶⁰⁹ 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.⁶¹⁰ 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.⁶¹¹ 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.⁶¹²

4. Entry of Judgment in Court-Martial

As noted *supra*,⁶¹³ under the current rules, the convening authority has the final word on post-trial actions in a court-martial.⁶¹⁴ 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,⁶¹⁵ and

607. UCMJ art. 60a (2016), 10 U.S.C. § 860a (Supp. IV 2016).

608. UCMJ art. 60b (2016), 10 U.S.C. § 860b (Supp. IV 2016).

609. *Id.*

610. UCMJ art. 60b(d) (2016), 10 U.S.C. § 860b(d) (Supp. IV 2016).

611. UCMJ art. 60b (2016), 10 U.S.C. § 860b (Supp. IV 2016).

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).

615. UCMJ art. 60c(a)(B)(i) (2016), 10 U.S.C. § 860c(a)(B)(i) (Supp. IV 2016).

(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

616. UCMJ art. 60c(a)(B)(ii) (2016), 10 U.S.C. § 860c(a)(B)(ii) (Supp. IV 2016).

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).

618. UCMJ art. 66 (2012), 10 U.S.C. § 866 (2012).

619. UCMJ art. 69 (2012), 10 U.S.C. § 869 (2012).

620. UCMJ art. 61(a) (2012), 10 U.S.C. § 861(a) (2012).

621. *Id.*

622. Military Justice Act of 2016, Pub. L. No. 114-328, § 5326, 130 Stat. 2000, 2928–99 (codified as UCMJ art. 62 (2016), 10 U.S.C. § 862 (Supp. IV 2016)).

623. UCMJ art. 61(a) (2016), 10 U.S.C. § 861(a) (Supp. IV 2016).

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.⁶²⁶ The procedural rules for doing so are set out in the Manual for Courts-Martial.⁶²⁷ Congress amended Article 62⁶²⁸ 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.⁶²⁹ 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.⁶³⁰ 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;⁶³¹ the appeal would be made in the first instance to the military judge in the case.⁶³² Finally, Congress added a new provision to the article that provides: “[T]he provisions of [Article 62] shall be liberally construed to effect its purposes.”⁶³³ These amendments were intended to mirror federal civilian practice.⁶³⁴

7. Rehearings

The subject of rehearings is covered in Article 63.⁶³⁵ 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.⁶³⁶ 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).

626. UCMJ art. 62(a)(1) (2012), 10 U.S.C. § 862(a)(1) (2012).

627. MCM, *supra* note 19, R.C.M. 908.

628. Military Justice Act of 2016, Pub. L. No. 114-328, § 5326, 130 Stat. 2000, 2928–99 (codified as UCMJ art. 62 (2016), 10 U.S.C. § 862 (Supp. IV 2016)).

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.

630. UCMJ art. 62(a)(1)(G) (2016), 10 U.S.C. § 862(a)(1)(G) (Supp. IV 2016).

631. UCMJ art. 62(a)(1) (2016), 10 U.S.C. § 862(a)(1) (Supp. IV 2016).

632. UCMJ art. 62(d) (2016), 10 U.S.C. § 862(d) (Supp. IV 2016).

633. UCMJ art. 62(e) (2016), 10 U.S.C. § 862(e) (Supp. IV 2016).

634. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 585.

635. UCMJ art. 63 (2012), 10 U.S.C. § 863 (2012).

636. *Id.*

rehearings.⁶³⁷ 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."⁶³⁸ 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).⁶³⁹ 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."⁶⁴⁰

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.⁶⁴¹ The 2016 amendments to that article restrict the legal review to only summary courts-martial.⁶⁴² 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 65.⁶⁴³

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.⁶⁴⁴ The 2016 amendments made substantial changes to Article 65.⁶⁴⁵ First, all general and special courts-martial records in which

637. Military Justice Act of 2016, Pub. L. No. 114-328, § 5327, 130 Stat. 2000, 2929 (codified as UCMJ art. 63 (2016), 10 U.S.C. § 863 (Supp. IV 2016)).

638. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 588 (citing *North Carolina v. Pearce*, 395 U.S. 711, 720–21 (1969)).

639. UCMJ art. 63(c) (2016), 10 U.S.C. § 863(c) (Supp. IV 2016).

640. *Id.*

641. UCMJ art. 64 (2016), 10 U.S.C. § 864 (Supp. IV 2016).

642. Military Justice Act § 5328, 130 Stat. 2000, 2929–30 (codified as UCMJ art. 63 (2016), 10 U.S.C. § 863 (Supp. IV 2016)).

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

644. UCMJ art. 65 (2012), 10 U.S.C. § 865 (2012) (amended 2016).

645. Military Justice Act § 5329, 130 Stat. 2000, 2929–30 (codified as UCMJ art. 65 (2016),

there is a finding of guilty will be sent to the Judge Advocate General.⁶⁴⁶ If the court-martial judgment is eligible for automatic review by the Court of Criminal Appeals under Article 66,⁶⁴⁷ the Judge Advocate General will forward the record to the Court of Criminal Appeals, as under current practice.⁶⁴⁸ 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.⁶⁴⁹ 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.⁶⁵⁰

Second, if the court-martial is not subject to direct review by the Court of Criminal Appeals,⁶⁵¹ 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.⁶⁵² 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.⁶⁵³ If the attorney conducting this legal review concludes that corrective action is required, new Article 65(e) provides for permissible remedies, including rehearings.⁶⁵⁴

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,

10 U.S.C. § 865 (Supp. IV 2016)).

646. UCMJ art. 65(a)(1) (2016), 10 U.S.C. § 865(a)(1) (Supp. IV 2016).

647. 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.

648. UCMJ art. 65(b)(2) (2016), 10 U.S.C. § 865(b)(2) (Supp. IV 2016).

649. UCMJ art. 65(b)(2)(A) (2016), 10 U.S.C. § 865(b)(2)(A) (Supp. IV 2016). The accused may request that a copy of the record of trial be forwarded to a civilian counsel.

650. UCMJ art. 65(c) (2016), 10 U.S.C. § 865(c) (Supp. IV 2016).

651. UCMJ art. 65(d)(2) (2016), 10 U.S.C. § 865(d)(2) (Supp. IV 2016).

652. 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).

653. UCMJ art. 65(d)(3) (2016), 10 U.S.C. § 865(d)(3) (Supp. IV 2016).

654. UCMJ art. 65(e) (2016), 10 U.S.C. § 865(e) (Supp. IV 2016).

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.⁶⁵⁵ Those courts, which are composed of high-ranking military officers,⁶⁵⁶ have fact-finding powers⁶⁵⁷ and have the authority to reassess a court-martial sentence.⁶⁵⁸ Appellate counsel is provided to a convicted service member free of charge.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.⁶⁶⁰ That court is composed of five civilian judges, who are appointed by the President for fifteen-year terms.⁶⁶¹ The entire process from the initial trial to review by the Court of Appeals for the Armed Forces can take several years.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.⁶⁶³

2. Review by the Courts of Criminal Appeals

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

655. UCMJ art. 66(b) (2012), 10 U.S.C. § 866(b) (2012) (amended 2016).

656. UCMJ art. 66 (2012), 10 U.S.C. § 866 (2012) (amended 2016). A civilian judge may be appointed to service appellate courts if there is statutory authority to do so. *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). *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). *See generally* 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, *supra* note 35, § 17–15(A) (discussing appointment of civilians to service appellate courts).

657. MCM, *supra* note 19, R.C.M. 1203(b).

658. *Id.*

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

660. UCMJ art. 67 (2016), 10 U.S.C. § 867 (Supp. IV 2016).

661. *Id.*

662. *See generally* 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, *supra* note 35, § 17–11 at 1150–60 (discussing post-trial and appellate delays).

663. UCMJ art. 67a(a) (2016), 10 U.S.C. § 867a(a) (Supp. IV 2016); 28 U.S.C. § 1259 (2012).

664. UCMJ art. 66 (2012), 10 U.S.C. § 866 (2012) (amended 2016).

665. UCMJ art. 66(a) (2012), 10 U.S.C. § 866(a) (2012) (amended 2016).

666. UCMJ art. 66(b) (2012), 10 U.S.C. § 866(b) (2012) (amended 2016).

scope of the courts' authority to review courts-martial convictions, including de novo factual review of those cases.⁶⁶⁷ Congress made several significant changes to Article 66.⁶⁶⁸ 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.⁶⁶⁹ This proposal mirrors a similar amendment to Article 26, which addresses minimum tours of assignment, i.e., "tenure," for military judges.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.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.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.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;⁶⁷⁴ (2) the government has

667. UCMJ art. 66(f) (2012), 10 U.S.C. § 866(f) (2012) (amended 2016). *See generally* 2 SCHLUETER, *MILITARY CRIMINAL JUSTICE*, *supra* note 35, § 17–15 (discussing appellate review by the service Courts of Criminal Appeals).

668. Military Justice Act of 2016, Pub. L. No. 114-328, § 5330, 130 Stat. 2000, 2932–34 (codified as UCMJ art. 66 (2016), 10 U.S.C. § 866 (Supp. IV 2016)).

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

670. *See supra* Part VII.C, for a discussion of minimum tours of duty for military judges.

671. UCMJ art. 66(b)(3), 10 U.S.C. § 866(b)(3) (Supp. IV 2016).

672. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 609. *See generally* Major Jeffery D. Lippert, *Automatic Appeal Under UCMJ Article 66: Time for a Change*, 182 MIL. L. REV. 1 (2004) (recommend the U.C.M.J. be amended to delete the requirement for automatic appeal of all special courts-martial).

673. UCMJ art. 66(b)(1) (2016), 10 U.S.C. § 866(b)(1) (Supp. IV 2016).

674. UCMJ art. 66(b)(1)(A) (2016), 10 U.S.C. § 866(b)(1)(A) (Supp. IV 2016).

appealed a ruling by the military judge under Article 62;⁶⁷⁵ (3) the government has appealed a court-martial sentence under new Article 56(d);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.⁶⁷⁷ The amended article requires that an appeal under one of these provisions must be timely.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.⁶⁷⁹ Currently, only military case law addresses this type of relief.⁶⁸⁰

Fifth, the amended Article 66 includes specific statutory guidance on the courts' consideration of sentences appealed by the government.⁶⁸¹ The Courts of Criminal Appeals will be authorized to consider whether the adjudged sentence violates the law⁶⁸² and whether the sentence is plainly unreasonable.⁶⁸³

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

675. UCMJ art. 66(b)(1)(B) (2016), 10 U.S.C. § 866(b)(1)(B) (Supp. IV 2016).

676. UCMJ art. 66(b)(1)(C) (2016), 10 U.S.C. § 866(b)(1)(C) (Supp. IV 2016).

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.

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).

679. UCMJ art. 66(b)(2) (2016), 10 U.S.C. § 866(b)(2) (Supp. IV 2016).

680. See generally 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, *supra* note 35, § 7–11 (addressing case law involving post-trial delays in the military justice system); Major William J. Nelson, *A Right Way and a Wrong Way: Remedying Excessive Post-Trial Delays in Light of Tardif, Moreno, and Toohey*, 198 MIL. L. REV. 1 (2008) (arguing that the military appellate courts granting relief for post-trial delay exceed their jurisdictional authority); Major Jennifer L. Venghaus, *Seven Years Later: The Struggle With Moreno Continues*, 217 MIL. L. REV. 1 (2015) (presenting a lengthy analysis of post-trial and appellate delays in the military justice system).

681. UCMJ art. 66(e) (2016), 10 U.S.C. § 866(e) (Supp. IV 2016).

682. UCMJ art. 66(e)(A) (2016), 10 U.S.C. § 866(e)(A) (Supp. IV 2016).

683. UCMJ art. 66(e)(B) (2016), 10 U.S.C. § 866(e)(B) (Supp. IV 2016).

appellate courts' powers to review findings and sentences,⁶⁸⁴ and to order rehearings or dismiss charges.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.⁶⁸⁶ This will generally comport with federal civilian practice.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 *de novo, sua sponte*, factual review of the evidence submitted at trial.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.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

684. UCMJ art. 66(f)(2) (2016), 10 U.S.C. § 866(f)(2) (Supp. IV 2016). *See generally* Lieutenant Colonel Jeremy Stone Weber, *Sentence Appropriateness Relief in the Courts of Criminal Appeals*, 66 A.F. L. REV. 79 (2010) (providing a comprehensive study of how the service courts of appeals have exercised their broad powers in reviewing court-martial sentences, recommending that those powers be applied more uniformly, and suggesting that failure to do so should warrant removal of that power from those courts).

685. UCMJ art. 66(f) (2016), 10 U.S.C. § 866(f) (Supp. IV 2016).

686. *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). *See generally* Andrew Effron, *United States v. DuBay and the Evolution of Military Law*, 207 MIL. L. REV. 1 (2011) (discussing *United States v. DuBay*, which details a mechanism used in post-trial fact-finding proceedings); Captain David Jividen, *Will the Dike Burst? Plugging the Unconstitutional Hole in Article 66(c) U.C.M.J.*, 38 A.F. L. REV. 63 (1994) (explaining that the unique powers of service appellate courts, under UCMJ Article 66(c), to make independent factual findings may be abused where the courts rely on post-trial affidavits rather than ordering *DuBay* rehearings).

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).

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).

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.⁶⁹⁰ 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.⁶⁹¹ First, Article 67(a)(2) was amended to include a reference to the Commandant of the Marine Corps.⁶⁹² 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.⁶⁹³ Finally, Article 67(c) was changed to reflect that with the adoption of Article 60c⁶⁹⁴ and the abolishment of convening authority's actions,⁶⁹⁵ the military appellate courts will be reviewing court-martial judgments entered by the military judge.⁶⁹⁶

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.⁶⁹⁷ 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.⁶⁹⁸ 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.⁶⁹⁹ It indicated that, although legislation has been introduced to conform military practice to civilian procedures regarding Supreme Court review, no action has been taken.⁷⁰⁰ The

690. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 610. The Group noted its proposal was based on New York state practice. *Id.*

691. Military Justice Act of 2016, Pub. L. No. 114-328, § 5331, 130 Stat. 2000, 2934-35 (codified as UCMJ art. 67 (2016), 10 U.S.C. § 867 (Supp. IV 2016)).

692. UCMJ art. 67(a)(2) (2016), 10 U.S.C. § 867(a)(2) (Supp. IV 2016).

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).

697. UCMJ art. 67a (2012), 10 U.S.C. § 867a (2012) (amended 2016).

698. Military Justice Act of 2016, Pub. L. No. 114-328, § 5332, 130 Stat. 2000, 2935 (codified as UCMJ art. 67a (2016), 10 U.S.C. § 867a (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.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,⁷⁰² which are not otherwise reviewable by the service Courts of Criminal Appeals under Article 66, discussed *supra*.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.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.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.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.⁷⁰⁷

The amendments to Article 69 effected several changes.⁷⁰⁸ First, the amendments combined the two current forms of Article 69 review, which are outlined, *supra*.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

Sess. (2013).

701. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 628.

702. UCMJ art. 69 (2012), 10 U.S.C. § 869 (2012) (amended 2016).

703. *See supra* Part XII.C.

704. UCMJ art. 69(a) (2012), 10 U.S.C. § 869(a) (2012) (amended 2016).

705. *Id.*

706. UCMJ art. 69(b) (2012), 10 U.S.C. § 869(b) (2012) (amended 2016).

707. UCMJ art. 69(d) (2012), 10 U.S.C. § 869(d) (2012) (amended 2016).

708. Military Justice Act of 2016, Pub. L. No. 114-328, § 5333, 130 Stat. 2000, 2935–36 (codified as UCMJ art. 69 (2016), 10 U.S.C. § 869 (Supp. IV 2016)).

709. *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.⁷¹⁰ The accused must file the request within one year after the completion of the review set out in Articles 64⁷¹¹ and 65.⁷¹² The Judge Advocate General may extend the time, but not beyond three years.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.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.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,⁷¹⁶ whichever is the earlier date.⁷¹⁷ As under current law, the Court of Criminal Appeals may take action only on matters of law.⁷¹⁸ Thus, unlike review under Article 66, *infra*,⁷¹⁹ the court may not engage in *de novo* review of the evidence presented at trial.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.⁷²¹ Congress added Article 70(f),⁷²² which will require that to the greatest extent

710. UCMJ art. 69 (2016), 10 U.S.C. § 869 (Supp. IV 2016).

711. UCMJ art. 64 (2016), 10 U.S.C. § 864 (Supp. IV 2016).

712. UCMJ art. 69(a) (2016), 10 U.S.C. § 869(a) (Supp. IV 2016).

713. UCMJ art. 69(b) (2016), 10 U.S.C. § 869(b) (Supp. IV 2016).

714. UCMJ art. 69(d) (2016), 10 U.S.C. § 869(d) (Supp. IV 2016).

715. UCMJ art. 69(d)(2)(A) (2016), 10 U.S.C. § 869(d)(2)(A) (Supp. IV 2016).

716. UCMJ art. 69(d)(2)(B)(i)–(ii) (2016), 10 U.S.C. § 869(d)(2)(B)(i)–(ii) (Supp. IV 2016).

717. UCMJ art. 69(d)(2)(B) (2016), 10 U.S.C. § 869(d)(2)(B) (Supp. IV 2016).

718. UCMJ art. 69(e) (2016), 10 U.S.C. § 869(e) (Supp. IV 2016).

719. *See infra* Part XII.C.2.

720. *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).

721. UCMJ art. 70 (2012), 10 U.S.C. § 870 (2012) (amended 2016).

722. Military Justice Act of 2016, Pub. L. No. 114-328, § 5334, 130 Stat. 2000, 2936 (codified

practicable, in any capital case, at least one of the appellate defense counsel must be “learned in the law applicable to [death penalty] cases.”⁷²³ 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.⁷²⁴

7. Hearing on a Vacation of a Suspended Sentence

Article 72 addresses the procedures for vacating a suspended sentence.⁷²⁵ Currently, that article states that the special court-martial convening authority is responsible for holding the hearing⁷²⁶ and then reporting the results of that hearing to the general court-martial convening authority.⁷²⁷ 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.⁷²⁸ 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.⁷²⁹

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.⁷³⁰ 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.⁷³¹

as UCMJ art. 70 (2016), 10 U.S.C. § 870 (Supp. IV 2016)).

723. UCMJ art. 70(f) (2016), 10 U.S.C. § 870(f) (Supp. IV 2016).

724. *Id.*

725. UCMJ art. 72 (2012), 10 U.S.C. § 872 (2012) (amended 2016).

726. UCMJ art. 72(a) (2012), 10 U.S.C. § 872(a) (2012) (amended 2016).

727. UCMJ art. 72(b) (2012), 10 U.S.C. § 872(b) (2012) (amended 2016).

728. Military Justice Act of 2016, Pub. L. No. 114-328, § 5335, 130 Stat. 2000, 2936–37 (codified as UCMJ art. 72 (2016), 10 U.S.C. § 872 (Supp. IV 2016)).

729. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 650.

730. UCMJ art. 73 (2012), 10 U.S.C. § 873 (2012) (amended 2016). *See generally* 2 SCHLUETER, MILITARY CRIMINAL JUSTICE, *supra* note 35, § 17–21 (discussing filing a petition for a new trial).

731. FED. R. CRIM. PRO. 33(b)(1). *See generally* MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 653–54.

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 60⁷³⁶ 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 133⁷⁴⁰ and 134.⁷⁴¹

The 2016 amendments made significant changes to the punitive articles.

732. UCMJ art. 75 (2012), 10 U.S.C. § 875 (2012) (amended 2016).

733. Military Justice Act of 2016, Pub. L. No. 114-328, § 5337, 130 Stat. 2000, 2937 (codified as UCMJ art. 75(d) (2016), 10 U.S.C. § 875(d) (Supp. IV 2016)).

734. Military Justice Act § 5338, 130 Stat. 2000, 2937 (codified as UCMJ art. 76a (2016), 10 U.S.C. § 876a (Supp. IV 2016)).

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.

738. UCMJ art. 79–134 (2012), 10 U.S.C. §§ 879–934 (2012) (amended 2016).

739. UCMJ art. 90 (2012), 10 U.S.C. § 890 (2012) (amended 2016).

740. UCMJ art. 133 (2012), 10 U.S.C. § 933 (2012) (amended 2016).

741. UCMJ art. 134 (2012), 10 U.S.C. § 934 (2012) (amended 2016).

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.⁷⁴² In the following discussion, 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.⁷⁴³ The article is intended to provide greater accountability for sexual misconduct by recruiters and trainers during the recruiting and military training environments.⁷⁴⁴

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

Congress added a new offense in Article 121a.⁷⁴⁵ It prohibits the fraudulent use of credit cards, debit cards, and other access devices.⁷⁴⁶ The new provision is similar to 18 U.S.C. § 1029, which prohibits fraud and related activity in connection with access devices.⁷⁴⁷ 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.⁷⁴⁸

742. The term “migrated” is the term used by the Military Justice Review Group. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 37.

743. Military Justice Act of 2016, Pub. L. No. 114-328, § 5410, 130 Stat. 2000, 2942–43 (codified as UCMJ art. 93a (2016), 10 U.S.C. § 893a (Supp. IV 2016)).

744. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 735–38.

745. Military Justice Act § 5432, 130 Stat. 2000, 2951 (codified as UCMJ art. 121a (2016), 10 U.S.C. § 921a (Supp. IV 2016)).

746. UCMJ art. 121a (2016), 10 U.S.C. § 921a (Supp. IV 2016).

747. 18 U.S.C. § 1029 (2012).

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.⁷⁴⁹ The 2016 amendments moved that offense to Article 105.⁷⁵⁰ 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. § 1030,⁷⁵¹ which prohibits fraud and related activities in connection with computers.⁷⁵²

4. Article 132, Retaliation

Currently, Article 132 addresses the offense of fraud against the United States.⁷⁵³ Congress moved that offense to Article 124⁷⁵⁴ and in its place created a new Article 132 offense—retaliation.⁷⁵⁵ 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.⁷⁵⁶ The Group's report continues by noting that Article 132 would not preempt prosecution of retaliatory conduct under other punitive articles.⁷⁵⁷ Congress extended the Military Justice Review Group's punitive article to include reports of "protected communications."⁷⁵⁸

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.⁷⁵⁹ The scope

749. UCMJ art. 132 (2012), 10 U.S.C. § 932 (2012) (amended 2016).

750. Military Justice Act § 5401(12), 130 Stat. 2940 (codified as UCMJ art. 105 (2016), 10 U.S.C. § 905 (Supp. IV 2016)).

751. 18 U.S.C. § 1030 (2012).

752. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 909.

753. UCMJ art. 132 (2012), 10 U.S.C. § 932 (2012) (amended 2016).

754. Military Justice Act § 5401(14), 130 Stat. 2000, 2939 (codified as UCMJ art. 124 (2016), 10 U.S.C. § 924 (Supp. IV 2016)).

755. Military Justice Act § 5450, 130 Stat. 2000, 2957 (codified as UCMJ art. 132 (2016), 10 U.S.C. § 932 (Supp. IV 2016)).

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)).

758. Military Justice Act § 5450, 130 Stat. 2000, 2957 (codified as UCMJ art. 132 (2016), 10 U.S.C. § 932 (Supp. IV 2016)).

759. UCMJ art. 134 (2016), 10 U.S.C. § 934 (Supp. IV 2016). See generally MILITARY CRIMES AND DEFENSES, *supra* note 450, § 7.3 (discussing general article offenses).

of Article 134 is broad, owing to the special needs of the military.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.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.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.⁷⁶³ In *United States v. Fosler*,⁷⁶⁴ the United States Court of Appeals for the Armed Forces held that the government must both plead and prove a terminal element.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.⁷⁶⁶

In amending the punitive articles of the UCMJ, Congress “migrated”⁷⁶⁷ many,⁷⁶⁸ but not all,⁷⁶⁹ of the Article 134 offenses currently listed in

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).

761. UCMJ art. 134 (2012), 10 U.S.C. § 934 (2012) (amended 2016).

762. MCM, *supra* note 19, pt. IV, ¶¶ 61–113.

763. UCMJ art. 134 (2012), 10 U.S.C. § 934 (2012) (amended 2016).

764. *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

765. *Id.* at 230.

766. *Id.*

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).

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).

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.⁷⁷⁰ 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.⁷⁷¹ Thus, the Government should not have to plead and prove those terminal elements, as required by Article 134.⁷⁷² For each of the migrated offenses in its Report, the Group addressed that reasoning.⁷⁷³

Using that rationale, Congress migrated many offenses,⁷⁷⁴ 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.⁷⁷⁵ 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 99.⁷⁷⁶ 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.⁷⁷⁷ The offense is currently covered in the Manual for Courts-Martial under Article 134.⁷⁷⁸

2. Article 84, Breach of Medical Quarantine

Currently, Article 84 proscribes unlawful enlistment, appointment, or

770. See, e.g., UCMJ art. 131 (2016), 10 U.S.C. § 931 (Supp. IV 2016) (containing perjury provisions, which were migrated from Article 134).

771. See generally MILITARY JUSTICE REVIEW GRP., *supra* note 23 (detailing the movement of articles).

772. See *id.* at 987 (contending the “terminal element” requirement undermines uniform treatment of service members).

773. See, e.g., *id.* at 712 (explaining the offense of breaking restriction directly flouts command authority and is, thus, “inherently prejudicial to good order and discipline;” consequently, the offense does not rely on the “additional proof of the terminal element of Article 134 as the basis for its criminality”).

774. *Id.* at 985.

775. See, e.g., UCMJ art. 131 (2016), 10 U.S.C. § 931 (Supp. IV 2016) (creating a new provision for various forms of perjury, which were migrated from Article 134).

776. UCMJ art. 82 (2012), 10 U.S.C. § 882 (2012) (amended 2016).

777. Military Justice Act § 5403, 130 Stat. 2000, 2939–40 (codified as UCMJ art. 82 (2012), 10 U.S.C. § 882 (2012) (amended 2016)).

778. MCM, *supra* note 19, pt. IV, ¶ 105.

separation.⁷⁷⁹ As noted, *infra*,⁷⁸⁰ Congress moved this offense to Article 104.⁷⁸¹ In its place, it inserted the offense of breach of medical quarantine.⁷⁸² This offense is currently listed in the Manual for Courts-Martial as an offense under Article 134.⁷⁸³

3. Article 87, Missing Movement

Article 87 currently covers only the offense of missing movement.⁷⁸⁴ The 2016 amendments added the offense of jumping from a vessel into the water, an offense currently addressed in Article 134.⁷⁸⁵

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.⁷⁸⁶ The provision is drawn from the offense of breaking restriction⁷⁸⁷ and offenses against correctional custody,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.⁷⁸⁹ As noted, *infra*,⁷⁹⁰ that article will be re-designated as Article 87a.⁷⁹¹ In its place, Congress migrated the offenses committed by a sentinel or lookout, currently covered by Article 134.⁷⁹²

779. UCMJ art. 84 (2012), 10 U.S.C. § 884 (2012) (amended 2016).

780. *See infra* Part XIII.E.

781. *See* Military Justice Act § 5401(1), 130 Stat. 2000, 2938 (re-designating articles 83 and 84 as 104a and 104b, respectively).

782. Military Justice Act § 5405, 130 Stat. 2000, 2940 (codified as UCMJ art. 84 (2012), 10 U.S.C. § 884 (2012) (amended 2016)).

783. MCM, *supra* note 19, pt. IV, ¶ 100.

784. UCMJ art. 87 (2012), 10 U.S.C. § 887 (2012) (amended 2016).

785. MCM, *supra* note 19, pt. IV, ¶ 91.

786. Military Justice Act § 5407, 130 Stat. 2000, 2941 (codified as UCMJ art. 87b (2016), 10 U.S.C. § 887b (Supp. IV 2016)).

787. MCM, *supra* note 19, pt. IV, ¶ 102.

788. *Id.* pt. IV, ¶ 70.

789. UCMJ art. 95 (2012), 10 U.S.C. § 895 (2012) (amended 2016).

790. *See infra* Part XII.E.

791. Military Justice Act § 5401(2), 130 Stat. 2000, 2938 (codified as UCMJ art. 87a (2016), 10 U.S.C. § 887a (Supp. IV 2016)).

792. Military Justice Act § 5401(8), 130 Stat. 2000, 2938 (codified as UCMJ art. 95 (2016), 10 U.S.C. § 895 (Supp. IV 2016)); MCM, *supra* note 19, pt. IV, ¶ 104(b)(2).

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.⁷⁹³ It is currently covered by Article 134 and was migrated from Part IV of the Manual for Courts-Martial.⁷⁹⁴

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

Congress maintained the offense of releasing a prisoner without authority in Article 96,⁷⁹⁵ but it transferred into that article the offense of drinking with a prisoner as Article 96(b).⁷⁹⁶ That offense is currently covered by Article 134.⁷⁹⁷ The article was retitled to reflect the addition of that offense.⁷⁹⁸

8. Article 104, Public Records Offenses

Currently, Article 104 covers the offense of aiding the enemy.⁷⁹⁹ Congress relocated that offense into Article 103b.⁸⁰⁰ In its place, Congress also migrated the offense of altering, concealing, removing, mutilating, obliterating, or destroying a public record, into Article 104.⁸⁰¹ That offense is currently covered by Article 134 in the Manual for Courts-Martial.⁸⁰²

9. Article 105a, False or Unauthorized Pass Offenses

The offense of false or unauthorized pass is currently addressed under

793. Military Justice Act § 5412, 130 Stat. 2000, 2943–44 (codified as UCMJ art. 95a (2016), 10 U.S.C. § 895a (Supp. IV 2016)).

794. MCM, *supra* note 19, pt. IV, ¶ 104(b)(1).

795. UCMJ art. 96 (2012), 10 U.S.C. § 896 (2012) (amended 2016).

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)).

797. MCM, *supra* note 19, pt. IV, ¶ 74.

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”).

799. UCMJ art. 104 (2012), 10 U.S.C. § 884 (2012) (amended 2016).

800. Military Justice Act § 5401(5), 130 Stat. 2000, 2938 (codified as UCMJ art. 103 (2016), 10 U.S.C. § 903b (Supp. IV 2016)).

801. Military Justice Act § 5415, 130 Stat. 2000, 2944 (codified as UCMJ art. 104 (2016), 10 U.S.C. § 904 (Supp. IV 2016)).

802. MCM, *supra* note 19, pt. IV, ¶ 99.

Article 134.⁸⁰³ Congress moved that offense into a new punitive article, Article 105a.⁸⁰⁴

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

Article 106 currently covers the offense of spies.⁸⁰⁵ As noted, *infra*,⁸⁰⁶ the 2016 amendments renumbered that offense as Article 103.⁸⁰⁷ In its place, Congress transferred the offense of impersonating an officer, noncommissioned or petty officer, or agent or official⁸⁰⁸—an offense currently covered in Article 134.⁸⁰⁹ 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.⁸¹⁰ That Report also states that the term “officer” in new Article 106(a)(1) will have the same meaning given to it in 18 U.S.C. § 101(b)(1).⁸¹¹

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

Article 106a currently covers the offense of espionage.⁸¹² Congress moved that offense to Article 103a,⁸¹³ as noted, *infra*.⁸¹⁴ In its place, Congress transferred the offense of wearing an unauthorized insignia, decoration, badge, ribbon, device, or lapel button,⁸¹⁵ which is currently

803. *Id.* pt. IV, ¶ 77.

804. Military Justice Act § 5416, 130 Stat. 2000, 2938 (codified as UCMJ art. 106 (2016), 10 U.S.C. § 906 (Supp. IV 2016)).

805. UCMJ art. 106a (2012), 10 U.S.C. § 906a (2012) (amended 2016).

806. See *infra* Part XIII.E.

807. Military Justice Act § 5401(7), 130 Stat. 2000, 2938 (codified as UCMJ art. 103 (2016), 10 U.S.C. § 903 (Supp. IV 2016)).

808. Military Justice Act § 5417, 130 Stat. 2000, 2945 (codified as UCMJ art. 106 (2016), 10 U.S.C. § 906 (Supp. IV 2016)).

809. MCM, *supra* note 19, pt. IV, ¶ 86.

810. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 790.

811. *Id.* at 792.

812. UCMJ art. 106a (2012), 10 U.S.C. § 906a (2012) (amended 2016).

813. Military Justice Act § 5401(7), 130 Stat. 2000, 2938 (codified as UCMJ art. 103a (2016), 10 U.S.C. § 903a (Supp. IV 2016)).

814. See *infra* Part XIII.E.

815. Military Justice Act § 5418, 130 Stat. 2938, 2945–46 (codified as UCMJ art. 106a (2016), 10 U.S.C. § 906a (Supp. IV 2016)).

treated as an Article 134 offense.⁸¹⁶

12. Article 107, False Official Statements; False Swearing

The current version of Article 107 covers the offense of false statements.⁸¹⁷ The 2016 amendments added the offense of false swearing to the article.⁸¹⁸ That offense is currently covered under Article 134.⁸¹⁹

13. Article 107a, Parole Violation

Congress transferred the current offense of parole violations to new Article 107a.⁸²⁰ That offense is currently covered under Article 134.⁸²¹

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 134.⁸²² The 2016 amendments transferred that offense to new Article 109a.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.⁸²⁴ As noted, *infra*,⁸²⁵ Article 111 was renumbered as Article 113.⁸²⁶ The amendments transferred the offense of leaving the scene of a vehicle accident—currently covered under Article 134⁸²⁷—into a new Article 111.⁸²⁸

816. MCM, *supra* note 19, pt. IV, ¶ 113.

817. UCMJ art. 107 (2012), 10 U.S.C. § 907 (2012) (amended 2016).

818. Military Justice Act § 5419, 130 Stat. 2000, 2946 (codified as UCMJ art. 107 (2016), 10 U.S.C. § 907 (Supp. IV 2016)).

819. MCM, *supra* note 19, pt. IV, ¶ 79.

820. Military Justice Act § 5420, 130 Stat. 2000, 2946 (codified as UCMJ art. 107a (2016), 10 U.S.C. § 907a (Supp. IV 2016)).

821. MCM, *supra* note 19, pt. IV, ¶ 97a.

822. *Id.* pt. IV, ¶ 94.

823. Military Justice Act § 5421, 130 Stat. 2000, 2946–47 (codified as UCMJ art. 109a (2016), 10 U.S.C. § 909a (Supp. IV 2016)).

824. UCMJ art. 111 (2012), 10 U.S.C. § 911 (2012) (amended 2016).

825. *See infra* Part XIII.E.

826. Military Justice Act § 5401(9), 130 Stat. 2000, 2939 (codified as UCMJ art. 113 (2016), 10 U.S.C. § 913 (Supp. IV. 2016)).

827. MCM, *supra* note 19, pt. IV, ¶ 82.

828. Military Justice Act § 5423, 130 Stat. 2000, 2947 (codified as UCMJ art. 111 (2016), 10 U.S.C. § 911 (Supp. IV 2016)).

16. Article 112, Drunkenness and Other Incapacitation Offenses

The familiar offense of being drunk on duty is covered in Article 112.⁸²⁹ The 2016 amendments transferred the Article 134 offenses of incapacitation for the performance of duties⁸³⁰ and drunk prisoner⁸³¹ into the article, and retitled it.⁸³²

17. Article 114, Endangerment Offenses

The current Article 114 covers only the offense of dueling.⁸³³ The amended article contains three additional offenses currently addressed by Article 134: reckless endangerment,⁸³⁴ discharge of a firearm/endangering human life,⁸³⁵ and carrying a concealed weapon.⁸³⁶

18. Article 115, Communicating Threats

Currently, Article 115 proscribes malingering.⁸³⁷ Congress moved that offense to Article 83.⁸³⁸ In its place, Congress substituted a new Article 115, which will contain two Article 134 offenses—the offense of communicating a threat⁸³⁹ 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.⁸⁴⁰

19. Article 119b, Child Endangerment

Article 119b is a new punitive article.⁸⁴¹ It proscribes the offense of child endangerment, an offense currently covered under Article 134.⁸⁴² In

829. UCMJ art. 112 (2012), 10 U.S.C. § 912 (2012) (amended 2016).

830. MCM, *supra* note 19, pt. IV, ¶ 76.

831. *Id.* pt. IV, ¶ 75.

832. Military Justice Act § 5424, 130 Stat. 2000, 2947–48 (codified as UCMJ art. 112 (2016), 10 U.S.C. § 912 (Supp. IV 2016) (amended 2016)).

833. UCMJ art. 114 (2012), 10 U.S.C. § 914 (2012) (amended 2016).

834. Military Justice Act § 5426, 130 Stat. 2000, 2948 (codified as UCMJ art. 114 (2016), 10 U.S.C. § 914 (Supp. IV 2016)).

835. MCM, *supra* note 19, pt. IV, ¶ 81.

836. *Id.* pt. IV, ¶ 112.

837. UCMJ art. 115 (2012), 10 U.S.C. § 915 (2012) (amended 2016).

838. Military Justice Act § 5427, 130 Stat. 2000, 2948–49 (codified as UCMJ art. 115 (2016), 10 U.S.C. § 915 (Supp. IV 2016)).

839. MCM, *supra* note 19, pt. IV, ¶ 110.

840. *Id.* pt. IV, ¶ 109.

841. Military Justice Act § 5429, 130 Stat. 2000, 2949 (codified as UCMJ art. 119b (2016), 10 U.S.C. § 919b (Supp. IV 2016)).

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.

844. UCMJ art. 120a (2012), 10 U.S.C. § 920a (2012) (amended 2016).

845. Military Justice Act § 5401(11), 130 Stat. 2000, 2940 (codified as UCMJ art. 130 (2016), 10 U.S.C. § 930 (Supp. IV 2016)).

846. Military Justice Act § 5431, 130 Stat. 2000, 2951 (codified as UCMJ art. 120a (2012), 10 U.S.C. § 920a (2012) (amended 2016)).

847. MCM, *supra* note 19, pt. IV, ¶ 94.

848. Military Justice Act § 5433, 130 Stat. 2000, 2951 (codified as UCMJ art. 121b (2016), 10 U.S.C. § 921b (Supp. IV 2016)).

849. MCM, *supra* note 19, pt. IV, ¶ 78.

850. Military Justice Act § 5435, 130 Stat. 2000, 2952 (codified as UCMJ art. 122a (2016), 10 U.S.C. § 922a (Supp. IV 2016)).

851. MCM, *supra* note 19, pt. IV, ¶ 106.

852. Military Justice Act § 5437, 130 Stat. 2000, 2952–53 (codified as UCMJ art. 124a (2016), 10 U.S.C. § 924a (Supp. IV 2016)).

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.⁸⁵⁴ The 2016 amendments moved that offense to new Article 124b.⁸⁵⁵

25. Article 125, Kidnapping

Article 125 currently covers the offenses of forcible sodomy and bestiality.⁸⁵⁶ 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.⁸⁵⁷ The Group also recommended that the offense of bestiality be covered as a new offense under Article 134.⁸⁵⁸ In their place, Congress substituted the offense of kidnapping,⁸⁵⁹ an offense which is currently covered by Article 134.⁸⁶⁰

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,⁸⁶¹ an offense currently covered under Article 134.⁸⁶² The amendment also retitled the offense to reflect the addition of that offense in Article 126.⁸⁶³

27. Article 128, Assault

The 2016 amendments to Article 128, which covers the offense of assault, resulted in two changes.⁸⁶⁴ First, Congress adopted the

854. *Id.*

855. Military Justice Act § 5437, 130 Stat. 2000, 2952–53 (codified as UCMJ art. 124a (2016), 10 U.S.C. § 924a (Supp. IV 2016)).

856. UCMJ art. 125 (2012), 10 U.S.C. § 925 (2012) (amended 2016).

857. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 926.

858. *Id.* at 926.

859. Military Justice Act § 5439, 130 Stat. 2000, 2953 (codified as UCMJ art. 125 (2016), 10 U.S.C. § 925 (Supp. IV 2016)).

860. MCM, *supra* note 19, pt. IV, ¶ 92.

861. Military Justice Act § 5440, 130 Stat. 2000, 2954 (codified as UCMJ art. 126 (2016), 10 U.S.C. § 926 (Supp. IV 2016)).

862. MCM, *supra* note 19, pt. IV, ¶ 67.

863. *See* Military Justice Act of 2016 § 5440, 130 Stat. 2000, 2953–54 (codified as UCMJ art. 126 (2016), 10 U.S.C. § 926 (Supp. IV 2016)) (changing the title of the offense from “Arson” to “Arson; Burning Property with Intent to Defraud”).

864. Military Justice Act § 5441, 130 Stat. 2000, 2954 (codified as UCMJ art. 128 (2016), 10 U.S.C. § 928 (Supp. IV 2016)).

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.

869. UCMJ art. 129 (2016), 10 U.S.C. § 929 (Supp. IV 2016).

870. Military Justice Act § 5442, 130 Stat. 2000, 2954–55 (codified as UCMJ art. 129 (2016), 10 U.S.C. § 929 (Supp. IV 2016)).

871. MCM, *supra* note 19, pt. IV, ¶ 111.

872. *Id.* pt. IV, ¶ 98.

873. Military Justice Act § 5444, 130 Stat. 2000, 2956 (codified as UCMJ art. 131a (2016), 10 U.S.C. § 931a (Supp. IV 2016)).

874. MCM, *supra* note 19, pt. IV, ¶ 96.

875. Military Justice Act § 5445, 130 Stat. 2000, 2956 (codified as UCMJ art. 131b (2016), 10 U.S.C. § 931b (Supp. IV 2016)).

31. Article 131c, Misprision of Serious Offense

New punitive Article 131c addresses the offense of misprision of a serious offense,⁸⁷⁶ which is currently treated as an Article 134 offense.⁸⁷⁷ 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.⁸⁷⁸

32. Article 131d, Wrongful Refusal to Testify

The offense of wrongful refusal to testify is currently considered an Article 134 offense.⁸⁷⁹ Congress moved that offense to new Article 131d.⁸⁸⁰

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

New punitive Article 131e addresses the offense of prevention of the authorized seizure of property.⁸⁸¹ That offense is currently covered under Article 134.⁸⁸²

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 134.⁸⁸³ Congress migrated that offense into new punitive Article 131g.⁸⁸⁴

D. Other Amendments to the Punitive Articles

1. Article 79, Conviction of Lesser-Included Offense

Congress amended Article 79, which addresses lesser-included offenses,

876. Military Justice Act § 5446, 130 Stat. 2000, 2956–57 (codified as UCMJ art. 131c (2016), 10 U.S.C. § 931c (Supp. IV 2016)).

877. MCM, *supra* note 19, pt. IV, ¶ 95.

878. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 964.

879. MCM, *supra* note 19, pt. IV, ¶ 108.

880. Military Justice Act § 5447, 130 Stat. 2000, 2957 (codified as UCMJ art. 131d (2016), 10 U.S.C. § 931d (Supp. IV 2016)).

881. Military Justice Act § 5448, 130 Stat. 2000, 2957 (codified as UCMJ art. 131e (2016), 10 U.S.C. § 931e (Supp. IV 2016)).

882. MCM, *supra* note 19, pt. IV, ¶ 103.

883. *Id.* pt. IV, ¶ 96a.

884. Military Justice Act § 5449, 130 Stat. 2000, 2958 (codified as UCMJ art. 131g (2016), 10 U.S.C. § 931g (Supp. IV 2016)).

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.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.⁸⁸⁶ This list will certainly improve military justice by, *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.⁸⁸⁷

2. Article 83, Malingering

The offense of malingering is currently covered in Article 115.⁸⁸⁸ 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."⁸⁸⁹ The Military Justice Review Group explained that the change was intended to better address the issue of *mens rea*.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.⁸⁹¹ Congress added the offense of assault on a commissioned officer, transferring that offense from Article 90.⁸⁹² The Military Justice Review Group noted that the change would align the closely related offenses into one punitive article.⁸⁹³

885. Military Justice Act § 5402, 130 Stat. 2000, 2939 (codified as UCMJ art. 79 (2016), 10 U.S.C. § 879 (Supp. IV 2016)).

886. UCMJ art. 79(c) (2016), 10 U.S.C. § 883 (Supp. IV 2016).

887. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 680.

888. UCMJ art. 83 (2012), 10 U.S.C. § 883 (2012) (amended 2016).

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. . .").

890. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 852.

891. UCMJ art. 89 (2012), 10 U.S.C. § 879(b) (2012) (amended 2016).

892. Military Justice Act § 5408, 130 Stat. 2000, 2941 (codified as UCMJ art. 89 (2016), 10 U.S.C. § 889 (Supp. IV 2016)).

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.⁸⁹⁴ The 2016 amendments transfer the assault component from Article 90 to Article 89, and retitle the Article.⁸⁹⁵

5. Article 110, Improper Hazarding of Vessel or Aircraft

Article 110 makes it an offense to improperly hazard a vessel.⁸⁹⁶ The 2016 amendments added the new offense of improperly hazarding an aircraft to that article.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.”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.⁸⁹⁹ The current version of that article specifies a blood alcohol content (BAC) limit of .10.⁹⁰⁰ The 2016 amendments renumbered Article 111 as 113,⁹⁰¹ and lowered that BAC limit to .08,⁹⁰² to make the military provision consistent with state and federal practice.⁹⁰³

7. Article 118, Murder

Congress made only a technical amendment to Article 118, which

894. UCMJ art. 90 (2012), 10 U.S.C. § 890 (2012) (amended 2016).

895. Military Justice Act § 5409, 130 Stat. 2000, 2942 (codified as UCMJ art. 90 (2016), 10 U.S.C. § 890 (2016) (Supp. IV 2016)).

896. UCMJ art. 110 (2012), 10 U.S.C. § 910 (2012) (amended 2016).

897. Military Justice Act § 5422, 130 Stat. 2000, 2947 (codified as UCMJ art. 110 (2016), 10 U.S.C. § 910 (Supp. IV 2016)).

898. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 818.

899. UCMJ art. 111 (2012), 10 U.S.C. § 911 (2012) (amended 2016).

900. UCMJ art. 111(b)(3) (2012), 10 U.S.C. § 911(b)(3) (2012) (amended 2016).

901. Military Justice Act § 5401(9), 130 Stat. 2000, 2939.

902. Military Justice Act § 5425, 130 Stat. 2000, 2948 (codified as UCMJ art. 113 (2016), 10 U.S.C. § 913 (Supp. IV 2016)).

903. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 822.

covers the offense of murder.⁹⁰⁴ The words “forcible sodomy” were deleted from Article 118(4), to make it clear that the offense of forcible sodomy is covered under Article 120.⁹⁰⁵

8. Article 120, Rape and Sexual Assault Offenses

Congress amended Article 120,⁹⁰⁶ 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).⁹⁰⁷ 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.⁹⁰⁸ That offense is located in new Article 93a.⁹⁰⁹ Third, the amendments deleted the definition of “bodily harm” in Article 120(g)(3)⁹¹⁰ and changed the definition of “sexual contact” in Article 120(g)(2).⁹¹¹

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

Article 120b addresses the offense of rape and sexual assault of a child.⁹¹² Congress amended that article to conform the definition of “sexual act” to 18 U.S.C. § 2246(2).⁹¹³

904. Military Justice Act § 5428, 130 Stat. 2000, 2949 (codified as UCMJ art. 118(4) (2016), 10 U.S.C. § 918(4) (Supp. IV 2016)).

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”).

906. Military Justice Act § 5430, 130 Stat. 2000, 2949–50 (codified as UCMJ art. 120 (2016), 10 U.S.C. § 920 (Supp. IV 2016)).

907. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 873.

908. Military Justice Act § 5430(b)(2), 130 Stat. 2000, 2949.

909. Military Justice Act § 5410, 130 Stat. 2000, 2942–43 (codified as UCMJ art. 93a (2016), 10 U.S.C. § 893a (Supp. IV 2016)).

910. *Compare* UCMJ art. 120(g)(3)(2012), 10 U.S.C. § 920 (2012) (containing the definition of bodily harm), *with*, Military Justice Act § 5430(b), 130 Stat. 2938, 2950–51 (deleting the definition of bodily harm).

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).

912. UCMJ art. 120b (2013), 10 U.S.C. § 920b (Supp. I 2013) (amended 2016).

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.⁹¹⁴ The change conforms the punitive article to a similar offense found in 18 U.S.C. § 2111⁹¹⁵ and was made because the gravamen of the offense is the forcible taking of someone's property in their presence.⁹¹⁶

11. Article 130, Stalking

The offense of stalking, which is currently covered in Article 120a,⁹¹⁷ was moved to Article 130.⁹¹⁸ In addition, Congress amended the article to include cyberstalking and threats to intimate partners.⁹¹⁹

12. Article 134, General Article

As noted, *supra*, Article 134 prohibits a wide range of misconduct not otherwise expressly addressed in the enumerated punitive articles.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.⁹²¹ The 2016 amendment to Article 134 will cover all non-capital federal crimes, regardless of where they were committed.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.⁹²³

914. Military Justice Act § 5434, 130 Stat. 2000, 2951–52 (codified as UCMJ art. 122 (2016), 10 U.S.C. § 922 (Supp. IV 2016)).

915. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 901.

916. *Id.* at 902.

917. UCMJ art. 120a (2012), 10 U.S.C. § 920a (2012) (amended 2016).

918. Military Justice Act § 5401(11), 130 Stat. 2000, 2939.

919. Military Justice Act § 5443, 130 Stat. 2000, 2955–56 (codified as UCMJ art. 130 (2016), 10 U.S.C. § 930 (Supp. IV 2016)).

920. *See supra* Part XIII.C.

921. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 985.

922. Military Justice Act § 5451, 130 Stat. 2000, 5451 (codified as UCMJ art. 134 (2016), 10 U.S.C. § 934 (Supp. IV 2016)); *see also* 18 U.S.C. § 3261 (2012) (codifying the Military Extraterritorial Jurisdiction Act).

923. 18 U.S.C. § 3261. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 989. *See generally* 1 SCHLUETER, MILITARY CRIMINAL JUSTICE, *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

Military Extraterritorial Jurisdiction Act, which provides for federal criminal jurisdiction over civilians and service members overseas).

924. Military Justice Act § 5401(1), 130 Stat. 2000, 2938.

925. *Id.*

926. Military Justice Act § 5401(2), 130 Stat. 2000, 2938.

927. Military Justice Act § 5401(3), 130 Stat. 2000, 2938.

928. Military Justice Act § 5401(4), 130 Stat. 2000, 2938.

929. Military Justice Act § 5401(5), 130 Stat. 2000, 2938.

930. Military Justice Act § 5401(6), 130 Stat. 2000, 2938.

931. Military Justice Act § 5401(7), 130 Stat. 2000, 2938.

- 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 Forces⁹⁴⁴ and the appointment of a Code Committee to annually review the military justice system.⁹⁴⁵ Congress amended several of those

932. *Id.*

933. Military Justice Act § 5401(9), 130 Stat. 2000, 2939.

934. Military Justice Act § 5401(8), 130 Stat. 2000, 2938.

935. Military Justice Act § 5401(11), 130 Stat. 2000, 2939.

936. Military Justice Act § 5401(12), 130 Stat. 2000, 2939.

937. Military Justice Act § 5401(13), 130 Stat. 2000, 2939.

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.

939. Military Justice Act § 5401(14), 130 Stat. 2000, 2939.

940. UCMJ art. 135–40 (2012), 10 U.S.C. §§ 935–40 (2012).

941. UCMJ art. 135 (2012), 10 U.S.C. § 935 (2012) (amended 2016).

942. UCMJ art. 137 (2012), 10 U.S.C. § 937 (2012) (amended 2016).

943. UCMJ art. 138 (2012), 10 U.S.C. § 938 (2012) (amended 2016).

944. UCMJ art. 141–45 (2012), 10 U.S.C. §§ 941–45 (2012).

945. UCMJ art. 146 (2012), 10 U.S.C. § 946 (2012) (amended 2016).

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.

948. UCMJ art. 137(a) (2012), 10 U.S.C. § 937(a) (2012) (amended 2016).

949. UCMJ art. 137(a)(1) (2012), 10 U.S.C. § 937(a)(1) (2012) (amended 2016).

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).

951. *See* Military Justice Act of 2016, Pub. L. No. 114-328, § 5503, 130 Stat. 2000, 2960–61 (codified as UCMJ art. 137 (2016), 10 U.S.C. § 937 (Supp. IV 2016)) (requiring additional training and public transparency).

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.⁹⁵³ 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.⁹⁵⁴ Currently, there is no UCMJ requirement that the services maintain data and records, outside the information required under Article 146.⁹⁵⁵ Each service maintains separate data collections for military justice cases.⁹⁵⁶ 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.”⁹⁵⁷

In addition, the amendments will require the government to facilitate the public’s access to all court-martial filings and records.⁹⁵⁸ 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

953. Military Justice Act § 5503, 130 Stat. 2000, 2960–61 (codified as UCMJ art. 137 (2016), 10 U.S.C. § 937 (Supp. IV 2016)) (fostering transparency and knowledge through the availability of regulations in electronic form).

954. See UCMJ art. 140a (2016), 10 U.S.C. § 940a (Supp. IV 2016) (adding an article on case management, data collection, and accessibility).

955. See UCMJ art. 146 (2012), 10 U.S.C. § 946 (2012) (amended 2016) (requiring a minimal collection of data on different areas within the military justice system).

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)).

958. Military Justice Act § 5504(4), 130 Stat. 2000, 2961 (codified as UCMJ art. 140a (2016), 10 U.S.C. § 140a (Supp. IV 2016)).

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.⁹⁵⁹ That Committee is charged with submitting annual reports on various issues within the military justice system.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.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).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.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.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

959. UCMJ art. 146 (2012), 10 U.S.C. § 946 (2012) (amended 2016).

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).

961. Military Justice Act § 5522, 130 Stat. 2000, 2964–65 (codified as UCMJ art. 146a (2016), 10 U.S.C. § 946a (Supp. IV 2016)).

962. UCMJ art. 146 (2012), 10 U.S.C. § 946 (2012) (amended 2016).

963. Military Justice Act § 5522, 130 Stat. 2000, 2964–65 (codified as UCMJ art. 146a (2016), 10 U.S.C. § 946a (Supp. IV 2016)).

964. UCMJ art. 146a (2016), 10 U.S.C. § 946a (Supp. IV 2016).

enactment of this Act.”⁹⁶⁵ On July 11, 2017, the Department of Defense published, for public comment, its proposed implementing changes to the Manual for Courts-Martial.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.⁹⁶⁷ Those proposed amendments would go into effect on the date of the Executive Order.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.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.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

965. Military Justice Act § 5542(a), 130 Stat. 2000, 2967.

966. See Fed. Reg. No. 131, 31952 (July 11, 2017).

967. *Manual for Courts-Martial: Proposed Amendments*, REGULATIONS.GOV (July 11, 2017), <https://www.regulations.gov/document?D=DOD-2017-OS-0032-0001> [<https://perma.cc/HF8W-M59B>].

968. *Id.*

969. *Id.*

970. See Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 (creating the UCMJ).

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

971. Statement by SASC Chairman John McCain on National Defense Authorization Act Conference Report, *Press Releases*, MCCAIN SENATE (Nov. 30, 2016), <https://www.mccain.senate.gov/public/index.cfm/2016/11/statement-by-sasc-chairman-john-mccain-on-national-defense-authorization-act-conference-report> [<https://perma.cc/H2MV-A78W>].

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").

975. *See* UCMJ art. 29 (2012), 10 U.S.C. § 829 (2012) (amended 2016) (discussing excusals of members from the court).

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

976. UCMJ art. 66 (2012), 10 U.S.C. § 866 (2012) (amended 2016).

977. UCMJ art. 65 (2012), 10 U.S.C. § 865 (2012) (amended 2016).

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).

980. *See, e.g.*, Military Justice Act of 2016, Pub. L. No. 114-328, § 5202, 130 Stat. 2000, 2904–05 (codified as UCMJ art. 30a (2016), 10 U.S.C. § 830a (Supp. IV 2016)) (allowing military judges more latitude in considering and disposing of certain pretrial matters).

981. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 303.

magistrate to handle those pretrial matters, and if necessary, act as a judicial reviewer of the military magistrate's decision.⁹⁸² In effect, that new structure will provide military judges with subordinates who will undoubtedly be under the direct supervision of military judges.⁹⁸³ While this will be new to military justice, it has been the norm for decades in federal courts.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.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.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.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.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.⁹⁸⁹ It is

982. *Id.* at 303.

983. *Id.* at 307–08.

984. *Id.* at 306–07.

985. *Id.* at 560.

986. UCMJ art. 60 (2013), 10 U.S.C. § 860 (Supp. I 2013) (amended 2016).

987. *See* UCMJ art. 63 (2012), 10 U.S.C. § 863 (2012) (amended 2016) (governing rehearings).

988. MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 563.

989. *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, 19–20 (1991) (addressing criticism

critical to note that, despite those occasionally heated proposals, the 2016 amendments maintain the traditional role of the commander.⁹⁹⁰ The commander, *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.⁹⁹¹ The commander's authority to take final action on the case has been reduced, as discussed *supra*.⁹⁹² In the greater scheme of things, however, the commanders remain an essential element in the system, as they should.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.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 134.⁹⁹⁵ Although the Supreme Court has held that it is

of the commander's role in selecting members).

990. *See, e.g.*, UCMJ art. 22 (2012), 10 U.S.C. § 822 (2012) (amended 2016) (allowing commanding officers to convene a general courts-martial).

991. *See* UCMJ art. 30 (2012), 10 U.S.C. § 830 (2012) (amended 2016) (identifying the charges and specifications of the commander's role); UCMJ art. 33 (2012), 10 U.S.C. § 833 (2012) (amended 2016) (forwarding charges); UCMJ art. 22 (2012), 10 U.S.C. § 822 (2012) (amended 2016) (selecting who may convene general courts-martial); UCMJ art. 53a (2016), 10 U.S.C. § 853a (Supp. IV 2016) (outlining the commander's role in plea agreements); UCMJ art. 60b (2016), 10 U.S.C. § 860b (Supp. IV 2016) (promulgating the commander's post-trial review).

992. *See supra* Part IX.

993. *See generally* David A. Schlueter, *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).

994. *See supra* Part XIII.

995. *See, e.g.*, Wing Commander D. B. Nichols, *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,⁹⁹⁶ commentators have called for its removal—and rightfully so.⁹⁹⁷ 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*,⁹⁹⁸ 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.”⁹⁹⁹ 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.¹⁰⁰⁰ Following federal criminal procedure norms is commendable and reflects the approach taken by Congress countless times when amending the UCMJ.¹⁰⁰¹

survive).

996. *Parker v. Levy*, 417 U.S. 733, 771–72 (1974).

997. See Major Kenneth J. Hodson, *Manual for Courts-Martial-1984*, 57 MIL. L. REV. 1, 12 (1972) (advocating the abolition of Article 134 and the exclusive punishment of offenses expressly covered by law or regulation); Edward F. Sherman, *Civilianization of Military Justice*, 22 MAINE L. REV. 3, 9 (1970) (urging the elimination of Articles 133 and 134).

998. *Parker v. Levy*, 417 U.S. 733 (1974).

999. *Parker*, 417 U.S. at 744 (citing *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)).

1000. See, e.g., MILITARY JUSTICE REVIEW GRP., *supra* note 23, at 296 (discussing the combined aspects of the Federal Rules of Criminal Procedure in Article 30(a) for indictments).

1001. See, e.g., Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983) (using the federal rules of criminal procedure as a guide in the amendment process).

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.¹⁰⁰² While it would be more appropriate to list the good order and discipline component first,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 justice¹⁰⁰⁴ and a civilianization of military justice.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.¹⁰⁰⁶

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))).

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).

1004. See Walter T. Cox, *The Army, The Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987) (presenting an overview of the development of military justice in the United States); Andrew M. Ferris, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 440 (1994) (noting the military justice system, like other divisions of the government, has evolved).

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).

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.

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**THE MILITARY JUSTICE ACT of 2016 SUBCHAPTER I:
GENERAL PROVISIONS**

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 1	Definitions	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).	Military Justice Act of 2016, Pub. L. No. 114-328, § 5101, 130 Stat. 2000, 2894.	These amendments were non-substantive.
Article 2	Persons Subject to This Chapter	Para. (3) was changed to clarify court-martial jurisdiction over reservists on inactive duty training.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5102, 130 Stat. 2000, 2894-95.	This change addresses the jurisdictional gap recognized in <i>United States v. Wolpert</i> , 75 M.J. 777 (A. Ct. Crim. App. 2016) and in other cases.
Article 6	Judge Advocates and Legal Officers	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5103, 130 Stat. 2000, 2895.	These amendments were non-substantive.
Article 6a	Investigation and Disposition of Matters Pertaining to the Fitness of Military Judges	Conforming amendments were made to the article to reference military magistrates and appellate judges.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5104, 130 Stat. 2000, 2895.	These amendments were non-substantive.

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 6b	Rights of the Victim of an Offense Under This Chapter	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5105, 130 Stat. 2000, 2895-96.	The requirement that defense counsel go through the trial counsel to interview victims' was moved to Article 6b from Article 46.

SUBCHAPTER II: APPREHENSION AND RESTRAINT

UCMJ Provision	Title of Provision	Change Effectuated	Source	Comments
Article 10	Restraint of Persons Charged with Offenses	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5121, 130 Stat. 2000, 2896.	The requirement in Article 33 that charges be forwarded within eight days was deleted.
Article 12	Confinement with Enemy Prisoners Prohibited	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5122, 130 Stat. 2000, 2896-97.	The amendment addresses the problems of applying Article 12 any time a service member is confined with foreign nationals.

SUBCHAPTER III: NON-JUDICIAL PUNISHMENT

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 15	Commanding Officer's Non-judicial Punishment	The non-judicial punishment of being placed on "bread and water or diminished rations" will be eliminated.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5141, 130 Stat. 2000, 2897.	The punishment of being placed on diminished rations was considered a relic of the past.

SUBCHAPTER IV: COURT-MARTIAL JURISDICTION

UCMJ Provision	Title of Provision	Change Effectuated	Source	Comments
Article 16	Courts-Martial Classified	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5161, 130 Stat. 2000, 2897.	The changes to structure and composition of courts-martial are among the more significant changes to the UCMJ. The special court-martial with members only has been deleted.
Article 18	Jurisdiction of General Courts-Martial	The amendments conform the article to the provisions in Article 16 regarding types of courts-martial and to Article 56 regarding jurisdiction over sex-related offenses.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5162, 130 Stat. 2000, 2897-98.	The amendments moved the list of specified sexual offenses to Article 18 from Article 56.
Article 19	Jurisdiction of Special Courts-Martial	The amendments conform the article to provisions in Article 16 regarding types of courts-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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5161, 130 Stat. 2000, 2898.	The ability of magistrate judges to conduct special courts-martial is a significant change to the UCMJ and is intended to mirror federal practice where United States magistrate judges may try petty offenses.

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 20	Jurisdiction of Summary Courts-Martial	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5164, 130 Stat. 2000, 2898-99.	The amendment codifies case law which has held that a summary court-martial conviction is not a criminal conviction.

SUBCHAPTER V: COMPOSITION OF COURTS-MARTIAL

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 22	Who May Convene General Courts-Martial	The words "in chief" were removed to conform the article to language used for a commander of a naval fleet.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5181, 130 Stat. 2000, 2899.	The amendments were non-substantive.
Article 25	Who May Serve on Courts-Martial	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5182, 130 Stat. 2000, 2899-900.	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.
Article 25a	Number of Court-Martial Members in Capital Cases	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	Military Justice Act of 2016, Pub. L. No. 114-328, § 5183, 130 Stat. 2000, 2901.	The amendment recognizes that it is the possibility of a death sentence that dictates the size of the court-martial panel.

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
		determined that the accused may not be sentenced to death, the panel must consist of eight members.		
Article 26	Military Judge of a General or Special Court-Martial	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5184, 130 Stat. 2000, 2901.	One of the significant changes to Article 26 is the provision which will require the President to set uniform standards for minimum tours of duty for military judges.
Article 26a	Military Magistrates	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5185, 130 Stat. 2000, 2901-02.	This new provision is intended to mirror the office of United States magistrate judges in the federal system.
Article 27	Detail of Trial and Defense Counsel	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	Military Justice Act of 2016, Pub. L. No. 114-328, § 5186, 130 Stat. 2000, 2902.	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

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
		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.		courts-martial.
Article 29	Assembly and Impaneling of Members; Detail of New Members and Military Judges	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5187, 130 Stat. 2000, 2902-03.	The change, which will authorize the convening authority to appoint alternate members, will parallel federal civilian practice.

SUBCHAPTER VI: PRE-TRIAL PROCEDURE

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 30	Charges and Specifications	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5201, 130 Stat. 2000, 2904.	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.
Article 30a	Certain Proceedings Conducted Before Referral	This new article provides statutory authority for military judges and military magistrates to review and decide certain matters prior to referral of charges.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5202, 130 Stat. 2000, 2904-05.	This change was intended to expedite pre-referral disposition of issues by military judges and military magistrates.
Article 32	Preliminary Hearing Required Before Referral to General Court-Martial	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5203, 130 Stat. 2000, 2905-06.	The changes to Article 32 will require the hearing officer to provide a more detailed report to the convening authority.

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 33	Disposition Guidance	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5204, 130 Stat. 2000, 2906-07.	The intent of these changes is to provide important and helpful guidance to commanders, and others, on what may be considered in deciding how to dispose of charges.
Article 34	Advice to Convening Authority Before Referral to Trial	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5205, 130 Stat. 2000, 2907-08.	In recommending appropriate disposition of charges, the staff judge advocate and convening authority are required to consider the impact of the alleged offenses on justice and discipline.
Article 35	Service of Charges; Commencement of Trial	The amendment conforms the article to current practice for service of charges and waiting periods.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5206, 130 Stat. 2000, 2908.	The changes were non-substantive.

SUBCHAPTER VII: TRIAL PROCEDURE

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 38	Duties of Trial Counsel and Defense Counsel	The amendment requires that all defense counsel and assistant defense counsel be qualified under Article 27(b).	Military Justice Act of 2016, Pub. L. No. 114-328, § 5221, 130 Stat. 2000, 2909.	The amendment is designed to insure that defense counsel are qualified to represent accused service members.
Article 39	Sessions	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5222, 130 Stat. 2000, 2909.	The amendment makes a conforming change, which will recognize sentencing proceedings conducted by the military judge.
Article 40	Continuances	The amendment deletes references to courts-martial without a military judge and provides that summary courts-martial may grant continuances.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5223, 130 Stat. 2000, 2909.	The amendments are non-substantive.
Article 41	Challenges	The amendment conforms this provision to the amendments to Article 16 regarding fixed-sized panels; it also removes reference to special courts-martial	Military Justice Act of 2016, Pub. L. No. 114-328, § 5224, 130 Stat.	The amendment recognizes that there will no longer be any courts-martial without a military judge.

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
		without a military judge.	2000, 2909.	
Article 43	Statute of Limitations	The amendment extends the statute of limitations for child abuse cases, fraudulent enlistment cases, and in cases where DNA implicates an identified person.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5225, 130 Stat. 2000, 2909-10.	The statute of limitations for child abuse cases was increased from five to ten years.
Article 44	Former Jeopardy	The amendment aligns the military's double jeopardy protections with federal civilian protections.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5226, 130 Stat. 2000, 2910-11.	The amendment clarifies when jeopardy attaches in judge-alone trials and in trials with members.
Article 45	Pleas of the Accused	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5227, 130 Stat. 2000, 2911.	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.
Article 46	Opportunity to Obtain Witnesses and Other Evidence in Trial by Court-Martial	The amendment clarifies the authority to issue and enforce subpoenas for witnesses and evidence. The amendment also allows investigative	Military Justice Act of 2016, Pub. L. No. 114-328, § 5228,	One of the key changes in this article will permit the trial counsel to issue investigative subpoenas before

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
		subpoenas <i>duces tecum</i> , 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.	130 Stat. 2000, 2911–13.	referral of charges.
Article 47	Refusal of Person Not Subject to Chapter to Appear, Testify or Produce Evidence	The changes update and clarify this article and the relationship between this article and Article 46.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5229, 130 Stat. 2000, 2913.	This amendment was intended, in part, to clarify the relationships between Articles 46 and 47.
Article 48	Contempt	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5230, 130 Stat. 2000, 2913–14.	The amendment expands the list of those who may exercise contempt powers.

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 49	Depositions	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5231, 130 Stat. 2000, 2914-15.	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.
Article 50	Admissibility of Sworn Testimony From Records of Courts of Inquiry	The amendment updates the article to permit sworn testimony from a court of inquiry.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5232, 130 Stat. 2000, 2915.	The changes will permit counsel to introduce audio or videotapes of testimony given in a court of inquiry.
Article 50a	Defense of Lack of Mental Responsibility	The amendment deletes the reference to courts-martial without a military judge.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5233, 130 Stat. 2000, 2915.	These were non-substantive amendments.

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 51	Voting and Rulings	The amendment deletes the reference to courts-martial without a military judge.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5234, 130 Stat. 2000, 2915-16.	This was a non-substantive change which recognizes that there will no longer be any special courts-martial composed of only members.
Article 52	Votes Required for Conviction, Sentencing, and Other Matters	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5235, 130 Stat. 2000, 2916.	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 "numbers game," that counsel may currently play in exercising challenges to the panel.
Article 53	Findings and Sentencing	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	Military Justice Act of 2016, Pub. L. No. 114-328, § 5236, 130 Stat. 2000, 2917.	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

UCMJ Provision	Title of Provision	Change Effectuated	Source	Comments
		that in a summary court-martial, the court-martial will impose the sentence.		by members.
Article 53a	Plea Agreements	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5237, 130 Stat. 2000, 2917-18.	New Article 53a provides helpful statutory guidance on plea agreements, which have become a common part of military justice proceedings.
Article 54	Record of Trial	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5238, 130 Stat. 2000, 2918-19.	The amendment will shift the burden of certifying the record of trial from the military judge to the court reporter.

SUBCHAPTER VIII: SENTENCES

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 56	Sentencing	<p>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. The</p>	<p>Military Justice Act of 2016, Pub. L. No. 114-328, § 5301, 130 Stat. 2000, 2919–20.</p>	<p>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.</p>

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
		<p>amendment also provides that the government may appeal a sentence. The amendment repeals Article 56a, which addressed the punishment of life without parole. The amended article will permit the government to appeal a sentence.</p>		
Article 57	Effective Date of Sentences	<p>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.</p>	<p>Military Justice Act of 2016, Pub. L. No. 114-328, § 5302, 130 Stat. 2000, 2921-23.</p>	<p>The amendments consolidate several articles, which address the effective dates of punishments and deferrals of punishments.</p>
Article 58a	Sentences: Forfeiture of Pay and Allowances During Confinement	<p>The amendment requires reduction of enlisted members to E-1 when the approved sentence includes a punitive discharge, confinement, or hard labor without confinement.</p>	<p>Military Justice Act of 2016, Pub. L. No. 114-328, § 5303, 130 Stat. 2000, 2923.</p>	<p>The amendments are intended to create a uniform statutory rule for all of the services regarding automatic reductions in grade.</p>

**SUBCHAPTER IX: POST-TRIAL PROCEDURE AND REVIEW
OF COURTS-MARTIAL**

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 60	Post-Trial Processing in General and Special Courts-Martial	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5321, 130 Stat. 2000, 2924.	Clarification of the military judge's authority to conduct post-trial proceedings is a welcomed change.
Article 60a	Limited Authority to Act on Sentence in Specified Post-Trial Circumstances	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5322, 130 Stat. 2000, 2924-26.	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.
Article 60b	Post-Trial Actions in Summary Courts-Martial and Certain General and	This new provision addresses a convening authority's post-trial powers in general and special courts-martial,	Military Justice Act of 2016, Pub. L. No. 114-328, § 5323,	The article requires the convening authority to inform the military judge of his action, which is

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
	Special Courts-Martial	where the sentence falls outside the range of punishments covered by Article 60a, and in summary courts-martial.	130 Stat. 2000, 2926–27.	then included in the judgment of the court-martial.
Article 60c	Entry of Judgment	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5324, 130 Stat. 2000, 2927–28.	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.
Article 61	Waiver of Right to Appeal; Withdrawal of Appeal	The amendment conforms this provision to the amendments to Articles 60, 65, and 69.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5325, 130 Stat. 2000, 2928.	The amendments were non-substantive.
Article 62	Appeal by the United States	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	Military Justice Act of 2016, Pub. L. No. 114-328, § 5326, 130 Stat. 2000, 2928–29.	The provision authorizing a government appeal parallels a similar rule regarding interlocutory appeals in federal civilian courts.

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
		Articles 66 and 69.		
Article 63	Rehearings	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5327, 130 Stat. 2000, 2929.	The amendments remove any sentence limitation protections an accused might have on a rehearing.
Article 64	Judge Advocate Review of Finding of Guilty in Summary Courts-Martial	The amendment provides that this provision now only applies to summary courts-martial.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5328, 130 Stat. 2000, 2929-30.	This provision formerly addressed preparation of staff judge advocate post-trial reviews in general and special courts-martial. Under the amendments, the SJA's post trial review is no longer required.
Article 65	Transmittal and Review of Records	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5329, 130 Stat. 2000, 2930-31.	The changes to Article 65 were substantial.
Article 66	Courts of Criminal Appeals	The amendment establishes an appeal as of right in non-capital cases and expands the	Military Justice Act of 2016, Pub. L. No. 114-328,	Despite some calls for removing the fact-finding powers from the service

UCMJ Provision	Title of Provision	Change Effectuated	Source	Comments
		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.	§ 5330, 130 Stat. 2000, 2932–34.	appellate courts, Congress retained those powers.
Article 67	Review by the Court of Appeals for the Armed Forces	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5331, 130 Stat. 2000, 2934–35.	The amendments to this article were largely non-substantive.
Article 67a	Review by the Supreme Court	The amendment changed the name of the Court of Military Appeals to the Court of Appeals for the Armed Forces.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5332, 130 Stat. 2000, 2935.	The amendments are non-substantive.
Article 69	Review by Judge Advocate General	The amendment authorizes an accused to apply for discretionary review under Article 66 of a decision by the Judge Advocate General, who reviewed and decided the case	Military Justice Act of 2016, Pub. L. No. 114-328, § 5333, 130 Stat. 2000, 2935–36.	The amendments combined the two current forms of Article 69 review into one procedure.

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
		under Article 69.		
Article 70	Appellate Counsel	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5334, 130 Stat. 2000, 2936.	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.
Article 72	Vacation of Suspension	The amendment authorizes a special court-martial convening authority to detail a judge advocate to conduct a hearing on vacating a suspended sentence.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5335, 130 Stat. 2000, 2936-37.	The amendment provides an important change to suspension proceedings by insuring that lawyers will be reviewing the evidence.
Article 73	Petition for a New Trial	The period for petitioning the Judge Advocate General for a new trial has been extended from two to three years.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5336, 130 Stat. 2000, 2937.	The amendment conforms military practice to federal criminal practice.
Article 75	Restoration	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5337, 130 Stat. 2000, 2937.	A new provision in this article will provide additional procedural guidance on a service member's post-trial eligibility for pay and allowances.

UCMJ Provision	Title of Provision	Change Effectuated	Source	Comments
Article 76a	Leave Required to be Taken Pending Review of Certain Court-Martial Convictions	The amendment makes technical changes to conform the article to the amended Article 60 and new Article 60c.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5338, 130 Stat. 2000, 2937.	The amendments are non-substantive.

SUBCHAPTER X: THE PUNITIVE ARTICLES

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 79	Conviction of Offense Charged; Lesser Included Offenses and Attempts	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5402, 130 Stat. 2000, 2939.	Providing a list of lesser-included offenses for each punitive article will be a welcomed improvement.
Article 82	Soliciting Commission of Offenses	The amendment consolidates the solicitation offense under Article 134 with the specific solicitation offenses under Article 82.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5403, 130 Stat. 2000, 2939-40.	The offense of solicitation is covered under Article 134, MCM, Part IV, para. 105.
Article 83	Malingering	The offense of malingering is currently covered in Article 115. The original Article 83 is now Article 104a.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5404, 130 Stat. 2000, 2940.	Redesignating this article was part of the realignment of the punitive articles.
Article 84	Breach of Medical Quarantine	This is a new punitive article. The original Article 84 is now Article 104b.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5405, 130 Stat. 2000, 2940.	The offense of breach of quarantine is covered under Article 134, MCM, Part IV, para. 100.
Article 87	Missing Movement; Jumping from Vessel	The amendment adds the offense of jumping from a	Military Justice Act of 2016, Pub. L. No. 114-328,	The offense of jumping from a vessel into the water is covered under

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
		vessel.	§ 5406, 130 Stat. 2000, 2941.	Article 134, MCM, Part IV, para. 91.
Article 87a	Resistance, Flight, Breach of Arrest, and Escape	This offense is currently covered in Article 95.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(2), 130 Stat. 2000, 2938.	Redesignating this article was part of the realignment of the punitive articles.
Article 87b	Offenses Against Correctional Custody and Restriction	This is a new punitive article, which combines the offenses of violating several forms of custody and restriction.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5407, 130 Stat. 2000, 2941.	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.
Article 89	Disrespect Toward Superior Commissioned Officer; Assault of Superior Commissioned Officer	The amendment expands this article to include the offense of assaulting a superior commissioned officer.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5408, 130 Stat. 2000, 2941.	The amendment aligns similar offenses under Article 89.
Article 90	Willfully Disobeying Superior Commissioned Officer	The amendment removes the offense of assaulting a superior commissioned officer, which is now covered in Article 89.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5409, 130 Stat. 2000, 2942.	This amendment aligns similar offenses under Article 89.
Article 93a	Prohibited Activities with Military Recruit or Trainee by Person in Position of	This is a new punitive article which concerns the abuse of a training leadership position,	Military Justice Act of 2016, Pub. L. No. 114-328, § 5410,	The amendment is intended to provide enhanced accountability for

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
	Special Trust	abuse of position as a recruiter, the issue of consent, and definitions.	130 Stat. 2000, 2942-43.	sexual misconduct.
Article 95	Offenses by Sentinel or Lookout	This offense is currently covered in Article 113. Current Article 95 will be redesignated as Article 87a.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5411, 130 Stat. 2000, 2943.	The offenses by a sentinel or lookout are covered under Article 134, MCM, Part IV, para. 104(b)(2).
Article 95a	Disrespect Toward Sentinel or Lookout	This is a new punitive article.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5412, 130 Stat. 2000, 2943-44.	This offense is covered under Article 134, MCM, Part IV, para. 104(b)(1).
Article 96	Release of Prisoner Without Authority; Drinking with Prisoner	The amendment adds the offense of drinking with a prisoner and has been retitled.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5413, 130 Stat. 2000, 2944.	The offense of drinking with a prisoner is currently covered under Article 134, MCM, Part IV, para. 74.
Article 98	Misconduct as Prisoner	This offense is currently covered in Article 105.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(6), 130 Stat. 2000, 2938.	Redesignating this article was part of the realignment of the punitive articles.
Article 103	Spies	This offense is currently covered in Article 106. The amendment replaces the mandatory sentence of death with a discretionary	Military Justice Act of 2016, Pub. L. No. 114-328, § 5414, 130 Stat.	Redesignating this article was part of the realignment of the punitive articles.

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
		death penalty, similar to the provisions in Article 103a and for all other capital offenses in the UCMJ.	2000, 2944.	
Article 103a	Espionage	The offense of espionage is currently covered in Article 106a.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(7), 130 Stat. 2000, 2938.	Redesignating this article was part of the realignment of the punitive articles.
Article 103b	Aiding the Enemy	This offense is currently covered in Article 104.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(5), 130 Stat. 2000, 2938.	Redesignating this article was part of the realignment of the punitive articles.
Article 104	Public Records Offenses	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5415, 130 Stat. 2000, 2944.	The offense is currently covered under Article 134, MCM, Part IV, para. 99.
Article 104a	Fraudulent Enlistment, Appointment, or	This article was formerly Article 83.	Military Justice Act of 2016, Pub. L. No. 114-328,	Redesignating this article was part of the realignment of the

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
	Separation		§ 5401(1), 130 Stat. 2000, 2938.	punitive articles.
Article 104b	Unlawful Enlistment, Appointment, or Separation	This article was formerly Article 84.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(1), 130 Stat. 2000, 2938.	Redesignating this article was part of the realignment of the punitive articles.
Article 105	Forgery	The offense of forgery is currently covered under Article 123.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(12), 130 Stat. 2000, 2939.	Redesignating this article was part of the realignment of the punitive articles.
Article 105a	False or Unauthorized Pass Offenses	This is a new punitive article, which covers the offenses involving false or unauthorized passes.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5416, 130 Stat. 2000, 2944-45.	The offense of false or unauthorized pass is currently covered under Article 134, MCM, Part IV, para. 77.
Article 106	Impersonation of Officer, Noncommissioned or Petty Officer, or Agent or Official	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	Military Justice Act of 2016, Pub. L. No. 114-328, § 5417, 130 Stat. 2000, 2945.	The offense of impersonating the specified persons is currently covered under Article 134, MCM, Part IV, para. 86.

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
		"officer" in 10 U.S.C. § 101(1).		
Article 106a	Wearing Unauthorized Insignia, Decoration, Badge, Ribbon, Device, or Lapel Button	This is a new punitive article, which establishes the offense of wearing unauthorized ribbons, devices, decorations, badges, or lapel buttons.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5418, 130 Stat. 2000, 2945-46.	This offense is currently covered under Article 134, MCM, Part IV, para. 113.
Article 107	False Statements; False Swearing	The amendment adds the offense of false swearing.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5419, 130 Stat. 2000, 2946.	The offense of false swearing is currently covered under Article 134, MCM, Part IV, para. 79.
Article 107a	Parole Violation	This is a new punitive article.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5420, 130 Stat. 2000, 2946.	The offense of parole violation is currently covered under Article 134, MCM, Part IV, para. 97a.
Article 108a	Captured or Abandoned Property	This offense is currently covered under Article 103.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(4), 130 Stat. 2000, 2939.	Redesignating this article was part of the realignment of the punitive articles.
Article 109a	Mail Matter; Wrongful Taking, Opening, etc.	This a new punitive article.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5421, 130 Stat. 2000,	This offense is currently covered under Article 134, MCM, Part IV, para. 93.

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
			2946–47.	
Article 110	Improper Hazarding of Vessel or Aircraft	The amendment adds the offense of improper hazarding of an aircraft.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5422, 130 Stat. 2000, 2947.	This amendment was intended to fill a gap in military practice.
Article 111	Leaving Scene of Vehicle Accident	This is a new punitive article. Former Article 111 will be Article 113a.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5423, 130 Stat. 2000, 2947.	The offense of “fleeing from an accident,” is currently covered under Article 134, MCM, Part IV, para. 82.
Article 112	Drunkenness and Other Incapacitation Offenses	The title has been changed and the coverage extended.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5424, 130 Stat. 2000, 2947– 48.	The offenses of “drunkenness” and “drunk prisoner” are currently covered under Article 134, MCM, Part IV, paras. 76 and 75, respectively.
Article 113	Drunken or Reckless Operation of a Vehicle, Aircraft, or Vessel	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5425, 130 Stat. 2000, 2948.	Redesignating this article was part of the realignment of the punitive articles.

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 114	Endangerment Offenses	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5426, 130 Stat. 2000, 2948.	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.
Article 115	Communicating Threats	This is a new punitive article. This article formerly covered the offense of malingering.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5427, 130 Stat. 2000, 2948-49.	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.
Article 118	Murder	The amendment to the Article is technical; the words "forcible sodomy" were deleted from Article 118(4).	Military Justice Act of 2016, Pub. L. No. 114-328, § 5428, 130 Stat. 2000, 2949.	The amendment is a non-substantive change.
Article 119b	Child Endangerment	This is a new punitive article.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5429, 130 Stat. 2000, 2949.	The offense of child endangerment is currently covered under Article 134, MCM, Part IV, para. 68a.
Article 120	Rape and Sexual Assault Offenses	The amendment conforms the definition of "sexual	Military Justice Act of 2016, Pub. L.	This amendment is a non-substantive, conforming change.

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
		act" to 18 U.S.C. § 2246(2)(A)-(C).	No. 114-328, § 5430, 130 Stat. 2000, 2949-50.	
Article 120a	Mails: Deposit of Obscene Matter	This is a new punitive article. Current Article 120a will be Article 130.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5431, 130 Stat. 2000, 2951.	The offense of depositing obscene materials is currently covered under Article 134, MCM, Part IV, para. 94.
Article 120b	Rape and Sexual Assault of a Child	The amendment conforms the definition of "sexual act" to 18 U.S.C. § 2246(2)(A)-(C).	Military Justice Act of 2016, Pub. L. No. 114-328, § 5430(c), 130 Stat. 2000, 2950-51.	This amendment is a non-substantive, conforming change.
Article 121a	Fraudulent Use of Credit Cards, Debit Cards, and Other Access Devices	This is a new punitive article, which makes it a crime to commit larcenies using credit or debit cards, or other devices.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5432, 130 Stat. 2000, 2951.	This new article is intended to avoid some of the ambiguities regarding prosecution for misuse of credit cards under Article 121, which proscribes larceny.
Article 121b	False Pretenses to Obtain Services	This is a new punitive article.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5433, 130 Stat. 2000, 2951.	The offense of obtaining services under false pretenses is currently covered under Article 134, MCM, Part IV, para. 78.
Article 122	Robbery	The Act amended the existing provision to conform to	Military Justice Act of 2016, Pub. L. No. 114-328,	The amendment eliminates the requirement that the prosecution must

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
		18 U.S.C. § 2111, by removing the words "with the intent to steal."	§ 5434, 130 Stat. 2000, 2951–52.	prove that the accused intended to permanently deprive the victim of his or her property.
Article 122a	Receiving Stolen Property	This is a new punitive article.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5435, 130 Stat. 2000, 2952.	The offense of receiving stolen property is currently covered under Article 134, MCM, Part IV, para. 106.
Article 123	Offenses Concerning Government Computers	This is a new punitive article, which criminalizes intentional unauthorized access of a United States government computer or system.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5436, 130 Stat. 2000, 2952.	The new offense is modeled after similar offenses covered in 18 U.S.C. § 1030.
Article 124	Frauds Against the United States	This was formerly Article 132. Current Article 124, which covers the offense of maiming, will be moved to Article 128a.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(14), 130 Stat. 2000, 2939.	Redesignating this article was part of the realignment of the punitive articles.
Article 124a	Bribery	This is a new punitive article.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5437, 130 Stat. 2000, 2952–53.	The offense of bribery is currently covered in Article 134, MCM, Part IV, para. 66.
Article 124b	Graft	This is a new punitive article.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5438,	The offense of graft is covered in Article 134, MCM, Part IV, para. 66.

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			130 Stat. 2000, 2953.	
Article 125	Kidnapping	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5439, 130 Stat. 2000, 2953.	The offense of kidnapping is covered in Article 134, MCM, Part IV, para. 92.
Article 126	Arson; Burning Property With Intent to Defraud	The Act amended the existing punitive article to include the offense of burning property with the intent to defraud.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5440, 130 Stat. 2000, 2953–54.	The offense of burning property with an intent to defraud is covered in Article 134, MCM, Part IV, para. 67.
Article 128	Assault	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5441, 130 Stat. 2000, 2954.	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.
Article 128a	Maiming	The offense is currently in Article 124.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(13), 130 Stat. 2000, 2939.	Redesignating this article was part of the realignment of the punitive articles.
Article 129	Burglary; Unlawful Entry	The Act amended the existing punitive article to include the	Military Justice Act of 2016, Pub. L.	The offense of unlawful entry is covered under

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		offense of unlawful entry.	No. 114-328, § 5442, 130 Stat. 2000, 2955.	Article 134, MCM, Part IV, para. 111.
Article 130	Stalking	This offense is currently covered under Article 120a. It will include stalking through use of technology and includes threats to intimate partners.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5443, 130 Stat. 2000, 2955-56.	Redesignating this article was part of the realignment of the punitive articles.
Article 131a	Subornation of Perjury	This is a new punitive article. The offense of perjury remains in Article 131.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5444, 130 Stat. 2000, 2956.	The offense of subornation of perjury is covered under Article 134, MCM, Part IV, para. 98.
Article 131b	Obstructing Justice	This is a new punitive article.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5445, 130 Stat. 2000, 2956.	The offense of obstructing justice is covered under Article 134, MCM, Part IV, para. 96.
Article 131c	Misprision of Serious Offense	This is a new punitive article.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5446, 130 Stat. 2000, 2956-57.	The offense of misprision of a serious offense is covered under Article 134, MCM, Part IV, para. 95.
Article 131d	Wrongful Refusal to Testify	This is a new punitive article.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5447, 130 Stat.	The offense of wrongful refusal to testify is covered under Article 134, MCM, Part IV, para.

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			2000, 2957.	108.
Article 131e	Prevention of Authorized Seizure of Property	This is a new punitive article.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5448, 130 Stat. 2000, 2957.	The offense of prevention of the authorized seizure of property is covered under Article 134, MCM, Part IV, para. 103.
Article 131f	Noncompliance with Procedural Rules	This was formerly Article 98.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5401(3), 130 Stat. 2000, 2938.	Redesignating this article was part of the realignment of the punitive articles.
Article 131g	Wrongful Interference with Adverse Administrative Proceeding	This is a new punitive article.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5449, 130 Stat. 2000, 2957.	The offense of wrongful interference with an adverse administrative proceeding is covered under Article 134, MCM, Part IV, para. 96a.
Article 132	Retaliation	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5450, 130 Stat. 2000, 2957-58.	This new article will parallel a similar offense in 18 U.S.C. § 1513(a) (retaliating against a witness, victim, or an informant).
Article 134	General Article	This article was amended to establish extraterritorial jurisdiction over offenses charged	Military Justice Act of 2016, Pub. L. No. 114-328, § 5451, 130 Stat.	This amendment is intended to provide worldwide application of the UCMJ, consistent with congressional intent

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		under clause 3, which in turn covers "all federal crimes not capital."	2000, 2958.	reflected in Article 5.

SUBCHAPTER XI: MISCELLANEOUS PROVISIONS

UCMJ Provision	Title of Provision	Change Effected	Source	Comments
Article 135	Courts of Inquiry	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5501, 130 Stat. 2000, 2960.	This amendment was intended to extend the protections currently available to employees of the DoD to employees of the Department of Homeland Security.
Article 136	Authority to Administer Oaths	The title to this provision was amended by deleting the words “and to act as notary” from the title.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5502, 130 Stat. 2000, 2960.	These were non-substantive amendments.
Article 137	Articles to be Explained	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	Military Justice Act of 2016, Pub. L. No. 114-328, § 5503, 130 Stat. 2000, 2960–61.	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.

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		UCMJ and MCM on the Internet.		
Article 140a	Case Management; Data Collection and Accessibility	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5504, 130 Stat. 2000, 2961-62.	The amendments increase the ability of the public to access military justice case files, similar to the system used for federal criminal cases.
Article 146	Military Justice Review Panel	This provision was formerly entitled "Code Committee" 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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5521, 130 Stat. 2000, 2962-64.	The establishment of a Military Justice Review Panel is intended to enhance the effectiveness and efficiency of the UCMJ by creating a "blue ribbon" body to review the military justice system.
Article 146a	Annual Reports	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.	Military Justice Act of 2016, Pub. L. No. 114-328, § 5522, 130 Stat. 2000, 2964-65.	This new provision, which was formerly covered in Article 146, will provide an annual summary of military justice issues.