

LEGAL SERVICES

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MEMORANDUM

August 10, 2015

SUBJECT: Military Code of Justice
(CSHB 126(); Work Order No. 29-LS0473\N)

TO: Representative Gabrielle LeDoux
Attn: Lisa Vaught

FROM: Megan A. Wallace
Legislative Counsel

Enclosed please find the draft bill you requested. Please review it carefully. Please also be aware of the following drafting issues.

1. You requested that AS 26.05.380, relating to rules of procedure, be deleted. Please note, however, that there were internal references to AS 26.05.380 in AS 26.05.483, 26.05.523, and 26.05.533. I deleted the reference to "AS 26.05.380", but left a general reference to "rules of procedure." While I understand that you would like to make the punitive acts statutory, do you want to retain parts of AS 26.05.380 to allow for other rules of procedure to be adopted? If so, what parts? If not, all references to "rules of procedure" should be deleted from the bill. Please advise.
2. AS 26.05.400 has been revised in the draft bill, per your request, to that, with respect to an offense that violates both the military code of justice and state law, "a court-martial may be initiated only after the civilian court has declined to prosecute or dismissed the charge." First, "civilian court" is not the proper term to use, as courts do not prosecute crimes. In Alaska, only the state or a municipality may decline to prosecute a violation of their respective offenses or ordinances. I would recommend revising this section accordingly.
3. Under AS 26.05.400, when will a determination be made as to when the state or local body has "declined to prosecute"? Will it be when the statute of limitations expires?¹ Some sex-based crimes in Alaska, however, carry no statute of limitations, and the state can prosecute at any time.² It is unclear how this provision will be implemented, and this conflict should be discussed with the Department of Law.

¹ See AS 12.10.

² AS 12.10.010(a).

4. I made the revision you requested relating to applicability of the chapter. The code of military justice now applies to members of the militia at all times. At your request, all references to "active state service" were deleted from the draft bill. Please note, however, that existing AS 26.05.070, 26.05.075, 26.05.090, 26.06.140, 26.05.260, and 26.05.262 contain references to "active state service." Would you like to amend any of these provisions?
5. I did not delete the reference to "active state service" in AS 26.05.408 in the draft bill, relating to criminal acts committed outside of Alaska. This leaves the provision in line with the model code. If you would like to delete the reference to "active state service," please advise, but please note that Alaska law would not be applicable in other jurisdictions. Accordingly, there may be an instance when the member of the militia is subject to the Alaska code of justice and prosecution under the laws of a different state.
6. In AS 26.05.543(a), you state that a senior force judge advocate shall detail a judge advocate to serve as "civilian appellate trial counsel to represent the state." Then in (e), you state that an accused may be represented by "civilian appellate counsel at no expense to the state." Is the "civilian appellate counsel" in (e) also a judge advocate like in (a)? Or does this mean that an accused may hire his or her own attorney at his or her own expense? It is unclear as drafted in the material provided, and I would recommend revising this section to clarify.
7. On February 23, 2015, attorney Kathleen Strasbaugh sent you a memorandum relating to this bill. Please review this memorandum carefully, as the constitutional issues she raised in that memorandum are not cured by the current draft.
8. As discussed, this draft contains criminal acts that are inconsistent with existing state law, namely AS 26.05.741, 26.05.745, 26.05.760, 26.05.764, 26.05.766, 26.05.768, 26.05.770, and 26.05.772. This presents an issue, as the state is prosecuting the crimes under both AS 11 and under the code of military justice in AS 26.05. In one instance, the state prosecutes a civilian, and in another, the state (acting as the Alaska National Guard) prosecutes a militia member. Nevertheless, the same crime, depending on who is prosecuted, may have different elements, defenses, or levels of punishment. As a result, prosecution of these offenses may create unique and difficult double jeopardy and equal protection issues. These changes should be discussed with the Department of Law.
9. I have amended the draft bill to allow only a civilian appeal to the Alaska Supreme Court. Nevertheless, I would also discuss the appeal provisions in AS 26.05.540 with the Department of Law. Are the appeal rights in AS 26.05.513 consistent with the appeal rights provided for criminal cases under AS 12.55.120 and AS 22.07.020?

10. While you have added a grand jury requirement to the draft bill, it is unclear how this procedure will be executed. Under Alaska law, only a prosecuting attorney may bring a case before a grand jury. *See* AS 12.40.070. Do you intend that a prosecuting attorney conduct the grand jury for the court-martial proceeding? If not, your grand jury provision requires additional changes to substantive law. In addition, your request likely results in court rule changes. A court rule change would require a two-thirds vote in order to pass the measure under art. IV, sec. 15 of the Constitution of the State of Alaska, which reads:

Section 15. Rule-Making Power. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Rule 39(e) of the Uniform Rules requires:

(e) If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

Without additional information relating to the suggested grand jury proceeding, I cannot identify which rules might be subject to change.

Please contact me if you would like to make any revisions to the draft, have any questions, or need additional assistance.

MAW:dla
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Enclosure