Overview of the Military Justice System

Agenda

- The Military Justice System
  - Purpose and Sources
  - The Process
    - Investigation to Disposition – Overview
    - Types of Courts-Martial
    - Counsel, Discovery and Rules of Evidence
  - Court-Martial Procedures
  - Appellate Process
  - Sexual Assault Provisions in MCM
  - Unlawful Command Influence

Purpose

"The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."

Preamble, Manual for Courts-Martial

Purpose

- To enable commanders to ensure the good order and discipline of Soldiers (and some civilians) worldwide
- To address crime wherever it may occur (often where there is no available judicial system)
- To provide immediate and proximate deterrence
- To ensure due process and fairness to the accused service member and individual consideration of offenses and offenders

Sources

- Constitution – Article I, Section 8
  - "To make Rules for the Government and Regulation of the land and naval Forces"
- Statute – Uniform Code of Military Justice
  - 10 U.S.C. sec. 801 – 946
  - Title 18, state criminal codes, host-nation law
- Executive Order
  - Rules for Courts-Martial
  - Military Rules of Evidence
- DoD Directives and Instructions, Regulations
- Case law

The Military Justice System

- The Manual for Courts-Martial
  - Rules and procedures for the identification, investigation and disposition of criminal offenses
- Uniform Code of Military Justice (plus Title 18)
  - Congressional Action in 1950 – and ever since…
  - Over Military Members - all places and all times
  - Civilians - In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field
- Military Extraterritorial Jurisdiction Act (MEJA)
  - Prosecution of federal felony offenses, committed overseas, in US District Court

Process – Basic Terms

- Prefer/preferral
- Refer/referral
- Accused
- Convening Authority
  - Summary CMCA
  - Special CMCA
  - General CMCA
- Staff Judge Advocate
- Panel

The Military Justice System

Disposition of Offenses

Suspected Offense –Report

Investigation/Civilian Prosecution

Article 15 | Preferral | Administrative

Article 32 Investigation ← Accused & Counsel

Referral

Trial

Post-Trial

Appeals

The Military Justice System

- Disposition of Offenses-Administrative Actions
  - No Action
  - Oral/written Counseling
  - Letter of Reprimand
  - Non-judicial punishment
  - Administrative Separation
  - Resignation in Lieu of Court-Martial
  - Court-Martial

Other Comparisons – for misconduct below a DA or AUSA radar …

The Military Justice System

- Disposition Decision
  - Each commander has discretion to dispose of offenses in his/her command
  - Dispose of in timely manner at lowest appropriate level
  - Exception –
    - Rape, sexual assault, forcible sodomy, attempts
    - Pulled up to SPCMCA level (0-6) (SECDEF Panetta April 2012)

The Military Justice System

Factors – RCM 306 (Discussion)

- Nature and circumstances surrounding offense and effect on morale, discipline, health, safety, welfare;
- Views of victim as to disposition
- Existence of jurisdiction over person and offense
- Availability and admissibility of evidence
- Willingness of victim and others to testify
- Cooperation of accused in app/conviction of others
- Possible improper motives or biases of person alleging
- Availability/likelihood of prosecution by other juris
- Appropriateness of authorized punishment to particular accused or offense
- Character and military service of accused

- "Disposition that is warranted, appropriate, and fair."

The Military Justice System

- Types of Courts-Martial
  - Summary
    - 30 days maximum confinement
  - Special Court-Martial
    - 12 months maximum confinement
    - Bad Conduct Discharge
  - General Court-Martial
    - Article 32 Investigation required
    - Any punishment authorized by Manual for Courts-Martial (including death and punitive discharge)

Misdemeanor

Felony

Double Jeopardy? What about mistrials & ‘hung juries’…?

The Military Justice System

- Counsel, Discovery, and Rules of Evidence
  - Trial Counsel represents the United States
  - Defense Counsel/Civilian Defense Counsel represent only the Soldier
  - Extensive discovery available to the defense, including a copy of the pre-trial investigation/Art 32 and a copy of the law enforcement investigation
- Use modified version of Federal Rules of Evidence
- Military trial judges; mil and civilian appellate judges

Discovery Rules compared with Fed or State: Often not as open

The Military Justice System

- "Felony" Case Procedures
  - General Court-Martial requires minimum 5 members
  - 2/3 for findings of guilt and sentence
  - 3/4 for findings of more than 10 years confinement
  - Article 32 Pre-Trial Investigation required
- Capital Cases Procedures
  - Capital Cases are always different
  - Require a 12 member panel (Since 2002)
  - Require unanimous vote on findings of guilt
  - Require unanimous vote on sentence of death

Compare – unanimous in nearly all jurisdiction

The Military Justice System

- Courts-Martial Review/Appellate Process
  - Action by Convening Authority – Art 60
  - Courts of Criminal Appeals – Art 66
  - Court of Appeals for the Armed Forces – Art 67
  - Supreme Court – Art 67a
  - Counsel rights on appeal – Art 70

Sexual Assault Provisions

- **Article 120, UCMJ**
  - Pre - 2007
  - 30 Sep 2007 - 27 June 2012
  - 28 June 2012 - present
- **Additional articles**
  - Attempts, Conspiracy, Solicitation – Articles 80 - 82
  - Failure to obey order or regulation – Article 92
  - Maltreatment – Article 93
  - Sodomy – Article 125
  - Assault – Article 128
  - Conduct unbecoming an officer – Article 133
  - General Article – Article 134 (adultery, fraternization, kidnapping, obstructing justice, pandering/prostitution, communicating threat)

Sexual Assault Provisions

- MRE 412 – "Rape Shield"
- MRE 413-414 – Propensity evidence
- MRE 513 – Psychotherapist/patient privilege
- MRE 514 – Victim advocate-victim privilege
- Policy provisions not addressed here (Example: SVP)

Unlawful Command Influence

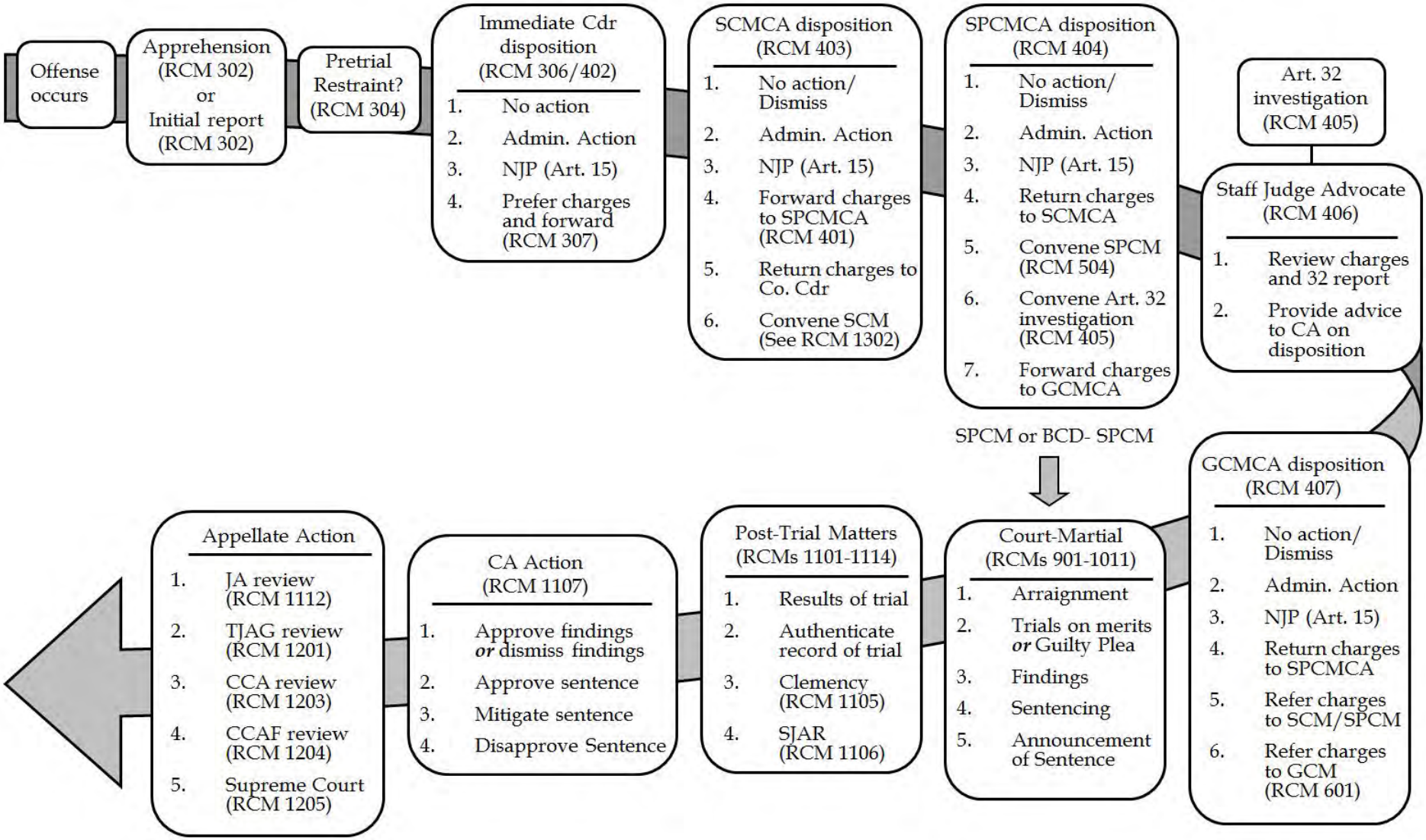
"Mortal Enemy of Military Justice"

- Article 37, UCMJ;
  - No convening authority may censure, reprimand, or admonish the court or any member, military judge, or counsel, with respect to findings or sentence, or exercise of functions in conduct of proceedings
  - No person subject to code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial in reaching findings or sentence, or the action of any convening, approving or reviewing authority with respect to his/her judicial acts.
  - Evaluation reports may not consider or evaluate performance as member or give a less favorable rating because of zeal with which a counsel represented an accused before court-martial.

Unlawful Command Influence

NOT THE MESSAGE SENT: IT'S THE MESSAGE RECEIVED

- Actual
  - Commander:
    - tells subordinate commander to court-martial Soldier
    - tells a witness they must not testify
    - issues statement to Command that he is "Death on Drugs"
- Implied
    - certain actions are expected
    - subordinates chilled in independent decision-making
    - witness chilled – will no longer participate in trial proceedings
- Appearance – "The appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial."
- Other Forms of Influence
  - second guessing CDRs during the Court-Martial Process
  - "Telegraph" expected actions
- Danger – impacts constitutional right to counsel, to confront witnesses, to call witnesses in defense , presumption of innocence, due process, right to present evidence in extenuation and mitigation

Conclusion

The Court-Martial Process