

Purple Haze:¹

Military Justice in Support of Joint Operations

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SITUATION (fictional):

Pirates raiding out of Indonesia's former island of Sumatra have effectively closed the Straits of Malacca to international shipping. Having welcomed Taliban and al Qaeda refugees fleeing American oppression in Afghanistan and Pakistan, Sumatra declared independence from the spiritually corrupt government of Indonesia. The fundamentalist island has become the world's leading sponsor of anti-American terrorism and regional piracy. The United States is organizing Joint Task Force Budi Utomo (JTF BU) to help restore international peace and security to the region. Joint Task Force BU will consist of Army, Navy, Air Force, and Marine Corps personnel assigned by Pacific Command, and will be commanded by Brigadier General Phightshard, Deputy Commander, I Corps, Fort Lewis, Washington. Having been recently assigned to Fort Lewis, you were handpicked by the staff judge advocate (SJA) to be the JTF Commander's legal advisor. The SJA reminds you that "Justice is Job #1," and tells you to get ready to deploy.

Introduction

Hazy or not, "purple" justice is a reality.² Judge advocates will increasingly find themselves operating within a joint environment, and they must be prepared to conduct justice matters

regardless of their service, the service of the commanders they serve, and the service of the accused. Many publications explicitly or implicitly state that judge advocates must be prepared to execute joint justice quickly, professionally, and flawlessly; however, none of these sources explain how to do it.³ Even the *Special Operations Force's Commander's Legal Handbook*, a publication from a command steeped in "jointness," does not address the administration of justice in a joint environment.⁴

Overview

This article addresses three distinct problem areas in the practice of joint justice: jurisdiction, court-martial convening authority level, and the administration of nonjudicial punishment (NJP) in a joint environment. The first problem area results from the general lack of familiarity judge advocates have with the practical aspects of establishing judicial and non-judicial jurisdiction. The second area relates to the practice, or habit, of not regularly giving joint commanders general court-martial convening authority. The third problem area derives from service specific regulations pertaining to NJP. Although joint commanders clearly have the authority to administer NJP over members from all services, there seems to be a cultural hesitance to exercise this authority.

Task Force Falcon (TFF), in Kosovo, is a recent example of how fractured and potentially frustrating justice matters can be

1. Jimi Hendrix, *Purple Haze*, on ARE YOU EXPERIENCED? (MCA Records 1967). "Purple haze all in my brain, lately things they don't seem the same." *Id.*
2. See, e.g., United States v. Egan, 53 M.J. 570 (Army Ct. Crim. App. 2000). Egan was an Army specialist assigned to a joint unit (the Joint Analysis Center (JAC)) commanded by an Air Force colonel, tried at a special court-martial convened by the Air Force colonel, and presided over by an Army judge. "The trial counsel was an Air Force officer. The appellant's trial defense team contained military attorneys from both the Army and the Air Force." *Id.* at 572. When the case was presented to the appropriate Army general court-martial convening authority (GCMCA), the GCMCA declined to refer charges. The JAC Commander subsequently referred identical charges to a special court-martial based upon a U.S. European Command (EUCOM) directive granting the JAC Commander that authority. Although the appellant argued that language in the directive prohibited such a referral, the court found that the directive's language was permissive in nature. The appellant further argued that the EUCOM directive restricted the JAC Commander from adjudging a bad-conduct discharge because it tied the convening authority to the Army's military justice regulation, which specifically limits special court-martial convening authority. While the court agreed that joint regulations might be written to displace the court-martial processing requirements of service regulations, the court found the EUCOM directive ambiguous in this regard and resolved the issue in the appellant's favor. *Id.*
3. See, e.g., INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK ch. 27 (2002) [hereinafter OpLaw Handbook] (containing discussion of reviewing JTF operations plans using the "FAST-J" method, which specifically prompts the judge advocate to address the areas of jurisdiction (joint or service specific), convening authorities, and military justice support, but does not give any detail on how to do it or what issues might be important). See generally Lieutenant Colonel Marc L. Warren, *Operational Law—A Concept Matures*, 152 MIL. L. REV. 33, 66 (1996) (containing a brief discussion of the importance of being prepared to conduct joint justice).
4. SOF COMMANDER'S LEGAL HANDBOOK CD-ROM ch. 1, at 4 (1 Feb. 2001) (BETA Version).

in a joint environment.⁵ The task force consisted of members from every service. The Task Force Commander—the Assistant Division Commander—did not have inherent court-martial convening authority and was never given court-martial convening authority over the service members assigned to him.⁶ The Division Commander, not present with TFF, maintained general court-martial convening authority over division soldiers and some soldiers attached to the division.⁷ “The Division Commander did not gain jurisdiction, however, over all U.S. troops within the Task Force”⁸ The Division Commander and his successors “did not exercise court-martial jurisdiction over Army special operation and civil affairs forces, and they had no jurisdiction over service members from other branches.”⁹

As a result of the fractured jurisdiction, the TFF Commander faced administering justice through a minimum of five general court-martial convening authorities (GCMCAs).¹⁰ The jurisdictional scheme apparently frustrated TFF legal advisors, who noted that offending service members of some “jurisdictionally excluded” units “were often merely returned to their home station with no action taken.”¹¹

A joint commander’s lack of general court-martial convening authority also affects matters outside of military justice. Court-martial convening authority is a power woven through the three functional areas of legal support to operations—command and control, sustainment, and personnel service support—and extends beyond strictly military justice functions.¹² Because court-martial convening authority has historically been a power vested with command, non-disciplinary regulations often employ the GCMCA as a reviewing, approving, or appellate authority.¹³ Hence, the impact of not vesting a multi-service commander with this authority is felt beyond criminal justice matters.

The TFF experience described above echoes the concerns voiced by Lieutenant Colonel Marc Warren in his 1996 *Military Law Review* article:

Judge advocates must have a clear understanding of how to create provisional units and transfer jurisdiction; how to establish courts-martial convening authorities; and how to administer “joint justice” in a [JTF]. Although the legal authority already exists, and joint doctrine and implementing regulations are maturing, practical experience in “joint justice” is limited. The growing role of the joint force commander will reduce the role of the component commander. As a result, the impact of component regulations and policies will diminish, and divergence among the regulations and policies will become increasingly vestigial. Absent compelling reason to the contrary, joint force commanders should have clear disciplinary authority over their subordinates. Their judge advocates must push to make it happen.¹⁴

Despite the years passed since this passage was written, surprisingly little has been done to address the issues it raises. This article addresses several of these issues, highlights some of the command discipline/criminal law challenges that may confront a judge advocate supporting a joint commander, and suggests some practical solutions to conducting justice in a joint environment. The goals of this article are to demystify this area of criminal law practice, to provide a roadmap for chiefs of justice and their trial counsel to better prepare them for addressing jurisdictional issues with their joint commanders, to propose a systemic solution to the convening authority problem, to com-

5. CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN KOSOVO: 1999-2001, 141 (2002) [hereinafter KOSOVO OPERATIONS BOOK]; see also CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN THE BALKANS: 1995-1998, 172 (1998) [hereinafter BALKANS OPERATIONS BOOK]. The *Balkans Operations Book* discusses the options used there to structure general court-martial convening authority, but does not comment on their efficacy. *Id.* at 170-71. The only mention of joint justice is a footnote comment that sister services handled UCMJ actions for non-Army U.S. military personnel assigned to the theater. See *id.* at 172 n.468.

6. KOSOVO OPERATIONS BOOK, *supra* note 5, at 141.

7. *Id.*

8. *Id.*

9. *Id.* at 142 n.174.

10. This figure corresponds to one GCMCA for the following categories of personnel: the Army units assigned to the division, the special operations and civil affairs units, the Navy, the Air Force, and the Marines.

11. KOSOVO OPERATIONS BOOK, *supra* note 5, at 142 n.175.

12. See U.S. DEP’T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS vii (1 Mar. 2000) [hereinafter FM 27-100].

13. See *infra* notes 87-92 and accompanying text.

14. Warren, *supra* note 3, at 66 (citations omitted). This passage was the catalyst and primary basis for the organization of this article.

pare and contrast adverse administrative actions and NJP among the services, and to present practical considerations for administering justice in a joint environment.

The article primarily focuses on managing military justice matters in light of the difficulties posed by joint operations. Secondly, the article provides methods of establishing a more unified courts-martial structure, thereby improving the efficiency and equality of justice administered in a joint environment. To provide additional focus for some of the issues raised, the article presents situational vignettes building upon the introductory JTF BU vignette.

Before discussing the three main issues this article presents—jurisdiction, court-martial convening authority level, and the administration of NJP in a joint setting—a historical perspective and an overview of the broader issues that surround joint justice are helpful.

Historical Background and Current Status

The Constitution grants Congress the power to make rules governing land and naval forces.¹⁵ The Uniform Code of Military Justice (UCMJ) embodies that congressional power as it pertains to the administration of justice within the military.¹⁶ The Goldwater-Nichols Act¹⁷ created the joint environment in which the military now operates, and it revised portions of the *Manual for Courts-Martial (MCM)*¹⁸ to give unified and specified combatant commanders more authority.¹⁹ The legislative history of Goldwater-Nichols indicates an intention for combatant commanders to have authority over all aspects of military justice within their commands.²⁰ “Nonetheless, the implementing rules and procedures of military justice have not evolved to

fully satisfy the congressional intent of [Goldwater-Nichols] with regard to the [combatant commander’s] prerogative”²¹

The lack of evolution may be due in part to the dichotomy of the military’s national command structure. Individual services are responsible for training and making forces available, while the combatant commands are responsible for actual warfighting. Committing to, or promulgation of, a joint-justice regulation gives the impression that the services are somehow relieved of their responsibility for disciplining the force that the *MCM* places upon them.²²

Other impediments to a joint-justice regulation include service idiosyncrasies in both NJP procedures and in the administration of trial and post-trial matters. Service regulations, which control these areas of military justice, contain some striking differences.²³ Also, provisions of the UCMJ can cause slight variances in the practice of military justice. For example, service members embarked on a naval vessel cannot refuse NJP and demand trial by court-martial.²⁴ This provision causes Navy and Marine Corps judge advocates to approach Article 15, UCMJ, advice differently than Army and Air Force judge advocates, who are trained to consider and advise commanders always on the practical aspects of Article 15 turndowns.²⁵ The net effect of these differences has been the development of service-specific military justice cultures.

The Service Judge Advocates General devoted two recent meetings to the issue of joint justice.²⁶ Although they have discussed changing the *MCM* to clarify and simplify joint-justice issues and considered drafting a joint military-justice publication, they do not currently have a consensus. While a general agreement concerning joint justice exists, the services are not likely to agree on specific *MCM* changes or on a joint regula-

15. U.S. CONST. art. I, § 8.

16. See 10 U.S.C. §§ 801-946 (2000).

17. 1986 DOD Reorganization Act, Pub. L. No. 99-433, 100 Stat. 1013 (codified as amended at 10 U.S.C. § 164). See generally Captain William H. Walsh & Captain Thomas A. Dukes, Jr., *The Joint Commander as Convening Authority: Analysis of a Test Case*, 46 A.F. L. REV. 195 (1999).

18. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000) [hereinafter MCM].

19. See 10 U.S.C. § 164.

20. Lieutenant Colonel (LtCol) Mike Finnie, United States Marine Corps (USMC), Joint Staff Legal Office, Monograph of the Goldwater-Nichols Legislative History Regarding Military Justice in a Joint Environment (Aug. 2, 2000) [hereinafter Finnie Monograph] (citing H.R. REP. NO. 90-4370 (1986)) (on file with author).

21. *Id.* at 1.

22. Telephone Interview with LtCol R. Gary Sokoloski, USMC, Chairman, Joint Services Committee on Military Justice (Mar. 20, 2002) [hereinafter Sokoloski Interview]. Lieutenant Colonel Sokoloski also serves as Head, Military Law Branch, Judge Advocate Division, Headquarters, USMC. *Id.*

23. See generally U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE (20 Aug. 1999) [hereinafter AR 27-10]; U.S. DEP’T OF NAVY, MANUAL OF THE JUDGE ADVOCATE GENERAL ch. 1 (C3, 3 Oct. 1990) [hereinafter JAGMAN], available at <http://192.156.19.100/Pubs/jagman/frameset/htm>; U.S. DEP’T OF AIR FORCE, INSTR. 51-202 NON-JUDICIAL PUNISHMENT (1 July 2002) [hereinafter AFI 51-202], available at <http://afpubs.hq.af.mil/pubfiles/af/51/afi51-202.pdf>.

24. UCMJ art. 15(a) (2000).

25. Article 15, UCMJ, gives commanders NJP authority. See *id.* Practitioners commonly use the term “article 15” as short-hand for NJP authority and NJP proceedings.

tion “during the annual review of military justice matters currently being conducted by the Joint Service Committee on Military Justice.”²⁷

While differences do exist, none of the differences create insurmountable obstacles to performing military justice in a joint environment.

Jurisdiction²⁸

SITUATION:

As you ponder where to begin your support of JTF BU, the deputy SJA pulls you aside and tells you a horror story about how bad morale became on her deployment to Haiti due to fractured military jurisdiction,²⁹ and she recommends that you get an early handle on jurisdictional chains.

The area of joint justice that may vex commanders the most is how it affects unity of command.³⁰ The power of command is tied to the power to discipline the force. As discipline authority becomes more fractured, a commander’s ability to enforce

his orders becomes more difficult. A continuing issue in the joint-justice arena is how to overcome the unity of command dilemma created by a fractured authority to convene courts-martial.³¹ The obvious solution to this problem is to eliminate the fractures by giving the joint commander the court-martial convening authority commensurate with his command position. Resolving this issue gives the commander the authority to enforce his orders; however, even after achieving unity of command, the legal practitioner remains faced with administering justice within service-specific regulations.

Jurisdictional Basis

Jurisdiction is based in the command structure. The Service Secretaries, as directed by the Secretary of Defense,³² assign all military forces to one of nine combatant commands.³³ Because most forces are stationed in the United States, but have a regional orientation to support another geographic combatant command, the Secretaries assign the majority of forces to Joint Forces Command.³⁴ When necessary, orders must be produced to transfer forces within the jurisdiction of a combatant command or from one combatant command to another.³⁵ To provide clear and cohesive command authority when this occurs, the

26. Sokoloski Interview, *supra* note 22; Telephone Interview with LTC William T. Barto, Acting Chief, Criminal Law Division, Office of the Judge Advocate General, U.S. Army (Mar. 11, 2002) [hereinafter Barto Interview] (referring to Service Judge Advocates General meetings in October 2001 and February 2002).

27. Sokoloski Interview, *supra* note 22; Barto Interview, *supra* note 26. See generally Department of Defense: Joint Service Committee on Military Justice, 67 Fed. Reg. 35,507 (May 20, 2002).

28. “Jurisdiction” as used in this context refers to administrative control over service members. The current *OpLaw Handbook*, in a change from prior editions, conceptualizes this use as describing “venue” (that is, choice of the appropriate commander) as opposed to a court’s legal authority as defined in Rule for Courts-Martial 201. Compare *OpLaw Handbook*, *supra* note 3, at 182, with MCM, *supra* note 18, R.C.M. 201. Judge advocates should recognize that, in accordance with UCMJ Article 17, court-martial jurisdiction is “universal.” Any officer vested with court-martial convening authority may refer any service member, regardless of service and unit, to a court-martial convened by that officer. The practical aspects of exercising this broad referral authority are (1) administrative control, and (2) coordination between commands with concurrent administrative control over a service member. Unlike court-martial convening authority, nonjudicial punishment (NJP) authority is limited to “commanders,” and commanders may only administer NJP to members of their command. MCM, *supra* note 18, pt. V, ¶ 2a.

29. See Major Michael J. Berrigan, *The UCMJ and the New Jointness: A Proposal to Strengthen the Military Justice Authority for Joint Task Force Commanders*, 44 NAVAL L. REV. 59, 69 (1997). The disparate treatment of soldiers and subsequent morale issues in Haiti resulted from both inter-service and intra-service jurisdictional fractures. *Id.*

30. See generally *id.* (containing a full discussion of this debate); JOINT CHIEFS OF STAFF, JOINT PUB. 0-2, UNIFIED ACTION ARMED FORCES (UNAAF) III-1 (10 July 2001) [hereinafter JOINT PUB. 0-2].

31. See Berrigan, *supra* note 29, at 85-103.

32. 10 U.S.C. §162(a) (2000).

33. The military currently has four geographic and five functional unified commands: European Command, with responsibility for Europe and parts of the Middle East and Africa and surrounding waters; Pacific Command, with responsibility for the Pacific Ocean, Southeast Asia and the Pacific and Indian Ocean rims; Southern Command, with responsibility for the Caribbean and Central and South America; Central Command, with responsibility for Southwest Asia, Eastern Africa and part of the Indian Ocean; Joint Forces Command, with responsibility as the joint force provider of its assigned continental United States-based forces and as the lead joint force integrator and trainer; Transportation Command, with responsibility for global transportation; Special Operations Command, with responsibility for training and equipping special operations forces; Space Command, responsible for air, missile and space defense; and Strategic Command, responsible for nuclear deterrence. JOINT PUB. 0-2, *supra* note 30, at II-14 to II-16.

The U.S. military will formally establish Northern Command on 1 October 2002. It will become the fifth geographic unified command, with responsibility for North America and adjacent waters. Space Command and Strategic Command will likely merge to maintain the total number of unified commands at nine. Colin Robinson, Center For Defense Information, *Northern Command Finally Announced: Details Still to Be Worked Through* (Apr. 24, 2002), at <http://www.cdi.org/terrorism/northcom.cfm>.

34. JOINT PUB. 0-2, *supra* note 30, at II-14.

assignment orders normally should include assignment for purposes of courts-martial and general administration of military justice.³⁶

Units formed for contingency operations do not always flow together as well as the above paragraph might suggest, and recent experience indicates that judge advocates must prepare to manage ad hoc jurisdiction if time or circumstances prevent better establishment of jurisdictional chains.³⁷ The challenge for operational attorneys as a contingency develops is to back up a unified command authority with a cohesive jurisdictional chain for military justice. Army legal doctrine recognizes the need for judge advocates to advise commanders on, and help provide for, continuity in jurisdiction; however, the actual tasks of jurisdiction transfer and creation of provisional units are outside the normal focus of judge advocates.³⁸ Judge advocates must understand these tasks to ensure that jurisdictional chains are as strong as possible.

Creating Provisional Units and Transferring Jurisdiction

To ensure clarity of jurisdiction, judge advocates must understand the processes for creating provisional units and transferring jurisdiction. Provisional units are

temporary units (not to exceed 2 years) composed of personnel detached from their unit of assignment and created under authority of [Army Regulation 220-5].³⁹ Provisional units are often used to create a UCMJ structure or fill gaps in UCMJ authority of a convening authority. They help to ensure that commanders at all levels are available to process UCMJ and administrative actions.⁴⁰

Most importantly for deploying judge advocates, the use of provisional units is not limited to filling jurisdictional gaps at home station. Provisional units may also be used to fill jurisdictional gaps in deploying units or to account for personnel not otherwise attached to a specific unit for UCMJ purposes.

The Army's *Operational Law Handbook* reminds military justice supervisors preparing for deployment to "[e]nsure orders assigning units and personnel clearly indicate which commanders have nonjudicial punishment and court-martial authority."⁴¹ This task is important even with single-service deployments because units will inevitably be divided into deploying and home-station units. Reorganizing and restacking units due to mission requirements also complicates this task.⁴² The joint environment further increases the complexity of reorganization, and requires that judge advocates pay particular attention to ensure the jurisdictional plans cover all units and personnel for UCMJ purposes. As noted below, orders are not legal authority for establishing court-martial convening authority. Instead, they serve to clarify statutory or regulatory authority. Only Army legal doctrine, however, focuses judge advocates on this issue.⁴³

Timing

The most efficient time for judge advocates to address jurisdiction issues is early in the process of creating a joint force. Judge advocates can ensure the proper establishment of jurisdictional chains much easier before a unit departs home station than after deployment. Pre-deployment, the necessary decision makers and participants are readily available, thereby drastically reducing the need for re-issuance of assignment orders.⁴⁴

35. See generally JOINT CHIEFS OF STAFF, JOINT PUB. 0-5, DOCTRINE FOR PLANNING JOINT OPERATIONS (13 Apr. 1995) [hereinafter JOINT PUB. 0-5].

36. AR 27-10, *supra* note 23, para. 3-8(a)(4).

37. Telephone Interview with Colonel (COL) Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division and Coalition Joint Task Force (CJTF)—Mountain in Uzbekistan and Afghanistan from 3 December 2001 to 13 June 2002. (June 18, 2002) [hereinafter Stone Interview]; see also CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH: 1998-1999, 121 (15 Sept. 2000) [hereinafter HURRICANE MITCH BOOK]. Not only did COL Stone's unit deploy without knowing who would comprise the CJTF, units and slice elements arrived in theater with orders no more specific than assigning them to the "Central Command area of responsibility" rather than to any particular unit. Stone Interview, *supra*.

38. FM 27-100, *supra* note 12, at vii, 3-5. See generally U.S. DEP'T OF ARMY, REG. 600-8-105, MILITARY ORDERS (28 Oct. 1994) [hereinafter AR 600-8-105].

39. U.S. DEP'T OF ARMY, REG. 220-5, DESIGNATION, CLASSIFICATION, AND CHANGE IN STATUS OF UNITS para. 2-5 (3 Sept. 1991) [hereinafter AR 220-5].

40. OPLAW HANDBOOK, *supra* note 3, at 185 n.153 (internal footnote added).

41. *Id.* at 185. See also FM 27-100, *supra* note 12, at 3-5.

42. OPLAW HANDBOOK, *supra* note 3, at 184.

43. FM 27-100, *supra* note 12, at vii.

Ensuring the establishment of a proper joint-unit jurisdictional chain involves the same process that incoming chiefs of justice undertake to ensure that all units on their installations are properly assigned for court-martial convening purposes. Creating a wire diagram of the proposed task force is a good way to guarantee that the command has jurisdiction over all assigned units and personnel. This process serves a dual purpose: it forces staff sections to produce an accurate wire diagram, and it forces the command to think proactively about military justice.

Because the J3/G3/S3 staff section is responsible for plans and training, and the J4/G4/S4 staff section is responsible for logistical support to the units,⁴⁵ coordinating with these two staff sections is an efficient way for judge advocates to ascertain which units the command expects to participate in a given deployment. The wire diagram enables judge advocates to help other staff sections logically organize the prospective chain of command. Further, through the process of creating the diagram, judge advocate can identify the need for provisional units to shore up any jurisdictional holes.

The best course of action for judge advocates brought in after the formation of the task force is to review all attachment orders for jurisdictional deficiencies. When judge advocates determine that a unit has been improperly excluded, they

should coordinate with the command section and the J3/G3/S3 to determine how jurisdiction should be organized. Once the command approves a jurisdictional scheme, the commander's staff can then produce orders which reflect his intent.

*Authority for Creating Provisional Units and Transferring Jurisdiction*⁴⁶

Because only Army legal doctrine views this as part of judge advocate responsibilities,⁴⁷ the discussion below focuses on those Army personnel vested with order production authority, and outlines what judge advocates should provide those authorities to ensure publication of jurisdictionally appropriate orders. Deploying judge advocates should coordinate with sister-service units to guarantee proper assignment for military justice purposes. Judge advocates should pay careful attention to the differing notice requirements services have for the establishment of units, specifically for the administration of nonjudicial discipline in a multi-service environment.⁴⁸

Whether orders are required to create provisional units, or they are simply needed to assign a unit to the task force, orders production is a function of the "adjutant general, adjutant, or other authorized individual charged with headquarters administration."⁴⁹ Although authority to publish orders may be delegated below installation level, the authority is usually maintained at a military personnel work center at Headquarters,

44. HURRICANE MITCH BOOK, *supra* note 37, at 121.

Resolving UCMJ jurisdictional issues occupied a significant amount of the deployed JA's time. Brigade and Group commanders were all designated Special Courts-Martial Convening Authorities (SPCMCA) prior to deployment. However, several smaller provisional unit commanders, including battalion-size unit commanders, did not have courts-martial convening authority because their designation as a provisional unit commander did not include this authorization. General courts-martial convening authorities (GCMCA) can establish deployment contingency plans, which when executed, designate provisional units whose commanders have SPCMCA

Some provisional units deployed without orders assigning or attaching their personnel to the provisional unit for military justice purposes, although all provisional unit commanders had assumption of command orders.

Id.

45. See generally U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS (31 May 1997) [hereinafter FM 101-5]; JOINT PUB. 0-2, *supra* note 30.

46. See generally AR 600-8-105, *supra* note 38, para. 1-11b; U.S. DEP'T OF AIR FORCE, INSTR. 38-101, MANPOWER AND ORGANIZATION para. 4.3.4 (1 July 1998) (discussing Air Force construction of provisional units), available at <http://afpubs.hq.af.mil/pubfiles/af/38/afi38-101/afi38-101.pdf>.

47. See FM 27-100, *supra* note 12, at vii, 3-5.

48. Army and Naval regulations permit multi-service commanders to designate service-specific units and commanders for the administration of nonjudicial discipline. See AR 27-10, *supra* note 23, para. 3-7b (requiring a copy of any such designation provided to The Judge Advocate General of the Army, Criminal Law Division); JAGMAN, *supra* note 23, § 0106d (requiring a copy of any such designation provided to the Chief of Naval Personnel, or the Commandant of the Marine Corps and The Judge Advocate General of the Navy). The Air Force, on the other hand, does not permit multi-service commanders to designate an Air Force specific unit for nonjudicial discipline purposes, and hence does not require any notification. The Air Force arguably provides for the same effect, however, by defining the following as "commanders" for administration of nonjudicial discipline: the "Commander, Air Force Forces (COMAFFOR), which is an officer designated from the U.S. Air Force who serves as the commander of all U.S. Air Force forces assigned or attached to the U.S. Air Force component in a joint or combined operation;" the "commander of an Air Force element, [including Air Force elements of a joint or combined command or task force or other activity outside the Air Force], if designated to function as a unit pursuant to AFI 38-101, *Air Force Organization*;" and the "Senior Air Force Officer (SAFO) in the headquarters staff organization of a unified command, subordinate unified command, joint task force, combined command or combined task force." AFI 51-202, *supra* note 23, paras. 2.2, 2.2.2-3, 2.2.5.

49. AR 600-8-105, *supra* note 38, para. 1-11b. See generally AR 220-5, *supra* note 39.

Department of the Army; major command; or installation level.⁵⁰ At the installation level, the Personnel Service Company (PSC) will probably be the responsible section. If not, judge advocates should start with the PSC to determine who has the authority to produce orders.

Authorities may publish orders for several purposes. Most importantly, they have the authority to publish orders to mobilize and demobilize individuals and units,⁵¹ and to “[a]ctivate, inactivate, organize, reorganize, designate, re-designate, discontinue, assign, and reassign all types of U.S. Army controlled organizations and units, and attach one unit to another.”⁵² This authority gives the command the flexibility to task organize and create jurisdictional chains of command that ensure the discipline of that organization.

Although *Army Regulation (AR) 600-8-105*, the Army’s regulation on military orders, contains many order formats, it does not contain specific language for unit activation or assignment, nor suggested specific language to describe assignment for courts-martial jurisdiction or the general administration of military justice matters. Suggested language can, however, be found in *AR 27-10, Military Justice*.⁵³ Judge advocates should coordinate with the J1/G1/S1 section to check that all orders assign personnel and units to the task force properly and include court-martial and administrative military justice authority over each person and unit. Failure to have this suggested language will not prevent the exercise of Article 15 authority; however, inclusion may resolve the issue decisively.⁵⁴

Keeping up with changes to the units that comprise a task force may prove very difficult, especially when the task force has been deployed in support of a mission with a rapidly changing political or military situation. The Haiti and Hurricane Mitch deployments are examples of how fluid the chain of command can get in a developing situation.⁵⁵ Some situations may be so dynamic that a complete jurisdictional solution may not be possible.⁵⁶ Despite this challenge, judge advocates should avoid the temptation to simply wait until things settle down before seeking joint UCMJ authority or engaging in the establishment of jurisdiction. Although a fluid situation may frustrate these measures, failing to take action early will make overcoming the inertia of fractured jurisdictional chains more difficult or impossible.⁵⁷

While having well-established jurisdictional chains reflected in assignment orders is clearly desirable, as mentioned above, it is not a condition precedent to the exercise of NJP authority. Even absent direct language in assignment orders, commanders are vested with NJP authority and may exercise that authority over service members within their actual control.⁵⁸ The fact that *AR 27-10* includes suggested jurisdictional language tends to mislead commanders and judge advocates to believe that such language is required for a commander to exercise NJP authority: There is no such requirement. Although jurisdictional language in orders certainly clarifies the authority for all parties concerned, the authority to administer NJP is derived from the functional command relationship, not from the language of assignment orders.⁵⁹ In ad hoc command situa-

50. AR 600-8-105, *supra* note 38, para. 1-11b. “Authority to delegate below installation level is vested in the adjutant general subject to the limitations imposed in paragraph 1–16 [of *Army Regulation 600-8-105*].” *Id.*

51. *Id.* para. 1-11a(6).

52. *Id.* para. 1-11a(5).

53. See AR 27-10, *supra* note 23, para. 3-8(a)(4). This paragraph states that “[i]f orders or directives include such terms as ‘attached for administration of military justice,’ or simply ‘attached for administration,’ the individual so attached will be considered to be of the command, of the commander, of the unit of attachment for the purpose of Article 15.” *Id.*

54. *Id.* para. 3-8(a).

55. See Berrigan, *supra* note 29, at 67-71. The Haiti deployment is also an example of an SJA advising against seeking joint UCMJ authority based on the fluidity of the jurisdictional situation. See *id.*; see also HURRICANE MITCH BOOK, *supra* note 37, at 121.

56. Berrigan, *supra* note 29, at 67-71.

57. *Id.* Even after the operation became relatively stable, no attempt was made to seek joint UCMJ authority. *Id.*

58. See MCM, *supra* note 18, pt. V, ¶ 2a. “Unless otherwise provided by regulations of the Secretary concerned, a commander may impose nonjudicial punishment upon any military person of that command.” *Id.* Absent jurisdictional language within an assignment order, judge advocates can look for a description of the command relationship within the orders to help determine jurisdiction. While Operational Control (OPCON), Tactical Control (TACON), and Administrative Control (ADCON) may all be used to describe command relationships, and none of these relationships are dispositive, ADCON is doctrinally more authoritative in determining jurisdiction because it is defined to include disciplinary control. See JOINT PUB. 0-2, *supra* note 30, at III-11.

59. Although functional command relations will probably suffice for determining who should exercise NJP over a service member, judge advocates should not overlook the possibility of using territorial jurisdiction as a fallback position. “‘Commander’ means a commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area, which under pertinent official directives is recognized as a ‘command.’” MCM, *supra* note 18, pt. V, ¶ 2a (emphasis added).

tions, such as those associated with Coalition Joint Task Force—Mountain (CJTF—Mountain)⁶⁰ in Afghanistan, judge advocates must look to the “attendant circumstances” to determine NJP authority.⁶¹

Identifying and Establishing Courts-Martial Convening Authorities

SITUATION:

The Deputy SJA grabs you again as you are trying to figure out how the scanner that came with your rucksack deployable law office can scan text as a word document. She tells you that you will be glad you did the staff work to ensure solid jurisdictional chains when you “get over there.” She then recalls that task force commanders are generally vested only with special court-martial convening authority, and asks, “What are you going to do when you need a GCMCA? Are you going to mail packets back and forth across the ocean?” She then recommends that you look at what “they” did in Somalia to establish the JTF Commander as a GCMCA.⁶²

This section discusses who has the power to designate court-martial convening authorities, and how to ensure that a multi-service commander has maximum disciplinary flexibility; it argues that JTF commanders should be vested regularly with general courts-martial convening authority; and it closes with a discussion of the exercise of reciprocal court-martial jurisdiction in a joint environment. As at least one senior army judge advocate has noted, plans and orders are not legal authority for determining who may have courts-martial convening authority, or who can delegate or grant that authority:

Notwithstanding the statement of command relationships found in plans and orders, judge advocates must look to law and regulation to determine whether commanders are in fact courts-martial convening authorities. Judge advocates should read UCMJ Articles 22 through 24, and study [Rule for Courts-Martial (RCM) 201(e)], “Reciprocal Jurisdiction,” and the analysis thereto.⁶³

Designation as a Court-Martial Convening Authority by the UCMJ

The UCMJ designates some commanders as court-martial convening authorities.⁶⁴ Other commanders may be given this authority either by delegation from a superior with the power to create subordinate convening authorities, or by defining the commander’s position as one in which the UCMJ vests such authority. Regarding multi-service units, Article 22, UCMJ, provides that “the commanding officer of a unified or specified combatant command” may convene general courts-martial.⁶⁵ Article 23, UCMJ, provides that “the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose” may convene special courts-martial.⁶⁶ Arguably, Article 23 grants any JTF commander or other multi-service unit commander special court-martial convening authority, without requiring any further action.⁶⁷

While these UCMJ sections are fairly clear, the UCMJ provides no additional specific guidance regarding the level of court-martial convening authority given to joint-unit commanders. Standing alone, these sections create a broad gap of authority. The joint commanders of combatant commands have general court-martial convening authority; however, joint com-

60. Note that here the acronym CJTF uses “Coalition,” as opposed to “Combined,” to describe the JTF.

61. See generally AR 27-10, *supra* note 23, para. 3-8a(3). The CJTF-Mountain SJA used this exact technique to assist the command with NJP administration. Stone Interview, *supra* note 37.

If orders or directives do not expressly confer authority to administer non-judicial punishment to the commander of the unit with which the soldier is affiliated or present (as when, for example, they contain no provision attaching the soldier “for disciplinary purposes”), consider all attendant circumstances, such as—(a) The phraseology used in the orders. (b) Where the soldier slept, ate, was paid, performed duty, the duration of the status, and other similar factors.

AR 27-10, *supra* note 23, para. 3-8a(3).

62. See Berrigan, *supra* note 29, at 72; see also BALKANS OPERATIONS BOOK, *supra* note 5, at 172 (discussing several options used to structure general court-martial convening authority, but unfortunately, not commenting on their efficacy).

63. Warren, *supra* note 3, at 66.

64. UCMJ arts. 22-24 (2000) (stating who may convene general, special, and summary courts-martial, respectively).

65. *Id.* art. 22(a)(3).

66. *Id.* art. 23(a)(6).

67. Barto Interview, *supra* note 26.

manders below this level, regardless of rank, are limited to special court-martial convening authority, unless they are somehow otherwise vested with the authority to convene general courts-martial.⁶⁸ Other UCMJ provisions, which permit designation of GCMCAs, help fill in this gap.

Designation By Authority of the UCMJ

President

The UCMJ specifically authorizes the President to designate any commanding officer as a GCMCA.⁶⁹

Secretary of Defense

The President has authorized the Secretary of Defense (SECDEF) to empower any commanding officer of a joint command or joint task force to conduct general courts-martial.⁷⁰ During the deployment to Somalia, the SECDEF designated the JTF Commander as a GCMCA over all members of the JTF. This was accomplished only through the diligence and foresight of the Central Command SJA, who coordinated with the legal counsel for the Joint Chiefs of Staff to request general court-martial convening authority from the SECDEF.⁷¹

Service Secretaries

The “Secretary concerned” is given the authority to designate other “commanding officers,” “officers in charge of any other command,” or both, with court-martial convening author-

ity at whatever level is appropriate.⁷² Not only does Article 22, UCMJ, list the SECDEF separately from “Secretary concerned” as one authorized to convene general courts-martial, indicating an intent to exclude the SECDEF from the meaning of “Secretary concerned” within the UCMJ, it also explicitly defines “Secretary concerned” to exclude the SECDEF.⁷³ This is important because, unlike a “Secretary concerned,” the UCMJ does not authorize the SECDEF to designate court-martial convening authorities.⁷⁴

In a single-service environment, “the Secretary concerned” is much easier to determine than in multi-service units, in which arguably every Service Secretary involved is a “Secretary concerned.” At least one proposal has been made to clarify who qualifies as a “Secretary concerned” in a joint environment by defining the term as the Service Secretary of the service “of which the accused is a member.”⁷⁵ This suggestion, if followed, would reinforce a parochial application of justice, rather than reinforce the evolving joint nature of the armed forces. Every other paragraph within the UCMJ that describes who may convene a court-martial, at any particular level, focuses on the level of command or responsibility of the commander, not on the service of the accused.⁷⁶ Assuming that clarification is necessary, the better approach is to define “Secretary concerned” as the Service Secretary of which the *commander* is a member. Not only does this definition best reinforce unity of command, it also follows the basic logic that applies to the UCMJ sections as currently written; only the Service Secretary of the commander’s service should and would have the authority to so empower a commander.

68. *Army Regulation 27-10* further restricts SPCMCAs by prohibiting them from convening a court-martial empowered to adjudge a bad-conduct discharge—a punitive discharge—unless authorized to do so, in writing, by a superior GCMCA. AR 27-10, *supra* note 23, para. 5-25.

69. UCMJ art. 22 (a)(9). Article 22(a)(9) permits the President to designate “any other commanding officer” as a GCMCA. *Id.*

70. MCM, *supra* note 18, R.C.M. 201(e)(1)(B).

So much of the authority vested in the President under Article 22(a)(9) to empower any commanding officer of a joint command or joint task force to convene courts-martial is delegated to the Secretary of Defense, and such a commanding officer may convene general courts-martial for the trial of members of any of the armed forces.

Id.

71. Berrigan, *supra* note 29, at 72.

72. UCMJ arts. 22(a)(8), 23(a)(7), 24(a)(4). Article 22(a)(8) provides for GCMCA appointment of “any other commanding officer designated by the Secretary concerned.” *Id.* art. 22(a)(8). Article 23(a)(7) provides for SPCMCA appointment of “the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.” *Id.* art. 23(a)(7). Article 24(a)(4) provides for summary court-martial convening authority appointment of “the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.” *Id.* art. 24(a)(4).

73. MCM, *supra* note 18, R.C.M. 103 discussion (citing 10 U.S.C. § 101(8)).

74. *See* UCMJ arts. 22(a)(8), 23(a)(7), 24(a)(4).

75. Sokoloski Interview, *supra* note 22 (referring to PowerPoint slides and notes prepared by LtCol Mike Finnie, USMC, Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff (undated, but known to be from between 1999 and 2001) (on file with author)).

76. *See* UCMJ arts. 22(a)(8), 23(a)(7), 24(a)(4).

Combatant Commander Authority

Articles 23(a)(1) and 24(a)(1), UCMJ, make it clear that combatant commanders may convene special or summary courts-martial because Article 22 specifically grants them with the authority to convene general courts-martial.⁷⁷ Whether their subordinate commanders have this same authority, however, is unclear. “[T]he UCMJ and *MCM* are not explicit as to the specific circumstances under which subordinate joint commanders have special court-martial convening authority.”⁷⁸ Combatant commanders do not have the authority to create subordinate GCMCA’s; however, they appear to have the authority, and do in fact exercise the authority, to designate certain subordinate joint commanders as Special Courts-Martial Convening Authorities (SPCMCA’s). Combatant commanders exercise this authority by designating a unit as “separate” under Article 23(a)(6), and by empowering the commander to try any member of the armed forces under RCM 201(e)(2)(c).⁷⁹ While this is a reasonable interpretation of these rules and is currently in use, some controversy still exists in this area of military justice.⁸⁰

Deploying judge advocates should first determine if the UCMJ grants the task force commander either special or general courts-martial convening authority. If no specific provision applies to their commander under the given circumstances, judge advocates should next seek appointment of the commander as a SPCMCA by the combatant commander. The next step for judge advocates when supporting a multi-service unit, especially one designated as a JTF, is to request from a higher authority a grant for the commander to convene general courts-martial.⁸¹ If the organization is deemed a “joint command” or “joint task force,” judge advocates should make this request through the SECDEF, as was done in Somalia.⁸² If the unit is not so designated, then the request should go through the commander’s Service Secretary. The judge advocate community

has yet to incorporate these request provisions into its pre-deployment standing operating procedures (SOPs); however, they should be written into pre-deployment SOPs throughout the military services.

Justification for Regularly Vesting Multi-Service Commanders with General Court-Martial Convening Authority

As noted above, multi-service commanders are not automatically granted general court-martial convening authority. Although the President, SECDEF, and arguably the Service Secretaries have the power to vest multi-service commanders with this authority, it is not regularly done.⁸³ While designating multi-service commanders as GCMCA’s may not always be necessary, and multi-service commanders may not always exercise the authority if granted, the failure to make that designation appears time and again in deployments as a hindrance to the smooth operation of military justice.⁸⁴

Some may argue that the recent increase in maximum punishment authority of SPCMCA’s from six months to one year⁸⁵ will increase the number of cases referred to special courts-martial and decrease the incentive for commanders to seek the authority to convene general courts-martial. While these projections may prove accurate, this does not diminish other arguments for regularly vesting multi-service commanders with general court-martial convening authority.

Army legal doctrine clearly indicates a preference for performing military justice functions as far forward in the area of operations as possible.⁸⁶ Vesting joint commanders with general court-martial convening authority is a cornerstone toward reaching this goal. Not only does it allow the exercise of this authority as far forward as possible, it also provides a basis for

77. JOINT PUB. 0-2, *supra* note 30, at IV-15a (construing UCMJ arts. 22(a)(8), 23(a)(7), 24(a)(4)).

78. Finnie Monograph, *supra* note 20, at 2.

79. *Id.*

80. The primary controversy over the authority of combatant commanders to designate subordinate court-martial convening authorities arises from the fact that the UCMJ prescribes court-martial authority and review following the individual service, rather than unified, chains of command. *See* UCMJ art. 23; *MCM*, *supra* note 18, R.C.M. 201(e), 504(b), 1111-1112. *See generally* Finnie Monograph, *supra* note 20.

81. Berrigan, *supra* note 29, at 118.

82. *See supra* notes 70-71 and accompanying text.

83. Berrigan, *supra* note 29, at 67-71.

84. *See, e.g.*, HURRICANE MITCH BOOK, *supra* note 37, at 121. “The JTF commander during Hurricane Mitch was not designated as a General Courts-Martial Convening Authority. The only GCMCA for the operation was [the combatant commander for U.S. Southern Command].” *Id.* *See also* KOSOVO OPERATIONS BOOK, *supra* note 5, at 142 n.175.

85. *MCM*, *supra* note 18, R.C.M. 201(f)(2)(B) (as amended by Exec. Order No. 13,262, 67 Fed. Reg. 18,773 (Apr. 11, 2002)).

86. “Courts-martial will be conducted in the accused’s unit’s area of operations and as far forward in the unit’s area of operations as the commander deems appropriate.” FM 27-100, *supra* note 12, at 4-29.

unity of command in a joint environment. Probably of greater importance to the commander, such vesting provides him with maximum authority and flexibility to address military justice matters.

In addition to providing the commander with the foundational basics for the unity of command and military justice, vesting him with general court-martial convening authority impacts beyond justice matters. The power of a GCMCA is necessary for the administration of matters that fall outside of those which are purely military justice, to include complaints of wrongs by a commanding officer under Article 138 (assuming the appropriate predicate processing),⁸⁷ aviation accident investigations,⁸⁸ certain claims,⁸⁹ certain line of duty investigations,⁹⁰ and, in some limited circumstances, leaves and passes.⁹¹ The provisions governing these fundamentally administrative actions are not written to empower a “commander” or an officer of a given rank; rather, they require action by court-martial convening authorities.⁹² Thus, vesting joint commanders with general court-martial convening authority not only enables the command to process justice actions as far forward as possible, but also enables the command to complete a host of administrative actions that otherwise must be coordinated with rear echelons.

The default mode for a JTF should be to vest the JTF Commander with general court-martial convening authority.⁹³ As mentioned above, standard operating procedures in preparation for joint operations should be adapted to accomplish, or at least

guarantee, that proper requests are made to accomplish this authorization.

To best serve the commander who is not otherwise vested with general court-martial convening authority, judge advocates should begin every deployment into a joint environment by requesting either the Service Secretary or the SECDEF to grant the commander this authority. Judge advocates must coordinate the request through the judge advocate technical chain to either the Service Secretary’s legal advisor, the Chairman of the Joint Chiefs of Staff’s legal advisor, or both. If the request is denied, judge advocates should request that the GCMCA superior to the multi-service unit grant the commander the authority to convene special courts-martial with the power to adjudge a bad-conduct discharge. Absent such a request, unless the combatant command’s justice regulations specifically grant the commander this authority, it is withheld by Army regulation.⁹⁴

Reciprocal Court-Martial Jurisdiction and RCM 201(e)

SITUATION—CASE #1:

Joint Task Force BU has been deployed to a camp near the city of Tanjungpandan, located on the island of Belitung, one of the many islands that make up the Indonesian archipelago. The Indonesian government has welcomed the task force with open arms to help

87. UCMJ art. 138 (2000). Article 138, UCMJ, requires un-redressed complaints to be forwarded to “the officer exercising general court-martial jurisdiction over the officer against whom it is made.” *Id.* Colonel M. Tia Johnson, the Deputy SJA for JTF Guantanamo during 1991-92, noted an example of an Article 138 complaint filed during her deployment to Guantanamo. The appeal of a Naval noncommissioned officer’s (NCO’s) relief for cause was processed under Article 138 because the Naval NCO rating system did not contain an inherent administrative appeal process. Interview with then-Lieutenant Colonel M. Tia Johnson, Chair, International & Operational Law Department, The Judge Advocate General’s School, U.S. Army, in Charlottesville, Va. (Mar. 2, 2002). This example highlights both the administrative GCMCA function and fractured jurisdiction issues. Because of the perception of fractured jurisdiction, the NCO’s appeal was sent to four GCMCA’s. *Id.* This “result” is not only inefficient, but also gives rise to the specter of a four-way split opinion.

88. U.S. DEP’T OF ARMY, REG. 385-40, ACCIDENT REPORTING AND RECORDS para. 1-9 (1 Nov. 1994).

89. U.S. DEP’T OF ARMY, REG. 27-20, CLAIMS paras. 9-6(1)-(2) (1 Nov. 94). Special court-martial convening authorities may approve assessments up to \$5000 per incident. General court-martial convening authorities may approve assessments up to \$10,000 per incident. *Id.*; see also U.S. DEP’T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES ch. 9 (1 Apr. 1998); JAGMAN, *supra* note 23, § 0251; U.S. DEP’T OF NAVY, SEC’y OF THE NAVY INSTR. 5890.1, ADMINISTRATIVE PROCESSING AND CONSIDERATION OF CLAIMS ON BEHALF OF AND AGAINST THE UNITED STATES (17 Jan. 1991).

90. JAGMAN, *supra* note 23, § 0204d(2).

In the event of a major incident, however, the officer exercising general court-martial convening authority over the command involved, if a flag or general officer, or the first flag or general officer in the chain-of-command, or any superior flag or general officer in the chain-of-command, will immediately take cognizance over the case as the [convening authority].

Id. See also *id.* §§ 0209h, 0230b, 0231.

91. U.S. DEP’T OF ARMY, REG. 600-8-10, LEAVES AND PASSES para. 5-15(e) (1 July 1994).

92. See, e.g., JAGMAN, *supra* note 23, § 0204d(2).

93. Berrigan, *supra* note 29, at 121.

94. See AR 27-10 *supra* note 23, para. 5-25. See generally *United States v. Egan*, 53 M.J. 570, 580-81 (Army Ct. Crim. App. 2000) (deciding that the geographic combatant commander’s rules and regulations, as written, failed to overcome the Army regulatory restriction); MCM, *supra* note 18, R.C.M. 201(f)(2)(B), 1003(b)(8)(C).

*restore peace and stability to the region. After you have been in country for three weeks, with the operation going as planned, an Air Force staff sergeant assigned to the Joint Special Operations Task Force headquarters is accused of raping a local girl. One of the task force Air Force officers demands that the task force return the accused to his home unit so the Air Force can court-martial him.*⁹⁵

Regardless of the characterization of a multi-service operation and the level of court-martial convening authority ultimately granted, joint commanders should not be afraid to exercise court-martial convening authority over members of all services within their command. Judge advocates should be prepared to advise joint commanders on the full range of military justice options. Sending a violator from a sister service home from a deployment for discipline is not always the best course of action, nor is it required.⁹⁶

Article 17, UCMJ, gives each military service court-martial jurisdiction over members of the other services.⁹⁷ Rule for Courts-Martial 201(e), based upon Article 17, further lays out the basic framework for reciprocal court-martial jurisdiction among the services.⁹⁸ This rule identifies four explicit circumstances authorizing reciprocal jurisdiction: when a unified or specified combatant commander convenes the court-martial;⁹⁹ when a commander of a joint command or JTF vested with general court-martial convening authority by the SECDEF convenes the court-martial;¹⁰⁰ when a commander vested with special court-martial convening authority by a commander described in the two previous sections convenes the court-martial;¹⁰¹ and when, regardless of the joint nature of the operation, the accused cannot be delivered to his parent service “without manifest injury to the armed forces.”¹⁰²

When supporting a commander empowered to convene special courts-martial by a unified or specified combatant com-

mander or by a commander designated by the SECDEF, judge advocates should ensure that the superior command has prescribed regulations for convening such courts-martial.¹⁰³ Absent such regulations, the SPCMCA title is of little use under RCM 201(e). If the superior command has not prescribed such regulations, it is incumbent upon the forward deployed judge advocate to request them.¹⁰⁴

What if the organization is joint, but the commander is not empowered to convene courts-martial under Article 22(a)(9) or under RCM 201(e)(2) as was the case in Task Force Falcon?¹⁰⁵ Alternately, what if the joint commander’s Service Secretary granted him court-martial convening authority, as proposed above?

Note first that a unit does not have to be labeled “joint” to fall under RCM 201(e)’s definition of “joint command” or “joint task force,” in stark contrast to the use and definition of these terms in joint publications.¹⁰⁶ Rule for Courts-Martial 103 defines “joint,” when “connect[ed] with military organizations, [as] connot[ing] activities, operations, organizations, and the like in which elements of more than one military service of the same nation participates.”¹⁰⁷ Under this definition, essentially any multi-service organization is “joint” for purposes of reciprocal jurisdiction under RCM 201(e).¹⁰⁸

When the commander derives his court-martial convening authority from a source not specifically described in RCM 201(e), the “manifest injury” provision of RCM 201(e)(3)(B) is the best place for counsel to begin the argument for referring a case involving an accused from a sister service. “‘Manifest injury’ does not mean minor inconvenience or expense. Examples of manifest injury include direct and substantial effect on morale, discipline, or military operations, substantial expense or delay, or loss of essential witnesses.”¹⁰⁹ As joint operations become more common, the manifest injury to military justice caused by failing to take action as far forward as possible

95. Case #1 involves allegations of a crime that a convening authority would normally refer to a general, rather than special, court-martial. The discussion assumes that sovereign jurisdiction has been resolved in favor of the United States either by a status of forces agreement or other action or agreement by the host nation.

96. See generally *Egan*, 53 M.J. at 579-81.

97. UCMJ art. 17 (2000).

98. MCM, *supra* note 18, R.C.M. 201(e) analysis, app. 21, at A21-8 to -9.

99. *Id.* R.C.M. 201(e)(2)(A).

100. *Id.* R.C.M. 201(e)(2)(B).

101. *Id.* R.C.M. 201(e)(2)(C).

102. *Id.* R.C.M. 201(e)(3)(B).

103. See *id.* R.C.M. 201(e)(2)(C).

104. See *United States v. Egan*, 53 M.J. 570, 579 (Army Ct. Crim. App. 2000) (noting that military justice rules and regulations promulgated by a unified command, if properly written, may displace service-regulation rules and processing requirements).

105. See *KOSOVO OPERATIONS BOOK*, *supra* note 5, at 141.

becomes more obvious, and the argument for this exception will strengthen.

Although in practice the analysis probably stops with “manifest injury,” it should not. Joint commanders and judge advocates should not conclude that a court-martial convening authority cannot otherwise refer a case to court-martial. While noting the preference for a member of the same service as the accused to convene a court-martial, operational judge advocates should also note that a *preference* is not a *prohibition* to do otherwise.¹¹⁰ Contrary to the limiting specificity of RCM 201(e)(2) and RCM 201(e)(3)(B), the closing sentence of RCM 201(e)(3) contains the following very permissive language, which seems to make the specific provisions unnecessary: “[h]owever, failure to comply with this policy does not affect an otherwise valid referral.”¹¹¹ Joint commanders can and should take advantage of this provision to refer appropriate cases to courts-martial.

Others have taken a narrower position on this issue:

The comments, however, make it clear that such reciprocal jurisdiction is not to be utilized outside of the joint environment. “The rule and its guidance effectuate the congressional intent that reciprocal jurisdiction ordinarily not be exercised outside of joint commands or task forces.” This guidance

often presents problems for multi-service operations that are not actual joint commands or task forces. Issues arise, for example, in joint training where a member of one service is assigned to a training position under the command of another service. The usual practice is simply to return the member to his home unit for appropriate discipline, but this can be costly and inefficient.¹¹²

The statement that “[t]his guidance often presents problems for multi-service operations” seems to ignore not only the plain language of RCM 201(e)(3) and its discussion, but also the evolution of joint operations.

Joint policy also indicates a preference for, but does not dictate, same-service disposition of cases.

Matters that involve more than one service or that occur outside a military reservation but within the jurisdiction of the JFC [Joint Force Commander] may be handled either by the JFC or by the Service component commander unless withheld by the JFC. . . . Matters that involve only one Service, and occurring on the military reservation or within the military jurisdiction of that Service component, normally should be handled

106. Compare MCM, *supra* note 18, R.C.M. 201(e), with JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 223, 232 (12 Apr. 2001) [hereinafter JOINT PUB. 1-02]. *Joint Publication 1-02* defines the terms joint force commander and joint task force as follows:

[J]oint force commander—A general term applied to a combatant commander, subunified commander, or joint task force commander authorized to exercise combatant command (command authority) or operational control over a joint force. Also called JFC.

. . . .

[J]oint task force—A joint force that is constituted and so designated by the Secretary of Defense, a combatant commander, a subunified commander, or an existing joint task force commander. Also called JTF.

JOINT PUB. 1-02, *supra*, at 223, 232.

107. MCM, *supra* note 18, R.C.M. 103(13).

108. Note, however, that the MCM does not define the term “elements” used in its definition of “joint.” See *id.* R.C.M. 103 (definitions and rules of construction). Whether “elements” is meant only to refer to established units, to include provisional units, or to refer to individual service members, is unclear.

109. *Id.* R.C.M. 201(e) discussion.

110. See *id.* R.C.M. 201(e)(3). See generally *United States v. Egan*, 53 M.J. 570, 578-81 (Army Ct. Crim. App. 2000).

111. MCM, *supra* note 18, R.C.M. 201(e)(3). The analysis to this section states that

[RCM 201(e)] adds a clarification at the end of subsection (3) that a court-martial convened by a commander of a service different from the accused’s is not jurisdictionally defective nor is the service of which the convening authority is a member an issue in which the accused has a recognized interest.

Id. R.C.M. 201(e)(3) analysis, app. 21, at A21-8.

112. Major Grant Blowers, *Disciplining the Force—Jurisdictional Issues in the Joint and Total Force*, 42 A.F. L. REV. 1, 12 n.67 (1997) (quoting MCM, *supra* note 18, R.C.M. 201, cmt. (e)).

by the Service component commander, subject to Service regulations.¹¹³

Primary Jurisdiction

Note, however, that the use of the word “normally” recognizes that even in single-service violations, joint commanders have the ultimate decision as to whether they, or a service component commander, will administer NJP in any given circumstance.¹¹⁴

Administration of Nonjudicial Punishment

SITUATION—CASE #2:

The Chief of Staff catches you in the chow hall at breakfast and tells you to be in the General's office in thirty minutes to brief “the old man” on his options for dealing with “the four clowns they caught downtown last night.” Having no idea what he is talking about and trying to avoid the “deer in the headlights look,” you respond, “Roger, Sir. Thirty minutes.” You quickly leave the chow hall and discover that an Army specialist was caught drinking with a senior airman, a Marine corporal, and a Navy petty officer third class (all E-4s). Having drafted General Order #1 for BG Phightshard's signature, you are well aware that consuming alcohol is a violation of the order.

More often than not, breaches of discipline, such as described in the above scenario, are dealt with most appropriately at the Article 15 level. Given that these four individuals are the same grade and committed the same or similar misconduct, the commander's first inclination probably is to treat all four similarly. This proposition becomes difficult, however, as one explores the applicable NJP regulations. This section discusses the authority to conduct NJP within a multi-service organization, discusses which regulations to apply, compares and contrasts key features of military service NJP regulations, and closes with a discussion of how to address differences among these regulations.

Authority to impose NJP is a function of command. *Joint Publication (JP) 0-2* states that “[t]he JFC may impose nonjudicial punishment upon any military personnel of the command, unless such authority is limited or withheld by a superior commander.”¹¹⁵ The joint publication definition of JFC includes JTF commanders given command authority.¹¹⁶ Assuming that a superior commander has not withheld NJP authority, JTF commanders may impose NJP on offending service members who are “of the command.”¹¹⁷

Commanders of multi-service organizations not meeting the definition of “Joint Force” in *JP 1-02, Department of Defense Dictionary of Military and Associated Terms*, may still have NJP authority over members of their command regardless of service. Article 15, UCMJ, permits a commander to impose NJP upon “officers of his command [and] other personnel of his command.”¹¹⁸ Article 15 does not define the phrase “of his command,” but it is defined within service regulations. All three services define “of the command” in a fairly similar manner.¹¹⁹ Unlike the status definitions required for court-martial convening authorities,¹²⁰ all three services define “command” functionally for Article 15 purposes.¹²¹ As discussed previously, in establishing jurisdiction, the clearest indication that a service member is “of the command” is the order assigning him to a unit or the order assigning the unit to its higher command. Absent these orders, judge advocates may look to the “attendant circumstances” to determine if the service member is sufficiently associated with the command to warrant exercise of NJP authority.¹²² Although neither the Navy's *Manual of the Judge Advocate General (Navy Manual, or JAGMAN)* nor the Air Force Instruction (AFI) on NJP, *AFI 51-202*, specifically uses the term “attendant circumstances,” both fairly embrace the concept.¹²³

113. JOINT PUB. 0-2, *supra* note 30, at V-21.

114. *See Egan*, 53 M.J. at 578 (noting in dicta that the EUCOM directive, mirroring language found in *Joint Publication 0-2*, did not prohibit referral of charges by another service).

115. JOINT PUB. 0-2, *supra* note 30, at V-21.

116. JOINT PUB. 1-02, *supra* note 106, at 223.

117. UCMJ art. 15(b) (2000).

118. *Id.* art. 15(b)(2).

119. *Compare* AR 27-10, *supra* note 23, para. 3-8, with JAGMAN, *supra* note 23, § 0107a(1), and AFI 51-202, *supra* note 23, paras. 2.3, 2.3.1.

120. *See* UCMJ arts. 22-24.

121. JAGMAN, *supra* note 23, § 0107a(1); AFI 51-202, *supra* note 23, para. 2.3.1; AR 27-10, *supra* note 23, para. 3-7.

122. AR 27-10, *supra* note 23, para. 3-8a(3). *See supra* note 61 (stating this provision).

A sub-issue to the determination of whether a service member is “of the command” in a multi-service organization is concurrent jurisdiction. Both the *Navy Manual* and *AFI 51-202* recognize that, under certain circumstances, a service member may be concurrently subject to the NJP authority of more than one commander who are not part of the same chain of command.¹²⁴ Although *AR 27-10* does not specifically address concurrent NJP jurisdiction, its definition of “of the command” leaves this possibility open. The *Navy Manual* and *AFI 51-202* both use the example of a service member’s parent and host units having concurrent NJP authority when a service member is attached to another unit for temporary duty. Thus, it is possible for commanders of different services to have NJP authority simultaneously over a service member. While a commander is not required to coordinate with or provide notification to another commander with whom he shares NJP jurisdiction, commanders should do so to avoid the possibility of the other chain of command dismantling the NJP administratively.

For quite some time, Army and Naval regulations have recognized the authority of other services over their members when they are assigned to multi-service organizations. These regulations designate the authority to administer NJP very broadly. Rather than limiting NJP authority to joint, unified, or JTF commanders as *JP 1-02* defines them, *AR 27-10* and the *Navy Manual* use the more inclusive term “multi-service” commander.¹²⁵ By using this broad term, these regulations authorize multi-service unit commanders to exercise NJP authority over Army and Naval service members “of the command” in the multi-service units, even though the unit does not meet *JP 1-02*’s definition of joint command, unified command, or JTF.

Recent changes to *AFI 51-202* expanded the Air Force’s definition of “commander.”¹²⁶ Until this change, the definition included only Air Force officers, and it arguably precluded commanders of other services from exercising NJP authority over Air Force members unless those members were assigned

123. See *JAGMAN*, *supra* note 23, § 0107(a)(1); *AFI 51-202*, *supra* note 23, para. 2.3.1. The *JAGMAN* uses the terms “of the command” and “of the unit” to describe the required command relationship, and states simply, “A member is ‘of the command,’ or ‘of the unit,’ if assigned or attached thereto.” *JAGMAN*, *supra* note 23, § 0107(a)(1). *Air Force Instruction 51-202* uses the term “members of their command” analogously to “of the command,” and states that “a member need not be attached on TDY [temporary duty] orders for the commander to exercise NJP authority if the commander exercises the usual responsibilities of command over the member.” *AFI 51-202*, *supra* note 23, para. 2.3.1.

124. See *JAGMAN*, *supra* note 23, § 0107(a)(1); *AFI 51-202*, *supra* note 23, para. 2.3.1. Section 0107(a)(1) of the *Navy Manual* states that

[a] member may be “of the command,” or “of the unit,” of more than one command or unit at the same time and, consequently, be subject to the nonjudicial punishment authority of both commanders. For example, members assigned to or attached to commands or units for the purpose of performing temporary duty (TDY) are subject to the nonjudicial punishment authority of the commanders of both the parent and TDY commands. Similarly, members assigned or attached to a detachment under the operational control of another command or unit by virtue of operational orders, or other authorized means, are subject to the nonjudicial punishment authority of the commanders of both the parent and supported units.

JAGMAN, *supra* note 23, § 0107(a)(1). *Air Force Instruction 51-202* states that

[a] member need not be attached on TDY orders for the commander to exercise NJP authority if the commander exercises the usual responsibilities of command over the member. A TDY commander has concurrent authority with the commander of the member’s element or organization of permanent assignment.

AFI 51-202, *supra* note 23, para. 2.3.1.

125. Compare *AR 27-10*, *supra* note 23, para. 3-7b, and *JAGMAN*, *supra* note 23, § 106d, with *JOINT PUB. 1-02*, *supra* note 106, at 223, 232. *Army Regulation 27-10* states that

[a] multi-service commander or officer in charge, to whose command members of the Army are assigned or attached, may impose nonjudicial punishment upon such soldiers. A multi-service commander or officer in charge, alternatively, may designate one or more Army units, and shall for each such Army unit designate an Army commissioned or warrant officer as commanding officer for the administration of discipline under Article 15, UCMJ A multi-service commander or officer in charge, when imposing nonjudicial punishment upon a military member of their command, shall apply the provisions of this regulation.

AR 27-10, *supra* note 23, para. 3-7b. Section 106(d) of the *Navy Manual* states that

[a] multi-service commander or officer in charge to whose staff, command or unit members of the naval service are assigned may impose nonjudicial punishment upon such individuals. A multi-service commander, alternatively, may designate one or more naval units, and shall for each such naval unit designate a commissioned officer of the naval service as commanding officer for the administration of discipline under article 15, UCMJ. A copy of any such designation by the commander of a multi-service command shall be furnished to the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, and to the Judge Advocate General.

JAGMAN, *supra* note 23, § 106d.

126. See *AFI 51-202*, *supra* note 23, para. 2.2.

to a joint or unified billet.¹²⁷ The revised Air Force definition of commander includes both “joint force commanders” and “multi-service commanders in combined commands, combined task forces and activities outside the Air Force.”¹²⁸ The use of the term “multi-service commander” overtly recognizes non-Air Force commanders’ NJP authority over Air Force members.¹²⁹ In addition, *AFI 51-202* expansively defines the phrase “activities outside the Air Force” to include, apparently, even very small units to which Air Force personnel are attached or assigned.¹³⁰ To ensure NJP coverage for Air Force members, *AFI 51-202* gives the 11th Wing Commander, Bolling AFB, Washington D.C., concurrent jurisdiction over Air Force personnel assigned to any “activity outside the Air Force.”¹³¹ The AFI also reminds multi-service commanders to ensure that they have “command authority” over any offending member of the Air Force before they initiate NJP.¹³² Although *AFI 51-202* does not define “command authority,” the context implies and the intent when written was synonymous use with the phrase “of the command.”¹³³

Applicable NJP Regulation

Presuming a service member is “of the command” for NJP, the next issue is what regulations or guidance on NJP applies in

a joint setting. The UCMJ and *MCM* are joint by their very nature. Article 15, UCMJ, and *MCM*, Part V, apply to all service members.¹³⁴ Beyond this guidance, however, no joint NJP regulations exist.

The UCMJ and *MCM* both allow the Service Secretaries to promulgate regulations that limit or implement their NJP provisions.¹³⁵ With this authority, the Secretaries have implemented such regulations, with some striking differences. This challenges judge advocates supporting multi-service operations to become sufficiently familiar with the other services’ regulations to advise their joint commanders appropriately and to administer NJP properly.

To help resolve the issue of what NJP rules apply in a joint setting, the Army and Air Force regulations echo *JP 0-2*’s guidance by requiring application of “the regulations of the offender’s Service when conducting [NJP] proceedings, including punishment, suspension, mitigation, and filing.”¹³⁶ The Navy is silent on this point; however, one reaches the same conclusion following the guidance in *JP 0-2*.

As mentioned earlier, commanders can address NJP in a joint setting simply by returning violators home to their units. Although a weak approach from a standpoint of unit discipline,

127. See U.S. DEP’T OF AIR FORCE, INSTR. 51-202 NONJUDICIAL PUNISHMENT para. 2.2 (1 Oct. 1996) [hereinafter *AFI 51-202*, 1996 edition], available at <http://afpubs.hq.af.mil/pubfiles/af/51/afi51-202.pdf>. Although the 1996 edition of *AFI 51-202* did not define joint commander specifically, one could derive an exclusionary definition from the context of its use. As seen below, the section was entitled “NJP Authority in Joint or Unified Commands,” and the language used in the section mirrors that found in *JP 1-02*. In addition, the manner the 1996 edition of *AFI 51-202* used the term “joint or unified commander” appeared to contemplate only *JP 1-02*’s use of the terms, thereby excluding commanders of multi-service units not specifically characterized as joint or unified. Cf. *JOINT PUB. 1-02*, *supra* note 106, at 223, 232. The following is the previous AFI language:

NJP Authority in Joint or Unified Commands. The commander of a joint command, unified command, or joint task force is responsible for discipline in the command. The joint or unified commander should normally exercise disciplinary authority through the Air Force component commander or the SAFO [senior Air Force officer] to the extent practicable. The joint or unified commander may impose NJP on Air Force members of that command, regardless of the commander’s parent service, unless such authority is withheld by a superior commander. The joint or unified commander will follow this instruction when imposing nonjudicial punishment on Air Force members. Matters that involve more than one service or that occur outside a military reservation but within the joint or unified commander’s jurisdiction may be handled by the joint or unified commander, the Air Force component commander, or the SAFO, unless withheld by the joint or unified commander. Matters that involve only one service, and occurring on a military reservation or within the military jurisdiction of the Air Force, normally should be handled by the Air Force component commander or the SAFO, subject to this instruction. [See *JOINT PUB. 0-2*, *supra* note 30]. When NJP appears warranted, the joint commander coordinates with the SAFO or commander of the appropriate Air Force element before taking action. If the joint commander decides not to take action, but NJP still appears warranted, the SAFO or Air Force element commander takes action. If the joint commander decides to impose NJP, the SAFO or commander of the element immediately notifies the servicing Air Force [SJA].

AFI 51-202, 1996 edition, *supra*, para. 2.2.

128. *AFI 51-202*, *supra* note 23, paras. 2.2.9 to .10.

129. See *id.* para. 2.2.10 (“The multi-service commander must be an officer in the U.S. Armed Forces.”).

130. *Id.* atch. 1 (Glossary of References and Supporting Information).

131. *Id.* para. 2.2.6.

132. *Id.* para. 2.6.

133. Telephone Interview with Major Dave Kendrick, Chief of Policy & Precedents, Air Force Legal Services Agency, Military Justice Section (May 7, 2002).

134. See generally UCMJ art. 15 (2000); *MCM*, *supra* note 18, pt. V (describing NJP procedures).

135. See UCMJ art. 15(a); *MCM*, *supra* note 18, pt. V, ¶ 2a.

the benefit to this approach is case management, especially during short-term deployments that stretch time and resources to their limits. While easy to administer, this approach has several problems. First, it simply shuffles a problem onto someone else's desk. As the length of a deployment increases, this approach becomes less appealing. Second, returning problem soldiers to garrison may incite morale or discipline problems as troops quickly learn that committing a minor disciplinary infraction may be a ticket home.¹³⁷ Another obvious problem with this approach is that as the distance from the offender and the situs of his crime or disciplinary infraction increases, the more problematic it becomes to prove the case. The cost/benefit analysis undertaken by commanders in garrison may lead them to not take action. Unfortunately, this approach seems to be a common solution.

An alternate approach is to allow the offender's service to administer NJP. This can be done by authorizing service component commanders to administer NJP to members of their service regardless of where those members are assigned. The benefit to this approach is that it helps ensure expertise in the application of service regulations, which minimizes the potential for administrative errors that may later affect the Article 15.

Joint Publication 0-2 and all of the service regulations have provisions for allowing a senior member of a service in a multi-service unit to exercise administrative and NJP authority over members of their respective service.¹³⁸ *Joint Publication 0-2* states that "a combatant commander may prescribe procedures by which a senior officer of a Service assigned to the headquar-

ters element of a joint organization may exercise administrative and nonjudicial punishment authority over personnel of the same Service."¹³⁹ *Air Force Instruction 51-202* addresses this issue by defining the "senior Air Force officer in the headquarters staff organization of a unified command, subordinate unified command, joint task force, combined command, or combined task force [or activity outside the Air Force]" as a commander, regardless of whether they actually occupy a command billet.¹⁴⁰ As mentioned above, *AR 27-10* and the *Navy Manual* allow multi-service commanders to designate a senior Army or Naval officer, respectively, for administration of NJP to members of their service within the command, as long as certain notice provisions are met.¹⁴¹ *Air Force Instruction 51-202* also recognizes this authority, but has no notice requirement.¹⁴²

Finally, a multi-service commander may choose to process the NJP action within the service member's operational chain of command. The servicing judge advocate and their staff need to apply the service member's own regulation to process these NJP actions properly. Only one service regulation mandates that the multi-service commander consult with a servicing SJA. *Air Force Instruction 51-202* requires a multi-service commander to coordinate with the servicing Air Force SJA when the commander is considering an Air Force member for NJP. The practical reason for this consultation is to ensure that the commander understands Air Force policies and NJP procedures.¹⁴³ Although not required by Army and Naval regulations, all judge advocates should coordinate with sister service judge advocates when undertaking cross-service NJP.

136. JOINT PUB. 0-2, *supra* note 30, at V-21. Cf. AR 27-10, *supra* note 23, paras. 3-7b, 3-8c; AFI 51-202, *supra* note 23, para. 2.4.2. *Army Regulation 27-10* states that

[a] multi-service commander or officer in charge, when imposing nonjudicial punishment upon a military member of their command, shall apply the provisions of this regulation. . . . Other provisions of [AR 27-10] notwithstanding, an Army commander may impose punishment upon a member of another service only under the circumstances, and according to the procedures prescribed by the member's parent service.

AR 27-10, *supra* note 23, paras. 3-7b, 3-8c.

137. Blowers, *supra* note 112, at 12 n.67.

138. See JOINT PUB. 0-2, *supra* note 30, at V-20; AR 27-10, *supra* note 23, para. 3-7b; JAGMAN, *supra* note 23, § 0106d; AFI 51-202, *supra* note 23, para. 2.2.5.

139. JOINT PUB. 0-2, *supra* note 30, at V-20.

140. AFI 51-202, *supra* note 23, para. 2.2.5.

141. See AR 27-10, *supra* note 23, para. 3-7b; JAGMAN, *supra* note 23, § 0106d. *Army Regulation 27-10* states that

[a] multi-service commander or officer in charge, alternatively, may designate one or more Army units, and shall for each such Army unit designate an Army commissioned or warrant officer as commanding officer for the administration of discipline under Article 15, UCMJ. A copy of such designation shall be furnished to Criminal Law Division, The Judge Advocate General

AR 27-10, *supra* note 23, para. 3-7b. Section 0106d of the *Navy Manual* states that

[a] multi-service commander, alternatively, may designate one or more naval units, and shall for each such naval unit designate a commissioned officer of the naval service as commanding officer for the administration of discipline under article 15, UCMJ. A copy of any such designation by the commander of a multi-service command shall be furnished to the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, and to the Judge Advocate General.

JAGMAN, *supra* note 23, § 0106d.

142. AFI 51-202, *supra* note 23, paras. 2.7-2.7.2 (requiring only the filing of the original delegation letter with the servicing SJA).

Comparing the Service Regulations

Part of determining how to process an incident of minor misconduct in a joint environment is the overarching problem of how to achieve an atmosphere of equity. As indicated above, commanders must apply the service regulation of the accused, and these regulations approach NJP differently. To ensure that multi-service commanders understand that blind application of a member's regulation can lead to disparate results, judge advocates should advise these commanders of the differences among the service regulations.

Standard of Proof

The standard of proof required is the most fundamental difference among Army, Navy, and Air Force NJP regulations. The *Navy Manual* requires proof by a preponderance of the evidence, while *AR 27-10* requires, and *AFI 51-202* appears to require, proof beyond a reasonable doubt.¹⁴⁴ Neither standard is wrong; however, this variance highlights a fundamental difference in the services' philosophical approach to NJP. The Army and Air Force base their standard upon the potential for the action to end up at court-martial, while the Navy bases its standard upon the fact that NJP is administrative in nature. This difference affects how commanders from the different services approach and use NJP. It also affects how members of the different services perceive NJP. Commanders must be cognizant

of this basic difference when considering NJP for members of another service.

Right to Counsel

Another difference among regulations is the treatment accorded an alleged offender's right to counsel. In contrast to the Army and Air Force, the Navy and Marine Corps do not recognize a right to legal advice by counsel before Article 15 proceedings.¹⁴⁵ Note, however, that the *Navy Manual* does not permit the entry of an NJP result into a service record unless the service member was given the opportunity to consult with counsel or waived that right in writing.¹⁴⁶ Consultation with counsel before the imposition of NJP on a Naval service member involves only a basic explanation of rights, and it does not include advice on the merits of the action.¹⁴⁷ Again, neither approach is wrong; rather, this variance reflects the services' differing philosophical approaches to this administrative disciplinary function.

Additionally, *AFI 51-202* addresses requests for individual military counsel (IMC) in the NJP setting. Although it creates no right to an IMC, the instruction creates a processing requirement if the Air Force member asserts an attorney-client relationship with a military defense counsel other than his detailed military defense counsel. While this does not create a disparate treatment issue, such requests from airmen must be processed in accordance with *AFI 51-202*.¹⁴⁸

143. See *id.* paras. 2.5.1, 2.6.

144. Compare JAGMAN, *supra* note 23, § 0110b (“[The] standard of proof by which facts must be established at mast or office hours is a ‘preponderance of the evidence,’ rather than ‘beyond a reasonable doubt,’ as it is at courts-martial.”), with *AR 27-10*, *supra* note 23, para. 3-181 (“Punishment will not be imposed unless the commander is convinced beyond a reasonable doubt . . . that the soldier committed the offense(s).”), and *AFI 51-202*, *supra* note 23, para. 3-4. The AFI states:

While no specific standard of proof applies to NJP proceedings . . . an alleged offender is entitled to demand trial by court-martial, in which case proof beyond a reasonable doubt of each element of every offense by legal and competent evidence is a prerequisite to conviction. . . . If such proof is lacking, NJP action is usually not warranted.

AFI 51-202, *supra* note 23, para. 3-4.

145. Compare *AR 27-10*, *supra* note 23, para. 3-18c (“The soldier will be informed of the right to consult with counsel and the location of counsel.”); and *AFI 51-202*, *supra* note 23, para. 3.12.2, with JAGMAN, *supra* note 23, § 0109a. The *Navy Manual* states:

There is no right for an accused to consult with counsel prior to nonjudicial punishment; however, commanding officers are encouraged to permit accused to so consult Failure to provide the opportunity for an accused to consult with counsel prior to nonjudicial punishment does not preclude the imposition of nonjudicial punishment; it merely precludes the admissibility of the record of nonjudicial punishment in aggravation at a later court-martial

JAGMAN, *supra* note 23, § 0109a (emphasis added).

146. JAGMAN, *supra* note 23, § 0109e(1). Note that JAGMAN appendix A-1-d can be used to record NJP proceedings. See generally *id.* app. A-1-d.

147. *Id.* § 0109d(2).

Such advice to an accused from a military lawyer shall be limited to an explanation of the legal ramifications involved in the right to refuse captain's mast/office hours. These legal ramifications are limited to areas such as: the accused's substantive and procedural rights at a court-martial as opposed to captain's mast/office hours; the respective punishment limitations; and the potential uses of courts-martial convictions and captain's mast/office hours records at any subsequent trial by court-martial.

Id.

Right to Demand Trial by Court-Martial

The *Navy Manual* states that “[a] person in the Navy or Marine Corps who is attached to or embarked in a vessel does not have the right to demand trial by court-martial in lieu of nonjudicial punishment.”¹⁴⁹ Although this provision indicates that only Naval and Marine personnel lose the right to demand trial by court-martial when embarked, Article 15 itself makes no such distinction.¹⁵⁰ No member of any service may demand trial by court-martial in lieu of NJP while embarked in a vessel, regardless of the service of the officer offering the NJP. Surprisingly, *AR 27-10* makes note of this provision of Article 15,¹⁵¹ while *AFI 51-202* is silent on this issue. Even if a service regulation contradicted this provision, the UCMJ, enacted by Congress, would take precedence.

Punishment

In addition to these procedural differences, each Service Secretary has taken advantage of their authority to further limit the “kind and amount of punishment authorized” by Article 15.¹⁵² Appendix A to this article presents the *MCM*’s punishment limitations¹⁵³ in a chart format. Appendices B-D chart the punishment limitations found in service regulations,¹⁵⁴ discussed below.

UCMJ Article 15 Restrictions on Punishment

Article 15 itself sets up the basic split in punishment authority over enlisted members between company-grade and field-grade commanding officers. Army and Naval regulations retain this split in authority,¹⁵⁵ while the Air Force divides it fur-

ther. The Air Force distinguishes commanders in the rank of major from higher-ranking officers to address specifically their ability to reduce enlisted soldiers.¹⁵⁶ Officers in charge (OICs) may also have Article 15 punishment authority, up to the maximum allowed for a company-grade commander, if their Service Secretary has provided them with this authority under service regulations.¹⁵⁷

The maximum punishment authority established in Article 15 and the *MCM* for company-grade commanders is a reprimand, confinement on bread and water for three days (if attached to or embarked in a vessel), seven days’ correctional custody, fourteen days’ restriction, fourteen days’ extra duty, forfeiture of seven days’ pay, reduction in rank of one pay grade—if within the imposing officer’s promotion authority, and detention of pay¹⁵⁸ for fourteen days.¹⁵⁹ Article 15 gives field-grade and general officers greater punishment authority, but limits them to imposing a reprimand, confinement on bread and water for three days (if attached to or embarked in a vessel), thirty days’ correctional custody, forty-five days’ restriction, forty-five days’ extra duty, forfeiture of thirty days’ pay, reduction in rank to the lowest enlisted pay grade—if within the imposing officer’s promotion authority (enlisted members, E-5 and above, however, may not be reduced more than one pay grade), and detention of one-half pay for three months.¹⁶⁰

Summarized Article 15

The Army is the only service that includes within its regulations the very limited form of NJP called a “summarized” Article 15.¹⁶¹ Summarized Article 15s are recorded on a form different from those used with formal Article 15s,¹⁶² and the

148. See *AFI 51-202*, *supra* note 23, para. 3.12.2.

149. *JAGMAN*, *supra* note 23, § 0108c.

150. See UCMJ art. 15 (2000). “However, except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment.” *Id.* (emphasis added).

151. See *AR 27-10*, *supra* note 23, para. 3-18d.

152. UCMJ art. 15(a).

153. See *MCM*, *supra* note 18, pt. V, ¶ 5; UCMJ art. 15.

154. See *AR 27-10*, *supra* note 23, tbl. 3-1; *AFI 51-202*, *supra* note 23, tbls. 3.1-3.2; BRENT G. FILBERT & ALAN G. KAUFMAN, *NAVAL LAW—JUSTICE AND PROCEDURE IN THE SEA SERVICES* 66 (3d ed. 1998). See generally *AR 27-10*, *supra* note 23, ch. 3; *JAGMAN*, *supra* note 23, § 0111; *AFI 51-202*, *supra* note 23, para. 3.17.

155. See *AR 27-10*, *supra* note 23, para. 3-19 and tbl. 3-1; *JAGMAN*, *supra* note 23, § 0111.

156. *AFI 51-202*, *supra* note 23, tbl. 3.1.

157. UCMJ art. 15(c).

158. Although authorized by Article 15 and the *MCM*, see, e.g., *id.* art. 15(b)(2), none of the service regulations have provisions for the detention of pay.

159. *Id.* art. 15(b)(2); *MCM*, *supra* note 18, pt. V, ¶ 5.

160. UCMJ art. 15(b)(2)(H).

maximum punishment a commander can impose is a reprimand, fourteen days' restriction, and fourteen days' extra duty. In addition, *AR 27-10* designs summarized Article 15s as purely local actions, with no means of filing the documentation in a service member's official records. Because of the limited nature of the punishment, service members offered summarized Article 15 procedures have no right to advice of counsel.¹⁶³

Confinement on Bread and Water (if Attached to or Embarked in a Vessel)

Although Article 15 and the *MCM* do not place rank restrictions on the punishment of confinement on bread and water, each military service does restrict the use of this punishment. Both the Navy and Army limit confinement on bread and water to grades E-3 and below, whereas the Air Force disallows the punishment altogether.¹⁶⁴ An Army Ranger, private first class, involved in some minor misconduct while living aboard an aircraft carrier that his company was using as a staging base, might be surprised to discover that if subjected to NJP proceedings, he could not demand trial by court-martial,¹⁶⁵ and either the Ranger company commander or the ship's captain could confine him on bread and water for up to three days.¹⁶⁶

Correctional Custody, Restriction, and Extra Duty

None of the services further limit the maximum duration of correctional custody commanders and OICs may impose;¹⁶⁷ however, the Army and Navy have emplaced restrictions based

upon the rank of the offender. Army and Naval regulations only permit correctional custody of service members in grades E-3 or below, or of those that have an unsuspended reduction to E-3 or below.¹⁶⁸ The Air Force does not have a similar rank or grade limitation.

None of the services further limit the maximum punishment under the *MCM* that commanders and OICs may impose for restriction to limits with or without suspension of duty. Therefore, company-grade commanders and OICs may impose up to fourteen days, and commanders in grades O-4 and above may impose up to sixty days, of either form of restriction.¹⁶⁹

Neither the Army nor Air Force impose hour limitations on the performance of extra duty, but with recent changes to *AFI 51-202*, both now limit the type of extra duty service members may perform.¹⁷⁰ The Navy and Marine Corps have the most restrictive extra duty limitations: no extra duty on Sunday, and "normally" limiting extra duty to two hours per day.¹⁷¹

Reduction in Rate or Grade

The *Navy Manual* appears to give all commanders, regardless of rank, the same general reduction authority;¹⁷² however, other sources limit the reduction authority of commanding officers to ranks within their promotional authority.¹⁷³ In addition, commanders cannot reduce Navy enlisted members in grades E-7 and above and Marine Corps enlisted members in grades E-6 and above at Article 15 proceedings. The major difference is that, unlike the other services, the *Navy Manual* only permits a reduction of one grade, regardless of the offender's

161. See generally *AR 27-10*, *supra* note 23, para. 3-16.

162. The Army uses Department of the Army (DA) Form 2627 to record formal Article 15 proceedings, and uses DA Form 2627-1 to record summarized Article 15 proceedings. See U.S. Dep't of Army, DA Form 2627, Record of Proceedings Under Article 15, UCMJ (Aug. 1984); U.S. Dep't of Army, DA Form 2627-1, Summarized Record of Proceedings Under Article 15, UCMJ (Aug. 1984).

163. *AR 27-10*, *supra* note 23, para. 3-16c(2).

164. Compare *id.* para. 3-19b(2), and JAGMAN, *supra* note 23, § 0111c, with *AFI 51-202*, *supra* note 23, tbl. 3.1 n.3.

165. UCMJ art. 15(a).

166. See *AR 27-10*, *supra* note 23, para. 3-19b(2).

167. Company-grade commanders and OICs may impose up to seven days, and commanders in grades O-4 and above may impose up to thirty days' correctional custody. *MCM*, *supra* note 18, pt. V, ¶ 5.

168. *AR 27-10*, *supra* note 23, para. 3-19b(1); JAGMAN, *supra* note 23, § 0111b.

169. *MCM*, *supra* note 18, pt. V, ¶ 5.

170. See *AR 27-10*, *supra* note 23, para. 3-19b(5); *AFI 51-202*, *supra* note 23, para. 3.17.4.

171. JAGMAN, *supra* note 23, § 0111d.

172. *Id.* § 0111e.

173. See U.S. DEP'T OF NAVY, NAVAL PERSONNEL MANUAL art. 1450-010 (Jan. 2002), available at https://buperscd.technology.navy.mil/bup_updt/upd_CD/BUPERS/MILPERS/Milpers.pdf; U.S. MARINE CORPS, ORDER P1400.32C, MARINE CORPS PROMOTION MANUAL, vol. 2, Enlisted Promotions paras. 1200, 7001 (30 Oct. 2000), available at <http://www.usmc.mil/directiv.nsf>.

grade.¹⁷⁴ Both Army and Air Force regulations permit field-grade commanders and OICs to reduce enlisted members, grades E-4 and below, by more than one grade.¹⁷⁵

Army Regulation 27-10 permits company-grade commanding officers to reduce by one grade any service member holding an enlisted rank within the commanding officer's general promotion authority.¹⁷⁶ On the other hand, Army regulations restrict officers in the field from reducing enlisted members in grades E-7 and above because these members are not within their promotion authority.¹⁷⁷

Air Force Instructions generally do not tie reduction authority to promotion authority. *Air Force Instruction 51-202* limits the reduction authority of company-grade commanders to grades E-5 and below. The instruction also limits the reduction authority of field-grade officers: commanders in the rank of major may reduce grades E-6 and below, and commanders in the rank of lieutenant colonel or above may reduce grades E-7 and below. Only the Air Force permits reduction of enlisted members in grades E-8 and E-9. While denying Article 15 authority over those in grades E-8 and E-9 to commanders below the rank of lieutenant colonel, *AFI 51-202* permits commanders of major commands, combatant commanders, and officers delegated with the corresponding promotion authority to reduce these senior enlisted grades.¹⁷⁸

An important point for commanders of multi-service units in exercising NJP authority is that the reduction in grade authority refers to the commander's authority to promote others of similar rank, not necessarily their authority to promote the individual being subjected to NJP.¹⁷⁹

The differences in service regulations lead to a major discrepancy in authority to reduce when administering NJP.

Applying individual service regulations to the appropriate service member, an O-5 commander of a multi-service unit may reduce an E-6 from any branch other than the Marine Corps, but may only reduce an E-7 belonging to the Air Force. This potential disparate treatment may create a perception of unfairness among the troops assigned to a multi-service unit. While commanders must follow individual service regulations when administering NJP, to avoid creating an environment in which members from different services feel they are being treated unfairly, commanders should take into consideration the differences in available punishment power. A basic tenet of military justice is that punishment should be tailored to fit both the misconduct and the offender. This tenet allows commanders great latitude when fashioning appropriate punishment; however, judge advocates should ensure that commanders exercise this authority fully cognizant that their authority varies by service.

Discussion—CASE #2: Violation of JTF BU General Order #1. After considering all of the service specific punishment parameters, the JTF Commander might choose to level the punishment “playing field” by withholding reduction authority for reductions of more than one grade. Assuming the specialist was not offered summarized treatment, this would mean that all four service members would be at risk of losing only one grade.

Alternatively, the JTF Commander might withhold NJP authority altogether to equalize treatment. The one area the JTF Commander cannot equalize is the sailor's inability to refuse NJP.

Withholding authority to the JTF Commander's level, however, raises the next issue—appellate authority.

174. JAGMAN, *supra* note 23, § 0111e.

175. AR 27-10, *supra* note 23, paras. 3-19b(6), 3-26, tbl. 3-1; AFI 51-202, *supra* note 23, tbl. 3-1.

176. AR 27-10, *supra* note 23, para. 3-19b(6)(a); *see also* U.S. DEP'T OF ARMY, REG. 600-8-19, ENLISTED PROMOTIONS AND REDUCTIONS (2 Oct. 2000) [hereinafter AR 600-8-19].

177. Promotion to E-7 is at the DA level. *See* AR 600-8-19, *supra* note 176, para. 1-7.

178. AFI 51-202, *supra* note 23, tbl. 3.1.

179. FILBERT & KAUFMAN, *supra* note 154, at 66.

Appellate Authority

Joint Publication 0-2 gives the following guidance regarding NJP appeals: “[A]ppeals and other actions involving review of nonjudicial punishment imposed by a JFC will follow the appropriate regulations of the offender’s Service.”¹⁸⁰

Army Regulation 27-10 directs Army commanders to follow the service regulation of the offender’s service to determine the appellate process and the “next superior” authority for purposes of appeal.¹⁸¹ With regard to an appeal by an Army service member, *AR 27-10* permits a “next superior” commander to process the appeal *only* if the commander has an Army judge advocate assigned to him or his higher headquarters.¹⁸²

Although *AFI 51-202* does not direct Air Force officers imposing NJP on members of other services to use the offending service member’s service regulation for appeals, logic dictates that they do so. Furthermore, unlike the previous version of *AFI 51-202*, the new version does not direct multi-service commanders imposing NJP on Air Force members to process NJP appeals of those members through Air Force chains of command. The instruction now directs appeals from NJP imposed by a JFC, including an Air Force officer acting in that capacity, to follow the chain of command within the “joint” or “multi-service” unit chain of command.¹⁸³

In a joint service environment, the *Navy Manual* separates NJP appeals by Navy personnel from appeals by Marine Corps personnel; however, it directs both to a general court-martial convening authority.¹⁸⁴ Note, however, that the imposition of

NJP by a Naval officer designated as a commander for purposes of NJP administration is an exception to this general rule. In this limited exception, the service member directs his appeal to the multi-service commander who made the designation, if the multi-service commander made himself the appellate authority. When dividing NJP authority, establishing provisional units to aid in the administration of justice, or both, judge advocates should consider this as a method of keeping the appellate authority within the multi-service unit chain of command.

Filing Determinations

Each military service maintains its own system of records and system for filing NJP actions. *Joint Publication 0-2* instructs that “the JFC will use the regulations of the offender’s Service when conducting nonjudicial punishment proceedings, including punishment, suspension, mitigation, and filing.”¹⁸⁵ *Army Regulation 27-10* echoes this instruction.¹⁸⁶

To record NJP actions, the Army uses DA Form 2627 for formal Article 15s and DA Form 2627-1 for summarized proceedings, the Air Force uses AF Form 3070, and the Navy and Marine Corps use *JAGMAN* appendix A-1-d. The Army requires filing of all DA Forms 2627: for soldiers below the grade of E-5, DA Forms 2627 are filed for two years in the soldier’s local file; for all other soldiers, DA Forms 2627 are filed permanently, either in the performance or restricted portion of the service member’s Official Military Personnel File.¹⁸⁷

180. JOINT PUB. 0-2, *supra* note 30, at V-21. The section notes an exception to this general practice when the combatant commander takes action: “When the combatant commander personally imposes nonjudicial punishment, or is otherwise disqualified from being the appellate authority, appeals will be forwarded to the Chairman of the Joint Chiefs of Staff for appropriate action by the Secretary of Defense or his designee.” *Id.*

181. *AR 27-10*, *supra* note 23, para. 3-30d.

When an Army commander imposes nonjudicial punishment on a member of another service, the authority “next superior” shall be the authority prescribed by the member’s parent service. (See *JAGMAN* 0117 for Navy and Marine Corps personnel, paragraph 7.1.4, *AFI 51-202* for Air Force personnel, and *MJM*, Article 1-E-11(d) for Coast Guard personnel.) Other provisions of this regulation notwithstanding, an appeal by such member will be processed according to procedures contained in the governing regulation of the member’s parent service.

Id.

182. *Id.* para. 3-30e.

When a commander of another service imposes nonjudicial punishment upon a soldier, the authority “next superior” need not be an Army officer or warrant officer. However, the “next superior” commander for purposes of appeals processed under this regulation must have an Army JA [judge advocate] assigned to the commander’s staff or the staff of the commander’s supporting headquarters. When acting on the soldier’s appeal, the Army JA will advise the commander on the appellate procedures prescribed by [*AR 27-10*] and will advise the other than Army commander to ensure compliance with paragraph 3-34 of [*AR 27-10*].

Id.

183. *AFI 51-202*, *supra* note 23, paras. 4.2.8-9.

184. *JAGMAN*, *supra* note 23, § 0117.

185. JOINT PUB. 0-2, *supra* note 30, at V-21.

186. *AR 27-10*, *supra* note 23, para. 3-6c.

The Air Force maintains a separate system of selection records for officers and enlisted members in the grade of master sergeant and above. The imposing official can file an NJP record in the offender's selection file, but is not required to do so. To do this, however, the imposing commander must serve the offender with a notification letter at the time the commander imposes punishment.¹⁸⁸ The final filing decision is made after the resolution of any appeal.¹⁸⁹ The letter, along with the Article 15 documentation, is then forwarded to the GCMCA's SJA for a legal review and subsequent forwarding to the appropriate records custodian.¹⁹⁰

To "file" the imposition of NJP for Navy or Marine Corps personnel, a separate annotation must be made in the member's service record. This annotation is made on "Page 13" for Navy personnel, and on "Page 12" for Marines.¹⁹¹

Addressing Service Differences

Judge advocates can handle the differences in NJP among the services in three basic ways: (1) let service-specific commanders impose NJP with the advice of judge advocates from their own service; (2) let service-specific judge advocates provide advice to joint commanders regarding NJP actions against members of their service; and (3) ensure that judge advocates deployed in support of joint commanders are thoroughly cross-trained in the other service's NJP regulations. The first method is certainly the least difficult for deployed judge advocates to support, and although the second method may prove easier than the third, the second method will almost certainly inhibit the trust and confidence the joint commander places in his supporting judge advocate.

As introduced in the vignette discussion above, the multi-service commander has several options he may use to level the punishment playing field in a joint environment. Another option to withholding punishment authority or withholding jurisdiction altogether is for the commander to allow his lower-

level commanders to administer NJP, and then he can adjust punishments at the appellate level if necessary, and if requested. The problem with this option is that it does not address the standard of proof variance among the service regulations. Due to the *Navy Manual's* lower requisite standard of proof, Navy and Marine Corps personnel can be found guilty of an offense for which Army and Air Force personnel, based on the same evidence, are found not guilty.¹⁹²

The dilemma for commanders is whether to allow services to mead out potentially disparate punishment for similar offenses, to dictate the use of a "most restrictive standard" derived from each service to level the potential punishments, or to withhold jurisdiction to their level. Achieving even-handed results almost requires commanders to consider each service's most restrictive limitations as the ceiling on punishment for every service member.

If a commander adopted a most restrictive means test to create a joint NJP standard, the following procedures would result: All service members could seek legal counsel before accepting Article 15 proceedings,¹⁹³ and the standard of proof applied would be beyond a reasonable doubt. The most restrictive means test would place limits on authorized field-grade level punishment, as follows: no confinement on bread and water—even if attached or embarked in a vessel, a written reprimand, thirty days' correctional custody, sixty days' restriction, forty-five days' extra duty (limited to two hours per day and not performed on Sunday), and either a reduction of one grade *or* forfeiture of one half month's pay for two months.

All of this might be a good argument for the promulgation of a joint NJP regulation. Absent the adoption of uniform NJP standards and procedures, however, judge advocates serving joint commands must do their best to ensure their commanders apply NJP in an even-handed manner, to protect not only the NJP system, but also the command's they serve.

187. *Id.* para. 3-37b(1).

188. See U.S. DEP'T OF AIR FORCE, INSTR. 36-2608 MILITARY PERSONNEL RECORDS SYSTEMS (1 July 1996) (providing formats and procedures), available at <http://afpubs.hq.af.mil/pubfiles/af/36/afi36-2608/afi36-2608.pdf>.

189. AFI 51-202, *supra* note 23, para. 4.8.

190. *Id.* paras. 4.8, 6.8.

191. JAGMAN, *supra* note 23, § 0109e (providing sample language to use in such entries); see also *id.* § 0119.

192. See *supra* note 144 and accompanying text. Furthermore, given the strong language of AFI 51-202 counseling commanders to impose reductions and forfeitures only "when the maximum exercise of NJP authority is warranted," an airmen is less likely to receive these punishments than members of other services tried for the same offense by their respective services.

193. Due to the *Navy Manual's* language discouraging the creation of attorney-client relationships during NJP proceedings, either Army or Air Force judge advocates may have to provide Navy and Marine Corps personnel pre-Article 15 advice. See JAGMAN, *supra* note 23, § 0109d(2). "Military lawyers making such explanations should guard against the establishment of any attorney-client relationship unless detailed by proper authority to serve as defense counsel or personal representative of the accused." *Id.*

Conclusion

Joint justice currently presents three distinct problem areas—establishing judicial and NJP jurisdiction, level of court-martial convening authority, and administration of NJP. Joint commanders should feel confident in their ability to exercise judicial and NJP authority over forces assigned to them, regardless of service.

To this end, every judge advocate should (1) be sufficiently familiar with the process of establishing units to assist effectively in the establishment of appropriate jurisdictional chains, (2) actively seek to have multi-service commanders empow-

ered as GCMCAs to help increase the commander's administrative and judicial options, and (3), absent the adoption of a joint NJP regulation, cross-train with sister-service NJP regulations. Most importantly, judge advocates should not wait until they are packing for a deployment to learn about joint justice.

The concepts and areas of concern involved with the administration of justice in a joint environment should be taught by chiefs of justice to their new trial counsel and incorporated into each service's basic judge advocate training. Education is the key; hopefully this article removes some of the haze from the practice of joint justice

Appendix A

Article 15, UCMJ and MCM, pt. V - Nonjudicial Punishment Limits

MCM, pt. V and UCMJ Art 15 - NJP Limits Chart	On Officers by			On Enlisted Personnel By	
	CO who is O-3 or below	CO who is O-4 or above	CO who is GCMCA, General Officer or Flag Rank	CO who is O-3 or below (or any OIC)	CO who is O-4 or above
Admonition/Reprimand <i>plus</i> one or more of the following	Written (1)	Written (1)	Written (1)	Oral or Written	Oral or Written
Confinement on Bread & Water if attached to or embarked in a vessel (B&W) (2)				3 days	3 days
Correctional Custody (CC)				7 days	30 days
Arrest in Quarters (AiQ)			30 days		
Restriction to limits with or without suspension of duty	30 days	30 days	60 days	14 days	60 days
Extra Duties (ED)				14 days	45 days
Forfeiture (3)			1/2 per 2 month	7 days pay	1/2 per 2 month
Reduction in rate (4)				one grade	To the lowest enlisted grade (5)
Detention of Pay (6)			1/2 per 3 month	14 days pay	1/2 per 3 month
NOTES:					
1 - MCM Part V permits only written. Art 15 makes no distinction.					
2 - No limit is placed on enlisted ranks that may be subject to this punishment.					
3 - Forfeiture is in the grade to which reduced even if reduction is suspended.					
4 - If within the promotion authority of the officer imposing the reduction.					
5 - Art 15 limits reductions of E-5 and above to a maximum of two grades. MCM, pt. V further limits reductions of grades E-5 and above to a maximum of one grade, but allows for an increase to two grades by the "Secretary concerned" in time of war or national emergency.					
6 - Detention of Pay is not provided for in MCM, pt. V.					
COMBINATION RESTRICTIONS:					
- B&W cannot be combined with CC, ED, or restriction. (MCM, pt. V)					
- CC cannot be combined with ED or restriction. (MCM, pt. V)					
- AiQ cannot be combined with restriction. (MCM, pt. V)					
- B&W, CC, Restriction, AiQ, and ED must run concurrently up to their maximum unless apportioned. (Art. 15, UCMJ)					
- Restriction and ED may be combined to run concurrently but may not to exceed max for ED. (MCM, pt. V)					

Appendix B

Navy and Marine Corps Nonjudicial Punishment Chart

Navy NJP Limits Chart	Summarized	On Officers by			On Enlisted Personnel by	
		CO who is O-3 or below	CO who is O-4 or above	CO who is a General or Flag Rank	CO who is O-3 or below (or any OIC)	CO who is O-4 or above
Admonition/Reprimand (1) <i>plus</i> one or more of the following	N/A	Written	Written	Written	Oral or Written	Oral or Written
Confinement on Bread & Water if attached to or embarked in a vessel (2)	N/A				3 days	3 Days
Correctional Custody (3)	N/A				7 days	30 days
Arrest in Quarters	N/A			30 days		
Restriction to limits with or without suspension of duty	N/A	15 days (4)	30 days	60 days	14 days	60 days
Extra Duties (5)	N/A				14 days	45 days
Forfeiture (6)	N/A			1/2 per 2 month	7 days pay	1/2 per 2 month
Reduction in rate (7)	N/A				one grade	one grade
Right to Counsel? (8)	N/A	Limited	Limited	Limited	Limited	Limited
Recording of NJP	N/A	JAGMAN Appendix A-1-d				
Filing of NJP Record	N/A	Service-record entries on Page 13 (Navy) or Page 12 (Marine Corps) (9)				
NOTES:						
1 - JAGMAN 0114c.						
2 - Only for E-3 and below (includes unsuspended reduction to below E-4). (JAGMAN 0111c)						
3 - Only for E-3 and below (unless unsuspended reduction to below E-4 is imposed). (JAGMAN 0111b)						
4 - JAGMAN 0111a						
5 - "Normally" limited to 2 hours per day; Shall not be performed on Sunday; "Guard duty shall not be assigned as punishment." (JAGMAN 0111d)						
6 - Forfeiture is in the grade to which reduced even if reduction is suspended.						
7 - No reduction from pay grade E-7 or above in the Navy. No reduction from pay grade E-6 or above in the Marine Corps. (JAGMAN 0111e)						
8 - See JAGMAN 109a and 109d(2). Together these sections provide the following: "There is no right for an accused to consult with counsel prior to nonjudicial punishment;" however, if an accused is given the opportunity, such advice is limited to "an explanation of the legal ramifications involved in the right to refuse [NJP]."						
9 - Only if JAGMAN Appendix A-1-d is used or SM was represented by lawyer at the hearing. (JAGMAN 0109e)						
10 - See MCM, Part V, paragraph 5d for further limitations on combinations of punishments.						

(JAGMAN)

Appendix C

Army Nonjudicial Punishment Chart

Army NJP Limits chart	Summarized	On Officers by		On Enlisted Personnel By	
		CO who is NOT a General Officer or GCMCA	CO who is a General Officer or GCMCA	CO who is O-3 or below (or any OIC)	CO who is O-4 or above
Admonition/Reprimand <i>plus</i> one or more of the following	Oral	Written	Written	Oral or Written	Oral or Written
Confinement on Bread & Water if attached to or embarked in a vessel (1)				3 days	3 Days
Correctional Custody (2)				7 days	30 days
Arrest in Quarters (3)			30 days		
Restriction to limits with or without suspension of duty	14 days	30 days	60 days	14 days	60 days
Extra Duties (ED) (4)	14 days			14 days	45 days
Forfeiture (5)			1/2 per 2 month	7 days pay (6)	1/2 per 2 month
Reduction in grade (7)				One grade (8)	To the lowest enlisted grade (8, 9)
Right to Counsel?	None	Yes	Yes	Yes	Yes
Recording of NJP	DA Form 2627-1	DA Form 2627			
Filing of NJP Record	Local file (2yr max)	OMPF Performance or restricted			
NOTES:					
1 - Impossible only on E-3 and below. (AR 27-10, para. 3-19b(2)) Cannot be combined with correctional custody, extra duty or restriction.					
2 - Not available for E4 and above unless unsuspended reduction to below E4 is imposed. (AR 27-10 para. 3-19b(1)) Cannot combine with ED or restriction.					
3 - Arrest in Quarters cannot be combined with restriction.					
4 - Restriction and Extra Duty may be combined to run concurrently (not to exceed maximum allowed for Extra Duty).					
5 - Forfeiture is in the grade to which reduced even if reduction is suspended.					
6 - Must be within one month (i.e. no forfeiture for 3 days for 2 months).					
7 - Promotions to E-7, E-8 and E-9 are done at DA level, therefore, no commander has reduction authority. (AR 600-200 para. 7-36)					
8 - If within the promotion authority of the officer imposing the reduction. For example O-4 commanders (not serving in O-5 or higher billet) do not have the authority to promote to E-5 or E-6 under AR 600-8-19, therefore cannot reduce from those ranks.					
9 - Grades E-5 and above may not be reduced more than one grade. May be increased to two grades by the "Secretary" concerned in time of war or national emergency. (MCM pt. V, ¶ 5b(2)(B)(iv))					
10 - See MCM, Part V, paragraph 5d for further limitations on combinations of punishments.					

(AR 27-10)

Appendix D

Air Force Nonjudicial Punishment Chart

Air Force NJP Limits chart	Summarized	On Officers by			On Enlisted Personnel By		
		CO who is Lt Col or below	CO who is Col	General Officer or GCMCA	CO who is Capt or below (1)	CO who is Major (1)	CO who is Lt Col or above
Admonition/Reprimand <i>plus</i> one or more of the following	N/A	None	Written	Written	Written	Written	Written
Confinement on Bread & Water if attached to or embarked in a vessel	N/A				Not Authorized	Not Authorized	Not Authorized
Correctional Custody	N/A				7 days	30 days	30 days
Arrest in Quarters	N/A			30 days			
Restriction to limits with or without suspension of duty	N/A	None	30 days	60 days	14 days	60 days	60 days
Extra Duties (2)	N/A				14 days	45 days	45 days
Forfeiture (3), (4)	N/A			1/2 per 2 month	7 days pay	1/2 per 2 month	1/2 per 2 month
Reduction in grade	N/A				One grade (5)	See Notes (4), (7)	See Notes (7), (8), (9)
Right to Counsel ?	N/A	N/A	Yes	Yes	Yes	Yes	Yes
Recording of NJP	N/A	AF Form 3070					
Filing of NJP Record	N/A	Filing in Selection Record is possible (Officer or Senior NCO) (10)					
NOTES:							
1 - May not impose NJP on CMSgt or SMSgt.							
2 - Restriction and Extra Duty may be combined to run concurrently (not to exceed maximum allowed for Extra Duty).							
3 - "[C]ommanders should impose an unsuspended reduction in grade, along with forfeiture of pay, only when the maximum exercise of Article 15 authority is warranted. (e.g. repeat offender, most serious offenses, past rehabilitative efforts have failed, or recalcitrant offender)." (AFI 51-202 para 5.4.2)							
4 - Forfeiture is in the grade to which reduced even if reduction is suspended.							
5 - SSgt and below.							
6 - TSgt, SSgt - one grade. SrA and below - to lowest enlisted grade.							
7 - Grades E-5 and above may not be reduced more than one grade. (May be increased to two grades by the "Secretary concerned" in time of war or national emergency." (MCM pt. V, ¶ 5b(2)(B)(iv)).							
8 - MSgt, TSgt, SSgt - one grade. SrA and below - to lowest enlisted grade.							
9 - CMSgt, SMSgt - one grade if imposing officer is MAJCOM commander, combatant commander, or commander to whom promotion authority has been delegated.							
10 - Must serve offender with a notification of intent letter when imposing punishment. (IAW AFI 36-2608, Military Personnel Records System) (AFI 51-202 para 4.8)							
11- See MCM, Part V, paragraph 5d for further limitations on combinations of punishments.							

(AFI 51-202)