

Judicial Review of Courts-Martial in Historical Perspective

**Panel Discussion:
75 Years of the Uniform Code of Military Justice**

**U.S. Court of Appeals for the Armed Forces
Continuing Legal Education and Training Program
May 15, 2025**

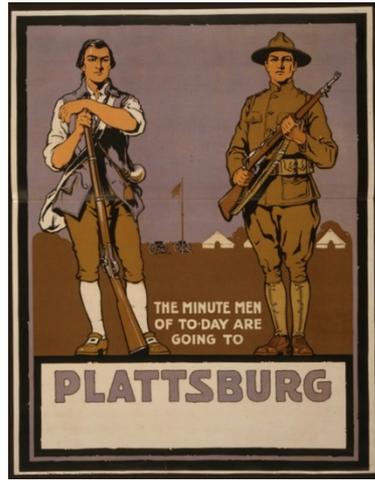
The UCMJ At 75

Looking Back Before We Look Ahead

1950-1951

- The UCMJ transformed appellate review in the military justice system from a process that utilized advisory opinions to a system based upon the issuance of binding judicial decisions.
- The implementation of the broad range of reforms under the UCMJ – including the new system of judicial appellate review – also required addressing the challenge of managing the transition during the unanticipated outbreak of large-scale war – the conflict in Korea, which began in June 1950, the month after the UCMJ was signed into law.

1775 1950



UCMJ (enacted 1950)

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**Uniform Code of Military
Justice (1946-1951)**

Uniform Code of Military Justice (1946-1951)

The Uniform Code of Military Justice (UCMJ) took effect in 1951 and the foundation for military law in the United States. Included here are the precursor studies, the Elston Act, and the papers of Edmund M. Morgan, the chair of the committee to draft the new UCMJ.

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Enactment of the UCMJ

Public Law 81-506, 64 Stat 107, 81st Cong. 2d Sess., May 5, 1950

[107]

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[CHAPTER 169]

AN ACT

To unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice.

May 5, 1950
[H. R. 4080]
[Public Law 506]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a Uniform Code of Military Justice for the government of the armed forces

Uniform Code of
Military Justice.

108

PUBLIC LAWS—CH. 169—MAY 5, 1950

[64 STAT.

Citation of articles.

of the United States, unifying, consolidating, revising, and codifying the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, is hereby enacted as follows, and the articles in this section may be cited as “Uniform Code of Military Justice, Article ”.

UNIFORM CODE OF MILITARY JUSTICE

* * * * *

I have today approved H.R. 4080 which establishes a Uniform Code of Military Justice equally applicable to all of the Armed Forces of the United States in time of war and peace.

It is particularly appropriate that this Uniform Code of Military Justice should be enacted on the eve of the First Armed Forces Day. The Code is one of the outstanding examples of unification in the Armed Forces and is tangible evidence of the achievements possible by the coordinated teamwork of the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard.

Under the provisions of this uniform and modern Code, the democratic ideal of equality before the law is further advanced.

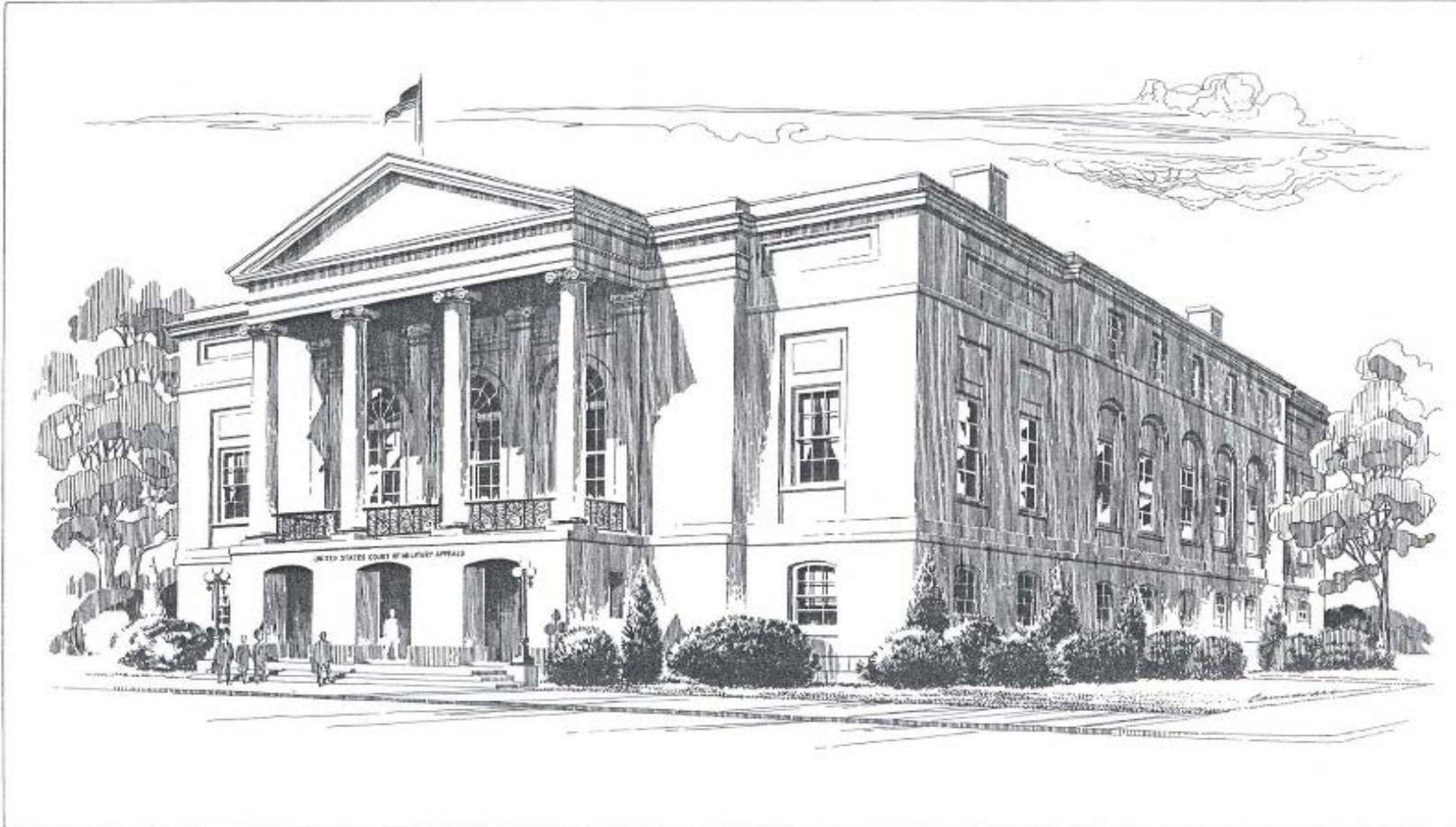
It has given me great pleasure, therefore, to sign H.R. 4080. I compliment the members of the Department of Defense committee who drafted this

The Evolution of Judicial Review Under the UCMJ Overview

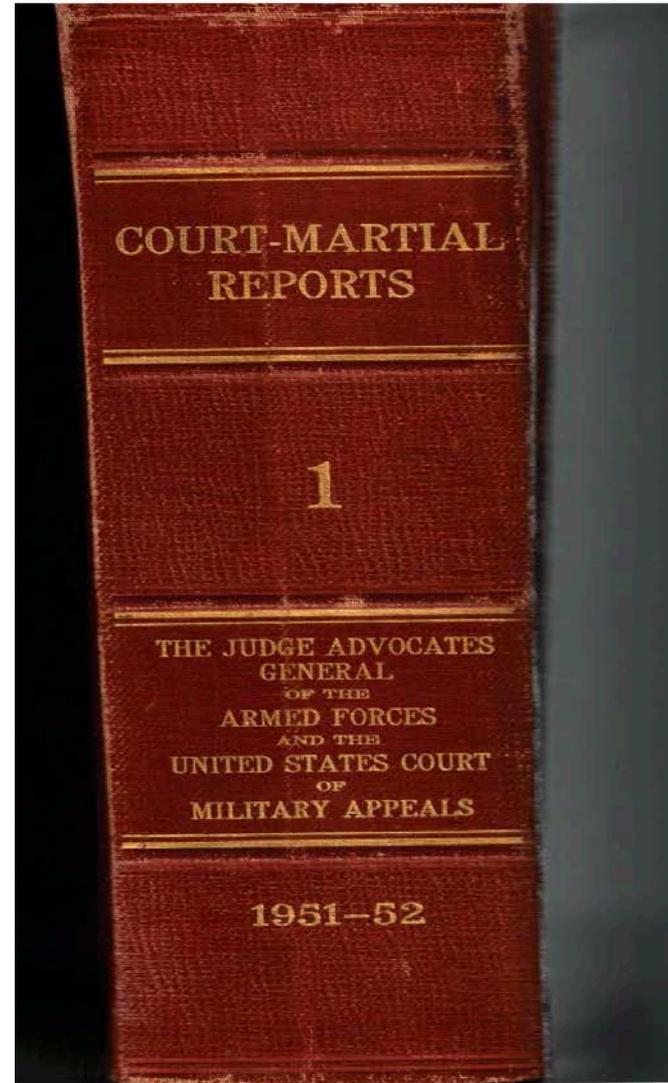
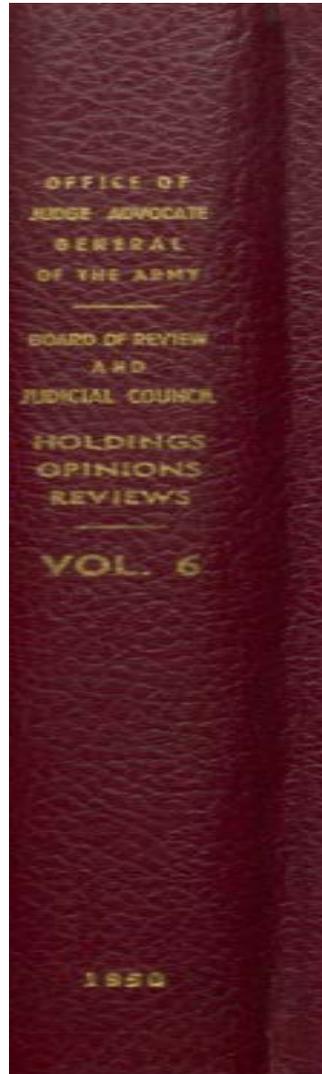
Here's a brief summary of the topics that we'll consider during this portion of today's panel presentation.

- The operational plans and actions undertaken during the one-year period between enactment of the UCMJ on May 5, 1950, and the effect date of the legislation on May 31, 1951, focusing on the steps that enabled the Court to fulfill the intent of Congress to establish the judicial character of appellate review under the UCMJ.
- Selected issues presented to the Court of Military Appeals during the first year of the Court's operation.
- Subsequent statutory changes in the judicial appellate review process.
- Appellate consideration of the relationship between the UCMJ and the Constitution.
- Appellate consideration of the relationship between the UCMJ and other federal statutes.
- The relationship between the Supreme Court and the appellate courts under the UCMJ.

The unique challenge of implementing a new appellate review process in a new court in the midst of an unanticipated wartime environment.



1950-1952



Implementation of Appellate Review at the Court of Military Appeals

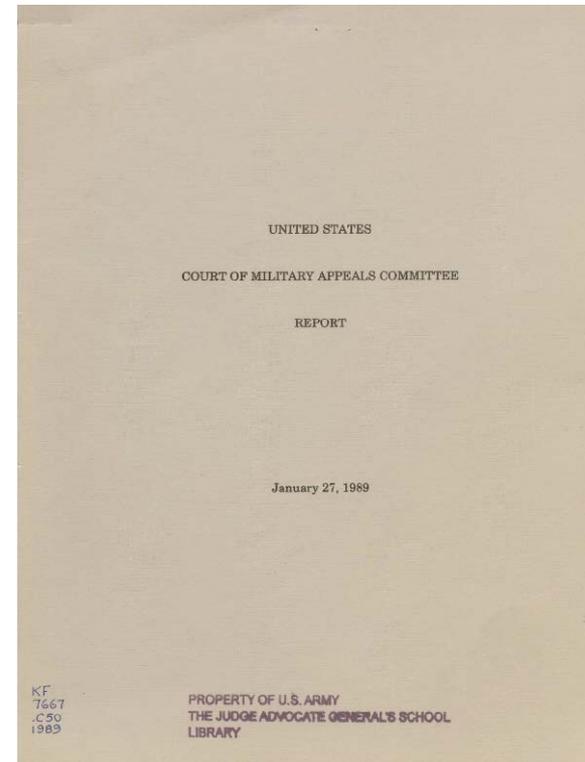
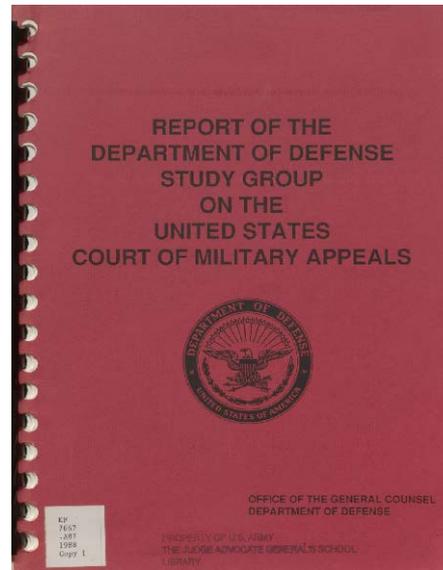
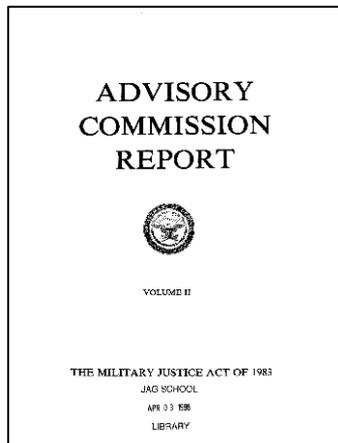
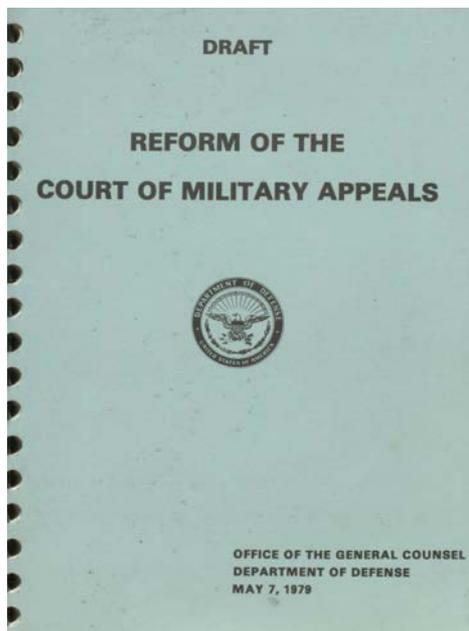


Judge Latimer

Chief Judge Quinn

Judge Brosman

1979-1989 – A Decade of Analysis and Debate



- <https://tile.loc.gov/storage-services/service/II/IImlp/Reform-Court-Mil-Appeals/Reform-Court-Mil-Appeals.pdf>
- <https://tile.loc.gov/storage-services/service/II/IImlp/ACR-1983-I/ACR-1983-I.pdf>
- <https://tile.loc.gov/storage-services/service/II/IImlp/ACR-1983-II/ACR-1983-II.pdf>
- <https://www.loc.gov/item/2021700503/>
- <https://tile.loc.gov/storage-services/service/II/IImlp/Court-Military-Appeals-Comm-Report-1989/Court-Military-Appeals-Comm-Report-1989.pdf>

Congressional Focus on Judicial Review

Selected Examples of UCMJ Changes in the last 75 years

- Transformation of appellate review, from the initial coverage of a limited segment of general courts-martial, into a system that provides broad opportunities for the parties in all levels of courts-martial to seek judicial review of trial and appellate decisions, as well as a variety of interlocutory matters. (e.g., Arts. 62, 66, 67).
- Transformation of the Boards of Review into the Courts of Criminal Appeals with broad jurisdiction over courts-martial and tenure defined by regulations (e.g., Art. 66).
- Transformation of the law officer into a military judge with judicial authority over the pretrial proceedings, the trial on the merits and sentencing, and tenure provided by regulations (e.g., Arts. 26, 30a, 39, 51, 53, 56).
- Transformation of the Court of Military Appeals into the U.S. Court of Appeals for the Armed Forces established under Article I of the Constitution with 5 judges, full 15-year terms, rotation in the position of Chief Judge, a judicial retirement system, and direct review by the Supreme Court (e.g., Arts. 67a, 141-145)

Judicial Review of the Military Justice System

Selected Topics

- In the beginning - the Court of Military Appeals and the Constitution
- The statutory authority conferred upon “courts established by Act of Congress”
- Collateral review of military justice decisions
- The relationship between the Supreme Court and appellate review of military judge decisions

The Court of Military Appeals and the Constitution

- The Henderson-Wiener Debate
 - Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957)
 - Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1 (1958)..... [Part II]... 72 Harv. L. Rev. 266 (1958).
- United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951)
 - “Military due process”
- United States v. Sutton, 3 USCMA 220, 11 CMR 220 (1953)
 - The relationship between statutory and constitutional provisions
- United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960)
 - Statutory interpretation in a constitutional context – the new test
- United States v. Tempia, 16 U.S.C.M.A 629, 37 C.M.R. 249 (1967)

... and a few words from the Supreme Court *Parker v. Levy*, 417 U.S. 733 (1974)

- Nature of Levy's duties and relationship to the charged offenses
- Substantive offense at issue before the S.Ct.
 - Compare to consideration of similar conduct by a person not subject to the UCMJ
- Constitutional issues in the case
- Non-constitutional issues
- The standard of review established in *Parker v. Levy*
- Additional background: Robert N. Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 Wis. L. Rev. 839

The statutory authority conferred upon “courts established by Act of Congress” . . .

Article I Courts in an Article III World

- United States v. Dubay, 17 C.M.A. 147, 37 C.M.R. 411 (1967).
 - Effron, *UNITED STATES V. DUBAY and the Evolution of Military Law*, 207 Mil. L. Rev. 1, (2011).
- Noyd v. Bond, 395 U.S. 683 (1969); United States v. Noyd, 18 U.S.C.M.A. 483, 50 C.M.R. 195 (1969)
- Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982)
- United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988)
- ABC, Inc. v. Powell, 47 M.J. 363 (C.A.A.F. 1997)
- Clinton v. Goldsmith, 526 U.S. 529 (1999)
- United States v. Denedo, 556 U.S. 904 (2009)

Collateral review of military justice decisions

Article III Judges in an Article I World:

Collateral Review

- Collateral review in the era following enactment of the UCMJ.
 - *Burns v. Wilson*, 346 U.S. 137 (1953)
 - Richard D. Rosen, *Civilian courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 Mil. L. Rev. 5 (1985)
 - *Jurisdiction and Ability of Federal Court to Grant Writ of Habeas Corpus in Proceeding Concerning United States Citizen Detained or Allegedly Constructively Detained by United States Military*, 22 A.L.R. Fed. 2d 1
 - Varying standards used by courts outside the military justice system when reviewing court-martial cases

... Collateral Review ...

- Application of the full and fair consideration test by the Art. III federal courts of appeals in court-martial cases – selected examples:
 - *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975): The four-part version of the full and fair consideration test; applicable to constitutional errors and fundamental non-constitutional errors amounting to a miscarriage of justice.
 - *Roberts v. Callahan*, 321 F.3d 994 (10th Cir. 2003): the four parts as factors rather than a set of separate gates.
 - *United States ex rel. New v. Rumsfeld*, 448 F.3d 403 (D.C. Cir. 2006): suggesting broad application of the tests and factors rather than fine gradations.
- Example of internal collateral review: *Loving v. United States*, 62 M.J. 235 (C.A.A.F. 2005); 64 M.J. 132 (C.A.A.F. 2006) 68 M.J. 1 (C.A.A.F. 2009) (collateral review within the military justice system prior to final approval of the sentence)

The Supreme Court and appellate review of military justice decisions

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Article I Courts in an Article III World

Ortiz v. United States, 138 S.Ct. 2156 (2018)

- The road to the Supreme Court
 - Trial, CCA, and USCAAF developments (consolidated cases)
- Issues at the Supreme Court
 - Appellate jurisdiction
 - Judicial disqualification

Judicial Review of the Military Justice System

The Court, an independent tribunal established under Article I of the Constitution, . . . regularly interprets federal statutes, executive orders, and departmental regulations. The Court also determines the applicability of constitutional provisions to members of the armed forces. Through its decisions, the Court has a significant impact on the state of discipline in the armed forces, military readiness, and the rights of servicemembers. The Court plays an indispensable role in the military justice system.

Appendix - Selected Resources

- Gerald F. Crump, Part I: A History of the Structure of Military Justice in the United States, 1775-1920, 16 A.F. L. Rev. 41 (1974); Part II: ... 1921-1966, 17 A.F. L. Rev. 55 (1975)
- Department of Defense, Report of the Military Justice Review Group, Part I... (2015), pp. 41-86 (Historical Perspective: Summary of Structural Changes in the Military Justice System) <https://ogc.osd.mil/Links/Military-Justice-Review-Group/>
- Andrew S. Effron, The Fiftieth Anniversary of the UCMJ: The Legacy of the 1948 Amendments, The Reporter [U.S. Air Force], December 2000, at 3.
- Andrew S. Effron, United States v. DuBay and the Evolution of Military Law, 207 Mil. L. Rev. 1 (2011).
- William F. Fratcher, Appellate Review in American Military Law, 14 Mo. L. Rev. (1949)
- Frederic I. Lederer, The Military Rules of Evidence: Origins and Judicial Implementation, 130 Mil. L. Rev. 5 (1990)
- Jonathan Lurie, Arming Military Justice: The Origins of the United States Court of Military Appeals, 1775-1950 [Vol. I] (Princeton University Press 1992).
- Jonathan Lurie, Pursuing Military Justice: The History of the United States Court of Appeal for the Armed Forces, 1951-1980 [Vol. II] (Princeton University Press 1998).
- Richard D. Rosen, Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial, 108 Mil. L. Rev. 5 (1985)
- David A. Schlueter, The Court-Martial: An Historical Survey, 87 Mil. L. Rev. 129 (1980)
- U.S. Court of Appeals for the Armed Forces brochure
<https://www.armfor.uscourts.gov/newcaaf/library/brochure.pdf>