

ACMJ Quick Fix Bullet Points

- HB 126 is **constitutionally inconsistent** and invites challenge

- Includes Grand Jury Requirement (26.05.444, Art 1, Sec 8) and Unanimous verdict requirement (26.05.505, Art 1, Sec 11), but does not require 12/6 jurors (Art 1, sec 11)

- Legislative history does not support idea that inclusion of GJ and unanimous verdict was policy choice rather than constitutionally driven

- See 23 February 2015 Memo from Legislative Legal, and 22 Sept Judicial Committee hearing (Q: “Does AK Constitution apply?” A: “Absolutely, that’s why we included Grand Jury, etc.”)

- “Military Exception” to Federal 5th and 6th Amendments (grand jury and petit jury) is based on language of 5th Amend (“...except in cases arising in the land and naval forces, or in the militia, when in actual service in time of war or public danger.”) and applied to the 6th by analogy. (*Ex parte Milligan*, 71 US 2, 123 (1866), *Ex parte Quirin*, 317 US 1, 39-40 (1942)). It is not based in power of Executive as Commander-in-Chief, or in Legislature’s ability to regulate forces.

- Unclear if “military exception” would apply at state level due to difference in constitutional language, and make up of Guard as citizen soldiers/airmen. (Active duty always in military status, ACMJ would allow military prosecution even if member committed crime while not in military status.) AK Constitution requires grand jury “except in cases arising in the armed forces in times of war or public danger,” (no general military exception) and juries of 12/6 in “all criminal prosecutions” (more below)

- If no state level “military exception” applies, then 26.05.433, **Courts-martial classified**, is unconstitutional because it lacks required number of jurors

- Art 1, Sec 11 of the AK Constitution requires “all criminal prosecutions” to have juries of 12, or no fewer than 6. *See also* AK R. Crim. Pro. 23(b). Prosecution under the ACMJ would be both criminal and state law based; making it subject to this provision.

- re: “all criminal prosecutions” language: See *Baker v. City of Fairbanks*, 471 P.2d 386 (1970): “we define the category of “criminal” prosecutions as including any offense a direct penalty for which may be incarceration in a jail or penal institution. ... 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.[29]”

- see also AK Constitution: A Citizen’s Guide, pgs. 24-25. Available at: https://akleg.gov/docs/pdf/citizens_guide.pdf

-- **Recommend** making the bill consistent by either taking the position that “military exception” applies on the state level (which all other states seem to have done) and removing GJ and unanimous verdict requirements, or upping the number of jurors to 12/6. The consistency will aid in preventing a challenge, and in defending the code if eventually challenged. Selective inclusion of rights would be hard to defend, especially with the rights-friendly nature of our Supreme Court and the language in *Baker v. City of Fairbanks*. The Federal Military Justice Review Group released a 2015 report suggesting making active duty juries an increased, fixed number of members: 8 for a GCM and 4 for a special. **Based on case law, etc., safest course of action would be to include GJ, remove Prelim Hearing, up number of jurors, and include unanimous verdict.**

- Sec 26.05.444, **Grand Jury Requirement**, and 26.05.468, **Prelim Hearing**, are redundant

-- bill currently reads as requiring both a grand jury and prelim in all GCMs, since if prosecution was going to ask for less than a year it would likely be a Special CM

-- if “military exception,” no need for Grand Jury. But, requiring all General CM to go to grand jury instead of a prelim and eliminating the prelim would expedite the process and save resources; it is a mechanism already in place.

-- 26.05.468(c) does not make sense. If the accused does not have the rights outlined in (c)(1), (2), and (3) during the hearing because a grand jury already heard the case, then what is the point of the prelim hearing? Excepting those rights would make the whole prelim meaningless and unnecessary, and further supports removal.

- Sec 26.05.614(c)(1), **Wrongful use or possession of controlled substances**, includes marijuana use which is no longer a crime under state law.

- **Multiple Substantive Articles are Missing**

-- Code of Mil Justice is synergistic. All parts work together to make whole. Every Article essentially serves as enabling statute for Manual for Courts-Martial.

-- Codifying gives provisions daylight and makes less subject to regulatory procedure

-- Consistent with model code & civilian prosecution to codify criminal pro: AK Statutes codify Criminal Procedure in Title 12, “Code of Criminal Procedure.”

-- More consistency, better workability in making code statutory instead of piecemeal statute and regulation. Piecemeal selection is inconsistent, extracts necessary Articles

-- All sentencing articles should be included. Sentencing is fundamental part of process and is substantive. Deserves weight of law as opposed to regulation. See AK Statutes, 12.55 “Sentencing and Probation.”

- all Articles relate directly to CM, why not include when we have opportunity to put complete code on the books and show anyone outside looking in that our code is complete AND workable? Easy to add and still get passage.

- **Art. 13: Punishment Prohibited Before Trial**

- Importance: Bedrock principle for treatment of members, and makes it illegal to mistreat/punish (i.e. impose extra duty, hard labor, etc.) based on charges before a finding of guilt. Puts “innocent until proven guilty” into practice. It also sets the standard that arrest or confinement will be no “more rigorous than the circumstances required to insure the person’s presence.” This fits with the State’s overall current push to reduce incarceration.

- Example: Active Duty defendants under federal UCMJ continue to work and perform duties while pending courts-martial.

- No similar section: Secs. 26.05.423, Imposition of Restraint, and 26.05.425, Restraint of persons charged with offenses, deal with arrest and confinement, but do not prohibit additional punishments (like those mentioned above) for those defendants not subject to actual arrest and/or confinement.

- **Art. 38: Duties of Trial Counsel and Defense Counsel**

- Importance: codifies responsibilities of counsel, especially that of the defense counsel, and codifies important rights of the accused, i.e., the right to appointed counsel, the ability to have civilian counsel, the right of the accused to be represented at a preliminary hearing (inclusion of this would depend on the ultimate resolution of the grand jury vs. preliminary hearing question), and the right to submit matters to the convening authority for consideration following conviction.

- No similar section: 26.05.455, Detail of trial/defense counsel deals with the selection/assignment of JAGs as prosecutors/defense attorneys, and list required qualifications. It does not provide for responsibilities/duties of those detailed/assigned. It also does not provide for rights of the accused as outlined in Art. 38

- **Art 39: Sessions**

- Importance: Provides forum for arraignment and receiving pleas (the act of receiving pleas is provided for at 26.05.490, but the forum is not), a forum for resolving pretrial motions, etc., outside the presence of the jury (because the jury would be tainted by hearing motions, etc.) and ensures that all other “sessions” are “on the record.”

- No similar section: 26.05.503, Voting and rulings, deals with reaching a verdict, receiving the verdict, and jury instructions. It does not deal with motions, etc.

- **Art 41: Challenges**

--- Importance: Provides necessary guidance for jury selection and challenges to jurors and the military judge. Provides for challenges for cause and preemptory challenges. Jury selection is vital part of courts-martial proceedings. Would need modification from Model Code language if number of jurors changes, and possibly an increase in the # of preemptory challenges

--- No similar section

-- **Art 46: Opportunity to Obtain Witnesses and other Evidence**

--- Importance: codifies equal opportunity for both parties to obtain witnesses, and allows service by civil authorities (ex: Judicial Services Troopers). Service of process will comply with state process requirements where the witness located, expediting process. Extends process to all States.

--- No similar section: 26.05.493, does not provide for civil authority involvement, and limits subpoena authority to Alaska only.

-- **Art 47: Refusal to Appear or Testify** (quasi covered in AS 26.05.493)

--- Importance: Gives CM the ability to independently ensure witness participation as opposed to trying to rely on civilian courts and the logistical headache involved with that. Requires payment of witnesses up front. 26.05.493 makes receipt of payment a prerequisite for charging someone under that section, but does not require payment upfront. *Recommend* adding a section requiring upfront payment, or, better fiscally, removing the requirement that a witness have “been paid or tendered fees” before being subject to violation for not complying with a subpoena.

--- While 26.05.493 is similar, there is room for improvement.

-- **Art 49: Depositions**

--- Importance: provides ability to conduct depositions: procedures for, and requirements of. Especially important for highly operational/deployment heavy units like 176 WG and 168 WG. Without, no codified way to take testimony from deploying members before they leave.

--- No similar section

-- **Art 57: Effective Date of Sentence**

--- Importance: Sets date that sentences, to include forfeitures, confinement, etc., become effective. Substantive sentencing provision. Necessary corollary to prosecution.

--- Bill includes Art 57a (Deferment, 26.05.515), but provides no effective date. Need an effective date in order to defer,

--- No similar section

-- **Art 58(a): Sentences: Reduction in Enlisted Grade Upon Approval**

--- Importance: Requires any enlisted member receiving a dishonorable or bad-conduct discharge, or confinement, to automatically be reduced to the lowest rank. Deserves weight of law as removing property interest in rank. Fiscally responsible also.

--- No similar section: 26.05.518 codifies Art 58 and deals with confinement, not reduction. Art 58(a) is a separate substantive article dealing with reduction, not confinement.

-- **Art 58(b): Sentences: Forfeiture of pay and allowances during confinement**

--- Importance: Requires forfeiture of pay and allowances during periods of confinement and requires an effective date provided in Art 57. Fiscally responsible; prohibits members collecting pay and allowances while in jail.

--- No similar section: 26.05.518 codifies Art 58 and deals with confinement, but does not require the member to forfeit pay while jailed. No section of the code does that in spite of its fiscal and equitable merits. Art 58(b) is a separate substantive article not in HB 126

-- **Art 60: Action by Convening Authority**

--- Importance: VITAL: provides procedure for convening authority (CV) following court-martial. CV begins process and has to end it. It also allows the defendant to submit matters for consideration/requests for leniency. "Approval" must happen before a sentence is effective, and is referenced in 26.05.535, but "approval" is not provided for in bill b/c this article is missing. *Recommend* including this article, but modifying it to prohibit the convening authority from overturning a finding of guilty to prevent abuse of discretion and favoritism.

--- No similar section

-- **Art 63: Rehearing**

--- Importance: provides specific guidance for retrials should one be necessary by virtue of a hung jury. Retrials not address anywhere in bill.

--- No similar section: Art 63 deals with retrials after a hung jury, Sec 26.05.530 provides for a completely new trial if new evidence of innocence or fraudulent prosecution found

-- **Art 64: Review by Senior Force Judge Advocate**

--- Importance: Requires legal review of proceedings to ensure legal sufficiency. Provides valuable legal guidance for TAG. Empowers Staff Judge Advocate as process watchdog, and guarantees rights of both defendant and government.

--- No similar section: This legal review is part of the JAGs role as advisor to the TAG and the functional owner of the military justice system. It is separate from and analyzes issues differently than the Military Appeals Commission.

-- **Art 65: Disposition of Records:**

--- Importance: provides that disposition of record of trial should be in accordance with state law, i.e., kept for a period of years, reported to clerk of court, etc.

--- No similar section: 26.05.508 deals with forming the record of trial, but does not provide for its disposition/storage.

-- **Art 71: Execution of Sentence; Suspension of Sentence**

--- Importance: Prohibits executing certain portions of a sentence while an appeal is pending.

--- No similar section

-- **Art 74: Remission and Suspension:**

--- Importance: Provides for suspension of any part or amount of the unexecuted portion of a sentence. More importantly, HB 126 has Art 72 (26.05.528), vacation of suspension, but no mechanism to actually suspend. 26.05.535 also references suspension. This article is that missing mechanism.

--- No similar section

-- **Art 76: Finality of Proceedings:**

--- Importance: Makes findings and sentence final as a matter of law, and makes convictions binding as appropriate. Necessary to end proceedings that begin by statute.

--- No similar section

-- **Art 137: Articles to Be Explained**

--- Importance: Puts members on notice of ACMJ and expectations.

--- No similar section

-- **Art 143: Uniformity of Interpretation:** include direct reference to UCMJ for clarity

-- **Art 145: Severability**

--- Importance: Codifies idea that if one provision is found to be invalid for any reason, the remainder of the code is still valid. Important considering the constitutional questions raised by the bill.

--- No similar section

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