

CLE: The 75th Anniversary of the Uniform Code of Military Justice

Class Length: 120 minutes

Instructors: Andrew Effron, John Cooke, and Dwight Sullivan

Moderator: Moira Modzelewski

Event: U.S. Court of Appeals for the Armed Forces, CLE, May 15, 2025

Summary

This class is a panel discussion of the history of the Uniform Code of Military Justice on its 75th anniversary. The class has three segments. It begins with a presentation on judicial review of courts-martial, beginning in the pre-UCMJ era and moving into the reforms that followed World War II. Judge Effron will discuss the evolution of judicial review under the UCMJ, focusing on changes to the judicial structure, further legislative developments over the decades, and select U.S. Supreme Court cases involving review of decisions of the U.S. Court of Appeal for the Armed Forces. His substantive presentation will be followed by a question-and-answer dialogue with the moderator.

In the second segment, Mr. Cooke will discuss the evolution of the Manual for Courts-Martial (MCM): its historical antecedents from the 19th and early 20th centuries, the creation of the modern MCM in 1951, the President's authority to prescribe rules, the changes wrought by the Military Justice Act of 1968, important changes in 1984, and the evolution of the MCM from 1994 to the present. His substantive presentation will be followed by a question-and-answer dialogue with the moderator.

In the third segment, Mr. Sullivan will address the dramatic reforms to the UCMJ that began in 2013, including: the establishment of victims' counsel programs in each military service and the evolving expansion of victims' rights, the changes to Article 32 hearings, the curtailment of the power of convening authorities, mandatory sentences for certain sexual assault convictions, historic sentencing reforms, and the creation of the special trial counsel offices in each service. Among other topics, Mr. Sullivan will highlight the role of Congressional reforms in NDAA's spanning from 2014 through 2022, the importance of the Military Justice Act of 2016, the expansion of the jurisdiction of the Courts of Criminal Appeals and SCOTUS, and the challenges posed by a declining court-martial docket. His substantive presentation will also be followed by a question-and-answer dialogue with the moderator.

The class concludes with questions from the audience to the panel.

PART I

USCAAF 2025 Conference

Panel Discussion: 75th Anniversary of the Uniform Code of Military Justice

Draft: 3-7-2025

The U.S. Court of Appeals for the Armed Forces: Judicial Review of Courts-Martial in Historical Perspective

Outline of Topics for the Panel Discussion

Overview

1. Review of Courts-Martial - Historical Evolution
2. Judicial Review Under the UCMJ - Selected Topics
3. Selected Resources

1. Review of Courts-Martial - Historical Evolution

a. The pre-UCMJ Era

(1) The foundational period: 1775-1917 (Revolutionary War through World War I)

- Separate court-martial systems for the Army and Navy
- Courts-martial conducted without requiring legally qualified counsel or judges at trial or on appeal.
- The review of a court-martial verdict was typically conducted by the same commander who had exercised prosecutorial discretion in sending the case to trial and who had exercised responsibility for the process by selecting the members of the court-martial panel.
- A limited class of cases were eligible for further review by senior officials, including the President, but there was no direct judicial review.
- Collateral review in the Article III civilian courts focused narrowly on matters involving the scope of court-martial jurisdiction over the person, the offense, or the sentence.

(2) World War I and post-war reforms: 1917-1940

- Significant public attention to controversial cases led to internal and external debates about the fairness of the military justice system, including issues involving review of courts-martial.
- During the war, the Army established a board of review process to provide non-binding advice in cases involving serious levels of punishment.
- Post-war congressional hearings led to legislation -- the 1920 Articles of War -- containing a variety of military justice reforms in the Army, including a process for placing a law member on general courts-martial panels in a non-judicial role when available. The legislation also provided statutory authority

for the boards of a review, whose decisions were advisory and subject to approval or modification by senior officials.

- Proposals considered but not adopted at that time included a proposal to establish a military judicial to preside at courts-martial and a proposal to establish an independent civilian appellate court to review court-martial cases.

(3) World War II, post-war reforms, and enactment of the UCMJ: 1941-1950

- Broad public exposure to the military justice system and extensive calls for reform.
- Congressional hearings led to revision of the Army's Articles of War in 1948 and enactment of a unified system for all of the armed forces in 1950 -- the Uniform Code of Military Justice (UCMJ). Among the numerous reforms in military law established under the UCMJ, the legislation included:
 - a requirement for a law officer to preside at general courts-martial, with the authority to issue binding judicial decisions.
 - establishment of a Board of Review in each service with authority to issue binding legal decisions in cases involving capital punishment, confinement one year or more, punitive separations, and other designated types of cases.
 - Establishment of an independent three judge civilian court under Article I of the Constitution -- the Court of Military Appeals -- to review cases from the Boards of Review
 - Providing the accused with counsel at both the trial and appellate levels.

2. Judicial Review Under the UCMJ - Selected Topics

(1) The judicial structure

- Congress subsequently created the military judiciary in 1968 to preside over general and special courts-martial
- In the same legislation, Congress redesignated the Boards of Review as the Courts of Military Review (subsequent legislation in 1994 provided their current names -- the Courts of Criminal Appeals). The 1968 legislation redesignated the Court of Military Appeals as the United States Court of Military Appeals (subsequent legislation in 1994 provided the Court with its given -- the U.S. Court of Appeals for the Armed Forces).
- Over the next two decades, several study groups examined the question of whether the Court should be reestablished under Article III of the Constitution. The studies resulted in variety of recommendations but there were no subsequent legislative changes in the Court's Article I status.
- 1989 Congress increased the membership of the Court to five judges, reflecting the American Bar Association's Standards for Court organization.

(2) Selected further legislative developments - direct review of court-martial cases

In 1983, Congress authorized military judges issue interlocutory rulings. Those rulings currently are subject to review by the Courts of Criminal Appeals and the U.S. Court of Appeals for the Armed Forces.

- The 1983 legislation also authorized direct review in the Supreme Court of decisions by the U.S. Court of Appeals for the Armed Forces (then designated as the U.S. Court of Military Appeals), except for cases involving a denial of discretionary review. The exception for cases involving a denial of discretionary review was removed in 2024.
- In 2022, Congress enacted legislation to provide an avenue for appeal of any special of general court-martial, regardless of the severity of the sentence.

(3) Selected Supreme Court Cases involving review of decisions by the U.S. Court of Appeals for the Armed Forces - including both direct and collateral review.

- Application of constitutional law in review of court-martial cases: *Parker v. Levy*, 417 U.S. 733 (1974), *Solorio v. United States*, 483 U.S. 435 (1987), *Weiss v. United States*, 510 U.S. 163 (1994), *Ortiz v. United States*, 585 U.S. 427 (2018)
- Review of cases involving the All Writs Act (28 U.S.C. 1651): *Noyd v. Bond*, 395 U.S. 683 (1969), *Clinton v. Goldsmith*, 520 U.S. 529 (1999), *United States v. Denedo*, 556 U.S. 904 (2009).

3. 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://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf>
- 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)
- David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 St. Mary's L.J. 1 (2017)
- U.S. Court of Appeals for the Armed Forces brochure <https://www.armfor.uscourts.gov/newcaaf/library/brochure.pdf>

PART II: MANUAL FOR COURTS-MARTIAL

I. Pre-UCMJ

- See MCM (2024 ed.) Appendix 15, pp. A15-2, A15-2.

- 19th Century
 - Regulations, promulgated pursuant to U.S. Const. Art. II, sec. 2, cl 1, and statutes
 - Treatises, e.g. Winthrop, *Military Law and Precedents*
 - “Manuals” (unofficial), e.g., A. Murray, *A Manual for Courts-Martial* (1895)
 - A Manual For Courts-Martial And Of Procedure Under Military Law (1898)

- 20th Century
 - MCM 1917
 - Articles of War 38 & 45
 - Promulgated by Secretary of War
 - Format
 - Includes rules of evidence, punishment limits

 - MCM 1921
 - Promulgated by the President
 - Amended several times 1921-1949

II. UCMJ

- MCM 1951
 - Article 36, 56
 - Format
 - COMA and the MCM,
 - See, e.g., *U.S. v. Rinehart*, 18 C.M.A. 402, 24 C.M.R. 212 (1957)

- MCM 1969
 - Military Justice Act of 1968
 - COMA and the MCM
 - *U.S. v. Ware*, 1 M.J. 282 (C.M.A. 1976)
 - *U.S. v. Heard*, 3 M.J. 14 (C.M.A. 1977)
 - Military Rules of Evidence 1978
 - Article 36 amended 1979
 - Pub. L No. 96-107, Section 801(b), 93 Stat. 810, 811.

- MCM 1984
 - Background
 - Format

- MCMs since 1994

PART III: Military Justice Metamorphosis – 2013–?

Dwight Sullivan¹

Select Bibliography

- Statutes

- National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013) (enacting military justice system victims' rights statute, modifying Article 32 pretrial investigations, sharply curtailing convening authorities' post-trial clemency power; mandating dismissal/dishonorable discharge for penetrative sexual assault offenses; codifying special victims' counsel programs)

- Military Justice Act of 2016, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, Division E, 130 Stat. 2000, 2894-2968 (2016) (enacting modified version of recommendations of the Military Justice Review Group)

- National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021) (creating special trial counsel and transferring convening authorities' referral authority over "covered offenses" to them; requiring President to prescribe sexual harassment as an enumerated Article 134 offense; reforming military sentencing system)

- James M. Inhofe Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022) (making 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) (expanding the Supreme Court's certiorari jurisdiction to petitions for grant of review and petitions for extraordinary relief that CAAF denies)

- Executive Order

- Exec. Order No. 14130 of December 20, 2024, 89 Fed. Reg. 105343 (2024) (provided right to counsel as summary courts-martial and established a right to consult with counsel before nonjudicial punishment (subject to a military exigency exception) and after imposition of nonjudicial punishment)

- Court Decisions

- *Ortiz v. United States*, 585 U.S. 427 (2018) (holding that the Supreme Court may constitutionally review CAAF decisions on direct appeal)

¹ The views expressed in this presentation are those of the author and do not necessarily reflect the views of the Department of Defense or any of its components.

- *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023) (rejecting constitutional challenge to lack of unanimous verdict requirement for court-martial conviction), *cert. denied*, 144 S. Ct. 1003 (2024)
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- Reports
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- Military Justice Review Group Report of the Military Justice Review Group Part I: UCMJ Recommendations (Dec. 22, 2015), https://tile.loc.gov/storage-services/service/l1/l1mlp/Military-Justice-Review-Group-Report_Part1/Military-Justice-Review-Group-Report_Part1.pdf
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- Independent Review Commission Recommendations on Countering Sexual Assault in the US Military, *Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military* (Jul. 2021), <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF>
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- Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems, Report (Aug. 31, 2022), <https://media.defense.gov/2023/Jun/08/2003238260/-1/-1/1/IRT-REPORT.PDF>
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- Commentary
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- Captain Stephen C. Reyes, JAGC, USN, *Military Sentencing Parameters and Criteria Offenses: A First Step to Reducing “Noise” in Court-Martial Sentencing*, 70 NAVAL L. REV. 1 (2024)
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- Michael Waddington, *Military Justice Reform: The Current State of Affairs*, 39 Crim. Just. 3 (2024)
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- Dwight H. Sullivan, *The Military Justice Decrescendo*, 68 VILL. L. REV. 849 (2024)
- David A. Schlueter & Lisa Schenck, *Transforming Military Justice: The 2022 and 2023 National Defense Authorization Acts*, 231 MIL L. REV. 1 (2023)
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- Judge Andrew S. Effron & Jonathan J. Wroblewski, *Congress Reforms Military Sentencing. Creating an Opportunity for a Productive Sentencing Reform Dialogue Between the Military and Civilian Criminal Justice Systems*, 35 FED. SENT. RPTR. 73 (2022)
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- Lieutenant Jacob E. Thayer, U.S. Coast Guard & Lieutenant Jessica Dobry, U.S. Coast Guard, *Dealing with the “Shorter” Limited Special Courts-Martial*, 67 NAVAL L. REV. 191(2021)
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- Colonel Louis P. Yob, *The Special Victim Counsel Program at Five Years: An Overview of Its Origins and Development*, ARMY LAW., 2019 no. 1, at 42
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- James A. Young, *Post-Trial Procedure and Review of Courts-Martial Under the Military Justice Act of 2016*, ARMY LAW., Jan. 2018, at 31
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- David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY'S L.J. 1 (2017)
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- Lieutenant Colonel Rhea A. Lagano, Major Sarah W. Edmundson & Major L. Dustin Grant, *The Air Force SVC Program: The First Five Years*, 44 RPTR. 31 (2017)
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- Lieutenant Colonel John Loran Kiel Jr., *Not Your Momma's 32: Explaining the Impetus for Change Behind Key Provisions of the Article 32 Preliminary Hearing*, ARMY LAW., Jul. 2016, at 8
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