

Topics

2009 Commission on Military Justice

This list of topics was organized for subject matter discussion and consists of issues and ideas submitted to the Commission over the past several weeks from many sources. They are not listed in order of importance. The Commission will hold public hearings regarding the topics on **June 16, 2009**, at the George Washington University Law School in Washington, DC. All interested persons are invited to attend and participate in the hearings. This is a non-exclusive list; all matters germane to the military justice reform that are presented will be considered.

I. MODERN MILITARY COURT-MARTIAL

This topic focuses on the administration of military justice in modern times with particular emphasis on the best, fairest, and most efficient use of limited financial and judge advocate resources. The overall topic has not been considered by Congress since 1984, over 25 years. Many progressive changes have been made *de facto*. The Commission has received many suggestions and ideas regarding this subject.

A. Role of the Convening Authority

1. Pre trial.
2. Post Trial.
 - a. Consider review of court-martial prior to preparation of record of trial, through abstract of trial proceedings.
 - b. Consider limiting powers to clemency and sentence reductions.

B. Military Judge

1. Consider replacing *ad hoc* jurisdiction over persons charged with specific offenses with standing courts-martial defined by geographic region.
2. Pre trial. Consider changes in the management of:
 - a. Confinement.
 - b. Motions.
 - c. Other matters.
3. Trial. Consider:
 - a. Judge alone sentencing in all cases.
 - b. Imposing sentencing guidelines.
 - c. Issuing subpoenas in the name of court-martial by court.
4. Post trial. Review the extent of:
 - a. Jurisdiction over probationary sentences.
 - b. Extraordinary writ jurisdiction under All Writs Act.
 - c. Post conviction relief jurisdiction.
5. Consider means of selection and tenure of military judges.
6. Give military judges clear contempt powers.

C. Staff Judge Advocate

1. Consider role of SJA in investigative process.
2. Consider role of SJA in making recommendations to Convening Authority regarding prosecutorial decisions.
3. Consider how SJA should supervise the prosecution function.

D. Trial Counsel. Consider limits and powers of trial counsel.

E. Defense Counsel

1. Consider centralized funding for investigative services, expert witnesses and witness travel.
2. Review training and tenure practices.
3. Consider the applicability of the United States public defender model.

F. Court Reporters

1. Permit court reporters to certify record rather than Military Judge.
2. Encourage the use of an electronic record of trial.
3. Prepare record of trial only if case appealed.

G. Court Martial Panels

1. Transfer member selection to a Military Jury Office supervised by Chief Military Judge of the Court Martial District.
2. Eliminate court members in Special courts-martial (all Judge –alone trials).
3. Provide for minimum of six members in any trial by court-martial with members.
4. Forbid service by members who are reported on by other members, absent military exigency.
5. Include civilians as potential members when accused is a civilian.

H. Trial Court Arrangements

1. Abolish summary courts-martial.
2. Impose uniform public docket arrangements.
3. Prescribe normal hours for courtroom proceedings, subject to change for good cause shown on the record or by consent of the government and accused.
4. Forbid simultaneous duty as Trial Counsel and Defense Counsel
5. Require that government disclose all witnesses interviewed to the defense

II. APPELLATE REVIEW OF COURTS-MARTIALS

This topic has not been revisited by Congress since 1984 when for the first time Congress authorized direct petitions to the Supreme Court of cases reviewed by the United States Court of Military Appeals (Now United States Court of Appeals for Armed Forces). Focus will be given for allocation of resources, both financial and personnel. There have been many suggestions concerning this area of the law. For ease of consideration, the Commission has organized them in the following outline.

A. Right of Appeal

1. Should a convicted service member have the right to appeal any conviction by special and general courts-martial as a matter of right to the Courts of Criminal Appeals?
2. Should the convicted service member be required to make an election to appeal his or her case within a day certain or should the appeal be automatic unless the member waives the appeal?
3. Should Art. 62, UCMJ, give the government the right to appeal to the Courts of Criminal Appeal and then either party have the right to appeal to the United States Court of Appeals for the Armed Forces the decision of the Court of Appeals?
4. Should 28 U.S.C. §1259, 10 U.S.C. 867a, be amended to allow any military member convicted of an offense by special or general court-martial to petition the Supreme Court for Review?

B. Jurisdiction

1. Jurisdiction of appellate courts. Consider the following issues:
 - a. Regular appeals.
 - b. Extraordinary writs (All Writs Act).
 - i. Prior to Art. 76 finality.
 - ii. After Art. 76 finality.
2. Collateral attacks of courts-martial convictions on appeal.
 - a. Define rules and procedure for collateral attack.
 - b. Define standards for Court to consider for collateral attack on conviction.
 - c. Propose Rule for Courts-Martial dealing with collateral attacks.

C. Processes and Administration

1. Consider whether CAAF should rely on electronic records of trial.
2. Consider one step briefing for appeals to CAAF.
3. Consider whether CAAF should adopt the federal court PACER system for filing.

D. Restructure of System

1. Abolish intermediate Courts of Criminal Appeals and replace with expanded Article III United States Court of Appeals for Armed Forces that will hear cases in panels of three judges (in a manner similar to federal Circuit Courts of Appeals).
2. Allow direct appeal to this newly structured court in all cases, with appeal elected by accused rather than mandatory.
3. Allow Government appeals.
4. Adopt Federal Rules of Appellate Procedure.
5. Allow petitions to Supreme Court in all cases, similar to the treatment of cases from the United States Courts of Appeals.

III. MILITARY COMMISSIONS AND INTERNATIONAL HUMAN RIGHTS

The Commissions recognizes that the new president has created a high level committee to study the situation of “enemy combatants” and does not believe that it needs to duplicate that effort. Here, we focus on matters associated with the underlying issues of military commissions with the larger structures of military justice.

A. Repeal of Military Commission Act

1. Recommend how court-martial rules and procedures should be adapted or modified (or left unchanged) in the event that “enemy combatants” are tried before a UCMJ based military commission or court-martial.
2. Consider the appropriate role of the United States Court of Appeals for Armed Forces in the appeals process.

B. International Human Rights

1. Consider the role and posture of the United States in the evolution of international human rights laws particularly as they relate to trials by military courts-martial or military commissions.
2. Review existing Rules for Courts-Martial and UCMJ for compatibility with evolving standards of international human rights.
3. Consider impact of capital case when committed in the territory of a nation that does not permit capital punishment.

IV. CRIMES, OFFENSES AND PUNISHMENT

The Commission has received a number of suggestions and ideas regarding crimes and offenses. They are consolidated in this section for study purposes.

A. General

1. Repeal a number of the punitive articles in UCMJ and adopt federal crimes and offenses prescribed in Title 18 U.S.C.
2. Work out system where those crimes and offenses that are not uniquely military and occur in the United States or its territories are prosecuted in the Federal District Courts, offenders discharged upon conviction and imprisoned in federal institutions.
3. Remove presumption of knowledge of use of a drug in a trial where a positive urine test is the only evidence.
4. Increase maximum punishments for dereliction of duty.
5. Mandate quinquennial review of maximum punishments.

B. Capital Punishment

1. Revisit death penalty in cases other than homicide in light of Supreme Court decision in *Kennedy* .
2. Authorize life without parole sentence option, with accused’s consent, for rehearing in cases originally tried before life without parole was an option.

3. Allow judge-alone sentencing in capital cases with consent of accused and government.
4. Authorize guilty pleas in capital cases.
5. Require twelve-person jury in capital cases.
6. Require Racial Justice Act type of instruction in capital cases, as is the rule in U.S. District Courts.
7. Record stationhouse interrogations in all instances where Article 31 warnings include any homicide or capital offense.

C. Officer Misconduct

1. Codify doctrine of command responsibility under Article 92 and allow for increased punishments.
2. Develop a process to investigate expeditiously and resolve officer misconduct cases.
3. Allow general officers and O-6's in command billets to be investigated by FBI and civilian federal authorities.

D. Homosexuality and Sex Crimes

1. Modify Art. 125 so as to decriminalize consensual, adult, private sexual conduct.
2. Decriminalize adultery.

E. Non-Judicial Punishment

1. Mandate uniform burden of proof in MCM.
2. Memorialize the 1962 Schlei Memorandum criteria in MCM (*See United States v. Edwards*).
3. Modify MCM to include a definition of "vessel" for purposes of "vessel exception."

F. Animal Abuse. Create a crime for abuse and abandonment of non-military animals

V. MISCELLANEOUS

The Commission received several suggestions and ideas for general military legal reform, some of which have been discussed before in various venues. We list some here to memorialize them and solicit additional comments.

1. Place changes in Manual for Courts Martial before Congress.
2. Improve statistics and data furnished Congress in Annual Report.
3. Create a single military law school and close separate service schools,
4. Restore "Territory" to Articles 8, 22, 46, 47, 49, 58, and 88.
5. Revisit the concept of the Code Committee and consider alternatives for Judicial Rule Making such as a Judicial Conference with rule making authority.
6. Amend the Abused Military Dependents act of 1992 to treat military victims of domestic violence, as well as civilian victims, fairly.