

**ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE**

September 22, 2015

1:31 p.m.

Anchorage, Alaska

MEMBERS PRESENT

Representative Gabrielle LeDoux, Chair
Representative Wes Keller, Vice Chair
Representative Bob Lynn
Representative Charisse Millett
Representative Matt Claman
Representative Max Gruenberg

MEMBERS ABSENT

Representative Neal Foster
Representative Kurt Olson (alternate)

OTHER MEMBERS IN ATTENDANCE

Representative Chris Tuck

COMMITTEE CALENDAR

HOUSE BILL NO. 126

"An Act relating to the administration of military justice; relating to the adoption of a code of military justice by the adjutant general; relating to the authority of the adjutant general; relating to appeals of convictions and sentences of courts-martial; establishing the Military Appeals Commission; relating to the detention and incarceration of members of the militia; relating to the jurisdiction of the court of appeals; relating to involuntary commitment for evaluation or treatment of a mental disease or defect before court-martial proceedings; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 126

SHORT TITLE: CODE OF MILITARY JUSTICE; APPEALS

SPONSOR(S): JUDICIARY

02/25/15 (H) READ THE FIRST TIME - REFERRALS

02/25/15 (H) MLV, JUD
03/24/15 (H) MLV AT 1:00 PM CAPITOL 120
03/24/15 (H) -- MEETING CANCELED --
03/26/15 (H) MLV AT 1:00 PM CAPITOL 120
03/26/15 (H) Heard & Held
03/26/15 (H) MINUTE(MLV)
03/31/15 (H) MLV AT 1:00 PM CAPITOL 120
03/31/15 (H) Moved CSHB 126(MLV) Out of Committee
03/31/15 (H) MINUTE(MLV)
04/01/15 (H) MLV RPT CS(MLV) NT 3DP 4AM
04/01/15 (H) DP: LYNN, LEDOUX, HERRON
04/01/15 (H) AM: TUCK, GRUENBERG, COLVER, HUGHES
04/14/15 (H) JUD AT 1:00 PM CAPITOL 120
04/14/15 (H) Heard & Held
04/14/15 (H) MINUTE(JUD)
09/22/15 (H) JUD AT 1:30 PM Anch LIO AUDITORIUM

WITNESS REGISTER

CAPTAIN FORREST DUNBAR
Assistant Judge Advocate
Alaska Army National Guard
JBER, Alaska

POSITION STATEMENT: During the hearing on CSHB 126, explained changes in Version I, and answered questions.

MEGAN WALLACE, Attorney
Legislative Legal and Research Services
Legislative Affairs Agency
Juneau, Alaska

POSITION STATEMENT: During the hearing on CSHB 126, answered questions.

REPRESENTATIVE CHRIS TUCK
Alaska State Legislature
Juneau, Alaska

POSITION STATEMENT: Testified during the hearing on CSHC 126.

PETER SAVAGE, Lieutenant Colonel
Alaska National Guard, (Army, ret.)
(No address provided)

POSITION STATEMENT: During the hearing on CSHB 126, testified as to problems within the Alaska National Guard, and answered questions.

ACTION NARRATIVE

[1:31:38 PM](#)

CHAIR GABRIELLE LEDOUX called the House Judiciary Standing Committee meeting to order at 1:31 p.m. Representatives Lynn, Millett, Keller, and LeDoux were present at the call to order. Representatives Gruenberg and Claman arrived as the meeting was in progress. Also in attendance was Representative Tuck.

HB 126-CODE OF MILITARY JUSTICE; APPEALS

[1:32:25 PM](#)

CHAIR LEDOUX announced that the only order of business would be HOUSE BILL NO. 126, "An Act relating to the administration of military justice; relating to the adoption of a code of military justice by the adjutant general; relating to the authority of the adjutant general; relating to appeals of convictions and sentences of courts-martial; establishing the Military Appeals Commission; relating to the detention and incarceration of members of the militia; relating to the jurisdiction of the court of appeals; relating to involuntary commitment for evaluation or treatment of a mental disease or defect before court-martial proceedings; and providing for an effective date." [Before the committee was CSHB 126 (MLV).]

[1:32:38 PM](#)

REPRESENTATIVE KELLER moved to adopt CSHB 126, labeled 29-LS0473\I, Wallace, 9/18/15, as the working document. There being no objection, Version I was before the committee.

CHAIR LEDOUX noted that Captain Forrest Dunbar will present Version I, and explained that Version I includes documents related to Version P, and included the [indisc.] version of the bill. She further explained that the sectional analysis refers to Version P, and also applies to Version I, as the changes made were minor.

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FORREST DUNBAR, Captain/Assistant Judge Advocate, Alaska Army National Guard, noted that a Code of Military Justice, similar to a criminal code, offers commanders the ability to conduct courts-martial, and nonjudicial punishment for minor offenses resulting in reductions, fines, and withholding pay. He pointed to a graphic [contained within the committee packets] and stated the goal is to always maintain good order and discipline within

the Alaska National Guard, approximately 4,000 soldiers and airmen across the state. He advised the guardsmen are subject to Alaska criminal law while in this state, and can also be disciplined using administrative action, which include letters of reprimand, reduction boards, and separation boards. He explained that separation boards are intensive and conducted according to federal regulations, and on both sides of the board the service members and command are represented by Judge Advocates. He referred to page 1 of the slide show depicting the third leg of a stool as a tool other states have, and Alaska has not had, as an Alaska Code of Military Justice (ACMJ) based in part upon the Uniform Code of Military Justice (UCMJ) which is the federal comprehensive criminal code for the military.

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CHAIR LEDOUX asked whether prior to this bill, if someone is a bad actor in either civil, criminal courts, or this administrative action, the guard had no authority to court-martial.

CAPTAIN DUNBAR responded correct, as the guard is limited with those administrative actions in exactly what it can do. For example, he pointed out, the guard cannot give bad conduct discharges or dishonorable discharges; therefore, it gives an "other than honorable discharge."

CHAIR LEDOUX posed a scenario of someone that commits an offense while in the National Guard, and the bill passes, and the person is no longer in the National Guard, asked whether the National Guard will have jurisdiction over that person.

CAPTAIN DUNBAR acknowledged that the question has not been researched and he will get back to the committee, but his initial reaction is "No, we're not going to pull people back and court-martial them," in that it would be an ex post facto law and the National Guard would not be able to criminally punish them for a law not yet on the books.

CHAIR LEDOUX disagreed that it would be an ex post facto law, in that it would be a different type of punishment and was not certain the prohibition against ex post facto law necessarily applies.

CAPTAIN DUNBAR said he will speak with the Department of Law (DOL), but at this time he does not anticipate pulling people back due to past conduct.

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CAPTAIN DUNBAR referred to slide 2, and offered that the bill coming out of the Military and Veterans Affairs Standing Committee was essentially a merged version of Representative LeDoux and Representative Tuck's two bills introduced last session.

CHAIR LEDOUX interjected that the version passed out of the Military and Veterans Affairs Standing Committee was not a merged version in that Version I is the merged version.

CAPTAIN DUNBAR described it as the "more merged version," as provisions were taken from Representative Tuck's bill in the spring, and now more have been taken due to conversations during the summer. He explained that the version adopted in the spring instructed the National Guard to create two sets of regulations, one being the punitive articles, and the other being the nonjudicial punishment regulation. During the summer it was determined that the punitive articles would no longer be in regulation, but instead in statute, he explained.

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REPRESENTATIVE KELLER referred to his statement that most other states [adopted a Code of Military Justice] and asked for clarification, including whether the bill is before the committee due to past struggles wherein possibly justice was not fulfilled.

CAPTAIN DUNBAR responded that the bill is before the committee in large part due to events over the last several years and specifically the federal Office of Criminal Investigations (OCI) report. He offered that a recommendation of the OCI report is that the Alaska National Guard adopt a Code of Military Justice, which motivated the National Guard to work with Representative LeDoux and others to create this system. Major Brian Fuchs, Alaska Provost Marshall was appointed due to a recommendation of the OCI report. In 2007, the National Guard Bureau (not a command and control organization) published a recommended state model code and a number of states adopted that code which reflected the federal Uniform Code of Military Justice (UCMJ). He referred to slide 3, and advised the Commanders Action Group (that included a number of leaders, enlisted leaders, warrant officers, commanders, and Alaska self-defense force representative) reviewed the UCMJ with the state model code, and

reviewed each provision line-by-line as to what to bring into Alaska. The group worked on the assumption it would be regulation, but when the punitive articles assembled Representative LeDoux advised it should be in statute. An important facet is the nonjudicial punishment regulation allowing commanders to, more quickly than a court-martial, discipline soldiers and airmen with minor offenses and punishments. He said the bill allows the National Guard to keep the nonjudicial punishment regulation as a regulation, which is more common in other states, and plans to present a good version to the committee before January 2016. He advised the Commanders Action Group is reviewing best practices from other states.

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REPRESENTATIVE KELLER questioned whether there is resistance to this in other states, and the source of the resistance. He asked whether the National Guard Bureau recommends that the states do adopt, or did it just recommend a standard for adoption. He further asked why the National Guard did not do this a long time ago.

CAPTAIN DUNBAR advised that the National Guard Bureau did recommend that other states adopt their model code, and some did. The biggest resistance is cost and resources. He explained that in the 90's the Judge Advocate's Office recommended that the model code not be adopted due to lack of funds as courts martial are costly, and nonjudicial punishment requires training and resources. He expressed that command decided it is worth the cost due to the events over the last several years.

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CHAIR LEDOUX asked whether he could honestly say that with the real problems with the former leadership of the National Guard, this bill would have made a difference, and opined this bill will not make a difference without good leadership.

CAPTAIN DUNBAR agreed, and said [the bill] is a larger set of solutions, including the creation of a provost marshal. He pointed out that good leadership is at the heart of things, similar to the [state] criminal code wherein it doesn't work without good prosecutors and police officers. He opined there is currently a good command structure and the bill is a tool it can use.

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REPRESENTATIVE KELLER remarked that the committee does not have a fiscal note, which will be a large factor for the upcoming legislature.

CHAIR LEDOUX said she has not seen a fiscal note.

REPRESENTATIVE KELLER advised they are there, but are dated March from the old version.

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REPRESENTATIVE GRUENBERG asked whether there is a "Plan B" should the legislature not appropriate enough money.

CAPTAIN DUNBAR deferred to the deputy commissioner, but said that Version I should have a lower fiscal note than the previous version due to steps taken with the Alaska Court System in reducing their exposure to appeals.

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REPRESENTATIVE MILLETT offered that even though costs will be increased, the cost of human lives will be decreased by prosecuting people for wrongdoing and protecting victims.

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REPRESENTATIVE CLAMAN said assuming the bill passes, the question of whether it made a difference in the Alaska National Guard as a tool, will only be known 5-10 years from now.

CAPTAIN DUNBAR agreed, and said the National Guard anticipates few actual courts martial in that most other states have one or less than one a year. He extended that the more immediate effect will be the nonjudicial punishment regulation which is a different manner in which to enforce the code. He assumed the deputy commissioner would point out that for every dollar the Alaska National Guard spends, the federal government spends much more on the Alaska National Guard. For example, while testifying, his salary is paid by the federal government even while under the command and control of the state, as will other individuals involved in various activities, he pointed out. The National Guard Bureau indicated it will make resources available for these things by putting out the state model code, and having investigators review certain kinds of crimes in that it is

important for the combat readiness of the force that there is good order and discipline.

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CAPTAIN DUNBAR reiterated a difference between Versions I and the version reviewed in March, being that the punitive articles were put into statute, Sec. 26.05.577 - 26.05.634. He described it as substantive articles that cover items such as: missing a movement, disrespect toward a superior officer, which are offenses the guard will be able to enforce. He offered that much of the other portions of the bill tells the National Guard how to procedurally set up things, such as a court-martial and who can be on a court-martial. He pointed out another major change to the bill is that the earlier version was unclear as to when these laws would apply to the service members. He offered that through discussions the leadership determined it applies at all times to the service members - a model entitled "24/7," which a number of other states adopted. The bill was originally written to not apply to the volunteer "self-defense force," as it did not make sense to hold them to the same standard as the National Guard, he said. He pointed out that the "Alaska Self-Defense Force" took great offense and asked to be held to the same standard, and now they are.

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CHAIR LEDOUX asked whether the state defense force is the same as the self-defense force.

CAPTAIN DUNBAR answered that he misspoke in that it is the state defense force, not self-defense force. In response to Chair LeDoux's comment, answered that it is a relatively small organization of approximately 90 members, mostly comprised of officers. He explained that in the time of calamity they would be gathered by the governor and provide leadership to the unorganized militia which is almost every able-bodied male, which is how the law is written. He offered they also have technical expertise and are active participants in disaster relief especially in Alaska Shield, for example.

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CHAIR LEDOUX posed a scenario that should a volunteer receive a DUI, having nothing to do with their military volunteer work, asked whether they are subject to court-martial.

CAPTAIN DUNBAR replied in the affirmative as they wear a uniform and a rank, and think of themselves as soldiers - their leadership would decide to call the court-martial. He said DUI is another main change in that in the spring he assured the committee the National Guard only wants to prosecute strictly military offenses. After communicating with service members it was found they want a couple of offenses, not purely military, included within the Alaska Code of Military Justice, he related. He explained that the federal UCMJ is comprehensive and covers things such as: murder, arson, and assault, and the National Guard believes that civilian law enforcement is better equipped to handle most of those cases. However, there are relatively common offenses where the National Guard wants the ability to court-martial people if, for some reason, the civilian prosecutors did not move forward and prosecute DUI, and sexual assault offenses. Within the vast majority of cases it will remain with the civilian law enforcement and, he noted, the language was altered to clearly read that civilians have first crack at a case and only when they decide not to pursue charges, the National Guard has the ability to potentially court-martial.

[2:02:19 PM](#)

CHAIR LEDOUX asked whether he was discussing Sec. 26.05.400, [page 3, lines 15-23], which read:

Courts martial have primary jurisdiction over offenses under this chapter. A proper civilian court has primary jurisdiction of an offense not defined by this chapter when an act or omission violates both this chapter and local criminal law, foreign or domestic. In that case, a court-martial may be initiated only after a civilian authority has declined to prosecute or dismissed the charge, provided jeopardy has not attached. Jurisdiction over attempted crimes, conspiracy crimes, solicitation, and accessory crimes must be determined by the underlying offense. These jurisdictional requirements do not apply to nonjudicial punishment or administrative action taken by military authorities.

CHAIR LEDOUX stressed that she does not find it all that clear and offered alternative language that Ms. Wallace, Legislative Legal and Research Services, will review. She suggested, "Court-martials have primary jurisdiction over offenses under this chapter except that a proper civilian court has primary jurisdiction of an offense when an act or omission violates both

this chapter and local criminal law, foreign or domestic." She presumed the language is acceptable to the National Guard.

CAPTAIN DUNBAR said it is acceptable, and it also addresses the memo dated 9/21/15, from Legislative Legal and Research Services, wherein this concern is highlighted.

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MEGAN WALLACE, Attorney, Legislative Legal and Research Services, Legislative Affairs Agency, responded that it does help remedy the ambiguity with the phrase "not defined by this chapter" currently in Version I. She noted that removing that phrase makes the intent clear, that the civilian court has first opportunity to prosecute those overlapping crimes.

CAPTAIN DUNBAR offered that the National Guard agrees with that assessment which is a good amendment to the bill. He reiterated that DUI and sexual assault are the two main offenses ...

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REPRESENTATIVE GRUENBERG interjected that DUI is in Sec. 26.05. .611, beginning on page 42, [beginning on line 26]. He posed a scenario of someone driving from work to home, having nothing to do with the National Guard and gets a DUI. He asked whether the intention is that the National Guard could court-martial that person, and questioned whether there should be a nexus to the service.

CAPTAIN DUNBAR answered yes, the National Guard intends jurisdiction, with the nexus being the person's military service, which is how other states have done it.

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REPRESENTATIVE GRUENBERG questioned, currently, when reservists do something with no relation to the National Guard or their service under the reserve component, that they can be court-martialed for something in Europe or someplace nowhere near the National Guard and having nothing to do with the National Guard.

CAPTAIN DUNBAR offered that they can't be court-martialed because currently the National Guard does not court-martial, but there may be an administrative separation wherein a person may not be on duty ...

REPRESENTATIVE GRUENBERG interjected that he is not speaking about the administrative separation from the service, and asked whether Captain Dunbar said they could be court-martialed.

CAPTAIN DUNBAR answered yes.

REPRESENTATIVE GRUENBERG asked whether there are cases affirming that jurisdiction.

CAPTAIN DUNBAR offered that the National Guard has never had a Code of Military Justice to attempt this, yet other states the nexus is the military service and not whether or not a person was headed to or from drill.

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REPRESENTATIVE GRUENBERG posed a scenario of someone on a trip across country and receives a DUI, he asked whether the intent is that it could form the basis of a court-martial and put that person in prison a year. He opined that it is not permissible under the due process clause criminally, as a person cannot be prosecuted in Alaska for a crime with no connection to the State of Alaska. He advised that a few years ago he, and DOL, looked into this issue and believes there must be some nexus with the jurisdiction assuming the case.

CAPTAIN DUNBAR answered that within the first scenario the discussion was regarding the person not being on orders, and the second scenario was the person is not in the state at all. He said the second scenario is a question he does not have a detailed answer, but the bill contains a long arm provision, as to whether or not it could reach out to someone committing a non-military offense in a non-military status in another state, the reach to them would be tenuous. He offered it is likely they would be prosecuted by that state, and administratively punished by the National Guard. In a scenario of the person being within the State of Alaska and a member of the Alaska National Guard, it doesn't matter what status they are in, such as Title 32, state active duty, or in civilian status, the National Guard has jurisdiction over them. He related the point being that a person is a soldier or airman 24/7, and are held to standards. He opined that standards are not particularly hard to meet because the vast majority of offenses are military offenses, "of which is almost impossible to commit when you are not in uniform, that is, it is hard to be a deserter if you are not on orders."

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REPRESENTATIVE GRUENBERG stated this may be the poster child that does not fall into the category of a DUI, and asked the jurisdictional statute cite.

CAPTAIN DUNBAR asked whether he was referring to the long arm statute within the bill, and advised he does not have it off the top of his head.

REPRESENTATIVE GRUENBERG said he finds this troubling and requested the authority in the previous scenarios have nothing to do with the military and are within the jurisdiction of the State of Alaska.

CAPTAIN DUNBAR agreed to explore the issue, and stressed that the intent is that their soldiers and airmen will be held to this standard, regardless of whether they are currently in uniform, or not.

REPRESENTATIVE GRUENBERG offered that it could be handled under the Alaska civil jurisdiction statute, and under Jonz v. Garrett/Airesearch Corp., 490 P.2d 1197 (1971), which has been interpreted identically to California, "and to the maximum extent constitutionally permissible."

CHAIR LEDOUX suggested that at the time of the initial signing of a soldier or airman's contract, let them consent to jurisdiction.

CAPTAIN DUNBAR responded that it could be written more explicit in the contract, but the feeling of command is that when someone swears to uphold the laws of the state and Alaska State Constitution holds them up to a higher standard, and holding themselves up to this standard. He agrees that the National Guard must be very explicit with their soldiers and airmen as they join the guard that they are subject to this code.

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REPRESENTATIVE CHRIS TUCK, Alaska State Legislature, offered that the Department of Military and Veterans Affairs' authority serves many purposes, and with regard to CSHB 126 the department is an employer and within human resources laws may need to be put in place through regulations. He noted that when it comes to criminal misconduct a procedure must be determined. He noted the issues are both an employer and overseer of criminal law

and, for example, the DWI scenario that civilian courts have the authority and obligation to prosecute, but the National Guard should have the reserved right to administratively discipline. He offered an example of a trucking company owner expecting drivers with clean driving records and the fact a person has a DWI, the owner has no jurisdiction to criminally charge them but being an employer, disciplinary action can be taken on that employee. He said he is not convinced the National Guard should have jurisdiction or criminally charged unless it is on their property and a person is pulled over by military police; however, the guard should reserve for the integrity of employment and the soldier's contract on agreeing to uphold the laws, the National Guard should be allowed that authority. He stated the point of demarcation is the employer responsibility versus the overseer of criminal activity.

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CAPTAIN DUNBAR surmised that what Representative Tuck was speaking to is covered by nonjudicial punishment regulations. He explained that nonjudicial punishment is not the traditional federal regulatory administrative action, as it is faster and different but looks like administrative action rather than criminal action. Within the regulation being written there will be no threat of prison time or separation using a nonjudicial punishment, and these offenses must be within the Code of Military Justice in order to use nonjudicial punishment. For example, he said, if DUI is removed from this code, nonjudicial punishment will not be available unless the guard attempts to use other parts of the code such as, conduct unbecoming an officer.

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CHAIR LEDOUX offered that it may be difficult and could create a more complicated bill, but she is uncomfortable with the idea "Well, we'll just put this in so that we can use it for a nonjudicial punishment, but we're really not going to use it for a criminal punishment when it's standing right there, and it's looking for all the world to see like a criminal punishment." She offered that where the intent is to not use something as a criminal punishment, it must read similar to Sec. 26.05.634(c), page 52, lines 21-22, which read:

(c) A court-martial may not impose a sentence of confinement under (a) or (b) of this section.

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CAPTAIN DUNBAR offered that the National Guard will be unable to bring a criminal charge, or court martial, if the civilian authorities criminally prosecute. He advised that the civilians collect the evidence, and in this scenario the civilians would have collected enough evidence that the National Guard would be comfortable meeting the "beyond a reasonable doubt" standard and convicting them with a DUI, and the civilians decide not to prosecute. Nonjudicial punishment has remained in regulation and it does not create jeopardy such that if the civilians move forward with the criminal prosecution, the National Guard will be able to use nonjudicial punishment which does not result in jail time and possibly the civilian charge will, he said. The National Guard will then use nonjudicial punishment to reduce the service member in rank or withhold pay to enforce the law. He pointed out that a goal is to strengthen Sec. 26.05.400, to clearly read that civilians always have the first shot, and it will only be used in cases where civilians have decided not to prosecute.

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REPRESENTATIVE GRUENBERG said that some people play a game in choosing a general court-martial because it is too expensive to prosecute, and the charges are dismissed. He said someone could have a DUI in civilian court and go to jail for a substantial period of time. He asked whether this bill takes steps in a plea bargain situation, who says "I will agree to plead guilty to this but only under this where I may not be in jeopardy of losing my license, going to jail, having a felony." He explained there could be a situation with an over-burdened district attorney, and a smart defendant and defense attorney who are in the National Guard, and the defendant agrees to plead guilty but the punishment must be under "this" because they would be immunized from "these" other problems.

CAPTAIN DUNBAR advised that is why Sec. 26.05.400 should be strong, in that the prosecutor would have had to take the affirmative step to not prosecute the person before the National Guard would do that, and both of those sets of laws are under the sovereign of the State of Alaska.

REPRESENTATIVE GRUENBERG interjected that the National Guard and the JAG could be set up by a smart prosecutor and district attorney who could say "Look, I'm willing to ... it's a hot potato, I'm willing to wash my hands of it and they would have a

choice of walking scot free - you'd be the only people who could do it.

CAPTAIN DUNBAR responded, at that point the National Guard might court-martial and imprison the person for a period of time, as well as dishonorably discharge them.

REPRESENTATIVE GRUENBERG said he was pointing out the issue and doesn't know what can be done about it, but these people will play games.

CAPTAIN DUNBAR referred to the strength of Sec. 26.05.400, and the National Guard's reliance on the civilian prosecutors to do their job. He referred to Chair LeDoux's previous comment that none of these laws will function if there is no good leadership, and this bill is predicated on the idea that people are willing to enforce the law.

[2:23:53 PM](#)

REPRESENTATIVE CLAMAN stated that three different scenarios occur with a DUI: a DWI occurs on base and the civilian authorities prosecute and there is a conviction - under this bill the National Guard has the option of imposing nonjudicial punishment; a DUI occurs on base and there is an unsuccessful civilian prosecution so the National Guard has the option to court-martial that person because double jeopardy would not bar the military prosecution; and a presumably on orders person receives a DUI in South Dakota, with a successful South Dakota civilian prosecution, the Alaska National Guard is limited to nonjudicial options.

CAPTAIN DUNBAR offered a fourth scenario wherein a soldier is not on orders, and within their general life a DUI occurs in South Dakota ... in a case where they are on orders and in uniform, the National Guard has the ability to prosecute and punish. He referred to the first scenario wherein civilians convict and the National Guard has the option to enforce nonjudicial punishment is correct, which is likely if the person goes to civilian jail. He said with the second scenario where civilians prosecute and do not get a conviction, if jeopardy attached the National Guard is barred from a court marital with the option of nonjudicial punishment or administrative separation.

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REPRESENTATIVE CLAMAN asked whether the National Guard is barred if the civilians declined prosecution.

CAPTAIN DUNBAR answered the National Guard would not be barred, which is the only time it would have the ability to go forward and potentially court-martial a person for a DUI.

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REPRESENTATIVE KELLER surmised that the trigger on whether this code applies is the affirmative action of the prosecutor not to prosecute, and requested guidelines.

CAPTAIN DUNBAR explained that only in the cases where it could be charged in both civilian court and court-martial, such as DUI and sexual assault, would that affirmative step by the prosecutor be necessary. In all of the other strictly military offenses the National Guard has the ability to move forward regardless of the civilians, because the civilians have no jurisdiction. He explained that guidelines have not yet been established. He opined that a statement from the civilian prosecutor would be necessary advising they are unwilling to prosecute, and clearly something taken up by the provost marshal. Historically, a problem within the National Guard, he pointed out, there have been situations where someone receives a DUI or performs inappropriate relationships with a recruit, and the civilian authorities assume the National Guard is handling it and vice versa, and subsequently the offenders fall through the cracks. He related that this code is intended to plug those holes and works in consort with the provost marshal who currently coordinates very closely with law enforcement regarding potentially criminal offenses. He said this issue has been flagged by Legislative Legal and Research Services.

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CHAIR LEDOUX assumed this issue will arise more frequently under sexual assault cases where it boils down to a "he said, she said" scenario. Whereas, the typical DUI involves a breathalyzer or not, and with breathalyzer there is a good chance civilian authorities will prosecute, she remarked.

CAPTAIN DUNBAR agreed.

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REPRESENTATIVE GRUENBERG commented that usually the question of jeopardy is of double jeopardy under what circumstances a person can be retried. He opined in criminal law it generally attaches with regard to the timing of the trial. On the other hand, he said, the question of whether someone should be prosecuted in federal court and state court, or state and municipal court is a matter of sovereignty. He presumed in this case, the two concepts which are different, are being melded unless using the term "jeopardy" differently than he was taught in law school.

CAPTAIN DUNBAR explained it is being used in the former sense in that there is no question that the National Guard has sovereignty and the state doesn't, "that is to say we are the same sovereign." He stated Representative Gruenberg is correct that someone could be prosecuted by the federal government ...

REPRESENTATIVE GRUENBERG interjected that was not his question and restated "are you a state agency in the prosecution here or a federal agency."

CHAIR LEDOUX stressed that Captain Dunbar clearly stated that they will not prosecute for a court-martial where jeopardy has not attached, so it is not necessary to determine whether the guard is a federal agency or state agency. Theoretically, she offered, when assuming the National Guard is a federal agency there could be two prosecutions.

[2:33:05 PM](#)

REPRESENTATIVE TUCK noted the provost marshal's position was created within the last year. He is aware that civilian investigations were jeopardized by the passing of information back and forth between the Anchorage Police Department and by commanding officers. He stressed he is troubled by the collusion taking place with the provost marshal and civilian court investigations due to past practices and the results. He pointed to the bill he introduced to attempt to separate that because whether it is in the National Guard or any employer, when a sexual assault investigation takes place the employer should not be notified, unless they are part of the investigation or the employee foregoes that right. He remarked that in this case the National Guard is the employer of their soldiers and airmen and for the employer to know about the investigation of witnesses puts the National Guard in an awkward situation, which is true in civilian life. When reviewing CSHB 126, the hope is that the provost marshal will answer the previous problems, but he said he is concerned it doesn't

completely fix the problem due to collusion with the investigations that take place with the National Guard being the employer.

CHAIR LEDOUX noted that is really not a subject of this bill, but perhaps another bill that deals with the structural problems with the National Guard.

[2:35:42 PM](#)

CAPTAIN DUNBAR related it is no secret that sexual assault in the whole military has struggled with including investigations. He offered the National Guard has restricted reporting structures in place to address this issue, including avenues where potentially assaulted soldiers can access services with a sexual assault response coordinator, without command being informed. He conveyed that the language of the bill was taken from the Louisiana Code [of Military Justice] as their National Guard is unique in that the Judge Advocate has been prosecuting cases, and imprisoning people for absent without leave (AWOL) for not showing up at drill or annual training. He said Louisiana's provision is based upon the federal sexual assault provision, Article 121, who took it to their state level and removed certain portions of the federal law. He advised that he took the same approach and removed very serious offenses, such as unclassified felonies in Alaska or Class A felonies - such as, sexual assault of a child, or a violent rape. Those offense were removed because the National Guard does not have the competence or desire to prosecute as the specialized prosecutors are within the civilian world. Which, he said, goes to Representative Tuck's comments as to whether this should be kept internal, and offered that with sexual assault of the child the National Guard is not comfortable keeping that internally, as it should be aggressively prosecuted by civilian authorities. He pointed out that the National Guard is capped at a sentence of ten years in this bill, which is standard around the country.

[2:39:04 PM](#)

REPRESENTATIVE GRUENBERG noted that approximately 20 years ago, the legislature took major steps to recognize victim's rights and it was put into the constitution. He asked whether victims or their representatives were included in the drafting process, what are the protections, and what participation does the victim have in the process under CSHB 126.

CAPTAIN DUNBAR advised that victims or representatives of victims are not on the Commanders Action Group; however, he spoke during a sexual response coordinator meeting and presented this code. He said victims were absolutely considered in this drafting, and are represented within the investigations and preliminary hearings portion. A most recent change to the federal UCMJ was the introduction of a "rape shield law," wherein a victim cannot be forced to testify in the preliminary hearing and be re-victimized, and that language is included in the bill, he explained.

REPRESENTATIVE GRUENBERG described it as an important component of Alaska criminal law.

[2:41:18 PM](#)

CAPTAIN DUNBAR referred to [slide 5] and advised he worked with the court system to change the soldiers' right to appeal to the criminal court of appeals has now been changed to the Alaska Supreme Court by the request of the court system, and the right to appeal has now been changed to appeal by petition. He said another change includes the addition of a grand jury provision for a potential felony charge, and adapted the state model code to conform to Alaska constitutional law. He reiterated that changes to the investigation section introduce protections for victims of sexual assault and generally victims.

[2:43:05 PM](#)

REPRESENTATIVE GRUENBERG asked whether this code is bound by the Alaska State Constitution.

CAPTAIN DUNBAR responded it is absolutely bound by the Alaska State Constitution. An oath is sworn to uphold the constitution he was deliberate in conforming this bill to the state constitution. He acknowledged that in the future portions of this will be challenged by defense attorneys, and rarely cases will end up in the United States Supreme Court.

[2:44:04 PM](#)

REPRESENTATIVE GRUENBERG opined there is a constitutional right within some cases such as, K & L Distributors, Inc. v. Murkowski, 486 P.2d 351, 357 (Alaska 1971), that read "at least for constitutional issues, you have a constitutional right to appeal to the Supreme Court." He mentioned that language should be in the bill in that regard because in Alaska there is a right

of appeal in criminal case to the court of appeals, and civil cases to the Supreme Court. Otherwise, he remarked, he is concerned and asked whether this has been vetted through legal counsel to identify any potential state constitutional issues.

CAPTAIN DUNBAR responded that Legislative Legal and Research Services has reviewed the bill and offered several memos which he has attempted to meet and address, although, in some cases they disagree, and is also working with DOL. With regard to the right to appeal, he noted that soldiers do have the right to appeal to a Military Appeals Commission established by this bill. He remarked they will have at least one right in the same manner a criminal defendant has a right to go to the court of appeals, and soldiers have an additional right to petition (not right to appeal) to the Alaska Supreme Court under this bill. In moving forward, he commented, if Version I passes it will establish a functioning system of military justice, although, small amendments could strengthen the bill without changing the intent as suggested by Chair LeDoux and Representative Gruenberg. He offered that he will continue to work with the committee in passing this bill out of the House of Representatives, Senate, and to the governor's desk by next session as the National Guard currently lacks tools to improve good order and discipline.

[2:48:26 PM](#)

CHAIR LEDOUX referred to Sec. 2, page 2, lines 5-7, which read:

(a) Members of the militia ordered into active service for the state by order of the governor are not liable civilly [OR CRIMINALLY] for any act done by them in their official capacity while in this such service.

CHAIR LEDOUX posed a scenario of a person on National Guard time, off the base hits someone with a car and a DUI, that they can't be sued.

CAPTAIN DUNBAR deferred to Representative Gruenberg, and said this language is from the Murkowski administration.

CHAIR LEDOUX pointed out that the language is before this committee right now and wants to know what it actually means.

CAPTAIN DUNBAR opined that Legislative Legal and Research Services included it to conform the old law with the new law by

removing "or criminally" due to the new criminal jurisdiction. As for the tort law, he deferred to Representative Gruenberg.

2:50:17 PM

REPRESENTATIVE GRUENBERG opined that Governor Murkowski introduced a "horrible" bill where this provision was included relating to a terrible situation where a National Guard airplane crashed and everyone was killed. He offered there is a doctrine in federal law that the Supreme Court applied to remove the immunization of the state and these people were allowed to recover. He said Governor Murkowski's bill again immunized the state, and there was nothing Representative Gruenberg could do about it. He said he appreciates the language being in the bill, and will brief the committee at the appropriate time, as "this is frankly something that should be repealed - the whole thing."

CHAIR LEDOUX surmised there may be a difference as to whether National Guard people can sue other National Guard people, but the person is a civilian and someone from the National Guard ran them over, she can't see any reason why a lawsuit could not be brought forward.

REPRESENTATIVE GRUENBERG opined that the National Guardsmen were killed, but the language in the bill is confusing.

CHAIR LEDOUX said she would flag the issue.

REPRESENTATIVE GRUENBERG commented he likes the removal of "or criminally," but that is a small step.

2:52:49 PM

REPRESENTATIVE GRUENBERG referred to page 55, line 5, and stated he would like the word to remain "Alaskan," and described it as a typographical error.

2:53:41 PM

CHAIR LEDOUX referred to Sec. 26.05.460(b)(c), page 13, lines 16-30, which read:

(b) If a general court-martial, other than a general court-martial composed of only a military judge, is reduced below five members, the trial may not proceed unless the convening authority assigns new

members sufficient in number to restore the court to five members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.

(c) If a special court-martial, other than a special court-martial composed of only a military judge, is reduced below three members, the trial may not proceed unless the convening authority details new members in sufficient number to restore the court to three members. The trial shall proceed with the new members present as if no evidence had been introduced previously at the trial, unless a verbatim record of the evidence previously introduced before the members of the court or a written stipulation of the evidence is read to the court in the presence of the military judge, the accused, and counsel for both sides.

CHAIR LEDOUX suggested following civilian court and offer alternates. She pointed out that new members cannot actually get the "gist" of the trial by reading something into evidence, as there is no opportunity to watch a person and decide whether they are being truthful.

CAPTAIN DUNBAR responded that this is one of the many provisions taken "wholesale" from the state model code, and the guard is open to alternates. He related that the preference is for a larger pool of people to be available due to removing people for cause, and, he agreed, the opportunity to sit in the room and experience the trial from the beginning would be easier for them to step in as an alternate.

[2:56:11 PM](#)

CHAIR LEDOUX expressed it would not only be easier for the person but she can't imagine a fair trial without a person sitting throughout the testimony and trial. Chair LeDoux then referred to Sec. 26.05.460, page 13, beginning line 31, which read:

(d) If the military judge of a court-martial composed of only a military judge is unable to proceed with a trial because of a challenge or for other good cause, the senior force judge advocate shall detail a new military judge. The trial shall proceed as if no evidence had previously been introduced, unless a

verbatim record of the evidence previously introduced or a written stipulation of the evidence is read in court in the presence of the new military judge, the accused, and counsel for both sides.

CHAIR LEDOUX stress that judges being changed in mid-stream and then introduce a record as opposed to ... she said she just cannot see how that can work.

[2:56:48 PM](#)

CAPTAIN DUNBAR replied he is not familiar with how it works within civilian courts, and asked whether there are always two judges at every trial.

CHAIR LEDOUX answered that she does not know the answer to that question, but probably it is a mistrial.

REPRESENTATIVE GRUENBERG opined it may be largely discretionary.

CAPTAIN DUNBAR proffered that there will be a challenge to find enough trained military judges as this is a small population state. With regard to the Military Appeals Commission, he reiterated, the idea of alternates there will be a challenge in recruiting and training enough people to serve in those roles. He offered doubt that there will be alternate military judges observing trials.

CHAIR LEDOUX interjected that she was not suggesting alternate judges, and not having ever practiced criminal law does not know what happens should the judge have a heart attack during a trial.

[2:58:29 PM](#)

REPRESENTATIVE CLAMAN responded he does not know the answer of a heart attack, but he has had judges take ill, usually in the midst of jury deliberations, and another judge handles the jury deliberations. He opined the ability to bring in another judge to finish the trial without starting over would depend upon the timing and circumstances. Whereas, he opined, within a complicated trial it is less likely it would use a substitute judge, and the trial would start over. He does not believe there is a standard rule.

CAPTAIN DUNBAR, in response to Chair LeDoux, responded that the judges do not also act as jurors. In this case, the jury is that panel so it is structured differently.

REPRESENTATIVE GRUENBERG opined there is a civil rule covering substitution of judges.

[2:59:36 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.485(e), page 20, lines 1-5, which read:

(e) If charges or specifications are dismissed as defective or insufficient for any cause, and the period prescribed by the applicable statute of limitations has expired or will expire within 180 days after the date of dismissal of the charges and specifications, trial and punishment under new charges and specifications are not barred by the statute of limitations if the new charges and specifications

CHAIR LEDOUX pointed to it being a huge loophole, in that if the case is falling apart, it is dismissed in order to have a whole new statute of limitations.

CAPTAIN DUNBAR replied that the question is who is doing the dismissal and if it is command then it could be seen as a loophole, if instead it is the legal advisor or military judge's decision then perhaps it is not such a loophole.

[3:01:27 PM](#)

REPRESENTATIVE GRUENBERG opined that when within the midst of an empaneled jury criminal trial, and the case is dismissed then jeopardy is attached and prosecution is barred by double jeopardy.

CHAIR LEDOUX reiterated that the committee is flagging issues now.

[3:02:00 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.498, Defense of insanity, and asked whether there is something in Alaska law that reads "guilty but insane."

REPRESENTATIVE CLAMAN said technically it is "guilty but mentally ill." In the olden days, with English common law, there are two different standards for guilty by reason of insanity: the accused does not know the meaning and quality of their conduct; and the accused understands the meaning of the quality of their conduct but cannot control themselves, he explained. He continued that "guilty but mentally ill" is when the accused knows what they are doing but cannot stop themselves; and guilty by reason of insanity is when the accused does not know what they are doing. For example, if the accused believes they are killing a turnip and the turnip is in fact a person, it is "not guilty by reason of insanity."

CHAIR LEDOUX offered "the McNaughton rules."

REPRESENTATIVE CLAMAN said correct, and there are two phases of McNaughton.

CHAIR LEDOUX said it is something the committee may want to consider whether or not it wants to include the language of "guilty but mentally ill."

[3:03:25 PM](#)

REPRESENTATIVE GRUENBERG suggested reading Chase v. State wherein a secretary instead of having ... a person does not know the nature and quality of their actions or does not know the difference between right and wrong - "they made you have to prove them both, it was a typographical error and the court upheld it."

[3:03:47 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.5009d0, page 23, lines 23-30, which read:

(d) If, at the end of a period of commitment under (b) and (c) of this section, it is determined that the accused's mental condition has not improved so as to permit the trial to proceed, the charges shall be dismissed without prejudice, and continued commitment proceedings shall be governed by the provisions relating to civil commitment under AS 47.30.700 - 47.30.915. If the accused remains incompetent for five years after the charges have been dismissed under this subsection, the accused may not be charged again for an offense under this chapter

arising out of the facts alleged in the original charges.

CHAIR LEDOUX asked whether that is the same as in criminal law.

REPRESENTATIVE CLAMAN opined that the general theory is that with someone lacking capacity "you keep sending them back to the mental hospital" and check every six-twelve months to determine whether they've gotten better."

CHAIR LEDOUX suggested the committee may want to consider this issue.

3:04:50 PM

CHAIR LEDOUX referred to Sec. 26.05.053(b), page 24, lines 23-30, which read:

(b) The military judge shall rule on all questions of law and all interlocutory questions arising during the proceedings. A ruling made by the military judge on a question of law or an interlocutory question, other than the factual issue of mental responsibility of the accused, is final and constitutes the ruling of the court. However, the military judge may change the ruling at any time during the trial. Unless the ruling is final, if a member objects to a ruling, the court shall be cleared and closed, and the question shall be decided by a voice vote and provided in AS 26.05.505, beginning with the junior in rank.

CHAIR LEDOUX requested clarification as to whether the military judge can make a ruling, and then the panel can overrule the ruling of the judge.

CAPTAIN DUNBAR responded this issue should be flagged and discussed at a later date.

3:06:10 PM

CHAIR LEDOUX referred to Sec. 26.05.513, page 26, lines 23-26, which read:

(a) ... A sentence of imprisonment imposed under this chapter may not exceed 10 years. An offense under this chapter for which a sentence of confinement

for a term of more than one year is authorized as a felony offense. Except for convictions by a summary court-martial and except as otherwise specifically provided in the code of military justice, all other offense under this chapter are misdemeanors. A conviction by a summary court-martial is a violation.

CHAIR LEDOUX stated it is not clear in this bill, where they have authorized confinement for more than one year, which would require reviewing the Code of Military Conduct.

CHAIR LEDOUX restated her question and said she was trying to determine the definition of misdemeanors because "an offense under this chapter ... we're looking at 25.05.513, a sentence of imprisonment imposed under this chapter may not exceed ten years. An offense under this chapter for which a sentence of confinement for a term of more than one year is authorized as a felony," but there is nothing in this bill describing the length of confinement. She expressed concern that nothing is stated within this bill, and advised the committee that before something is passed out, a felony and a misdemeanor must be defined.

[3:07:50 PM](#)

CAPTAIN DUNBAR explained that the bill caps the number of years at 10 years as the maximum authorized, and due to subsection (b), which may be amended, there is a charge that will be capped either at 10 years or at the federal cap. He stated that within the bill's system and the federal and state systems there are no minimum sentences, only maximum sentences. He offered that, in some cases, whether it is a misdemeanor or felony depends upon the nature of the offense. For example, he pointed out, with assault of a superior officer, or disrespect to a superior officer, the charges are not broken out in Alaska law such as, Class C or Class B, and different charges. Instead, he remarked, there is the overall charge, and if command charges up to the federal maximum sentence the charge is equivalent to a felony charge.

CHAIR LEDOUX interjected that it specifically read specifically: "An offense under this chapter for which a sentence of confinement for a term of more than one year is authorized is a felony offense." She opined that it doesn't matter what sentence someone is given, it's how much they are authorized.

[3:09:43 PM](#)

CAPTAIN DUNBAR noted that the confusion is with the word "authorized," as the intent is not what is authorized by the statute, it is what is authorized to the panel by the commander making the charge. He reiterated it is not what a person is sentenced to, the charge will determine whether it is a misdemeanor or felony. For example, he said, "we're going to present you with this charge, and we're saying we're going to try to get a dishonorable discharge and two years in prison."

CHAIR LEDOUX surmised that when someone is charged, they are told how much time that the National Guard is trying to put them in prison, instead of charging them with the actual crime, and after their conviction imposing a sentence.

CAPTAIN DUNBAR advised he believes that is the case, but will get back to the committee.

CHAIR LEDOUX expressed that she is uncomfortable with the idea of not setting forth sentences.

CAPTAIN DUNBAR responded that no other state lays out sentences for every offense in their code, and he will return with a detailed answer.

CHAIR LEDOUX replied that Alaskans don't care how they do it on the outside, and wants to determine whether it makes sense to do it that way, or to address each specific crime with a sentence.

[3:11:30 PM](#)

REPRESENTATIVE CLAMAN explained that within the context of Alaska criminal law, the maximum sentence is what defines something as a felony or misdemeanor, and it is not a function. In fact, in dealing with the Sentencing Commission many people are charged with felonies that might have a five-ten year maximum sentence or an unlimited sentence. He stated that the question of what a person may be sentenced to may often be, especially in the lower grade felonies, much less than a year and are still charged with a felony based on the maximum. He said this provision is basically saying anything in which ... that the maximum sentence is 10 years. Those are all felonies except if it specifically said the maximum sentence is a year.

CHAIR LEDOUX corrected Representative Claman in that it is less than a year.

REPRESENTATIVE CLAMAN agreed and said "or a year, or less than a year."

[3:12:41 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.588, page 38, lines 5-10, which read:

A commissioned officer of the militia who uses contemptuous words against the President or Vice-President of the United States, the United States Congress, the United States Secretary of Defense, the United States Secretary of Homeland Security, the secretary of a military department of the United States, or the governor or legislature of this state shall be punished as a court-martial may direct.

CHAIR LEDOUX pointed out that the list of people includes the governor of the state and the legislature, and noted that the bill defines a person as being a soldier 24/7, as well as volunteers making up the state defense force. She posed a scenario of someone writing on their Facebook page that the legislature is a bunch of yahoos for spending \$91,000 in attending a conference, and asked whether that will subject the person to a court-martial.

CAPTAIN DUNBAR replied there is precedence, arising often on the federal side such as, during President Bill Clinton, President George Bush, and President Barack Obama's administrations. There are standards, not just that they were yahoos in attending a conference as, he opined, it would not hit the threshold for contemptuous, which is more severe. He noted that the language refers to commissioned officers, which does not apply to enlisted people in the force.

CHAIR LEDOUX interjected that it would apply to the officer volunteers.

[3:14:35 PM](#)

CAPTAIN DUNBAR agreed, and offered another precedence in that if contemptuous language is used in a private conversation, there would be evidentiary concerns, and the language typically would not qualify. He said it refers to very strong comments in a public forum.

CHAIR LEDOUX argued that is Facebook.

CAPTAIN DUNBAR offered that Facebook is probably where these cases will arise, and where they been arising in other states on the federal level. He related that a commissioned officer is free to disagree passionately with the governor or legislature on certain issues, but cannot use contemptuous words. He stressed that the officer is held to the standard of being an officer and a gentleman.

CHAIR LEDOUX asked the definition of contemptuous words.

CAPTAIN DUNBAR remarked that he does not have the standard of contemptuous words, and doubts that "the legislature is a bunch of yahoos" is included.

[3:15:59 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.599, page 40, lines 8-10, which read:

A member of the militia is guilty of misbehavior before the enemy if the member is before or in the presence of the enemy, or is facing a threat as described in AS 26.05.070 and

CHAIR LEDOUX asked whether these people have already been federalized.

CAPTAIN DUNBAR answered yes, in most cases. He described long discussions within the Commanders Action Group about this, and other similar provisions, dealing with situations wherein the vast majority of cases a person is fully federalized. He explained the person is under Title 10, and subject to a federal UCMJ, not the ACMJ. He related that Sgt. Bowe Bergdahl is charged with the rare charge of misbehavior before the enemy. He said the Commanders Action Group intentionally changed these provisions so they would be more applicable to the real world whereby "we" would not necessarily be fully federalized. He pointed to line 10, "or is facing a threat as described in AS 26.05.070," refers to already existing state law regarding natural disasters, riots, and gang violence. In that regard, the Commanders Action Group attempted to slightly expand this provision and others, so it would be applicable in circumstances where "we" are not fully federalized.

[3:18:23 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.609, page 42, lines 17-21, which read:

A member of the militia who, while on active duty, wilfully or recklessly wastes, spoils, or otherwise wilfully and wrongly destroys or damages any property other than military property of the United States or of any state, shall be punished as a court-martial may direct.

CHAIR LEDOUX referred to "while on active duty" and asked whether that means they are federalized.

CAPTAIN DUNBAR responded that was language taken from the state model code which means it cannot refer to being federalized, it is state active duty, and Title 32.

[3:18:53 PM](#)

REPRESENTATIVE GRUENBERG referred to Sec. 26.05.610, page 42, lines 22-25, which read:

A member of the militia who wilfully, wrongfully, or with gross negligence hazards or suffers to be hazarded a vessel of the armed forces of the United States or the militia of the state shall suffer the punishment as a court-martial may direct.

REPRESENTATIVE GRUENBERG suggested amending the language to include vehicle or airplane, as there is not a naval National Guard.

CAPTAIN DUNBAR offered that there is a naval militia authorized by statute, but it is not currently active.

REPRESENTATIVE GRUENBERG related that it is more likely a service member would hazard a jeep as opposed to a vessel.

[3:19:35 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.614, page 44, lines 15-17, which read:

(b) In this section, "controlled substance" means
(1) opium, heroin, cocaine, amphetamine,
lysergic acid diethylamide, methamphetamine,
phencyclidine, barbituric acid, and marijuana;

CHAIR LEDOUX pointed to a provision within Alaska Statute and said that, "Notwithstanding any other section of the law that possession of less than one ounce of marijuana is not a crime." She assumed from the employer's viewpoint it can dictate whether or not people partake of drugs, which would be the National Guard's nonjudicial punishment or administrative separation. She questioned how someone can be court-martialed and subject to imprisonment for doing something which is now legal under state law.

REPRESENTATIVE LYNN offered that state law is one thing, and National Guard regulation is another.

CHAIR LEDOUX argued that the National Guard is a quasi-state, quasi-federal entity, and the bill is under 24/7.

REPRESENTATIVE GRUENBERG posed a scenario of a person smoking marijuana in Colorado, and asked whether the National Guard can court-martial.

[3:21:57 PM](#)

CAPTAIN DUNBAR referenced Representative Gruenberg's earlier point regarding whether the Alaska National Guard can reach out to other states when not on orders. He explained that command believes certain behaviors are incompatible with the National Guard service, although it is a right given to other Alaskans. A person cannot use marijuana and serve in the National Guard, which is more an administrative issue, than a court-martial issue.

[3:22:33 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.617, page 45, lines 4-6, which read:

A member of the militia who uses provoking or reproachable words or gestures toward another member of the militia shall be punished as a court-martial may direct.

CHAIR LEDOUX asked the definition of "provoking or reproachable words or gestures toward another member of the militia," and noted this is not just the officer corps.

CAPTAIN DUNBAR said he will provide the committee with the definition, and noted it is a standard military offense within the state and federal model codes.

[3:23:49 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.622(c), page 49, lines 5-7, which read:

(c) A member of the militia who intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall be punished as a court-marshal may direct.

CHAIR LEDOUX referred to the nude beaches in Hawaii, and asked whether a member of the militia is subject to a court-martial when attending a nude beach in Hawaii.

CAPTAIN DUNBAR advised he does not have a good answer, but opined it would go to the term "indecent manner," although, when attending a nude beach the person is, in theory, not being indecent. He expressed his confidence that a good Judge Advocate could prevent that soldier from being successfully court-martialed.

REPRESENTATIVE LYNN asked whether it is indecent exposure when in the shower.

[3:25:25 PM](#)

CHAIR LEDOUX referred to Sec. 26.05.633, page 52, lines 9-11, which read:

A commissioned officer, cadet, candidate, or midshipman of the militia who is convicted of conduct unbecoming an officer shall be punished as a court-martial may direct.

CHAIR LEDOUX expressed that conduct unbecoming an officer language is too nebulous to allow a prison sentence. She asked, while understanding certain things more unacceptable in the military, whether it includes adultery or fooling around. She expressed she does not have a problem with administrative separation, or nonjudicial punishment, but when actually putting someone in jail specifics must be set out as to what the person cannot do.

3:26:38 PM

CHAIR LEDOUX then referred to Sec. 26.05.634(c), page 52, lines 21-22, which read:

(c) A court-martial may not impose a sentence of confinement under (a) or (b) of this section.

CHAIR LEDOUX pointed out that Section 26.05.634(c) should be applicable to Sec. 26.05.633, also.

CAPTAIN DUNBAR answered that he will discuss that issue with command, and in the example "adultery - that kind of thing," it is true it should not result in a period of confinement as those cases would generally be prosecuted under the general article, where the protection is include. He pointed to the recent scandal and behavior with the high school students, and if "they" had been officers is the type of behavior that may be prosecuted. In that case, he said, under civilian law sexual assault was not committed if "they" were have consensual sex with a high school student, and they were of age. He explained "they" violated prohibition on recruiters having sex with recruits, and engaging in behavior command would consider beyond the pale ...

CHAIR LEDOUX interjected that there are not things that should be covered, rather that it must be set out before putting someone in jail. In the event the National Guard wants to include adultery, having sex with high school students, or whatever, put it into the statute. Possibly farther down the road the National Guard may realize an offense that should be covered by a statute, and amend that statute, she related.

3:29:04 PM

REPRESENTATIVE GRUENBERG asked whether the National Guard has ever had warrant officers.

CAPTAIN DUNBAR responded yes, on the Army National Guard side.

REPRESENTATIVE GRUENBERG suggested including warrant officers within the definition in Sec. 26.05.633.

CAPTAIN DUNBAR opined that the issue was discussed within the Commanders Action Group, but does not recall the exact thought process other than it was not inserted.

CHAIR LEDOUX opened public testimony and advised there will be another hearing prior to the beginning of the second session.

3:31:33 PM

PETER SAVAGE, Lieutenant Colonel, Alaska National Guard, (Army, ret.), described the bill as a good boilerplate, and pointed to the need for a soldier or officer code of conduct. He said his suggestion relates across a broad gamut of issues of the past, such as: how boards are run; nepotism problems continuing to today; and the appeal process of issues within the structure of the National Guard, which should be clarified. There have been nepotism problems in the past and, he stated, nepotism continues to occur with the senior leadership, and needs to be nipped. Issues relating to the National Guard have been brought forward by other people, but in specifically addressing the code of conduct of senior officials is paramount in how they conduct themselves in the future, he stressed

REPRESENTATIVE GRUENBERG asked whether the ombudsman has any jurisdiction in this area.

MR. SAVAGE responded "Not to my knowledge."

REPRESENTATIVE GRUENBERG suggested reviewing that issue.

3:33:54 PM

CHAIR LEDOUX asked the issues Mr. Savage would address in a code of conduct.

MR. SAVAGE answered there are a number of procedural issues and actual events that require review in terms of the force structure itself. He offered the following issues: nepotism, or his term "dual spousal affiliation," when senior leaders have a family member within the organization that can influence or "cherry pick" senior officers to do their bidding; and issues with promotion boards and how they are conducted in terms of officer evaluations and the issue of evaluation not being performed on a timely basis when they are required by federal statute "just prior to boards, federal boards, and promotion boards, and selection and retention boards." He related that these issues are critical in not performing an officer's evaluation as "... it allows that a federal board to come in and see that there is no evaluation done and that automatically is a flag for anybody getting promoted, or seeking a position of

higher authority, or it can even affect an officer's ability to go to school." He stressed the importance of officer evaluations being completed on time and correctly, as sometimes they are not. He explained that sometimes the board officer evaluation ... "the senior raters and the raters ... there used to be a published ... published criteria required that these rating chains were above board, sometimes they are not, but they need to be."

[3:36:01 PM](#)

MR. SAVAGE continued that other issues relate to turnover especially among senior leadership in that consideration should be taken in limiting the amount of time senior leaders stay in position, sometimes they come in as "O6" and have 10 years left. We cannot allow some of these people to have 10 years in an organization that may not be competent, or may not allow subordinates to come up through the chain of command because they do not want to leave. He offered concern with regard to senior leaders (O6 and above) need to leave after three years of service of being in the full force. Issues with E9s, which are sergeant majors need to leave after three years at the senior level and allow others to advance in the organization, he said. Other issues must be addressed in a long term code of conduct and policy issues on how the guard is run. He said, "I don't know if people knew the total issue with the appointment of the new tag, and the connection of the full time individual that was also a member of the guard, at the time that was done it was also a married individual ... you know ... to the current tag." He described these as long term systemic problems to be addressed in a code of conduct, basically it is a leadership issue that needs to be addressed in writing.

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REPRESENTATIVE KELLER asked whether the National Guard has a code of conduct in other states.

MR. SAVAGE answered that the National Guard Bureau generally stays out of issues and hands out money, rather than dealing with legal issues it leaves it to the Alaska legislature and governor. He pointed out that the governor is commander-in-chief within a peacetime environment until the state is federalized, and it becomes the President of the United States.

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CHAIR LEDOUX reminded the committee she put this bill forth as chair of the House Judiciary Standing Committee and believes it is a good bill.

MR. SAVAGE stated it is a boilerplate and a good place to start.

CHAIR LEDOUX continued that she does not want this bill to pass with everyone believing that all of the problems of the National Guard are solved. She advised her intention is to speak further with Mr. Savage, and anyone willing to speak with her about the issues in an attempt to create a bill addressing the systemic problem seen previously in the National Guard.

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REPRESENTATIVE GRUENBERG referred to Sec. 26.05.634(a), page 52, lines 12-16, which read:

(a) Although not specifically mentioned in this chapter, all disorders and acts that prejudice good order and discipline in the militia of the state and all conduct of a nature to bring discredit on the militia of the state shall be considered by a court-martial and punished at the discretion of a military court.

REPRESENTATIVE GRUENBERG opined the phrases are "phrases of art."

CAPTAIN DUNBAR agreed and said they are well defined legal terms with a long history in the military.

REPRESENTATIVE GRUENBERG offered that it, and Sec. 26.05.633, can lead to discretion with the charging authority. He pointed out that many members of the committee are lawyers who do often see "loose" language in the law, as it is unconstitutional, vague and standard-less, and would be struck down as a violation of substantive due process.

CAPTAIN DUNBAR pushed back on the notion that it is constitutionally or unconstitutionally vague for the reasons of Representative Gruenberg's comments. He added that if the language was in another criminal statute it probably would be, except it is in the military statute with a specific military meaning. He referred to the provision added by Chair LeDoux wherein there is no sentence of confinement, also helps to alleviate those concerns. He explained the general article is

within the state model code, and every other state's version of its state codes.

REPRESENTATIVE GRUENBERG argued that this deals with punishment as a discretion of a military court and court-martial, therefore, it is a court-martial unless there is language stating a person cannot be confined.

CAPTAIN DUNBAR offered that (c) was added by Chair LeDoux.

REPRESENTATIVE GRUENBERG related that the legislature is dealing with this bill which is different from dealing with the court, and lawyers generally judge standards by courts. He said in this case the legislature's standard is not necessarily similar to the court's standard.

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CHAIR LEDOUX referred to Sec. 26.05.900, page 53, lines 20-21, which read:

(9) "day" means calendar day and is not synonymous with the term "unit training assembly";

CHAIR LEDOUX questioned whether this may be a typographical error.

CAPTAIN DUNBAR explained it is not a typographical error, in that a unit training assembly is how the National Guard measures "days for pay" in the military. For example, he said, a typical drill weekend is two calendar days, but is actually typically four unit training assemblies.

CHAIR LEDOUX announced the bill will be held in committee, and noted the committee is looking forward to putting together "something else" dealing with the other problems within the National Guard.

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ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:47 p.m.