

Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District of Columbia

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*Nothing can be more hurtful to the service, than the neglect of discipline; for that discipline, more than numbers, gives one army the superiority over another.*¹

I. Introduction²

Members of the U.S. Armed Forces are subject to the Uniform Code of Military Justice (UCMJ) at all times while serving on active-duty in the military.³ Similarly, servicemembers in the organized reserves of the Army, Navy, Marine Corps, Air Force, and Coast Guard⁴ are also subject to the UCMJ, while serving in an active military status.⁵

An exception to this jurisdictional principle regarding the UCMJ is the applicability to Soldiers and Airmen serving in the Army and Air National Guards⁶ of the individual states.⁷ Unless serving in a federal active-duty status under Title 10 of the United States Code, members of the National Guard are not subject to the UCMJ and military justice action or disciplinary measures must be taken by the individual states.⁸

Those military justice actions taken by the states are often markedly different than courts-martial or nonjudicial punishment under the UCMJ. This article provides an overview of the National Guard military justice systems among the states, territories, and the District of Columbia.⁹ Specifically, the overview addresses nonjudicial punishment, all levels of courts-martial including pre-trial matters, courts-martial personnel, trials, post-trial procedures, and appellate matters. The following discussions examine the similarities and differences with the UCMJ and state military justice systems as well as the procedural and substantive differences in the two systems of criminal justice. Additionally, a recently proposed Model State Code of Military Justice will be examined in contrast to existing state laws.¹⁰

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¹ 8 THE WRITINGS OF GEORGE WASHINGTON 359 (John C. Fitzpatrick ed., 1933) (quoting General George Washington, General Orders, July 6, 1777).

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³ UCMJ art. 2(a)(1) (2005) (codified at 10 U.S.C. §§ 801–946 (2000)); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 202(a) discussion (5) and R.C.M. 204 (2005) [hereinafter MCM].

⁴ Members of the U.S. Coast Guard are also subject to the UCMJ, however, they serve under Title 14 U.S.C. as opposed to Title 10. See 10 U.S.C. § 801 (2000). See generally 14 U.S.C. § 2 (2000).

⁵ UCMJ art. 2(a)(1); MCM, *supra* note 3, R.C.M. 202(a) discussion (5) and R.C.M. 204.

⁶ While each state has components of both Army National Guard and Air National Guard, this article focuses primarily on the Army National Guard. Unless otherwise indicated, the term “National Guard” as used in this article refers only to the Army National Guard.

⁷ UCMJ art. 2(a)(2)(B).

⁸ See 32 U.S.C.S. §§ 326–327 (LexisNexis 2008).

⁹ Each state, territory, and the District of Columbia has a National Guard. 32 U.S.C. § 101(4) (2000). The term “state” used throughout this work shall be inclusive of the territories and the District of Columbia unless otherwise noted.

¹⁰ NATIONAL GUARD BUREAU, MODEL STATE CODE OF MILITARY JUSTICE (2007) [hereinafter MODEL STATE CODE OF MJ], available at http://www.ngb.army.mil/jointstaff/ps/ja/conference/2007/MODEL_STATE_CODE_OF_MILITARY_JUSTICE.doc.

A. The Army National Guard

The Army National Guard of the United States is part of the organized militia which is “a land force” that is “trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution,” which “is organized, armed, and equipped wholly or partly at Federal expense,” and is also “federally recognized.”¹¹ The Army National Guard is made up of more than 340,000 Soldiers.¹² Of those 340,000 plus Soldiers, there are more than 600 Judge Advocates serving in the Army National Guard.¹³

While the National Guard is a component of the U.S. Armed Forces, it is also the militia of the individual state when not serving in a federal status.¹⁴ More simply put, unless called into federal service under Title 10, the National Guard remains primarily under the control of the states and their governors. Accordingly, discipline of National Guard Soldiers and military justice actions are under the exclusive jurisdiction of the state when not in federal service.¹⁵

In July of 2003, the structure of each state’s National Guard Headquarters was changed from their previous make-up. The Chief of the National Guard Bureau directed that states transition from separate Army and Air National Guard commands into a joint headquarters.¹⁶ Consequently, as joint commands, most states administer military justice in the same manner for both the Army and Air National Guard components.¹⁷

B. Historical Overview

The militia system in the United States can trace its roots back to the earliest settlers on this continent. As early as the 1500s, militias were formed by Spanish settlers.¹⁸ In 1565, Saint Augustine, Florida, was established as the first Spanish military *presidio* (headquarters) in what would become the United States.¹⁹ More than four hundred years later, Saint Augustine retains its historic ties to the militia system as the location of the Florida National Guard Headquarters.²⁰

While the term “National Guard” was first used in 1824,²¹ the framework for the modern National Guard was established by federal legislation in 1903.²² The Militia Act of 1903 (also known as the Dick Act²³) secured the federal nexus between state militias and the United States military by providing funding and equipment and requiring the militias to standardize their training and structure.²⁴ It was then that the National Guard first became subject to call-up for federal service other than

¹¹ 32 U.S.C. § 101(4).

¹² Lieutenant General Clyde A. Vaughn, *The Army National Guard’s Accomplishments and Initiatives*, ARMY, Oct. 2006, at 121.

¹³ Major Patrick Barnett, U.S. Army, Video Lecture for the 2007 Judge Advocate Officer Advanced Course at TJAGLCS: National Guard Trial Defense Service (Oct. 17, 2006) [hereinafter Barnett Lecture].

¹⁴ See 32 U.S.C. § 102; see also *id.* § 104.

¹⁵ See 32 U.S.C.S. §§ 326–327 (LexisNexis 2008).

¹⁶ Memorandum, Chief, National Guard Bureau, to The Adjutants General of All States et al., subject: National Guard Bureau Transformation (1 July 2003) [hereinafter NGB Memo].

¹⁷ See Captain Robert L. Martin, Results of Military Justice Survey (Jan. 25, 2007) (unpublished summary of data collected from National Guard Military Justice Survey conducted in Nov. 2006) (on file with author) [hereinafter MJ Survey].

¹⁸ MICHAEL D. DOUBLER & JOHN W. LISTMAN, JR., *THE NATIONAL GUARD: AN ILLUSTRATED HISTORY OF AMERICA’S CITIZEN SOLDIERS* 1 (2003).

¹⁹ *Id.* at 2.

²⁰ CAPTAIN ROBERT L. MARTIN, *HISTORY OF THE FLORIDA NATIONAL GUARD JUDGE ADVOCATE GENERAL’S CORPS 1870–2005*, at 79 (2006).

²¹ NATIONAL GUARD ASSOCIATION OF THE UNITED STATES: *THE NATION’S NATIONAL GUARD* 10 (1954) [hereinafter *THE NATION’S NATIONAL GUARD*]. The designation “National Guard” was adopted by the 7th Regiment, New York Militia in 1824 to honor the Marquis de Lafayette, and his military unit, the “Garde National” of France. DOUBLER ET AL., *supra* note 18, at 25.

²² DOUBLER ET AL., *supra* note 18, at 53.

²³ So named for the sponsor, U.S. Sen. Charles Dick, who was also a Major General in the Ohio National Guard. *THE NATION’S NATIONAL GUARD*, *supra* note 21, at 27.

²⁴ Militia Act of 1903, ch. 196, 32 Stat. 775; see also DOUBLER ET AL., *supra* note 18, at 53.

on a volunteer basis.²⁵ When not in federal service, responsibility for military justice action and discipline of militia troops remained with the states.²⁶

Following World War II, Congress enacted the UCMJ.²⁷ During the floor debates about the UCMJ, the issue of its applicability to the National Guard was specifically addressed for the record:

Mr. HOLLAND. I should like to ask the Senator from Tennessee if it is correct to say for the record that there is nothing in this bill which is applicable to the National Guard of the several States?

Mr. KEFAUVER. There is not, unless members of the National Guard are on Federal service.

Mr. HOLLAND. Does the Senator mean by his answer to state that the National Guard and no components of personnel therefrom would be affected by or subject to any of the provisions of this bill until and unless they have been actually federalized?

Mr. KEFAUVER. Until they have been actually called or ordered to duty or training by the Federal Government.²⁸

It was the intent of Congress in 1949 that the newly enacted UCMJ not apply to the National Guard unless serving in a federal status.²⁹ Additionally, the 1950 version of the UCMJ required any orders placing reserve component personnel on federal active-duty to specifically state they were then subject to the UCMJ.³⁰ The inapplicability of the UCMJ to non-federalized National Guard personnel remains the case today.³¹

C. Role of the National Guard

The National Guard is the only reserve component of the United States' military to also have a non-federal mission. Serving as the state militia, the National Guard's unique dual military role has been explained as follows:

Perhaps the most unique aspect of the National Guard is that it exists as both a federal and state force. As a federal force, the Guard provides ready, trained units as an integral part of America's field forces. In its state role, the National Guard protects life and property and preserves peace, order, and public safety under the direction of state and federal authorities. No other reserve military force in the world has such an arrangement, and the National Guard's dual allegiance to state and nation has often been the subject of much controversy and misunderstanding National Guard troops serve at the direction of the state governors until the president [sic] of the United States orders them to active duty for either domestic emergencies or overseas service.³²

Since the National Guard falls under Title 32 of the United States Code, rather than Title 10, when serving in its state militia status, the UCMJ is not applicable to National Guard members unless called into federal military service.³³ Therefore, as previously noted, the authority to discipline Soldiers in a Title 32 status remains with the individual states and territories.³⁴

²⁵ DOUBLER ET AL., *supra* note 18, at 53.

²⁶ See 32 U.S.C.S. §§ 326–327 (LexisNexis 2008).

²⁷ UCMJ, ch. 169, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801–946 (2000)).

²⁸ DEPARTMENT OF THE NAVY, JUDGE ADVOCATE GENERAL, CONGRESSIONAL FLOOR DEBATE ON THE UNIFORM CODE OF MILITARY JUSTICE 226 (1950).

²⁹ *Id.*

³⁰ See UCMJ art. 2(3) (1950); see also FREDERICK BERNAYS WIENER, THE UNIFORM CODE OF MILITARY JUSTICE: EXPLANATION, COMPARATIVE TEXT, AND COMMENTARY 37 (1950).

³¹ UCMJ art. 2(a)(3) (2005); MCM, *supra* note 3, R.C.M. 202(a) discussion (5).

³² DOUBLER ET AL., *supra* note 18, at xi.

³³ UCMJ art. 2(a)(3); MCM, *supra* note 3, R.C.M. 202(a) discussion (5); see also 32 U.S.C.S. §§ 326–327 (LexisNexis 2008).

³⁴ See 32 U.S.C.S. §§ 326–327.

D. National Guard Duty Status

Active component and reserve component personnel (other than the National Guard) serve only in a military duty status under Title 10. National Guard personnel may serve in several different military statuses, all of which impact military justice jurisdiction.³⁵ To better understand state (and federal) military justice jurisdiction and its limitations, one must also understand the military statuses in which National Guard personnel serve.

Members of the National Guard generally serve in one of four military categories: (1) federal active-duty under Title 10; (2) full-time active-duty under Title 32; (3) inactive training duty under Title 32; and (4) state active duty under the laws of the individual states. Each of these categories is discussed below.

1. Federal Active-Duty Under Title 10

National Guard personnel may serve pursuant to federal law under Title 10 or Title 32. Soldiers of the National Guard normally serve under Title 10 only when they have been federally mobilized for deployment due to a national emergency, or a contingency operation in the United States or overseas.³⁶ For example, National Guard units mobilized and deployed to Iraq serve under Title 10. Soldiers on active-duty and assigned to the National Guard Bureau may also fall under Title 10.³⁷ National Guard Soldiers serving in this status are subject to the UCMJ.³⁸

2. Full-Time Active-Duty Under Title 32

Soldiers serving in a duty status under Title 32 normally remain under the command and control of their state's governor, even when performing some federal missions such as those related to homeland defense.³⁹ While most National Guard Soldiers are traditional drilling reservists, there are also personnel who perform their duties on a full-time basis.⁴⁰

National Guard units function very much like their active-duty counterparts on a day-to-day basis, but the staffing of these units is somewhat different. Full-time staffing of National Guard units is often by active-duty Soldiers, known as Active Guard Reserve (AGR) personnel.⁴¹ At the state level, AGR Soldiers have a full-time duty status under Title 32.⁴² In addition to AGR Soldiers, personnel who are on active-duty for extended periods for advanced training schools, active-duty for special work such as recruiting or counter-drug missions, or other special full-time permanent or temporary assignments, are serving under Title 32.⁴³ Regardless of whether National Guard Soldiers serve full-time or part-time, if the duty status is under Title 32, those personnel are subject only to the state military codes, and not the UCMJ.⁴⁴

³⁵ Duty status in the National Guard is also relevant to issues other than military justice. The status of a member of the National Guard is significant for retirement, benefits, and legal protections, not just the applicability of the UCMJ or state military code. See *infra* App. C, National Guard Duty Status Chart.

³⁶ See, e.g., 10 U.S.C. § 12301 (2000).

³⁷ See, e.g., *id.*

³⁸ UCMJ art. 2(a)(1); MCM, *supra* note 3, R.C.M. 202(a) discussion (5), R.C.M. 204.

³⁹ See, e.g., 32 U.S.C.S. § 904.

⁴⁰ Full-time staffing of the National Guard includes AGR Soldiers, and military technicians, as well as military personnel employed by the individual states, such as The Adjutant General (TAG).

⁴¹ Administrative and staff positions are filled by both AGR Soldiers and military technicians. Military technicians are similar to AGR Soldiers in that they are members of the National Guard, but serve in a full-time capacity as federal employee (rather than as an active-duty Soldier) for pay and benefits purposes. Military technicians serve under Title 5 of the United States Code. See 5 U.S.C. § 2105 (2000).

⁴² See, e.g., 32 U.S.C. § 502 (2000). A National Guard AGR Soldier may sometimes serve under Title 10. For example, a Soldier assigned to the National Guard Bureau or detailed as an instructor at TJAGLCS serves under Title 10, not under Title 32, as his or her duties would be primarily federal in nature and do not fall under the command and control of an individual state.

⁴³ See *id.*

⁴⁴ UCMJ art. 2(a)(3) (2005); MCM, *supra* note 3, R.C.M. 202(a) discussion (5).

3. Inactive Training Duty Under Title 32

Most National Guard personnel serve in the traditional, part-time military status normally associated with the reserve components. Soldiers serving in an inactive duty training status, such as weekend drill status or during their annual training period, normally fall within the provisions of Title 32.⁴⁵ An exception to this rule is when training missions are conducted outside the continental United States, which must be done in a federal active-duty status.⁴⁶ National Guard Soldiers attending some advanced individual training, officer basic and advanced courses, and similar training do so under Title 32. Unless National Guard Soldiers are performing inactive duty training under Title 10, they are not subject to the UCMJ in that status.⁴⁷

4. State Active Duty Under the Laws of the Individual States

Unlike members of the other reserve components, National Guard personnel may serve on active-duty solely under state law in their capacity as the state militia.⁴⁸ The governor of a state, as Commander-in-Chief of their National Guard, has the authority to order Soldiers to active-duty for state missions. State active duty missions may include fighting forest fires, homeland security missions, relief efforts during natural disasters such as floods, hurricanes, blizzards, or responding to civil unrest or violence, such as rioting.⁴⁹

When serving in a state active duty status, National Guard personnel receive their pay and allowances from the state government.⁵⁰ Accordingly, these Soldiers do not earn federal military retirement credit for service in their state-only capacity.⁵¹ Another major distinction from a federal mission is that Soldiers performing state active duty are not covered by federal medical or disability benefits. Soldiers performing state missions are only protected under state worker's compensation laws.⁵² Because their service is solely under state law, Soldiers performing state missions would never be subject to the UCMJ.⁵³

II. Military Justice in the National Guard

The UCMJ only applies to National Guard personnel serving in a federal military status under Title 10. Conduct that would constitute an offense under the UCMJ, but committed while serving in a National Guard status (under Title 32 or while on state active duty) can only be addressed under state law.⁵⁴

Unlike active-duty military personnel who are always subject to UCMJ action, state law dictates when and how military justice jurisdiction is applicable to members of the National Guard.⁵⁵ The inapplicability of the UCMJ, the part-time military status of most National Guard Soldiers, and the diversity of laws in the individual states results in unique military justice issues not encountered in the active-duty armed forces.

⁴⁵ See 32 U.S.C. § 502.

⁴⁶ Army National Guard Soldiers who deploy outside the United States must be in an active duty status under Title 10. U.S. DEP'T OF ARMY, REG. 350-9, OVERSEAS DEPLOYMENT TRAINING para. 4-2 (8 Nov. 2004). A Title 10 duty status may protect National Guard personnel under any existing Status of Forces agreements with the host nation. See NAT'L GUARD BUREAU, AIR NATIONAL GUARD INSTR. 16-101, INTERNATIONAL ACTIVITIES para. 2-1 (1 Dec. 2006).

⁴⁷ UCMJ art. 2(a)(3); MCM, *supra* note 3, R.C.M. 202(a) discussion (5).

⁴⁸ See, e.g., FLA. STAT. § 250.06 (2006).

⁴⁹ See, e.g., 32 U.S.C. § 328; see also Colonel John C. Renaud, National Guard Fact Sheet Army National Guard (FY 2005) (May 3, 2006); KEITH E. BONN, ARMY OFFICER'S GUIDE 61 (50th ed. 2005).

⁵⁰ See, e.g., FLA. STAT. § 250.23.

⁵¹ See U.S. DEP'T OF ARMY, REG. 135-180, ARMY NAT'L GUARD AND ARMY RESERVE QUALIFYING SERVICE FOR RETIRED PAY NONREGULAR SERVICE para. 2-8 (1 July 1987).

⁵² See, e.g., FLA. STAT. § 250.34.

⁵³ UCMJ art. 2(a)(3) (2005); MCM, *supra* note 3, R.C.M. 202(a) discussion (5).

⁵⁴ See 32 U.S.C.S. §§ 326-327 (LexisNexis 2008).

⁵⁵ See MJ Survey, *supra* note 17.

Like members of all United States military reserve components, a National Guard Soldier is considered to be in a duty status only when performing military duties.⁵⁶ As with any reserve component servicemember, criminal acts committed by National Guard Soldiers not in a duty status will likely be handled by civilian authorities. Such conduct may, however, result in military administrative action depending on the offense and final disposition of the case.⁵⁷

When a National Guard member commits a purely military offense, but is not in a duty status, what then is the recourse for that conduct? Is a state military justice code applicable when a Guardsman, in a duty status, commits a military offense outside his or her state? There is no one answer to these questions as each is dependant on the laws of the individual states. To address these and other disciplinary issues, most states have enacted a military justice code, as authorized under federal law.⁵⁸

Title 32 provides for court-martial jurisdiction among the states for National Guard personnel.⁵⁹ Specifically, under federal law it is provided that when the

National Guard [is] not in Federal service, there are general, special, and summary courts-martial constituted like similar courts of the Army and the Air Force. They have the jurisdiction and powers, except as to punishments, and shall follow the forms and procedures, provided for those courts. Punishments shall be as provided by the laws of the respective States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands.⁶⁰

The research for this article demonstrates that most states have taken steps to exercise that authority by adopting some type of state military justice code.⁶¹

A. Military Justice Survey⁶²

In November of 2006, the author sent a National Guard-specific military justice survey (MJ Survey)⁶³ to the state staff judge advocate (SJA) for the National Guard⁶⁴ of each state, territory, and the District of Columbia.⁶⁵ The questionnaire covered several topics including the form of the state military justice code, courts-martial, punishments, convening authorities, nonjudicial punishment, court-martial personnel, and post-trial and appellate procedures.⁶⁶ Fifty percent of the states responded to the MJ Survey.⁶⁷

⁵⁶ See, e.g., 32 U.S.C. § 502 (2000).

⁵⁷ See, e.g., U.S. DEP'T OF ARMY, REG. 135-178, ARMY NAT'L GUARD AND ARMY RESERVE ENLISTED ADMIN. SEPARATIONS para. 12-1 (10 July 2006) (discussing separation for misconduct).

⁵⁸ See MJ Survey, *supra* note 17.

⁵⁹ See 32 U.S.C.S. §§ 326-327.

⁶⁰ *Id.* § 326.

⁶¹ See MJ Survey, *supra* note 17.

⁶² The author would like to acknowledge the assistance of Colonel (COL) Elizabeth C. Masters & Ms. Cathy Tringali, Office of the Staff Judge Advocate, Fla. National Guard, for their assistance in coordinating the dissemination of the MJ Survey. The author would also like to acknowledge the assistance of MAJ Nick Lancaster of TJAGLCS for his guidance in finalizing the MJ Survey document.

⁶³ A copy of the MJ Survey is included at App. A, *infra*.

⁶⁴ The following National Guard Judge Advocates participated in the MJ Survey process: COL Richard Palmatier, Jr. – Arizona, Captain (CPT) Jake Jones – Arkansas, COL Roland L. Candee – California, Lieutenant Colonel (LTC) Victor A. Tall – District of Columbia, COL Kenneth Waldrep – Georgia, COL David B. Riano – Guam, LTC David Dahle – Idaho, LTC Wayne S. Carlson – Illinois, LTC Michael A. Kuehn – Iowa, COL Kenneth G. Gale – Kansas, COL Jules D. Edwards, III – Louisiana, MAJ Anthony Sciaraffa – Massachusetts, MAJ John Wojcik – Michigan, MAJ Mark Majors – Mississippi, COL Douglas Wilken – Nebraska, Lt Col Francine Swan – New Hampshire, COL Daniel Giaquinto and CPT Robert Stevens – New Jersey, COL James C. McKay – New Mexico, COL George A. Yanthis – New York, LTC Duncan Aukland – Ohio, MAJ Mark Ronning – Oregon, LTC Phillip M. Reilly – Puerto Rico, COL Barry J. Bernstein – South Carolina, MAJ Matthew Cooper – Washington, CPT Gerald Fox – Wisconsin, and MAJ Francisco Romero – Wyoming.

⁶⁵ While American Samoa has a National Guard, no statutory reference to a military justice system could be located, nor was there a listing for a staff judge advocate. Therefore, no MJ Survey was sent to American Samoa and that territory is not included in the statistical analysis of this article.

⁶⁶ See *infra* App. A, MJ Survey.

⁶⁷ As of 1 March 2007, Arkansas, California, District of Columbia, Florida, Georgia, Guam, Idaho, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Puerto Rico, South Carolina, Washington, Wisconsin, and Wyoming responded to the MJ Survey.

The results of the MJ Survey responses are supplemented by the author's review of the various state and territorial codes.⁶⁸ A summary of the MJ Survey results and the author's review of the state codes are contained in Appendix B and discussed in greater detail below.

B. State Military Justice Systems

1. State Military Justice Codes

Federal law authorizes each state National Guard to administer a military justice program similar to that of the UCMJ, with punishments determined by the states.⁶⁹ In response to a congressional mandate,⁷⁰ the Model State Code of Military Justice (Model Code) has been drafted by personnel of the National Guard Bureau.⁷¹ The promulgation of the Model Code is an effort to bring consistency to state courts-martial actions, but it has not yet been adopted by any of the states.⁷²

Fifty-two of the fifty-four states and territories have some form of a military justice code in their published laws.⁷³ The State of Tennessee⁷⁴ and the Territory of American Samoa⁷⁵ do not have codified state military justice codes. Based on the results of the author's MJ Survey and a review of existing state military justice codes, it appears that more than 70% of the states have, by law, a military justice system similar to that provided for under the UCMJ.⁷⁶

Specifically, nearly 30% of the state military justice codes appear to be adapted from (or at least based upon) the UCMJ.⁷⁷ Most of the remaining states have enacted legislation adopting some version of the actual UCMJ for use by their National Guard.⁷⁸ In line with the 2003 directive from the Chief of the National Guard Bureau that state headquarters transition into joint commands, more than 90% of the state military justice systems are applicable to both Army and Air National Guard personnel.⁷⁹

Several states indicate that while there is a military justice code on the books, either their state does not have an active military justice program,⁸⁰ or that the system in use differs from the UCMJ.⁸¹ Some states, rather than use courts-martial, employ military administrative remedies for misconduct and also refer criminal matters to civilian authorities for

⁶⁸ See *infra* App. D, State Military Justice Codes; MJ Survey, *supra* note 17.

⁶⁹ See 32 U.S.C.S. §§ 326–327 (LexisNexis 2008).

⁷⁰ See Bob Stump National Defense Authorization Act for 2003, Pub. L. No. 107-314, 116 Stat. 2537 [hereinafter NDAA 2003].

⁷¹ The *Model State Code of Military Justice* is discussed in more detail at Part VI, *infra*. MODEL STATE CODE OF MILITARY JUSTICE 2007, *supra* note 10; see also Colonel Jeffrey Lawson, PowerPoint Presentation at the National Guard Bureau All Hands Conference in Orlando Fla.: Model Code & Manual (Jan. 17, 2007) [hereinafter Lawson Presentation] (on file with author).

⁷² A new state military code that closely tracks the Model Code is under consideration by the Wisconsin legislature as of December 2006. See National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Wisconsin National Guard, completed by CPT Gerald Fox) (on file with author) [hereinafter Wis. MJ Survey].

⁷³ See MJ Survey, *supra* note 17.

⁷⁴ Under Tennessee state law, there are no provisions for courts-martial. However, the Tennessee Code does have penal provisions that are directly applicable to National Guard personnel. See TENN. CODE ANN. §§ 58-1-611 to 58-1-634 (2006). It is presumed that these offenses would be prosecuted by Tennessee state courts as would any other crime. The Tennessee National Guard did not respond to the author's MJ Survey request.

⁷⁵ American Samoa has no reference to military justice or courts-martial contained in its statutes.

⁷⁶ See MJ Survey, *supra* note 17.

⁷⁷ *Id.*

⁷⁸ Not all states have adopted the UCMJ. The states of California, Florida, Indiana, Montana, North Carolina, North Dakota, South Dakota, and Wyoming have adopted some version of the UCMJ by statute. See *id.*; see also 32 U.S.C.S. §§ 326–327 (LexisNexis 2008).

⁷⁹ Tennessee does not have a state military justice code; the District of Columbia, Illinois and New Jersey do not have an active military justice system. See MJ Survey, *supra* note 17; see also NGB Memo, *supra* note 16.

⁸⁰ The District of Columbia, Illinois, Massachusetts, Nebraska, New Hampshire, New Jersey, New York, Oregon, and Wyoming indicate that their state's military justice system is either inactive or is rarely used. See MJ Survey, *supra* note 17.

⁸¹ The laws pertaining to courts-martial in Alabama, Alaska, Delaware, District of Columbia, Illinois, Indiana, Maine, Maryland, Mississippi, Nebraska, New Jersey, South Carolina, Utah, and Vermont differ from the provisions of the UCMJ. See MJ Survey, *supra* note 17.

prosecution.⁸² A number of states utilize civilian authorities in addition to (or instead of) military justice action in all criminal matters.⁸³

2. State Military Justice Regulations

In addition to the Manual for Courts-Martial (*MCM*), the active-duty Army exercises regulatory control of the military justice process through Army Regulation 27-10 (AR 27-10). To supplement their state military justice codes, some states have promulgated their own military justice regulation.⁸⁴ Many states that have a military justice regulation adapted it from AR 27-10.⁸⁵

While there are a number of states that have regulatory materials to supplement the state military justice code, not all are based on AR 27-10. Some state regulations are a hybrid of AR 27-10 and the *MCM*, while others are more akin to the *MCM* alone.⁸⁶ The California National Guard is unique in that it has a “courts-martial manual,” although the publication is specific to their state law and not similar to AR 27-10 or the active-duty *MCM*.⁸⁷ While a few states have some form of military justice regulation with a limited scope of applicability,⁸⁸ the remaining states have no regulatory materials supplementing their state military justice code.⁸⁹

The congressional requirement that the Model Code be developed for adoption by the states includes a directive to create a model state manual for courts-martial.⁹⁰ A model state manual for courts-martial was drafted in 2003.⁹¹ The model state manual does not “duplicate” the *MCM*, but “[a]llows states to supplement” when necessary.⁹²

III. Courts-Martial Actions in the National Guard

National Guard Soldiers (serving under Title 32 or on state active duty) violating the law, state military justice code, or applicable regulations, may be subject to military justice action under state law. While this may include courts-martial as provided for by the applicable state code, such actions may differ greatly from those conducted under the UCMJ. This section will discuss pretrial matters such as jurisdictional issues, investigation of charges, as well as custodial arrests. Other matters addressed are courts-martial personnel, the different types of courts-martial in the National Guard, and confinement of offenders.

⁸² These states include the District of Columbia, Illinois, Nebraska, New Hampshire, and New Jersey. The Illinois and New Hampshire National Guards also use nonjudicial punishment as a corrective measure. *See id.*

⁸³ These states include Nebraska, New Hampshire, New Jersey, Tennessee, and Vermont. *See id.*

⁸⁴ *See id.*

⁸⁵ The regulations for Arkansas, Georgia, Kansas, Michigan, Montana, New York, Ohio, Oregon, South Carolina, and Washington are based upon the U.S. Army’s Military Justice regulation. *See id.*; *see also* U.S. DEP’T OF ARMY, REG. 27-10, MIL. JUST. para. 3-2 (16 Nov. 2005) [hereinafter AR 27-10].

⁸⁶ New Jersey has a military justice regulation similar to AR 27-10, but they do not have an active military justice system at this time. National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of New Jersey National Guard, completed by COL Daniel Giaquinto and CPT Robert Stevens) (on file with author) [hereinafter N.J. MJ Survey]. The Florida and Guam regulations are taken from both AR 27-10 and the *MCM*. National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Florida National Guard, completed by CPT Robert L. Martin) (on file with author); National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Guam National Guard, completed by COL David B. Riano) (on file with author). The Louisiana and Wisconsin regulations are more similar to the *MCM* only. National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Louisiana National Guard, completed by COL Jules Edwards) (on file with author); Wisconsin MJ Survey, *supra* note 72.

⁸⁷ CALIFORNIA NATIONAL GUARD, MANUAL FOR COURTS-MARTIAL CALIFORNIA (2007); *see also* National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of California National Guard, completed by COL Roland L. Candee) (on file with author) [hereinafter Cal. MJ Survey].

⁸⁸ The New Hampshire National Guard military justice regulation covers only arrests and nonjudicial punishment and the Illinois regulation is applicable only to nonjudicial punishment. *See* National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Illinois National Guard, completed by LTC Wayne S. Carlson) (on file with author) [hereinafter Illinois MJ Survey]; National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of New Hampshire National Guard, completed by LTC Francine Swan) (on file with author) [hereinafter N.H. MJ Survey].

⁸⁹ These states include Arizona, Iowa, Massachusetts, Mississippi, Nebraska, New Hampshire, New Mexico, Oregon, and Wyoming. *See* MJ Survey, *supra* note 17.

⁹⁰ *See* NDAA 2003, *supra* note 70.

⁹¹ Lawson Presentation, *supra* note 71.

⁹² *Id.*

A. Pre-Trial Issues

1. Jurisdiction by Military Status

Active-duty and reserve component personnel are subject to courts-martial jurisdiction under the UCMJ by virtue of their Title 10 military status at the time an offense is committed,⁹³ and also at the time of court-martial.⁹⁴ As with the UCMJ, jurisdiction is also a significant issue under state law for National Guard personnel.

In most states, the military status of the National Guard Soldier (serving in a Title 32 or state active duty status) is the key component of jurisdiction for military justice action.⁹⁵ Not all states, however, are uniform in their application of the status element. Nearly half of the states require the Soldier be in a duty status (or under orders to be in a duty status) at the time of the offense to establish jurisdiction over an accused for courts-martial or nonjudicial punishment.⁹⁶ The other states indicated their jurisdictional criteria for courts-martial and nonjudicial punishment is more like the requirements set forth in the UCMJ.

Under the laws of these states, all Soldiers (and members of the Air National Guard), by being a member of the National Guard, are subject to the state's military justice code at all times.⁹⁷ In these states, misconduct by a National Guard member at anytime could result in military justice action as courts-martial jurisdiction exists over a Soldier regardless of his duty status at the time of the offense.⁹⁸

2. Jurisdiction by the Offense Committed

For active-duty military personnel, there is no "subject matter" requirement for courts-martial jurisdiction. The UCMJ does not require an offense to have a military nexus, or be service connected, to establish jurisdiction over misconduct committed by an active-duty servicemember.⁹⁹ The "service connection" jurisdictional requirement under the UCMJ was abolished by the U.S. Supreme Court in 1987.¹⁰⁰ The military nature (or non-military nature) of an offense is not a jurisdictional issue under the UCMJ. This is not always the case under some state military codes.

Unlike the UCMJ, some states maintain an *alternative* method of establishing jurisdiction over a National Guard Soldier if the offense committed has a "military nexus."¹⁰¹ In these states, the "service connection" is an additional method of obtaining jurisdiction over a National Guard Soldier, if the Soldier was *not* in a duty status when the offense was committed.

The proposed Model Code requires both status as a National Guard member and nexus between the offense and "the state military force."¹⁰² Like the Model Code, Kansas is unique in that it is the only state currently requiring both a military status (under Title 32 or state active duty) as well as a "military connection" to the offense to establish jurisdiction.¹⁰³

⁹³ UCMJ art. 2(a)(3) (2005); *see also* United States v. Chodara, 29 M.J. 943 (A.C.M.R. 1990) (military status required for offenses committed by reservists).

⁹⁴ UCMJ art. 3.

⁹⁵ *See* MJ Survey, *supra* note 17.

⁹⁶ The states requiring duty status include Alabama, Alaska, Delaware, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana (except drug offenses), Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, Ohio, Oklahoma, Oregon, Puerto Rico, Utah, Washington, Wisconsin, and Wyoming. *See id.*

⁹⁷ These states are Arkansas, Arizona, California, Colorado, Florida, Georgia, Kansas, Louisiana (for Article 112a drug offenses only), Maine, Massachusetts, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Virgin Islands, and West Virginia. *See id.*

⁹⁸ *See id.*

⁹⁹ MCM, *supra* note 3, R.C.M. 203.

¹⁰⁰ *See* Solorio v. United States, 483 U.S. 435 (1987).

¹⁰¹ These states include Illinois, Oregon, Puerto Rico, and Wisconsin. *See* MJ Survey, *supra* note 17.

¹⁰² MODEL STATE CODE OF MJ, *supra* note 10, art. 2.

¹⁰³ *See* National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Kansas National Guard, completed by COL Kenneth G. Gale) (on file with author).

3. Extraterritorial Jurisdiction

The UCMJ does not limit jurisdiction to offenses committed by an accused Soldier at certain locations, such as on a military installation, or even within the United States.¹⁰⁴ For Title 10 active-duty personnel, status of the accused at the time of the offense (and at the time of trial) is the key to jurisdiction.¹⁰⁵ For active-duty personnel, the UCMJ jurisdiction applies at all times and in all places.¹⁰⁶ Unlike the unlimited territorial applicability of the UCMJ, geographic boundaries can be a jurisdictional issue in National Guard military justice.

National Guard personnel often cross state lines for official duties under both Title 32 and when serving on state active duty.¹⁰⁷ Most state military codes are similar to the UCMJ in that jurisdiction for courts-martial action is not limited to the boundaries of the state.¹⁰⁸ Only ten National Guards limit military justice jurisdiction to offenses committed within the state.¹⁰⁹ In most states, an offense committed by National Guard personnel serving outside of the state still confers jurisdiction over the offense and the accused.¹¹⁰ Like the UCMJ, the key to jurisdiction under the laws of these states is the duty status of Soldier, not the location of the offense.¹¹¹ The Model Code provides for extraterritorial jurisdiction when Soldiers commit offenses while serving beyond the limits of their state.¹¹²

4. Investigation of Charges

The UCMJ requires allegations of criminal or regulatory misconduct be investigated.¹¹³ Such inquiries may be conducted by the commander, Military Police, the U.S. Army Criminal Investigative Division, or pursuant to Army Regulation 15-6 (AR 15-6). In the National Guard, all states generally follow the active-duty procedures for investigating allegations of wrongdoing; however, such inquiries are handled in a variety of differing ways.¹¹⁴

Most states responding to the MJ Survey indicated that investigations were primarily a command responsibility.¹¹⁵ California, for example, handles investigations in the same manner as the active component.¹¹⁶ In addition to National Guard commanders (or a designee) handling investigations, a number of states also allow others, such as investigating officers

¹⁰⁴ UCMJ art. 5 (2005).

¹⁰⁵ *Id.* art. 2.

¹⁰⁶ *Id.*

¹⁰⁷ For example, in October 2005, the author deployed from Florida to Louisiana in a Title 32 status during Hurricane Katrina operations.

¹⁰⁸ *See* MJ Survey, *supra* note 17.

¹⁰⁹ The laws of Alabama, Alaska, Delaware, Guam, Illinois, Indiana, Kansas, Maryland, New Hampshire, and New York do not provide for extraterritorial jurisdiction. *See* MJ Survey, *supra* note 17.

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² MODEL STATE CODE OF MJ *supra* note 10, art. 2.

¹¹³ MCM, *supra* note 3, R.C.M. 303.

¹¹⁴ *See* MJ Survey, *supra* note 17.

¹¹⁵ *See id.*

¹¹⁶ *See* Cal. MJ Survey, *supra* note 87.

appointed under AR 15-6, military police,¹¹⁷ and/or civilian law enforcement officers to also investigate alleged offenses.¹¹⁸ At least two states have laws requiring military courts of inquiry to be appointed to conduct investigations.¹¹⁹

5. Arrests and Pre-Trial Confinement

In the active component, any person subject to the UCMJ may be apprehended (arrested) based upon probable cause that they committed an offense that may subject them to trial by courts-martial.¹²⁰ Rule for Courts-Martial (RCM) 304 provides for imposing pretrial restraint on Soldiers with a pending UCMJ action and is defined as “moral or physical restraint on a person’s liberty . . . imposed before and during disposition of offenses.”¹²¹ Pretrial *restraint* may be in the form of “conditions on liberty, restriction in lieu of arrest, arrest, or confinement.”¹²² Due to the part-time nature of their military service, pretrial restraint is rarely used in National Guard court-martial actions.¹²³

Active-duty servicemembers facing trial by courts-martial under the UCMJ may also be placed in more restrictive pretrial *confinement* (actual custodial confinement) under RCM 305.¹²⁴ When National Guard Soldiers are facing charges, a custodial arrest, pretrial restriction, or confinement is not always available under the state military justice systems.¹²⁵

While it is unknown why pretrial confinement authorization is not available in some states, it is likely that the more common military offenses are not serious enough to justify such restrictions on a part-time Soldier’s liberty.¹²⁶ By the very nature of their part-time military service, pretrial restraint is difficult to impose on traditional drilling National Guard personnel; however, more than half of the state military justice codes do allow pretrial confinement for Soldiers facing courts-martial.¹²⁷

Although arrests are not commonplace in the National Guard, only five states prohibit custodial arrest for violations of the state military justice code.¹²⁸ The most common offenses in the National Guard are not of a nature to warrant pretrial confinement as most states use the civilian criminal justice system for serious crimes.¹²⁹ In states that allow National Guard Soldiers to be incarcerated, most use civilian jails when restraint is necessary.¹³⁰

¹¹⁷ Military police are authorized to conduct criminal investigations in Arkansas, Arizona, Florida, Georgia, Guam, Idaho, Kansas, Michigan, Louisiana, Massachusetts, Michigan, Mississippi, Nebraska, South Carolina, and Wisconsin. See MJ Survey, *supra* note 17. Ohio and Wyoming do not have military police available for this purpose. See National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Ohio National Guard, completed by LTC Duncan Aukland) (on file with author); National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Wyoming National Guard, completed by MAJ Francisco Romero) (on file with author) [hereinafter Wyo. MJ Survey]. Military police may be used to conduct an investigation in Washington only where they have been appointed under AR 15-6. See MJ Survey, *supra* note 17.

¹¹⁸ Investigations are not addressed under the laws of Illinois. See Ill. MJ Survey, *supra* note 88. Civilian law enforcement may be utilized in Arizona, Florida, Georgia, Guam, Idaho, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, Ohio, Puerto Rico, South Carolina, Washington, Wisconsin, and Wyoming. See MJ Survey, *supra* note 17. The New Jersey National Guard refers all criminal matters to civilian law enforcement officials. See N.J. MJ Survey, *supra* note 86.

¹¹⁹ Those states include New Hampshire and Oregon. See N.H. MJ Survey, *supra* note 88; National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Oregon National Guard, completed by MAJ Mark Ronning) (on file with author).

¹²⁰ MCM, *supra* note 3, R.C.M. 302.

¹²¹ *Id.* R.C.M. 304.

¹²² *Id.*

¹²³ See MJ Survey, *supra* note 17.

¹²⁴ MCM, *supra* note 3, R.C.M. 305.

¹²⁵ See MJ Survey, *supra* note 17.

¹²⁶ In Florida, for example, pretrial restraint is only authorized when an accused has been given notice of court-martial and fails to appear for the proceedings. FLORIDA DEP’T OF MILITARY AFFAIRS REG. 27-10, MILITARY JUSTICE para. 4-6 (1 June 2006) [hereinafter FLA. NG REG. 27-10]. Such custody is limited to a forty-eight-hour period or the duration of the court-martial. *Id.* It should be noted that serious criminal charges, unless of a purely military nature, are referred to the civilian courts in Florida. *Id.* para. 1-5.

¹²⁷ See MJ Survey, *supra* note 17.

¹²⁸ Arrests for military offenses are generally not permitted in Alabama, Illinois, Nebraska, New Jersey, and Puerto Rico. See *id.*

¹²⁹ See *id.*

¹³⁰ See *id.* Some states did indicate the use of a military “guardhouse” in addition to civilian facilities. *Id.*

The Model Code provides for both warrantless arrests of offenders and pretrial restraint or confinement, when circumstances require it.¹³¹ It remains to be seen whether states adopting the Model Code will accept these provisions of the act. This may be a point of consideration in those states that now prohibit arrests by the National Guard.¹³²

B. Court-Martial Personnel

Article 27 of the UCMJ establishes minimum qualifications for counsel involved in litigating courts-martial. Specifically, it requires that both trial counsel (prosecutor) and defense counsel be law school graduates, admitted as a member of a federal or state bar, and be “certified as competent to perform such duties by the Judge Advocate General”¹³³ The minimum qualifications for Judge Advocates serving as trial and defense counsel at courts-martial within the National Guard vary from state to state.

1. Trial Counsel

Nearly 80% of the states require military offenses to be prosecuted by a Judge Advocate.¹³⁴ Most states do not require Article 27(b), UCMJ, certification for Judge Advocates participating in courts-martial, but some states have alternative requirements such as approval by the state SJA.¹³⁵ Some states allow prosecution by civilian prosecutors in addition to Judge Advocates, however, in the District of Columbia, offenses committed by National Guard Soldiers are prosecuted only in the civilian courts.¹³⁶

2. Defense Counsel

An accused facing a general or special court-martial under the UCMJ has the right to representation by an assigned military defense counsel.¹³⁷ Additionally, the UCMJ affords an accused the right to his or her choice of military defense counsel, if available, and civilian counsel at the expense of the accused.¹³⁸ In most states, statutes or regulations provide that Soldiers who are accused of committing a military offense are entitled to representation by a detailed Judge Advocate.¹³⁹

More than half of the states require their defense counsel to either be Article 27 (b), UCMJ, certified, or be approved by the state SJA.¹⁴⁰ In a number of states, civilian defense attorneys are authorized in addition to (or in lieu of) military counsel.¹⁴¹ Some states, however, do not require any type of certification of defense counsel, military or civilian.¹⁴²

Assignment as a defense counsel in the National Guard is normally an additional duty; however, a few states have one or more Judge Advocates dedicated as defense counsel.¹⁴³ The Florida National Guard, for example, previously manned a

¹³¹ See MODEL STATE CODE OF MJ, *supra* note 10, arts. 7, 9, and 10.

¹³² Those states include Alabama, Illinois, Nebraska, New Jersey, and Puerto Rico. See MJ Survey, *supra* note 17.

¹³³ UCMJ art. 27(b) (2005).

¹³⁴ There are no specific trial counsel requirements in Massachusetts, New Hampshire, or New Jersey. See MJ Survey, *supra* note 17.

¹³⁵ See *id.*

¹³⁶ Those states which allow civilian prosecutions include Illinois and Wyoming. See Illinois MJ Survey, *supra* note 88; Wyoming. MJ Survey, *supra* note 117; see also National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of District of Columbia National Guard, completed by LTC Victor A. Tall) (on file with author).

¹³⁷ UCMJ art. 38.

¹³⁸ *Id.*

¹³⁹ About 77% of the state codes provide for representation by military defense counsel. See MJ Survey, *supra* note 17.

¹⁴⁰ See *id.*

¹⁴¹ These states include New York, New Mexico, Oregon, Puerto Rico, and Wisconsin. See *id.*

¹⁴² These states include Arkansas, Connecticut, Georgia, Guam, Illinois, Iowa, Mississippi, Nebraska, Oregon, South Carolina, Washington, and Wisconsin. See *id.*

¹⁴³ These states include Alabama, California, Illinois, Louisiana, Nebraska, New York, Washington, and Wyoming. See *id.*

dedicated trial defense counsel position and their current state military justice regulation provides for a dedicated trial defense counsel, however, defense counsel are detailed only as needed.¹⁴⁴

3. National Guard Trial Defense Service Positions¹⁴⁵

The United States Army Trial Defense Service (TDS) began in 1978 to ensure the independence of military defense attorneys, who previously worked under the same convening authority as the courts-martial to which they were detailed.¹⁴⁶ The mission of the TDS is “to provide a full-range of defense legal services to over 490,000 soldiers serving in numerous commands worldwide.”¹⁴⁷ The Army’s TDS has traditionally been comprised of active-duty Army and Army Reserve personnel. In 2005 planning was implemented to include the National Guard in the U.S. Army TDS.¹⁴⁸

As the Army force structure changes to modular units, National Guard TDS elements will begin to form and the changes should be complete by 2011.¹⁴⁹ The National Guard positions will fall under Army TDS, with a National Guard Deputy Chief reporting to the Chief of TDS.¹⁵⁰ However, the National Guard Judge Advocates assigned to TDS will remain members of their state’s National Guard.¹⁵¹

The training requirements and opportunities for National Guard TDS personnel will be the same as those for active-duty officers.¹⁵² National Guard Judge Advocates who serve as TDS counsel may be utilized by the active component, as well as represent Soldiers in National Guard military justice cases and adverse administrative matters.¹⁵³ Trial Defense Service activities that cross state lines will be funded centrally through the National Guard Bureau.¹⁵⁴ Intra-state defense matters remain a state mission, which would be paid for locally.¹⁵⁵

The new TDS positions will bolster the strength level for Judge Advocates in the National Guard. It is anticipated that the TDS function will add approximately 132 new Judge Advocate positions to the National Guard.¹⁵⁶ These positions will be organized both as elements of combat theatre sustainment units as well as stand-alone TDS elements.¹⁵⁷ Allocation of the TDS slots to the states will be based upon “troop density, geography, state code, licensure, and workload history.”¹⁵⁸ It is anticipated that each state will have at least one TDS attorney, with some states having multiple positions.¹⁵⁹ Additional enlisted personnel will be authorized to support the National Guard TDS mission.¹⁶⁰

¹⁴⁴ FLA. NG REG. 27-10, *supra* note 126, para. 1-4.

¹⁴⁵ The author acknowledges the contribution of MAJ Christopher Brown, TJAGLCS for his assistance in obtaining the background materials and information on the National Guard Trial Defense Service program.

¹⁴⁶ U.S. Trial Defense Service - History, https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/TDS/TDS_Hq.nsf/ (last visited Jan. 18, 2007).

¹⁴⁷ TDS Mission, https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/TDS/TDS_Hq.nsf/ (last visited Jan. 18, 2007).

¹⁴⁸ Barnett Lecture, *supra* note 13.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; see also Major Patrick Barnett, National Guard Trial Defense Service (Oct. 17, 2006) (unpublished PowerPoint Presentation) (on file with author) [hereinafter Barnett PowerPoint].

¹⁵¹ Barnett Lecture, *supra* note 13.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*; see also Barnett PowerPoint, *supra* note 150.

¹⁵⁸ Barnett Lecture, *supra* note 13; see also Barnett PowerPoint, *supra* note 150.

¹⁵⁹ Barnett Lecture, *supra* note 13.

¹⁶⁰ *Id.*; see also Barnett PowerPoint, *supra* note 150.

4. Military Judges

Under the UCMJ, most general courts-martial are presided over by a military judge.¹⁶¹ While each service may have individual requirements, the UCMJ requires only that a military judge be:

[A] commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.¹⁶²

Under the military justice codes of the states, qualifications for military judges usually have similar criteria; however, some states do not provide for a military judiciary at all.¹⁶³

State military justice codes provide for judges in more than 70% of states, although not all of those states currently have a qualified military judge.¹⁶⁴ Most states do not require their National Guard judges to complete the Military Judge Course at The Judge Advocate General's Legal Center and School, as in the Regular Army and Army Reserve.¹⁶⁵

In those states whose laws do not provide for military judges, or where there is not a qualified National Guard military judge available, that role is filled in other ways. Wyoming allows non-military state court judges to be utilized by the National Guard.¹⁶⁶ Army Reserve Military Judges are authorized for National Guard courts-martial in a few states that do not have their own military judges.¹⁶⁷ In other states, Presidents of Courts-Martial, who may not necessarily be a Judge Advocate or attorney, are used in lieu of military judges.¹⁶⁸ The term "Law Officer" from the original UCMJ,¹⁶⁹ who served in the role of a military judge, is still used in a few state codes.¹⁷⁰

5. State Bar Membership

Accession into the Army Judge Advocate General's Corps, whether as an active-duty or reserve component Judge Advocate, requires applicants to "be admitted to practice and have membership in good standing of the bar of the highest court of a state of the United States, the District of Columbia, Commonwealth of Puerto Rico, or a Federal court."¹⁷¹ It is further required that such bar membership be maintained for continued service as a Judge Advocate.¹⁷² There is no U.S. Army policy requiring a Judge Advocate appointed in the National Guard be admitted to a *specific* state bar.¹⁷³

State military justice actions are purely state law matters and do not constitute federal practice.¹⁷⁴ Unlike UCMJ actions, state military justice proceedings often require bar membership in that particular jurisdiction.¹⁷⁵ Even though not required by

¹⁶¹ See UCMJ art. 26(b) (2005). A military judge may be detailed to a special court-martial. MCM, *supra* note 3, R.C.M. 501(a)(2)(B).

¹⁶² UCMJ art. 26(b).

¹⁶³ There are no provisions for military judges under the state codes of Alabama, Illinois, Indiana, Massachusetts, New Hampshire, North Dakota, and Puerto Rico. See MJ Survey, *supra* note 17.

¹⁶⁴ See *id.*

¹⁶⁵ Only Arizona, California, Florida, Idaho, Louisiana, New York, Ohio, and Wyoming indicated that the Military Judge Course was a requirement for their states. See *id.*

¹⁶⁶ Wyo. MJ Survey, *supra* note 117.

¹⁶⁷ These states are Arizona, Nebraska, and Wyoming. See National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Arizona National Guard, completed by COL Richard Palmatier, Jr.) (on file with author); National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Nebraska National Guard, completed by COL Douglas Wilken) (on file with author); Wyo. MJ Survey, *supra* note 136.

¹⁶⁸ Those states are Alabama, Indiana, Massachusetts, and North Dakota. See MJ Survey, *supra* note 17.

¹⁶⁹ See UCMJ art. 26 (1950). The current UCMJ uses the term "military judge." See UCMJ art. 26 (2005).

¹⁷⁰ The term "law officer" is found in the state codes of Hawaii, Puerto Rico, and Rhode Island. See MJ Survey, *supra* note 17.

¹⁷¹ U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 13-2(h)(1) (30 Sept. 1996).

¹⁷² *Id.* para. 13-2(h)(2).

¹⁷³ Thus, under Army policy, an attorney appointed as a Judge Advocate in the New York National Guard need not be licensed to practice law in New York, as long as he or she is admitted to the bar of some state. As noted below, some individual states have their own policies or practices that would preclude appointment of a National Guard Judge Advocate not admitted to the bar of their state.

¹⁷⁴ Barnett Lecture, *supra* note 13.

Army regulations or policies, many states require that National Guard Judge Advocates be licensed by the bar of their particular state, whether by state law or by policy.¹⁷⁶

While many states require licensure as an attorney in that state for appointment as a National Guard Judge Advocate, bar membership in that state is not necessarily a requirement to serve as a trial or defense counsel in state courts-martial.¹⁷⁷ A number of states do not require admission to their particular state bar to participate in military justice proceedings and allow Judge Advocates admitted to a federal bar to appear, if approved by the state SJA.¹⁷⁸ The Model Code requires that court-martial counsel be admitted to the “bar of the highest court of the State where the court-martial is held.”¹⁷⁹ The Model Code also provides for pro hoc vice admission by the military judge for counsel who are military officers that are members in good standing of a state bar, and “certified as a judge advocate in the Judge Advocate General’s Corps of the Army, Air Force, Navy, or the Marine Corps.”¹⁸⁰

State bar membership is an issue being addressed in the creation of National Guard TDS positions.¹⁸¹ It is anticipated that National Guard TDS attorneys will not be detailed to represent clients in a state wherein they are not admitted to the bar, unless they can be admitted pro hoc vice, when necessary.¹⁸²

In most states, military judges in the National Guard are required to be members of their state’s bar.¹⁸³ Possessing a state law license is not a statutory requirement for military judges in some states, while others require only admission to a federal bar.¹⁸⁴ The provisions of the Model Code pertaining to military judges specifically allow for judges to be detailed from other states.¹⁸⁵

C. Courts-Martial Proceedings in the National Guard

Soldiers accused of committing criminal acts under the UCMJ may be tried by general, special, or summary court-martial.¹⁸⁶ The most serious offenses, including those which are subject to the death penalty, are tried by general or special court-martial under the Federal UCMJ.¹⁸⁷ Less serious crimes are generally handled by summary courts-martial.¹⁸⁸

National Guard Soldiers who violate their state’s military code may be tried and punished for such offenses. Since these are state law actions, the types of courts-martial and potential punishments differ from those under the UCMJ.¹⁸⁹ Normally, state courts-martial are limited to minor crimes or purely military offenses, such as a minor assault or unauthorized absence

¹⁷⁵ See MJ Survey, *supra* note 17.

¹⁷⁶ Arkansas, Arizona, Colorado, Connecticut, Georgia, Hawaii, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, and Washington require admission to highest of court of that state to be appointed as a National Guard Judge Advocate. *See id.*

¹⁷⁷ While not specifically addressed in the MJ Survey results, some states indicated that this practice is allowed to utilize Army Reserve Judge Advocates as military judges for state courts-martial. It is presumed that this may also be the reason that trial and defense counsel qualifications differ from National Guard appointment criteria in those states. *See id.*

¹⁷⁸ These states include Hawaii, Minnesota, Missouri, Nevada, Oregon, Rhode Island, and West Virginia. *See id.*

¹⁷⁹ MODEL STATE CODE OF MJ, *supra* note 10, art. 27.

¹⁸⁰ *Id.*

¹⁸¹ Barnett Lecture, *supra* note 13.

¹⁸² *Id.*

¹⁸³ See MJ Survey, *supra* note 17.

¹⁸⁴ State bar licensure is not statutorily required for military judges in California, Florida, Idaho, Nevada, North Carolina, Rhode Island, or Wisconsin. *See* MJ Survey, *supra* note 17. National Guard Judge Advocates who are admitted to a federal bar are eligible to serve as military judges in Idaho, Iowa, and Rhode Island. *See id.*

¹⁸⁵ MODEL STATE CODE OF MJ, *supra* note 10, art. 26 annot.

¹⁸⁶ UCMJ art. 16 (2005).

¹⁸⁷ *Id.* art. 18.

¹⁸⁸ *Id.* arts. 19, 20.

¹⁸⁹ See MJ Survey, *supra* note 17.

from drill.¹⁹⁰ Most state military code punishments are relatively minor and some do not provide for confinement.¹⁹¹ Unless empowered to do so by statute, most civilian state courts would not even have jurisdiction over military offenses.¹⁹² Similarly, most state military courts would not be involved with non-military offenses or serious acts of criminal conduct, even if committed by a National Guard Soldier.¹⁹³

If a National Guard Soldier commits a serious criminal offense, such as rape, murder, or other felonious act, that misconduct is also a violation of state penal laws and could be tried in the civilian courts. In such circumstances, state court jurisdiction for National Guard personnel would be no different than for a Soldier subject to the UCMJ in that military status does not necessarily preclude jurisdiction by civilian authorities.¹⁹⁴ Additionally, courts-martial punishments under state law rarely exceed the sanctions normally imposed for misdemeanor offenses.¹⁹⁵ Therefore, serious criminal misconduct committed by National Guard personnel is generally disposed of by civilian state courts rather than courts-martial.¹⁹⁶

1. General Courts-Martial

A general court-martial under the UCMJ is distinguishable from other proceedings by its potential punishments. Only a general court-martial is empowered to impose the death penalty or the dismissal of an officer.¹⁹⁷ Thus, a general court-martial is normally used only for the most serious offenses.

Trial by general courts-martial, usually convened by the governor or state adjutant general, is authorized under most state military justice codes.¹⁹⁸ Under most state military justice codes, punishments by general courts-martial provide for punitive discharge, however confinements are normally limited to less than one year as very few states have military offenses that are classified as felony offenses.¹⁹⁹

The Model Code provides for general courts-martial that are closely aligned with the UCMJ, but limits the potential confinement punishments to a maximum of ten years.²⁰⁰ While many offenses under the Model Code would constitute a felony, it is not known why the punishment maximum cap was placed at ten years. Perhaps it was contemplated that the National Guard would continue to refer serious misconduct, not purely military in nature, to the civilian courts for disposition.

While most states²⁰¹ provide for various levels of courts-martial, in Maine, the laws provide only for “courts-martial,” presided over by a military judge, with or without a panel.²⁰² Similarly, the Utah National Guard is authorized a “military court,” composed of a judge and a panel of three members.²⁰³

¹⁹⁰ *See id.*

¹⁹¹ *See id.*

¹⁹² *See id.*

¹⁹³ *See id.*

¹⁹⁴ *See MCM, supra note 3, R.C.M. 201(d)(2)* (“An act or omission which violates both the code and local criminal law, foreign or domestic, may be tried by a court-martial, or by a proper civilian tribunal . . .”).

¹⁹⁵ *See MJ Survey, supra note 17.*

¹⁹⁶ *See id.*

¹⁹⁷ *MCM, supra note 3, R.C.M. 1003, 1004.*

¹⁹⁸ Approximately 88% of the state codes provide for general courts-martial. *See MJ Survey, supra note 17.*

¹⁹⁹ *See id.*

²⁰⁰ MODEL STATE CODE OF MJ, *supra note 10, arts. 16, 56.*

²⁰¹ The State of New Jersey does not use courts-martial and all criminal matters are referred to civilian authorities. *See N.J. MJ Survey, supra note 86.* The State of Tennessee has no courts-martial provisions in their state code. *See MJ Survey, supra note 17.*

²⁰² *See MJ Survey, supra note 17; cf. 32 U.S.C.S. § 326 (LexisNexis 2008)* (“In the National Guard not in Federal service, there are general, special, and summary courts-martial constituted like similar courts of the Army and the Air Force.”).

²⁰³ *See MJ Survey, supra note 17.*

2. Special Courts-Martial

A special court-martial is similar to a general court-martial under the UCMJ; however it differs significantly in the potential punishments it may impose. Special courts-martial may not impose any separation greater than a bad-conduct discharge, nor impose any confinement in excess of one year.²⁰⁴

Special courts-martial authority can be found in the military justice codes of forty-six states.²⁰⁵ Convening authorities for National Guard special courts-martial are often at the brigade and battalion commander levels, although some states limit the authority to the state's Adjutant General.²⁰⁶ Punishments are normally similar to those of the state's general courts-martial, but provide for less confinement and may also limit the authority to impose a punitive discharge.²⁰⁷

3. Summary Courts-Martial

The UCMJ also provides for proceedings known as summary courts-martial, whose purpose is "to promptly adjudicate minor offenses under a simple procedure."²⁰⁸ Summary courts-martial are conducted by a commissioned officer, who is not a Judge Advocate, and have the authority to try any Soldier subject to the UCMJ, "except commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen, for any noncapital offense"²⁰⁹

Summary courts-martial are less formal proceedings than general or special courts-martial and are more restricted in the punishments that may be imposed. In the Army, the authority to convene a summary court-martial is granted to anyone with the authority to convene a general or special court-martial, or "[t]he commander of a detached company or other detachment"²¹⁰ The punishments authorized for a summary court-martial are "confinement for 30 days, forfeiture of two-thirds pay per month for one month, and reduction to the lowest pay grade."²¹¹ No punitive discharge may be imposed by summary courts-martial.²¹²

In most states allowing special court-martials, summary court-martials are available as well.²¹³ Often, the authority to convene and try National Guard Soldiers by summary courts-martial is at the company commander level.²¹⁴ The maximum sentence permitted under the state codes are less severe than those authorized for special courts-martial.²¹⁵

D. Sentences of Confinement

Sentences of confinement are a potential punishment under most state military justice codes.²¹⁶ The conditions and length of potential confinement sentences varies from state to state.²¹⁷ Most serious offenses committed by Soldiers should

²⁰⁴ MCM, *supra* note 3, R.C.M. 201(f)(2)(B).

²⁰⁵ There are no statutory provisions for special courts-martial under the laws of Maine, New Jersey, Utah, or Tennessee. *See* MJ Survey, *supra* note 17; *cf.* 32 U.S.C.S. § 326 (LexisNexis 2008) ("In the National Guard not in Federal service, there are general, special, and summary courts-martial constituted like similar courts of the Army and the Air Force.").

²⁰⁶ *See* MJ Survey, *supra* note 17.

²⁰⁷ *See id.*

²⁰⁸ MCM, *supra* note 3, R.C.M. 1301(b).

²⁰⁹ *Id.*

²¹⁰ *Id.* R.C.M. 1302(a)(2). In practice, summary courts-martial authority is usually with battalion-level commanders.

²¹¹ *Id.* R.C.M. 1301(d)(1) discussion.

²¹² *Id.* R.C.M. 1301(d)(1).

²¹³ Summary courts-martial are not available in Idaho. *See* MJ Survey, *supra* note 17; *see also* National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Idaho National Guard, completed by LTC David Dahle) (on file with author); *cf.* 32 U.S.C.S. § 326 (LexisNexis 2008) ("In the National Guard not in Federal service, there are general, special, and summary courts-martial constituted like similar courts of the Army and the Air Force.").

²¹⁴ *See* MJ Survey, *supra* note 17.

²¹⁵ *See id.*

²¹⁶ No statutory provisions for a sentence of incarceration by a court-martial exist in Alabama, Massachusetts, New Jersey, or Vermont. *See id.*

²¹⁷ *See id.*

also be violations of state penal laws handled by civilian authorities. Very few states, therefore, have potential sentences of more than one year, and in many states confinement sentences are only given in lieu of fines.²¹⁸ As previously noted, the Model Code contains the same maximum punishments for military offenses as the UCMJ, except that the death penalty and sentences of confinement in excess of ten years are not authorized.²¹⁹

IV. Post-Trial and Appellate Matters

Articles 59 through 69 of the UCMJ provide for post-trial and appellate review of military convictions. An accused convicted at court-martial is entitled to first seek clemency or other relief from the convening authority.²²⁰ A Soldier receiving an approved sentence of confinement in excess of one year, and/or a dishonorable or bad-conduct discharge or dismissal, is also entitled to appellate review by the Army Court of Criminal Appeals.²²¹

All military justice proceedings against National Guard Soldiers who are not serving on active-duty under Title 10 are state law proceedings. Accordingly, post-trial and appellate procedures, as well as the classification of such convictions, are governed by the laws of the state and often differ greatly from the UCMJ.²²²

The Model Code, recognizing the differences in post-trial procedures among the states, includes no provision that parallels Article 66 of the UCMJ. Under the Model Code it is required that the “senior force judge advocate” review all general and special courts-martial convictions.²²³ This is similar to the UCMJ Article 64 requiring review by a “judge advocate.”²²⁴

A. Classification of Convictions

While all convictions under the UCMJ are considered federal criminal convictions, not all state military justice adjudications fall into that classification. While many states do classify military offenses as criminal convictions,²²⁵ a number of jurisdictions classify them as non-criminal matters.²²⁶ Most states, however, do not classify any military offenses as felony crimes.²²⁷ Violations of state military justice codes are classified as misdemeanor offenses in most states.²²⁸ A few jurisdictions classify at least some of their military court convictions as either a civil infraction or a non-criminal offense.²²⁹ As previously discussed, the proposed Model Code authorizes sentences that would classify convictions as felony offenses.²³⁰

²¹⁸ Only Colorado, Michigan, Montana, North Carolina, Virgin Islands, and Wyoming have potential sentences of confinement that exceed one-year. *See id.*

²¹⁹ MODEL STATE CODE OF MJ, *supra* note 10, arts. 16, 56.

²²⁰ UCMJ art. 60 (2005).

²²¹ *See id.* art. 66.

²²² *See* MJ Survey, *supra* note 17.

²²³ MODEL STATE CODE OF MJ, *supra* note 10, art. 64.

²²⁴ UCMJ art. 64.

²²⁵ State courts-martial adjudications are considered criminal convictions in Arkansas, Arizona, California, Colorado, Florida, Guam, Idaho, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, New York, North Carolina, Ohio, Oregon, Texas, Virginia, Virgin Islands, Washington, Wisconsin, and Wyoming. *See* MJ Survey, *supra* note 17.

²²⁶ Violations of the state military justice codes in Georgia, Iowa, Illinois, Nebraska, New Hampshire, New Jersey, New Mexico, Puerto Rico, South Carolina, and Vermont are not criminal adjudications. *See id.*

²²⁷ Currently, only Colorado, Michigan, Montana, North Carolina, Virgin Islands, and Wyoming have military offenses that may be punished by more than one year of confinement. *See id.* If Wisconsin adopts the Model Code this year, they too will have offenses punishable as a felony. *See* Wis. MJ Survey, *supra* note 72.

²²⁸ *See* MJ Survey, *supra* note 17.

²²⁹ These states include Guam, Idaho, Mississippi, New Mexico, and New York. *See id.*

²³⁰ MODEL STATE CODE OF MJ, *supra* note 10, art. 56.

B. Post-Trial Review

As is required by the UCMJ, most state courts-martial undergo a mandatory post-trial review.²³¹ Most states allow the convening authority of a court-martial to modify sentences and grant clemency to an accused.²³² Additionally, many states require a legal review of convictions by the state SJA and some states also require a post-trial review by The Adjutant General (TAG) before a sentence can be approved.²³³ Some states do not have any statutory provision requiring a post-trial review, although it may be required by regulation or practice.²³⁴

C. Role of TAG and Governor

The Adjutant General, as commander of the state's military force, is often a key figure in National Guard military justice proceedings, with their roles ranging from convening authority to appellate review. In many states TAG is the general courts-martial convening authority, which defines his or her role in the post-trial process as is the case under the UCMJ with regard to clemency and sentence approval.²³⁵ State adjutants general are involved in the appellate or post-trial proceedings in more than 40% of the states,²³⁶ and several states permit appeals and clemency requests to be submitted to TAG, even if they were not the convening authority.²³⁷ Several states do not involve TAG in post-trial or appellate matters at all.²³⁸

Each state's governor serves as the commander-in-chief of that state's military forces.²³⁹ According to the results of the MJ Survey, the governor of a state is even more likely to participate in post-trial military justice proceedings than TAG.²⁴⁰ While it varies from state-to-state, governors are often vested with general courts-martial convening authority and a number of states permit appeals and clemency requests to be submitted to the governor.²⁴¹

In more than 60% of the states, governors have an active role in the military post-trial process.²⁴² Some states limit the governor's involvement to approval of sentences involving a punitive discharge.²⁴³ In states where the governor is the convening authority, he or she participates in the post-trial process in a manner similar to an active-duty convening authority.²⁴⁴

²³¹ See MJ Survey, *supra* note 17.

²³² See *id.*

²³³ See *id.*

²³⁴ There is no *statutory* requirement for post-trial review of courts-martial records in Alabama, Alaska, Arkansas, Delaware, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, or North Dakota. See *id.* Several of these states do provide for appellate review of courts-martial convictions. *Id.*

²³⁵ In Arizona, Florida, Idaho, Iowa, Kansas, Michigan, Mississippi, Puerto Rico, and Washington, TAG is involved in post-trial matters only when serving as the convening authority of the court-martial. In California, TAG is involved only if he or she supervises the convening authority. See *id.*; see also UCMJ art. 60 (2005).

²³⁶ In addition to those states where TAG is involved only as the convening authority, he or she serves a post-trial role in Alabama, Arkansas, Delaware, Guam, Louisiana, Montana, New Hampshire, New Mexico, New York, Ohio, Oregon, Virginia, and Vermont. See MJ Survey, *supra* note 17.

²³⁷ See *id.*

²³⁸ TAG is not routinely involved in the post-trial or appellate process in Maine, Massachusetts, Nebraska, or Wyoming. See *id.*

²³⁹ See 32 U.S.C. § 104(c) (2000). The President of the United States is also the Commander-in-Chief of the District of Columbia National Guard. D.C. CODE § 49-409 (2007).

²⁴⁰ The author's research indicates post-trial involvement for Adjutants General, including those serving as the convening authority at approximately 40%. See MJ Survey, *supra* note 17. Statistically, governor's are involved in over 60% of the states. *Id.*

²⁴¹ See *id.*

²⁴² See *id.*

²⁴³ These states include Florida, Idaho, Minnesota, and Virginia. See *id.*

²⁴⁴ In Iowa, Kansas, Mississippi, South Carolina, and Washington, the governor participates in the post-trial process only as the convening authority. See *id.*

D. Appellate Review

As purely state law actions, there is no jurisdiction for the federal military courts of criminal appeal to hear appeals from National Guard court-martial convictions.²⁴⁵ However, appeals from National Guard courts-martial to state-level military and civilian courts are allowed in several jurisdictions.²⁴⁶

1. State Military Appellate Courts

Under the UCMJ, courts-martial convictions that result in a punitive discharge or confinement for more than one year are required to be reviewed by the appellate court for the accused's branch of service.²⁴⁷ Similarly, about fifteen states have established appellate bodies to review military convictions from the National Guard.²⁴⁸

Several other states conduct some form of appellate review without a formal standing military court.²⁴⁹ These states review court-martial convictions by appointing boards of review, when necessary.²⁵⁰ These boards of review are usually appointed by the state SJA or the state's Adjutant General.²⁵¹

2. Civilian Appellate Courts

Since National Guard court-martial convictions are state law actions and are not subject to review by the Army (or Air Force) Court of Criminal Appeals, several jurisdictions permit Soldiers to appeal convictions to the civilian state appellate courts. Sixteen states, including some with military appellate forums, provide for appeals in the state court system.²⁵² States allowing state court appeals of court-martial convictions are in the minority as twenty-four states do *not* permit civilian state court appeals of military cases.²⁵³ In those states where courts-martial appeals are not permitted in state court, eight of those states have a military appellate forum.²⁵⁴ Four other of those states indicate that their military justice system is inactive or rarely used.²⁵⁵

V. Nonjudicial Punishment in the National Guard

Article 15 of the UCMJ prescribes the types of nonjudicial punishments commanders may impose on Soldiers who commit minor offenses that do not warrant a court-martial.²⁵⁶ Each armed service is permitted to develop its own regulation pertaining to the imposition of nonjudicial punishment.²⁵⁷ The Army's applicable regulation is AR 27-10, which specifically provides that nonjudicial punishment may be used to:

²⁴⁵ See UCMJ art. 66 (2005).

²⁴⁶ See MJ Survey, *supra* note 17.

²⁴⁷ UCMJ art. 66.

²⁴⁸ Military appellate courts have been established by statute for the states of Arizona, Delaware, Indiana, Kansas, Michigan, Mississippi, Nebraska, Oregon, Puerto Rico, and Texas. See MJ Survey, *supra* note 17.

²⁴⁹ Court-martial convictions are reviewed by an appointed military "board of review" rather than an appellate court in Missouri, New York, Pennsylvania, and West Virginia. See *id.*

²⁵⁰ See *id.*

²⁵¹ See *id.*

²⁵² State court appeals are allowed in Alabama, Arizona, Arkansas, California, Colorado, Florida, Guam, Hawaii, Idaho, Kansas, Louisiana, Maine, Nebraska, New Mexico, New York, South Carolina, and Wyoming. See *id.*

²⁵³ No state court appeals are provided for by statute in military cases in Alaska, Connecticut, Delaware, Georgia, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Missouri, Mississippi, Montana, New Hampshire, Pennsylvania, Ohio, Oregon, Puerto Rico, Rhode Island, Utah, Virginia, Vermont, Washington, and West Virginia. See *id.*

²⁵⁴ See *id.*

²⁵⁵ See *id.*

²⁵⁶ UCMJ art. 15 (2005).

²⁵⁷ *Id.*

- a. Correct, educate, and reform offenders who the imposing commander determines cannot benefit from less stringent measures.
- b. Preserve a Soldier's record of service from unnecessary stigma by record of court-martial conviction.
- c. Further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial.²⁵⁸

In the United States Army, such punishments may include correctional custody, restriction, arrest in quarters, extra duties, reduction in grade, and forfeiture of pay.²⁵⁹ Nonjudicial punishment is generally administered informally by commanders and Soldiers do not have to accept the nonjudicial punishment process.²⁶⁰ A Soldier has the right to demand court-martial in lieu of nonjudicial punishment proceedings.²⁶¹

Under AR 27-10, nonjudicial punishment may be imposed under "summarized proceedings" for offenses wherein the commander will not sentence a Soldier to extra duty or restriction in excess of fourteen days, or not issue more than an oral reprimand or admonition.²⁶² Summarized proceedings provide for reduced punishments, but also provide for diminished due process rights such as no right to counsel and a shorter decision period for acceptance of nonjudicial punishment.²⁶³

Most states have adopted some form of nonjudicial punishment under their state code of military justice. Punishments are generally similar to those imposed under Article 15 of the UCMJ by the active Army.²⁶⁴ In the National Guard, more than 80% of the state military justice codes contain a provision for nonjudicial punishment.²⁶⁵ Summarized nonjudicial punishment, however, a procedure created by regulation, is available in very few states.²⁶⁶

The proposed Model Code contains a section that closely parallels Article 15 of the UCMJ, but allows each state to promulgate its own regulation to administer nonjudicial punishment.²⁶⁷ While the Model Code does not expressly provide for summarized proceedings, it is likely that any state adopting the Model Code could utilize such procedures by developing a state regulation allowing it.²⁶⁸ The nonjudicial punishment provisions in the Model Code are a "hybrid" of Army and Air Force procedures in recognition of the joint-command concept in the National Guard.²⁶⁹

VI. Model State Code of Military Justice

As discussed in the preceding sections, military justice in the National Guard is driven by the varying state code provisions that have been enacted over the years. While some states have adopted some version of the UCMJ,²⁷⁰ or modeled the state code on the UCMJ,²⁷¹ the administration of military justice differs greatly from state to state. At least two attempts have been made to bring uniformity to the state codes since the UCMJ was enacted.

²⁵⁸ AR 27-10, *supra* note 85, para. 3-2.

²⁵⁹ *Id.* para. 3-19.

²⁶⁰ UCMJ art. 15.

²⁶¹ *Id.*

²⁶² AR 27-10, *supra* note 85, para. 3-16.

²⁶³ *Id.*

²⁶⁴ *See* MJ Survey, *supra* note 17.

²⁶⁵ Only Alabama, Alaska, District of Columbia, Maine, New Jersey, and Virginia do not have statutory authority to impose nonjudicial punishment. *See* MJ Survey, *supra* note 17.

²⁶⁶ Summarized nonjudicial punishment is allowed in Florida, Guam, Louisiana, Michigan, Mississippi, Puerto Rico, South Carolina, and Wyoming. *See* MJ Survey, *supra* note 17.

²⁶⁷ MODEL STATE CODE OF MJ, *supra* note 10, art. 15 annot.

²⁶⁸ *Id.*

²⁶⁹ *See* Lawson Presentation, *supra* note 71.

²⁷⁰ Some version of the UCMJ has been adopted by statute in California, Florida, Indiana, Montana, North Carolina, North Dakota, South Dakota, Virgin Islands, and Wyoming. *See* MJ Survey, *supra* note 17.

²⁷¹ *See id.*

In 1961, the Uniform Commission of Model State Laws drafted a model military justice code,²⁷² based upon the UCMJ, which was subsequently enacted in twenty-three states.²⁷³ In 1998, a military justice panel made recommendations pertaining to a new model code for the states, but no model code resulted.²⁷⁴ An effort to standardize and update the state codes was made again in 2002 with the passage of 2003 National Defense Authorization Act (NDAA 2003).²⁷⁵

Section 512 of the 2003 NDAA amended Title 32 and required the Secretary of Defense to prepare a model state code and a model *MCM*, consistent with the 1998 panel recommendations, for use by the National Guard in Title 32 status.²⁷⁶ The National Guard Bureau played a key role in the drafting and development of the Model Code.²⁷⁷

In July of 2003, the first draft of the Model Code was completed, with a draft model *MCM* produced in September of 2003.²⁷⁸ Both draft documents were sent to Congress, as required in the NDAA, in December 2003.²⁷⁹ From January through June of 2004, the documents were reviewed by the Departments of Defense, Air Force, and Army, and their comments were ultimately incorporated into the draft Model Code.²⁸⁰ The final draft of the Model Code was approved by the Department of Defense in 2005.²⁸¹ As of the Fall of 2006, the Model Code has been approved for presentation to the states by the National Guard Bureau.²⁸²

As with previous efforts, it is obvious that the goal of the latest Model Code is to establish consistency in administering military justice among the states, as well as to align their systems with the UCMJ. Uniformity in laws and procedures would also be a great advantage to the new National Guard TDS organizations. In that it is based upon the UCMJ, the Model Code has many positive attributes such as a uniform jurisdiction standard over National Guard Soldiers and extraterritorial provisions that are lacking in some states.²⁸³

One of the needs for the Model Code has been expressed in the context of “increased operational tempo” resulting in more National Guard “disciplinary and criminal matters.”²⁸⁴ But will the adoption of a Model Code result in more courts-martial? Most states now have a high operational tempo, even those that indicate that the military justice system is inactive or rarely used.²⁸⁵ For example, since September of 2001 the Florida National Guard has mobilized and deployed, at various times, nearly 40,000 Army and Air National Guard personnel in support of global, domestic, and state operations.²⁸⁶ During that same period, the Florida National Guard, which adopts the UCMJ by statute,²⁸⁷ has gone forward with only two general courts-martial.²⁸⁸ Florida, like many other states, uses summary courts-martial, nonjudicial punishments, and administrative

²⁷² HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTEENTH YEAR 234–76 (1961).

²⁷³ COLONEL ESTHER RADA, AIR NATIONAL GUARD COMMANDER’S LEGAL DESKBOOK, sec. 8-15, at 2 (2004) [hereinafter ANG LEGAL DESKBOOK].

²⁷⁴ See Lawson Presentation, *supra* note 71.

²⁷⁵ NDAA 2003, *supra* note 70.

²⁷⁶ *Id.*; see also Lawson Presentation, *supra* note 71.

²⁷⁷ See Lawson Presentation, *supra* note 71.

²⁷⁸ See *id.*

²⁷⁹ ANG LEGAL DESKBOOK, *supra* note 273, at 2; see also Lawson Presentation, *supra* note 71.

²⁸⁰ Lawson Presentation, *supra* note 71.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ There is no extraterritorial jurisdiction under the laws of Alabama, Alaska, Delaware, Guam, Illinois, Indiana, Kansas, Maryland, New Hampshire, and New York. See MJ Survey, *supra* note 17.

²⁸⁴ Lawson Presentation, *supra* note 71.

²⁸⁵ The District of Columbia, Illinois and New Jersey do not have active military justice systems. See MJ Survey, *supra* note 17.

²⁸⁶ The Florida National Guard has deployed 9745 Army and Air National Guard personnel in support of federal missions since September 2001. See e-mail from MAJ Lynn Pate, Office of the Deputy Chief of Staff Operations, Florida National Guard Headquarters, St. Augustine, Fla., to CPT Robert L. Martin, Student, 55th Judge Advocate Graduate Course, Charlottesville, Va. (Jan. 26, 2007, 08:00 EST) (on file with author). In support of various state and domestic operations such as hurricanes, wildfires, seaport and airport security, more than 29,000 Florida National Guard Soldiers and Airmen have been called to active-duty at different times since September 2001. See Unpublished State Active Duty Missions Summary, Florida National Guard (Sept. 15, 2006) (on file with author).

²⁸⁷ See FLA. STAT. § 250.35(1) (2006) (adopting the *MCM (2002)* as the Florida Code of MJ).

²⁸⁸ The assertion is based upon the author’s experience as a Florida Army National Guard Judge Advocate from 18 May 2000 to 31 July 2006.

actions to handle nearly all minor military offenses.²⁸⁹ Serious criminal activity by Florida National Guard personnel is referred to state and federal civilian law enforcement authorities when appropriate.²⁹⁰

A review of the Model Code demonstrates its close association with the UCMJ.²⁹¹ For states that adopt the Model Code, Judge Advocates mobilized into federal service will easily make the transition from their state's military justice code to the UCMJ. A major issue with the Model Code, however, will be whether or not states adopt it. While the author's research has clearly shown the marked differences between the various state codes, the clamor for uniformity has not come from the states. Many states have addressed the inconsistencies between National Guard military justice and the active component by simply adopting the UCMJ as state law by legislation.²⁹² Similarly, a number of states have enacted a military justice code similar to the UCMJ.²⁹³

While the Model Code's final version has just recently been approved, only Wisconsin indicates that adoption of a *similar* version is under consideration by their legislature.²⁹⁴ While it is unlikely that every state and territory will adopt the Model Code, some no doubt will do so. It will be interesting to see if other states adopting the Model Code will follow the same tact as Wisconsin and adopt a "similar" version of the code. In the end, the adopted Model Codes may be as different from one another as the current codes are today.

VII. Conclusion

When military justice action is taken in the active and reserve components of our armed forces, there is one body of law applicable to the proceedings. In the National Guard, when not in federal service and functioning as the militia of the individual states, the laws and procedures for administering military justice are as varied and unique as the states themselves. State military justice codes, much like the civilian penal laws of the individual states, provide for differing procedures, penalties, and proscriptions.

While laws may differ from state to state, should the focus in state military justice be a matter of consistency, or rather one of justice? Assuming that current state military codes adequately ensure constitutional protections to those accused of military offenses, do the state systems otherwise need uniformity? As previously noted, the Model Code was not created at the request of the states.

The Model Code currently proposed would provide consistency, uniformity, and bridge any gaps left by state law, but will this ever come to pass? Under existing laws, every state administers military justice differently (or in some cases, takes no military justice action at all). That being the case, is it not a fair prediction that any state adopting the Model Code will change it to meet its own needs? And each change made thwarts the goal of uniformity.

In the end, assuming the unlikely possibility that *all* states adopt a version of the Model Code, we would likely still end up with fifty-two different state military justice codes. Absent any evidence of injustice to our Soldiers caused by the present systems, why ask the states to change what appears to be working for them? While there are obvious advantages to having a uniform system of military justice among the states, perhaps the Model Code is just "an ingenious solution to a nonexistent problem."²⁹⁵

²⁸⁹ *Id.*

²⁹⁰ See FLA. NG REG. 27-10, *supra* note 126, para. 1-5.

²⁹¹ See MODEL STATE CODE OF MJ, *supra* note 10.

²⁹² Current or previous versions of the UCMJ have been adopted in California, Florida, Indiana, Montana, North Carolina, North Dakota, South Dakota, Virgin Islands, and Wyoming. See MJ Survey, *supra* note 17.

²⁹³ See *id.*

²⁹⁴ See Wis. MJ Survey, *supra* note 72.

²⁹⁵ See Massad Ayoob, *A Great Man*, AM. HANDGUNNER, Mar./Apr. 2007, at 87 (attributing the phrase to the late Lieutenant Colonel Jeff Cooper, U.S. Marine Corps).

Appendix A

Military Justice Survey

NATIONAL GUARD MILITARY JUSTICE SURVEY
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The information gathered in this survey will be used as the basis for my Graduate Course research project, which is a survey of how military justice is administered within the National Guard's of the states, territories and the District of Columbia (the use of the term "state" is used generically in this survey and is intended to encompass the territories and D.C.).

Please provide the information requested, or state that it is not available or inapplicable.

*If you have questions about this survey, you may contact me via email:
robert.martin5@us.army.mil – or by telephone – (904) 814-4220.*

INFORMATION ABOUT THE PERSON COMPLETING THIS SURVEY:

STATE / TERRITORY / D.C.: _____

RESPONDENT'S NAME/RANK: _____

RESPONDENT'S TITLE: _____

1. DOES YOUR STATE'S NATIONAL GUARD HAVE A "MILITARY JUSTICE" SYSTEM? YES/NO

- a. If **NO**, how are disciplinary or criminal matters handled?
[i.e. Administrative action, prosecution by civilian authority, etc.]
- b. If **YES**, please provide the applicable state statute or code provision(s):
[i.e. Chapter 250, Florida Statutes, etc.]:
- c. Is your state military justice code similar to, or adapted from, the Uniform Code of Military Justice (or the model state code of military justice)?
- d. Does your military justice code apply to both the Army and Air National Guard of your state?

2. JURISDICTION:

- a. How is jurisdiction over the accused obtained under your state code (i.e. status as a NG Soldier, nexis with military duties, etc.)?
- b. Does your state code have a provision to extend jurisdiction beyond the state for military offenses committed beyond its boundaries?

3. COURTS-MARTIAL:

- a. Does your state law provide for **General Courts-Martial**? **YES/NO**
 - (i) If **YES**, who is the convening authority?
 - (ii) What are the maximum punishments?

- b. Does your state law provide for **Special Courts-Martial**? **YES/NO**
 - (i) If **YES**, who is the convening authority?
 - (ii) What are the maximum punishments?
- c. Does your state law provide for **Summary Courts-Martial**? **YES/NO**
 - (i) If **YES**, who is the convening authority?
 - (ii) What are the maximum punishments?

4. NON-JUDICIAL PUNISHMENT:

- a. Does your state law provide for Article 15-type **Non-Judicial Punishment** (NJP)? **YES/NO**
 - (i) If **YES**, who may impose NJP?
 - (ii) What are the maximum punishments?
- b. Does your state law provide for Summarized NJP? **YES/NO**
 - (i) If **YES**, who may impose Summarized NJP?
 - (ii) What are the maximum punishments?

5. MILITARY JUSTICE REGULATION(S):

- a. Does your state's National Guard have regulation similar to Army Regulation 27-10 (Military Justice) to assist in administering military justice under the state's military code? **YES/NO**
- b. If **YES**, is the regulation similar to, or adapted from, AR 27-10?
- c. If **YES**, is this a joint publication (as opposed to the ANG and ARNG having separate regulations)?
- d. If **YES**, is a copy of this publication available for use in this research project (in hard-copy or electronically)?

6. INVESTIGATIONS / ARRESTS:

- a. Who may investigate allegations of military code violations?
 - (i) Commanders (or designee)?
 - (ii) AR 15-6 investigating officers?
 - (iii) Military Police?
 - (iv) Civilian law enforcement?
 - (v) Other – please specify:
- b. Does the state's military code require Article 31, UCMJ Rights (or a state code equivalent) for questioning suspects who may have committed a violation of a military offense? **YES/NO**
- c. Is custodial arrest authorized for offenders?

- (i) If YES, are warrants issued?
- (ii) Who issues the warrant?

7. COURT MARTIAL PERSONNEL:

- a. Are violations of your state's military code prosecuted by a Judge Advocate (as opposed to a civilian prosecutor)?
- b. Is a defendant/accused represented by a Judge Advocate (as opposed to court-appointed civilian defense counsel or public defenders)?
- c. Does your state require military defense counsel to be Art. 27(b), UCMJ, certified?
- d. Does your state have a Trial Defense Service (or similar entity) with Judge Advocates dedicated to serve as assigned defense counsel? (Please provide details such as how many JAs serve in the role, etc.)
- e. Does your state have **Military Judges** to preside at courts-martial? **YES/NO**
 - (i) Does your state require completion of the Army Military Judge course?
 - (ii) Does your state have other requirements for appointment as a Military Judge? (If YES, please specify)
- f. If your state does not have military judge(s), who presides in that role?
 - (i) State court judges (non-military)
 - (ii) State court judges (National Guard member)
 - (iii) Reserve component Military Judge (not National Guard)
 - (iv) Other – please specify:
- g. **BAR MEMBERSHIP** – Does your state require bar membership (in your state) for:
 - (i) All Judge Advocates?
 - (ii) Trial counsel/prosecutor?
 - (iii) Defense counsel (military and/or civilian)?
 - (iv) Military Judges?

8. INCARCERATION:

- a. Does your state's military justice system provide for incarceration as a punishment for those convicted at courts-martial? **YES/NO**
- b. If **YES**, who is the final approval authority to commit the defendant to incarceration (i.e. convening authority, TAG, etc.)?
- c. May a defendant be placed in **post-trial confinement** while awaiting approval of the sentence?
 - (i) Who may authorize post-trial confinement (i.e. Military Judge, Convening Authority, TAG, etc.)?

- (ii) Under what circumstances/criteria may a defendant be placed in post-trial confinement before the sentence is approved?
- d. May a defendant be placed in **pre-trial confinement**?
 - (i) Who may authorize pre-trial confinement (i.e. Military Judge, Convening Authority, TAG, etc.)?
 - (ii) Under what circumstances/criteria may a defendant be held in pre-trial confinement?
- e. Where are defendants incarcerated for pre-trial and/or post-trial confinement (i.e. county or municipal jail, state prison, etc.)?

9. CONVICTIONS, POST-TRIAL PROCEDURES, AND APPEALS:

- a. Are state court martial convictions considered a criminal conviction under your state's laws?
 - (i) Are any court martial offenses considered a felony (punishable by more than one year in prison)?
 - (ii) Misdemeanor?
 - (iii) Civil infraction or offense?
- b. When a Soldier has been convicted at a state Court Martial, what is the appellate process?
 - (i) May the convening authority modify or set-aside convictions or sentences?
 - (ii) Is the Adjutant General involved in the post-trial or appellate process? (If YES, please explain the TAG role)
 - (iii) Is the Governor (as Commander-in-Chief) involved in the post-trial or appellate process? (If YES, please explain the Governor's role)
- c. May convictions be appealed in the civilian appellate courts of your state? (If YES, please explain the process and name the court(s) involved)
- d. Does your state have a military appellate court or similar body?

10. OTHER – Please provide any additional information or facts about your state's military justice system or procedures not covered in the preceding questions:

Appendix B

Results of Military Justice Survey

STATES/TERRITORIES SURVEYED: *All states, territories and D.C.*

STATES/TERRITORIES WHO RESPONDED: Arizona (AZ), Arkansas (AR), California (CA), District of Columbia (DC), Florida (FL), Georgia (GA), Guam (GU), Idaho (ID), Iowa (IA), Illinois (IL), Kansas (KS), Louisiana (LA), Massachusetts (MA), Michigan (MI), Mississippi (MS), Nebraska (NE), New Hampshire (NH), New Jersey (NJ), New Mexico (NM), New York (NY), Ohio (OH), Oregon (OR), Puerto Rico (PR), South Carolina (SC), Washington (WA), Wisconsin (WI), and Wyoming (WY).

STATES/TERRITORIES WHO DID NOT RESPOND (answers provided are from the author's review of the applicable state statutes or codes): *Alabama (AL), Alaska (AK), Colorado (CO), Connecticut (CT), Delaware (DE), Hawaii (HI), Indiana (IN), Maine (ME), Maryland (MD), Minnesota (MN), Missouri (MO), Montana (MT), Nevada (NV), North Carolina (NC), North Dakota (ND), Oklahoma (OK), Pennsylvania (PA), Rhode Island (RI), South Dakota (SD), Tennessee (TN), Texas (TX), Utah (UT), Vermont (VT), Virginia (VA), Virgin Islands (VI), and West Virginia.*

THE SUMMARY BELOW REFLECTS THE ANSWERS TO THE SURVEY PROVIDED BY THE STATE INDICATED, AND INFORMATION GATHERED BY THE AUTHOR THROUGH STATUTE REVIEW. THE INFORMATION GATHERED BY STATUTE IS INDICATED BY THE STATE'S ABBREVIATION IN *ITALICS* FOR QUESTIONS THAT WERE NOT ANSWERS BY THE STATE SURVEYED AND/OR NOT AVAILABLE BY STATUTE REVIEW, NO RESPONSE IS INDICATED BELOW.

1. DOES YOUR STATE'S NATIONAL GUARD HAVE A "MILITARY JUSTICE" SYSTEM? YES/NO

YES	NO	OTHER
<i>AL, AK, AR, AZ, CA, CO, CT, DE, FL, GA, GU, HI, ID, IA, IN, KS, LA, ME, MD, MI, MN, MS, MO, MT, NV, NM, NY, NC, ND, OH, OK, OR, PA, PR, RI, SC, SD, TX, UT, VA, VI, VT, WA, WV, WI, WY</i>	<i>DC, TN</i>	<i>IL, MA, NE, NH, NJ, NY, OR, WY – not active/rarely used</i>

a. If **NO**, how are disciplinary or criminal matters handled?
[i.e. Administrative action, prosecution by civilian authority, etc.]

CIVILIAN AUTHORITIES	ADMINISTRATIVE ACTION	NJP
<i>DC, NE, NJ, NH, TN, VT</i>	<i>DC, NE, NJ, NH</i>	<i>IL, NH</i>

b. If **YES**, please provide the applicable state statute or code provision(s):
[i.e. Chapter 250, Florida Statutes, etc.]:

ALL STATES EXCEPT TENNESSEE (MILITARY PENAL LAWS ONLY, NO MILITARY JUSTICE PROVISIONS) AND AMERICAN SAMOA, HAVE MILITARY JUSTICE STATUTES. THIS INCLUDES THOSE STATES WHO RARELY USE MILITARY JUSTICE, OR THE SYSTEM IS CONSIDERED "INACTIVE."

c. Is your state military justice code similar to, or adapted from, the Uniform Code of Military Justice (or the model state code of military justice)?

YES	NO
<i>AR, AZ, CA, CO, CT, DE, FL, GA, GU, HI, ID, IA, KS, LA, MA, MI, MN, MO, MT, NV, NC, ND, NH, NM, NY, OH, OK, OR, PA, PR, RI, SD,</i>	<i>AL, AK, DE, DC, IL, IN, ME, MD, MS, NE, NJ, SC, UT, VT</i>

<i>TX, VA, VI, WA, WV, WI, WY</i>	
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d. Does your military justice code apply to both the Army and Air National Guard of your state?

YES
<i>AL, AK, AR, AZ, CA, CO, CT, DE, FL, GA, GU, HI, ID, IL, IN, IA, KS, LA, ME, MA, MI, MN, MS, MO, MT, NE, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, PR, RI, SC, SD, TX, UT, VA, VI, VT, WA, WV, WI, WY</i>

2. JURISDICTION:

a. How is jurisdiction over the accused obtained under your state code (i.e. status as a NG Soldier, nexus with military duties, etc.)?

NG MEMBERSHIP	DUTY STATUS	OTHER
<i>AR, AZ, CA, CO, CT, FL, GA, KS, LA (Art. 112a only), ME, MA, NM, NY, NC, PA, RI, SC, SD, TX, VI, WV</i>	<i>AL, AK, DE, GU, HI, ID, IL, IN, IA, LA, MD, MI, MN, MS, MO, NE, NV, NH, OH, OK, OR, PR, UT, WA, WI, WY</i>	<i>IL, OR, PR, WI – also by military nexus</i>

b. Does your state code have a provision to extend jurisdiction beyond the state for military offenses committed beyond its boundaries?

YES	NO
<i>AR, AZ, CA, CO, CT, FL, GA, HI, ID, IA, LA, ME, MA, MI, MN, MS, MO, MT, NE, NV, NM, NC, OH, OK, OR, PA, PR, RI, SC, TX, UT, WA, WV, WI, WY</i>	<i>AL, AK, DE, GU, IL, IN, KS, MD, NH, NY,</i>

3. COURTS-MARTIAL:

a. Does your state law provide for **General Courts-Martial**? YES/NO

YES	NO
<i>AL, AK, AR, AZ, CA, CO, CT, DE, DC, FL, GA, GU, HI, ID, IA, IN, KS, LA, ME, MD, MI, MN, MS, MO, MT, NV, NM, NY, NC, ND, OH, OK, OR, PA, PR, RI, SC, SD, TX, UT, VA, VI, VT, WA, WV, WI, WY</i>	<i>NJ</i>

(i) If YES, who is the convening authority?

[RESPONSES OMITTED - See text]

(ii) What are the maximum punishments?

[RESPONSES OMITTED - See text]

b. Does your state law provide for **Special Courts-Martial**? YES/NO

YES	NO
<i>AL, AK, AR, AZ, CA, CO, CT, DE, FL, GA, GU, HI, ID, IA, IN, KS, LA, MD, MI, MN,</i>	<i>ME, NJ, UT</i>

MS, MO, MT, NV, NM, NY, NC, ND, OH, OK, OR, PA, PR, RI, SC, SD, TX, UT, VA, VI, VT, WA, WV, WI, WY	
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(i) If YES, who is the convening authority?

[RESPONSES OMITTED - See text]

(ii) What are the maximum punishments?

[RESPONSES OMITTED - See text]

c. Does your state law provide for **Summary Courts-Martial**? YES/NO

YES	NO
AL, AK, AR, AZ, CA, CO, CT, DE, FL, GA, GU, HI, IA, IN, KS, LA, MD, MI, MN, MS, MO, MT, NV, NM, NY, NC, ND, OH, OK, OR, PA, PR, RI, SC, SD, TX, UT, VA, VI, VT, WA, WV, WI, WY	ID, ME, NJ, UT

(i) If YES, who is the convening authority?

[RESPONSES OMITTED - See text]

(ii) What are the maximum punishments?

[RESPONSES OMITTED - See text]

4. NON-JUDICIAL PUNISHMENT:

a. Does your state law provide for Article 15-type **Non-Judicial Punishment** (NJP)? YES/NO

YES	NO
AR, AZ, CA, CO, CT, DE, FL, GA, GU, HI, ID, IA, IN, KS, LA, MD, MI, MN, MS, MO, MT, NV, NM, NY, NC, ND, OH, OK, OR, PA, PR, RI, SC, SD, TX, UT, VI, VT, WA, WV, WI, WY	AL, AK, DC, ME, NJ, VA

(i) If YES, who may impose NJP?

[RESPONSES OMITTED - See text]

(ii) What are the maximum punishments?

[RESPONSES OMITTED - See text]

b. Does your state law provide for Summarized NJP? YES/NO

YES
FL, GU, LA, MI, MS, PR, SC, WY

(i) If YES, who may impose Summarized NJP?

[RESPONSES OMITTED - See text]

(ii) What are the maximum punishments?

[RESPONSES OMITTED - See text]

5. MILITARY JUSTICE REGULATION(S):

a. Does your state's National Guard have regulation similar to Army Regulation 27-10 (Military Justice) to assist in administering military justice under the state's military code? **YES/NO**

YES	NO	OTHER
AR, FL, GA, GU, KS, MI, MT, NY, OH, OR, PR, SC	AZ, IA, ID, MA, MS, NE, NH, NJ, NM, OR, WY	CA, LA, WI – State MCM; IL – NJP only

b. If **YES**, is the regulation similar to, or adapted from, AR 27-10?

YES	NO	OTHER
AR, FL, GA, GU, IL, KS, MI, MT, NY, SC, WA	CA, LA, NH, NM, OR, PR, WY	FL, GU – adapted from AR 27-10 and MCM; IL – NJP only; LA, WI – adapted from MCM; PR – from 10 U.S.C. § 827

c. If **YES**, is this a joint publication (as opposed to the ANG and ARNG having separate regulations)?

YES	NO	N/A
FL, GA, GU, IL, KS, LA, MI, PR, SC, WI	AR	CA, IA, NH, NM, OR, WY

d. If **YES**, is a copy of this publication available for use in this research project (in hard-copy or electronically)?

[RESPONSES OMITTED]

6. INVESTIGATIONS / ARRESTS:

a. Who may investigate allegations of military code violations?

(i) Commanders (or designee)?

YES	NO	OTHER
AR, AZ, CA, CO, FL, GA, GU, IA, ID, KS, LA, MA, MI, MS, NE, NM, NY, OH, OR, PR, WA, WI, WY	NH	IL, NJ – n/a

(ii) AR 15-6 investigating officers?

YES	NO	OTHER
AR, AZ, CA, FL, GA, GU, IA, ID, KS, LA, MA, MI, MS, NE, NM, NY, OH, OR, PR, SC, WA, WI, WY	NH	IL, NJ – n/a

(iii) Military Police?

YES	NO	OTHER
AR, AZ, CA, FL, GA, GU, ID, KS, LA, MA, MI, MS, NE, SC, WI	LA, NH, NM, NY, OH, OR, WY	IL, NJ, PR – n/a; WA – if appointed under AR 15-6

(iv) Civilian law enforcement?

YES	NO	OTHER
AZ, FL, GA, GU, ID, KS, LA, MA, MI, MS, PR, SC, WA, WI, WY	AR, CA, GA, IA, LA, NE, NH, NM, NY, OH, OR	IL, NJ – n/a

(v) Other – please specify:

MA – Provost Marshal; AL, NH, OR, and WI – Court of Inquiry

b. Does the state’s military code require Article 31, UCMJ Rights (or a state code equivalent) for questioning suspects who may have committed a violation of a military offense? **YES/NO**

YES	NO	OTHER
AR, AZ, CA, CO, CT, FL, GA, GU, HI, ID, IA, KS, LA, MA, MI, MN, MS, MO, MT, NV, NE, NM, NC, ND, PR, OH, OK, OR, PA, RI, SD, TX, VA, VI, WA, WV, WI, WY	AL, AK, NY	IL, NH, NJ – n/a; NE – (not required/done in practice)

c. Is custodial arrest authorized for offenders?

YES	NO
AZ, CA, CO, CT, FL, GA, GU, HI, ID, IN, IA, KS, LA, ME, MA, MI, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TX, UT, VA, VI, WA, WV, WI, WY	AL, IL, NE, NJ, PR

(i) If YES, are warrants issued?

[RESPONSES OMITTED]

(ii) Who issues the warrant?

[RESPONSES OMITTED]

7. COURT MARTIAL PERSONNEL:

a. Are violations of your state’s military code prosecuted by a Judge Advocate (as opposed to a civilian prosecutor)?

YES	NO	OTHER
AR, AZ, CA, CO, CT, FL, GA, GU, HI, ID, IL, IA, KS, LA, MI, MN, MS, MO, MT, NV, NE, NM, NY, NC, ND, OH, OK, OR, PA, PR, RI, SC, SD, TX, VA, VI, VT, WA, WV, WI, WY	DC, MA, NH, NJ	IL, WY – civilian authorized

b. Is a defendant/accused represented by a Judge Advocate (as opposed to court-appointed civilian defense counsel or public defenders)?

YES	NO	OTHER
AR, AZ, CA, CO, CT, FL, GA, GU, HI, ID, IL, IA, KS, LA, MI, MN, MS, MO, MT, NV, NE, NM, NY, NC, ND, OH, OK, OR, PA, PR, RI, SC, SD, TX, VA, VI, VT, WA, WV, WI, WY	DC	MA, NH, NJ – n/a; NY, NM, OR, PR, WI – civilian authorized

c. Does your state require military defense counsel to be Art. 27(b), UCMJ, certified?

YES	NO	OTHER
FL, KS, LA, MI, MT, NM, NY, NC, ND, OH, PR, VA, VI, WY	AR, CT, DC, GA, GU, IL, IA, MS, NE, OR, SC, WA, WI	AZ, CA, CO, HI, ID, ME, MN, MO, NV, PA, RI - State SJA approval; MA, NH - n/a

d. Does your state have a Trial Defense Service (or similar entity) with Judge Advocates dedicated to serve as assigned defense counsel? (Please provide details such as how many Jas serve in the role, etc.)

YES	NO
AL, CA, IL, LA, NE, NY, WA, WY	AR, AZ, DC, FL, GA, GU, IA, ID, KS, MA, MI, MS, NH, NM, OH, OR, PR, SC

e. Does your state have **Military Judges** to preside at courts-martial? YES/NO

YES	NO
AR, AZ, CA, CO, CT, DE, FL, GA, HI, ID, IA, KS, LA, ME, MI, MN, MS, MO, MT, NE, NV, NM, NY, NC, OH, OK, OR, PA, RI, SC, SD, TX, UT, VA, VI, WA, WV, WI, WY	AL, GU, IL, IN, MA, NH, ND, PR

(i) Does your state require completion of the Army Military Judge course?

YES	NO
AZ, CA, FL, ID, LA, NY, OH, WY	AR, CO, CT, DE, GA, IA, ME, MI, MS, NE, NM, OR, SC, WA, WI

(ii) Does your state have other requirements for appointment as a Military Judge? (If YES, please specify)

[RESPONSES OMITTED]

f. If your state does not have military judge(s), who presides in that role?

(i) State court judges (non-military)

YES
WY

(ii) State court judges (National Guard member)

YES
WY

(iii) Reserve component Military Judge (not National Guard)

YES
AZ, NE, WY

(iv) Other – please specify:

OTHER	PRESIDENT OF C.M.
HI, NE, WY (<i>see text</i>)	AL, IN, MA, ND

g. **BAR MEMBERSHIP** – Does your state require bar membership (in your state) for:

(i) All Judge Advocates?

YES	NO
AR, AZ, CO, CT, GA, HI, IA, KS, LA, MA, MI, MN, MS, MO, NE, NJ, NM, OH, OK, OR, PA, SC, TX, WA	CA, DC, FL, GU, ID, NH, NY, PR, WY

(ii) Trial counsel/prosecutor?

YES	NO	OTHER
AR, CO, GA, IA, ID, KS, LA, MA, MI, MS, NE, NJ, NM, NY, OH, OK, OR, PA, SC, TX, WA	CA, CT, FL, GU, HI, ME, MN, MO, NH, PR, RI, WV, WY	HI, MN, MO, NV, OR, RI, WV – may be certified by State SJA (if admitted to a federal court)

(iii) Defense counsel (military and/or civilian)?

YES	NO	OTHER
AR, CO, GA, IA, ID, KS, LA, MA, MI, MS, NE, NJ, NM, NY, OH, OK, OR, PA, SC, TX, WA	CA, CT, FL, GU, HI, ME, MN, MO, NH, PR, RI, WV, WY	HI, MN, MO, NV, OH, RI, WV – may be certified by State SJA (if admitted to a federal court); OR – may be certified by State SJA

(iv) Military Judges?

YES	NO	OTHER
AR, AZ, GA, HI, IA, KS, LA, ME, MI, MN, MS, MO, NE, NM, NY, OH, OK, OR, PA, SC, SD, TX, UT, VA, WA, WV, WY	CA, FL, ID, NV, NC, RI, WI	GU, NJ, NH, PR, – n/a; ID, IA, RI - federal bar membership only permitted

8. INCARCERATION:

a. Does your state's military justice system provide for incarceration as a punishment for those convicted at courts-martial? **YES/NO**

YES	NO
AR, AK, AZ, CA, CO, CT, DE, FL, GA, GU, HI, ID, IL, IN, IA, KS, LA, ME, MA, MD, MI, MN, MS, MO, MT, NE, NV, NH, NM, NY, NC, ND, OH, OR, PA, PR, RI, SC, TX, UT, VA, VI, WA, WV, WI, WY	AL, MA, NJ, VT

b. If **YES**, who is the final approval authority to commit the defendant to incarceration (i.e. convening authority, TAG, etc.)?

[RESPONSES OMITTED - See text]

c. May a defendant be placed in **post-trial confinement** while awaiting approval of the sentence?

YES	NO
AZ, CA, GU, IA, KS, MI, MS, MT, NM, NY, NC, ND, OH, PR, SD, VA, VI, WY	AL, AR, FL, GA, ID, IL, LA, MA, NE, NH, NJ, OR, SC, VT, WA

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(i) Who may authorize post-trial confinement (i.e. Military Judge, Convening Authority, TAG, etc.)?

[RESPONSES OMITTED - See text]

(ii) Under what circumstances/criteria may a defendant be placed in post-trial confinement before the sentence is approved?

[RESPONSES OMITTED - See text]

d. May a defendant be placed in **pre-trial confinement**?

YES	NO
AR, AZ, CA, CO, CT, FL, GA, GU, HI, IA, KS, LA, MI, MN, MS, MT, NE, NY, NC, ND, OH, OR, SD, VA, VI, WA, WY	AL, ID, IL, MA, NH, NJ, NM, PR, SC, VT, WI

(i) Who may authorize pre-trial confinement (i.e. Military Judge, Convening Authority, TAG, etc.)?

[RESPONSES OMITTED - See text]

(ii) Under what circumstances/criteria may a defendant be held in pre-trial confinement?

[RESPONSES OMITTED - See text]

e. Where are defendants incarcerated for pre-trial and/or post-trial confinement (i.e. county or municipal jail, state prison, etc.)?

[RESPONSES OMITTED - See text]

9. CONVICTIONS, POST-TRIAL PROCEDURES, AND APPEALS:

a. Are state court martial convictions considered a criminal conviction under your state's laws?

YES	NO
AR, AZ, CA, CO, FL, GU, ID, KS, LA, MD, MA, MI, MS, MT, NY, NC, ND, OH, OR, TX, VA, VI, WA, WI, WY	GA, IA, IL, NE, NH, NJ, NM, PR, SC, VT

(i) Are any court martial offenses considered a felony (punishable by more than one year in prison)?

YES
CO, MI, MT, NC, VI, WI, WY

(ii) Misdemeanor?

YES	NO
AR, AZ, CA, CO, FL, IA, ID, KS, LA, MD, MA, MI, MS, MT, NM, NY, NC, ND, OH, OR, TX, VA, VI, WA, WI, WY	AL, GA, GU, NE, NJ, PR, SC, VT

(iii) Civil infraction or offense?

YES	NO
GU, ID (some offenses), MS (some offenses), NM, NY	AR, AZ, CA, FL, GA, IA, KS, LA, MD, MA, MI, MT, NE, NJ, NC, OH, OR, PR, SC, VI, WA, WI, WY

b. When a Soldier has been convicted at a state Court Martial, what is the appellate process?

(i) May the convening authority modify or set-aside convictions or sentences?

YES	NO	OTHER
<i>AZ, AR, CA, CO, CT, FL, GA, GU, HI, ID, IA, KS, LA, ME, MI, MS, MO, MT, NE, NV, NH, NM, NY, NC, ND, OH, OK, PA, PR, RI, SD, TX, UT, VA, VI, VT, WA, WV, WI, WY</i>	OR	IL, MA, NH – n/a

(ii) Is the Adjutant General involved in the post-trial or appellate process? (If YES, please explain the TAG role)

YES	NO	OTHER
<i>AL, AK, AR, AZ, DE, GU, ID, LA, MT, NH, NM, NY, OH, OR, VA, VT</i>	<i>IL, ME, MA, NE, NJ, WY</i>	<i>AZ, FL, IA, ID, KS, MI, MS, PR, WA – if convening authority (C/A); CA – if supervising the C/A</i>

(iii) Is the Governor (as Commander-in-Chief) involved in the post-trial or appellate process? (If YES, please explain the Governor's role)

YES	NO	OTHER
<i>AL, AK, AZ, CO, CT, DE, GU, IN, LA, ME, NE, NV, NH, NM, NY, NC, OH, OK, OR, PR, RI, WY</i>	<i>AR, GA, IL, MA, MI, MT, NJ</i>	<i>FL, ID, MN, VA – punitive discharge only; IA, KS, MS, SC, WA – if C/A;</i>

c. May convictions be appealed in the civilian appellate courts of your state? (If YES, please explain the process and name the court(s) involved)

YES	NO
<i>AL, AR, AZ, CA, CO, FL, GU, HI, ID, KS, LA, ME, NE, NM, NY, SC, WY</i>	<i>AK, CT, DE, GA, IL, IN, IA, MA, MI, MO, MS, MT, NV, NH, PA, OH, OR, PR, RI, UT, VA, VT, WA, WV</i>

d. Does your state have a military appellate court or similar body?

YES
<i>AZ, CA, DE, IN, KS, MI, MS, MO, NE, NY, OR, PA, PR, TX, WV</i>

10. OTHER – Please provide any additional information or facts about your state's military justice system or procedures not covered in the preceding questions:

[RESPONSES OMITTED]

Appendix C

National Guard Duty Status Chart

The following chart compares the various benefits and obligations of National Guard personnel in state and federal status:¹

	State Active Duty	Title 32 – AGR -IDT - AT- ADSW²	Title 10 – Federal Active Duty
Command & Control	Governor	Governor	President
Who Performs Duty	National Guard	National Guard	Active, Reserve & National Guard
Where Duty is Performed	Determined by State Statute	CONUS – EMAC ³	Worldwide
Pay & Benefits	State Pay & Allowances	Federal Pay & Allowances	Federal Pay & Allowances
Tort Immunity	Under State Law	Federal Tort Claims Act	Federal Tort Claims Act
Posse Comitatus	Not applicable	Not applicable	Yes
Reemployment Rights	State Statute only	USERRA	USERRA
SCRA Protections	No	Yes – Limited	Yes
Missions	Determined by State Law	IDT, AT, AGR & other Federally Authorized	Federal only
Discipline	State Law	State Law	UCMJ
Federal Retirement	No	Yes	Yes
Medical Coverage	State Benefits only	Federal Benefits	Federal Benefits
Disability	State Workers Compensation	Federal Benefits	Federal Benefits
Involuntary Order to Duty	Determined by State Law	Yes	Yes
Voluntary Order to Duty	Determined by State Law	Yes	Yes

¹ Adapted from a similar chart created by Colonel Bryan Morgan, Staff Judge Advocate, Alabama National Guard, January 2006 (on file with author).

² AGR – Active Guard-Reserve; IDT – Inactive Duty for Training; AT – Annual Training; ASDW – Active Duty for Special Work.

³ EMAC is the Emergency Management Assistance Compact, a model code adopted by most states to provide for mutual aid across state lines during an emergency. Emergency Management Assistance Compact, <http://www.emacweb.org> (last visited Dec. 10, 2006).

Appendix D

State Military Justice Codes

Included in this Appendix is a listing of the Military Justices Codes and other related laws for the individual states. The State of Tennessee does not have a military code which provides for courts-martial, however, they do have penal laws applicable to National Guard personnel. The Territory of American Samoa does not have any statutory provisions related to military justice.

CODE OF ALABAMA	Title 31, Military Affairs and Civil Defense, Chapter 2, Military Code
ALASKA STATUTES	Title 26, Military Affairs, Veterans, & Disasters, Chapter 05, Military Code of Alaska
ARIZONA REVISED STATUTES	Title 26, Military Affairs and Emergency Management
ARKANSAS CODE OF 1987	Title 12, Law Enforcement, Emergency Management, & Military Affairs, Subtitle 4 - Military Affairs, Chapter 64, Military Justice
DEERING'S CALIFORNIA CODES ANNOTATED	Military & Veterans Code, Division 2 - Military Forces of the State Part 1 - The State Militia, Chapter 1, Laws & Regulations of the United States
COLORADO REVISED STATUTES	Title 28 - Military & Veterans, Article 3.1, Colorado Code of Military Justice
CONNECTICUT STATUTES	Title 27, Armed Forces & Veterans, Chapter 507, Connecticut Code of Military Justice
DELAWARE CODE	Title 20 - Military & Civil Defense, Part I - Military, Chapter 1 - Delaware National Guard, Subchapter IV, Courts-Martial & Sentences
DISTRICT OF COLUMBIA CODE	Title 49 - Military, Chapter 5, Courts-Martial
FLORIDA STATUTES	Chapter 250 - Military Affairs, Part I, Military Code
OFFICIAL CODE OF GEORGIA ANNOTATED	Title 38, Military, Emergency Management, & Veterans Affairs Chapter 2 - Military Affairs, Article 5, Code of Military Justice
GUAM CODE ANNOTATED	Title 10 - Health & Safety, Division 3 - Public Safety, Chapter 63 Guam National Guard, Article 7, Guam Code of Military Justice
HAWAII REVISED STATUTES	Division 1 - Government, Title 10, Public Safety & Internal Security, Chapter 124A, Hawaii Code of Military Justice
IDAHO CODE STATUTES ANNOTATED	Title 46 - Militia and Military Affairs, Chapter 11, Code of Military Justice
ILLINOIS COMPILED STATUTES ANNOTATED	Chapter 20 - Executive Branch, Department of Military Affairs, Military Code of Illinois, Article XIV, Military Offenses
BURNS INDIANA STATUTES ANNOTATED	Title 10 - State Police, Civil Defense, & Military Affairs Article 16 - Indiana Military Code, Chapter 9, Court-martial Procedures

IOWA ANNOTATED STATUTES	Title I, State Sovereignty & Management, Subtitle 11 - Defense Chapter 29b, Military Justice
KANSAS ANNOTATED STATUTES	Chapter 48, Militia, Defense & Public Safety
KENTUCKY REVISED STATUTES ANNOTATED	Title V, Military Affairs, Chapter 35, Military Justice
LOUISIANA REVISED STATUTES	Title 29, Military, Naval, & Veteran's Affairs, Chapter 1 - Military Forces of the State, Part 2, Louisiana Code of Military Justice
MAINE REVISED STATUTES	Title 25, Internal Security & Public Safety, Part 3 - Military Law Chapter 137, Courts-Martial
ANNOTATED CODE OF MARYLAND	Title 13 - Militia, Subtitle 8, Courts-Martial
LAWS OF MASSACHUSETTS	Part I, Administration of the Government, Chapter 33 - Militia VI. Military Justice
MICHIGAN COMPILED LAWS SERVICE	Chapter 32, Military Establishment, Michigan Code of Military Justice of 1980
MINNESOTA STATUTES	Military Affairs, Chapter 192a, Uniform Code of Military Justice
MISSISSIPPI CODE of 1972	Title 33 - Military Affairs, Chapter 13, Mississippi Code of Military Justice
MISSOURI STATUTES	Title 5 - Military Affairs & Police, Chapter 40, Military Justice
MONTANA CODE	Title 10, Military Affairs & Disaster, & Emergency Services Chapter 1 - Militia
NEBRASKA REVISED STATUTES	Chapter 55 - Militia, Article 4, Nebraska Code of Military Justice
NEVADA REVISED STATUTES ANNOTATED	Title 36, Military Affairs & Civil Emergencies, Chapter 412, Nevada Code of Military Justice
NEW HAMPSHIRE REVISED STATUTES	Title VIII, Public Defense & Veterans' Affairs, Chapter 110-B The Militia
NEW JERSEY ANNOTATED STATUTES	Title 38a - Military & Veterans Law, Subtitle 1 - Armed Forces Chapter 10, Military Courts
STATUTES OF NEW MEXICO	Chapter 20 - Military Affairs, Article 12, Code of Military Justice
NEW YORK CODES, RULES AND REGULATIONS	Title 9 -Executive Department, Subtitle L, Division of Military & Naval Affairs, Chapter IV, Military Justice
GENERAL STATUTES OF NORTH CAROLINA	Chapter 127A - Militia, Article 3, National Guard
NORTH DAKOTA CENTURY CODE	Title 37 - Military, Chapter 37-09, Military Courts
PAGE'S OHIO REVISED CODE ANNOTATED	Title 59, Veterans - Military Affairs, Chapter 5924 Code of Military Justice
OKLAHOMA STATUTES	Title 44 - Militia, Chapter 7, Code of Military Justice

OREGON REVISED STATUTES	Title 32, Military Affairs; Emergency Services, Chapter 398 Military Justice
PENNSYLVANIA CONSOLIDATED STATUTES	Title 51 - Military Affairs, Part IV, Military Justice
LAWS OF PUERTO RICO ANNOTATED	Title 25 - Internal Security, Subtitle 2 - Military Matters, Part I - Military Code of Puerto Rico, Chapter 207, Military Justice
GENERAL LAWS OF RHODE ISLAND	Title 30 - Military Affairs & Defense, Chapter 13, Rhode Island Code of Military Justice
SOUTH CAROLINA CODE OF LAWS	Title 25, Military, Civil Defense & Veterans Affairs, Chapter 1 - Military Code, Article 19, Code of Military Justice for the National Guard
SOUTH DAKOTA STATUTES	Title 33 - Military Affairs, Chapter 33-10, National Guard Discipline & Courts-Martial
TENNESSEE CODE	Title 58, Military Affairs, Emergencies, & Civil Defense, Chapter 1 - Military Forces, Part 6, Armed Forces-Penal Provisions
TEXAS STATUTES AND CODES	Government Code, Title 4 - Executive Branch, Subtitle C, State Military Forces and Veterans, Chapter 432, Texas Code of Military Justice
UTAH CODE ANNOTATED	Title 39 - Militia and Armories, Chapter 6, Utah Code of Military Justice
VERMONT STATUTES	Title Twenty, Internal Security & Public Safety, Part 2 - National Guard, Chapter 39, Courts-Martial
CODE OF VIRGINIA	Title 44, Military & Emergency Laws, Chapter 1 - Military Laws of Virginia, Article 4, National Guard Courts-Martial
VIRGIN ISLANDS CODE ANNOTATED	Title Twenty-Three, Internal Security & Public Order, Chapter 19 National Guard, Subchapter II, Rights & Liabilities of Members & Officers
REVISED CODE OF WASHINGTON	Title 38 - Militia and Military Affairs, Chapter 38.38, Washington Code of Military Justice
WEST VIRGINIA CODE	Chapter 15 - Public Safety, Article 1E, Code of Military Justice
WISCONSIN STATUTES	General Organization of the State, Except the Judiciary, Chapter 21, Department of Military Affairs
WYOMING STATUTES ANNOTATED	Title 19 - Defense Forces & Affairs, Chapter 12 - Military Courts & Justice, Article 1, State Military Code