Article 49 – Depositions
10 U.S.C. § 849

1. Summary of Proposal

This proposal would amend Article 49 to reflect current deposition practice, case law, related statutory provisions, and related proposals in this Report. The proposed amendments also would better align military deposition practice with federal civilian deposition practice by ensuring that depositions generally are ordered in military criminal cases only when it is likely that a prospective witness's trial testimony otherwise would be lost.

2. Summary of the Current Statute

Article 49 provides statutory authority for the taking of depositions by the parties; it also places statutory restrictions on the conduct of depositions and on their use as a substitute for live witness testimony at trial. Subsection (a) requires the party requesting a deposition to demonstrate that, "due to exceptional circumstances, it is in the interest of justice that the testimony of the prospective witness be taken and preserved for use at a preliminary hearing . . . or a court-martial." Subsection (a)(1) provides that depositions may be ordered between preferral and referral of charges by the convening authority, and after referral of charges by either the convening authority or the military judge. Under subsection (a)(3), the convening authority may designate commissioned officers to represent the prosecution and the defense during deposition hearings and to take the deposition of any witness. The article's remaining five subsections require that the party requesting the deposition give reasonable notice to the other parties of the time and place of the deposition; authorize the deposition officer to be any military or civil officer authorized to take oaths; provide rules and restrictions concerning the admissibility of depositions at trial in non-capital cases; and authorize the use of depositions by the defense in capital cases, and by either party in cases when death is authorized but not mandatory and the convening authority directs that the case be treated as not capital.

3. Historical Background

Congress derived Article 49 from Articles 25 and 26 of the 1920 Articles of War, as amended by the Elston Act of 1948.[1] Under the Articles of War, the parties had greater flexibility in taking depositions and using them at trial than in most civilian jurisdictions, where the ordering of depositions is generally tied to prospective witness unavailability at trial. When the UCMJ was enacted in 1950, Congress maintained this variance with civilian practice (and expanded it slightly) by expressly allowing the parties to take oral or written

[1] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1065 (1949) [hereinafter *Hearings on H.R. 2498*].

depositions at any time after preferral of charges, unless forbidden by a competent convening authority "for good cause."[2] The main justifications offered for Article 49's openness to taking depositions and using them as a substitute for live witness testimony at trial included the greater mobility of servicemembers, the risk of sudden death for potential court-martial witnesses prior to trial, and the remoteness of many overseas duty stations. As Professor Everett commented in 1960:

> Many exigencies peculiar to the Armed Services undoubtedly led Congress to authorize in Article 49 of the [UCMJ]—and in previous parallel legislation—a use of depositions unparalleled elsewhere in American criminal law administration. 'For instance, when the Armed Services are operating in foreign countries where there is no American subpoena power, it might be impossible to compel a foreign civilian witness to come to the place where the trial is held, and yet he may be quite willing to give a deposition. Furthermore, military life is marked by transfers of personnel—the military community being much more transient than most groups of civilians. To retain military personnel in one spot so that they will be available for a forthcoming trial, or to bring them back from a locale to which they have been transferred, might involve considerable disruption of military operations. Likewise, in combat areas there is often considerable risk that a witness may be dead before trial date, in which event, were civilian rules to be followed, his testimony would be lost.[3]

During the 1949 congressional hearings, Representative Elston suggested that Article 49 provided an important protection for servicemembers accused of offenses, particularly in deployed environments: "I think the reason we provided for depositions . . . was to give the accused a greater opportunity. . . . [T]he complaint we had to deal with was that an accused person was often deprived of witnesses. So we wrote into the law that depositions could be taken."[4] In the decade following the UCMJ's enactment, military courts generally embraced these early justifications for the Article 49's openness to allowing depositions to be taken and used at trial.[5] When the position of military judge was created in 1968, Congress chose

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[2] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108; *see Hearings on H.R. 2498*, *supra* note 1, at 1065.

[3] Robinson O. Everett, *The Role of Depositions in Military Justice*, 7 MIL. L. REV. 131 (1960) (quoting ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 221-22 (1956)). Two decades after writing these comments on Article 49, Professor Everett would become Chief Judge of the Court of Military Appeals.

[4] *Hearings on H.R. 2498*, *supra* note 1, at 696. Not everyone at the Congressional hearings shared Representative Elston's (and Professor Everett's) view that an expansive use of depositions in courts-martial was desirable, let alone necessary. As stated by Mr. John Finn, spokesperson for the American Legion: "[Article 49] loses sight of the ancient right afforded in English and American justice of the right of confrontation of an accused by his accusers. It is believed that no greater latitude with regard to the use of depositions should be allowed in the proposed code than is presently allowed under the rules of criminal procedure presently in effect in the United States courts. . . . It seems that the military services were able to get along from their inception until comparatively recent times without the use of depositions to convict alleged guilty parties. In these days of airplane and other means of rapid transportation, the necessity for the use of depositions seems to be less apparent than ever." *Id.* at 685.

[5] *See, e.g.*, United States v. Drain, 16 C.M.R. 220, 221 (C.M.A. 1954) ("We recognize that the broad use of depositions against a defendant in criminal cases is peculiar to military law, and that it arises justifiably from

to maintain a key aspect of this variance between military and civilian deposition practice, extending Article 49(a)'s limited authority to forbid depositions "for good cause" to military judges following referral of charges to court-martial.[6]

In the 1960s and '70s, military courts endeavored to reconcile Article 49's broad language concerning the availability of depositions in court-martial proceedings with the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[7] In *United States v. Jacoby*, the Court of Military Appeals reversed a line of cases which held that Article 49 "expressly or by necessary implication" made the Sixth Amendment right of confrontation inapplicable in the military setting.[8] In its decision, the Court acknowledged "[t]hat the exigencies of the military service frequently prohibit the appearance of a military witness or a civilian far removed from the place of trial"; nevertheless, it held that the Sixth Amendment right to confront witnesses does indeed apply to servicemembers in court-martial proceedings, and that a military accused's right of confrontation is not satisfied unless he or she is given the opportunity to be present at the taking of depositions and to cross-examine the deposed witnesses in person.[9] A decade later, in *United States v. Davis*, the Court of Military Appeals struck down the so-called "100-mile rule" of Article 49(d)(1) with respect to military witnesses, announcing that "depositions are an exception to the general rule of live testimony and are to be used only when the Government cannot reasonably have the witness present at trial."[10] Then, in 1980, the President exercised rule-making authority

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difficulties in obtaining witnesses—which difficulties are unique to law administration in the Armed Forces"); *see also* LT Dale Read, Jr., *Depositions in Military Law*, 26 JAG JOURNAL 181, 184-85 (1972) ("[T]he court's assertion that 'the broad use of depositions against a defendant in criminal cases is peculiar to military law' stems from no more than a recognition that the basic nature of military life is such that a significantly greater percentage of witnesses will be unavailable at the time of trial than is true in civilian courts."); Col. Mark L. Allred, *Depositions and a Case Called Savard*, 63 A.F. L. REV. 1, 7-10 (2009) ("[A]s our military society is both highly mobile and of global reach, situations in which there is no legal process for securing the attendance of potentially important witnesses are not uncommon in courts-martial. . . . Because military members deploy to war zones, the high seas, and other locations from which they cannot easily return, taking their depositions is often wise.").

[6] Article 49(a) (1968-2014) (". . . [A]ny party may take oral or written depositions unless the military judge or court-martial without a military judge hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause.").

[7] U.S. CONST. amend. VI.

[8] 29 C.M.R. 244 (C.M.A. 1960) (reversing United States v. Sutton, 11 C.M.R. 220 (C.M.A. 1953); United States v. Parrish, 22 C.M.R. 127 (C.M.A. 1956)).

[9] 29 C.M.R. at 249.

[10] 41 C.M.R. 217, 220 (C.M.A. 1970); *see also* Read, Jr., *supra* note 5, at 198 ("The effect of this section is to emasculate the nationwide service of process in article 46; though service of subpoena may still be made, a deposition may be used instead if the witness is presently beyond a 100-mile radius, or beyond a state line regardless of distance. This provision differs markedly from civilian practice and cannot be justified by any condition 'unique to law administration in the Armed Forces.' Moreover, it contravenes the congressional intent to place, 'in so far as reasonably possible . . . military justice on the same plane as civilian justice.'") (citations omitted).

under Article 36 to adopt the military rules of evidence (modeled after the federal rules of evidence), including M.R.E. 804(a), which provided situational definitions for "unavailability as a witness" that effectively replaced Article 49(d)'s "unavailability" criteria. Each of these events brought military deposition practice closer in line with federal civilian deposition practice—affording the accused greater protections while narrowing the range of situations in which depositions could be presented as evidence by either party in courts-martial.

Aside from considerations governing the use of depositions at trial, depositions also have been used in connection with Article 32 investigations as a means of defense discovery.[11] In 2014, Congress transformed the Article 32 investigation into a "preliminary hearing" and provided that crime victims may not be compelled to testify at the hearing.[12] In 2015, Congress amended Article 49(a) to expressly authorize the ordering of depositions to preserve prospective witness testimony "for use at a preliminary hearing."[13] At the same time, Congress removed the broad language in Article 49 authorizing the parties to take depositions at any time unless forbidden "for good cause." In place of this broad language, Congress provided a more restrictive standard for ordering depositions, based on the language of R.C.M. 702 and Fed. R. Crim. P. 15. Under the amended statute, depositions may be ordered by convening authorities—and by military judges after referral of charges—"only if the [requesting] party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of the prospective witness be taken and preserved for use at a preliminary hearing . . . or a court-martial."[14]

4. Contemporary Practice

The ordering and use of depositions in current military practice is somewhat rare. R.C.M. 702(a) emphasizes that depositions should be ordered in "exceptional circumstances . . . [when] it is in the interest of justice that the testimony of a prospective witness be taken

[11] *See* MCM, App. 21 (R.C.M. 702(c)(3)(A), Analysis) ("Article 49 [has served] as a means of satisfying the discovery purposes of Article 32 when the Article 32 proceeding fails to do so.") (citing United States v. Chuculate, 5 M.J. 143, 145 (C.M.A. 1978) (deposition may be an appropriate means to allow sworn cross-examination of an essential witness who was unavailable at the Article 32 hearing), United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976) (deposition may be an appropriate means to cure error where witness was improperly found unavailable at Article 32 hearing), and United States v. Cumberledge, 6 M.J. 203, 205, n.3 (C.M.A. 1980)); *see also Hearings on H.R. 2498*, *supra* note 1, at 997 (statement of Mr. Larkin) ("[N]ot only does [Article 32] enable the investigating officer to determine whether there is probable cause . . . but it is partially in nature of a discovery for the accused in that he is able to find out a good deal of the facts and circumstances which are alleged to have been committed which by and large is more than an accused in a civil case is entitled to."); United States v. Samuels, 27 C.M.R. 280, 286 (C.M.A. 1959) ("It is apparent that [Article 32] serves a twofold purpose. It operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.").

[12] NDAA FY 2014, § 1702.

[13] Article 49(a)(2), as amended by NDAA FY 2015, § 532.

[14] *Id.* In its current form, Article 49 authorizes the ordering of depositions for use at preliminary hearings, but Article 47 does not provide a mechanism for enforcing these orders in the case of civilian witnesses.

and preserved for use at a preliminary hearing . . . or a court-martial."[15] This language was derived, in part, from the federal rule on depositions, which states that "[a] party may move that a prospective witness be deposed in order to preserve testimony for trial," and that "[t]he court may grant the motion because of exceptional circumstances and in the interest of justice."[16] The 2015 amendments to Article 49(a) updated the statute to reflect the more restrictive language from R.C.M. 702(a). R.C.M. 702's remaining subsections cover who may order depositions; the procedures for requesting, acting upon requests for, and conducting depositions; notice requirements; the duties of deposition officers; objections; and depositions by agreement of the parties.[17] With respect to the admissibility of depositions at court-martial, M.R.E. 804 prohibits the use of depositions unless the moving party can establish that the deponent is unavailable to testify in person. Article 49(d)(1)'s "100-mile rule" is not included among the situational definitions of "unavailability" given in M.R.E. 804(a); rather, the rule states that "'[u]navailability as a witness' includes situations in which the declarant is unavailable within the meaning of Article 49(d)(2)."[18] There are four unavailability criteria contained in Article 49(d)(2) that are not *also* contained in M.R.E. 804(a): age, imprisonment, military necessity, and "other reasonable cause."[19]

In 2014, the Response Systems to Adult Sexual Assault Crimes Panel observed that Congress's transformation of the Article 32 investigation into a preliminary hearing "may result in additional requests to depose victims and other witnesses."[20] In a recent executive order, the President has amended R.C.M. 702 to clarify the recent amendments to Articles 32 and 49.[21] The amendments to the rule are as follows:

R.C.M. 702(a) clarifies that "exceptional circumstances" for ordering a deposition do not include a victim's refusal to testify at a preliminary hearing or to submit to pretrial interviews. Subsection (a) also requires the convening authority or military judge to

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[15] R.C.M. 702(a).

[16] FED. R. CRIM. P. 15(a)(1).

[17] R.C.M. 702(b)-(i).

[18] M.R.E. 804(a)(6).

[19] *See* MCM, App. 22 (M.R.E. 804(a)(6), Analysis) ("Rule 804(a)(6) . . . has been added in recognition of certain problems, such as combat operations, that are unique to the armed forces. Thus, Rule 804(a)(6) will make unavailable a witness who is unable to appear and testify in person for reason of military necessity within the meaning of Article 49(d)(2). The meaning of 'military necessity' must be determined by reference to the cases construing Article 49. The expression is not intended to be a general escape clause, but must be restricted to the limited circumstances that would permit use of a deposition."). The analysis section is silent on the other three "unavailability" criteria that appear in Article 49(d)(2) but do not appear in Rule 804(a): age, imprisonment, and "other reasonable cause."

[20] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 48 (June 2014) [hereinafter RESPONSE SYSTEMS PANEL REPORT].

[21] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

determine, by a preponderance of the evidence, that the victim will not be available to testify at court-martial before ordering a deposition of the victim.[22]

The standard for acting on requests for depositions of (non-victim) witnesses under R.C.M. 702(c)(3)(A) has been changed from "may be denied only for good cause" to "whether the requesting party has shown, by a preponderance of the evidence, that due to exceptional circumstances and in the interest of justice, the testimony of the prospective witness must be taken and preserved for use at a preliminary hearing under Article 32 or court-martial."

The requirement under R.C.M. 702(c)(2) that parties requesting depositions must include "[a] statement of the reasons for taking the deposition" in their request has been eliminated.

The Discussion section after R.C.M. 702(c)(3)(A) explaining which situations would constitute good cause for denial of a deposition request has been eliminated.

R.C.M. 702(d)(1) requires that a judge advocate certified under Article 27(b) be detailed as the deposition officer, unless "not practicable."

The rule changes create two different standards in the context of ordering pretrial depositions of prospective witnesses: one standard for victims (unavailability at trial), and a slightly broader standard for non-victim witnesses (exceptional circumstances and in the interest of justice). The changes also closely align the qualification requirements for deposition officers with those of preliminary hearing officers under the 2014 amendments to Article 32.[23]

5. Relationship to Federal Civilian Practice

In the federal criminal justice system and in the vast majority of state jurisdictions, depositions are not authorized for purposes of discovery. Instead, depositions are generally tied to prospective witness unavailability.[24] This is particularly true in jurisdictions that utilize the preliminary hearing as the primary pretrial screening device for charges.[25] In the federal civilian system, the primary purpose of depositions in criminal cases is explicitly to "preserve testimony for trial," and the admissibility of a deposition at trial is determined solely by the rules of evidence.[26] The courts have held that a federal judge's discretion in ordering depositions "is not broad and should be exercised carefully."[27] Also under the

[22] *Id.*

[23] *See* Article 32(b) ("A preliminary hearing . . . shall be conducted by an impartial judge advocate certified under [article 27(b)] whenever practicable or, in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a judge advocate.").

[24] WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING & ORIN KERR, CRIMINAL PROCEDURE § 20.2(e) (3d ed. 2013).

[25] *Id.*

[26] FED. R. CRIM. P. 15(a)(1) and 15(d).

[27] United States v. Mann, 590 F.2d 361, 365 (1st Cir. 1978).

federal rule, "only the 'testimony of a prospective witness of a party' can be taken . . . [which] means the party's own witness [and not] an adverse witness."[28] In contrast to the opportunity under Article 49 for the use of depositions as a discovery device, the standards in the federal civilian system do not include such situations, regardless of the witness's availability to testify at trial. A slightly different formulation of the rule is prevalent in many state jurisdictions, where statutes and rules of criminal procedure concerning the ordering of depositions require a showing "that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that the witness' testimony is material, and that it is necessary to take the witness' deposition in order to prevent a failure of justice."[29]

With respect to the admissibility of depositions at trial, Article 49(d)'s rules for using depositions at trial are significantly less restrictive than the rules provided under federal common law, where the Supreme Court has long held the use of depositions in criminal cases to be violative of the accused's Sixth Amendment right to confront adverse witnesses except in a narrow range of situations. In *Mattox v. United States*, 156 U.S. 237 (1895), the Court explained the antagonism between depositions and the Confrontation Clause as follows:

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[30]

More recently, the Court has held that depositions may not be used against an accused at trial even when the deposed witness is incarcerated at the time of trial and the accused previously has had ample opportunity to cross-examine the witness at a preliminary hearing, unless the prosecution can affirmatively show that the witness's presence at trial cannot practicably be obtained.[31] The enactment of the Federal Rules of Evidence in 1975 and the Military Rules of Evidence five years later narrowed the gap between the two systems with respect to the admissibility of depositions as evidence at trial, as the situational definitions for "unavailability as a witness" contained in M.R.E. 804(a) are largely identical to those contained in Fed. R. Evid. 804(a). However, the additional

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[28] FED. R. CRIM. P. 15 advisory committee note to 1974 Amendments.

[29] LAFAVE ET AL., *supra* note 24, at § 20.2(e) (3d ed.) (citing Idaho Crim. Rules 15(a); Kan. Stat. Ann. § 22-3211; Ky. R. Crim. P. 7.10; Me. R. Crim. P. 15(a)).

[30] 156 U.S. 237, 242-43 (1895). *See also* Motes v. United States, 178 U.S. 458 (1900) (Confrontation Clause violated by permitting a deposition of an absent witness taken at a preliminary proceeding to be read at the final trial where the witness's unavailability at trial was caused by the negligence of the prosecution and not because of any suggestion, connivance, or procurement of the accused).

[31] Barber v. Page, 390 U.S. 719 (1968).

"unavailability" criteria in Article 49(d)(2) that are not contained in the Rule—age, imprisonment, military necessity, and "other reasonable cause"—continue to allow for greater use of depositions in military criminal proceedings than in federal civilian practice.

A final difference between military and civilian deposition practice concerns the timing of the right to request depositions. Article 49(a) expressly limits the parties' ability to request depositions until after preferral of charges; Fed. R. Crim. P. 15(a), by contrast, contains no such limitation. In 1971, the Army Court of Military Review considered whether "pre-preferral" depositions could be ordered and concluded that, by its text, Article 49 does not authorize such depositions. In so holding, the Court also noted that, from the accused's perspective, "knowledge of the charge is essential to effective cross examination."[32] Federal case law has echoed this Sixth Amendment concern in the face of government motions for "pre-indictment" depositions of prospective witnesses.[33] However, in one recent decision, a federal district court ordered pre-indictment depositions on government motion where the prospective witnesses were likely to die soon.[34] In resolving the matter in favor of the government, the court looked to the text and history of the federal rule, which suggests that pre-indictment depositions may be ordered "in exceptional circumstances and in the interests of justice." Regarding the accused's Sixth Amendment concerns, the court noted that "the defense can always file a motion to suppress before trial" if the government moves to introduce a deposition that should not be admitted as a Constitutional matter.[35] Conceivably, the government could face a similar situation in a military case, particularly in a deployed environment, where it would be premature to prefer charges but also highly likely that a prospective witness's testimony would be lost without a deposition. In such a situation, the federal rule's greater flexibility allows the court to craft appropriate protections for the accused's Sixth Amendment rights on a case-by-case basis, ensuring that the "interests of justice" are not sacrificed merely because the factual situation confronted by the government is unusual. It is also arguable that the term "party" in Article 49(a) already implies the existence of an "accused," which itself implies the existence of preferred charges and specifications.[36] If this is the case, then Article 49(a)'s "post-preferral" timing requirement is not only unnecessary; it is redundant.

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[32] United States v. Vicencio, 44 C.M.R. 323, 329 (A.C.M.R. 1971).

[33] *See* In re Grand Jury Proceedings, 697 F. Supp. 2d 262 (D.R.I. 2010) (holding that "pre-indictment" depositions of nine terminally ill witnesses who were bystanders in an alleged scheme to defraud insurers were authorized under the rule, where the government assured the court that it would provide the defense with necessary discovery to cross-examine the witnesses effectively, and where the interests of justice favored ordering depositions, because otherwise the witnesses would likely die and prosecuting the case would become impossible).

[34] *Id.*

[35] *Id.* at 266, 274.

[36] *See* R.C.M. 103(16) (definition of "party"); Article 1(9) ("The term 'accuser' means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.").

6. Recommendation and Justification

Recommendation 49.1: Amend Article 49(a) to more closely mirror the language and function of Fed. R. Crim. P. 15(a)(1), while moving the more procedural aspects of this provision to R.C.M. 702. Specifically, amend subsection (a)(1) to provide that "a convening authority or a military judge may order depositions . . . only if the requesting party demonstrates 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.

This proposal would reduce Article 49(a) to its essential elements, allowing the more procedural aspects of requesting and ordering depositions to be moved to the rules implementing the statute. The result would be a clearer, more functional statute, and one less likely to require further amendments as practice in this area develops over time.

This proposal would clarify that depositions may not be ordered specifically for use at Article 32 preliminary hearings. This change would reflect federal civilian practice and would address the absence of subpoena authority under Article 47 to compel civilian witnesses to provide such depositions for use at preliminary hearings (as opposed to depositions for use at courts-martial, military commissions, and courts of inquiry). Importantly, depositions are not the only means of obtaining information for an Article 32 proceeding when in person testimony is not available. R.C.M. 405, the rule implementing Article 32, also provides for the use of sworn statements and testimony via remote means for witnesses who are not reasonably available to testify in person (as well as unsworn statements when the defense does not object). These alternatives should provide a sufficient means to obtain relevant witness testimony for the limited purposes of the preliminary hearing in most cases.

Under the proposal, a properly ordered deposition that complies with Article 49(a) (e.g., one not ordered specifically for use at an Article 32 preliminary hearing) may be used as a substitute for live testimony at a preliminary hearing.

Under current law, military judges are unable to order depositions or review denials of deposition requests by convening authorities until after the charges are referred to court-martial. By removing this prohibition, the proposed amendments to Article 49(a) would—in conjunction with the proposal to enact Article 30a—give the accused an avenue for judicial relief in cases where the convening authority improperly denies a pretrial deposition request.[37] Under current practice, such denials can result in lost testimony during the critical, investigative stages of a military criminal case. This change would prevent such loss.

This proposal also would remove Article 49(a)'s timing requirement, which limits the parties' ability to request depositions until after preferral of charges under Article 30. This timing requirement varies from the federal civilian rule unnecessarily. The new statutory rule for ordering depositions—"due to exceptional circumstances, [and] in the interest of

[37] *Accord* RESPONSE SYSTEMS PANEL REPORT, *supra* note 20, at 49 (Recommendation 118).

justice"—provides convening authorities and military judges with a clear standard for determining when, if ever, "pre-preferral" depositions may be warranted. Furthermore, under R.C.M. 103(16) and Article 1(9), the definition of "party" in military law arguably implies the existence of preferred charges and specifications, making this qualification in the current statute redundant at best.

Recommendation 49.2: Redesignate Article 49(b) as Article 49(a)(3), and amend the language of the provision by replacing the phrase "The party at whose instance a deposition is to be taken . . ." with the more direct phrase, "A party who requests a deposition . . . ."

This proposal would update the language of Article 49(b) to clarify the provision in the context of the statute's other provisions.

Recommendation 49.3: Redesignate Article 49(c) as Article 49(a)(4), and amend the language of the provision to reflect recent amendments to Article 32(b) and proposed changes to R.C.M. 702(d)(1), by requiring that deposition officers be judge advocates certified under Article 27(b) "whenever practicable."

Under current law, depositions "may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths." This allows for the detail of deposition officers who are not legally trained, with no requirement that judge advocates act as the deposition officer whenever practicable.

The proposed change to R.C.M. 702(d)(1) would require the convening authority to detail impartial judge advocates certified under Article 27(b) as deposition officers unless "not practicable." Similarly, Article 32(b) now requires judge advocates to be detailed as preliminary hearing officers "whenever practicable." This amendment would align deposition officer qualification requirements under Article 49 with the similar qualification requirements for preliminary hearing officers under Article 32.

Recommendation 49.4: Redesignate Article 49(a)(3) as Article 49(b) (Representation by Counsel), and amend the provision to provide that: (1) representation of the parties with respect to a deposition shall be by counsel detailed in the same manner as trial counsel and defense counsel are detailed under Article 27; and (2) the accused shall have the right to be represented by civilian or military counsel in the same manner as such counsel are provided for in Article 38(b).

Article 49(a)(3) currently provides that the convening authority "may designate commissioned officers as counsel for the Government and counsel for the accused, and may authorize those officers to take the deposition of any witness." R.C.M. 702(d)(2), by contrast, provides that the convening authority "shall ensure that counsel qualified as required under R.C.M. 502(d) are assigned to represent each party." R.C.M. 502(d), in turn, provides that trial and defense counsel in general courts-martial, and defense counsel in special courts-martial, must be certified under Article 27(b) unless the accused elects individual military or civilian defense counsel in accordance with Article 38(b)(2)-(3).

With respect to detailing of trial and defense counsel to depositions generally, both the statute and the rules need to be updated to reflect current practice, in which trial and defense counsel are detailed to courts-martial by their respective legal service departments, not by the convening authority.

This change would align Article 49 with the counsel qualification requirements of R.C.M. 702(d)(2) and R.C.M. 502(d), and with current practice with respect to the detailing of trial and defense counsel by legal chains of command rather than convening authorities. At the same time, it would preserve the option of the accused to be represented by non-Article 27(b) certified civilian defense counsel at depositions.

Recommendation 49.5: Amend Article 49(d) to replace that subsection's recitation of the situations in which depositions may be used in military proceedings with a more direct reference to the military rules of evidence, consistent with the federal rule.

The current version of Article 49(d) is basically unchanged from how it appeared in 1950, despite the President's adoption of the military rules of evidence in 1980, including M.R.E. 804(a), and despite court rulings in the intervening decades that have significantly narrowed this subsection's scope and effect. The proposed amendment would simplify Article 49(d) and better align the provision with current practice.

The proposed amendment, if adopted, would necessitate a change to M.R.E. 804(a)(6), which currently cross-references to Article 49(d)(2), in order to allow the use of depositions at trial when the deponent is unavailable as a witness due to military necessity or other reasonable cause. This rule change will be considered in Part II of this Report.

Recommendation 49.6: Amend Article 49(e) and (f) by redesignating the two subsections as a single Article 49(d) (Capital Cases), providing that "[t]estimony by deposition may be presented in capital cases only by the defense."

When the UCMJ was enacted, if an offense was punishable by death, the case was classified as "capital" unless the convening authority opted against a capital referral. Under R.C.M. 103(2) and R.C.M. 1004(b)(1), however, a case is not capital unless the convening authority specifically refers the case as capital through special instruction. Because of this change, Article 49(e)'s cross-reference to Article 49(d) is unnecessary.

7. Relationship to Objectives and Related Provisions

This proposal would support the GC Terms of Reference and Article 36 of the UCMJ by conforming Article 49 to current military deposition practice and case law, and by aligning military deposition practice more closely with deposition practices and procedures applicable in federal district court and most state jurisdictions.

This proposal would support MJRG Operational Guidance by providing greater internal consistency among related UCMJ articles, MCM provisions, and other MJRG proposals, including the proposal to expand the pre-referral authorities of military judges.

8. Legislative Proposal

SEC. 711. DEPOSITIONS.

Section 849 of title 10, United States Code (article 49 of the Uniform Code of Military Justice), is amended to read as follows:

"§849. Art. 49. Depositions

"(a) IN GENERAL.—(1) Subject to paragraph (2), a convening authority or a military judge may order depositions at the request of any party.

"(2) A deposition may be ordered under paragraph (1) only if the requesting party demonstrates 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.

"(3) A party who requests a deposition under this section shall give to every other party reasonable written notice of the time and place for the deposition.

"(4) A deposition under this section shall be taken before, and authenticated by, an impartial officer, as follows:

"(A) Whenever practicable, by an impartial judge advocate certified under section 827(b) of this title (article 27(b)).

"(B) In exceptional circumstances, by an impartial military or civil officer authorized to administer oaths by (i) the laws of the United States or (ii) the laws of the place where the deposition is taken.

"(b) REPRESENTATION BY COUNSEL.—Representation of the parties with respect to a deposition shall be by counsel detailed in the same manner as trial counsel and defense counsel are detailed under section 827 of this title (article 27). In addition, the accused shall have the right to be represented by civilian or military counsel in the same manner as such counsel are provided for in section 838(b) of this title (article 38(b)).

"(c) ADMISSIBILITY AND USE AS EVIDENCE.—A deposition order under subsection (a) does not control the admissibility of the deposition in a court-martial or other proceeding under this chapter. Except as provided by subsection (d), a party may use all or part of a deposition as provided by the rules of evidence.

"(d) CAPITAL CASES.—Testimony by deposition may be presented in capital cases only by the defense.".

9. Sectional Analysis

Section 711 contains a complete revision of Article 49. Article 49 provides statutory authority for the taking of depositions by the parties of a court-martial; it also places statutory restrictions on the conduct of depositions and on their use as a substitute for live witness testimony at trial. Consistent with Article 36, the proposed amendments would conform Article 49's substantive provisions, to the extent practicable, to the procedures and principles of law pertaining to depositions applicable in federal district court. These amendments also would conform the statute to the Confrontation Clause. As revised, Article 49 would contain the following provisions:

Article 49(a) would better align military deposition practice under Article 49 with federal and state deposition practice, and with the authority to issue and enforce subpoenas for witnesses under Articles 46 and 47, by ensuring that depositions of prospective witnesses will generally be ordered only when it is likely that the witness's trial testimony otherwise would be lost. By eliminating the reference to Article 32 preliminary hearings, the proposed amendments would ensure that depositions are permitted only for the purpose of preserving testimony for trial, not for pretrial discovery purposes. As amended,

subsection (a) would conform to the proposed Article 30a concerning pre-referral duties of military judges. As amended, the authority to order depositions could be exercised by military judges detailed under Articles 26 or 30a (consistent with the definition of "military judge" proposed under Article 1(10)), as well as military magistrates designated by the detailed military judge under Articles 19 or 30a.

Article 49(a)(3) would replace and clarify the requirement for notice currently contained in subsection (b).

Article 49(a)(4) would replace and update subsection (c), providing greater consistency between Articles 49 and 32 with respect to the qualifications of deposition officers and preliminary hearing officers.

Article 49(b) would replace and update the counsel provisions currently contained in subsection (a), ensuring that the parties at a deposition will be represented by counsel detailed in the same manner as under Articles 27 and 38.

Article 49(c) would update and replace obsolete provisions in subsection (d) concerning the admissibility of depositions as evidence at trial. These changes would reflect the adoption of the Military Rules of Evidence in 1980 and provide greater consistency with federal civilian deposition practice.

Article 49(d) would update and replace subsections (e) and (f) to clarify the prohibition on the use of depositions in capital cases by the government.

Article 53a (New Provision) – Plea Agreements
10 U.S.C. § 853a

1. Summary of Proposal

This proposal would create a new statute, transferring the authority for plea agreements—currently referred to as "pretrial agreements"—from Article 60 (Action of Convening Authority) to a new Article 53a (Plea Agreements). The proposed statute would provide basic rules concerning: (1) the construction and negotiation of plea agreements concerning the charges, the sentence, or both; (2) the military judge's determination of whether to accept a proposed plea agreement; and (3) the operation of plea agreements containing sentence limitations with respect to the military judge's sentencing authority. This proposal is related to the proposals in this Report to amend Articles 16, 53, 56, and 60 to allow for judge-alone sentencing in all non-capital cases, to establish sentencing parameters and criteria, and to move to an "entry of judgment" post-trial procedure model. Part II of the Report will provide more detailed implementing rules and procedures for the new statute.

2. Summary of the Current Statute

Currently, three articles in the UCMJ provide statutory authority for the government to negotiate binding agreements with a military accused concerning the charges to be referred to court-martial, the level of court-martial or other disciplinary proceeding to be convened, and the sentence that may be approved on the charges. Article 60 provides convening authorities with "the authority to approve, disapprove, commute, or suspend the sentence adjudged by the court-martial in whole or in part pursuant to the terms of [a] pre-trial agreement." Because courts-martial are transitory in nature, all plea agreements that contain binding sentence limitations derive their authority from this statute. In addition, Articles 30 and 34 vest discretion in convening authorities to dispose of charges and specifications against an accused "in the interest of justice and discipline," including by referring (or not referring) the charges to court-martial for trial. These articles are the basis of all agreements concerning disposition of the charges and specifications in a particular manner or to a particular forum in exchange for the accused's plea and other concessions.

3. Historical Background

Although there were no specific statutory or regulatory provisions governing the use of plea agreements in courts-martial until 1984, these agreements have been a part of military practice at least as far back as 1953. At that time, the Assistant Judge Advocate General of the Army, Major General Franklin P. Shaw, successfully proposed the use of plea agreements to help relieve a military justice system that was over-worked and over-

clogged as the result of two major wars.[1] That year, the Court of Military Appeals gave an initial non-committal acknowledgement of the use of plea agreements,[2] and it began to issue decisions that shaped plea-bargaining practice shortly thereafter.[3] By the end of the decade, a reference to plea-bargaining had been inserted into the MCM,[4] and the practice of using plea agreements to secure convictions—the "adoption of [which] was not an altruistic act, but a pragmatic decision to avoid drowning in a sea of litigation"[5]—had achieved widespread acceptance within the Army, Navy, and Coast Guard. The Air Force, however, continued to prohibit their use until 1975.[6]

In the absence of statutory and regulatory guidance on plea agreements during most of the formative years under the UCMJ, the rules for their use in courts-martial developed primarily through case law. In the mid-1950s, and from the late 1960s through the 1970s, plea agreements were looked upon with substantial skepticism, and terms that are now commonplace were subjected to severe appellate scrutiny.[7] Even terms that were found permissible were accepted with some degree of derision. For example, an agreement calling for trial by military judge alone was allowed but had "the appearance of evil,"[8] and a term prohibiting the accused from engaging in future misconduct was allowable but not "proper."[9] When the Rules for Courts-Martial were adopted in 1984, the rules concerning

[1] Col. Carlton L. Jackson, *Plea-Bargaining in the Military: An Unintended Consequence of the Uniform Code of Military Justice*, 179 MIL. L. REV. 1, 4 (2004).

[2] United States v. Gordon, 10 C.M.R. 130, 132 (C.M.A. 1953) ("While we express no view relative to the desirability or feasibility of such a practice before courts-martial, we observe that it has the sanction of long usage before the criminal courts of the Federal and state jurisdictions.").

[3] *See, e.g.*, United States v. Allen, 25 C.M.R. 8, 11 (C.M.A. 1957) ("If [an accused] enters into a pretrial agreement in regard to his plea with the [convening authority], the agreement cannot transform the trial into an empty ritual.").

[4] *See* MCM 1951, Part. XII, ¶70b, (1951) [hereinafter 1951 MCM], *as amended in* Manual for Courts-Martial, United States 1959, Pocket Part, at 39-40 (1960).

[5] Jackson, *supra* note 1, at 4. "Between 1952 and 1956, the guilty plea rate in Army general courts-martial rose from less than one percent to sixty percent. This allowed staff judge advocates to substantially reduce general courts-martial processing times, enabling them to process 11,168 general courts-martial in FY 1953, and then catch their breath as the number of such trials dropped to 7,750 in 1956. By 1958, this combination of increased guilty pleas and decreased general courts-martial reduced the workload of the Army Board of Military Review enough to eliminate three of its seven panels of appellate judges." *Id.* at 4-5.

[6] *Id.* at 4.

[7] *Compare* United States v. Cummings, 38 C.M.R. 174, 177 (C.M.A. 1968) (holding that waiver of speedy trial "has no place in any pretrial agreement" and that pretrial agreements should "concern themselves with nothing more than bargaining on the charges and sentence, not with ancillary conditions . . .") *with* United States v. Rivera, 46 M.J. 52, 54 (C.A.A.F. 1997) (enforcing any agreement not prohibited by the rules); *see* Jackson, *supra* note 1, at 35-39; *see also* Maj Stefan Wolfe, *Pretrial Agreements: Going Beyond the Guilty Plea*, 2010 ARMY LAW. 27, 29 (Oct. 2010) ("In the initial years of the UCMJ, courts were extraordinarily paternalistic in reviewing pretrial agreements.").

[8] United States v. Schmeltz, 1 M.J. 8, 11 (C.M.A. 1975).

[9] United States v. Dawson, 10 M.J. 142, 148-49 (C.M.A. 1981).

permissible and prohibited pretrial agreement terms and conditions reflected the prevailing case law at the time.[10]

Because of the unique role of the convening authority in military justice practice, the rules and procedures applicable to plea agreements concerning the sentence to be adjudged and approved developed much differently than in the federal civilian system. Under applicable case law and rules, the military judge's determination of an appropriate sentence must be independent, without prior reference to any sentence agreement between the convening authority and the accused.[11] To accommodate this, plea agreements are divided into two parts: the first part of the agreement contains the agreement's terms and conditions; the second part contains the sentence limitations (the "cap" or "quantum"). The military judge is prohibited from examining Part 2 of the agreement until after announcing the adjudged sentence.[12]

This practice results from a confluence of two UCMJ Articles. First, Article 60 gives convening authorities discretion to decrease adjudged sentences, but it prohibits them from increasing sentences. Thus, even if the parties were to agree in advance to a specific sentence or sentence range, the convening authority would be powerless to increase any adjudged sentence to conform to the agreement. Second, under a practice that was developed before the establishment of military judges in 1968, the sentencing authority cannot be informed in advance of a sentence limitation because that would be tantamount to allowing the court to be influenced by the convening authority's view on an appropriate sentence, in violation of Article 37's prohibition on unlawful command influence.

In short, in military plea-bargaining practice, if the sentence adjudged at trial is below the sentence "cap" agreed to by the parties—a cap that is not disclosed to the sentencing authority at trial—the accused receives the lower sentence, the sentence adjudged at trial.

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[10] R.C.M. 705(c) (1984). *See* United States v. Thomas, 6 M.J. 573 (A.C.M.R. 1978) (finding term in pretrial agreement requiring the accused to enter into a stipulation of fact was not an illegal collateral condition); United States v. Reynolds, 2 M.J. 887, 888 (A.C.M.R. 1976) (finding a provision requiring the accused to testify truthfully in other proceedings to be permissible); United States v. Callahan, 8 M.J. 804, 806 (N.M.C.M.R. 1980) (allowing a term requiring that the accused pay cash restitution to victims acceptable and cautioning against restitution "in-kind," such as labor); United States v. Dawson, 10 M.J. 142, 150 (C.M.A. 1982) (approving 'no misconduct' provision in plea deal, but holding that the CA must give accused due process before setting aside sentence limitation); United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982) (finding that it is permissible to waive the Article 32 Investigation as part of a pretrial agreement); United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975) (approving a plea deal in which the accused was required to request trial by judge alone); United States v. Mills, 12 M.J. 1 (C.M.A. 1981) (allowing the accused to waive Government production of sentencing witnesses as part of pretrial agreement).

[11] United States v. Green, 1 M.J. 453, 456 (C.M.A. 1976) ("Inquiry into the actual sentence limitations specified in the plea bargain should be delayed until after announcing sentence where the accused elects to be sentenced by the military judge rather than a court with members"); *see* R.C.M. 910(f)(3) ("If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted, provided that in trial before military judge-alone the military judge ordinarily shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced.").

[12] *See* R.C.M. 910(f)(3).

But if the sentence adjudged at trial is above the sentence cap agreed to by the parties, the accused gets the benefit of the sentence cap, because the convening authority is prohibited from approving any sentence above the agreed upon cap. This system—which was not planned by the drafters of the UCMJ, but which rather evolved from a confluence of statutory structure, case law, and procedural rules over the course of several decades—has come to be known, and criticized, as "beat the deal" plea-bargaining.[13]

4. Contemporary Practice

Today, the use of plea agreements to secure convictions in exchange for sentence caps and other concessions is standard practice throughout the services—though service practices with respect to standard terms, conditions, and restrictions in agreements vary.[14] In addition to the statutory provisions concerning plea agreements in Article 60, the President has prescribed two rules controlling their use, acceptance, and effect in court-martial cases. R.C.M. 705 (Pretrial agreements) provides specific guidance on the use, structure, and effect of pretrial agreements, including permissible and prohibited terms and conditions and the prohibition on disclosing the existence of a pretrial agreement to the panel.[15] Under the rule, "The decision whether to accept or reject an offer [of the accused to enter into a pretrial agreement] is within the sole discretion of the convening authority."[16] R.C.M. 910 (Pleas) implements Article 45, and governs the plea process itself, including the duties of the military judge to advise the accused properly, to ensure the plea is voluntary and accurate, to ensure the accused understands the terms and effect of any pretrial agreement, and to issue findings appropriately upon acceptance of the plea.[17] Under the rule, the military judge may strike any provisions in a pretrial agreement that are prohibited by R.C.M. 705(c)(1) or that "violate appellate case law, public policy, or notions of fundamental fairness."[18]

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[13] *See, e.g.*, Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39, 46 (2009) (criticizing "beat the deal" plea-bargaining as inherently slanted in favor of the convicted servicemember).

[14] *See, e.g.*, AIR FORCE INSTR. 51-201, Administration of Military Justice (6 June 2013) [hereinafter AFI 51-201], at 8.4.1–8.4.3 (setting forth restrictions on the use of pretrial agreements that differ from the practice in the other services).

[15] R.C.M. 705(b)-(e).

[16] R.C.M. 705(d)(3) (emphasis added); *see also* United States v. Callahan, No. 200100696, 2003 CCA LEXIS 165, at n.3 (N-M Ct. Crim. App. July 30, 2003) ("this Court gives deference to a CA's decision on the appropriate disposition of charges or a decision regarding the appropriate limitations of punishment agreed to in a pretrial agreement as these decisions are also exercises of *prosecutorial* discretion."). *Cf.* FED. R. CRIM. P. 11(c)(3)(A) (". . . the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.").

[17] R.C.M. 910(a)-(j).

[18] United States v. Thomas, 60 M.J. 521, 528 (N-M Ct. Crim. App. 2004). In some cases, military courts have held that the presence of an impermissible term requires nullification of the entire pretrial agreement and the authorization of a rehearing. *See, e.g.*, United States v. Holland, 1 M.J. 58, 60 (C.M.A. 1975). In most cases,

5. Relationship to Federal Civilian Practice

In both military practice and federal civilian practice, the parties are allowed to plea-bargain on the charges, the sentence, or both. Both systems rely on plea-bargaining to efficiently administer justice, and both systems provide safeguards to ensure the accused is not coerced by the government into signing a plea agreement that does not represent the accused's actual guilt, or that exaggerates his or her wrongdoing. The Supreme Court recognizes the federal plea-bargaining process provides systemic benefits, including facilitating pleas and speeding the process of rehabilitation; increasing the certainty of both parties in the results; protecting society from individuals who otherwise might be out on bail pending completion of their trials; and helping to conserve limited judicial and prosecutorial resources.[19] These benefits are applicable to plea-bargaining in the military justice system, as well. The two systems differ in the area of sentence agreements.

In federal civilian practice, the parties can bargain on sentence by agreeing that a specific sentence or sentencing range is appropriate for the offense, which may or may not be binding on the judge's sentencing discretion.[20] If the agreement is one that binds the sentencing discretion of the sentencing judge, after reviewing the agreement, the judge has three options: (1) accept the agreement and adjudge the sentence (or within the limits of the sentence range) agreed to by the parties; (2) reject the agreement entirely; or (3) defer the decision until after review of the presentence report.[21] Because the sentence agreement is binding, the parties—and any victim of the offense—are able to know in advance the upper and lower bounds of the sentence that is likely to be adjudged. If the judge rejects an agreement, that rejection is reviewable (at the request of the defendant) for abuse of discretion.[22] The federal rule states that "[t]he court must not participate in these [plea agreement] discussions."[23]

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however, an impermissible term may be stricken without impairing the remainder of the agreement. *See, e.g.*, United States v. McLaughlin, 50 M.J. 217, 218-19 (C.A.A.F. 1999).

[19] Blackledge v. Allison, 431 U.S. 63, 71 (1977).

[20] *See* FED. R. CRIM. P. 11(c)(1)(C). The Rule 11(c)(1)(C) agreement is one of two types of sentence agreements in federal practice. Under Rule 11(c)(1)(B), the prosecutor makes a recommendation to the judge that a particular sentence or sentencing range is appropriate. The recommendation is not binding on the judge's sentencing discretion. Whether prosecutors use the recommendation-type sentence agreement under Rule 11(c)(1)(B) or the binding "C" sentence agreement is largely a function of local practice, as usage varies by district. In recent years, type "C" agreements have become more favored. *See generally* Wes R. Porter, *The Pendulum in Federal Sentencing Can Also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post*-Booker, 37 WM. MITCHELL L. REV. 469 (2011); *see also* Barry Boss and Nicole L. Angarella, *Negotiating Federal Plea Agreements Post*-Booker*: Same As It Ever Was?*, 2 CRIM. J. 22 (2006).

[21] FED. R. CRIM. P. 11(c)(3)(A).

[22] *See, e.g.*, In re Morgan, 506 F.3d 705, 710-711 (9th Cir. 2007). Federal judges exercise wide discretion with respect to accepting or rejecting binding sentence agreements. *See, e.g.*, Ellis v. United States District Court, 356 F.3d 1198, 1209 (9th Cir. 2004) (upholding a district court's rejection of a sentence agreement where the court "viewed the sentence resulting from the plea bargain as not in the best interest of society, given [the accused's] criminal history and the circumstances of the offense charged."); State v. Conger, 325 Wis.2d 664, 797 N.W.2d 341 (2010) ("[A] circuit court must review a plea agreement independently and may, if it

In the federal system, use of "specific sentence/sentencing range" plea agreements predates the adoption of the Federal Sentencing Guidelines in 1984. Since their adoption, the Guidelines have provided a framework—in addition to the other sentencing factors under 18 U.S.C. § 3553(a)—for analyzing the discretionary acceptance/rejection of sentence agreements by trial judges.[24] Under the Guidelines, a court may impose the agreed-upon sentence only if it is satisfied that the sentence is either "within the applicable guideline range" or "departs from the applicable guidelines range for justifiable reasons."[25]

6. Recommendation and Justification

Recommendation 53a.1: Enact a new Article 53a to provide statutory authority and basic rules for: (1) the construction and negotiation of charge and sentence agreements; (2) the military judge's determination of whether to accept a proposed plea agreement; and (3) the operation of sentence agreements with respect to the military judge's sentencing authority.

Under this Report's proposal to amend Article 60 to establish an "entry of judgment" model for the military judge's sentence determinations, a new statutory authority for the convening authority's ability to enter into binding plea agreements with the accused will be necessary. This proposal would create a new statute to transfer the authority currently in Article 60 into a new article, while providing more robust statutory rules concerning the construction and operation of plea agreements in the adjudication process.

Part II of the Report will provide implementing rules for this proposed statute, with particular emphasis on the opportunity for negotiated sentencing ranges. Under this proposal, if the agreement contained a negotiated sentencing range or sentence limitation, the military judge would enter a sentence in accordance with the agreement unless the judge determined the negotiated sentencing range or sentence limination to be plainly unreasonable or otherwise unlawful.

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appropriately exercises its discretion, reject any plea agreement that does not, in its view, serve the public interest"). However, the discretion of district judges to reject sentence agreements "is not unbounded," and courts abuse their discretion when they fail to "consider individually every sentence bargain presented to them and . . . set forth, on the record, [their] reasons in light of the specific circumstances of the case for rejecting the bargain." *In re Morgan*, 506 F.3d at 712; *accord* United States v. Robertson, 45 F.3d 1423 (10th Cir. 1995) (noting that the requirement for judges to set forth the reasons for their rejection of a plea agreement "helps insure the court is aware of and gives adequate deference to prosecutorial discretion" and "is the surest, indeed the only way to facilitate appellate review of rejected plea bargains.").

[23] FED. R. CRIM. P. 11(c)(1). *See* United States v. Baker, 489 F.3d 366 (D.C. Cir. 2007) (district court violated rule when it impermissibly engaged in lengthy plea discussion with defendant concerning sentence length).

[24] *See* United States v. Wright, 291 F.R.D. 85, 88 (E.D. Penn. 2013) ("In considering . . . plea agreements, courts follow the framework provided by the United States Sentencing Guidelines, which are now advisory. An agreement should be accepted 'only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence departs from the applicable guideline range for justifiable reasons.'") (citing U.S. Sentencing Guidelines Manual § 6B1.2 cmt. (2012)). *See generally* WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, & ORIN KERR, CRIMINAL PROCEDURE § 21.1(h) (3d ed. 2013).

[25] U.S.S.G. § 6B1.2(b)-(c).

Part II of the Report will also address procedures to allow the victim to be heard by the convening authority before a decision on a plea agreement. Plea agreements are one of the primary tools convening authorities utilize to dispose of charges against an accused; however, currently, R.C.M. 705 does not address the role of the victim in this decision. The implementing rules that will be proposed in Part II of the Report will address this gap in the current rules.

Recommendation 53a.2: In the new Article 53a, provide that the military judge shall accept any lawful sentence agreement submitted by the parties, except that: (1) in the case of an offense with a sentencing parameter under Article 56, the military judge may reject the agreement only if it proposes a sentence that is both outside the sentencing parameter and plainly unreasonable; and (2) in the case of an offense without a sentencing parameter, the military judge may reject the agreement only if it proposes a sentence that is plainly unreasonable.

This proposal would better align military plea-bargaining practice with federal civilian plea-bargaining practice, and would result in increased efficiencies and greater bargaining power for both parties.

The proposed "plainly unreasonable" standard would ensure that military judges are appropriately constrained in their ability to reject sentence agreements entered into by the parties, while at the same time providing military judges the authority to reject agreements they determine are unacceptable, consistent with federal civilian practice. The decision of a military judge to reject an agreement would be reviewable for an abuse of discretion.

This proposal takes into account the Response Systems to Adult Sexual Assault Crimes Panel's recommendation to "study whether the military plea bargaining process should be modified."[26]

Part II of the Report will address the rules implementing Article 53a, including a requirement that if the military judge holds that a sentence agreement is plainly unreasonable, the judge must set forth on the record the findings of fact and conclusions of law supporting that determination.

7. Relationship to Objectives and Related Provisions

This proposal is related to the proposals concerning Articles 16, 53, 56, and 60.

This proposal would support the GC Terms of Reference by incorporating, insofar as practicable, plea-bargaining practices and procedures applicable in federal district court into military justice practice. This proposal also supports the GC terms of Reference by considering the recommendations of the Response Systems Panel.

[26] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 49 (June 2014) (Recommendation 117).

8. Legislative Proposal

SEC. 717. PLEA AGREEMENTS.

Subchapter VII of chapter 47 of title 10, United States Code, is amended by inserting after section 853 (article 53 of the Uniform Code of Military Justice) the following:

"§853a. Art. 53a. Plea agreements

"(a) IN GENERAL.—(1) At any time before the announcement of findings under section 853 of this title (article 53), the convening authority and the accused may enter into a plea agreement with respect to such matters as—

"(A) the manner in which the convening authority will dispose of one or more charges and specifications; and

"(B) limitations on the sentence that may be adjudged for one or more charges and specifications.

"(2) The military judge of a general or special court-martial may not participate in discussions between the parties concerning prospective terms and conditions of a plea agreement.

"(b) ACCEPTANCE OF PLEA AGREEMENT.—Subject to subsection (c), the military judge of a general or special court-martial shall accept a plea agreement submitted by the parties, except that—

"(1) in the case of an offense with a sentencing parameter under section 856 of this title (article 56), the military judge may reject a plea agreement that proposes a sentence that is outside the sentencing parameter if the military judge determines that the proposed sentence is plainly unreasonable; and

"(2) in the case of an offense with no sentencing parameter under section 856 of this title (article 56), the military judge may reject a plea agreement that proposes a sentence if the military judge determines that the proposed sentence is plainly unreasonable.

"(c) LIMITATION ON ACCEPTANCE OF PLEA AGREEMENTS.—The military judge of a general or special court-martial shall reject a plea agreement that—

"(1) contains a provision that has not been accepted by both parties;

"(2) contains a provision that is not understood by the accused; or

"(3) except as provided in subsection (d), contains a provision for a sentence that is less than the mandatory minimum sentence applicable to an offense referred to in section 856(b)(2) of this title (article 56(b)(2)).

"(d) LIMITED CONDITIONS FOR ACCEPTANCE OF PLEA AGREEMENT FOR SENTENCE BELOW MANDATORY MINIMUM FOR CERTAIN OFFENSES.—With respect to an offense referred to in section 856(b)(2) of this title (article 56(b)(2))—

"(1) the military judge may accept a plea agreement that provides for a sentence of bad conduct discharge; and

"(2) upon recommendation of the trial counsel, in exchange for substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, the military judge may accept a plea agreement that provides for a sentence that is less than the mandatory minimum sentence for the offense charged.

"(e) BINDING EFFECT OF PLEA AGREEMENT.—Upon acceptance by the military judge of a general or special court-martial, a plea agreement shall bind the parties and the military judge.".

9. Sectional Analysis

Section 717 would create a new section, Article 53a, transferring the statutory authority for plea agreements from Article 60 to the new Article 53a. The proposed new article would provide basic rules for: (1) the construction and negotiation of plea agreements concerning the charge and the sentence; (2) allowing the convening authority and the accused to enter into binding agreements regarding the sentence that may be adjudged at a court-martial; and (3) the military judge's determination of whether to accept a proposed plea agreement in a general or special court-martial. Under the amended statute, the military judge would review the entire agreement, including any negotiated sentence agreement, prior to determining whether to accept the agreement and adjudge the sentence. If the agreement contains a negotiated sentencing range, the military judge would enter a sentence within that range unless the judge determines that the negotiated sentencing range is plainly unreasonable or otherwise unlawful. The new statute would preserve current law pertaining to plea agreements involving offenses with mandatory minimum sentences.

Implementing rules for the new Article 53a would address a number of issues concerning plea agreements, including the structure and procedures for sentence agreements; the opportunity for negotiated sentencing ranges; a requirement that, if the military judge determines that a sentence agreement is plainly unreasonable, the judge must set forth on the record the findings of fact and conclusions of law supporting that determination; plea agreements in summary courts-martial; and the role of the victim in plea agreements, with particular emphasis on the rules structuring the convening authority's decision-making with respect to acceptance of plea agreements proposed by the defense.

Articles 56-56a – Maximum and Minimum Limits & Sentence of Confinement for Life without Eligibility for Parole

10 U.S.C. §§ 856-56a

1. Summary of Proposal

This proposal would align court-martial sentencing procedures with this Report's proposal for judicial sentencing in all noncapital general and special courts-martial. The proposal would enable military sentencing to benefit from the experiences of state and federal civilian courts in sentencing reform, while adapting the lessons learned from those experiences to the special needs of the military justice system.

The sentencing reforms proposed by this Report are made possible by the amendments to Article 53 providing for judicial sentencing, and come in three parts.

First, as discussed in the proposal for Article 53, the current adversarial sentencing process (which utilizes many of the same procedural and evidentiary rules applicable during findings) would be modified to more closely align with the process used in civilian courts, in which all relevant information is presented to aid the judge in fashioning an appropriate sentence. Part II of this Report will set forth the rules for such sentencing proceedings, taking into account the interests of the government, the accused, and any victims in having a thorough, balanced, and transparent proceeding.

Second, this proposal would replace the current requirement to adjudge a unitary sentence, in which a single sentence is adjudged for all offenses for which there has been a finding of guilty without the need to identify which portions of the sentence are attributable to which offense. Under the proposal, which follows the practice used in most civilian proceedings, the judge would pronounce a distinct sentence for those portions of a sentence that can be segmented and attributed to a specific offense—confinement and fines—with a requirement to designate whether any segmented portions will run concurrently or consecutively in the sentence.

Third, this proposal implements sentencing parameters and criteria to guide the discretion of the military judge in determining a sentence for each guilty finding. This proposal would establish a Sentencing Parameters and Criteria Board to develop parameters and criteria. The sentencing parameters and criteria proposed by the Board would be subject to approval by the President. As in many civilian courts, a parameter for an offense would set a boundary on the judge's discretion, subject to a departure for case specific reasons set forth by the judge in the record. Sentencing parameters would not be required for those offenses for which it would be impracticable to set a parameter, such as unique military offenses that vary greatly in seriousness depending on the context. The Board would establish sentencing criteria for those offenses without parameters. The implementation of

parameters and criteria would draw upon best practices at the federal and state level, and would replace the current practice of adjudging sentences with little or no guidance.

This proposal provides for a four-year period to develop sentencing parameters and criteria. This four-year implementation period allows for the Board to collect and analyze sentencing data—especially the data made available after the implementation of segmented sentencing.

2. Summary of the Current Statute

Article 56 provides the authority for the President to set maximum punishments for UCMJ violations. The President has exercised this authority in two ways: First, the President has limited the types of punishments that may be imposed at a court-martial to those specified in R.C.M. 1003, which prohibits punishments other than reprimands, forfeitures, fines, reductions in grade, restriction, hard labor, confinement, punitive discharges, and death. Second, for most offenses, the President has limited the amount of confinement, forfeitures, or the type of punitive discharge that may be imposed. The President's authority is subject to any maximum or mandatory punishments Congress establishes in the UCMJ.

Article 56(b), added to the statute in 2014, mandates that an accused convicted of certain sex offenses (and attempts of those crimes), be discharged from the military with a dishonorable discharge or a dismissal. An enlisted accused who pleads guilty to rape or sexual assault may receive a bad-conduct discharge, in lieu of a dishonorable discharge, as a term of a plea agreement.

Article 56a authorizes the punishment of confinement for life without the possibility of parole any time confinement for life is an authorized punishment. A sentence to life without parole may be reduced only by: (1) the convening authority, pursuant to a pretrial agreement;[1] (2) the convening authority, upon recommendation of trial counsel after the accused has provided substantial assistance in another investigation or prosecution;[2] (3) the appellate courts;[3] (4) the Service Secretary (personally, and non-delegable);[4] or (5) through a pardon by the President.[5]

3. Historical Background

The sentencing procedures in courts-martial have changed substantially throughout the history of military law. Under the early Articles of War, sentences were determined by

[1] 10 U.S.C. § 860(c)(4)(C).

[2] 10 U.S.C. § 860(c)(4)(B).

[3] 10 U.S.C. § 866(c); 10 U.S.C. § 867; 10 U.S.C. § 867a.

[4] 10 U.S.C. § 874(a).

[5] *See* Article 60(c)(4) (Action by the Convening Authority); Article 66(c) (Review by Court of Criminal Appeals); Article 67 (Review by the Court of Appeals for the Armed Forces); Article 67a (Review by the Supreme Court); U.S. CONST. art. II, § 2 (Presidential pardon power).

majority vote.[6] Although the Articles of War provided for several mandatory sentences,[7] most offenses were punished entirely within the discretion of the court-martial. In 1890, Congress authorized the President to establish maximum sentences in times of peace.[8]

When the UCMJ was enacted in 1950, Congress provided the President with the authority to promulgate rules on sentencing under Article 36; in Article 56, Congress specifically authorized the President to determine the maximum punishments for violations of the UCMJ.[9] As originally enacted, the only offenses in the UCMJ that included mandatory minimum sentences were premeditated murder (life in prison); felony murder (life in prison) and spying (mandatory death).[10] In 1960, Congress enacted Article 58a to establish mandatory reductions for the enlisted grades as a collateral effect of a court-martial sentence, subject to exceptions in Service regulations.[11] In 1996, Congress enacted Article 58b to require mandatory forfeitures, if not adjudged at trial, during certain periods of confinement.[12] In 1997, Congress enacted Article 56a, to provide for the punishment of confinement for life without parole and restricted clemency authority for such sentences.[13] In 2013, Congress amended Article 56 to provide for mandatory punitive discharges for rape and sexual assault.[14]

There is no specific statutory requirement for restitution as part of court-martial practice, although restitution has been recognized as a valid term of a plea agreement since at least 1977.[15] When Congress enacted the Mandatory Victims Restitution Act of 1996, it did not specifically address victims of crimes tried by courts-martial.[16]

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[6] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 391-92 (photo reprint 1920) (2d ed. 1896).

[7] *See, e.g.,* AW 14 of 1895 ("Any officer who knowingly makes a false muster of man or horse . . . shall, upon proof thereof by two witnesses . . . be dismissed from the service").

[8] 26 Stat. 491, ch. 998 (1890); *see also* Carter v. McClaughry, 183 U.S. 365, 381-82 (1902) (Writ of habeas corpus filed from Fort Leavenworth when court-martial sentence exceeded maximum authorized by the President).

[9] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

[10] *Id.*

[11] Act of July 12, 1960, Pub. L. No. 86-633, 74 Stat. 468.

[12] NDAA FY 1997, Pub. L. No. 104-201, § 1068, 110 Stat. 2655 (1996).

[13] NDAA FY 1998, Pub. L. No. 105-85, §S 581-82, 1073(a)(9)-(11), 111 Stat. 1759, 1900 (1997). The limitations on clemency were passed in 2000 and are contained in Article 74.

[14] NDAA FY 2014, Pub. L. No. 113–66, § 1705(a)(1), (2)(A), 127 Stat. 672 (2013). This amendment also provided for mandatory minimum sentences for convictions for rape and sexual assault of a child, forcible sodomy, and attempts of these offenses.

[15] *See* United States v. Brown, 4 M.J. 654, 655 (A.C.M.R. 1977).

[16] *See* 18 U.S.C. § 3663A.

4. Contemporary Practice

Currently, military practice utilizes unitary sentencing, in which a court-martial adjudges a single sentence for the accused, regardless of the number of offenses for which the accused has been found guilty. This practice is specifically required by the Rules for Courts-Martial,[17] and is implicitly required by Article 52's requirement for panel voting.[18] If the accused has been found guilty of multiple offenses, the maximum authorized sentence is the sum of the maximum punishments for all offenses individually.[19]

R.C.M. 1002 provides the rule for sentence determination in courts-martial. The rule states that the sentence "is a matter within the discretion of the court-martial." Pursuant to this rule, except for the few offenses that have mandatory minimum sentences—which include premeditated murder and the sexual offenses described earlier—the court is free to arrive at a sentence anywhere from no punishment to the maximum established by the President under Article 56(a). The appropriate sentence for an accused is generally within the discretion of the court-martial, and the court may adjudge any lawful sentence, from no punishment to the maximum established by the President. With a few exceptions, there are few constraints on the discretion of the sentencing authority in courts-martial.

With respect to restitution, under current law, victims who suffer property losses are allowed to file a claim for payment under Article 139. However, such claims are not part of the formal court-martial process, and are limited to instances of willful destruction of property. Article 139 claims do not cover, for example, medical bills, missed wages, or other economic losses recoverable in federal court.[20] Under current practice, restitution is addressed primarily through the use of pretrial agreements between the convening authority and the accused.[21]

5. Relationship to Federal Civilian Practice

Military practice and federal civilian practice differ significantly in the areas of sentence determination, restitution, and appeals of sentences.

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[17] R.C.M. 1006(c).

[18] To sentence an accused to more than ten years confinement requires a concurrence of three-fourths of the panel members. A sentence of less than 10 years requires a two-thirds concurrence. These voting requirements would not work in a non-unitary sentencing model, for example, when each individual sentence was less than 10 years but the combined sentence was more than 10 years. Additionally, a single sentence has long been military practice. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 404 (photo reprint 1920) (2d ed. 1896).

[19] R.C.M. 1003(c)(1)(C).

[20] Article 139 claims provide superior victim rights to restitution awarded in federal court in one limited manner: they generally require proof only by a preponderance of the evidence that the accused committed the alleged offense.

[21] R.C.M. 705(c)(2)(C).

Prior to the Sentencing and Reform Act of 1984,[22] a federal district judge exercised "virtually unlimited discretion to sentence a convicted defendant anywhere within the range created by the statutory maximum and minimum penalties for the offense or offenses of conviction."[23] During the 1970s and 1980s, academics, the public, and eventually policymakers grew concerned about sentencing disparities in the federal courts. A political consensus arose in the early 1980s that the prevailing system of indeterminate sentencing no longer adequately fulfilled the primary objectives of the criminal justice system. Criticisms of the system at the time echo current criticisms of courts-martial and included sentencing disparity and loss of public confidence.[24] In 1984, Congress established the U.S. Sentencing Commission, directing it to create federal sentencing guidelines.

Statutory provisions required the original Commission to promulgate a sentencing guidelines grid, based on the offense and criminal history of the defendant, with 258 different "boxes." While initially intended as binding, the Supreme Court later declared mandatory guidelines unconstitutional as a violation of the Sixth Amendment.[25] Since the Court's *Booker* decision, the guidelines have been advisory only; district courts are required to take them into account, but are not bound to apply them when determining an appropriate sentence for an accused. Federal judges may depart upward or downward from an advisory sentencing range for an offense due to "an array of mitigating and aggravating factors listed under 18 U.S.C. § 3553(b)"—including circumstances not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.[26] The federal

[22] 18 U.S.C. § 3551 *et. seq.*

[23] Frank O. Bowman, *The Quality of Mercy must be Restrained, and other Lessons in Learning to Love the Federal Sentencing Guidelines,* 1996 WIS. L. REV. 679, 682 (1996). Professor Bowman served as Special Counsel to the U.S. Sentencing Commission.

[24] *See id.* ("A variety of complaints arose about this [pre-sentencing guidelines] system. First, critics said that it led to tremendous sentencing disparity. . . . Second, critics believed that plea bargaining exacerbated the potential for disparity between similarly-situated defendants. . . . Third, critics observed that because of the parole system, the real power to determine the length of time a defendant actually spent in prison rested not with judges, prosecutors, defense attorneys or legislators, but with a parole board that operated substantially out of public view. . . . Fourth, indeterminate sentencing was thought to erode public faith in the criminal justice system. Because defendants rarely served anything close to the amount of time the judge announced, observers unfamiliar with the system's rituals saw the system as fraudulent. . . . Fifth, observers had the sense that lazy prosecutors were indiscriminately plea bargaining away cases against vicious criminals to reduce their workloads, and that soft judges were letting criminals get away with minimal sentences. . . . Finally, I suspect that all these critiques rooted in concerns about fairness would not have led to global reform if people felt that the system worked, in the sense that it reduced or controlled crime.") (internal citations omitted).

[25] United States v. Booker, 543 U.S. 220 (2005).

[26] Kimbrough v. United States, 552 U.S. 85, 105 (2007); *see also* Gall v. United States, 552 U.S. 38, 51 (2007); United States v. Booker, 543 U.S. 220, 233 (2005).

guidelines have been criticized on a variety of grounds, including for being unnecessarily complex.[27]

In brief, the federal sentencing guidelines operate as follows:

As with courts-martial, in federal district court the maximum sentence is determined by the statute criminalizing the offense. The appropriate sentence range is often determined by judicial fact-finding, made with the aid of a presentence report. The guideline range is determined by two factors: (1) the defendant's criminal history category; and (2) the offense level.

A defendant's criminal history category is determined by the defendant's previous interactions with the criminal justice system. A defendant who previously received substantial prison sentences, or who committed the current offense while still under probation, will receive a higher criminal history category, and in most cases a higher sentencing guideline range.

The U.S. Sentencing Guidelines assign most criminal violations of federal law an offense level ranging from 1-43. The offense level is adjusted based on the severity of the crime, victim status, the role of the defendant in the crime, and the defendant's acceptance of responsibility, among other factors. If the defendant played a small role in the offense, assisted the prosecution, and took responsibility for his role in the crime, the offense level can be decreased substantially. Thus, two defendants convicted of the same offense may face different sentencing guideline ranges based on the manner in which they committed the offense and their prior criminal histories. Different charging decisions, different government priorities, and the exercise of sentencing discretion by different judges may also result in markedly different sentences, even if two individuals are sentenced within the guideline range for the same offense.

Generally, the federal judge will repeat this process for every offense, although there are rules for grouping offenses—for example, offenses involving the same victim and the same act. Although the judge is required to consider the sentencing guidelines, the judge is not required to apply the guidelines when determining the appropriate sentence for a defendant. In addition, federal civilian judges must determine whether multiple terms of imprisonment imposed on a defendant will run concurrently or consecutively.[28]

With respect to restitution, federal law provides for mandatory restitution for victims of crimes of violence, crimes against property, and any crime for which the victim suffers a pecuniary loss.[29] Restitution is determined as part of the sentencing proceedings,[30] and

[27] Erik S. Siebert, *The Process is the Problem: Lessons Learned from United States Drug Sentencing Reform*, 44 U. RICH. L. REV. 867 (2010).

[28] 18 U.S.C.S. § 3584.

[29] *See* 18 U.S.C. § 3663A (mandatory restitution); § 3664 (enforcement); and §§3612-3614 (collection and penalties for failure to pay). Federal courts of appeal are split on whether restitution is a punishment or civil remedy. *See* Paroline v. United States, 134 S. Ct. 1710, 1724 (2014) (Aside from the manifest procedural differences between criminal sentencing and civil tort lawsuits, restitution serves purposes that differ from

may include the return of property; compensation for damaged or destroyed property; compensation for medical bills, physical therapy, occupational therapy, and professional services (including psychiatric care); and compensation for income lost as a result of the offense.[31] Restitution is ordered without consideration of the defendant's ability to pay,[32] and a defendant who defaults on a restitution payment may be resentenced, or the court may order the sale of the defendant's property and impose civil remedies.[33]

With respect to sentencing appeals, in federal civilian practice both the government and defense may appeal a sentence if it is unreasonable.[34] A government appeal of a sentence may not be prosecuted without the approval of the Solicitor General or Deputy Solicitor General.[35]

6. Recommendation and Justification

Recommendation 56.1: Amend Article 56 to replace the court-martial practice of "unitary" sentencing with "segmented sentencing" where, if confinement is adjudged for guilty findings, the amount of confinement for each guilty finding would be determined separately. This proposal also would provide for segmented sentencing for fines.

This proposal would increase transparency in military sentencing by allowing the parties and the public to know the specific punishments for each offense. Additionally, for cases involving a victim (or multiple victims), identifying the sentence associated with their injury may provide clarity and increase confidence in the results of the court-martial.

(though they overlap with) the purposes of tort law); Kelly v. Robinson, 479 U. S. 36, 49, n.10 (1986) (noting that restitution is, inter alia, "an effective rehabilitative penalty"); United States v. Serawop, 505 F.3d 1112, 1122-1123, (10th Cir. 2007) (finding restitution is not punitive and summarizing the circuit split).

[30] Prior to sentencing, the district court directs a probation officer to collect, (as part of the presentence report or as a separate document), sufficient information for the court to fashion an appropriate restitution order. Each defendant is required to file an affidavit describing his or her financial resources with the probation officer. The government provides the probation officer with the amount of restitution due each victim. Victims may also independently provide input. The court may request additional information, and may receive evidence in camera. The burden is on the government to establish the amount of loss sustained by a victim; the burden of establishing the financial resources of the defendant is on the defense. 18 U.S.C. § 3664(a), (d)(2)-(4).

[31] 18 U.S.C. § 3663A(c).

[32] 18 U.S.C. § 3663A(f)(1)(A). Restitution may be ordered to be paid as a lump sum, in installments, or even in-kind services. If there are multiple defendants, the court may order each defendant liable for the full amount. If the defendant knowingly fails to pay restitution, the court may resentence the defendant to any sentence which may have been originally imposed, but may not increase punishment if the failure to pay is "solely" because of the defendant's indigence. 18 U.S.C. § 3664(f)(3)(A).

[33] 18 U.S.C. § 3614; 18 U.S.C. § 3613(f).

[34] United States v. Booker, 543 M.J. 220 (2005).

[35] 18 U.S.C. § 3742(b)(4).

On appeal, segmented sentencing will increase the efficiency of appellate review and may result in fewer remands for resentencing. Under current law, when an appellate court sets aside a guilty specification, the appellate court can reassess the sentence if it can be assured "that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed."[36] If not, the case may be remanded for a new sentencing proceeding. Non-unitary sentencing would simplify this burden for appellate courts.

Segmented sentencing should provide practitioners and policy makers with more accurate information about punishments in courts-martial, particularly in the development and refinement of sentencing parameters and criteria. As most cases involve convictions for more than one offense, it is challenging to assemble reliable sentencing data in courts-martials. More accurate data would allow policy makers to know how the sentencing system is functioning, which is a significant prerequisite to evaluating its effectiveness and proposing changes.

Segmented sentencing requires protections to ensure that an accused is not unfairly sentenced twice for what is essentially one offense. This proposal therefore also would require that the military judge determine whether terms of confinement will run concurrently, or consecutively. Under segmented sentencing, an accused convicted of two offenses would receive a term of confinement appropriate for each offense. If the offenses involved the same transaction, victim, and harm, the sentence could be overly severe for what was essentially one criminal act. This is of special concern in the military justice system where the UCMJ has several ambiguous offenses, unknown in the civilian practice, that increase the potential for unreasonable multiplication of charges;[37] where prosecutors are expected to charge all known offenses at a single trial;[38] and the accused must reach a high bar to have charges severed.[39]

Under the proposed amendments, military judges would need to make a determination, on the record, as to the appropriate amount of confinement for each offense. At the same time, the military judge would determine whether the sentences should run concurrently or consecutively. This proposal is rooted in the federal system, where federal district courts generally have broad discretion to impose a consecutive or concurrent sentence.[40] The

[36] United States v. Sales, 22 M.J. 305, 308 (C.M.A. 1986).

[37] *See e.g.,* Articles 89-92, UCMJ (disrespect, disobedience, and dereliction offenses); Article 133, UCMJ (conduct unbecoming an officer); Article 134, UCMJ (the General Article).

[38] *See* R.C.M. 601(e)(2) (Discussion) ("Ordinarily all known charges should be referred to a single court-martial.").

[39] *See* R.C.M. 906(b)(10) (Accused must show "manifest injustice" for severance of charges).

[40] Sester v. United States, 132 S.Ct. 1463, 1468 (2012); 18 U.S.C. § 3584. Exercise of that discretion, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission. For example, under U.S. Sentencing Guidelines § 3D1.1 and 3D1.2, all counts involving "substantially the same harm" are grouped together into a single group if they 1) involve the same victim and the same act or transaction; 2) involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a

Supreme Court has made clear, however, that double-jeopardy principles prohibit imposing consecutive sentences for "the same offense," unless the legislature specifically authorizes multiple sentences.[41]

This proposal would not apply segmented sentencing to unique military punishments that affect the accused's status in the service (e.g., discharges, forfeitures, reductions in pay grade, or reprimands). These punishments are best determined by looking at the sum of the accused's crimes in relation to the accused's potential for future service. The case of a servicemember convicted of more than one minor offense, for example, may warrant a punitive discharge, even though no one offense, standing alone, would warrant such punishment.

Recommendation 56.2: Establish sentencing parameters and criteria to provide guidance to military judges in determining an appropriate sentence.

This proposal would establish a more structured sentencing system that draws upon practice and experience in the civilian sector, including under the U.S. Sentencing Guidelines, while utilizing an approach that reflects that an effective military justice system requires a range of punishments and procedures that have no direct counterpart in civilian criminal trials.

Criminal sentencing systems face two competing goals: consistency and individualized consideration. Consistency in sentencing (similar offenses by similar accused receiving similar sentences) may serve to increase deterrence, predictability, and public confidence in criminal sentences. Individualized sentencing tailors a sentence to the accused and the particular circumstances of his or her crime. Despite similar goals, direct application of the U.S. Sentencing Guidelines presents several concerns. First, military judges do not have the equivalent logistical support and staff to mirror the duties of a federal district court.[42] Second, federal sentencing guidelines were developed for federal crimes. While the UCMJ

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common scheme or plan; 3) when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts; and 4) when the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of the substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior. *See* United States Sentencing Guidelines, § 3D1.2.

[41] *See* Missouri v. Hunter, 459 U.S. 359, 368 (1983) (Where unequivocal legislative intent was to impose consecutive sentences for even arguably same conduct, such sentences do not violate double-jeopardy principles); Albernaz v. United States, 450 U.S. 333, 344 (1981) ("[T]he question of what punishments are constitutionally permissible is no different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution.").

[42] The Administrative Office of the United States Courts has over 32,000 employees, with almost 100,000 criminal cases processed each year. The military justice system, by contrast, tried less than 2500 cases in 2013, and military judges often cover a large geographical area and may not even have a single clerk. http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice.aspx; http://www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-caseload-indicators.aspx; Annual Report Submitted to the Committees on Armed Services of the U.S. Senate and the House of Representatives (2013).

includes offenses common to the federal code, many offenses are unique to the military and have no counterpart in civilian criminal law. Third, military justice has as an additional purpose: the maintenance of good order and discipline. Finally, military justice has traditionally focused on rehabilitation, to include the possibility of return to service in appropriate cases, and most offenders have no prior criminal record. As an overriding constraint, a court-martial sentencing scheme must be effective during peacetime and war, state-side and overseas.

In view of these considerations, this proposal differs from the approach taken in the U.S. Sentencing Guidelines in several key respects:

First, the proposal would establish a maximum of 12 offense categories, as compared to the 43 in the US Sentencing Guidelines. Broad offense categories ensure that there is a sufficiently large sentencing range to capture an offense. With no more than 12 categories to cover offenses from petty theft to premeditated murder, each offense category must be broad.

Second, this proposal would require that the sentencing parameter for any given offense be based on the offense at findings, not on other factors. Under the U.S. Sentencing Guidelines, a defendant's guideline sentence is often based on judicial fact-finding made during the presentencing proceeding. In the extreme situation, a federal judge can find, by a preponderance of the evidence, that the defendant committed additional misconduct—and therefore deserves a higher offense category—even if the jury acquitted him of that same misconduct.

Third, some military unique offenses are unsuitable for parameters entirely. Some military offenses are so varied in their nature that they escape any reasonable categorization. The effect of disobeying an order ranges from the trivial to the perilous, and this fact is reflected in the range of lawful punishment.

A sentencing system in the military must reflect the unique offenses under the UCMJ, and must serve the dual goals of justice and discipline. This proposal is therefore designed around the key principle of flexibility. A military sentencing scheme must be flexible enough to adjudge any lawful sentence when appropriate. Crimes committed in combat, for example, may severely aggravate an offense if the accused put the unit or mission at risk, or may mitigate an offense committed during or after intense operations. Courts-martial, while often trying crimes similar to those in civilian courts, need to have the flexibility to impose an appropriate sentence stemming from extreme situations (or unique military contexts).

Accordingly, this proposal directs the establishment of two forms of guidance for military judges in determining an appropriate sentence: "sentencing parameters" and "sentencing criteria." A sentencing parameter would provide an upper and lower limit on the sentence that may be imposed, but one that the military judge could depart from when warranted by the facts of a case and to fashion an individualized sentence for the offender. Sentencing criteria would consist of factors that aggravate or mitigate the severity of an offense and

that the military judge must consider, but would not constrain the development of an appropriate sentence.

In short, this proposal would retain flexibility in sentences, recognizing the unique offenses and circumstances of military justice; it would continue the current emphasis on rehabilitation of an accused; and it would alter current practice by providing guidance to the judge on how to fashion an appropriate sentence.

The proposal would be implemented as follows:

Interim Period. This Report's proposals generally become effective one year after enactment. For sentencing parameters and criteria, this proposal calls for implementation within four years of enactment. This transitional period allows time for the Board to collect and analyze sentencing data, propose sentencing parameters and criteria, and submit the proposals to the President for approval. This proposal also requires the President to establish interim guidance during this period until parameters become effective.

Sentencing Parameters and Criteria Board. Upon enactment, the proposed amendment of Article 56 would establish a Board within the Department of Defense to develop sentencing parameters and criteria, as well as review and recommend changes to sentencing rules and procedures. The Board would develop and propose either sentencing parameters or criteria for all military offenses. Proposals for sentencing parameters and criteria would require approval by the President to take effect. The five-member board would be composed of the chief trial judge from each service (plus a designated trial judge from either the Navy or Marine Corps, depending on the service affiliation of the chief trial judge of the Navy-Marine Corps Trial Judiciary). The Secretary of Defense would designate one member to serve as Chair, and one as Vice-Chair. *Ex-officio* members would be designated by the Attorney General, the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of the Joint Chiefs of Staff, and the Department of Defense General Counsel. Board members would serve as a collateral duty. The Department of Defense would provide a full-time staff. The Board's proposals would be developed in consultation with advisory groups comprised of senior officers and enlisted members and practitioners selected by the services.

Sentencing Parameters. The proposal for Article 56 requires, within four years of enactment, the establishment of sentencing parameters for most offenses under the UCMJ. Similar to federal sentencing guidelines, a sentencing parameter anchors the discretion of a military judge within a specified range, but allows the military judge to exercise discretion in deviating from the established parameter.

Sentencing Criteria. For military unique offenses unsuitable for sentencing parameters this proposal would require the development of sentencing criteria. Sentencing criteria are offense specific factors that the military judge must consider in determining a proper sentence, but that do not direct a particular sentence. Sentencing criteria apply to all offenses for which a sentencing parameter is not established. Sentencing criteria may also provide guidance about when a punishment is appropriate or inappropriate, and the proper consideration of collateral effects of a sentence. For example, a punitive discharge

deprives a servicemember of substantially all benefits administered by the Department of Veterans Affairs and the Department of Defense. In cases with a retirement eligible accused, a punitive discharge deprives the accused, and their dependents, of receiving retired pay and benefits.[43] Sentencing criteria established by the President could assist the military judge in determining how to determine an appropriate sentence, but would not direct any particular sentence.

When sentencing parameters and criteria take effect, this proposal would sunset the mandatory punitive discharge provisions in Article 56(b). This would eliminate a current incongruity in the system where designated sex offenses result in mandatory discharge, but there is no equivalent mandatory discharge for other serious crimes such as murder. Mandatory discharges have the potential to distort sentencing proceedings in an undesirable fashion. As a collateral consequence of a dishonorable discharge or dismissal an accused loses essentially all benefits administered by their Service and the Department of Veterans Affairs. The mandatory discharge provisions prohibit alternative resolutions of a case (such as confinement and administrative separation). A purpose of establishing sentencing parameters is to provide sufficient guidance to military judges as to make mandatory minimum sentences unnecessary. This recommendation, combined with the proposal to allow for government appeals of sentences, provides sufficient protections against improper sentences, but also eliminates the current incongruity where only one type of offense has a mandatory discharge.

Appeals. Under this proposal, Article 56 would address the standards for appealing sentences. Both the government and the accused could appeal a sentence, although under different circumstances. Both the government and the accused could file an appeal if the sentence was unlawful, incorrectly calculated, or plainly unreasonable. The government would not be permitted to file an appeal during the interim period prior to the establishment of sentencing parameters, and an appeal by the government after parameters are established would require the approval of the Judge Advocate General.

The general structure of this subsection is adopted from 18 U.S.C. § 3742, with modifications that reflect military practice.

Recommendation 56.3: Incorporate Article 56a into Article 56 without substantive change.

Article 56a allows for a sentence of confinement for life without the eligibility of parole any time a life sentence is authorized. The article also specifies the limited circumstances under which a sentence to life without parole can be reduced. Relief is limited to action under Article 60, appellate review, a Presidential pardon, and clemency personally granted by the Service Secretary under Article 74.[44] Clemency by the Secretary may not be taken until after 20 years.

[43] *See, e.g.* Army Pamphlet 27-9 ("Military Judges' Benchbook") pg. 104, 10 September 2014.

[44] The 2014 amendment to Article 60 limited the convening authority's power to reduce the punishment in most serious offenses (i.e. a case where LWOP was adjudged).

This Report does not recommend any substantive change to Article 56a, but as part of the review of the UCMJ recommends that Article 56a be incorporated into Article 56, and that Article 56a be stricken.

Recommendation 56.4: Additional study of restitution in courts-martial.

Article 6b(a)(6) provides that a victim has the "right to receive restitution as provided in law." As a matter of current practice, non-statutory restitution may be included in pretrial agreements in guilty plea cases,[45] and a limited form of restitution related to property damage is available outside the sentencing process in the form of deductions from pay under Article 139. The congressionally-chartered Judicial Proceedings Panel is considering whether additional options for restitution should be provided in connection with sexual offense proceedings.[46] Given the limited jurisdiction of courts-martial over personal property and assets, it may be necessary to consider options outside the military sentencing process, and beyond the scope of this Report, for purposes of developing an effective restitution program. Because such options would include consideration of administrative and judicial procedures outside the military justice system, this Report recommends that development of any statutory changes regarding restitution take place after the Judicial Proceedings Panel presents its recommendations.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference and MJRG Operational Guidance by more closely aligning the UCMJ with federal civilian practice, while accounting for unique circumstances specific to military practice.

The substantive recommendations in this proposal assume enactment of this Report's proposal for judge-alone sentencing, as sentencing parameters and non-unitary sentencing are infeasible for panels. First, the instructions necessary for a panel to implement sentencing parameters would be onerously complex. Second, the voting requirements would be difficult to apply if the panel were to vote on individual sentences for each offense.

8. Legislative Proposal

SEC. 801. SENTENCING.

(a) IN GENERAL.—Section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), is amended to read as follows:

[45] *See, e.g.*, R.C.M. 705(c)(2)(C).

[46] *See* NDAA FY 2014, Pub. L. No. 113- 66, § 1731(b)(1)(D), 127 Stat. 672 (2013).

"§856. Art. 56. Sentencing

"(a) SENTENCE MAXIMUMS.—The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

"(b) SENTENCE MINIMUMS FOR CERTAIN OFFENSES.—(1) Except as provided in subsection (d) of section 853a of this title (article 53a), punishment for any offense specified in paragraph (2) shall include dismissal or dishonorable discharge, as applicable.

"(2) The offenses referred to in paragraph (1) are as follows:

"(A) Rape under subsection (a) of section 920 of this title (article 120).

"(B) Sexual assault under subsection (b) of such section (article).

"(C) Rape of a child under subsection (a) of section 920b of this title (article 120b).

"(D) Sexual assault of a child under subsection (b) of such section (article).

"(E) An attempt to commit an offense specified in subparagraph (A), (B), (C), or (D) that is punishable under section 880 of this title (article 80).

"(c) IMPOSITION OF SENTENCE.—

"(1) IN GENERAL.—In sentencing an accused under section 853 of this title (article 53), a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—

"(A) the nature and circumstances of the offense and the history and characteristics of the accused;

"(B) the impact of the offense on—

"(i) the financial, social, psychological, or medical well-being of any victim of the offense; and

"(ii) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;

"(C) the need for the sentence—

"(i) to reflect the seriousness of the offense;

"(ii) to promote respect for the law;

"(iii) to provide just punishment for the offense;

"(iv) to promote adequate deterrence of misconduct;

"(v) to protect others from further crimes by the accused;

"(vi) to rehabilitate the accused; and

"(vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service;

"(D) the sentences available under this chapter; and

"(E) the applicable sentencing parameters or sentencing criteria prescribed under this section.

"(2) APPLICATION OF SENTENCING PARAMETERS IN GENERAL AND SPECIAL COURTS-MARTIAL.—

"(A) Except as provided in subparagraph (B), in a general or special court-martial in which the accused is convicted of an offense with a sentencing parameter under subsection (d), the military judge shall sentence the accused for that offense within the applicable parameter.

"(B) The military judge may impose a sentence outside a sentencing parameter upon finding specific facts that warrant such a sentence. The military judge shall include in the record a written statement of the factual basis for any sentence under this subparagraph.

"(3) USE OF SENTENCING CRITERIA IN GENERAL AND SPECIAL COURTS-MARTIAL.—In a general or special court-martial in which the accused is convicted of an offense with sentencing criteria under subsection (d), the military judge shall consider the applicable sentencing criteria in determining the sentence for that offense.

"(4) OFFENSE BASED SENTENCING IN GENERAL AND SPECIAL COURTS-MARTIAL.—In announcing the sentence under section 853 of this title (article 53) in a general or special court-martial, the military judge shall, with respect to each offense of which the accused is found guilty, specify the term of confinement, if any, and the amount of the fine, if any. If the accused is sentenced to confinement for more than

one offense, the military judge shall specify whether the terms of confinement are to run consecutively or concurrently.

"(5) NONAPPLICABILITY TO DEATH PENALTY.—Sentencing parameters and sentencing criteria are not applicable to the issue of whether an offense should be punished by death.

"(6) SENTENCE OF CONFINEMENT FOR LIFE WITHOUT ELIGIBILITY FOR PAROLE.—(A) If an offense is subject to a sentence of confinement for life, a court-martial may impose a sentence of confinement for life without eligibility for parole.

"(B) An accused who is sentenced to confinement for life without eligibility for parole shall be confined for the remainder of the accused's life unless—

"(i) the sentence is set aside or otherwise modified as a result of—

"(I) action taken by the convening authority or the Secretary concerned; or

"(II) any other action taken during post-trial procedure and review under any other provision of subchapter IX of this chapter;

"(ii) the sentence is set aside or otherwise modified as a result of action taken by a Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court; or

"(iii) the accused is pardoned.

"(d) ESTABLISHMENT OF SENTENCING PARAMETERS AND SENTENCING CRITERIA.—

"(1) IN GENERAL.—The President shall prescribe regulations establishing sentencing parameters and sentencing criteria in accordance with this subsection.

"(2) SENTENCING PARAMETERS.—(A) A sentencing parameter provides a delineated sentencing range for an offense that is appropriate for a typical violation of the offense, taking into consideration—

"(i) the severity of the offense;

"(ii) the guideline or offense category that would apply to the offense if the offense were tried in a United States district court;

"(iii) any military-specific sentencing factors; and

"(iv) the need for the sentencing parameter to be sufficiently broad to allow for individualized consideration of the offense and the accused.

"(B) Sentencing parameters established under paragraph (1)—

"(i) shall include no fewer than seven and no more than twelve offense categories;

"(ii) other than for offenses identified under paragraph (5)(B), shall assign each offense under this chapter to an offense category;

"(iii) shall delineate the confinement range for each offense category by setting an upper confinement limit and a lower confinement limit; and

"(iv) shall be neutral as to the race, sex, national origin, creed, sexual orientation, and socioeconomic status of offenders.

"(3) SENTENCING CRITERIA.—Sentencing criteria are factors concerning available punishments that may aid the military judge in determining an appropriate sentence when there is no applicable sentencing parameter for a specific offense.

"(4) MILITARY SENTENCING PARAMETERS AND CRITERIA BOARD.—

"(A) IN GENERAL.—There is established within the Department of Defense a board, to be known as the 'Military Sentencing Parameters and Criteria Board', hereinafter referred to in this subsection as the 'Board'.

"(B) VOTING MEMBERS.—The Board shall have five voting members, as follows:

"(i) The four chief trial judges designated under section 826(g) of this title (article 26(g)), except that, if the chief trial judge of the Coast Guard is not available, the Judge Advocate General of the Coast Guard may designate as a voting member a judge advocate of the Coast Guard with substantial military justice experience.

"(ii) A trial judge of the Navy, designated under regulations prescribed by the President, if the chief trial judges designated under section 826(g) of this title (article 26(g)) do not include a trial judge of the Navy.

"(iii) A trial judge of the Marine Corps, designated under regulations prescribed by the President, if the chief trial judges designated under section 826(g) of this title (article 26(g)) do not include a trial judge of the Marine Corps.

"(C) NONVOTING MEMBERS.—The Attorney General, the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of the Joint Chiefs of Staff, and the

General Counsel of the Department of Defense shall each designate one nonvoting member of the Board.

"(D) CHAIR AND VICE-CHAIR.—The Secretary of Defense shall designate one voting member as chair of the Board and one voting member as vice-chair.

"(5) DUTIES OF BOARD.—

"(A) As directed by the President, the Board shall submit to the President for approval—

"(i) sentencing parameters for all offenses under this chapter, other than offenses that are identified by the Board as unsuitable for sentencing parameters; and

"(ii) sentencing criteria to be used by military judges in determining appropriate sentences for offenses that are identified as unsuitable for sentencing parameters.

"(B) For purposes of this paragraph, an offense is unsuitable for sentencing parameters if—

"(i) the nature of the offense is indeterminate and unsuitable for categorization; and

"(ii) there is no similar criminal offense under the laws of the United States or the laws of the District of Columbia.

"(C) The Board shall consider the appropriateness of sentencing parameters for punitive discharges, fines, reductions, forfeitures, and other punishments authorized under this chapter.

"(D) The Board shall regularly review, and propose revision to, in consideration of comments and data coming to its attention, the sentencing parameters and sentencing criteria prescribed under subsection (d)(1).

"(E) The Board shall develop means of measuring the degree to which applicable sentencing, penal, and correctional practices are effective with respect to the sentencing factors and policies set forth in this section.

"(F) In fulfilling its duties and in exercising its powers, the Board shall consult authorities on, and individual and institutional representatives of, various aspects of the military criminal justice system. The Board shall establish separate advisory groups consisting of individuals with current or recent experience in command and in senior enlisted positions, individuals with experience in the trial of courts-martial, and such other groups as the Board deems appropriate.

"(G) The Board shall submit to the President proposed amendments to the rules for courts-martial with respect to sentencing proceedings and maximum punishments, together with statements explaining the basis for the proposed amendments.

"(H) The Board shall submit to the President proposed amendments to the sentencing parameters and sentencing criteria, together with statements explaining the basis for the proposed amendments.

"(I) The Board may issue nonbinding policy statements to achieve the Board's purposes and to guide military judges in fashioning appropriate sentences,

including guidance on factors that may be relevant in determining where in a sentencing parameter a specification may fall, or whether a deviation outside of the sentencing range may be warranted.

"(J) The Federal Advisory Committee Act shall not apply with respect to the Board or any advisory group established by the Board.

"(6) VOTING REQUIREMENT.—An affirmative vote of at least three members is required for any action of the Board under this subsection.

"(e) APPEAL OF SENTENCE BY THE UNITED STATES.—(1) With the approval of the Judge Advocate General concerned, the Government may appeal a sentence to the Court of Criminal Appeals, on the grounds that—

"(A) the sentence violates the law;

"(B) in the case of a sentence for an offense with a sentencing parameter under this section, the sentence is a result of an incorrect application of the parameter; or

"(C) the sentence is plainly unreasonable.

"(2) An appeal under this subsection must be filed within 60 days after the date on which the judgment of a court-martial is entered into the record under section 860c of this title (article 60c).

"(3) The Government may appeal a sentence under this section only after sentencing parameters are first prescribed under subsection (f).".

(b) CONFORMING AMENDMENT.—Section 856a of title 10, United States Code (article 56a of the Uniform Code of Military Justice), is repealed.

(c) IMPLEMENTATION OF SENTENCING PARAMETERS AND CRITERIA.—(1) Not later than four years after the date of the enactment of this Act, the President shall prescribe the regulations for sentencing parameters and criteria required by subsection (d) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice).

(2) Not later than one year after the date of the enactment of this Act, the President shall prescribe interim guidance for use in sentencing at courts-martial before the implementation of sentencing parameters and criteria pursuant to the regulations referred to in paragraph (1). Insofar as the President considers practicable, the interim guidance shall be consistent with the purposes and procedures set forth in subsections (c) and (d) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), taking into account the interim nature of the guidance. For purposes of sentencing under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), the interim guidance shall be treated as sentencing parameters and criteria.

(3) The President shall prescribe the effective dates of the regulations referred to in paragraph (1) and of the interim guidance referred to in paragraph (2).

(d) PROSPECTIVE REPEAL OF SENTENCE MINIMUMS FOR CERTAIN OFFENSES.—Upon the taking effect of sentencing parameters for offenses specified in paragraph (2) of subsection (b) of section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), as in effect on the day after the date of the enactment of this Act—

(1) section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), is amended—

(A) in subsection (a), by striking "(a) SENTENCE MAXIMUMS.—"; and

(B) by striking subsection (b); and

(2) section 853a of title 10, United States Code (article 53a of the Uniform Code of Military Justice), is amended by striking subsections (c) and (d) and inserting the following new subsection:

"(c) LIMITATION ON ACCEPTANCE OF PLEA AGREEMENTS.—The military judge shall reject a plea agreement that—

"(1) contains a provision that has not been accepted by both parties; or

"(2) contains a provision that is not understood by the accused.".

9. Sectional Analysis

Section 801 would amend Article 56, which provides the authority for the President to set maximum punishments for UCMJ violations, subject to any maximum or mandatory punishments Congress has established in the UCMJ. The President has exercised this authority in two ways: (1) by limiting the types of punishments that may be imposed at a court-martial to those specified in R.C.M. 1003; and (2) by limiting the amount of confinement, forfeitures, or the type of punitive discharge that may be imposed at a court-martial.

The proposed amendments would align court-martial sentencing procedures with the proposal for judicial sentencing in all non-capital general and special courts-martial. *See* Section 716, *supra.* The amendments are designed to be phased in over a four-year period to enable military sentencing to benefit from the experiences of state and federal civilian courts in sentencing reform, while adapting the lessons learned from those experiences to the special needs of the military justice system. The amendments also would increase the transparency of military sentencing practices and provide additional structure in sentencing, while retaining flexibility in determining an appropriate sentence for the individual.

The amendments proposed in Section 801 would take effect in two phases, as follows:

Phase One. The first phase would begin on the date the legislation is enacted. During the first phase, the Military Sentencing Parameters and Criteria Board (the Board) would begin the process of gathering sentencing data for the development of sentencing parameters and criteria. During this Phase, the President would establish interim guidance, to become effective upon the effective date of the legislation. The Board would be primarily responsible for developing the interim guidance. In this phase, judicial sentencing in all non-capital general and special courts-martial would take effect. *See* Section 716, *supra*. Under judicial sentencing, the current adversarial sentencing process (which utilizes many of the procedural and evidentiary rules applicable during findings) would be modified to more closely align with the process used in civilian courts, in which all relevant information is presented to aid the judge in fashioning an appropriate sentence. The sentencing process during the first phase also would replace the current requirement to adjudge a unitary sentence, in which a single sentence is adjudged for all offenses for which there has been a finding of guilty without any explanation as to how the sentence was reached or which portions of the sentence are attributable to which offense.

In the first phase, which would be completed within four years after the legislation is enacted, the Board also would develop sentencing parameters and criteria to replace the interim guidance. The sentencing parameters and criteria proposed by the Board would be subject to approval by the President. As in many civilian courts, a sentencing parameter for an offense would set a boundary on the judge's discretion, subject to a departure for case specific reasons set forth by the judge in the record. Sentencing parameters would not be required for those offenses for which it would be impracticable to set a parameter, such as unique military offenses that vary greatly in seriousness depending on the context. The Board also would establish sentencing criteria—factors that a judge must consider when sentencing a case, but that do not propose a specific punishment. The implementation of parameters and criteria would draw upon best practices at the federal and state level, and would replace the current practice of adjudging sentences with little or no guidance. Until the parameters and criteria are implemented, the sentencing process would utilize the procedures set forth in Phase One.

Phase Two. In the second phase, which would begin four years after the legislation is enacted, the parameters and criteria approved by the President would apply to sentencing proceedings for general and special courts-martial. Military judges would utilize the parameters and criteria in conjunction with the segmented sentencing procedures and other changes in the sentencing process developed during Phase One. Military judges would retain discretion to sentence outside parameters in order to fashion individualized sentences, subject to a requirement to set forth on the record reasons for any departure.

Finally, once sentencing parameters are in place, this proposal would authorize government appeals of sentences and eliminate the requirement for mandatory minimum discharges. By addressing sentencing discretion through the use of parameters, Article 56 would reduce the need for rigid mandatory minimum sentences.

Section 801(a) would amend Article 56 in its entirety. As amended, Article 56 would contain the following provisions:

Article 56(a)-(b) would retain current law regarding maximum and minimum sentences, subject to Section 801(d), *infra.*

Article 56(c)(1) would enumerate factors the court-martial would be required to consider before imposing a sentence. The proposed factors are adapted from 18 U.S.C. § 3553(a).

Article 56(c)(2) would require the military judge to determine a sentence in accordance with the sentencing parameters established by the President. Consistent with federal civilian practice, a military judge could sentence outside the parameter based upon written factual findings that such a sentence is justified. This paragraph would not apply to summary courts-martial.

Article 56(c)(3) would require the military judge to consider sentencing criteria established by the President when determining a sentence. The sentencing criteria would provide factors for the military judge to consider, and would not direct any specific punishment. This paragraph would not apply to summary courts-martial.

Article 56(c)(4) would require the military judge to determine the appropriate amount of fine and confinement for each separate offense of which the accused is found guilty. The assignment of a specific sentence for each offense is designed to provide additional transparency to the parties and the public and advance the purposes of sentencing. With respect to all other punishments (discharges, reductions, forfeitures, and similar unique military punishments), the current practice of awarding a single sentence for all offenses would be retained, as these punishments are not readily segmented. To ensure the accused is not punished twice for what is substantially one offense, the military judge would be required to determine whether periods of confinement should run concurrently or consecutively. The requirement to determine whether sentences should run concurrently or consecutively is in the statute, and the process for making the determination is left to the Rules for Courts-Martial. A sentence to confinement for one offense that runs concurrently with the sentence to confinement of another offense would not increase the total period of

confinement for purposes of determining whether the period of confinement satisfies a jurisdictional predicate (i.e., confinement for more than six months) for an appeal as of right to the Court of Criminal Appeals under proposed revisions to Article 66(b)(1)(A). In general, this subsection envisions requiring military judges to impose concurrent sentences when the offenses involve the same act, transaction, or criminal objective and the same victim. This would be similar to the rules governing the grouping of offenses under § 3D1.2(a-b) of the United States Sentencing Commission Guidelines Manual. In other circumstances, the decision to have sentences run concurrently would be left to the discretion of the judge, informed by consideration of the purposes of sentencing. This paragraph would not apply to summary courts-martial.

Article 56(c)(5) would provide that sentencing parameters and criteria do not apply to the issue of whether an offense should be punished by death.

Article 56(c)(6) would incorporate Article 56a (Sentence of confinement for life without eligibility for parole) into Article 56 without substantive change. Article 56a would be repealed. *See* Section 801(b), *infra.*

Article 56(d)(1) would require the President to establish sentencing parameters and criteria.

Article 56(d)(2) would establish the requirements for sentencing parameters. Except for unique military offenses, all violations of the UCMJ would be assigned to between seven and twelve offense categories. Each offense category would specify a range of confinement and may include an appropriate range for other punishments such as discharges. The subsection also would prescribe the minimum requirements for each sentencing parameter.

Article 56(d)(3) defines sentencing criteria as factors that the military judge must consider when sentencing. Under the proposal, there are two types of sentencing criteria: criteria that inform how to punish a violation of a specific offense (e.g., factors that aggravate or mitigate the harm of a military offense); and criteria that inform when certain punishments may be appropriate or inappropriate (e.g., factors that inform when a reduction or discharge may be appropriate).

Article 56(d)(4) would create the Military Sentencing Parameters and Criteria Board to develop parameters and criteria. The Board would be created within the Department of Defense, and would be composed of the chief trial judge of each service, subject to the opportunity to detail alternate members when required by circumstances applicable to the Navy, Marine Corps, and Coast Guard. The chief trial judges would be detailed by the Judge Advocate General of each military Service and the Secretary of Defense would select a chair and vice-chair of the Board. Service on the Board would be a collateral duty. The Board would have non-voting members designated by the Attorney General, the Chief Judge of the Court of Appeals for the Armed Forces, the Chairman of the Joint Chiefs of Staff, and the

General Counsel of the Department of Defense. The Department of Defense would provide full-time staff to assist the Board.

Article 56(d)(5) would prescribe the duties of the Board. The Board would be required to develop sentencing parameters, criteria, and sentencing rules for submission to the President. The Board also could promulgate non-binding policies on sentencing. In fulfilling its duties, the Board would be required to consult with commanders, enlisted leaders, practitioners, and others. The Board would be required to establish two advisory groups. The first advisory group would be composed of senior officer and enlisted members who provide guidance on the effectiveness of military justice on discipline. The second advisory group would be composed of military justice practitioners.

Article 56(e) would provide for limited appeal of sentences by the government. This right would be available only after the establishment of sentencing parameters. Similar to 18 U.S.C. § 3742(b)(4), the government would be required to obtain the approval of the Judge Advocate General before filing an appeal on the sentence. Finally, such appeals would be limited to whether the sentence is illegal, calculated incorrectly, or is plainly unreasonable. In determining whether a sentence is plainly unreasonable, a Court of Criminal Appeals could, but would not be required to, presume that a sentence within a sentencing parameter is reasonable. The core of the subsection is taken from 18 U.S.C. § 3742, modified for military practice and reflecting the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005).

Section 801(b) is a conforming amendment.

Section 801(c) would require the President to prescribe the regulations for sentencing parameters and criteria required by Article 56(d), as amended, not later than four years after enactment of the bill. It also would require the President to prescribe interim guidance.

Section 801(d) would repeal Article 56(b) and Article 53a(d) upon the taking effect of sentencing parameters for the offenses specified in Article 56(b)(2) that have mandatory minimum punishments. *See also* Section 717, *supra.*

Article 32 – Preliminary Hearing
10 U.S.C. § 832

1. Summary of Proposal

This proposal would focus the preliminary hearing on an initial determination of probable cause prior to referring charges to a general court-martial; require a more comprehensive preliminary hearing report; and provide an opportunity for the government, the defense, and victims to submit additional information at the conclusion of the hearing pertinent to an appropriate disposition of the charges and specifications. The proposal would replace the statute's provision for a "recommendation" on disposition with a requirement for the preliminary hearing officer to analyze and organize the information from the proceeding in a manner designed to better assist the staff judge advocate and the convening authority in fulfilling their respective disposition responsibilities under Articles 30 and 34. Part II of the Report will address changes in the rules implementing Article 32 that would be required as a result of the proposed statutory amendments.

2. Summary of the Current Statute

Article 32, as recently amended by NDAA FY 2014 and NDAA FY 2015, requires completion of a preliminary hearing as a precondition to referral of charges to a general court-martial. The statute provides that the purpose of a preliminary hearing is limited to: (1) determining whether there is probable cause to believe the accused committed the offense; (2) determining whether there is jurisdiction over the accused and the offense(s); (3) considering the form of the charge(s); and (4) recommending "the disposition that should be made of the case." An impartial hearing officer, normally a judge advocate senior in rank to the accused, presides at the preliminary hearing and prepares a post-hearing report for the convening authority addressing probable cause, jurisdiction, the form of the charges, and the hearing officer's recommendation as to disposition. At the hearing, the accused, who must be advised of the charges, has the right to be represented by counsel, to cross-examine witnesses who testify, and to present evidence in defense and mitigation that is relevant to the purposes of the hearing. The hearing officer may consider uncharged misconduct, subject to providing notice to the accused and affording the accused the same opportunities for representation, cross-examination, and presentation of evidence as are available regarding the charges.

Article 32(d)(3) provides that a victim (including any military member) who declines to testify at the preliminary hearing cannot be required to do so. Under Article 32(e), the preliminary hearing must be recorded, and a copy of the recording must be provided to a victim upon request. The requirements of Article 32 are binding on all convening authorities; however, failure to follow them does not constitute jurisdictional error.

3. Historical Background

Article 32 traces its history to the 1920 amendments to the Articles of War, which grew out of the post-World War I debates concerning the administration of military justice in the Army during the war.[1] A significant concern raised during the hearings and debates concerned the practice under which "a soldier may be put on trial by a commanding officer's arbitrary discretion, without any preliminary inquiry into the probability of the charge."[2] The 1920 amendments to the Articles of War established a requirement that:

> No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides . . . .[3]

The goal of this statutory pretrial investigation was to ensure adequate preparation of cases; to guard against hasty, ill-considered charges; to save innocent persons from the stigma of unfounded charges; and to prevent trivial cases from going before general courts-martial.[4]

The post-World War II military justice debates resulted in a series of amendments to the Articles of War known as the Elston Act.[5] Among the changes, Congress moved "pretrial investigations" to Article 46 and amended the statute to permit the accused to be

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[1] AW 70 of 1920. Like the rest of the Articles of War, this requirement applied only to the United States Army. Discipline in the Navy was controlled by the Articles for the Government of the Navy, which contained no statutory provision for a pretrial investigation. The Articles for the Government of the Navy were adopted in 1862 and had not been substantially amended since that time. Coast Guard Disciplinary Regulations called for a "careful investigation into the circumstances on which the complaint is founded" and a written report which included available witnesses and evidence.

[2] WAR DEPARTMENT, MILITARY JUSTICE DURING THE WAR 63 (1919). It was also during this time that the Army first developed the criminal investigative division within the Military Police Corps to conduct criminal investigations. However, at this early stage, investigators were selected from military police units within each individual command, and they generally lacked investigative training and experience. The Navy's criminal investigative organization did not develop until 1945, when the Office of Naval Intelligence charter was expanded to include criminal investigations.

[3] AW 70 of 1920.

[4] Humphrey v. Smith, 336 U.S. 695, 698-99 (1949) (citing WAR DEPARTMENT, MILITARY JUSTICE DURING THE WAR 63 (1919)).

[5] Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 627.

represented by counsel at the investigation.[6] Two years later, Congress consolidated the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Rules for the Coast Guard into the UCMJ and incorporated the requirement for a pretrial investigation.[7] The language of Article 32 outlining its purpose, however, remained essentially the same as under the original statute under the 1920 Articles of War: an inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case "in the interest of justice and discipline."[8]

Subsequent to enactment of the UCMJ, the statutory provisions governing the Article 32 investigation remained largely unchanged over the next six decades, with only minor technical and clarifying amendments. The Military Justice Amendments of 1981 clarified the accused's right to individual military counsel at the investigation and aligned the right to counsel in Article 32(b) with the right to counsel under Article 27 and the duties of counsel contained in Article 38.[9] NDAA FY 1996 amended the statute to provide for the investigation of uncharged misconduct,[10] and NDAA FY 2012 expanded the subpoena authority under Article 47 to include a subpoena to compel the production of documents and evidence issued in connection with an Article 32 investigation.[11]

In NDAA FY 2014, Congress revised Article 32 in its entirety, with the new provisions applying to offenses committed on or after December 27, 2014.[12] The Joint Explanatory Statement accompanying the final bill noted that the legislation "changes Article 32, UCMJ, proceedings from an investigation to a preliminary hearing."[13] The statement drew the

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[6] AW 46(b) of 1948 ("The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general court-martial jurisdiction over the command . . . ."). As Congress was enacting the Elston Act, the Navy was conducting a review of the Articles for Government of the Navy. Although these Articles did not require a pretrial investigation, internal Service regulations called for an inquiry by the officer recommending court-martial, who could order a board of investigation or court of inquiry if additional development of the facts was needed. *See* SYNOPSIS OF RECOMMENDATIONS FOR THE IMPROVEMENT OF NAVAL JUSTICE, OFFICE OF THE JUDGE ADVOCATE GENERAL, NAVY DEPARTMENT (1947), *available at* http://www.loc.gov/mwg-internal/de5fs23hu73ds/progress?id=yHs22rx0-_bQk8Zm_NTgo2FGtJbHsUEszdpj8uXPbRo.

[7] Act of May 5, 1950, ch. 169, 64 Stat. 108.

[8] Article 32(a) (1950-2013).

[9] Military Justice Amendments of 1981, Pub. L. No. 97-81, § 4, 95 Stat. 1085.

[10] NDAA FY 1996, Pub. L. No. 105-85, § 1131, 111 Stat. 1759 (1997).

[11] NDAA FY 2012, Pub. L. No. 112-81, § 542, 125 Stat 1298 (2011); *see* R.C.M. 703(e)(2)(c)(1).

[12] NDAA FY 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 672 (2013). NDAA FY 2015 subsequently amended the new Article 32 to apply to all hearings held on or after December 27, 2014, irrespective of the date of the offenses. NDAA FY 2015, Pub. L. No. 113-291, § 531(a)(4), 128 Stat. 3292 (2014).

[13] 159 CONG. REC. H7949 (daily ed. Dec. 12, 2013) (Joint Explanatory Statement on H.R. 3304).

following contrast between an Article 32 "investigation" under then-current law and an Article 32 "preliminary hearing" under the new version of Article 32:

> Under current law and Rule 405 of the Rules for Courts-Martial, an Article 32, UCMJ investigation includes an inquiry into the truth of the matters set forth in the charges, provides a means to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, and serves as a tool of discovery. The agreement establishes that an Article 32, UCMJ, preliminary hearing has a narrower objective: (1) Determine whether there is probable cause to believe an offense has been committed and that the accused committed the offense; (2) Determine whether the convening authority has court-martial jurisdiction over the offense and the accused; (3) Consider the form of the charges; and (4) Recommend the disposition that should be made of the case.[14]

Subsequently, Congress approved a technical amendment to the new Article 32 to clarify that the accused, as under prior law, could waive the Article 32 proceeding.[15]

4. Contemporary Practice

The new Article 32 provisions apply to all preliminary hearings held on or after December 27, 2014. A recent executive order contains the implementing rules and procedures for the new Article 32, including a new R.C.M. 404A addressing disclosure of matters to the defense before the preliminary hearing.[16] The substance of the new statute and the new implementing provisions have not been addressed in reported appellate decisions.[17] Part II of this Report will further consider contemporary practice in light of any developments in the implementing rules or the applicable case law concerning Article 32.

5. Relationship to Federal Civilian Practice

There is not a direct corollary to the Article 32 hearing in federal civilian practice. Both the prior Article 32 investigation and the current Article 32 preliminary hearing have been compared to two distinct types of civilian proceedings—a civilian grand jury and a judicial probable cause hearing.[18] The current Article 32 preliminary hearing has some of the traits of both, and possesses other traits common to neither.

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[14] *Id.*

[15] NDAA FY 2015, Pub. L. No. 113-291, § 531(a)(4), 128 Stat. 3292 (2014).

[16] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

[17] *See* Manual for Courts-Martial; Proposed Amendments, 79 Fed. Reg. 59,938-59,942 (Oct. 3, 2014).

[18] *See, e.g.*, Lawrence J. Sandell, *The Grand Jury and the Article 32: A Comparison*, 1 N. KY. L. REV. 25 (1973); *see also* REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (May 2014) (comparing the prior Article 32 investigation and the new Article 32 preliminary hearing to the civilian preliminary hearing, and identifying two major differences: (1) unlike civilian preliminary hearings, Article 32 hearings have traditionally served as a discovery tool for the defense; and (2) unlike

In federal civilian criminal trials, the right to a grand jury is established through the Fifth Amendment to the Constitution and is implemented in the Federal Rules of Criminal Procedure, which recognize the right to grand jury indictment in all felony cases.[19] The Supreme Court has described the purpose and powers of the grand jury in expansive terms:

> [The grand jury] serves the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions. It has . . . extraordinary powers of investigation and great responsibility for directing its own efforts. . . . Without thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution.[20]

The U.S. Attorney's Manual, however, describes a narrower role for grand jurors:

> While grand juries are sometimes described as performing accusatory and investigatory functions, the grand jury's principal function is to determine whether or not there is probable cause to believe that one or more persons committed a certain Federal offense within the venue of the district court. . . . The grand jury's power, although expansive, is limited by its function toward possible return of an indictment . . . [and] cannot be used solely to obtain additional evidence against a defendant who has already been indicted [or] used solely for pre-trial discovery or trial preparation.[21]

Although the grand jury is often described as an independent body—and grand juries do act with independence in many areas—the Supreme Court has stated that it is "an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses."[22] This specifically includes the ability of the grand jury to issue subpoenas. However, the court's ability to exercise its supervisory power over grand juries is limited.[23]

Regular federal grand juries are standing bodies, impaneled for up to eighteen months, although they may actually sit for as little as once a month. Grand juries have a maximum of 23 members, with 16 needed for a quorum. An indictment may be returned by a vote of 12

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civilian preliminary hearings, the Article 32 hearing officer's determination regarding probable cause is not binding on the convening authority).

[19] FED. R. CRIM. P. 7(a).

[20] United States v. Sells Engineering, Inc., 463 U.S. 418, 423 (1983) (internal quotations and citations omitted).

[21] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-11.101 (1997) [hereinafter USAM].

[22] Brown v. United States, 359 U.S. 41, 49 (1959).

[23] *See* United States. v. Williams, 504 U.S. 36 (1992) ("Given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure.").

or more members.[24] The grand jury does not conduct its business in open court, and a federal judge does not preside over its proceedings. It meets behind closed doors, in secret, with only the grand jurors, the attorney for the government, witnesses, a recorder, and possibly an interpreter present. The target of a grand jury investigation or a potential defendant may request to appear and testify before the grand jury, but may actually appear only if invited or subpoenaed and may not be accompanied by counsel while testifying. In addition, a potential defendant has no right to cross-examine witnesses and no right to introduce evidence in rebuttal. Hearsay evidence is generally permissible at the grand jury proceeding, and there is no legal requirement for the prosecutor to present exculpatory evidence.[25]

There are four possible outcomes from a federal grand jury investigation: (1) an indictment, in which the grand jury accuses an individual investigated of a specific crime and the government is authorized to proceed to trial; (2) a vote not to indict, which is binding on the government unless the U.S. Attorney specifically authorizes the case to be re-presented to the same or a different grand jury; (3) the discharge or expiration of the grand jury without any action; or (4) the submission of a presentment or report to the court.[26] In the majority of cases that go before a grand jury, the government will have already conducted a criminal investigation, and is primarily seeking an indictment. In these cases, the attorney for the government will present evidence to the grand jury, including testimony from criminal investigators or law enforcement agents, in order to establish probable cause for the indictment. In other cases, however, the investigation will be incomplete before the grand jury stage, and the grand jury—either on its own initiative or at the suggestion of the attorney for the government—will investigate the matter presented by the government. In its investigative capacity, the grand jury has the power to issue subpoenas to compel the testimony of witnesses and the production of documents

[24] FED. R. CRIM. P. 6(a) and (f).

[25] *See Williams*, 504 U.S. at 55 ("[W]e conclude that courts have no authority to prescribe such a duty [to disclose exculpatory evidence to the grand jury] pursuant to their inherent supervisory authority over their own proceedings."). Although there is not a legal requirement, Department of Justice policy requires a prosecutor who is personally aware of substantial evidence that directly negates the guilt of a subject to disclose that evidence to the grand jury before seeking an indictment. USAM, *supra* note 21, at § 9-11.241. *Cf.* R.C.M. 601(d)(1) (providing that charges may be referred to court-martial by a convening authority "based on hearsay in whole or in part" and that "[t]he convening authority or judge advocate may consider information from any source . . . ."); R.C.M. 701(a)(6) (requiring the trial counsel to disclose to the defense "as soon as practicable" evidence known to the trial counsel that reasonably tends to negate the guilt of the accused of an offense charged, reduce the degree of guilt, or reduce the punishment).

[26] *See generally* SUSAN W. BRENNER, GREGORY C. LOCKHART & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE, 1 FED. GRAND JURY § 3:4 (2d ed., 2006). At common law, 'indictments' were returned based upon evidence presented to the grand jury, while 'presentments' were "the notice taken by the grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them. . . ." Presentments are no longer a common practice.

and physical evidence.[27] A grand jury uses the court's subpoena power, as provided in Fed. R. Crim. P. 17.

In addition to the grand jury, federal civilian practice also provides for an adversarial preliminary hearing, to be conducted between 14-21 days following a not-yet-indicted accused's initial appearance following arrest.[28] The hearing is presided over by a federal magistrate judge, whose role is to determine whether there is probable cause for the charges. If there is probable cause, the magistrate judge "binds over" the charges for felony trial (pending indictment) in U.S. district court; if there is not probable cause, the magistrate judge dismisses the complaint.[29] The purpose of this proceeding is to provide the accused a procedural protection against baseless charges early in the life of a case in situations where the government has not yet sought or obtained a grand jury indictment.[30]

With respect to state practice, the Constitutional guarantee of prosecution by grand jury indictment is not applicable to the states,[31] and the Supreme Court has held that independent judicial screening of felony-level charges through a preliminary hearing is not a due process requirement.[32] Nevertheless, all American jurisdictions provide at least one procedural avenue for obtaining such a screening, and nearly two-thirds of the states allow for filing of felony-level charges without a prior grand jury indictment.[33] Instead, most of these states allow felony cases to be brought following an adversarial preliminary hearing similar to the one provided for by Fed. R. Crim. P. 5.1. Six of these states permit bypassing the preliminary hearing through direct filing of an information (a charging instrument filed with the court similar in both content and function to charges that are referred to a court-martial).[34] In these direct filing jurisdictions, the trial judge makes an ex parte probable

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[27] *Cf.* R.C.M. 703(e)-(f), as amended by Exec. Order No. 13,669, 79 Fed. Reg. 34,999 (June 18, 2014) (providing trial counsel and the Article 32 investigating officer with the power to issue subpoena duces tecum prior to referral of charges to court-martial in support of the investigation).

[28] FED. R. CRIM. P. 5.1(c). The rule requires the preliminary hearing to take place within 14 days of the initial appearance only when the accused is in custody.

[29] FED. R. CRIM. P. 5.1(e)-(f); *see* WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, AND ORIN KERR, CRIMINAL PROCEDURE §14.1(a) (Screening) (3d ed. 2013).

[30] *See* LAFAVE ET AL., *supra* note 29, at § 14.1 (Functions of the preliminary hearing) (3d ed. 2013) ("Preliminary hearing screening is said to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, to save the defendant from the humiliation and anxiety involved in public prosecution, and to ensure that there are substantial grounds upon which a prosecution may be based."). Under FED. R. CRIM. P. 5.1(a)(2), the government can bypass the preliminary hearing requirement by securing a prior grand jury indictment.

[31] Hurtado v. California, 110 U.S. 516 (1884).

[32] Lem Woon v. Oregon, 229 U.S. 586 (1913).

[33] *See* LAFAVE ET AL., *supra* note 29, at § 14.1 (Indictment states) and § 14.2(d) (Information states).

[34] *Id*. The "direct filing" states include Florida, Iowa, Montana, Minnesota, Vermont, and Washington. Of these states, Minnesota and Vermont have eliminated the preliminary hearing entirely. *Id.*

cause determination after the filing of the information by the prosecutor, by reviewing the charges and the prosecutor's sworn affidavit summarizing the available evidence.[35]

Like Article 32 hearings, state-level preliminary hearings are generally adversarial in nature. The accused has a right to counsel and to cross-examine witnesses; though in the majority of jurisdictions the rules of evidence do not apply, except with respect to privileges.[36] Most jurisdictions recognize a general defense right to present defense witnesses at the preliminary hearing.[37] However, "[w]here the magistrate has reason to believe that the defense is calling a witness to obtain further discovery of the prosecution's case, the magistrate may require the defense to make an offer of proof as to what will be obtained from the witness' testimony."[38] Furthermore, in most jurisdictions, magistrate judges will not allow subpoenas of crime victims to testify at the preliminary hearing, or at any pretrial proceeding, unless it can be shown that they are likely to be unavailable to testify at trial.[39]

The primary purposes of preliminary hearings in both federal and state practice—similar to the primary purposes of Article 32 and its statutory predecessors in the Articles of War—are to prevent hasty, malicious, improvident, or oppressive prosecutions; to ensure that there are substantial grounds upon which a prosecution may be based; and to avoid the unnecessary public expense of an unwarranted trial.[40] To ensure these purposes are fulfilled, the magistrate judge's probable cause determination is generally binding on the government.[41] Preliminary hearings also serve several prosecution and public policy goals, including: helping to inform the decision by the government whether to proceed with criminal prosecution at the felony trial court; informing the ultimate decision by the

[35] *Id.*; *see, e.g.*, MINN. R. CRIM. P. 2.01.

[36] LAFAVE ET AL., *supra* note 29, at § 14.4 (Preliminary hearing procedures). The right to cross-examine witnesses at a preliminary hearing is based on local law only, as the Supreme Court has long held that cross-examination at a preliminary hearing is not required by the confrontation clause of the Sixth Amendment. *See* Goldsby v. United States, 160 U.S. 70 (1895).

[37] LAFAVE ET AL., *supra* note 29, at § 14.4(d).

[38] *Id.*

[39] *Id.*; *see also id.* at § 20.2(e) (Depositions) (explaining that in the vast majority of jurisdictions, so-called "discovery depositions" are not allowed).

[40] *Id.* at § 14.1(a). *Cf.* Humphrey v. Smith, 336 U.S. 695, 698-99 (1949) ("[The pretrial investigation's] original purposes were to insure adequate preparation of cases, to guard against hasty, ill-considered charges, to save innocent persons from the stigma of unfounded charges, and to prevent trivial cases from going before general courts-martial.") (referring to AW 70 of 1920, the predecessor to Article 32 of the UCMJ).

[41] LAFAVE ET AL., *supra* note 29, at § 14.3. In most jurisdictions, the consequence of the magistrate judge not finding probable cause is a dismissal without prejudice, with the ability for the prosecution to seek a new preliminary hearing with new evidence, or even with the same evidence. *Id.* at § 14.3(c). A minority group of states, however, prohibit refiling on the same evidence and provide for prosecution appeal of a dismissal to the trial court. *Id.*

accused with respect to his plea;[42] gaining the defense perspective as to what actually happened; promoting the victim's interest in pursuing the matter by presenting it in a public forum; and promoting public confidence in a sensitive prosecutorial decision by having the evidence presented in a public forum and the decision ratified by a neutral and detached magistrate (or, if the case is likely to be dismissed, by showing that the dismissal stemmed from deficiencies in the evidence rather than any favoritism on the part of the prosecutor).[43] For these reasons, in most states where there is an option to bypass the preliminary hearing with a grand jury indictment, prosecutors generally choose not to exercise this option.[44]

The recently enacted Article 32 preliminary hearing differs from its federal and state civilian counterpart in that the preliminary hearing officer does not exercise judicial powers with respect to the disposition of charges. Instead, the preliminary hearing and the report of the preliminary hearing officer serve primarily as vehicles for developing and analyzing information for consideration by the staff judge advocate and the convening authority. The responsibility for determining probable cause and jurisdiction, as well as the responsibility for making a decision on disposition, only arise after the preliminary hearing officer prepares and forwards the report required by Article 32. At that point, before the charges and specifications may be referred to a general court-martial for trial, the staff judge advocate makes a determination on the legal issues of probable cause, jurisdiction, and whether each specification states an offense under military law which is binding on the convening authority if any of the three are lacking. As a separate matter, the staff judge advocate makes an advisory recommendation on disposition to the convening authority, the officer charged with the responsibility for making the ultimate disposition decision.

6. Recommendation and Justification

Recommendation 32: Amend Article 32(a)-(c) by revising the current requirement for a disposition "recommendation" to focus the preliminary hearing officer more directly on providing an analysis of the information that will be useful in fulfilling the statutory responsibilities of: (1) the staff judge advocate, in providing legal determinations and a disposition recommendation to the convening authority under Article 34; and (2) the convening authority, in disposing of the charges and specifications "in the interest of justice and discipline" under Article 30.

- This proposal would retain the core purposes of the Article 32 preliminary hearing as amended—to determine whether or not each specification alleges an offense, whether or not there is probable cause to believe that the accused committed the

[42] *Id.* at § 14.1(e) ("The hearing may then provide a valuable 'educational process' for the defendant who is not persuaded by his counsel's opinion that the prosecution has such a strong case that a negotiated plea is in the defendant's best interest.").

[43] YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS & QUESTIONS 1015 (13th ed. 2012).

[44] *See id.* at § 14.2(d), noting that the bypass option is utilized in many state jurisdictions in less than ten percent of felony cases. This is different from the federal practice, where federal prosecutors routinely bypass scheduled preliminary hearings by obtaining prior indictments. *See id.* at § 14.2(b).

offense charged, and whether or not the convening authority has jurisdiction over the accused and the offense—while restructuring the current requirement for a disposition recommendation. As amended, the parties and any victim of an offense could submit additional matters relevant to disposition to the hearing officer, which the hearing officer would then organize and analyze in the preliminary hearing report. As such, the proposed amendments would retain the current limitations on the nature of the Article 32 preliminary hearing, while expanding the opportunity for victims and the accused to provide timely and useful input for consideration in the disposition decision-making process.

- The proposed amendments recognize that the preliminary hearing officer is in a unique position to organize and analyze the information developed during the preliminary hearing and—as will be developed more fully in the proposed implementing rules in Part II of this Report—a broader range of additional documentary information that the government, the accused, and the victim would be able to submit following the hearing. Under the proposed amendments, the hearing officer would use all of this information to assist and inform the staff judge advocate's recommendation and the convening authority's ultimate disposition decision.

- Under the proposal, the hearing officer's report would be required to include an analysis of whether each specification alleges an offense; whether there is probable cause to believe the accused committed the offense; whether any modifications to the specifications are needed; the evidence supporting the elements of each offense; a summary of witness testimony and documentary evidence; observations concerning the testimony of witnesses; additional information relevant to the convening authority's disposition decision under Articles 30 and 34; and a discussion of any uncharged offenses.

- The proposed amendments would emphasize that the primary responsibility for a disposition recommendation resides with the staff judge advocate under Article 34. Also, while not requiring the preliminary hearing officer to make a recommendation, the proposed legislation does not preclude the preliminary hearing officer from doing so, either when required by service regulations or by the convening authority in a particular case.

- As in the current statute, the proposal reflects that none of the preliminary hearing officer's conclusions would be binding on the convening authority, who is ultimately responsible for determining the appropriate disposition of the charges and specifications for each case in the interest of justice and discipline.

- This proposal reaffirms that a victim's desire not to testify at the preliminary hearing will not, alone, be grounds for ordering a deposition.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by incorporating, to the extent practicable and appropriate, the principles of law and the rules of procedure used in the trial of criminal cases in the United States district courts into military justice practice.
- This recommendation also supports the GC Terms of Reference by examining and incorporating where appropriate the recommendations, proposals and analysis of the Response Systems Panel—in particular, Recommendation 115 (concerning the ordering of depositions), Recommendation 116 (regarding the treatment of the hearing officer's recommendation), and Recommendation 55 (regarding creation and implementation of mechanisms requiring trial counsel to convey the victim's specific concerns and preferences to the convening authority regarding case disposition) of the Response Systems Panel's final report.
- This recommendation is related to the proposed amendments to Articles 30, 33 and 34 concerning the staff judge advocate's responsibility to provide a recommendation, the convening authority's responsibility to appropriately dispose of the case, and guidance concerning the exercise of disposition authority.

8. Legislative Proposal

SEC. 603. PRELIMINARY HEARING REQUIRED BEFORE REFERRAL TO GENERAL COURT-MARTIAL.

(a) IN GENERAL.—Section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), is amended by striking the section heading and subsections (a), (b), and (c), and inserting the following:

"§832. Art. 32. Preliminary hearing required before referral to general court-martial

"(a) IN GENERAL.—(1)(A) Except as provided in subparagraph (B), a preliminary hearing shall be held before referral of charges and specifications for trial by general court-martial. The preliminary hearing shall be conducted by an

impartial hearing officer, detailed by the convening authority in accordance with subsection (b).

"(B) Under regulations prescribed by the President, a preliminary hearing need not be held if the accused submits a written waiver to the convening authority and the convening authority determines that a hearing is not required.

"(2) The issues for determination at a preliminary hearing are limited to the following:

"(A) Whether or not the specification alleges an offense under this chapter.

"(B) Whether or not there is probable cause to believe that the accused committed the offense charged.

"(C) Whether or not the convening authority has court-martial jurisdiction over the accused and over the offense.

"(b) HEARING OFFICER.—(1) A preliminary hearing under this section shall be conducted by an impartial hearing officer, who—

"(A) whenever practicable, shall be a judge advocate who is certified under section 827(b)(2) of this title (article 27(b)(2)); or

"(B) in exceptional circumstances, shall be an impartial hearing officer, who is not a judge advocate so certified.

"(2) In the case of a hearing officer under paragraph (1)(B), a judge advocate who is certified under section 827(b)(2) of this title (article 27(b)(2)) shall be available to provide legal advice to the hearing officer.

"(3) Whenever practicable, the hearing officer shall be equal in grade or senior in grade to military counsel who are detailed to represent the accused or the Government at the preliminary hearing.

"(c) REPORT TO CONVENING AUTHORITY.—After a preliminary hearing under this section, the hearing officer shall submit to the convening authority a written report (accompanied by a recording of the preliminary hearing under subsection (e)) that includes the following:

"(1) For each specification, a statement of the reasoning and conclusions of the hearing officer with respect to determinations under subsection (a)(2), including a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations of the hearing officer concerning the testimony of witnesses and the availability and admissibility of evidence at trial.

"(2) Recommendations for any necessary modifications to the form of the charges or specifications.

"(3) An analysis of any additional information submitted after the hearing by the parties or by a victim of an offense, that, under such rules as

the President may prescribe, is relevant to disposition under sections 830 and 834 of this title (articles 30 and 34).

"(4) A statement of action taken on evidence adduced with respect to uncharged offenses, as described in subsection (f).".

(b) SUNDRY AMENDMENTS.—Subsection (d) of such section (article) is amended—

(1) in paragraph (1), by striking "subsection (a)" in the first sentence and inserting "this section";

(2) in paragraph (2), by striking "in defense" and all that follows through the end and inserting "that is relevant to the issues for determination under subsection (a)(2).";

(3) in paragraph (3), by adding at the end the following new sentence: "A declination under this paragraph shall not serve as the sole basis for ordering a deposition under section 849 of this title (article 49)."; and

(4) in paragraph (4), by striking "the limited purposes of the hearing, as provided in subsection (a)(2)." and inserting the following: "determinations under subsection (a)(2).".

(c) REFERENCE TO MCM.—Subsection (e) of such section (article) is amended by striking "as prescribed by the Manual for Courts-Martial" in the second sentence and inserting "under such rules as the President may prescribe".

(d) EFFECT OF VIOLATION.—Subsection (g) of such section (article) is amended by adding at the end the following new sentence: "A defect in a report under subsection (c) is not a basis for relief if the report is in substantial compliance with that subsection.".

9. Sectional Analysis

Section 603 would amend Article 32 to clarify current law concerning the requirement for and the conduct of preliminary hearings before referral of charges and specifications to general courts-martial for trial. The amendments would focus the preliminary hearing on an initial determination of probable cause, jurisdiction, and the form of the charges, and would provide for the production of evidence and the examination of witnesses to assist the preliminary hearing officer in making these determinations. In addition, the amendments would revise the requirement for a disposition recommendation—currently provided as a fourth, distinct purpose of the preliminary hearing—to focus the preliminary hearing officer more directly on providing a thorough analysis of the information developed at the hearing. The purpose of this analysis would be to inform the staff judge advocate's recommendation and the convening authority's ultimate disposition decision with respect to the charges and specifications in the case, rather than providing a disposition recommendation in summary form without supporting analysis. The report and the analysis contained within it would be advisory in nature and would be designed to assist the staff judge advocate and the convening authority. The analysis contained within the report would not provide a basis for complaint or relief when in substantial compliance with the requirements of the amended Article 32. As amended, Article 32 would contain the following provisions:

Article 32(a) would state the issues for determination at the preliminary hearing: (1) whether or not the specification alleges an offense under the UCMJ; (2) whether or not there is probable cause to believe that the accused committed the offense charged; and (3) whether or not the convening authority has court-martial jurisdiction over the accused and over the offense.

Article 32(b) would retain and clarify current law concerning the qualifications of the preliminary hearing officer.

Article 32(c) would require the preliminary hearing officer's report to include an analysis of whether each specification alleges an offense; whether there is probable cause to believe the accused committed the offense; any necessary modifications to the form of the charges and specifications; the state of the evidence supporting the elements of each offense; a summary of witness testimony and documentary evidence; a statement regarding the availability and admissibility of evidence; additional information relevant to disposition of

charges and specification under Articles 30 and 34; and a discussion of any uncharged offenses. The proposed amendments recognize that the primary responsibility for a disposition recommendation resides with the staff judge advocate under Article 34. Also, while not requiring the preliminary hearing officer to make a recommendation, the proposed legislation does not preclude the preliminary hearing officer from doing so, either when required by service regulations or by the convening authority in a particular case.

Article 32(c)(2) would provide the parties and any victim with the opportunity to submit additional information to the preliminary hearing officer for transmission for consideration by the convening authority with respect to disposition. The procedure for submission of additional information would be separate from the hearing, reflecting the broader range of information that may be pertinent to the exercise of disposition discretion. The implementing regulations would provide procedures for sealing or otherwise protecting sensitive or personal material in the additional information submitted by the parties or the victim.

Article 32(d)(3) would clarify that a victim's declination to participate in the Article 32 hearing "shall not serve as the sole basis for ordering a deposition" under Article 49. This change would ensure that a victim's declination under Article 32(d)(3) is not used to circumvent the limited purpose of depositions under Article 49: to preserve prospective witness testimony for use at trial, generally in cases where the prospective witness will be unavailable to testify in person. *See* Section 711, *infra.*

The proposed changes are based in part on a recognition that the convening authority's ultimate disposition decision depends on a broad range of factors relating to good order and discipline—of which the preliminary hearing officer may not be aware and which may not directly relate to the legal or factual strengths or weaknesses of the limited case as presented at the preliminary hearing—including those factors contained in the disposition guidance under the proposed new Article 33. In addition, consistent with the proposed amendments to Articles 46 and 47 (and as will be more fully developed in the Rules for Courts-Martial), the authority to issue pre-referral investigative subpoenas would be governed by a uniform policy that will apply throughout the process prior to referral, and would not be limited narrowly to Article 32 proceedings.