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Military Law: Summary and Resource Digest¹

“...that the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield.”

—Dow v. Johnson, 100 U.S. 158, 169 (1879)²

Constitutional Sources of Military Law.

The U.S. Congress has full lawmaking authority under Art. I, § 1, including laws governing the military (e.g., Title 10, U.S. Code, *below*). The spending and debt clauses in Art. I, § 8, cl. 1 & 2 provide the general power to fund military power.

Congress may declare war, Art. I, § 8, cl. 11, and may also define violations of international law, Art. I, § 8, cl. 10.

Congress may raise and fund armies, but may fund them only within a two-year period; it may also raise and maintain a navy, albeit without any limit on naval appropriation (army and navy clauses, Art. I, § 8, cl. 12 & 13). This has been construed to include those forces evolving from the army and navy, e.g., the Air Force and the Marine Corps.

Other sources of Congressional authority over the military include:

- the Government and Regulation Clause, Art. I, § 8, cl. 14, rule-making authority over the land and naval forces. This provides for Congress’ establishment of laws governing the military (Title 10, U.S. Code) and the Militia (Title 32), and for a separate military court system.
- the Militia Clauses, Art. I, § 8, cl. 15 & 16, permitting Congress to “call forth” and regulate the “Militia,” which has evolved into the states’ Army and Air National Guard. The Guard is under Federal control when

“employed in the Service of the United States.”

- The Necessary and Proper Clause, Art. I, § 8, cl. 18, empowers Congress to enact whatever laws are necessary for it to act upon its powers.
- The Habeas Corpus clause, Art. I, § 9, cl. 12, requires preservation of the Great Writ unless suspended in time of “Rebellion or Invasion;” habeas corpus is a useful writ when the U.S. military is holding someone. Habeas’ presence in Art. I suggests that its suspension and uses are up to Congress.

The **President** is vested with the Executive power, Art. II, § 1, cl. 1, and is named as the Commander in Chief of the armed forces, Art. II, § 2, cl. 1. The Treaty Clause (Art. II, § 2, cl. 2) enables the President to make treaties, with the advice and consent of the Senate, including on matters of national security.

More generally, The Appointments Clause (Art. II, § 2, cl. 2) permits the President to appoint Officers either with advice & consent of the Senate (e.g., Secretary of Defense) or such “inferior officers” that the Congress vests in the President by law, which would include military officers (though according to case law, not necessarily military judges). The Take Care Clause, Art. II, § 3, requires the President to “take Care” that the laws be executed, and has been construed (e.g., *Youngstown Sheet & Tube, below*) to include emergency national security actions.

The **Judiciary** may rule on cases and controversies arising under federal constitutional and statutory law (Art. III, § 2), including those involving the Armed Forces requiring interpretation of Art. I and II, as part of “all cases in law and equity”.

Treaties made (ratified) under the authority of the United States, e.g., the Geneva Conventions, are the supreme law of the land. Art. VI, cl. 2.

The Second Amendment provides for a Militia and the right to bear arms; some courts have seen in this a *collective rights* view of the people to form a Militia in this context; this has not been conclusively decided.

The Fourth Amendment’s search-and-seizure provision does not exclude military personnel. The Military Rules of Evidence (included in the Manual for Courts-Martial, see below) 311-315 discuss this, do make some limited exceptions for administrative inspections, do allow commanders to authorize searches, but generally hew to

similar law.

The Fifth Amendment exempts criminal military cases from presentment or indictment. However, the right against self-incrimination does apply and is mandated by Art. 31, UCMJ (10 U.S.C. § 831) and by Mil.R. of Evid. 301. Military courts have found Art. 31 to be broader than *Miranda*, though *Miranda* does apply.

The Sixth Amendment applies, albeit the right to counsel is in proportion to the formality of the proceeding, esp. at general courts-martial level.

The First Amendment does not mention service members but case law and statute has limited their religious and free-speech rights, e.g., Art. 88 forbids contemptuous words about the President and certain other civilian officials; disloyal statements are an included offense under Art. 134, the “conduct unbecoming” statute.

Framers’ intent.

The Framers recognized the need for a national military – a “common defense” – but sought to divide its control between Congress, the Executive, and the States. [Federalist](#) Nos. 23-25, 74 (Hamilton). They did see commerce and a Navy as a solely national responsibility, particularly as the latter would defend the former. Federalist No. 11 (Hamilton).

The Framers saw the “Militia” – state militaries, now the National Guard – as a counterweight to the threat of tyranny by a national military establishment. The Federalist Nos. 25, 28, 29, 69 (Hamilton); 41, 46 (Madison).

The Framers believed that the judiciary should have prerogatives in the area of international and military law. Federalist No. 80 (Hamilton). The judicial power was the ultimate defense of the Constitution, outside which the Executive and Congress’ authority would be void. Federalist No. 78 (Hamilton).

Statutory sources of military law.

Title 10 of the United States Code, enacted by Congress, provides for the regulation and governance of the U.S. military. Title 10 includes the **Uniform Code of Military Justice**⁶, enacted as 10 U.S.C. §§ 801-946 (also characterized as UCMJ Articles 1-146 inclusive). Some particularly important subsections of the UCMJ:

Art. 2 (10 U.S.C. § 802). Sets out the categories of active-duty service members subject, wherever they are worldwide, to the UCMJ and court-martial proceedings. This is “status-based jurisdiction,” and they are liable from the moment of their oath of enlistment through discharge or release from active duty⁷ for offenses committed during that period.⁸

Art. 31. Official re-emphasis of right of suspects against self-incrimination.

Art. 32. Pre-trial investigation, often termed “an Article 32.”⁹ Provision for right to counsel and for due process, though error in Art. 32 proceedings does not constitute judicial error.¹⁰ Art. 33-38 provide for further pre-trial procedure, e.g., referral and service of charges.

The “punitive articles” (Art. 77-134, 10 U.S.C. §§ 877-934) describe crimes and set out penalties “as a court martial may direct” (the specific punishments left to the Manual for Courts Martial, below) and, in some crimes, death. Many of the crimes are standard common-law crimes, e.g., murder, arson, theft; also inchoate crimes (principals, accessories, etc.). Other crimes are “status” crimes peculiar to the military: absence (AWOL, desertion); duties and orders (disobedience, mutiny, dereliction of duty, misbehavior of a sentinel); superior-subordinate offenses (mutiny, contempt, insubordination, etc.); combat-related offenses (e.g., espionage, misconduct before the enemy, conduct unbecoming a service member, spying, misconduct as prisoner). Two general articles, Art. 133 and 134, cover “conduct unbecoming” by officers and by military personnel generally.

Courts-martial and military commissions are not normally reviewable under the Administrative Procedure Act, 5 U.S.C. § 701(b)(1)(F).¹¹

The **Manual for Courts Martial**,¹² an executive-branch document, includes in one volume: specifications for UCMJ crimes; the **Rules for Courts-Martial** (RCM, i.e., rules of procedure); the **Military Rules of Evidence**

(Mil.R. of Evid.), which are nearly identical to the Federal Rules of Evidence as enacted by Congress; specifications and punishments for each crime. The MCM is common to all services **and the UCMJ and MCM are the primary, comprehensive sources in military criminal matters.**

“Military law” also generally includes regulations of the individual services (on all topics). The primary authority is by Department of Defense [Directives](#) and Instructions (along with DoD Handbooks for further clarification) and these represent a mid-level authority between U.S. statutes and service regulations. DoD directives can also appear in the [Code of Federal Regulations](#)¹³ (notably Title 32, National Defense).

Each military service will have its own set of regulations – Air Force Instructions (AFI); Secretary of the Navy Instructions (SECNAVINST), for Navy and Marine Corps; Army Regulations (AR) – as the primary authority, along with assorted handbooks, field manuals, publications and pamphlets to expand on the regulations. These publications will usually have a series number (Army publications of the 27-series, e.g., cover Legal Affairs); researchers may find service publications online of the [Army](#), [Navy](#),¹⁴ [Air Force](#), [National Guard Bureau](#), [Coast Guard](#) and [US Marine Corps](#). All of this is subordinate to Title 10, the UCMJ, the MCM and DoD directives.

Sometimes these regulations may supplement legal proceedings, e.g., [AR 15-6](#) provides for Army staff investigations of wrongdoing (often termed “a 15 dash 6 investigation” or simply “a 15 dash 6,” e.g., Maj. Gen. Taguba’s 2004 report on Abu Ghraib was a “15-6”)¹⁵; [AR 735-5](#), Property Accountability¹⁶, provides for lost-property investigations and imposition of pecuniary liability (formerly “reports of survey”); AR 190-series (military police) includes [AR 190-14](#), use of force, and [AR 190-55](#), military executions.

Subordinate commands of the various services often will also issue regulations, usually as supplements to existing service regulations and usually with the same numbering system. The National Guard Bureau issues National Guard Regulations for Army and Air National Guards of the various states, which will supplement Army and Air Force service regulations for Guard organizations.

Note: service members can be prosecuted for failure to obey regulations under Art. 92 of the UCMJ (10 U.S.C. § 892). This can include investigators or prosecutors who exceed their authority, e.g., breach Art. 31 or 32.

The Military Court System.

The military may try and punish offenses against the UCMJ by several different methods:

Art. 15 (10 U.S.C. § 815) **proceedings** (“Article 15s,” also characterized by the traditional terms of “Captain’s Mast” (Navy) or “Office Hours” (USMC)) provide for nonjudicial punishment in relatively informal settings before a unit commander. Procedures are by service regulation (e.g., [AR 27-10](#), *Military Justice* for the Army; [AFI51-202](#), *Nonjudicial Punishment* for the Air Force; [JAG INSTR. 5800.7D](#), *Manual of the Judge Advocate General* (JAGMAN 2004) for the Navy and Marines, Commandant Instruction [CIM 5810.1D](#), *Military Justice Manual* for the Coast Guard). Article 15s are “company grade” or “field grade” – the rank of the commander, a company commander usually 1st Lt. or Captain (Army/Air Force/Marines) or Lt. (j.g.) or Lt. (Navy/Coast Guard) and “field grade,” i.e., battalion or brigade level or equivalent – Major, Lt. Colonel or Colonel (Lt. Cdr., Cdr., Captain in seagoing services). The distinction is important since a field-grade commander can apply heavier penalties.

Article 15s take place for minor offenses (i.e., no higher penalty than bad-conduct discharge or confinement for 1 year), and must be for a breach of the UCMJ. The commander will, in conducting the Article 15, inform the service member of certain rights, including the right to consult with counsel (but not have counsel present), to remain silent, to present evidence, or to refuse Art. 15 and opt for court-martial. Punishments can include reprimand; restriction, extra duties, forfeiture of pay for a certain period, correctional custody (the base stockade or brig) for 7-30 days, or reduction in rank.

Summary, Special and General Courts Martial are convened by a higher commander, e.g., the Convening Authority. General Court Martial Convening Authorities (GCMA) is usually a very senior commander (two-star rank or above, division command or above); special and summary courts-martial can also be convened by GCMA's or by installation or vessel commanders. The convening authority is a commander, not just a person of a certain rank, and cannot be the person bringing charges; they may refer the charges to higher authority.¹⁷ (Art. 16-21 define courts-martial and set jurisdiction). The courts-martial are conducted according to the RCM.

- Summary courts-martial will usually consist of an impartial commissioned officer who is a judge, is limited to enlisted defendants and minor offenses under the UCMJ, is somewhat inquisitorial in nature, and may impose a limited range of sentences. The accused may consult with counsel but has no right to military counsel at trial; s/he

may be represented by civilian counsel, but not at government expense.¹⁸

- Special courts-martial may try any non-capital¹⁹ offense under the UCMJ, has a panel of 3 members and usually has a military judge. Enlisted defendants may request 1/3 of the panel also be enlisted. Special and general courts-martial are conducted more in the manner of a formal civilian trial, with verbatim records and full defense counsel.
- “BCD Special” courts martial may adjudge confinement in excess of 6 months (to a maximum of one year), forfeiture of pay for more than 6 months, or bad-conduct discharges (BCD). This proceeding requires that a military judge was detailed to the trial, qualified counsel (Art. 27(b) UCMJ) was detailed to represent the accused, and a verbatim record of the proceedings and testimony was made.²⁰
- General courts-martial may try any person subject to the UCMJ, and may impose any sentence of imprisonment (e. g., to military prison), any level of discharge, forfeiture of pay and allowances, or death, depending on the offense. It consists of a military judge and not less than 5 members (though the defendant can request a judge alone). Trial lawyers are always certified military lawyers and the judge usually a detailed military judge.

Note: armed services’ trial judges, defense counsel²¹ and criminal investigators²² may be in separate organizations, attached to field commands but not under direct command. A military judge *must* be independent of convening command authority per 10 U.S.C. § 826(c) (Art. 26(c) UCMJ) nor may the judge consult *ex parte* with members of the court (Art. 26(e)).

Criminal cases usually follow a pattern of search, seizure, accusation; Art. 15 or Art. 32 proceeding; pre-trial procedure and investigation; trial; verdict and sentence. Review of court findings and sentence must be reviewed by the convening authority, usually referred to that authority’s Staff Judge Advocate; then, the convening authority must forward the case to that service’s Judge Advocate General (TJAG), who may modify or set aside the findings and/or sentence and forward it to the court of criminal appeals.

The military has two appellate-court levels to consider court-martial appeals and to interpret military law. Each service (Army, Navy/Marine Corps, Air Force, Coast Guard) has a Court of Criminal Appeals (CCA, formerly known as Courts of Military Review (C.M.A.)). Above them is a single United States Court of Appeals for the Armed Services (USCAAF, formerly Court of Military Appeals). Beyond that, the highest level of appeal is to the U.S. Supreme Court.

Federal civilian courts (below U.S. Supreme Court)²³ normally cannot review findings of courts-martial or military commissions, as the Administrative Procedures Act exempts courts-martial and military commissions, and military actions

in the field in time of war, from civilian court review.²⁴ However, counsel can still seek remedy from Federal courts in certain instances even with courts-martial – see “Servicemembers’ Access to Federal Courts” section below – or from military appellate courts (see “extraordinary writs” further below that).

Military courts’ rulings, which are binding in the same manner as other courts, are in the Military Justice Reports (M.J.).²⁵ These are a separate set of bound reports but, where these cases interpret a statute (esp. 10 U.S.C.), the U.S. Code Service or U.S. Code Annotated will list them, along with any rulings by the U.S. Supreme Court or other courts (where relevant). Researchers may also find M.J. cases listed online, e.g., at Westlaw.

Jurisdiction is usually over active-duty service members, as defined in Art. 2, UCMJ. This usually does not extend to civilian (non-military) persons but if charged (e.g., as spies) such persons could face a military commission instead of a Federal court. (See “Military Commission Trials,” separate section below).

States may also create military courts-martial (summary, special and general) and courts of inquiry for Guard members in state service, and may incorporate the UCMJ, see, e.g., Cal. Mil. & Vet. Code §§ 102, 103, 450-474.

Military Court Staffing and Legal Agencies

The US Army’s Legal Services Agency includes counsel that represent the Army as an agency, e.g., its Procurement Fraud, Litigation and Environmental Law divisions; more importantly, it also supports the Army Court of Criminal Appeals,²⁶ the Army Trial Judiciary and the Army’s [Trial Defense Service](#). The latter provides defense counsel, who are independent of field commands (i.e., of Convening Authority). Army TDS represents soldiers charged with military criminal offenses at trial; represents soldiers during criminal investigations and before elimination or grade reduction boards; counsels soldiers regarding pretrial restraint, nonjudicial (Art. 15) punishment, and various adverse administrative actions. The Military Judge Program is administered by the Army Trial Judiciary and provides judges to general and special courts-martial.

Air Force organization is similar, with a USAF Trial Judiciary and a Trial Defense Division²⁷ providing judges and defense counsel. The Navy JAG office includes investigations, constitutional-law, Article 138 and appellate-defense units, as well as a trial judiciary to serve the Navy and Marine Corps; it also includes the Navy/Marine Corps court

of criminal appeals, whose chief judge reports to the Navy's judge advocate general.²⁸ However, trial defense counsel will be Navy/Marine JAG personnel "detailed by the judge advocate's commanding officer," i.e., by the possible convening authority.²⁹

Current Legal Authorities for War and Mobilization.

While not on point for most courts-martial, the legal basis for the current war may be both the authority for – and the object of legal challenge to – such wartime matters as mobilization, stop-loss, and military-commission trials.

The War Powers Resolution, passed by Congress at the end of the Vietnam War, 50 U.S.C. §§ 1541-1548, requires armed forces to be withdrawn from a conflict after 60 days unless further authorized by Congress, and Congress may pass a resolution directing their withdrawal. This was passed over Pres. Nixon's veto and no President since has conceded its constitutionality since.

Congress, in September 2001, did not declare war but did authorize the President to engage in military operations against al-Qaeda, notably in Afghanistan, with its Authorization for Use of Military Force Joint Resolution, Pub.L. 107-40, 115 Stat. 224, 50 U.S.C. § 1541. Congress later authorized the use of force against Iraq, H. J. RES. 114 (October 10, 2002), [text online](#).

With these authorizations, the President issued Presidential Proclamation 7463, 66 Fed.Reg. 48199 (Sept. 14, 2001), declaring a national emergency; this was the basis for deployment of forces and call-up of Reserve and National Guard units, and delegated Executive authority for this to the Secretaries of the military departments. Exec. Order No. 13223, 66 Fed.Reg. 48201 (Sept. 14, 2001).

Reserve Components³⁰ – the Reserve units and individuals of the five armed services, plus the Army and Air National Guard of the various States and Territories – can be mobilized into Federal active-duty service in certain contingencies; that is their purpose.³¹ The statutory authorities for mobilization, usually pursuant to a declaration of war or national emergency by the President and/or Congress, are 10 U.S.C. §§ 331-335³², 10102, 12301, 12302, 12304, and 12406³³, which often set time and number-of-personnel limits on those call-ups. Most of the post-9/11 and Iraq call-ups were under §§

12301(a), 12302 and 12304. § 12302(b) does require “fair treatment” in call-ups but has not been tested, nor has 10 U.S.C. § 12404 requiring the President to maintain National Guard units’ composition “so far as practicable.”

Stop Loss

“Stop loss” is the suspension of retirement, release from active duty, discharge or separation of military personnel deemed essential to national security. 10 U.S.C. § 12305 authorizes the President to suspend certain personnel actions (e.g., discharges, releases from active duty, etc. – in other words, “stop loss”) of Reserve Component and active-military (regular) military members. The term itself is not mentioned in the statute but has been in use since 1990’s Operation Desert Shield. All armed services had some form of stop-loss after 9/11 and for the first months after the March 2003 invasion of Iraq; as of summer 2005 only the Army (which includes Army Reserve and Army National Guard) has stop-loss; Army stop-loss has focused on certain key specialties, notably Special Forces and MPs.

Army regulations only touch on stop loss and much of the official guidance has been in memoranda and directives. The main authorities are:

- Message, 210002Z NOV 02,³⁴ Dept. of the Army (DAPE-MPE), SUBJ: New Reserve Component Unit Stop Loss Policy. Frequently cited in Army documents, this directive announces a “skill-based” stop-loss policy for RC members mobilized under 10 U.S.C. §§ 12302 and 12304, effective till 90 days after the unit’s *de*-mobilization. This directive also sets out categories of soldier separations that would *not* be affected by stop-loss, including CO, hardship, homosexuality, disability and certain other (usually involuntary) separations.
- MILPER Message 03-040.³⁵ Nov. 22, 2002 directive suspending releases from active duty (REFRAD) for National Guard members mobilized under 10 U.S.C. §§ 12302 and 12304, keeping them on active duty for the mobilized time of their unit plus 90 days, but continuing the usual involuntary separations as noted in the 21 Nov message *supra*. Cited in *Santiago*.

The Army usually sets a new Expiration of Time of Service (ETS) date that is meant as a “notional and arbitrary” flag,³⁶ usually a 24 December date far in the future (usually 24 Dec 2031).

Little case law exists on “stop loss” and much of it is ongoing as of July 2005.³⁷ As of that date, the cumulative-service limits

(personnel numbers and time duration) of 10 U.S.C. §§ 12301, 12302, and 12304 have not been raised, nor has 10 U.S.C. § 12407(a), requiring Guard members to be released at the end of his/her term of enlistment.

Recruitment: Legal issues.

The recruitment contract has often, but not always, analyzed in light of contract-law principles; courts often deem the military's (non-)compliance with statute and its own regulations a stronger criterion.

Service regulations governing recruitment include [AR 601-210](#), *Regular Army and Reserve Enlistment Program*; Air Force Recruiting Service Instruction (AFRSI) [36-2001](#), *Recruiting Procedures for the Air Force*; ³⁸ *Coast Guard Recruiting Manual*, Commandant Instruction (COMDITINST) [M1100.2D](#); *Navy Recruiting Manual*, [COMNAVRECINSTR 1130.8F](#); **Marine Corps Order (MCO) [P1100.72A](#), *Personnel Procurement Administration*, and MCO [P1100.72C](#), *Enlisted Procurement*.**

Some requirements include the requirement for the enlistee to sign in the presence of the officer administering the oath of allegiance, 10 U.S.C. § 502. The minimum age for enlistment is 18 (also the age of majority for signing such a contract) but a 17-year-old can enlist if her/his parents co-sign the enlistment form.³⁹ The criteria for enlistment can differ between men and women.⁴⁰ The time between enlistment and reporting for duty can be separated under the Delayed Entry Program (DEP).⁴¹

A defective enlistment might not preclude criminal jurisdiction under the UCMJ, per Art. 2(b) and 2 (c) (10 U.S.C. §§ 802 (b-c)).⁴²

Members of the Reserve Components can incur obligation to attend active-duty for training, one-weekend-a-month drills, and a two-week annual training ("summer camp"); see, e.g., [AR 135-91](#), *Army National Guard and Army Reserve: Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Procedures* (1 Feb 05) which describes individual service commitments for the RC member prior to wartime mobilization.

Courts may review enlistment cases based on principles of contract law but the case law is inconsistent; a recent 9th Circuit

⁴³ stop-loss case, *Santiago*, ruled that common-law principles can apply to contracts, but that plain language of a relevant statute could prevail, esp. if enlistment contracts acknowledge that laws and regulation may change without notice.

Servicemembers' Access to Federal Courts.

Generally, a person challenging a military decision generally must allege (a) a violation of a recognized constitutional right, a federal statute, or military regulations, and (b) exhaustion of available intraservice remedies. Court weighs (1) the nature and strength of the plaintiff's claim, (2) the potential injury to the plaintiff if review is refused, (3) the extent of interference with military functions, and (4) the extent to which military discretion or expertise is involved.⁴⁴

The Administrative Procedures Act,⁴⁵ as litigated, includes military organizations as "agencies" that can be mandated to comply with administrative procedure under the APA.⁴⁶ Service members need not exhaust administrative remedies to raise an issue under Federal law.⁴⁷

The *Feres* doctrine can complicate servicemembers' attempts to seek remedy for personal injury incident to service; usually they cannot recover under the Federal Tort Claims Act.⁴⁸ In the *Feres* case,⁴⁹ Lt. Rudolph Feres died in a barracks fire; his widow sought to recover damages and was denied in a 1950 landmark case that courts have construed widely in military cases since then. For a service member's claim to succeed, the injury must have occurred off-duty, not on military property,⁵⁰ not during a military mission, and not under military authority. This includes claims by National Guard members.⁵¹ *Feres* does not apply to Privacy Act actions by service members,⁵² since Congress expressly meant to provide for such actions; implicitly, this may apply where *Feres* clashes with explicit statutory intent.

National Guard members' standing to sue, and even criminal jurisdiction, may depend on their status. National Guard members could be subject to state law, or have access to Federal tort remedies, depending on the type of service: certain types of full-time state duty (armory technicians, state disaster missions) are termed "Title 32 status" (i.e., 32 U.S.C., which governs the Guard); active-duty-for-training tours on a Federal base could create UCMJ criminal jurisdiction; and a mobilized (Federalized) unit ("Title 10 status"), being under Federal law, could require proceedings in a Federal court.⁵³

Military personnel facing some imminent event to themselves, e.g., a military deployment with a “stop-loss” issue pending, might seek **injunctive relief** to avert it. The usual 4-prong balance-of-harms tests – 1) a substantial likelihood of success on the merits, 2) that the plaintiff would suffer irreparable injury if an injunction is not granted, 3) that an injunction would not substantially injure another interested party, and 4) that an injunction would favor the public interest – applies.⁵⁴ The “exhaustion of administrative remedies” requirement might be waived if that would be futile or if the plaintiff can show irreparable harm.⁵⁵ Note, however, that in military cases the moving party must make a much stronger showing of irreparable harm than for the ordinary criterion for injunctive relief.⁵⁶

Habeas may also be available to challenge the legality of a military commission hearing.⁵⁷ Venue for habeas applications for Guantánamo detainees is the D.C. District Court.⁵⁸

Normally Federal civilian courts cannot review findings of courts-martial or military commissions;⁵⁹ however, some courts have held that **collateral review** is possible as the actions facing review are actions in the military “agency” and not in the courts-martial.⁶⁰ Against courts-martial findings, an attack on the court’s jurisdiction, using the **writ of habeas corpus**, “is the ordinary procedural vehicle” for such an attack.⁶¹ Such a habeas claim must: (1) assert a constitutional violation; (2) consist of an issue of law rather than fact; (3) implicate no special military considerations making federal court intervention inappropriate; and (4) have received inadequate consideration in the military courts or had the wrong legal standards applied.⁶² Otherwise, the courts may assert that adequate appellate or administrative remedies, e.g., Art. 69 review, have not been exhausted.⁶³ The usual habeas statute is 28 U.S.C. § 2241.⁶⁴ Habeas can be for other than matters of confinement or criminal custody, e.g., stop-loss appeals, “For the writ of habeas corpus has long been recognized as the appropriate remedy for servicemen who claim to be unlawfully retained in the armed forces.”⁶⁶

Extraordinary writs may be available under 28 U.S.C. § 1651, to include mandamus,⁶⁷ prohibition and *coram nobis*. Military appellate courts can grant them.⁶⁸ A Federal court might not be able to issue a writ in a military *criminal* case if that remedy has not been exhausted in military courts,⁶⁹ otherwise a Federal court might have original mandamus jurisdiction.⁷⁰ However, the Government can also seek writs, e.g., to appeal a dismissal;⁷¹ the military appellate courts

themselves can also seek a writ.⁷² The MCM (2005 ed.) edition index does not mention these writs.

Sexual Harassment.

Sexual harassment, which may be characterized generally as unwanted and persistent sexual comments, advances or demands, appears in military policy in several guises, as policies and sanctions against sexual harassment as such, against fraternization or other inappropriate relationships, and against sexual assault. 10 U.S.C. § 1561 is the military's sexual harassment statute, which proscribes it as a matter of policy and sets requirements for investigation. A servicemember client who experiences sexual harassment, or assault, could proffer criminal charges and might also seek whatever remedy through medical, compensatory or administrative (e.g. Art. 138) remedies the military affords (see below and elsewhere in this digest).

Tort remedies by a harassed service member will be complicated by the *Feres* doctrine, which could preclude damages from injuries arising from the member's military service. However, for members of the Reserves and National Guard, the *Feres* doctrine might not apply, depending on their status at the time of injury (see Appendix 4).

No punitive UCMJ statute criminalizes sexual harassment per se; "sexual assault" is encompassed by several punitive statutes, notably:

- Art. 120, rape. Common-law language, death-penalty provision.
- Art. 128, assault. Can include battery, e.g., fondling, touching, etc., which have been prosecuted (see cases, appendix 1 below).
- Art. 77, 78, 81 (principal, accessory, conspiracy). Might apply where others, not actually perpetrating the harassment, are part of the harassment climate or who engage in reprisals against service members complaining of harassment.
- Art. 92, failure to obey regulations. Can encompass failure to comply with sexual-harassment regulations, statutes and policies by the perpetrator(s) or their superiors.
- Art. 93, cruelty or maltreatment toward a subordinate. Has been prosecuted in sexual harassment cases.
- Art. 134, conduct unbecoming. Sexual harassment has been an included offense.

DoD prohibits sexual *harassment*, as a matter of policy, see DoD Directive 1350.2, “Military Equal Opportunity Program” (1995, current to 2003, [PDF](#) and [HTML](#)). Includes sexual harassment policy, guidelines, responsibilities, reporting requirements as part of the larger policy. Civilian employees are covered by 32 C.F.R. § 191, DoD Civilian Equal Opportunity Program.

DoD guidance against sexual *assault* is contained in “Directive Type Memoranda,” general [collection](#) that includes sexual assault (as opposed to sexual harassment). Two recent and important DoD memoranda include Donald Rumsfeld, DoD [Memorandum](#), “Confronting Sexual Assault” (April 30, 2004), which sets out three mandates: are victims comfortable coming forward? Are appropriate and effective mechanisms in place for them? Are commands acting against perpetrators? For guidance on victim protection see also Paul Wolfowitz, DoD Memorandum, “Confidentiality Policy for Victims of Sexual Assault” (March 16, 2005, [PDF](#)).

Service regulations against sexual harassment include:

- Army Regulation⁷³ (AR) 600-20, “Army Command Policy” ([PDF](#)), which includes the Army policy and procedures against sexual harassment in Ch. 7; also ¶¶ 4-14 to 4-16 prohibit improper relationships (e.g., fraternization between ranks). See also Army Sexual Harassment/Equal Opportunity [webpage](#).
- US Air Force Instruction⁷⁴ (USAFI) 36-2706, “Military Equal Opportunity” (2004, [PDF](#)). Establishes the Air Force policy against sexual harassment (¶ 1.1) as part of the much larger equal opportunity program; sets general procedures, responsible authorities. See also USAF Pamphlet 36-2705, “Discrimination and Sexual Harassment” (Feb. 28, 1995, [PDF](#)), a layperson discussion of harassment and what to expect from the Air Force. See also the Air Force Academy [policy](#) and points of contact.
- Secretary of the Navy⁷⁵ Instruction (SECNAVINST) 5300.26C, “Dept. of the Navy Policy on Sexual Harassment” (17 October 1997, [PDF](#)). Policy, responsibilities, procedures. Also see [Navy](#) and [Marine Corps](#) webpages on sexual-harassment policy and procedures, esp. the latter.
- Coast Guard Commandant’s Instruction ([COMDTINST 5350.21D](#)), “Commandant’s Equal Opportunity and Sexual Harassment Policy Statements” sets out policy. Further policy and procedure is in the *Coast Guard*

Personnel Manual, [CIM 1000.6A](#), Ch. 8.H, 8.I, 8.J.

- National Guard Pamphlet [600-4](#) (30 Jun 82, also titled ANG Pamphlet 30-02) governs Army and Air National Guard units, commanders, managers and supervisors. Note: National Guard personnel in civilian job categories or on state (“Title 32”) duty⁷⁶ might have access to civil remedies for harassment.

Separation and Discharge.

Courts-martial may impose **dishonorable discharges**, which can only be adjudged by a general court-martial and is a separation under dishonorable conditions; and **bad-conduct discharge** (BCD) — which can be adjudged by either a general court-martial or a special court-martial and is a separation under conditions other than honorable. Congress has set out types of discharges in 10 U.S.C. § 1169.

The military may also separate personnel through administrative procedure; the types of discharges may be **honorable**, **general discharge “under honorable conditions”**, and **discharge under other than honorable conditions** (“OTH”, formerly Undesirable Discharge). Administrative separations might be for a number of reasons. The ten separations the Army, e.g., typically excepts from stop-loss are mandatory retirement; disability retirement or separation; “separation for the convenience of the government” (e.g., surviving sons or daughters, parenthood, pregnancy, failure to meet procurement medical fitness standards); separation because of dependency or hardship; quality of service separation (e.g., misconduct, poor duty performance, alcohol or drug rehabilitation failure, and punitive discharges under the UCMJ); “don’t ask” separations for homosexuality; separations for failure to meet body fat standards; conscientious objectors;⁷⁷ personnel security program separations; and soldiers deemed “not essential to the national security of the united states.”⁷⁸

The exclusionary (evidence) rule does not apply to administrative discharge proceedings.

DoD Directive [1332.14](#) governs enlisted separations. Pursuant to that, Army service regulations governing administrative separation include [AR 635-200](#), *Enlisted Separations*⁷⁹ (new edition effective 6 July 2005); for Guard and Army Reserve see [AR 135-178](#). Other services address enlisted separations in Navy Personnel Manual (MILPERSMAN) [15560D](#), Marine Corps Separation Manual MARCORSEPMAN (MCO P1900.16 F), and Air Force Instruction [AFI 36-3208](#), Administrative Separation of Airmen.⁸⁰ (Coast Guard separations are at Ch. 12 in the

main *Coast Guard Personnel Manual*, [CIM 1000.6A](#).) For some common separation issues, see below.

Separation: Conscientious Objectors.

Conscientious objection is one longstanding exemption from conscription and military service; administrative separation from the latter is a method. §6(j) of the Universal Military Training and Service Act⁸¹ exempts from “combatant training and service ... who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.” The objector might not need to be a member of an organized sect,⁸² or even religious but the objection must be deeply grounded in deeply held beliefs.⁸³ The objection cannot be limited to a particular conflict⁸⁴, i.e., the objector must object to war in any form. The objection must be sincerely held.⁸⁵ The objection can crystallize after entry into military service.⁸⁶ The objector will have the burden of establishing the claim⁸⁷ but then the burden of disproving it falls on the military.⁸⁸

Service regulations on CO, all solely focused on this topic, the service procedures and criteria, include [DoD Directive 1300.6](#), *Conscientious Objectors*, and 32 C.F.R. §§ 75.1-11, which guide all services. See also the Army's [AR 600-43](#), *Conscientious Objection*; the Marines' [MCO 1306.16 E](#), *Conscientious Objectors*, and Air Force [AFI 36-3204](#), *Procedures for Applying as a Conscientious Objector*.⁸⁹

The DoD Directive and CFR are authoritative on all services. In addition, each service's general reg on administrative separation, noted above, can also apply.

A key organization to consult for information on CO matters is the [Conscientious Objector Central Committee](#); much of its website material need not be repeated here.

Separation: Homosexuality: “Don’t Ask, Don’t Tell”

10 U.S.C. § 654 is the statutory expression of the “don’t ask, don’t tell” policy that mandates administrative separation of those who engage in homosexual acts, who state they are homosexual, or who marry another of the same sex. “Stating” they are homosexual can include any revelation of that propensity, or “demonstration” of that propensity.⁹⁰ Personnel so accused create a rebuttable presumption that they are. The subsequent investigation, on the basis of “credible information,” is conducted by commanders under DoD Directive 1332.14,⁹¹ [§ E3.A4](#), or by military investigators under DoD Directive [5505.8](#), “Investigation of Sexual Misconduct by the Defense Criminal Investigative Organizations.”⁹² Separation mandate and procedure is conducted under the separation regulation of the service and DoD (cited above).⁹³

“Don’t ask” personnel are not precluded from bringing an APA action.⁹⁴

Art. 125 UCMJ is the military criminal statute against sodomy. The Dept. of Defense recently indicated that it means to dispense with the statute; this does not preclude criminal prosecution under Art. 133 and 134 UCMJ, the “conduct unbecoming” statutes.⁹⁵

The [Servicemembers’ Legal Defense Network](#) is a key legal/lobby organization and source of reference for “don’t ask” and gay/lesbian/transgender/bisexual issues in the military.⁹⁶

Separation: Hardship

The service may separate a member, “for the convenience of the government,” for dependency or for hardship. Dependency is where the death or disability of a family member⁹⁷ causes a member to become dependent upon the service member. Hardship is where the service member’s separation will alleviate undue and genuine hardship. Authority for hardship discharge is under 10 U.S.C. § 1173 but is left for service regulations; DoD authority is the standard DoD Directive [1332.14](#) on separations,⁹⁸ and such discharges are usually honorable. The enlisted-separation regulation on separations include definitions on hardship/dependency separations and include

them under their standard administrative procedures in that reg.⁹⁹

Separation: Disabilities

The services may separate military personnel for inability to continue performing their duties; legal authority is 10 U.S.C. Chapter 61 (§§ 1201-1221); DoD authority is DoD Directive [1332.18](#),

***Separation or Retirement for Physical Disability.*¹⁰⁰ The procedure will involve medical evaluation, physical disability evaluation (including appeals), counseling and final disposition. The separation may include entitlement for future benefits, depending on the disability or injury.**

Military Commission Trials

A special and hitherto unusual proceeding, military commissions were once similar to courts-martial, though the latter has since evolved to a trial system, with rules of evidence, procedure and appeal, very much resembling civilian courts, particularly in general courts-martial.¹⁰¹ Military commissions, however, are special military tribunals by which the U.S. military may try *any* persons, particularly non-U.S. military (e.g., spies, “enemy combatants,” etc.); the authority for these courts is by executive order of the current Administration. As currently authorized, these courts may determine rules of evidence, may adjudge verdict and pass sentences of imprisonment or death, and appeals are limited to the Executive branch.¹⁰²

The Administration has cited 10 U.S.C. § 113(b), 140(b), 821, 836, such that they are, as statutory authority¹⁰³ along with Congress’ Sept. 2001 force authorization.¹⁰⁴ Current military commission authority is by executive order, beginning with the *Military Order of November 13, 2001*, Federal Register Nov. 16, 2001 (Vol. 66, No. 222) at 57831-57836 (also listed as [66 F.R. 57833](#) (Nov. 16, 2001)).¹⁰⁵ DoD has supplemented this with:

- DoD Military Commission Order No. 1, [March 21, 2002](#); updated [August 31, 2005](#). Rules of procedure and evidence, such that they are. Differs from the President’s Nov. 13, 2001 Order in that death sentences require unanimous vote, not 2/3¹⁰⁶ (but 2/3 still suffices for a guilty verdict).
- DoD Military Commission Order No. 3, Feb. 5, 2004 ([PDF](#)). Monitoring of the accused and their counsel.
- Military Commission Instructions [Nos. 1-9](#). Proceedings, crimes & elements, qualification of court members

and defense counsel, sentencing, review. Given the constraints on counsel (e.g., SECRET clearance),¹⁰⁷ the limitations on due process and evidentiary rules, and the exclusion of sentence from judicial review, these are critical. The “review” process here is strictly administrative.

- DoD Directive 5105.70, Appointing Authority for Military Commissions, Feb. 10, 2004 ([PDF](#)). Composition, functions and relationships.
- The Code of Federal Regulations, [32 CFR](#) §§ 9.1-18.6, includes the above and is worth comparing, esp. for updates.

No such trials are known to have reached a verdict as of September 1, 2005.

Appendix 1. Some central cases in military law. (see also footnoted cases in text above)

Constitutional powers.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Limits on Commander-in-Chief authority; Congressional superiority.

Perpich v. Dept. of Defense, 496 U.S. 334 (1990). Federal (esp. Congressional) supremacy over **states** in military matters, i.e., Federal mobilization and deployment of the National Guard. Save Our NTC, Inc., v. City of San Diego, 105 Cal.App.4th 285 (Ct.App.4th Dist., 2003). Congress, not state or local governments (issue here: zoning authority), has exclusive legislative jurisdiction, an actual transfer of sovereignty, over Federal base property (active or inactive), and remains except as modified by statute.

Bas v. Tingy, 4 U.S. (7 Dall.) 37 (1800). Congress' and civilians' legal prerogatives in "partial," i.e., non-declared-war conflicts. Early Court recognition of non-declaratory war.

The Paquete Habana, 175 U.S. 677 (1900). Customary **international law**, e.g., law of war, is part of U.S. law and is enforceable by U.S. courts. Supremacy clause. *See also* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). U.S. law cannot be interpreted to violate international law; U.S. commanders could be liable to U.S. citizens therefor. Dow v. Johnson, 100 U.S. 158 (1879). U.S. forces in occupied territory are not liable to that country's law (e.g., in this case, the Confederate States of America) but to U.S. law. *Habana* and *Betsy* questioned by *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir., May 2001): *jus cogens* should not infer or create U.S. jurisdiction over foreign sovereignties.

U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). **Presidential** superiority in foreign treaties and negotiations; Congress may not intrude beyond treaty advise-and-consent.

Dames & Moore v. Regan, 453 U.S. 654 (1981). **President** has power to make agreements in area of national security.

Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857). **Congress** has more authority, and the courts less, in military

matters. Congress' power to provide for trial and punishment of military offenses is independent of Art. III judicial power (i.e., courts-martial as "Art. I" courts). Courts may not review courts-martial *if* the court was properly convened and conducted.

Rostker v. Goldberg, 453 U.S. 57 (1981), judicial **deference** to Congress' judgment on military affairs. Necessary & Proper clause. Issue: statutory exemption of women from draft registration.

McKinney v. White, 291 F.3d 851 (D.C. Cir., 2002), Federal Courts do not have jurisdiction under the Administrative Procedures Act (5 U.S.C. § 701(b)(1)(F)) **to review or set aside** court-martial or military-commission findings where it is a court-martial matter and not, collaterally, that of the "agency."

Runkle v. United States, 122 U.S. 543 (1887), military courts and law must follow **Congress'** specifications.

Weiss v. United States, 510 U.S. 163 (1994), military judges not significantly different than other military personnel. Appointments Clause. *See also* U.S. v. Ryder, 515 U.S. 177 (1995), improperly appointed military judges' decisions not valid. Appointments Clause.

U.S. Navy-Marines Court of Appeal v. Carlucci, 26 M.J. 328 (1988). **Art. I courts** can issue extraordinary writs; military judges must adhere to the ABA Code of Judicial Conduct; military judges must maintain the integrity of their court against the chain of command, on pain of prosecution for dereliction of duty.

Servicemembers' rights.

Middendorf v. Henry, 425 U.S. 25 (1976), courts must **defer** to Congress' judgment on military due process. Summary courts-martial as such, at issue in this case, might not represent a denial of due process or right to counsel.

U.S. v. Hartwig, 39 M.J. 125 (Ct. of Military Appeals, 1994), service members' **free speech** rights adhere to older ¹⁰⁸ *Schenck* "clear and present danger" standard.

U.S. v. Averette, 19 U.S.C.M.A. 363, 1970 WL 7355 (C.M.A., 1970), military lacks **jurisdiction** to court-martial civilian employees of military contractors,¹⁰⁹ absent a Congressional declaration of war. Solorio v. U.S., 483 U.S. 435, 438 (1987). If military has jurisdiction over servicemembers (Art. 2), it can try them for non-service related (e. g., common-law) crimes enumerated in the UCMJ.

U.S. v. Dowty, 60 M.J. 163 (2004).¹¹⁰ Sixth Amendment **right to jury** does not apply to courts-martial; however, convening authority has a duty to appoint a fair and impartial panel and not “stack” the jury.

Burns v. Wilson, 346 U.S. 137 (1953), civilian courts may not review courts-martial but this does not preclude **habeas**. See also Schlesinger v. Councilman, 420 U.S. 738 (1975),¹¹¹ Art. III courts can hear collateral *habeas* attacks on courts-martial, suits for damages or equitable relief. *But see* Hartikka v. U.S., 754 F.2d 1516 (9th Cir., 1985) for criteria on irreparable harm and **injunctive relief** that servicemember plaintiffs must raise.

Feres v. United States, 340 U.S. 135 (1950). Members of armed services whose injuries are incident to their military service cannot recover under the Federal Tort Claims Act. See also Chappell v. Wallace, 462 U.S. 296 (1983), inability to sue on discrimination (*Bivens*) claims since a *Feres* waiver might undermine discipline; U.S. v. Shearer, 473 U.S. 52 (1985), off-duty and off-base requirement; U.S. v. Stanley, 483 U.S. 669 (1987), *Chappell* extended; United States v. Johnson, 481 U.S. 681 (1987), *Feres* upheld, but with dissents, see this case also for recent *Feres* doctrine; Bowen v. Oistead, 125 F.3d 800 (9th Cir., 1997), *Feres* is binding on National Guard members.

Cummings v. Department of the Navy, 279 F.3d 1051 (2002), exception from *Feres* in Privacy Act actions; possible exception whenever Congressional statutory intent is clear.

Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388 (1971). Civilians can sue the U.S. (including, e.g., the military) for **constitutional torts**; *Feres* bars this for service members (see *Chappell*, above).

Garrett v. Lehman, 751 F.2d 997 (9th Cir., 1985). Exclusionary rule does **not** apply to adminis-tra-tive discharge proceedings.

Courts-Martial generally

U.S. v. Hall, 58 M.J. 90 (2003). Gov't bears burden of showing that a constitutional error (in this case, admission of hearsay evidence) is harmless beyond a reasonable doubt.

U.S. v. Mason, 59 M.J. 416 (2004). **Probable cause** basis for a military magistrate's issue of a search authorization (DNA test); U.S. v. Cravens, 56 M.J. 370 (2002). defense has burden of establishing "reckless or intentional" withholding of exculpatory evidence from magistrate.

Noyd v. Bond, 395 U.S. 683, 693 (1969). Military appellate courts can issue **extraordinary writs** and appellants must pursue this avenue before seeking writs from Federal courts. *See also* Dettinger v. U.S., 7 M.J. 216 (C.M.A., 1979). More authorities, and criteria for a Government appeal of a dismissal. *See also* Toohey v. U.S., 60 M.J. 100 (2004). Criteria for seeking extraordinary relief, in this case, because Δ did not receive timely appellate review. *See also* U.S. v. Toy, 60 M.J. 598 (N.M. Ct. of Crim. App., 2004) for more criteria for extraordinary writs.

United States v. Henderson, 59 M.J. 350 (2004). **Special courts-martial** may not, absent proper authority, try any UCMJ capital statute; doing so now constitutes fatal jurisdictional error.

U.S. v. Thomas, 22 M.J. 388 (C.M.A., 1986), **command influence** over courts martial is improper, unlawful; oft-quoted,

"Command influence is the mortal enemy of military justice." . See also U.S. v. DuBay, 37 C.M.R. 411, 17 U.S.C.M.A. 147, 1967 WL 4276 (C.M.A., 1967) which provides for "*DuBay* hearings" on command-influence allegations. For standards of proving unlawful command influence see United States v. Biagase, 50 M.J. 143 (1999), United States v. Richter, 51 M.J.

213 (1999) and United States v. Stoneman, 57 M.J. 35 (2002) . U.S. v. Johnson, 54 M.J. 32 (2000), commingling of administrative investigation with pre-trial procedure; also UCI press **publicity** implications; *see also* U.S. v. Baldwin, 54 M.J. 308 (2001), U.S. v. Ayers, 54 M.J. 85 (2000).

Recruitment.

United States v. Brown, 48 C.M.R. 778 (C.M.A., 1974), 1974 WL 13915. Recruiter misconduct can create defective

enlistment.

United States v. Catlow, 48 C.M.R. 758, 1974 WL 13909, 23 U.S.C.M.A. 142 (C.M.A., 1974). Enlistment can be defective when coerced, e.g., Hobson's choice between enlistment or jail.

Bell v. United States, 366 U.S. 393 (1961). Exclusion of recruitment from common-law contract principles under certain circumstances.

Jablon v. United States 657 F.2d 1064 (9th Cir., 1981). Contract enforcement against Government; enlistee cannot bring promissory estoppel or loss-of-pay damages; remedy must be based on regulation and statute

United States v. Larionoff, 533 F.2d 1167 (D.C. Cir., 1976), *affirmed* 431 U.S. 864. Regulations and statutes can displace common-law on recruitment contract disputes; see also for class-action implications. See also *Antonuk v. United States*, 445 F.2d 592, 598-99 (6th Cir.1971).

Court Access; recruitment; adverse personnel actions.

Mindes v. Seaman, 453 F.2d 197 (5th Cir., 1971), appealed on remand, 501 F.2d 175 (5th Cir., 1974). Often cited (see, e.g., *Qualls and Santiago* under stop-loss, below.) Balance servicemember's claim based on Federal law against interference with military functions. Later courts strongly dispute *Mindes* but Gov't pleadings (e.g., *Santiago*) still raise it.

Wenger v. Monroe, 282 F.3d 1068 (9th Cir., 2002). Criteria for challenging a military decision in court.

Peavy v. Warner, 493 F.2d 748 (5th Cir., 1974). Courts can review and set aside actions taken by the military not in accord with their own regulations.¹¹⁴

National Guard: dual status

Perpich; see above. Definitive ruling on Federal supremacy over States in National Guard mobilization, but also a

comprehensive discussion of **dual status** nature of state militaries and Guard members and how these evolved.

Holmes v. California National Guard, 90 Cal.App.4th 297 (2001). **Dual status** can mean different laws and rights for Guard members when in *state* military status, as opposed to Federally-recognized status.

United States v. Phillips, 58 M.J. 217 (2004). **UCMJ jurisdiction** over reservists is not limited to Art. 2(a)(1) and 2(a)(3), the reservist clauses, but can extend under Art. 2(c), the constructive enlistment clause. Not only does it include travel days where misconduct would hitherto have been outside UCMJ jurisdiction, but the military can use 2(c) to establish subject matter jurisdiction outside the time frame of reservists' orders.

“Don’t Ask, Don’t Tell.”

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir., 1989). Upholds homosexual exclusion policy. Based on *Bowers v. Hardwick*; possibly in question since *Lawrence v. Texas*.

Dahl v. Secretary United States Navy, 830 F.Supp. 1319 (E.D. Cal., 1994). No rational basis for differential between gay/lesbian and heterosexual service members. *See also* *Meinhold v. United States Dep’t of Defense*, 34 F.3d 1469 (9th Cir., 1994), standard for “propensity” goes beyond a mere admission; both cases pre-“don’t ask”.

Able v. United States, 155 F.3d 628 (2nd Cir., 1998). Constitutionality of 10 U.S.C. § 654, “don’t ask” statute, upheld.

Holmes v. California Army National Guard, 920 F.Supp. 1510 (N.D. Cal., 1996); *reversed by* *Holmes v. California Army National Guard*, 124 F.3d 1126 (9th Cir., 1997); *Rehearing and suggestion for rehearing en banc denied by* *Holmes v. California Army Nat. Guard*, 155 F.3d 1049, (9th Cir., 1998); *certiorari denied by* *Holmes v. California Army Nat. Guard*, 525 U.S. 1067 (1999). **Unsuccessful challenge** to “don’t ask.” See also the subsequent and different-issue *Holmes v. California National Guard*, 90 Cal.App.4th 297 (2001) regarding dual status and Lt. Holmes’ possible right to stay on state military duty under California’s non-discrimination law.

United States v. Marcum, 60 M.J. 198 (2004), constitutional challenges to **Article 125** based on *Lawrence v. Texas* must

be addressed on an as applied, case-by-case basis. A 3-prong test: First, was the conduct within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest? *See also* U.S. v. Stirewalt, 60 M.J. 297 (2004).

[Complaint](#), Loomis v. United States, U.S. Ct.Fed.Claims, filed 7 July 2003. Post-*Lawrence* challenge to “don’t ask,” pending; arguments beginning Sept. 2005.

[Cook v. Rumsfeld](#) (U.S.D.C. Mass.), pending, July 2005. Post-*Lawrence* challenge.

Conscientious Objectors

Parisi v. Davidson, 405 U.S. 34 (1972). CO applicants can seek habeas, court-martial charges notwithstanding.

United States v. Seeger, 380 U.S. 163 (1965). Objector need not be affiliated with an organized religion.

Welsh v. United States, 398 U.S. 333 (1970). Objections to war need not be theological.

Sicurella v. United States, 348 U.S. 385 (1955). Limitations on theological (esp. Jehovah’s Witness) objections.

Gillette v. United States, 401 U.S. 437 (1971). Limitations on selective objection to a particular conflict.

Witmer v. United States, 348 U.S. 375 (1955). The objection must be sincerely held.

Sanger v. Seamans, 507 F.2d 814 (9th Cir., 1974). Burden of proof shifts to military; CO’s objection can crystallize after entry in service. *See also* Woods v. Sheehan, 987 F.2d 1454 (9th Cir., 1993), the military can have a “basis in fact” for denying CO status, insincerity being one basis.

Sexual Harassment, criminal prosecution of.

Art. 77, 78, 81: abettors. U.S. v. Seberg, 5 M.J. 895, 900 (Air Force Court of Military Review (A.F.C.M.R.), 1978).

Elements of Art. 77 (principal) and Art. 81 (conspiracy) defined. See also U.S. v. Manuel, 8 M.J. 822, 824 (A.F.C.M. R., 1979). Art. 78 (accessory) defined.

Art. 93: maltreatment of subordinate. U.S. v. Carson, 55 M.J. 656 (Army Court of Criminal Appeals, 2001). Successful prosecution of sexual harassment under Art. 93. See also U.S. v. Johnson, 45 M.J. 543 (Army Ct. Crim. App. 1997), *review denied* 48 M.J. 345 — another Art. 93 sexual prosecution.

Art. 128: assault (battery). United States v. Bonanno-Torres, 31 M.J. 175 (Court of Military Appeals, 1990). An attempt to unbutton a victim's blouse, successfully prosecuted as battery under Art. 128, though persistent sexual overtures (i.e., typical harassment) did not meet elements of rape statute. See also United States v. Gore, 14 M.J. 975 (U.S. Army Court of Military Review, 1982), where fondling could be a separate Art. 128 battery charge. See also United States v. Watkins, 21 M.J. 224 (C.M.A., 1986), *cert. denied* 476 U.S. 1108. Art. 128 battery could be separate charge from rape charge arising from same assault.

Art. 134: conduct unbecoming; sexual harassment as included offense. United States v. Peszynski, 40 M.J. 874 (Navy-Marine Corps Court of Military Review, 1994). Navy petty officer convicted under Art. 134 (conduct unbecoming) for sexual harassment; overturned because Art. 134 charge had no objective, clearly understood standard of criminality nor adequate notice to the public of wrongdoing.¹¹⁸ Further, “we are unaware of any ... custom of the service that proscribes behavior that is characterized *only* as repeated and unwelcome comments and gestures of a sexual nature.”¹¹⁹

United States v. Saunders, 59 M.J. 1 (2003). Court found that prosecution under Art. 134 was proper for sexual harassment. Did not mention *Peszynski* (may be different, more egregious offense, etc.) but counsel should compare the two.

Sexual harassment, generally.

Feres v. United States (see above). Could complicate active duty service members' claims for personal injuries/damages (including from sexual harassment).

U.S. v. Morrison, 529 U.S. 598 (2000). Gov't counsel might invoke this to parry a harassment case. Here, the Court overturned the Violence Against Women Act on grounds that Congress misconstrued the Commerce Clause and 14th Am. § 5 enforcement clause; this might not strike down a *military* harassment claim since federalism is not an issue in a military setting.

U.S. v. Giles, 246 F.3d 966 (7th Cir., 2001). An example of “quid pro quo” when sexual harassment is combined with abuse of official office.

Military commission trials.

ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). Military could not deny habeas corpus to the courts, nor try U.S. citizens when Federal courts are open and available. Silent on foreigners. Still quoted.

ex parte Quirin, 317 U.S. 1 (1942). Supreme Court upheld the military commissions' legality and jurisdiction over German spies arrested in the U.S. in wartime, but reserved the courts' right of ultimate review on military commissions and on Constitutional aspects generally, following *Milligan*. Cited in the Guantánamo detention cases of 2004.

Application of Yamashita, 327 U.S. 1 (1946). Military commissions, trying foreign nationals, can proceed with abridged evidentiary and due process rights. Dissenters objected to denial of Fifth Amendment due process. This case also the origin of the **command-responsibility** doctrine: commanders are strictly liable for any atrocities committed by members of their command.

Duncan v. Kahanamoku¹¹⁸, 327 U.S. 304 (1946). U.S. military did not have the power to try U.S. citizens for non-military offenses while U.S. civilian courts were available.

Johnson v. Eisentrager, 339 U.S. 763 (1950). U.S. *did* have the power to try enemy “illegal combatant” nationals in a military commission when the defendants were captured and tried outside the U.S.

Colepaugh v. Looney, 235 F.2d 429 (10th Cir., Kansas, 1956); *cert. denied*, 77 S.Ct. 568 (1957). U.S. citizen tried by

a military commission in wartime (as a spy, following *Quirin*) need not be afforded a full (treason) trial.

Mudd v. White, 309 F.3d 819 (D.C. Cir., 2002). Issue of standing to challenge a military tribunal finding; only a member of the armed forces or his heir or legal representative may seek to alter a military record.¹¹⁹

Gherebi v. Bush, 374 F.3d 727 (9th Cir., July, 2004). Habeas jurisdiction over “enemy combatants” is valid wherever the U. S. has “exclusive jurisdiction”; proper venue for habeas appeals in Guantánamo is at the D.C. Circuit.

Khalid v. Bush, 355 F.Supp.2d 311, 2005 WL 100924 (D.C. Dist. Ct., Jan. 2005). Enemy combatants captured outside the U.S. have no cognizable constitutional rights.

In re Guantanamo Detainee Cases, 355 F.Supp.2d 443, 2005 WL 195356 (D.C. Dist. Ct., Jan. 2005). Due process and the Fifth Amendment do apply to “enemy combatants.”

Hamdan v. Rumsfeld, 415 F.3d 33, 2005 WL 1653046 (D.C. Cir., July 15, 2005),. Separation of powers doctrine not violated by President’s designation of a military commission to try Al Qaeda suspect. Further, the Geneva Convention of 1949 is not enforceable in court by an enemy combatant, and even if it was, a military-commission trial does not violate it.

¹²⁰

Wartime Detentions

Korematsu v. U.S., 323 U.S. 214 (1944). U.S. can detain U.S. citizens in wartime, on a racial or other basis; reasons of national security meet the strict-scrutiny test. Possibly useful language for counsel in dissents on matters of *habeas* and on judicial deference to military decisions.

Padilla v. Rumsfeld, 542 U.S. 426 (2004). U.S. citizen arrested on U.S. soil on orders from Federal Court in Manhattan and then seized from them by the U.S. military, needed to file for *habeas* in the district that included his brig (South Carolina), not the Southern District of New York. Kept in detention on jurisdictional grounds.

Hamdi v. Rumsfeld, 542 U.S. 507 (2004). U.S. citizen arrested in an overseas war zone (Afghanistan) and held in

the brig did have right to review his detention, but *Korematsu* not mentioned. Split decision, with possibly useful language on habeas corpus by Scalia, J., dissenting.

Rasul v. Bush, 542 U.S. 466 (2004). Foreign nationals (albeit from “friendly” nations, i.e., Kuwait and Australia) detained in Gitmo did have access to Federal district courts via habeas corpus, Alien Tort Claims Act and federal-question statute.

Stop-Loss.

Sherman v. United States, 755 F.Supp. 385 (M.D. Ga., 1991). First Gulf War. The stop-loss statute¹²¹ applies to active duty personnel; court deference to President’s military decision on stop-loss in wartime¹²² .

Qualls v. Rumsfeld, 357 F.Supp.2d 274 (D.D.C., Feb. 7, 2005). National Guard member, enlisted under the “Try One” program and retained under § 12305 “stop loss,” alleged breach of contract, fraud, and deprivation of due process. Injunction to release him from active service denied; though irreparable harm was possible the court found *no* likelihood he would prevail on his claims. The court found he *could* sue without exhausting administrative remedies,¹²³ and that the contract would be rescinded if fraud and false representations were the inducement.

Santiago v. Rumsfeld, 407 F.3d 1018 (9th Cir., May 13, 2005). The language of enlistment contract, albeit with a vague provision that “laws and regulations that govern military personnel may change” regardless of the contract, was valid. Plaintiff sought relief via habeas and mandamus. President’s authority under 10 U.S.C. § 12305 is valid, and that the period of national emergency declared by the President¹²⁴ post-9/11 still lent it validity. Plaintiff not denied due process in this process, nor was the ETS date of December 2031 in conflict with the stop-loss policy’s usual provision that mobilization would be 12-24 months, cumulative.

Doe v. Rumsfeld, Case No. 05-156870 (9th Cir., filed May 19, 2005), on appeal from E.D. Cal.¹²⁵ California Nat’l Guard member seeks a restraining order on personal hardship grounds and imminent harm. Doe argues that the September 2001 Executive Orders’ authority – to oppose terrorist attacks on the homeland – do not extend to post-invasion Iraq and thus the “stop loss” is unauthorized and in violation of National Guard statutes 10 U.S.C. §§ 12403 and 12407. Case denied by the Eastern District and is now at the 9th Circuit.

Appendix 2. Background material: Treatises and Books

Basic Regulations: Military Justice

[Manual for Courts Martial, United States](#) (2005). **Rules of Court-Martial (RCM, i.e., procedure), Military Rules of Evidence, more. 25MB .pdf file.**

Air Force: [AFI51-201](#), *Military Justice*

Army: [AR 27-10](#), *Military Justice*

Navy/Marine Corps: [JAG INSTR. 5800.7D](#), *Manual of the Judge Advocate General* (JAGMAN 2004)

Coast Guard: Commandant Instruction [CIM 5810.1D](#), *Military Justice Manual*

Supplemental material: Military legal reference

Military Citation Guide (Army Judge Advocate General's Legal Center & School, 2003)

Joseph Rouse, ed., *Federal Tort Claims Handbook* (U.S. Army Claims Service, 2003). Index of relevant cases, by type and procedure of military tort claim.

Administrative Law Topic/Reference Index (U.S. Army JAG Center, June 2003). Index of Army and DoD regulations relevant to a particular topic, e.g., discharge review.

Generally

Charles A. Shanor, L. Lynn Hogue, *National Security and Military Law in a Nutshell* (Thomson West, 2003), ISBN 0-314-26357-8 (see [Amazon](#)). See esp. ch. 5, "A Brief History of American Military Law."

David A. Schleuter, *Military Criminal Justice: Practice and Procedure* (LexisNexis, 6th ed. 2004), ISBN 0327164174 (see [Amazon](#)). Treatise.

Amjur Military and Civil Defense Summary (AMJUR MILITARY SUM on Westlaw). General summary and index.

3 Fed. Proc., L. Ed. § 5:100, Special Courts-Martial.

53 Am. Jur. 2d Military and Civil Defense § 59, *Enlistment as Contract – applicability of common-law principles*. See also 62 A.L.R. Fed 860, *Modern Status of Military Enlistment Contract*. The latter includes only cases in which the court's decision was based on common-law contract principles.

Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048 (2005).

H. R. “Sparky” Gierke (Chief Judge, USCAAF), *The Use of Article III Case Law in Military Jurisprudence*, 2005-AUG Army Law. 25. Art. III law can be persuasive, but not usually binding; he notes that the Supreme Court is usually binding on military courts but hasn't heard oral arguments in a USCAAF case since 1999

Writs and Collateral Challenges

95 A.L.R. Fed. 472, *Review by Federal Civil Courts of Court-Martial Convictions--Modern Status*. See also 53A Am. Jur. 2d Military and Civil Defense § 230, *Exhaustion of Administrative Remedies*.

92 A.L.R. Fed. 333, *Judicial Review of Military Action with Respect to Type of Discharge Given Member of Armed Forces*. See also 10 A.L.R. Fed. 15, *Discharge from Armed Forces on Ground of Conscientious Objection*; see also 53A Am. Jur. 2d Military and Civil Defense § 236, *Administrative Discharges, Proceedings Under the Administrative Procedure Act*.

57 C.J.S. Military Justice § 483, *Military Justice: Extraordinary relief*. Military courts of appeal can grant writs of mandamus, prohibition and *coram nobis*. See also 53A Am. Jur. 2d Military and Civil Defense § 242 , *Mandamus*.

See generally Stephen Wisotsky, *Extraordinary Writs: "Appeal" by Other Means*, 26 Am. J. Trial Advoc. 577 (Spring 2003). Mandamus requirements, special attention to 9th Circuit requirements. See, e.g., 7B AMJUR Pl. & Pr. Forms §§ 19, 27, 35 for pleading & practice forms for military *coram nobis*.

Trial Issues: Recent Case Law

Maj. Christopher W. Behan, *New Developments in Evidence for the 2004 Term of Court*, 2005-APR Army Law. 4. ¹²⁸ Focuses on the USCAAF's recent evidence-law rulings. See also Maj. Christopher T. Fredrikson, *What's Done is Done: Recent Developments in Self-Incrimination Law*, 2005-MAY Army Law. 19.

Maj. Jeffrey Hagler, *Measure for Measure: Recent Developments in Substantive Criminal Law*, 2005-MAY Army Law. 69. Recent USCAAF rulings on sodomy, absence offenses, more.

Maj. Deidra Fleming, *Out Damned Error! Out I Say! The Year in Court-Martial Personnel, Voir Dire and Challenges and Pleas and Pretrial Agreements*, 2005-MAY Army Law. 45. How prosecutorial procedural errors overturned recent convictions.

Lt. Col. Patricia A. Ham, *Revitalizing the Last Sentinel: The Year in Unlawful Command Influence*, 2005-MAY Army Law. 1. Recent developments in a peculiarly military type of legal challenge to convening authorities' legitimacy. See also Col. Robert Burrell, *Recent Developments in Unlawful Command Influence*, 2001-MAY Army Law. 1. Issues of pretrial publicity and comments by command authority that can raise a command-influence question.

Robert Harmon, *Command Influence* (MLTF memorandum, Aug. 12, 2005), online at [Military Law Task Force](#) (click "Resources," then "Chain of Command.") See also 53A Am. Jur. 2d Military and Civil Defense § 265, Unlawful Command Influence.

Lt. Col. Timothy Grannell, *Annual Review of Developments in Instructions*, 2005-APR Army Law. 28. Military "jury" instructions.

Elizabeth Lutes Hillman, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 Yale L.J. 879. How rank affects this particularly-military trial defense.

Servicemembers' rights; Feres implications

David Saul Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine*, 95 Yale L.J. 992. Discussion and history of the doctrine.

Robin Rogers, *A Proposal for Combatting Sexual Discrimination in the Military: Amendment of Title VII*, 78 Cal. L. Rev. 165 (1990). Reviews the limited remedies available under *Feres* to harassed service members. 31 A.L.R. Fed. 146, *Serviceman's Right to Recover Under Federal Tort Claims Act (28 U.S.C.A. §§ 2671 et seq)*. A complete resource. See also 69 A.L.R. Fed. 949, *Right of Member of Family Of Serviceman to Maintain Action under Federal Tort Claims Act (28 U.S.C.A. §§ 1346(B), 2671-2680) Against United States Based Upon Injuries Sustained by Serviceman While on Active Duty*.

The Feres Doctrine; an Examination of this Military Exception to the Federal Tort Claims Act, U.S. Senate Judiciary Hearing, [Oct. 8, 2002](#). Sen. Leahy [statement](#). Navy [testimony](#).¹²⁹ Army [JAG testimony](#).

Servicemembers' rights; sexual harassment

Christin M. Damiano, *Lesbian Baiting in the Military: Institutionalized Sexual Harassment Under "Don't Ask, Don't Tell, Don't Pursue,"* 7 Am. U. J. Gender, Soc. Pol'y & L. 499 (1999). Counter-claim to a sexual-harassment charge is often "don't ask" allegation against the victim.

Madeleine Morris, *By Force of Arms: Rape, War and Military Culture*, 45 Duke L.J. 651 (1996). Background. Often cited since 1996.

Kristin S. Dodge, *Countenancing Corruption: A Civic Republican Case against Judicial Deference to the Military*, 5 Yale J.L. & Feminism 1 (1992). Courts tend to defer to the military on "good order & discipline matters."

Robert D. Harmon, *On Sexual Warfare: Sexual Harassment Reform in U.S. Military Law*, 5 N.C.C. J. Pub. Intr. L. 69 (May 2005). A history of sexual harassment controversies (and attempts at reform) in the U.S. military 1991-2005, along with related war-crimes, sexual-orientation and Congressional matters.

Jurisdiction issues

95 A.L.R. Fed. 472, *Review by Federal Civil Courts of Court-Martial Convictions--Modern Status.* Servicemembers' access to Art. III court review: injunctions, military habeas, declaratory relief, correction of military records, and much more, possibly applicable to other collateral reviews. Updated weekly. See also 133 A.L.R. Fed. 537, *Construction and Application of "Military Function" Exception to Notice and Comment Requirements of Administrative Procedure Act (5 U.S.C.A. § 553 (A)(1)). Exceptions for, e.g, conscientious objector matters. See generally 39 AMJUR Trials 157, Historical Aspects and Procedural Limitations of Federal Habeas Corpus and 20 AMJUR Trials 1, Federal Habeas Corpus Practice.*

92 A.L.R. Fed. 333, *Judicial Review of Military Action with Regard to Discharge.* See also 100 A.L.R. Fed. 821, *What Circumstances Constitute Laches Barring Federal Judicial Review of Allegedly Wrongful Discharge from Military Service.*

Maj. Christopher T. Fredrikson, *The Unsheathing of a Jurisdictional Sword: The Application of Article 2c to Reservists*, 2004-JUL Army Law. 1. Addresses the impacts of both the Art. 2(c) decision, *U.S. v. Phillips*¹³⁰, and the *U.S. v. Henderson*¹³¹ case that limits special court-martial jurisdiction.

J. Mackey Ives, Michael J. Davidson, *Court-Martial Jurisdiction over Retirees under Articles 2(4) and 2(6): Time to Lighten Up and Tighten Up?*, 175 Mil. L. Rev. 1 (March 2003). Retired military members' possible UCMJ liability; special attention to Art. 88 (contemptuous speech toward the President).

"Don't Ask", Recruitment Issues

Elvia R. Arriola, *Democracy and Dissent: Challenging the Solomon Amendment as a Cultural Threat to Academic Freedom and Civil Rights*, 24 St. Louis U. Pub. L. Rev. 149 (2005). Educational resistance to recruitment access.

General Accounting Office, GAO-05-299, *Military Personnel: Financial Costs and Loss of Critical Skills Due to DoD's Homosexual Conduct Policy Cannot be Completely Estimated* (Feb. 2005). 12 years of "don't ask, don't tell." [.pdf](#) and [.html](#).

Administrative Law

Lt. Col. Victor M. Hansen, *Walking on Unfamiliar Ground: A Primer for Defense Counsel Representing Clients in an Inspector General Investigation*, 2005-MAR Army Law. 1.

Military Commission Trials

185 A.L.R. Fed. 475, *Designation as Unlawful or Enemy Combatant*. “[T]he power of the executive branch to declare persons unlawful or enemy combatants, thereby denying them constitutional rights to due process and the rights afforded under the laws of war.” Updated weekly.

Gov’t viewpoints.

Maj. Gen. (ret.) Michael J. Nardotti, Jr., *Military Commissions*, 2002-MAR Army Law. 1. Overview from Army standpoint.¹³²

American Bar Association Task Force on Terrorism and the Law Report and Recommendations on Military Commissions, 2002-MAR Army Law. 8.

Maj. Timothy C. MacDonnell (Prof., Crim. Law), *Military Commissions and Courts-Martial: A brief Discussion of the Constitutional and Jurisdictional Distinctions between the two Courts*, 2002-MAR Army Law. 19. Comparison between traditional courts-martial and the commissions.

Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe, 34 Tex. Tech. L. Rev. 899 (2003).

Opposing viewpoints.

Neal K. Katyal and Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002). Possible *ultra vires* illegalities of such tribunals.

Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int’l L. 1 (Fall 2001). Warning to military jurists that this could be a war crime.

Sean D. Murphy, *Doctrine of Command Responsibility in U.S. Human Rights Cases*, Am. J. Int'l L. 719 (July, 2002). Possible repercussions for any U.S. commanders (including Defense Secretary and the President) convening such trials under this doctrine, i.e., *Yamashita*, which holds commanders strictly accountable.

Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DePaul L. Rev. 925 (Summer 2000). Alternatives to military commission trials of enemy war criminals.

Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 Stan. L. Rev. 13 (Nov. 1990). An 1862 military-commission trial of native Americans; case study. See also Anne English French, *Trials in Times of War: Do the Bush Military Commissions Sacrifice Our Freedoms?*, 63 Ohio St. L. J. 1225 (2002), for more legal military-commission history, focusing on *Milligan*, *Quirin*, the relevant UCMJ sections and the 1949 Geneva Conventions.

Robert D. Harmon, *General Yamashita's Revenge: A Judicial Murder and its Implications for U.S. Military Commissions in Current Warfare*, 4 New Coll. of Cal. L.Rev. 13 (May 2003). Available from MLTF or the author. Article on the Yamashita military-commission trial, past history of U.S. commission trials, and command-responsibility doctrine.

Books, supplemental

Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford Univ. Press, 1991, [paperback](#)). Military commissions and wartime habeas. See esp. Chapter 8 (at 160 *et seq*), "The Irrelevance of the Milligan Decision".

Jerry Cooper, *The Rise of the National Guard: The Evolution of the American Militia, 1865-1920* (Univ. of Nebraska Press, 1997), ISBN 0-8032-6428-3 ([paperback ed.](#))). National Guard: legal status and evolution. The institutional and early statutory foundations of the modern National Guard. Paperback edition considerably less expensive than the hardback.

Appendix 3. Web sources (see esp. Word version of this document as this is hyperlinked).

Publications Websites

[DefenseLink](#), DoD publications, directives, press releases.

[Joint Publications](#) of the U.S. Joint Staff, i.e., The Pentagon.

[National Guard Bureau](#). NGB controls the states' Army and Air National Guard programs from Washington.

Army Publishing Directorate, [current website](#), see also Ft. Belvoir [Army pubs website](#), see also Army Publications Directorate [former website](#); includes Consolidated Army Publications and Forms Index in Dept. of the Army Pamphlet 25-30 [[DA PAM 25-30](#)].

US Air Force [pubs](#).

US Navy [pubs](#), also see Navy's [public access library](#); for Navy/Marine legal regs see the [JAG Instructions](#) website

US Marine Corps [pubs](#).

US Coast Guard [pubs](#); see esp. USCG [directives](#) website.

California National Guard: ARNG [pubs](#); ANG [pubs](#).

Defense Technical Information Center, Public Science & Technical Information Center ([STINET](#)). Includes military law information.

“[U.S. Military Online](#),” at Geo. Washington Univ., an index to DoD and all the armed services. Also a guide to the military publications and sites online.

[Conscientious Objector Central Committee](#)’s comprehensive website on CO and related administrative-proceeding matters includes an [index page](#) of military discharge regs, a page on [grievances and filing complaints](#) by service members, on the Delayed Enlistment Program ([DEP](#)), and a [guide](#) to military regulations generally, esp. discharge regs. Key areas of site, [Helping Out](#), [GI Rights Hotline](#), and [Publications](#), are major compendia of sources and links.

Military Law Websites (with cases, pleadings, reference material, links).

[Nat’l Institute of Mil. Justice](#).

Library of Congress [military law site](#).

[Army Trial Defense Service](#). Independent of chain of command; represents soldiers facing trial or punitive proceedings.

Army Judge Advocate Corps ([JAGC](#)) official website. Limited access to public.

[Center for Constitutional Rights](#). Has litigated on behalf of servicemembers, others.

Law Offices of [Michael Sorgen](#), a San Francisco law firm that has litigated stop-loss.

[Servicemembers’ Legal Defense Network](#), the primary lobby for lesbian/gay/bi/trans-sexual military inclusion, with reference material on the website

[Center for Studies of Sexual Minorities in the Military](#), more LGBT material and sources. Further information at the Human Rights Campaign [Military Issues](#) webpage.

Lambda Legal [military law page](#). Litigated *Able* among other “don’t ask.”

Cornell Univ. law site on [military law](#).

[US Court of Appeals for the Armed Forces](#).

[Tricare](#), the military’s health care system.

[Military Law Task Force](#) of the National Lawyers’ Guild.

[Military Law & Justice](#). Informational website, with links. Private law firm (Philip D. Cave).

[Findlaw military law index](#). Some articles. See also Findlaw [international law index](#) for related topics.

[ACLU](#). Currently [litigating FOIA](#) on the prisoner abuse cases; active on “homeland security” matters; may be active on resisters’, protestors’ rights. See also [ACLU Northern California](#).

Misc. anti-war law websites: [Pro Se Institute](#), [Lawyers Against the War](#), [Institute for Policy Studies](#).

Military Commissions

Defenselink [page](#) on military commission documents. Includes updates, military commission [orders](#) and procedural [instructions](#).

“Defense Department Policy,” Global Security.com [collection](#), includes all key Military Commission documents.

“DoD Military Commission instructions,” Global Security.com [index page](#). Procedural material.

General reference

[United States Code](#); part of Cornell University's comprehensive [Legal Information Institute](#) reference site. Searchable/browsable USC text; does not include case law but does have links to parallel (C.F.R.) authorities.

[Global Security](#). General and authoritative reference page on worldwide militaries, particularly the US; emphasis more on news than legal material. Includes orders of battle (unit deployments) for tracing unit locations.

[General Accounting Office](#). Reports and testimony, including about problem areas in military policy and personnel.

Selected [Executive Orders](#).

Real World Solutions [military links page](#). Numerous military and related links.

Appendix 4. Possible implications on standing for National Guard members.

Note: a client's remedies, standing, jurisdiction, liabilities and venue, if they are a National Guard member, **will depend on their duty status at a particular time.**

[see MLTF Briefing Paper, "National Guard: individual Federal status," June 23, 2005 for full discussion].

[133](#)

Comparison of Duty Status for National Guard Personnel

Comparison of duty status for National Guard personnel under state active duty, Title 32 and Title 10. [abbreviations below]

[Frame1]

- - -

Types of Guard/Reserve duty: Abbreviations: ¹³⁴

AGR: Active Guard Reserve program. Fulltime armory and support staff under Title 10 for Guard and Reserve units. ¹³⁵
Some personnel are on Full Time National Guard Duty under Title 32. Three-year period for AGR enlistments.

AT: Annual training, at least 15 days/year including travel time, required of every Guard member. Normally performed as a unit.

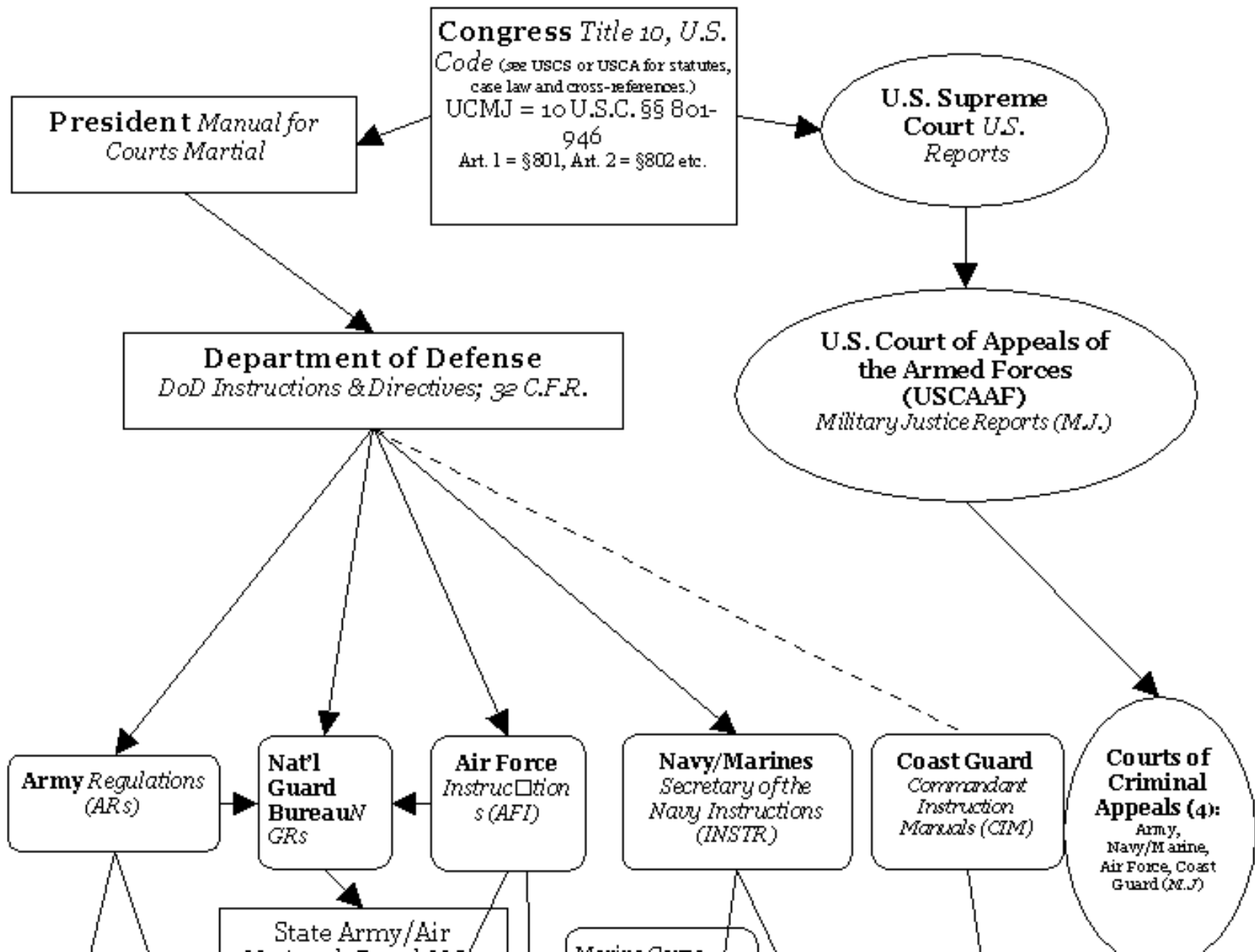
AAT: Additional Annual Training is authorized for units to support extended requirements for training. Restrictions set by National Guard Bureau (NGB).

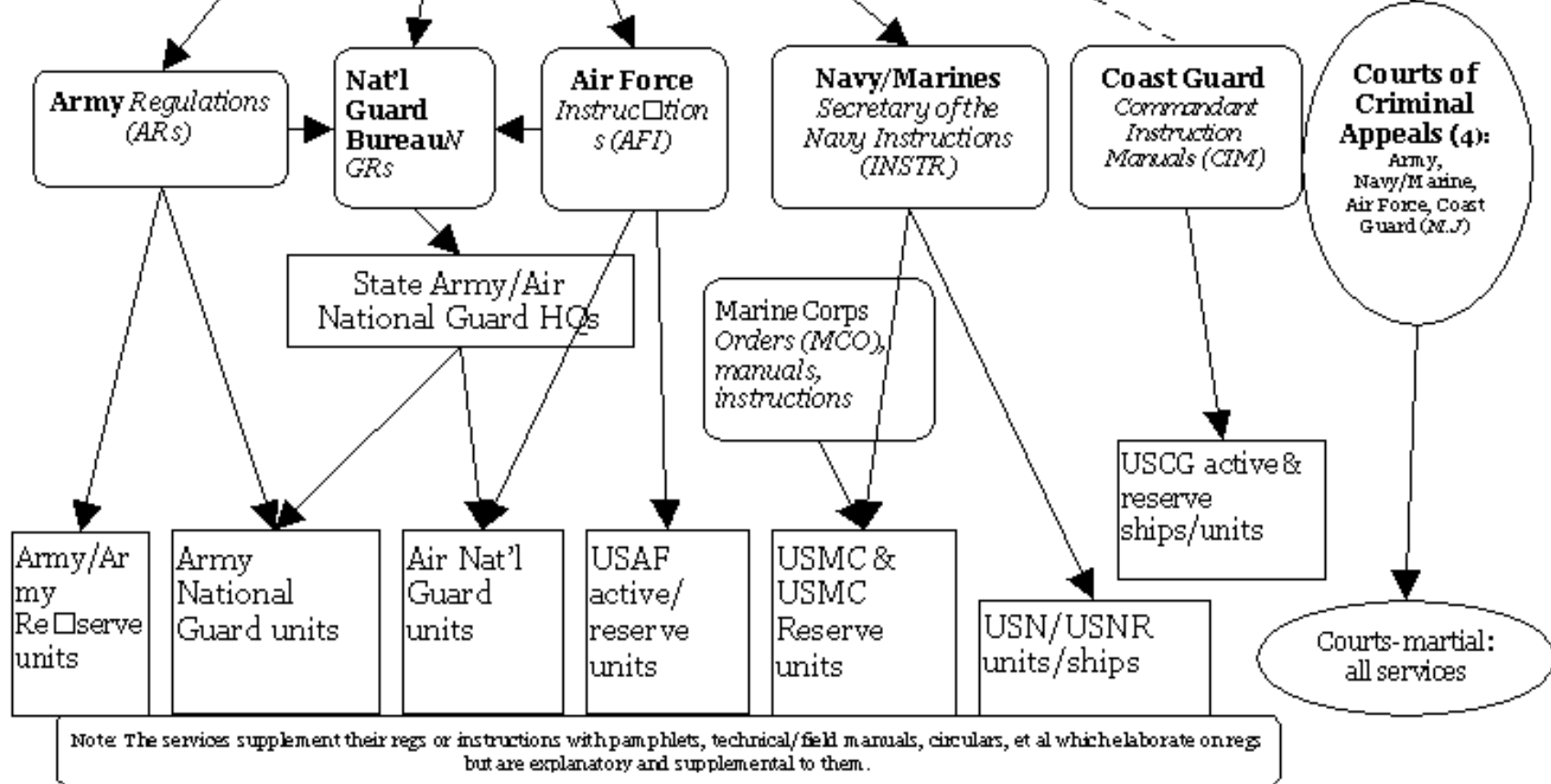
ADT: Active Duty for Training. Active duty for a specific course of training, not to exceed 179 days.

IDT: Inactive Duty for Training. Training or duty (other than AT, AAT, ADT or ADSW), authorized for the ARNG under Title 32; performed in a state status and includes [assorted unit drills and state training sessions].

ADSW: Active Duty for Special Work. A period of duty to support “a number of diverse purposes which are essential to the organization,” not to exceed 179 days w/o approval by National Guard Bureau.

Appendix 5: Hierarchy of Military Law, Regulations and Authorities
(publications in rounded rectangles; courts in circular boxes)





The appellate chain is from courts-martial *upward* to the service's Court of Criminal Appeals, then to the USCAAF. U.S. Supreme Court can hear USCAAF appeals on *cert*.

¹ Author, Robert D. Harmon, intern, MLTF, August 2005.

² Field, J., majority opinion. Quoted approvingly in *Duncan v. Kahanamoku*, 327 U.S. 304, 322-323 (1946) in a ruling striking down a military tribunal's jurisdiction over U.S. civilians.

³ Herein, Mil.R. of Evid. means Military Rule(s) of Evidence. Military citation rules prefer the acronym MRE. Military Citation Guide 9 (Army Judge

Advocate General's Legal Center & School, 2003). Note, however, that outside a military courtroom, the military term "MRE" usually means Meals, Ready to Eat, i.e., the standard field ration. FYI.

4 U.S. v. Baird, 851 F.2d 376, 383 (D.C. Circuit, 1988).

5 See, e.g., DoD Directive [1344.10](#) for constraints on active-duty servicemembers' political activity.

6 See a simple listing of the UCMJ at [constitution.org](#). See 10 U.S.C.A. or 10 U.S.C.S. for full legal background.

7 See 10 U.S.C.A. §§ 802 *passim*, see also 53A AMJUR §§ 283-285 on jurisdiction. The crime need not be "service related" but simply triable because of the servicemembers status under UCMJ. Solorio v. U.S., 483 U.S. 435, 438 (1987).

8 A court-martial could still have jurisdiction over someone who has been separated or discharged but committed a crime on active duty. 10 U.S.C. § 803 (Art. 3).

9 For a sample of official procedure in "an Article 32," see the Dept. of the Army's Pamphlet (DA Pam) [27-17](#), Procedural Guide for Article 32(b) Investigating Officer, said officer possibly a non-lawyer.

10 See 10 U.S.C.A. or U.S.C.S. §§ 832 for instances.

11 See, e.g., McKinney v. White, 291 F.3d 851 (D.C. Cir., 2002). Also, 5 U.S.C. § 701(b)(1)(G) also excludes "military authority exercised in the field in time of war or in occupied territory". See, e.g., Khalid v. Bush, 355 F.Supp.2d 311, 326 (D.C. Dist. Ct., Jan. 2005). *But see below*, pp. 6 & 10, for possible exceptions to this rule.

12 2005 edition. This may be supplemented by service publications, e.g., the Army's [DA Pam 27-9](#), Military Judges' Benchbook.

13 See also Findlaw CFRs [listing](#).

14 For Navy/Marine Corps legal regulations see esp. the [JAG Instructions webpage](#).

15 The Navy/Marine Corps term for such a non-Art. 32 investigation (command, staff or collateral investigation) is a "JAGMAN [investigation]," for the Navy JAG manual, [JAGINSTR 5800.7D](#), Manual of the Judge Advocate General (JAGMAN 2004), see esp. Chapter 2, Administrative Investigations. The Coast Guard manual is [COMDITINST M5830.1](#), Administrative Investigations Manual.

[16](#) The Army's 700-series publications address logistics and property accounting, not law, but a lost-property proceeding can have the force of law.

[17](#) Convening authorities can exert *unlawful command influence*, a legal doctrine recognized by military appellate courts as grounds for mitigation or possible overturning of a court-martial finding and sentence. See MLTF memorandum, "Command Influence," August 12, 2005.

[18](#) Normal courts-martial follow the MCM. Service publications, e.g., the Army's DA Pam [27-7](#), Guide for Summary Court-Martial Trial Procedure, may have more information on the informalities in the summary court-martial. (Note: a Pamphlet is a helpful guide to laypersons, not as authoritative as a service reg, though it should reflect it.)

[19](#) Even when a capital sentence is not contemplated; any charge that includes a capital offense will remove the case from SPCM jurisdiction and if a SPCM tries the case, it constitutes fatal jurisdictional error. *United States v. Henderson*, 59 M.J. 350 (2004), see also RCM 201(f)(2)(c).

[20](#) Per 10 U.S.C. § 819 (Art. 19 UCMJ). See also MCM, RCM 201(f)(2)(B)(ii). Also reflected in service regs, e.g., AR 27-10, ¶ 5-27. At least in the Army, the SPCM charge sheet does not have to say it can adjudge a BCD (it presumably can do so), though it must comply with ¶ 5-27. *U.S. v. Scott*, 59 M.J. 718, 720 (Army Ct.Crim. App., 2003).

[21](#) E.g., the Army Trial Defense Service.

[22](#) Army: Criminal Investigations Detachments (CID); Air Force: Office of Special Investigations; Navy/USMC: Naval Criminal Investigations Service (NCIS, formerly NIS).

[23](#) The U.S. Supreme Court may review decisions of the U.S. Court of Appeals of the Armed Force on a writ of *cert.* 28 U.S.C. § 1259, Such decisions are binding on military courts; also, U.S. military appellate courts should also interpret U.S. Supreme Court case law in general. H. R. "Sparky" Gierke (Chief Judge, USCAAF), *The Use of Article III Case Law in Military Jurisprudence*, 2005-AUG Army Law. 25.

[24](#) 5 U.S.C. § 701(b)(1)(F) & (G). Collateral actions outside the court-martial may be subject to APA review, however, see "Servicemembers' Access to Civilian Courts" below in text.

[25](#) Note: in military case citations, where the M.J. does not show a military court, but simply a date, the citation refers to a ruling by the U.S. Court of Appeals of the Armed Forces (USCAAF). Military Citation Guide 3 (*supra*).

[26](#) The former Army Court of Military Review.

[27 AFI51-201](#), Military Justice, ¶¶ 5.1-5.2, in conformity with RCM503(b) and (c). See also Air Force Manual [AFMAN51-204](#) for more detail on Air Force “field judiciary” and trial counsel organization.

[28](#) See generally Dept. of the Navy [JAG INSTR 5400.1A](#), Office of the Judge Advocate General Operating Manual.

[29 JAGINSTR 5800.7D](#) (JAGMAN 2004), §§ 0130b, 0131b(2). The latter section permits convening authorities this role, and the commander can make determinations on attorney-client privilege. *Id.*, § 0131d.

[30](#) Defined in 10 U.S.C. § 10101.

[31](#) 10 U.S.C. § 10102.

[32](#) 10 U.S.C. §§ 331-335 apply to calling out the “militia,” i.e., the National Guard, by the President or the respective State Governor in the event of insurrection or breach of public order; one method is where the President can seize state troops from the Governor, e.g., Arkansas during the 1957 school integration crisis.

[33](#) The military cites these in [DoD Directive 1235.10](#), Activation, Mobilization, and Demobilization of the Ready Reserve (Sept. 23, 2004), implementing the mobilization.

[34](#) Date/time group, means 12:02 am GMT (Zulu or Z time zone), 21 November 2002. MLTF has a copy; see also the MLTF Briefing Paper on Stop-Loss, which includes this document.

[35](#) MILPER MESSAGE # 03-040 (TAPC-PDT-PM), SUBJECT: RC Unit Stop Loss Procedures For The Army National Guard, 21 Nov 02. See also MILPER MESSAGE #03-041 (TAPC-PDT-PM), SUBJECT: RC Unit Stop Loss Procedures For The Army Reserve, 21 Nov 02, which appears to be similar. MLTF has copies.

[36](#) As noted in various MILPER messages, see MLTF Briefing Paper, Stop Loss.

[37](#) See appendices, below.

[38](#) See also Air Force Reserve Instruction (AFRI) [36-2001](#), Air Force Reserve Recruiting Procedures.

[39](#) 10 USC § 978.

[40](#) Lewis v. United States Army, 697 F.Supp. 1385, 1389 (E.D. Pa., 1988).

[41](#) See the [CCCO information page](#) on DEP for a full discussion.

[42](#) See, e.g., 10 U.S.C.A. §§ 802, 803 and Corpus Juris Secundam §§ 16, 17, 20. See also, e.g., U.S. v. Reid, 46 M.J. 236 (1997). See esp. 10 U.S.C. § 803 (b).

[43](#) Santiago v. Rumsfeld, 407 F.3d 1018 (9th Cir., 2005).

[44](#) Wenger v. Monroe, 282 F.3d 1068 (9th Cir., 2002). See also Peavy v. Warner, 493 F.2d 748 (5th Cir., 1974).

[45](#) 5 U.S.C. §§ 701 et seq.

[46](#) As noted above, the APA excepts courts-martial and military commissions, and military actions in the field in time of war, from civilian court review. 5 U.S.C. § 701(b)(1)(F) & (G).

[47](#) Santiago, 407 F.3d at 1021.

[48](#) FTCA is 28 U.S.C. §§ 1346(b), 2671-2680.

[49](#) Feres v. United States, 340 U.S. 135 (1950).

[50](#) U.S. v. Shearer, 473 U.S. 52 , 57 (1985).

[51](#) Bowen v. Oistead, 125 F.3d 800 (9th Cir., 1997).

[52](#) Cummings v. Department of the Navy, 279 F.3d 1051 (2002).

[53](#) See Appendix 4 for a chart of the different status implications.

[54](#) *Qualls v. Rumsfeld*, 357 F.Supp.2d 274, 279 (D.D.C., Feb. 7, 2005). See generally *Hartikka v. U.S.*, 754 F.2d 1516 (9th Cir., 1985) for precise 9th Circuit criteria on irreparable harm and injunctive relief that servicemember plaintiffs must raise.

[55](#) *Id.* at 279, citing *Bois v. Marsh*, 801 F.2d 462, 468 (D.C.Cir., 1986). The 9th Circuit calls this a “prudential” rather than jurisdictional doctrine. **Santiago v. Rumsfeld**, 407 F.3d 1018, 1022 (9th Cir., May 2005).

[56](#) *Hartikka*, 754 F.2d at 1518. But see the dissent at 1519 *et seq.*

[57](#) See, e.g., *ex parte Milligan* and *ex parte Quirin*, cited in Appendix 1, Cases, for original basis for Federal habeas on military-commission issues.

[58](#) Per *Gherebi*, *infra* at Appendix 1, cases.

[59](#) Administrative Procedures Act, 5 U.S.C. § 701(b)(1)(F) & (G). Appellate review still possible through the military appellate courts to the U.S. Supreme Court.

[60](#) *Cothran v. Dalton*, 83 F.Supp.2d 58, 63 (D.C. Cir., 1999), finding that while the court-martial is not an “agency,” the military entities that support the military legal system— i.e., staff judge advocates – are. But see *McKinney v. Caldera*, 141 F.Supp.2d 25, 31 (D.C. Cir., 2001), agency action, to be subject to APA review, should be “arbitrary and capricious or contrary to the law.” See also *McKinney v. White*, 291 F.3d 851 (D.C. Cir., 2002), which held that “agency” doesn’t extend to an appellate process, i.e., Judge Advocate General review of military trial.

[61](#) Lawrence Tribe, *American Constitutional Law* 45 (Foundation Press, 1978).

[62](#) *Haeger v. Lansing*, 3 Fed. Appx. 893 (10th Cir. 2001), cert. denied, 122 S. Ct. 306 (2001). See also *United States ex rel. New v Perry*, 919 F.Supp 491 (U. S.D.C., D.C., 1996).

[63](#) *Small v Commanding General Marine Corps Base*, 320 F Supp 1044, 1045 (S.D. Cal., 1970), *affirmed* 448 F2d 1397 (9th Cir.)

[64](#) See also 28 U.S.C. § 1331, “federal question,” not precluded by Art. 76 UCMJ. *Schlesinger v. Councilman*, 420 U.S. 738, 745 (1975).

[65](#) See, e.g., *Qualls* and *Santiago*, cited in Appendix 1, Cases, under “stop-loss.”

[66](#) Parisi v. Davidson, 405 U.S. 34, 39 (1972).

[67](#) See Bauman v. U.S. Dist. Court (557 F.2d 650, 654 (9th Cir., 1977) for the 9th Circuit 5-prong test for mandamus.

[68](#) 57 C.J.S. Military § 483. See also Ct.Crim.App. Rule 2, 10 U.S.C.A. foll. § 866, Military Review Rule 2(b), 10 U.S.C.A. foll. § 866 and Military Rule 4(b) (1), 10 U.S.C.A. foll. § 867. See also Toohey v. U.S., 60 M.J. 100 (2004) and U.S. v. Toy, 60 M.J. 598 (N.M. Ct. of Crim. App., 2004) for more military-court criteria for extraordinary writs.

[69](#) Noyd v. Bond, 395 U.S. 683, 688 (1969). Also ruled: that the then-Court of Military Appeals has the power to issue such writs.

[70](#) See AMJUR Military § 242, *Mandamus*.

[71](#) Dettinger v. U.S., 7 M.J. 216 (C.M.A., 1979).

[72](#) U.S. Navy-Marines Court of Appeal v. Carlucci, 26 M.J. 328 (1988), where the court sought a writ to stop the DoD Inspector General's office (Frank Carlucci was Defense Secretary at the time) from interfering with a military court.

[73](#) Binding on Army, Army Reserve, Army National Guard.

[74](#) Binding on Air Force, Air Force Reserve, Air National Guard.

[75](#) Includes Navy and Marine Corps and their Reserve components.

[76](#) Note: as opposed to "Title 10" (Federalized) service by National Guard. "Title 10" and "Title 32" are standard (slang) terms. See Appendix 4 for the varying legal status and jurisdiction that various National Guard status can involve.

[77](#) See also the CCCO [reference page](#) for further information on types of discharges.

[78](#) Garrett v. Lehman, 751 F.2d 997 (9th Cir., 1985). See also 53A Am. Jur. 2d Military and Civil Defense § 208, Evidence.

[79](#) For correcting/upgrading records of past discharges, see [AR 15-130](#), Army Clemency and Parole Board, [AR 15-180](#), Army Discharge Review Board, or [AR 15-185](#), Army Board for Correction of Records.

[80](#) See also AFI 36-3209, *Separation Procedures for Air National Guard and Air Force Reserve Members*.

[81](#) 50 U.S.C.App., § 456(j).

[82](#) *United States v. Seeger*, 380 U.S. 163 (1965).

[83](#) *Welsh v. United States*, 398 U.S. 333 (1970).

[84](#) See, e.g., *Gillette v. United States*, 401 U.S. 437 (1971).

[85](#) *Witmer v. United States*, 348 U.S. 375 (1955).

[86](#) *Sanger v. Seamans*, 507 F.2d 814, 816-817 (9th Cir., 1974).

[87](#) 32 C.F.R. § 75.5.

[88](#) *Sanger*, 507 F.2d at 816.

[89](#) See also **92 A.L.R. Fed. 333**, *Discharge from Armed Forces on Ground of Conscientious Objection*.

[90](#) *Watson v. Perry*, 918 F.Supp. 1403, 1414 (W.D. Wash, 1996), affirmed 124 F.3d 1126.

[91](#) *Enlisted Administrative Separations*, cited above.

[92](#) For an example of evidentiary and *mens rea* issues in a military homosexuality case, see *U.S. v. Simmons*, 59 M.J. 485 (2004), in which an off-base domestic dispute led to seizure of a personal letter and a court-martial, later criticized by a divided USCAAF. “Officer Fox testified that Investigator Boone’s comment to him upon finding the letter was something to the effect of “This is going to be good.” *Id.* at 487.

[93](#) See also 53A Am. Jur. 2d Military and Civil Defense § 202, Homosexuality and 53A Am. Jur. 2d Military and Civil Defense § 208, Evidence [at administrative proceedings.].

94 *Watson*, 918 F.Supp. at 1411.

95 John Files, ***Pentagon Considers Changing The Legal Definition of Sodomy***, *New York Times*, April 21, 2005, at A18.

96 For further research information see [Center for Studies of Sexual Minorities in the Military](#).

97 Immediate family, usually defined as spouse, children, parents, siblings, only blood relative, or someone who is “in loco parentis.” [AR 635-200](#), ¶ 6-5.

98 See DoDD [1332.14](#), attachment E3.A1, ¶ E3.A1.1.3.4.3 sets overall criteria

99 Service references on hardship/dependency include (Army) [AR 635-200](#), ch. 6; (Air Force) [AFI 36-3208](#), § 3C (¶¶3.20 et seq), *see also* AFI 36-3209, ¶ 3.12.11 (for reserves/ANG); (Navy) [MILPERSMAN](#) part [1910-110](#); (Coast Guard) CIM 1000.6A, § 12D.

100 Service references on separation for disability include (Air Force) [AFI 36-3212](#), *Physical Evaluation for Retirement, Retention, and Separation*; (Army) [AR 635-40](#), *Physical Evaluation for Retirement, Retention and Separation*; (Navy) [MILPERSMAN](#) part [1910-120](#) and [1910-168](#) (see [MILPERSMAN](#) chapters 1900-1999 generally; (Coast Guard) CIM 1000.6A, § 12.B.15.

101 Maj. Timothy C. MacDonnell (Prof., Crim. Law), *Military Commissions and Courts-Martial: A brief Discussion of the Constitutional and Jurisdictional Distinctions between the two Courts*, 2002-MAR Army Law. 19.

102 Though habeas may still be available. See *ex parte Quirin*, 317 U.S. 1 (1942).

103 UCMJ provisions mentioning military tribunals are at 10 U.S.C. §§ 818, 821, 836 (Art. 18, 21, 36). But see 8 U.S.C. § 1226a (orig. § 412 of the USA-Patriot Act). Detained aliens subject to the Patriot Act must be criminally charged, or removal proceedings begun, within seven days of detention. Provision for habeas corpus.

104 Authorization for Use of Military Force Joint Resolution, Pub.L. 107-40, 115 Stat. 224, 50 U.S.C. § 1541.

105 Online [here](#).

106 But Order No. 1 also provides that, in the event of any inconsistencies, the President’s Military Order governs.

[107](#) See DoD Directive 5200.2R, Personnel Security Program, Jan. 1987 ([PDF](#)), cited in the *Instructions*. Personnel security investigation; required for defense counsel security (Secret) clearance. See also DoD Directive 5200.2, Personnel Security Program, April 9, 1999 for the overall program ([HTML](#)).

[108](#) Schenck v. U.S. , 249 U.S. 47 (1919), rather than the civilian *Brandenburg v. Ohio*, 395 U.S. 444 (1969), standard.

[109](#) I.e., under Art. 2(a)(10), UCMJ, “persons accompanying” clause.

[110](#) Note: in military case citations, where the M.J. does not show a military court, but simply a date, the citation refers to a ruling by the U.S. Court of Appeals of the Armed Forces (USCAAF).

[111](#) *Schlesinger* overruled on other grounds by *Solorio v United States*, 483 US 435(1987).

[112](#) U.S. v. Thomas, 22 M.J. 388, 393 (U.S. Court of Military Appeals, 1986). Note: the *Thomas* court did not find fatal error in the four *Thomas* appellees, since the lower Court of Military Review had mitigated the damage caused by command interference in their trials, and the modified sentences stood.

[113](#) *Stoneman: distinguished* by U.S. v. Bridges, 57 M.J. 540, 551 (Coast Guard Ct. of Crim. App., 2003). *Stoneman* was distinguishable because that commander had sent an e-mail threatening “to CRUSH leaders who fail to lead by example.”

[114](#) See, e.g., Slovik, 2 U.S. Op. Off. Legal Counsel 370, 1977 WL 18090 (1977). Forfeiture of military insurance benefit, for statutory reasons, not reversible by court or by posthumous Presidential pardon, i.e., of Pvt. Eddie Slovik’s court-martial conviction and death sentence, as long as the Army’s action was in conformity with statute and regulation.

[115](#) 539 U.S. 558 (June 2003). Civilian case striking down Texas’ sodomy law.

[116](#) *Peszynski*, 40 M.J. at 878.

[117](#) *Id.* at 880. Emphasis original.

[118](#) The Kahanamoku here is Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu.

[119](#) Plaintiff was great-grandson of Dr. Samuel Mudd; a military commission convicted Dr. Mudd in 1865 for his role (treating John Wilkes Booth’s

broken leg) in the Lincoln assassination. The descendant sought to overturn Dr. Mudd's conviction.

[120](#) Dententions without trial or prior to trial.

[121](#) As numbered then, 10 U.S.C. § 673c.

[122](#) *Sherman*, 755 F.Supp at 388.

[123](#) *Qualls*, 357 F.Supp.2d at 279.

[124](#) Presidential Proclamation 7463, 66 Fed.Reg. 48199 (Sept. 14, 2001) invoked 10 U.S.C. § 12302 to call up Reserve Components. President also delegated § 12302 authority to Secretaries of the military depts. Exec. Order No. 13223, 66 Fed.Reg. 48201 (Sept. 14, 2001).

[125](#) Documents from this case are on the Sorgen law firm's [website](#).

[126](#) Law review and treatise material available from Westlaw online unless otherwise noted.

[127](#) Note also COMDITINST [M16722.3](#), *Index of Commandant's Decisions on Appeal and Review of Suspension and Revocation Proceedings*; cases and appeals.

[128](#) *Army Lawyer* is published by the Army JAG School at Charlottesville, VA, and is available online at Westlaw. It is also published as a Dept. of the Army Pamphlets series (DA Pam 27-50-[#]). Though an Army publication, it reviews all military law, including case law from the Air Force, Navy/Marine, and Coast Guard Courts of Criminal Appeals.

[129](#) Which lists statutory compensation of survivors of U.S. military personnel.

[130](#) *United States v. Phillips*, 58 M.J. 217 (2003).

[131](#) *United States v. Henderson*, 59 M.J. 350 (2004).

[132](#) *Army Lawyer* is published by Army JAG and is available online at Westlaw. It is also published as a series of Dept. of the Army Pamphlets (DA Pam 27-50-[#]).

133 See [this chart](#) online at National Governors' Assn. website at www.nga.org. . See next page below for abbreviations.

134 Abbreviations and definitions per [CAL ARNG Reg 310-4](#), Request for Orders, 1 Oct 96, unless otherwise footnoted.

135 [AR 135-18](#), *Active Guard and Reserve Program* devoted *in toto* to AGR matters.