

2 The Military Environment

This chapter sets the context for the report by discussing important characteristics of the military environment and culture.

The Department of Defense has responsibility for approximately 3.2 million military and civilian employees who operate from or are deployed to more than 6,000 locations in the United States and more than 146 countries around the globe. Military operations can make it necessary for members of the Armed Forces to face long separations from friends and family and experience close living and working conditions that are often austere, and characterized by minimum accommodations for privacy.

Mission of the Armed Forces

The Department of Defense provides the military forces needed to deter war and protect the security of the United States.² When deployed, leaders of our Armed Forces place our Soldiers, Sailors, Marines, and Airmen in harm's way knowing that they may give their lives in service to our Nation.

Often we project our military forces from permanent basing platforms to areas where infrastructure and support services may not be readily available. The availability of these support assets is dependent on the intensity of conflict, the austerity of the local environment, and whether support assets were deployed as part of the force package. Deployment of these resources is based on the expediency of the mission and types of forces used, planning documents required to provide structure to that response, and the execution orders, which are approved by both civilian and military leadership, to achieve tactical, operational, and strategic objectives.

Military Values and Leadership

The means by which the Department achieves its mission, military values, and leadership goals is by application of command and control structure and authorities. This structure of the “chain of command” promotes the ability of leaders to give and execute war-fighting orders as well as account for the health, welfare, and morale of forces. Each of the Services specifically identifies core values that are a part of every member's reception, training and continued service. Examples of these values are: integrity, selfless service, courage, honor, respect, commitment, and discipline. While the Services may articulate their values differently, all capture the importance of these values to the profession of arms. These values help instill confidence, respect, and create a willingness to go forward during the most difficult situations. They are the essence of our standards of conduct and the bedrock of our profession.

² From www.defenselink.mil Facts and Figures, DOD 101 briefing slides.

The standards we hold leaders to and the nature of command leadership are inimitable to the military. Commanders and leaders are carefully selected for their job because of their demonstrated judgment and abilities. Leaders are entrusted with commensurate powers in relation to the level of responsibilities they shoulder. Sometimes it is difficult for those unfamiliar with or outside of the military to understand the scope of leaders' responsibility and authority over their subordinates and how these interrelate to the decisions and actions taken to ensure readiness and mission accomplishment. At each level, leaders have the crucial responsibility to care for, train, equip, and manage the force under their control in order to accomplish the military mission. Because of this inordinate level of responsibility, every leader's conduct must be exemplary.

A leader's ability to be trusted and followed is based principally on a subordinate's respect for the leader's moral values, demonstrated tactical and technical competence, and physical and mental vigor. Trust between and among different ranks within a unit is essential in achieving the unit cohesion, morale, and teamwork necessary in stressful combat conditions. Any action that results in the appearance of partiality or favoritism undermines the ability to enforce good order, discipline, and authority and compromises the chain of command. Furthermore, any abuse of a leader's power shakes the very foundations where our Service men and women anchor their faith and trust. If an allegation of sexual assault is not appropriately acted upon by trusted commanders and leaders or if an act of sexual assault comes at the hands of a non-commissioned officer or commissioned officer, faith and confidence in the command and its leaders are undermined.

Military Justice System

The purpose of the military justice system is to promote justice, to assist commanders in maintaining good order and discipline, to promote efficiency and effectiveness within the military establishment, and thereby to strengthen the national security of the United States. The legislative underpinning for this system is the Uniform Code of Military Justice (UCMJ), which is found at Title 10, United States Code (USC), Sections 801 through 946. Congress enacted the UCMJ in 1950 as a major revision of then-existing military criminal law. The UCMJ is implemented through Executive Orders of the President of the United States, pursuant to his authority under Article 36, UCMJ (10 U.S.C. §836). Those Executive Orders form a comprehensive volume of law known as the Manual for Courts-Martial (MCM), which includes the Rules for Courts-Martial (RCM) and Military Rules of Evidence (MRE).

Over the past 54 years, the UCMJ and its implementing regulations have undergone multiple amendments and changes to meet the evolving legal requirements of commanders and their respective service members. Congress makes changes to the UCMJ on almost a yearly basis in response to recommendations of the Services and the public. Likewise, the President publishes Executive Orders modifying the Manual for Courts-Martial. The Services also routinely promulgate implementing instructions. The purpose of all these changes and modifications is to maintain the military justice system as a fair and progressive system of criminal justice.

Unlike civilian society—where District Attorneys and U.S. Attorneys make prosecutorial decisions—the military justice system holds alleged offenders accountable through “command” decisions. Commanders are responsible and entrusted with specific legal

responsibilities pertaining to offenses and offenders within their scope of responsibility. As such, commanders at all levels typically receive formal training in their legal responsibilities before they assume command. Also, commanders routinely receive advice from their supporting Staff Judge Advocate personnel with respect to the commanders' obligations and options for handling offenses. The authority and discretion of a commander for how best to handle offenses that come to his or her attention is addressed in Rule for Courts-Martial (R.C.M.) 306.

Options available under the UCMJ

The unique ability of the military system to address alleged offenses in a variety of judicial and administrative ways is poorly understood both outside and within the military. Ordinarily, the immediate commander of a person accused or suspected of committing a criminal offense initially determines how to dispose of that offense. Each commander in the chain of command has independent, yet overlapping discretion to dispose of offenses within the limits of that officer's authority. A decision by a commander does not bar a different disposition by a superior commander. In many cases, the immediate commander will forward the matter to a superior commander because the lower-level commander lacks sufficient authority to take action that he or she believes is appropriate to deal with the severity of the offense.

Rules for Courts-Martial 306(b) provides a list of factors a commander should consider when deciding how to dispose of an offense. These factors include: (1) the character and military service of the accused, (2) the nature of and circumstances surrounding the offense and the extent of harm caused, (3) the appropriateness of the authorized punishment to the particular accused or offense, (4) possible improper motives of the accuser, (5) reluctance of the victim or others to testify, (6) cooperation of the accused in the apprehension or conviction of others, (7) the availability and likelihood of prosecution by another jurisdiction and the existence of jurisdiction over the accused and the offense, and (8) the availability and admissibility of evidence.

When commanders, typically based upon the legal advice of the Staff Judge Advocate, conclude that proper sanctions lay in a judicial forum and that the criminal burden of proof of "beyond a reasonable doubt" can be met, they have the option to refer alleged offenses for trial by courts-martial in several types of forums, each having different levels of rights and authorized punishments.

General Court Martial: This forum is the highest trial level in military law and, with rare exceptions; it is typically only convened by order of a general or flag officer. Those exercising general courts-martial convening authority are typically division or corps commanders in the Army, commanders of numbered air forces or major commands in the Air Force, Navy regional commanders, or Marine Corps general officers in command. Prior to the convening of a general court-martial, a formal pretrial investigation into the offense(s) must be conducted, and a written legal opinion as to the disposition of the charges must be given to the convening authority. The court-martial may be composed of a military judge sitting alone or a combination of at least five members with a military judge presiding.

An accused elects whether to be tried by military judge alone or by a court-martial panel of members. If an accused pleads guilty to some or all of the charges, only the military judge will accept the plea(s) and enter the finding(s) of guilty and the accused elects whether to be sentenced by the military judge or by a panel of members. The trial counsel (prosecutor) represents the government and defense counsels are appointed to represent the accused. In addition, the accused may retain civilian counsel at no expense to the government or request to be represented by a military counsel of choice when reasonably available. The only limits upon a general court-martial sentence are the maximum limits established for each offense and punishments may include: the death penalty (imposed by court members only), a dishonorable discharge or bad-conduct discharge for enlisted members, a dismissal for officers (which is generally viewed as equivalent to a dishonorable discharge), confinement, loss of all rank for enlisted members, loss of all pay and allowances, and fines.

Special Court-Martial: This is the intermediate court in the military's trial structure and must be convened by an officer (typically in the grade of O-5 or higher) specifically vested with authority to convene a special court-martial. Similar to a general court-martial, but less formal in nature, special court-martial convening authorities receive the benefit of legal advice from their Staff Judge Advocate and alleged offenses are investigated before charges are preferred (initiated) and referred to trial, where the legal standard is proof beyond a reasonable doubt. The court-martial may be composed of either a military judge sitting alone, at least three members sitting without a judge, or a combination of a military judge presiding with at least three members.

Similar to a general court-martial, the accused generally has the same options with respect to being tried and sentenced by a military judge or panel members, and the accused has similar options regarding defense counsel representation. Any service member may be tried by a special court-martial for any non-capital offense. Maximum punishments from this proceeding include confinement at hard labor for one year, forfeiture of two-thirds of one month's pay for one year, and loss of all rank for an enlisted member. A bad-conduct discharge may also be assessed against enlisted members so long as a military judge was detailed and a defense counsel represented the accused.

Summary Court-Martial: This type of trial is designed to dispose of non-capital offenses in a simplified proceeding, consisting of one commissioned officer that may, but not need be, a lawyer. The accused must consent to trial by this forum as a prerequisite to the proceeding. The accused is not entitled to a detailed lawyer, but may be represented by a civilian counsel at no expense to the government, or by an individually requested military counsel. Such requests for counsel shall be granted if the appearance will not unreasonably delay proceedings and military exigencies do not preclude it. The proceedings include examination of witnesses and evidence, application of the Military Rules of Evidence, factual conclusions, and imposition of punishment.

Only enlisted service members may be tried by summary court-martial. The maximum punishment that may be imposed by a summary court includes reduction in grade, confinement at hard labor for one month, forfeiture of two-thirds of one month's pay for one month, hard labor without confinement for forty-five days, or restriction for two months.

Unlike civilian jurisdictions, commanders can take a variety of adverse actions against alleged offenders when the evidence falls short of that required for criminal prosecution or the offense otherwise does not warrant trial by court-martial, or when other issues suggest a more appropriate disposition (e.g., a victim's desire to not testify).

Nonjudicial Punishment: Nonjudicial punishment is specifically addressed in Article 15 of the UCMJ and often referred to as an “Article 15,” Captain’s Mast (in the Navy), or nonjudicial punishment proceedings. Essentially, the commander serves as sole decision authority (i.e., judge, jury, and sentencing official) in nonjudicial punishment proceedings. Part V of Manual for Courts-Martial (MCM) notes that commanders considering cases under Article 15 “will exercise personal discretion in evaluating each case, both as to whether nonjudicial punishment is appropriate and, if so, as to the nature and amount of punishment appropriate.” However, commanders are always cognizant of the fact that an alleged offender does not have to accept nonjudicial punishment proceedings as the forum to dispose of the charges, but may instead demand to be tried by court-martial.

Procedures and maximum punishments are specified within Part V of MCM. Additionally, each Military Department has its own implementing regulations providing guidance for the administration of cases under Article 15, UCMJ. Punishments can include correctional custody for certain enlisted members, arrest in quarters for officers, extra duties for certain enlisted members, reductions in grade for enlisted members, forfeitures of pay, restrictions to certain geographical limits, reprimands, and admonishments.

Administrative Action: When circumstances surrounding reported offenses present evidence problems or other legal issues, commanders may instead elect to pursue appropriate types and combinations of administrative actions to hold a military member accountable for violating military standards.

Although the administrative options vary somewhat by Service, options commonly available include: administrative discharges with or without unfavorable characterizations, downgraded performance or efficiency reports, administrative reductions in rank, extra training, censures, reprimands, rebukes, administrative withdrawal or withholding of privileges, establishment of unfavorable or derogatory information files, reassignment or transfer actions, rehabilitation, career field reclassifications, bars to reenlistment, personnel reliability program recertification, security classification changes; and pecuniary liability for negligence or misconduct.

It is also important to note that commanders often can utilize many of these administrative options in conjunction with courts-martial convictions or nonjudicial punishment proceedings. In addition, both nonjudicial punishment and administrative actions can have significant negative career and employment repercussions, both within the military and in the civilian community. However, the Privacy Act and other privacy considerations for both the victim and the alleged offender (who is not convicted of a crime), make it nearly impossible to make these administrative and nonjudicial options “transparent” to the public.