

FALL 2023 SUPPLEMENT TO
MODERN
MILITARY JUSTICE
(THIRD EDITION)

BY

LISA M. SCHENCK

*Associate Dean for National Security, Cybersecurity, and Foreign Relations Law
The George Washington University Law School*

AMERICAN CASEBOOK SERIES

West Group has created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. West Group is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

American Casebook Series and West Group are trademarks registered in the U.S. Patent and Trademark Office.

COPYRIGHT © 2023 By WEST GROUP

All rights reserved.

Printed in the United States of America.

PREFACE TO THE FALL 2023 SUPPLEMENT

The 2023 Supplement is a cumulative supplement that addresses the changes that Congress and the President have made to the Uniform Code of Military Justice (*hereinafter* UCMJ) and the materials included in the Manual for Courts-Martial, United States (2019 Ed.) (*hereinafter* MCM) since publication of the Third Edition.

The 2023 Supplement adds to the 2022 Supplement by including recent amendments to the UCMJ that were made in §§ 541-549C the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, 136 Stat. 2395 (Dec. 22, 2022) (*hereinafter* NDAA FY23), which is available here:

<https://www.congress.gov/117/plaws/publ263/PLAW-117publ263.pdf>

The text of the of the UCMJ, as amended, is available here:

<https://uscode.house.gov/view.xhtml?path=/prelim@title10/subtitleA/part2/chapter47&edition=prelim>

The 2023 Supplement also includes amendments to materials in the MCM made in Executive Order No. 14103, 88 Fed. Reg. 50535 (Jul. 28, 2023), which is available here:

<https://www.federalregister.gov/documents/2023/08/02/2023-16570/2023-amendments-to-the-manual-for-courts-martial-united-states>

A new version of the MCM that incorporates these changes is expected to be published in late 2023. Until then, military practitioners must consult both the MCM (2019 Ed.) and Executive Order No. 14103.

As a reminder, in addition to these most recent changes, Congress also made significant amendments to the UCMJ in the Military Justice Act of 2016 (MJA 2016), enacted in §§ 5001-5542 of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, 130 Stat. 2000 (Dec. 23, 2016), and additional amendments in §§ 531-538 of the National Defense Authorization Act for Fiscal Year 2018 (NDAA 2018), Pub. L. 115-91, 131 Stat. 1283 (Dec. 12, 2017), §§ 531-538 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA 2019), Pub. L. 115-232, 132 Stat. 1636 (Aug. 13, 2018), §§ 531-536 of the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), Pub. L. 116-92, 133 Stat. 1198 (Dec. 20, 2019), §§ 531-540N of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (NDAA 2021), Pub. L. 116-283, 134 Stat. 3388 (Jan. 1, 2021), and §§ 531-549M2022 National Defense Authorization Act for Fiscal Year 2022, Pub. L. 117-81, 135 Stat. 1541 (Dec. 27, 2021) (NDAA FY22). In addition, the President issued four executive orders making extensive amendments to the MCM. See Executive Order No. 13696, 80 Fed. Reg. 35783 (Jun. 17, 2015); Executive Order No. 13730, 81 Fed. Reg. 33331 (May 20, 2016);

Executive Order No. 13740, 81 Fed. Reg. 65175 (Sept. 16, 2016); and Executive Order No. 13825, 83 Fed. Reg. 9889 (Mar. 1, 2018).

I recommend that students, at a minimum, download the 2019 version of the MCM. Most of the amendments to the UCMJ and MCM apply to courts-martial convened after January 1, 2019. With so many changes to the military justice system in the past few years, in the transitional period, in which older cases are being completed and newer cases are being started, practicing military justice will be difficult.

Thanks to my research assistants, Austin Coyle and Jackson Kitchin, for their help in preparing this supplement.

LISA M. SCHENCK
Washington, D.C.
August 2023

SUPPLEMENT CONTENTS

Chapter 1. Overview of the Military Justice System

1-2. Overview of the System from Start to End	1
1-3. Jurisdiction Over Military Persons and Offenses	8
1-4. Role of the Commander and Unlawful Command Influence	9

Chapter 2. Judge Advocate Professional Responsibility

2-1. Military Lawyers for the Government, the Accused, and Victims	11
2-2. Standards Regarding Advocacy and Sixth Amendment Right to Effective Counsel	12

Chapter 3. Alternatives to Trial by Court-Martial

3-3. Nonjudicial Punishment.....	13
----------------------------------	----

Chapter 5. Pretrial Procedural Requirements

5-1. Preferral and Forwarding of Charges.....	14
5-2. Article 32, UCMJ, Preliminary Hearings	16
5-3. Staff Judge Advocate Pretrial Advice to the Convening Authority	17
5-4. Referral of a Case to Court-Martial	17

Chapter 6. Pretrial Decisions

6-3. Plea Agreements	20
6-4. Military Panel (Jury) Requirements and Selection.....	21

Chapter 7. Pretrial Motions and Interlocutory Appeals

7-2. Examples of Common Pretrial Motions	23
7-3. Article 62 Interlocutory Appeals by the United States	24

Chapter 8. Findings

8-3. Findings with Exceptions and Substitutions.....	25
--	----

2023 Supplement to MODERN MILITARY JUSTICE

Chapter 9. Military Sentencing

9-1. Introduction and Purposes	26
9-2. Lawful Punishments	27
9-4. The Death Penalty in the Military	28

Chapter 10. Post-Trial Review Procedures

10-4. Post-Trial Processing Time.....	29
---------------------------------------	----

Chapter 11. Appellate Review Procedures

11-2. Appeal to the Service Courts of Criminal Appeals	30
11-3. The U.S. Court of Appeals for the Armed Forces and Supreme Court Review	32
11-4. Parole, Boards for Correction of Military Records, and Pardons	32

Chapter 12. Military Crimes in General

12-1. Overview of the Punitive Articles	34
---	----

Chapter 13. Inappropriate Conduct Offenses

13-1. Conduct Unbecoming an Officer	35
13-3. Other Improper Conduct	35

Errata	38
---------------------	----

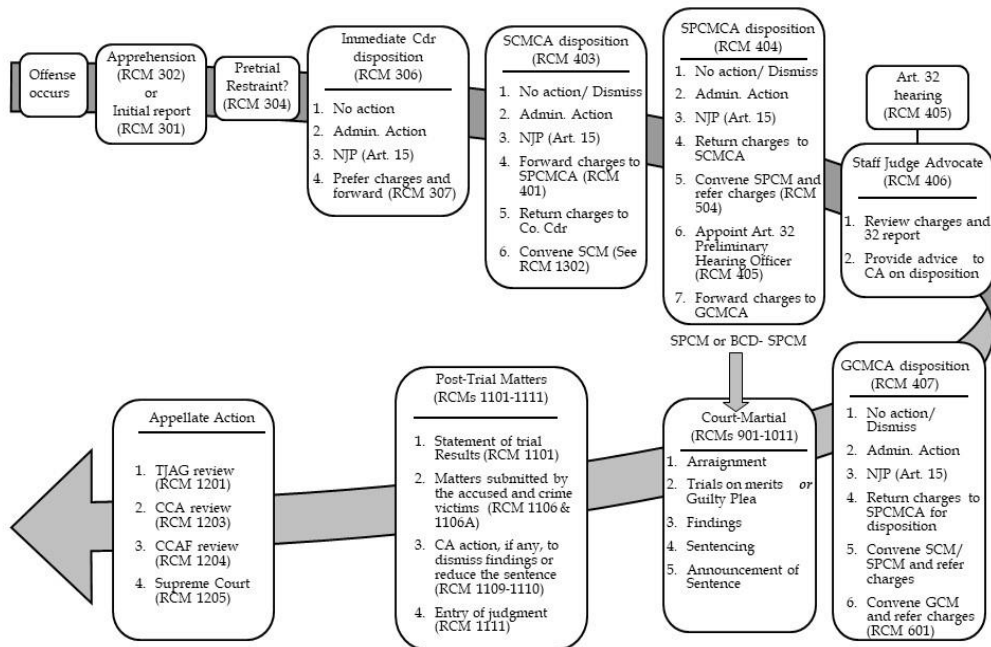
CHAPTER 1

OVERVIEW OF THE MILITARY JUSTICE SYSTEM

1-2. Overview of the System from Start to End

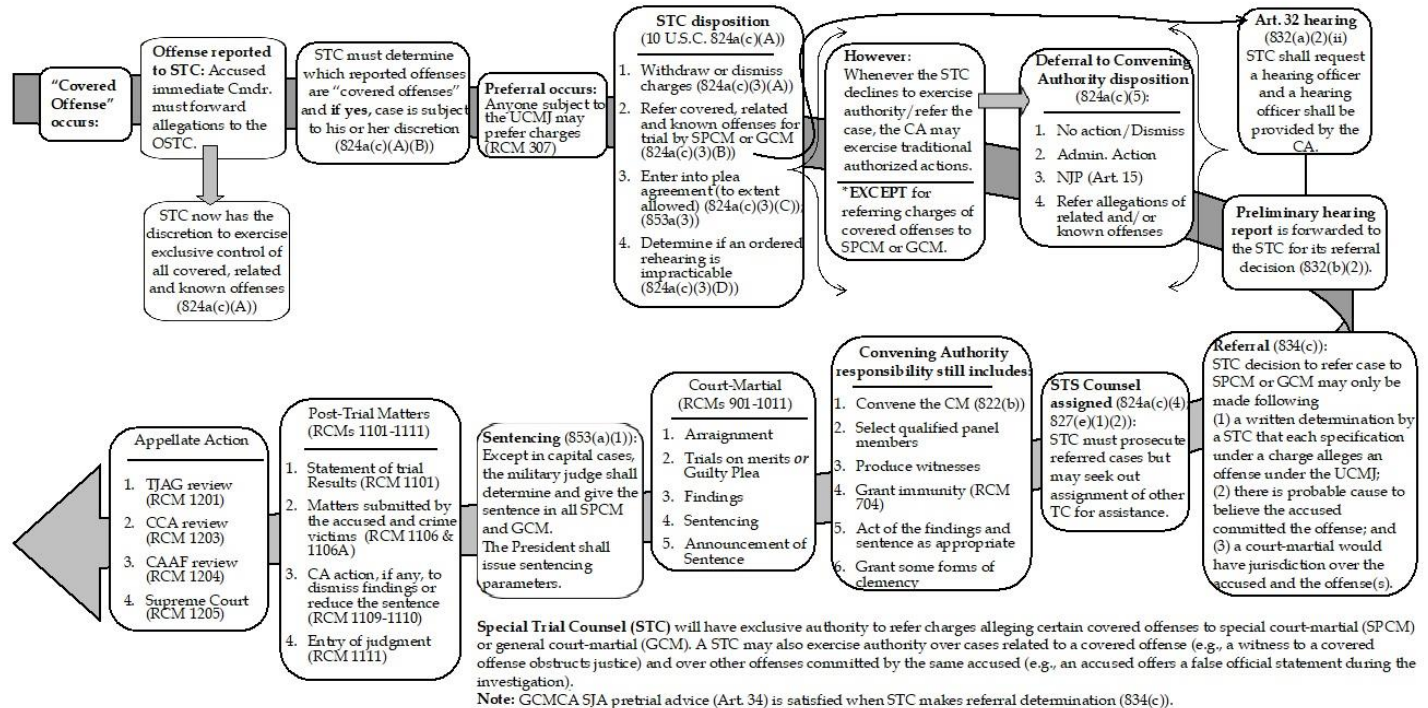
Replace the chart on page 12 of the casebook with the updated chart below and the chart that follows on the next page:

The Court-Martial Process



Note: The process outlined here is subject to exceptions and special rules, especially in sexual assault cases.

The Court-Martial “Covered Offenses” Process



The National Defense Authorization Act for Fiscal Year 2022, enacted in Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021) [*hereinafter* NDAA FY22] provided that the Office of Special Trial Counsel will have exclusive authority to refer charges for the following “covered offenses” listed in the Act and any related offenses: Article 117a (Wrongful Broadcast or Distribution of Intimate Visual Images); Article 118 (Murder); Article 119 (Manslaughter); Article 120 (Rape and Sexual Assault Generally); Article 120b (Rape and Sexual Assault of a Child); Article 120c (Other Sexual Misconduct); Article 125 (Kidnapping); Article 128b (Domestic Violence); Article 130 (Stalking); Article 132 (Retaliation); Article 134 (Child Pornography); Article 82 (Solicitation to commit one of the foregoing offenses); Article 81 (Conspiracy to commit one of the foregoing offenses); and Article 80 (Attempt to commit one of the foregoing offenses).

The 2023 National Defense Authorization Act for Fiscal Year 2023 (2023 NDAA), Pub. L. 117-263, 136 Stat. 2395 (Dec. 23, 2022) [*hereinafter* NDAA FY23] added Article 119a (Death or Injury of an Unborn Child), Article 120a (Deposit of Obscene Matter); and Article 134 (Sexual Harassment) (effective at the later date of January 1, 2025) to the list of “covered offenses.”

“Covered offenses” also include “related” offenses, as well as “any other offense” alleged to have been committed by the accused. All allegations of covered offenses will be forwarded promptly to a special trial counsel (STC). *See* revised R.C.M. 301. The STC has the exclusive authority to determine whether a reported offense is a covered, known, or related offense in accordance with revised R.C.M. 303A. If the STC determines a reported offense is a covered offense, the STC has authority over that offense. Additionally, the STC may exercise authority over “any other offense” or charge alleged to have been committed by the suspect of the covered offense. *See* revised R.C.M. 303A. The STC also may exercise authority over any reported offense or charge “related” to a covered offense, whether allegedly committed by the covered offense suspect or by anyone else subject to the Uniform Code of Military Justice.

Essentially, the STC can decline to prefer charges for an offense or decline to refer charges to court-martial (i.e., “deferral”). And once the STC declines to prefer or refer charges for a covered offense, a commander can exercise authority, other than referring the case to a special or general court-martial. Only the STC may dispose of a specification alleging a covered offense or another offense over which an STC has exercised authority and has not deferred. *See* revised R.C.M. 401A.

Moreover, with the exception of convening the court-martial, once the STC exercises authority over a covered offense, the court-martial process largely falls into the control of the STC, including overseeing charges and specifications, grants of immunity, case referral, and plea agreements.

In the NDAA FY23, however, Congress directed the President to effect a transfer of the commander’s residual powers in the Manual for Courts-Martial. Specifically, when the STC is involved in any covered offense, the commander’s residual powers will transfer to the STC or to military judges. *See* § 541(c), The James M. Inhofe National Defense Authorization Act for Fiscal Year 2023. These changes will be effective in December 2023. *Id.* It is unclear whether the commander’s appointment of an Article 32 Preliminary Hearing Officer is considered one of those residual powers, and if so, whether that appointment authority will be transferred to STC or military judges.

For charges over which the STC has exercised authority and has not deferred the offense to the commander, only the STC may refer charges to a court-martial. Commanders of the victim and the accused in a case involving a covered offense do have the opportunity to provide non-binding disposition recommendations to the STC prior to referral of the case to a court-martial. *See* revised R.C.M. 105.

Although the STC will have exclusive authority to refer those charges to a court-martial, commanders who are convening authorities will continue to convene courts-martial and select court-martial panel members. However, the

4 **2023 Supplement to MODERN MILITARY JUSTICE**

NDAA FY23 Section 543(a), added a new provision to Article 25(e), requiring random selection of panel members (effective December 22, 2024) which states:

When convening a court-martial, the convening authority shall detail as members thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.

This required implementation of new Rules for Courts-Martial or other regulations to establish the randomized selection process in the military justice system and those rules and regulations had to be consistent with the current Article 25, UCMJ requirements for selecting the best qualified members. Accordingly, revised R.C.M. 911 now provides for “randomization” by requiring the military judge or a designee thereof to randomly assign numbers to panel members detailed by the convening authority; and subsequently, the military judge determines how many members must be present and those members will be present “according to the randomly assigned order.”

If the STC has not exercised authority over the covered offenses or has deferred, then the commander or convening authority may take appropriate action over those offenses such as nonjudicial punishment or an administrative separation, except that he or she may not refer charges and specifications for a covered offense for trial by special or general court-martial. 10 U.S.C. 21 § 824a(5).

If the accused is charged with an offense other than a covered offense listed above, the existing system—as described previously and on the chart on page 1 *supra* remains intact. In effect, the NDAA FY22 creates two systems of handling court-martial charges. Most cases prosecuted in recent years involve what would now be considered “covered offenses.” These significant NDAA FY22 changes go into effect on December 27, 2023.

Add the following footnote to the following sentence in the second full paragraph on page 19.

And unlike a civilian jury, the panel’s finding does not have to be unanimous.*

* Recently an issue has arisen regarding whether a unanimous verdict is required in military criminal cases, based on the Supreme Court’s decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), overturning *Apodaca v. Oregon*, 406 U.S. 404 (1979) and holding that the Sixth Amendment requires conviction by a unanimous jury for felony offenses and that right to a unanimous jury verdict applies to state criminal trials pursuant to the Fourteenth Amendment.

The Court of Appeals for the Armed Forces recently weighed in on this issue in *United States v. Anderson*, ____ M.J. ____ (C.A.A.F. 2023), holding that military accuseds tried by courts-martial do not have a constitutional right to a unanimous guilty verdict. The court distinguished the Supreme Court's holding in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), and first, rejected the argument that *Ramos* required unanimous verdicts in courts-martial. The court noted that the U.S. Supreme Court has repeatedly stated that the Sixth Amendment right to trial does not apply to courts-martial. The court further applied the balancing test adopted by the Supreme Court in *Weiss v. United States*, 510 U.S. 163 (1994) for determining whether the Fifth Amendment's Due Process Clause requires a unanimous verdict in courts-martial. The Court of Appeals for the Armed Forces concluded that weighing the factors in favor of the right to a unanimous verdict did not overcome the balance struck by Congress in Article 52, UCMJ, that permits a nonunanimous verdict. Also, the Court rejected the argument that equal protection in the Fifth Amendment's Due Process Clause required unanimous verdicts in courts-martial because military accuseds are being treated differently than civilian defendants; on that note the Court found that those two classes of persons are not similarly situated.

Delete “or a sentence” and “or the sentence” in the first two sentences in the last paragraph on page 19.

On page 20, add the following after the second full paragraph on that page:

The National Defense Authorization Act for Fiscal Year 2022, enacted in Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021) [*hereinafter* NDAA FY22] significantly changed the role of commanders in referring court-martial charges for certain “covered offenses.” Specifically, NDAA FY22, Section 531 added Article 24a, UCMJ, and created the Office of “Special Trial Counsel,” requiring each Service Secretary to promulgate regulations to detail commissioned Judge Advocates to serve as Special Trial Counsel (STC), with a Service lead STC in the grade of at least O-7 who will report directly to the Service Secretary (not the Service Judge Advocate General or the Service Chief of Staff). The NDAA FY22 and the 2023 National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, 136 Stat. 2395 (Dec. 23, 2022) [*hereinafter* NDAA FY23] provide that the Office of Special Trial Counsel will have exclusive authority to refer charges for the following “covered offenses” listed in those Acts and any related offenses:

- Article 117a (Wrongful Broadcast or Distribution of Intimate Visual Images);
- Article 118 (Murder);
- Article 119 (Manslaughter);
- Article 120 (Rape and Sexual Assault Generally);
- Article 120b (Rape and Sexual Assault of a Child);

6 2023 Supplement to MODERN MILITARY JUSTICE

- Article 120c (Other Sexual Misconduct);
- Article 125 (Kidnapping);
- Article 128b (Domestic Violence);
- Article 130 (Stalking);
- Article 132 (Retaliation);
- Article 134 (Child Pornography);
- Article 82 (Solicitation to commit one of the foregoing offenses);
- Article 81 (Conspiracy to commit one of the foregoing offenses);
and
- Article 80 (Attempt to commit one of the foregoing offenses);

And added by NDAA FY23:

- Article 119a (Death or Injury of an Unborn Child);
- Article 120a (Deposit of Obscene Matter); and
- Effective January 1, 2025, Article 134 (Sexual Harassment)

Essentially, the NDAA FY22 added a new Article 1(17), UCMJ listing the original “covered offenses” and the NDAA FY23 added Article 119a (Death or Injury of an Unborn Child), Article 120a (Deposit of Obscene Matter); and Article 134 (Sexual Harassment) (effective at the later date of January 1, 2025) to the list of “covered offenses.”

“Covered offenses” also include “related” offenses, as well as “any other offense” alleged to have been committed by the accused. All allegations of covered offenses will be forwarded promptly to a special trial counsel (STC). *See* revised R.C.M. 301. The STC has the exclusive authority to determine whether a reported offense is a covered, known, or related offense in accordance with revised R.C.M. 303A. If the STC determines a reported offense is a covered offense, the STC has authority over that offense. Additionally, the STC may exercise authority over “any other offense” or charge alleged to have been committed by the suspect of the covered offense. *See* revised R.C.M. 303A. The STC also may exercise authority over any reported offense or charge “related” to a covered offense, whether allegedly committed by the covered offense suspect or by anyone else subject to the Uniform Code of Military Justice.

Essentially, the STC can decline to prefer charges for an offense or decline to refer charges to court-martial (i.e., “deferral”). And once the STC declines to prefer or refer charges for a covered offense, a commander can exercise authority, other than referring the case to a special or general court-martial. Only the STC may dispose of a specification alleging a covered offense or another offense over which an STC has exercised authority and has not deferred. *See* revised R.C.M. 401A.

Moreover, with the exception of convening the court-martial, once the STC exercises authority over a covered offense, the court-martial process largely

falls into the control of the STC, including overseeing charges and specifications, grants of immunity, case referral, and plea agreements.

In the NDAA FY23, however, Congress directed the President to effect a transfer of the commander's residual powers in the Manual for Courts-Martial. Specifically, when the STC is involved in any covered offense, the commander's residual powers will transfer to the STC or to military judges. *See* § 541(c), The James M. Inhofe National Defense Authorization Act for Fiscal Year 2023. These changes will be effective in December 2023. *Id.* It is unclear whether the commander's appointment of an Article 32 Preliminary Hearing Officer is considered one of those residual powers, and if so, whether that appointment authority will be transferred to STC or military judges.

For charges over which the STC has exercised authority and has not deferred the offense to the commander, only the STC may refer charges to a court-martial. Commanders of the victim and the accused in a case involving a covered offense do have the opportunity to provide non-binding disposition recommendations to the STC prior to referral of the case to a court-martial. *See* revised R.C.M. 105.

Although the STC will have exclusive authority to refer those charges to a court-martial, commanders who are convening authorities will continue to convene courts-martial and select court-martial panel members. However, the NDAA FY23 Section 543(a), added a new provision to Article 25(e), requiring random selection of panel members (effective December 22, 2024) which states:

When convening a court-martial, the convening authority shall detail as members thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.

This required implementation of new Rules for Courts-Martial or other regulations to establish the randomized selection process in the military justice system and those rules and regulations had to be consistent with the current Article 25, UCMJ requirements for selecting the best qualified members. Accordingly, revised R.C.M. 911 now provides for "randomization" by requiring the military judge or a designee thereof to randomly assign numbers to panel members detailed by the convening authority; and subsequently, the military judge determines how many members must be present and those members will be present "according to the randomly assigned order."

If the STC has not exercised authority over the covered offenses or has deferred, then the commander or convening authority may take appropriate action over those offenses such as nonjudicial punishment or an administrative

8 2023 Supplement to MODERN MILITARY JUSTICE

separation, except that he or she may not refer charges and specifications for a covered offense for trial by special or general court-martial.

If the accused is charged with an offense other than a covered offense listed above, the existing system—as described previously and on the chart on page 1 *supra* remains intact. In effect, the NDAA FY22 creates two systems of handling court-martial charges. Most cases prosecuted in recent years involve what would now be considered “covered offenses.” These significant NDAA FY22 changes go into effect on December 27, 2023.

On page 21, modify the following sentence in the second paragraph as follows (inserting the underlined words):

The accusation is forwarded to a commander and that commander may have ~~who has~~ responsibility for deciding whether to refer such a case to a court-martial (i.e., for deciding whether the government should prosecute the service member for the alleged offense).

1-3. Jurisdiction Over Military Persons and Offenses

On page 33, add the following footnote at the end of the following sentence in the first paragraph:

Few military retirees who are receiving retired pay probably realize that retirees can be and occasionally are tried by court-martial.**

** Two recent conflicting cases raise an issue regarding continuous UCMJ jurisdiction over retirees of a regular armed forces component entitled to pay (pursuant to Article 2(a)(4), UCMJ) and over Fleet Reserve or Fleet Marine Corps Reserve (e.g., “Fleet Reservists”) (pursuant to Article 2(a)(6)), UCMJ). (Enlisted members of the Navy or Marine Corps may transfer into the Fleet Reserve or Fleet Marine Corps Reserve after twenty years of active-duty service and then receive retainer pay, are subject to recall, and must maintain military readiness. The U.S. District Court for the District of Columbia held, in *Larrabee v. Braithwaite*, 502 F. Supp. 3d 322 (D.D.C. 2020), that court-martial jurisdiction over Fleet Marine Reservists was unconstitutional because it exceeds Congress’s Article I authority to “make rules for the regulation and government of the land and naval forces.” This decision, however, was reversed by the U.S. Court of Appeals for the D.C. Circuit in *Larrabee v. Del Toro*, 45 F.4th 81 (D.C. Cir. 2022). A petition for certiorari is now pending before the U.S. Supreme Court. The Court of Appeals for the Armed Forces (C.A.A.F.) reached the same result as the U.S. Court of Appeals for the D.C. Circuit in *United States v. Begani*, 81 M.J. 273 (C.A.A.F. 2021), reaffirming that UCMJ jurisdiction over retirees and Fleet Reservists is constitutional based on their status as members of the “land and naval forces” and sufficient connections as such (e.g., pay, recall status, and the maintaining readiness requirement). The C.A.A.F. further held that subjecting Fleet Reservists and not retired Reservists

to continuous UCMJ jurisdiction did not violate the Fifth Amendment's Equal Protection guarantee because the two groups are not similarly situated, receive different benefits, and are subject to different requirements.

1-4. Role of the Commander and Unlawful Command Influence

On page 67, add the following after United States v. Boyce:

In the above case, *United States v. Boyce*, the court reversed the findings and sentence because of the negative impact of unlawful command influence on the public's perception of the military justice system, stating

[T]he prejudice involved in [apparent unlawful command influence] is the damage to the public's perception of the fairness of the military justice system as a whole and not the prejudice to the individual accused.

76 M.J. at 248-49.

Essentially, according to the *Boyce* decision, the courts can reverse a conviction even if the accused was not prejudiced personally by the apparent unlawful command influence. However, in the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, Congress, added Article 37(c), UCMJ, a new provision which states:

(c) No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused.

*On page 67, replace the first **point of discussion** with the following.*

1. What is the court's authority for providing a remedy for "apparent" as opposed to "actual" unlawful command influence? In light of the new Article 37(c), UCMJ provision, should courts now conclude that an accused must be prejudiced in cases of apparent unlawful command influence?

*On page 72, add the following **point of discussion**.*

3. As reflected in *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017) (previously provided in this chapter), military case law supports that the conduct and or statements of non-commanders such as members of Congress, the President, and even armed forces attorneys may raise the issue of unlawful command influence. For example, in *United States v. Bergdahl*, 80 M.J. 230 (C.A.A.F. 2020), the late Senator John McCain and President Trump (as a presidential candidate and later as President) made negative comments about

the accused. A plurality opinion concluded that Senator McCain (as a military retiree) and President Trump (as a sitting President) were capable of committing unlawful command influence with their comments and although the accused met his burden of showing “some evidence” of unlawful command influence, their comments did not “place an intolerable stain upon the public’s perception of the military justice system” and an objective, disinterested observer, would conclude that instead of being swayed by those comments, the military judge was “notably impervious to them.” *Id.* at 233-44.

CHAPTER 2

JUDGE ADVOCATE PROFESSIONAL RESPONSIBILITY

2-1. Military Lawyers for the Government, the Accused, and Victims

Add the following after the second full paragraph on page 74.

The National Defense Authorization Act for Fiscal Year 2022, enacted in Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021) [*hereinafter* NDAA FY22] NDAA FY22 added Article 24a, UCMJ, requiring that the Service Judge Advocates General certify the lead Special Trial Counsel (STC), a judge advocate in a grade no lower than O-7 with significant military justice experience who reports directly to the Secretary of the applicable military department. The lead STC is responsible for a dedicated office within each Military Department and they will provide supervision and oversight of the Service STC. The lead STC will report directly to the Secretary concerned, without intervening authority.

Service Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps must detail judge advocates as Special Trial Counsel who are qualified by reason of education, training, experience, and temperament. In each case, the STC must be independent of both the chain of command of the accused and of the victim, but the accused's and victim's commanders may provide non-binding input regarding the disposition of the case. An STC must be detailed as trial counsel for each special and general court-martial for which charges and specifications were referred by an STC and the STC may detail other Judge Advocates as trial counsel. *Id.*

Add the following after the last paragraph on page 79.

Article 6b, UCMJ generally provides victims' rights for those who have "suffered direct physical, emotional, or pecuniary harm as a result of the commission of" a UCMJ offense. For example, Article 6b, provides victims with the rights to be reasonably protected from the accused; to reasonable, accurate, and timely notice throughout the process; not to be excluded from any public hearing or proceeding; to be reasonably heard at certain public hearings regarding the case; to confer with Government counsel in the proceedings; to restitution as provided by law; to unreasonable delay of proceedings; and to be treated with fairness and respect. Other victims' rights are set forth in the Manual for Courts-Martial (e.g., R.C.M. 1001(c)(1), right to be reasonably

heard at the presentencing proceeding) or in other service regulations (e.g., U.S. Dep't of the Army, Reg. 600-20, Army Command Policy, para. 7-8, explaining the Army's policy against sexual assault and support for victims).

The NDAA FY22 included additional procedural rights and protections for victims and Section 541 of that Act expanded Article 6b(a), UCMJ, by adding a new provision, which states:

(8) The right to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement, or non-prosecution agreement relating to the offense, unless providing such information would jeopardize a law enforcement proceeding or would violate the privacy concerns of an individual other than the accused.

Add the following to the end of footnote 5 on page 79.

And the appellate courts have weighed in on that right. In *Fink v. Y.B. and United States*, ___ M.J. ___ (C.A.A.F. 2023), the U.S. Court of Appeals for the Armed Forces (C.A.A.F.) held that, notwithstanding its decision in *Randolph v. HV*, 76 M.J. 27 (C.A.A.F. 2017), a 2017 amendment to Article 67(c)(1)(B) extended the court's jurisdiction to consider the accused's appeal of the adverse decision of the U.S. Coast Guard Court of Criminal Appeals granting a victim's writ of mandamus petition regarding the military judge's Military Rule of Evidence 412 ruling. Essentially, if the victim of an offense successfully petitions a Service Court of Criminal Appeals (CCA) for a writ of mandamus under Article 6b(e), UCMJ and the CCA affirms or sets aside the military judge's decision or order, the accused may petition the C.A.A.F. for review under Article 67(a)(3), UCMJ and the C.A.A.F. in turn may act with respect to the military judge's decision or order, pursuant to Article 67(c)(1)(B), UCMJ. Also, recently, in *M.W. v. United States*, ___ M.J. ___ (C.A.A.F. 2023), the C.A.A.F. held that despite amendments to Article 6b, UCMJ, that court still lacks jurisdiction over a victim of an offense's request to review a CCA's denial of a petition for a writ of mandamus under Article 6b, UCMJ.

2-2. Standards Regarding Advocacy and Sixth Amendment Right to Effective Counsel

Delete the following sentence (shown in strikethrough text) in the second paragraph after the case of Strickland v. Washington on page 97.

~~If this is not possible, defense counsel should disclose to the tribunal the client's intent to commit perjury.~~

CHAPTER 3

ALTERNATIVES TO TRIAL BY COURT-MARTIAL

3-3. Nonjudicial Punishment

Replace the text below on the bottom of page 146 and top of page 147,

“Second, the burden of proof varies among the Services. The Army requires and the Air Force encourages commanders to insist on proof “beyond a reasonable doubt” before imposing punishment . . . (citing the relevant service regulations).”

with the following:

Second, the President recently issued Executive Order No. 14103, 88 Fed. Reg. 50535, 50595 (Jul. 28, 2023), which established that commanders use “preponderance of the evidence” as the burden of proof during the nonjudicial punishment process.

CHAPTER 5

PRETRIAL PROCEDURAL REQUIREMENTS

5-1. Preferral and Forwarding of Charges

Add the following footnote at the end of the title of the section on page 226 and renumber the footnotes in this section on pages 226-227.

5-1. Preferral and Forwarding of Charges¹

¹The FY22 National Defense Authorization Act, Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021) [*hereinafter* NDAA FY22] significantly changed the role of commanders in referring court-martial charges. The NDAA FY22 created the Office of Special Trial Counsel, which will have exclusive authority to refer charges for “covered offenses” to a court-martial if the accused allegedly commits one or more of “covered offenses” listed in the Act (adding a new Article 1(17), UCMJ) and the 2023 National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, 136 Stat. 2395 (Dec. 23, 2022) [*hereinafter* NDAA FY23] added Article 119a (Death or Injury of an Unborn Child), Article 120a (Deposit of Obscene Matter); and Article 134 (Sexual Harassment) (effective at the later date of January 1, 2025) to the following list of “covered offenses.”

- Article 117a (Wrongful Broadcast or Distribution of Intimate Visual Images);
- Article 118 (Murder);
- Article 119 (Manslaughter);
- Article 120 (Rape and Sexual Assault Generally);
- Article 120b (Rape and Sexual Assault of a Child);
- Article 120c (Other Sexual Misconduct);
- Article 125 (Kidnapping);
- Article 128b (Domestic Violence);
- Article 130 (Stalking);
- Article 132 (Retaliation);
- Article 134 (Child Pornography);
- Article 82 (Solicitation to commit one of the foregoing offenses);
- Article 81 (Conspiracy to commit one of the foregoing offenses);
- Article 80 (Attempt to commit one of the foregoing offenses);
- Article 119a (Death or Injury of an Unborn Child);
- Article 120a (Deposit of Obscene Matter); and

- Effective January 1, 2025, Article 134 (Sexual Harassment)

“Covered offenses” also include “related” offenses, as well as “any other offense” alleged to have been committed by the accused. All allegations of covered offenses will be forwarded promptly to a special trial counsel (STC). *See* revised R.C.M. 301. The STC has the exclusive authority to determine whether a reported offense is a covered, known, or related offense in accordance with revised R.C.M. 303A. If the STC determines a reported offense is a covered offense, the STC has authority over that offense. Additionally, the STC may exercise authority over “any other offense” or charge alleged to have been committed by the suspect of the covered offense. *See* revised R.C.M. 303A. The STC also may exercise authority over any reported offense or charge “related” to a covered offense, whether allegedly committed by the covered offense suspect or by anyone else subject to the Uniform Code of Military Justice.

An STC may prefer charges (or cause charges to be preferred) or defer the offense by electing not to prefer. *See* revised R.C.M. 306A. And once the STC declines to prefer or refer charges for a covered offense (“deferral”), a commander can exercise authority, other than referring the case to a special or general court-martial. For example, the commander may impose nonjudicial punishment. *See* revised R.C.M. 306(c)(3). Only the STC may dispose of a specification alleging a covered offense or another offense over which an STC has exercised authority and has not deferred. *See* revised R.C.M. 401A.

Moreover, with the exception of convening the court-martial, once the STC exercises authority over a covered offense, the court-martial process largely falls into the control of the STC, including overseeing charges and specifications, grants of immunity, case referral, and plea agreements.

In the NDAA FY23, however, Congress directed the President to effect a transfer of the commander’s residual powers in the Manual for Courts-Martial. Specifically, when the STC is involved in any covered offense, the commander’s residual powers will transfer to the STC or to military judges. *See* § 541(c), The James M. Inhofe National Defense Authorization Act for Fiscal Year 2023. These changes will be effective in December 2023. *Id.* It is unclear whether the commander’s appointment of an Article 32 Preliminary Hearing Officer is considered one of those residual powers, and if so, whether that appointment authority will be transferred to the STC or military judges.

For charges over which the STC has exercised authority and has not deferred the offense to the commander, only the STC may refer charges to a court-martial. Commanders of the victim and the accused in a case involving a covered offense do have the opportunity to provide non-binding disposition recommendations to the STC prior to referral of the case to a court-martial. *See* revised R.C.M. 105.

Although the STC will have exclusive authority to refer those charges to a court-martial, commanders who are convening authorities will continue to convene courts-martial and select court-martial panel members. However, the NDAA FY23 Section 543(a), added a new provision to Article 25(e), requiring random selection of panel members (effective December 22, 2024) which states:

When convening a court-martial, the convening authority shall detail as members thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.

This required implementation of new Rules for Courts-Martial or other regulations to establish the randomized selection process in the military justice system and those rules and regulations had to be consistent with the current Article 25, UCMJ requirements for selecting the best qualified members. Accordingly, revised R.C.M. 911 now provides for “randomization” by requiring the military judge or a designee thereof to randomly assign numbers to panel members detailed by the convening authority; and subsequently, the military judge determines how many members must be present and those members will be present “according to the randomly assigned order.”

If the STC has not exercised authority over the covered offenses or has deferred, then the commander or convening authority may take appropriate action over those offenses such as nonjudicial punishment or an administrative separation, except that he or she may not refer covered offense charges to a special or general court-martial.

If the accused is charged with an offense other than a covered offense listed above, the existing system—as described previously and on the chart on page 1 *supra* remains intact. In effect, the NDAA FY22 creates two systems of handling court-martial charges. Most cases prosecuted in recent years involve what would now be considered “covered offenses.” These significant NDAA FY22 changes go into effect on December 27, 2023.

5-2. Article 32, UCMJ, Preliminary Hearings

*Add the following before **Points for Discussion** on page 232.*

The National Defense Authorization Act for FY 2022, Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021), [*hereinafter* NDAA FY22] included several UCMJ changes that will impact the Article 32, Preliminary Hearing, and Article 34, UCMJ, Pretrial Advice. Specifically, NDAA FY22 Section 536 provided that if a Special Trial Counsel (STC), the new lead trial counsel position for “covered offense” charges created by the Act, exercises authority over the

charges and specifications, then the STC must request that the convening authority appoint the Article 32, Preliminary Hearing Officer, but the hearing report will be provided to the STC. Also, NDAA FY22 Section 537 required that before referring charges to a special or general court-martial, the STC must provide a written determination that (1) each specification under a charge alleges an offense; (2) there is probable cause to believe that the accused committed the offense charged; and (3) a court-martial would have jurisdiction over the accused and the offense. These UCMJ changes go into effect in December 2023.

5-3. Staff Judge Advocate Pretrial Advice to the Convening Authority

Add the following before United States v. Mercier on page 237.

Similar to the required staff judge advocate's Article 34, UCMJ pretrial advice to the convening authority prior to a general court-martial, the National Defense Authorization Act for FY 2022, Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021), Section 537 provides that if a Special Trial Counsel (STC)—a new position created by the Act—exercises authority over the charges and specifications, then the STC, before referring charges to a special or general court-martial, must provide a written determination that (1) each specification under a charge alleges an offense; (2) there is probable cause to believe that the accused committed the offense charged; and (3) a court-martial would have jurisdiction over the accused and the offense. These UCMJ changes go into effect in December 2023.

5-4. Referral of a Case to Court-Martial

*Add the following before **Points for Discussion** on page 242.*

The National Defense Authorization Act for Fiscal Year 2022, enacted in Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021) [*hereinafter* NDAA FY22] provided that the Office of Special Trial Counsel will have exclusive authority to refer charges for the following “covered offenses” listed in the Act and any related offenses: Article 117a (Wrongful Broadcast or Distribution of Intimate Visual Images); Article 118 (Murder); Article 119 (Manslaughter); Article 120 (Rape and Sexual Assault Generally); Article 120b (Rape and Sexual Assault of a Child); Article 120c (Other Sexual Misconduct); Article 125 (Kidnapping); Article 128b (Domestic Violence); Article 130 (Stalking); Article 132 (Retaliation); Article 134 (Child Pornography); Article 82 (Solicitation to commit one of the foregoing offenses); Article 81 (Conspiracy to commit one of the foregoing offenses); and Article 80 (Attempt to commit one of the foregoing offenses).

The 2023 National Defense Authorization Act for Fiscal Year 2023 (2023 NDAA), Pub. L. 117-263, 136 Stat. 2395 (Dec. 23, 2022) [*hereinafter* NDAA FY23] added Article 119a (Death or Injury of an Unborn Child), Article 120a (Deposit of Obscene Matter); and Article 134 (Sexual Harassment) (effective at the later date of January 1, 2025) to the list of “covered offenses.”

“Covered offenses” also include “related” offenses, as well as “any other offense” alleged to have been committed by the accused. All allegations of covered offenses will be forwarded promptly to a special trial counsel (STC). *See* revised R.C.M. 301. The STC has the exclusive authority to determine whether a reported offense is a covered, known, or related offense in accordance with revised R.C.M. 303A. If the STC determines a reported offense is a covered offense, the STC has authority over that offense. Additionally, the STC may exercise authority over “any other offense” or charge alleged to have been committed by the suspect of the covered offense. *See* revised R.C.M. 303A. The STC also may exercise authority over any reported offense or charge “related” to a covered offense, whether allegedly committed by the covered offense suspect or by anyone else subject to the Uniform Code of Military Justice.

An STC may prefer charges (or cause charges to be preferred) or defer the offense by electing not to prefer. *See* revised R.C.M. 306A. And once the STC declines to prefer or refer charges for a covered offense (“deferral”), a commander can exercise authority, other than referring the case to a special or general court-martial. For example, the commander may impose nonjudicial punishment. *See* revised R.C.M. 306(c)(3). Only the STC may dispose of a specification alleging a covered offense or another offense over which an STC has exercised authority and has not deferred. *See* revised R.C.M. 401A.

Moreover, with the exception of convening the court-martial, once the STC exercises authority over a covered offense, the court-martial process largely falls into the control of the STC, including overseeing charges and specifications, grants of immunity, case referral, and plea agreements.

In the NDAA FY23, however, Congress directed the President to effect a transfer of the commander’s residual powers in the Manual for Courts-Martial. Specifically, when the STC is involved in any covered offense, the commander’s residual powers will transfer to the STC or to military judges. *See* § 541(c), The James M. Inhofe National Defense Authorization Act for Fiscal Year 2023. These changes will be effective in December 2023. *Id.* It is unclear whether the commander’s appointment of an Article 32 Preliminary Hearing Officer is considered one of those residual powers, and if so, whether that appointment authority will be transferred to the STC or military judges.

For charges over which the STC has exercised authority and has not deferred the offense to the commander, only the STC may refer charges to a court-martial. Commanders of the victim and the accused in a case involving a

covered offense do have the opportunity to provide non-binding disposition recommendations to the STC prior to referral of the case to a court-martial. *See* revised R.C.M. 105.

Although the STC will have exclusive authority to refer those charges to a court-martial, commanders who are convening authorities will continue to convene courts-martial and select court-martial panel members. However, the NDAA FY23 Section 543(a), added a new provision to Article 25(e), requiring random selection of panel members (effective December 22, 2024) which states:

When convening a court-martial, the convening authority shall detail as members thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.

This required implementation of new Rules for Courts-Martial or other regulations to establish the randomized selection process in the military justice system and those rules and regulations had to be consistent with the current Article 25, UCMJ requirements for selecting the best qualified members. Accordingly, revised R.C.M. 911 now provides for “randomization” by requiring the military judge or a designee thereof to randomly assign numbers to panel members detailed by the convening authority; and subsequently, the military judge determines how many members must be present and those members will be present “according to the randomly assigned order.”

If the STC has not exercised authority over the covered offenses or has deferred, then the commander or convening authority may take appropriate action over those offenses such as nonjudicial punishment or an administrative separation, except that he or she may not refer covered offense charges to a special or general court-martial.

If the accused is charged with an offense other than a covered offense listed above, the existing system—as described previously and on the chart on page 1 *supra* remains intact. In effect, the NDAA FY22 creates two systems of handling court-martial charges. Most cases prosecuted in recent years involve what would now be considered “covered offenses.” These significant NDAA FY22 changes go into effect on December 27, 2023.

CHAPTER 6

PRETRIAL DECISIONS

6-3. Pretrial Agreements

*Replace “pretrial” with “plea” in the title of this section and throughout this section before *United States v. Dunbar* on pages 252-253 and in the **Points for Discussion** on page 257.*

6-3. ~~Pretrial~~ Plea Agreements

Add the following after the first paragraph in section 6-3.

Plea agreements in the military justice system will be substantially changed pursuant to the National Defense Authorization Act for Fiscal Year 2022, enacted in Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021) [*hereinafter* NDAA FY22]. That Act provided that the Office of Special Trial Counsel will have exclusive authority to refer charges for the following “covered offenses” listed in the Act and any related offenses: Article 117a (Wrongful Broadcast or Distribution of Intimate Visual Images); Article 118 (Murder); Article 119 (Manslaughter); Article 120 (Rape and Sexual Assault Generally); Article 120b (Rape and Sexual Assault of a Child); Article 120c (Other Sexual Misconduct); Article 125 (Kidnapping); Article 128b (Domestic Violence); Article 130 (Stalking); Article 132 (Retaliation); Article 134 (Child Pornography); Article 82 (Solicitation to commit one of the foregoing offenses); Article 81 (Conspiracy to commit one of the foregoing offenses); and Article 80 (Attempt to commit one of the foregoing offenses).

The 2023 National Defense Authorization Act for Fiscal Year 2023 (2023 NDAA), Pub. L. 117-263, 136 Stat. 2395 (Dec. 23, 2022) [*hereinafter* NDAA FY23] added Article 119a (Death or Injury of an Unborn Child), Article 120a (Deposit of Obscene Matter); and Article 134 (Sexual Harassment) (effective at the later date of January 1, 2025) to the list of “covered offenses.”

“Covered offenses” also include “related” offenses, as well as “any other offense” alleged to have been committed by the accused. All allegations of covered offenses will be forwarded promptly to a special trial counsel (STC). *See* revised R.C.M. 301. The STC has the exclusive authority to determine whether a reported offense is a covered, known, or related offense in accordance with revised R.C.M. 303A.

If an accused decides to enter into a plea agreement with any sentence limitations or other matters involving those charged offenses, the STC will have exclusive authority to enter into the plea agreement with the accused. Art. 53a, UCMJ. The STC will sign the plea agreement, not the convening authority. In all likelihood, although the convening authority in those cases will not sign the plea agreement with the accused, the impact of those plea agreements on sentencing should not change. If a covered offense is not involved in the case, then the present system of establishing a plea agreement with the convening authority will be followed and the convening authority will refer the charges to a court-martial.

6-4. Military Panel (Jury) Requirements and Selection

Add the following after the first sentence in this section on page 257.

(Note, assuming that the Special Trial Counsel, who is appointed pursuant to the FY 2022 National Defense Authorization Act, Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021) [*hereinafter* NDAA FY22], effective December 27, 2023, as described above, decides to refer “covered offense” charges to a court-martial, the convening authority will still convene the court. *Id.*)

Add the following after the first paragraph on page 258.

Section 543(a) of the 2023 National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, 136 Stat. 2395 (Dec. 23, 2022) added a new provision to Article 25(e), requiring random selection of panel members (effective December 22, 2024) which states:

When convening a court-martial, the convening authority shall detail as members thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.

This required implementation of new Rules for Courts-Martial or other regulations to establish the randomized selection process in the military justice system and those rules and regulations had to be consistent with the current Article 25, UCMJ requirements for selecting the best qualified members. Accordingly, revised R.C.M. 911 now provides for “randomization” by requiring the military judge or a designee thereof to randomly assign numbers to panel members detailed by the convening authority; and subsequently, the military judge determines how many members must be present and those members will be present “according to the randomly assigned order.”

To help ensure that any jurisdictional prerequisites of the court-martial are noted on the record, the trial counsel announces the court-martial convening order and the names of parties present in the courtroom. R.C.M. 813(a). The NDAA FY23, however, directed that the Rules for Courts-Martial be amended to ensure that at the beginning of the court-martial the name, rank, or position of the convening authority are not announced, unless the convening authority is the President, Secretary of Defense, or the Secretary concerned. *Id.* at § 541(d).

CHAPTER 7

PRETRIAL MOTIONS AND INTERLOCUTORY APPEALS

7-2. Examples of Common Pretrial Motions

Replace the last sentence preceding the case of United States v. Mizgala on page 267 with the following text.

The following case controversially interpreted the version of R.C.M. 707(e) that was in effect at the time of the case. At the time, R.C.M. 707(e) provided: “Waiver. Except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty waives *any speedy trial issue* as to that offense.” Manual for Courts-Martial, United States (2002 ed.) (emphasis added). The Court held that while an unconditional guilty plea waives speedy trial rights under the Sixth Amendment and R.C.M. 707, it does not waive speedy trial claims under Article 10, UCMJ. Rule for Court-Martial 707(e) was subsequently amended to state “Except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty forfeits any speedy trial issue as to that offense, unless affirmatively waived.” However, Executive Order No. 14103, 88 Fed. Reg. 88 Fed. Reg. 50535, 50556-57 (Jul. 28, 2023) again modified R.C.M. 707(e) and now states: “(e) Waiver. Except as provided in R.C.M. 910(a)(2), a plea of guilty that results in a finding of guilty waives any speedy trial issue under this rule as to that offense.” Under the latest version of the rule, a speedy trial issue is always waived, and not merely forfeited, by a guilty plea.

Modify Point for Discussion 3 on page 278 adding the following underlined text.

3. An amendment to the Rules for Courts-Martial codified the result of *United States v. Mizgala*, 61 M.J. 122 (C.A.A.F. 2005), by altering R.C.M. 707(e) to provide: “Except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty forfeits any speedy trial issue as to that offense, unless affirmatively waived.” A further amendment slightly altered this language. Pursuant to Executive Order No. 14103, 88 Fed. Reg. 50535, 50556-57, however, R.C.M. 707(e) now provides: “Except as provided in R.C.M. 910(a)(2), a plea of guilty that results in a finding of guilty waives any speedy trial issue under this rule as to that offense.” Under the latest version of the rule, a speedy trial issue is always waived, and not merely forfeited, by a guilty plea.

7-3. Article 62 Interlocutory Appeals by the United States

Add the following at the end of Article 62(a)(1)(A), before (B) on page 286.

(Note, this includes when a military judge declares a mistrial, even though the convening authority could re-refer the charge without holding another Article 32, Preliminary Hearing. *See United States v. Badders*, 82 M.J. 299 (C.A.A.F. 2022).

Add the following provision after Article 62(a)(1)(F), the last sentence on page 286.

(G) An order or ruling of the military judge entering a finding of not guilty with respect to a charge or specification following the return of a finding of guilty by the members.

CHAPTER 8

FINDINGS

8-3. Findings with Exceptions and Substitutions

*Add the following footnote to the following sentence on page 330 and redesignate the footnote on page 332 as **.*

But unlike in a typical civilian trial, a unanimous verdict is not necessary for a finding of guilty.*

* The Supreme Court's decision in *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020) recently raised an issue regarding whether a unanimous verdict is required in the military. In *Ramos*, the Court overturned *Apodaca v. Oregon*, 406 U.S. 404 (1979) and held that for felony offenses the Sixth Amendment requires conviction by a unanimous jury and that a right to a unanimous jury verdict applies to state criminal trials as well pursuant to the Fourteenth Amendment. *Ramos*, 140 S.Ct. at 397. The Court of Appeals for the Armed Forces recently weighed in on this issue in *United States v. Anderson*, _____ M.J. _____ (C.A.A.F. 2023), holding that military accuseds tried by courts-martial do not have a constitutional right to a unanimous guilty verdict. The Court distinguished the Supreme Court's holding in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), and first, rejected the argument that *Ramos* required unanimous verdicts in courts-martial. The court noted that the U.S. Supreme Court has repeatedly stated that the Sixth Amendment right to trial does not apply to courts-martial. The court further applied the balancing test adopted by the Supreme Court in *Weiss v. United States*, 510 U.S. 163 (1994) for determining whether the Fifth Amendment's Due Process Clause requires a unanimous verdict in courts-martial. The Court of Appeals for the Armed Forces concluded that weighing the factors in favor of the right to a unanimous verdict did not overcome the balance struck by Congress in Article 52, UCMJ, that permits a nonunanimous verdict. Also, the Court rejected the argument that equal protection in the Fifth Amendment's Due Process Clause required unanimous verdicts in courts-martial because military accuseds are being treated differently than civilian defendants; on that note the Court found that those two classes of persons are not similarly situated.

CHAPTER 9

MILITARY SENTENCING

9-1. Introduction and Purposes

Replace the second paragraph with the following on page 340.

The FY 2022 National Defense Authorization Act, Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021), effective on December 27, 2023, significantly changed military court-martial sentencing procedures. One major change requires that the military judge will impose the sentence in all non-capital special and general courts-martial. *Id.* The second major change requires that the President establish sentencing parameters and sentencing criteria, to be used by the military judge when imposing a sentence on a convicted accused. *Id.* Accordingly, Executive Order No. 14103, 88 Fed. Reg. 50535, 50699-70732 (Jul. 28, 2023) provides a revised Manual for Courts-Martial, Appendix 12A, “Presidentially-Prescribed Lesser Included Offenses Pursuant to Article 79(b)(2) Uniform Code of Military Justice” and adds a new Appendix 12B, “Sentencing Parameter Table – Confinement Range Categories,” a new Appendix 12C, “Offense Category Chart,” and a new Appendix 12D, “List of Sentencing Criteria Offenses” (which includes sentencing criteria for each of the listed offenses).

Delete the following in the first full paragraph on page 341.

~~If the trial is by members, the military judge will instruct the members on what penalties are lawful, and the members will then deliberate and announce a sentence. Otherwise,~~

Delete the last sentence on page 341.

~~If a panel sentences the accused, the panel will announce a unitary sentence for all offenses, as was the prior practice. See Art. 56(e)(3).~~

*Delete the following sentence in the first **Point for Discussion** on page 342.*

~~Under current law, however, the accused may request trial by members and sentencing by the military judge (except in capital cases). See Art. 53(b) &~~

~~(e)(1), UCMJ.~~

9-2. Lawful Punishments

Delete the following text from the last paragraph on page 348.

~~Third, the MJA 2016 changed the percentage of panel members who must vote in support of a sentence. The previous rule was two-thirds. Under the MJA 2016, votes on the sentence require agreement of three-fourths of the panel members. See Art. 52(b).~~

Delete “the members” from the first sentence on page 350.

Delete the following from the last sentence on page 351.

~~As discussed above, the military justice system does not have sentencing guidelines, but~~

Replace the second full paragraph on page 352 with the following.

For several years, critics of the military justice system have recommended that the military adopt the sentencing procedures used in federal court system, with the judge imposing the sentence. *See, e.g.,* MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP, 475-76 (2015). Congress finally adopted that approach for sentencing, setting forth requirements for military judge sentencing and sentencing parameters in the FY 2022 National Defense Authorization Act, Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021) [*hereinafter* NDAA FY22], effective December 27, 2023. The NDAA FY22 added paragraph (E) to the above quoted Article 56 (c)(1), as follows “and . . . (E) the applicable sentencing parameters or sentencing criteria set forth in regulations prescribed by the President pursuant to section 539E(e) of the [NDAA FY22].” NDAA FY22, Section 539E(e) required that the President prescribe, within two years of the date of enactment, sentencing parameters and sentencing criteria for offenses under the UCMJ—essentially guidelines for military judges to consider when sentencing the accused. Accordingly, Executive Order No. 14103, 88 Fed. Reg. 50535, 50699-70732 (Jul. 28, 2023) provides a revised Manual for Courts-Martial, Appendix 12A, “Presidentially-Prescribed Lesser Included Offenses Pursuant to Article 79(b)(2) Uniform Code of Military Justice” and adds a new Appendix 12B, “Sentencing Parameter Table – Confinement Range Categories,” a new Appendix 12C, “Offense Category Chart,” and a new Appendix 12D, “List of Sentencing Criteria Offenses” (which includes sentencing criteria for each of the listed offenses).

Also, NDAA FY22, Section 539E provided that if an accused is convicted of non-capital offenses in a general or special court-martial (whether or not any of the offenses are “covered offenses,” discussed *supra*) the military judge will

impose the sentence and that will be considered the sentence of the court-martial. (The NDAA FY22 removed any discretion that an accused had to decide whether the sentence would be imposed by the military judge or the panel members.)

The NDAA FY22, Section 539E also provided that for capital cases, panel members must decide (1) whether the sentence for the offense will be death or “life in prison without the eligibility for parole;” or (2) the matter should be returned to the military judge to determine a lesser punishment. The military judge must then sentence the accused in accordance with the court members determination.

Delete the following sentence from the third paragraph on page 352.

~~The military justice system has no sentencing guidelines and few mandatory minimum penalties.~~

9-4. The Death Penalty in the Military

On page 370, add the following footnote at the end of the last sentence in the first full paragraph.

Id. at 1004(c)(1).*

*The FY 2022 National Defense Authorization Act, Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021), effective December 27, 2023, Section 539E also provided that in capital cases, members must decide (1) whether the sentence for the offense will be death or “life in prison without the eligibility for parole;” or (2) the matter should be returned to the military judge to determine a lesser punishment. The military judge must then sentence the accused in accordance with the court members determination.

*Add the following question to the **Points for Discussion** on page 379.*

5. In *United States v. Briggs*, 592 U.S. ____ (2020) the Supreme Court overturned the U.S. Court of Appeals for the Armed Forces and held that even if a UCMJ punitive offense is not actually punishable by death (because of the Court’s Eighth Amendment precedent prohibiting a death sentence for rape of an adult woman), its designation as an offense punishable by death in the UCMJ still determines the statute of limitations. Focusing on the phrase “punishable by death” in the UCMJ, the Court held that the court-martial for rape did not have to begin within five years of the date of the commission of the charged offenses. Should Congress amend the UCMJ to remove statements that certain offenses are punishable by death if those statements are not true because the Supreme Court has held that imposing the death penalty for those offenses would violate the Eighth Amendment?

CHAPTER 10

POST-TRIAL REVIEW PROCEDURES

10-4. Post-Trial Processing Time

On page 394, add the footnote below to the following sentence in the second paragraph.

The *Moreno* Court announced that there would be a presumption of unreasonable delay for cases completed after June 11, 2006, that either: 1) did not have initial action taken within 120 days of trial completion;* 2) were not docketed within 30 days of the convening authority's action; or 3) were not reviewed by the Service court of appeals within 18 months of docketing.

* Based on the Military Justice Act of 2016 changes to post-trial processing, convening authorities are no longer required to take action, so the lack of action within 120 days of trial cannot be interpreted as a presumptive unreasonable delay as set forth in the *Moreno* test. Accordingly, some Service Courts of Criminal Appeals have applied a 150-day presumption of unreasonable delay for the period between final adjournment and docketing of appeal. See *United States v. Brown*, 81 M.J. 507 (Army Ct.Crim.App. 2021) (350-day unexplained delay between trial final adjournment and docketing of appeal did not rise to due process violation; there was no speedy post-trial processing request and no asserted particularized prejudice); *United States v. Livak*, 80 M.J. 631 (A.F.Ct.Crim.App. 2020) (presuming unreasonable delay for over 150 days between final adjournment and docketing of appeal and applying *Moreno*'s four balancing factors, and granting relief under Art. 66(d)). But see *United States v. Rivera*, 81 M.J. 741 (N.M.Ct.Crim.App. 2021) (addressing the standards for measuring post-trial delays, the court applied Navy Instruction on those delays which required that the record of trial be certified and forwarded to the Navy-Marine Corps Court of Criminal Appeals within 120 days of the Entry of Judgment ("Post-Trial I) and that the case be docketed in that court within 30 days ("Post-Trial II); under the facts, the one-day delay under that standard did not result in prejudice to the accused; the court discussed the tests used by the Army and Air Force Courts of Criminal Appeals, which conflate *Moreno I* and *Moreno II* standards into consolidated 150-time periods). Under what authority (if any) can the courts declare that 150 days is presumptively unreasonable?

CHAPTER 11

APPELLATE REVIEW PROCEDURES

11-2. Appeal to the Service Courts of Criminal Appeals

On page 431, add the following sentence at the end of the first paragraph.

Pursuant to the National Defense Authorization Act for Fiscal Year 2021, Section 542(a), Service Court of Criminal Appeals judges must have “not fewer than 12 years of experience in the practice of law before such assignment.”

On page 431, replace the last sentence and block quote at the end of the second paragraph, “In reviewing . . . witnesses.” with the following text.

For legal errors, military appellate courts may only affirm such findings of guilty as the court finds correct in law, but the National Defense Authorization Act for Fiscal Year 2021 limited the Service Courts’ authority to review cases for factual sufficiency. The amended Art. 66(d), now authorizes factual sufficiency review only “upon request of the accused if the accused makes a specific showing of a deficiency in proof” and then the appellate court “may weigh the evidence and determine controverted questions of fact subject to—appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and appropriate deference to findings of fact entered into the record by the military judge” and if the court is “clearly convinced that the finding of guilty was against the weight of the evidence,” may grant relief. How significantly this change will affect appellate review is not yet known.

On page 432, after the first sentence in the first full paragraph, replace the remainder of the paragraph with the following text.

The 2023 National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, 136 Stat. 2395 (Dec. 23, 2022) [hereinafter NDAA FY23] also amended the jurisdiction of the Service courts. There are now essentially four classes of appeals from the judgment of a court-martial. First, based on the NDAA FY23 amendments, the accused now has the right to appeal the judgment of a court-martial that includes a finding of guilty. Art. 66(b)(1)(A), UCMJ. Second, the NDAA FY23, also authorizes the accused to appeal a summary court-martial conviction in which the accused files an application for review with the Service Court of Criminal Appeals Court under Article 69(d)(1), UCMJ and for which the court grants the application. Art. 66(b)(1)(A), UCMJ.

Third, the government has the right to appeal on grounds that the sentence violates the law or that the sentence is plainly unreasonable. Art. 66(b)(2), UCMJ. Fourth, the Courts of Criminal Appeals automatically review all judgments in which the accused receives a sentence of a dishonorable discharge, a bad-conduct discharge, a dismissal, or to two years or more of confinement. Art. 66(b)(3), UCMJ. Notably, pursuant to the Military Justice Act of 2016 amendments, the accused may appeal after entering a plea of guilty, but errors will be considered harmless if they do not “materially prejudice the substantial rights of the accused.” Art. 45(c), UCMJ.

Essentially, the NDAA FY23 amendment eliminates the accused’s ability to appeal to a Service court if the Government appealed a ruling under Article 62 or if the Government appealed a sentence. But the jurisdiction of the Service courts will be expanded because an accused can appeal a court-martial conviction, regardless of the adjudged sentence, and regardless of whether it was a special or general court-martial. Apparently, these amendments were effective on the date the President signed the bill, December 22, 2022.

On page 432, add the following text after the second full paragraph.

The Fiscal Year 2022 National Defense Authorization Act, Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021), effective December 27, 2023, Section 539E(d) amended Article 66, UCMJ, addressing the review powers of the Courts of Criminal Appeals. Congress added a new provision regarding the courts’ powers to review courts-martial sentences. The new provision states that in reviewing court-martial sentences, Service courts may consider:

- (1) Whether the sentence violates the law;
- (2) Whether the sentence is inappropriately severe—

If the sentence is for an offense for which the President has not established a sentencing parameter or in the case of an offense for which the President has established a sentencing parameter, the sentence is above the upper range of that parameter;

If the sentence is for an offense for which there is a sentencing parameter, whether the sentence is the result of an incorrect application of that parameter;

- (3) Whether the sentence is plainly unreasonable; and
- (4) If the sentence was death or life in prison without the eligibility of parole, whether the sentence is otherwise appropriate under the rules established by the President.

Id.

11-3. The U.S. Court of Appeals for the Armed Forces and Supreme Court Review

On page 437, delete the first sentence in the second paragraph and insert the following text.

The National Defense Authorization Act for Fiscal Year 2021 amended the C.A.A.F.'s standard of review, which was previously limited to questions of law, and gave the C.A.A.F. factual sufficiency review insofar as a Service Court of Criminal Appeals' decision affirmed, dismissed, set aside, or modified a trial court's judgment as factually insufficient. Specifically, Section 542(c) amended Art. 67(c)(1), UCMJ, to read as follows:

- (1) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to—
 - (A) the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals;
 - (B) a decision, judgment, or order by a military judge, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals; or
 - (C) the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modified by the Court of Criminal Appeals as incorrect in fact under [Art. 66(d)(1)(B), UCMJ].

As a result, the C.A.A.F. can now review appeals by the Government from Service Courts of Criminal Appeals decisions overturning convictions based on factual insufficiency.

On page 438, replace “Id.” with “Art. 67, UCMJ.” in the first line on the page and delete the first sentence including “Id.” in the first full paragraph.

11-4. Parole, Boards for Correction of Military Records, and Pardons

On page 443, at the end of the second full paragraph add the following footnote.

Id. at ¶ 17(b)(3).*

* A new provision in the Fiscal Year 2022 National Defense Authorization Act, Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021), Section 539E, effective December 27, 2023, provided that if the accused is found guilty of an offense for which a court-martial may impose a sentence of confinement for life, the military judge may impose a sentence of life without eligibility for parole. In that

case, the accused will be confined for the remainder of his or her life (with no opportunity for parole), unless the sentence is set aside or modified as a result of (1) action taken by the convening authority or the Secretary concerned, (2) action during post-trial procedures or review under the UCMJ, (3) action taken by a court of competent jurisdiction, or (4) a pardon or another form of Executive clemency the accused receives.

Id.

CHAPTER 12

MILITARY CRIMES IN GENERAL

12-1. Overview of the Punitive Articles

On page 456, add the following after Art. 117 Provoking speeches or gestures.

Art. 117a. Wrongful broadcast or distribution of intimate visual images

On page 457, add the following after Art. 128 Assault.

Art. 128b. Domestic violence

On page 457, add the following after Art. 134 General article.

Art. 134. Sexual harassment

CHAPTER 13

INAPPROPRIATE CONDUCT OFFENSES

13-1. Conduct Unbecoming an Officer and Gentleman

*Delete “an Gentleman” from the title of this section and throughout the section on page 528, from **Point for Discussion 1** on page 529, and from **Point for Discussion 1** on page 538.*

13-1. Conduct Unbecoming an Officer ~~and Gentleman~~

Add the following text before the third paragraph on page 528.

Note, the FY 2022 National Defense Authorization Act, Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021), amended Article 133 by removing the reference to the words “and a gentleman.”

*Delete **Point for Discussion 2** on page 529.*

13-3. Other Improper Relationships

Replace “Relationships” with “Conduct” in the title of this section on page 558.

13-3. Other Improper ~~Relationships~~ Conduct

*Add the following text after the **Points for Discussion** on page 563.*

Article 134 Sexual Harassment

The Fiscal Year 2022 National Defense Authorization Act, Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021), [hereinafter NDAA FY22], Section 539D, required the President to add the offense of sexual harassment under Article 134 in the Manual for Courts-Martial, within 30 days of the date of the Act’s enactment and accordingly, on January 26, 2022, the President amended the Manual for Courts-Martial by signing an Executive Order that included the new punitive article. See <https://www.federalregister.gov/documents/2023/08/02/2023-16570/2023-amendments-to-the-manual-for-courts->

[martial-united-states](#). The Fiscal Year 2023 National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, 136 Stat. 2395 (Dec. 23, 2022), Section 541(b), included Sexual Harassment as a “covered offense” within the purview of the Special Trial Counsel effective January 1, 2025, and will apply with respect to offenses that occur after that date.

Also, the Executive Order added a new Paragraph 107a in Part IV of the Manual, reflecting the new offense of Sexual Harassment and amends other existing offenses in Part IV, including Domestic Violence, Article 128b, now covered in new Paragraph 78a.)

NDAA FY22, Section 539D(b) provided the following elements of the new offense of Sexual Harassment:

(1) that the accused knowingly made sexual advances, demands or requests for sexual favors, or knowingly engaged in other conduct of a sexual nature;

(2) that such conduct was unwelcome;

(3) that, under the circumstances, such conduct—

would cause a reasonable person to believe, and a certain person did believe, that submission to such conduct would be made, either explicitly or implicitly, a term or condition of that person’s job, pay, career, benefits, or entitlements;

would cause a reasonable person to believe, and a certain person did believe, that submission to, or rejection of, such conduct would be used as a basis for decisions affecting that person’s job, pay, career, benefits, or entitlements; or

was so severe, repetitive, or pervasive that a reasonable person would perceive, and a certain person did perceive, an intimidating, hostile, or offensive working environment; and

(4) that, under the circumstances, the conduct of the accused was—

to the prejudice of good order and discipline in the armed forces;

of a nature to bring discredit upon the armed forces; or

to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

Referral of Complaints of Sexual Harassment to Independent Investigator

Also, the NDAA FY22, Section 543 amended Title 10 Section 1561 by requiring that if a commander receives a formal sexual harassment complaint, the commander must direct, within 72 hours of receiving the complaint, that an independent investigation be conducted. The commander is required to report the results of that investigation to the next superior officer within twenty days after the investigation commences and every 14 days thereafter until the investigation is completed, and then submit a final report on the investigation results and any actions taken as a result of that investigation. *Id.*

ERRATA

Please note the errors on these pages:

Page 286: In **7-3 Article 62 Interlocutory Appeals by the United States**,

“Article 62(a)(1) states” should be corrected as follows:

“In a trial by court-martial in which a military judge presides ~~and in which a punitive discharge may be adjudged~~, the United States may appeal. . . .”

Page 309: In **8-1 Providence Inquiry for Guilty Pleas**, in the second paragraph replace “pretrial agreement” with “plea agreement”.

Page 572: Under **Sodomy**, the second and third sentences should be changed to read as follows:

“After recent amendments, however, there is no Article specifically devoted to sodomy. Article 120 addresses forcible sodomy as a form of rape or sexual assault.”

The author welcomes notice of additional errors, whether substantive or merely typographical.