COURT-MARTIALING CADETS
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I. INTRODUCTION

Recently, military criminal jurisdiction involving cadets and midshipmen of the service academies has been the focus of several media reports, with most of the reports discussing allegations of sexual misconduct. To illustrate, in 2006, the United States Coast Guard Academy saw the first court-martial of one of its cadets in the 130-year history of that institution. Acquitted of rape, the Cadet was convicted of “extortion, sodomy, indecent assault and other charges.” He was sentenced to be dismissed from the Coast Guard and to be incarcerated for six months.

Even more newsworthy was the court-martial of the United States Navy Academy’s starting quarterback. Although similarly acquitted of rape, the Midshipman was convicted of “conduct unbecoming of an officer for engaging in sexual contact on academy grounds and failing to obey a lawful order.” A second Naval Academy football player was convicted of sexually assaulting a female midshipman.

In the wake of these courts-martial, a cadet from the United States Military Academy at West Point, New York, was convicted of both rape and attempted rape and sentenced to be incarcerated for eight years. In
both cases, the victims were “former female cadets.” Significantly, the rape conviction was the first conviction of a cadet for that crime since women entered the Military Academy in 1976.

Although recent media events have highlighted the susceptibility of cadets and midshipman to military criminal justice, these unique members of the armed forces have long been the object of courts-martial. This Article will initially focus on the history and development of courts-martial involving cadets of the United States Military Academy (“West Point”). However, the scope of the Article will broaden to reflect the enactment of the Uniform Code of Military Justice (UCMJ) in 1950. The UCMJ codified military law and made it uniformly applicable to the entire armed forces, including the cadets from the service academies of the Army, Navy, Air Force and Coast Guard.

II. HISTORICAL BACKGROUND

The United States Military Academy (USMA) at West Point, New York, was founded in 1802 during the administration of President Thomas Jefferson. A proponent of the citizen-militia system, Jefferson

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6 Id.
7 Id. Apparently, this was not the first incident of a rape committed by a cadet at West Point. See e.g., Loritts v. United States, 489 F. Supp. 1030, 1031 (D. Mass. 1980) (noting that a visiting college co-ed had been “assaulted and raped by an academy cadet”). In 1997, a West Point cadet was charged with raping a female cadet, though he was acquitted at court-martial. Jury Acquits West Point Cadet Accused of Rape, THE MESA TRIBUNE, Jan. 25, 1997, at A5.
10 RUSSELL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 105 (1967); see also U.S. MILITARY ACADEMY, BUGLE NOTES 128 (1978) [hereinafter BUGLE NOTES] (“The United States Military Academy was established by act of Congress on March 16, 1802.”). However, cadets were appointed and reported to West Point by September 1801. THEODORE J. CRACKEL, AN ILLUSTRATED HISTORY OF WEST POINT 77 (1991).
recognized the necessity for some form of standing army. Further, Jefferson believed that if a standing army were to be permitted to exist, then its officer corps should be educated and should be able to serve the nation in times of peace as well as war. However, the Jefferson administration envisioned the creation of USMA as part of a broader military reform, which included a political component. Appointments to the Academy were made primarily to the sons of political loyalists so that Jefferson could create an Army led by officers embracing his republican principles. Laudably, Jefferson also hoped to use USMA as a means by which the less wealthy, and concomitantly less educated, portions of society could receive an education.

The Military Peace Establishment Act officially established the United States Military Academy and created a “corps of engineers” to be stationed at West Point, which included ten cadets among its ranks. These cadets were required “to do duty in such places, and on such service as the President of the United States shall direct.” The Academy’s initial affiliation with the Army’s Corps of Engineers “comported with Jefferson’s concept of an academy of more than military utility.”

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11 Weigley, supra note 10, at 104–05.
12 Id. at 105.
13 Id. at 106. Jefferson’s selection of a scientist, rather than a professional soldier, as West Point’s first Superintendent reflects Jefferson’s emphasis on developing the “scientific aspects of the West Point program,” rather than an exclusive focus on the martial arts. Id.
14 Crackel, supra note 10, at 74.
15 As Crackel notes,

    after the new administration had come into power, ‘appointments to military office were made from families of prominent Democrats [Jeffersonian Republicans] . . . .’ Drawn from Republican families and trained under officers carefully selected for the task, these young men, it was hoped, would form an officer corps that would be thoroughly attached to the republican principles they were sworn to defend.

    Id.
16 Id. at 75. Part of Jefferson’s desires in this area appear to be politically motivated since the rival Federalist party was generally wealthier and better educated than members of his own party. Id.
18 Id.
19 Weigley, supra note 10, at 106.
The War of 1812 led to a renewed focus on creating a modern, professional military academy. President Monroe’s Secretary of War, John C. Calhoun, sought to advance a new national security policy that placed greater emphasis on the Regular Army and set about trying to improve the institution. Calhoun’s reform efforts extended to the U.S. Military Academy. The Secretary of War sought to sever the Academy’s subordinate link to the Corps of Engineers, increase the size and pay of the Academy’s facility, set the minimum admission age at sixteen, and create a disciplinary system for the cadets since the applicability of military law remained uncertain.

Critical to the successful transformation of the Academy was President Monroe’s appointment of Sylvanus Thayer to the position of Superintendent of the United States Military Academy. Both academic and soldier, Thayer supervised the creation of a four-year curriculum emphasizing small class instruction with daily recitations by the cadets. Thayer also established the position of Commandant of Cadets, responsible for both military training and discipline. Thayer struggled to impose discipline on the cadets, meeting with personal affronts, near mutinies, and even an attempt on his life. As part of his cadet disciplinary system, Thayer issued a set of regulations to control cadet behavior and increased the staff of tactical officers to enforce discipline. Thayer’s reforms were later adopted by the United States Naval Academy following its founding in 1845.

The first court-martial convened to address misconduct by West Point cadets appears to date to 1818, while Thayer served as Superintendent. Several cadets that year had been charged with military offenses, and a general court-martial assembled; however, the officers serving as members of the court refused to address the charges, believing that the court had no

\[ \text{Id. at 144–45.} \]
\[ \text{Id. at 133.} \]
\[ \text{Id. at 145.} \]
\[ \text{Id. at 145–46.} \]
\[ \text{Id. at 147.} \]
\[ \text{CRACKEL, supra note 10, at 106–07. In 1821, unknown cadets set a fire as a diversion and dragged a cannon to the front of Thayer’s quarters. Id. at 107. The cannon was aimed at his home and the fuse ignited, but the fuse burned out before it could ignite the gunpowder that would fire the cannon. Id.} \]
\[ \text{Id. at 107.} \]
\[ \text{H. MICHAEL GELFAND, SEA CHANGE AT ANNAPOLIS: THE UNITED STATES NAVAL ACADEMY, 1949–2000 i, 3 (2006).} \]
Prior to that time, the general consensus of opinion held that cadets were not subject to court-martial jurisdiction. To resolve the matter, the issue of jurisdiction was forwarded to the Attorney General. On August 21, 1819, Attorney General William Wirt opined that “the corps [of cadets] at West Point form a part of the land forces of the United States, and have been constitutionally subjected by Congress to the rules and articles of war, and to trial by court-martial.” A second opinion, rendered by Attorney General Cushing in 1855, similarly concluded that “cadets are subject to trial by court-martial . . . .”

A. Edgar Allan Poe

One of the earliest courts-martial involving a well-known figure was the trial of Cadet Edgar Allan Poe. The future literary master entered West Point in 1830 and performed well academically, but he then began to accumulate a significant number of demerits. By late January 1831, Poe was charged with “gross neglect of duty” for being absent twenty-three times from a parade or military formation and for being “absent from all his academic duties between January 15 and 27.” Additionally, he was charged with disobeying two orders: “an order to attend church and another order given him by the officer of the day.” Poe “pleaded guilty to all but the first specification of the first charge” but after a brief one day trial was found guilty of all charges and specifications. The court sentenced Poe to be dismissed from the Army, and by February 19, 1831, he had departed West Point.

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29 Id.
30 Id.
34 Id. at 66.
35 Id.
36 Id. at 66–67.
37 Id. at 67.
B. The Un-Civil War Generals

West Point graduates held the lion’s share of significant military positions during the Civil War. The President of the Confederacy, Jefferson Davis, was an 1828 graduate. Although no West Point graduate was a general at the beginning of the war, by its conclusion 297 graduates were generals in the Union Army and 152 were promoted to general officer rank in the Confederate Army. Indeed, of the sixty most important battles of the Civil War, West Point “graduates commanded on both sides [in 55 battles]; in the remaining 5, a graduate commanded one of the opposing sides.” Notably, Ulysses S. Grant, who rose to command all Union armies, was a 1843 graduate, and the Confederacy’s premier commander, Robert E. Lee, was a 1829 graduate.

Several of these military icons had run afoul of the military’s criminal justice system as cadets. During the summer following his plebe (freshman) year, Cadet Jefferson Davis and four classmates were caught at Benny Havens, a popular off-post tavern, and the five cadets were subsequently charged with two specifications of violating an Academy regulation, “namely, ‘drinking spirituous and intoxicating liquor’ and ‘going to a public house or place where spirituous liquors are sold,’ as well as leaving post without permission.”

Cadet Davis elected to defend himself and mounted a spirited defense at his court-martial. Of the three specifications, Davis attacked the validity of the first two, arguing that they were based on a new regulation because it “had not been communicated to the Corps [of Cadets], and ‘isolated as we are from the rest of the world,’ such orders could not be considered valid.” Further, being unaware of the new regulation, he was unable to obey it. Further, Davis attacked the “weak evidence” presented by the Government. Davis pled guilty to leaving post without permission, but

39 BUGLE NOTES, supra note 10, at 260.
40 Id. at 261.
41 WOOSTER, supra note 38, at 8 (Grant), 15 (Lee).
43 Id. at 16.
44 Id.
45 Id.
attributed his misconduct to confusion associated with bad weather, which had caused him to take shelter off-post.\footnote{Id.}

Unimpressed, the members of the court found Davis guilty of all three specifications and sentenced him to dismissal, but further recommended that the dismissal be remitted to reflect his otherwise good record of behavior.\footnote{Id. at 17.} Ultimately, Davis was permitted to remain at the Academy.\footnote{Id.}

Cadet Fitzhugh Lee faced a court-martial in December 1853 while his uncle, Robert E. Lee, was serving as Superintendent of the United States Military Academy.\footnote{Id. at 121.} Fitzhugh Lee and four other cadets were court-martialed for various liquor violations.\footnote{Id.} The senior member of the Lee family refused to help his nephew and the court ultimately convicted the errant cadet, but did not dismiss him.\footnote{Id.} Fitzhugh Lee graduated from West Point in 1856,\footnote{Stewart Sifakis, Who Was Who in the Civil War 379 (1988).} and was wounded fighting Indians in Texas.\footnote{Id.} After the Civil War broke out, Lee fought for the Confederacy in several major battles, eventually being promoted to the rank of Major General.\footnote{Id. Lee was wounded a second time during the Third Battle of Winchester. Id.} After the war, Fitzhugh Lee eventually was elected Governor of Virginia and was appointed a Major General of volunteers during the Spanish-American War.\footnote{Id.}

Another future Confederate General, Lewis Addison Armistead, struggled academically and ranked near the bottom of his class in discipline.\footnote{Robbins, supra note 42, at 65.} In January 1836, Armistead was arrested and confined for “disorderly conduct in the mess hall,” apparently after hitting another future Confederate General, Jubal Early, in the head with a plate.\footnote{Id. at 65, 424 n.42.} Armistead resigned in lieu of facing a court-martial, and eventually was
killed in action leading a portion of the assault popularly known as “Pickett’s Charge” during the July 1863 Battle of Gettysburg.58

On the Union side, Cadet Philip Sheridan was convicted, and dismissed from the Army, for chasing another cadet off the parade field “at the point of his bayonet.”59 Fortunately, Sheridan was reinstated at the Academy the following year and graduated with the class of 1853.60 During the Civil War, Sheridan served successfully in Kentucky and Tennessee before taking command of Union forces in Virginia’s Shenandoah area, where he defeated the Confederate forces located there.61 After the War, Sheridan commanded troops in the South during Reconstruction, fought the Southern Plains Indians, and eventually rose to serve as commanding general of the entire United States Army.62

George Armstrong Custer is best known for his defeat at the hands of a combined force of Sioux and Cheyenne warriors at the 1876 Battle of the Little Big Horn.63 This military defeat is popularly known as “Custer’s Last Stand.”64 However, before his demise Custer had enjoyed a

58 Id. at 65–66, 251. “Pickett’s Charge” was actually a large-scale unsuccessful assault against Union positions by two Confederate divisions, commanded by George Pickett and James Pettigrew. Id. at 243.

59 KENDALL BANNING, WEST POINT TODAY 114 (1959).

60 Id.; see also WOOSTER, supra note 38, at 54.

61 WOOSTER, supra note 38, at 54, 53. Sheridan defeated Confederate forces under the command of Lieutenant General Jubal Early, West Point class of 1837. Id. at 54–55, 205.

62 Id. at 55.

63 Custer and five companies of the Seventh U.S. Cavalry, consisting of approximately 225 troopers, were wiped out on June 25, 1876. JEROME A. GREENE, EVIDENCE AND THE CUSTER ENIGMA 5, 12 (1986). The remainder of the Seventh Cavalry, under the command of Major Marcus Reno and Captain Frederick Benteen, were surrounded by the hostile Indian forces approximately three miles from Custer, but were able to repulse the attacks until the Indians withdrew the following day. Id. at 44–45. Ironically, Reno’s cadet career just missed overlapping with that of Custer. ROBBINS, supra note 42, at 189. Hardly a model cadet at West Point, Reno was forced to repeat his first year, then was later dismissed and reinstated, eventually graduating in 1857 after six years as a cadet. Id. The year following the Custer massacre, Reno was court-martialed “for attempts to seduce the wife of an officer of his own regiment, absent on detached duty, and for his using his position as commanding officer to slander her” and found guilty of attempting to seduce another officer’s wife, for being absent from duty and for slander. FAIRFAX DOWNEY, INDIAN-FIGHTING ARMY 187, 212 (1941). Reno was suspended from the Army for two years. Id. However, in 1880 Reno was again court-martialed following incidents of drunkenness and brawling and was finally dismissed from the Army. Id. at 187–88.

64 GREENE, supra note 63, at 5.
spectacular military career during the Civil War. Only days before the July 1863 Battle of Gettysburg Custer was promoted to the temporary rank of Brigadier General, becoming at the age of twenty-four one of the Union Army’s youngest generals.65

However, on the eve of graduation from West Point, Custer’s military career was almost killed in its infancy.66 On June 30, 1861, Custer’s class graduated early in order to provide officers for the rapidly expanding Union Army.67 The night before graduation, Custer was serving as cadet officer of the guard and came upon two cadets engaged in a fistfight.68 Instead of stopping the fight, Custer pushed aside those cadets who were trying to separate the two and ordered: “Stand back, boys; let’s have a fair fight!”69 Unfortunately for Custer, two Army officers observed his behavior and he was arrested the next day.70 Two weeks after his class had graduated, Custer was court-martialed and pled guilty to “neglect of duty” (for not breaking up the brawl) and ‘conduct to the prejudice of good order and military discipline’ (for calling for a fair fight),” was sentenced to be reprimanded, and ordered to report for duty.71 Days later, Custer was in combat in the Battle of Bull Run.72

Although he managed to escape serious punishment at his cadet court-martial, the Army’s justice system was not done with Custer. In 1867, Custer learned that his wife was caught in a cholera outbreak and left his unit while on duty; for this he was court-martialed.73 Additional charges were added, so that by the time he stood trial, Custer also faced charges for failing to adequately repulse an Indian attack and ordering deserters to be shot.74 Custer was convicted of all these charges and sentenced “to be

65 Roy Morris, Jr., Cavalry Clash at Gettysburg, 15 MIL. HIST., Apr. 1998, at 38, 42.
66 Custer may have been considered for court-martial charges after his first day at West Point. Reportedly, Custer disobeyed a direct order from a superior upon arriving at the Academy, but because he had not yet been sworn into the Army, no jurisdiction existed over him. Mark McKenna, Generals Leave Mark as West Point Goats, WASH. TIMES, Aug. 20, 2005, at D5.
67 ROBBINS, supra note 42, at 203.
68 Id.
69 Id.
70 Id.
71 Id. at 203–04.
72 Id. at 204.
73 DOWNEY, supra note 63, at 76, 83; see generally LAWRENCE A. FROST, THE COURT-MARTIAL OF GENERAL GEORGE ARMSTRONG CUSTER (1968).
74 FROST, supra note 73, at 99–102.
suspended from rank and command for one year, and [to] forfeit his pay for the same time.”

C. Racism On Trial

One of the most controversial courts-martial involving a cadet was United States v. Johnson Whittaker. Early on the morning of April 6, 1880, Cadet Whittaker was found on the floor of his room, apparently unconscious, bleeding with his hands bound and his feet tied to his bed. The first Army officer called to the scene feared Whittaker had been murdered. Later, Whittaker alleged that three masked men had entered his room at night, assaulted him, threw him to the floor, gouged clusters of hair from his head, and cut his ear lobes. The three assailants also reportedly threatened to kill Whittaker if he cried out for help or reported the assault. The last thing Whittaker heard before the three departed was: “Then he will leave.”

Later that morning, Whittaker provided a threatening note to Academy authorities that the cadet alleged he had found in his room the prior day. Signed by “A Friend,” the note stated: “Mr. Whittaker. You will be fixed. Better keep awake.”

Whittaker was no ordinary cadet. Were he to graduate, Whittaker would have held the distinction of being only the second African American cadet to graduate from the United States Military Academy, following in the footsteps of Henry O. Flipper, West Point Class of 1877. Unfortunately, in 1881 the Army court-martialed Lieutenant Flipper for embezzlement and “conduct unbecoming an officer and a gentleman.”

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75 Id. at 245–46.
76 The case was never reported. What is known of the background facts and proceedings is based on subsequent interviews and research.
77 JOHN F. MARZALEK, ASSAULT AT WEST POINT 1–2, 44 (1972).
78 Id. at 47.
79 Id. at 50–51.
80 Id. at 51.
81 Id.
82 Id. at 54.
83 Id. at 55.
84 Id. at 19.
85 JANE EPPINGA, HENRY OSSIAN FLIPPER: WEST POINT’S FIRST BLACK GRADUATE 95 (1996).
Acquitted of embezzlement but convicted of unbecoming conduct, Flipper was dismissed from the Army.86

Born a slave, Cadet Whittaker was one of twenty-three African American young men to enter West Point in the first quarter century following the Civil War.87 Only three of those twenty-three would eventually graduate.88 Instead of being the second African American cadet to graduate from West Point, Whittaker became the second African American cadet to be court-martialed.89

Whittaker’s report of what occurred met with early skepticism. Upon discovery of the bound cadet, the Academy’s surgeon was summoned and examined Whittaker, but quickly formed the opinion that the cadet was feigning unconsciousness.90 One of the first cadets to discover Whittaker, George Burnett, observed the surgeon’s examination and “blurted out, ‘I think this thing is a hoax.”’91 Although other cadet rooms adjoined Whittaker’s quarters, no other cadets reported that they heard the assault or any cry for help.92 Whittaker explained that he initially called for help in a weak voice after being assaulted, but he was afraid that if he continued his

86 Id. at 125. The conviction and sentence was reviewed by Secretary of War Robert Todd Lincoln, the son of Abraham Lincoln, and approved by President Chester Arthur. Id. at 126–27. However, in 1976 the Carter Administration reviewed the Flipper court-martial and honorably discharged him from the Army, posthumously. BENJAMIN O. DAVIS, JR., BENJAMIN O. DAVIS JR.: AMERICAN, AN AUTOBIOGRAPHY 22 (1991).

87 MARSZALEK, supra note 77, at 19.

88 Id. (“Of these twenty-three blacks, only three graduated: Henry O. Flipper in 1877, John H. Alexander in 1887, and Charles Denton Young in 1889.”). Another African American cadet would not graduate from West Point until 1936. DAVIS, supra note 86, at 48. The son of the only African American active duty Army officer upon his entrance to West Point, Benjamin Davis Jr. graduated from West Point in 1936 and eventually rose to the rank of Lieutenant General. Id. at 22, 48, 274.

89 MARSZALEK, supra note 77, at 22. Cadet James Webster Smith was dismissed after having been found to have lied in response to having been placed on report for “inattention in ranks.” Id. Smith alleged that he was merely attempting to prevent another cadet from stepping on his shoes, a charge denied by that cadet. Id. President Grant reduced the dismissal to suspension from the Academy for one year. Id. Eventually Cadet Smith was dismissed from West Point as an academic failure. Id. at 23.

90 Id. at 48.

91 Id. at 44, 49. Whittaker suspected Burnett as being one of the three attackers. Id. at 71.

92 Id. at 58.
assailants would return.\textsuperscript{93} Further, even if his cry were heard, Whittaker doubted that anyone would come to his assistance.\textsuperscript{94}

Whittaker’s assessment that other cadets would not come to his assistance appeared valid. Since his arrival, Whittaker’s fellow cadets had ostracized him on racial grounds.\textsuperscript{95} Virtually all African American cadets experienced this form of social isolation;\textsuperscript{96} a practice known as being “cut” or “silenced”\textsuperscript{97} that lasted well into the next century.\textsuperscript{98} As a by-product of the social ostracism, Whittaker had no roommate,\textsuperscript{99} which made supporting or refuting his story very difficult.

\textsuperscript{93} Id. at 51.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 41.
\textsuperscript{96} Id. at 17 (“Black cadets were ostracized as a matter of course.”); see also CRACKEL, supra note 10, at 164 (“[T]he social climate among the cadets ensured that the black cadets would be subjected to scorn and maltreatment during the whole of their stay at West Point.”); RICK ATKINSON, THE LONG GRAY LINE 62 (1989) (noting “the vicious treatment accorded blacks earlier in the academy’s history”).
\textsuperscript{97} This practice was known as being “cut” at the time Whittaker and Flipper were cadets. MARSZALEK, supra note 77, at 16; HENRY OSSIAN FLIPPER, THE COLORED CADET AT WEST POINT 52 (William Katz ed., Arno Press & The New York Times 1969) (1878). By the twentieth century, the practice became known as “silencing.” DAVIS, supra note 86, at 27. During Whittaker’s tenure at West Point, a cadet could be cut if “considered to be ungentlemanly or cowardly or a believer in an idea that the Corps [of Cadets] found repugnant . . . .” MARSZALEK, supra note 77, at 16. In 1875, Cadet Charles Robinson was cut after reporting a first class (senior) cadet to Academy authorities after Robinson found the first classman requiring a plebe (freshman) to perform menial services for him. CRACKEL, supra note 10, at 163. A “cut” or “silenced” cadet “was treated as if he did not exist. The ‘silenced’ cadet lived in a separate room, ate alone at a table in the Cadet mess, was not spoken to by any other cadet except for official purposes, and was otherwise completely ignored.” Major John H. Beasley, The USMA Honor System—A Due Process Hybrid 118 MIL. L. REV. 187, 198 (1987); BANNING, supra note 59, at 220 (“No cadet speaks to or notices the presence of the [silenced cadet] except on strictly official business.”).
\textsuperscript{98} Benjamin Davis Jr., class of 1936, reported in his autobiography that “the great majority of the Corps of Cadets silenced me absolutely for four years.” DAVIS, supra note 86, at 28; see also ATKINSON, supra note 96, at 62 (Davis “was subjected to ‘the silence’”). The last reported case of a cadet being silenced involved Cadet James Pelosi, who was found guilty of an honor violation by a cadet honor committee. DAVIS, supra note 86, at 51. Pelosi appealed to a board of officers and the case was dismissed after it came to light that the cadet honor committee had seen a note from a military officer indicating that Pelosi was guilty. Id. Nevertheless, the Corps of Cadets officially silenced Pelosi. Id.
\textsuperscript{99} MARSZALEK, supra note 77, at 41.
Other portions of Whittaker’s explanation were difficult to believe. For example, Whittaker reported that during the assault he became faint and asked his three assailants for a pillow; oddly they placed one under his head.100

The Commandant of Cadets, Lieutenant Colonel Henry M. Lazelle, conducted the initial investigation into Whittaker’s allegations and rendered a report severely unfavorable to the Cadet.101 Within two days of the incident, Lazelle provided an investigative report to the Academy’s Superintendent, General John Schofield, that the entire incident was a hoax perpetrated by Whittaker.102 Lazelle recommended that “Whittaker be given the choice of resignation, or asking for a Court of Inquiry, or of a Court-Martial.”103 When confronted with the report, an indignant Whittaker denied its conclusions and demanded a court of inquiry, which Schofield granted.104

The Academy convened a court of inquiry, which began its proceedings on April 9, 1880.105 The court consisted of four Army officers, all of whom were members of the West Point faculty.106 One of the four officers, First Lieutenant Clinton Sears, served as court recorder, which required him to combine the roles of “prosecutor, investigator, and supervisor of the official record.”107 To represent him, Whittaker requested the services of another faculty member and West Point graduate, First Lieutenant John Knight.108 Whittaker was provided the opportunity to object to any members of the court, but had no objections.109 None of the participants were lawyers.110

100 Id. at 51. Whittaker was found “with the right side of his face on a comforter topped by a pillow.” Id. at 44.
101 Id. at 55–57 (“[T]he report accused Whittaker of writing the note of warning, mutilating himself, and then faking unconsciousness.”).
102 Id. at 57 (“[T]he report accused Whittaker of writing the note of warning, mutilating himself, and then faking unconsciousness.”).
103 Id. at 58.
104 Id. at 58–59.
105 Id. at 66.
106 Id. at 60–61.
107 Id. at 61.
108 Id.
109 Id. at 67.
110 Id. at 62.
The official inquiry into the alleged assault on Cadet Whittaker quickly became “a national cause célèbre,” with extensive press coverage.\(^{111}\) Several officers and cadets agreed to be interviewed and generally voiced their disbelief as to Whittaker’s allegations.\(^{112}\) The disbelief of some cadets was apparently based on purely racial grounds.\(^{113}\) Others attributed Whittaker’s allegations to his fear of academic failure\(^ {114}\) or an attempt to strike back at West Point for years of social ostracism.\(^{115}\) Numerous witnesses testified before the court of inquiry, including Whittaker, two barbers, handwriting examiners who served as expert witnesses, other cadets and faculty members, and the post surgeon.\(^{116}\) Ultimately, the court of inquiry rejected Whittaker’s version of the facts, disbelieving that anyone had assaulted the cadet.\(^{117}\)

In the wake of the court of inquiry, Army officials leveled two criminal charges against Cadet Whittaker. First, the Army charged Whittaker with “conduct unbecoming an officer and gentleman” by “mutilating himself and writing the note of warning ‘with the design and intention to excite public sympathy, to bring discredit upon the said Military Academy, to obtain notoriety, and further to avoid and escape an approaching public examination.’”\(^{118}\) Further, it was alleged that Whittaker “‘deceived his superior officers’ and ‘the public at large’ into believing that he had been the victim of a conspiracy.”\(^{119}\) Second, he was charged with “conduct prejudicial to good order and discipline” as a result of lying during his court of inquiry.\(^{120}\)

Whittaker’s court-martial was approximately four months in duration and the trial testimony totaled more than 9,000 pages.\(^{121}\) Eventually, Whittaker was convicted of perjury and conduct unbecoming an officer.\(^{122}\) The court sentenced him to a dishonorable discharge, a one dollar fine and confinement for a year, but recommended that the “fine and imprisonment

\(^{111}\) Id. at 63, 66.
\(^{112}\) Id. at 63–64, 77.
\(^{113}\) Id. at 77.
\(^{114}\) Id. at 77; Crackel, supra note 10, at 166.
\(^{115}\) Marszalek, supra note 77, at 77–78.
\(^{116}\) Id. at 67–70, 82–83, 113–14.
\(^{117}\) Id. at 130.
\(^{118}\) Id. at 166.
\(^{119}\) Id.
\(^{120}\) Id.
\(^{121}\) Id.
\(^{122}\) Crackel, supra note 10, at 167.
be remitted." An internal review of the court-martial conducted by the Army’s Judge Advocate General (senior military lawyer), opined that the conviction was legally infirm and not supported by sufficient evidence. The case was then referred to the Attorney General who recommended that the verdict be set-aside, but only because of the use at trial of inadmissible handwriting evidence.

President Chester A. Arthur disapproved the court-martial convictions. Although Whittaker managed to survive the military justice system, he did not graduate. Whittaker was dismissed as an academic failure by order of the Secretary of War, Robert Lincoln.

An interesting theme running through Whittaker’s West Point experience, which, in addition to the impact of racial prejudices, may have contributed to Whittaker’s difficulties at West Point, was the perception by some that he lacked the requisite “manliness” to be a cadet and future Army officer. During Whittaker’s plebe (freshman) year, a Southern cadet, J.B. McDonald, struck Whittaker, who in turn reported the assault. The Army court-martialed McDonald and sentenced him to a six-month period of suspension, which required McDonald to repeat a year at the Academy. As a result, some of Whittaker’s fellow cadets “despised” him and “tabbed him a coward.”

Further, there is some evidence of this perception of Whittaker being held by the Army officers as well. When the Commandant of Cadets arrived at Whittaker’s room and found him apparently unconscious, the Army officer ordered: “Mr. Whittaker, get up, be a man.” Additionally, when General Schofield forwarded the records from the court of inquiry to Army officials in Washington, he included a letter recommending Whittaker’s separation from West Point, noting: “[e]ven if his ‘impossible’

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123 Marszalek, supra note 77, at 239–40.
124 Id. at 246. The report was eventually leaked to the press. Id. at 247.
125 Id. at 248.
126 Crackel, supra note 10, at 167; Marszalek, supra note 77, at 248.
127 Crackel, supra note 10, at 167; Marszalek, supra note 77, at 249. Eventually Whittaker became a teacher and lawyer. Id. at 257–58.
128 Marszalek, supra note 77, at 39.
129 Id.
130 Id.; cf. Crackel, supra note 10, at 166 (“Whittaker clashed with one of the unwritten rules of the Academy . . .”).
131 Marszalek, supra note 77, at 50.
story could be believed, his ‘total lack of manly character’ was sufficient cause for dismissal.”

The United States Naval Academy (USNA) also struggled with hostility by midshipmen to attempts to integrate that academy. In 1872, the first African American midshipman, James H. Conyers, entered USNA and was socially ostracized by his fellow midshipmen. Further, several midshipmen subjected Conyers to extensive hazing. Conyers was subjected to several courts-martial and sentenced to dismissal, but reinstated by the Secretary of the Navy. Ultimately, Conyers left USNA as a result of academic deficiencies.

Two additional African Americans entered the Naval Academy during the Reconstruction era and two more were admitted during the 1930s, but all failed to graduate. These midshipmen were subjected to severe hazing, with reports of one plebe being assaulted by several midshipmen and another requiring the protection of an armed naval officer to avoid harm. Finally, Wesley A. Brown entered the Naval Academy in June 1945 and successfully graduated with the class of 1949. Brown also suffered social ostracization, racial slurs, and attempts to force him out

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132 Id. at 135.
133 Gerald Astor, The Right to Fight: A History of African Americans in the Military 54 (1998) (“The New York Times reported the plebe was totally ignored by classmates who agreed to avoid personal contact even at the risk of violating orders.”)
134 Gelfand, supra note 27, at 50 (“In spite of the protective efforts of some midshipmen, other midshipmen hazed Conyers extensively, including assaulting him and in one incident forcing him, wearing almost no clothing, to climb a tree during a cold winter night and imitate a barking dog.”).
135 Astor, supra note 133, at 54.
136 Id. at 55; see also Gelfand, supra note 27, at 50 (“[T]he Academy expelled him for academic deficiency ...”).
137 Ray Rivera, Slur, Demerits No Barrier To Naval Academy Pioneer, WASH. POST, June 4, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/06/03/AR2005060301444_pf.html; see also Gelfand, supra note 27, at 50–52 (Alonzo McClellan entered USNA in 1873, Henry Baker was admitted in 1874, James Johnson in 1936 and George Trivers in 1937).
138 Astor, supra note 133, at 55. (“A newspaper story said that an officer had to draw his sword to protect one black plebe and on another occasion a gang of midshipmen joined in a general assault.”); see Gelfand, supra note 27, at 50–52 (victims of hazing).
139 Rivera, supra note 137. Brown completed a successful naval career, retiring as a lieutenant commander after twenty years of service. Id.
through an excess accumulation of demerits for disciplinary infractions. Fortunately, other groups of midshipmen, including future President Jimmy Carter, and military officers at the Naval Academy came to Brown’s assistance and provided a measure of protection to the struggling midshipman. Since Brown’s graduation, the Naval Academy, like the other military academies, have made dramatic improvements in racial relations and integration. As of 2003, 19% of the Air Force Academy, 20% of the Naval Academy, and 24% of the Military Academy consisted of racial or ethnic minorities.

D. The Rush Cases

By 1886, the Corps of Cadets had developed a traditional greeting of the returning second classmen (juniors) when they returned from summer leave and reported back to West Point. The first class (seniors) would wait for the returning second class, who were dressed in civilian attire, at the edge of the parade field and, “[o]n some signal . . . would ‘rush’ the returning second class.” At the time, the summer furlough between the

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140 Id. at *2; see also GELFAND, supra note 27, at 53–54 (Brown was subjected to “racial comments” and “other midshipmen would get up and move if he sat near them during various activities, including chapel”).

141 Rivera, supra note 137; GELFAND, supra note 27, at 54. The Academy’s Superintendent and Commandant “assigned a military professor and the Brigade commander to ensure Brown’s safety and fair treatment.” Id.


144 Lieutenant Colonel William Hagen, The Rush Cases and the Class of 1887, ARMY LAW., May 1987, at 18, 19; see also FRANK E. VANDIVER, BLACK JACK: THE LIFE AND TIMES OF JOHN J. PERSHING 39 (1977) (“[A]t a signal both lines rushed together amid (continued)
cadet’s second and third year was the first opportunity most cadets had to leave West Point for any length of time. Once the two classes met, there would be “cheering, hat tossing, and general hilarity.” The two classes would then return to West Point together. It was a happy event that the cadets enjoyed.

However, in August 1886, the day before the second class was to return to West Point from summer leave, the Superintendent, Colonel Wesley Merritt, suddenly issued an order prohibiting the rush. The cadets were stunned, but perhaps more shocking, they voted on whether or not to obey the order, eventually voting in favor of obedience. Unaware of Colonel Merritt’s order, the second class returned to West Point, to observe the first classmen in the distance behind a sentry line. Disregarding the order, an unknown first class cadet let out a shout and crossed the sentry line, followed by a large number of his classmates.

Within a week of the rush, “the six cadet officers involved had been tried by a general court-martial” for participating in the rush and for failing to stop other cadets from doing so. Despite the participation of Colonel William Winthrop as defense counsel, an expert on military law, the
evidence was overwhelming and all six cadets were convicted, with five of the six cadets being sentenced to dismissal. Fortunately, President Grover Cleveland reduced the sentences to a mere reduction in cadet rank.

E. The Inter-War Years

In 1944, the Army’s Office of the Judge Advocate General’s Corps published *Board of Review Holdings*, its first court-martial reporter, with cases extending back to 1929. One particularly noteworthy case from the period was *United States v. Roberts*. Cadet Roberts was found guilty of “drink[ing] intoxicating liquor” and being “drunk while in uniform” in public, both in violation of the 96th Article of War. Both specifications were based on misconduct occurring on November 25, 1934; Roberts was observed in an intoxicated state as the cadets were preparing to board a train and return to West Point following the Army-Notre Dame football game. As punishment, Roberts was suspended from the Army for a year, after which he could rejoin the Corps of Cadets. On returning to West Point, Roberts was required to “serve sixty-six punishment tours.”

Robert’s court-martial for drinking and public intoxication itself was not noteworthy. Indeed, other cadets were prosecuted for similar

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154 *Id.* at 19–20.
155 *Id.* (The cadets were reduced “from the grade of cadet officer to that of cadet”).
156 The Judge Advocate General’s School, *MIL. CITATION* 8 (4th ed. July 1988). Prior to 1951, the military printed courts-martial results in eight different reporters, of which *Board of Review Holdings* was the first, covering cases from 1929 through 1949. *Id.* at 8–9. The index to volumes 51–81, which covers the period 1945 through 31 January 1949, contains no listing of a cadet court-martial. *Tables And Index*, Volumes 51–81, B.R. (1949). From 1951 until 1975 military cases were published in the Court-Martial Reports. *MILITARY CITATION* at 7. From 1975 until the present, military cases have been published in the Military Justice Reporter. *Id.*
158 *Id.* at 291–92.
159 *Id.* at 291–93. First Lieutenant James Pierce first observed Roberts being supported by two other cadets. *Id.* at 292. When Roberts’ companions saw Lieutenant Pierce, they “let go of [Roberts] and he staggered.” *Id.*
160 *Id.* at 292.
161 *Id.* A single punishment tour is normally served by walking across a large courtyard in the barracks area (called “the area”), for an hour, in uniform, in silence, and carrying a rifle “in the prescribed position at right or left shoulder arms.” *BANNING, supra* note 59, at 56.
offenses\textsuperscript{162} and alcohol-related misconduct appears to have been the most prevalent basis for cadet courts-martial during this period.\textsuperscript{163} What was noteworthy however, at least historically, were two of the prosecution witnesses: Major Omar N. Bradley and Lieutenant Colonel Simon Buckner Junior.

Bradley testified that he considered Roberts to be drunk when Bradley observed him, and further testified that Roberts could have been seen by nearby civilians.\textsuperscript{164} Major Bradley eventually rose to the rare rank of General of the Army (five-star general).\textsuperscript{165} During World War II, Bradley commanded “the Twelfth Army Group, composed of 1,300,000 men—the largest single formation of American troops in U.S. history . . . .”\textsuperscript{166} In 1949, Bradley was appointed the first Chairman of the Joint Chiefs of Staff.\textsuperscript{167} Bradley was portrayed by Karl Malden in the popular 1970 movie \textit{Patton}.\textsuperscript{168}

Lieutenant Colonel Buckner also testified against Roberts.\textsuperscript{169} Similarly, Buckner testified that he had observed Roberts on November


\textsuperscript{164} 6 B.R. at 293.

\textsuperscript{165} BUGLE NOTES, supra note 10, at 261. In addition to Bradley, only three other officers rose to the rank of General of the Army: Dwight Eisenhower, Douglas MacArthur and George Marshall. \textit{Id}. Graduating from West Point in 1907, Henry Arnold was the only General of the Air Force. \textit{Id}.

\textsuperscript{166} LANNING, supra note 144, at 174.

\textsuperscript{167} \textit{Id}. at 176.


\textsuperscript{169} 6 B.R. at 293.
25th and also considered him to be intoxicated. Buckner eventually rose to the rank of Lieutenant General (three star) and was killed in action leading the U.S. 10th Army against Japanese forces during the invasion of Okinawa. Buckner enjoyed the dubious distinction of being “the highest-ranking American field general killed in World War II.”

At least one cadet was prosecuted for cheating in his course work. In United States v. MaHood, the plebes, or the fourth-classmen (freshmen), of a French class were required to stand before blackboards and translate English sentences into French as part of a graded exercise. As part of a daily grading and recitation system dating back to Sylvanus Thayer, cadets have been ordered to “take boards,” where they would then be required to solve an academic problem provided by their classroom instructor. One or more cadets would then be called upon to explain the answer to the instructor and remainder of the class.

MaHood was charged with several acts of looking at the work of nearby cadets and then altering his own translations, in violation Article 95 of the Articles of War. The prosecution presented testimony from several faculty members who had observed the cadet during these daily graded exercises, including MaHood’s instructor “who had been instructed particularly to observe the actions of [the] accused,” and another faculty member “who was in attendance for the purpose of watching [the] accused.” In his defense, MaHood presented the testimony of his two

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170 Id. at 293.
172 Id.
174 Id. at 279–80.
175 See Ruggiero, supra note 142, at 132.
176 Id. at 132–33. Some instructors also took the opportunity to inspect the cadet’s appearance as well as his/her academic work. Id. at 133. In his Memoirs, General Douglas MacArthur recalled being required to recite “the space-time relationship later formulated by Einstein as his Theory of Relativity.” Douglas MacArthur, Reminiscences 27 (1964). After correctly reciting the theory, MacArthur was asked if he actually understood it; he replied, “No Sir.” Id. After a period of awkward silence, the instructor replied “Neither do I, Mister MacArthur. Section dismissed.” Id. Penning his memoirs decades later, MacArthur admitted “I still do not understand the theory.” Id.
177 MaHood was charged with seven such acts, but convicted of only six. MaHood, 8 B.R. at 277–79.
179 MaHood, 8 B.R. at 280–81.
roommates that he had a habit of “frequently look[ing] up and about” and MaHood testified that he had the “habit of looking” to his left, acknowledged looking in the direction of the other cadets’ blackboards, but denied copying from them.\textsuperscript{180} The court found Mahood guilty and sentenced him to be dismissed.\textsuperscript{181}

\section*{III. Modern Court-Martial Jurisdiction Under the Uniform Code of Military Justice}

In 1950, Congress enacted the Uniform Code of Military Justice (UCMJ), which provided a uniform body of military law applicable to the entire armed forces.\textsuperscript{182} In 1968, Congress made significant modifications to the UCMJ to have it more closely resemble certain aspects of civilian criminal systems.\textsuperscript{183} In 1983, Congress again enacted major revisions to the UCMJ to include providing for direct review by the United States Supreme Court of decisions by the military’s highest appellate authority.\textsuperscript{184} Periodically, Congress continues to revise the UCMJ.\textsuperscript{185}

Additionally, Article 36 of the UCMJ authorizes the President to prescribe “[p]rettrial, trial, and post-trial procedures” for courts-martial.\textsuperscript{186} By Executive Order, the President has promulgated the Manual for Courts-Martial (MCM) to implement the UCMJ.\textsuperscript{187} Significantly, the 1984 MCM was promulgated to reflect major changes to the UCMJ and to conform military law “to federal criminal procedure.”\textsuperscript{188} The MCM continues to be modified on a frequent basis.\textsuperscript{189}

\textsuperscript{180} \textit{Id.} at 282–83.
\textsuperscript{181} \textit{Id.} at 286. Subsequently, the Army’s Board of Review found “persuasive” the “circumstantial evidence of deliberate cheating . . . .” \textit{Id.} at 284.
\textsuperscript{182} \textsc{Byrne, supra} note 9, at 7.
\textsuperscript{183} \textit{Id.} at 8 (“[I]n 1968 Congress again made significant changes in the [UCMJ]. The changes again reflected the application of civilian concepts of civilian jurisprudence to the military.”).
\textsuperscript{184} \textsc{David A. Schlueter, Military Criminal Justice: Practice and Procedure} § 1-6(C) (6th ed. 2004 & Supp. 2006).
\textsuperscript{185} \textit{Id.} (changes in 1992 and 1996).
\textsuperscript{186} Art. 36, UCMJ; 10 U.S.C. § 836 (2000); \textit{see also} \textsc{Schlueter, supra} note 184, § 1-1(B).
\textsuperscript{187} \textsc{Schlueter, supra} note 184, § 1-3(B). Included within the MCM are the Rules for Courts-Martial (RCM), which “prescribe [binding] procedures for courts-martial” and the Military Rules of Evidence. \textit{Id.}
\textsuperscript{188} \textit{Id.} § 1-6(C).
\textsuperscript{189} \textit{Id.} § 1-3(C).
A. Legal Status Of Cadets And Midshipmen

The cadets and midshipmen of the Military, Naval and Air Force academies have always been part of the United States military. Presently, by statute West Point cadets are designated as part of the Regular Army. They are considered to be on active duty in the Army, subject to extended active duty during periods of war, and may assume command of soldiers during emergencies. Similarly, Air Force Academy cadets are part of the Regular Air Force and midshipmen are “member[s] of the naval service.” Additionally, cadets and midshipmen are considered to be in the armed forces during periods of war and emergencies.
midshipmen have historically been viewed as a form of officer,197 a status that continues today.198 Cadets and midshipmen are neither commissioned officers nor enlisted personnel; they occupy a unique status between the two.199 Army regulations place the rank of a cadet below commissioned and warrant officers, but above enlisted ranks.200 Cadets have been referred to as “inchoate” officers, and generally must be afforded the legal rights and courtesies accorded to a commissioned officer.201


197 United States v. Cook, 128 U.S. 254, 256 (1888) (“That a midshipman is an officer has been understood ever since there was a navy.”); United States v. Baker, 125 U.S. 646, 650 (1888) (a cadet midshipman is “an officer of the navy”); Babbit v. United States, 16 Ct. Cl. 202, 216–17 (1880) (a West Point cadet is “an inferior officer” or “an uncommissioned officer”); see Court-Martial Orders, U.S. Dep’t of Navy, Court-Martial Order No. 2-1941, at 335 (1944) (“[Midshipmen in the Naval Academy are officers in the Regular Navy . . . .”); C.M.O.1-1924, supra note 190, at 6 (Midshipmen are “officers of the Navy” “whose status is not dissimilar to a commissioned officer undergoing training”); cf. Hartigan v. United States, 196 U.S. 169, 172 (1905) (“A cadet . . . may be an officer in a certain sense as distinguished from an enlisted man . . . .”).

198 GELFAND, supra note 27, at 23 (“[M]idshipmen at USNA are junior officers . . . .”); see ARMY REGULATION No. 350-18, U.S. MILITARY ACADEMY CADET ARMY ORIENTATION TRAINING (AOT), § 3-8a (May 28, 1974) [hereinafter AR 350-18] (The legal status of cadets serving summer duty with Army units “is that of a subordinate officer, entitled in all possible circumstances to certain of the legal rights appertaining to the condition of officers of the Army as distinguished from noncommissioned officers.”).

199 Cook, 128 U.S. at 256 (A midshipman’s status occupies “a middle position between that of a superior officer and that of the common seaman.”); Index of Court-Martial Orders, 1 U.S. NAVY DEP’T, COMPILATION OF COURT-MARTIAL ORDERS, Court-Martial Order No. 9-1922, at 812 (1923) (“Midshipmen are not enlisted men nor are they commissioned officers, but they are nevertheless officers appointed by the President as authorized by Congress.”); see also BANNING, supra note 59, at 220 (“In the military service a cadet of the United States Military Academy ranks above a non-commissioned officer and below a warrant officer . . . .”); Zbar & Mazza, supra note 9, at 32 (“[A] cadet is not a commissioned officer or an enlisted man.”).

200 AR 600-20, supra note 194, § 1.6; see also AR 350-18, supra note 198, § 3-8 (“Their military rank is above that of enlisted personnel, but below that of commissioned or warrant officers.”).

201 7 Op. Att’y. Gen. 323, 332 (1855); see also AR 350-18, supra note 198, § 3-8(a) (The legal status of cadets serving summer duty with Army units “is that of a subordinate officer, entitled in all possible circumstances to certain of the legal rights appertaining to the condition of officers of the Army as distinguished from noncommissioned officers”), § 3-8(c) (“Socially, cadets [serving with Army units] will be treated as junior officers, sharing (continued)
B. Military Criminal Jurisdiction

All cadets and midshipmen of the United States Military, Naval, Air Force and Coast Guard Academies are subject to the Uniform Code of Military Justice (UCMJ).202 Article 2(a)(2) provides specifically for jurisdiction over all “[c]adets, aviation cadets, and midshipmen.”203 The UCMJ defines a cadet as “a cadet of the United States Military Academy, the United States Air Force Academy, or the United States Coast Guard Academy.”204 The definition of a midshipman includes “a midshipman of the United States Naval Academy . . . .”205 The UCMJ, however, does not apply to cadets of the Reserve Officer Training Corps (ROTC).206

Current military jurisdiction over members of the armed forces, including cadets and midshipmen, is broad. In 1987, the United States Supreme Court determined that military jurisdiction was dependent only upon status as a member of the armed forces and jettisoned earlier requirements that military jurisdiction over misconduct have a military connection.207 “Accordingly, a military court has jurisdiction over any UCMJ offense, regardless of the status of the victim or the location of the crime.”208 Additionally, cadets and midshipmen may be court-martialed after graduation and commissioning for conduct committed while still at

fully in the normal social and recreational opportunities available to officers of the command.”); cf. Air Force v. Rose, 425 U.S. 352, 384 (1976 ) (Burger, C.J., dissenting) (“[C]adets and midshipmen—‘inchoate officers’—have traditionally been held to the same high standards and subjected to the same stigma as commissioned officers when involved in matters with overtones of dishonor.”) (footnote omitted). While serving in a normal cadet status, enlisted personnel are not required to salute West Point cadets. See BANNING, supra note 59, at 220 (“[D]oes not rate a salute.”). However, when cadets are serving as officers with Army units for summer training “enlisted men will salute cadets and address them as ‘Sir.’” AR 350-18, supra note 198, § 3-10.

202 Allison v. United States, 426 F.2d 1324, 1326 (6th Cir. 1970); cf. RUGGERO, supra note 142, at 26 (West Point cadets are “subject to military law and discipline”).
208 Id.
the academies. They may also be prosecuted by state and federal entities with concurrent jurisdiction.

Since the UCMJ became effective in 1951 cadets and midshipmen of the service academies have been subject to court-martial for a multitude of offenses. To illustrate, cadets or midshipmen have been convicted of possession, distribution or use of illegal drugs, larceny, conspiracy,

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209 See, e.g., United States v. Sweet, 38 M.J. 583, 585 (N.M.C.C.M.R. 1993) (Naval Ensign convicted of “indecent acts with a child under 16 years of age,” the misconduct having occurred while he was a midshipman), aff’d 42 M.J. 183 (1995).

210 MANUAL FOR COURTS-MARTIAL: UNITED STATES, R.C.M. 201(d) (2005) [hereinafter MCM]; see, e.g., Ex-Midshipman Guilty of Abuse, WASH. POST, Aug. 13, 1996, at C7 (“In Anne Arundel County Circuit Court, Maryland, a former midshipmen pleaded guilty to molesting toddler while a midshipmen): 2 More Indicted In Midshipman Car Theft Case, WASH. POST, Aug. 15, 1996, at C2 (Current and former midshipmen indicted in federal court to conspiracy to sell stolen cars. Some pleaded guilty); cf. Amy Argetsinger, 2 Naval Academy Students Accused In Assault Cases, WASH. POST, Nov. 2, 1997, at B4 (“[A] junior at the academy is facing expulsion and a criminal trial in Pensacola, Fla., for allegedly beating a bartender so badly that he had to be hospitalized.” The midshipman allegedly assaulted the bartender while getting a ride to his ship during the midshipman’s summer cruise).


housebreaking, dereliction of duty, driving while intoxicated, willfully disobeying the lawful command of a superior commissioned officer, computer hacking, involuntary manslaughter, rape, and conduct unbecoming an officer and gentleman. Indeed, cadets are subject to court-martial for the violation of any punitive article of general application. However, because cadets and midshipmen are not "commissioned officers" they are not susceptible to court-martial for offenses limited to that class of officer, such as "Contempt toward officials." 

From the cadet store); Sue McMillin, Air Force Academy Cadets Under Investigation, Air Force Times, Mar. 22, 1999, at 15 (13 cadets charged with “mail theft or attempted mail theft . . . .”).


Cadet Gets 15 Months in Break-In, Army Times, Aug. 28, 2000, at 3 (Two cadets were sentenced to military prison after breaking into the cadet store and stealing merchandise. The cadets were charged with “felony housebreaking” among other crimes). Housebreaking violates Article 130, UCMJ. 10 U.S.C. § 930 (2000).

Green, 58 M.J. 855, 856; see also Bruno, supra note 211. Dereliction of duty violates Article 92, UCMJ. 10 U.S.C. § 892(3) (2000).


Diedrich, supra note 212 (In 1999 at least one Air Force Academy cadet was court-martialed for computer hacking); see also Sue McMillin, Female Cadet Reports Assault by Classmates, Air Force Times, Feb. 15, 1999), at 10 (Air Force Academy cadet “charged with three counts of accessing protected corporate computers with the intent to cause damage and “one charge of . . . using government software to operate an Internet account outside the academy’s security measures”).


Art. 88, UCMJ. This punitive article punishes “contemptuous words” against the President, the Vice President, Congress and other high-ranking federal and state officials. Id. 10 U.S.C. § 888 (Supp. V. 2005).
In addition to being subject to the UCMJ, cadets and midshipmen occupy a unique status in military law because others are subject to the UCMJ for misconduct related to their interaction with cadets. Again, because they not commissioned officers, cadets and midshipmen may not be the victims of those punitive articles designed to protect such officers, such as “Disrespect toward superior commissioned officer,”223 or “Assaulting or willfully disobeying superior commissioned officer.”224 However, under some circumstances the failure to obey an order issued by a cadet or midshipmen may serve as the basis for a court-martial. For example, Army regulations clearly provide that cadets serving in leadership positions with Army units may issue lawful orders to military subordinates, the violation of which “normally will constitute an offense under UCMJ.”225

Within the academy system, the cadets and midshipmen operate within a military structure in which they are subject to the orders of both commissioned officers and superior cadets and midshipmen, respectively.226 Cadets and midshipmen serve in leadership positions in which they are responsible for maintaining discipline.227 Clearly, a cadet’s willful failure to obey the order of a commissioned officer constitutes an offense under the UCMJ.228 Less clear are the military justice consequences of failing to obey an order of a superior cadet.

As noted earlier, in 1855 Attorney General Cushing opined that West Point cadets were subject to court-martial.229 However, in the same opinion Cushing took the view that “[t]he rank of the cadets within the

225 AR 350-18, supra note 198, § 3-8(b). Presumably, the failure to obey the lawful order of a cadet under such circumstances would violate Article 92, UCMJ (“Failure to obey order or regulation.”).
226 GELFAND, supra note 27, at 23 (“The Brigade of Midshipmen has both an officer and a midshipmen military structure.”); USMA PROSPECTUS, THE WEST POINT EXPERIENCE, CADET DEVELOPMENT: MILITARY (“There is both an officer and a cadet ‘chain of command’ . . .”), available at http://www.admissions.usma.edu/prospectus/wpe_military.cfm.
227 See United States v. Green, 58 M.J. 855, 856 (A. Ct. Crim. App. 2003) (The accused was a “cadet first sergeant” who “was responsible for enforcement of discipline and accountability”).
229 See supra note 32 and accompanying text.
Academy, as commissioned officers, non-commissioned officers, and privates, is not rank in the Army." 230 The Academy’s military structure as it related “to the cadets as among themselves” was only for purposes of “military instruction.” 231 Accordingly, the “Article of War, which defines the punishment of an officer or soldier who offers violence to, or disobeys the command of, his superior officer, does not apply as between the undergraduate cadet and his fellow undergraduate, whatever may be their relative rank in the academic organization . . . “ 232

The clarity of Cushing’s opinion was clouded by the report of a 1888 court-martial. In a summary report contained in an Army Digest of Opinions the following appeared: “Held that the disobedience, by a cadet private of the Military Academy, of an order of a cadet lieutenant of his company, the latter not being a commissioned officer, was not chargeable under [Article 21] but was an offence under Art. 62.” 233 Like the Article of War held inapplicable by Cushing, the military judicial authority found Article 21 inapplicable. 234 However, Article 62, which criminalized conduct “to the prejudice of good order and military discipline,” 235 was determined to apply.

With the single exception of the 1888 court-martial, no reported case appears to exist—and certainly none in modern times—reflecting the court-martial of a cadet or midshipman for the failure to obey an order from a fellow, albeit superior, cadet or midshipman. The academies handle such misconduct through their own internal disciplinary systems.

C. Hazing

The first year at a service academy is traditionally a rigorous and stressful one. “Each of the academies operates a fourth class system [designed] to indoctrinate new cadets and midshipmen into the academy and to provide a leadership laboratory to train upperclass cadets and

231 Id.
232 Id.
234 Article 21 also prohibited offering violence against, or disobeying the lawful order of, a superior officer. BREVET COLONEL W. WINTHROP, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 8 (1880).
235 Id. at 41. This type of misconduct is currently punishable pursuant to Article 134, UCMJ. 10 U.S.C. § 934 (2000).
midshipmen.”

The fourth class experience serves to teach the cadets and midshipmen to function under pressure, and promotes such qualities as “self-discipline, professional knowledge, physical fitness, ethics, teamwork, and esprit de corps.” It remains a system designed to transition new cadets and midshipmen into the academies that incorporates an element of physical and mental stress.

In addition to the official practices of the fourth class system, numerous unsanctioned practices developed over time. Many of these practices were harmless, fraternity-like pranks. For example, before the Civil War such pranks at West Point included “pulling a sleeping plebe out of bed, cutting tent ropes in the middle of the night, and hiding a plebe’s clothes at night, causing him to be late for formation or to have to report wrapped in a blanket.” Pranks of more modern vintage included

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237 Ruggiero, supra note 142, at 31; Captain Carol Barkalow, In the Men’s House 36 (1990) (“In its ideal form, hazing was specifically related to performing tasks, memorizing required information, and, most important, learning the time-management and self-disciplinary skills that would enable a potential officer to function in a high-stress military environment.”).

238 GAO/NSIAD-93-36, supra note 236, at 10.


240 “By tradition and custom, each of the fourth class systems has built up a variety of practices that have been part of the programs for decades, and some have been around for a century or more.” GAO/NSIAD-93-36, supra note 236, at 10.

241 Ruggiero, supra note 142, at 31 (“Some of the hazing was just stupid, boys’-school and fraternity-row stuff . . . .”); GAO/NSIAD-93-36, supra note 236, at 4 (“[R]elatively harmless, done in a spirit of fun as a pressure release valve . . . .”).

242 GAO/NSIAD-93-36, supra note 236, at 11. During the 1870s, Naval Academy “plebes had to mimic gorillas, bears, and other animals while acting out amusing poems.” Gale G. Kohltagen & Ellen B. Heinbach, The United States Naval Academy: A Pictorial Celebration of 150 Years 98 (1995). One plebe in the class of 1924 reported that he “was made to sing ‘Anchor’s Aweigh’ while standing on his head under the shower.” Id.
memorizing “personal ‘poop,’” hitting new cadets with water balloons, and inviting a plebe to “hang around” and listen to music in an upper class room.

Other practices were more abusive and were often designed to put the new cadets under a significant amount of stress. By the early 1900s, more than 100 forms of harassing conduct had developed and at least two deaths were linked to excessive hazing. One such case involved a Cadet Booz who refused to change certain practices while standing guard and was subsequently challenged to a fight, which Booz lost. Unfortunately, other cadets believed Booz had intentionally lost the fight, refusing to get back up after taking a single blow. Viewing Cadet Booz as a coward, upperclassmen systematically began to haze the hapless cadet, to include forcing Booz to drink Tabasco sauce at each meal. Booz eventually resigned, his throat became badly inflamed, and he died “of tuberculosis of

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243 Barkalow, supra note 237, at 30–31; see also Ruggero, supra note 142, at 101 (“Many new cadets are required to memorize, and recite on command, special ‘poop,’ a little entertainment for the upperclass cadets.”). As an example of “poop,” one cadet in the class of 1980 was required to recite: “Sir, I’m 125 pounds of twisted steel and sex appeal. The Lone Ranger would rather French kiss a rattlesnake than mess around with me.” Barkalow, supra note 237, at 31.

244 GAO/NSIAD-93-36, supra note 236, at 67.

245 Ruggero, supra note 142, at 179–80. The plebe would literally hang from a wardrobe door and attempt to last the length of a song; sometimes this was done less playfully “with the sharp edges of the door biting into his armpits . . . .” Id. The author observed this practice in 1979, but never in a harmful or malicious manner.

246 Colonel (Ret.) Larry R. Donnithorne, The West Point Way of Leadership 150 (1993) (“Throughout much of West Point’s history, several questionable practices—such as hazing, harassment, screaming, and cruel, terrorizing jokes—were traditional behavior by the upper three classes of cadets toward plebes.”). At the Naval Academy, “[p]lebes had been beaten with broom handles, coat hangers, curtain rods, and hairbrushes.” Kohlhagen & Heinbach, supra note 242, at 98.

247 Ruggero, supra note 142, at 30 (“[S]creaming; the nose-to-nose, spittle-flying screeching of upper class into the faces and ears of shocked new cadets.”); see also Barkalow, supra note 237, at 33 (Cadets are “subjected to a host of physical, mental, and emotional stresses designed either to eliminate them from the Corps or to make them worthy of further ascent”).

248 GAO/NSIAD-93-36, supra note 236, at 11–12.

249 Id. at 12; Donnithorne, supra note 246, at 151.

250 GAO/NSIAD-93-36, supra note 236, at 12; Donnithorne, supra note 246, at 151.

251 GAO/NSIAD-93-36, supra note 236, at 12; Donnithorne, supra note 246, at 151 (“[A] whole bottle within a week.”).
the larynx” within two years of resigning. More modern practices included “shower formations,” “uniform drills,” bracing and “pass[ing] out their plates.”

During the late 1980s through the early 1990s, the service academies began to change the fourth class system, moving away from the traditional, and oftentimes abusive, aspects of the system and adopting a positive leadership approach. However, forms of hazing continued to exist and were unofficially tolerated. By the late 1990s West Point began aggressively enforcing a no-haze policy. West Point cadets are no

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252 GAO/NSIAD-93-36, supra note 236, at 12; DONNITHORNE, supra note 246, at 151.
253 RUGGERO, supra note 142, at 30–31 (In a “shower formation[s] . . . . plebes [were] dressed in sweat suits and raincoats [and] were made to stand in steamy shower rooms until they nearly fainted.”).
254 Id. at 31 (“[P]lebes were given orders to appear in a certain uniform in an impossibly short amount of time, the game repeated through endless varieties of uniforms until the plebes dropped from exhaustion in rooms littered with articles of clothing and equipment. And then, almost inevitably, an upperclassman would announce “Room inspection in ten minutes!”’); cf. BARKALOW, supra note 237, at 34 (subject to multiple clothing formations). At the Naval Academy “[u]niform races, used to instruct Plebes in familiarity with uniforms, time management, and attention to detail are tightly controlled and may only be conducted with the approval of the midshipman company commander.” Groah, supra note 239, at 41.
255 BARKALOW, supra note 237, at 35 (Officially outlawed in the late 1960s, but unofficially continuing into at least the late 1970s, bracing “compelled a plebe to walk with his chin tucked in so far that he made a perfectly straight line down the back of his neck, or forced a plebe to use his neck in the same position to sweat a nickel to the wall”). Although a less strenuous form of bracing is permitted at the Naval Academy, “[p]hysically strenuous braces and creative braces are strictly prohibited.” Groah, supra note 239, at 41.
256 RUGGERO, supra note 142, at 30 (“[R]eturning untouched meals to the waiter for an error in the bizarre table etiquette of the Cadet Mess, or for incurring the displeasure of an upperclass cadet.”). Currently at the Naval Academy, “Plebes are allowed to eat their entire meal . . . .” Groah, supra note 239, at 41.
257 GAO/NSIAD-93-36, supra note 236, at 4, 46; DONNITHORNE, supra note 246, at 150 (At West Point “it was not until the 1980s and 1990s that much progress was made”); RUGGERO, supra note 142, at 30 (“[A] move toward what the academy calls ‘inspirational leadership.’”).
258 DAVID LIPSKY, ABSOLUTELY AMERICAN: FOUR YEARS AT WEST POINT 21 (2003) (“As late as 1995, plebe year was so frightening that new cadets would pee in their own sinks rather than risk the walk to the bathroom . . . .”).
259 Id.
longer required to “ping” when walking, sit at attention during meals, or subjected to screaming, and enjoy considerably more privileges than plebes in earlier years. However, not everyone has embraced the new system. A recent study of hazing at the Naval Academy indicates that despite that institution’s official policy against such behavior and a significant decline in such conduct, some hazing still occurs. Further, many service academy graduates question whether the fourth class system has become too easy.

Ironically, cadets and midshipmen who have successfully survived abusive practices have, upon reflection, found the system meritorious based on the results it produced. Some graduates attribute their success

260 Ruggero, supra note 142, at 66 (“[N]ew cadets walk briskly, but they do not ‘ping’ (an exaggerated walk, like race-walking, that made plebes look like windup toys and led to shinsplints.”); Lipsky, supra note 258, at 22 (“Plebes no longer have to ping . . . .”); cf. Barkalow, supra note 237, at 27 (“[T]o ‘ping out’ [meant] to walk at 120 paces per minute while hugging the walls and squaring every corner . . . .”).

261 Ruggero, supra note 142, at 130; GAO/NSIAD-93-36, supra note 236, at 47 (Cadets now may “enjoy their meal sitting ‘at ease’”).

262 Ruggero, supra note 142, at 64, 66; Barkalow, supra note 237, at 35; see also Lipsky, supra note 258, at 21 (“As of 1998, if you hazed a plebe with even violent yelling, you’d be reprimanded; if it happened repeatedly, you’d be expelled.”). At the Naval Academy, “verbally berating another” is a form of impermissible hazing. Groah, supra note 239, at 40.

263 Lipsky, supra note 258, at 22.

264 Groah, supra note 239, at 83–87. For example, 92% of plebes surveyed indicated that they had experienced an upper class midshipman scream in their face at least once during their plebe year. Id. at 56.

265 Ruggero, supra note 142, at 31 (Retired Army Colonel and USMA graduate expressed concern that plebe year no longer teaches “you how to function under pressure, how to control your emotions and still make decisions when people are counting on you”); Lipsky, supra note 258, at 22 (“Hard-line graduates e-mail the superintendent complaining the place is soft, will turn out soft officers.”); see Barkalow, supra note 237, at 35 (“Old grads are saying, ‘You’re never going to make a good cadet out of somebody who hasn’t had a tough Fourth Class Year.’”).

266 Ruggero, supra note 142, at 30 (“[S]ome treasure the system that treated them this way, not for the treatment itself, but for the results it produced.”); cf. Barkalow, supra note 237, at 34 (“Nobody liked the Fourth Class System in the beginning, but most cadets will admit ‘it did build you up.’”). However, graduates rarely defend the stress-inducing characteristics of the system on the basis that it taught the upperclass how to become better leaders. Ruggero, supra note 142, at 33 (“Graduates who defend what the old system did for plebes never add, ‘and it taught good leadership techniques to the upperclass cadets.’”).
in combat to the rigor of their fourth class experiences.267 At least one Naval Academy graduate attributed his ability to survive seven years of brutal captivity as a prisoner of war in North Vietnam in part to the rigors of his plebe experience.268

Other cadets believed hazing necessary to effectively assimilate the new cadets into the military system.269 West Point’s first African American graduate, Henry O. Flipper wrote:

I do not mean to defend hazing in any sense of the word; but I do believe that it is indispensable as practiced at the Academy. It would simply be impossible to mould and polish the social amalgamation at West Point without it. Some of the rough specimens annually admitted care nothing for regulations. It is fun to them to be punished. Nothing so effectively makes a plebe submissive as hazing. That contemptuous look and imperious bearing lowers a plebe, I sometimes think, in his own estimation. He is in a manner cowed and made to feel that he must obey, and not disobey . . .270

Hazing at West Point and the Naval Academy has a long history. Playful forms of hazing gave way to more abusive and violent forms following the Civil War.271 By the 1870s, hazing at the academies began to be viewed as a criminal matter. West Point’s Superintendent considered

267 See, e.g., RUGGERO, supra note 142, at 31 (USMA 1962 graduate attributed his ability to command a company, surrounded by the enemy in Vietnam during intense combat, to his plebe year experiences), 31–33 (USMA 1983 graduate, who commanded successfully in combat during Desert Storm, attributed his plebe experiences with his ability “to deal with an overwhelming amount of disjointed information, quickly process that information, categorize it, and make rapid, sound decisions”); DONNITHORNE, supra note 246, at 39–41 (USMA 1966 graduate, who commanded an infantry company’s successful repulse of a large-scale Viet Cong attack in Vietnam, attributed his ability to manage fear to his West Point experience.).

268 GAO/NSIAD-93-36, supra note 236, at 69.

269 Id. at 11 (“Hazing was perpetuated by graduates who encouraged the upperclassmen to use it as a method of suppressing the cockiness of plebes.”).

270 FLIPPER, supra note 97, at 61–62.

271 GAO/NSIAD-93-36, supra note 236, at 11 (“After the Civil War, hazing . . . became much more virulent in its form.”); BARKALOW, supra note 237, at 35 (“Violent hazing was introduced to West Point in the post-Civil War years, when war veterans began entering the Academy as plebes, and the younger, less experienced upperclass cadre felt that they had to resort to desperate means in order to enforce their authority.”).
hazing “essentially criminal” and “a vicious and illegal indulgence.” 272 Similarly, the Naval Academy’s Superintendent “referred to the hazing of junior class cadets as a ‘cruel and senseless practice.’” 273 Congress agreed, passing legislation in 1874 that required the Naval Academy’s Superintendent to court-martial midshipmen for hazing. 274 Nonetheless, the conduct continued largely because it was supported by academy graduates, faculty and the cadets themselves. 275 Plebes subjected to various abuses refused to identify the misbehaving upperclassmen. 276 When called before a congressional hearing investigating hazing, future Army General, Douglas MacArthur, refused to identify the cadets responsible for his mistreatment. 277 Deaths and serious injuries were attributed to hazing. 278

The first, and only, reported court-martial of a cadet or midshipman for hazing is Melvin v. United States. 279 In that case, a midshipman was convicted of hazing after “causing certain midshipmen of the fourth class to stand on their heads, to hang from a locker, and to do a physical exercise known as the sixteenth.” 280 Subsequently the United States Court of Claims upheld Melvin’s dismissal from the Navy as a result of the court-martial conviction. 281

Currently, three separate statutes specifically criminalize hazing at the military academies. Title 10, United States Code, section 4352 criminalizes hazing by West Point cadets; section 6964 applies to Naval Academy midshipmen, and section 9352 applies to Air Force Academy

272 GAO/NSIAD-93-36, supra note 236, at 11.
273 Id.
274 Id. at 13 (citing Act of June 23, 1874, ch. 453, 18 Stat. 203). In 1885, the Attorney General opined that to constitute the offense of hazing, the victim was required to be a member of the fourth class. Id. (citing 18 Op. Att’y Gen. 292 (1885)).
275 GAO/NSIAD-93-36, supra note 236, at 12.
276 Id.
277 Id.; see also MACARTHUR, supra note 176, at 25 (MacArthur “refused to divulge the names of the upper classmen involved”). As a plebe, MacArthur “was once forced to do a rigorous exercise until he lost all control of his muscles and collapsed, unable to move.” GAO/NSIAD-93-36, supra note 236, at 12.
278 GAO/NSIAD-93-36, supra note 236, at 2, 12; see also supra notes 248–252 and accompanying text.
279 45 Ct. Cl. 213 (Ct. Cl. 1910).
280 Id. Midshipman Melvin was acquitted of a charge involving “the use of abusive language to one of [the] midshipmen.” Id. at 214–15.
281 Id. at 214–18.
cadets. Only one of the three statutes specifically defines the term. Section 6964 defines hazing as “any unauthorized assumption of authority by a midshipman whereby another midshipman suffers or is exposed to any cruelty, indignity, humiliation, hardship, or oppression, or the deprivation or abridgement of any right.” However, conduct that would rise to the level of hazing is rarely charged as such and no reported case appears under any of these three statutes. Instead, the academies appear to address such misconduct either through the academy’s internal disciplinary system or less frequently through the UCMJ.

D. Procedural Posture

Within the military justice system, cadets and midshipmen are generally treated as commissioned officers for most procedural purposes. Their officer-like status is reflected in their susceptibility to the jurisdiction of the three types of court-martial. The UCMJ specifically provides that “officers, cadets . . . and midshipmen” are not subject to the jurisdiction of a summary court-martial, which is the lowest

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283 10 U.S.C. § 6964. The Naval Academy also issued instructions that further defined conduct constituting inappropriate hazing. Groah, supra note 239, at 40 (citing COMDTMIDNINST 3120.1). Sections 4352 and 9352 authorize the Superintendents of West Point and the Air Force Academy, respectively, to issue regulations defining hazing. 10 U.S.C. §§ 4352, 9352.
286 See LIPSKY, supra note 258, at 21.
287 GAO/NSIAD-93-36, supra note 236, at 32 (An Air Force Academy cadet who struck a fourth class cadet punished administratively under Article 15, UCMJ, and two upper class cadets who set a fourth class cadet’s room on fire and then put whipped cream on the new cadet were charged with arson, in violation of Article 126, UCMJ.).
288 See Zbar & Mazza, supra note 9, at 32–33 (“[A]lthough not a commissioned officer, there are sufficient indices common to office in the public sense to warrant considering a cadet to be an officer in the legal sense.”); cf. Rose, supra note 190, at 7 n.24 (“Application of the UCMJ requires that cadets be treated as officers.”). Historically, cadets had been treated like officers for purposes of arrest or being ordered into confinement. See Zbar & Mazza, supra note 9, at 33. That cadets have been treated as officers for purposes of arrest is a long-standing practice. WINTHROP, supra note 190, at 123 (“In the main the principles applicable to the arrest of officers will apply to the arrest of cadets, these also being officers.”).
and most limited form of court-martial. Cadets and midshipmen are subject to the next higher level of court-martial, the special court-martial. After taking additional procedural steps, a special court-martial may be authorized to adjudge a bad conduct discharge. In the Army this type of court-martial is known as a “BCD special.”

However, like a commissioned officer, a cadet or midshipman may only be punitively separated from the military via a dismissal, rather than a dishonorable or bad conduct discharge. Accordingly, in order to punitively separate a cadet or midshipman, they must first be subject to the more procedurally burdensome general court-martial.

290 Art. 20, UCMJ; 10 U.S.C. § 820. A “summary court-martial is the most limited of the three different courts-martial [and] its jurisdiction is limited to enlisted personnel . . . .” CHARLES A. SHANOR & L. LYNN HOGUE, MILITARY LAW: IN A NUTSHELL 118 (2d ed. 1996). The maximum punishment that a summary court-martial may render is confinement not to exceed one month, hard labor without confinement for less than 45 days, restriction for 2 months and forfeiture of two-thirds of one month’s pay. MCM, supra note 210, R.C.M. 1301(d)(1).

291 See Raymond McCaffrey, Another Ex-Player Charged with Rape, WASH. POST, Sept. 27, 2006, at B2 (noting that a midshipman was to be tried by a special court-martial). A special court-martial consists of a military judge and prosecutor, defenses counsel, and at least three members (jurors). FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, 1 COURT-MARTIAL PROCEDURE 8-51 (3d ed. 2006) (citations omitted). The maximum punishment that a special court-martial may impose is “confinement for one year, forfeiture of two-third’s pay per month for one year, and reduction to [the lowest enlisted grade].” Id.; see also Art. 19, UCMJ; 10 U.S.C. § 819. However, a cadet or midshipman cannot be sentenced to confinement or reduced in grade by a special court-martial. MCM, supra note 210, R.C.M. 1003(c)(2).

292 GILLIGAN & LEDERER, supra note 291, at 8-52. Unlike the Army, “other services, notably the Navy and Coast Guard, normally convene all special courts-martial so that a bad conduct discharge may be adjudged.” Id.

293 Id.

294 United States v. Ellman, 9 C.M.A. 549 (1958); MCM, supra note 210, R.C.M. 1003(b)(8)(A); see also Air Force v. Rose, 425 U.S. 352, 384 (Burger, C.J., dissenting) (“[T]he mode of punitive separation as the result of court-martial is the same for both officers and cadets-dismissal.”); Zbar & Mazza, supra note 9, at 32 (discussing the Ellman case); cf. John Diedrich, Academy Rocked by Drugs, AIR FORCE TIMES, June 4, 2001, at 20 (Air Force Academy cadet sentenced to a punitive dismissal); Cadet Gets 15 Months in Break-In, ARMY TIMES, Aug. 28, 2000, at 3 (noting cadet was sentenced to dismissal).

295 MCM, supra note 210, R.C.M. 1003(c)(2)(A)(iv); cf. GILLIGAN & LEDERER, supra note 291, at 8-52 (referring to the “time-consuming Article 32 investigation and pretrial advice, both of which are prerequisites for a general court-martial”), 8-53 (“[T]he general court-martial’s chief disadvantage involves the time and expense in processing the case.”). (continued)
Further, cadets and midshipmen are treated like commissioned officers for purposes of sentencing. Like a commissioned officer, they cannot be reduced in grade (rank), can only be sentenced to confinement by a general court-martial, and may not be sentenced to hard labor without confinement. Further, the relevant Secretary, or his/her designee, must approve a cadet or midshipman’s dismissal before it can be executed.

However, because they are not commissioned officers, cadets and midshipmen do not enjoy the full rights and responsibilities of that class of officer. For example, cadets and midshipmen may not serve as a court-martial member (juror), as military counsel, or as a summary court-martial officer.

IV. CONCLUSION

Since the earliest days of the nation, cadets and midshipmen of the service academies have been considered members of the armed forces, a status that they retain today. However, they occupy a unique position in the military hierarchy. They are neither members of the enlisted ranks, nor full-fledged officers. More than a century and a half ago, cadets were characterized as inchoate officers. Regardless of their peculiar characterization, cadets and midshipmen of the service academies are still a
form of officer, albeit not a commissioned one, entitled to many of the rights and privileges of that military class.

Cadets and midshipmen possess a long history of encounters with the military justice system. Indeed, some well known names in American military history—Custer, Sheridan, Lee—have found themselves facing a court-martial while a cadet. Today, cadets and midshipmen of the service academies are subject to the Uniform Code of Military Justice, including the vast majority of the UCMJ’s punitive articles. Although only inchoate officers, they also enjoy many of the procedural rights normally applicable to commissioned officers.