

**Secrets to Successfully
Defending the Accused in
A Military Court-Martial**

By

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Introduction

A military court-martial is one of the most serious events for any service member from any branch of the Armed Forces. At a minimum, a punitive discharge from a Special or General Court-Martial can leave a permanent stain on the service member's record and affect employment long after the service member has left the service. In worse case scenarios, service members can be sentenced to death. Yet, I find that most service members, regardless of rank or service, have very little understanding of what a court-martial is and what it is not. As the wheels of military justice begin to grind, people caught in those gears can be crushed.

But a conviction is not inevitable. In fact, there are inherent advantages an accused, the term used by the military to refer to the service member charged with a crime, has that gives him or her a greater chance of success than his or her civilian counterpart may have. One major advantage, which will be discussed in greater detail in Part V of this publication, is the right to retain experienced civilian counsel at no cost to the government.¹ The accused still retains his military detailed defense counsel², but what this means at a very practical level is that the accused can retained an experienced defense lawyer with decades more experience than the military lawyer detailed by the service. It also means the accused will have two attorneys, one military and the other civilian, to defend the accused.

Like a civilian court, the burden of proof required to convict a person accused of a crime is proof beyond a reasonable doubt. Attorneys for service members have the same rights to file motions and suppress evidence just as would happen in a civilian court. There is an added level of protection service members receive that civilian defendants do not, referred to as "Military Due Process"³. Military officers who serve as jurors tend to take their oaths seriously and are less likely to defer to the government than civilian jurors.

Understanding the differences between a military court-martial and a civilian trial and knowing how to maximize the court-martial process and the rights of the accused can be the key to a successful defense of charges before a court-martial.

¹ UCMJ Art. 38(b)(2), 10 U.S.C. 838(b)(2).

² UCMJ Art. 38(b)(4), 10 U.S.C. 838(b)(4).

³ See Rachel E. VanLandingham, *Military Due Process: Less Military & More Process*, 94 Tulane Law Review XX (2019). One example of military due process is the concept of "undue command influence" which permits the accused to file a motion to dismiss charges because a convening authority has attempted to influence the outcome of a court-martial. This concept will be discussed in greater detail later in this publication.

I. Understanding a Military Court-Martial and How it Differs from a Civilian Court.

Courts exist in all countries. In the United States, federal courts are created by Article III of the U.S. Constitution, and each state has a court system established by its own constitution. These courts are “standing courts”, meaning they are permanent courts. These courts hear all matters within their jurisdiction, which, again, is established by constitution or statute. For example, federal courts have “federal question jurisdiction” to hear violations of federal criminal statutes.⁴ Therefore, if a civilian violates a federal law and the U.S. Department of Justice decides to charge that person, the indictment will be filed in the appropriate federal court, and the defendant will be arraigned and tried before that court.

Military courts-martial are very different, however, and understanding those differences can be key in understanding how to win at trial.

To begin with, court-martial jurisdiction arises under Congress’ power to regulate “land and naval Forces”.⁵ Since the inception of the Republic, Congress has used this authority to create *ad hoc* courts to litigate cases as opposed to a separate judiciary. Certain senior officers in the services are designated as “convening authorities”⁶, and it these convening authorities that order courts-martial into existence for a limited period of time to hear cases that are referred to it. Significantly, convening authorities are not lawyers or judges, and they do not have legal training. Rather, they create courts-martial to ensure good order and discipline in the armed forces.

Therefore, unlike a U.S. District Court judge, who has spent a lifetime in the legal profession and has been appointed by the President with the consent of the Senate, the individual responsible for administering military justice is a senior officer whose primary concern is commanding soldiers, sailors, marines, or coast guardsmen in battle. To this officer, the trial of a service member is usually a distraction that competes for the officer’s attention with almost unlimited other tasks. This can be useful in attempting to negotiate a non-trial disposition of the case.

Superficially, a court-martial looks like a trial. There is a judge (called a military judge), a prosecutor (called trial counsel), a defense attorney (called defense counsel), and a jury (called members). However, the process by which a case enters the court-martial system is completely different from its civilian counterpart and will be explained in Section III below. The military judge is appointed to the court-martial by the convening authority and is usually a senior judge

⁴ 28 U.S.C. 1331.

⁵ Constitution, Art. 1. Sec. 8, Cl. 14.

⁶ A convening authority is an officer responsible for convening a court. The responsibilities of convening authorities are set for in UCMJ Arts. 22, 23, and 24, 10 U.S.C. 822, 823, and 824. If a court-martial is not properly convened, it lacks jurisdiction to try matters referred to it.

advocate assigned to a judicial office for a limited period of time, as opposed to a federal judge who is appointed by the President for a lifetime. Members of the court-martial are military officers or seniors who are assigned to court-martial by the convening authority and specially selected because of their experience; civilian jurors are random “peers” of the defendant. Civilian jurors must be unanimous in their verdict; military juries decide cases by a majority vote (usually a two-thirds’ vote).

In a military court, the verdict and sentence of a court must be approved by the convening authority who may alter the verdict or the sentence either by dismissing charges upon the accused has been convicted or reducing the sentence. In a civilian court, the judge may review and dismiss the charges of which the defendant has been convicted, but the judge alone imposes the sentence. The judgement and/or sentence of the civilian judge, however, is final and may only be appealed to a higher court.

Although the Rules for Courts-Martial (RCM) differ substantially from the Federal Rules of Criminal Procedure (FRCP), the Military Rules of Evidence (MRE) are very similar to the Federal Rules of Evidence (FRE). The presentation of evidence in a court-martial is therefore similar to the presentation of evidence in a civilian trial.

There are inherent strengths and weaknesses in both civilian courts and military courts-martial. Since military courts are *ad hoc*, they tend to lack the sophistication of civilian courts. This does not mean that the military does not prosecute the most serious criminal cases; they do. Murder is a crime under the UCMJ⁷, as are rape⁸, espionage⁹, and sedition¹⁰. Military courts-martial can also impose the death penalty under certain circumstances. What it does mean, however, is that the military sees these offenses less frequently than civilian courts and are therefore less prepared to try them.

II. Ordinary Crimes and Uniquely Military Crimes under the UCMJ.

The punitive articles of the UCMJ make all crimes known at common law military offenses, even some that would appear to have no modern relevance. For example, “dueling” is a crime under the UCMJ¹¹ even though no military officer seems to have been court-martialed

⁷ UCMJ Art. 118, 10 U.S.C. 918.

⁸ UCMJ Art. 120, 10 U.S.C. 920.

⁹ UCMJ Art. 103a, 10 U.S.C. 903a.

¹⁰ UCMJ Art. 94, 10 U.S.C. 894.

¹¹ UCMJ Art. 114, 10 U.S.C. 914.

for dueling since the early 19th Century, yet it lives on in the UCMJ. The reality is that if something is illegal in the civilian world, it will also be illegal under the UCMJ.

There are a number of offenses in the UCMJ, however, that apply only to service members and have no civilian counterpart. If a civilian who has taken a job far from home becomes tired of the job and leaves, there are no criminal repercussions for leaving. He or she may be fired, but that is about it. If a service member decides to leave his or her command and return home, the service member could be charged with desertion¹². The maximum punishment for desertion is five years, but if a service member deserts during time of war, the maximum punishment is death.¹³ Other offenses include missing movement¹⁴, disrespect to a superior¹⁵, failure to obey a lawful order¹⁶, misbehavior before the enemy¹⁷, cruelty and maltreatment¹⁸, and dereliction of duty¹⁹, just to name a few.

The UCMJ also has two general articles. Article 133 of the UCMJ prohibits all conduct that is “unbecoming of an officer”. The crime is very broad and has been held to cover such conduct as drunkenness, failing to pay a debt, cheating on an exam, lying in an official statement, and consorting with a known prostitute, although there is much wider range of conduct that could be considered unbecoming.

Article 134 of the UCMJ covers any conduct that is “service discrediting” or “prejudicial to good order and discipline”. Article 133 applied to commissioned and warrant officers of the services. Article 134 applies to enlisted members of the services. Both Articles 133 and 134 can result in charges punishable by many years of incarceration.

III. A Review of the Court-Martial Process.

¹² UCMJ Art. 85, 10 U.S.C. 885.

¹³ The last service member executed for desertion was a U.S. Army private named Eddie Slovik. Following a general court-martial where Private Slovik was convicted of desertion, he was sentenced to death. He was executed by firing squad on January 31, 1945.

¹⁴ UCMJ Art. 87, 10 U.S.C. 887.

¹⁵ UCMJ Art. 89, 10 U.S.C. 889.

¹⁶ UCMJ Art. 92, 10 U.S.C. 892.

¹⁷ UCMJ Art. 99, 10 U.S.C. 899.

¹⁸ UCMJ Art. 93, 10 U.S.C. 893.

¹⁹ UCMJ Art. 92, 10 U.S.C. 892.

There are three types of courts-martial in the military: summary courts-martial, special courts-martial, and general courts-martial. Of these, the summary court-martial is the most minor and affords the accused the fewest rights. Since a summary court-martial does not constitute a criminal conviction²⁰, it will not be discussed in this publication. The special court-martial is similar to a civilian misdemeanor court. Special courts-martial can impose sentences of up to one year's confinement and a bad conduct discharge.²¹ Special court-martial is the most common type of court convened in the military.

A general court-martial is the most serious type of court-martial and can impose the most serious sentences, including death, life in prison and a dishonorable discharge when authored as punishment for the offense charged.²²

Charges in the military are initiated or "preferred" when someone subject to the UCMJ signs and swears a charge sheet (a form document located in the Manual of Courts-Martial (MCM)²³. Once the charges have been properly sworn, they must be submitted to the accused's immediate commander who then serves the charges on the accused. Service of the charges on the accused begins the "speedy trial" clock. This is the time within which an accused must be brought to trial.

The decision to "refer" the charges to a court-martial rests with the "convening authority". The convening authority is an officer designated by the service Secretary as having either special court-martial convening authority (OESCMJ) (usually a commanding officer) or general court-martial convening authority (OEGCMJ) (usually a general or flag officer). The convening authority will decide whether to refer the case to a court-martial. Cases can only be referred to an existing court-martial, which the convening authority creates by separate order.

Before a case can be referred to a general court-martial, two intermediate steps are required before the case is referred to a court-martial. First, the charges must be referred to an officer for preliminary hearing, usually known as an Article 32 hearing. The hearing officer will ordinarily be a judge advocate and will conduct a hearing to determine:

1. Whether or not the specification alleges an offense under the UCMJ;
2. Whether or not there is probable cause to believe that the accused committed the offense charged;

²⁰ UCMJ Art. 20, 10 U.S.C. 820.

²¹ UCMJ Art. 19, 10 U.S.C. 819.

²² UCMJ Art. 18, 10 U.S.C. 818.

²³ R.C.M. 307 indicates that an accused must be brought to trial within 120 days of when the accused has been placed in pretrial confinement; however, there are numerous exceptions to the rule.

3. Whether or not the convening authority has court-martial jurisdiction over the accused and over the offense; and,

4. A recommendation as to the disposition that should be made of the case.²⁴

Following the completion of the hearing, the Article 32 officer is required to prepare a report summarizing the evidence and making a recommendation as to the possible disposition of the charges. The Article 32 officer can recommend referral to summary, special, or general court-martial or that the matter be referred for non-judicial punishment or dismissed entirely. These recommendations are only recommendations and the OEGCMJ may reject the recommendations, but advocacy at this early stage can greatly benefit the accused. An accused may also waive an Article 32 investigation.

When the Article 32 officer completes his or her report, the officer will forward the report and recommendation to the OEGCMJ where it will be reviewed by the Staff Judge Advocate.²⁵ The staff judge advocate is supposed to review the Article 32 officer's report and make recommendations as to whether the specifications allege an offense, whether there is probable cause to support the specifications, and whether the court-martial has jurisdiction over the offense. The Article 32 report and Article 34 advice are then forwarded to the OEGCMJ who will decide whether to refer the case to a court-martial and, if the case is referred, the type of court-martial that will hear the case.

Once the case is referred to a court-martial, it will proceed to trial as a civilian case would. However, both military and civilian cases are usually resolved by a plea bargain. In military cases, however, any limitation on sentences must be negotiated with the convening authority, not military judge, although the military judge must review the plea agreement to ensure its legality.²⁶

A military trial appears similar to a civilian trial with a few exceptions. First, there is no set maximum number of members, although a general court-martial must contain at least five members, and a special court-martial must have at least three members. If the accused is enlisted, he or she can request at least one third of the members be enlisted. All court-martial members must be senior to the accused. In order for an accused to be convicted, three-fourths of the members must vote guilty. This differs from civilian courts where a unanimous verdict is required.

²⁴ UCMJ Art. 32(a), 10 U.S.C. 832(a).

²⁵ UCMJ Art. 34, 10 U.S.C. 834.

²⁶ UCMJ Art. 53a, 10 U.S.C. 853a.

IV. Taking Advantage of the Government's Weaknesses in the Court-Martial Process.

It must be understood that the primary purpose of the military justice system is an *ad hoc* system of justice developed primarily to maintain good order and discipline within the military forces of the United States. Simply stated, the military exists to deter the adversaries of the United States, and, if that fails, to defeat and destroy any enemy. The focus of Commanders is, and should be on the training of military forces, the development of plans of doctrines, and the procurement of weapons systems. To many military commanders, military justice is a distraction.

In addition, the armed forces are in a continuous state of flux, often operating overseas in dangerous environments. Personnel transfer and leave the service to relocate anywhere in the United States. Convening authorities, staff judge advocates, investigators, and prosecutors transfer from duty station to duty station or leave active duty. This wreaks havoc on the investigative progress and makes prosecution more difficult. There simply may not be the resources to locate a witness, or an investigator may transfer and his or her successor might not be as interested in pursuing a matter. It may be easier in these circumstances to convince a convening authority not to pursue a case.

The military also has a lower volume of serious crimes to begin with and repeat offenders and career criminals are unheard of. Without as much serious crime to deal with, military investigators rarely have the opportunity to develop the expertise their civilian counterpart might have.

This lack of experience results in mistakes being made. An inexperienced investigator is more likely to miss important pieces of evidence and may not be as good at interviewing witnesses as a more experienced investigator might be. This inexperience can leave holes in an investigation. The failure to follow up on another potential suspect or to interview everyone who might have knowledge of an event can be fatal to the government's case.

When it comes to actually trying a case, there is no substitute for experience. While there are many excellent military lawyers, there are few, if any, that have the experience of a seasoned, civilian trial lawyer. It used to be said that an attorney had to try twenty-five jury trials before he or she began to feel comfortable in a courtroom. The more trials an attorney has tried; however, the more comfortable that attorney becomes in court. The accused in a court-martial has the ability to retain very experienced, former-military, civilian counsel. The government does not.

Understanding these inherent weaknesses is important in developing a successful defense strategy.

V. Maximizing The Rights of an Accused in a Court-Martial.

The accused has greater rights than a civilian criminal defendant under the UCMJ, the Rules for Court-Martial, and the Manual of the Judge Advocate General. There is one right,

however, that is paramount, and that is the right to counsel under the UCMJ. In the civilian world, indigent defendants have the right to counsel, frequently an overworked public defender, if they do not have the ability to hire private counsel. In the military, the accused has an absolute right to detailed defense counsel regardless of his or her ability to retain counsel.²⁷

The accused also has the absolute right to retain civilian counsel, and if the defendant retains civilian counsel, the accused is still entitled to the services of detailed defense counsel.²⁸ This means that the accused is able to be represented by an attorney who wears a uniform and an experienced civilian defense counsel simultaneously. Usually, the two attorneys will form a strong team and give the accused the best chance at a positive outcome.

When would someone want to use a civilian defense counsel? The better question is why wouldn't a service member want to use a civilian defense counsel? A civilian defense counsel is free from the military chain of command and does not have to be concerned with a future military career. The civilian defense counsel will be a more experienced criminal defense counsel than detailed defense counsel and, in many cases, will have vastly more experience.

Of course, cost might be a factor. Retaining the best civilian criminal defense attorney available can be expensive, but probably not nearly as expensive in the long run as the cost of a general court-martial conviction. The effects of a court-martial conviction are life altering. They entail a loss of freedom, a criminal conviction on one's record, forfeitures and fines, and a punitive discharge (either a dishonorable discharge or bad conduct discharge). Even after being released from custody and discharged from the military, the effects of a court-martial affect employability and income for decades.

The other reason why service members do not hire civilian defense counsel is because they believe that civilians do not understand the military and therefore will not be able to assist them properly. The military has a certain culture, and any civilian counsel retained by an accused needs to understand that culture. A defense counsel used to practice in an intercity jurisdiction may not come across as well to a panel of college-educated officers. However, a civilian attorney with former military practices will understand the military culture and be able to connect with the court-martial.

It is noteworthy that in nearly all courts-martial where general or flag officers are accused of violating the UCMJ, they are defended by highly qualified civilian defense counsel. In most high-profile cases, the accused will retain civilian defense counsel. The right to counsel is the greatest right afforded to any American under the Constitution. It is among the greatest safeguards for ensuring that someone accused of a crime is not wrongfully convicted. In the

²⁷ UCMJ Art. 27, 10 U.S.C. 827. Detailed defense counsel must be a member of the bar of the highest court in a state or be a member of a federal bar and be certified as competent by the Judge Advocate General of the Service.

²⁸ UCMJ Art. 38, 10 U.S.C. 838. The UCMJ does not define "civilian counsel".

military, Congress has sought to reenforce that right by providing a right to both a military lawyer at no cost to the accused and to a civilian lawyer of the accused's own choosing. It would not make sense to forgo this right.

Conclusion

A court-martial is a life-altering event, but a conviction is not inevitable. Of course, every case is different. There is no "one size fits all" for defending a court-martial or any other criminal case for that matter. However, a court-martial provides an excellent forum for the defense of someone accused of a crime. The manner in which charges are investigated in the military often leaves substantial unanswered questions. These questions, combined with a defense investigation, can lead to a defense verdict. In fact, we have had cases withdrawn by the convening authority before trial because of an inadequate investigation.

As fair as the court-martial system is, however, the military defense counsel is part of the military and subject to at least subtle pressure in some circumstances. Fortunately, Congress has provided a role for civilian defense counsel in order to counteract this concern. Civilian counsel can also bring substantial expertise and experience to a case; experience and expertise are frequently lacking in military defense counsel. This is not to suggest that there is anything wrong with military defense counsel. To the contrary, they are almost uniformly excellent young attorneys. They simply lack the experience that may be useful in more serious and complex cases.

The secret to success in a court-martial is simple: understand the system, be prepared to take advantage of the weaknesses inherent in the military justice system and utilize the rights available to the accused under the UCMJ. This is only the beginning, however. Every case is different, and another secret to success is understanding the facts of the case better than the investigators and the government. This is not a secret unique to courts-martial. It applies in every trial, including courts-martial.

The most important point to remember above all else is that courts-martial can be won.