

Lesson 7

Military Justice



Key Terms

admissible
admonition
Article 15
censure
coerced
general, special, and summary court-martials
UCMJ

What You Will Learn to Do

- Justify the differences between the military and civilian justice systems

Linked Core Abilities

- Communicate using verbal, non-verbal, visual, and written techniques
- Apply critical thinking techniques

Skills and Knowledge You Will Gain Along the Way

- Identify the four factors that determine whether a crime is service-connected
- Identify the rights of an accused person under the military justice system
- Explain the procedures for administering and imposing nonjudicial punishment under Article 15 of the UCMJ
- Differentiate between the three levels of court-martial as they pertain to court composition and the types of cases heard by each level
- Define key words contained in this lesson

Chapter 6

Introduction

Military personnel do not have the same basic national rights and freedoms as civilians. For the armed forces to function efficiently, military personnel must give up some of their personal liberties and conform to military standards. Although most of them do not have a problem with the strict discipline of military life, the issue of basic rights becomes extremely important in a military court of law, especially because many of the military justice procedures are different from those used in civilian (federal and state) courts.

The Uniform Code of Military Justice (UCMJ)

The Uniform Code of Military Justice (**UCMJ**) is the basis of all military law in the United States Armed Forces. It describes all of the procedures that should be followed when a member of the armed forces is accused of committing a military offense. In addition, it protects the accused by listing their rights and ensuring that they receive a fair trial. The purpose of the UCMJ is to recognize the different needs of the military while still ensuring justice for all military personnel.

History of the UCMJ

Until 1951, the U.S. Army and Navy had their own court-martial systems. The Army Articles of War dated back to the Revolutionary War; they were borrowed from the British Articles of War with very few changes. Congress occasionally revised the Articles over the years, but the military justice system remained basically the same through World War II.

Under the Articles of War, the commander who initiated a court-martial had almost complete control over the outcome of the trial. The commander brought the charges, appointed officers to the court, and reviewed the proceedings, verdict, and sentence—all without approval from anyone with higher authority.

After World War II, there were many public objections to the military justice system. Congress responded to the complaints by carefully reviewing the Articles of War. The result of this effort was the UCMJ, which introduced several major reforms. These reforms brought military justice closer to civilian justice.

- **The UCMJ established a U.S. Court of Military Appeals composed of three civilian judges appointed for 15-year terms by the President (with the consent of the Senate).**
- **The UCMJ also provided for a law officer, similar to a judge, who would ensure a fair and orderly trial.**
- **A third major reform provided by the UCMJ was that enlisted personnel could sit as members of the court if the accused was an enlisted person.**

Since 1951, the Court of Military Appeals has undergone several changes. There are now five civilian judges who each serve for 15-year terms. A chief judge serves for five years and is succeeded by the next senior judge on the court. Additionally, in 1994, the name of the court was changed to the U.S. Court of Appeals for the Armed Forces.

Key Note Term

UCMJ (Uniform Code of Military Justice)—the basis for all military law in the U.S. Armed Forces; established by Congress in 1951

Types of Military Offenses

Before 1969, all soldiers accused of crimes could be court-martialed simply because of their military status; however, the Supreme Court case of *O’Callahan vs. Parker* limited the use of courts-martial to “service-connected” offenses. Factors that determine whether an offense is service-connected include the relationship of the offense to military duties, the presence of a threat to military personnel, abuse of military status or the location of the crime on a military base. Except in a few cases, a soldier can only be court-martialed if the offense in some way affects the military or its personnel.

One exception is a drug-related offense. Because an immediate, serious threat to the military is inherent in drugs, a drug offense is service-connected even if it occurs off-base. Violations of federal or state laws are another exception to the “service-connected” rule. According to Article 134 of the UCMJ, a soldier who violates a federal or state law can be court-martialed and can be tried by a federal or state court for the same offense.

Rights of the Accused

Even though the military justice system functions differently from the civilian justice system, the accused still has similar rights:

- **The right to a speedy trial**
- **The right against self-incrimination**
- **The right to counsel**
- **The right of due process**

Speedy Trial

An accused soldier must be brought to trial within 120 days after receiving notice of the charge. If the soldier is confined, the period is 90 days. A trial must occur within these time limits, or the charges will be dismissed.

The government is accountable for the time required to process a case and must explain any delays. Some delays are acceptable, as long as the government can show special circumstances that caused the delay.

Self-Incrimination

The Fifth Amendment to the Constitution and Article 31 of the UCMJ protect soldiers against **coerced** statements. As in civilian arrests or questioning, the accused must receive a Miranda warning (see Figure 6.7.1). For any statement to be used in a court-martial, the statement must be voluntary. If the prosecutor cannot prove that a military person’s admission to an offense was voluntary, the statement cannot be used. In addition, any evidence that comes from a coerced statement will not be considered valid.

Key Note Term

coerced—the act, process, or power of forcing someone to act or think in a given manner, such as by using force or threats as a form of control

Figure 6.7.1: Military personnel receive a Miranda warning, similar to civilians.

Courtesy of Kim Kulish/
Corbis Images.



The Miranda Warning

In 1963, Ernesto Miranda was accused of kidnapping and raping an 18-year-old, mildly retarded woman. He was brought in for questioning, and confessed to the crime. He was not told that he did not have to speak or that he could have a lawyer present. At trial, Miranda's lawyer tried to get the confession thrown out, but the motion was denied. In 1966, the case came in front of the Supreme Court. The Court ruled that the statements made to the police could not be used as evidence, since Miranda had not been advised of his rights.

Since then, before any pertinent questioning of a suspect is done, the police have been required to recite the Miranda warning. The statement, reproduced below, exists in several forms, but all have the key elements: the right to remain silent and the right to an attorney. These are also often referred to as the "Miranda rights." When you have been read your rights, you are said to have been "Mirandized."

The Miranda warning reads as follows:

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to be speak to an attorney, and to have an attorney present during any questioning. If you cannot afford a lawyer, one will be provided for you at government expense.

Counsel

Similar to civilians, military personnel have the right to consult a lawyer both before and during questioning (see Figure 6.7.2). The accused may have a civilian lawyer, a military lawyer, or both. A civilian lawyer is at the military person's expense, but a military lawyer is free.



Figure 6.7.2: Military personnel have the right to legal representation, either military or civilian.

Courtesy of Bettmann/Corbis Images.

Due Process

If the government obtains evidence by using unlawful methods, the evidence cannot be used. For example, obtaining evidence by pumping a suspect's stomach or taking a urine sample is a violation of due process; however, a suspect can be required to step in plaster molds of footprints, make a handwriting sample, or submit to fingerprinting.

Searches and Seizures

The Fourth Amendment of the Constitution protects all citizens, including soldiers, against unreasonable searches and seizures; however, a "reasonable" search in the military may not be considered "reasonable" in civilian life. Before most civilian searches can begin, a judge must issue a search warrant based on a probable cause to search.

In the military, a commander can authorize a search without obtaining a warrant as long as there is probable cause. Although the commander can authorize the search orally, a written authorization stating the reasons for the search is preferred. Whether the authorization is oral or written, the commander must specify the place to be searched and the items to be seized; then, the commander cannot conduct the search personally. He or she can be present at the time of the search, but someone else must actually conduct it (such as the Military Police).

Commanders have the right and duty to inspect their troops to make sure they are prepared to accomplish the unit's mission. Inspections are not the same as searches. During an inspection, the commander looks at the overall status of the unit and does not focus attention on any particular person. A search, on the other hand, singles out individuals and looks for particular evidence.

Key Note Term

admissible—capable of being allowed or accepted (as in a court of law); worthy of being admitted

Article 15—the least severe and most commonly used punitive measure for minor military offenses; though called non-judicial punishment, the accused's company or battalion commander (who usually imposes non-judicial punishment) act in a quasi-judicial capacity

Key Note Term

censure—an opinion or judgment that criticizes or condemns sternly

admonition—cautionary advice or criticism for a fault; a mild censure

If a commander finds illegal drugs, weapons, or other incriminating evidence during a routine inspection, the evidence is **admissible** in a court-martial. However, commanders cannot conduct a search under the pretense of an inspection. Any evidence seized during an unlawful inspection cannot be used in a trial.

Nonjudicial Punishment—Article 15 of the UCMJ

All commanders may impose nonjudicial punishment under **Article 15** of the UCMJ on members within their command for offenses they consider minor; however, they also have the option of referring the matter to their immediate commander when a higher form of punishment may be more suitable for the offense committed. As one would expect, field grade officers have more punishment power than do company grade officers.

Because the decision to administer discipline under Article 15 is a personal responsibility of each commander, a commander's superior cannot specify when to use an Article 15 or what the punishment should be. However, a superior can withhold or limit a subordinate commander's authority to impose Article 15 punishment.

All commanders can impose any combination of up to four different types of punishment under Article 15. Again, this decision is a personal responsibility made by the commander based on the nature of the offense (after the commander has made a thorough investigation of the incident), prior record of the individual, recommendations made on the individual's behalf by other personnel, and so on.

- **Censure, admonition, or reprimand.** These types of punishment are generally in the form of an oral or written warning; however, if the offense is repeated, a harsher punishment may occur.
- **Loss of liberty.** Military personnel can be punished by correctional custody, arrest in quarters, extra duty, or restriction.
- **Forfeiture of pay.** Military personnel can lose a portion of their basic pay, sea pay, or foreign duty pay for a specified period of time.
- **Reduction in grade.** This punishment is the most severe nonjudicial punishment. It affects the rate of pay and results in a loss of privileges and responsibilities.

Service Member's Options

When nonjudicial punishment is being considered against a member of the Armed Forces, that individual has the right to:

- **Consult with a judge advocate or other legal expert after receipt of the charges from the commander**
- **Request an open hearing, which would be held in an informal and non-adversarial way**
- **Have a spokesperson present at the hearing**
- **Have witnesses testify on his or her behalf at the hearing**
- **Present evidence**
- **Demand a court-martial instead of accepting punishment under Article 15; if this happens, the Article 15 proceedings stop and the commander decides whether to bring court-martial charges against that person**

Military personnel who are punished under Article 15 have the right to appeal the punishment. The appeal first goes to the officer who imposed the punishment; then, if disapproved, to the next higher authority. Either officer may suspend or reduce the punishment.

Court-Martial Proceedings

Whenever possible, commanders use Article 15 punishment to avoid the time and expense of a court-martial; however, serious crimes require formal proceedings and the more severe punishment that accompanies a court-martial. There are three levels of courts-martial that handle cases ranging from relatively minor offenses to capital crimes. The levels, from lowest to highest are **summary**, **special**, and **general court-martial**.

Summary Court-Martial

The summary court-martial is designed to discipline enlisted personnel who commit relatively minor offenses. The court is composed of one commissioned officer who acts as a judge, jury, and counsel for both sides. In a summary court-martial, the accused is not entitled to a detailed military counsel (although the accused is entitled to consult with military counsel prior to the court-martial); however, this person may be represented by a civilian attorney at no expense to the government.

No accused may be tried by a summary court-martial if he or she objects; however, the case may then be referred to a higher court.

Because the summary court-martial handles only minor offenses, its punishments are similar to Article 15 punishment. The maximum punishments allowed for a summary court-martial for enlisted personnel in the pay grades of E-1 to E-4 are forfeiture of two-thirds of one month's pay; confinement for one month, hard labor without confinement for 45 days, or restriction for two months; and/or reduction to the lowest enlisted grade. Enlisted personnel in the grades of E-5 to E-9 may be reduced only one grade and may not be confined or placed in hard labor without confinement. Officers cannot be tried by a summary court-martial.

Special Court-Martial

A special court-martial may try any offense not punishable by death. The special court may consist of at least three members and a military judge or a military judge alone if the accused so requests and the judge grants the request. The accused has the right to be represented by a military lawyer or a civilian lawyer at no expense to the government. An accused enlisted member can also request that the court consist of one-third enlisted personnel.

A special court-martial can order a maximum punishment of confinement for six months, forfeiture of two-thirds of a month's pay for six months, and reduction to the lowest enlisted grade. If a punitive discharge is specifically authorized, a special court-martial can impose a bad-conduct discharge on enlisted members in addition to the other punishments. Although officers can be tried by a special court-martial, they cannot be confined or dismissed.

Key Note Term

summary

court-martial—the lowest level of trial courts in the military justice system, which provides for the disposition of minor offenses under a simple procedure when non-punitive measures and punishment are inappropriate or ineffective; it may try only enlisted personnel; its punishment is less severe for senior enlisted personnel; and it does not have the authority to impose a dishonorable discharge of any kind

special court-martial—the intermediate level of trial courts in the military justice system, which tries offenses not punishable by death; if convened by a general court-martial convening authority and a punitive discharge is specifically authorized, it has the authority to impose a bad-conduct discharge to enlisted members. It does not have the authority to dismiss or confine commissioned officers

general court-martial—the highest level of trial courts in the military justice system, which tries the most serious kinds of cases with authority to impose a dishonorable discharge or capital punishment

General Court-Martial

The highest level of trial courts in the military justice system is the general court-martial. General courts try military personnel for the most serious crimes, such as treason and murder. A general officer ordinarily convenes a general court-martial, and each case must have a formal pre-trial investigation.

A general court-martial usually consists of a military judge and at least five members. Except in a capital case, the accused may request that the court consist of a military judge alone. The rules regarding composition of the court and the accused's attorney rights are generally the same for a special court-martial. A general court-martial can impose a dishonorable discharge, dismissal, confinement for life or a lesser term, forfeiture of all pay and allowances, and in capital cases, death.

Court-Martial Appeals

Following a trial, the convening authority has the sole power and responsibility to approve that part of the findings and sentence that he/she finds correct in law and in fact. The convening authority may also approve or set aside, in whole or in part, the findings of guilty and the sentence, but may not change not guilty findings to guilty or increase the severity of the adjudged sentence.

All courts-martial are reviewed by an attorney for legal sufficiency. Findings from a general court-martial or a special court-martial which imposed a bad-conduct discharge are sent to the Court of Military Review for a formal appeal after the convening authority has taken action. Some convictions may also be appealed to the U.S. Court of Appeals for the Armed Forces. This court's jurisdiction is worldwide, but it encompasses only questions of law arising from trials by court-martial where:

- **A death sentence is imposed**
- **A case is certified for review by the Judge Advocate General**
- **The accused, who faces a severe sentence, petitions and shows good cause for further review**

The Supreme Court has jurisdiction to review decisions of the U.S. Court of Appeals for the Armed Forces and of military appellate courts in which the U.S. has taken an appeal from rulings by military judges during trials by court-martial.

Case Studies: A Comparison

How does military justice compare to federal justice? Would a case involving a civilian accused of a crime be handled in the same way if a military person were accused of the same crime, or vice versa? The best way to answer these questions is to compare the two systems; therefore, the remainder of this lesson presents three case studies for you to examine. Be prepared to discuss your views about them or to write your views in your journal.

Article 15 for Insubordination

The duty roster read, “Private Breck—cleaning detail.” When Cathy Breck reported to her platoon sergeant, SFC Lancaster, he told her, “Your assignment is to clean the extra rifles before the inspection.”

“But I already cleaned my rifle,” Private Breck protested. “I shouldn’t have to clean the rifles that I didn’t even fire.”

“It is your turn on the duty roster,” replied SFC Lancaster. “I don’t want to hear any more complaints. Report to the arms room.”

“Well, I didn’t make those rifles dirty, so I’m not going to clean them,” responded Breck.

“Private Breck, this unit can’t function properly with this kind of insubordination. If you refuse to complete this assignment, I’ll have no choice but to recommend you for an Article 15. This incident will go on your record.”

Private Breck still refused to perform her duty and the company commander administered her an Article 15. She was restricted for 15 days, required to forfeit one-third of her pay for one month, and directed to clean all the rifles as well as the entire arms room. She appealed the punishment, but the company commander stuck with the original decision and the battalion commander did not grant her appeal.

United States vs. Garwood

PFC Robert R. Garwood, shown in Figure 6.7.3, did not return from the Vietnam War until 1979, 14 years after he had been taken a prisoner of war (POW) by the North Vietnamese. Major Thomas Hamilton conducted an investigation of this incident while Garwood was assigned to Camp Lejeune, NC. Hamilton discovered that Garwood had accepted a position in the North Vietnamese Army, acted as a guard for other American prisoners, worked as a questioner for the Vietnamese Communists, struck an American without reason, and encouraged Americans to throw down their weapons and refuse to fight. In February of 1980, Hamilton recommended that Garwood be court-martialed on the charges of:

Soliciting an act of misbehavior before the enemy (authorized a maximum punishment of ten years confinement at hard labor)

Unauthorized absence without leave (this charge was combined with Charge #3)

Desertion in time of war (authorized the maximum punishment: the death penalty, confinement at hard labor for life, total forfeiture of pay and allowances, reduction to the lowest enlisted grade, and/or dishonorable discharge)

Collaborating with the enemy (authorized the same punishment as Charge #3)

Maltreatment of prisoners of war (authorized the maximum punishment, but not the death penalty)

Although Major Hamilton recommended that the death penalty not be precluded as a punishment and that while the alleged offenses were serious in nature, it was his opinion this case be referred as a non-capital offense—unless the ordering officer

Figure 6.7.3: PFC Robert R. Garwood was the defendant of a general court-martial in 1980.

Courtesy of Bettmann/Corbis Images.



considered the death penalty to be appropriate punishment if adjudged. Major Hamilton further recommended that if the case was referred as non-capital, then the maximum punishment would be limited to confinement to hard labor for life, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and/or dishonorable discharge.

After a thorough review, Brigadier General David Barker ordered a general court-martial for Garwood as a non-capital case.

In the only prosecuted case of this kind arising from the Vietnam War, Garwood was found guilty on February 5, 1981 of collaborating with the enemy while a POW in Vietnam in 1967. Because Garwood had presumably been a captive of the North Vietnamese from 1965 to 1979, the court did not sentence him to prison. Instead, he was reduced in rank and given a dishonorable discharge.

Schenck vs. United States

Charles R. Schenck was a civilian who opposed the United States' involvement in World War I. In 1917, he mailed pamphlets to thousands of young men, urging them to refuse the draft. According to the Espionage Act of 1917, it was illegal to interfere with the war effort. A U.S. District Court convicted Schenck for his actions.

Schenck's lawyers appealed his case to the Supreme Court, stating that the Espionage Act violated Schenck's First Amendment right to freedom of speech. The Court unanimously decided that what a person has the right to say during peacetime is different from what a person can say when the nation is at war. According to this Court, Schenck's words presented a "clear and present danger" to the U.S., and his acts were not protected by the Constitution.

Conclusion

Before and during World War II, the Army and Navy had separate disciplinary codes, but the creation of the Air Force after that war led to the enactment of a criminal law system that would be uniformly applied by all the services. Since Congress enacted the Uniform Code of Military Justice (UCMJ) in 1951, it has become the basis for the criminal law system for the military. Over the years since its creation, the UCMJ has evolved to the extent that it now balances the need to maintain discipline in the armed forces while giving military members who are accused of crimes rights that closely parallel those of accused persons in the civilian sector.

This lesson concludes the chapter, “The Bill of Rights.” In the next chapter, “Citizen Roles in American Democracy,” you will learn about the roles that you have as a citizen of the United States as well as new citizenship and Constitutional issues.

Lesson Review

1. What is the UCMJ? Explain its purpose.
2. In a military justice system, what are the rights of the accused?
3. Explain the three types of court martial proceedings.
4. What is Article 15? What does it provide?