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## COMMENT

### CONFINEMENT OF U.S. SERVICE MEMBERS IN CIVILIAN PRISONS: WHY CONGRESS NEEDS TO MODIFY ARTICLE 12 OF THE UNIFORM CODE OF MILITARY JUSTICE

**Coley R. Myers, III\***

*Article 12 of the Uniform Code of Military Justice prohibits the confinement of service members in close proximity to foreign nationals, while Article 58 governs the treatment of service members in both military and civilian prisons. Individual branches routinely violate Article 12 in domestic confinement situations because adequate on-base facilities are not always available. Two cases before the Court of Appeals of the Armed Forces involved the conflict between Articles 12 and 58, and both cases were decided on the same day: *United States v. McPherson* and *United States v. Wilson*. These cases are significant because they illustrate statutory interpretation problems that create an ambiguity in the meaning of the statute's plain language. The same dissenting judge in both cases, adopting his *McPherson* opinion in *Wilson*, agreed with the majority's reading of the plain meaning of the statute regarding service member confinement near foreign nationals, but disagreed as to whether Article 12 applied to Article 58. This Comment proposes changes in the wording of Article 12 that resolves ambiguities with respect to Article 58. It further provides for a more flexible approach for service member confinement in both military and civilian facilities with regards to confinement in close proximity to foreign nationals.*

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## INTRODUCTION

Article 12 of the Uniform Code of Military Justice (“UCMJ”) prohibits the confinement of service members in close proximity to foreign nationals.<sup>1</sup> While at first glance this may not seem like it would be an issue outside of combat zones, the individual military branches frequently violate this Article in domestic confinement situations due to the absence of adequate on-base facilities. Several military bases, particularly smaller ones, lack prisons, and often the nearest base with a brig is too far away to transport a service member immediately after he or she has been taken into custody by military

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<sup>1</sup> The UCMJ is codified at 10 U.S.C. §§ 801-946 (2012). Article 12 states, “No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces.” UCMJ art. 12.

police for an infraction. To remedy the lack of prison facilities, the individual military branches often have agreements with local jails permitting local authorities to provide pre-trial confinement for service members.<sup>2</sup> For military personnel serving longer sentences, the Army has an agreement with the Department of Justice, Federal Bureau of Prisons (“Bureau”) to house a certain number of prisoners.<sup>3</sup> Other military branches then send their prisoners to the Army for transfer of custody to the Bureau in accordance with the agreement.<sup>4</sup> On arrival, the service member becomes part of the general prison population, members of which frequently happen to be foreign nationals.

Unless the Military Judge Advocate<sup>5</sup> asks about the service member’s specific confinement situation both pre- and post-trial, the service member who is in a local or federal prison under the Army’s agreement will likely be incarcerated in close proximity to foreign nationals. This situation is a seemingly clear violation of Article 12.<sup>6</sup>

This violation that arises when a service member is imprisoned in a civilian institution may seem insignificant on the surface, but it reveals a conflict between two UCMJ articles that can impact the safety of pretrial service members if they are placed in contact with pretrial or sentenced foreign nationals. Article 12 prohibits confining service members with enemy combatants or foreign nationals;<sup>7</sup> meanwhile, Article 58 allows the military to utilize civilian institutions to house service members when military briggs are not available.<sup>8</sup> The conflict occurs when courts evaluate how Article

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<sup>2</sup> Captain Joshua R. Traeger, *The Confinement of Military Members in Civilian Facilities: How a Broadening Interpretation of Article 12, UCMJ Impacts Military Justice*, 39 REPORTER 31, 32 (2012).

<sup>3</sup> FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, PROGRAM STATEMENT 5110.16, ADMINISTRATION OF SENTENCE FOR MILITARY INMATES 1 (2011).

<sup>4</sup> *Id.*

<sup>5</sup> A Judge Advocate is a military legal advisor for a military command and is part of the Judge Advocate General’s Corps (JAGC) for the respective military branch. 10 U.S.C. §§ 801(1), (13) (2012).

<sup>6</sup> UCMJ art. 12.

<sup>7</sup> *Id.*

<sup>8</sup> Article 58(a) states:

12 should be applied in the context of Article 58 confinements in civilian facilities. At present, there is a difference of opinion among the judges on the United States Court of Appeals for the Armed Forces (“CAAF”) as to whether Congress intended Article 12 to apply to Article 58,<sup>9</sup> even though military courts have expanded Article 12’s meaning with regards to what constitutes proper separation while in confinement.<sup>10</sup> Although the majority of military courts have held that the plain language of the statute is clear, and that Article 12 must apply to Article 58, a minority of courts have found the language ambiguous, and judges on those courts have conflicting interpretations of how the two Articles intersect.<sup>11</sup> Settling this conflict of interpretation will require two revisions to Article 12. The first involves specifying the types of foreign nationals with which the code is concerned; specifically, the article should allow confinement with foreign nationals that bear no ill will toward the United States. The second change should add a provision stating that Article 12 applies regardless of whether a service member is confined in a military or civilian prison, thus preventing possible radicalization of our service members, while at the same time, ensuring their safety.

Part I of this Comment examines the history of the UCMJ from its predecessor, the Articles of War, to the passage of the UCMJ

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Under such instructions as the Secretary concerned may prescribe, a sentence of confinement adjudged by a court-martial or other military tribunal, whether or not the sentence includes discharge or dismissal, and whether or not the discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated.

UCMJ art. 58(a).

<sup>9</sup> See, e.g., *United States v. McPherson*, 73 M.J. 393 (C.A.A.F. 2014); *United States v. Wilson*, 73 M.J. 404 (C.A.A.F. 2014).

<sup>10</sup> See *McPherson*, 73 M.J. at 398; *Wilson*, 73 M.J. at 406; see also Traeger, *supra* note 2, at 32.

<sup>11</sup> See *McPherson*, 73 M.J. at 398; *Wilson*, 73 M.J. at 406.

itself. This section explains the purpose of the UCMJ as well as the legislative intent behind the articles in question. Part II of this Comment presents the evolution and expansion of Article 12 through court decisions.<sup>12</sup> Part III of this Comment charts the progression of related cases, culminating in two recent cases—*United States v. McPherson* and *United States v. Wilson*—that support a plain text reading of both Article 12 and Article 58.<sup>13</sup> The majority in both cases concluded that as these two articles are part of the same statute, they necessarily apply to each other; however, the plain text reading in one of the two cases led to an absurd result.<sup>14</sup> Therefore, the discussion of these cases also shows why a change to the current Article 12 language is required. Finally, Part IV of the Comment reviews several alternatives and proposes modifications to both articles that will resolve the ambiguity, provide clarification for the armed services and the courts, and bring the articles into agreement.

## I. BACKGROUND

Congress enacted the UCMJ in the 1950s as a follow-up to the Selective Service Act of 1948.<sup>15</sup> The UCMJ applies to all branches of the military, presenting a consistent approach to military trials for service members.<sup>16</sup> To understand the current conflict between Articles 12 and 58, it is necessary to review the history and foundation of the UCMJ. At the founding of our nation, it was undisputed that discipline of military forces was directly proportional to a nation's prosperity,<sup>17</sup> and the United States adopted the British Articles of War, which were simply a translation of the Roman Articles of War, on June 30, 1775.<sup>18</sup> The Articles were revised

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<sup>12</sup> See *McPherson*, 73 M.J. at 398; *Wilson*, 73 M.J. at 406; see also Traeger, *supra* note 2, at 32.

<sup>13</sup> See *McPherson*, 73 M.J. at 396; *Wilson*, 73 M.J. at 406.

<sup>14</sup> See *McPherson*, 73 M.J. at 396; *Wilson*, 73 M.J. at 406 (holding solitary confinement in a civilian prison met the requirements of Article 12).

<sup>15</sup> Selective Service Act of 1948, Pub L. No. 80-759, 62 Stat. 604.

<sup>16</sup> Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 173-74 (1953).

<sup>17</sup> *The Adams Papers Digital Edition*, ROTUNDA, <http://rotunda.upress.virginia.edu/founders/ADMS-01-03-02-0016-0172> (last visited Mar. 29, 2015).

<sup>18</sup> 96 CONG. REC. 1331, 1353-55 (1950) [hereinafter Kefauver speech]; see Morgan, *supra* note 16, at 169; *Adams Papers*, *supra* note 17.

in 1874 and 1916;<sup>19</sup> then, in response to criticism, they were completely overhauled in 1920.<sup>20</sup> The most prominent complaint at the time concerned the “lack of uniformity in the [Army and Navy’s] systems.”<sup>21</sup> Continuing criticism after World War II led the Army and Navy to introduce amendments to their governing statutes.<sup>22</sup> But, even then, the Articles of War did not contain any requirement that service members be kept separate from enemy combatants when detained or incarcerated.<sup>23</sup>

A. *Selective Service Act of 1948 (“Elston Act”)*

The provision governing separation in confinement was first introduced in the Selective Service Act of 1948, also known as the Elston Act.<sup>24</sup> Under Title II of the Elston Act, Article 16 of the Articles of War was revised to include the following: “No person subject to military law shall be confined with enemy prisoners or any other foreign nationals *outside of the continental limits* of the United States.”<sup>25</sup> While this precise wording did not exist in the first drafts or proposed bills that led to the Act,<sup>26</sup> the restriction on confinement of service members with enemy prisoners was introduced over the course of congressional hearings.<sup>27</sup> This sparked debate in Congress because one problem with the wording of this provision was that it was possible to interpret the prohibition on confinement to include a brig or building that contained prisoners of war.<sup>28</sup> The Eighty-First Congress was concerned that this would impact the ability to put

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<sup>19</sup> Kefauver speech, *supra* note 18, at 1353.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See generally Articles of War, 41 Stat. 787 (1920).

<sup>24</sup> Selective Service Act of 1948, Pub L. No. 80-759, 62 Stat. 604, 630.

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> AMENDING THE ARTICLES OF WAR TO IMPROVE THE ADMINISTRATION OF MILITARY JUSTICE, TO PROVIDE FOR MORE EFFECTIVE APPELLATE REVIEW, TO INSURE THE EQUALIZATION OF SENTENCES, AND FOR OTHER PURPOSES, H.R. REP. NO. 80-1034 (1st Sess. 1947).

<sup>27</sup> S. COMM. ON ARMED SERVICES, 80TH CONG., COURTS MARTIAL LEGISLATION: A STUDY OF THE PROPOSED LEGISLATION TO AMEND THE ARTICLES OF WAR (H.R. 2575); AND TO AMEND THE ARTICLES FOR THE GOVERNMENT OF THE NAVY (H.R. 3687; S. 1338) 12 (Comm. Print 1948).

<sup>28</sup> S. REP. NO. 81-486, at 10 (1949).

“naval personnel in the brig of a ship if the brig contained prisoners from an enemy vessel.”<sup>29</sup> Disciplinary tools might have been compromised even if there were a way to segregate the prisoners inside of the brig.<sup>30</sup> Congress, in a Committee report on the UCMJ, stated its intent that Article 12 would nevertheless allow detention within the same facility as long as prisoners were kept completely separated.<sup>31</sup> Congress added the language “in immediate association” to the article so as to allow detention of service members and foreign nationals as long as they were segregated; this change went into effect when the UCMJ was enacted in 1950.<sup>32</sup>

### B. *Uniform Code of Military Justice*

Around the same time Congress passed the Elston Act, Secretary of Defense James Forrestal ordered the formation of a select subcommittee to work toward a more uniform code.<sup>33</sup> President Harry Truman approved the Manual for Courts Martial (“MCM”) on February 8, 1951, by Executive Order.<sup>34</sup> The MCM combined the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard in a standardized code applicable to each service.<sup>35</sup> The purpose of the UCMJ, which is contained within the MCM, was threefold. First, it would establish a consistent system of military justice that would “protect the rights of those subject to it.”<sup>36</sup> Second, it would “increase public confidence in military justice.”<sup>37</sup> Finally, it would not “impair the performance of military functions.”<sup>38</sup>

In a 1950 hearing, Senator Kefauver from Tennessee supported the proposed UCMJ, and he took to the Senate floor to

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Kefauver speech, *supra* note 18, at 1353.

<sup>34</sup> Exec. Order No. 10,214, 16 Fed. Reg. 1303 (Feb. 10, 1951), *available at* <http://trumanlibrary.org/executiveorders/index.php?pid=139>.

<sup>35</sup> *Id.*

<sup>36</sup> Kefauver speech, *supra* note 18, at 1353.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*



discuss the articles in detail.<sup>39</sup> According to him, Article 12 would continue to prohibit the confinement of service members with enemy prisoners.<sup>40</sup> Congress proposed another revision to Article 12 in 1955.<sup>41</sup> This provision allowed for an exception to the prohibition on confinement with foreign nationals so long as the particular foreign national was a member of a friendly foreign nation's armed forces.<sup>42</sup> This proposed revision indicates that at least some members of Congress considered limited exceptions to the restriction on confinement with foreign nationals.

Article 58(a) was introduced by incorporating the Army's Articles of War 42 and the Articles for the Government of the Navy 7, and permitted prisoner transfers to Department of Justice institutions.<sup>43</sup> The armed forces desired to afford maximum support for young, rehabilitative prisoners, and to maintain their separation from hardened criminals.<sup>44</sup> Senator Kefauver later noted that, after consulting with each service's correctional branch, Article 58 was revised "to make available more adequate facilities for rehabilitation of offenders."<sup>45</sup> The purpose of the article was first, to rehabilitate a prisoner so he could return to duty, or second, to prepare the prisoner for a "successful adjustment in civil[ian] life."<sup>46</sup>

## II. THE EVOLUTION AND EXPANSION OF ARTICLE 12

### A. *Important Canons of Statutory Interpretation*

Before examining how the judiciary has expanded its interpretation of Article 12, it is worth reviewing how courts might employ various canons of statutory interpretation in defining its scope. The Supreme Court has set the standard for statutory

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1358.

<sup>41</sup> H.R. 6583, 84th Cong., at 2 (1955).

<sup>42</sup> *Id.*

<sup>43</sup> S. REP. NO. 81-486, at 24-25 (1949).

<sup>44</sup> *Id.*

<sup>45</sup> Kefauver speech, *supra* note 18, at 1362.

<sup>46</sup> S. REP. NO. 81-486, at 25 (1949).

interpretation by first looking to the plain meaning of the statute.<sup>47</sup> The current language of Article 12 provides: “No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces.”<sup>48</sup> In order to evaluate the language properly, we use canons of interpretation that evaluate the language itself as well as the entire act as a whole.<sup>49</sup>

### 1. The Plain Meaning Canon

The most fundamental canon of interpretation is the plain meaning canon, in which the words of the statute are given their most common, ordinary meaning unless there is a reason to believe a word should be considered in another context.<sup>50</sup> In Article 12, a court would analyze the words “confinement,” “immediate,” and “association” to determine what constitutes the necessary separation from enemy combatants. Confinement is defined in Black’s Law Dictionary as “the state of being imprisoned or restrained.”<sup>51</sup> Although this definition is broad enough to include solitary confinement, it is likely not a result Congress intended.<sup>52</sup> Solitary confinement may bring in constitutional concerns, and the constitutional doubt canon indicates statutes should be interpreted so that the constitutionality is not in doubt.<sup>53</sup> Similarly, “immediate”

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<sup>47</sup> *United States v. Turkette*, 452 U.S. 576, 580 (1981) (“In determining the scope of a statute, we look first to its language.”); see David A. Strauss, “*Why Plain Meaning?*,” 72 NOTRE DAME L. REV. 1565, 1569-70 (1997) (noting that the plain language of a statute is typically “the best indication of what the legislature intended”).

<sup>48</sup> UCMJ art. 12.

<sup>49</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 59 (2012) (“No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.”); see also Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395, 403 (1949-1950).

<sup>50</sup> SCALIA & GARNER, *supra* note 49, at 69-70.

<sup>51</sup> BLACK’S LAW DICTIONARY 340 (9th ed. 2009).

<sup>52</sup> Solitary confinement is defined as “the complete isolation of a prisoner.” BLACK’S LAW DICTIONARY 1521 (9th ed. 2009).

<sup>53</sup> SCALIA & GARNER, *supra* note 49, at 247.

is defined as a lack of separation between people or things,<sup>54</sup> and “association” is defined as “[a] gathering of people for a common purpose” or “persons so joined.”<sup>55</sup> Thus, a court could read this statute to mean that some type of separation must exist when confined within the same facility.

## 2. The Whole-Text Canon

Another important canon is the whole-text canon, which states that “[t]he text must be construed as a whole.”<sup>56</sup> This canon is important when examining the UCMJ because many of the articles ought to be interpreted in relation to one another. Since Article 12 and Article 58 are part of the same statute,<sup>57</sup> the whole-text canon provides that each part of the statute should be construed in a way that avoids conflict with the rest.<sup>58</sup> In other words, to maintain the wholeness of the statute, a court should interpret Article 12 to apply to Article 58.

### *B. Precedent Concerning UCMJ Interpretation*

Courts have established precedent concerning UCMJ interpretations and have confronted the issue of whether Article 12 applies to Article 58 on several occasions.<sup>59</sup> Courts have also expanded interpretations of Article 12’s language by finding, for example, that a single piece of wire can provide separation.<sup>60</sup> Such court determinations have been based on dictionary definitions and legislative history.<sup>61</sup>

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<sup>54</sup> BLACK’S LAW DICTIONARY 816 (9th ed. 2009).

<sup>55</sup> *Id.*; see also *United States v. Wise*, 64 M.J. 468, 470 (C.A.A.F. 2007).

<sup>56</sup> SCALIA & GARNER, *supra* note 49, at 167.

<sup>57</sup> 10 U.S.C. § 47 (2012).

<sup>58</sup> SCALIA & GARNER, *supra* note 49, at 167.

<sup>59</sup> *Webber v. Bureau of Prisons*, No. 02-5113, 2002 WL 31045957, at \*1 (D.C. Cir. 2002).

<sup>60</sup> *Wise*, 64 M.J. at 474.

<sup>61</sup> *Id.*

## 1. Application of Article 12 and Article 58

The U.S. Court of Appeals for the District of Columbia Circuit noted that Article 58 explicitly mandates that service members receive the “same treatment as their civilian counterparts” when housed in a civilian prison.<sup>62</sup> Because Article 58 does not specifically “create an exception concerning confinement of foreign nationals,” and because Article 12 does not insist that it applies to civilian confinement facilities, the court reasoned that Article 58 “trumps” Article 12.<sup>63</sup>

## 2. Article 12 Applications to Pretrial Confinement

In *United States v. Palmiter*, the Court of Military Appeals reviewed a case involving a challenge to pretrial confinement where the service member “was placed in the general population of the confinement facility with sentenced prisoners.”<sup>64</sup> Although this case involved an Article 13 issue and not Article 12, Chief Judge Everett, in his concurrence, suggested that Article 12 prevented “commingling of pretrial detainees,” which could include pretrial foreign nationals.<sup>65</sup> He further stated that Article 12 seems to show “a prisoner may have a legitimate interest in being confined” separately from a “distinctively different class of prisoners,” as commingled confinement may be demeaning to the accused detainee.<sup>66</sup> However, the majority dismissed this argument due to lack of support in the legislative history and noted that Article 13 was silent on the issue of commingling.<sup>67</sup> The court correctly held Article 13 was intended to prevent “pretrial confinement as punishment without benefit of trial.”<sup>68</sup> However, it is unclear whether or not the commingling of prisoner types in pretrial confinement constitutes punishment, and the court’s reliance on congressional silence in

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<sup>62</sup> *Webber*, 2002 WL 31045957, at \*1.

<sup>63</sup> *Id.* The court provided no reasoning for this position in its opinion.

<sup>64</sup> *United States v. Palmiter*, 20 M.J. 90, 92 (C.M.A. 1985).

<sup>65</sup> *Id.* at 98 (Everett, J. concurring).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 96 (majority opinion).

<sup>68</sup> *Id.*

answering this issue in the negative is problematic.<sup>69</sup> Chief Judge Everett's interpretation that commingling is prohibited would provide a safer environment for a pretrial service member by ensuring the service member would not be in contact with either a pretrial or sentenced foreign national.<sup>70</sup>

### 3. Interpreting Article 12's "Immediate Association" Language

Some critics believe the courts have expanded the "immediate association" language of Article 12 and cite to *United States v. Towhill* as an example of this overreach.<sup>71</sup> In that case, a service member was placed in a housing pod while awaiting transfer to another military prison.<sup>72</sup> The service member had daily contact with a Spanish-speaking foreign national, nicknamed "The Mexican."<sup>73</sup> Although the two were confined separately, they had "direct and indirect interaction on numerous occasions."<sup>74</sup> After several weeks, the corrections officer recognized the issue and transferred the service member to a different pod.<sup>75</sup> Citing congressional debate that led to adoption of the "immediate association" language because of problems that could arise in overseas areas with only one jail facility, the court held that the Article 12 language meant service members could be confined in the same prison but must be separated in different cells.<sup>76</sup> The court, however, granted credit for the confinement time with the foreign national, not because they were confined in the same housing pod,

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<sup>69</sup> *Id.*

<sup>70</sup> *Palmiter*, 20 M.J. at 98 (Everett, J. concurring).

<sup>71</sup> See Traeger, *supra* note 2, at 32-33 (stating that "in the span of sixty-three years," Article 12's interpretation has broadened from "prohibiting 'confinement' with 'prisoners of war' . . . to granting credit for 'immediate association' in a 'housing pod' with a 'Spanish-speaking inmate'"); UCMJ art. 12.

<sup>72</sup> *United States v. Towhill*, ACM 37695, 2012 WL 1059015, at \*1 (A.F. Ct. Crim. App. 2012).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at \*2; see *United States v. Wise*, 64 M.J. 468, 475 (C.A.A.F. 2007); see also S. REP. NO. 81-486, at 10 (1949).

but because they had near daily contact, a clear violation of Article 12.<sup>77</sup>

The courts further expanded the meaning of Article 12's "immediate association" language in *United States v. Wise*, a case where a service member was confined in the same location as Iraqi enemy prisoners.<sup>78</sup> The confinement area was simply a space bounded by concertina wire<sup>79</sup> and then subdivided into sections with additional concertina wire.<sup>80</sup> As concertina wire is not a solid barrier, the enemy prisoners were close enough to engage the service member in conversation.<sup>81</sup> The service member also claimed that two of the enemy prisoners had tuberculosis and were within a distance of fifteen feet.<sup>82</sup> The court noted that the "immediate association" language was "subject to multiple interpretations."<sup>83</sup> After analyzing the dictionary definitions of both "immediate" and "association," the court determined that Article 12 prohibits confinement that is "directly connected or combined."<sup>84</sup> The court concluded that, while one strand of concertina wire represented a "real boundary" between the service member and the enemy prisoners, it did not dispose of the issue.

The court then turned to legislative history to determine what type of separation Article 12 required.<sup>85</sup> Even though the court properly stated the legislative history, the court confused Congress' reasoning behind the change in wording from the Selective Service

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<sup>77</sup> *Towhill*, 2012 WL 1059015 at \*3; *see also* *United States v. Brandon*, ACM 37399, 2010 WL 4025685 at \*3 (A.F. Ct. Crim. App. Mar. 22, 2010) (granting credit for Article 12 violation because service member was housed in open bay with foreign nationals); *United States v. Spinella*, ACM S31708, 2010 WL 8033026, at \*3 (A.F. Ct. Crim. App. 2010) (awarding credit for service member confined with foreign nationals in open bay jail).

<sup>78</sup> *Wise*, 64 M.J. at 470.

<sup>79</sup> Concertina wire is a "high strength, spring-steel wire with multiple barbs attached at short intervals." *Id.* at 474.

<sup>80</sup> *Id.* at 470.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 474.

<sup>84</sup> *Wise*, 64 M.J. at 474.

<sup>85</sup> *Id.* at 475.

Act of 1948.<sup>86</sup> The court noted that the change in the text of the Act reflected the fact that “Congress specifically intended to avoid” that this type of situation would be a “per se violation[] of Article 12.”<sup>87</sup> By holding that concertina wire provided an adequate boundary, the court expanded the plain meaning of the statute.<sup>88</sup> Congress was clear during debate that the intent was to allow confinement in the same facility but in “different cells.”<sup>89</sup> It does not follow that Congress would accept a single strand of wire separating prisoners as being analogous to a different cell.<sup>90</sup>

### III. AN EXAMINATION OF TWO RECENT CASES

In the summer of 2014, CAAF heard two cases involving Article 12: *United States v. McPherson* and *United States v. Wilson*. Each case covered several issues, including the meaning of the statute’s language, whether a conflict exists between Articles 12 and 58, and whether administrative remedies must be exhausted before receiving relief for a violation of Article 12.<sup>91</sup> The cases were decided on the same day and Chief Judge Baker adopted his *McPherson* dissent as his dissent in *Wilson*.<sup>92</sup>

#### A. *United States v. McPherson*

During a special court-martial<sup>93</sup> in *United States v. McPherson*, a military judge convicted Senior Airman McPherson of numerous offenses, including unauthorized absence, distribution of

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<sup>86</sup> *Id.* at 475-77; see also *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Serv.*, 81st Cong. 914-16 (1949) [hereinafter *Hearing on H.R. 2498*].

<sup>87</sup> *Wise*, 64 M.J. at 476.

<sup>88</sup> See *id.* at 474.

<sup>89</sup> *Hearing on H.R. 2498*, *supra* note 86, at 914.

<sup>90</sup> See *Wise*, 64 M.J. at 474.

<sup>91</sup> See *United States v. McPherson*, 73 M.J. 393, 394 (C.A.A.F. 2014); *United States v. Wilson*, 73 M.J. 404, 405 (C.A.A.F. 2014).

<sup>92</sup> See *McPherson*, 73 M.J. at 397 (Baker, C.J., dissenting in part); *Wilson*, 73 M.J. at 406 (Baker, C.J., dissenting).

<sup>93</sup> A special court-martial may try a service member for any non-capital offense and certain capital offenses where punishment is within the special court-martial’s authority. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULE FOR COURTS-MARTIAL 201(f)(2) (2012) [hereinafter R.C.M.].

drugs, and fraudulent enlistment.<sup>94</sup> He was subsequently sentenced to a bad-conduct discharge,<sup>95</sup> confinement for eight months, and a reduction in rank.<sup>96</sup> The Judge Advocate General of the Air Force, in the form of a certified question, asked CAAF to determine whether Article 12 applies to service members who are confined in state or federal facilities within the continental United States.<sup>97</sup> In its decision, the court also addressed whether administrative remedies must be exhausted before relief under Article 12 could be granted.<sup>98</sup>

### 1. Article 12 Issues

After McPherson was sentenced, he was imprisoned at the Elmore County Detention Facility in Idaho for fifteen days.<sup>99</sup> During his time there, he claimed he was lodged in an open area where he had contact with a foreign national awaiting deportation.<sup>100</sup> He stated that he and the foreign national “played card games together every night.”<sup>101</sup> Although McPherson knew the person was a foreign national, he never raised the issue with anyone in his chain of

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<sup>94</sup> *McPherson*, 73 M.J. at 394.

<sup>95</sup> A bad-conduct discharge is less severe than a dishonorable discharge and only applies to enlisted personnel. A special court-martial may award this punishment, which is reserved for only bad conduct and not for serious offenses. See R.C.M. 1003(b)(8)(C).

<sup>96</sup> *McPherson*, 73 M.J. at 394.

<sup>97</sup> *Id.*

<sup>98</sup> The court specifically examined whether a service member must exhaust all administrative remedies under Article 138 when an Article 12 violation occurs before relief is granted. *Id.* at 394, 397. Relief may be granted by awarding one day of credit for each day of violation. R.C.M. 305(k). The court noted that the exhaustion of administrative requirements provides (1) that grievances will be resolved at the lowest possible level and (2) for the development of an adequate appellate record. *McPherson*, 73 M.J. at 397. Because McPherson did not raise an Article 12 issue to his chain of command or during his clemency submission, the Air Force never had the opportunity to correct the condition, and the record on appeal did not contain details of his confinement. *Id.* The author does not believe discussing the exhaustion of administrative remedies is necessary and leaves that question for a future article.

<sup>99</sup> *McPherson*, 73 M.J. at 394.

<sup>100</sup> *Id.* at 394-95.

<sup>101</sup> *Id.* at 395.



command or with anyone at the facility.<sup>102</sup> He was later transferred to the brig at Marine Corps Air Station (“MCAS”) Miramar.<sup>103</sup>

The court held that “the text of Article 12 is plain on its face.”<sup>104</sup> The statute imposes no geographical limitations; therefore, the court stated it would not read any limitations into it.<sup>105</sup> Instead, the court “must presume that a legislature says in a statute what it means and means in a statute what it says there.”<sup>106</sup> The court also held that Article 12 applies to service members in state or federal confinement.<sup>107</sup> No further inquiry is required when the text of the statute is unambiguous.<sup>108</sup>

## 2. Article 58 Issues

The Government also argued that Article 12 is in conflict with Article 58, so the court conducted additional statutory interpretation.<sup>109</sup> Congress used the phrase “[p]ersons so confined . . . are subject to the same discipline and treatment as persons confined . . . by the courts of the United States or of the State.”<sup>110</sup> The Government maintained that this implied Article 58 was more specific than Article 12,<sup>111</sup> reasoning that Congress intentionally omitted this language from Article 12.<sup>112</sup> In the Government’s opinion, the more specific language of Article 58 should apply to both Articles.<sup>113</sup> But the court disagreed with the Government’s analysis, reasoning that a service member can receive the same treatment as a civilian confined in a civilian prison, and

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* The brig at MCAS Miramar is the Naval Consolidated Brig Miramar and is also known as Joint Regional Correctional Facility Southwest. *Naval Consolidated Brig Miramar*, NAVY PERS. COMMAND, <http://www.public.navy.mil/bupers-npc/support/correctionprograms/brigs/miramar/> (last visited Mar. 26, 2015).

<sup>104</sup> *McPherson*, 73 M.J. at 395.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* (quoting *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 395.

<sup>110</sup> *McPherson*, 73 M.J. at 396; UCMJ art. 58.

<sup>111</sup> *McPherson*, 73 M.J. at 396.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

simultaneously be confined in an area separate from any foreign nationals.<sup>114</sup> The court further stated it could not create a conflict where one does not exist.<sup>115</sup>

Both articles were passed at the same time, and the court read them as relating to the same matter.<sup>116</sup> Thus, “both apply without conflict to military members confined in state or federal institutions in the United States.”<sup>117</sup> The Government next argued that the holding would generate an absurd result with respect to confinement conditions, particularly solitary confinement.<sup>118</sup> The court, however, saw this as a policy matter and not a legal issue, even though some confinement conditions may have constitutional implications.<sup>119</sup> According to the court, since other methods of applying Article 12 requirements exist, the plain language reading of the statute did not prescribe “absurd results.”<sup>120</sup>

#### B. *United States v. Wilson*

*United States v. Wilson*, like *McPherson*, involved an Article 12 complaint and was resolved the same day as *McPherson*.<sup>121</sup> Here, a general court-martial convicted Wilson of failing to obey orders.<sup>122</sup> He was sentenced to a bad-conduct discharge, confinement for three months, and a reduction in pay grade.<sup>123</sup> He was subsequently sentenced to serve his confinement in a nearby civilian facility.<sup>124</sup>

Because the jail did not have a process for determining which prisoners were foreign nationals, jail officers segregated Wilson from

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *McPherson*, 73 M.J. at 396.

<sup>118</sup> *Id.*; see also *United States v. Wilson*, 73 M.J. 404, 406 (C.A.A.F. 2014) (holding solitary confinement in a civilian prison met the requirement of Article 12).

<sup>119</sup> See *McPherson*, 73 M.J. at 396; see U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment).

<sup>120</sup> *McPherson*, 73 M.J. at 396.

<sup>121</sup> *Wilson*, 73 M.J. at 405.

<sup>122</sup> *Id.*; see also UCMJ art. 92.

<sup>123</sup> *Wilson*, 73 M.J. at 405.

<sup>124</sup> The civilian facility was the jail in Cook County, Georgia, near Moody Air Force Base. *Id.*

the rest of the prison population in a single cell, so he was essentially in solitary confinement.<sup>125</sup> The Air Force Court of Criminal Appeals held that Article 12 applies to service members “‘everyplace,’ to include confinement facilities within the continental United States.”<sup>126</sup> The court concluded, in accord with *McPherson*, that Article 12 does apply to a service member confined in a civilian jail; however, because Wilson was confined alone, no violation of Article 12 occurred.<sup>127</sup>

### C. A Common Dissent

The *Wilson* dissent adopted the *McPherson* dissent in total.<sup>128</sup> Both the majority and the dissent agreed that a service member, consistent with *Wise*, must exhaust all administrative remedies for an Article 12 violation before relief is granted.<sup>129</sup> The disagreement among the judges lay in the interpretation of Article 12, where the dissent saw a conflict with Article 58 when Article 12 is read literally.<sup>130</sup> The dissent’s argument in *McPherson* centered around two points: (1) legislative intent, and (2) which Article should take precedence.<sup>131</sup>

#### 1. Legislative Intent

The dissent maintained that, based on legislative history, Congress desired Article 12 to protect service members from being confined with enemy combatants, while Article 58 allowed for the services to take advantage of the rehabilitation services of civilian institutions.<sup>132</sup> There was no proposition or recommendation that would allow Article 12 to be used to circumvent Article 58.<sup>133</sup>

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (quoting *Hearing on H.R. 2498*, *supra* note 86, at 914-15).

<sup>127</sup> *Id.* at 406.

<sup>128</sup> See *id.* at 406 (Baker, C.J., dissenting). Because the dissents are identical, this Comment will identify it as the *McPherson* dissent.

<sup>129</sup> See *McPherson*, 73 M.J. at 397-98 (Baker, C.J., concurring in part and dissenting in part).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 398-99.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

Although the majority asserted that solitary confinement is not the only way to follow Article 12, the dissent stated the natural result is that civilian prisons will continue to place service members in solitary confinement to avoid an Article 12 conflict.<sup>134</sup> The majority also sidestepped the issue of how the “same discipline and treatment” language of Article 58, as well as the rehabilitative intent, can be achieved with a service member in solitary confinement.<sup>135</sup>

The number of incarcerated foreign nationals also poses a problem. A Government Accountability Office report indicates approximately 350,000 foreign nationals are incarcerated in local, state, and federal jails and prisons.<sup>136</sup> Over 218,000 prisoners are housed in the Bureau of Prison system that comprises 119 institutions.<sup>137</sup> In total, there are approximately 2.3 million inmates for any given day in roughly 3,100 jail facilities throughout the United States.<sup>138</sup> This shows that foreign nationals may comprise more than 15 percent of inmates. Based on these numbers, it appears that solitary confinement may be the only viable way to conform to the statute.<sup>139</sup>

The dissent claimed that the purpose behind Article 12, and the principal change in language from “confined with” to “in immediate association with,” was the prohibition on “confinement of a [service member] in the same cell with a foreign national, particularly one engaged in military service, in times of war.”<sup>140</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> *McPherson*, 73 M.J. at 398-99 (Baker, C.J., concurring in part and dissenting in part).

<sup>136</sup> *Id.* at 400; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-187, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATION, ARRESTS, AND COSTS (2011).

<sup>137</sup> FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 2014, available at [http://www.bop.gov/resources/pdfs/legal\\_guide.pdf](http://www.bop.gov/resources/pdfs/legal_guide.pdf).

<sup>138</sup> *Statistics of Note*, AMERICAN JAIL ASS'N, <https://members.aja.org/About/StatisticsOfNote.aspx> (last visited Mar. 26, 2015). For a detailed breakdown of prison population statistics, see LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 (2014), available at <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>.

<sup>139</sup> See *McPherson*, 73 M.J. at 400 (Baker, C.J., concurring in part and dissenting in part).

<sup>140</sup> *Id.* at 400-01.

While the dissent followed a plain reading of the text, the emphasis centered on confinement with “*enemy prisoners*,” but ignored the likelihood that civilian facilities will not always house enemy prisoners.<sup>141</sup> Further, congressional debate that removed the geographic restraint from Article of War 16 illustrated the intent that Article 12 would apply “everyplace.”<sup>142</sup> Based on the fact that there was no legislative discussion of Article 12’s applicability to confinement in civilian jails or prisons, the dissent infers that Congress never intended that service members confined in a civilian institution be separated from foreign nationals “who are not enemies” or “hostile to the government.”<sup>143</sup> If the statute applies to service members “everyplace,”<sup>144</sup> then it would follow that civilian institutions are included as long as the plain meaning of the text is considered.

Service members’ rehabilitation facilitates their reentry into either service or civilian life and is the primary purpose behind the legislative history of Article 58’s provisions for service members incarcerated in civilian prisons.<sup>145</sup> Because military guards rotate duty assignments at regular intervals, they do not gain the experience or specialized training that their civilian counterparts have at major correctional institutions.<sup>146</sup> Thus, military members are not specifically trained in rehabilitation, and one of the primary objectives behind Article 58 is service member rehabilitation.<sup>147</sup> The dissent notes that there is no discussion in the legislative history of any priority between articles, but instead shows that the government would not, and should not, have limited options for confining a service member in a civilian institution.<sup>148</sup> Thus, the dissent argues

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<sup>141</sup> *Id.* at 401 (emphasis added) (internal quotes omitted).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *McPherson*, 73 M.J. at 402 (Baker, C.J., concurring in part and dissenting in part); see also S. REP. NO. 81-486, at 25 (1949).

<sup>146</sup> See *McPherson*, 73 M.J. at 402 (Baker, C.J., concurring in part and dissenting in part).

<sup>147</sup> S. REP. NO. 486, at 24-25.

<sup>148</sup> *McPherson*, 73 M.J. at 403 (Baker, C.J., concurring in part and dissenting in part).

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that the majority's interpretation "defeats the purpose of Article 58," by removing its priority over Article 12.<sup>149</sup>

## 2. Statutory construction

The dissent argued that nothing in the legislative history indicated that Congress intended for Article 12 to impede Article 58.<sup>150</sup> The dissent relied on a decision by the U.S. Court of Appeals for the District of Columbia Circuit that concluded the two articles "could not be harmonized."<sup>151</sup> That court held:

Article 58 of the Uniform Code of Military Justice states categorically that military prisoners housed in Bureau of Prisons facilities shall be subject to the same treatment as their civilian counterparts. It does not create an exception concerning confinement with foreign nationals, nor does Article 12 of the Code provide that its prohibition against such confinement survives Article 58's same-treatment rule. Thus, by its terms, Article 58 trumps Article 12, and the district court properly dismissed the complaint for failure to state a claim.<sup>152</sup>

This does not follow if one is interpreting the text by applying the whole-text canon.<sup>153</sup> The Court of Appeals for the Armed Forces stated that Article 58 created no specific exception for foreign nationals, but by its own interpretation, conflict arises between the articles that the whole-text canon seeks to avoid.<sup>154</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 400.

<sup>151</sup> *Id.* at 399.

<sup>152</sup> *Webber v. Bureau of Prisons*, No. 02-5113, 2002 WL 31045957, at \*1 (D.C. Cir. 2002) (citations omitted).

<sup>153</sup> See SCALIA & GARNER, *supra* note 49, at 167.

<sup>154</sup> See *McPherson*, 73 M.J. at 399 (quoting *Webber*, 2002 WL 31045957, at \*1 (citations omitted)); see also SCALIA & GARNER, *supra* note 49, at 167.

*D. Policy Implications – Why it is Necessary for Article 12 to Attach to Article 58*

Although the shared dissents in *Wilson* and *McPherson* argued that Article 58 trumps Article 12,<sup>155</sup> this approach creates policy implications. A Department of Defense (“DOD”) Directive provides that “[p]ost-trial confinement of military prisoners shall serve the purposes of the incapacitation, rehabilitation, deterrence, and punishment of prisoners.”<sup>156</sup> The DOD Directive further provides for “uniformity in and among the Military Services in the treatment of prisoners” as well as the Article 12 prohibition on confinement with foreign nationals.<sup>157</sup> Because there is no DOD directive to the contrary, it follows that the services are still required to ensure uniform treatment of military prisoners in civilian institutions. This flows directly from Article 58’s “same discipline and treatment” language;<sup>158</sup> however, it also follows that the respective branch should guarantee the Article 12 prohibition is honored.

The policy behind Article 12 is self-evident: safety of service members while in confinement. This is analogous to some civilian jails that offer former police officers protective custody while they are in confinement.<sup>159</sup> When foreign nationals are located in the same facility as a military prisoner, the service member’s safety is paramount. Additionally, there is a concern that a service member

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<sup>155</sup> *McPherson*, 73 M.J. at 399 (Baker, C.J., concurring in part and dissenting in part).

<sup>156</sup> U.S. DEP’T OF DEF., DIR. 1325.04, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES para. 4.2 (Apr. 23, 2007).

<sup>157</sup> *Id.* at paras. 4.1, 4.3.

<sup>158</sup> UCMJ art. 58.

<sup>159</sup> See Frank Main, *When cops go to jail*, CHICAGO SUN TIMES (Jan. 12, 2011), <http://www.suntimes.com/news/metro/3430932-418/pedersen-prison-burge-law-chicago.html>; but see Trisha Bishop, *In federal prison, Baltimore cops get no breaks*, BALTIMORE SUN (Aug. 19, 2012), [http://articles.baltimoresun.com/2012-08-19/news/bs-md-officers-in-prison-20120819\\_1\\_federal-prison-kickback-scheme-baltimore-cops](http://articles.baltimoresun.com/2012-08-19/news/bs-md-officers-in-prison-20120819_1_federal-prison-kickback-scheme-baltimore-cops).

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could be radicalized and turned against the United States.<sup>160</sup> In fact, the Federal Bureau of Investigation has stated:

Prisons literally provide a captive audience of disaffected young men easily influenced by charismatic extremist leaders. These inmates, mostly minorities, feel that the United States has discriminated against them or against minorities and Muslims overseas. This perceived oppression, combined with a limited knowledge of Islam, makes this population vulnerable for extremists looking to radicalize and recruit.<sup>161</sup>

This is just one example of a type of radicalization that illustrates the necessity to maintain military prisoners separate from any potentially hostile foreign national prisoners. In order to prevent these and other types of situations, clarification of Article 12's language is required

#### IV. RECOMMENDED CHANGES TO RESOLVE AMBIGUITY

Changes to Article 12 are necessary to provide clarification of the legislative purpose to military judges, Judge Advocates, and service members. As long as courts adhere to precedent, the articles will be connected and solitary confinement will be an acceptable solution for military prisoners housed in civilian prisons.<sup>162</sup> As maintaining the status quo does not appear to be a logical option, because it does not solve any of the issues stated by the dissent in *McPherson* and *Wilson*, there are two proposed alternatives: (1) return to the original Article 12 language from the Elston Act, or (2) adopt new changes to Article 12. These options will be analyzed and each approach will be weighed critically.

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<sup>160</sup> See generally Dennis A. Ballas, *Prisoner Radicalization*, FBI LAW ENFORCEMENT BULL., Oct. 2010, available at <http://leb.fbi.gov/2010/october/prisoner-radicalization>.

<sup>161</sup> *Id.* at 4 (citing FBI Deputy Asst. Dir. Donald Van Duyn's testimony before the Senate Committee on Homeland Security and Governmental Affairs); see also Mark S. Hamm, *Prisoner Radicalization: Assessing the Threat in U.S. Correctional Institutions*, 261 NAT'L INST. FOR JUSTICE J. 14 (2008).

<sup>162</sup> See *United States v. Wilson*, 73 M.J. 404, 406 (C.A.A.F. 2014).



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A. *Return to the Original Language from the Elston Act*

One option suggested for resolving the ambiguity in Article 12 is to return to the original language proposed in the Elston Act, which simply states that service members should not be confined with enemy prisoners.<sup>163</sup> This presents a binary approach: service members will not be where enemy prisoners are located, and vice versa.<sup>164</sup> The problem with this approach is that most detainees are located overseas or on Naval vessels in international waters.<sup>165</sup> Returning to the Elston Act language does not address the concerns Congress raised when debating the UCMJ.<sup>166</sup> Service member confinement aboard a ship of foreign base may be impossible if enemy prisoners are already housed in the same facility.<sup>167</sup> Congress was concerned that the language was too restrictive and would prohibit confinement of service members in the same building or ship where an enemy combatant was located.<sup>168</sup> Thus, returning to the Elston Act language does not solve the ambiguity problem.

B. *Proposed Changes to Article 12*

Because returning to the prior version carries so many problems, the language to Article 12 requires a change to resolve its current ambiguity and solidify its relationship with Article 58. Certain revisions will provide a more manageable solution to confinement in military and civilian prisons. These changes include modifying the language and adding a new section covering when the Article applies.

The first necessary change would modify the language of Article 12 as follows: “(a) No member of the armed forces may be placed in confinement in immediate association with enemy

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<sup>163</sup> Traeger, *supra* note 2, at 34; see Selective Service Act of 1948, Pub L. No. 80-759, 62 Stat. 604, 630.

<sup>164</sup> See Traeger, *supra* note 2, at 34.

<sup>165</sup> *Id.*

<sup>166</sup> See S. REP. NO. 81-486, at 10 (1949).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

prisoners or other foreign nationals *hostile to the United States*.<sup>169</sup> There are several ways to determine if a prisoner is hostile to the United States. First, a prisoner is deemed hostile if they are citizens of nations the State Department has designated as state sponsors of terrorism (currently Cuba, Iran, Sudan, and Syria); likewise, people from terrorist safe havens will require extra scrutiny.<sup>170</sup> Second, a person who has lost their U.S. citizenship, or had their lawful permanent resident (LPR) status revoked, could be designated as hostile to the United States, depending on the reason for their loss of nationality or LPR status.<sup>171</sup> Third, any U.S. Citizen who is suspected of or involved in international or domestic terrorism should be designated as hostile.<sup>172</sup> Whether a foreign national is a member of a friendly nation's armed forces, or simply a visitor from a foreign country not included in the lists above, should have no bearing on confinement conditions if that foreign national displays no hostility to our country. Congress had once proposed an exception for military members of a friendly nation's armed forces,<sup>173</sup> and should again consider making an exception for any foreign national not hostile to the United States. If a service member is placed in prison with a person from Canada who shows no hostility to America, then there is less concern for the service member's safety. In the alternative, if a foreign national is not an enemy combatant but demonstrates hostility to the country, then the confinement restriction applies.

The second change to Article 12 would add an additional section titled part (b), to give clear guidance on its applicability to service member confinement in civilian prisons. Here, the proposed language is simply, "(b) This article applies whether a service

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<sup>169</sup> See UCMJ art. 12 (where "hostile to the United States" would replace the current wording of "not members of the armed forces.").

<sup>170</sup> *State Sponsors of Terrorism*, U.S. DEP'T OF STATE, <http://www.state.gov/j/ct/list/c14151.htm> (last visited Mar. 30, 2015); see also U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2013: EXECUTIVE SUMMARY 19 (Apr. 2014), available at <http://www.state.gov/documents/organization/225050.pdf>.

<sup>171</sup> 8 U.S.C. § 1451(c) (2012) (providing for revocation of naturalization due to membership in certain organizations); 8 U.S.C. § 1481(a)(3), (7) (2012) (providing for loss of nationality).

<sup>172</sup> See 18 U.S.C. § 2331 (2012) (defining international and domestic terrorism).

<sup>173</sup> H.R. 6583, 84th Cong., at 2 (1955).

member is confined in a military or civilian facility.” This change provides the necessary guidance to military bases that do not have confinement facilities.<sup>174</sup> While it is unlikely that an enemy combatant will be confined in a civilian prison, it is much more likely that a hostile foreign national will be confined in one. For instance, there have been numerous homegrown terrorist plots in the United States since 9/11.<sup>175</sup> In many of these, the plot involved foreign nationals living in the United States, who could be confined in local civilian institutions, not governed by the Bureau, before transferring to federal detention sites.<sup>176</sup> Furthermore, the closing of numerous military bases, along with any related confinement facilities, compels remaining bases without detention facilities to utilize civilian institutions more often.<sup>177</sup> Although Congress recently voted against another round of base closures, studies of future base closings may further impact this issue.<sup>178</sup> Although some articles have suggested that we should invest in “reestablishing military confinement facilities,”<sup>179</sup> a constrained budget affected by sequestration makes that improbable.<sup>180</sup>

### C. *Possible criticism for proposed approach*

Some anticipated criticisms to the proposed language modifications are: (1) that the change is unnecessary because it may cause more confusion and do more harm than good, (2) that there is

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<sup>174</sup> The Air Force frequently uses local civilian confinement facilities because it lacks facilities on base. See Traeger, *supra* note 2, at 33.

<sup>175</sup> See JESSICA ZUCKERMAN, ET AL., 60 TERRORIST PLOTS SINCE 9/11: CONTINUED LESSONS IN DOMESTIC COUNTERTERRORISM (July 22, 2013), available at <http://www.heritage.org/research/reports/2013/07/60-terrorist-plots-since-911-continued-lessons-in-domestic-counterterrorism>.

<sup>176</sup> *Id.*

<sup>177</sup> See generally DEF. BASE CLOSURE & REALIGNMENT COMM’N, FINAL REPORT TO THE PRESIDENT: EXECUTIVE SUMMARY (2005), available at <http://www.brac.gov/docs/final/ExecutiveSummary.pdf>.

<sup>178</sup> Jared Serbu, *DoD maintains BRAC fight, despite opposition from Congress*, FED. NEWS RADIO (June 14, 2013), <http://www.federalnewsradio.com/414/3358039/DoD-maintains-BRAC-fight-despite-opposition-from-Congress>.

<sup>179</sup> Traeger, *supra* note 2, at 34.

<sup>180</sup> See *DOD Releases Report on Estimated Sequestration Impacts*, U.S. DEP’T OF DEF. (Apr. 15, 2014), <http://www.defense.gov/news/newsarticle.aspx?id=122065> [hereinafter *Sequestration Impacts*].

no path for civilian institutions that are unable to separate prisoners with the exception of solitary confinement, and (3) that the change is unnecessary because the majority opinions of the courts have consistently adhered to precedent through *stare decisis*.

While it is always possible for a statute to cause confusion, it is unlikely that would be the case here. The modifications to the statute are not major changes and would, at a minimum, cause no more confusion than exists now. Instead, they would clarify the applicability of Article 12 to Article 58. The change from “not members of the armed forces”<sup>181</sup> to “hostile to the United States” would provide flexibility for both military and civilian prisons to confine military prisoners with non-hostile foreign nationals. Moreover, this proposed change would reinforce many court opinions and may reduce the number of appeals for Article 12 violations.<sup>182</sup>

The next critique may be that it is too costly to modify civilian jails to provide separation between service members and foreign nationals. To modify every local jail to meet this requirement would indeed be cost-prohibitive. Making a small modification to the text of Article 12 is much less costly and more worthwhile. Prisoners are typically assigned custodial levels by which they are then separated.<sup>183</sup> Different levels of control exist corresponding to the custodial level.<sup>184</sup> Therefore, for larger facilities, separating prisoners will be an easier task. For smaller institutions that lack any system of separation besides solitary confinement, the military can make the decision to transfer the prisoner to a military prison farther away, as all military prisons accept prisoners from other military branches.<sup>185</sup> The probability that a civilian institution cannot provide separation without solitary confinement appears to be small, as only

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<sup>181</sup> UCMJ art. 12.

<sup>182</sup> See, e.g., *United States v. Towhill*, ACM 37695, 2012 WL 1059015, at \*3 (A.F. Ct. Crim. App. Mar. 16, 2012) (finding an Article 12 violation because the service member interacted with a Spanish-speaking foreign national).

<sup>183</sup> See, e.g., *Assigning Inmates to Prison*, N.C. DEP'T OF PUB. SAFETY, <http://www.doc.state.nc.us/dop/custody.htm> (last visited Mar. 30, 2015).

<sup>184</sup> *Id.*

<sup>185</sup> See DODD 1325.04, *supra* note 156, at § 4.7.

a few cases have confronted this issue.<sup>186</sup> This may be more costly in a few instances; nonetheless, the modification of “hostile to the United States” should provide even fewer of these situations and ultimately prove to be more cost-effective. Another option is for the government to build DOD prison facilities, but this is also a costly option. In the current budget environment,<sup>187</sup> Congress could appropriate only a small amount of funds to current institutions that require these changes. Certainly, any amount Congress would appropriate for this purpose would pale in comparison to the cost of building a new DOD facility.<sup>188</sup> Further, the modification would actually ease the burden on local jails because *fewer* prisoners would require separation.

Lastly, it can be argued that change is not necessary because the courts have relied on precedent when interpreting Article 12 and Article 58. While this may be true, statutory interpretation warrants *de novo* review.<sup>189</sup> Therefore, it is possible that a future court could interpret the articles differently than precedent would suggest. *Stare decisis* and precedent are both subject to change; thus, it is better to modify the language of the statute to provide clarity. The proposed change to Article 12 removes the ambiguity over application to Article 58 and also provides a path to allow prisons to confine non-hostile foreign nationals with military prisoners.

## V. CONCLUSION

Since its inception, the UCMJ has been periodically reviewed, and if needed, revised. This Comment maintains that a revision to Article 12 is now required. Although Article 12 prohibits service member confinement in close proximity to foreign nationals, this Article is frequently violated in domestic confinement situations. The purpose of Article 12 is to provide for the safety of military

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<sup>186</sup> See, e.g., *United States v. Wilson*, 73 M.J. 404 (C.A.A.F. 2014) (holding solitary confinement in a civilian prison met the requirement of Article 12).

<sup>187</sup> See *Sequestration Impacts*, *supra* note 180.

<sup>188</sup> See Carol Rosenberg, *Clinic, other features add \$20M to new prison cost*, MIAMI HERALD (July 15, 2014), <http://www.miamiherald.com/news/nation-world/world/americas/article1964349.html>.

<sup>189</sup> *United States v. Wise*, 64 M.J. 468, 470 (C.A.A.F. 2007).

prisoners. Separately, Article 58 provides for greater prisoner rehabilitation by allowing service members to be confined in both military and civilian institutions. Both purposes are impeded because of the perceived ambiguity of the relationship of the two articles as well as the conflicting interpretations of the courts.

In two recent cases before the Court of Appeals for the Armed Forces, the majority and dissent disagreed as to the meaning of Article 12's text and whether it applied to Article 58. Because of such ongoing disagreement and confusion, modifying Article 12's language solves two problems, which Congress should address at the earliest opportunity. First, courts need clarity, which would be provided by stating that Article 12 must be applied to Article 58. Second, the modification provides flexibility for both military and civilian prisons by allowing military prisoners to be confined with non-hostile foreign nationals. Although there are potential criticisms to this approach, the removal of ambiguity in the statute will provide needed long-term benefits by strengthening the underlying purpose of both articles: keeping our service members safe and providing greater opportunities for rehabilitation.

