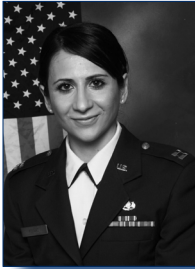


Military Criminal Justice: A Guide for the Civilian Prosecutor

by Nana Knight



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“Discipline is the soul of the army. It makes many numbers formidable, procures success to the weak and esteem to all.”

— George Washington

Recent publicity surrounding sexual assault in the military has increased public and legislative interest in the military justice system. Questions have been raised about some features of military criminal law, most notably, regarding military commanders’ discretion in the disposition of criminal allegations, the authority to convene a court-martial and conduct pretrial investigations, and the power to grant clemency to members convicted in courts-martial. The media’s portrayal of the issues continues against the backdrop of historical criticism of the military justice system as an archaic, inefficient, and arbitrary system of quasi-courts requiring major overhaul.¹ In that sense, military justice has been described as a “rough form of justice,”² with “dangers lurking in military trials,”³ and a system that is in need of “modernization”⁴ and respect.⁵ This article seeks to explain the origin, purpose, and the multi-faceted

pretrial and trial features of the military justice system. It also offers practical tips for civilian practitioners dealing with military offenders—to foster a better understanding and appreciation of this unique piece of jurisprudence.

Purpose, Origin, and Sources of Military Law

The Uniform Code of Military Justice (UCMJ) is the basic statute regulating criminal law in the armed forces and is the final binding authority.⁶ The UCMJ was enacted in 1951 in response to public and legislative discontent with World War II military criminal law, which was primarily based on the outdated Articles of War and the Articles of Government for the Navy.⁷ The President implemented the UCMJ in 1984 through the revised *Manual for Courts-Martial (MCM)*.⁸ As stated in the preamble of the *MCM*, the purpose of military criminal 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.”⁹ The *MCM* contains the Rules for Courts-Martial (RCM), the Military Rules of Evidence (MRE), and the UCMJ. Other primary sources of military law include Department of Defense directives, service regulations, and military case law.¹⁰

The Need for a Separate System

The military justice system operates separately from its federal and state counterparts with separate crimes, procedures, and sanctions.¹¹ The reasons for the separate system are based on the rationale that worldwide deployment of large numbers of military personnel pose unique disciplinary requirements, and, therefore, require a separate, flexible form of jurisprudence.¹² A separate system is also justified based on the need for instant mobility of personnel,¹³ the necessity for a speedy trial to avoid loss of witnesses due to combat effect and mission requirements, and the need for disciplined personnel—all in the context of accommodating the peculiar nature of military life with the corresponding stress of combat or preparation for combat.¹⁴

The primary goal of the military justice system is to enforce good order and discipline, concepts that may seem unfamiliar to

civilians. Due to the unique needs of the military, military personnel are subject to prosecution for unique military offenses that have no analogue in the civilian world. For example, civilian law does not criminalize offenses such as Absence without Leave (Article 86, UCMJ), Disrespect Toward a Superior Commissioned Officer (Article 89), Conduct Unbecoming an Officer and Gentleman (Article 133), Fraternization (Article 134), or Adultery (Article 134). These types of offenses exist to ensure that servicemembers follow orders in furtherance of the mission.¹⁵ The basic premise is that a commander must be able to rely on the subordinate to execute orders to sustain the fighting force necessary to accomplish the mission and further national interests. This requires discipline and adherence to rules, sanctions, and procedures different from the civilian system. The system is therefore designed to ensure obedience to orders through fear of punishment and individual accountability. An impartial view of the realities of military life leads to the conclusion that a separate system is inevitable and vital for an effective military.¹⁶

Jurisdiction

Court-martial jurisdiction applies worldwide.¹⁷ The UCMJ holds court-martial jurisdiction over 12 categories of individuals,¹⁸ including active duty, reserve, retired military personnel, members of quasi-military organizations, prisoners of war, and, under very limited circumstances, civilians. The fact that an accused is tried by a court-martial does not prevent the possibility of trial by another jurisdiction, either in lieu of a court-martial or in addition to it.¹⁹ The United States Supreme Court has held that the double jeopardy clause of the Constitution does not prohibit trial of an accused by one sovereign after either conviction²⁰ or acquittal by another.²¹ However, since military courts are federal in nature, trial by either a civilian or military federal court prevents trial by the other.²² As a practical matter, it is the policy of some branches to maximize requests for jurisdiction, and try the case in a court-martial forum. To prosecute criminal acts that have no counterpart under the UCMJ, services use the federal Assimilative Crimes Act²³ under Article 134, UCMJ, to assimilate federal and state offenses.²⁴ Examples of these kinds of offenses may include cross-dressing²⁵ or

prosecution of drugs that are not specifically covered under Article 112(a).²⁶

Commanders

Commanders play an integral part in the military criminal justice system. With the assistance of judge advocates, commanders initiate and conduct preliminary investigations into allegations of misconduct,²⁷ authorize searches and seizures, interrogate suspects, and dispose of cases administratively or through a UCMJ action, including preferring and referring charges. They also select jury members to serve on courts-martial and consider clemency matters post-trial. In weighing options with regard to disposition of offenses, commanders generally consider the servicemember's past disciplinary actions, duty performance and military character, the impact of the misconduct on the unit, the victim's desires, the gravity of the crime, and deterrence from misconduct in the future.²⁸ The *MCM* mandates commanders to employ the lowest level of disciplinary tools from adverse administrative actions to convening courts-martial in the disposition of offenses.²⁹

If the commander decides a court-martial is the appropriate disposition, he or she then prefers the charges against the accused.³⁰ The commander has wide discretion in the number and types of charges to prefer, but must swear or affirm that the charges, to the best of his or her knowledge, are true.³¹ Military prosecutors are heavily involved in drafting charges and providing pretrial advice, and have significant influence over case disposition. Once the charges are preferred, the charge sheet and the investigative report is forwarded to the next higher commander in the chain, with a recommendation as to the type of court-martial the case should be referred.³²

Pretrial Investigation

Before preferring court-martial charges, a commander is responsible for conducting a thorough and impartial inquiry into the charged offenses.³³ Similar to civilian offenders, the military accused is entitled to the protections of the Fourth Amendment, vis-à-vis searches, seizures, the privilege against self-incrimination, and the right to counsel. From the initial stages of an inquiry into

a report of misconduct, a military member has greater rights against self-incrimination than a civilian offender: Under Article 31 of the UCMJ, which is modeled on *Miranda* rights, the suspect must be read his or her rights before any questioning regarding the misconduct—no custody is required for the rights to attach.³⁴ In practice, a significant number of military suspects choose to waive their rights and make statements,³⁵ and they often do it in writing.

Convening Authority

Unlike civilian courts, a court-martial does not represent a continuous form of jurisdiction: It is created by officers vested with the authority to create one, usually colonels or general officers, who are also known as “convening authorities.” After reviewing the evidence, the charges, and the accused’s immediate commander’s recommendation, the convening authority generally has the option of (1) dismissing the charges, (2) referring the charges to a court-martial, (3) returning the charges to the immediate commander for a lesser disposition, (4) forwarding the charges with recommendations to a higher convening authority, or (5) directing that further investigation take place.³⁶ Depending on the nature and severity of the misconduct, the convening authority administers nonjudicial punishment or may refer the case to a summary, special, or general court-martial.

Nonjudicial Punishment

Nonjudicial punishment under Article 15, UCMJ, serves as a middle ground in military justice. Designed for minor offenses, it provides sanctions that are less severe than a court-martial, but harsher than other nonpunitive measures.³⁷ The imposition of nonjudicial punishment does not result in a federal conviction. In fact, the proceeding is non-adversarial, and the acceptance of the punishment does not amount to admission of guilt.³⁸ The accused has the right to refuse the nonjudicial punishment and demand trial by court-martial.³⁹ The accused also has the right to present evidence in his or her defense and consult with counsel. The commander makes the final determination as to whether the accused committed the offense—and imposes punishment accordingly. Punishment options include reductions in grade,

correctional custody, extra duties, restriction to base, reprimand, and forfeiture of pay.⁴⁰

Summary Court-Martial

This is the least formal of the three types of courts-martial designed to dispose of relatively minor offenses, usually misdemeanors and infractions.⁴¹ Only enlisted members, based on consent, may be tried in a summary court-martial.⁴² If the accused refuses to be tried by a summary court, the charges may be dealt with administratively or referred to a special or general court-martial.⁴³ The “judge” in the summary court is a single officer, not necessarily a lawyer, who presides over the hearing and renders a verdict. If the accused is guilty, the officer may impose a sentence.⁴⁴ The accused has a right to discovery, cross-examination of witnesses, and presentation of evidence. The government is required to prove guilt beyond a reasonable doubt. Unlike special or general courts-martial, punishment options are limited.⁴⁵

Special Court-Martial

This is an intermediate forum for trial convened by a commander vested with special court-martial-convening authority.⁴⁶ Both officers and enlisted members accused of non-capital offenses may be tried in this forum.⁴⁷ A special court-martial must have at least three members and a military judge.⁴⁸ The trial is akin to a civilian criminal trial, where counsel on both sides conduct voir dire, make opening statements, examine witnesses, and present evidence and closing arguments to the judge or a jury. The procedure is governed by the MREs (modeled on the Federal Rules of Evidence) and RCMs found in the *MCM*. The proceedings are public, but arraignment and motions are held outside the jury. Similar to civilian criminal trials, the prosecution has the burden to prove the elements of the crime “beyond a reasonable doubt.”⁴⁹ The findings of guilty may be based on direct or circumstantial evidence. The maximum punishment for special courts-martial includes a bad conduct discharge (less severe than a dishonorable discharge), maximum confinement not to exceed one year, and/or forfeiture of two-thirds pay for 12 months and a reprimand.⁵⁰

General Court-Martial

General courts-martial are reserved for the most serious offenses, including capital cases. A general court-martial must have at least five members with a presiding judge. A general court-martial follows the same process as a special court-martial. The most notable difference between the two types of courts-martial is that prior to a general court-martial, an Article 32 hearing must be held to inquire into “the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.”⁵¹

An Article 32 hearing is the military’s equivalent of a preliminary hearing. However, unlike a preliminary hearing, an Article 32 also serves as a discovery tool and is designed for counsel to observe and evaluate adverse witnesses and to strategize for trial. The hearing is presided over by an investigating officer (IO)—a commissioned officer who is independent from the government, defense, and the command.⁵² The accused may be represented by counsel, and may elect to testify and present witnesses and evidence for the IO’s consideration.⁵³ The hearing allows the accused to prove to the convening authority that the charges are meritless, and to persuade the convening authority to dismiss the case or refer it to a lesser forum.

Jury and Verdict

A military accused is entitled to trial by bench or jury.⁵⁴ For jury trials, the convening authority appoints the court members (usually from the installation) and refers the case to them for adjudication.⁵⁵ Court members are selected by their age, education, training, experience, length of service, and judicial temperament.⁵⁶ The court-martial is comprised of officers, unless the accused requests that one-third of the panel consist of enlisted members.⁵⁷ Unlike civilian jurors, most, if not all, panel members have at least a high school degree, and many have bachelors and graduate degrees.⁵⁸

The court member selection process is flexible in that it applies to all U.S. military units in the United States and abroad, regardless of logistical challenges and operational demands. The voir dire process allows for unlimited challenges for cause and one

peremptory per accused.⁵⁹ The commander is criminally prohibited from attempting to influence or affect the outcome: Under Article 37(a), UCMJ, no convening authority “may censure, reprimand, admonish the court or any member, military judge or counsel thereof, with respect to the findings or sentence adjudged by the court or with respect to any other exercises of its or his functions in the conduct of the proceedings.”⁶⁰ The defense may challenge the selection process used by the commander to detail the members.⁶¹

These safeguards ensure that each court-martial member detailed to the court is free from improper influence in his or her decision. The result is a flexible and impartial system that allows counsel to thoroughly assess the fitness of each member serving on the panel. Military members are chosen to serve on the jury because they have a unique understanding of the rigors of military life, and are exclusively positioned to insightfully evaluate the accused’s actions and the facts of the case.

Following presentation of evidence, closing arguments, and jury instructions, members retire to deliberate. The voting on findings is through a secret written ballot.⁶² For non-capital cases, a two-thirds vote is required for a finding of guilty: A lesser vote results in acquittal.⁶³ Unlike civilian trials, no hung juries exist in military practice.

Sentencing

Although civilian and military criminal trials are nearly identical with regard to trial procedure, significant differences exist in the sentencing stage of the criminal proceedings. The sentencing procedure begins immediately after the guilty verdict is announced and constitutes an adversarial proceeding, involving the fact finder—a judge or jury.⁶⁴ Probation is not authorized as a punishment option.⁶⁵ During the sentencing, the prosecution presents its “case in aggravation,” after which the defense presents its “case in extenuation and mitigation.”⁶⁶ The MREs govern the process. The presentation of evidence is very similar to a civilian trial, after which both sides present closing arguments on the merits, and the jury deliberates on the actual sentence. In a system with no minimum sentences, and where only maximum punishment is prescribed, sentencing by a jury serves to curb potentially arbitrary sentences imposed by individual judges.

Clemency

Unlike the civilian system, those convicted in military courts have an unmatched opportunity to have their sentences reduced, suspended, or commuted, also known as clemency.⁶⁷ The findings and sentence of a court-martial are not final until the convening authority, the commander who convened the court-martial, approves them. The convening authority may, at his or her discretion, disapprove any or all of the findings and suspend or reduce the sentence, considering sentences imposed in similar cases.⁶⁸ The convening authority may not increase the sentence. Once final action is taken on the case, the conviction is ripe for an appeal.

The clemency is one of the most criticized features of the military justice system because it allows the convening authority to set aside a verdict that was rendered by a jury.⁶⁹ Due to the convening authority's perceived, unbridled authority to overturn cases, new legislative reforms, vis-à-vis the 2014 National Defense Authorization Act, have been advanced to curtail the convening authority's power to modify sentences for serious offenses by overturning a guilty verdict or reducing the finding of guilty to that of a lesser included offense.⁷⁰ The Department of Defense was charged with implementing the reform by June 24, 2014.⁷¹

Cooperation with Civilian and Military Law Enforcement

Civilian authorities and the military both have jurisdiction in cases in which servicemembers are accused of a crime that violates both military and state law. The general military policy of some branches is to maximize jurisdiction in all cases.⁷² Therefore, in states with significant military presence, district attorney's offices often receive requests for jurisdiction for offenses committed off base. Requests for jurisdiction are founded upon the military's strong interest in maintaining control over military offenders, administering justice swiftly, and publicizing a message of "zero tolerance" of misconduct by the command. Almost always, there is an analogue of the civilian offense in the UCMJ, including a "catch-all" provision, Article 134, which allows the military to capture the civilian misconduct under the UCMJ. In this context, service-

discrediting conduct during the commission of the offense may be an aggravating factor for case disposition purposes in the military.

Overall, understanding how the military justice system works allows for a better cooperation between the two parties and may aid in the civilian practitioner's decision to relinquish or retain jurisdiction of military offenders.

In processing a request for jurisdiction from the local installation, one important consideration should be the speed at which cases are dealt with through the military command. In this sense, the celerity in which cases are disposed of at installation level is unparalleled—cases do not linger on for months and years with unlimited continuances and defense delay tactics. The civilian prosecutor can be reassured that the issue will get immediate command attention, and, if no court-martial action is brought, some sort of administrative punishment will be imposed, up to and including administrative discharge from the branch. These punitive actions are tracked internally and remain on the servicemember's record for potential increase in punishment for future misconduct. From the military perspective, speed is important not only to send a message to other members that misconduct will be dealt with swiftly and severely, but also to clear up the member for potential deployment—having an open criminal case “downtown” typically restricts the servicemember's deployability.

Some tension is common to both military and civilian officials when dealing with crimes such as driving under the influence off the military base. A DUI is a prime example of competition for jurisdiction, where both parties cite deterrence as a top priority, and both are interested in swift and just resolution of the case that results in a permanent record transcending jurisdictional demarcations. However, unlike civilian criminal cases, the typical military disposition of DUIs is with non-judicial punishment that does not result in a criminal conviction. Notwithstanding a lack of a criminal conviction, non-judicial punishments are administered expeditiously and generally have very serious consequences for the servicemember, including ineligibility for promotion, possible demotion, forfeiture of pay and allowance, and potential discharge down the line if the member engages in future misconduct.

Despite its effectiveness in the military, non-judicial punishment offers little to the civilian practitioner concerned with maintaining a rap sheet or civilian record of the offender's DUI. The civilian practitioner has limited to no ability to track the military's internal systems of records to access the offender's history. Unfortunately, DD Form 214, or the Certificate of Discharge, is of no value in this regard since it only captures the servicemember's characterization of service, not the offender's military rap sheet.

One tool that might help address the civilian prosecutor's concern for recordkeeping is the National Crime Information Center (NCIC) criminal history database, which mandates the Department of Defense to enter the final disposition of military judicial and non-judicial proceedings, including criminal convictions.⁷³ Remarkably underutilized, the NCIC database allows the military practitioner to appropriately notify law enforcement agencies nationwide of military convictions. Access to this database can potentially assuage the civilian prosecutor's concern for permanent records, making the prosecutor more amenable to ceding jurisdiction to the military.

Other situations in which relinquishing jurisdiction may be warranted involve cases with extensive digital evidence. This includes child pornography cases or offenses that involve voluminous cellphone data or "soft" information stored in various types of digital systems. Military branches such as the U.S. Air Force and Army are exceptionally well-equipped in conducting digital forensic exploitation, drawing on the experience and advanced technical methods cultivated through the military's counter-terrorism efforts.

Notwithstanding the benefits of ceding jurisdiction, there are certain situations in which the interests of justice may be better served if civilian prosecutors retain the case. For example, in domestic violence cases, the military's protective orders, while binding on servicemembers, are not binding on civilians; this becomes an important issue in situations where the military member is alleging violence by a civilian. Further, even if binding on the military member, protective orders are temporary and require reconsideration by the command every 30–60 days on average. Although the military offers extensive counseling and

advocacy services for military families, the civilian criminal system is better equipped to deal with such cases, especially in light of special protections for victims and mandatory batterers' treatment programs.

Other circumstances justifying retention of the case by civilian prosecutors involve the accused's confessions and admissions. Article 31 rights essentially track *Miranda* rights, but they are much broader in scope because no custody is required before the rights attach. Consequently, in a case where Article 31 rights are violated and the accused's statements cannot be used in the court-martial, the civilian prosecutor may still be able to use those statements in a civilian criminal case because no *Miranda* rights violation has taken place. In serious cases where the accused's statements are a critical part of proving the case, it may be more prudent to allow civilian prosecutors to prosecute the case.

Minimum prescribed punishments are another area where the California Penal Code has an advantage over the UCMJ. The UCMJ generally offers no mandatory minimums—only maximum punishments are prescribed. This is in contrast to the Penal Code, which specifies a triad of confinement times for various offenses. In cases where some guaranteed exposure to confinement is warranted, justice may be better served if civilian prosecutors retain the case.

Conclusion

Unfavorable comparisons between the military and civilian justice systems focus on the exceptional cases or the theoretical ways in which the military justice system can be abused. Such comparisons frequently emanate from the public's misunderstanding of the features of the military justice system, and they are frequently flawed because of this reason. The primary perceived flaw is the degree of commander control, i.e., clemency. That is why legislative changes are underway to address this concern, particularly in the area of sexual assault. Although efforts to manipulate the court or exert undue command influence are extremely rare, they do sometimes occur. However, unlike the civilian system, there are no reports of unduly biased judges; no defendants waiting years until trial; and no defendants

impoverished by the need to retain counsel or forced to be represented by potentially inexperienced counsel. An unbiased and comprehensive view of military proceedings leads to the conclusion that they are as careful and as fair as their civilian counterparts. In this respect, it is important for civilian prosecutors to understand and appreciate this unique system of justice to help foster cooperation with military authorities. As American servicemembers continue serving worldwide, they need a comprehensive, expeditious system of justice that balances their rights against the need for good order and discipline. The military justice system provides a valuable and practical framework for discipline and military readiness that is vital to the success of our military. In this regard, the system has survived the test of time, and will continue to do so in the future. ■

ENDNOTES

1. See e.g., *O'Callahan v. Parker* (1969) 395 U.S. 258, 265–266 “courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. . . . A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights . . . while [the] ‘military law has always been and continues to be an instrument of discipline not justice.’”
2. *Reid v. Covert* (1957) 354 U.S. 1, 35.
3. *United States ex rel. Toth v. Quarles* (1955) 350 U.S. 11, 22.
4. See, e.g., Kevin J. Barry, “Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress,” 165 *Mil.L.Rev.* 237 (2000).
5. See e.g., David A. Schlueter, “Military Justice for the 1990’s: A Legal System Looking for Respect,” 133 *Mil.L.Rev.* 1 (1991).
6. 10 USCS §§ 801–946.
7. See Francis A. Gilligan, and Frederic I. Lederer, *Court-Martial Procedure* (2006), pp. 1–14.
8. *Id.* at pp. 1–27.
9. *Manual for Courts-Martial (MCM)*, United States (2012 edition), Preamble, 3, p. 1-1. <http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf> (accessed Mar. 17, 2015).
10. Gilligan and Lederer, *supra*, *Court-Martial Procedure*, p. 1–24. See also, David A. Schlueter, *Military Criminal Justice: Practice and Procedure* (2012 8th Ed.), p. 14.
11. *Orloff v. Willoughby* (1953) 345 US. 83, 94 “The military constitutes a specialized community governed by a separate discipline from that of the civilian.”
12. Schlueter, *supra*, *Military Criminal Justice*, p. 4.
13. See e.g., *Solorio v. United States* (1987) 483 U.S. 435, 439 [The Court rejected the “service-connection” requirement before jurisdiction could attach for

- court-martial purposes). The effect of this holding is that servicemembers are subject to the *UCMJ* regardless of their location and may be tried for offenses committed both on and off duty and both on and off the military installation.]
14. Gilligan and Lederer, *supra*, *Court-Martial Procedure*, p. 1–4. See also *Burns v. Wilson* (1953) 346 U.S. 137, 140, plurality opinion stating “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.”
 15. See *Solorio, supra*, at 448 “civil courts are ‘ill equipped’ to establish policies regarding matters of military concern....”
 16. Gilligan and Lederer, *supra*, *Court-Martial Procedure*, p. 1–4.
 17. UCMJ, § 805, Art. 5. [UCMJ may be found as Appendix 2 of the *MCM*, beginning on page A2-1. <http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf> (accessed Mar. 17, 2015)] [Most Air Force Instructions may be accessed by typing in the instruction number (e.g. AFI 51-202) in the box titled “Product Number/Title Search.”].
 18. UCMJ, § 802, Art. 2(a)(1)–(13).
 19. Gilligan and Lederer, *supra*, *Court-Martial Procedure*, p. 2–45.
 20. *Abbate v. United States* (1959) 359 U.S. 187 [federal court could lawfully convict defendant previously convicted of the same offenses in state court].
 21. *Bartkus v. Illinois* (1959) 359 U.S. 121 [state courts could lawfully convict a defendant previously acquitted in federal courts for the same offense].
 22. Gilligan and Lederer, *supra*, *Court-Martial Procedure*, p. 2–46, fn. 256 [stating that since both federal district courts and courts-martial are federal forums, they are treated as part of the same sovereign for purposes of double jeopardy].
 23. 18 USCS § 13.
 24. *MCM, supra*, Part IV, Art. 134, 60c(4), p. IV-101.
 25. *United States v. Guerrero* (N.M.C.M.R. 1990) 31 M.J. 692.
 26. Schlueter, *supra*, *Military Criminal Justice*, 118.
 27. *MCM, supra*, Part II, RCM Rule 303, page II-19 [Most serious offenses are investigated by the Criminal Investigation Department (Army), Office of Special Investigations (AF), or Naval Criminal Investigative Service (NCIS)].
 28. See e.g. *Goldman v. Weinberger* (1986) 475 U.S. 503, 507 [stating that great deference must be given to commanders in exercising professional judgment].
 29. *MCM, supra*, Part II, RCM Rule 306(b), p. II-25.
 30. This is most commonly done by the accused’s immediate commanding officer. Note that under Article 1(9), UCMJ, anyone subject to the UCMJ may prefer charges.
 31. *MCM, supra*, Part II, RCM Rule 307(a), p. II-27; see also *United States v. Baker* (C.M.A. 1983) 14 M.J. 361, 365 (“the convening authority ... is free to decide the number of offenses to charge ...”).
 32. *MCM, supra*, Part II, RCM Rule 401(c)(2), p. II-31.

33. *MCM, supra*, Part II, RCM Rule 301, p. II-17 [Depending on the seriousness of the alleged misconduct, most Air Force installations conduct the investigation informally through chain of command, first sergeants and other "management" and supervisor-type figures. Serious charges, like sexual assault, are reserved for the Air Force Office of Special Investigations.].
34. *MCM, supra*, Part III, MRE Rule 301(a), p. III-1.
35. *Id.*
36. *MCM, supra*, Part II, RCM Rule 403, p. II-32.
37. *MCM, supra*, UCMJ, § 815, Art. 15, p. A2-4.
38. See Air Force Instruction 51-202, Non-Judicial Punishment, § 3.12. <<http://www.e-publishing.af.mil/>> (accessed Mar. 24, 2015).
39. *MCM, supra*, UCMJ, § 815, Art. 15(a), page A2-4. [A servicemember has the right to decline non-judicial punishment and demand trial by court-martial, unless the individual is attached to or embarked upon a vessel.].
40. *MCM, supra*, Part V, Non-Judicial Punishment, 5c (1)–(8), pp. V-5–6.
41. See *MCM, supra*, UCMJ, § 816, Art. 16 and § 820, Art. 20, p. A2-6 [The Supreme Court has labeled this court as a "disciplinary proceeding."]; see generally *Middendorf v. Henry* (1976) 425 U.S. 25.
42. *MCM, supra*, UCMJ, § 820, Art. 20, page A2-6, and RCM Rule 1303, p. II-180.
43. *MCM, supra*, RCM Rule 601, p. II-51-53.
44. *MCM, supra*, RCM Rule 1301(a), p. II-179.
45. *MCM, supra*, UCMJ, § 820, Art. 20, p. A2-6. [The maximum punishment includes for grades E-4 and below, 30 days confinement at hard labor, 45 days hard labor without confinement, 60-day restriction, forfeiture of two-thirds pay for one month, and reduction to the grade of E-1. For grades E-5 and above, the punishment includes 60 days restriction, forfeiture of two-thirds of pay for one month, and reduction to next lower pay grade.].
46. In the U.S. Air Force, this is usually the Air Force wing or installation commander; *MCM, supra*, UCMJ, § 823, Art. 23, p. A2-7.
47. *MCM, supra*, UCMJ, § 834, Art. 34, p. A2-10.
48. *MCM, supra*, UCMJ, § 819, Art. 19, p. A2-6.
49. *MCM, supra*, RCM Rule 918(c), p. II-115.
50. *MCM, supra*, RCM Rule 201(f)(2)(B), p. II-12, and Rule 1103(b)(2), page II-142.
51. *MCM, supra*, UCMJ, § 832, Art. 32, p. A2-9-10.
52. *United States v. Payne* (C.M.A. 1977) 3 MJ 354, 355.
53. *United States v. Craig* (ABR 1956) 22 CMR 466, aff'd 24 CMR 28 (1957) [the investigating officer must allow defense to examine all matters considered by the investigating officers].
54. *MCM, supra*, RCM Rule 903(a)(1) and (2), p. II-90.
55. *MCM, supra*, UCMJ, § 825, Art. 25, p. A2-8.
56. *Id.*
57. See *United States v. McCain* (C.M.A. 1986) 22 MJ 124 [an enlisted accused has the absolute right to request enlisted members on his court-martial panel].
58. Air Force Instruction 36-2002, Attachment 2, § A2.1.5 [Enlisted members must be high school graduates or higher.]. <<http://www.e-publishing>.

- af.mil/*> (accessed Mar. 24, 2015).
59. *MCM, supra*, UCMJ, § 841, Art. 41, p. A2-12.
 60. *MCM, supra*, UCMJ, § 837, Art. 37(a), p. A2-11.
 61. *MCM, supra*, RCM Rule 912(b), p. II-104. [Another method is to challenge the selection process through a motion to dismiss on jurisdictional basis.] *United States v. Packer* (N.C.M.R. 1980) 8 MJ 785.
 62. *MCM, supra*, UCMJ, § 851, Art. 51(a), p. A2-15; *MCM, supra*, RCM Rule 921 (c)(1), page II-119.
 63. *MCM, supra*, UCMJ, § 852, Art. 52, p. A2-15.
 64. Note there are no probation or pre-sentencing reports in military practice. See RCM, Chapter X. Sentencing, Rule 1001(a)(1) for the general sentencing procedure, pp. II-122 et seq.
 65. See generally Lowery, "One 'Get Out of Jail Free' Card: Should probation be an Authorized Court-Martial Punishment?" (2008) 198 *Mil.L.Rev.* 165.
 66. Gilligan and Lederer, *Court-Martial Procedure*, (2006 ed.) pp. 23-30.
 67. *MCM, supra*, RCM Rule 1107(d)(1), page II-153; *MCM, supra*, UCMJ, § 860, Art. 60(c)(3) and (e), p. A2-18-19. *United States v. Walker* (A.C.C.A. 1999) 52 M.J. 501 [convening authority could properly convert punishment of dismissal, adjudged against an un-commissioned warrant officer, to a dishonorable discharged].
 68. *MCM, supra*, RCM Rule 1107(b); RCM 1109; *United States v. Hurd* (C.M.A. 1979) 7 M.J. 18; *United States v. Lynch* (N.M.C.R 1981) 10 M.J. 764 [vacation proceedings are an integral part of a court-martial sentence]. See also *United States v. Snelling* (C.M.A. 1982) 14 M.J. 267. Cf. *United States v. Feagans* (A.F.C.M.R. 1983) 15 M.J. 667 [Convening authority may not compare cases where there is no "direct relationship" between them.].
 69. See Craig Whitlock, "Air Force general to retire after criticism for handling of sexual-assault case" (Jan. 8, 2014) *Washington Post* <http://www.washingtonpost.com/world/national-security/air-force-general-criticized-for-handling-of-sexual-assault-cases-to-retire/2014/01/08/9942df96-787d-11e3-b1c5-739e63e9c9a7_story.html> (accessed Mar. 17, 2015).
 70. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§1702(d)(1) and 1702(d)(2) <<http://beta.congress.gov/113/bills/hr3304/BILLS-113hr3304enr.pdf>> (accessed on Mar. 17, 2015).
 71. David Vergun, "New Law Brings Changes to Uniform Code of Military Justice," *DoD News* (Jan. 8, 2014) <<http://www.defense.gov/news/newsarticle.aspx?id=121444>> (accessed Apr. 16, 2015).
 72. See Air Force Instruction 51-201, § 2.6. <<http://www.e-publishing.af.mil/>> (accessed March 24, 2015).
 73. Department of Defense Instruction 5505.11 (December 1, 1998) <http://biotech.law.lsu.edu/blaw/dodd/corres/pdf/i550511_120198/i550511p.pdf> (accessed Mar. 18, 2015).