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MEMORANDUM

February 23, 2015

SUBJECT: Alaska Code of Military Justice (Work Order No. 29-LS0473\A)

TO: Representative Gabriel LeDoux
Attn: Thomas Brown

FROM: Kathleen Strasbaugh
Legislative Counsel

Please find enclosed the draft bill you requested adopting a model state code of military justice (model code.)

The model code. A document entitled "Model State Code of Military Justice" was developed by the National Guard Bureau as the result of a provision of Pub. L. 107 - 314, div. A, title V, sec. 512(e), Dec. 2, 2002, that required the U.S. Department of Defense to prepare a model state military code and manual for courts-martial.¹ I have used a copy of the code available from the website of the American Bar Association's Standing Committee on Armed Forces Law.²

The approach to drafting. I reviewed the Arizona adaptation of the model code as you requested, as well as Pennsylvania's, as Mr. Brown requested. I also reviewed other state codes, including Minnesota and Oregon. In Oregon the offenses and much of the procedure are set out in orders of the adjutant general. Its appeals process is before a separate military appeals court.³ Oregon's approach was based on the premise that it

¹ Maj. Robert L. Martin, "Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District Of Columbia," *Army Lawyer* at 30, note 10. (December 2007). The article does not appear to have a direct link but is available online in a PDF format by typing the title and author in a search engine.

² See http://www.americanbar.org/groups/committees/armed_forces_law.html. The document may be obtained by clicking on "Model State Code of Military Justice" in the middle of the right column of the page. I could not locate an "official" copy on the website of the National Guard Bureau.

³ Oregon Revised Statutes 396.125 - 128 (authority to adopt code); Oregon Revised Statutes ch. 398 (Military Justice.) (ORARNGR 27-5 / ORANGR 51-20 1 / 01 Feb. 2010). The regulations may be located on the website of the Oregon National Guard

promoted consistency between federal and state law, important for members of the National Guard who may be called upon to transition between federal service where federal military law applies, and state service.⁴

Mr. Brown expressed an interest in this approach so I have drafted the bill in a manner similar to Oregon's approach. It contains a provision authorizing the adoption of a code of military justice by the adjutant general, with the approval of the governor.⁵ I included more provisions of the model code in statute than are found in Oregon's statute because they appear to me to be matters on which the legislature may wish to set policy, including convening authority for courts-martial, maximum sentences, limitations on confinement, and the like. Please review the remaining statutory provisions and let me know if you would prefer otherwise. In keeping with your request to adopt the model code, I retained model code language in the remaining statutory provisions, as discussed in more detail below.⁶ However, as I discussed with Mr. Brown, the model code is inconsistent with the

Trial defense services. <http://www.oregon.gov/OMD/JAG/pages/index.aspx> (lower right column.)

⁴ "Senate Bill 32 is a housekeeping measure requested by the Oregon Military Department. The Legislature authorized the Oregon National Guard (ORNG) to promulgate the Oregon Code of Military Justice (OCMJ) by agency administrative regulation. The OCMJ Regulation is based on the Model Code of Military Justice recommended by the National Guard Bureau to create a seamless military justice system which enables Servicemembers to transition from State to Federal jurisdiction when called to Active Duty. To the extent allowed under Oregon law, the Oregon Code of Military Justice mirrors the punitive standards and organizational systems of the Uniform Code of Military Justice (UCMJ). The OCMJ now enables Servicemembers to transition from Guard status to Active Duty status without varying standards or expectations. It also modifies statutes of limitation to match federal standard and eliminates redundant or contradictory statutory language. Senate Bill 32 completes the process of transitioning the OCMJ to an administrative regulation which is capable of quickly adapting to the federal military standards promulgated by Congress under the UCMJ." Oregon State Bar, Public Affairs Department, "2013 Oregon Legislation Highlights" at 23 - 24 (2013) (available at www.osbar.org).

⁵ Because there does not appear to be an "official" model state code, I made direct reference to the federal uniform code as the guide to the state instead. You may wish to check with the National Guard to find out if there is an official publication so I can determine whether it is suitable for citation in the Alaska Statutes and, if so, substitute it for the federal reference.

⁶ I did take the liberty of borrowing Oregon statutes allowing prehearing release for minor offenses. See AS 26.05.425, an option that is not listed in the code. Please let me know if you would prefer that it be removed.

state's drafting manual and raises significant constitutional questions. In addition, as Mr. Brown and I later discussed, the model code does not spell out specific sentences for most offenses - a person must consult federal or state procedural manuals to determine them. The movement of the offenses to regulation poses similar challenges.

Effect on existing statutes. This draft changes the convening authority for courts-martial, removes state law limitations on the sentences for military crimes, and makes other changes for consistency.⁷ As I discussed with Mr. Brown, the draft includes the model code's military court-martial procedures, but does not include the model code provision that allows the prosecution of state criminal offenses in military courts if they have a "nexus" with military service. Thus, offenses not purely military in nature are to be tried in state court. AS 26.05.300, an existing declaration of this policy, is retained, but renumbered as AS 26.05.400, as the opening section of the military justice code.⁸

Constitutional issues raised by the model code. Much of the model code will be in regulation. However, whether in statute or regulation, it raises a number of constitutional questions.

Art. I, sec. 8, cl. 16 of the United States Constitution empowers Congress to "provide for . . . disciplining" and the authority "of training the militia according to the discipline prescribed by Congress." Currently, Congress prescribes the types of courts-martial and generally requires them to follow federal forms and procedures:

⁷ For example, Article 22 of the model code (AS 26.05.445 in the draft) authorizes the governor, an adjutant general, or certain commanding officers to convene a general court-martial. Under AS 26.05.320, only the governor can convene a general court-martial.

⁸ It should be noted that AS 26.05.060, 26.05.190(a), 26.05.320(b), and AS 26.05.340, currently authorize the governor and the adjutant general to adopt regulations generally, and specifically with respect to military courts. In *State, Department of Military and Veteran's Affairs v. Bowen*, 953 P.2d 888 (Alaska 1998), a case concerning a non-court-martial matter, the Alaska Supreme Court observed that AS 26.05.340(d) presently authorizes regulation by the governor and the adjutant general, but "[no] such regulations have been adopted." *Id.* at 899 - 900. AS 26.05.320 authorizes the governor and the adjutant general to adopt regulations for the general court-martial. To my knowledge, no regulations have been adopted under AS 26.05.320.

AS 26.05.320 requires the regulations to take into account the state's limited facilities for confinement and the "peculiar characteristics of the state." *See also* AS 26.05.310, which directs consideration of federal forms and procedures in establishing military courts, similarly counsels consideration of the practical effects of financing, personnel, and administration. However, such regulations could, subject to the foregoing limitations, incorporate the model code or the federal uniform code of military justice into such regulations.

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. 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

32 U.S.C. 326.⁹ However, at present federal law does not impose the model code or its provisions as a mandate. A state must comply with the state and federal constitutions.¹⁰ Further, it does not seem likely that a state will be able to invoke certain "military exceptions" to settled constitutional protections for criminal defendants including the

⁹ A state statute that conflicts with federal law enacted under art. I, sec. 8, cl. 16 can be overturned as unconstitutional -- when it has prescribed a process or punishment, a conflicting state punishment will be overturned. *State ex rel. Games-Neely v. Sanders*, 575 S.E.2d 320, 324 - 25 (2002) (state statute providing mandatory jail time for "missing movement" invalidated under art. I, sec. 8, cl. 16 because 32 U.S.C. 327 - 330 in effect at the time the case was decided had specific sentencing limitations and did not authorize a mandatory jail term). Federal law preempts state action given "the supremacy of federal powers in military affairs." *Perpich v. Department of Defense*, 496 U.S. 334, 350 - 52 (1990) (a governor may not veto the federalization of a state's national guard; rights reserved to state under art. I, sec. 8, cls. 15 and 16 are subordinate).

¹⁰ In a discharge case filed by an officer in the organized state militia challenging his termination from the militia on the grounds that his right to due process had been violated, the Alaska Supreme Court rejected the state's arguments that state courts lacked jurisdiction over the case -- which the court held was in fact a supremacy clause argument, that the officer's claims were preempted by federal law. *Bowen, supra*, 953 P.2d at 893 - 94. (*DMVA v. Bowen*), 953 P.2d 888, 893 - 94 (Alaska 1998). The Court noted:

While the federal government might have acted to regulate comprehensively the administration of the AGR program in the Alaska Air National Guard, it has not done so. Examination of two federal laws shows this. First, 32 U.S.C. § 324(b) allows termination of a National Guard officer "as provided by the laws of the State." Congress has chosen to affirm, rather than abridge, the states' role in terminating officers of their National Guards. This is clear recognition that state law may provide additional termination requirements.

Id. at 894 - 95.

right to a trial by jury.¹¹ This seems especially so in light of the fact that many service members will be serving part time, not subject to military jurisdiction for most of their daily lives. A state undertaking to adopt the model code is acting under color of state law, and is likely to be required to comply with the state and federal constitutions, even if it adopts federal law and procedure verbatim.¹²

Court-martial procedure does provide many of the constitutional safeguards afforded criminal defendants in civilian courts.¹³ Further, a court-martial may be held for conduct

¹¹ The "military exception" is a federal doctrine. Under it, among other things, a defendant in a court-martial is not entitled to a jury trial under the Sixth Amendment. The doctrine is built on the military exception to the grand jury requirement expressly provided in the Fifth Amendment, but is generally explained as judicial deference to Congress in enacting laws governing the military, (the "make rules" clause of art. I, sec. 8, cl. 14) and the need of the military to maintain order and discipline. *Solorio v. U.S.*, 483 U.S. 435, 439 - 41, 447 - 49 (1987) (court-martial had jurisdiction to try sexual abuse charges committed off base because of defendant's status as a service member; overruled prior requirement that a crime must be service-connected to be tried in a court-martial). The exception has been criticized as inadequate to support the deprivation of constitutional rights even for members of the regular armed forces. Stephen I. Vladek, "Military Courts and Article III," 103 *Georgetown Law Journal*, 2015, Forthcoming. (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2419342). See also Frederick Bernays Wiener, "Courts-Martial and the Bill of Rights: The Original Practice?," 1975 *Mil. L. Rev.* 171 (September, 1975).

Some states apparently follow the federal lead with respect to the military exception. *State v. Davis*, 2010 WL 4278277 at 5 - 6 (La. Ct. App. November 1, 2010) (unreported). However, the Alaska Supreme Court has rejected such deference with respect to constitutionally guaranteed due process, at least in a civil matter. *Bowen, id.* at 896 (finding that a determination whether a state agency had violated the rights of a state employee was not a matter "of military expertise or one which causes interference with a military mission").

¹² See *Gilliam v. Miller*, 973 F.2d 760, 763 - 64 (9th Cir. 1992) (Oregon adjutant general acting under color of a state statute when he terminated National Guard members for failing to meet federal training standards adopted by the Oregon legislature for Oregon guard members).

¹³ In commentary to the model code, the drafters suggest that because the court-martial is a statutory court, some state constitutional protections may not apply. Model Code, Annotations to Article 52. The United States Supreme Court has held that the Sixth Amendment guarantee of the right to counsel does not apply to summary courts-martial in light of the opportunity to object (which carries with it the risk that higher penalties may be imposed in a general or special court martial), and that the Fifth Amendment guarantee of due process does not require the advice of counsel to

that is not criminal, or a purely disciplinary purpose.¹⁴ And some conduct must be addressed during a military mission, or to protect the safety of others. However, for some cases, the provisions of the model code incorporated in this draft or in the code to be adopted into regulation, may implicate the rights of state militia members under the state and federal constitutions tried by a court-martial for offenses for which a jail term is a possibility.

Grand Jury; Fifth Amendment of the U.S. Constitution and art. 1.8 of the Constitution of the State of Alaska. Both the state and federal constitutions require a grand jury indictment for a serious crime, but contain exceptions for the armed forces.¹⁵

assist in articulating defense or mitigating circumstances; the Court noted that Congress's determination not to provide for a summary court-martial was entitled to deference under art. I, sec. 8. *Middendorf v. Henry*, 425 U.S. 25, 34, 43 and 46 - 47 (1976) (enlisted Marines who agreed to summary courts-martial for unauthorized absences that resulted in sentences of confinement to a summary court-martial could not object to the results). It is not clear whether an Alaska court will agree.

¹⁴ The purpose of nonjudicial punishment has been held to be noncriminal in nature:

As noted, "[n]onjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in service members without the stigma of a court-martial conviction." Thus, a primary purpose of NJP is to maintain military order, a purpose distinct from those underlying traditional criminal punishment.

Indeed, military "discipline is not achieved exclusively or even primarily through use or threat of the military criminal law process, the court-martial." "Commanders use a combination of tools to maintain discipline, including leadership by example, training, corrective measures, administrative actions authorized by applicable regulations, and NJP. . . ."

United States v. Reveles, 660 F.3d 1138, 1145 (9th Cir. 2011) (citations omitted).

¹⁵ The Fifth Amendment provides:

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, *unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger*; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

Both provisions refer to the exception in connection with a time of war or public danger. Federal case law does not seem to apply "when in actual service in time of war or public danger" as a modifier of the land and naval forces provision; however, it does modify the militia provision.¹⁶ The state provision is clearly tied to periods of war and public danger, which suggests that a felony level charge may not withstand a challenge unless it occurs during a military operation that meets the condition. It is worth noting, though, that the model code has a relatively thorough investigatory process in which, unlike a grand jury proceeding, the defendant can be represented, present evidence, and examine witnesses. AS 26.05.495. Model Code, Article 32.

process of law; nor shall private property be taken for public use, without just compensation. [Emphasis added.]

Art. I, sec. 8 provides:

SECTION 8. Grand Jury. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases *arising in the armed forces in time of war or public danger*. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment. The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended. [Emphasis added.]

¹⁶ *Johnson v. Sayre*, 158 U.S. 114 - 15 (1895). However, this likely refers to the militia when in federal service:

This provision is intended "to prevent persons not subject to the military law from being held to answer for a capital or otherwise infamous crime without presentment or indictment by a grand jury," the words "when in actual service," etc., referring to the militia and not to "land or naval forces," because, as said by Mr. Justice Gray, "All persons in the military or naval service of the United States are subject to the military law, the members of the Regular Army and Navy at all times -- the militia so long as they are in such service." *Johnson v. Sayre*, 158 U. S., 109, 114. And a reason for referring the clause "when in actual service in time of war or public danger" to the militia and not to the Army or Navy is said to be found in the fact "that it is only at those times that the militia are under the jurisdiction and control of the General Government," while the Army and Navy of the United States are always in the service of the Government.

Alabama Great S. R. Co. v. United States, 49 Ct. Cl. 522, 534 - 35 (1914).

Double Jeopardy; art. 1, sec. 9. Nonjudicial punishment is not a bar to a court-martial for a more serious crime arising out of the same act, Model Code, Article 15. A court-martial will bar a subsequent civilian prosecution for the same offense but in the regular armed forces, a nonjudicial punishment is not deemed a criminal punishment for the purpose of the protection against double jeopardy under the Fifth Amendment.¹⁷ Whether the Alaska courts will take the same view under art. 1, sec. 15 may depend on the effect of the nonjudicial punishment.¹⁸

Right to jury trial: Sixth Amendment to the United States Constitution; art. I, sec.11, Constitution of the State of Alaska. A general or special court-martial is like a jury trial in that the finder of fact composed of a group of service members, subject to challenge by the parties, who hear the facts and determine guilt. Model Code, Articles 25 and 41. However, the members are selected by the convening authority, Model Code, Article 25(f). The verdict need not be unanimous. Under federal law, the right to a jury trial under the Sixth Amendment does not apply to courts-martial.¹⁹ Under art. I, sec. 11 of the Constitution of the State of Alaska, a defendant subject to criminal prosecution is entitled to the unanimous verdict of a jury.²⁰ While some offenses under the model code

¹⁷ *U.S. v. Reveles*, 660 F.3d 1138, 1145 (9th Cir. 2011) (nonjudicial punishment not "punitive").

¹⁸ *Cf. Aaron v. City of Ketchikan*, 927 P.2d 335 (Alaska App. 1996) (administrative action on drivers license does not preclude drunk driving charge). *But see Doe v. State*, 189 P.3d 999, 1019 (Alaska 2008) (in case using analysis similar to *Reveles* for an ex post facto challenge to Alaska's sex offender registration law, Court treated law as punitive under art. I, sec. 9 of the Constitution of the State of Alaska, even though United States Supreme Court had upheld the law under the federal ex post facto clause, art. I, sec. 9, cl. 3 of United States Constitution).

¹⁹ *Reid v. Covert*, 354 U.S. 1, 35 - 40 and notes 44 and 68 (1957) (case concerned limitations on ability of military courts to try civilians; noting that in contrast military justice was substantially different, that military courts did not provide the right to a jury trial at common law, and that the application of the bill of rights was uncertain). At least one state court has observed that a member of a state militia is not entitled to a jury trial under the state constitution because it was unavailable in a military court at common law. *Application of Palacio*, 238 Cal.App.2d 545, 551 (1965) (dicta) (petitioner released because not afforded opportunity to demand a special or general court-martial before confined after summary court-martial.) *See also Miller v. Rockefeller*, 327 F.Supp. 542, 547, n. 5 (S.D.N.Y. 1971).

²⁰ Art. I, sec. 11 provides:

SECTION 11. Rights of Accused. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not

may not be considered criminal prosecutions, the prosecution of a violation of state law or regulation that has incarceration as a potential result is likely governed by art. I, sec. 1.

Other legal issues.

Attorneys. The model code "deems" that military judges and defense counsel may appear pro hac vice if they are not admitted to the Alaska Bar. *See*, Articles 26 and 27 of the model code. (Trial counsel, the prosecutor, must be admitted to the Alaska Bar.) I have eliminated the Alaska admission requirement for the judge, instead requiring a bar membership. AS 26.05.453.²¹ Defense counsel may practice as authorized by the Alaska

more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

(Emphasis supplied.) In *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970) the Alaska Supreme Court held that the right to a jury trial to any criminal prosecution of an offense that includes:

a direct penalty for which may be incarceration in a jail or penal institution. It also includes offenses which may result in the loss of a valuable license, such as a driver's license or a license to pursue a common calling, occupation, or business. It must also include offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term.

Excluded from the requirement of jury trial are such relatively innocuous offenses as wrongful parking of motor vehicles, minor traffic violations, and violations which relate to the regulation of property, sanitation, building codes, fire codes, and other legal measures which can be considered regulatory rather than criminal in their thrust, so long as incarceration is not one of the possible modes of punishment.

Id. at 402 - 03. The revocation of a valuable license is subject to trial by jury if the court, rather than an administrative agency is required to revoke a license on conviction of certain offenses. *State v. District Court*, 927 P.2d 1295, 1296 - 97 (Alaska Ct. App. 1996). A unanimous jury is constitutionally required. *Khan v. State*, 278 P. 3d 893, (Alaska 2012); *Andres v. United States*, 333 U.S. 740, 748-49 (1948).

²¹ The drafters of the model code envisioned the use of out-of-state judges. Model Code, Article 26 commentary.

Supreme Court.²² The bill authorizes Appeals Commission members to serve with an out-of-state license. To the extent that service is construed to be the practice of law, the member may require a waiver under Civil Rule 81 as well.

Lack of specific sentences and maximum sentences in statute. Under federal law, the President sets maximum sentences. 10 U.S.C. 856. The model code refers to this source as part of the calculation of maximum sentences for offenses for which a sentence is not otherwise specified -- it is to be the lesser of the federal maximums and those adopted under the rules of procedure to be adopted under AS 26.05.380.²³ The Model Code has a general set of limitations. Model Code, Article 56. This draft adopts these provisions, AS 26.05.478. Under Article 137 of the model code an enlisted person must have certain the provisions of the code explained on entry into service, after the completion of basic training, and on reenlistment. A person reviewing the code would not find the penalties for many offenses in the code itself, but in either the federal or state procedure manuals.²⁴ If the model code is adopted, the upper limit will be guided by the adjutant general and the upper limit set as in federal law, even though Congress has authorized the states to set penalties under 32 U.S.C. 326. Under current law, AS 26.05.320 - 26.03.324, the penalties are set out in statute. These statutes are repealed in the bill.²⁵

²² Under Alaska Rule of Court, Civil Rule 81, applicable to criminal proceedings under Criminal Rule 50, an attorney may practice "in the courts of the state" under certain circumstances, and under Bar Rule 43.1, an active duty attorney representing clients in the regular armed services may receive a waiver. If a court-martial is a "court of this state," Rule 81 may apply, but the courts-martial are not actually within the judicial branch, but are instead an arm of the executive branch. Counsel in a court-martial are, however, practicing law. This raises the question whether the court's general authority over the practice of law precludes legislation. (The Alaska Supreme Court's authority to regulate and govern the practice of law comes from the court's exercise of its inherent judicial power and jurisdiction in art. IV, sec. 1 of the Constitution of the State of Alaska. *See, e.g., Citizens for Tort Reform, v. McAlpine*, 810 P.2d 162, 170 - 71 (Alaska 1991); *In re Stephenson*, 511 P.2d 136, 142 (Alaska 1973); *Application of Steelman*, 448 P.2d 817, 819 (Alaska 1969); *In re MacKay*, 416 P.2d 823, 836 - 37 (Alaska 1964). In the *Stephenson* case, the Court held that requirements in the Bar Rules regarding the admission to practice law prevailed over the Alaska Statutes, due to the court's exclusive and inherent authority which derives from art. IV, sec. 1, Constitution of the State of Alaska.

²³ See enclosure.

²⁴ *See* Manual for Courts-Martial United States (2012), 884 pages. The Manual can be obtained in pdf form from this link: www.apd.army.mil/pdffiles/mcm.pdf (last viewed February 14, 2015).

²⁵ The maximum sentence of confinement is presently 60 days. AS 26.05.320 (general court-martial).

Extra territorial jurisdiction. AS 26.05.408 (Model Code, Article 5) provides that the code can be applied to out of state conduct. This may apply, for example, to conduct that occurs while the militia is deployed under a mutual aid compact. AS 26.23.136; AS 26.25. However, it is not clear that a state court-martial for a state military offense will have extraterritorial jurisdiction to serve process. Model Code, Article 46. Whether the broad reach of the provisions concerning the apprehension of defendants is authorized for a state military crime is also unclear. AS 26.05.420; (Article 7 of the model act).²⁶

Extradition. The bill draft at sec. 26.05.420(c), provides for apprehension of an offender of the military justice code "in accordance with applicable extradition procedures or by reciprocal agreement." However, under AS 12.70.210, the Uniform Criminal Extradition Act adopted by the state applies only to a person "charged with a crime or breaking the terms of probation and parole." It is unclear whether the model code is intended to provide for new military crimes since the code refers to them as "offenses" and since the code contemplates court-martial proceedings for those offenses. On the other hand, sec. 26.05.478 describes the maximum penalties for military offenses in terms of felonies, misdemeanors, and violations. Since the Uniform Criminal Extradition Act may not be modified to expressly add military offenses, the bill draft creates an ambiguity with respect to which extradition procedures may apply under the new military code, particularly with respect to violations tried by summary court-martial.

Controlled substances. As noted above, this bill draft does not set out criminal offenses -- they are in the model code. However, I wanted to alert you that Article 112a of the code establishes a military offense for wrongful use or possession of a controlled substance and defines controlled substance in a way that is inconsistent with state law that relies on a schedule established by the President of the United States for the purposes of the U.S. Armed Forces.

Rules of Evidence. The model code fails to identify the rules of evidence that are applicable to court-martial proceedings but seems to contemplate the use of the federal military code rather than state rules. However, sec. 26.05.380 authorizes the adjutant general to establish rules of procedure and other secs. describe witness examination and cross-examination procedures. The cases are appealable through state courts. Therefore, I have added a requirement at sec. 26.05.380(b) that the rules must be consistent with the Alaska Rules of Evidence. That caveat may not adequately address the state constitutional issues raised in sec. 3 of this opinion, particularly with respect to Alaska's unique criminal rules of procedure pertaining to discovery and rights of the accused. Both the state rules of evidence and criminal procedure reflect differences between Alaska's constitutional protections and those provided by the federal constitution.

²⁶ It is also unclear whether the interstate compact on detainers, which includes the federal government, applies to state military prisoners. AS 33.35.010 - 22.35.040; 18 U.S.C. Appendix.

Contempt. Articles 46 and 47 of the Model Code provide for issuance of subpoenas and contempt orders on civilians. The model code draws no distinction between contempt committed in the court's presence and those, including refusal to obey a subpoena, that are not. We have added a requirement that the contempt must be direct. But we have serious doubts about the authority of military courts to enforce a subpoena or contempt order against a civilian. We have added in AS 26.05.460, 26.05.463 and 26.05.465 concerning the authority to issue subpoenas, a provision authorizing the adjutant general to seek the assistance of the attorney general in enforcing them.²⁷ Oregon's statute provides specific contempt authority to military courts.²⁸ However, it does not seem appropriate to confer such powers on tribunals with so limited a jurisdiction.²⁹ The contempt for failure to obey a subpoena should arise only on a violation of a court order. We have amended the Model Code's articles 46 and 47 to address these issues.

Insanity defense. This draft includes statutory provisions to permit the military courts to address the insanity defense that is provided in the model code.³⁰ AS 12.47.030 and 12.47.040 currently provide for an additional defense to crimes not included in the model code for persons guilty but mentally ill. Do you want to add that defense to the military code?

If I may be of further assistance, please advise.

KJS:dla
15-101.dla

Enclosure

²⁷ In Alaska, a court asked to enforce a subpoena must determine whether the agency seeking to enforce it an agency has statutory authority to issue it. *Tesoro Petroleum Corp. v. State*, 42 P.3d 531, 541 (Alaska 2002). We have adopted some language from Oregon Revised Statutes 390.408, which seems more consistent with state law than Article 46 of the Model Code. Please let me know if you prefer the Code language.

²⁸ Oregon Revised Statutes 398.226; *see also* ORARNGR 27-5 / ORANGR 51-20-1 at 30 - 31.

²⁹ Alaska, remedies and proceedings for criminal contempt apply to court proceedings, and specific acts. AS 09.50.010 - 09.50.060.

³⁰ Oregon includes these provisions in regulation, but I thought it better to have a procedure explicitly authorized by the legislature, since other state departments and facilities are involved. ORARNGR 27-5 / ORANGR 51-20-1 at 45 - 47. The model code provides that state law should apply. Model Code, art. 76a.