

SESSION OF 2024

**SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2392**

As Amended by Senate Committee on Judiciary

**Brief\***

HB 2392, as amended, would make updates to the Kansas Code of Military Justice (KCMJ). The bill would consolidate language from various provisions of Chapter 48 of the *Kansas Statutes Annotated* into new sections of law and repeal those sections that have been consolidated or otherwise removed. The bill would update language in the remaining sections of the KCMJ to comply with the Uniform Code of Military Justice (UCMJ) and to modernize statutory phrasing. The bill would also remove all references to, and sections concerning, trial by court-martial.

[*Note:* Three statutes contained in the KCMJ would not be amended or repealed by the bill: KSA 48-3002, concerning who may be subject to the provisions of the KCMJ; KSA 48-3004, concerning convictions of lesser included offenses; and KSA 48-3113, providing the citation of the act.]

***Prohibition on Confinement with Enemy Prisoners  
(Section 1)***

The bill would prohibit the confinement of a member of the state military forces with foreign or domestic enemy prisoners or other foreign nationals who are not members of the Armed Forces.

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\*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

### ***Appeal of Nonjudicial Punishment (Section 2)***

The bill would outline the appeal procedure when a person punished under the KCMJ considers the findings unsupported by the evidence or the punishment unjust or disproportionate to the offense.

The bill would specify if punishment relates to apprehension, a person would not be entitled to one appeal, but would not be entitled to any appeal under this section.

### ***Trial by Civilian Court (Section 3)***

The bill would state disciplinary punishment for an act or omission under the KCMJ would not bar a trial by a civilian court for a serious crime or offense related to the same act or omission. Any disciplinary punishment under the KCMJ could be considered during a civilian trial and would be required to be considered in sentencing if the accused is found guilty.

### ***Prohibited Sexual Activity (Section 4)***

The bill would outline what would constitute prohibited sexual activity under the KCMJ. "Prohibited sexual activity" would mean, as specified in military regulations, inappropriate physical intimacy under circumstances described in such regulations. Such activity would be punished if occurring between:

- An officer in a training leadership position, as defined by the bill, and a specially protected junior member of the Armed Forces, also defined by the bill;
- A military recruiter and an applicant for military service;

- A military recruiter and a specially protected junior member of the Armed Forces who is enlisted under a delayed entry program; or
- A military cadre and specially protected junior member of the Armed Forces who is enlisted under a delayed entry program.

The bill would specify consent would not be a defense for any conduct prohibited by the KCMJ pursuant to this section.

### ***Sexual Harassment (Section 5)***

The bill would outline what would constitute sexual harassment under the KCMJ. A person subject to the KCMJ would be punished if:

- Such person made sexual advances, demands, or requests for sexual favors or knowingly engaged in other conduct of a sexual nature;
- Such conduct was unwelcome; and
- Under the circumstances, such conduct:
  - Would cause a reasonable person to believe, and such person did believe, that submission to such conduct would be made either explicitly or implicitly a term or condition of a person's job, pay, career, or entitlements;
  - Would cause a reasonable person to believe, and such person did believe, that submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting such person's job, pay, career, benefits, or entitlements; or
  - Was so severe, repetitive, or pervasive that a reasonable person would perceive, and such

person did perceive, an intimidating, hostile, or offensive work environment.

***Conduct of Sentinel or Lookout (Sections 6 and 7)***

The bill would direct punishment against a sentinel or lookout who is drunk, sleeps, or leaves while on post before being regularly relieved. Similarly, any sentinel or lookout who loiters or wrongfully sits down while on post would be punished under the KCMJ. The bill would also provide that any person subject to the KCMJ who, knowing that another person is a sentinel or lookout, behaves in a wrongful and disrespectful manner toward a sentinel or lookout who is on duty would be punished.

***Fraudulent Conduct (Sections 8–12)***

*Adulteration of Public Records (Section 8)*

The bill would direct punishment against a person subject to the KCMJ if such person alters, conceals, removes, mutilates, obliterates, or destroys a public record or takes a public record with the intent to do the same.

*Making False Writings (Section 9)*

The bill would direct punishment against a person subject to the KCMJ if such person intentionally falsely makes or alters any signature or writing that would, if genuine, impose a legal liability on another or would change their legal rights or liability. The bill would also impose punishment on a person who knows a writing is false and utters, offers, issues, or transfers the writing.

### *Impersonations (Section 10)*

The bill would direct punishment against a person subject to the KCMJ if such person willfully, or with intent to defraud, impersonates:

- An officer, noncommissioned officer, or petty officer;
- An agent of superior authority of one of the Armed Forces or state military forces; or
- A government official.

The bill would state that if a person impersonates a government official by committing an act that exercises or asserts the authority of the office of the official being impersonated, such person would be punished under the KCMJ even if they did not have intent to defraud.

### *Unauthorized Wearing of Decorations (Section 11)*

A person subject to the KCMJ would be punished if such person wears an insignia, decoration, badge, ribbon, device, or lapel button upon the person's uniforms or civilian clothing when the person is not authorized to wear such decorations.

### *Mail Tampering (Section 12)*

The bill would direct punishment against a person subject to the KCMJ if such person wrongfully takes any mail before such mail is delivered to or received by the addressee, with the intent to obstruct the correspondence or to pry into the business secrets of any person or organization. A person would also be punished for wrongfully opening, destroying, or stealing mail before such mail is delivered to or received by the addressee.

***Vehicle Accidents Resulting in Personal Injury or Property Damage (Section 13)***

A person subject to the KCMJ who is involved in a vehicle accident causing personal injury or property damage would be punished under the KCMJ if such person:

- Is the driver of a vehicle that is involved in an accident that results in a personal injury or property damage; and
- Wrongfully leaves the scene of the accident without providing assistance to an injured person, personal identification to others involved in the accident, or personal identification to appropriate authorities.

A person would also be punished under the KCMJ if such person:

- Is a passenger in a vehicle that is involved in an accident that results in personal injury or property damage;
- Is the superior commissioned or noncommissioned officer of the driver or commander of the vehicle; and
- Wrongfully and unlawfully orders, causes, or permits the driver to leave the scene of the accident without providing assistance to an injured person, personal identification to others involved in the accident, or personal identification to appropriate authorities.

***Violent Conduct (Sections 14–17)***

The bill would direct punishment against a person subject to the KCMJ when such person displays any conduct involving violence toward others, as follows.

*Discharge or Brandishment of Firearm (Section 14)*

The bill would direct punishment against a person subject to the KCMJ if such person willfully and wrongfully discharges or brandishes a firearm under any circumstance that endangers a human life or causes a reasonable person to be apprehensive of the potential endangerment of human life.

*Simple Assault (Section 15)*

The bill would direct punishment against a person guilty of simple assault under the KCMJ if such person, who is subject to the KCMJ:

- Attempts to do bodily harm to another person;
- Offers to do bodily harm to another person; or
- Does bodily harm to another person.

For the purposes of this section, “another person” would mean a cadet, trainee, or recruit of the state military forces, the U.S. Armed Forces, or the state military forces of another state.

*Domestic Violence (Section 16)*

The bill would direct punishment against a person who:

- Commits a violent offense against a spouse, intimate partner, or immediate family member of such person;
- Commits an offense under the KCMJ against any person or any property, including animals, with the intent to threaten or intimidate a spouse, intimate partner, or immediate family member of such person;

- Violates a protection order, with the intent to threaten or intimidate a spouse, intimate partner, or immediate family member of such person; or
- Violates a protection order, with the intent to commit a violent offense against a spouse, intimate partner, or immediate family member of such person.

#### *Threats of Violence (Section 17)*

The bill would direct punishment against a person who communicates a threat to injure the person, property, or reputation of another.

The bill also would specify a person would be punished if such person communicates a threat, or maliciously communicates a false threat, to injure the person, property, or reputation of another by use of:

- An explosive;
- A weapon of mass destruction;
- A biological or chemical agent, substance, or weapon; or
- A hazardous material.

The bill would define “false threat” to mean a threat that, at the time it is communicated, is known to be untrue by the person communicating the threat.

#### ***Distribution of Intimate Visual Images or Sexually Explicit Conduct (Section 18)***

The bill would outline when a person would be guilty of wrongful distribution of intimate visual images or visual images of sexually explicit conduct (images). The bill would state a person subject to the KCMJ would be punished if such person:



- Knowingly and wrongfully broadcasts or distributes an image involving a person who:
  - Is at least 18 years of age at the time the image was created;
  - Is identifiable from the image or from information displayed in connection with the image; and
  - Does not explicitly consent to the broadcast or distribution of the image;
- Knows or reasonably should have known that the image was made under circumstances in which the person depicted in the image retained a reasonable expectation of privacy regarding any broadcast or distribution of the image;
- Knows or reasonably should have known that the broadcast or distribution of the image is likely to:
  - Cause harm, harassment, intimidation, emotional distress, or financial loss for the person depicted in the image; or
  - Harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relations; or
- Engaged in conduct that had a reasonably direct connection to a military mission or military environment.

The bill would also define certain terms for purposes of the section.

## ***Perjury and Obstruction of Justice (Sections 19–24)***

### ***Inducing False Testimony Under Oath (Section 19)***

The bill would direct punishment against a person subject to the KCMJ if such person induces another person to take an oath and falsely testify, depose, or make a statement upon such oath. In order for a person to be punished for this conduct:

- The oath would have to be administered as required by law, and by a person that has the authority to do so;
- Upon taking such oath, the other person willfully makes or attests to a false statement that is material to the proceedings; and
- When the statement is made or attested to, the person subject to the KCMJ and the person induced into such conduct do not believe such statement is true.

### ***Obstruction of Justice (Section 20)***

The bill would direct punishment against a person subject to the KCMJ if such person engages in conduct intending to influence, impede, or otherwise obstruct the due administration of justice.

### ***Duty to Report Offense (Section 21)***

The bill would direct punishment against a person subject to the KCMJ if such person:

- Knows another person has committed a serious offense; and

- Wrongfully conceals the commission of the offense and fails to make the commission of the offense known to civilian or military authorities as soon as possible.

*Duty to Cooperate With Judicial Proceedings (Section 22)*

The bill would direct punishment against a person subject to the KCMJ if such person wrongfully refuses to qualify as a witness or wrongfully refuses to answer a question after having been directed to do so by a presiding authority in certain judicial proceedings, as specified by the bill.

*Search and Seizure (Section 23)*

The bill would direct punishment against a person subject to the KCMJ if such person knows that one or more persons authorized to make searches and seizures are seizing, about to seize, or are endeavoring to seize property and then destroys, removes, or otherwise disposes of the property with the intent to prevent the seizure of such property.

*Obstruction of Pending Administrative Action (Section 24)*

The bill would direct punishment against a person subject to the KCMJ if such person has reason to believe that an adverse administrative action is pending against any person subject to the KCMJ and either:

- Intentionally acts to influence, impede, or obstruct the conduct of the proceeding; or
- Acts to obstruct the due administration of justice.

***Bribery (Sections 25 and 26)***

The bill would direct punishment against a person subject to the KCMJ if such person occupies an official position or has official duties and wrongfully asks for, accepts, or receives something of value with the intent to have the person's decision or action influenced regarding an official matter in which the State of Kansas or the United States is interested.

The bill would direct punishment against a person subject to the KCMJ if such person wrongfully promises, offers, or gives something of value to a person who occupies an official position or has official duties and intends to influence the decisions or actions of the person regarding an official matter in which the State of Kansas or the United States is interested.

The bill would direct punishment against a person subject to the KCMJ if such person occupies an official position or has official duties and wrongfully asks for, accepts, or receives something of value as compensation for or in recognition of services rendered or to be rendered by the person regarding an official matter in which the State of Kansas or the United States is interested.

The bill would direct punishment against a person subject to the KCMJ if such person promises, offers, or gives something of value to a person who occupies an official position or who has official duties as compensation for or in recognition of services rendered by such person regarding an official matter in which the State of Kansas or the United States is interested.

***Credit Card Fraud (Section 27)***

The bill would direct punishment against a person subject to the KCMJ if such person, with the knowing intent to defraud and obtain money, property, services, or something of value, uses:

- A stolen credit card, debit card, or other access device;
- A revoked, canceled, or otherwise invalid credit card, debit card, or other access device; or
- A credit card, debit card, or other access device without the authorization of a person whose authorization is required for such use.

The bill would define the terms “access device” and “credit card” for the purposes of this section.

***Extortion (Section 28)***

The bill would direct punishment against a person subject to the KCMJ if such person communicates threats to another person with the intention to obtain something of value or any acquittance, advantage, or immunity.

***Breach of Privacy; Forcible Pandering; Indecent Exposure (Section 29)***

The bill would direct punishment against a person subject to the KCMJ if such person, without legal justification or lawful authorization:

- Knowingly and wrongfully views the private area of another person without the other person’s consent and when that other person has a reasonable expectation of privacy;
- Knowingly photographs, videotapes, films, or records by any means the private area of another person without that other person’s consent and when that other person has a reasonable expectation of privacy; or

- Knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under circumstances described above.

If a person subject to the KCMJ compels another person to engage in an act of prostitution with any person, the person subject to the KCMJ would be guilty of forcible pandering.

If a person subject to the KCMJ intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple, the person would be guilty of indecent exposure.

The bill would define related terms for the purposes of the section.

### ***Retaliation (Section 30)***

The bill would direct punishment against a person subject to the KCMJ if such person takes or threatens to take an adverse personnel action or withholds or threatens to withhold a favorable personnel action, with the intent to:

- Retaliate against any person for reporting or planning to report a criminal or military offense;
- Retaliate against any person making or planning to make a protected communication; or
- Discourage any person from reporting or planning to report a criminal or military offense.

The bill would define related terms as used in this section.

***Application of Other Military Regulations and Instructions (Section 31)***

The bill would state certain military regulations and instructions could be used to effectuate the purpose and provisions of the KCMJ to the extent they are consistent with the KCMJ.

***Administrative Action (Section 32)***

The bill would state nothing in the KCMJ would preclude an administrative action against a person subject to the KCMJ for an offense, military or nonmilitary, as allowed by law or regulation.

***Severability (Section 33)***

The bill would provide that the provisions of the KCMJ are severable, meaning if any portion of the KCMJ were to be held unconstitutional or invalid, such invalidity would not affect other portions of the KCMJ that could be given effect without the invalid portion or application, and the applicability of such other portions of the KCMJ would remain valid and enforceable.

***Willful Disobedience (Section 34)***

The bill would direct punishment against a person subject to the KCMJ if such person willfully disobeys a lawful command of such person's superior commissioned officer.

***Amendments to KCMJ (Sections 35–101)***

The bill would make various amendments to sections of law in the KCMJ reflecting the reorganization, consolidation, and modernization of language in the new sections created

by the bill. [Note: Only substantive changes have been included in this Supplemental Note.]

The bill would also remove all references to, and sections concerning, trial by court-martial. [Note: The bill would replace certain references to trial by court-martial with references to punishment at the direction of a commanding officer. Sections in which this would be the only change are not included in this Supplemental Note.]

#### *Definitions (Section 35)*

The bill would substantively update several definitions used in the KCMJ, including: “state military forces,” “commanding officer,” “state active duty,” “duty status other than start active duty,” “enemy,” and “state judge advocate.” The bill would also remove the definitions of “military court,” “military judge,” “record,” and “convening authority” from this section. Finally, the bill would add definitions of “cadet,” “classified information,” “day,” “military offenses,” “national security,” “commissioned officer,” “pay,” “open hearing,” “open proceeding,” and “UCMJ.”

#### *Persons Subject to the Code (Section 36)*

The bill would enumerate the circumstances in which a person may be subject to the KCMJ, and would provide further direction determining whether subject-matter jurisdiction exists under the KCMJ. Current law provides that the KCMJ applies to all members of the state military forces who are not under a call or order of the President.

#### *Territorial Applicability (Section 38)*

The bill would clarify that the KCMJ applies to all times and places when a person subject to the KCMJ is in a duty status. The bill would also state jurisdiction under the KCMJ would not preclude or limit any applicable civilian jurisdiction, with the exception of double jeopardy.



#### *Judge Advocates (Section 39)*

The bill would update this section to remove provisions concerning the appointment and qualifications of judge advocates, and remove provisions providing for assistant judge advocates. The bill would also direct that judge advocates make frequent inspections in the field under the supervision of the appropriate Administration of Military Justice.

#### *Apprehension (Section 40)*

The bill would specify that no person authorized under the KCMJ to apprehend persons subject to the KCMJ, nor any place authorized to confine or house such apprehended persons, could require payment of any fee, nor charge for receiving, apprehending, confining, restraining, holding, or otherwise housing a person except as otherwise provided by law.

#### *Nonjudicial Punishment (Section 43)*

The bill would make several clarifying amendments to the types of disciplinary punishments that may be imposed on persons subject to the KCMJ. The bill would specify that any person subject to a nonjudicial punishment would have a right to be physically present during any hearing conducted. The bill would also require that when a finding of guilt is made and punishment imposed under this section, a written record be made that includes all testimonial evidence and supporting documentation.

#### *Statutes of Limitations (Section 46)*

The bill would add an exception to the general statute of limitations concerning a person's liability for committing an offense when the commission of the offense was not immediately known and not readily discoverable. When such

is the case, the statute of limitations would be two years from the date of discovery.

The bill would also exclude periods of time in which an accused is absent without authority or fleeing from justice from the period of limitation described above.

The bill would specify that when the United States is at war or the President has declared a national emergency, the applicable statute of limitations would be tolled until three years after the termination of hostilities or national emergency when the offense involves fraud or attempted fraud or in connection with a contract, subcontract, or purchase order involving the war.

*Cruel and Unusual Punishment (Section 48)*

The bill would specify that punishment by flogging, branding, marking, or tattooing the body is cruel and unusual punishment and would be prohibited under the KCMJ.

*Maximum Punishment (Section 49)*

The bill would specify the maximum fine that may be assessed pursuant to a punishment under the KCMJ could not exceed \$2,500.

*Missing Movement (Section 58)*

The bill would add to the prohibition against missing a movement of a ship, aircraft, or unit to include wrongfully and intentionally jumping into the water from a vessel that is in use by the U.S. Armed Forces or state military forces as an action which may be punished under the KCMJ.

*Contempt Towards Officials (Section 59)*

The bill would expand the list of persons that a person subject to the KCMJ could be punished for using contemptuous words against. Such additions would include a secretary of a military department, the Secretary of Homeland Security, the Legislature, or the legislature of any other state.

*Improper Conduct with a Prisoner (Section 67)*

The bill would add unlawfully drinking any alcoholic beverage with a prisoner as conduct that would be punished under the KCMJ.

*False Official Statements (Section 77)*

The bill would specify punishment would be imposed when any person subject to the KCMJ takes a proper oath, and upon taking such oath, makes or subscribes to a statement that, at the time the oath was administered, the person did not believe to be true.

*Wrongful Use of Controlled Substances (Section 83)*

The bill would specify that a person subject to the KCMJ would be punished if such person wrongfully possesses, in such person's blood or urine, metabolites of a prohibited substance specified in the section.

*Perjury (Section 88)*

The bill would provide that a person subject to the KCMJ would be punished if such person testifies to any false statement material to the issue or matter of inquiry in any declaration, certificate, verification, or statement.

*Disorders and Neglects (Section 92)*

The bill would specify that simple assault could be punished under the KCMJ rather than reserved to civil courts.

*Authority to Administer Oaths and Act as Notary (Section 94)*

The bill would amend the list of persons authorized to administer oaths and act as notaries, removing references to judge advocates and specifying such persons who are so authorized under the section would be designated by military regulation or statute.

*Complaints of Wrongs (Section 96)*

The bill would clarify procedure when any member of the state military forces believes such member was wronged. The bill would specify the complaint would be forwarded to the first general in the member's chain of command, who would be required to investigate and take proper measure for redressing the wrong and send a statement of the complaint to the Adjutant General. The bill would specify that this procedure may not be used when:

- Review is provided specifically by the KCMJ;
- The matter has been taken under the recommendation by an administrative board and where such complainant was afforded the rights of a respondent; or
- Policy, regulation, or instruction specifically authorizes an administrative appeal or similar redress for the matter.

*Redress of Injuries to Property (Section 97)*

The bill would amend a provision governing redress for property damage when an offender cannot be ascertained but

the organization to which an offender belongs is known. In this instance, the bill would allow damages to be assessed on a proportional basis, using the number of individuals of the organization who were present at the scene when damages were inflicted.

*Payment of Fines; Disposition; Confinement for Failure to Pay (Section 98)*

The bill would update language concerning the collection of fines under the KCMJ to reflect the removal of punishment by court-martial and specify the manner in which such fines may be paid.

*Immunity for Action of Military Courts (Section 99)*

The bill would remove references to military courts and would instead specify all persons acting under the KCMJ, whether a member of the military or a civilian, have immunity from personal liability for any act or omission related to such person's duties under the KMCJ.

*Uniformity (Section 101)*

The bill would require information accompanying each punitive article of the UCMJ be used in the defining and charging of any offense under the KCMJ, to the extent the UCMJ is consistent.

The bill would also state the decisions of the various military branch appeals courts would not be binding on proceedings under the KCMJ, but could be used for guidance in determining guilt or punishment of any member of the state military forces subject to the KCMJ.

## **Background**

The bill was introduced by the House Committee on Veterans and Military at the request of a representative of the Adjutant General's Department (TAG).

[*Note:* Generally, when Kansas National Guard members serve pursuant to federal orders, they are subject to the UCMJ under Title 10 of the United States Code. However, the majority of guard members will serve most of their careers under Title 32 of the United States Code, which makes them subject to the KCMJ for administrative and disciplinary matters.]

### ***House Committee on Veterans and Military***

In the House Committee hearing on February 16, 2023, **proponent** testimony was provided by a representative of TAG. The representative stated that while the UCMJ has undergone several major revisions since its enactment in 1951, the KCMJ has only been minimally revised since its enactment in 1972. Consequently, the KCMJ needs updating to serve the current needs of commanders.

No other testimony was provided.

The House Committee adopted technical amendments to further clarify language and ensure consistency in statutory phrasing.

### ***Senate Committee on Judiciary***

In the Senate Committee hearing on February 8, 2024, **proponent** testimony was provided by a representative of TAG, providing similar testimony as provided in the House Committee hearing.

No other testimony was provided.

The Senate Committee adopted a technical amendment to update statutory references throughout the bill to account

for the bill having been introduced in the 2023 Legislative Session.

### **Fiscal Information**

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, TAG and the Judicial Branch indicate enactment of the bill would not have a fiscal effect on either agency's operations.

Veterans and military; Kansas Code of Military Justice; Uniform Code of Military Justice