ABA Section of Litigation 2012 Section Annual Conference April 18-20, 2012:
U.S. v. General Custer, 2012

Balancing Order and Justice: The Court-Martial Process

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TRIAL BY COURT-MARTIAL

After a preliminary inquiry and consideration of administrative, nonpunitive and nonjudicial actions, the unit commander may determine that the matter is sufficiently serious to warrant trial by court-martial. Before deciding on this, the commander should consult with the supporting SJA office.

Battery/Company commanders normally cannot convene courts-martial. They may only *recommend* trial and *forward* the entire case file up the chain of command. Each subsequent higher commander must exercise personal discretion in disposing or recommending disposition of the case.

Preferral of charges. The preferral of charges initiates the court-martial process. Any person subject to the code may prefer charges. Persons who prefer charges must:

- Sign the charges and specifications form (DD Form 458) under oath before a commissioned officer of the armed forces who is authorized to administer oaths; and,
- State that they have personal knowledge of or have investigated into the matters set forth in the charges and specifications, and that the allegations are in fact true to the best of their knowledge and belief.

A *charge* and its *specification* constitute the formal written allegation of criminal behavior by the accused. The charge informs the accused of the specific article of the UCMJ alleged to have been violated. The specification sets forth the specific facts, dates, times, places, and circumstances of the offense so the accused may prepare a defense to the allegation. Ordinarily, charges and specifications alleging all known offenses by an accused should be preferred at the same time. The immediate commander must inform the accused of the charges and the name of the person who preferred the charges as soon as possible.

Forward the matter to superior or subordinate commander. A commander may decide to forward a disciplinary matter concerning an offense to a superior or to a subordinate commander for action. For example, the commander may lack the authority to take action, or a higher commander may have withheld authority to act on certain offenses. When forwarding a matter to a superior commander, the subordinate commander *must* make a recommendation as to disposition of the charges. In contrast, when forwarding a matter to a subordinate commander, the superior commander *must avoid* recommending a specific disposition, and instead must merely forward the matter "for appropriate disposition."

Commanders will forward the matter through the chain of command to the officer who is authorized to *convene* (order into being) a court-martial of the appropriate level for the offense charged. This officer is called a **convening authority**. Each commander in the chain of command will review the charges, the investigative report, and all prior recommendations, and make an independent recommendation as to the appropriate disposition of the case.

Under normal circumstances, a commander who receives charges from a subordinate commander is free to dispose of those charges at her own level. For example, a battalion commander may receive court-martial charges from a company commander, but decide that, contrary to the company commander's recommendation, Article 15 disposition is appropriate. The battalion commander may dismiss the charges and offer the soldier proceedings under Article 15 for the same offenses.

Referral is the order of a convening authority that charges against an accused be tried by a particular court-martial panel. The convening authority may not refer a charge to a court-martial unless there are reasonable grounds to believe that the accused committed the offense charged, and that the specification of the charge alleges an offense under the UCMJ. Depending on the seriousness of the charges, they may be referred to one of three different levels of courts-martial: **Summary, Special** or **General**.

SUMMARY COURT-MARTIAL

A summary court-martial (SCM) consists of one impartial commissioned officer who conducts the trial proceedings and makes all the decisions required in the case. Normally, a SCM is convened by a battalion or higher commander and sometimes by the CO of a detached company or other detachment. A SCM may try any soldier, except officers, warrant officers, cadets, and midshipmen, for any noncapital UCMJ offense. Typically offenses tried at SCMs are minor offenses. The maximum punishment a summary court-martial may impose is confinement for one month, forfeiture of two-thirds of one month's pay, and reduction to E1. If the accused is above E4, the maximum punishment is more restricted--reduction is limited to one grade and confinement is not authorized.

Perhaps the most important limitation on the jurisdiction of a SCM is that a soldier may refuse to be tried by a SCM, even if the soldier has previously refused nonjudicial punishment. In a trial by summary court-martial, an accused has a right to consult with military counsel before trial, but does not have a right to be represented by a detailed military defense counsel at the hearing. The accused may obtain representation by a civilian attorney at no expense to the

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SPECIAL COURT-MARTIAL

A special court-martial (SPCM) is normally composed of a military judge, legally qualified trial counsel (prosecutor) and defense counsel. The Government will provide the accused with Defense Counsel at no expense to the soldier. The accused may also retain private counsel at her own expense. Although the MCM only requires three panel members (jurors) for a SPCM, typically twelve soldiers are detailed to sit as panel members. If the accused elects to be tried by the military judge alone, there are no panel members. An enlisted accused tried by SPCM may demand that at least one-third of the panel members be enlisted soldiers (i.e., an "Enlisted Panel"). Brigade commanders (some battalion commanders) or higher commanders are SPCM convening authorities.

There is a second, "hybrid" type of Special court-martial in the Army, known as a Special Court-Martial Authorized to Adjudge a Bad Conduct Discharge ("**BCD Special**"). The composition and maximum punishment authority of this court is exactly the same as that of a "straight Special," except that it is also

empowered to adjudge a Bad Conduct Discharge for enlisted soldiers. Because it may adjudge a punitive discharge, only a General Court-Martial convening authority may convene this type of court-martial. The accused at this court-martial has more due process rights—to include the right to a verbatim transcript of the trial—as well as greater appellate rights.

A SPCM may try any soldier for any non-capital (non-death penalty) offense under the UCMJ. A SPCM may impose punishment not to exceed confinement for 12 months, forfeiture of two-thirds pay per month for 12 months, reduction to E1, and, if convened by a GCMCA, a BCD. An individual cannot refuse to be tried by a SPCM. A SPCM may not sentence an officer to reduction, confinement, hard labor without confinement, or dismissal. (No court-martial may reduce an officer.)

Any soldier may be tried by Special court-martial. However, commissioned warrant officers and commissioned officers cannot be sentenced at a Special court-martial to a Bad Conduct Discharge or to confinement.

GENERAL COURT-MARTIAL

A general court-martial (GCM) is composed of a military judge, typically twelve panel members (the MCM requires a minimum of five), and legally qualified trial and defense counsel. A GCM is convened by a General Court-Martial Convening Authority (GCMCA). The GCMCA is often a general officer, and is typically the commander of a post, division, or separate brigade. The GCMCA may refer any person subject to the UCMJ under his or her jurisdiction for any offense made punishable by the UCMJ to any level of court-martial. A GCM court may, upon conviction, recommend any punishment authorized by the UCMJ to include death, dismissal, dishonorable discharge, total forfeiture of all pay and allowances, confinement and lesser punishments (see maximum punishments table at MCM, Appendix 12). The GCMCA may approve or disapprove the punishment adjudged by the court-martial, but may not impose a punishment harsher than that adjudged by the court-martial.

As in a SPCM an enlisted accused may demand that at least one-third of the panel members be enlisted soldiers (i.e., an “Enlisted Panel”). Also, as in a Special court-martial, the accused may, in noncapital cases (non death penalty cases), request trial by military judge alone rather than by members. If the request is granted, there will be no court members. The military judge would then rule on all matters of law, find the accused guilty or not guilty, and, if the accused is convicted, decide the sentence. If the trial is with court members, the court will, upon two-thirds concurrence of the members present, make findings of guilty, and, if the accused is convicted, decide the sentence. Three-fourths concurrence is required for sentences of confinement of more than ten years. A unanimous vote of the panel is required for imposition of the death penalty.

As in Special courts-martial, a soldier tried by General court-martial is entitled to representation by military defense counsel and, in some instances, a specific military counsel of his choice. He may also hire a civilian attorney at no expense to the government.

A General court-martial may impose any punishment authorized by law, including death, confinement for life, dismissal from the Army (for officers only), a Dishonorable or a Bad Conduct Discharge and forfeiture of all pay and allowances. A verbatim record of the trial is prepared for General court-martial proceedings.

ARTICLE 32 INVESTIGATIONS

The Fifth Amendment constitutional right to grand jury indictment is expressly inapplicable to the Armed Forces. In its absence, Article 32 of the Uniform Code of Military Justice (Section 832 of Title 10, United States Code), requires a thorough and impartial investigation of charges and specifications before they may be referred to a general court-martial (the most serious level of courts-martial). However, the accused may waive the Article 32 investigation requirement. The purpose of this pretrial investigation is to inquire into the truth of the matter set forth in the charges, to consider the form of the charges, and to secure information to determine what disposition should be made of the case in the interest of justice and discipline. The investigation also serves as a means of pretrial discovery for the accused and defense counsel in that copies of the criminal investigation and witness statements are provided and witnesses who testify may be cross-examined.

An investigation is normally directed when it appears the charges are of such a serious nature that trial by general court-marital may be warranted. The commander directing an investigation under Article 32 details a commissioned officer as investigating officer, who will conduct the investigation and make a report of conclusions and recommendations. This officer is never the accuser. This officer may or may not have any legal training, although the use of military attorneys (judge advocates) is common within Service practice. If the investigating officer is not a lawyer, he or she may seek legal advice from an impartial source, but may not obtain such advice from counsel for any party.

An investigative hearing is scheduled as soon as reasonably possible after the investigating officer's appointment. The hearing is normally attended by the investigating officer, the accused and the defense counsel. In some cases, the commander will also detail counsel to represent the United States, a court reporter and an interpreter. Ordinarily, this investigative hearing is open to the public and the media.

The investigating officer will, generally, review all non-testimonial evidence and then proceed to examination of witnesses. Except for a limited set of rules on privileges, interrogation, and the rape-shield rule, the military rules of evidence (which are similar to the federal rules of evidence) do not apply at this investigative hearing. This does not mean, however, that the investigating officer ignores evidentiary issues. The investigating officer will comment on all evidentiary issues that are critical to a case's disposition. All testimony is taken under oath or affirmation, except that an accused may make an unsworn statement.

The defense is given wide latitude in cross-examining witnesses. If the commander details an attorney to represent the United States, this government representative will normally conduct a direct examination of the government witnesses. This is followed by cross-examination by the defense and examination by the investigating officer upon completion of questioning by both counsel. Likewise, if a defense witness is called, the defense counsel will normally conduct a direct examination followed by a government cross-examination. After redirect examination by the defense counsel, or completion of questioning by both counsel, the investigating officer may conduct additional examination. The exact procedures to be followed in the hearing are not specified in either the Uniform Code of Military Justice or the Manual for Court-Martial. The investigating officer, however, will generally:

- Announce the beginning of the investigation and its purpose.
- Advise the accused of his or her right to counsel and ascertain whether the accused will be represented by counsel, and if so, by whom.
- Formally read the charges preferred against the accused.
- Advise the accused of his or her rights to make a statement or to remain silent.
- Review the documentary or real evidence available against the accused.
- Call any available adverse witnesses.
- Review documentary or real evidence in favor of the accused.

- Call available favorable witnesses for the accused.
- Hear any evidence presented by the accused.
- Hear any statement the accused or defense counsel may make.
- Entertain, if any, arguments by counsel.

Upon completion of the hearing, the investigating officer submits a written report of the investigation to the commander who directed the investigation. The report must include:

- Names and organizations or addresses of defense counsel and whether they were present throughout the taking of evidence, or if not, why not.
- The substance of any witness testimony taken.
- Any other statements, documents, or matters considered by the investigating officer.
- A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense, or was not competent to participate in the defense during the investigation, or there is a question of the accused's competency to stand trial.
- A statement whether the essential witnesses will be available at the time anticipated for trial or a statement why any essential witness may not then be available.
- An explanation of any delays in the investigation.
- The investigating officer's conclusion whether the charges and specifications are in proper form.
- The investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged.
- The recommendations of the investigating officer, including disposition of the charges.

Upon completion, the report is forwarded to the commander who directed the investigation for a decision on disposition of the offenses.

The accused at an Article 32 investigation has several important rights. The accused also has a right to waive an Article 32 investigation and such waiver may be made a condition of a plea bargain. If the investigation is not waived, the accused is entitled to be present throughout the investigative hearing (unlike a civilian grand jury proceeding). At the hearing, the accused has the right to be represented by an appointed military defense counsel or may request an individual military defense counsel by name and may hire a civilian attorney at his or her own expense. Again, unlike a civilian grand jury proceeding, the servicemember, through the member's attorney, has the following rights: to call witnesses; to present evidence; to cross-examine witnesses called during the investigation; to compel the attendance of reasonably available military witnesses; to ask the investigating officer to invite relevant civilian witnesses to provide testimony during the investigation; and, to testify, although he or she cannot be compelled to do so.

The accused must be served with a copy of the investigative report and associated evidence. Within five days of receipt, the accused may submit objections or comments regarding the report to the commander who directed the investigation.

The Article 32 investigation has often been compared to both the civilian preliminary hearing and the civilian grand jury since it is functionally similar to both. All three of these proceedings are theoretically similar in that each is concerned with determining whether there is sufficient probable cause (reasonable grounds) to believe a crime was committed and whether the person accused of the crime committed it. The Article 32 investigation, however, is broader in scope and more protective of the accused. As such, it is not completely analogous to either proceeding.

A civilian defendant at a preliminary hearing may have the right to counsel, the right to cross-examine witnesses against him or her, and the right to introduce evidence in his or her behalf. An Article 32 investigation is considered broader in scope because it serves as a mechanism for discovery by the defense, and because it supplies the convening authority (the decision authority) with information on which to make a disposition decision. While a decision by a magistrate at a preliminary hearing is generally final, the investigating officer's decision is merely advisory.

Unless waived, a civilian defendant may be prosecuted in a federal court for an offense punishable by death, imprisonment for a term exceeding one year, or imprisonment at hard labor only after indictment by a grand jury. (An indictment is a formal written accusation or charge). This Fifth Amendment constitutional right does not apply to state prosecutions - although some state constitutions and statutes have provisions that are analogous to the Fifth Amendment and require an indictment by a grand jury for a felony or other defined offenses. Accordingly, if a servicemember is tried in a state court, his or her right to indictment by grand jury is dependent upon the particular state's procedures.

The grand jury is a closed, secret proceeding, in which only the prosecution is represented. The body of jurors decides to indict based upon evidence frequently provided solely by the prosecutor. This may even happen without the accused even having knowledge of the proceeding. Inspection or disclosure of the transcript of the proceeding after indictment is also, generally, severely limited. Obviously, by his absence, a defendant is precluded from the opportunity to confront and cross-examine witnesses, to present evidence, call witnesses in his or her favor, or even to speak for him or herself. If a defendant is called before a grand jury, he or she has no right to have a lawyer present through or at any other part of the proceeding. If a grand jury does not indict, the decision is generally final and charges against the defendant are usually dismissed.

The Article 32 investigation, in contrast, is generally an open proceeding that may be attended by the public. Unlike a grand jury proceeding, the accused has the right to be present at the investigation; the right to be represented by an attorney; the right to present evidence; the right to review a copy of the investigative report as well as the several other important rights discussed above. Again, the recommendation of the Article 32 investigating officer is not final - it is only advisory.

Beyond Article 32 of the Uniform Code of Military Justice (Section 832 of Title 10, United States Code), additional rules on Article 32 investigations are contained at Rule for Courts-Martial (R.C.M) 405, as supplemented by case law and service regulations.

Prior to referring a case to a General court-martial, the convening authority must also receive **Pretrial Advice** from the Staff Judge Advocate (SJA), who is the senior legal advisor within the command. This advice, which must be written and signed by the SJA, must contain four specific opinions:

- whether the specifications allege offenses under the UCMJ;
- whether the allegations are warranted by the evidence;
- whether the court-martial would have jurisdiction over the accused and the offense; and
- what disposition is appropriate.

The SJA's pretrial advice is unique to General Courts-Martial and is not required for cases referred to a Special or Summary Court-Martial.

DISPOSITION OF THE OFFENDER

While the offense packet is being processed, a commander has several options for dealing with the alleged offender. The command may also place some administrative restrictions on the movement of the accused in order to prevent further misconduct or to assure the soldier's presence for trial. A commander may simply withdraw accused soldiers' pass privileges so that they may not leave the installation. In some cases, the commander may determine that it is necessary to restrict the soldier to the barracks, work, place of worship, and the mess hall. Other possible actions include not permitting the soldier to use facilities on post that he has abused, such as the NCO or Enlisted Club, the Post Exchange, or the post theater. These temporary, limited restrictions allow the commander to more closely supervise the conduct and ensure the presence of a soldier while criminal matters are resolved. In no way, however, are these restrictions considered to be punishments: they may never be employed in place of legally imposed punishments.

PRETRIAL CONFINEMENT

The most severe form of restriction is Pretrial Confinement, which is permitted only in very narrow circumstances. The law generally disfavors confinement before a court has found the soldier guilty of any offense. A commander may order a soldier into pretrial confinement *only if* the commander has reasonable grounds to believe that:

(1) an offense triable by court-martial has been committed; *and*
(2) the soldier committed it; *and*
(3) confinement is necessary to ensure the soldier's presence at trial, or because it is foreseeable the soldier will engage in additional, serious criminal misconduct; *and*
(4) lesser forms of restraint are inadequate.

If convicted at a subsequent court-martial and sentenced to confinement, the soldier receives one-for-one credit against his sentence for each day of pretrial confinement.

Within 48 hours of entering pretrial confinement, a soldier must be allowed to consult with a lawyer. Additionally, if the decision to order confinement was made by someone other than the soldier's commander, the soldier's actual commander must review the decision to impose pretrial confinement and determine whether there is probable cause to believe the soldier committed an offense. Moreover, within seven days, a military magistrate (a Judge Advocate serving on orders) must review the lawfulness of pretrial confinement and its continued necessity.

Once again, pretrial confinement is considered an administrative measure: the government may *not* use its pretrial options to punish the accused. Pretrial punishment is unlawful under Art. 13, UCMJ, and may cause the government to be sanctioned.

TRIAL BY COURT-MARTIAL

[Adapted in part from Davidson, Michael J., A Guide to Military Criminal Law: A Practical Guide for All the Services. Annapolis: Naval Institute Press, 1999.]

The rules and procedures in courts-martial are very similar to those in civilian courts. The Convening Authority (CA) convenes a court-martial by issuing an order that an accused servicemember will be tried by a specified court-martial. This order is called a "convening order" and shall designate the type of court-martial (summary, special or general) that will try the charges. The convening order may designate when and where the court-martial will meet.

Each court-martial includes a military judge, at least one detailed trial counsel (prosecutor) and one detailed defense counsel. The military judge is an experienced judge advocate, normally a Colonel or Lieutenant Colonel who has served in a variety of legal positions. All Army military judges are assigned to the U.S. Army Trial Judiciary at Falls Church, Virginia. In this way, the trial judge is independent of the local command.

The Army has also created a separate command, the Trial Defense Service, for defense counsel. This attorney is assigned free of charge to the servicemember. The servicemember may also request a specific military attorney to join his defense team and, if available, that attorney will also be assigned free of charge to the defense team. Finally, at his own expense, the servicemember may hire a civilian attorney (even so, the military attorneys remain assigned to the case). Army Judge Advocates assigned as defense counsel are rated by a chain of command separate from the installation where they are assigned, permitting them to act as zealous advocates for their clients.

The military judge may hold informal conferences to coordinate aspects of the trial. These are similar to conferences a civilian judge might have "in chambers." Under the military rules, "RCM 802 conferences" may be in person, or by phone, but may not be used to resolve contested issues. Contested procedural or legal issues must be resolved in court, on the record.

Once charges are referred to trial, the military judge, working with the trial counsel and the defense counsel, schedules a trial date. The military judge usually settles contested legal or procedural issues under Article 39(a), of the Uniform Code of Military Justice, which allows him to conduct hearings for that purpose. Called "Article 39(a) sessions," the military judge may hear witnesses, take other evidence, and hear arguments, just as a civilian judge would during "motion hearings" in a civilian case. These sessions and most other proceedings of courts-martial are open to the public. As in civilian cases, Article 39(a) sessions take place outside the presence of the "court-martial members" who serve as the jury in military cases.

ARRAIGNMENT

One of the first "Article 39(a) sessions" in a military case is typically "arraignment." Just as in civilian cases, the accused servicemember is informed of the charges against him and offered an opportunity to make a plea (i.e., "guilty" or "not guilty"). If the servicemember intends to plead guilty, before a formal plea may be accepted the military judge must ensure that the servicemember understands what he is doing and is acting voluntarily. This is called a "providency inquiry." Civilian judges have the same requirement, although the military inquiry is typically more extensive and fact-specific regarding the offenses. Usually a trial date will be announced; counsel for both sides may be told informally of the date before arraignment.

The arraignment serves several important factors, besides kicking off the beginning of the court-martial. First, it stops the speedy trial clock. Usually, the government has 120 days from the date of preferral of charges, or the imposition of restraint, to get the accused to trial. Failure to bring the accused to trial within the 120-day rule could result in a dismissal of the charges. Second, an accused that fails to attend the court-martial, usually by being AWOL, may be tried in "absentia" (while absent). The effect of a trial in absentia is that the defense tries an empty chair at court-martial. Further, after arraignment no additional charges may be referred to that particular court-martial unless the accused consents.

THE PRETRIAL AGREEMENT

The accused soldier has an absolute right at court-martial to plead not guilty. This places the burden of proof on the government to establish the accused's guilt beyond a reasonable doubt. More than half of the soldiers facing court-martial plead guilty, often because they gain the benefit of a pretrial agreement. A **pretrial agreement,** similar to a plea bargain in the civilian system, is a contract between the accused and the convening authority; the accused agrees to plead guilty and the convening authority most often promises to limit the approved sentence to a particular amount. The accused benefits by the limitation on potential punishment, and the government gains the certainty of a conviction, saves time, avoids emotional trauma to victims and witnesses, and escapes the expense of a trial. The accused must personally describe the offense to the judge while under oath, and he must admit each element of the crime. The judge must be convinced of the accused's guilt before accepting the guilty plea. If the accused enters a plea of not guilty, the case will move on to the contested trial.

THE COURT-MEMBER PANEL

The actual court-martial is divided into two phases: guilt/innocence and sentencing. Prior to trial the accused must elect between a trial by judge alone, by an officer panel, or by an enlisted panel. This is a tactical decision made by the accused and his defense counsel.

For special and general courts-martial, the convening order will designate the members of the court-martial panel (the military equivalent of the jury). Although the ultimate membership of the panel is determined, as in the civilian system, through voir dire, the Convening Authority (CA) initially details the panel members to the court-martial. Similar to civilian juries, court-martial members are officers or enlisted persons from the same community or command ("jury of peers") as the servicemember on trial. In civilian communities, serving on a jury is a duty of citizenship, and local court officials will "summon" citizens to serve as jurors. The CA convening a court-martial must personally detail panel members. RCM 503(a). "The convening authority shall detail qualified persons as members for courts-martial." The CA must determine who in the CA's *personal* opinion are "best qualified" under the criteria set out in Article 25, UCMJ:

- Judicial Temperament
- Experience
- Training
- Age
- Length of Service

VOIR DIRE AND CHALLENGES

Just as with civilian jurors, court-martial members must be impartial and may make no decisions about a case until the military judge directs them to begin deliberations. Each side -- prosecution and defense -- gets a chance to ask the court-martial members questions to ensure that members are impartial. This

questioning process is called “voir dire.” Any panel member may be challenged, and remove “for cause.” Grounds for removal include being improperly detailed, having had prior involvement in the case, exhibiting an inflexible attitude concerning the accused’s guilt or as to the severity of sentences for particular crimes, and the catch-all “in the interest of having the court-martial free from substantial doubt as to the legality, fairness, and impartiality.” If a court-martial member's impartiality is brought into question, or if it is otherwise inappropriate for that member to serve on the court-martial, the military judge will dismiss him or her, as would a civilian judge.

As is done in civilian courts, the prosecution or defense may also remove a court-martial member "peremptorily," meaning without a stated reason, so long as the challenge is not based on improper considerations such as the race or gender of the panel member. In military practice, both the prosecution and defense are afforded one peremptory challenge. The use of the peremptory challenge by the defense could be used to gain a slight mathematical advantage. For example, with nine members on the panel, the prosecution needs six votes for conviction. If the defense strikes a member, leaving eight members, the prosecution still needs six votes to convict because two-thirds of eight is slightly more than five.

THE CONTESTED CASE

Once the panel members have been selected the attorneys will make opening statements to the panel. Opening statements will normally provide a road map to the panel as to what evidence they will hear. It also provides each side the opportunity to give the panel their theory of the case. The defense does not have to make an opening statement, or it can reserve it until after the prosecution has presented their evidence.

Following opening statements, the court-martial begins with the prosecution presenting its case. This phase of the trial is called the government’s “case-in-chief. The trial counsel introduces the evidence and presents witness testimony to prove the elements of the charged offenses beyond a reasonable doubt. The defense has the opportunity to challenge any government evidence and to cross-examine witnesses. After the prosecution rests, the defense may then present evidence to rebut (counter) the government's case, or to raise a defense to the allegations. If it wishes, the defense may opt not to present any evidence or witnesses.

During the court-martial, panel members may take notes on the testimony or evidence presented. The panel members may also request that witnesses be asked particular questions by submitting written questions to the judge via the attorneys, giving the attorneys the opportunity to object. The judge is also permitted to ask questions of the witnesses during this phase.

After the presentation of evidence, both sides make closing arguments. Following the conclusion of the closing arguments by both sides, the military judge instructs the members on the applicable law before they meet to discuss the evidence and vote on the accused’s guilt or innocence.

The panel will then leave the courtroom and reassemble with their notes, any written legal instructions, and any physical evidence in a separate room. The members then deliberate on their findings of guilt or innocence. No influence of rank or position may be used to influence other members. The members deliberate in secret and may not reveal the vote of the court unless ordered to do so by the judge. In their deliberations, the members discuss the case and then vote by secret written ballot. If two-thirds vote to convict, the accused is found guilty. If less than two-thirds vote to convict, the accused is found not guilty and the proceedings end. There are no "hung juries" in the military. If the accused is found guilty of any charge, the sentencing process begins.

MILITARY SENTENCING

If the servicemember is convicted of any offense, the case proceeds immediately to the issue of sentencing. This is different from most civilian courts, where sentencing is delayed several weeks pending the completion of a pre-sentencing report. In military cases, there is no pre-sentencing report. Rather, the prosecution and defense are expected to be prepared for this possibility and be ready to present evidence about the convicted servicemember and the offense.

Sentencing evidence includes the impact of the crime, or matters in aggravation (both on a victim, and on a unit's discipline and morale), the servicemember's duty performance history, and extenuating or mitigating circumstances. Both the prosecution and defense may call witnesses. The accused may also testify by giving an unsworn statement for consideration. At the conclusion of the presentation of evidence, the prosecution and defense meet with the military judge regarding sentencing instructions to be given in court-member cases and then counsel present arguments about what the appropriate sentence should be.

If a servicemember elected to waive his right to have court-martial members participate in his case, then the military judge will impose the sentence. However, if court-martial members found the servicemember guilty, they will also decide the sentence. This is another difference from the typical practice in civilian courts where a judge imposes the sentence in almost all cases. The only exceptions in both civilian and military courts are death penalty cases that require the participation of a jury.

Once the prosecution and defense finish presenting all their evidence and arguments on sentencing, the military judge instructs the members on the maximum permissible punishment, and the law to be applied in the case. The *Manual for Courts-Martial* contains the maximum punishment for all offenses. The military judge, in a judge alone case, or court-martial members will deliberate on the appropriate penalty. The types of sentences that may be imposed differ significantly from those imposed in civilian cases. In civilian courts, typical sentences may include death, confinement, or fines. A civilian judge may also impose probation, and he may require the completion of community service and mandatory treatment or education programs as a condition of probation. Although probation is not possible in military cases because a court-martial is a temporary entity created to resolve a particular case and adjourned when the sentence is imposed, sentences may subsequently be suspended by the court-martial convening authority.

The panel members deliberate on the sentence much as they do on findings, once again voting by secret written ballot on an appropriate sentence. After discussion, members propose a sentence. The proposed sentences are voted on, beginning with the lightest sentence proposed, and then proceeding to the most severe. Once two-thirds of the members agree, that is the sentence of the court. For the court to sentence the accused to 10 or more years confinement, three-fourths of the members must agree; to sentence the accused to death, the vote must be unanimous.

Military sentences may include many different punishments such as death, confinement, separation from the service, reduction in pay grade, forfeiture of pay and allowances, fine, and reprimand. The maximum limits on punishments for each offense are set by Congress in the Uniform Code of Military Justice and defined in more detail by the President in the *Manual for Courts-Martial*. Unlike civilian courts, where an individual will receive a sentence on each count for which he is convicted (for example, if convicted of two counts of burglary, a civilian judge might sentence an individual to three years in prison for each count to run consecutively -- or a total of six years in prison).

In the military, a court-martial imposes one overall sentence, no matter how many "counts" (termed "specifications") there are. The overall sentence limits are the sum of the limits on each "count" charged. For example, a servicemember charged with burglary before a general court-martial would face a

maximum possible sentence of 5 years of confinement, forfeiture of all pay and allowances and dishonorable discharge. If charged and convicted of two counts of burglary, the servicemember could be sentenced to up to 10 years of confinement. Also, there are no "sentencing guidelines" or minimum sentence requirements for military courts. After the members have announced a sentence, the case is returned to the convening authority for review.

COURT-MARTIAL PERSONNEL SUMMARY

MAJOR POINT	SUMMARY
THE CONVENING AUTHORITY	O A convening authority (CA) must personally select court-martial panel members. The CA must pick members using criteria that comports with Article 25, UCMJ. The CA may not select members based on their rank (except that the CA may not appoint members junior in rank to the accused). The decision to send or "refer" cases to court-martial must be the CA's personal decision. O A convening authority who is an accuser may not act as a convening authority (that is, may not refer a case to trial). A CA who is *statutorily disqualified* as an accuser (e.g., because she signed the charge sheet) may still dismiss the charges, pursue an administrative disposition, offer nonjudicial punishment, appoint an investigating officer or forward it to a higher commander with a recommendation for disposition. A CA who is *personally disqualified* as an accuser (e.g., where he or she has a personal interest in a case) is further limited. She may not appoint an investigator nor may she make a recommendation when forwarding the case to a higher commander. Art. 1(9), Arts. 22 and 23, UCMJ.
THE ACCUSED'S RIGHTS: COUNSEL QUALIFICATIONS AND PRO SE REPRESENTATION	O The accused is entitled to qualified counsel at trial. The accused has a right to have a military lawyer as his counsel. He may request a specific military counsel; if that counsel is available, she will be appointed. Finally, he may also hire a civilian lawyer to represent him. O Counsel qualification issues are resolved based on whether the defect results in prejudice to the accused. Such defects are, however, nonjurisdictional. O Prior representation issues are determined by examining whether there was former representation, whether there was a substantial relationship between the subject matters, and whether there was a subsequent proceeding. O An accused may proceed *pro se* if the MJ makes the accused aware on the record of the disadvantages of self-representation and secures a voluntary and knowing waiver of counsel.
COURT MEMBERS	O "Court stacking" is impermissible. A CA generally violates the law if she uses criteria other than the UCMJ art. 25(d) criteria (age, experience, education, training, length of service, judicial temperament) to select members, or if selection is in bad faith or to achieve a particular result. Rank is not a selection criterion. Neither gender nor race is a criterion unless a CA seeks to include members of these categories for fairness or cross sectional representation. O Enlisted members cannot be from the accused's company-size unit. This is a jurisdictional issue that is waivable, however.

THE MILITARY JUDGE	O A MJ should disqualify himself when his partiality might reasonably be questioned. To ensure that such motions are properly handled, a MJ should follow RCM 902 by making full disclosure on the record of the potentially disqualifying matter, and permit voir dire and challenge. O Bailiffs/drivers/etc. should not discuss cases with the MJ and other court personnel.
SELECTION OF FORUM	O Whether requesting trial by military judge under Article 16 or by a panel of officers with at least 1/3 enlisted under Article 25, accused must make his selection orally on record or in writing. Court will test for "substantial compliance" with this rule, often by returning the case for a *Dubay* hearing.
TRIAL *IN ABSENTIA* **PRESENCE**	O Trial *in absentia* is only possible after an effective arraignment. The MJ must ensure that the accused is called upon to enter pleas. Arraignment does not include *entry* of the plea. O The UCMJ and RCMs require that all parties to a trial be *physically* present in one location to conduct valid court-martial proceedings. This ensures that the MJ is able to preside over the trial and evaluate whether the accused genuinely desires to proceed with a particular forum or waive or pursue rights under the *Constitution* and UCMJ.

DEFINITIONS OF COMMON COURT-MARTIAL TERMS

Accuser -- a person who signs and swears to charges, any person who directs charges be signed and sworn to by another, or any other person who has an interest other than an official interest in the prosecution of the accused.

Action -- the convening authority's written decision whether to approve, or not, the findings and sentence of a court-martial. The action occurs after the record of trial has been prepared and the accused has been provided an opportunity to submit matters for the convening authority's consideration.

Apprehension -- the taking of a person into custody. (Equivalent to a civilian arrest.)

Article 32 Investigation -- a pretrial investigation always required before charges are referred to any general court-martial. The investigation's purpose is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information upon which to determine what disposition should be made of the case.

Charge -- a statement of the article of the UCMJ, or penal code, which the accused allegedly violated.

Convening Authority -- a commander who has been delegated authority by the President, or Service Secretary, to order a court-martial into being, and to appoint members to hear a case.

Court Members ("panel members") - personnel selected by the convening authority to sit as members of the court martial panel (equivalent to a civilian jury).

Defense Counsel -- the person who represents the accused at the court-martial. Army defense counsels are assigned to the Trial Defense Service (an independent command) and serve at no cost to the accused. A civilian defense counsel provided at no charge to the government may also represent the accused.

Preferral -- the act of swearing to the truth of an allegation; the formal bringing of charges by an accuser against a person in the military justice system.

Pretrial Advice -- a written statement from the staff judge advocate to the general court-martial convening authority setting forth legal conclusions about whether each specification alleges an offense under the UCMJ, whether the allegations are warranted by the evidence, whether a court-martial would have jurisdiction over the accused and the offense, and what disposition is appropriate.

Referral -- an order of a convening authority that charges against an accused will be tried by a specific court-martial

Specification -- a concise statement of the essential facts that constitute the offense charged, alleging every element of the charged offense, expressly or by necessary implication.

Staff Judge Advocate -- a senior Judge Advocate who is the principal legal advisor of a command. A special staff officer.

Trial Counsel -- the judge advocate who prosecutes the court-martial on behalf of the United States.

UNITED STATES v. RHONE
United States Air Force Court of Criminal Appeals
ACM 32258 (1997)

OPINION PER CURIAM:

The appellant pled guilty to smoking cocaine-laced cigarettes several times between 6 October 1995 and 17 October 1995 and using his American Express government travel card 13 times on 11 December 1995 to withdraw cash for his own use. His approved sentence is a bad-conduct discharge, confinement for 6 months, forfeiture of $ 219 pay per month for 6 months, and reduction to the lowest enlisted grade, E-1. He raises one issue on appeal: he argues that the military judge erred in denying him additional credit under R.C.M. 305(k) for illegal pretrial confinement. We find no error and affirm.

After an outstanding career of nearly ten years, the appellant's performance began to deteriorate. He failed to go to work on time, resulting in nonjudicial punishment under Article 15 in April 1995. On 6 and 17 October 1995, the appellant failed to report for work on time. The second time, his supervisor asked him to consent to a urinalysis, which he did. The test showed that the appellant had used cocaine. Interviewed after rights advisement by investigators on 13 November 1995, the appellant confessed to twice buying cocaine-laced cigarettes and using nearly all of them. On 11 December 1995, the appellant used his government-issued travel card 13 times to withdraw a total of $ 470 in cash for personal use, despite the fact that he knew he was not authorized to use the card except for official travel.

The facts considered by the military magistrate who reviewed the appellant's pretrial confinement are not in dispute. The appellant's commander preferred the charges on 16 January 1996. After investigation pursuant to Article 32, UCMJ, the general court-martial convening authority referred the charges to trial by general court-martial on 8 February 1996. Meanwhile, on 25 January 1996, the appellant was absent from duty at his unit without authority. His unit found him at 1730 hours and his commander ordered him to submit to a command-directed urinalysis. The appellant was served with the [new] charges on 12 February 1996. On 16 February 1996, the unit learned that this command-directed urinalysis was positive for cocaine.

On 21 February 1996, the appellant again absented himself from his unit. After learning of his absence at 0600, members of his unit began looking for him and found him at 0900. Again, the appellant's commander directed a urinalysis and placed the appellant into pretrial confinement.

The military magistrate reviewed the pretrial confinement on 23 February 1996 and directed continued pretrial confinement. The magistrate found continued pretrial confinement necessary for the following reasons:

a. Based on the evidence of two positive urinalysis tests for cocaine, both samples having been given after A1C Rhone was AWOL, I am convinced by a preponderance of the evidence that he has a cocaine problem which he has not yet been able to overcome.

b. While under charges and awaiting court-martial, A1C Rhone absented himself from his place of duty and went on a cocaine binge on two occasions about one month apart.

c. His cocaine abuse - coupled with his failing to report for duty - constitutes serious criminal misconduct which poses a threat to the safety of the community and the effectiveness, morale, discipline, readiness and safety of the 347th Wing.

d. Less severe forms of pretrial restraint are inadequate to ensure that A1C Rhone will appear at trial and not engage in serious criminal misconduct. No form of pretrial restraint other than confinement includes physical barriers which will prevent A1C Rhone from fleeing and continuing to abuse cocaine.

At trial, the appellant moved the military judge to declare the pretrial confinement unlawful and grant additional credit against the sentence pursuant to R.C.M. 305 (j)(2). The military judge denied this motion, finding that the commander and magistrate had sufficient basis for directing the appellant's pretrial confinement.

The appellant argues that the military judge abused his discretion in not declaring this pretrial confinement illegal. He asserts "the magistrate had no evidence before him to conclude Appellant 'has a cocaine problem which he has yet been able to overcome,' or that he 'absented himself from his place of duty and went on a cocaine binge on two occasions about one month apart' while he was already under charges and awaiting trial." (Emphasis added by the appellant). Instead, the appellant argues, the magistrate relied on arguments of the government representative at the pretrial confinement review hearing and the "speculative, unqualified opinion developed by the First Sergeant and commander that Appellant was an addict and that he had used cocaine because he was late for work and appeared tired."

We, like the military judge, are limited in our review to a test for abuse of discretion. We must look at the same facts used by the military magistrate who reviewed the confinement decision. The test is not whether we would have reached the same decision as did the magistrate, but whether a preponderance of the evidence supports the magistrate's decision. Neither the military judge nor this Court should substitute its judgment for that of the magistrate. The commander who directed confinement and the reviewing magistrate "are obliged to make their probable cause determinations under R.C.M. 305 on the basis of the totality of the circumstances." United States v. Fisher (N.M.C.M.R. 1993).

Applying this law to the issue raised by the appellant, we find no abuse of discretion. The appellant is correct that the military magistrate did not know for certain all the facts he applied to his decision. In his decision, he was using reasonable inferences drawn from the facts he had available. Given the facts he knew and the reasonable inferences drawn from those facts, the magistrate did not abuse his discretion in ordering the appellant's pretrial confinement to continue. Moreover, the military judge did not err in refusing to grant additional credit for unlawful pretrial confinement, as we agree that the appellant's pretrial confinement was not unlawful.

We conclude the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and the sentence are AFFIRMED.

UNITED STATES v. CRUZ
United States Court of Military Appeals
25 M.J. 326 (1987)

SULLIVAN, Judge:

On June 9, 1983, appellant was tried by a military judge sitting alone as a general court-martial at Fuerth, Federal Republic of Germany. Pursuant to his pleas, he was found guilty of one specification of possession of marijuana in the hashish form and two specifications of distribution of the same substance, in violation of Article 134, Uniform Code of Military Justice. He was sentenced to a dishonorable discharge, confinement for 16 months, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the sentence as adjudged. On appeal, the Court of Military Review dismissed the possession charge and affirmed the remaining findings of guilty and the sentence.

This Court granted review of the following issue [among others]:

> WHETHER THE UNUSUAL PRE-TRIAL STIGMATIZATION, SEPARATION, CONDEMNATION, AND RESTRICTION OF APPELLANT CONSTITUTED ILLEGAL PRE-TRIAL RESTRAINT AND PUNISHMENT IN VIOLATION OF ARTICLE 13, U.C.M.J.

We hold that appellant was punished prior to trial in violation of Article 13, UCMJ, and a rehearing on sentence is required.

The facts surrounding the granted issues are fully reported in the decision below. They are based on sworn statements offered by both parties on appeal, and an administrative investigation conducted pursuant to Army Regulation (AR) 15-6. A brief summary follows.

Early in 1983, the Army Criminal Investigation Command (CID) uncovered the presence of "large-scale drug abuse" at Pinder Barracks, Federal Republic of Germany. Approximately one quarter of the soldiers of the 6th Battalion, 14th Field Artillery (6/14th FA) of the Division Artillery (DIVARTY), 1st Armored Division, had positive urinalysis test results. The DIVARTY commander, Colonel Leslie E. Beavers, who also was the installation commander for Pinder Barracks, was notified of the large number of positive test results for his unit.

On March 24, 1983, Colonel Beavers held a meeting with Lieutenant Colonel (LTC) Glen D. Skirvin, Jr., battalion commander of the 6/14th FA, and LTC John Dubia, battalion commander of the 1/22d FA. He informed them of his planned mass apprehension of suspected drug abusers within DIVARTY. LTC Dubia initiated a discussion regarding removal of unit crests from the uniforms; Colonel Beavers assented to this action.

At 0630 on March 25, 1983, the battalion commanders informed their battery commanders that a mass formation was to be held that same day. Major Richard H. Witherspoon, battalion executive officer of the 6/14th FA, later stated that LTC Skirvin ordered his battery commanders and senior non-commissioned officers to remove the unit crests from the

arrestees identified at the formation. Moreover, the procedure to be used at the formation was also established at this time. When a soldier's name was called, he would be escorted by his battery commander and first sergeant to the platform situated at the front of the formation. Once in front of the platform, the soldier's unit crests would be removed from his uniform by his escorts. He would then salute Colonel Beavers and await further instructions.

At 0800 on March 25, 1983, the formation was held. Approximately 1,200 soldiers were present. Colonel Beavers began speaking about trust and how that trust had been betrayed by members of the assembled unit. As he spoke, German Polizei and Army military police entered the base and took stations around the formation. Then, Colonel Beavers began calling the names of the suspected drug abusers. Approximately 40 soldiers, including appellant, were called out of the formation. As previously arranged, the soldiers were escorted to the platform, whereupon the majority of the soldiers had their unit crests removed. They saluted, but Colonel Beavers failed to return the salutes. The Court of Military Review assumed for purposes of its decision that, severally or jointly, the assembled collection of soldiers were called "bastards" or "criminals" or both by Colonel Beavers. This assembled collection was then marched to an adjacent site where the soldiers were individually searched and handcuffed by CID agents, in full view of the soldiers remaining in the formation.

These soldiers were then transported to the CID office for questioning. After being questioned by the CID, the soldiers were returned to their units. Thirty-five arrestees were members of the 6/14th FA. These soldiers, including appellant, were then billeted separately from their unit. After preferral of charges, they were given the opportunity to return to their individual barracks, but twenty-seven elected to remain separate. They were given or adopted the name "Peyote Platoon." This "unit" assembled separately from the battalion in subsequent formations and allegedly marched to the cadence of "peyote, peyote, peyote." Of these soldiers, fourteen were tried by general court-martial and one by a BCD special court-martial; eleven were tried by summary court-martial; five were given nonjudicial punishment; and four received administrative discharges in lieu of trial….

Turning to the pretrial punishment issue in this case, we are convinced that appellant's treatment on the parade ground and as a member of the so-called "Peyote Platoon" violated Article 13. This codal provision states:

> Art. 13. Punishment prohibited before trial
> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

In determining whether the treatment afforded appellant was a punishment or penalty for purposes of this provision, recourse to the military experience is particularly helpful. Colonel Winthrop, in his work Military Law and Precedents 434 (2d ed. 1920 Reprint), stated the following in this regard:

> Discharge with ignominy. A mode of dishonorable discharge, sanctioned by usage for time of war, is drumming, (or bugling,) out of the service, with the "Rogue's March," in the presence of the command. This ignominious form is sometimes conjoined with circumstances of special ignominy. Thus soldiers have been sentenced to be drummed out after having their clothing stripped of all military insignia, or after being tarred and feathered, or with their heads shaved or half-shaved, or with straw halters around their necks, or bearing placards inscribed with the names of their offences.

He also described the disused punishment of placarding as follows:

> Standing or marching for a certain time bearing a placard or label inscribed with the name of the offence -- as "Deserter," "Coward," "Mutineer," "Marauder," "Pillager," "Thief," "Habitual Drunkard" was at one time a not uncommon punishment. In some cases the inscriptions were more extended -- as "Deserter: Skulked through the war;" "A chicken-thief;" "For selling liquor to recruits;" "I forged liquor orders;" "I presented a forged order for liquor and got caught at it;" "I struck a noncommissioned officer;" "I robbed the mail -- I am sent to the penitentiary for 5 years;" "The man who took the bribe from deserters and assisted in their escape."

An historic example of this type of military punishment, although from another country [France], was the public ignominy or ceremony of degradation imposed on Captain Dreyfus. See J. Bredin, The Affair: The Case of Alfred Dreyfus (New York, 1986). Of course, even the alleged traitor Dreyfus was not subjected to this treatment until after he had undergone a trial by court-martial, albeit a highly irregular one. Clearly, public denunciation by the commander and subsequent military degradation before the troops prior to courts-martial constitute unlawful pretrial punishment prohibited by Article 13. The treatment appellant suffered was substantially the same.

We ... hold that a new sentence hearing must be ordered so appellant can bring this prior punishment to the attention of his court-martial. (The suggestion by government appellate counsel that such treatment is not punishment because it was intended to curb the unit drug problem is somewhat specious. Under this rationale, Article 13 would not be violated even if these arrestees had been shot or flogged, so long as its ultimate purpose was to benefit the unit as a whole…). The decision of the United States Army Court of Military Review is reversed as to sentence, and the sentence is set aside. The record of trial is returned to the Judge Advocate General of the Army. A rehearing on sentence based on the approved findings may be ordered.
