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Military Courts-Martial: An Overview

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Summary

Reports of abuse of detainees held by U.S. military forces in Iraq have drawn attention to the role of military discipline and the military justice system. Under its authority to regulate the armed forces, Congress enacted the Uniform Code of Military Justice (UCMJ) to prescribe criminal law and trial procedure for the armed forces. The President implements the UCMJ by issuing the Manual for Courts-Martial (MCM). This report provides an overview of military courts-martial: jurisdiction, potential punishments, and the appeals process.

Background

Under Article I, sec. 8 of the U.S. Constitution, Congress has the power to raise and support armies; provide and maintain a navy; and provide for organizing and disciplining them. Under this authority, the Congress has enacted the Uniform Code of Military Justice (UCMJ),¹ the code of military criminal laws applicable to all military members worldwide. The President implemented the UCMJ through the Manual for Courts-Martial (MCM), which was initially prescribed by Executive Order 12473 (April 13, 1984). The Manual for Courts-Martial contains the Rules for Courts-Martial (RCM), the Military Rules of Evidence (MRE),² and the UCMJ. The MCM covers almost all aspects of military law.³ Military criminal trial courts are known as courts-martial. Military courts are not considered Article III courts but instead are established pursuant to Article I of the

¹ 10 U.S.C. §§ 801-941.

² Rules of procedure and rules of evidence for courts-martial are established by the President as authorized by Art. 36, UCMJ (10 U.S.C. § 836).

³ 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 Instructions.

Constitution.⁴ This report provides an overview of military courts-martial.⁵ It does not cover administrative disciplinary options such as nonjudicial punishments.⁶

Jurisdiction

The UCMJ gives courts-martial jurisdiction over servicemembers as well as several other categories of individuals, including retired members of a regular component of the armed forces entitled to pay; 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; 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 persons with or accompanying the military in the field during “times of war,” limited to declared wars.⁷ Jurisdiction of a court-martial does not depend on where the offense was committed; it depends solely on the status of the accused.⁸

Types of Offenses

Courts-martial try “military offenses,” which are listed in the punitive articles of the UCMJ and are codified in 10 U.S.C. 877 et seq.⁹ Some “military offenses” have a civilian analog, but some are exclusive to the military.¹⁰ The President is authorized to prescribe the punishments which a court-martial may impose within the limits established by Congress.¹¹ In addition, a servicemember may be tried at a court-martial for offenses not specifically covered through the use of the General Article – UCMJ Article 134,¹² which states that all “crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-

⁴ Article III of the U.S. Constitution, addressing the judicial powers of the United States, contains certain requirements such as life tenure for judges and a prohibition against diminution of salaries. Article I of the U.S. Constitution, addressing the legislative powers of Congress, includes to the power to regulate the armed forces and, by implication, the power to create legislative courts to enforce those regulations. In creating legislative courts, Congress is not limited by the restrictions imposed in Article III.

⁵ For a brief comparison of procedural rights available in courts-martial to those applicable in federal courts, see CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, by Jennifer K. Elsea.

⁶ Military commanders may use nonjudicial punishment, also known as “Article 15,” to discipline servicemembers for minor offenses without having to face a court-martial. Art. 15, UCMJ; 10 U.S.C. § 815.

⁷ Art. 2, UCMJ; 10 U.S.C. § 802.

⁸ See *Solorio v. United States*, 483 U.S. 435, 447 (1987).

⁹ The punitive articles run from Arts. 77 through 134 of the UCMJ; 10 U.S.C. §§ 877-934.

¹⁰ Military-specific offenses include mutiny or sedition (Art. 94, UCMJ); insubordinate conduct (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).

¹¹ Art. 56, UCMJ; 10 U.S.C. § 856.

¹² 10 U.S.C. § 934.

martial, according to the nature and degree of the offense.” The armed forces have used art. 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 potential punishments for violations generally match those applicable to the corresponding civilian offense.

Investigation

When a servicemember has reportedly committed an offense, the accused’s immediate commander will conduct an inquiry.¹³ This inquiry may range from an examination of the charges and an investigative report or summary of expected evidence to a more extensive investigation, depending on the offense(s) alleged and the complexity of the case. The investigation may be conducted by members of the command or, in more complex cases, military and civilian law enforcement officials. Once evidence has been gathered and the inquiry is complete, the commander can choose to dispose of the charges by (1) taking no action, (2) initiating administrative action,¹⁴ (3) imposing nonjudicial punishment, (4) preferring charges, or (5) forwarding to a higher authority for preferral of charges.¹⁵ The first formal step in a court-martial, preferral of charges, consists of drafting a charge sheet containing the charges and specifications¹⁶ against the accused. The charge sheet must be signed by the accuser¹⁷ under oath before a commissioned officer authorized to administer oaths.¹⁸ Once charges have been preferred they may be referred¹⁹ to one of three types of courts-martial: summary, special or general.²⁰ The seriousness of the offenses alleged generally determines the type of court-martial. The court-martial must be convened by the convening authority,²¹ who will generally be the commander of the unit to which the accused is assigned.²²

Types of Courts-Martial

Summary Courts-Martial. The summary court-martial can adjudicate minor offenses allegedly committed by enlisted servicemembers. It can adjudge maximum punishments of thirty 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

¹³ RCM 303.

¹⁴ Administrative action can include separation from the military. *See* 10 U.S.C. §§ 1161 et seq.

¹⁵ RCM 306(c).

¹⁶ A specification is a plain and concise statement of the essential facts constituting the offense charged. RCM 307(c)(3).

¹⁷ Any person subject to the UCMJ may prefer charges as the accuser. RCM 307(a).

¹⁸ RCM 307(b).

¹⁹ Referral is the order that states that charges against an accused will be tried by a specific court-martial. RCM 601.

²⁰ *See* RCM 401(c).

²¹ RCM 504.

²² RCM 103(6).

grade E-4,²³ the summary court-martial may not adjudge confinement or hard labor without confinement and can only reduce them to the next lower pay grade.²⁴ Summary courts-martial are composed of one commissioned officer who need not be a lawyer.²⁵ The accused must consent to the proceedings²⁶ and normally is not entitled to a lawyer.²⁷

Special Courts-Martial. The special court-martial can try any servicemember for any noncapital offense or, under presidential regulation, capital offenses.²⁸ Special courts-martial generally try offenses that are considered misdemeanors. A special court-martial can be composed of a military judge alone, three members,²⁹ or a military judge and three members.³⁰ Contrary to civilian criminal trials, the agreement of only two-thirds of the members of a court-martial is needed to find the accused guilty. Otherwise, the accused is acquitted.³¹ There are no “hung juries” in courts-martial.

Regardless of the offenses tried, the maximum punishment allowed at a special court-martial 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.³² The accused is entitled to an appointed military attorney, a military counsel of his or her selection, or he or she can hire a civilian counsel at no expense to the government.³³

General Courts-Martial. A general court-martial is the highest trial level in military law and is usually used for the most serious offenses. It is composed of a military

²³ Paygrade E-4 consists of corporals or specialists (Army), petty officers 3rd class (Navy), corporals (Marine Corps), and senior airman (Air Force).

²⁴ RCM 1301; Art. 20, UCMJ; 10 U.S.C. § 820.

²⁵ Art. 16, UCMJ; 10 U.S.C. § 816.

²⁶ Art. 20, UCMJ; 10 U.S.C. § 820.

²⁷ *Middendorf v. Henry*, 425 U.S. 25 (1970).

²⁸ Arts. 16 & 19, UCMJ; 10 U.S.C. §§ 816, 819; RCM 201(f)(2)(A).

²⁹ Members in the military justice system are the equivalent of jurors and are generally composed of officers from the accused’s command.

³⁰ The accused has the right to choose the composition of the court-martial or whether to be tried by a military judge alone, a military judge and members, or a panel of members. Enlisted servicemembers may request that the members’ panel include enlisted members. RCM 903.

³¹ RCM 921(c). The same is applicable to general courts-martial with the exception of offenses where the death penalty is mandatory, which require a unanimous verdict. Art. 52, UCMJ; 10 U.S.C. § 852.

³² Art. 19, UCMJ; 10 U.S.C. § 819; RCM 201(f)(2)(B). A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may only be adjudged if a complete record of the proceedings and testimony has been made, defense counsel was appointed, and a military judge presided over the court-martial. If a military judge could not be appointed, a detailed written statement stating the reasons why must be submitted by the commander who convened the court-martial.

³³ Art. 27, UCMJ; 10 U.S.C. § 827.

judge sitting alone, or five members and a military judge.³⁴ It can adjudge, within the limits prescribed for each offense, a wide range of punishments to include confinement, reprimand, forfeitures of up to all pay and allowances, reduction to the lowest enlisted paygrade, punitive discharge (bad conduct discharge, dishonorable discharge or dismissal), restriction, fines and, for certain offenses, death.³⁵ 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.

Prior to convening a general court-martial, a pretrial investigation must be conducted. This investigation, known as an Article 32 hearing, is the equivalent of a civilian grand jury, meant to ensure that there is a basis for prosecution.³⁶ An investigating officer, who must be a commissioned officer,³⁷ presides, and the accused has the same entitlements to counsel as in a special courts-martial. However, unlike in a civilian grand jury investigation where the accused has no access to the proceedings, the accused is afforded the opportunity to examine the evidence presented against him, cross-examine witnesses and present his own arguments.³⁸ If the investigation uncovers evidence that the accused has committed an offense not charged, the investigating officer can recommend that new charges be added.³⁹ Likewise, if the investigating officer believes that evidence is insufficient to support a charge, he can recommend that it be dismissed.

Once the Article 32 investigation is complete, the investigating officer makes recommendations to the convening authority (CA) via the CA's legal advisor. The legal advisor in turn, provides the CA with a formal written recommendation, known as the Article 34, UCMJ advice, as to the disposition of the charges. The CA then determines whether to convene a court-martial or dismiss the charges.⁴⁰

Post-Trial Review

Convictions at a general or special court-martial that include a punitive (bad conduct or dishonorable) discharge are subject to an automatic post-trial review by the CA. The process starts with a review of the trial record by the staff judge advocate (SJA), who makes a recommendation to the CA as to what action to take. This review is recognized as the accused's best hope for relief as the CA has broad powers to act on the case.⁴¹ Upon review of the record of trial and the SJA's recommendation, the CA may, among other remedies, suspend all or part of the sentence, disapprove a finding or conviction or

³⁴ Art. 16, UCMJ The accused has the right to choose the composition of the court-martial except in capital cases, where members are required. See note 29, *supra*. and RCM 201(f)(1)(C).

³⁵ RCM 1003. Possible punishments are different for officers and enlisted servicemembers.

³⁶ Art. 32, UCMJ; 10 U.S.C. § 832.

³⁷ RCM 405(d)(1).

³⁸ Art. 32(b)-(c), UCMJ; 10 U.S.C. § 832(b)-(c); RCM 405(f).

³⁹ Art. 32(d), UCMJ; 10 U.S.C. § 823(d); RCM 405(e).

⁴⁰ Art. 33-35, UCMJ; 10 U.S.C. §§ 833-835; RCM 407.

⁴¹ *United States v. Davis*, 58 M.J. 100, 102 (2003).

lower the sentence.⁴² The CA may not increase the sentence. Once the CA takes action on the case, the conviction is ripe for an appeal.

Summary court-martial convictions and general court-martial convictions not reviewable by the service appellate courts⁴³ are reviewed by a judge advocate to determine if the findings and sentence, as approved by the CA, are correct in law and fact.⁴⁴ If those criteria are met, the conviction is final. If not, the judge advocate forwards the case to a general court-martial CA for corrective action.⁴⁵ If the CA refuses to take corrective action, the case is referred to the Judge Advocate General for review.

Appellate Review

Convictions by a special or general court-martial are subject to an automatic⁴⁶ appeal to a service Court of Criminal Appeals if the sentence includes confinement for one year or more, a bad-conduct or dishonorable discharge, death, or a dismissal in the case of a commissioned officer, cadet or midshipman.⁴⁷ Appeal is mandatory when the sentence includes death. If the conviction is affirmed by the service court, the appellant may request review by the Court of Appeals for the Armed Forces (CAAF)⁴⁸ and ultimately the U.S. Supreme Court.⁴⁹ 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. The Court does not have jurisdiction to review a denial of discretionary review by the CAAF,⁵⁰ nor does it have jurisdiction to consider denials of petitions for extraordinary relief. Service members whose petitions for review or for extraordinary relief are denied by the CAAF may seek additional review only through collateral means, e.g., petitioning for *habeas corpus* to an Article III court, which could provide an alternate avenue for Supreme Court review.

⁴² Art. 60, UCMJ; 10 U.S.C. § 860; RCM 1107.

⁴³ 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. A service appellate court will have jurisdiction in cases where the sentence includes confinement for one year or more, a bad-conduct or dishonorable discharge, death, or a dismissal from service in the case of a commissioned officer, cadet or midshipman. Art. 66, UCMJ; 10 U.S.C. § 866.

⁴⁴ Art. 64, UCMJ; 10 U.S.C. § 864; RCM 1111, 1112 and 1306.

⁴⁵ Art. 64(c)(3), UCMJ; 10 U.S.C. § 864(c)(3); RCM 1112.

⁴⁶ Military appellate courts are required to review cases over which they have jurisdiction unless the appellant waives his or her right to appeal. An appellant may not waive his right to appeal when the sentence includes death. RCM 1110.

⁴⁷ Art. 66, UCMJ; 10 U.S.C. § 866.

⁴⁸ See 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.

⁴⁹ 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, P.L. 98-209, 97 Stat. 1393, 28 U.S.C. § 1259.

⁵⁰ 10 U.S.C. § 867a.