

Soldier's First Offense: Article 15 or Summary Court-Martial?

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I. Introduction

Under the Uniform Code of Military Justice (UCMJ), both Article 15 (or nonjudicial punishment (NJP)) and summary courts-martial (SCMs) enable commanders to swiftly dispose of “minor offenses.”¹ Because of their similar truncated processes with no trial, NJP and SCMs are often placed side-by-side on a linear continuum of commander’s disciplinary options, showing a SCM as a mere escalated version of NJP. This simple characterization, however, obscures the significant differences between them, often enticing commanders to prefer SCM over NJP for a first-time minor offense because of the possibility of “jail time.”²

This note explores the differences between an Article 15 and a SCM, and provides points commanders should consider before disposing of a Soldier’s first UCMJ offense. Part II briefly explains the origins of NJPs and SCMs and reviews their similarities. Part III then discusses five considerations commanders should contemplate before deciding between NJP and SCM: (1) the authority to initiate; (2) jurisdiction; (3) the degree of commander’s control and discretion; (4) the punishment of and the collateral consequences to the Soldier; and (5) the resources and time required. After weighing these five considerations, commanders will realize that an Article 15 is the preferred option to dispose of a first-time offense that does not merit a special or general court-martial.

II. Background

To appreciate the difference between NJP and a SCM, one gains perspective by understanding their historical origins. Many of the similarities between NJP and SCM are due to how they came about.

A. Origins of Article 15s and SCMs

Article 15s and SCMs originated from the same need—a commanders’ necessity to preserve the unit’s good order and discipline by quickly punishing Soldiers without a trial. This need existed from the time of the Continental Army.³

At the inception of the Army in 1775, commanders did not have statutory authority to punish Soldiers for minor offenses without resorting to a court-martial.⁴ Experiencing difficulty with troop discipline, General George Washington requested the Continental Congress grant commanders authority to summarily punish Soldiers, pleading that “the Army will be totally ruined” otherwise.⁵ Despite this request, the Continental Congress did little, granting only limited authority to punish.⁶ Frustrated by the lack of statutory authority, through general orders, Washington authorized corporal punishments (i.e., lashes) for minor infractions.⁷ This began the commander’s practice of summarily punishing Soldiers.⁸

In the 1800s, the Army added a regulation allowing regimental commanders to demote noncommissioned officers, but did not provide commander’s with disciplinary authority, forcing commanders to rely on their unsanctioned measures to discipline Soldiers who committed minor offenses.⁹ To address the disciplinary issues during the Civil War, Congress created a “field officer’s court,” a wartime court to summarily dispose of minor offenses in lieu of regimental or garrison court (predecessors of today’s special courts-martial).¹⁰ The field officer’s court consisted of one field grade officer who could summarily adjudicate enlisted Soldiers for noncapital offenses. Maximum punishment consisted of a fine of one month’s pay and one month’s confinement or hard labor.¹¹ In 1890, Congress then created a peacetime field officer’s court, a “summary court,” providing peacetime commanders with a system to try minor

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¹ Compare MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V, ¶ 1e (2012) [hereinafter MCM] (defining “minor offenses” under the punitive articles of the Uniformed Code of Military Justice (UCMJ)), with *id.* R.C.M. 1301(b) (“The function of the summary court-martial is to promptly adjudicate minor offenses. . .”).

² Interview with Mr. Fred Borch, Regimental Historian, The Judge Advocate Gen.’s Legal Ctr. & Sch., Charlottesville, Va. (Dec. 4, 2013) (speaking from his professional experience having advised commanders at all levels as an active duty judge advocate for over twenty years, retiring as a colonel, and serving as the regimental historian who reviews and archives military justice records).

³ See Captain Harold L. Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37, 38–39 (1965).

⁴ *Id.*

⁵ *Id.* at 39 (quoting 6 WRITING OF WASHINGTON 91–92 (Fitzpatrick ed. 1932)).

⁶ *Id.* (authorizing commanders to arrest or imprison for “reproachful or provoking speech or gesture”).

⁷ *Id.*

⁸ *Id.* at 40.

⁹ See *id.* at 41 (citing Army Regs. art. IX, para. 13 (1835)). A captain was able to reduce a first sergeant under this authority. *Id.*

¹⁰ *Id.* at 42; see WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 490–92 (2d ed. 1920 reprint).

¹¹ Miller, *supra* note 3, at 42.

offenses.¹² Unlike the field officer's court, Congress provided the accused with a right to refuse the summary court by requesting a trial by court-martial.¹³ This summary court, codified in Article 14 of the Articles of War, is the predecessor of today's SCM, codified in Article 20, UCMJ.¹⁴

Because of the swift nature of the summary court procedure, summary courts became the commander's choice for disposing of minor offenses—the caseloads in summary courts dramatically increased, raising Army court-martial statistics.¹⁵ Concerned with the appearance of an Army discipline problem, the acting Judge Advocate General in 1892 reported to the Secretary of War that a majority of the summary court cases would have been disposed of by company commanders' unofficial measures used before the creation of summary courts.¹⁶ In response, the Army officially sanctioned the commander's authority to discipline Soldiers for minor offenses in 1895; however, the regulation limited the commander's authority to "admonitions" and "withholding of privileges."¹⁷ The Army further limited the commander's disciplinary authority by providing the accused the right to demand trial by court-martial in lieu of accepting the commander's punishment.¹⁸ This authority became statutory law in 1912 as Article 104 of the Articles of War, forming the basis for the commander's disciplinary tool under Article 15, UCMJ, which came into existence in 1950.¹⁹ In 1962, Congress amended Article 15 to its current form, strengthening the commanders' NJP authority.²⁰

B. Article 15 and Summary Court-Martial Today

Born out of the same need, NJPs and SCMs are very similar in terms of purpose, procedure, and punishment level. First, they have the same purpose: to dispose of minor offenses.²¹ The UCMJ does not define what constitutes a "minor offense"; however, the *Manual for Courts-Martial (MCM)* and *Army Regulation 27-10, Military*

Justice, provide that "minor offenses" are those UCMJ offenses that, if tried at a general court-martial, carry a punishment no greater than a bad-conduct discharge or one year of confinement.²² Commanders have the discretion to decide whether an offense (even ones carrying a maximum of dishonorable discharge or one year of confinement) is a "minor offense" or not, based on the nature of the offense, the circumstances, and the accused's rank and experience.²³ *Army Regulation 27-10* states that minor offenses for Article 15 should equate to an "average offense tried by summary court-martial," essentially stating that NJP and SCM are interchangeable as a disposition choice.²⁴

As methods to punish Soldiers quickly without trial, both procedures are similarly truncated and simplified: (1) one officer decides the guilt of the accused and what punishment to impose; (2) the accused does not have a right to counsel at their proceedings; (3) both NJP and SCM proceedings are non-adversarial with minimal due process, but still ensure that the accused has notice of the charges and an opportunity to present matters in defense; and (4) the accused has a right to refuse either process by demanding a trial by court-martial.²⁵

Lastly, though not exactly the same, their punishment levels are substantially similar. Neither method can separate an accused from the service, and both can impose punishments such as reprimand, forfeiture of pay, restrictions, and grade reduction. The punishment under SCM is slightly elevated above NJP maximum punishment: SCMs allow confinement for up to one month and hard labor; however, Article 15 has a similar punishment of correctional custody for thirty days, which may include hard labor.²⁶

¹² *Id.* at 43.

¹³ WINTHROP, *supra* note 10, at 493 (quoting Act of Oct. 1, 1890, ch. 1259, sec. 1).

¹⁴ *Uniform Code of Military Justice: Hearing on H.R. 2498 Before the Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. 972 (statement of Mr. Robert W. Smart, professional staff member); 10 U.S.C. § 820 (2012).

¹⁵ Miller, *supra* note 3, at 43.

¹⁶ *Id.*

¹⁷ *Id.* at 44 (quoting U.S. DEP'T OF WAR, REGS. para. 930 (Oct. 31, 1895)).

¹⁸ *Id.*

¹⁹ *Id.* at 44–46.

²⁰ *Id.* at 46. As a result, it reduced the number of summary courts-martial (SCMs) drastically. *Id.* at 108 ("During the last nine months of 1963, 12,271 [SCMs] were conducted compared with 41,848 during the same period in 1962.")

²¹ *Supra* note 1 and accompanying text.

²² MCM, *supra* note 1, pt. V, ¶ 1e; U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3-9 (3 Oct. 2011) [hereinafter AR 27-10]; MCM, *supra* note 1, R.C.M. 1301(b) discussion (referring to Part V, ¶ 1e definition of "minor offenses").

²³ MCM, *supra* note 1, pt. V., ¶ 1e.

²⁴ AR 27-10, *supra* note 22, para. 3-9 ("Generally, the term 'minor' includes misconduct not involving any greater degree of criminality than is involved in the average offense tried by summary court-martial (SCM).").

²⁵ Compare MCM, *supra* note 1, R.C.M. 1301(a), (e), R.C.M. 1301–04 (summary court-martial process), with *id.* pt. V, ¶¶ 3, 4 (Article 15 process).

²⁶ Compare *id.* R.C.M. 1301(d), with *id.* pt. V, ¶ 5. Though theoretically available, the current regulation on correctional custody fails to include "hard labor" as part of the duty. U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM ch. 15 (15 June 2006). For more insight on implementation of hard labor, see generally Major Joseph B. Berger III, *Making Little Rocks out of Big Rocks: Implementing Sentences to Hard Labor Without Confinement*, ARMY LAW., Dec. 2004, at 1.

III. Analysis

Despite the similarities between NJP and SCMs, there are differences that commanders need to consider to assess which disposition is best for a particular minor offense.

A. Initiating Authority

The first crucial difference is the authority to conduct an Article 15 or a SCM. All commanders (company equivalent and above) have NJP authority; however, the authority to refer matters to a SCM is limited to the three court-martial convening authorities (summary,²⁷ special, and general).²⁸ Hence, if a commander lacks authority to refer a matter to a SCM on his own, he must consider whether it is serious enough to require a superior commander's action on the matter.

B. Jurisdiction

Article 15 and SCM also differ in their jurisdiction. Commanders may mete out NJP to Soldiers of any rank in the unit (provided superior authority has not withheld such authority over certain rank²⁹); whereas, the SCM jurisdiction is limited to enlisted Soldiers only. Therefore, commanders must rule out SCM as an option when disposing of misconduct for officers and warrant officers.³⁰

C. Commander's Control and Discretion

Commanders must also consider the difference in the level of commander's control and discretion between NJP and SCM. A commander retains a high degree of control and discretion over the Article 15 process as the imposing authority; whereas in SCMs, a commander must give away his control and discretion over to a neutral and detached SCM officer.

²⁷ Interestingly, there is an issue concerning whether battalion commanders are SCM convening authorities in light of the plain language of Article 24, UCMJ, 8 U.S.C. § 824 (2012). Article 24 does not list battalion commanders as having authority to refer SCMs. Currently, the Office of the Judge Advocate General (OTJAG) permits battalion commanders to refer SCMs; however, it is recommended that a brigade commander make such a referral. Lecture by Major Jeremy Steward, Crim. L. Dep't, The Judge Advocate General's School, Survey of Military Justice (Nov. 4, 2013) (notes on file with author).

²⁸ Compare 10 U.S.C. § 815(a), with 10 U.S.C. § 824.

²⁹ E.g., III CORPS & FORT HOOD, REG. 27-10, MILITARY JUSTICE para. 4-2 (10 Nov. 2008), available at <http://www.hood.army.mil/dhr/pubs/fhr27-10.pdf> (stating that III Corps Commander withholds disposition of alleged UCMJ violations by commissioned officers, warrant officers, and senior NCOs in the rank of master sergeant and above).

³⁰ 10 U.S.C. § 820.

In the NJP process, the imposing commander determines the Soldier's guilt by weighing the evidence without concern for Military Rules of Evidence (MREs), except privileges.³¹ Even after imposing the punishment, a commander has the authority to suspend, mitigate, remit, or set aside the punishment, giving maximum flexibility and authority to a commander to "correct, educate, and reform" a Soldier's behavior without unnecessarily tarnishing one's record with a "stigma of court-martial conviction."³² In essence, the commander has full control and discretion over the Soldier's Article 15, providing certainty of the outcome.

On the other hand, upon referring the matter to the SCM officer, the commander loses control over the SCM until its completion. The SCM officer acts "as judge, fact[-]finder, prosecutor, and defense counsel," inquiring into the case impartially, looking out for both government's and defense's interests.³³ He conducts a trial starting with an arraignment and ensures that his findings are based on admissible evidence under the MRE.³⁴ During this process, commanders may not exert any command influence over the SCM officer.³⁵ Upon completion of the SCM, the SCM convening authority, who may not be the commander who sought the SCM, regains control over the case and may set aside or reduce the sentence; however, he cannot reverse a finding of not guilty.³⁶ Hence, the commander relinquishes control and discretion over the SCM during trial, resulting in uncertainty whether a Soldier is punished or not.

D. Punishment and Collateral Consequences

Despite similarities, there are significant differences between NJP and SCM in the allowable punishments—the reduction of senior noncommissioned officers (NCOs) and their collateral consequences on one's personnel and criminal records.

A senior NCO, a sergeant first class and above, can be reduced in rank by one grade at a SCM, but not under NJP. Article 15s allow commanders to reduce Soldiers in rank, but the reduction authority coincides with the imposing

³¹ MCM, *supra* note 1, pt. V, ¶ 4(c)(3). Section V of the Military Rules of Evidence covers privileges such as attorney-client, clergy, spousal, "psychotherapist-patient," "victim advocate-victim" and so forth. *Id.* MIL. R. EVID. sec. v.

³² *Id.* pt. V, ¶ 6; AR 27-10, *supra* note 22, para. 3-2.

³³ MCM, *supra* note 1, R.C.M. 1301; *Middendorf v. Henry*, 425 U.S. 25, 32 (1976).

³⁴ MCM, *supra* note 1, R.C.M. 1304(b)(1) ("During the trial, the summary court-martial will not consider any matters, including statements previously made by the accused to the officer detailed as summary court-martial unless admitted in accordance with the Military Rules of Evidence.").

³⁵ 10 U.S.C. § 837 (unlawfully influencing action of court).

³⁶ MCM, *supra* note 1, R.C.M. 1107, 1306.

commander's promotion authority.³⁷ Because the promotion authority for E-7 and above resides with Commander, Army Human Resources Command, commanders cannot reduce E-7 and above with an Article 15.³⁸ However, a SCM officer can reduce E-7 and above by one rank, regardless of promotion authority.³⁹

Commanders have discretion over how Article 15 records are filed, but none over how SCM records are filed. Depending on the Soldier's rank and the commander's discretion, the NJP record may or may not be filed in the performance section or the restricted section of the Army Military Human Resource Record (AMHRR), formerly known as the Official Military Performance Fiche (OMPF).⁴⁰ Article 15s for E-4 and below are never filed in their AMHRRs; for E-5 and above, the commander must file the NJP in the AMHRR, but has the discretion to file it in the restricted section rather than in the performance section.⁴¹ On the other hand, commanders have no discretion for SCM convictions—they must be filed in the performance section of the Soldier's AMHRR and can never be filed locally or in the restricted section.⁴²

Commanders have no discretion regarding criminal records: both field grade Article 15s and SCM convictions for certain offenses are reportable to the FBI's Criminal Justice Information Services if investigated by DoD law enforcement.⁴³ Though neither are federal convictions, Soldiers would have a criminal record either stating "[s]ubject found guilty by [SCM]" or "nonjudicial disciplinary action."⁴⁴ Despite the Supreme Court's holding

in *Middendorf v. Henry* that SCM is not a "criminal prosecution" triggering Sixth Amendment protections, there is a stronger stigma attached to a SCM conviction than for NJP action.⁴⁵

E. Resources and Time Required

Finally, the most important concern for commanders is the time and resources required. There is no question that a SCM would require more time, manning, and resources than NJP would. A SCM requires referral of charges; the selection, appointment, and training of a SCM officer; a SCM officer and recorder's preparation for trial; the trial itself; post-trial actions and approval by the SCM convening authority, and, if adjudged confinement, personnel to transport to confinement facility, and in some cases, monitoring during confinement.⁴⁶ On the other hand, a commander can notify the accused of NJP and impose the punishment within days.⁴⁷

IV. Conclusion

Based on the above considerations, commanders will usually prefer an Article 15 over a SCM for a first-time offender. The only time a commander should consider SCM is when the first-time offense was so egregious that the extra punishment of "jail time" is worth the extra time and effort needed to conduct a SCM, yet not too egregious for a special court-martial that the Soldier does not deserve more than thirty days' confinement. A commander should also consider whether the first-time offense is worth the risk of potential acquittal or less severe punishment due to a SCM's independent decision or legal error. Of course, it is the commander's prerogative to decide whether a first-time offense deserves a SCM conviction rather than NJP; however, it would be prudent for commanders to count the cost before seeking SCM rather than NJP—the unit's interest in punishing a first-time offender through SCM must outweigh the unit's interest in faster disposition, fewer resources, and rehabilitating the Soldier for future service.

³⁷ See AR 27-10, *supra* note 22, tbl. 3-1. Company commanders can reduce E-4 and below, and field grade (and above) commanders can reduce E-5 and E-6 by one rank. *Id.*

³⁸ U.S. DEP'T OF ARMY, REG. 600-8-19, ENLISTED PROMOTIONS AND REDUCTIONS para. 4-1a (30 Apr. 2010) (RAR, 27 Dec. 2011).

³⁹ MCM, *supra* note 1, R.C.M. 1301(d).

⁴⁰ See AR 27-10, *supra* note 22, para. 3-6; U.S. DEP'T OF ARMY, REG. 600-8-104, ARMY MILITARY HUMAN RESOURCES RECORD MANAGEMENT app. B (2 Aug. 2012) [hereinafter AR 600-8-104].

⁴¹ AR 27-10, *supra* note 22, para. 3-6; AR 600-8-104, *supra* note 40, app. B ("DA Form 2627"). However, if a commander chooses to file an Article 15 for Soldiers in the grade of sergeant (SGT) or higher in the restricted section, the Army Military Human Resource Record (AMHRR) must first be reviewed. If the restricted section contains a previous Article 15, then the present Article 15 must be filed in the performance section. AR 27-10, *supra* note 22, para. 3-6(b).

⁴² AR 600-8-104, *supra* note 40, app. B ("COURT MART").

⁴³ U.S. DEP'T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING para. 4-10 (30 Mar. 2007) [hereinafter AR 190-45]; U.S. DEP'T OF DEF., INSTR. 5505.11, FINGERPRINTING CARD AND FINAL DISPOSITION REPORT SUBMISSION REQUIREMENTS enclosures 2, 3 ¶ 2.b.(1) (9 July 2010) (C1, 3 May 2011) [hereinafter DODI 5505.11].

⁴⁴ DODI 5505.11, *supra* note 43, enclosure 4, para. 2.d.(1)-(2) (requiring the recording of adverse findings for SCM and NJP for purposes of reporting to the FBI in accordance with DoD Instruction 5505.11 requirements). *Contra* AR 190-45, *supra* note 43, para. 4-10 (stating that SCM results will not be reported to FBI).

⁴⁵ 425 U.S. 25, 42 (1976) ("[W]e conclude that a summary court-martial is not a 'criminal prosecution' for purposes of the Sixth Amendment."); see AR 27-10, *supra* note 22, para. 3-2b (advising that NJP is preferred to "[p]reserve a Soldier's record . . . from unnecessary stigma by record of court-martial conviction").

⁴⁶ See generally, MCM, *supra* note 1, ch. XIII; U.S. DEP'T OF ARMY, PAM. 27-7, GUIDE TO SUMMARY COURTS-MARTIAL TRIAL PROCEDURES (15 June 1984).

⁴⁷ There is a regulatory guideline to provide the Soldier twenty-four hours to decide whether to accept the Article 15; however, it may take several days, depending on the Trial Defense Service's schedule to see the Soldier. AR 27-10, *supra* note 22, para. 3-16c.