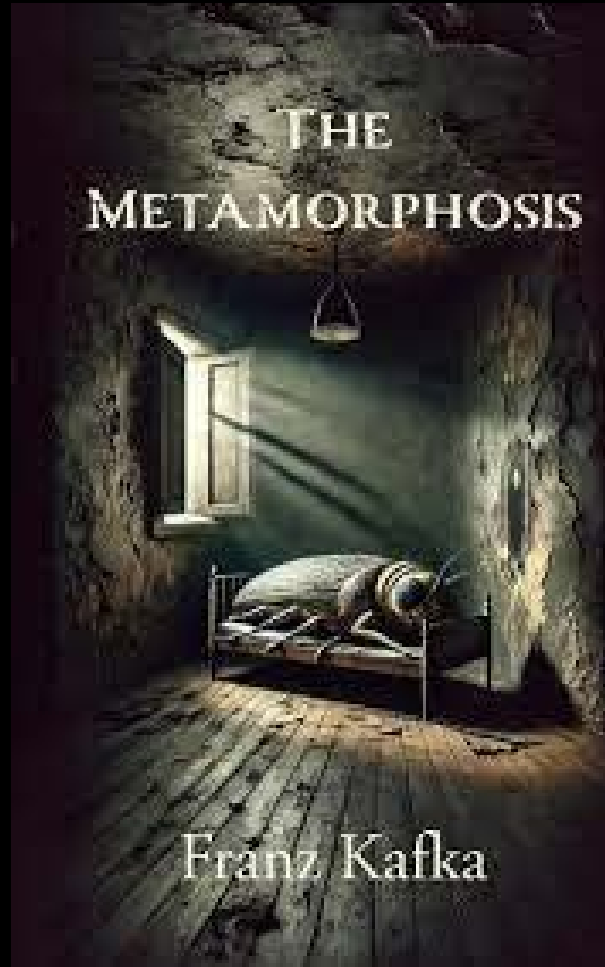


MILITARY JUSTICE METAMORPHOSIS 2013—?

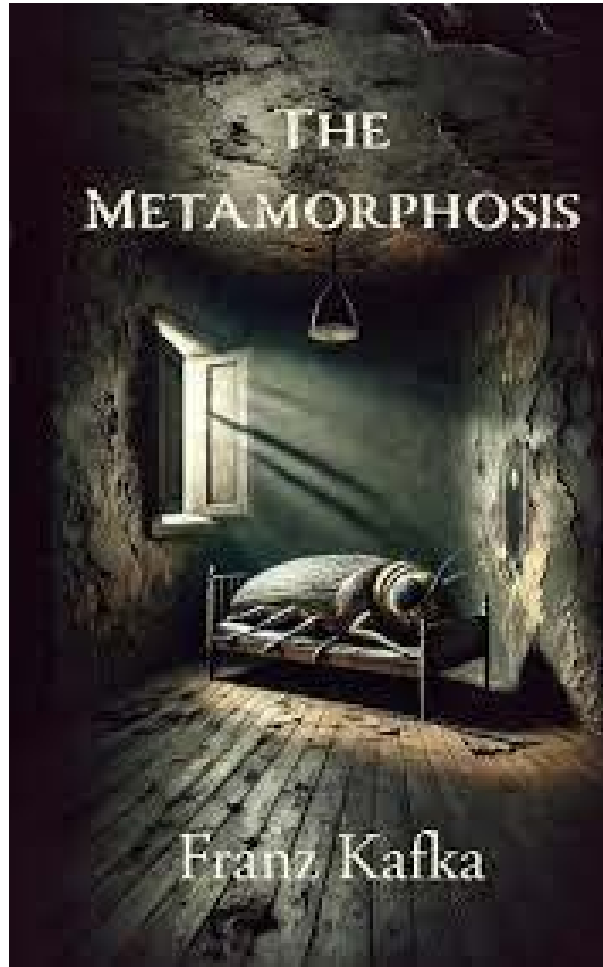
DISCLAIMER

MILITARY JUSTICE METAMORPHOSIS

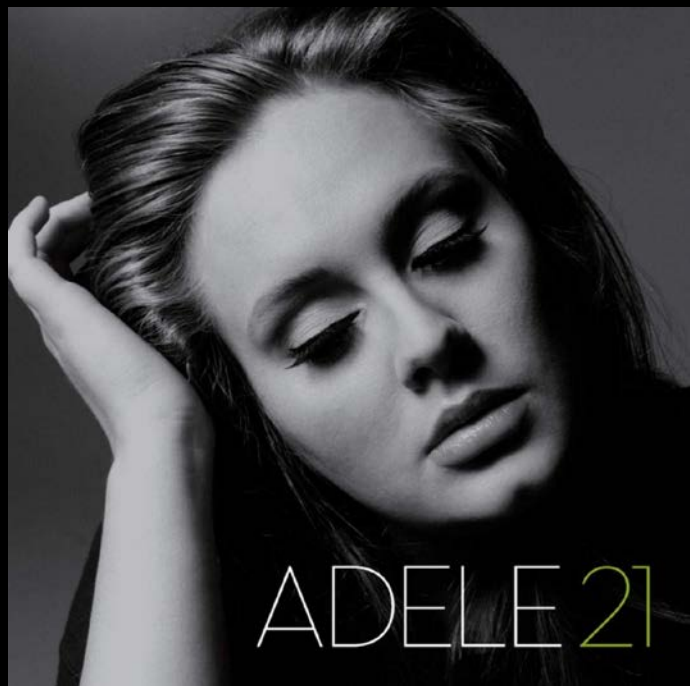
Metamorphosis



Metamorphosis



2012



2012

Court-Martial Forums

GCM—variable number of members not less than 5

SPCM—variable number of members not less than 3

No such thing as a short-martial

SPCMs with members but no military judge were sometimes used

Article 32 pretrial investigations: no prohibition against calling an alleged victim who is a service member; Article 32 was recognized as a discovery device for the defense

2012

Disposition of alleged offenses

Special trial counsel didn't exist

Only a convening authority could refer charges to trial

Only a convening authority could enter into a pretrial agreement for the government

A convening authority had unfettered discretion to set aside findings and reduce the sentence

2012

Victims' rights

There was no such thing as a special victims' counsel/victims' counsel/victims' legal counsel

UCMJ art. 6b didn't exist

2012

Military Rules of Evidence

The psychotherapist-patient privilege rule included an exception applying “when admission or disclosure of a communication is constitutionally required”

2012

Court-Martial Sentencing

The findings authority also adjudged the sentence

All sentencing was unitary; no segmented sentencing

No sentencing parameters or criteria

2012

Appeals

A CCA had a sua sponte duty to perform a factual sufficiency review in every contested case

A special or general court-martial conviction for which the sentence did not include death, a punitive discharge, or a year or more of confinement could be heard by a CCA only upon referral by a Judge Advocate General (which almost never happened)

The Supreme Court had no statutory certiorari jurisdiction over direct appeals in which CAAF denied the petition for grant of review or extraordinary relief cases in which CAAF denied relief



January 28, 2013:
Air Force Special Victims' Counsel
program launched

Secretary of Defense
Hagel directed
establishment of special
victims' counsel programs
for all DoD military
services

August 14, 2013



National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013)

- § 1701 – enacted UCMJ art. 6b (victim rights' statute)
- § 1702(a) – changed Article 32 “pretrial investigation” into a “preliminary hearing” with limited scope and no ability to compel testimony from an alleged victim
- § 1702(b) – eliminated convening authorities' power to set aside findings and reduce the sentence except pursuant to a pretrial agreement in most cases
- § 1705 – mandated dismissal or dishonorable discharge for penetrative sexual assault convictions



National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013)

- § 1716 – enacted 10 U.S.C. § 1044e (special victims' counsel statute)
- § 1744 – requirement for higher-level reviews of decisions not to refer charges of alleged penetrative sexual assaults



Military Justice Review Group

Report of the Military Justice Review Group

Part I: UCMJ Recommendations



December 22, 2015

Military Justice Act of 2016, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, Division E, 130 Stat. 2000, 2894–968 (2016)

- Modernized UCMJ's punitive articles
- Fixed the number of court-martial members at 4/8/12 – established $\frac{3}{4}$ as vote required for conviction
- Eliminated no-judge SPCMS/created the short-martial
- Took incremental steps toward MJRG's recommended sentencing reform and appellate reform; subsequent NDAAs would complete the job





Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military



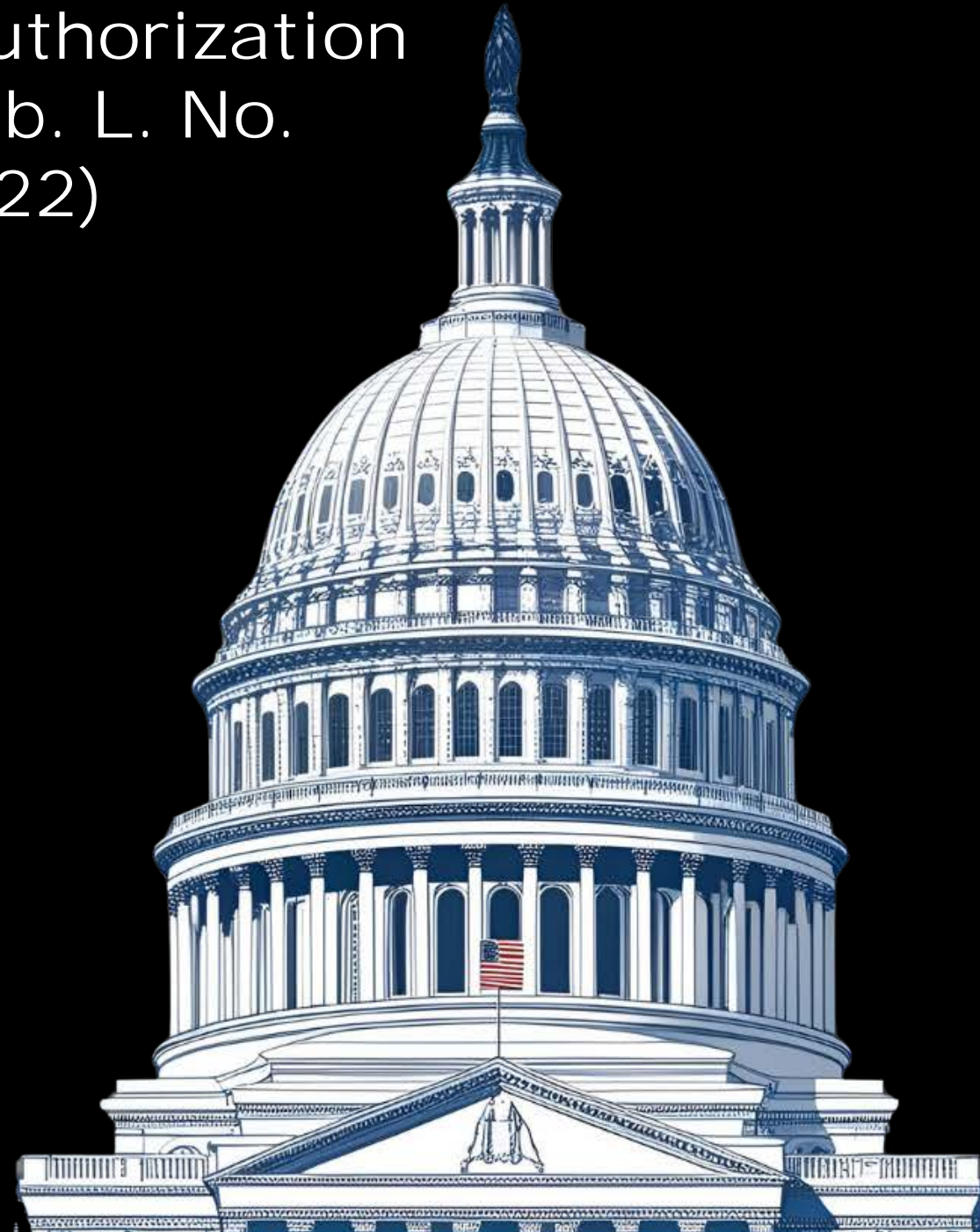
A detailed blue and white line drawing of the United States Capitol dome, showing its iconic architecture with the rotunda, columns, and the Statue of Freedom on top. The dome is set against a solid black background.

National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021)

- § 531 – created special trial counsel and transferred CA's referral authority over "covered offenses" to them
- § 539D – required President to prescribe sexual harassment as an enumerated Article 134 offense
- § 539E – reformed military sentencing system

James M. Inhofe Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022)

- § 544 – made every general and special court-martial resulting in a finding of guilty eligible for review by the applicable Court of Criminal Appeals



National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, 137 Stat. 138 (2023)

- § 533 Expanded SCOTUS certiorari jurisdiction to petitions for grant of review and petitions for extraordinary relief that CAAF denies



Ortiz v. United States,
585 U.S. 427 (2018)

“The procedural protections afforded to a service member are ‘virtually the same’ as those given in a civilian criminal proceeding, whether state or federal.”





Ortiz v. United States,
585 U.S. 427 (2018)



Ortiz v. United States,
585 U.S. 427 (2018)

General and special courts-
martial



What of summary courts-martial and nonjudicial punishment?

Military Justice Act of 2016, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, Division E, 130 Stat. 2000, 2894–968 (2016)

- § 5141 eliminated confinement on bread and water or diminished rations as an authorized nonjudicial punishment for those attached to or embarked on vessels
- § 5164 – amended UCMJ art. 20 to provide: “(b) NON-CRIMINAL FORUM.— A summary court-martial is a non-criminal forum. A finding of guilty at a summary court-martial does not constitute a criminal conviction.”





Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems

August 31, 2022

Presidential Documents

Executive Order 14130 of December 20, 2024

2024 Amendments to the Manual for Courts Martial, United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946a), and in order to prescribe additions and amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473 of April 13, 1984, as amended, it is hereby ordered as follows:

Section 1. Part II, Part III, Part IV, and Part V of the Manual for Courts-Martial, United States, are amended as described in the Annex attached to and made a part of this order.

Sec. 2. With this order, I hereby prescribe regulations for the randomized selection of qualified personnel as members of a court-martial to the maximum extent practicable, pursuant to section 543 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Public Law 117–263 (10 U.S.C. 825(e)(4)).

Sec. 3. Except as provided in sections 4 and 5 of this order, these amendments shall take effect on the date of this order, subject to the following:

(a) Nothing in these amendments shall be construed to make punishable any act committed or omitted prior to the date of this order that was not punishable when committed or omitted.

(b) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action begun prior to the date of this order, and any such nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

Sec. 4. The amendments to Rule for Courts-Martial (R.C.M.) 908(c)(3), R.C.M. 1205(a), and R.C.M. 1209(a)(1) shall take effect on December 22, 2024, subject to the following:

(a) Nothing in these amendments shall be construed to make punishable any act committed or omitted prior to the effective date that was not punishable when committed or omitted.

(b) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action begun prior to the effective date, and any such nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

Sec. 5. The amendment to R.C.M. 503(a)(1) shall take effect on December 23, 2024, subject to the following:

(a) Nothing in this amendment shall be construed to make punishable any act committed or omitted prior to the effective date that was not punishable when committed or omitted.

(b) Nothing in this amendment shall be construed to invalidate any nonjudicial punishment proceeding, restraint, preliminary hearing, referral of

(II) A petition for a writ of certiorari is denied or otherwise rejected by the Supreme Court; or

(III) Review is otherwise completed in accordance with the judgment of the Supreme Court.”

(hh) R.C.M. 1301(a) is amended to read as follows:

“(a) *Composition*. A summary court-martial is composed of one commissioned officer on active duty. Unless otherwise prescribed by the Secretary concerned, a summary court-martial shall be of the same armed force as the accused. Summary courts-martial shall be conducted in accordance with the regulations of the military Service to which the accused belongs. Whenever practicable, a summary court-martial should be an officer whose grade is not below lieutenant of the Navy or Coast Guard or captain of the Army, Marine Corps, Air Force, or Space Force.”

(ii) R.C.M. 1301(e) is amended to read as follows:

“(e) *Counsel*. The accused at a summary court-martial has a right to military defense counsel. The accused may expressly waive the right to be represented by defense counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the summary court-martial officer only upon finding that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.”

(jj) R.C.M. 1302(a) is amended to read as follows:

exist.”

(n) Paragraph 95.c.(11) is amended to read as follows:

“(11) Visual depiction includes any developed or undeveloped photograph, picture, film or video; any digital or computer image, picture, film or video made, adapted, modified, or generated by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image.”

(o) Paragraph 95.c.(10)(e) is amended to read as follows:

“(e) lascivious exhibition of the anus, genitals, or pubic area of any person.”

Section 4. Part V of the Manual for Courts-Martial, United States, is amended as follows:

A new paragraph 2A is inserted immediately after paragraph 2 to read as follows:

“2A. Right to consult with counsel

a. *Consultation before nonjudicial punishment proceeding.* Unless precluded by military exigencies, Servicemembers have the right to consult with counsel prior to the decision by the Servicemember under paragraph 4.b. of this Part.

b. *Consultation after nonjudicial punishment is imposed.* Servicemembers have a right to consult with counsel regarding an appeal under Paragraph 7.a. of this Part.

c. *No unreasonable delay.* The exercise of this right to consult shall not unreasonably delay the proceedings.”

Military justice
metamorphosis driven by
congressional and
presidential actions **not**
by judicial decisions

Military justice
metamorphosis driven by
congressional and
presidential actions **not**
by judicial decisions

Contrast that with the
Fletcher era

Another, less visible
systemic change has also
occurred

Another, less visible
systemic change has also
occurred

Driven by military
commanders

Endangered Species

Endangered Species



Endangered Species



Endangered Species



Endangered Species



**SUMMARY
COURT-MARTIAL**

FY 2024

DoD military services combined
tried 146 summary courts-martial

FY 2024

DoD military services combined
tried 146 summary courts-martial

FY 2012

DoD military services combined
tried 1,329 summary courts-martial

General and Special Courts-Martial

