

# THE JURISDICTION OF MILITARY JUSTICE AND THE UCMJ

by Jane A. Phinney, RP

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**T**he globe has become a place in which countries and people, governments and politics, religions and armed forces are coming closer and closer together. Did you ever consider under what circumstances you or a member of your family could be taken to court or put on trial under a military system? Do you think it couldn't happen to you? If it did occur, what do you know about the United States system of military justice?

## The Powers That Create the System of Military Justice

If you, as a civilian paralegal working under the judicial power of the United States, think in terms of jurisdiction, you may consider the judiciary powers of the U.S. as being only vested in one Supreme Court. Article III, § 1, of the U.S. Constitution (Constitution) also names the inferior courts, but military courts are not assembled or run through the inferior courts either.

What, then, encompasses and empowers the system of military justice? It is these: the powers granted to Congress under Article I, § 8, of the Constitution, the powers granted to the President under Article II, § 2, of the Constitution, and the Constitution's Fifth Amendment, which guarantees that "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 . . . ."

Beginning in 1920, Congress enacted a series of statutes. The Army Reorganization Act of 1920, also known as the National Defense Act, amended the Articles of War of 1916. The Elston Act of 1948, also known as the Selective Service Act, further defined the Articles of War requiring that military judges be attorneys and that they be qualified by the Judge Advocate General as having the necessary legal capabilities. Together with the Uniform Code of Military Justice of 1950 (UCMJ), these three statutes developed military law as a means "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" (from the Preamble of the *Manual for Courts-Martial (MCM)*, U.S. 1984).

If the ultimate aim of law is to safeguard the sanctuary, confidence in, and collateral of the people under its jurisdiction, then military law protects persons under the domain of the military, as well as the persons who may fall within the complexity of military jurisdiction.

## Jurisdiction of Military Justice

The U.S. government determines the jurisdiction of military justice in four ways, according to the scenario in which the jurisdiction will be asserted: military government, martial law, any area so deemed as held under the laws of war, and military law.

### Military Government

The replacement of a judicial system by military government is the exercise of supreme authority by an armed force over the lands, property, and inhabitants of a territory occupied by hostile forces. Whether the person involved is a civilian inhabitant, a member of the military, or a member of the occupying force itself, such situations demand the exercise of judicial powers by military force in order to hold a level of law and order between the groups of people.

### Martial Law

Martial law, which was created for more temporary situations than military government, is called for in an area in which a domestic civilian government, including its judicial system, cannot operate due to civil war or warfare. This jurisdiction, imposed upon the non-

military public, is created by necessity. Whatever the situation that created the need for martial law is also what will determine its duration. The extent of the military force used and the legal propriety of the measures taken will depend on the actual threat to order and public safety that exists at the time. Thus, when the temporary situation necessitating martial rule ends, and the civilian government and judicial powers are restored, martial law ends.

For example, in New York during the 9/11 terrorist attacks, had the New York judicial courts and other divisions of the state government not been able to operate and protect, martial law could have been imposed.

## An Area Declared Under the Laws of War

When our nation is declared under law of war, military judicial powers may be exercised. Article II of the Constitution names the President as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual service of the United States . . .," thus charging the President with the duties to regulate and govern the members of the armed forces and the conduct of war. Therefore, when we are "in war," our President is not only Commander-in-Chief, but also the head of the judiciary powers. In *Ex parte Quirin*, 317 U.S. 1, 28 (1942), the Supreme Court confirmed the President's authority to commission military judicial powers to defend our nation against violators of the laws of war and of certain articles of war. It is under this phase of military jurisdiction that such entities as international military tribunals are empowered. (An international military tribunal is the coming together of multi-national military judicial powers who are each entitled to exercise separately in a location, but wish to act in a united front against the violators of the laws of war.)

## Military Law

Military law is the judicial power exercised by the military over its own members to promote good discipline and order. Military law is a series of federal statutes. Those statutes, ratified by Congress and interpreted by the (civil) courts, are executed by the President through regulations and

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# A FEW GOOD PARALEGALS

Sergeant Mercedes M. Wenier, a paralegal stationed at Quantico, VA, is currently serving as an active duty Marine. As such, she is the supervisor for the Administrative Law department for the Office of the Staff Judge Advocate, Marine Corps Combat Development Command. Her duties include:

- managing the docket for upcoming administrative separations boards;
- ensuring the research of each case for legal sufficiency;
- performing functions of the information system coordinator; and
- managing the personnel in her department.

Sgt. Wenier handles an average of 580 administrative law cases per year in her current position. After graduating Marine Corps recruit training at Parris Island, SC, in 1997, she was assigned to Camp Johnson, NC, for training as a Legal Services Specialist. She was subsequently assigned to the Marine Corps Recruit Depot, San Diego, CA, for duty as a legal services specialist with the Office of the Staff Judge Advocate. From 1997 to 2001, Sgt. Wenier served in a number of capacities with the Office of the Staff Judge Advocate, including Legal Assistance Specialist (Family Law), Income Tax Assistance Specialist, Defense Chief, Administrative Law, and Military Justice Chief (Military Law).

While serving in these positions, she assisted an active duty military population of more than 5,000 Marines and Navy per-

sonnel stationed in the San Diego area. Additionally, she provided service to a retired military population in excess of 50,000 people. Sgt. Wenier was awarded a personal decoration in the form of a Navy and Marine Corps Achievement Medal for her diligent services as a paralegal.



In 2001, Sgt. Wenier graduated with honors from the paralegal studies program at the University of San Diego, an ABA-approved program. While she was attending the paralegal program, she joined NFPA and has been a member ever since. Sgt. Wenier enjoys being a member of NFPA because it keeps her in touch with her civilian counterparts.

In January 2002, Sgt. Wenier was reassigned to her current position with the Office of the Staff Judge Advocate, Marine Corps Combat Development Command, Quantico, VA. In that capacity, she provides administrative legal support to nine general officers encompassing commands in excess of 60,000 Marine Corps personnel.

Sgt. Wenier is married to Sgt. Robert J. Wenier, USMC. Her husband is also an active duty paralegal serving with the Marine Corps Military Law Branch located in the Pentagon, Washington, DC. Currently, Sgt. Wenier is attending Mary Washington College, pursuing her bachelor's degree in management and leadership. Her goal is to be commissioned as a Marine Corps warrant officer and serve as a law office manager.



**More specifically, as the military's criminal code, the UCMJ is found under Title 10, Chapter 47, of the U.S.C. Twelve subchapters distinguish and define what constitutes military law.**

put into practice in accordance with the rules of each particular branch of military service. These statutes, composing the basis of military law, preside over the organization as well as the operation of each of the armed services. Finally, military law stands over those under its jurisdiction whether it is in times of peace or of war. Those who fall under its jurisdiction include, but are not limited to,

- commissioned officers,
- cadets and midshipmen (those persons who are in the process of becoming officers of the regular components of the armed forces),
- inductees and enlistees (the volunteers of the regular components of the armed forces),
- reservists on inactive-duty training, as well as on active duty service and also at other particularly named times,
- retired members who elicit pay from a regular component of the armed forces,
- civilians such as "members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations when assigned to and serving with the armed forces,"
- prisoners of war, and
- in times of war, any person (civilian, anyone attached with an armed force, or a military person) serving with, or accompanying any of, the armed forces in the field.

See 10 U.S.C. § 802(a).

## History of the UCMJ

Until 1951, the rules of each particular branch of military service governed the behaviors of its personnel. The Army and Air Force created their rules for military justice from the Articles of War passed by Congress on April 10, 1806. Congress passed the "Act for establishing Rules and Articles for the government of the Armies of the United States," which may be found in the Statutes at Large, Volume 2, pages 359 to 372. But it was not until 1863 that Congress authorized the Army to try soldiers by courts-martial or military commission for murder, manslaughter, robbery, larceny, and other specified crimes.

The Navy, including the U.S. Marine Corps and the U.S. Coast Guard, regulated its personnel's actions through the Articles for the Government of the Navy of 1799. It was the Articles that allowed courts-martial for naval officers or enlisted personnel charged with murders outside the territorial jurisdiction of the United States. In *United States v. Bevans*, 16 U.S. (3 Wheat.) 336, 390 (1818), the Court found that Congress had not authorized such a court-martial for naval personnel accused of committing the act within the territorial jurisdiction. Upon reaching such an impasse, however, Chief Justice Marshall suggested that Congress "had the authority to do so."

The courts-martial systems, then, consisted of different courts, procedures, and rules for each of the services. These systems lacked uniformity and therefore held the possibility of metering justice unequally. The UCMJ came about in 1950, in large part from reforms made to each service's courts-martial system through Title 10 of the U.S.C., which became active in 1951.

## The Criminal Code

While the UCMJ covers a greater variety of criminal matters punishable by military law than criminal matters covered under the civilian system of justice, the members of the armed forces, like members of the civilian populace, also have need for civil law. These needs are attempted to be met by the armed forces' Judge Advocate Generals' offices for Legal Assistance. This work is greatly encouraged and supported by the ABA's Standing Committee on Legal Assistance to Military Personnel (LAMP).

More specifically, as the military's criminal code, the UCMJ is found under Title 10, Chapter 47, of the U.S.C. Twelve subchapters distinguish and define what constitutes military law:

- the General Provisions,
- Apprehension and Restraint,
- Non-Judicial Punishment (Article 15),
- Court-Martial Jurisdiction,
- Composition of Courts-Martial,
- Pre-Trial Procedures,
- Trial Procedures,
- Sentences,
- Post-Trial Procedures and Review of Courts Martial,
- the Punitive Articles,
- Miscellaneous Provisions, and
- the Court of Military Appeals.

The UCMJ, however, goes further than defining criminal acts and the limits for the punishment of those acts. For example, Subchapter X, Punitive Articles, names each of the criminal offenses particularly covered by the UCMJ. If any criminal action was not specifically named but may need to be dealt with by a military court, this subchapter maintains that though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, or which persons sub-



*Tim Burmaster receives his commission to 2nd Lt., seen here being sworn in by a military paralegal.*

may be considered an act subject to an Article 15 of the UCMJ. Other actions unique as to being called "criminal" within the military scenario are such offenses as malingering, failure to obey orders, dereliction of duty, absence without leave, desertion, disrespect towards superiors, unbecoming conduct, and wrongful disposition of military property. (10 U.S.C. §§ 877-934)

Some actions, as criminal offenses, may receive the highest punishment in a court-martial due to the serious nature of the military mission and the action's

impact on that mission. Such actions include misbehavior before the enemy, mutiny, conspiracy, improper use of countersign, aiding the enemy, misconduct as a prisoner, misbehavior of a sentinel, or spying. (*Id.*, and 10 U.S.C. § 856) If judged as a capital offense, the maximum punishment is death. Ultimately, the UCMJ protects the military's mission by recognizing and judging actions through the ideal of utmost importance: our nation's security.

## The Military Justice System Created by the UCMJ

The formation of the UCMJ provides a concise system of military justice for all the services. It determines that the military jus-

tice system will include the commander, a staff judge advocate, trial counsel, defense counsel, a military judge, legal specialists, and a court reporter. (10 U.S.C. §§ 822-828). It requires that a superior (anyone holding rank over another person) cannot order a subordinate to take specific action, intimidate or discourage a witness, or reprimand or give unfavorable ratings for conduct as court or board member. (10 U.S.C. § 837). And with its own version of the "Miranda Rights" included in the UCMJ, which was created approximately 16 years before the Supreme Court affirmed those rights for civilians (see *Miranda v. Arizona*, 384 U.S. 436 (1966)), the military justice system affords greater rights for the accused than its civilian justice counterpart, as to the nature of the suspected offense, the right to remain silent (any statement made could be used), the right to consult an attorney prior to, and right to have an attorney present during, questioning, and the right to representation throughout the process. (U.S.C. §§ 830-876a).

## Types of Enforcement of the UCMJ

The service member's first education about the system of military justice and enforcement of the UCMJ often comes in the form of leadership that one encounters in his or her unit or command. Those in positions of military leadership first embody good order and discipline, as well as efficiency and effectiveness in performing his or her duties and thereby teach others proper conformity to the rules. Non-commissioned officers are held at a higher standard than lower enlisted personnel, and so on, up to the commanding officers, who are held at the standard of exhibiting the highest level of leadership to the personnel who are subject to them.

When an alleged offense occurs, the commanding officer considers the avenues of enforcement of the UCMJ that will allow solving the problem at the lowest level possible. This includes non-punitive enforcement called Non-Judicial Punishment (NJP), also known as an "Article 15." Under Article 15, pay reduction to a rank below the service member's current level, extra duties, and restrictions (*e.g.*, house arrest) may be given. If the Article 15 is "summarized" (or delivered by an officer at a lower level), the service member does not

ject 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, and shall be punished at the discretion of that court. (10 U.S.C. § 934)

Thus, many actions that may not be against criminal law under the civil system of justice do constitute criminal behavior under the UCMJ. Any action with an end result against, or negative to, the purpose of any of the armed forces, therefore, is an action to be punished under military law. For example, upon their arrival at a military installation on Guam, all personnel are told that at 13° latitude, they will get sunburned, with a possibility of second-degree burns. They are duly advised, then, that if a sunburn keeps them from being fit for duty, it

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**The UCMJ and MCM are consistently maintained to keep up with the changes that occur in the body of the armed forces. The organizations that govern those modifications are each service's Court of Criminal Appeals, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court.**

have a right to an attorney during the process. If the Article 15 is "formal," the service member has the right to consult with a lawyer, but the process culminates in a formal administrative record and has potential for a more significant punishment. See 10 U.S.C. § 815.

The administrative approaches available include oral and written counseling and reprimands and corrective training. Other administrative actions given a service member for unauthorized or non-allowable behaviors include placing a bar against his or her reenlistment and even withholding benefits and privileges. Under some circumstances, administrative separations are given to enlisted personnel. Article 15s are subject to appeal to the next superior commander (or the officer one step above the officer who gave the NJP). The appeal includes a hearing, after which the appellate authority may hold that the punishment given in the NJP is approved, mitigated, remitted, suspended, or set aside. (10 U.S.C. § 864(c).)

Should the impact of the offense on the victim, or to the command, service, or nation warrant, the appropriateness of punitive discharge or long-term confinement and the level of court-martial are taken into account. There are three types of courts-martial in the military justice system: general, special or summary.

A military defendant may request a general court-martial, the highest of the three courts-martial, limited to a military judge alone (likened to a trial by court for civil justice) or a trial by member (which is like a trial by jury). If the military judge does not approve of hearing the case solo, the general court-martial consists of a military judge and not fewer than five court members.

A special court-martial is made up of at least three members, as is a civil trial heard by a panel of judges. It may also consist of a military judge and at least three members, or, if requested by the military defendant and the judge allows, the military judge alone.

A summary court-martial, the lowest of the three types of courts-martial, is composed of only one commissioned officer. (10 U.S.C. § 816)

## Changes to the Law of the Military Justice System

The laws that regulate military justice do not create a stagnant system. The UCMJ and MCM are consistently maintained to keep up with the changes that occur in the body of the armed forces. The organizations that govern those modifications are each service's Court of Criminal Appeals, the U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court. Three other sources of change to the UCMJ and MCM are the ABA's Standing Committee on Armed Forces Law, the Joint Service Committee on Military Justice, and the "Code Committee" (see 10 U.S.C. § 946), which make an annual, comprehensive survey of the cases and law affected by the statutes.

Two of the most recent substantial changes to the UCMJ and MCM became law January 3, 2003. (See JAMGRAM - New UCMJ Changes dated January 3, 2003, at [www.au.af.mil/au/awc/awcgate/awclaw.htm#ucmj](http://www.au.af.mil/au/awc/awcgate/awclaw.htm#ucmj)). First, the new requirement for court-martial for capital cases now necessitates a 12-member jury rather than the previous five members required in a general court-martial. Second, a new blood alcohol limit was set for drunken or reckless driving cases. This change allows for the adoption of the local standard set by the state in which the offense occurs for both cases of Driving Under the Influence and Driving While Intoxicated offenses.

These changes, brought about by the vigilance in maintaining the law of the military justice system, ensure that, according to resolution stated in the ABA's 2002 Standing Committee on Armed Forces Law Report to the House of Delegates, "the American system of military justice is fully capable of operating effectively and efficiently in peace and war, and is, in both appearance and reality, as fair and just a system as is feasible."

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