



Military Criminal Justice System

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Background

Military law comprises federal law, constitutional authority, and inherent command authority. It is meant to promote justice, efficiency, and discipline in the armed services. Jurisdiction under military law is based on the U.S. Constitution and relevant aspects of international law. Military law jurisdiction is exercised through four distinct forums: (1) courts-martial, (2) courts of inquiry, (3) military commissions, and (4) nonjudicial punishment proceedings (10 U.S.C. §§815, 816, 935).

Throughout the 1940s, Congress received evidence of military justice maladministration. The primary concerns were the system's lack of due process and independence. Congress responded to these concerns by enacting the Uniform Code of Military Justice (UCMJ) in 1950, which applies to each armed service and replaced the prior military justice system.

The punitive articles in the UCMJ are military law offenses (10 U.S.C. §§877-934). Many of the punitive articles are criminal conduct offenses that have a referent offense in modern penal codes or historical common law (e.g., rape, murder, robbery). Other punitive articles are military misconduct offenses that have a referent offense in medieval chivalric codes or Roman military practices (e.g., mutiny, desertion, cowardice).

Judge Advocates

Each armed service has a senior legal officer known as the Judge Advocate General (JAG) (10 U.S.C. §801(1)) who is the principal legal officer responsible for military justice matters. The attorneys whom they appoint to serve as legal officers throughout the service are responsible for implementing the military justice system (10 U.S.C. §806). When serving as a military justice practitioner, the roles and functions of these judge advocate officers resemble those of attorneys in a civilian criminal justice system.

Although legislative reforms establishing the UCMJ relied on civilian criminal law and procedure as a model, the reforms also preserved many historical attributes of military justice, such as a commander's discipline and disposition authority. This meant that while the UCMJ replicated a civilian criminal justice system overall, the reforms did not allow military lawyers to make decisions regarding the criminal

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prosecution of servicemembers. Prosecutorial discretion remained a function of command, and lawyers continued to serve as advisors to commanders regarding their prosecutorial authority.

Investigation

Department of Defense (DOD) policy states that only entities with statutory law enforcement or criminal investigatory authority may conduct criminal investigations. Each armed service has a military criminal investigative organization (MCIO). MCIOs must identify a service nexus before initiating a criminal investigation. This nexus is a reasonable likelihood that an alleged or suspected offense is related to service personnel, activities, or installations. If a serious offense with a service nexus is alleged, including a sexual offense, an MCIO must investigate the allegation.

All commanders have authority to conduct inquiries into military justice matters. The form of such inquiries can range from an administrative investigation to a court of inquiry. Commanders must conduct preliminary inquiries into allegations that a servicemember committed an offense. However, MCIO investigations preempt commander inquiries, and other parallel investigations, and commanders are required to report alleged or suspected sexual offenses to an MCIO.

Prosecution

Upon completion of an inquiry or investigation, a commander makes an initial determination regarding the allegations. For certain sexual offenses, initial determination is restricted to the first officer in the chain of command who is in pay grade O-6 (37 U.S.C. §201(a)(1)) and a special court-martial convening authority (10 U.S.C. §823(a)). Initial determination options are

- take no action;
- initiate administrative discipline;
- impose nonjudicial punishment;
- initiate disposition of charges; or
- forward for disposition of charges.

There are three levels of courts-martial, each with a corresponding level of convening authority: general, special, and summary (10 U.S.C. §816). Special and general courts-martial try criminal conduct offenses analogous to misdemeanors and felonies, respectively, but they may also try minor misconduct offenses. A summary court-martial adjudicates minor military misconduct offenses.

Among the various military justice procedures, certain sequential steps must occur before a military offense can be prosecuted in a trial by court-martial. A proper authority

- must first prefer charges (press charges, provide notice to the accused);
- may then refer the charges to a court-martial (present charges, serve them upon the accused); and
- may then convene a court-martial (conduct a trial to adjudicate the charges against the accused).

If the initial determination is to prefer charges or forward for disposition, a superior commissioned officer may subsequently determine to dismiss the charges or to refer any or all of the charges to a court-martial, as authorized. A general court-martial referral cannot be made before the convening authority obtains legal advice from a staff judge advocate (10 U.S.C. §834). A court-martial must be convened for each referral of charges, because unlike civilian criminal courts, which typically are standing courts, a court-martial is a temporary activity established by a convening authority to conduct a trial for specific charges.

(For more information regarding prosecutions under the UCMJ, see CRS Report R46503, *Military Courts-Martial Under the Military Justice Act of 2016*, by Jennifer K. Elsea and Jonathan M. Gaffney.)

Incarceration

Servicemembers who receive a sentence of confinement may be confined in any facility under the control of an armed force or the United States, or a place the United States may use (10 U.S.C. §858). Such confinement typically occurs in a military confinement facility (MCF), unless a military offender is subsequently transferred to a federal civilian facility. According to the Annual Correctional Report issued by each armed service, the total MCF population at the beginning of 2021 was 1,180 military offenders (759 military sex offenders and 421 other military offenders; 64% and 36%, respectively). Military offenders transferred to a Bureau of Prisons (BOP) facility as military inmates are not included in the Annual Correctional Report data. As of May 2021, 247 military inmates were held in BOP facilities (116 military sex offenders and 131 other military offenders; 47% and 53%, respectively).

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