

# The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U.S. Army

## Summary Court-Martial: Using the Right Tool for the Job

*It would seem inconceivable that a serious charge . . . would ever be prosecuted before a court which could impose maximum confinement at hard labor for only one month. But if that occurred, an accused so charged before a summary court-martial would no doubt be delighted at his good fortune.*<sup>1</sup>

### Introduction

Under the Rules for Courts-Martial (RCM),<sup>2</sup> commanders decide the level at which misconduct will be handled.<sup>3</sup> Much like operational rules of engagement, the standing guidance to commanders is to use the minimum force necessary to achieve a desired outcome.<sup>4</sup> To carry out their duties properly, commanders must know their available options when dealing with a range of Uniform Code of Military Justice (UCMJ) violations, from minor infractions to those of a more serious nature.

Summary courts-martial serve as an important bridge between nonjudicial punishment imposed by the commander and judicial proceedings.<sup>5</sup> The function of a summary-court martial is to promptly adjudicate minor offenses using a simple procedure.<sup>6</sup> The summary court-martial has been described as “speedier than a special court-martial, . . . a supercharged Article 15 that is dressed up in a courtroom.”<sup>7</sup>

A summary court is the lowest of three levels of courts-martial.<sup>8</sup> It lies between informal Article 15 procedures<sup>9</sup> and judicial procedures of general and special courts-martial.<sup>10</sup> Unlike the two higher levels of courts-martial, military judges never preside at summary courts.<sup>11</sup> Instead, one officer, usually a non-lawyer, presides as judge (ruling on issues of law) and jury (as finder of fact).<sup>12</sup> The summary-court officer has the responsibility to “thoroughly and impartially” inquire into both sides of the matter.<sup>13</sup> Although the accused does not have the right to representation by defense counsel, the summary-court officer is charged with ensuring that the “interests of both the government and the accused are safeguarded” and that justice is done.<sup>14</sup> In this respect, the summary-court officer acts not only as judge and jury, but also as the prosecutor and defense counsel.

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1. *Middendorf v. Henry*, 425 U.S. 25, 40 n.17 (1976) (Rehnquist, J.) In *Middendorf*, enlisted Marines brought a class action challenging the authority of the military to try them at a summary court-martial without providing counsel. Finding that a summary court-martial occupies a position between informal nonjudicial disposition under Article 15 and the courtroom-type procedure of general and special courts-martial, the Supreme Court held that “a summary court-martial is not a ‘criminal prosecution’ for purposes of the Sixth Amendment.” *Id.* at 42.

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. (2000) [hereinafter MCM].

3. *Id.* R.C.M. 306.

4. *See id.* R.C.M. 306(b); *see also* U.S. DEP’T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 3-2 (20 Aug. 1999) [hereinafter AR 27-10] (“A commander should use nonpunitive measures to the fullest extent to further the efficiency of the command.”).

5. *See* MCM, *supra* note 2, pt. II, ch. XIII; *see also id.* app. 9.

6. *Id.* R.C.M. 1301; *see also* U.S. DEP’T OF ARMY, PAM. 27-7, GUIDE FOR SUMMARY COURT-MARTIAL TRIAL PROCEDURE (15 Apr. 1985) (providing guidance on availability of witnesses, arranging the room for trial, scripts for informing the accused of his rights, acceptance of guilty pleas, and trial on merits and sentencing).

7. Michael H. Gilbert, *Summary Courts-Martial: Rediscovering the Spumoni of Military Justice*, 39 A.F. L. REV. 119 (1996).

8. *See* UCMJ art. 16 (2000).

9. *See* *Middendorf v. Henry*, 425 U.S. 25, 31-32 (1976) (noting that Article 15 punishment, conducted personally by the accused’s commanding officer, is an administrative method of dealing with most minor offenses).

10. *Id.* at 31.

11. Compare UCMJ art. 16(3), with *id.* art. 16(1)-(2). Rule for Courts-Martial 1301(a), however, allows for a military judge to preside over a summary court. *See* MCM, *supra* note 2, R.C.M. 1301(a).

12. UCMJ art. 16(3).

13. MCM, *supra* note 2, R.C.M. 1301.

14. *Id.* R.C.M. 1301.

## Who May Convene Summary Courts-Martial

Any officer who may convene a general or special court-martial may also convene a summary court-martial;<sup>15</sup> however, most summary courts in the Army are convened by battalion commanders.<sup>16</sup> Although not vested with the power to convene general or special courts, battalion commanders can gain the authority to convene summary courts from their general court-martial convening authorities (GCMCAs).<sup>17</sup>

In addition to those empowered to convene general or special courts, the commanding officer of a *detached* company may also convene summary courts-martial.<sup>18</sup> A GCMCA can designate subordinate commanders of *detached* units to convene summary courts within their command.<sup>19</sup> The RCMs define *detached* in terms of discipline rather than in a tactical or geographic sense, with the GCMCA deciding whether a unit is “separate or detached.”<sup>20</sup> Therefore, if the GCMCA decides to hold his battalion commanders “primarily responsible for discipline” within their battalions,<sup>21</sup> the units are “detached” and the battalion commanders are convening authorities empowered to refer cases to summary courts-martial.<sup>22</sup>

Normally, such GCMCA designations are found in local supplements to *Army Regulation (AR) 27-10*. Arguably, as long as a GCMCA is aware that his battalion commanders are exercising the authority to convene summary courts,<sup>23</sup> and the

GCMCA does nothing to prevent this, the GCMCA has de facto “separate” battalions.<sup>24</sup> The best practice, however, is to include this designation in the local *AR 27-10* supplement.

Summary courts-martial have worldwide jurisdiction over all persons subject to the UCMJ except officers and cadets, and may hear any UCMJ violation except capital offenses.<sup>25</sup> Commanders decide whether alleged misconduct is “minor” and should be tried by a summary court. Commanders should base their decisions on the nature of the offense; the circumstances surrounding its commission; the offender’s age, rank, duty assignment, record, and experience; and the maximum sentence authorized for the offense if tried by general court-martial.<sup>26</sup>

The maximum punishment a summary court-martial may impose on an accused is reduction to the lowest enlisted grade; forfeiture of two-thirds pay for one month; and either confinement for one month, hard labor without confinement for forty-five days, restriction for two months, or combinations thereof.<sup>27</sup> The maximum punishment a summary court can impose on those above grade E-4 is further limited.<sup>28</sup>

No one may be brought to trial before a summary court-martial absent his consent.<sup>29</sup> If an accused objects to trial by a summary court, the charges may be dismissed or the accused may face trial by special or general court-martial.<sup>30</sup> Special courts-martial typically try misdemeanor-type offenses, however,

15. See UCMJ art. 24.

16. See, e.g., MCM, *supra* note 2, app. 4 (Dep’t of Defense, Form 458, Charge Sheet (Aug. 1984) (battalion commander’s adjutant signs block 13 for the commander as receipt by summary court-martial convening authority)).

17. See UCMJ art. 24(a)(2); MCM, *supra* note 2, R.C.M. 1302(a)(2).

18. See UCMJ art. 24.

19. See *id.* art. 24(a)(2); MCM, *supra* note 2, R.C.M. 1302(a)(2).

20. See MCM, *supra* note 2, R.C.M. 504(b)(2)(B)(i).

21. *Id.* R.C.M. 504(b)(2)(A).

22. See UCMJ art. 24.

23. This should be the case, because battalion commanders generally “receive” charges as summary court-martial officers in cases later referred to special and general courts-martial. See, e.g., MCM, *supra* note 2, app. 4.

24. This argument draws support from historical practice within the Judge Advocate General’s Corps. See generally Memorandum, DAJA-CL, to LTC Green, Chief, CLD TJAGSA, subject: Summary Courts-Martial Convening Authority at Battalion Level (19 Mar. 1984) (“[I]n deciding Art. 69 petitions, [The Judge Advocate General of the Army] (TJAG) has repeatedly held that battalion commanders may convene [summary courts-martial]. This has also been the long-standing position of [the Criminal Law Division.]”) (citing TJAG opinions from the fifties and sixties supporting this position) (on file with author).

25. UCMJ arts. 17, 20.

26. MCM, *supra* note 2, pt. V, ¶ 1e (Nonjudicial Punishment Procedure).

27. See UCMJ art. 20; MCM, *supra* note 2, R.C.M. 1301(d)(1)-(2); see also *id.* R.C.M. 1003(b)(5)-(7) (discussing combinations of confinement, hard labor without confinement, and restrictions).

28. See *supra* notes 45-46 and accompanying text.

29. See UCMJ art. 20; MCM, *supra* note 2, R.C.M. 1303.

under UCMJ, Article 19, they “have jurisdiction to try . . . any noncapital offense.”<sup>31</sup> Their maximum punishments include a bad-conduct discharge, reduction to the lowest enlisted grade, confinement for one year, and forfeitures of two-thirds pay per month for one year.<sup>32</sup> Convening authorities usually reserve general courts-martial for the most serious, felony-type offenses. As the highest level of military trial courts, general courts-martial may adjudge the maximum punishment allowed for a particular offense—for example, death for murder.<sup>33</sup>

### **Advantages of Trial by Summary Court-Martial**

#### *Advantages to the Command*

Summary courts-martial are a great tool for commanders who consider an offense in the gray area between an Article 15 and a special court-martial. Because the proceeding is called a “court-martial,” and because a summary court may confine an enlisted soldier for up to thirty days, these proceedings are valuable when commanders want to teach a soldier a swift, harsh lesson that also serves as a strong message to others within their commands.

As discussed above, summary courts-martial in the Army are usually convened by battalion commanders.<sup>34</sup> These commanders normally appoint one of their subordinate officers to serve as the summary court-martial hearing officer. In most cases, this officer can notify the accused and try the case within a week. Compared to a special or general court-martial, this proceeding is very quick with fewer administrative burdens imposed on the unit. In addition, all post-trial matters—that is, clemency—are handled at the battalion level. Offenders submit any appeals directly to The Judge Advocate General, and therefore do not create extra work for the battalion commander’s superiors.<sup>35</sup>

#### *Advantages to the Accused*

A soldier would wisely consent to trial by summary court-martial for many reasons. First, this type of court can resolve the accusation quickly. Second, the soldier may plead guilty or not guilty, and the summary court-martial officer has the responsibility to “thoroughly and impartially” inquire into both sides of the matter.<sup>36</sup> Third, although soldiers do not have a right to representation by military defense counsel, they can consult with counsel before deciding whether to accept trial by summary court-martial. They may also hire civilian defense counsel to represent their interests before, during, and after the proceedings.<sup>37</sup> Fourth, the Military Rules of Evidence (MRE) apply throughout the proceeding. Fifth, the accused may call, question, and cross-examine witnesses for and against him. Finally, and in many cases most importantly, the maximum penalties at a summary court are much lower than those the soldier would face at trial by special or general court-martial.<sup>38</sup> A finding of guilty at a summary court-martial is not a federal conviction,<sup>39</sup> and soldiers found guilty do not face a punitive discharge as part of their sentence.<sup>40</sup>

### **Disadvantages of Trial by Summary Court-Martial**

#### *Disadvantages to the Command*

The main drawbacks to handling misconduct with a summary court-martial are the relatively low maximum penalties. If an enlisted soldier is “maxed-out” and given thirty days’ confinement, he will often return to duty in twenty-five days. The five-day reduction results from administrative “good time” credit confinees automatically receive from the confinement facility.<sup>41</sup> Furthermore, because summary courts cannot impose punitive discharges, the soldier remains in the unit. If discharge is appropriate, commanders must pursue administrative

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30. UCMJ art. 20.

31. *Id.* art 19.

32. *Id.* (as amended by Exec. Order No. 13,262, 2002 Amendments to the Manual for Courts-Martial, United States, 67 Fed. Reg. 18,773, 18,774 (Apr. 17, 2002)).

33. *Id.* art. 18.

34. *See supra* text accompanying notes 16-24.

35. *See MCM, supra* note 2, R.C.M. 1306.

36. *Id.* R.C.M. 1301(b).

37. *Id.* R.C.M. 1301(e). In rare cases, the accused may request representation by military counsel at the summary court-martial proceedings. The regional defense counsel may approve these types of requests. *See id.* R.C.M. 1301(e) discussion. More commonly, trial defense counsel “ghost write” motions and other documents for the accused soldier’s signature and prepare the accused to defend himself at the hearing. In contrast, only The Judge Advocate General may authorize a trial counsel to participate directly in the proceedings.

38. *Compare id.* R.C.M. 1301(d), *with id.* R.C.M. 1003.

39. *See Middendorf v. Henry*, 425 U.S. 25 (1976) (holding that summary courts-martial are not trials that trigger an accused’s Fifth or Sixth Amendment right to counsel).

separation in a separate proceeding in which either the brigade or division commander serves as the separation authority.<sup>42</sup>

Summary courts-martial can be unpredictable. The application of the MREs can create situations in which defense counsel play havoc with the proceeding—either directly or by ghost writing motions for the accused to present at trial. Take, for example, an accused facing trial for use of a controlled substance based on a positive urinalysis. The accused could accept a summary court-martial, plead not guilty, and then object to the admission of the litigation packet prepared by the laboratory. In this situation, the summary court-martial would need to produce someone from the laboratory to authenticate the litigation packet and provide expert testimony; alternatively, the summary-court officer can acquit the accused in lieu of producing the expert witness. This scenario, which has resulted in unjustified acquittals at various Army posts,<sup>43</sup> flies in the face of the President's intent that the proceeding "promptly adjudicate minor offenses using a simple procedure."<sup>44</sup>

Another disadvantage with summary courts concerns offenders above grade E-4. A summary court may only reduce a soldier above grade E-4 by one grade, and may not confine soldiers above grade E-4 or give them hard labor without confinement.<sup>45</sup> These additional limitations on maximum punishment may create an appearance, or the reality, of a double standard. As a practical result, noncommissioned officers (NCOs) face no greater punishment at a summary court-martial than what they would face at a field-grade Article 15 proceeding.<sup>46</sup>

Although a battalion commander may feel that an NCO does not deserve the harsh stigma of a federal conviction for his alleged misconduct, if the facts and circumstances demand some jail time, the commander has no option but to forward the preferred charges with a recommendation for at least a special court-martial. Because most brigade commanders do not exercise their authority to send cases to "straight" special courts-martial, this could result in trial by a special court-martial empowered to adjudge a bad-conduct discharge.

### *Disadvantages to the Accused*

An accused soldier may choose to turn down trial by summary court-martial for many valid reasons.<sup>47</sup> Summary courts have fewer procedural protections and, therefore, less due process throughout the proceeding. Also, as mentioned above, although the accused may hire a civilian attorney at his own expense and may elect to have a spokesperson to represent him at the proceeding, an accused at a summary court does not have the right to military counsel.<sup>48</sup>

A third problem for an accused stems from the convening authority's selection of a summary-court officer. When a battalion commander convenes a summary court, he often selects the unit's executive officer or S-3 to serve as the summary court-martial officer because in most units they are the only available field-grade officers. Despite the summary-court officer's responsibility to be impartial,<sup>49</sup> the accused may perceive that the officer's personal and professional loyalty runs directly to the convening authority. Reinforcing this perception is the fact that all post-trial matters, including final decisions about requests for clemency, rest with the battalion commander. This stands in stark contrast to a field-grade Article 15, in which a soldier can appeal the findings and punishments imposed at the battalion level to the brigade commander.<sup>50</sup>

### **Pretrial Agreements**

Commanders would, perhaps, send more serious cases to trial by summary court-martial if they could be assured that the accused would be separated from the military with an other than honorable (OTH) discharge once the accused had served his punishment.

By entering into a pretrial agreement with the accused, commanders may achieve this result. In other words, a pretrial agreement would permit a prompt adjudication of the offenses using the simplified summary court procedures; as part of the pretrial agreement, there would be a follow-on administrative separation proceeding, virtually guaranteeing the discharge. Of course, the accused must consent to this arrangement.<sup>51</sup>

40. MCM, *supra* note 2, R.C.M. 1301(d)(1). They may, however, face administrative separation under AR 635-200. See U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL (1 Nov. 2000) [hereinafter AR 635-200].

41. See generally U.S. DEP'T OF ARMY, REG. 633-30, APPREHENSION AND CONFINEMENT: MILITARY SENTENCES TO CONFINEMENT (28 Feb. 1989).

42. See AR 635-200, *supra* note 40, para. 1-19.

43. For example, the author experienced this situation as a trial counsel at Fort Bragg, North Carolina.

44. MCM, *supra* note 2, R.C.M. 1301.

45. *Id.* R.C.M. 1301(d)(2).

46. Compare *id.* with *id.* pt. V, ¶ 5b(2).

47. Note, however, that when soldiers exercise their right to object to trial by summary court-martial, they most likely will face trial by special or general court-martial. See UCMJ art. 20 (2000); MCM, *supra* note 2, R.C.M. 1303.

## Conclusion

Convening authorities may agree to refer pending charges to a certain type of court-martial, to include summary courts-martial.<sup>52</sup> In exchange, an accused may promise to plead guilty, enter into a confessional stipulation, and fulfill additional terms not otherwise prohibited.<sup>53</sup> Specifically, an accused may enter into an agreement to waive administrative discharge proceedings, to include those associated with an OTH discharge.<sup>54</sup>

In the above scenario, the accused may consent to avoid the harsh stigma of a federal criminal conviction. The command may consent to achieve what has been called a “Chapter 10 plus”<sup>55</sup> or a “supercharged Charticle 29.”<sup>56</sup>

The summary court-martial, the lowest level of court-martial under the UCMJ, is an important command tool. Designed primarily for disposition of relatively minor offenses, it is a convenient bridge between nonjudicial punishment imposed by the commander and full judicial proceedings.

A summary court-martial is a “trial” in name only. Measured by constitutional due process standards, the proceedings fall well short of American expectations of criminal justice.<sup>57</sup> Military justice practitioners should bear in mind that although the proceeding may take place in a courtroom, a summary court in reality is a supercharged Article 15.<sup>58</sup> Given that all parties agree to dispose of the action at this level, the relatively low amounts of punishment involved, and the fact that a guilty finding is not a federal conviction, judge advocates should remind their commanders that trial by summary court-martial is a swift and fair option to address minor misconduct within their commands. Major Huestis.

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48. MCM, *supra* note 2, R.C.M. 1301(e).

49. *Id.* R.C.M. 1301.

50. *See* UCMJ art. 15(e).

51. *See* MCM, *supra* note 2, R.C.M. 705(c)(1)(A) (“A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.”), 1303 (“No person who objects thereto before arraignment may be tried by summary court-martial even if that person also refused punishment under Article 15 and demanded trial by court-martial for the same offense.”).

52. *Id.* R.C.M. 705(b)(2)(A).

53. *Id.* R.C.M. 705(b)(1).

54. *See, e.g.,* United States v. Gansemer, 38 M.J. 340 (C.M.A. 1993).

55. A discharge in lieu of court-martial, processed in accordance with AR 635-200, Chapter 10, normally results in an OTH discharge, but the accused avoids confinement and a federal conviction. *See generally* AR 635-200, *supra* note 40.

56. “Charticle 29” is slang for a separation action for misconduct under AR 635-200 paragraph 14 in conjunction with an Article 15. The exposure of an accused in the grade of E-4 or below to the possibility of thirty days’ confinement at a summary court supercharges the Charticle 29 scenario.

57. *See* Middendorf v. Henry, 425 U.S. 25 (1976).

58. *See generally* Gilbert, *supra* note 7.