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Department of Defense
Office of General Counsel
ATTN: Paul S. Koffsky
Deputy General Counsel (Personnel & Health Policy)
1600 Defense Pentagon
Washington, D.C. 20301-1600

Dear Sir:

Thank you for your invitation to provide advice or recommendations to improve our military justice system as part of the comprehensive review ordered by the Secretary of Defense. The National Institute of Military Justice's core mission is to improve the administration of military justice, and we appreciate the opportunity to participate in the Military Justice Review Group (MJRG)'s comprehensive review.

We have provided our recommendations in our attachment, and respectfully invite the MJRG's attention to the cited articles and blog posts detailing the history and rationale behind our recommendations. If you have any questions, or require additional information, please do not hesitate to contact us through our President at the above phone number and email, or directly through email to dru.brenner-beck@hotmail.com.

Sincerely,

Dru Brenner-Beck
President
National Institute of Military Justice

Attachment
National Institute of Military Justice
2014 Recommendations to the Military Justice Review Group

1) In R.C.M. 109 or 503(b) or some other appropriate place, prescribe a fixed term of office of at least five years' duration for military trial and appellate judges, or in the alternative, for a shorter fixed period that terminates with a release from active duty or retirement.

Terms of office are widely understood to be an essential component of judicial independence. The current arrangements are unsatisfactory because the three-year terms afforded to Army and Coast Guard judges are too short and subject to loopholes, and Air Force, Navy, and Marine Corps judges continue to serve on an at-will basis. This proposal would eliminate the service disparity, be good policy, and would comport with contemporary standards for the administration of justice as manifest, for example, in the jurisprudence developed by the Human Rights Committee under the International Convention on Civil and Political Rights to which the United States is a party. See Prof. Victor M. Hansen's recent comments on tenure for military judges, *available at* <http://globalmjreform.blogspot.com/2014/03/prof-hansen-on-tenure-for-military.html>.

2) Amend R.C.M. 109 to prescribe uniform rules of professional and judicial conduct.

The services' inability to speak with one voice on these subjects is a significant failure. The result is a legal tower of Babel. See Military Court Rules of the United States (LexisNexis 2012).

3) Add a new requirement in R.C.M 405(d)(1) that the Article 32 Investigating Officer be a Judge Advocate, absent a written finding of imperative necessity to use a line officer made by the Convening Authority.

4) Add an additional requirement in R.C.M. 405(j)(2), R.C.M. 406, and R.C.M. 407, that if an Article 32 Investigating Officer concludes that there are not reasonable grounds to believe that the accused committed the offenses alleged, that conclusion can be overruled only by the Convening Authority on written advice by the Staff Judge Advocate (in his Pretrial Advice under R.C.M 406) that indicates with specificity why the IO's assessment of the evidence was flawed.

5) Add a requirement in Article 31(b) to also warn that failure to make a statement in response to inquiry will not result in any adverse inference in subsequent proceedings.

This additional warning would ensure that service members do not confuse the duties inherent in military service with the obligation to assist the government in substantiating allegations of misconduct, and would counteract the intense military cultural ethic requiring service members to be forthcoming with superior authorities, and accept responsibility for transgressions. Such a warning should inform the service member that silence in the face of official accusation results in no adverse evidentiary consequence.

6) Electronic Discovery. Make explicit the inclusion of electronic discovery (and electronically stored information) under R.C.M. 701, and add to the definition of a "writing" in R.C.M. 103(20) to include "electronically stored information," as part of the discovery obligations in the M.C.M.

Although the 2012 Amendments to the M.C.M. updated the definition of the term "writing" to include "include[] printing and typewriting and reproductions of visual symbols by handwriting,

typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation” R.C.M. 103(20), the amendments did not account for its actual use in the appropriate rules concerning discovery obligations. See Daniel Park, *Change Necessary: Electronic Discovery Under the Manual for Courts-Martial*, 39 RUTGERS COMPUTER & TECH. L.J. 246, 279-280 (2013). In order to clarify electronic discovery obligations and to bring military discovery practice into accord with federal electronic discovery practice, we recommend the following additional changes to the M.C.M., which will make explicit the inclusion of electronic discovery (and electronically stored information) under R.C.M. 701, based on the changes made in the Federal Rules of Civil Procedure.

One option below, as proposed by Daniel Park:

Rule 103(20). “Writing” includes printing and typewriting and reproductions of visual symbols by handwriting, typewriting, printing, photostating, photographing, electronically stored information, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

Rule 701(a)(2). Documents, tangible objects, reports. After service of charges, upon request of the defense, the Government shall permit the defense to inspect:

(A) Any books, papers, documents, writings, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and

Rule 701(b)(3). Documents and tangible objects. If the defense requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect books, papers, documents, writings, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

7) Bring the varied definitions of a “victim,” implemented in the 2013 changes to the UCMJ, into consonance as detailed in CAAFlog’s analysis of the 2013 changes.

There are five different definitions of the term “victim” in these changes, in Article 6(b), Article 32, Article 46(b), Article 60(d), and the new 10 U.S.C. § 1044e (the SVC statute). See Zachary D Spilman’s comments: [2013 Changes to the UCMJ – Part 6: Practice notes](http://www.caaflog.com/2014/01/10/2013-changes-to-the-ucmj-part-6-practice-notes/), available at <http://www.caaflog.com/2014/01/10/2013-changes-to-the-ucmj-part-6-practice-notes/>.

8) Restore clear authority for trial by general courts-martial for Article 18, U.C.M.J. “to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war,” by deleting the limitations to courts-martial jurisdiction added in 2006 in Article 2(a)(13), as amended in 2009 (as detailed below).

Maintenance of a clear general court-martial alternative to try violators of the law of war, subject to trial by military tribunal by the law of war, is critical to maintain flexibility of our national response to violations of the law of war in the future.

Statutory Changes from 2006 to 2009:

In 2006 Congress added the following statutory change to Article 2(a), UCMJ:

“(1) APPLICABILITY TO LAWFUL ENEMY COMBATANTS.—Section 802(a) (article 2(a)) is amended by adding at the end the following new paragraph:

(13) Lawful enemy combatants (as that term is defined in section 948a(2) of this title) who violate the law of war.”

Oct. 17, 2006, Pub.L. 109-366, § 4(a)(1), 120 Stat. 2631.

In 2009, Congress further amended Article 2 (a)(13), UCMJ, as follows:

“(13) Individuals belonging to one of the eight categories enumerated in Article 4 of the Convention Relative to the Treatment of Prisoners of War, done at [Geneva August 12, 1949 \(6 UST 3316\)](#), who violate the law of war.”

Oct. 28, 2009, [Pub.L. 111-84](#), Div. A, Title XVIII, § 1803(a)(1), 123 Stat. 2612.).

Article 18, UCMJ, states in relevant part:

“General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”

The apparent intent of these statutory changes was to make military commissions under Title 10, Chapter 47A the sole military tribunal available to try “unprivileged enemy belligerents” who violate the laws of war. This jurisdictional restriction in Article 2, which limits the authority granted by article 18 of the UCMJ, unnecessarily restricts future flexibility.

9) Congress should adopt a definition of “time of war,” modeled on the current R.C.M. 103(19).

Congress has never defined “time of war” in the Code, leaving it as a matter of statutory construction by the judiciary. The President has defined “time of war” in the Manual for Courts-Martial (MCM), but has limited that definition to Parts IV and V of the M.C.M. Passage of a Congressional definition of the term “in time of war,” modeled on the current definition in R.C.M. 103(19), would resolve much of the ambiguity resulting from varying judicial interpretations, and would provide a triggering mechanism for the enhanced penalties, expansion of the statute of limitations, and expansion of UCMJ jurisdiction over civilians accompanying the force in Article 2(a)(10). Any Presidential determination would have to be made for the purpose of invoking “time of war” provisions in the U.C.M.J, as delimited by the qualifying language “for purposes of this chapter,” and would eliminate reliance on public political statements by the President. See Joseph Romero, *Of War and Punishment: “Time of War” in Military Jurisprudence and a Call for Congress to Define Its Meaning*, 51 NAVAL L. REV. 1, 50-51 (2005) for a proposed statutory definition as follows:

801. ART. 1. DEFINITIONS.

In this chapter.

(17) “Time of war” means a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a ‘time of war’ exists for purposes of this chapter.

By providing such a specific Congressional definition, much of the ambiguity surrounding the term would be resolved. Requiring either a declaration of war by Congress or the issuance by the President of an Executive Order or some other form of directive declaring the existence of a “time of war” would function as a triggering mechanism for the enhanced penalties under the U.C.M.J. and would bring the applicability of the definition between punitive and non-punitive articles into alignment. Such a declaration of Congressional intent concerning the reach of Article 2a(10) would also increase the likelihood of judicial recognition of such an assertion of jurisdiction under the test articulated by Justice Jackson in his Youngstown Sheet & Tube Co. v. Sawyer concurrence.

10) Congress should consider, with DOD’s recommendation, the benefit of enumerating war crimes in the punitive articles in a manner analogous to the enumeration of offenses in the MCA. However, at a minimum, Congress should amend the punitive articles to include a command responsibility provision for war crimes, ensuring that U.S. commanders are criminally accountable for the war crimes of subordinates pursuant to the "known or should have known" standard of war crimes liability established by US v. Yamashita and codified in the Statute for the International Criminal Court. Should DoD recommend that war crimes be specifically enumerated in a punitive articles, recommend that any such enumeration contain a savings clause retaining authority to prosecute for violations of the international law of war (law of armed conflict) even if the offense is not specifically enumerated.

11) Authorize and include within the M.C.M. and Judge’s Benchbook the use of convening authority clemency as a method to implement treatment-based suspended punitive discharges for convicted soldiers traumatized by combat as an option in appropriate cases.

A modified Sentence Worksheet and specially tailored panel instructions can be used to authorize panel members or the military judge to make a non-binding clemency recommendation for treatment, and treatment conditions. See Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1 (2011). This would bring military practice into consonance with civilian Veteran’s Treatment Courts, initiatives that recognize the trauma that can be caused by combat.

12) Although tangentially related to the administration of military justice, change the regulations governing the effects of other than honorable discharges (adjudged either through UCMJ or administrative action) to allow Veteran’s Administration treatment for service-connected Post-Traumatic Stress Disorder (PTSD) or Total or Partial Brain Injury (TBI).

See John W. Brooker, Evan R. Seamone, Leslie C. Rogall, *Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1 (2012), for an explanation of the complexity of the existing system in preserving the possibility of VA medical treatment for service related PTSD and TBI

13) Amend R.C.M. 806 or 808 to provide for public and media access to court-martial pleadings and rulings in a timely fashion through adoption of the PACER system or its equivalent. Such a system would promote transparency and would allow public and media access to court-martial proceedings in a timely fashion, goals that would enhance public understanding and confidence in the administration of military justice.