

## The Military Justice Act of 2016

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Panel:

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### I. Historical Foundation

#### A. 18<sup>th</sup> Century to 20<sup>th</sup> Century Eve of World War I

- Court-martial panel selected by the commander.
- Court-martial panel serves as both judge and jury.
- Primary reliance on non-lawyers as court-martial panel members and counsel.
- Focus primarily on unique military offenses. Trial of common law offenses largely limited to wartime.
- Review: within the chain of command. Evolution to greater involvement of judge advocates in review process.
- Timeline
  - 1775 - adoption of the British AW/AGNs.
  - 1863 - jurisdiction over common law felonies in wartime.
  - 1916 - jurisdiction over common law felonies in peacetime (except rape/murder in US); expanded jurisdiction over civilians accompanying the armed forces; express authority in the President to establish rules of evidence and procedure.

#### B. World War I, World War II – Pre-UCMJ

- World War I and post-war developments
  - 1920 - AWs - Statutory creation of the Boards of Review – first judicial-type appellate review (subject to review by The Judge Advocate General); creation of law member position, predecessor to MJ, but serving as a panel member. Eliminated convening authority power to return case for reconsideration of acquittals.
- WWII experience and studies.
- Post-WWII hearings.
- 1947 Elston Act: Prohibition against UCI; self-incrimination protections; qualifications of law member and counsel; appellate review in case of punitive discharge.

### C. UCMJ – Structural Highlights

- 1950 - UCMJ enactment - uniformity; judicial independence of the Boards of Review; replace law member with law officer with judicial powers to preside and rule; broad jurisdiction over common law felonies in both peacetime and wartime. Independent civilian appellate court.
- 1968 Act: created military judiciary; expanded judicial powers of law officer (now military judge) and provided authority for judge alone trials.
- 1980: President issues the Military Rules of Evidence.
- 1981 amendments: overruled effect of CMA decisions that had restricted MCM authority and that had made recruiter fraud a bar to jurisdiction.
- 1983 amendments: interlocutory government appeals to parallel civilian procedure. Direct Supreme Court review by certiorari in limited cases.
- 1984: President issues comprehensive rule-based Manual for Courts-Martial.

### D. The Last Decade: The Pace of Legislative Change Accelerates

- 2006: Major revisions to Art. 120 (rape and sexual assault).
- 2009: Legislation concerning post-trial/appellate delays.
- 2011: Further revisions to Art. 120.
- 2013-2015: Enactment of more than 60 legislative provisions concerning military justice, including substantial amendments to numerous UCMJ Articles.
- Legislation enacted since 2013 includes:
  - Transformation of broad Article 32 pretrial investigations into a limited pretrial hearing.
  - Enhancement of victim rights.
  - Narrowing of convening authority's post-trial powers.
- Statutory Blue Ribbon Panels:
  - Response Systems Panel.
  - Judicial Proceedings Panel.
  - Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces.

## II. The Military Justice Review Group

### A. MJRG Establishment and Timelines

- JCS REQUEST - 2013: The JCS requested that SecDef direct a “holistic review” of the military justice system to:
  - Ensure the system is able to do justice effectively and efficiently.
  - Ensure the system provides due process and preserves good order & discipline.
- JCS recommended that Services detail military justice experts to support the review.
- SecDef approved and MJRG became fully operational in March 2014.

- Timelines established by SecDef and GC:
  - UCMJ Report: March 25, 2015.
  - MCM Report: Sept. 21, 2015.

B. MJRG Guiding Principles

- SECDEF/GC Direction:
  - Use the current UCMJ as a point of departure for a baseline reassessment.
  - Consider incorporation of practices used in U.S. district courts.
  - To the extent practicable, apply provisions uniformly across the Services.
  - Consider recommendations from federal advisory groups concerning military justice.
  - Draw upon the experience of staff members and consider a broad range of information.
- MJRG Focal Points:
  - Military discipline and national security.
  - Discipline - unique features of military law.
  - Justice and discipline in a democratic society.
  - Flexibility across a wide variety of national security environments and military personnel practices.
  - Periodic evaluation and recalibration.

C. MJRG Process

- Public Input:
  - MJRG website <http://www.dod.mil/dodgc/mjrg.html>.
  - Letters: DoD/GC letters soliciting input from State Bar Associations, law schools, and public interest organizations.
  - Federal Register: 19 May 14 (79 FR 28688); 3 Sep 14 (79 FR 52306).
- Panel Discussions:
  - General and Flag Officer Panel.
  - Participation from each Service and the Joint Staff.
  - Commander and Senior Enlisted Panels:
    - Participation by students and staff from the Marine Corps University, the Judge Advocate General's Legal Center and School, and National Defense University, including those with convening authority experience.

D. Development and Coordination

- MJRG Teams – Article-by-Article review.
- Advance consultation and coordination with the Judge Advocates General, SJA to the Commandant, and the Legal Advisor to the Joint Chiefs prior to completion of the 25 Mar 15 MJRG's initial UCMJ report.
- Formal coordination of 25 Mar 15 recommendation within DoD.
- Interagency coordination of DoD Proposal.
- Submission of DoD Proposal to Congress, Dec. 28, 2015.

E. MJRG UCMJ Report

- MJRG Legislative Report available at:  
[http://www.dod.gov/dodgc/images/report\\_part1.pdf](http://www.dod.gov/dodgc/images/report_part1.pdf).
- Contents
  - Overview
  - Executive Summary
  - Legislative Report:
    - Section A. Background
      - Part 1. Historical Perspective
      - Part 2. The Role of the MJRG
    - Section B. Statutory Review and Recommendations
    - Section C. Consolidated Legislative Proposal
    - Section D. Section-by-Section Analysis
- Organization of the Article-by-Article Analysis (Section B)
  - Standard format for each Article or group of Articles
    1. Summary of Proposal
    2. Summary of the Current Statute
    3. Historical Background
    4. Contemporary Practice
    5. Relationship to Federal Civilian Practice
    6. Recommendation and Justification
    7. Relationship to Objectives and Related Provisions
    8. Legislative Proposal (if any)
    9. Sectional Analysis (if legislative proposal included)

III. Overview of the Military Justice Act of 2016

A. The Act in perspective

Statement on the filing of the Conference Report  
Sen. John McCain, Chairman, Senate Armed Services Committee  
Nov. 30, 2016

*“... Reforming the Military Justice System: The NDAA implements the recommendations of the Department of Defense Military Justice Review Group by incorporating the Military Justice Act of 2016 as amended by the committee. Taken together, the provisions contained in the conference report constitute the most significant reforms to the Uniform Code of Military Justice since it was enacted six decades ago.”*

B. Highlights of the Military Justice Act of 2016 (from Senator McCain’s Statement)

*“The conference report:*

*“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 justice system.*

*“Improves the functionality of punitive articles and proscribes additional acts.*

*“Incorporates best practices from federal criminal proceedings where applicable.”*

C. Effective Dates and Implementation Period

- One year statutory deadline for the President to promulgate implementing regulations: not later than Dec. 23, 2017 for most provisions.
- Presidential authority to establish effective date for amendments made by the legislation.
- Statutory deadline for provisions to become effective: not later than Jan. 1, 2019.
- Note: a few provisions have specific implementation dates (e.g., Art. 140a public access to court-martial filings; case management and data collection).

D. Transitional Provisions

- Presidential authority to establish application of effective date of new provisions to ongoing cases.
- Cases referred to trial before presidentially prescribed effective date: in general will proceed under pre-existing UCMJ/MCM provisions.
- Offenses committed prior to effective date: in general charges and authorized sentences will proceed under preexisting UCMJ/MCM provisions.

E. Implementation Process

- Step 1: Draft proposals for the MCM – DoD Directive 5500.17 (the Joint Service Committee on Military Justice - JSC)
  - <http://jsc.defense.gov>
  - Drafting by the Working Group of the JSC.
  - Review-Revision by the JSC.
  - Federal Register Notice of opportunity to comment.
  - Public Hearings.
  - Further revisions by the JSC.
  - JSC submits a draft Executive Order to DoD/GC for formal coordination.
  
- Step 2: Coordination
  - DOD/GC ensures internal DoD coordination.
  - Following coordination and adoption of an official DoD position, DOD/GC submits the proposed Executive Order to OMB for Interagency Coordination.
  - Following interagency coordination, including review of the proposed EO for form and substance by OMB, the proposed EO is submitted to the President.
  - Action by the President – on or before Dec. 23, 2017.
  
- Step 3: Preparation for effective date application to courts-martial
  - Training: commanders, NCOs, judge advocates, military judges, paralegals, court-reporters, military law enforcement personnel, others ....
  - Revision of service-specific implementing regulations.
  - Revision of the Military Judges Bench Book.
  - Complete training and updating by the effective date set forth by the President in the MCM – not later than Jan. 1, 2019.

IV. The Military Justice Act of 2016 (selected provisions)

A. Provisions that Enhance Transparency

- Public access to court-martial and appellate documents . [§ 5504, Art. 140a]
- Uniform procedures for case management, data collection, and accessibility of court-martial information. [§ 5504, Art. 140a]
- Publication on the internet of all updates to the UCMJ and MCM. [§5503, Art. 137]
- Public access to disposition guidance on the exercise of prosecutorial discretion. [§5204, Art. 33]
- Eliminates the prohibition on consideration of the sentencing portion of a pretrial agreement during the sentencing phase of a court-martial. [§ 5237, Art. 53a]

- B. Independent Reviews and Assessments
- Independent blue ribbon panel of experts to conduct periodic reviews and assessments of the UCMJ at regularly scheduled intervals. [§ 5521, Art. 146].
- C. Structural Foundation of the Military Justice System
- Selection criteria and minimum tour lengths for military trial and appellate judges. [§ 5184, Art. 26; § 5330, Art. 66]
  - Authorizing military judges to issue rulings on certain issues that arise prior to referral. [§ 5202, Art. 30a]
  - New option for disposition of certain offenses in a judge-alone special court-martial – 6 months max confinement and no punitive discharge authorized. [§5161, Art. 16]
  - Military Magistrates Program [§ 5163, Art. 19; §5185, Art. 26a; §5202 Art. 30a]
  - Disposition guidance [§ 5204, Art. 33]; and training for commanders and convening authorities focused on the proper exercise of UCMJ authority. [§ 5503, Art. 137]
- D. Fairness and Efficiency in Pretrial and Trial Procedures
- Standard eight members in a non-capital general court-martial; standard twelve members in a capital case; and standard four members in a special court-martial. [§ 5161, Art. 16; § 5183, Art. 25a]
  - Panel votes on findings or sentence will require the concurrence of three-fourths of the panel members. In capital cases, however, the death penalty may be imposed for capital offenses only if the vote to convict is unanimous and the vote on the death penalty is unanimous. [§ 5235, Art. 52]
  - Broadens the opportunity for enlisted personnel to serve on court-martial panels while providing an enlisted accused with the option of requesting trial before a panel composed of officers. [§ 5182, Art. 25]
  - Improves the quality of pre-referral investigations by expanding the authority to obtain documents during investigations through subpoenas and other processes. [§ 5228, Art. 46]
  - Enhances the utility of the preliminary hearing report by focusing on the organization and presentation of information pertinent to the exercise of prosecutorial discretion and by providing an opp. for parties and victims to submit relevant information regarding the appropriate disposition of charges. [§5203, Art. 32]
  - Modernizes proceedings in capital cases by requiring that, to the greatest extent practicable, at least one defense counsel be learned in the law applicable to such cases. [§5186, Art. 27]
  - Furthers the rights of victims by:
    - Creating the opportunity for victim input on disposition decisions at the preliminary hearing stage. [§ 5203, Art. 32]
    - Treating victims consistently with regard to defense counsel interviews and access to records of trial. [§ 5105, Art. 6b]

E. Sentencing

- Statutory criteria to guide the imposition of the sentence. [§ 5301, Art. 56]
- Judicial sentencing in all non-capital cases unless the accused expressly requests sentencing by members. [§ 5182, Art. 25; § 5236, Art. 53]
- Segmented sentencing. [§ 5301, Segmented sentencing by the military judge, reflecting the general practice in federal and state criminal proceedings. [Art. 56]
  - The military judge will set forth on the record (1) the term of confinement adjudged for that particular offense, and (2) whether the period of confinement for that offense will run concurrently or consecutively with other periods of confinement in the same case. [§ 5301, Art. 56]
- When an accused has requested sentencing by a court-martial panel, the members will impose a unitary sentence for all offenses and will not use segmented sentencing.

F. Streamlining the Post-Trial Process

- Eliminates redundant post-trial paperwork. [§§ 5322-23, Arts. 60a, 60b]
- Enhances clarity of post-trial actions by requiring an entry of judgment by the military judge similar to federal civilian practice to mark the completion of a special or general court-martial. [§§ 5324, Arts. 60c]
- Provides authority to suspend sentences in cases in which the military judge recommends a specific form of suspension and the convening authority approves a suspension within the military judge's recommendation. [§ 5322, Art. 60a]
- Simplifies the process of preparing and certifying records of trial. [§ 5238, Art. 54]

G. Military Appellate Practice

- Provides servicemembers, like their civilian counterparts, with the opportunity to obtain judicial review in all cases by eliminating current restrictions that preclude direct appellate review in many cases.
- The Courts of Criminal Appeals will review automatically all non-capital cases in which the sentence includes a punitive separation or confinement for two years or more unless the accused waives or withdraws the appeal. [§ 5330, Art. 66]
- Servicemembers will have the opportunity to file an appeal with the Courts of Criminal Appeals in all other cases in which the sentence includes confinement for more than six months. [§ 5330, Art. 66]
- Removes an artificial bar to interlocutory appeals by permitting the government to file interlocutory appeals in general and special courts-martial regardless of whether a punitive discharge could be adjudged. [§ 5326, Art. 62]
- Establishes a harmless error standard of review for guilty pleas similar to those applied by the federal civilian courts of appeal. [§ 5227, Art. 45]

- Permits the government to appeal a sentence under a standard similar to the test applied by the federal civilian courts of appeal. [§ 5301, Art. 56]
- Extends the time to petition for a new trial to three years after entry of judgment at the trial level, similar to the period for filing such motions in the federal civilian courts. [§5336, Art. 73]

#### H. Punitive Articles and Revising the Statute of Limitations

- Improves the clarity of disciplinary standards by revising and restructuring the punitive articles of the UCMJ. [Title LX, §§ 5401-5452]
- Establishes specific statutory punitive articles to cover many forms of misconduct, such as kidnapping, that currently are addressed by Executive Order in the Manual for Courts-Martial.
- Revises the definition of “sexual act” and “incapable of consenting”. [§ 5430, Art. 120]
- Clarifies the prohibition against stalking (Article 130) to include cyberstalking and threats to intimate partners. [§ 5443, Art. 130]
- Creates new enumerated offenses, including:
  - Article 93a: Prohibited activities with military recruit or trainee by person in position of special trust [§ 5410, Art. 93a]
  - Article 121a: Fraudulent use of credit cards, debit cards, and other access devices [§ 5432, Art. 121a]
  - Article 123: Offenses concerning Government computers [§ 5436, Art. 123]
  - Article 132: Retaliation [§ 5450, Art. 132]
- Modernizes the statute of limitations [§5225, Art. 43] by increasing the applicable periods, consistent with federal civilian law, for –
  - Child abuse offenses.
  - Fraudulent enlistment or appointment offenses.
  - Offenses in cases involving DNA evidence.

#### V. Selected Legislative Resources

- Text of the Act:
  - <https://www.congress.gov/114/bills/s2943/BILLS-114s2943enr.pdf>
- Conference Report - House Report 114-840, Nov. 30, 2016
  - <https://www.congress.gov/114/crpt/hrpt840/CRPT-114hrpt840.pdf>
- Senate Bill (S. 2943) passed in the Senate (June 14, 2016). (printed as passed, June 21, 2016)
  - <https://www.congress.gov/114/bills/s2943/BILLS-114s2943pap.pdf>
- Senate Report 114-255 (May 18, 2016)
  - <https://www.congress.gov/114/crpt/srpt255/CRPT-114srpt255.pdf>

- House Bill (H.R. 4909) as passed in the House (May 18, 2016) (placed on the Senate Calendar. (printed as passed, June 21, 2016)
  - <https://www.congress.gov/114/bills/hr4909/BILLS-114hr4909pcs.pdf>
- House Report 114-537 (parts 1 and 2) (May 4, 2016; May 12, 2016)
  - <https://www.congress.gov/114/crpt/hrpt537/CRPT-114hrpt537.pdf>
  - <https://www.congress.gov/114/crpt/hrpt537/CRPT-114hrpt537-pt2.pdf>