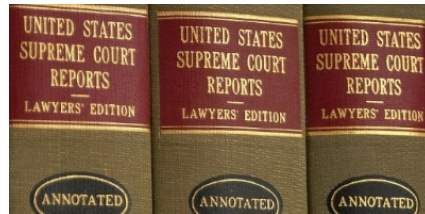




SUFFOLK ACADEMY OF LAW
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INTRODUCTION TO MILITARY LAW

FACULTY

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Suffolk County Bar Association, New York

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Chad Lennon was appointed Director of the Veterans and Service Members' Rights' Clinic At Touro Law Center February 2019. He was previously an Assistant District Attorney in Suffolk County who was also the Prosecutor in Veterans Treatment Court for the District Court and East End Court. Previously, Director Lennon was a Criminal Defense Attorney in Maryland before taking the position at the Suffolk County District Attorney's Office. In addition to his role as the Director of the clinic, he serves in the Marine Corps reserves as a Major. His current billet is the Company Commander of Bravo Company. He has participated in numerous deployments and exercises around the globe and is a Purple Heart recipient.

Co-Chair, Suffolk County Bar Association, Committee on Military and Veterans Affairs

Co-Chair, Advocacy Committee, National Law School Veterans Clinic Consortium

Committee member, New York State Bar, Committee on Veterans Board of Directors, Bob Feller Act of Valor Foundation

Board of Directors, Veteran Suicide Awareness and Remembrance Flag

President, Semper Fi Fund Long Island Squad

An Introduction to The Uniform Code of Military Justice

The Uniform Code of Military Justice (UCMJ) is essentially a complete set of criminal laws. It includes many crimes punished under civilian law (e.g., murder, rape, drug use, larceny, drunk driving, etc.), but it also punishes other conduct that affects good order and discipline in the military. Those unique military crimes include, for example, such offenses as desertion, absence without leave, disrespect towards superiors, failure to obey orders, dereliction of duty, wrongful disposition of military property, drunk on duty, malingering, and conduct unbecoming an officer.

The UCMJ is implemented through Executive Orders of the President of the United States pursuant to his authority under Article 36, UCMJ (10 USC § 836). Those Executive Orders form a comprehensive volume of law known as the Manual for Courts-Martial (“MCM”). The Preamble to the MCM explains that:

“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.”

Commanders are given significant roles in the military justice system because discipline is essential to mission readiness. At the same time, there are extensive safeguards to protect against abuse of authority. In the opinion of some legal scholars, the UCMJ has not only kept pace with innovations in civilian criminal jurisprudence, but has actually led the way, establishing more safeguards to protect the rights of those accused of criminal offenses. The UCMJ and MCM are primarily kept current with the basic principles of American jurisprudence through two standing committees, The Code Committee and the Joint Service Committee on Military Justice.

Types of Courts-Martial. There are three types of courts-martial - summary, special and general.

Summary Court-Martial. Trial by summary court-martial provides a simplified procedure for the resolution of charges involving minor incidents of misconduct. The summary court-martial consists of one officer who, depending upon Service policies and practice, is a judge advocate (a military attorney). The maximum punishment a summary court-martial may impose is considerably less than a special or general court-martial. The accused must consent to be tried by a summary court-martial.

Special Court-Martial. A special court-martial is the intermediate court level. It consists of a military judge, trial counsel (prosecutor), defense counsel, and a minimum of three officers sitting as a panel of court members or jury. An enlisted accused may request a court composed of at least one-third enlisted personnel. An accused, officer or enlisted, may also request trial by judge alone. Regardless of the offenses involved, a special court-martial sentence is limited to no more than one year confinement (or a lesser amount if the offenses have a lower maximum), forfeiture of two-thirds basic pay per month for one year, a bad-conduct discharge (for enlisted

personnel), and certain lesser punishments. An officer accused in a special court-martial cannot be dismissed from the service or confined.

General Court-Martial. A general court-martial is the most serious level of military courts. It consists of a military judge, trial counsel, defense counsel, and at least five court members. Again, an enlisted accused may request a court composed of at least one-third enlisted personnel. Unless the case is one in which the death sentence could be adjudged, an officer or enlisted accused may also request trial by judge alone. In a general court-martial, the maximum punishment is that established for each offense under the Manual for Courts-Martial, and may include death (for certain offenses), confinement, a dishonorable or bad-conduct discharge for enlisted personnel, a dismissal for officers, or a number of other lesser forms of punishment. A pretrial investigation under Article 32, UCMJ, must be conducted before a case may be referred to a general court-martial, unless waived by the accused.

Suspect Rights

Self-Incrimination Protections. The military justice system provides an accused rights and due process that in many ways are superior to those provided a defendant in civilian criminal courts. Pursuant to Article 31, Uniform Code of Military Justice (Section 831 of Title 10, United States Code), servicemembers have a right against self-incrimination and an entitlement to be informed of the suspected offense(s) before questioning begins. In addition to protections against self-incrimination, servicemembers have a right to free military counsel when questioned as a suspect of committing an offense, upon prefferal of court-martial charges, or initiation of arrest or apprehension. In the military justice system, these rights are afforded much earlier in the criminal justice system than in civilian practice. These rights and protections apply whenever the servicemember is questioned as a suspect of an offense. In civilian practice, Miranda rights or warnings are not required unless there is custodial interrogation by law enforcement personnel. In fact, the U. S. Supreme Court referenced the military's "warning rights" practice under Article 31, UCMJ, when deciding to establish the "Miranda Warning" requirement. A showing of indigence is required before a defendant is provided counsel without cost in the civilian system.

Article 31, UCMJ Rights. Article 31 has two important parts:

1. No one subject to the Uniform Code of Military Justice may compel any person to incriminate himself or to answer any question the answer that may tend to incriminate him.
2. No person subject to the Uniform Code of Military Justice may interrogate, or request any statement from a person suspected of an offense without first informing him of the nature of the accusation, that he does not have to make a statement regarding the offense, and that any statement may be used against him as evidence in a trial by court-martial.

Right To Counsel. An independent military defense counsel is provided free of charge regardless of the accused's ability to pay. The accused may also employ civilian counsel at his or her own expense, or request a particular military counsel, who will assist the accused if reasonably available. The accused has the right to be represented by counsel at the magistrate hearing when a determination is made regarding continued pretrial confinement, at the Article 32 investigation, and during all court-martial sessions. After trial, the accused has a right to free

military counsel to assist with his appeal through the military appellate courts, and potentially to the U.S. Supreme Court.

Pretrial Confinement in the Military

Pretrial confinement in the military is similar to the civilian system in some respects and different in others. In the civilian community, police arrest serious offenders and take them to jail. In military cases, servicemembers who are "apprehended" ("arrest" has a different technical meaning in the military) are typically turned over to a member of command authority. The command then decides whether to confine the member in a military jail (called "brig" "confinement").

The command may also impose pretrial "restrictions" or "restraints" instead of confinement. For instance, the servicemember may be restricted to his post or base, pending trial. Before any servicemember is confined or restrained, there must be "probable cause" (a reasonable belief) that the servicemember committed an offense triable by courts-martial and that confinement or restriction is necessary under the circumstances. In addition, like a civilian policeman, any military officer can order an enlisted servicemember to be confined.

The decision to confine a military member is the subject of several reviews. The military justice system follows the civilian requirement that a review of the decision to confine the person be conducted within 48 hours. Within 72 hours, the military member is entitled to have his commanding officer review whether his continued confinement is appropriate. (However, if someone other than the commanding officer confined the member and the commanding officer review was actually conducted within 48 hours, then this commanding officer review can serve to satisfy both review requirements.) Thereafter, a military magistrate who is independent of the command must conduct another review within 7 days. Finally, a military member may request the military judge assigned to the case review the appropriateness of the pretrial confinement.

Throughout the confinement review process, a servicemember is provided a military lawyer, at no expense, to assist him or her. These reviews must confirm, in writing, that there is probable cause to believe that the servicemember committed an offense triable by courts-martial; that confinement is necessary to prevent the servicemember from fleeing or engaging in serious criminal misconduct; and that lesser forms of restraint would be inadequate. When his charges are "referred" or presented to a court-martial, the confined servicemember may ask the military judge presiding over the court to review his pretrial confinement again.

If rules were violated, the military judge can release the servicemember, and he can reduce any subsequent sentence, giving additional credit for inappropriate confinement. In the civilian community, persons accused of crimes who might flee or commit other crimes may also be confined prior to their trial. A civilian magistrate must review this confinement within 48 hours. In many cases, the magistrate will require confinees to post bail to ensure their return for trial. While awaiting trial, a civilian confinee usually does not receive pay and may actually lose his or her job. Servicemembers do not have to post bail, receive their regular military pay, and do not lose their jobs while awaiting trial.

Article 32 Investigations

Purpose. The Fifth-Amendment constitutional right to grand jury indictment is expressly inapplicable to the Armed Forces. In its absence, Article 32 of the Uniform Code of Military Justice (10 USC § 832), requires a thorough and impartial investigation of charges and specifications before they may be referred to a general court-martial (the most serious level of courts-martial). However, the accused may waive the Article 32 investigation requirement. The purpose of this pretrial investigation is to inquire into the truth of the matter set forth in the charges, to consider the form of the charges, and to secure information to determine what disposition should be made of the case in the interest of justice and discipline. The investigation also serves as a means of pretrial discovery for the accused and defense counsel in that copies of the criminal investigation and witness statements are provided and witnesses who testify may be cross-examined.

Procedures. An investigation is normally directed when it appears the charges are of such a serious nature that trial by general court-martial may be warranted. The commander directing an investigation under Article 32 details a commissioned officer as investigating officer, who will conduct the investigation and make a report of conclusions and recommendations. This officer is never the accuser. The investigating officer may seek legal advice from an impartial source, but may not obtain such advice from counsel for any party.

An investigative hearing is scheduled as soon as reasonably possible after the investigating officer's appointment. The hearing is normally attended by the investigating officer, the accused and the defense counsel. The commander may also, as a matter of discretion, detail counsel to represent the United States, a court reporter, and an interpreter. Ordinarily, this investigative hearing is open to the public and the media. The investigating officer will, generally, review all non-testimonial evidence and then proceed to examination of witnesses. Except for a limited set of rules on privileges, interrogation, and the rape-shield rule, the military rules of evidence (which are similar to the federal rules of evidence) do not apply at this investigative hearing. This does not mean, however, that the investigating officer ignores evidentiary issues. The investigating officer will comment on all evidentiary issues that are critical to a case's disposition. All testimony is taken under oath or affirmation, except that an accused may make an unsworn statement.

The defense is given wide latitude in cross-examining witnesses. If the commander details an attorney to represent the United States, this government representative will normally conduct a direct examination of the government witnesses. This is followed by cross-examination by the defense and examination by the investigating officer upon completion of questioning by both counsel. Likewise, if a defense witness is called, the defense counsel will normally conduct a direct examination followed by a government cross-examination. After redirect examination by the defense counsel, or completion of questioning by both counsel, the investigating officer may conduct additional examination.

The exact procedures to be followed in the hearing are not specified in either the Uniform Code of Military Justice or the Manual for Court-Martial. The investigating officer, however, will generally:

- Announce the beginning of the investigation and its purpose
- Advise the accused of his or her right to counsel and ascertain whether the accused will be represented by counsel, and if so, by whom
- Formally read the charges preferred against the accused
- Advise the accused of his or her rights to make a statement or to remain silent
- Review the documentary or real evidence available against the accused
- Call any available adverse witnesses
- Review documentary or real evidence in favor of the accused
- Call available favorable witnesses for the accused
- Hear any evidence presented by the accused
- Hear any statement the accused or defense counsel may make
- Entertain, if any, arguments by counsel upon completion of the hearing, the investigating officer submits a written report of the investigation to the commander who directed the investigation.

The report must include:

- Names and organizations or addresses of defense counsel and whether they were present throughout the taking of evidence, or if not, why not
- The substance of any witness testimony taken
- Any other statements, documents, or matters considered by the investigating officer
- A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense, or was not competent to participate in the defense during the investigation, or there is a question of the accused's competency to stand trial
- A statement whether the essential witnesses will be available at the time anticipated for trial or a statement why any essential witness may not then be available
- An explanation of any delays in the investigation
- The investigating officer's conclusion whether the charges and specifications are in proper form
- The investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged
- The recommendations of the investigating officer, including disposition of the charges

Upon completion, the report is forwarded to the commander who directed the investigation for a decision on disposition of the offenses.

Rights of the Accused. The accused at an Article 32 investigation has several important rights. The accused also has a right to waive an Article 32 investigation and such waiver may be made a condition of a plea bargain. If the investigation is not waived, the accused is entitled to be present throughout the investigative hearing (unlike a civilian grand jury proceeding). At the hearing, the accused has the right to be represented by an appointed military defense counsel or may request an individual military defense counsel by name and may hire a civilian attorney at his or her own expense. Again, unlike a civilian grand jury proceeding, the servicemember, through the member's attorney, has the following rights: to call witnesses; to present evidence; to cross-examine witnesses called during the investigation; to compel the attendance of reasonably available military witnesses; to ask the investigating officer to invite relevant civilian witnesses

to provide testimony during the investigation; and, to testify, although he or she cannot be compelled to do so. The accused must be served with a copy of the investigative report and associated evidence. Within five days of receipt, the accused may submit objections or comments regarding the report to the commander who directed the investigation.

Comparison to the Civilian Preliminary Hearing and Grand Jury Process. The Article 32 investigation has often been compared to both the civilian preliminary hearing and the civilian grand jury since it is functionally similar to both. All three of these proceedings are theoretically similar in that each is concerned with determining whether there is sufficient probable cause (reasonable grounds) to believe a crime was committed and whether the person accused of the crime committed it. The Article 32 investigation, however, is broader in scope and more protective of the accused. As such, it is not completely analogous to either proceeding. A civilian defendant at a preliminary hearing may have the right to counsel, the right to cross-examine witnesses against him or her, and the right to introduce evidence in his or her behalf.

An Article 32 investigation is considered broader in scope because it serves as a mechanism for discovery by the defense, and because it supplies the convening authority (the decision authority) with information on which to make a disposition decision. While a decision by a magistrate at a preliminary hearing is generally final, the investigating officer's decision is merely advisory. Unless waived, a civilian defendant may be prosecuted in a federal court for an offense punishable by death or imprisonment for a term exceeding one year only after indictment by a grand jury. (An indictment is a formal written accusation or charge).

This Fifth Amendment constitutional right does not apply to state prosecutions - although some state constitutions and statutes have provisions that are analogous to the Fifth Amendment and require an indictment by a grand jury for a felony or other defined offenses. Accordingly, if a service member is tried in a state court, his or her right to indictment by grand jury is dependent upon the particular state's procedures. The grand jury is a closed proceeding in which only the prosecution is represented. The body of jurors decides to indict based upon evidence frequently provided solely by the prosecutor. Inspection or disclosure of the transcript of the proceeding after indictment is also, generally, severely limited. Obviously, by his absence, a defendant is precluded from the opportunity to confront and cross-examine witnesses, to present evidence, call witnesses in his or her favor, or even to speak for him or herself. If a defendant is called before a grand jury, he or she has no right to have a lawyer present through or at any other part of the proceeding. If a grand jury does not indict, the decision is generally final and charges against the defendant are usually dismissed.

The Article 32 investigation, in contrast, is generally an open proceeding that may be attended by the public. Unlike a grand jury proceeding, the accused has the right to be present at the investigation; the right to be represented by an attorney; the right to present evidence; the right to review a copy of the investigative report as well as the several other important rights discussed above. Again, the recommendation of the Article 32 investigating officer is not final - it is only advisory. Beyond Article 32 of the Uniform Code of Military Justice (Section 832 of Title 10, United States Code), additional rules on Article 32 investigations are contained at Rule for Courts-Martial (R.C.M) 405, as supplemented by case law and service regulations.

Referral of Charges and Convening a Court-Martial

Courts-martial (military criminal trial courts) are convened (established) by commanders possessing the authority to do so.

Court-Martial Convening Authority. Congress, through the Uniform Code of Military Justice (UCMJ), specifies which commanders and officials possess the authority to convene a court-martial. A commander who possesses the authority to convene a court-martial is known as a Convening Authority (CA). The CA convenes a court-martial by issuing an order that charges previously preferred (initiated) against an accused servicemember will be tried by a specified court-martial. This order is called a “convening order” and shall designate the type of court-martial (summary, special or general) that will try the charges. The convening order may designate when and where the court-martial will meet.

Detailing the Court-Martial Panel. For special and general courts-martial, the convening order will also designate the members of the court-martial panel (the military equivalent of the jury). Although the ultimate membership of the panel is determined, as in the civilian system, through *voir dire*, the CA initially details the panel members to the court-martial. As required by Congress in Article 25, UCMJ, the CA must choose members who are best qualified to serve based on their age, education, training, experience, length of service, and judicial temperament. However, it is the accused’s choice whether he or she will be tried by a panel of officers, a combined panel of officers and enlisted members, or by the military judge sitting alone.

Types Of Courts-Martial. The characteristics of the different types of courts-martial are described below.

SUMMARY COURT-MARTIAL

A summary court-martial has jurisdiction over all personnel, **except** commissioned officers, warrant officer, cadets, aviation cadets, and midshipmen, charged with a UCMJ offense referred to it by the convening authority.

- Composed of one commissioned officer on active duty, usually pay grade O-3 or above
- The accused member is not entitled to be represented by a military attorney, but may hire a civilian lawyer at his own expense.
- The accused member may object to trial by summary court-martial, in which case the charges are returned to the convening authority for further action (e.g., disposition other than by court-martial or action to send the charges to a special or general court-martial).
- The maximum punishment a summary court-martial may award is: confinement for 30 days, forfeiture of two-thirds pay for one month, and reduction to the lowest pay grade (E-1).
- In the case where the accused is above the fourth enlisted pay grade, a summary court-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next lowest pay grade.

SPECIAL COURT-MARTIAL

A special court-martial has jurisdiction over all personnel charged with any UCMJ offense referred to it by the convening authority.

- Composed of not less than three members, which may include commissioned officers and enlisted members (at the accused's request).
- Presided over by a military judge
- The military judge may conduct the trial alone, if requested by the accused.
- A military lawyer is detailed to represent the accused servicemember at no expense to the accused. The servicemember may instead request that a particular military attorney, if reasonably available, represent him or her.
- The member may also retain a civilian attorney at no expense to the government.
- The prosecutor is a military lawyer (judge advocate).
- The maximum punishment a special court-martial may adjudge is: confinement for one year, forfeiture of two-thirds pay for one year, reduction to the lowest pay grade (E-1), and a bad conduct discharge.

GENERAL COURT-MARTIAL

A general court-martial has jurisdiction over all personnel charged with any UCMJ offense referred to it by the convening authority.

- Unless the accused waives this right, no charge may be referred to a general court-martial until a thorough and impartial investigation into the basis for the charge has been made.

This pretrial proceeding is known as an "Article 32" investigation or preliminary hearing and essentially serves the equivalent function of a grand jury hearing in civilian jurisdictions.

- Composed of a military judge and not less than five members, which may include commissioned officers (and enlisted members at the accused's request)
- In non-capital cases, military judges may conduct the trial alone at the accused's request.
- A military lawyer is detailed to represent the accused member at no expense to the accused. The member may instead request that a particular military attorney, if reasonably available, represent him or her.
- The member may also retain a civilian attorney at no expense to the government.
- The prosecutor must be a military lawyer (judge advocate).
- A general court-martial may adjudge any sentence authorized by the Manual for Courts-Martial for the offenses that the accused is found to have committed

Independent Defense – Independent Judiciary. It is the duty of military defense counsel to zealously represent their clients' legal interests. It is the duty of military judges to be fair and impartial in overseeing trials, applying the law, and if applicable, passing judgment and sentence upon an accused servicemember. Defense counsel and military judges are assigned to an independent judiciary within the military, with command and performance rating chains that are separate from those of the prosecutors and convening authorities. To further insure complete independence, prosecutors, defense counsel, and military judges maintain separate office facilities.

Introduction to Military Law

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Agenda

- Board of Corrections for Military Records.
- Discharge Review Boards.
- NJP/Article 15.
- Court Martials.
- ROTC/Academy Disenrollment.
- USERRA.
- Military Divorce.
- Military Disability Retirement.

BCMR

- Correct alleged errors or injustices in military system.
- Civilian Review Board.
- Can upgrade discharge status.
- Awards, decorations, non-selection for promotion, adverse material, pay disputes, MDR.
- Not to set aside court-martial convictions.
- Does not issue injunctive relief.
- DD149
- 1-2 years plus for adjudication.
- Could receive an Advisory Opinion.

BCMR

- Different branches, including Coast Guard.
- 3 years of discovery of error, but can be longer.
- Judicial Review.
 - US District Court 6 years at date action is final.
 - US Court of Federal Claims. 6 years at date of discharge.

DRB

- Within 15 years of discharge (no exceptions)
- Inequity or impropriety.
- Service characterization.
- RE Code.
- Secretarial Authority.
- Not for MDR.
- DD293
- 1-2 years plus for adjudication.

BCMR & DRB

- A lot of overlap but different.
- Memos for PTSD (Hagel), TBI, MST (Kurta)
- Liberal view for Don't Ask, Don't Tell or pregnancy.
- Need Records SF-180
- Personal Appearance!
- Clemency Claim
- Expedite

NJP/Article 15

- “Hearing”
- Reduction in rank.
- Includes civilian charges, not just convictions.
- Can lead to Administrative Separation.
- Can end a career.
- Can be placed in a temporary or permanent file.

Court-Martial

- Summary
 - Lowest court-martial
 - Resolve minor offenses
 - Fewer rights for accused
 - Battalion Commander has power to convene (create).
 - One person determines adjudication and punishment, O-3 or higher.
 - Generally, not considered a conviction.
- Special
 - Intermediate court-martial
 - Panel of one military judge or three members and a judge.
 - Adversarial
 - Confinement NLT 1 Year.
 - Not a felony.
- General
 - Highest level.
 - May request judge only trial
 - Max penalties in MCM, including death penalty.
 - Article 32 investigation = grand jury

ROTC/Academy Disenrollment

- Debt Actions
- Can be notified years later.
- Owe time in service for college payment.
- Can be messy with Commands.
- Can only guide client, not advocate during hearing.

USERRA

- Reemployment.
 - 5 years
- Seniority and benefits.
- Discharge from employment.
- Merit Systems Protection Board
 - 120-150 days to complete

Military Divorce

- Payments come from DFAS.
- Survivor Benefit Plan
 - Financial support to military spouse after death of service member.
 - Can get very complicated when court deems an election to be made.
- 10/10 Rule
 - Payment to ex-spouse with 10 years of marriage and 10 years in service.
- Uniformed Services Former Spouses' Protection Act
 - Federal Statute for Military to accept state statutes.
 - Military retired pay as property, not income.

MDR

- Can be petition through BCMRs.
- Referral to MEB
 - Determine fitness for service.
- IPEB
 - Determines rating
- FEB
 - Appeal fitness/challenge percentage
- 30% rating
 - Less than is lump-sum
- TDRL
 - Periodic re-evaluations, could reduce rating
- PDRL
 - No re-evaluations
- IDES & LDES
 - IDES is active duty, sets VA percentage before retirement
 - LDES retain VA rating, expedite process

Hot Issue

- Security Clearances
 - CLE on each topic.
 - Can appeal denial and revocation of clearance
 - Various Guidelines
- COVID vaccine.
 - Religious or medical accommodation.
 - JAGs are government attorneys, not personal.

Questions

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to speak with an attorney who will provide support and recommend
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Feel Free to Join Us at Our Weekly Recovery Meeting