



# Military Justice: Courts-Martial, An Overview

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## Summary

A string of recent high profile military-related cases, including Maj. Nidal Hasan, the alleged shooter at Fort Hood, and Pfc. Bradley Manning, the alleged source of leaked classified materials through the organization WikiLeaks, has resulted in increased public and congressional interest in military discipline and the military justice system. In the criminal law system, some basic objectives are to discover the truth, acquit the innocent without unnecessary delay or expense, punish the guilty proportionately with their crimes, and prevent and deter further crime, thereby providing for the public order. Military justice shares these objectives in part, but also serves to enhance discipline throughout the Armed Forces, serving the overall objective of providing an effective national defense.

Under Article I, Section 8 of the U.S. Constitution, Congress has the power to raise and support armies; provide and maintain a navy; and provide for organizing and disciplining them. Under this authority, the Congress has enacted the Uniform Code of Military Justice (UCMJ), which is the code of military criminal laws applicable to all U.S. military members worldwide. The President implemented the UCMJ through the Manual for Courts-Martial (MCM). The Manual for Courts-Martial contains the Rules for Courts-Martial (RCM), the Military Rules of Evidence (MRE), and the UCMJ. Members of the Armed Forces are subjected to rules, orders, proceedings, and consequences different from the rights and obligations of their civilian counterparts and the UCMJ establishes this unique legal framework.

The UCMJ authorizes three types of courts-martial: (1) summary court-martial; (2) special court-martial; and (3) general court-martial. Depending on the severity of the alleged offense, the accused's commanding officer enjoys great discretion with respect to the type of court-martial to convene. Generally, each of the courts-martial provides fundamental constitutional and procedural rights to the accused, including, but not limited to, the right to a personal representative or counsel, the opportunity to confront evidence and witnesses, and the right to have a decision reviewed by a lawyer or a court of appeals. The chart that concludes this report compares selected procedural safeguards employed in criminal trials in federal criminal court with parallel protective measures in military general courts-martial.

## **Contents**

Introduction .....	1
Military Courts-Martial .....	1
Jurisdiction .....	2
Types of Offenses .....	3
Investigation .....	3
Types of Courts-Martial .....	4
Summary Courts-Martial.....	5
Special Courts-Martial .....	5
General Courts-Martial .....	6
Post-Trial Review .....	7
Appellate Review.....	7
Selected Procedural Safeguards.....	8

## **Tables**

Table 1. Selected Procedural Safeguards in Federal and Military Courts .....	8
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## **Contacts**

Author Contact Information .....	15
Acknowledgments .....	15

## Introduction

A string of recent high profile military-related cases, including Maj. Nidal Hasan, the alleged shooter at Fort Hood, and Pfc. Bradley Manning, the alleged source of leaked classified materials through the organization WikiLeaks, has resulted in increased public and congressional interest in military discipline and the military justice system.

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

The Fifth Amendment to the Constitution provides that “no person shall be ... deprived of life, liberty, or property, without due process of law.” Due process includes the opportunity to be heard whenever the government places any of these fundamental liberties at stake. The Constitution contains other explicit rights applicable to various stages of a criminal prosecution. Criminal proceedings provide both the opportunity to contest guilt and to challenge the government’s conduct that may have violated the rights of the accused. The system of procedural rules used to conduct a criminal hearing, therefore, serves as a safeguard against violations of constitutional rights that take place outside the courtroom.

## Military Courts-Martial

The Constitution, in order to provide for the common defense,<sup>1</sup> gives Congress the power to raise, support, and regulate the Armed Forces,<sup>2</sup> but makes the President Commander-in-Chief of the Armed Forces.<sup>3</sup> Article III which governs the federal judiciary does not give it any explicit role in the military, and the Supreme Court has taken the view that Congress’s power “To make Rules for the Government and Regulation of the land and naval Forces”<sup>4</sup> is entirely separate from Article III.<sup>5</sup> Therefore, courts-martial are not considered to be Article III courts and are not subject to all of the rules that apply in federal courts.<sup>6</sup>

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<sup>1</sup> U.S. CONST. Preamble.

<sup>2</sup> *Id.* art. I § 8, cls. 11-14 (War Power).

<sup>3</sup> *Id.* art. II § 2, cl. 1.

<sup>4</sup> *Id.* art. I § 8, cl. 14.

<sup>5</sup> *See* *Dynes v. Hoover*, 61 U.S. (How.) 65 (1857).

<sup>6</sup> *See* WILLIAM WINTHROP, *WINTHROP’S MILITARY LAW AND PRECEDENTS* 48-49 (2d. ed. 1920)(describing courts-martial as *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein) (emphasis in original).

Members of the Armed Forces are subjected to rules, orders, proceedings, and consequences different from the rights and obligations of their civilian counterparts.<sup>7</sup> As such, it might be said that discipline is as important as liberty interests in the military justice system. The Constitution specifically exempts military members accused of a crime from the Fifth Amendment right to a grand jury indictment,<sup>8</sup> from which the Supreme Court has inferred there is no right to a civil jury in courts-martial.<sup>9</sup> However, in part because of the different standards provided in courts-martial, their jurisdiction is limited to those persons and offenses the military has a legitimate interest in regulating. Courts-martial jurisdiction extends mainly to servicemembers on active duty, prisoners of war, and persons accompanying the Armed Forces in time of declared war,<sup>10</sup> as well as certain violators of the law of war.<sup>11</sup>

Under Article I, Section 8 of the U.S. Constitution, Congress has the power to raise and support armies; provide and maintain a navy; and provide for organizing and disciplining them. Under this authority, the Congress has enacted the Uniform Code of Military Justice (UCMJ),<sup>12</sup> which is the code of military criminal laws applicable to all U.S. military members worldwide. The President implemented the UCMJ through the Manual for Courts-Martial (MCM), which was initially prescribed by Executive Order 12473 (April 13, 1984). The Manual for Courts-Martial contains the Rules for Courts-Martial (RCM), the Military Rules of Evidence (MRE),<sup>13</sup> and the UCMJ. The MCM covers almost all aspects of military law.<sup>14</sup> Military courts are not considered Article III courts but instead are established pursuant to Article I of the Constitution, and as a result are of limited jurisdiction.<sup>15</sup>

## Jurisdiction

The UCMJ gives courts-martial jurisdiction over servicemembers<sup>16</sup> as well as several other categories of individuals, including retired members of a regular component of the Armed Forces

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<sup>7</sup> United States v. Watson, 69 M.J. 415 (2011).

<sup>8</sup> The Fifth Amendment provides, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; ....”

<sup>9</sup> See *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). Congress has, in article 32, UCMJ, provided for a pre-trial hearing that performs the same basic function as a grand jury. Court-martial panels consist of a military judge and several panel members, who function similarly to a jury.

<sup>10</sup> See 10 U.S.C. § 802. “In time of war” refers to war declared by Congress. United States v. Averette, 17 USCMA 363 (1968).

<sup>11</sup> See 10 U.S.C. § 818.

<sup>12</sup> 10 U.S.C. §§ 801-941.

<sup>13</sup> Rules of procedures and rules of evidence for courts-martial are established by the President and authorized by Art. 36, UCMJ (10 U.S.C. § 836).

<sup>14</sup> Each military service supplements the MCM to meet its individuals needs. The Army has Army Regulation 27-10; the Navy and Marine Corps have the Manual for the Judge Advocate General; and the Air Force has Air Force Instructions.

<sup>15</sup> Article III of the U.S. Constitution, addressing the judicial powers of the United States, contains certain requirements such as life tenure for judges and a prohibition against diminution of salaries. Article I of the U.S. Constitution, addressing legislative powers of congress, includes the power to regulate the Armed Forces, and by implication, the power to create legislative courts to enforce those regulations. In creating legislative courts, Congress is not limited by the restrictions imposed in Article III. See United States v. Wuterich, 67 M.J. 32 (2007).

<sup>16</sup> The term servicemembers, as used in this report, includes uniformed members of the U.S. Army, U.S. Marine Corps, U.S. Navy, U.S. Air Force, and the U.S. Coast Guard.

entitled to pay; retired members of a reserve component who are hospitalized in a military hospital; persons in custody of the military serving a sentence imposed by a court-martial; members of the National Oceanic and Atmospheric Administration and Public Health Service and other organizations, when assigned to serve with the military; enemy prisoners of war in custody of the military; and persons with or accompanying the military in the field during “times of war,” limited to declared wars.<sup>17</sup> Jurisdiction of a court-martial does not depend on where the offense was committed; it depends solely on the status of the accused.<sup>18</sup>

## **Types of Offenses**

Courts-martial try “military offenses,” which are listed in the punitive articles of the UCMJ and are codified in 10 U.S.C. 877 et seq.<sup>19</sup> Some “military offenses” have a civilian analog, but some are exclusive to the military.<sup>20</sup> The President is authorized to prescribe the punishments which a court-martial may impose within the limits established by Congress.<sup>21</sup> In addition, a servicemember may be tried at a court-martial for offenses not specifically covered through the use of the General Article – UCMJ Article 134,<sup>22</sup> which states that all “crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court martial, according to the nature and degree of the offense.” The Armed Forces have used Art. 134 to assimilate state and federal offenses for which there is no analogous crime in the UCMJ in order to impose court-martial jurisdiction. The potential punishments for violations generally match those applicable to the corresponding civilian offense.

## **Investigation**

When a servicemember has reportedly committed an offense, the accused’s immediate commander will conduct an inquiry.<sup>23</sup> This inquiry may range from an examination of the charges and an investigative report or summary of expected evidence to a more extensive investigation, depending on the offense(s) alleged and the complexity of the case. The investigation may be conducted by members of the command or, in more complex cases, military and civilian law enforcement officials. Once evidence has been gathered and the inquiry is complete, the commander can choose to dispose of the charges by (1) taking no action, (2) initiating administrative action,<sup>24</sup> (3) imposing non-judicial punishment, (4) preferring charges, or (5) forwarding to a higher authority for preferral of charges.<sup>25</sup> The first formal step in a court-martial, preferral of charges, consists of drafting a charge sheet containing the charges and specifications<sup>26</sup>

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<sup>17</sup> Art. 2, UCMJ; 10 U.S.C. § 802.

<sup>18</sup> See *Solorio v. United States*, 483 U.S. 435, 447 (1987).

<sup>19</sup> The punitive articles run from Arts. 77 through 134 of the UCMJ; 10 U.S.C. §§ 877-934.

<sup>20</sup> Military-specific offenses include mutiny or sedition (Art. 94, UCMJ); insubordinate contact (Art. 91, UCMJ); failure to obey an order (Art. 92, UCMJ); cruelty and maltreatment (Art. 93, UCMJ); and misconduct as a prisoner (Art. 105, UCMJ).

<sup>21</sup> Art. 56, UCMJ; 10 U.S.C. § 856.

<sup>22</sup> 10 U.S.C. § 934.

<sup>23</sup> RCM 303.

<sup>24</sup> Administrative action can include separation from the military. See 10 U.S.C. §§ 1161 *et seq.*

<sup>25</sup> RCM 306(c).

<sup>26</sup> A specification is a plain and concise statement of the essential facts constituting the offense charged. RCM 307(c)(3).

against the accused. The charge sheet must be signed by the accuser<sup>27</sup> under oath before a commissioned officer authorized to administer oaths.<sup>28</sup> Once charges have been preferred they may be referred<sup>29</sup> to one of three types of courts-martial: summary, special, or general.<sup>30</sup> The seriousness of the offenses alleged generally determines the type of court-martial. The court-martial must be convened by an officer with sufficient legal authority, i.e., the “convening authority,”<sup>31</sup> who will generally be the commander of the unit to which the accused is assigned.<sup>32</sup>

## Types of Courts-Martial

The federal judiciary is established by Article III of the Constitution and consists of the Supreme Court and “inferior tribunals” established by Congress. It is a separate and co-equal branch of the federal government, independent of the executive and legislative branches, designed to be insulated from the public passions. Its function is not to make law but to interpret law and decide disputes arising under it. Federal criminal law and procedures are enacted by Congress and housed primarily in Title 18 of the *U.S. Code*. The Supreme Court promulgates procedural rules for criminal trials at the federal district courts, subject to Congress’s approval. These rules, namely the Federal Rules of Criminal Procedure (Fed. R. Crim. P.) and the Federal Rules of Evidence (Fed. R. Evid.), incorporate procedural rights that the Constitution and various statutes demand.

Unlike with the federal courts, the Supreme Court does not promulgate procedural rules for military courts-martial. As discussed above, Congress regulates the Armed Forces largely through Title 10 of the *U.S. Code*. The military courts-martial system is specifically addressed in the Uniform Code of Military Justice (UCMJ), Chapter 47 of Title 10.<sup>33</sup> Article 36 of the UCMJ authorizes the President to prescribe rules for “pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial....” Such rules are to “apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts” insofar as the President “considers practicable” but that “may not be contrary to or inconsistent” with the UCMJ.<sup>34</sup> Pursuant to that delegation, the President created the Rules for Courts-Martial (R.C.M.) and the Military Rules of Evidence (Mil. R. Evid.)<sup>35</sup>

Congress, in creating the military justice system, established three types of courts-martial: (1) summary court-martial, (2) special court-martial; and (3) general court-martial.<sup>36</sup> While the promulgated RCM and the Military Rules of Evidence are applicable to all courts-martial, the jurisdiction and authorized punishments varies among the different courts-martial types. The

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<sup>27</sup> Any person subject to the UCMJ may prefer charges as the accuser. RCM 307(a).

<sup>28</sup> RCM 307(b).

<sup>29</sup> Referral is the order that states that charges against an accused will be tried by a specific court-martial.

<sup>30</sup> See RCM 401(c).

<sup>31</sup> RCM 504.

<sup>32</sup> RCM 103(6).

<sup>33</sup> 10 U.S.C. §§ 801 *et seq.*

<sup>34</sup> 10 U.S.C. § 836.

<sup>35</sup> The rules are set forth in the Manual for Courts-Martial (M.C.M.), established as Exec. Order No. 12473, Manual for Courts-Martial, United States, 49 Fed. Reg 17,152, (Apr. 23, 1984), as amended.

<sup>36</sup> Art. 16, UCMJ; 10 U.S.C. § 816.

function of the summary court-martial is to “promptly adjudicate minor offenses under a simple procedure” and “thoroughly and impartially inquire into both sides of the matter” ensuring that the “interests of both the Government and the accused are safeguarded and that justice is done.”<sup>37</sup> However, special and general courts-martial function to adjudicate more serious offenses with more severe punishments and thus the procedures are more complex.

Although a discussion of the RCM and Mil. R. Evid. is beyond the scope of this report, the procedures employed in courts-martial are intended to afford servicemembers basic constitutional rights. Appended as **Table 1** is an excerpt from CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, which compares selected constitutionally based trial procedures in federal courts and general courts-martial.<sup>38</sup>

## Summary Courts-Martial

The summary court-martial can adjudicate minor offenses allegedly committed by enlisted servicemembers. It can adjudge maximum punishments of thirty days’ confinement; hard labor without confinement for 45 days; restriction to specified limits for 45 days; forfeiture of two-thirds’ pay per month for one month; and reduction to the lowest pay grade. In the case of enlisted members above pay grade E-4,<sup>39</sup> the summary court-martial may not adjudge confinement or hard labor without confinement and can only reduce them to the next lower pay grade.<sup>40</sup> Summary courts-martial are composed of one commissioned officer who need not be a lawyer.<sup>41</sup> The accused must consent to the proceedings<sup>42</sup> and normally is not entitled to a lawyer.<sup>43</sup> If an accused refuses to consent to a trial by summary court-martial, a trial may be ordered by special or general court-martial as may be appropriate, at the discretion of the convening authority.<sup>44</sup>

## Special Courts-Martial

The special court-martial can try any servicemember for any noncapital offense or, under presidential regulation, capital offenses.<sup>45</sup> Special courts-martial generally try offenses that are considered misdemeanors. A special court-martial can be composed of a military judge alone, not less than three members,<sup>46</sup> or a military judge and not less than three members.<sup>47</sup> Contrary to

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<sup>37</sup> RCM 1301(b).

<sup>38</sup> CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, by Jennifer K. Elsea

<sup>39</sup> Pay grade E-4 consists of corporals or specialists (Army), petty officers 3<sup>rd</sup> class (Navy), corporals (Marines), and senior airman (Air Force).

<sup>40</sup> RCM 1301; Art 20, UCMJ; 10 U.S.C. § 820.

<sup>41</sup> Art. 16, UCMJ; 10 U.S.C. § 816.

<sup>42</sup> Art. 20, UCMJ; 10 U.S.C. § 820.

<sup>43</sup> *Middendorf v. Henry*, 425 U.S. 25 (1970).

<sup>44</sup> Art. 20, UCMJ; 10 U.S.C. § 820.

<sup>45</sup> Arts. 16 & 19, UCMJ; 10 U.S.C. §§ 816, 819; RCM 201(f)(2)(A) (Capital offenses, as defined by RCM 103(3), for which there is not a mandated punishment in excess of the punitive power of a special court-martial may be referred and tried by a special court-martial. RCM 201(f)(2)(C)).

<sup>46</sup> Members in the military justice system are the equivalent of jurors and are generally composed of officers from the accused’s command.

<sup>47</sup> The accused has the right to choose the composition of the court-martial or whether to be tried by a military judge alone, a military judge and members, or a panel of members. Enlisted servicemembers may request that the members’ (continued...)



civilian criminal trials, the agreement of only two-thirds of the members of a court-martial is needed to find the accused guilty. Otherwise, the accused is acquitted.<sup>48</sup> There are no “hung juries” in courts-martial. Regardless of the offenses tried, the maximum punishment allowed at a special court-martial is confinement for one year; hard labor without confinement for up to three months; forfeiture of two-thirds’ pay per month for up to one year; reduction in pay grade; and a bad-conduct discharge.<sup>49</sup> The accused is entitled to an appointed military attorney, a military counsel of his or her selection, or he or she can hire a civilian counsel at no expense to the government.<sup>50</sup>

## General Courts-Martial

A general court-martial is the highest trial level in military law and is usually used for the most serious offenses. It is composed of a military judge sitting alone, or not less than five members and a military judge.<sup>51</sup> It can adjudge, within the limits prescribed for each offense, a wide range of punishments to include confinement; reprimand; forfeitures of up to all pay and allowances; reduction to the lowest enlisted pay grade; punitive discharge (bad conduct discharge, dishonorable discharge or dismissal); restriction; fines; and, for certain offenses, death.<sup>52</sup> The accused is entitled to an appointed military attorney or a military counsel of his or her selection, or the accused can hire civilian counsel at no expense to the government.

Prior to convening a general court-martial, a pretrial investigation must be conducted. This investigation, known as an Article 32 hearing, is meant to ensure that there is a basis for prosecution.<sup>53</sup> An investigating officer, who must be a commissioned officer,<sup>54</sup> presides, and the accused has the same entitlements to counsel as in a special courts-martial. However, unlike in a civilian grand jury investigation where the accused has no access to the proceedings, the accused is afforded the opportunity to examine the evidence presented against him, cross-examine witnesses and present his own arguments.<sup>55</sup> If the investigation uncovers evidence that the accused has committed an offense not charged, the investigating officer can recommend that new

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(...continued)

panel include enlisted members. RCM 903.

<sup>48</sup> RCM 921(c). The same is applicable to general courts-martial with the exception of offenses where the death penalty is mandatory, which require a unanimous verdict. Art. 52, UCMJ; 10 U.S.C. § 852.

<sup>49</sup> Art. 19, UCMJ; 10 U.S.C. § 819; RCM 201(f)(2)(B). A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may only be adjudged if a complete record of the proceedings and testimony has been made, defense counsel was appointed, and a military judge presided over the court-martial. If a military judge could not be appointed, a detailed written statement stating the reasons why must be submitted by the commander who convened the court-martial.

<sup>50</sup> Art. 27, UCMJ; 10 U.S.C. § 827. *See generally* United States v. Hutchins, 69 M.J. 282 (2010).

<sup>51</sup> Art. 16, UCMJ. The Accused has the right to choose the composition of the court-martial except in capital cases, where members are required. *See* footnote 47, *supra*. And RCM 201(f)(1)(C).

<sup>52</sup> Art. 18, UCMJ; 10 U.S.C. § 818; RCM 1003. (A penalty of death may only be adjudged with the concurrence of all members of the court-martial; the case was referred to the court-martial as a capital case; and one or more specified aggravating factors were present at the time of the offense. RCM 1004).

<sup>53</sup> Art. 32, UCMJ; 10 U.S.C. § 832.

<sup>54</sup> RCM 405(d)(1) (An commissioned officer is a member of the uniformed services not in an enlisted pay grade and includes a commissioned warrant officer (10 U.S.C. § 101). The investigating officer should be an officer in the grade of major or lieutenant commander or higher or one with legal training).

<sup>55</sup> Art. 32(b)-(c), UCMJ; 10 U.S.C. § 832(b)-(c); RCM 405(f). *See* United States v. Davis, 64 M.J. 445 (2007).

charges be added.<sup>56</sup> Likewise, if the investigating officer believes that evidence is insufficient to support a charge, he can recommend that it be dismissed. Once the Article 32 investigation is complete, the investigating officer makes recommendations to the convening authority (CA) via the CA's legal advisor. The legal advisor in turn, provides the CA with a formal written recommendation, known as the Article 34, UCMJ advice, as to the disposition of the charges. The CA then determines whether to convene a court-martial or dismiss the charges.<sup>57</sup>

## **Post-Trial Review**

Convictions at a general or special court-martial that include a punitive (bad conduct or dishonorable) discharge are subject to an automatic post-trial review by the CA. The process starts with a review of the trial record by the staff judge advocate (SJA), who makes a recommendation to the CA as to what action to take. This review is recognized as the accused's best hope for relief as the CA has broad powers to act on the case.<sup>58</sup> Upon review of the record of trial and the SJA's recommendation, the CA may, among other remedies, suspend all or part of the sentence, disapprove a finding or conviction, or lower the sentence.<sup>59</sup> The CA may not increase the sentence. Once the CA takes action on the case, the conviction is ripe for an appeal.

All court-martial convictions not reviewable by the service appellate courts<sup>60</sup> are reviewed by a judge advocate to determine if the findings and sentence, as approved by the CA, are correct in law and fact.<sup>61</sup> If those criteria are met, the conviction is final. If not, the judge advocate forwards the case to the officer exercising general court-martial CA over the accused at the time the court-martial was convened for corrective action.<sup>62</sup> If the CA refuses to take corrective action, the case is referred to the Judge Advocate General for review.

## **Appellate Review**

Convictions by a special or general court-martial are subject to an automatic<sup>63</sup> appeal to a service Court of Criminal Appeals if the sentence includes confinement for one year or more, a bad-conduct or dishonorable discharge, death, or a dismissal in the case of a commissioned officer, cadet or midshipman.<sup>64</sup> Appeal is mandatory when the sentence includes death. If the conviction is affirmed by the service court, the appellant may request review by the Court of Appeals for the

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<sup>56</sup> Art. 32(d), UCMJ; 10 U.S.C. § 823(d); RCM 407.

<sup>57</sup> Arts. 33-35, UCMJ; 10 U.S.C. § 833-835; RCM 407.

<sup>58</sup> *United States v. Davis*, 58 M.J. 100, 102 (2003).

<sup>59</sup> Art. 60, UCMJ; 10 U.S.C. § 860; RCM 1107.

<sup>60</sup> There are three service appellate courts: the Navy-Marine Corps Court of Criminal Appeals, the Army Court of Criminal Appeals, and the Air Force Court of Criminal Appeals. A service appellate court will have jurisdiction in cases where the sentence includes confinement for one year or more, a bad-conduct or dishonorable discharge, death, or a dismissal from service in the case of a commissioned officer, cadet, or midshipman. Art. 66, UCMJ; 10 U.S.C. § 866.

<sup>61</sup> Art. 64, UCMJ, 10 U.S.C. § 864, RCM 1111, 1112, and 1306.

<sup>62</sup> Art. 64(c)(3), UCMJ; 10 U.S.C. § 864(c)(3); RCM 1112.

<sup>63</sup> Military appellate courts are required to review cases over which they have jurisdiction unless the appellant waives his or her right to appeal. An appellant may not waive his right to appeal when the sentence includes death. RCM 1110.

<sup>64</sup> Art. 66, UCMJ; 10 U.S.C. § 866.

Armed Forces (CAAF)<sup>65</sup> and ultimately the U.S. Supreme Court.<sup>66</sup> Review by these courts is discretionary.

Supreme Court review by writ of certiorari is limited to cases where the CAAF has conducted a review, whether mandatory or discretionary, or has granted a petition for extraordinary relief. The Court does not have jurisdiction to review a denial of discretionary review by the CAAF,<sup>67</sup> nor does it have jurisdiction to consider denials of petitions for extraordinary relief.<sup>68</sup> Service-members whose petitions for review or for extraordinary relief are denied by the CAAF may seek additional review only through collateral means, e.g., petitioning for habeas corpus to an Article III court, which could provide an alternate avenue for Supreme Court review.

## Selected Procedural Safeguards

The following chart cites relevant federal rules and/or court decisions, as well as provisions of the UCMJ and applicable rules, but makes no effort to provide an exhaustive list of all procedural authorities.<sup>69</sup>

**Table I. Selected Procedural Safeguards in Federal and Military Courts**

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

<sup>65</sup> See Art. 67, UCMJ; 10 U.S.C. § 867. The Court of Appeals for the Armed Forces (CAAF) is a civilian court composed of five civilian judges appointed by the President.

<sup>66</sup> The U.S. Supreme Court did not have jurisdiction over decisions of the CAAF until Congress granted it in 1984. Military Justice Act of 1983, P.L. 98-209, 97 Stat. 1393, 28 U.S.C. § 1259.

<sup>67</sup> 10 U.S.C. § 867a.

<sup>68</sup> For an additional discussion on Supreme Court jurisdiction over military justice cases, please see CRS Report RL34697, *Supreme Court Appellate Jurisdiction Over Military Court Cases*, by R. Chuck Mason.

<sup>69</sup> “Table 1. Selected Procedural Safeguards in Federal and Military Courts” is excerpted from CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, by Jennifer K. Elsea.

Constitutional Safeguards	Federal Court	General Courts-Martial
<p><b>Right to Remain Silent</b></p> <p>“No person ... shall be compelled in any criminal case to be a witness against himself ....”</p> <p>Amendment V.</p>	<p>Incriminating statements made by defendant under duress or without prior <i>Miranda</i> warning are inadmissible as evidence of guilt in a criminal trial. <i>Miranda v. Arizona</i>, 384 U.S. 436 (1966).</p> <p>Before a jury is allowed to hear evidence of a defendant’s confession, the court must determine that it was voluntarily given.</p> <p>18 U.S.C. § 3501.</p>	<p>Coerced confessions or confessions made without statutory equivalent of <i>Miranda</i> warning are not admissible as evidence. Art. 31, UCMJ, 10 U.S.C. § 831.</p> <p>The prosecutor must notify the defense of any incriminating statements made by the accused that are relevant to the case prior to the arraignment. Motions to suppress such statements must be made prior to pleading.</p> <p>Mil. R. Evid. 304.</p>
<p><b>Freedom from Unreasonable Searches &amp; Seizures</b></p> <p>“The right of the people to be secure ... against unreasonable searches and seizures, shall not be violated; no Warrants shall issue, but upon probable cause...”</p> <p>Amendment IV.</p>	<p>Evidence, including derivative evidence, gained through unreasonable searches and seizures may be excluded in court. <i>Boyd v. United States</i>, 116 U.S. 616 (1886); <i>Nardone v. United States</i>, 308 U.S. 338 (1938); Fed. R. Crim. P. 41.</p> <p>A search warrant issued by a magistrate on a showing of probable cause is generally required for law enforcement agents to conduct a search of an area where the subject has a reasonable expectation of privacy, including searches and seizures of telephone or other communications and emissions of heat and other phenomena detectable with means other than human senses. <i>Katz v. United States</i>, 389 U.S. 347 (1967).</p> <p>Evidence resulting from overseas searches of American property by foreign officials is admissible unless foreign police conduct shocks judicial conscience or participation by U.S. agents is so substantial as to render the action that of the United States. <i>United States v. Barona</i>, 56 F.3d 1087 (9<sup>th</sup> Cir. 1995).</p>	<p>“Evidence obtained as a result of an unlawful search or seizure ... is inadmissible against the accused ...” unless certain exceptions apply.</p> <p>Mil. R. Evid. 311.</p> <p>“Authorization to search” may be oral or written, and may be issued by a military judge or an officer in command of the area to be searched, or if the area is not under military control, with authority over persons subject to military law or the law of war. It must be based on probable cause.</p> <p>Mil. R. Evid. 315.</p> <p>Interception of wire and oral communications within the United States requires judicial application in accordance with 18 U.S.C. §§ 2516 <i>et seq.</i></p> <p>Mil. R. Evid. 317.</p> <p>A search conducted by foreign officials is unlawful only if the accused is subject to “gross and brutal treatment.”</p> <p>Mil. R. Evid. 311(c).</p>

Constitutional Safeguards	Federal Court	General Courts-Martial
<p><b>Assistance of Effective Counsel</b></p> <p>“In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.”</p> <p>Amendment VI.</p>	<p>Defendants in criminal cases have the right to representation by an attorney at all stages of prosecution. The defendant may hire an attorney or, if indigent, have counsel appointed at the government’s expense. If two or more co-defendants are represented by one attorney, the court must inquire as to whether a conflict of interest exists.</p> <p>Fed. R. Crim. P. 44.</p> <p>Conversations between attorneys and clients are privileged. Fed. R. Evid. 501.</p> <p>Procedures for ensuring adequate representation of defendants are outlined at 18 U.S.C. §§ 3005 (capital cases) and 3006A.</p>	<p>The defendant has a right to military counsel at government expense. The defendant may choose counsel, if that attorney is reasonably available, and may hire a civilian attorney in addition to military counsel.</p> <p>Art 38, UCMJ, 10 U.S.C. § 838.</p> <p>Appointed counsel must be certified as qualified and may not be someone who has taken any part in the investigation or prosecution, unless explicitly requested by the defendant.</p> <p>Art. 27, UCMJ, 10 U.S.C. § 827.</p> <p>The attorney-client privilege is honored. Mil. R. Evid. 502.</p>
<p><b>Right to Indictment and Presentment</b></p> <p>“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger ....”</p> <p>Amendment V.</p>	<p>Where the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be tried except on the accusation of a grand jury. <i>Ex parte Wilson</i>, 114 U.S. 417 (1885); Fed. R. Crim. P. 7.</p> <p>Jurors must be selected from a fair cross section of the community; otherwise, an accused can challenge the indictment. 28 U.S.C. §§ 1861 et seq.</p> <p>Once an indictment is given, its scope may not be increased.</p> <p><i>Ex parte Bain</i>, 121 U.S. 1 (1887).</p> <p>(Amendments to an indictment must undergo further grand jury process.)</p>	<p>The right to indictment by grand jury is explicitly excluded in “cases arising in the land or naval forces.”</p> <p>Amendment V.</p> <p>Whenever an offense is alleged, the commander is responsible for initiating a preliminary inquiry and deciding how to dispose of the offense. R.C.M. 303-06.</p>
<p><b>Right to Written Statement of Charges</b></p> <p>“In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; ...”</p> <p>Amendment VI.</p>	<p>Defendant is entitled to be informed of the nature of the charge with sufficiently reasonable certainty to allow for preparation of defense.</p> <p><i>Cook v. United States</i>, 138 U.S. 157 (1891).</p>	<p>Charges and specifications must be signed under oath and made known to the accused as soon as practicable. Art. 30, UCMJ, 10 U.S.C. § 830.</p>

Constitutional Safeguards	Federal Court	General Courts-Martial
<p><b>Right to be Present at Trial</b></p> <p>The Confrontation Clause of Amendment VI guarantees the accused's right to be present in the courtroom at every stage of his trial.</p> <p>Illinois v. Allen, 397 U.S. 337 (1970).</p>	<p>The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial. Crosby v. United States, 506 U.S. 255, 262 (1993); Fed. R. Crim. P. 43.</p> <p>When defendant knowingly absents himself from court during trial, court may "proceed with trial in like manner and with like effect as if he were present."</p> <p>Diaz v. United States, 223 U.S. 442, 455 (1912).</p>	<p>The presence of the accused is required during arraignment, at the plea, and at every stage of the court-martial unless the accused waives the right by voluntarily absenting him or herself from the proceedings after the arraignment or by persisting in conduct that justifies the trial judge in ordering the removal of the accused from the proceedings.</p> <p>R.C.M. 801.</p>
<p><b>Prohibition against Ex Post Facto Crimes</b></p> <p>"No ... ex post facto law shall be passed."</p> <p>Art. I, § 9, cl. 3.</p>	<p>Congress may not pass a law punishing conduct that was not a crime when perpetrated, increasing the possible sentence for a crime, or reducing the government's evidentiary burden. Calder v. Bull, 3 Dall. (3 U.S.) 386 (1798); Ex Parte Garland, 4 Wall (71 U.S.) 1867.</p>	<p>Courts-martial will not enforce an ex post facto law, including increasing amount of pay to be forfeited for specific crimes.</p> <p>U.S. v. Gorki, 47 M.J. 370 (1997).</p>
<p><b>Protection against Double Jeopardy</b></p> <p>"... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ..."</p> <p>Amendment V.</p> <p>Subject to "dual sovereign" doctrine, that is, federal and state courts may prosecute an individual for the same conduct without violating the clause.</p>	<p>Jeopardy attaches once the jury is sworn or where there is no jury, when the first evidence is presented. If the trial is terminated after jeopardy has attached, a second trial may be barred in a court under the same sovereign, particularly where it is prosecutorial conduct that brings about the termination of the trial.</p> <p>Illinois v. Somerville, 410 U.S. 458 (1973).</p>	<p>Double jeopardy clause applies. See Wade v. Hunter, 336 US 684, 688-89 (1949).</p> <p>Art. 44, UCMJ prohibits double jeopardy, provides for jeopardy to attach after introduction of evidence.</p> <p>10 U.S.C. § 844.</p> <p>General court-martial proceeding is considered to be a federal trial for double jeopardy purposes. Double jeopardy does not result from charges brought in state or foreign courts, although court-martial in such cases is disfavored. United States v. Stokes, 12 M.J. 229 (C.M.A. 1982).</p> <p>Once military authorities have turned service member over to civil authorities for trial, military may have waived jurisdiction for that crime, although it may be possible to charge the individual for another crime arising from the same conduct. See 54 AM. JUR. 2D, Military and Civil Defense §§ 227-28.</p>

Constitutional Safeguards	Federal Court	General Courts-Martial
<p><b>Speedy &amp; Public Trial</b></p> <p>“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ....”</p> <p>Amendment VI.</p>	<p>Trial is to commence within seventy days of indictment or original appearance before court.</p> <p>18 U.S.C. § 3161.</p> <p>Closure of the courtroom during trial proceedings is justified only if 1) the proponent of closure advances an overriding interest likely to be prejudiced; 2) the closure is no broader than necessary; 3) the trial court considers reasonable alternatives to closure; and 4) the trial court makes findings adequate to support closure. See <i>Waller v. Georgia</i>, 467 U.S. 39, 48 (1984).</p>	<p>In general, accused must be brought to trial within 120 days of the referral of charges or the imposition of restraint, whichever date is earliest.</p> <p>R.C.M. 707(a).</p> <p>The right to a public trial applies in courts-martial but is not absolute.</p> <p>R.C.M. 806.</p> <p>The military trial judge may exclude the public from portions of a proceeding for the purpose of protecting classified information if the prosecution demonstrates an overriding need to do so and the closure is no broader than necessary.</p> <p><i>United States v. Grunden</i>, 2 M.J. 116 (CMA 1977).</p>
<p><b>Burden &amp; Standard of Proof</b></p> <p>Due Process requires the prosecution to prove the defendant guilty of each element of a crime beyond a reasonable doubt.</p> <p><i>In re Winship</i>, 397 U.S. 358 (1970).</p>	<p>Defendant is entitled to jury instructions clarifying that the prosecution has the burden of presenting evidence sufficient to prove guilt beyond a reasonable doubt.</p> <p><i>Cool v. United States</i>, 409 U.S. 100 (1978).</p>	<p>Members of court martial must be instructed that the burden of proof to establish guilt is upon the government and that any reasonable doubt must be resolved in favor of the defendant. R.C.M. 920(e).</p>
<p><b>Privilege Against Self-Incrimination</b></p> <p>“No person ... shall be compelled in any criminal case to be a witness against himself...”</p> <p>Amendment V.</p>	<p>Defendant may not be compelled to testify. Jury may not be instructed that guilt may be inferred from the defendant’s refusal to testify.</p> <p><i>Griffin v. California</i>, 380 U.S. 609 (1965).</p> <p>Witnesses may not be compelled to give testimony that may be incriminating unless given immunity for that testimony.</p> <p>18 U.S.C. § 6002.</p>	<p>No person subject to the UCMJ may compel any person to answer incriminating questions. Art. 31(a) UCMJ, 10 U.S.C. § 831(a).</p> <p>Defendant may not be compelled to give testimony that is immaterial or potentially degrading. Art. 31(c), UCMJ, 10 U.S.C. § 831(c).</p> <p>No adverse inference is to be drawn from a defendant’s refusal to answer any questions or testify at court-martial.</p> <p>Mil. R. Evid. 301(f).</p> <p>Witnesses may not be compelled to give testimony that may be incriminating unless granted immunity for that testimony by a general court-martial convening authority, as authorized by the Attorney General, if required.</p> <p>18 U.S.C. § 6002; R.C.M. 704.</p>

<b>Constitutional Safeguards</b>	<b>Federal Court</b>	<b>General Courts-Martial</b>
<p><b>Right to Examine or Have Examined Adverse Witnesses</b></p> <p>“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; ....”</p> <p>Amendment VI.</p>	<p>Rules of Evidence prohibit generally the introduction at trial of statements made out of court to prove the truth of the matter stated unless the declarant is available for cross-examination at trial (hearsay rule). Fed. R. Evid. 801 <i>et seq.</i></p> <p>The government is required to disclose to defendant any relevant evidence in its possession or that may become known through due diligence.</p> <p>Fed. R. Crim. P. 16.</p>	<p>Hearsay rules apply as in federal court. Mil. R. Evid. 801 <i>et seq.</i></p> <p>In capital cases, sworn depositions may not be used in lieu of witness, unless court-martial is treated as non-capital or it is introduced by the defense. Art. 49, UCMJ, 10 U.S.C. § 849.</p>
<p><b>Right to Compulsory Process to Obtain Witnesses</b></p> <p>“In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, ....”</p> <p>Amendment VI.</p>	<p>Defendants have the right to subpoena witnesses to testify in their defense. The court may punish witnesses who fail to appear. Fed. R. Crim. Pro. Rule 17.</p>	<p>Defendants before court-martial have the right to compel appearance of witnesses necessary to their defense. R.C.M. 703.</p> <p>Process to compel witnesses in court-martial cases is to be similar to the process used in federal courts. Art. 46, UCMJ, 10 U.S.C. § 846.</p>
<p><b>Right to Trial by Impartial Judge</b></p> <p>“The Judicial Power of the United States, shall be vested in one supreme Court, and in ... inferior courts .... The Judges ... shall hold their Offices during good Behaviour, and shall receive ... a Compensation, which shall not be diminished during their Continuance in Office.”</p> <p>Article III § 1.</p>	<p>The independence of the judiciary from the other branches was established to ensure trials are decided impartially, without the “potential domination by other branches of government.”</p> <p>United States v. Will, 449 U.S. 200, 217-18 (1980).</p> <p>Judges with a pecuniary interest in the outcome of a case or other conflicts of interest are disqualified and must recuse themselves.</p> <p>28 U.S.C. § 455.</p>	<p>A qualified military judge is detailed to preside over the court-martial. The convening authority may not prepare or review any report concerning the performance or effectiveness of the military judge. Art. 26, UCMJ, 10 U.S.C. § 826.</p> <p>Article 37, UCMJ, prohibits unlawful influence of courts-martial through admonishment, censure, or reprimand of its members by the convening authority or commanding officer, or any unlawful attempt by a person subject to the UCMJ to coerce or influence the action of a court-martial or convening authority.</p> <p>Art. 37, UCMJ, 10 U.S.C. § 837.</p>



Constitutional Safeguards	Federal Court	General Courts-Martial
<p><b>Right to Trial By Impartial Jury</b></p> <p>“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; ....”</p> <p>Art III § 2 cl. 3.</p> <p>“In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury of the state ....”</p> <p>Amendment VI.</p>	<p>The pool from which juries are drawn must represent a fair cross section of the community. <i>Taylor v. Louisiana</i>, 419 U.S. 522 (1975).</p> <p>There must further be measures to ensure individual jurors selected are not biased (i.e., the <i>voir dire</i> process). <i>Lewis v. United States</i>, 146 U.S. 370 (1892); see Fed. R. Crim. P. 24 (peremptory challenges).</p> <p>The trial must be conducted in a manner designed to avoid exposure of the jury to prejudicial material or undue influence. If the locality of the trial has been so saturated with publicity about a case that it is impossible to assure jurors will not be affected by prejudice, the defendant is entitled to a change of venue. <i>Irvin v. Dowd</i>, 366 U.S. 717 (1961).</p>	<p>A military accused has no Sixth Amendment right to a trial by petit jury. <i>Ex Parte Quirin</i>, 317 U.S. 1, 39-40 (1942) (<i>dicta</i>).</p> <p>However, “Congress has provided for trial by members at a court-martial.” <i>United States v. Witham</i>, 47 MJ 297, 301 (1997); Art. 25, UCMJ, 10 U.S.C. § 825.</p> <p>The Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations. <i>United States v. Lambert</i>, 55 M.J. 293 (2001).</p> <p>The absence of a right to trial by jury precludes criminal trial of civilians by court-martial.</p> <p><i>Reid v. Covert</i>, 354 U.S. 1 (1957); <i>Kinsella v. United States ex rel. Singleton</i>, 361 U.S. 234 (1960).</p>
<p><b>Right to Appeal to Independent Reviewing Authority</b></p> <p>“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”</p> <p>Article I § 9 cl. 2.</p>	<p>Originally, the writ of <i>habeas corpus</i> permitted collateral attack upon a prisoner’s conviction only if the sentencing court lacked subject matter jurisdiction. It later evolved into an avenue for the challenge of federal and state convictions on other due process grounds, to determine whether a prisoner’s detention is “contrary to the Constitution or laws or treaties of the United States.” 28 U.S.C. §§ 2241 <i>et seq.</i></p>	<p>The writ of <i>habeas corpus</i> provides the primary means by which those sentenced by military court, having exhausted military appeals, can challenge a conviction or sentence in a civilian court. The scope of matters that a court will address is more narrow than in challenges of federal or state convictions.</p> <p><i>Burns v. Wilson</i>, 346 U.S. 137 (1953).</p> <p>However, Congress created a civilian court, the Court of Appeals for the Armed Forces, to review military cases.</p>
<p><b>Protection against Excessive Penalties</b></p> <p>“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”</p> <p>Amendment VIII.</p>	<p>The death penalty is not <i>per se</i> unconstitutional, but its discriminatory and arbitrary imposition may be, and the death penalty may not be automatic. See <i>Gregg v. Georgia</i>, 428 U.S. 153 (1976); 18 U.S.C. § 3592 (mitigating /aggravating circumstances).</p> <p>When the death penalty may be imposed, the defendant shall be provided a list of potential jurors and witnesses, unless the court finds that such action might jeopardize the life or safety of any person. 18 U.S.C. § 3432.</p> <p>A special hearing is held to determine whether the death sentence is warranted. 18 U.S.C. § 3593.</p>	<p>Death may only be adjudged for certain crimes where the defendant is found guilty by unanimous vote of court-martial members present at the time of the vote. Prior to arraignment, the trial counsel must give the defense written notice of aggravating factors the prosecution intends to prove. R.C.M. 1004.</p> <p>A conviction of spying during time of war under article 106, UCMJ, carries a mandatory death penalty. 10 U.S.C. § 906.</p>

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## **Acknowledgments**

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