Military Courts-Martial Under the Military Justice Act of 2016

August 28, 2020

Congressional Research Service
https://crsreports.congress.gov
R46503

CRS REPORT
Prepared for Members and
Committees of Congress

Congressional Research Service
Informing the legislative debate since 1914

Military Courts-Martial Under the Military Justice Act of 2016

SUMMARY

R46503

August 28, 2020

Jennifer K. Elsea
Legislative Attorney

Jonathan M. Gaffney
Legislative Attorney

The Supreme Court has called military justice a system of justice separate from jurisprudence in the civilian courts. Members of the Armed Forces are subject to rules, orders, proceedings, and consequences different from the rights and obligations of their civilian counterparts. Accordingly, it might be said that discipline is as important as liberty interests in the military justice system. The Constitution specifically exempts military members accused of a crime from the Fifth Amendment right to a grand jury indictment, from which the Supreme Court has inferred there is no right to a civil jury in courts-martial. However, in part because of the different standards provided in courts-martial, their jurisdiction is limited to those persons and offenses the military has a legitimate interest in regulating.

Congress enacted the Uniform Code of Military Justice (UCMJ) under its constitutional authority to provide for disciplining the land and naval forces. Presidents have implemented the UCMJ through the Manual for Courts-Martial (MCM). The MCM contains the Rules for Courts-Martial (R.C.M.), the Military Rules of Evidence (Mil. R. Evid.), and the punitive articles of the UCMJ, with commentary. The MCM covers almost all aspects of military law.

The UCMJ gives courts-martial jurisdiction over servicemembers as well as several other categories of individuals connected to the uniformed services. There are three types of courts-martial: (1) summary court-martial (for minor offenses), (2) special court-martial (for offenses tantamount to misdemeanors), and (3) general court-martial (for offenses tantamount to felonies). While the R.C.M. and the Mil. R. Evid. are applicable to all courts-martial, the jurisdiction and authorized punishments vary among the different types.

A number of concerns relating to military justice led Congress in 2016 to enact the Military Justice Act of 2016 (MJA), which made sweeping changes to the UCMJ. The UCMJ provides the basic framework for the military justice system and defines offenses subject to trial by court-martial. Proponents of reform have for decades advocated changes relating to military jurisdiction; pretrial, trial, and post-trial process; over charging; court-martial panel selection; and appellate review. A perennial concern has been the perception of a lack of complete judicial independence, as well as commander's control over courts-martial, in part by choosing which charges to prefer against whom and by exercising post-trial clemency. One major recent concern has been the handling of sexual assault cases in the military. Congress enacted the MJA and other amendments to the UCMJ to address some of these issues.

This report provides an overview of the military justice system and the reforms enacted through the MJA and other legislation. It begins with a discussion of due process followed by a background of constitutional underpinnings for the military justice system and Congress's role in it. It follows with a discussion of military jurisdiction, military offenses set forth in the punitive articles of the UCMJ, and the three types of court-martial. The report continues with overviews of pretrial and trial process, sentencing and post-trial process, and appellate procedures. The report concludes with a table comparing selected constitutional protections as they apply in general courts-martial with those that operate in federal criminal court.

Contents

Tables

Contacts

Introduction

A number of concerns relating to military justice led Congress to enact the Military Justice Act of 2016 (MJA),[1] comprising sweeping changes to the Uniform Code of Military Justice (UCMJ).[2] The UCMJ provides the basic framework for the military justice system and defines offenses subject to trial by court-martial. Proponents of reform have for decades advocated changes relating to military jurisdiction; pretrial, trial, and post-trial process; over charging; court-martial panel selection; and appellate review.[3] A perennial concern has been the perception of a lack of complete judicial independence,[4] as well as commander's control over courts-martial, in part by choosing which charges to prefer against whom and by exercising post-trial clemency.[5] One major recent concern has been the handling of sexual assault cases as well as domestic and intimate partner violence in the military.[6]

In part due to these concerns and because the Department of Defense (DOD) had not undertaken a comprehensive review of the military justice system since enactment of the UCMJ in 1950,[7] the Secretary of Defense, on the recommendation of the Chairman of the Joint Chiefs of Staff, directed the DOD General Counsel to conduct a "holistic" review of the UCMJ and issue recommendations.[8] The result was the establishment of the Military Justice Review Group (MJRG), which issued its final report in December 2015.[9] The MJA followed a year later. One noted scholar of military law described the UCMJ overhaul as accomplishing the following broad goals:

> First, the amendments expand and solidify the role of military judges in the American military justice system. Although commanders continue to play a critical role in military justice, military judges will not only be able to address issues raised before charges are referred to a court-martial, but will also have the final say in the disposition of the court-

[1] National Defense Authorization Act for FY2017, Pub. L. No. 114-328, div. E, §§ 5001-5542, 130 Stat. 2000, 2894 (2016), codified at 10 U.S.C. §§ 801-946a. The changes did not take effect until January 1, 2019.

[2] Chapter 47 of title 10, U.S. Code, 10 U.S.C. §§ 801-946a (2019).

[3] David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act Of 2016*, 49 ST. MARY'S L.J. 1, 14-16 (2017) (describing various proposals for reforming the military justice system).

[4] *See* MILITARY JUSTICE CASES AND MATERIALS 783 (Eugene R. Fidell, et al., eds., 2d ed. 2012) (commenting that the lack of fixed term of office for military judges could give rise to at least the perception of a lack of judicial independence).

[5] Schlueter, *supra* note 3, at 15.

[6] *Id.* at 13 (noting that Congress amended the UCMJ in 2013, 2014 and 2015, to address issues related to sexual assault). For information about legislative action to address sexual assault in the military during the 113th and 114th Congresses, *see* CRS Report R43168, *Military Sexual Assault: Chronology of Activity in the 113th-114th Congresses and Related Resources*, by Barbara Salazar Torreon and Carla Y. Davis-Castro. For an overview of the issue, *see* CRS Report R44944, *Military Sexual Assault: A Framework for Congressional Oversight*, by Kristy N. Kamarck and Barbara Salazar Torreon. For current legislative activity, *see* CRS Report R46107, *FY2020 National Defense Authorization Act: Selected Military Personnel Issues*, coordinated by Bryce H. P. Mendez.

[7] Schlueter, *supra* note 3, at 13-16 (explaining impetus for military justice reform). As amended by the MJA, Art. 146 of the UCMJ establishes a new Military Justice Review Panel with the task of reviewing the military justice system every eight years. 10 U.S.C. § 946. In 2019, Congress tasked DOD with studying an alternative military justice system that would shift some court-martial decisions in many cases from the commander to a legal advisor outside the chain of command. National Defense Authorization Act for FY2020, Pub. L. No. 116-92 § 540F, 133 Stat. 1367 (2019).

[8] Schlueter, *supra* note 3, at 18.

[9] REPORT OF THE MILITARY JUSTICE REVIEW GROUP (2015) (hereinafter MJRG REP.), available at https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/03_DoD_Reports_Regs_Surveys/DoD_MJRG_Report/MJRG_Report_Part1_20151222.pdf.

> martial by issuing the "judgment" in a case, after the convening authority completes his or her limited review of the court-martial. Second, the changes demonstrate the continuing view that the military justice system should more closely parallel the federal criminal justice model. Throughout, it is clear that new procedures, and even terminology, mirror federal practice. And third, Congress completely reorganized the punitive articles, amended a significant number of those articles, and "migrated" a large number of offenses from coverage under Article 134, to new punitive articles. Collectively, these changes, and others, signal an extreme makeover of American military justice.[10]

This report provides an overview of the military justice system and the reforms enacted through the MJA and other legislation. It begins with a discussion of due process followed by a background of constitutional underpinnings for the military justice system and Congress's role in it. It follows with a discussion of military jurisdiction, military offenses set forth in the punitive articles of the UCMJ, and the three types of court-martial: summary, special, and general. The report continues with overviews of pretrial, trial process, sentencing, and post-trial and appellate procedures. The report concludes with **Table 1** comparing selected constitutional protections as they apply in general courts-martial with those that operate in federal criminal court.

Military Due Process

The U.S. Constitution imposes on the government a system of restraints to provide that no unfair law is enforced and that no law is enforced unfairly.[11] What is fundamentally fair in a given situation depends in part on the objectives of a given system of law weighed alongside the possible infringement of individual liberties that the system might impose.[12] In the criminal law system, some basic objectives are to discover the truth in order to punish the guilty proportionately with their crimes, acquit the innocent without unnecessary delay or expense, and prevent and deter further crime, thereby providing for public order.[13] Military justice shares these objectives in part, but also serves to enhance discipline throughout the Armed Forces, serving the overall objective of providing an effective national defense.[14]

The Fifth Amendment to the Constitution provides that "no person shall be … deprived of life, liberty, or property, without due process of law." Due process includes the right to notice and the opportunity to be heard whenever the government places any of these fundamental liberties at stake.[15] In the civilian setting, the exact process that is due is determined by a balancing of interests affected (individual or government), the risk of an erroneous deprivation of such an interest, and the probative value of additional procedural rights.[16] However, the Supreme Court has held that this balancing test does not apply in the context of military justice.[17] Rather, the

[10] Schlueter, *supra* note 3, at 9.

[11] U.S. CONST. amends. I-X.

[12] *See* CONG. RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1534 (Centennial ed. 2013).

[13] *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.2(e) (2d ed. 2003).

[14] MANUAL FOR COURTS-MARTIAL, UNITED STATES I-1 (2019) (hereinafter MCM) ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."

[15] Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

[16] *Id.* at 335.

[17] United States v. Weiss, 510 U.S. 163, 178-79 (1994) (finding no military due process right to military judge with fixed term of office).

military justice system falls under *Middendorf v. Henry*,[18] which calls for a test of whether factors favoring a particular right are so extraordinarily weighty as to overcome the balance struck by Congress. Perhaps because of this difference, military courts often use the term "military due process"[19] to describe the rights to which the accused at a court-martial is entitled.

The Constitution contains other explicit rights applicable to various stages of a criminal prosecution. Criminal proceedings provide both the opportunity to contest guilt and to challenge the government's conduct that may have violated the rights of the accused. The system of procedural rules used to conduct a criminal hearing serves as a safeguard against violations of constitutional rights that take place outside the courtroom. The differences in procedural matters between the military justice system and the civilian court system have frequently given rise to debate.[20]

The Supreme Court has called military justice a system of justice separate from jurisprudence in the civilian courts.[21] Members of the Armed Forces are subject to rules, orders, proceedings, and consequences different from the rights and obligations of their civilian counterparts.[22] Accordingly, the military justice system is designed to strike a balance between individual liberty and unique need for discipline.[23] The Constitution specifically exempts military members accused of a crime from the Fifth Amendment right to a grand jury indictment.[24] The Supreme Court has inferred from that absence that there is also no right to a civil jury in courts-martial.[25] However, in part because of the different standards provided in courts-martial, their jurisdiction is limited to those persons and offenses the military has a legitimate interest in regulating.[26]

Military Courts-Martial

The Constitution, to provide for the common defense,[27] gives Congress the power to raise, support, and regulate the Armed Forces,[28] but makes the President Commander-in-Chief of the

[18] 425 U.S. 25, 43-44 (1976).

[19] DAVID. A. SCHLEUTER, MILITARY CRIMINAL JUSTICE § 1-1(C) (9th ed. 2015).

[20] *Id*. at § 1-1(A)

[21] Parker v. Levy, 417 U.S. 733, 744 (1974) ("Just as military society has been a society apart from civilian society, so '[m]ilitary law ... is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.'" (citing Burns v. Wilson, 346 U.S. 137, 140 (1953)).

[22] United States v. Watson, 69 M.J. 415, 416 (C.A.A.F. 2011) (citing *Parker*, 417 U.S. at 733).

[23] *See* SCHLEUTER, *supra* note 19, §1-1; Curry v. Sec'y of Army, 595 F.2d 873, 880 (D.C. Cir. 1979) ("The provisions of the UCMJ with respect to court-martial proceedings represent a congressional attempt to accommodate the interests of justice, on the one hand, with the demands for an efficient, well-disciplined military, on the other.").

[24] U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger …. ").

[25] *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). Congress has, in article 32, UCMJ, provided for a pretrial hearing that performs the same basic function as a grand jury. 10 U.S.C. § 832 (2017). Court-martial panels consist of a military judge and, in some cases, several panel members, who function similarly to a jury.

[26] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 15 (1955) ("[T]he power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces [because] any expansion of court-martial jurisdiction … necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals.").

[27] U.S. CONST. pmbl.

[28] *Id*. art. I § 8, cls. 11-14 (War Powers).

Armed Forces.[29] Article III, which governs the federal judiciary, does not give it any explicit role in the military, and the Supreme Court has taken the view that Congress's power "To make Rules for the Government and Regulation of the land and naval Forces"[30] is entirely separate from Article III.[31] Therefore, courts-martial are not Article III courts and are not subject to the rules that apply in federal courts.[32]

Congress enacted the UCMJ under its authority to provide for disciplining the land and naval forces.[33] Presidents have implemented the UCMJ through the Manual for Courts-Martial (MCM), which President Ronald Reagan initially prescribed by Executive Order 12473 on April 13, 1984.[34] The MCM contains the Rules for Courts-Martial (R.C.M.), the Military Rules of Evidence (Mil. R. Evid.),[35] and the punitive articles of the UCMJ, with commentary. The MCM covers almost all aspects of military law.[36]

Jurisdiction

The UCMJ gives courts-martial jurisdiction over servicemembers[37] as well as several other categories of individuals, including retired members of a regular component of the Armed Forces entitled to pay[38] retired members of a reserve component who are hospitalized in a military hospital; persons in custody of the military serving a sentence imposed by a court-martial; cadets and midshipmen at the service academies; members of the National Oceanic and Atmospheric Administration and Public Health Service and other organizations, when assigned to serve with the military; enemy prisoners of war in custody of the military and individuals belonging to one of the eight categories enumerated in Article 4 of the Convention Relative to the Treatment of Prisoners of War[39] who violate the law of war; and persons serving with or accompanying the military in the field "[i]n time of declared war or a contingency operation."[40] The last provision

[29] *Id.* art. II § 2, cl. 1.

[30] *Id.* art. I § 8, cl. 14.

[31] *See* Dynes v. Hoover, 61 U.S. (How.) 65 (1858).

[32] *See* WILLIAM WINTHROP, WINTHROP'S MILITARY LAW AND PRECEDENTS 48-49 (2d. ed. 1920) (describing courts-martial as "*instrumentalities of the executive power*, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein") (emphasis in original).

[33] U.S. CONST. art. I, § 8, cl. 14.

[34] MCM, *supra* note 14. The current version is the 2019 edition.

[35] The President establishes rules of procedures and rules of evidence for courts-martial as authorized by Art. 36, UCMJ, 10 U.S.C. § 836. The regulations are, to the extent practicable, to "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," but may not be contrary to or inconsistent with the UCMJ. *Id.*

[36] Each military service supplements the MCM to meet its individual needs. The Army has Army Regulation 27-10; the Navy and Marine Corps have the Manual for the Judge Advocate General; and the Air Force has Air Force Instruction 51-201.

[37] The term servicemembers, as used in this report, includes uniformed members of the U.S. Army, U.S. Marine Corps, U.S. Navy, U.S. Air Force, U.S. Space Force, and the U.S. Coast Guard, whether or not it is serving as part of the Navy. It also includes members of the National Guard and Air National Guard when in federal service.

[38] The Navy-Marines Court of Criminal Appeals recently found that, although it is constitutional to subject military retirees to UCMJ jurisdiction, the disparity in treatment between regular component retirees and reserve retirees amounts to an unconstitutional violation to the right of equal protection. United States v. Begani, --- M.J. ----, 2019 WL 3542910 (N-M. Ct. Crim. App. 2019).

[39] Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[40] Art. 2, UCMJ; 10 U.S.C. § 802(a)(10).

covering civilians serving with or accompanying the Armed Forces was limited by judicial interpretation[41] to declared wars, but Congress amended it in 2006 to broaden its application to contingency operations.[42] Jurisdiction of a court-martial does not depend on where the offense was committed; it depends solely on the status of the accused.[43]

In the MJA, Congress expanded the provision regarding UCMJ jurisdiction over reservists and members of the National Guard in federal service[44] to cover not only inactive duty training, but also periods of travel to and from the training site and intervals between consecutive periods of training pursuant to orders or regulations.[45] This change closed a gap in jurisdiction encompassing the periods of time when trainees were subject to orders but were not actively performing training, such as off-duty time, time between classes, or travel time.[46]

Types of Courts-Martial

Congress has established three types of courts-martial: (1) summary court-martial, (2) special court-martial, and (3) general court-martial.[47] While the R.C.M. and the Mil. R. Evid. apply to all courts-martial, the jurisdiction and authorized punishments vary among the different types. The function of the summary court-martial is to "promptly adjudicate minor offenses under a simple procedure" and "thoroughly and impartially inquire into both sides of the matter," ensuring that the "interests of both the Government and the accused are safeguarded and that justice is done."[48] Special and general courts-martial adjudicate more serious offenses and can impose more severe punishments; thus the procedures in those tribunals are more complex. Only general courts-martial have jurisdiction over sexual assault offenses or attempted offenses under Articles 120(a) (rape), 120(b) (sexual assault), 120b(a) (rape of a child), or 120b(b) (sexual assault of a child).[49]

[41] United States v. Averette, 41 C.M.R. 363, 365 (C.M.A.1970) (interpreting "in time of war" to refer to war declared by Congress).

[42] Pub. L. No. 109-364, div. A, title V, § 552, 120 Stat. 2217 (2006). "Contingency operation" is defined in 10 U.S.C. 101(a)(13) to mean "a military operation that-(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 13 of [title 10], section 712 1 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress."

[43] *See* Solorio v. United States, 483 U.S. 435, 440-41 (1987) (overruling O'Callahan v. Parker, 395 U.S. 258 (1969)). A few articles in the UCMJ apply to "any person" and are thus not limited to servicemembers and other persons subject to the UCMJ. These include spying (Art. 103, UCMJ; 10 U.S.C. § 903), aiding the enemy (Art. 103b, UCMJ; 10 U.S.C. § 903b), and violations of the law of war (Art. 18, UCMJ; 10 U.S.C. § 818).

[44] For information about different types of reserve service, see CRS Report RL30802, *Reserve Component Personnel Issues: Questions and Answers*, by Lawrence Kapp and Barbara Salazar Torreon.

[45] Art. 2(a)(3), UCMJ;10 U.S.C. § 802(a)(3).

[46] Schlueter, *supra* note 3, at 22-23 (noting appellate court decisions creating gap, e.g. United States v. Wolpert, 75 M.J. 777, 782 (A. Ct. Crim. App. 2016); United States v. Spradley, 41 M.J. 827 (N-M. Ct. Crim. App. 1995)).

[47] Art. 16, UCMJ; 10 U.S.C. § 816.

[48] R.C.M. 1301(b).

[49] Art. 18(c), UCMJ; 10 U.S.C. § 818(c). Accused found guilty of these offenses or conspiracy to commit these offenses are subject to mandatory dismissal or dishonorable discharge. Art. 56, UCMJ; 10 U.S.C. § 856.

Summary Courts-Martial

The summary court-martial can adjudicate minor offenses allegedly committed by enlisted servicemembers.[50] It can adjudge maximum punishments of 30 days' confinement; hard labor without confinement for 45 days; restriction to specified limits for 45 days; forfeiture of two-thirds' pay per month for one month; and reduction to the lowest pay grade. In the case of enlisted members above pay grade E-4,[51] the summary court-martial may not adjudge confinement or hard labor without confinement, and can reduce a convicted accused only to the next lower pay grade.[52] Summary courts-martial are composed of one commissioned officer who need not be a lawyer.[53] The accused must consent to the proceedings[54] and normally is not entitled to a lawyer.[55] If an accused refuses to consent to a trial by summary court-martial, the convening authority may order trial by special or general court-martial as may be appropriate.[56] As amended by the MJA, a finding of guilty at a summary court-martial is not a criminal conviction.[57]

Special Courts-Martial

The special court-martial can try any servicemember for any non-capital offense or, under presidential regulation, capital offenses.[58] Special courts-martial generally try offenses that are tantamount to misdemeanors. A special court-martial can be composed of a military judge alone or a military judge and four members.[59] Regardless of the offenses tried, the maximum punishment allowed at a special court-martial with members is confinement for one year; hard labor without confinement for up to three months; forfeiture of two-thirds' pay per month for up to one year; reduction in pay grade; and a bad-conduct discharge.[60] Special courts-martial may not sentence officers to dismissal.[61] As amended by the MJA, in the case of a special court-martial composed of a judge alone, it may not adjudge a bad-conduct discharge, confinement of more than six months, or forfeiture of pay for more than six months.[62] With the consent of the

[50] Art. 20, UCMJ; 10 U.S.C. § 820.

[51] *Id*. Pay grade E-4 consists of corporals or specialists (Army), petty officers 3rd class (Navy), corporals (Marines), and senior airmen (Air Force).

[52] R.C.M. 1301; Art 20, UCMJ; 10 U.S.C. § 820.

[53] Art. 16, UCMJ; 10 U.S.C. § 816.

[54] Art. 20, UCMJ; 10 U.S.C. § 820.

[55] Middendorf v. Henry, 425 U.S. 25 (1976).

[56] Art. 20, UCMJ; 10 U.S.C. § 820.

[57] Art. 20, UCMJ; 10 U.S.C. § 820(b).

[58] Arts. 16 & 19, UCMJ; 10 U.S.C. §§ 816, 819; R.C.M. 201(f)(2)(A). Capital offenses, as defined by R.C.M. 103(4), for which there is not a mandated punishment in excess of the punitive power of a special court-martial may be referred and tried by a special court-martial. R.C.M. 201(f)(2)(C).

[59] The accused has the right to choose whether to be tried by a military judge alone or a military judge and members. Art. 16, UCMJ; 10 U.S.C. § 816(c). The option for a trial by members only was eliminated in the MJA. *See id*. The MJA also increased the size of the panel from three members to four. *Id*. Enlisted servicemembers may request that the members' panel include enlisted members. R.C.M. 903. Whenever possible, members must not be appointed who are junior to the accused in rank or grade. Art. 25, UCMJ; 10 U.S.C. § 825.

[60] Art. 19, UCMJ; 10 U.S.C. § 819; R.C.M. 201(f)(2)(B).

[61] Art. 19(a), UCMJ; 10 U.S.C. § 819(a).

[62] Art. 19, UCMJ; 10 U.S.C. § 819(b).

parties, a convening authority may appoint a magistrate judge to replace a military judge sitting alone.[63]

In contrast to the unanimity needed in civilian criminal trials, the agreement of three-fourths of the members of a special court-martial is necessary to find the accused guilty.[64] Otherwise, the accused is acquitted.[65] There are no "hung juries" in courts-martial. The accused is entitled to an appointed military attorney or a military counsel of his or her selection, or he can hire a civilian counsel at no expense to the government.[66]

In the case of a trial by a military judge alone, the military judge also decides the sentence.[67] Otherwise, if the accused chooses sentencing by members, three-fourths of the members must concur in the sentence.[68]

General Courts-Martial

A general court-martial is the highest trial level in military law and adjudicates the most serious offenses, those comparable to felonies. Pursuant to amendments enacted by the MJA, in non-capital cases, it is composed of a military judge sitting alone, if the accused so requests, or eight members and a military judge.[69] For capital cases, twelve members are required.[70] Three-fourths of the members must concur in order to find the accused guilty, except in capital cases, in which case the verdict must be unanimous.[71]

The general court-martial can adjudge, within the limits prescribed for each offense, a wide range of punishments, including confinement; reprimand; forfeitures of up to all pay and allowances; reduction to the lowest enlisted pay grade; punitive discharge (bad conduct discharge, dishonorable discharge, or dismissal, in the case of officers); restriction; fines; and, for certain offenses, death.[72] The accused is entitled to an appointed military attorney or a military counsel of his or her selection, or the accused can hire civilian counsel at no expense to the government.[73] A court-martial may adjudge a penalty of death only with the concurrence of all members, if the case was referred to the court-martial as a capital case, and if one or more specified aggravating factors are proved beyond a reasonable doubt.[74] Otherwise, the military judge will sentence the accused unless the accused requests sentencing by members,[75] in which case three-fourths of the members must concur in the sentence.[76]

[63] Art. 19, UCMJ; 10 U.S.C. § 819(c).

[64] Art. 52, UCMJ; 10 U.S.C. § 852.

[65] R.C.M. 921(c).

[66] R.C.M. 901(d)(4)(A).

[67] Art. 52, UCMJ; 10 U.S.C. § 852.

[68] Art. 52, UCMJ; 10 U.S.C. § 852; Art. 53, UCMJ; 10 U.S.C. § 853.

[69] Art. 16, UCMJ; 10 U.S.C. § 816(c). Prior to the MJA, panels consisted of no fewer than five members.

[70] Art. 25a, UCMJ; 10 U.S.C. § 825a.

[71] Art. 52, UCMJ; 10 U.S.C. § 852.

[72] Art. 18, UCMJ; 10 U.S.C. § 818; R.C.M. 1003.

[73] Art. 38, UCMJ; 10 U.S.C. § 838; R.C.M. 901(d)(4)(A).

[74] R.C.M. 1004. In cases where the death penalty is sought, the accused is, "[t]o the greatest extent practicable," entitled to a defense counsel who is learned in the applicable law. Art. 27, UCMJ; 10 U.S.C. § 827(d).

[75] Art. 53, UCMJ; 10 U.S.C. § 853.

[76] Art. 52, UCMJ; 10 U.S.C. § 852.

Types of Offenses

Courts-martial try "military offenses," which are listed in the punitive articles of the UCMJ and codified in 10 U.S.C. §§ 877-934. Some "military offenses" have a civilian analog, but some are exclusive to the military, such as failure to obey an order.[77] The UCMJ authorizes the President to prescribe the punishments that a court-martial may impose within the limits established by Congress.[78] As amended by the MJA, the court-martial is to "impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration [a number of factors]."[79]

A court-martial may try a servicemember for offenses not specifically covered in the other punitive articles through the use of the General Article—UCMJ Article 134.[80] The General Article defines as offenses all unenumerated conduct in three categories: (1) "disorders and neglects to the prejudice of good order and discipline in the armed forces," (2) "all conduct of a nature to bring discredit upon the armed forces," and (3) "crimes and offenses not capital, of which persons subject to this chapter may be guilty." These offenses are to "be taken cognizance of by a general, special, or summary court martial, according to the nature and degree of the offense."[81] The Armed Forces have used the third category in Article 134 to assimilate state and federal offenses for which there is no analogous crime in the UCMJ in order to impose court-martial jurisdiction.

The MJA amended Article 134 to define the term "crimes and offenses not capital" to include conduct committed outside the United States "that would constitute a crime or offense not capital if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States…."[82] The intent for the change was to make military practice uniform throughout the world.[83] Previously, extraterritorial conduct was not chargeable under the third prong of Article 134 unless the analogous federal offense was itself applicable extraterritorially.[84] Otherwise, the government had to charge federal crimes indirectly by proving not only the elements of the federal crime, but also that the conduct was prejudicial of good order and discipline or discrediting to service to satisfy the first two categories of Article 134.[85]

The MJA added four new offenses to the punitive articles and spelled out a number of offenses that had been prosecuted under Article 134.[86] The new offenses are

[77] Military-specific offenses include mutiny or sedition (Art. 94, UCMJ); insubordinate contact (Art. 91, UCMJ); failure to obey an order (Art. 92, UCMJ); cruelty and maltreatment (Art. 93, UCMJ); and misconduct as a prisoner (Art. 105, UCMJ).

[78] Art. 56, UCMJ; 10 U.S.C. § 856.

[79] Art. 56, UCMJ; 10 U.S.C. § 856(c). Congress in 2019 directed the Secretary of Defense to develop nonbinding guidelines on sentences for all UCMJ offenses. Pub. .L. No. 116-92 § 537, 133 Stat. 1363 (2019), codified at 10 U.S.C. § 856 note.

[80] Art. 134, UCMJ; 10 U.S.C. § 934.

[81] *Id.*

[82] Special maritime and territorial jurisdiction of the United States is defined in 18 U.S.C. § 7.

[83] MJRG Rep., *supra* note 9, at 987 (explaining the recommended language would provide "world-wide applicability of federal offenses charged under clause 3 [of Article 134]").

[84] *Id.*

[85] *Id.*

[86] Schlueter, *supra* note 3, at 93. The enumeration of offenses previously charged under Article 134 means that the government will no longer need to prove that the conduct discredits the Armed Forces or is prejudicial to discipline. *See* MJRG Rep., *supra* note 9, at 987.

- Article 93a, Prohibited Activities with Military Recruit or Trainee by Person in Position of Special Trust;[87]
- Article 121a, Fraudulent Use of Credit Cards, Debit Cards, and Other Access Devices;[88]
- Article 123, Offenses Concerning Government Computers;[89] and
- Article 132, Retaliation.[90]

Newly codified offenses previously prosecuted under Article 134 include solicitation,[91] misprision of a serious offense,[92] subornation of perjury,[93] false official statements,[94] obstruction of justice,[95] prevention of authorized seizure of property,[96] public records offenses,[97] parole violation[98] or escape from custody,[99] bribery[100] and graft,[101] kidnapping,[102] arson,[103] assault,[104] domestic violence,[105] burglary,[106] child endangerment,[107] and breach of medical quarantine.[108] Some of these offenses that might be considered military offenses include missing movement,[109] offenses by or toward a sentinel or lookout,[110] offenses involving passes,[111] impersonation of an officer,[112] and wearing unauthorized insignia.[113]

[87] 10 U.S.C. § 893a (prohibiting inappropriate physical intimacy, as defined in regulation, between recruiters and applicants for military service, between drill instructors and trainees, and between faculty and staff of the service academies and cadets or midshipmen).

[88] Art. 121a, UCMJ; 10 U.S.C. § 921a.

[89] Art. 123, UCMJ; 10 U.S.C. § 923.

[90] Art. 132, UCMJ; 10 U.S.C. 932 (protection for witnesses, victims, and other persons who report criminal activity).

[91] Art. 82, UCMJ; 10 U.S.C. § 882.

[92] Art. 131c, UCMJ; 10 U.S.C. § 931c.

[93] Art. 131a, UCMJ; 10 U.S.C. § 931a.

[94] Art. 107, UCMJ; 10 U.S.C. § 907.

[95] Art. 131b, UCMJ; 10 U.S.C. § 931b.

[96] Art. 131e, UCMJ; 10 U.S.C. § 931e.

[97] Art. 104, UCMJ; 10 U.S.C. § 904.

[98] Art. 107a, UCMJ; 10 U.S.C. § 907a.

[99] Art. 87b, UCMJ; 10 U.S.C. § 887b.

[100] Art. 124a, UCMJ; 10 U.S.C. § 924a.

[101] Art. 124b, UCMJ; 10 U.S.C. § 924b.

[102] Art. 125, UCMJ; 10 U.S.C. § 925.

[103] Art. 126, UCMJ; 10 U.S.C. § 926.

[104] Art. 128, UCMJ; 10 U.S.C. § 928.

[105] Art. 128b, UCMJ; 10 U.S.C. § 928b.

[106] Art. 129, UCMJ; 10 U.S.C. § 929.

[107] Art. 119b, UCMJ; 10 U.S.C. § 919b. For a complete list, see Schlueter, *supra* note 3, at 94-105.

[108] Art. 84, UCMJ; 10 U.S.C. § 884.

[109] Art. 87, UCMJ; 10 U.S.C. § 887.

[110] Arts. 95-95a, UCMJ; 10 U.S.C. §§ 895-95a.

[111] Art. 105a, UCMJ; 10 U.S.C. § 905a.

[112] Art. 106, UCMJ; 10 U.S.C. § 906.

[113] Art. 106a, UCMJ; 10 U.S.C. § 906a.

The MJA also amended Article 79 to authorize the President to prescribe lesser-included offenses.[114] This change was intended to provide notice by means other than the "elements test"—a lesser-included offense is a subset of elements of an offense—so that offenses charged under Article 134 may be brought within other punitive articles as lesser-included offenses.[115] The reform was considered advisable because the first two clauses of Article 134 provide that the offense must discredit the armed forces or be prejudicial to good order and discipline, elements not "articulated []or inherent in any of the enumerated punitive articles."[116] This meant that, prior to the MJA, such offenses could not be the basis for conviction on lesser-included offenses. The non-exhaustive list of designated lesser-included offenses now provided in Appendix 12 of the MCM may reduce the charges that could accrue for the same conduct and reduce criminal liability.[117]

Investigation and Charging

The first step in the military justice system is the preliminary inquiry. If warranted, the commander or other accuser may issue a written charge sheet, subject to a preliminary hearing under Art. 32, which is similar to a grand jury, and then referred to court-martial for trial.

Preliminary Inquiry

When a servicemember has reportedly committed an offense, the accused's immediate commander will conduct a preliminary inquiry.[118] This inquiry may include an examination of the charges, which varies in length and scope depending on the offense(s) alleged and the complexity of the case, and an investigative report or summary of expected evidence.[119] Members of the command may conduct the investigation or, in complex cases, military and civilian law enforcement officials may conduct it.[120] Once investigators gather evidence and the inquiry is complete, the commander can choose to dispose of the charges by (1) taking no action, (2) initiating administrative action,[121] (3) imposing non-judicial punishment,[122] (4) preferring charges, or (5) forwarding to a higher authority for preferral of charges.[123]

[114] Art. 79, UCMJ; 10 U.S.C. § 879.

[115] MJRG Rep., *supra* note 9, at 680.

[116] *Id*. at 678.

[117] *Id*. at 680 (explaining that "[c]onvening authorities [may] refer to trial only the charges that capture the gravamen of the accused's misconduct, instead of having to file additional, alternative charges, which unnecessarily expose the accused to excessively greater criminal liability").

[118] R.C.M. 303. A commander who receives a report of a sex-related offense by a servicemember in her chain of command is to refer the report to the appropriate military criminal investigative organization. *Id*. (discussion).

[119] *Id*. (discussion).

[120] *Id*. (discussion).

[121] Administrative action can include "counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges," among other things. R.C.M. 306(c)(2). Administrative discharge may also be considered where warranted. *Id*. (discussion).

[122] Art. 15, UCMJ; 10 U.S.C. § 815.

[123] R.C.M. 306(c)(5).

Preferral of Charges

The first formal step in a court-martial, preferral of charges, consists of drafting a charge sheet containing the charges and specifications[124] against the accused. The accuser must sign the charge sheet[125] "under oath before a commissioned officer ... authorized to administer oaths."[126] The accused's immediate commander must inform the accused of the charges "as soon as practicable" after they are preferred.[127] Pre-referral proceedings may be conducted by a military judge, or in some cases by a magistrate, to review requests for investigative subpoenas, search warrants, orders for electronic communications, the appointment of an individual to represent the interests of a victim, or matters related to pretrial confinement, mental capacity of the accused, or requests for individual counsel.[128]

Referral of Charges

After preferral of charges, a convening authority[129] may refer[130] them to one of the three types of courts-martial: summary, special, or general.[131] The seriousness of the offenses alleged generally determines the type of court-martial. The convening authority must be an officer with sufficient legal authority and will generally be the commander of the unit to which the accused is assigned.[132] In the case of sex-related offenses committed in the United States, the victim is to have an opportunity to express views as to whether to prosecute the offense by court-martial or in a civilian court with jurisdiction.[133] If the victim prefers prosecution in a civilian court, the commander or convening authority must notify the appropriate authorities and notify the victim of the decision by those authorities to prosecute or not to prosecute.[134]

Article 32 Hearing

Prior to convening a general court-martial, a preliminary hearing is required.[135] This hearing, known as an Article 32 hearing, is meant to ensure that there is a basis for prosecution.[136] A

[124] "A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged." R.C.M. 307(c)(3).

[125] "Any person subject to the UCMJ may prefer charges [as the accuser]." R.C.M. 307(a).

[126] R.C.M. 307(b).

[127] Art. 30, UCMJ; 10 U.S.C. § 830(c); R.C.M. 308.

[128] Art. 30a, UCMJ; 10 U.S.C. § 830a (added by the MJA and amended by Pub. L. No. 116-92 § 531, 133 Stat. 1359 (2019)); R.C.M. 309. Recipients of a subpoena or order to provide electronic communications may request the military judge to quash the subpoena or order. R.C.M. 309(b)(3).

[129] R.C.M. 504. Persons authorized to act as convening authorities for courts-martial are set forth in Arts. 22 -24, UCMJ; 10 U.S.C. §§ 822-24.

[130] Referral is the convening authority's order "that charges and specifications against an accused be tried by a specified court-martial." Art. 34, UCMJ; 10 U.S.C. § 834(d).

[131] R.C.M. 401(c).

[132] R.C.M. 103(6).

[133] R.C.M. 306(e).

[134] *Id*.

[135] Art. 32, UCMJ; 10 U.S.C. § 832; R.C.M. 405.

[136] Art. 32, UCMJ; 10 U.S.C. § 832. As revised in the MJA, the preliminary hearing officer is charged with (1) deciding whether the specification alleges an UCMJ offense, (2) determining whether there is probable cause to believe that the accused committed the offense, (3) determining whether the convening authority has jurisdiction over the offense and the accused, and (4) providing the convening authority with a recommendation for disposition of the charges.

preliminary hearing officer, who must be a commissioned officer and, except under "exceptional circumstances," a certified judge advocate,[137] presides, and the accused has the same entitlements to counsel as in a general- or special courts-martial.[138] However, unlike in a civilian grand jury investigation, where the accused has no access to the proceedings, the accused in an Article 32 hearing is afforded the opportunity to examine the evidence, cross-examine witnesses, and present his own arguments.[139] Any victim of the offense has the right to notification and the opportunity to be present during the preliminary hearing,[140] but a victim is not required to testify.[141] The government, the accused, and any victims may submit additional materials for the preliminary hearing officer's consideration.[142] If the hearing uncovers evidence that the accused has committed an offense not charged, the hearing officer can recommend additional charges.[143] Likewise, if the hearing officer believes that evidence is insufficient to support a charge, he can make recommendations to that effect.

Once the Article 32 hearing is complete, the hearing officer makes recommendations to the convening authority's legal advisor. The legal advisor, in turn, provides the convening authority with a formal written recommendation, known as the Article 34, UCMJ advice, regarding the disposition of the charges. The convening authority then determines whether to convene a court-martial or dismiss the charges.[144]

Ancillary Matters

A number of other issues may arise in the pretrial phase, including questioning the accused, determining whether to impose pretrial confinement, and assessing whether the accused has the mental capacity to stand trial.

Self-Incrimination during Questioning

Servicemembers are entitled to Fifth Amendment protection against self-incrimination.[145] Due to the inherently coercive environment in the military,[146] Congress provided in the UCMJ for the

[137] R.C.M. 405(d)(1). A commissioned officer is a member of the uniformed services not in an enlisted pay grade and includes a commissioned warrant officer (10 U.S.C. §101).

[138] Art. 32(d), UCMJ; 10 U.S.C. § 832(d).

[139] Art. 32(d), UCMJ; 10 U.S.C. § 832(d); R.C.M. 405(f). *See* United States v. Davis, 64 M.J. 445 (2007).

[140] R.C.M. 405(g). The judge may exclude the victim from the proceeding only in circumstances where a similarly situated victim would be excluded at trial. *Id*.

[141] Art. 32(d)(3), UCMJ; 10 U.S.C. § 832(d)(3).

[142] Art. 32(c)(3), UCMJ; 10 U.S.C. § 832(c)(3).

[143] Art. 32(f), UCMJ; 10 U.S.C. § 832(f).

[144] Article 33, UCMJ, requires the President to direct the Secretary of Defense, in coordination with the Secretary of Homeland Security, to issue "non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline." 10 U.S.C. § 833. The guidance is located in Appendix 2.1 of the MCM, *supra* note 14.

[145] *See* Mil. R. Evid. 304(a)(1)(A) (defining involuntary statement to mean "a statement obtained in violation of the self-incrimination privilege or Due Process Clause of the Fifth Amendment to the United States Constitution, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement"). The Supreme Court has never held that "the Fifth Amendment's privilege against self-incrimination ... applies of its own force to the military," but noted that it need not decide the issue because the MCM applies it and military appellate courts have construed the Supreme Court's Fifth Amendment cases to military interrogations. Davis v. United States, 512 U.S. 452, 457 n. * (1994).

[146] MODERN MILITARY JUSTICE 152 (Gregory E. Maggs and Lisa M. Schenck, eds. 2d ed. 2015).

right to freedom from coercion during interrogation and the right to a warning[147] similar to the familiar *Miranda* warning required for interrogation of civilians in police custody.[148] These Article 31(b) warnings are required prior to any official law enforcement or disciplinary interrogation[149] of a suspect,[150] who need not be in custody to be entitled to a warning.[151] The warning includes notification of (1) the nature of the accusation, (2) the right to remain silent, and (3) the fact that any statement made may be used as evidence in a trial by court-martial.[152] The right to be informed of the right to counsel attaches once the accused is in custody or charges are preferred.[153] A failure to give a required warning or otherwise compelling a suspect or accused to provide involuntary testimony usually results in the exclusion of such evidence at trial.[154]

Apprehension and Pretrial Confinement

Apprehension in the military, like arrest in the civilian context, means taking a person into custody.[155] Upon reasonable belief that an offense has been committed and that the person to be apprehended has committed it, any officer, petty officer, warrant officer, noncommissioned officer, or member of the military police or others performing law enforcement or guard duty may apprehend a servicemember.[156] No warrant is required.[157] An apprehension may occur by oral or written notice, but force may be used as reasonably necessary.[158]

---

[147] Art. 31, UCMJ; 10 U.S.C. § 831.

[148] Miranda v. Arizona, 384 U.S. 436, 489 (1966) (observing that the requirement to inform the accused of his right to stay silent and to warn that statements may be used against him had long been provided in the UCMJ).

[149] Casual conversations conducted in other than an official capacity do not require an Article 31 warning. MODERN MILITARY JUSTICE, *supra* note 1467, at 158 (citing United States v. Duga, 10 M.J. 206 (C.M.A. 1981); United States v. Loukas, 29 M.J. 385 (C.M.A. 1990); United States v. Jones, 73 M.J. 357 (C.A.A.F. 2014)); United States v. Ramos, 76 M.J. 372, 374 (C.A.A.F. 2017) (stating that "warning rights are required when '(1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected.'") (citing *Jones*, 73 M.J. at 361 (C.A.A.F. 2014)). The rights warning is also required for some "verbal acts" or actions that amount to a statement, such as compulsion to produce certain evidence a servicemember is not ordinarily required to make available. SCHLEUTER, *supra* note 19, § 5-4(A)(1)

[150] Whether a servicemember is a "suspect" depends on whether the questioner believes the servicemenber committed an offense and whether a reasonable person would have considered the servicemember to be a suspect. SCHLEUTER, *supra* note 19, § 5-4(B)(1) (citing military case law).

[151] Art. 31(b), UCMJ; 10 U.S.C. § 831(b) (providing that "[n]o person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial"); *see also* MILITARY JUSTICE CASES AND MATERIALS, *supra* note 4, at 987 (comparing *Miranda* requirements with Article 31(b)).

[152] Mil. R. Evid. 305(c).

[153] SCHLEUTER, *supra* note 19, § 5-4(B)(2).

[154] *Id*. (describing voluntariness test); *id*. § 5-4(B)(3) (giving reasons an unwarned statement may nevertheless be admissible).

[155] Art. 7, UCMJ; 10 U.S.C. § 807; R.C.M. 302.

[156] *Id*.; R.C.M. 302(b)-(c); MODERN MILITARY JUSTICE, *supra* note 7, at 164 (describing who may conduct apprehensions, noting that noncommissioned officers and petty officers should not apprehend an officer unless directed by a commissioned officer to do so).

[157] R.C.M. 302(d).

[158] *Id*.

As required by the circumstances,[159] servicemembers who are apprehended on suspicion of having committed an offense may be subjected to one of four types of pretrial restraint. Pretrial confinement is the most severe type of restraint and is subject to restrictions.[160] The other forms of restraint are moral rather than physical and include conditions on liberty (ordering a servicemember to do or refrain from certain acts); restriction in lieu of arrest (ordering a servicemember to stay within certain limits while continuing to perform duties); and arrest (ordering a servicemember to stay within specific limits without performing full military duties).[161] None of the forms of restraint may be used to punish the suspect.[162] If pretrial arrest or confinement is ordered, the commander is required to take "immediate steps" to inform the confinee of the specific charges serving as the basis for confinement and to either begin trial or release the individual from confinement.[163]

Pretrial confinement, or depriving a person of freedom pending disposition of charges, is available only for serious charges where probable cause exists. There must be a reasonable belief that "(1) an offense triable by court-martial has been committed; (2) the person confined committed it; and (3) confinement is required by the circumstances."[164] To continue confinement past 72 hours, the commander must also determine that confinement is necessary because it is foreseeable that

> (a) The confinee will not appear at trial, pretrial hearing, or preliminary hearing, or
>
> (b) The confinee will engage in serious criminal misconduct.[165]

If the commander approves continued confinement, he must document the reasons for the decision in a "72-hour memorandum."[166]

The R.C.M. also requires that a neutral and detached magistrate review the propriety of pretrial confinement within 48 hours of the commencement of the confinement,[167] which is the equivalent

---

[159] R.C.M. 304(c). Conditions that may require pretrial restrain include flight risk and danger to the unit, where lesser forms of restraint are inadequate. MODERN MILITARY JUSTICE, *supra* note 1467, at 165.

[160] R.C.M. 305.

[161] R.C.M. 304.

[162] Art. 13, UCMJ; 10 U.S.C. § 813; R.C.M. 304(f).

[163] Art. 10, UCMJ; 10 U.S.C. § 810 (as amended by the MJA).

[164] R.C.M. 305(d).

[165] R.C.M. 305(h)(2). Some of the factors which should be considered, according to the R.C.M. 305(h) discussion, include

> (1) the nature and circumstances of the offenses charged or suspected, including extenuating circumstances;
>
> (2) the weight of the evidence against the confinee;
>
> (3) the confinee's ties to the locale, including family, off-duty employment, financial resources, and length of residence;
>
> (4) the confinee's character and mental condition;
>
> (5) the confinee's service record, including any record of previous misconduct;
>
> (6) the confinee's record of appearance at or flight from other pretrial investigations, trials, and similar proceedings; and
>
> (7) the likelihood that the confinee can and will commit further serious criminal misconduct if allowed to remain at liberty.

[166] R.C.M. 305(h)(2)(C).

[167] R.C.M. 305(i)(1).

of a probable cause hearing conducted by a magistrate in the civilian justice system.[168] Finally, a neutral and detached officer assigned the task by regulation conducts a seven-day probable cause review to determine whether circumstances warrant continued confinement.[169] The impartial reviewer may review the commander's 72-hour memorandum and any other written materials, consider statements by the accused or his counsel, as well as consider views offered by the victim, where applicable.[170] If the charges are referred to court-martial, the military judge will upon motion review the seven-day confinement decision for abuse of discretion and may order release or administrative credit if there was such abuse or other requirements were not met.[171] The military judge may also order release if new information not presented to the reviewing officer requires release or there was no independent review and no reason exists for continued confinement.[172] The typical remedy for noncompliance with the requirements is administrative credit against the eventual sentence.[173]

Searches and Seizures

Military searches and seizures are governed by the Fourth Amendment[174] and the Military Rules of Evidence.[175] The main difference between the application of the Fourth Amendment right to be free from unreasonable government intrusions in the military and civilian contexts is the reduced expectation of privacy in the military, especially regarding searches that take place on government property.[176] A neutral and detached commander may issue a search authorization upon the existence of probable cause to believe evidence of a crime is present in an area under his command or on the person of a servicemember.[177] A military judge or magistrate may also issue a search authorization,[178] or a search may be conducted pursuant to a search warrant issued by a civilian judge or magistrate.[179] A search authorization or warrant may be unnecessary in exigent circumstances created where delay "would result in the removal, destruction, or concealment of the property or evidence sought," if military operational necessity would prevent communication with the person who would grant the search authorization, or where the Constitution does not require a warrant.[180]

---

[168] SCHLEUTER, *supra* note 19, § 5-9(D)(1).

[169] R.C.M. 305(i)(2).

[170] R.C.M. 305(i)(2)(A). The victim is entitled to notice that the hearing will take place, but the hearing may not be unduly delayed to facilitate the victim's attendance. *Id*.

[171] R.C.M. 305(j).

[172] SCHLEUTER, *supra* note 19, § 5-9(E).

[173] R.C.M. 305(k). In the event the treatment amounts to pretrial punishment, the remedy is "meaningful sentence relief," which could amount to more credit time than time served. SCHLEUTER, *supra* note 19, § 5-10(D).

[174] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause."); United States v. Middleton, 10 M.J. 123, 126–27 (C.M.A. 1981) ("While certain protections [of the Bill of Rights] have been deemed inapplicable, neither this Court nor the Supreme Court has ever held that the Fourth Amendment does not shield the American serviceperson." (citing United States v. Ezell, 6 M.J. 307, 313 (C.M.A. 1979)).

[175] Mil. R. Evid. 311-17.

[176] SCHLEUTER, *supra* note 19, § 5-3(A) (noting that the expectation of privacy is limited and the commander has power to intrude into areas under his control).

[177] Mil. R. Evid. 315(d) & (f).

[178] Mil. R. Evid. 315(d).

[179] Mil. R. Evid. 315(b)(2).

[180] Mil. R. Evid. 315(g).

As in the civilian context, some searches are reasonable even if conducted without probable cause.[181] These include border searches for immigration or customs purposes; searches conducted upon entry or exit of a military installation, aircraft, or vessel; searches of government property not issued for personal use; searches pursuant to voluntary and authorized consent; searches incident to a lawful stop (including stop and frisk as well as vehicle searches); searches incident to apprehension; searches within jails or other places of confinement; emergency searches to save lives or other emergency purposes; and searches of open fields.[182]

Evidence procured through an unreasonable search or seizure, or evidence derived from such evidence, is inadmissible at court-martial unless an exception applies.[183] The exceptions are evidence used for impeachment purposes, evidence that inevitably would have been discovered, or evidence acquired by good-faith reliance on an invalid search authorization or warrant.[184] Evidence that is uncovered during a valid inspection or inventory is admissible at court-martial.[185] An "inspection" is defined as "an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle … conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle."[186] "Inventory" is defined as an administrative, "reasonable examination, accounting, or other control measure used to account for or control property, assets, or other resources."[187] However, inspections and inventories conducted for law enforcement or disciplinary purposes are not valid, and any evidence of criminal activity discovered during their conduct may be inadmissible at court-martial.[188]

Mental Capacity

The mental capacity of the accused may have bearing on whether he may be prosecuted or convicted. A court-martial may not try an individual if he is suffering from a mental disease or defect such that he is unable to understand the nature of the proceedings or conduct or cooperate intelligently in the defense.[189] In the event the mental capacity or mental responsibility of the accused is in question, the convening authority or military judge may order an examination.[190] The examination, often called an R.C.M. 706 Board, must answer the four questions: (1) at the time of the alleged criminal conduct, did the accused have a severe mental disease or defect; (2)

[181] Mil. R. Evid. 314. The Supreme Court has asserted that "the most basic constitutional rule in [Fourth Amendment jurisprudence" is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specially established and well-delineated exceptions." Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)); G.M. Leasing Corp. v. United States, 429 U.S. 338, 352–53, 358 (1977). Such warrant exceptions include exigent circumstances (Payton v. New York, 445 U.S. 573, 590 (1980)); "stop and frisk" searches (Terry v. Ohio, 392 U.S. 1 (1968)); searches incident to custodial arrests (United States v. Robinson, 414 U.S. 218 (1973)); seizures of contraband "in plain view" (Washington v. Chrisman, 455 U.S. 1 (1982)); searches and seizures at the border (United States v. Ramsey, 431 U.S. 606 (1977)).

[182] Mil. R. Evid. 314.

[183] Mil. R. Evid. 311.

[184] *Id*.

[185] Mil. R. Evid. 313.

[186] Mil. R. Evid. 313(b).

[187] Mil. R. Evid. 313(c).

[188] Mil. R. Evid. 313; SCHLEUTER, *supra* note 19, § 5-3(E)(1).

[189] R.C.M. 909(a).

[190] R.C.M. 706.

what is the clinical psychiatric diagnosis; (3) was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature or wrongfulness of his conduct; and (4) is the accused currently suffering from a mental disease or defect to the point that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense?[191]

The report of the R.C.M. 706 Board may lead to the case's suspension, dismissal of charges by the convening authority, administrative separation of the accused from military service, or the trial of charges by court-martial.[192] Although an accused may be found competent to be tried by court-martial, that determination does not prohibit the accused from claiming the defense of lack of mental responsibility.[193] To prevail on a defense of lack of mental responsibility, the accused must prove by clear and convincing evidence that at the time of the commission of the acts constituting the offense, because of a severe mental disease or defect, he was unable to appreciate the nature and quality or wrongfulness of his acts.[194] Regardless of an initial competency determination, a military judge may order additional examinations at any stage of the proceedings if the accused's mental capacity is in question.[195]

Pretrial and Trial Process

When a convening authority refers charges, the referral triggers a series of steps beginning with the convening of the court-martial.[196] This post-referral process involves both pretrial matters, including the exchange of evidence, and the actual trial, including the selection of the *members* of special and general courts-martial—the equivalent of civilian jurors[197]—and presentation of evidence. The process ends with the court-martial's *findings*—or verdicts on the referred charges[198]—and, if the accused is convicted, sentencing.

Convening the Court-Martial

After referral, the convening authority will issue an order convening the court-martial. The order must designate the type of court-martial—general, special, or summary[199]—and detail the members (for special or general courts-martial) or presiding officer (for summary courts-martial).[200] The convening order may also specify where the court-martial will meet.[201] For special and general courts-martial, the military judge and counsel will be assigned under regulations issued by the secretaries of each military department.[202]

---

[191] R.C.M. 706(c)(2).

[192] R.C.M. 706(c)(3) (discussion).

[193] R.C.M. 916(b)(2).

[194] R.C.M. 916(k)(1).

[195] R.C.M. 706(c)(4). The accused's mental capacity is relevant at all stages of the proceedings, including, but not limited to, the arraignment, court-martial, and post-trial matters. *See* R.C.M. 1107.

[196] *See* Arts. 22-24, UCMJ; 10 U.S.C. §§ 822-24; R.C.M. 504.

[197] R.C.M. 502(a)(2)(A) ("The members of a court-martial shall determine whether the accused is proved guilty ....").

[198] *See* R.C.M. 918(a) ("The general findings of a court-martial state whether the accused is guilty of each charge and specification.")

[199] *See* discussion *supra* page 5 on types of courts-martial and who may convene each type.

[200] R.C.M. 504(d).

[201] *Id*.

[202] Arts. 26, 27, UCMJ; 10 U.S.C. §§ 826, 827; R.C.M. 503.

Members

For special and general courts-martial, the convening authority must *detail*—assign—members to serve on the court-martial.[203] The convening authority must select members who are on active duty and who, in the convening authority's opinion, "are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[204] Any commissioned officer may serve as a member of a court-martial,[205] but warrant officers may only do so if the accused is not a commissioned officer.[206] Enlisted servicemembers may not serve unless the accused is also an enlisted servicemember.[207] No accuser, witness for the prosecution, or individual who served as a preliminary hearing officer or counsel in the same case may serve as a member.[208] If possible, members should not be junior in rank or grade to the accused.[209]

The number of members a convening authority must detail depends on the type of court-martial and the nature of the charges against the accused.[210] The convening authority must detail at least the number of members required for a given type of court-martial and has discretion to authorize a military judge to impanel alternate members.[211]

General courts-martial typically consist of eight members,[212] with three exceptions. First, in capital cases (where the accused may be sentenced to death), a general court-martial must consist of twelve members.[213] Second, in non-capital cases, an accused may request trial by a military judge alone.[214] Third, in non-capital cases, a panel may consist of six or seven members if, after impanelment, members of the panel are excused or challenged and no alternates are available.[215] Special courts-martial consist of four members,[216] unless the accused requests trial by a military judge alone or the case is referred for trial by a military judge alone.[217]

Military Judges

Military judges preside over general and special courts-martial.[218] A military judge must be "[1] a commissioned officer of the armed forces [2] who is a member of the bar of a Federal court or the

[203] R.C.M. 503(a)(1); *see also* R.C.M. 501(a) (prescribing the composition of general and special courts-martial).

[204] Art. 25(e)(2), UCMJ; 10 U.S.C. § 825(e)(2); R.C.M. 502(a)(1).

[205] Art. 25(a), UCMJ; 10 U.S.C. § 825(a); R.C.M. 502(a)(1)(A).

[206] Art. 25(b), UCMJ; 10 U.S.C. § 825(b); R.C.M. 502(a)(1)(B).

[207] Art. 25(c), UCMJ; 10 U.S.C. § 825(c); R.C.M. 502(a)(1)(C). An accused who is an enlisted servicemember has a right to request a court-martial with membership consisting entirely of officers or at least one-third enlisted members. Art. 25(c)(2), UCMJ; 10 U.S.C. § 825(c)(2); R.C.M. 503(a)(2).

[208] Art. 25(e)(2), UCMJ; 10 U.S.C. § 825(e)(2).

[209] Art. 25(e)(1), UCMJ; 10 U.S.C. § 825(e)(1).

[210] Arts. 25, 25a, 29, UCMJ; 10 U.S.C. §§ 825, 825a, 829; R.C.M. 501.

[211] R.C.M. 501(a)(1)(ii), (a)(1)(B)(ii), (a)(2)(B).

[212] Art. 16(b)(1), UCMJ; 10 U.S.C. § 816(b)(1); R.C.M. 501(a)(1)(A)(ii). Before the MJA amendments, both general and special courts-martial required at least five members in non-capital cases. *See* 10 U.S.C. § 816 (2000).

[213] Art. 25a(a), UCMJ; 10 U.S.C. § 825a(a); R.C.M. 501(a)(1)(B)(i). Before the MJA amendments, general courts-martial in capital cases required at least twelve members, unless twelve members were not reasonably available. *See* 10 U.S.C. § 825a (2006).

[214] Art. 16(b)(3), UCMJ; 10 U.S.C. § 816(b)(3); R.C.M. 501(a)(1)(A)(iii).

[215] Art. 29(c), (d), UCMJ; 10 U.S.C. § 829(c), (d); R.C.M. 501(a)(1)(A)(iv).

[216] Art. 16(c)(1), UCMJ; 10 U.S.C. § 816(c)(1); R.C.M. 501(a)(2)(A).

[217] Art. 16(c)(2), UCMJ; 10 U.S.C. § 816(c)(2); R.C.M. 501(a)(2)(C), (D).

[218] Art. 16(b)-(c), UCMJ; 10 U.S.C. § 816(b)-(c). Any commissioned officer may serve as a summary court-martial.

highest court of a State and [3] certified to be qualified, by reason of education, training, experience, and judicial temperament, for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member."[219] Military judges generally must serve terms of at least three years.[220] The Judge Advocate General of each service branch or a military judge who reports directly to the Judge Advocate General may detail military judges to serve on general and special courts-martial.[221]

A military judge may not be an accuser or witness for the prosecution and may not consult with the members of the court-martial except in the presence of the accused and counsel.[222] Before a court-martial is assembled, the detailing authority may replace a military judge without explanation.[223] Once a court-martial is assembled, a military judge may be removed only for disqualification or good cause.[224] Convening authorities and their staff may not "prepare or review any report concerning the effectiveness, fitness, or efficiency" of a military judge.[225]

Counsel

In general and special courts-martial, trial counsel—which serves as the prosecutor[226]—and defense counsel will be detailed to the court-martial under regulations prescribed by the secretaries of each service branch.[227] Trial and defense counsel detailed in general courts-martial must be judge advocate officers who are "member[s] of the bar of a Federal court or of the highest court of a State" and approved by the appropriate Judge Advocate General.[228] Defense counsel detailed in special courts-martial must have the same credentials,[229] but trial counsel in special courts-martial may be any commissioned officer "determined to be competent to perform such duties by the Judge Advocate General."[230]

An accused has a right to counsel in general and special, but not summary, courts-martial.[231] An accused may be represented by (1) military counsel detailed to a court-martial; (2) civilian counsel provided by the accused; or (3) military counsel selected by the accused if that counsel is

Art. 16(d), UCMJ; 10 U.S.C. § 816(d).

[219] Art. 26(b), UCMJ; 10 U.S.C. § 826(b); R.C.M. 502(c)(1).

[220] R.C.M. 502(c)(3).

[221] Art. 26(c)(1), UCMJ; 10 U.S.C. § 826(c)(1); R.C.M. 503(b)(1).

[222] Art. 26(d)-(e), UCMJ; 10 U.S.C. § 826(d)-(e).

[223] R.C.M. 505(e)(1).

[224] R.C.M. 505(e)(2).

[225] Art. 26(c)(2), UCMJ; 10 U.S.C. § 826(c)(2).

[226] Art. 38(a), UCMJ; 10 U.S.C. § 838(a); R.C.M. 502(d)(4).

[227] Art. 27(a)(1), UCMJ; 10 U.S.C. § 827(a)(1); R.C.M. 501(b), 503(c)(1).

[228] Art. 27(b)(1), UCMJ; 10 U.S.C. § 827(b); R.C.M. 502(d)(1), (2)(A).

[229] Art. 27(c)(1), UCMJ; 10 U.S.C. § 827(c)(1); R.C.M. 502(d)(2)(A).

[230] Art. 27(c)(2), UCMJ; 10 U.S.C. § 827(c)(2); R.C.M. 502(d)(1)(B).

[231] Art. 38(b)(1), UCMJ; 10 U.S.C § 838(b)(1); R.C.M. 506, 1301(e).

"reasonably available."[232] If an accused retains civilian counsel, the defense counsel detailed to the court-martial will serve as an associate defense counsel unless excused by the accused.[233]

A person who has previously served in certain roles in a case may not be detailed as trial counsel or, unless expressly requested by the accused, as defense counsel.[234] These roles include (1) the accuser; (2) an investigating or preliminary hearing officer; (3) a military judge or appellate military judge; or (4) a member.[235] "No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution."[236]

Pretrial Matters

Once the convening authority issues the order convening the court-martial and detailing its personnel but before the trial begins, the court-martial must address several pretrial matters. These tasks differ depending on the type of court-martial but generally include preparing evidence and identifying witnesses. Pretrial activity may also include plea bargaining and an evaluation of the accused's mental capacity.[237]

General and Special Courts-Martial

Before trial by a general or special court-martial, counsel for each side and the court-martial have the opportunity to obtain witnesses and other evidence and must share information through the *discovery* process.[238] During this process, trial counsel must provide evidence and information to the defense, including

- the convening order, charge sheet, and any accompanying papers or statements;[239]
- relevant documents, papers, or objects in the trial counsel's possession;[240]
- the names and contact information of witnesses;[241]
- records of the accused's prior convictions, if any;[242]

[232] Art. 38(b)(2)-(3), UCMJ; 10 U.S.C. § 838(b)(2)-(3). The following persons are, by regulation, not reasonably available to serve as defense counsel: (1) generals and flag officers; (2) trial or appellate military judges; (3) trial counsel; (4) appellate defense or government counsel; (5) principal legal advisors to military commands, organizations, and agencies; (6) instructors and students at service academies; (7) college or university students; and (8) members of the staffs of the Judge Advocates General. R.C.M. 506(b)(1).

[233] Art. 38(b)(4), UCMJ; 10 U.S.C. § 838(b)(4).

[234] Art. 27(a)(2), UCMJ; 10 U.S.C. § 827(a)(2); R.C.M. 502(d)(3).

[235] Art. 27(a)(2), UCMJ; 10 U.S.C. § 827(a)(2); R.C.M. 502(d)(3).

[236] Art. 27(a)(2), UCMJ; 10 U.S.C. § 827(a)(2).

[237] For an overview of mental capacity determinations, see the discussion *supra* in "Mental Capacity."

[238] Art. 46(a), UCMJ; 10 U.S.C. § 846(a) ("In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."); *see also* R.C.M. 701.

[239] R.C.M. 701(a)(1).

[240] R.C.M. 701(a)(2).

[241] R.C.M. 701(a)(3).

[242] R.C.M. 701(a)(4).

- information trial counsel intends to present at sentencing;[243] and
- any evidence favorable to the defense.[244]

Defense counsel must likewise disclose certain documents and evidence, the names of witnesses, and the accused's intent to use certain defenses.[245]

In addition, both trial and defense counsel may, in exceptional circumstances, depose witnesses to preserve their testimony.[246] An "exceptional circumstance" is one where the witness "is likely to be unavailable to testify at the time of trial."[247] The convening authority, before referral, or the military judge, after referral, decides whether to allow depositions to take place.[248]

Summary Courts-Martial

Compared to general and special courts-martial, summary courts-martial employ a greatly simplified procedure.[249] A summary court-martial is a non-criminal forum without civilian analog.[250] A single officer (who need not be a lawyer), serves as the trial judge and finder of fact.[251] After convening, the officer serving as the summary court-martial must "examine the charge sheet, [any associated] papers, and the immediately available personnel records of the accused."[252] The summary court-martial must report any irregularities in those documents and may correct the charge sheet or amend the charges and specifications.[253]

Before trial, the summary court-martial must hold a preliminary proceeding.[254] During this proceeding, the summary court-martial must inform the accused of, among other things, (1) the nature of the charges; (2) the right to plead guilty or not guilty; (3) the right to examine evidence and call witnesses; (4) the maximum sentence the summary court-martial may adjudge; and (5) the "right to object to trial by summary court-martial."[255]

After the preliminary proceeding, the summary court-martial must give the accused "a reasonable period of time to decide whether to object to trial by summary court-martial."[256] If the accused objects, the summary court-martial must return the case to the convening authority for assignment

[243] R.C.M. 701(a)(5).

[244] R.C.M. 701(a)(6).

[245] R.C.M. 701(b)

[246] Art. 49, UCMJ; 10 U.S.C. § 849; R.C.M. 702.

[247] R.C.M. 702(a)(2).

[248] R.C.M. 702(b).

[249] *See* R.C.M. 1301(b) ("The function of the summary court-martial is to promptly adjudicate minor offenses under a simple disciplinary proceeding.").

[250] Art. 20, UCMJ; 10 U.S.C. § 820(b); *see* Mittendorf v. Henry, 425 U.S. 25, 38-42 (describing the differences between a summary court-martial and civilian criminal proceedings and holding that "a summary court-martial is not a 'criminal prosecution' for purposes of the Sixth Amendment").

[251] Art. 16, UCMJ, 10 U.S.C. § 816(d).

[252] R.C.M. 1304(a)(1).

[253] R.C.M. 1304(a)(2)-(4).

[254] R.C.M. 1304(b)(1).

[255] R.C.M. 1304(b)(1).

[256] R.C.M. 1304(b)(2)(A).

to a special or general court-martial.[257] If the accused does not object, the summary court-martial trial may proceed.[258]

Plea Agreements

At any point before the announcement of the court-martial's findings, an accused and a convening authority may enter into a plea agreement.[259] The parties can agree to dispose of one or more charges or specifications or to limits on the sentence imposed for one or more charges or specifications.[260] For example, an accused could promise to plead guilty to one charge in exchange for a promise from the convening authority not to refer other charges.[261] Likewise, a convening authority could agree to refer charges to a specific type of court-martial or to refer a potentially capital case as non-capital.[262] The accused must freely and voluntarily agree to all plea agreement provisions, and a plea agreement cannot deprive an accused of certain rights, including the rights to counsel and due process.[263] Once a general or special court-martial has convened, a plea agreement is not binding unless approved by the military judge..[264] The military judge may not, however, participate in plea agreement discussions.[265]

Trial Procedure

Once all pretrial matters have concluded, and absent a plea agreement, the case proceeds to trial. Trials by court-martial are generally public[266] and begin with the formal arraignment of the accused before proceeding to the presentation of evidence. They conclude with the announcement of findings and adjudging of sentences. As with the pretrial process, trial procedures vary between types of courts-martial.

Summary Courts-Martial

A trial by summary court-martial begins with the *arraignment* of the accused.[267] The summary court-martial reads the charges and specifications to the accused, considers motions to dismiss or for other relief, and asks the accused to plead to each specification and charge.[268] An accused may plead not guilty or guilty or may refuse to plead and may change any plea at any time before the court-martial announces its findings.[269] Once the accused pleads to each charge and specification, the summary court-martial calls and examines witnesses and considers evidence.[270] In particular,

[257] R.C.M. 1304(b)(2)(A).

[258] R.C.M. 1304(b)(2)(A).

[259] Art. 53a, UCMJ; 10 U.S.C. § 853a; R.C.M. 705(a).

[260] Art. 53a(1), UCMJ; 10 U.S.C. § 853a(1); R.C.M. 705(b).

[261] R.C.M. 705(b).

[262] R.C.M. 705(b).

[263] R.C.M. 705(c)(1).

[264] *See* Art. 53a(b)-(d), UCMJ; 10 U.S.C. § 853a(b)-(d).

[265] Art. 53a(a)(2), UCMJ; 10 U.S.C. § 853a(a)(2).

[266] R.C.M. 806(a).

[267] R.C.M. 1304(b)(2)(B).

[268] R.C.M. 1304(b)(2)(B)-(D).

[269] R.C.M. 1304(b)(2)(D).

[270] R.C.M. 1304(b)(2)(E).

the summary court-martial must "obtain evidence which tends to disprove the accused's guilt or establishes extenuating circumstances."[271]

General and Special Courts-Martial

A trial by a general or special court-martial begins with an opening session.[272] During this session, the military judge considers any preliminary motions and must inform the accused of the accused's right to counsel.[273] The accused chooses whether to be represented by counsel and whether to be tried before members or a military judge alone.[274] The military judge then arraigns the accused by reading the charges and specifications and asking the accused to plead to each charge or specification.[275] An accused may plead (1) guilty of the charged offense; (2) not guilty of the charged offense, but guilty of a lesser included offense; (3) guilty with exceptions or substitutions of the charges; or (4) not guilty.[276]

If the accused has elected to be tried by a court-martial consisting of members (instead of before a military judge alone), the military judge begins assembling the members.[277] Trial counsel and the accused may question and *challenge* the members, or request that members be excused from the court-martial.[278] This process is equivalent to *voir dire*, or the selection of a jury in civilian trials.[279] Challenges may take two forms: (1) challenges for cause, such as bias, which the military judge decides; and (2) peremptory challenges, which require no cause and the military judge does not review.[280] Each side may challenge an unlimited number of members for cause but may exercise only one peremptory challenge.[281] If a judge's excusal of a member based on a challenge reduces the court-martial to fewer than the number of required members, the convening authority must detail additional members to the court-martial unless it is not possible to do so.[282] After the trial counsel and accused have exercised their challenges, the military judge randomly selects the required number of members to form the court-martial and administers an oath to impanel the members and any alternates.[283]

Following the impaneling of the members, trial counsel and the accused each present their case.[284] Each side may present evidence and examine witnesses, subject to the military rules of evidence.[285] Witnesses must be examined under oath[286] and may testify remotely under

[271] R.C.M. 1304(b)(2)(E)(iv).

[272] R.C.M. 901.

[273] R.C.M. 901(d)(4).

[274] R.C.M. 901(d)(4), 903.

[275] R.C.M. 904.

[276] R.C.M. 910(a); *see also* Art. 45, UCMJ; 10 U.S.C. § 845.

[277] R.C.M. 911.

[278] Art. 41, UCMJ; 10 U.S.C. § 841; R.C.M. 912.

[279] *See* FED. R. CRIM. P. 24.

[280] Art. 41, UCMJ; 10 U.S.C. § 841; R.C.M. 912.

[281] Art. 41, UCMJ; 10 U.S.C. § 841; R.C.M. 912.

[282] Arts. 29(d), 41, UCMJ; 10 U.S.C. §§ 829(d), 841.

[283] Arts. 29(b), (d), 41-42, UCMJ; 10 U.S.C. §§ 829(b)-(d), 841-42.

[284] R.C.M. 913.

[285] R.C.M. 912-13; *see supra* note 35.

[286] Art. 42(b), UCMJ; 10 U.S.C. § 842(b).

procedures set by the military judge.[287] No convening authority or commanding officer may attempt to prevent or deter a witness from testifying.[288]

Once the prosecution has presented its case, and again after the close of evidence, the military judge may enter a finding of not guilty for any charge not supported by sufficient evidence.[289] In addition, the military judge may declare a mistrial if "manifestly necessary in the interests of justice" because the fairness of the trial is in doubt.[290]

Findings

After the presentation of evidence and, in general and special courts martial, the military judge has ruled on all questions of law,[291] the court-martial deliberates and decides whether the accused is guilty of each charge and specification.[292] These conclusions are called *findings*.[293] For each charge or specification, the court-martial can find an accused (1) guilty, (2) guilty of a lesser charge, (3) not guilty only by reason of lack of mental responsibility, or (4) not guilty.[294]

Who determines the findings depends on the type of court-martial. For trials by summary courts-martial, the officer serving as the summary court-martial determines the findings.[295] For trials by general and special courts-martial consisting of a military judge alone, the military judge determines and announces the findings.[296] For trials by general and special courts-martial consisting of both members and a military judge, the members meet in closed session to vote on each finding.[297] At least three-fourths[298] of members must vote to find an accused guilty of a charge or specification,[299] but in capital cases, a court-martial may not impose the death penalty absent a unanimous conviction.[300] Any vote that does not meet the three-fourths threshold results in a finding of not guilty.[301]

Sentencing

If the court-martial finds the accused guilty of a charge or specification, it must adjudge a sentence for that finding. The prosecution and defense have the opportunity to present arguments regarding the appropriate sentence, including aggravating or mitigating evidence.[302] In summary

[287] R.C.M. 914A-14B.

[288] Art. 37(a)(2), UCMJ; 10 U.S.C. § 837(a)(2).

[289] R.C.M. 917.

[290] R.C.M. 915(a).

[291] Art. 51(b), UCMJ; 10 U.S.C. § 851(b).

[292] R.C.M. 921.

[293] R.C.M. 918(a).

[294] R.C.M. 918(a)(1)-(2).

[295] R.C.M. 1304(b)(2)(G).

[296] Art. 51(d), UCMJ; 10 U.S.C. § 851(d); R.C.M. 922(b).

[297] Art. 51(a), UCMJ; 10 U.S.C. § 851(a); R.C.M. 921.

[298] Before the MJA amendments, two-thirds of members had to agree to find an accused guilty of a charge or specification, except for cases where the death penalty was mandatory, which required a unanimous vote. *See* 10 U.S.C. § 852 (2012).

[299] Art. 52(a)(3), UCMJ; 10 U.S.C. § 852(a)(3); R.C.M. 921(c)(2).

[300] Art. 52(b)(2), UCMJ; 10 U.S.C. § 852(b)(2).

[301] R.C.M. 921(c)(3).

[302] *See* R.C.M. 1001(a)(1).

courts-martial, the officer serving as the summary court-martial adjudges the sentence.[303] In general or special courts-martial before a military judge alone, the military judge adjudges the sentence.[304] For general and special courts-martials with members, the accused may elect to be sentenced by the members or the military judge, except members must adjudge sentences for all offenses for which the court-martial could impose the death penalty.[305] Three-fourths of members must agree to any sentence except death, which requires unanimous agreement.[306]

A court-martial has wide discretion to adjudge sentences.[307] Unless the UCMJ or the MCM impose mandatory minimum sentences, the court-martial can adjudge "any punishment authorized ..., including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment."[308] The sentence must be "sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces."[309]

Post-Trial Review

Following the verdict and sentencing in a general or special court-martial, the military judge must enter into the record a "Statement of Trial Results" (STR), including each plea entered by the accused, the court-martial findings, any sentence imposed, and any other information required by the President.[310] The military judge then forwards the STR, along with statements by the accused and victim, for post-trial review by the convening authority.[311] As amended in 2013[312] and again by the MJA,[313] the UCMJ permits the convening authority to act on the findings of a special or general court-martial only in certain cases. The convening authority is not authorized to act on the court-martial findings in cases in which (1) the authorized maximum confinement exceeds two years; (2) the sentence includes a dismissal or a dishonorable or bad-conduct discharge; (3) the confinement for all offenses running consecutively is more than six months; or (4) the accused was convicted of one of the sexual offenses listed in Articles 120(a)-(b), 120b, 125, or any other offense specified by the Secretary of Defense.[314]

Upon review of the record of trial and the SJA's recommendation and taking into consideration statements submitted by the accused or a victim,[315] the convening authority may, in applicable cases, suspend all or part of the sentence, disapprove a finding or conviction, or lower the sentence. The convening authority may not reduce, commute, or suspend (1) a sentence of confinement exceeding six months; (2) a sentence of dismissal, dishonorable discharge, or bad-

[303] Art. 53(b)(2), UCMJ; 10 U.S.C. § 853(b)(2).

[304] Art. 53(b)(1)(A), UCMJ; 10 U.S.C. § 853(b)(1)(A).

[305] Art. 25(d)(1)-(2), UCMJ; 10 U.S.C. § 825(d)(1)-(2).

[306] Art. 52(b)(2), UCMJ; 10 U.S.C. § 852(b)(2).

[307] R.C.M. 1002(a).

[308] R.C.M. 1002(a). For limits on the types of punishments that summary and special courts-martial may impose, see the "Types of Courts-Martial" section of this report.

[309] R.C.M. 1002(f).

[310] Art. 60, UCMJ; 10 U.S.C. § 860.

[311] *Id.*

[312] National Defense Authorization Act for FY 2014, Pub. L. No. 113-66, title XVII, § 1702, 127 Stat. 672, 954 (Dec. 26, 2013), codified at 10 U.S.C. § 860 (2013).

[313] Pub. L. No. 114-328, div. E, § 5322, 130 Stat. 2924 (Dec. 23, 2016), codified at 10 U.S.C. § 860a.

[314] Art. 60a, UCMJ; 10 U.S.C. § 860a; R.C.M. 1107.

[315] Art. 60a(e), UCMJ; 10 U.S.C. § 860a(e).

conduct discharge; or (3) a sentence of death.[316] Sentences of dismissal, discharge, or confinement are subject to suspension only if the military judge recommends that the sentence be suspended based on sufficient supporting facts or the accused substantially cooperating in the investigation or prosecution of another person.[317] The convening authority may not suspend a mandatory minimum sentence or suspend a sentence in excess of the suspension recommended by the military judge.[318] The convening authority may not increase the sentence or submit findings of not guilty for rehearing.[319] Once the convening authority takes action on the case, it is returned to the military judge for entry of final judgment,[320] and the conviction is ripe for an appeal.

All court-martial convictions not reviewed by the service appellate courts[321] may, upon timely application by the accused, be reviewed by the Judge Advocate General.[322] "[T]he Judge Advocate General may modify or set aside, in whole or in part, the findings and sentence in a court-martial," or may forward the case for review by the court of criminal appeals.[323]

Appellate Review

Convictions by a special or general court-martial are subject to an automatic[324] appeal to a service Court of Criminal Appeals if the sentence includes confinement for two years or more, a bad-conduct or dishonorable discharge, death, or a dismissal in the case of a commissioned officer, cadet, or midshipman.[325] Appeal is mandatory and cannot be waived when the sentence includes death.[326] Article 66 of the UCMJ, empowers military courts of criminal appeal to review court-martial cases not only for legal sufficiency but also for factual sufficiency,[327] including a potential assessment of the credibility of witnesses, a power that does not exist in civilian courts.[328] If the service court of criminal appeals affirms the conviction, the appellant may request review by the

[316] Art. 60a(c), UCMJ; 10 U.S.C. § 860a(c).

[317] Art. 60a(d), UCMJ; 10 U.S.C. § 860a(d).

[318] Art. 60a(c)(2), UCMJ; 10 U.S.C. § 860a(c)(2).

[319] Art. 60b, UCMJ; 10 U.S.C. § 860b.

[320] Art. 60c, UCMJ; 10 U.S.C. § 860c. In the case of a summary court-martial, the results are final upon the decision of the convening authority. R.C.M. 1111.

[321] Art. 66, UCMJ; 10 U.S.C. § 866. There are three service appellate courts: the Navy-Marine Corps Court of Criminal Appeals, the Army Court of Criminal Appeals, and the Air Force Court of Criminal Appeals.

[322] Art. 69, UCMJ, 10 U.S.C. § 869, R.C.M. 1201.

[323] *Id*.

[324] Military appellate courts are required to review cases over which they have jurisdiction unless the appellant waives his or her right to appeal.

[325] Art. 66, UCMJ; 10 U.S.C. § 866.

[326] R.C.M. 1115.

[327] Art. 66(d), UCMJ; 10 U.S.C. § 866(d). The standard for factual sufficiency review asks whether, "after weighing all of the evidence in the record of trial and making allowances for not personally having heard and seen the witnesses, the members of the Court of Military Review are themselves convinced of the accused's guilt beyond a reasonable doubt." United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987).

[328] *See, e.g.* United States v. Baker, 28 M.J. 121, 122 (C.M.A. 1989) (noting that Article 66, UCMJ "gives powers to a Court of Military Review [now called Courts of Criminal Appeal] that are unparalleled among civilian appellate tribunals. It not only considers issues of law but also makes factual findings and determines sentence appropriateness.").

Court of Appeals for the Armed Forces (CAAF)[329] and ultimately the U.S. Supreme Court.[330] Review by these courts is discretionary.

Supreme Court review by writ of certiorari is limited to cases where the CAAF has conducted a review, whether mandatory or discretionary, or has granted a petition for extraordinary relief.[331] The Court does not have jurisdiction to review a denial of discretionary review by the CAAF,[332] nor does it have jurisdiction to consider denials of petitions for extraordinary relief.[333] Servicemembers whose petitions for review or extraordinary relief are denied by the CAAF may seek additional review only through collateral means by, for example, petitioning for habeas corpus to an Article III court.[334] A collateral appeal to an Art. III court also could provide an alternate avenue for Supreme Court review.

Selected Procedural Safeguards

The following table provides examples of constitutional safeguards and compares how they apply in federal criminal courts and military general courts-martial. The table cites relevant federal rules and or court decisions, as well as provisions of the UCMJ and applicable rules, but makes no effort to provide an exhaustive list of all procedural authorities.

Table 1. Selected Procedural Safeguards in Federal and Military Courts

Constitutional Safeguards	Federal Court	General Courts-Martial
Presumption of Innocence "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895).	If the defendant fails to enter a proper plea, a plea of not guilty will be entered. Fed. R. Crim. P. 11(a). Defendant is entitled to jury instructions explaining that guilt must be proved on the evidence beyond a reasonable doubt. Taylor v. Kentucky, 436 U.S. 478 (1978). Defendant is entitled to appear in court without unnecessary physical restraints or other indicia of guilt, such as appearing in prison uniform, that may be prejudicial to jury. *See* Holbrook v. Flynn, 475 U.S. 560 (1986).	If the defendant fails to enter a proper plea, a plea of not guilty will be entered. R.C.M. 910(b). Members of court-martial must be instructed that the "accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond a reasonable doubt." R.C.M. 920(e). The accused shall be properly attired in uniform with grade insignia and any decorations to which entitled. Physical restraint shall not be imposed unless prescribed by the military judge. R.C.M. 804(e).

[329] Art. 67, UCMJ; 10 U.S.C. § 867. The Court of Appeals for the Armed Forces (CAAF) is a civilian court composed of five civilian judges appointed by the President. Art. 142, UCMJ, 10 U.S.C. § 942.

[330] The U.S. Supreme Court did not have jurisdiction over decisions of the CAAF until Congress granted it in 1984. Military Justice Act of 1983, Pub. L. No. 98-209 § 10(a)(1), 97 Stat. 1393, codified at 28 U.S.C. § 1259.

[331] 28 U.S.C. § 1259.

[332] Art. 67a, UCMJ; 10 U.S.C. § 867a.

[333] *Id.*

[334] *See* Burns v. Wilson, 346 U.S. 137, 139–40 (1953) (noting that "because of the peculiar relationship between the civil and military law," civilian courts' consideration of military habeas cases "has always been more narrow than in civil cases") (citing Hiatt v. Brown, 339 U.S. 103, 70 (1950)).

Constitutional Safeguards	Federal Court	General Courts-Martial
Right to Remain Silent "No person ... shall be compelled in any criminal case to be a witness against himself .... " Amendment V.	Incriminating statements made by defendant under duress or without prior *Miranda* warning are inadmissible as evidence of guilt in a criminal trial. Miranda v. Arizona, 384 U.S. 436 (1966). Before a jury is allowed to hear evidence of a defendant's confession, the court must determine that it was voluntarily given. 18 U.S.C. § 3501.	Coerced confessions or confessions made without statutory equivalent of Miranda warning are not admissible as evidence. Art. 31, UCMJ, 10 U.S.C. § 831. The prosecutor must notify the defense of any incriminating statements made by the accused that are relevant to the case prior to the arraignment. Motions to suppress such statements must be made prior to pleading. Mil. R. Evid. 304.
Freedom from Unreasonable Searches & Seizures "The right of the people to be secure ... against unreasonable searches and seizures, shall not be violated; no Warrants shall issue, but upon probable cause...." Amendment IV.	Evidence, including derivative evidence, gained through unreasonable searches and seizures may be excluded in court. Boyd v. United States, 116 U.S. 616 (1886); Nardone v. United States, 308 U.S. 338 (1939); Fed. R. Crim. P. 41. A search warrant issued by a magistrate on a showing of probable cause is generally required for law enforcement agents to conduct a search of an area where the subject has a reasonable expectation of privacy, including searches and seizures of telephone or other communications and emissions of heat and other phenomena detectable with means other than human senses. Katz v. United States, 389 U.S. 347 (1967). Evidence resulting from overseas searches of American property by foreign officials is admissible unless foreign police conduct shocks judicial conscience or participation by U.S. agents is so substantial as to render the action that of the United States. United States v. Barona, 56 F.3d 1087 (9th Cir. 1995).	"Evidence obtained as a result of an unlawful search or seizure ... is inadmissible against the accused" unless certain exceptions apply. Mil. R. Evid. 311. "Authorization to search" may be oral or written, and may be issued by a military judge or an officer in command of the area to be searched, or if the area is not under military control, with authority over persons subject to military law or the law of war. It must be based on probable cause. Mil. R. Evid. 315. Interception of wire and oral communications within the United States requires judicial application in accordance with federal law. R.C.M. 703A; Mil. R. Evid. 317. A search conducted by foreign officials is unlawful only if the accused is subject to "gross and brutal maltreatment." Mil. R. Evid. 311(b).
Assistance of Effective Counsel "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." Amendment VI.	Defendants in criminal cases have the right to representation by an attorney at all stages of prosecution. The defendant may hire an attorney or, if indigent, have counsel appointed at the government's expense. If two or more co-defendants are represented by one attorney, the court must inquire as to whether a conflict of interest exists. Fed. R. Crim. P. 44. Conversations between attorneys and clients are privileged. Fed. R. Evid. 502. Procedures for ensuring adequate representation of defendants are outlined at 18 U.S.C. §§ 3005 (capital cases) and 3006A.	The defendant has a right to military counsel at government expense. The defendant may choose counsel, if that attorney is reasonably available, and may hire a civilian attorney in addition to military counsel. Art 38, UCMJ, 10 U.S.C. § 838. Appointed counsel must be certified as qualified and may not be someone who has taken any part in the investigation or prosecution, unless explicitly requested by the defendant. Art. 27, UCMJ, 10 U.S.C. § 827. The attorney-client privilege is honored. Mil. R. Evid. 502.

Constitutional Safeguards	Federal Court	General Courts-Martial
Right to Indictment and Presentment "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.... " Amendment V.	When the accused is faces an infamous punishment if convicted, he has the right to insist that he not be tried except on the accusation of a grand jury. *Ex parte* Wilson, 114 U.S. 417 (1885); Fed. R. Crim. P. 7. Jurors must be selected from a fair cross section of the community; otherwise, an accused can challenge the indictment. 28 U.S.C. §§1861-1878 Once an indictment is given, its scope may not be increased. Amendments to an indictment must undergo further grand jury process *Ex parte* Bain, 121 U.S. 1 (1887).	The right to indictment by grand jury is explicitly excluded in "cases arising in the land or naval forces." Amendment V. Whenever an offense is alleged, the commander is responsible for initiating a preliminary inquiry and deciding how to dispose of the offense. R.C.M. 303-06.
Right to Written Statement of Charges "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation ...." Amendment VI.	Defendant has a right to be informed of the nature of the charge with sufficiently reasonable certainty to allow for preparation of defense. Cook v. United States, 138 U.S. 157 (1891).	Charges and specifications must be signed under oath and made known to the accused as soon as practicable. Art. 30, UCMJ, 10 U.S.C. § 830.
Right to be Present at Trial The Confrontation Clause of Amendment VI guarantees the accused's right to be present in the courtroom at every stage of his trial. Illinois v. Allen, 397 U.S. 337 (1970).	"The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial." Crosby v. United States, 506 U.S. 255, 262 (1993); Fed. R. Crim. P. 43. When the defendant knowingly absents himself from court during trial, court may "proceed with trial in like manner and with like effect as if he were present." Diaz v. United States, 223 U.S. 442, 455 (1912).	The presence of the accused is required during arraignment, at the plea, and at every stage of the court-martial unless the accused waives the right by voluntarily absenting him or herself from the proceedings after the arraignment or by persisting in conduct that justifies the trial judge in ordering the removal of the accused from the proceedings. R.C.M. 804.
Prohibition Against Ex Post Facto Crimes "No ... ex post facto Law shall be passed." Art. I, § 9, cl. 3.	Congress generally may not pass a law punishing conduct that was not a crime when perpetrated, increasing the possible sentence for a crime, or reducing the government's evidentiary burden for a crime. Calder v. Bull, 3 Dall. (3 U.S.) 386 (1798); Ex Parte Garland, 71 U.S. 333 (1867).	Courts-martial will not enforce an ex post facto law, including increasing amount of pay to be forfeited for specific crimes. United States. v. Gorski, 47 M.J. 370 (C.A.A.F. 1997).

Constitutional Safeguards	Federal Court	General Courts-Martial
Protection Against Double Jeopardy "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb ...." Amendment V. Subject to "dual sovereign" doctrine, that is, federal and state courts may prosecute an individual for the same conduct without violating the clause. United States v. Gamble, 139 S. Ct. 1960 (2019).	Jeopardy attaches once the jury is sworn or where there is no jury, when the first evidence is presented. If the trial is terminated after jeopardy has attached, a second trial may be barred in a court under the same sovereign, particularly where it is prosecutorial conduct that brings about the termination of the trial. Illinois v. Somerville, 410 U.S. 458 (1973).	Double jeopardy clause applies. *See* Wade v. Hunter, 336 U.S. 684, 688-89 (1949). Art. 44, UCMJ prohibits double jeopardy (called "former jeopardy"), provides for jeopardy to attach after the impanelment of members, or in a court-martial by judge only, after the introduction of evidence. 10 U.S.C. § 844. General court-martial proceeding is considered a federal trial for double jeopardy purposes. Former jeopardy does not result from charges brought in state or foreign courts, although court-martial in such cases is disfavored. United States v. Stokes, 12 M.J. 229 (C.M.A. 1982). Once military authorities have turned servicemember over to civil authorities for trial, military may have waived jurisdiction for that crime, although it may be possible to charge the individual for another crime arising from the same conduct. *See* 54 AM. JUR. 2D, Military and Civil Defense §§ 227-28.
Speedy & Public Trial "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,.... " Amendment VI.	Trial must begin within seventy days of indictment or original appearance before court. 18 U.S.C. § 3161. Closure of the courtroom during trial proceedings is justified only if (1) the proponent of closure advances an overriding interest likely to be prejudiced; (2) the closure is no broader than necessary; (3) the trial court considers reasonable alternatives to closure; and (4) the trial court makes findings adequate to support closure. See Waller v. Georgia, 467 U.S. 39, 48 (1984).	In general, accused must be brought to trial within 120 days of the preferral of charges or the imposition of restraint, whichever date is earliest. R.C.M. 707(a). The right to a public trial applies in courts-martial but is not absolute. R.C.M. 806. The military trial judge may exclude the public from portions of a proceeding for the purpose of protecting classified information if the prosecution demonstrates an overriding need to do so and the closure is no broader than necessary. United States v. Grunden, 2 M.J. 116 (CMA 1977).
Burden & Standard of Proof Due Process requires the prosecution to prove the defendant guilty of each element of a crime beyond a reasonable doubt. *In re* Winship, 397 U.S. 358 (1970).	Defendant is entitled to jury instructions clarifying that the prosecution has the burden of presenting evidence sufficient to prove guilt beyond a reasonable doubt. Cool v. United States, 409 U.S. 100 (1978).	Members of court-martial must be instructed that the burden of proof to establish guilt is upon the government and that any reasonable doubt must be resolved in favor of the defendant. R.C.M. 920(e).

Constitutional Safeguards	Federal Court	General Courts-Martial
Privilege Against Self-Incrimination "No person ... shall be compelled in any criminal case to be a witness against himself…." Amendment V.	Defendant may not be compelled to testify. Jury may not be instructed that guilt may be inferred from the defendant's refusal to testify. Griffin v. California, 380 U.S. 609 (1965). Witnesses may not be compelled to give testimony that may be incriminating unless given immunity for that testimony. 18 U.S.C. § 6002.	No person subject to the UCMJ may compel any person to answer incriminating questions. Art. 31(a) UCMJ, 10 U.S.C. § 831(a). Defendant may not be compelled to give testimony that is immaterial or potentially degrading. Art. 31(c), UCMJ, 10 U.S.C. § 831(c). No adverse inference is to be drawn from a defendant's refusal to answer any questions or testify at court-martial. Mil. R. Evid. 301(f). Witnesses may not be compelled to give testimony that may be incriminating unless granted immunity for that testimony by a general court-martial convening authority, as authorized by the Attorney General, if required. 18 U.S.C. § 6002; R.C.M. 704.
Right to Examine or Have Examined Adverse Witnesses "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...." Amendment VI.	Rules of Evidence prohibit generally the introduction at trial of statements made out of court to prove the truth of the matter stated unless the declarant is available for cross-examination at trial (hearsay rule). Fed. R. Evid. 801-807 The government is required to disclose to defendant any relevant evidence in its possession or that may become known through due diligence. Fed. R. Crim. P. 16.	Hearsay rules apply as in federal court. Mil. R. Evid. 801-807 In capital cases, sworn depositions may not be used in lieu of witness, unless court-martial is treated as non-capital or it is introduced by the defense. Art. 49, UCMJ, 10 U.S.C. § 849.
Right to Compulsory Process to Obtain Witnesses "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor ...." Amendment VI.	Defendants have the right to subpoena witnesses to testify in their defense. The court may punish witnesses who fail to appear. Fed. R. Crim. P. Rule 17.	Defendants before court-martial have the right to compel appearance of witnesses necessary to their defense. R.C.M. 703. Process to compel witnesses in court-martial cases is to be similar to the process used in federal courts. Art. 46, UCMJ, 10 U.S.C. § 846.

Constitutional Safeguards	Federal Court	General Courts-Martial
Right to Trial by Impartial Judge "The judicial Power of the United States, shall be vested in one supreme Court, and in ... inferior courts .... The Judges ... shall hold their Offices during good Behaviour, and shall ... receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Article III § 1.	The independence of the judiciary from the other branches was established to ensure trials are decided impartially, without the "potential domination by other branches of government." United States v. Will, 449 U.S. 200, 217-18 (1980). Judges with a pecuniary interest in the outcome of a case or other conflicts of interest are disqualified and must recuse themselves. 28 U.S.C. § 455.	A qualified military judge is detailed to preside over the court-martial. The convening authority may not prepare or review any report concerning the performance or effectiveness of the military judge. Art. 26, UCMJ, 10 U.S.C. § 826. Article 37, UCMJ, prohibits unlawful command influence of courts-martial through admonishment, censure, or reprimand of its members by the convening authority or commanding officer, or any unlawful attempt by a person subject to the UCMJ to coerce or influence the action of a court-martial or convening authority. Art. 37, UCMJ, 10 U.S.C. § 837.
Right to Trial By Impartial Jury "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury...." Art III § 2 cl. 3. "In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury of the state ...." Amendment VI.	The pool from which juries are drawn must represent a fair cross section of the community. Taylor v. Louisiana, 419 U.S. 522 (1975). There must further be measures to ensure individual jurors selected are not biased (i.e., the *voir dire* process). Lewis v. United States, 146 U.S. 370 (1892); *see* Fed. R. Crim. P. 24 (peremptory challenges). The trial must be conducted in a manner designed to avoid exposure of the jury to prejudicial material or undue influence. If the locality of the trial has been so saturated with publicity about a case that it is impossible to assure jurors will not be affected by prejudice, the defendant is entitled to a change of venue. Irvin v. Dowd, 366 U.S. 717 (1961).	A military accused has no Sixth Amendment right to a trial by petit jury. *Ex Parte* Quirin, 317 U.S. 1, 39-40 (1942) (dicta). However, "Congress has provided for trial by members at a court-martial." United States v. Witham, 47 MJ 297, 301 (1997); Art. 25, UCMJ, 10 U.S.C. § 825. The Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations. United States v. Lambert, 55 M.J. 293 (C.A.A.F. 2001). The absence of a right to trial by jury precludes criminal trial of civilians by court-martial. Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).
Right to Appeal to Independent Reviewing Authority "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Article I § 9 cl. 2.	Originally, the writ of habeas corpus permitted collateral attack upon a prisoner's conviction only if the sentencing court lacked subject matter jurisdiction. It later evolved into an avenue for the challenge of federal and state convictions on other due process grounds, to determine whether a prisoner's detention is contrary to the Constitution or laws or treaties of the United States. 28 U.S.C. §§ 2241-2255	The writ of habeas corpus provides the primary means by which those sentenced by military court, having exhausted military appeals, can challenge a conviction or sentence in a civilian court. The scope of matters that a court will address is narrower than challenges of federal or state convictions. Burns v. Wilson, 346 U.S. 137 (1953). However, Congress created a civilian court, the Court of Appeals for the Armed Forces, to review military cases. 10 U.S.C. § 867.

Protection Against Excessive Penalties "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Amendment VIII.	The death penalty is not *per se* unconstitutional, but its discriminatory and arbitrary imposition may be, and the death penalty may not be automatic. *See* Gregg v. Georgia, 428 U.S. 153 (1976); 18 U.S.C. § 3592 (mitigating /aggravating circumstances). When the death penalty may be imposed, the defendant must be provided a list of potential jurors and witnesses, unless the court finds that such action might "jeopardize the life or safety of any person." 18 U.S.C. § 3432. A special hearing is held to determine whether the death sentence is warranted. 18 U.S.C. § 3593.	Death may only be adjudged for certain crimes where the defendant is found guilty by unanimous vote of 12 court-martial members. Prior to arraignment, the trial counsel must give the defense written notice of aggravating factors the prosecution intends to prove. R.C.M.1004.

Author Information

Jennifer K. Elsea
Legislative Attorney

Jonathan M. Gaffney
Legislative Attorney

Disclaimer