

Factually Insufficient: A Response to the Military Justice Review Group's Appellate Review Proposal

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I. Introduction

In the past decade, allegations of rampant sexual misconduct and a toxic culture have plagued the United States military and called into question the functioning of the military justice system. As a result, the Army's civilian leadership and Congress tasked several entities to review the military justice system. One of these, the Military Justice Review Group (MJRG), was given a broad mission to review the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial (MCM) and to recommend changes. The MJRG's report, if adopted, would result in the most drastic changes since the adoption of the UCMJ. This article discusses changes in the appellate process which, if adopted by Congress, radically limit the available relief for servicemembers convicted at courts-martial.

The Military Justice Review Group

The MJRG resulted from a 2013 request by the then-Chairman of the Joint Chiefs of Staff, General Martin Dempsey, to Secretary of Defense Chuck Hagel for a "holistic review" of the military justice system to ensure it "most effectively and efficiently does justice consistent with due process and good order and discipline."¹ The Joint Chiefs deemed a comprehensive review necessary because of the transformation in the Armed Forces as well as major social changes in the United States since 1983, the date of the last comprehensive review.

In accordance with the Joint Chiefs' request, Secretary Hagel directed "the General Counsel of the Department of Defense (DoD) to conduct a comprehensive review of the UCMJ and the military justice system," including the Manual for Courts-Martial and the various service regulations that govern courts-martial.² The Secretary's direction included a requirement to review and implement those provisions of the report of the Response Systems to Adult Sexual Assault Crimes Panel³ (Response Systems Panel) the MJRG deemed appropriate.

The DoD General Counsel established five guiding principles for the MJRG:

1. Use the current UCMJ as a point of departure for baseline reassessment.
2. Where they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice.
3. To the extent practicable, UCMJ articles and MCM provisions should apply uniformly across the military services.
4. Consider any recommendations, proposals, or analysis relating to military justice issued by the Response Systems Panel.
5. Consider, as appropriate, the recommendations, proposals, and analysis in the report of the Defense Legal Policy Board, including the report of that Board's Subcommittee on Military Justice in Combat Zones.⁴

The MJRG also proclaims the proposed changes would follow the original objectives of the UCMJ—"to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."⁵

Since its inception in 1775, military law in the United States has evolved to recognize that all three components are essential to ensure that our national security is protected and strengthened by an effective, highly disciplined military force. The current structure and practice of the UCMJ embodies a single overarching principle based on more than 225 years of experience: a system of

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¹ REPORT OF THE MILITARY JUSTICE REVIEW GROUP 5 (Dec. 22, 2015), http://www.dod.gov/dodgc/images/report_part1.pdf [hereinafter MJRG REPORT].

² Memorandum from Sec'y of Def. to Secretaries of the Military Dep'ts et al., subject: Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013), http://www.dod.gov/dodgc/images/mjrg_secdef_memo.pdf.

³ DEP'T OF DEF., RESPONSE SYSTEMS PANEL REPORT (June 2014), http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf (last visited May 13, 2016).

⁴ MJRG REPORT, *supra* note 1, app. C-3.

⁵ *Id.* at 5; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES preamble (2012) [hereinafter MCM].

military law can only achieve and maintain a highly disciplined force if it is fair and just, and is recognized as such both by members of the armed forces and by the American public.⁶

II. History of Article 66 and its role

One of the unique aspects of the United States' military justice system is Article 66 of the UCMJ. Like most American justice systems, the UCMJ provides for levels of review. The majority of court-martial convictions are reviewed by an initial appellate service court and then, potentially, by the Court of Appeals for the Armed Forces (CAAF), and in limited circumstances, a case may be reviewed by the Supreme Court of the United States.⁷ However, aspects of the military appellate system are novel, and most significant among these is the review authority found in Article 66.

Under the current statutory scheme, Article 66 requires each service judge advocate general to refer cases to the respective services' court of criminal appeals (CCA) where the approved sentence includes at least one year of confinement, a punitive discharge, or extends to death.⁸ In other words, unlike many other systems of review, review of many courts-martial is automatic. But it is not just the scope of their appellate jurisdiction that makes the service courts' authority remarkable. When the service court acts on the findings and sentence approved by the convening authority, it may affirm only such findings of guilty and sentence as the court finds correct in law and fact and determines, on the basis of the entire record, should be approved.⁹ Furthermore, in considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.¹⁰ The service courts are required to determine (1) that the court itself is convinced of guilt beyond a reasonable doubt, and (2) that the findings and sentence approved "should be approved," based on the entire record.¹¹

This authority to weigh evidence, judge credibility, determine controverted fact, and affirm only what "should be approved" was of great significance to the drafters of the UCMJ. Harvard Law Professor Edmund J. Morgan, chairman of the Department of Defense special committee that helped draft the legislation which created the UCMJ (and widely

considered the intellectual driving force behind the UCMJ) testified before the House of Representatives Subcommittee on the Armed Services that the Board of Reviews were intended to limit command influence. "We think also that we have lessened command influence by making for all the services [provide a board of review]; namely, that they can review for law, fact, and sentence, so that they need approve only so much of it as they think justified."¹² Professor Morgan added that the idea was that "the board of review in the Judge Advocate's Office will be far away from the scene of the commanding officer who convened the court."¹³ Professor Morgan observed that,

Now we can act on the facts. We think that a means of lessening command influence. And when it is a question of law, the case then—in the severe cases—will go to the Judicial Council [the current Court of Appeals for the Armed Forces], which will be a civilian court and, of course, entirely outside the influence of any officer.¹⁴

General Franklin Riter of the American Legion described his experience in reviewing courts-martial under the Articles of War during World War II in the European Theater.¹⁵ General Riter struggled with finding the appropriate rules to apply to courts-martial, determining that the rules applicable to the federal courts of appeals should apply.¹⁶ But he observed they were simply not a good fit because those rules demanded that the review board accept the witnesses as credible.

And there we ran against that rule of where there is evidence to support the verdict. . . . They would not go behind that. And time and again, if we would have had the right—we knew that certain witnesses must have been plain liars that stood there—to judge credibility of witnesses and weigh the evidence our results would have been different.¹⁷

Consistent with the views expressed by Professor Morgan and General Riter, Congress enacted the UCMJ with Article 66. The Court of Appeals for the Armed Forces has observed that this statutory mandate is "[an] awesome, plenary, *de novo* power of review [that] grants unto the Court of Military Review authority to, indeed, 'substitute its

⁶ MJRG REPORT, *supra* note 1, at 16.

⁷ 10 U.S.C. § 867a (2016).

⁸ 10 U.S.C.S. § 866(b)(1) (2016). Cases with approved sentences of death have automatic review at both the service court and the U.S. Court of Appeals for the Armed Forces (CAAF). 10 U.S.C. § 867(a)(1).

⁹ *Id.*

¹⁰ *Id.*

¹¹ 10 U.S.C. § 866.

¹² *A Bill to Unify, Consolidate, Revise, and Codify The Articles of War, The Articles for the Government of the Navy, and the Disciplinary Laws of the*

*Coast Guard, and to Enact and Establish A Uniform Code of Military Justice: Hearings on H.R. 2498 Before the H. Subcomm. of the Comm. on Armed Services, 81st Cong., 1st Sess. 608 (1949) [hereinafter *House Hearings on the UCMJ*].*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 662.

¹⁶ *Id.*

¹⁷ *Id.*

judgment' for that of the military judge. It also allows a 'substitution of judgment' for that of the court members."¹⁸

Carte Blanche to Do Justice, Not Equity

In 2010, the CAAF addressed the scope of authority granted the service courts by UCMJ Article 66(c). In *United States v. Nerad*, the CAAF considered a decision by the Air Force Court of Criminal Appeals (AFCCA) in which the AFCCA relied on its "awesome, plenary, de novo powers" to determine that a conviction for child pornography "should not" be approved.¹⁹ Senior Airman Nerad was prosecuted for possessing naked photographs of his seventeen-year-old girlfriend. The Air Force Court observed that while it was lawful for the appellant to see his girlfriend naked (the age of consent under the UCMJ is 16), it was *unlawful* for him to possess nude photographs of her that she took and sent to him.²⁰ The Air Force Court concluded appellant's conduct was "not the sort of conduct which warrants criminal prosecution for possession of child pornography and that this conviction unreasonably exaggerates the criminality of his conduct."²¹

The CAAF reversed the Air Force Court, deciding the scope and meaning of the language "should be approved" was not without limits.²² While Article 66 demanded a service court only affirm findings and sentences that it: (1) finds correct in law; (2) finds correct in fact; and (3) determines should be approved, based on the entire record, the CAAF concluded this statutory grant did not provide Service courts with unfettered discretion. "[W]hen a [service court] acts to disapprove findings that are correct in law and fact, we accept the [service court] action unless in disapproving the findings the [service court] clearly acted without regard to a legal standard or otherwise abused its discretion."²³

As the legislative history and case law establish, Article 66 was enacted as a powerful tool to protect the rights of an accused servicemember from unjust conviction and curb command influence. No cases or literature suggests that Article 66, as it is currently written and understood, has not been working as it was originally intended. Nor does anything suggest that Article 66 results in frequent, let alone abundant, unjust windfalls for military accused. Nevertheless, the MJRG proposes to substantially limit Article 66 going forward. However, neither the reasons for such a limitation, nor the quantifiable results, support the MJRG proposal.

¹⁸ *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). In 1995, the Court of Military Appeals (CMA) became the CAAF. While colorfully conveying a service court's power, Judge Walter T. Cox was technically incorrect as it does not allow a substitute judgment merely a review of the entire record to determine what should be approved.

¹⁹ *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

²⁰ *United States v. Nerad*, 67 M.J. 748 (A.F. Ct. Crim. App. 2009).

²¹ *Id.* at 751.

III. Military Justice Review Group Proposal

Both the mechanisms for direct appeal and the jurisdictional bar to get to the service CCA's face wholesale changes in the MJRG proposal. The proposed legislation removes the automatic appeal and instead creates an appeal of right for these same cases while lowering the jurisdictional bar for confinement from one year to more than six months of confinement.²⁴ However, and more significantly, the manner of review by the courts of criminal appeals also changes drastically under the proposal. Under the MJRG proposal, all accused who meet the jurisdictional bar for CCA review must still present an assignment of error to the appropriate CCA before any review will occur. The CCA's independent duty to review for factual and legal sufficiency is absent from the proposal.

(d) DUTIES "(1) In any case before the Court of Criminal Appeals under paragraph (1) of subsection (b), the Court shall affirm, set aside, or modify the findings, sentence, or order appealed."

....

(e) CONSIDERATION OF THE EVIDENCE (1) In an appeal of a finding of guilty under paragraph (1)(A), (1)(B), or (2) of subsection (b), the Court of Criminal Appeals, *upon request of the accused, may consider the weight of the evidence upon a specific showing of deficiencies in proof by the accused. The Court may set aside and dismiss a finding if clearly convinced that the finding was against the weight of the evidence.* The Court may affirm a lesser finding. A rehearing may not be ordered.²⁵

As discussed, currently the courts conduct de novo reviews of every conviction meeting its jurisdictional bar, and must be convinced themselves of guilt beyond a reasonable doubt.

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. *It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.* In considering the record, it may weigh the evidence, judge the credibility of

²² *Nerad*, 69 M.J. at 146.

²³ *Id.* at 147.

²⁴ MJRG REPORT, *supra* note 1 at 1134. Section 910 of the Group's proposed Military Justice Act of 2015 discusses the change in appellate court jurisdiction. *Id.* at 612-20.

²⁵ *Id.* at 1137-38 (emphasis added).

witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.”²⁶

The MJRG goes to great lengths to explain the unique nature of the original Article 66, and argues implicitly its continued existence is unnecessary. However the report ignores precisely why the original Article 66 protections remain an important protection to military accused.

Throughout the MJRG proposal, the MJRG seeks to correlate military practice with federal and state practice.

The proposals recommend aligning certain procedures with federal civilian practice in instances where they will enhance fairness and efficiency and where the rationale for military specific practices has dissipated. For example, robust military judiciary and defense counsel organizations are firmly rooted in a system largely constructed prior to their development. These and other systemic changes reflect the growth and maturation of the military justice system since Congress enacted the UCMJ.²⁷

The MJRG regularly reiterates this theme in its Report, proposing substantially changing the military’s current practice regarding guilty pleas and calling for the adoption of some form of sentencing guidelines similar to those employed in the federal courts.²⁸ On the topic of appellate practice, the MJRG proposes “modernizing” the system.²⁹ The MJRG believes an amendment to Article 66 is necessary to mirror the appellate practice in “federal civilian appellate

courts”³⁰ In doing so, the proposed amendment would “increase the efficiency and effectiveness of the appellate process by focusing the courts on the issues raised by the parties.”³¹ The proposal would thus, in the MJRG’s view, meet the standards obtained in the federal system.

But pronounced differences exists between courts martial and federal district courts, and in almost every way, those differences cut against military accused. The vast statutory and constitutional differences are readily apparent. Limits on *voir dire* and panel selection;³² the lack of a unanimous vote for conviction;³³ the absence of grand jury proceedings; and the practice of non-binding Article 32 recommendations, are staples of the original UCMJ, and live on in the MJRG proposal.³⁴ One of the few counterweights to these due process limits afforded military accused is Article 66, which the MJRG proposes narrowing.

Not only does the UCMJ afford an accused lesser rights than are generally found in federal court practice, those serving as prosecutors, defense counsels, and judges have dramatically less experience than their federal counterparts. As Cully Stimson, an expert in national security and crime control for the Heritage Foundation recently observed, both the Army and Air Force Judge Advocate career model discourages specialization, instead adopting a standard of a “broadly skilled judge advocate.”³⁵ According to Stimson, a “stark contrast of experience” exists between litigators in at least two of the military services and civilian prosecutors and defense counsel—both state and federal—and military justice is paying the price.³⁶ And Stimson is not alone in his criticism.³⁷

²⁶ 10 U.S.C.S. § 866 (c) (2016) (emphasis added). The standard of proof used by the courts of criminal appeals has long required it to be convinced itself of guilt beyond a reasonable doubt. *See, e.g.*, *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

²⁷ MJRG REPORT, *supra* note 1 at 20.

²⁸ *Id.* at 505-13.

²⁹ *Id.* at 34.

³⁰ *Id.* at 609.

³¹ *Id.* at 611.

³² During *voir dire* in a courts-martial, each side receives one peremptory challenge of the empaneled members, all of whom were selected by the convening authority. *See* 10 U.S.C. § 825(d)(2) (2016); MCM, *supra* note 5, R.C.M. 503, 912(g). Conversely in federal district court practice, which the Military Justice Review Group (MJRG) was charged to consider, each side receives at least three peremptory challenges and can receive up to twenty in capital cases. FED. R. CRIM. P. 24(b); *see* MJRG REPORT, *supra* note 1, at 5-6.

³³ Currently, non-capital cases require a two-thirds majority of the panel while capital cases require unanimous verdicts. 10 U.S.C. 852(a) (2016). The MJRG proposal increases the non-capital ratio to three-fourths of the panel and mandates specific panel sizes of four members for special courts-martial and eight members for general courts-martial, while maintaining the twelve member requirement for capital cases. MJRG REPORT, *supra* note 1, at 1050-51, 1090 (sections 401 and 715).

³⁴ *See* *United States v. Meador*, Docket No. 002-62-16 (C.G. Ct. Crim. App. April 19, 2016). In the Article 62 appeal in *Meador*, the Coast Guard court reversed a trial court judge who ruled an Article 32 preliminary hearing officer’s recommendation was binding on the convening authority. *Id.*; *United States v. Mercier*, Docket No. 001-62-16 (C.G. Ct. Crim. App. March 18, 2016). In the Article 62 ruling in *Mercier*, the court upheld a trial court judge who dismissed a specification where the trial counsel presented no evidence to the preliminary hearing officer at the Article 32 hearing.

³⁵ Cully Stimson, *Army and Air Force JAG Corps Need Career Litigators Now*, THE DAILEY SIGNAL (May 2, 2016), <http://dailysignal.com/2016/05/02/army-and-air-force-jag-corps-need-career-litigators-now/>.

³⁶ *Id.*

³⁷ *See also* Major Jeffrey A. Gilberg, *The Secret to Military Justice Success: Maximizing Experience*, 220 MIL. L. REV. 1 (2014); Major Nathan J. Bankson, *A Justice Manager’s Guide to Navigating High Profile Cases*, ARMY LAW., July 2012, at 4; Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1 (1998); Major David L. Hayden et al., *Training Trial and Defense Counsel: An Approach for Supervisors*, ARMY LAW., Mar. 1994, at 21; Kenneth J. Hodson, *Military Justice: Abolish or Change?*, MIL. L. REV. (BICENTENNIAL VOLUME) 579 (1975); Lieutenant Colonel Gary J. Holland, *Tips and Observations from the Trial Bench*, ARMY LAW., Jan. 1993, at 9; Major Fansu Ku, *From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 MIL. L. REV. 49 (2009); Major Stephen J. McManus, *TRIALS: Advocacy Training for Courts-Martial*, 35 Rep. 16, no. 3 (2008); Lieutenant Colonel Edye U. Moran, *A View from the*

If the critics are correct, how can the military justice system credibly, let alone efficiently, navigate through a justice system which mirrors the federal system without the skill and experience, seen in the federal system? And if that navigation is not possible, how can the military justice system align with a system—‘modernize’ as the MJRG puts it—that has as its baseline such vast experience?

At some point the desire for increased efficiency in the military justice system loses sight of the touchstone of the military—the servicemembers. In the face of such drastic changes, the American Bar Association (ABA) urged restraint in letters to both the House and Senate armed services committees.

While the ABA takes no position on this proposal, *we urge the Armed Services Committee to proceed with caution before acting on proposals that take any material rights away from an accused. . . .* Automatic appeals to appellate courts outside the local command structure add an additional level of confidence and integrity for those convicted in the UCMJ system and also improve the public perception of the military’s trial process. We ask the Committee to consider whether there is a compelling justification to rescind or diminish this important right at this time.³⁸

The MJRG’s proposed revisions to appellate review are a solution in search of a problem, which come up empty-handed and in fact create greater inefficiency. No servicemember currently entitled to seek relief at the CCAs or the CAAF would necessarily be denied that right, they would simply have to face more obstacles to get relief. And they would have to wait longer as the bar is lowered to six months of confinement from the current twelve month mandate. And some research of recent case law explores the breadth of this proposal.

Bench: The Guilty Plea—Traps for New Counsel, ARMY LAW., Nov. 2008, at 61; Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15; Colonel Joe P. Peck, *Critique of Counsel Subsequent to Trial*, 15 A.F. L. REV. 163 (1973); Colonel Charles N. Pedo, *The Judge Advocate and the 21st Century*, ARMY LAW., Apr. 2011, at 32; Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, HERITAGE FOUNDATION (Nov. 6, 2013), <http://report.heritage.org/sr149>.

³⁸ Letter from Paulette Brown, President, American Bar Association, to House and Senate Armed Services Committees (May 5, 2016), http://www.abajournal.com/files/ABA_letter_to_House_Armed_Services_Committee.pdf (emphasis added); see also Terry Carter, *ABA expresses concerns about some proposed changes to the military justice system*, ABA JOURNAL, May 5, 2016, http://www.abajournal.com/news/article/aba_expresses_concerns_about_some_proposed_changes_to_the_military_justice?utm_source=internal&utm_medium=navigation&utm_campaign=navbar.

³⁹ E-mail from Malcom Squires, Clerk of Court, Army Court of Criminal Appeals, to author (Apr. 11, 2016, 17:02 EST) (on file with author). Both the CAAF and the service courts have long allowed the accused to personally raise issues to the courts even when counsel declines to raise the

IV. Use of the Article 66 Power by the Courts of Criminal Appeals

There were twenty-six cases in 2014 and twenty cases in 2015 when the Army court of criminal appeals exercised its independent Article 66 powers and gave relief where appellate and counsel simply filed a case on its merits.³⁹ The fact these Soldiers would not receive relief under the MJRG shows the breadth of this proposal.

Additionally, despite more than fifty years of case law the MJRG proposes to use the brute force of legislative fiat and dictate the standard of review used by the CCA’s moving from ‘beyond a reasonable doubt’ that an accused is guilty to the lower protections of ‘clearly convincing’ standard.⁴⁰ The upheaval this change causes both appellate courts and practitioners who have operated within a beyond a reasonable doubt standard for more than sixty years and developed a significant body of case law, cannot be overstated.⁴¹

As discussed, one of the guiding principles of the MJRG was to bring the military justice system into harmony with district courts wherever possible.⁴² The Group’s recommendation on appellate review not only misplays the tune, but indeed chooses the wrong instrument.

While no civilian jurisdiction vests an appellate court with such vast power, it is important to remember the climate surrounding the birth of the UCMJ. The Code was designed to be a check on command overreach, and thus the need for appellate review by officers removed from a command by both physical geography and technical supervision. The need to protect the process, and more importantly the accused, from unlawful command influence, has no comparison in civilian practice. The role of this review is not something which should be abandoned while the specter of UCI remains in our system.⁴³

A few years ago an argument existed that this power, coexisting with the convening authority’s vast post-trial clemency power, was *too* great of a benefit for the accused

issue. “[W]hen the accused specified error in his request for appellate representation or in some other form, the appellate defense counsel will, at a minimum, invite the attention of the Court of Military Review to those issues.” *United States v. Grostefon*, 12 M.J. 431, 436 (C.M.A. 1982).

⁴⁰ 10 U.S.C.S. § 866 (2016); MJRG REPORT, *supra* note 1.

⁴¹ See, e.g., *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (being cited more than 2,000 times for its holding and discussion of the factual sufficiency standard).

⁴² MJRG REPORT, *supra* note 1.

⁴³ See, e.g., *United States v. Salyer*, 72 M.J. 415, 428 (C.A.A.F. 2013) (CAAF disagreeing with the Navy-Marine court and dismissing a case for prejudice finding an appearance of unlawful command influence (UCI)); *United States v. Garcia*, No. 20130660, 2015 CCA LEXIS 335, at *25 (A. Ct. Crim. App. Aug. 18, 2015) (mem. op.) (overturning aside sexual assault convictions where the government counsel injected the stain of UCI during argument); *United States v. Howell*, No. NMCCA 201200264, 2014 CCA LEXIS 321, at *35 (N-M Ct. Crim. App. May 22, 2014).

and too much of a burden for a system which needed a clearer sense of finality.⁴⁴ However, the 2014 National Defense Authorization Act (NDAA),⁴⁵ and to a lesser extent the 2015 NDAA,⁴⁶ greatly altered that landscape and dramatically shrunk the clemency powers of a convening authorities. Whereas the accused once possessed a pair of weapons as they stood defending against government overreach, missteps, and legal error, the MJRG completes the disarmament of these same servicemembers.

At some point criminal law cases no longer represent numbers on a page but rather Soldiers, Sailors, Airmen, Coastguardsmen, and Marines whose due process rights would be sacrificed to make the military system more analogous to a civilian system.

The below cases represent just some of the military cases where relief has been granted since 2015—but these servicemembers would not see relief under the MJRG proposals.

A. Army Court of Criminal Appeals

As noted above there were twenty cases in 2015 where the Army Court of Criminal Appeals (ACCA) gave relief, though it was not sought by the accused or appellate counsel. Additionally, there have been eight occasions where unrequested relief was granted so far in 2016, one of which is highlighted here.⁴⁷

United States v. Sergeant First Class William J. Delgado⁴⁸

Although not raised by counsel, the court reviewed an inappropriate relationship conviction, originally charged as violating Army Regulation (AR) 600-20 and Article 92, and

found the conviction was insufficient. The court held “appellant’s non-consensual sexual assault on Private First Class YCG cannot form the basis to establish a consensual inappropriate relationship.”⁴⁹ This conviction was set aside by the ACCA on its own review, again an action not possible under the MJRG proposal.

United States v. Sergeant Malcolm Fiamé⁵⁰

Sergeant (SGT) Fiamé pled guilty to larceny and unauthorized sale of military property offenses. During the providency inquiry SGT Fiamé admitted that over the course of divers occasions total value of the property was more than \$500.⁵¹ A brief review of the facts lead the ACCA to conclude that the unauthorized sale offenses should be treated the same as larceny offenses, and the value aggregation principles should remain constant.⁵²

This case was also submitted on its merits by appellate counsel without any assigned errors. And while SGT Fiamé received no relief in this 2015 case, the redrawn specifications he stands convicted of and the new law developed by the ACCA are instructive as the ACCA has already used this precedent when granting relief in a pair of cases.⁵³ The rippling precedential effect flowing from a case such as this would not happen under the MJRG proposed change to appellate review.

B. Air Force Court of Criminal Appeals

⁴⁴ See Captain David Grogan, *Stop The Madness It’s Time To Simplify Court-Martial Post-Trial Processing*, 62 NAVAL L. REV. 1 (2013); Major John Hamner, *The Rise and Fall of Post-Trial—Is It Time for the Legislature to Give Us All Some Clemency?* ARMY LAW., Dec. 2007, at 1; Craig Whitlock, *Air Force General’s Reversal of Pilot’s Sexual Assault Conviction Angers Lawmakers*, WASH. POST (Mar. 8, 2013), https://www.washingtonpost.com/world/national-security/air-force-generals-reversal-of-pilots-sexual-assault-conviction-angers-lawmakers/2013/03/08/f84b49c2-8816-11e2-8646-d574216d3c8c_story.html.

⁴⁵ National Defense Authorization Act for Fiscal Year 2014, 113 Pub. L. No. 66, § 1702, 127 Stat. 672, 954 (2013).

⁴⁶ Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015, 113 Pub. L. No. 291, § 531, 128 Stat. 3292, 3362 (2014).

⁴⁷ United States v. Baker, No. 20140396 2016 CCA LEXIS 341 (A. Ct. Crim. App. May 13, 2016); United States v. Mozie, No. 20130065, 2016 CCA LEXIS 273 (A. Ct. Crim. App. Apr. 28, 2016) (setting aside a conviction using the court’s Article 66 power after finding error with the Staff Judge Advocate’s post-trial advice); United States v. Scioneaux, No. 20130850, 2016 CCA LEXIS 230 (A. Ct. Crim. App. Apr. 13, 2016) (excising certain words from an assault offense after conducting a factual sufficiency review); United States v. Santiago Serrano, No. 20140166, 2016 CCA LEXIS 165 (A. Ct. Crim. App. Mar. 16, 2016); United States v. Inson, No. 20130557, 2016 CCA LEXIS 130 (A. Ct. Crim. App. Feb. 29, 2016) (sum. op.) (setting aside a conviction for delivering defense information

using its factual sufficiency power); United States v. Davis, No. 20150219, 2016 CCA LEXIS 146 (A. Ct. Crim. App. Feb. 25, 2016) (sum. op.) (setting aside an assault consummated by a battery specification which it found to be an unreasonable multiplication of charges with a reckless endangerment conviction); United States v. Piccirillo, No. 20140897, 2016 CCA LEXIS 56 (A. Ct. Crim. App. Jan. 29, 2016) (sum. op.) (setting aside a conspiracy to commit arson conviction that was not raised by the appellant or counsel). Instances of Article 66 plenary power by the Army court are current as of May 13, 2016.

⁴⁸ United States v. Delgado, No. 20140927, 2016 CCA LEXIS 7 (A. Ct. Crim. App., Jan. 6, 2016) (mem. op.).

⁴⁹ *Id.* at *4.

⁵⁰ United States v. Fiamé, 74 M.J. 585 (A. Ct. Crim. App. 2015).

⁵¹ *Id.* at 586.

⁵² *Id.* at 587.

⁵³ United States v. Miller, No. 20140429, 2015 CCA LEXIS 586, at *3 (A. Ct. Crim. App. Dec. 21, 2015) (unpub.) (redrawing Miller’s conviction for selling military property of a value of more than \$500 to reflect a conviction for selling military property of some value); United States v. Goff, No. 20140327, 2015 CCA LEXIS 253 (A. Ct. Crim. App. June 15, 2015) (unpub.) (editing three convictions for selling military property of a value of more than \$500 to reflect convictions of selling military property of some value).

The Air Force Court of Criminal Appeals (AFCCA) has also used its plenary power to review and give relief three times this calendar year, and one case stands out.⁵⁴

United States v. Senior Airman Luis Salguero⁵⁵

Senior Airman Salguero's convictions included possessing child pornography, to which he pled guilty and was found provident by the military judge. On appeal, and without being raised by counsel, the court found providency did not extend to two of the forty-one images in the specification as the images did not depict the "sexually explicit conduct" necessary for child pornography.⁵⁶

C. Navy-Marine Court of Criminal Appeals

Similar to both the ACCA and the AFCCA, in this calendar year alone, the Navy-Marine Court of Criminal Appeals (NMCCA) has granted relief in a number of cases where the appellate and counsel submitted the matter on its merits, and one standout is highlighted here.⁵⁷

United States v. Lance Corporal Dustin Hackler⁵⁸

Lance Corporal (LCpl) Hackler, was charged with sexual assault, and convicted of the lesser-included offense of battery. Although he submitted an assignment of error alleging the evidence supporting the conviction was insufficient, the court went further and questioned in a specified issue "was [] even raised by evidence."⁵⁹ The court held the evidence here did not raise the lesser-included offense of battery and set aside the battery conviction. And unlike the above cases, the court also set aside LCpl Hackler's bad conduct discharge and ninety days of hard labor without confinement.⁶⁰ Thus solely due to the power of the court to affirm only what is correct in law and fact, LCpl Hackler no longer carries a bad conduct discharge from the military, nor

⁵⁴ See also United States v. Gallegos, No. ACM 38738, 2016 CCA LEXIS 208, (A.F. Ct. Crim. App. Mar. 31, 2016) (unpub.); United States v. Ellis, No. ACM 38655, 2016 CCA LEXIS 24 (A.F. Ct. Crim. App. Jan. 12, 2016) (unpub.). Instances of Article 66 plenary power by the Air Force court are current as of May 13, 2016.

⁵⁵ United States v. Salguero, No. ACM 38767, 2016 CCA LEXIS 5 (A.F. Ct. Crim. App. Jan. 6, 2016) (unpub.).

⁵⁶ *Id.* at *1-2, *7; see United States v. Blouin, 74 M.J. 247 (C.A.A.F. 2015).

⁵⁷ See also United States v. Mac, No. 201500413, (N-M Ct. Crim. App. Apr. 21, 2016); United States v. Mays, No. 201500372, 2016 CCA LEXIS 252 (N-M Ct. Crim. App. Apr. 21, 2016); United States v. Roller, No. NMCCA 201600008, 2016 CCA LEXIS 203 (N-M Ct. Crim. App. Mar. 31, 2016); United States v. Zambrano, No. NMCCA 201500002, 2016 CCA LEXIS 19 (N-M Ct. Crim. App. Jan. 19, 2016) (unpub.); United States v. Beaumont, No. 201500237, 2016 CCA LEXIS 12 (N-M. Ct. Crim. App. Jan. 12, 2016). Instances of Article 66 plenary power by the Navy-Martine court are current as of May 13, 2016.

⁵⁸ United States v. Hackler, No. NMCCA 201400414, 2016 CCA LEXIS 168 (N-M Ct. Crim. App. Mar. 17, 2016).

the stigma such a label holds. This extraordinary relief would, like so many others, be impossible in the proposed system.

D. Coast Guard Court of Criminal Appeals

Although none of the twelve cases issued by the Coast Guard Court of Criminal Appeals this year have seen its Article 66 plenary power employed, two of the thirteen opinions from 2015 saw relief granted to an accused after the courts applied its Article 66 power.⁶¹

V. Conclusion⁶²

The desire to modernize the military justice system is important and much-needed. However in the area of appellate review of cases, which were referred to trial by the accused's commander, and upon which a panel of individuals chosen by the commander often vote on guilt and a sentence, proposals to lessen the rights of the accused should be eyed skeptically. Change simply for the sake of change, especially when the current system of appellate review is far from broken is unwise.

In our attempts to update the UCMJ and the practice of military justice stakeholders must never lose sight of our *raison d'être*, the servicemembers we serve with every day defending this nation. They will bear the burden of this change. Congress should view limits to appellate review with a dubious eye and remove this proposal from any future legislation.

⁵⁹ *Id.* at *3.

⁶⁰ *Id.* at *26.

⁶¹ United States v. Rogers, No. 1391, 2015 CCA LEXIS 472, (C.G. Ct. Crim. App. July 8, 2015); United States v. Gilmore, No. 1388, 2015 CCA LEXIS 471 (C.G. Ct. Crim. App. July 2, 2015). Instances of Article 66 plenary power by the Coast Guard court are current as of May 13, 2016.

⁶² On May 18, 2016 2016, the House of Representatives passed its version of the 2017 National Defense Authorization Act (NDAA) which includes most of the proposals offered by the MJRG. That version of the bill however notably does not include the changes to the factual sufficiency on appellate review discussed in this article nor the requirement that the appellate must raise all issues to the court, though it does lower the jurisdictional bar to six months. See National Defense Authorization Act for Fiscal Year 2017, H.R. 4909, 114th Cong. § 6810 (2016). The Senate passed its version of the 2017 NDAA, which includes these MJRG provisions, on June 14, 2016. See, NDAA for Fiscal Year 2017, S. 2943. Thus, the future of these recommendations by the MJRG is uncertain.