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When Does the UCMJ Apply to Reservists?

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12.0 [Military Criminal Justice](#)

Q: I just enlisted in the Reserves. Does this mean I am always subject to the UCMJ, even when not on active duty?

A: The short answer is no. You are only subject to the Uniform Code of Military Justice (UCMJ) when on active duty and under specific circumstances enumerated in article two of the code.

The military has always been governed by a separate legal code than the one governing the general population. The Supreme Court has deemed this practice to be constitutional because “the military constitutes a specialized community governed by a separate discipline from that of the civilian”. *Orloff v. Willoughby*, 345 U.S. 83, 93, 73 S.Ct. 534, 97 L.Ed. 842 (1953); *see also Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973). Originally, each branch had its own legal code. The UCMJ was enacted in 1951, replacing the separate legal codes with one set of laws for the entire military. It is codified under 10 U.S.C. §§801-946.²

Section 802(c) sets up a general four-pronged test for determining who is subject to the UCMJ. It provides as follows:

(c) Notwithstanding any other provision of law, a person serving with an armed force who--

- (1) submitted voluntarily to military authority;
- (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;
- (3) received military pay or allowances; and
- (4) performed military duties;

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*The views expressed in this article do not represent the Maryland Law School or the Marine Corps.

² Title 10 of the United States Code is the main section of the code that deals with the armed forces. There is a separate section, Title 38, addressing veterans' benefits.

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

The courts have interpreted 802(c) to mean that service members (including members of reserve components) on active duty status, as opposed to active duty service, are subject to the UCMJ. *United States v. Phillips*, 58 M.J. 217, 220 (C.A.A.F.2003) (citing *United States v. Cline*, 29 M.J. 83, 85 (C.M.A.1989)). In *Cline*, the court defined and distinguished between active duty status and active duty service:

“For clarification, it is noted that duty status does not depend on duty service. There is no relationship between status and duty, however a reservist must be in status to perform duty. It is status, as opposed to duty, that determines when pay and other entitlements and benefits accrue. Although the appellant did not have to report for duty until 1600 hours on 25 April 1987, the evidence establishes that his pay and other entitlements started as of 0001 hours on that date. The 1600 hour reporting time is of no significance in determining jurisdiction. This time element is controlled by the organization and its only purpose is to determine when the member must be present to begin active duty service. It would be illogical to conclude that under these circumstances the military did not have in personam jurisdiction over the appellant.” *United States v. Cline*, 26 M.J. 1005, 1007 (A.F.C.M.R.1988); affirmed in *United States v. Cline*, 29 M.J. 83 (C.M.A.1989).

This means that service members are on active duty status for the entirety of any day on which they receive benefits for being on active duty. Active duty service is the hours on said day that they actually perform active duty. For example, if PFC Smith is getting paid for active duty while commencing a training exercise from 0800 – 1300 on November 25th, then he is on active duty service from 0800 – 1300. He is, however, on active duty status from 0001 to 2359 on November 25th, and is subject to the UCMJ for the entirety of the time he is on active duty status. This rule applies to reservists when on active duty (including annual training).

Section 802 (c) “is not intended to affect reservists not performing active [duty] service”. *Phillips*, 58 M.J. 217, 220 (C.A.A.F.2003) (citing U.S.Code Cong. & Admin.News 1979, at p. 1828). This means that §802(c) does not apply to reservist on weekend training, because weekend training is not active duty. Section 802(a)(3) provides, however, that:

(a) The following persons are subject to this chapter:

...

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service”

I have not found any case law clarifying if “inactive-duty training” means a twenty four hour day or only the hours when a reservist is actually on duty. There are, however, several older cases, predating the UCMJ stating that militia and guardsmen are only on

inactive-duty from muster in to muster out. This seems to apply to reserve components as well. For example, if PFC Smith has orders to report for weekend training from 0900 – 1700 on January 25 and 0900 – 1700 on January 26, then he would only be subject to the UCMJ during those hours. So if he gets arrested for fighting at 1900 on the night of January 25, then he would not be subject to the UCMJ and could only be tried in a civilian court.

Section 802 provides that reservists are subject to the UCMJ under several other special circumstances:

“Retired members of a reserve component who are receiving hospitalization from an armed force” §802(a)(5)

“Members of the Fleet Reserve and Fleet Marine Corps Reserve” §802(a)(6)

Reservists not on active duty (including IRR members) can also be, and sometimes are, recalled to active duty for court martial for serious offenses allegedly committed while on active duty. 10 U.S.C. 802(d). For an in-depth discussion on this phenomena, I invite your attention to [Law Review 1135](#).