

Military Justice

Military Justice

Cases and Materials

FOURTH EDITION

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This book is dedicated to our families, teachers, students, colleagues at the bar, and comrades-in-arms. We have learned from them all. It is also dedicated to the current and future judge advocates, judges, commanders, and political leaders on whose wisdom, learning, good sense, and dedication to American values public confidence in the administration of military justice rests. Finally, and above all, it is dedicated to the military personnel whose courage and service are critical to national security and the preservation of democracy.

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Foreword

Any course in military justice provides students with a unique opportunity — to learn about the military justice system in the abstract, but also to be exposed to all of the ways in which it does (and doesn't) depart from the rules, procedures, and constitutional protections of civilian criminal prosecutions in order to serve its distinct functions and purposes. In that respect, the study of military justice also provides both experts and novices alike with a fascinating opportunity to consider the universe of legal issues military practitioners confront on a daily basis through something of a looking glass — and to assess which commonalities and which departures make more (and less) sense.

And as much as that's always been the nature of courses in military justice, recent events make those inquiries only that much more essential — with Congress for the first time taking authority away from commanders in sexual assault and various other offenses committed after December 27, 2023; with the rise of the so-called “short martial,” and the debate over whether servicemembers have a constitutional right to be tried by a panel for serious offenses; with lingering questions about non-unanimous convictions in the military after and in light of the Supreme Court's 2020 ruling in *Ramos v. Louisiana*; with a battery of challenges to the scope of Article 134; and with the military's continuing efforts, in any number of respects, to provide unique protections and procedural rights to victims of sexual assault.

In my foreword to the previous edition of this venerable, accessible, and immensely useful casebook, I bemoaned the lack of attention that military justice receives — from the Supreme Court; from Congress; from law schools; and from legal scholars. Events in the intervening years have only underscored why we all ought to be paying more attention to the legal issues the military confronts on a regular basis — while also revealing the continuing dearth of engagement from those who have much to learn about this “other” body of federal law, which is to say all of us.

To that end, this fourth edition folds recent developments into a broader study of military justice that includes both the doctrinal weeds and the top-level debates. Thus, the book takes account of the significant changes Congress has passed in recent years; *Ortiz v. United States* — the 2018 ruling cementing the structural relationship between the court-martial system and the Supreme Court; developments in the area of unlawful influence; greater focus on non-judicial punishment (NJP), which, in sheer numbers, occupies an ever-larger place in the U.S. military justice system; and developments from a host of foreign and international tribunals to provide a thought-provoking comparative perspective.

All the while, the new edition of the casebook retains the prior iterations' thought-provoking focus on the broader, fundamental questions undergirding the entire project of military justice. Why does military justice continue to be a necessary institution in contemporary national legal systems, and how does the answer to that question bear upon the specific rules and regulations that govern its exercise? Reasonable people will disagree on the answers to these questions; the fourth edition of *Military Justice: Cases and Materials* arms its readers with everything they should need to formulate their own responses.

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Preface

The views expressed below are mine alone and are not attributable to the U.S. Court of Appeals for the Armed Forces or Notre Dame Law School.

Military justice — the combination of disciplinary practices within the military chain of command and the panoply of judicial review of those practices, as this textbook is entitled — has the potential to affect the lives of over 3.7 million active duty, selected reserves, and active component retirees of the Armed Forces. And it potentially affected an untold number of veterans that fall into none of those categories. Yet the subject is rarely found in law school curricula and remains little understood outside of the military. That is both unfortunate and misguided, as the military has often served as an instrument for social change; and issues that arise in the military justice system often reflect what is happening in society as a whole, albeit in a domain that is, and should remain, distinct.

Why? For one, military law was historically seen as a backwater; “harsh law,” *Reid v. Covert*, 354 U.S. 1, 38 (1957); a “rough form of justice.” *Id.* at 35. Even after the passage of the Uniform Code of Military Justice (UCMJ) and its attendant reforms, military justice generally remained the province of judge advocates, convening authorities, military defendants, and an exceedingly small cadre of scholars. Despite the fascinating issues of jurisdiction, separation of powers, constitutional law, and constitutional criminal procedure the military justice system presents, the field was seen to contribute little to broader jurisprudence or the legal academy. Military justice was “different,” so what is the point? To the extent they were offered outside of the Service Academies, courses focused, generally and anecdotally, more on how to practice law in the military, rather than on military justice writ large. While those concepts are related, they remain distinct, though there is a constituency and a place for both classes.

The fourth edition highlights, and renders accessible to the reader, the most pressing issues in the military justice system. The prominent scholars responsible for this book present unique insights into the way in which constitutional issues play out in the military context. This edition furnishes information necessary to understand the relevant questions; critiques settled law when appropriate; and poses provocative queries about issues that have yet to be resolved. While the authors generally acknowledge what the law is, they sometimes challenge the reader to question whether that is what the law *should* be. That provocation is what makes for a great seminar or symposium. Whether you teach, are a student, write about, practice or judge questions

of military law, this book facilitates fruitful discussion of the intricacies of military law — whether in class, at conference, or in court.

As for changes since the last edition, the military justice system has been in the public eye of late, most often due to highly publicized issues or cases, or efforts by those outside the system to overhaul and civilianize it *in its entirety*. I do not subscribe to the notion that any publicity is good publicity, but the generally negative public discourse has doubtless resulted in additional academic discussion and scholarly publications. This casebook recognizes and incorporates many of those issues and dialogues. While truncating content and removing certain materials, the fourth edition adds a necessary exploration of the application of the Religious Freedom Restoration Act (RFRA) to the military; notes how the Article III courts assess claims; and discusses both the related Vaccine Mandate initiated by the Department of Defense, and efforts to evade the same by servicemembers claiming a religious exemption. Similarly, this edition highlights the continued, albeit mutated, spate of Unlawful Command Influence (UCI), to include the highly publicized claim of UCI by the President of the United States and a sitting United States Senator in the case of *United States v. Bergdahl*. It raises the question of what — if anything — can be done about politically-motivated attempts to influence the system. Most timely and critically, it details the significant changes to the military justice system occasioned by the curtailment of some of the convening authority's historic functions and prerogatives, and explains what the creation of the new Special Trial Counsel does — and does not — mean for practitioners in the system. In short, this edition is a clear exposition of where things stand. For now. As the prologue pithily explains, the authors removed the text of the UCMJ from the book because more changes are sure to come.

Of course, not everyone will agree with each observation or selection of material. Indeed, I remain skeptical of the myriad cites to foreign law when expounding upon subject matter jurisdiction of the *United States* UCMJ. So too with the suggestion that these sources lend credence to the notion that military jurisdiction should be truncated and limited to crimes that require any military nexus other than the military status of the accused. Article I, §8, cl. 14 of the Constitution empowers Congress “To make Rules for the Government and Regulation of the land and naval Forces.” Congress, pursuant to that constitutional authority, extended courts-martial jurisdiction “to try persons subject to [the UCMJ] for any offense made punishable by [the UCMJ].” 10 U.S.C. § 818. In other words, jurisdiction ultimately turns on whether persons are themselves members “of the land and naval Forces” and whether the act is criminalized by the UCMJ. By overruling *O’Callahan v. Parker*, 395 U.S. 258 (1969), in *Solorio v. United States*, 483 U.S. 435 (1987), the Supreme Court did nothing more than restore the constitutional will of Congress that it had previously recognized and affirmed for almost a century and later abrogated.

But disagreement, of course, is healthy. It produces better dialogue among scholars in the field. It produces better debate among legislators exercising their constitutional duties. It produces better opinions among judges when it is within their constitutional or statutory wheelhouse. In that respect, this casebook undoubtedly

will contribute to ongoing debates in the military justice system. And, in turn, Congress may — as is its constitutional prerogative — alter the rules regarding UCMJ jurisdiction, and the Supreme Court’s jurisdiction over the system, in the same way it has revamped the role of the convening authority and created the Special Trial Counsel.

In sum, we owe a debt of gratitude to the authors for this timely and unique contribution to the field. Whether one is studying military justice for the first time or refreshing one’s recollection after a decades-long career in the field, every reader will find something enlightening in these pages.

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Introduction

For a subject that is not offered at most American law schools, military justice involves a surprising range of deep and enduring legal and policy issues facing the United States. What is the role of constitutional and international law and human rights jurisprudence? How much of the law is made by Congress and how much by the President? Is justice achieved? Is public confidence fostered? What role can military justice play in restraining and shaping the use of violence by states? Future lawyers, as public citizens, should be concerned with this subject, because it inevitably raises substantial issues of justice, governance, ethics, and conflict resolution.

This book is mostly about American military justice, but includes materials from other legal systems. As Dean Robert Post of Yale Law School pointed out in 2011 at a Global Military Appellate Seminar, there is a convergence in military law across national boundaries. He attributed that convergence to global trends toward combined military operations, greater enforcement of human rights law, and the legalization of military operations. Those trends have brought both national militaries and national military justice systems into closer alignment than in the past. Militaries of many countries and regions regularly share battlefields and undertake humanitarian missions together. They must harmonize not only military operations in the field, but norms and standards for handling misconduct.

This new era in military justice has created challenges across the spectrum of national militaries. The military forces of European nations have been subjected to scrutiny and at times censure by the European Court of Human Rights for failing to maintain an independent and impartial military judiciary. The High Court of Australia ruled the Australian Military Court unconstitutional in 2009 in a case that began with sexualized horseplay among navy recruiters and ended in the dismantling of that country's system. The United States system has been doubted for its performance in the field in Iraq and Afghanistan and for its limited effectiveness in deterring sexual crimes but wound up gaining new stature in *Ortiz v. United States*, a landmark 2018 ruling by the Supreme Court. Congress, for its part, has paid close attention to the subject, initiating historic reforms in recent years. War crimes issues emerged almost immediately after Russia invaded Ukraine in 2022. In addition to criminal law and procedure within national militaries, proceedings in international tribunals, civilian courts, and the seemingly immortal Guantánamo military commissions are likely to keep military justice in the public eye.

This book is neither a treatise nor a how-to manual. Moreover, rather than attempting a comprehensive review of the field, we have selected for study the most important

aspects of contemporary military justice in order to stimulate thinking about how military justice relates to core values in a democratic society. Must the military be a separate society with its own governance and disciplinary machinery? How do the exigencies of war and duty alter the balance of rights for servicemembers? What role should commanders play in criminal investigation, prosecution, and appeal? How do personnel policies that require conscription, integration (along lines of race, gender, or sexual orientation), or behavioral modification (such as “zero tolerance” for sexual and other forms of harassment) affect military crime and punishment? How should military justice draw the line between misconduct that warrants the full panoply of procedural protections and misconduct that can be dealt with summarily? Are there unusual policy and fairness issues when a military criminal conviction means not only punishment, as in civilian criminal courts, but also the loss of employment and pension benefits? During emergencies, does (and must) due process yield before concerns of national (or human) security? What should be the role of military justice in dealing with extremism in the ranks or resistance to vaccination programs such as those initiated in response to the COVID-19 pandemic? Our hope is that this book will help introduce these and other dilemmas of military law while deepening students’ understanding of criminal law and procedure, comparative law, international law, constitutional law, and ultimately, of governance in a democratic society.

Because George III’s Articles of War still cast a long shadow over America’s commander-centric military justice system, we have again included his image.

For easier reading, we have eliminated many citations and footnotes from the materials. We have, however, left orthography (*e.g.*, defense vs. defence) as it was in the original sources. We decided not to reproduce the Uniform Code of Military Justice in its entirety because it is certain to be amended during the anticipated life of this edition and in any event is readily available online for free. Instructors are strongly encouraged to caution students about the need to check the effective date of any amendments to the Code.

Views expressed in this book are those of the editors and individual authors and do not necessarily represent those of any government agency or institution of higher learning. A Teaching Manual is available from the publisher.

Please contact Carolina Academic Press or any of us with your suggestions and comments.

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