Introduction to Idaho National Guard Investigations, Sexual Assault, and Military Justice

Presentation to the ISB Gov. & Public Lawyers Section 12-7-2023

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Agenda

- Introduction to the Idaho Military Division
- Background and Authorities for Investigations and Military Justice
- Investigations/Discipline Framework
- Investigations in Sexual Assault Cases
- Common Military Legal Issues in Civilian Criminal Cases
- Open Discussion/Questions

Required Disclaimers

Outcomes

- Gain shared understanding of the IMD and the IMD OGC's mission and purpose
- Develop understanding with Prosecutors and Defenders on how their criminal justice mission intersects with the IMD's military justice mission
- Raise awareness of the special nature of sexual assault in the military and what the IMD is doing to address military sexual assault and trauma with the partnership of the civilian legal community
- Build partnerships in the legal community

Overview of the IMD/IDNG

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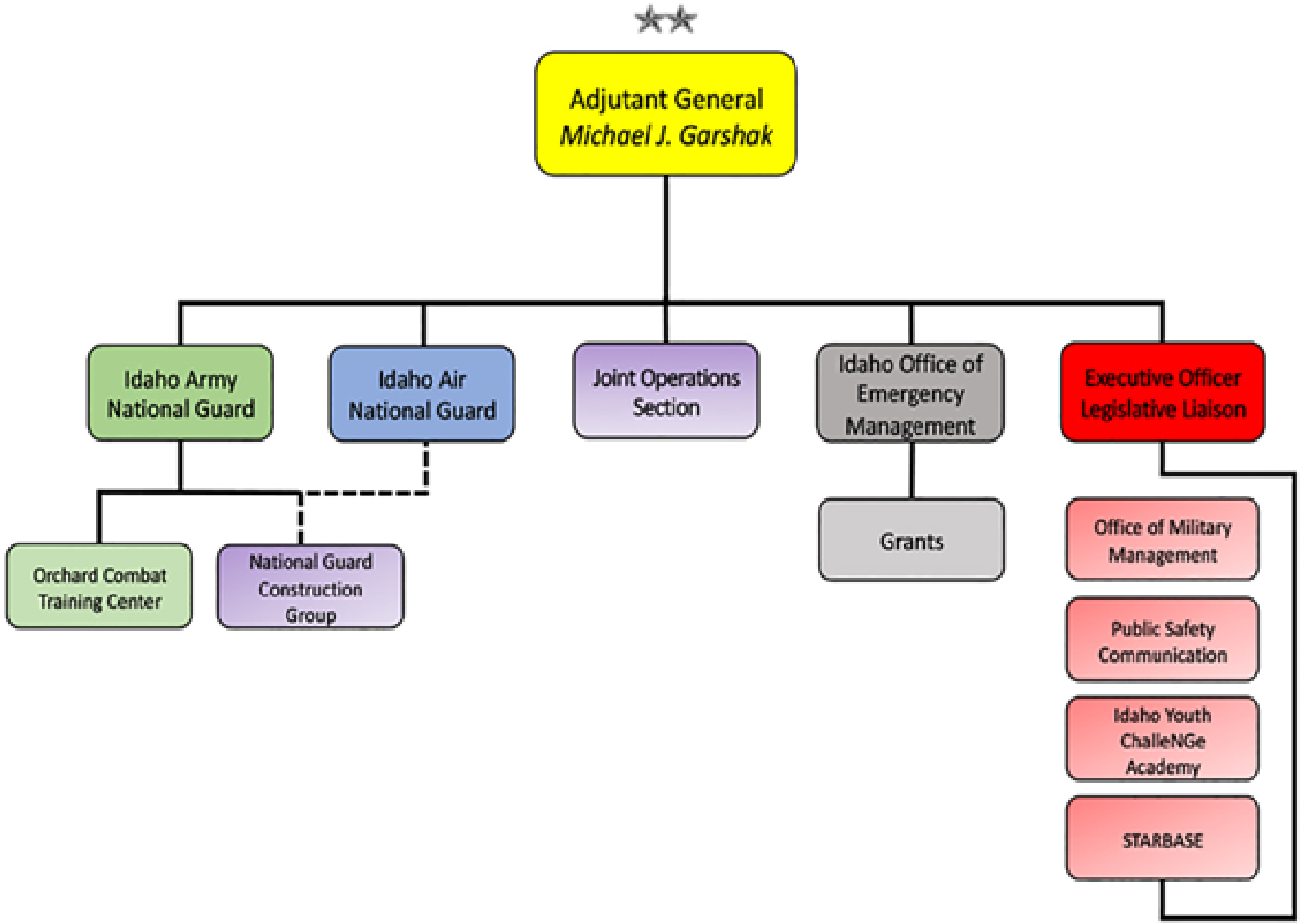
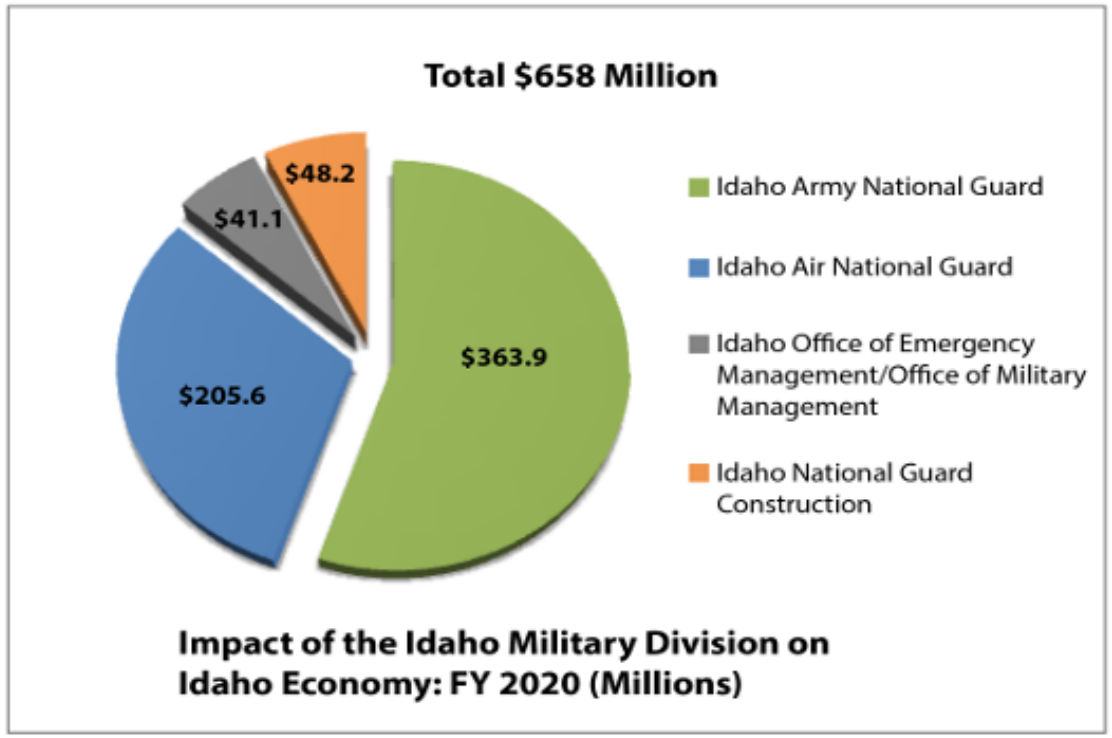
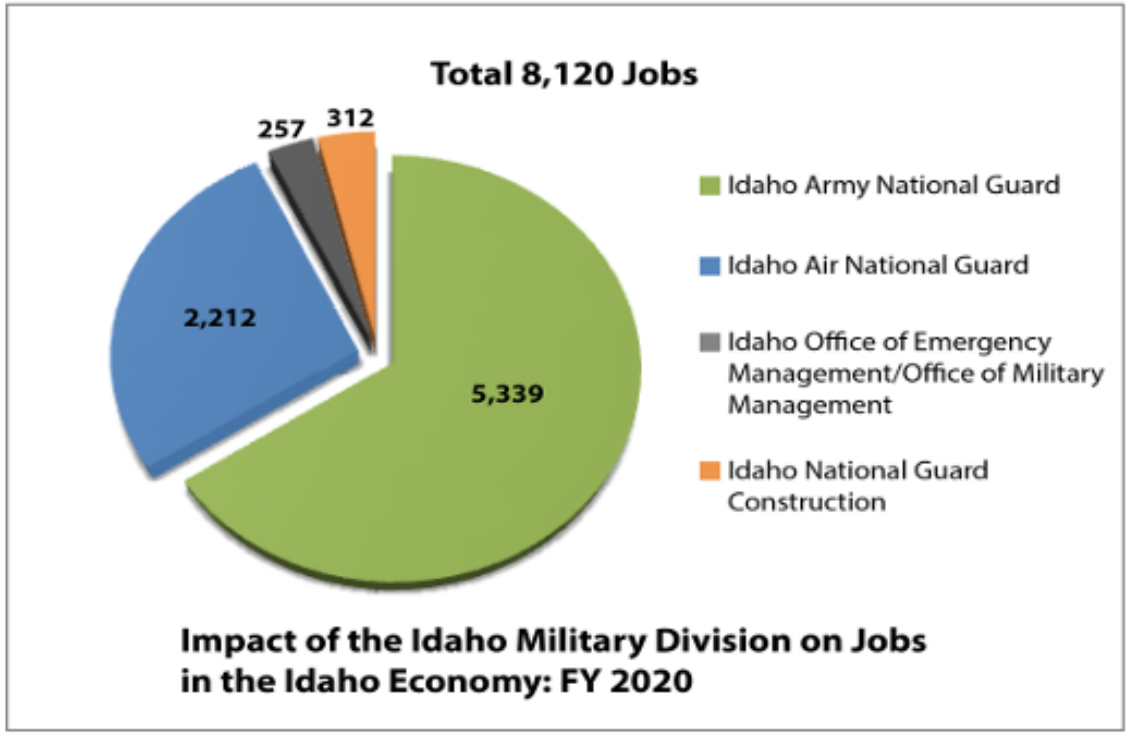
- The IMD is a state agency funded primarily by federal dollars
- Generally under the command of the Adjutant General and the Governor as commander in chief (Article IV, Section 4, Idaho Constitution)
- May be called to federal service under Title 10, United States Code
- Adjutant General's Strategic Imperatives
  - Maintain combat readiness to fight and win our nation's wars when called upon
  - Continue developing and strengthening our homeland security and emergency response readiness
  - Continue building and fostering partnerships throughout Idaho, the nation, and the world
- The Adjutant General's Vision: "To remain Idaho's premier public service organization; attracting our leading citizens, promoting a safe and secure environment for our state and nation."
- https://www.imd.idaho.gov/wp-content/uploads/2021/10/July-2021-Economic-Impact-FINAL.pdf
- www.imd.gov


Adjutant General
Michael J. Garshak
Idaho Army National Guard
Idaho Air National Guard
Joint Operations Section
Idaho Office of Emergency Management
Executive Officer Legislative Liaison
Orchard Combat Training Center
National Guard Construction Group
Grants
Office of Military Management
Public Safety Communication
Idaho Youth ChalleNGe Academy
STARBASE

IMD's Economic Impact

- IMD's overall economic impact is more than $658 million and 8,120 jobs.
  - Directly employs more than 6,400 people
  - Indirectly responsible for nearly 1,700 additional jobs

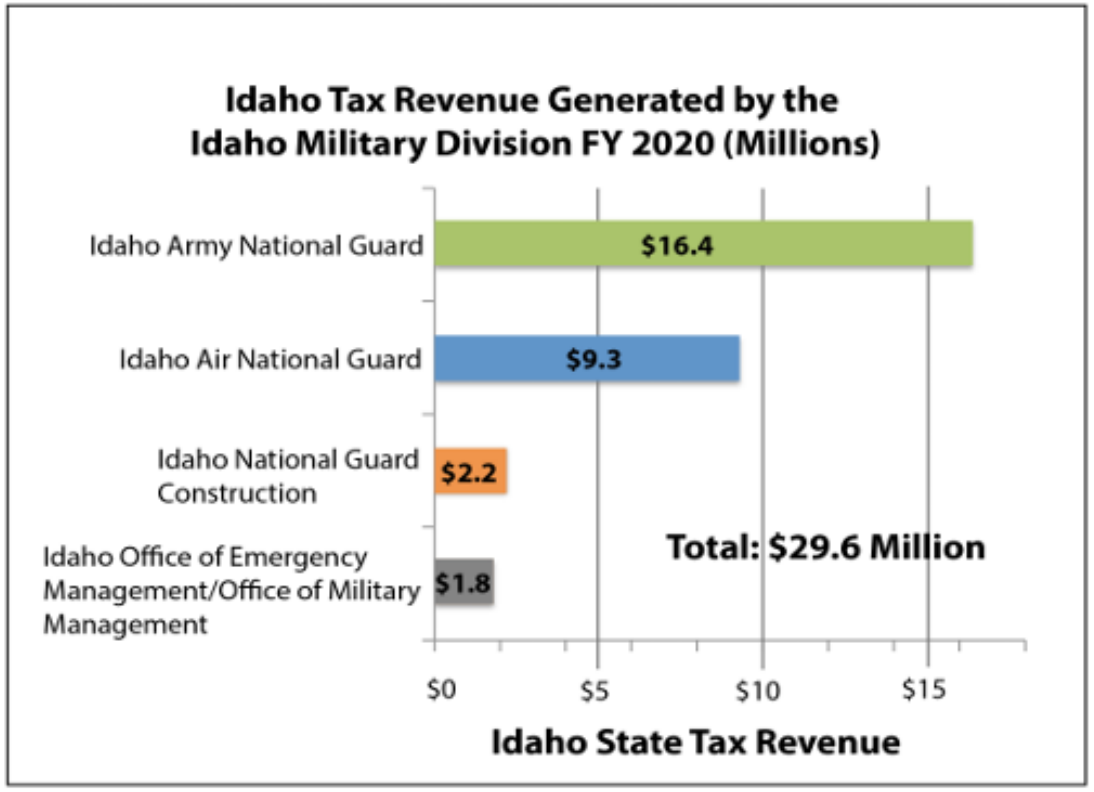


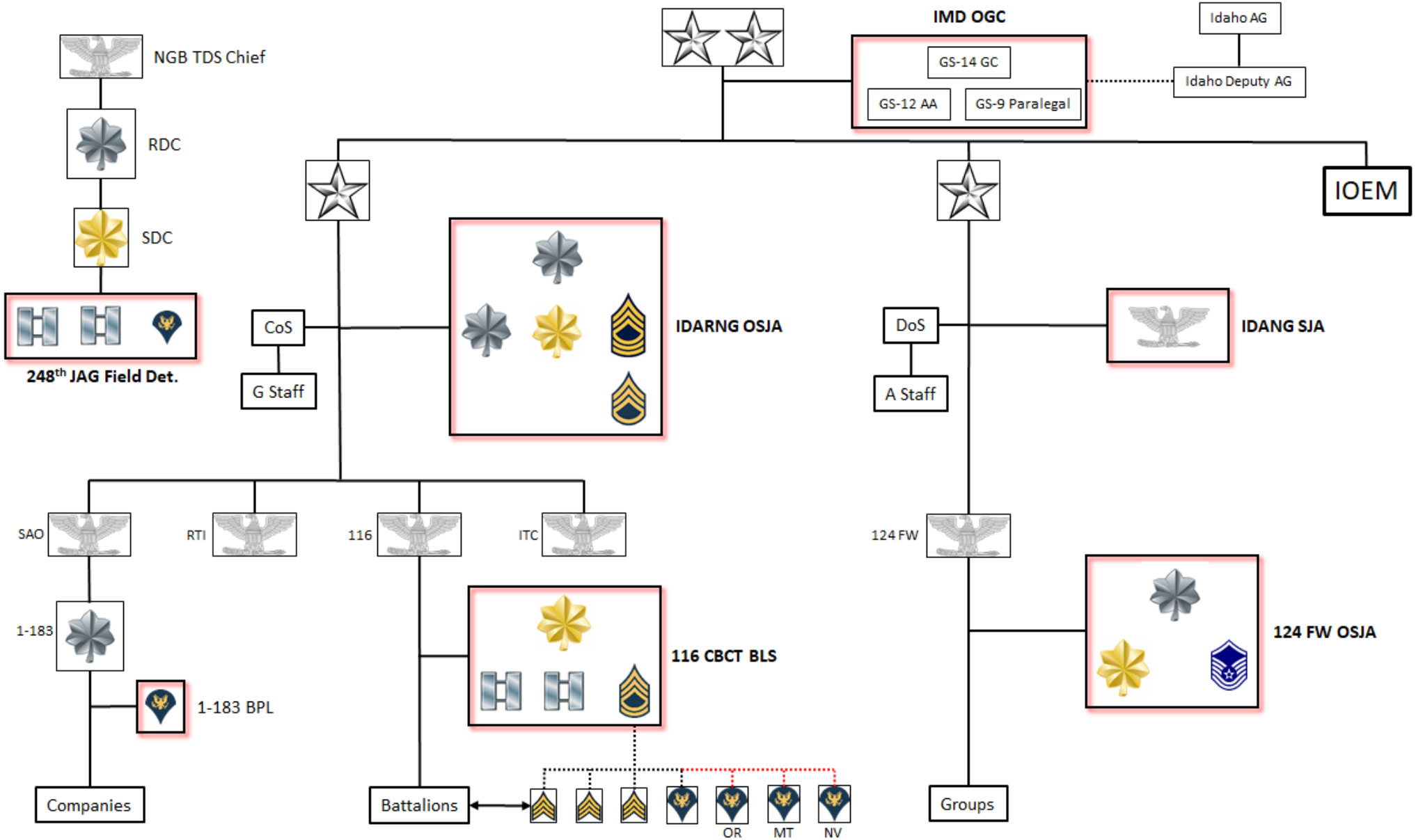


IMD's Economic Impact

- The State's fourth largest employer (as of 2020)
- $29.6 million in total tax revenue to the state of Idaho (as of 2020)
- IMD only receives appx. $7M from the general fund, while contributing approximately $30M

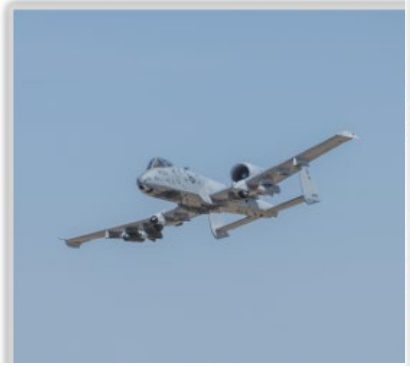
TOP PUBLIC & PRIVATE BUSNIESS IN IDAHO		
RANK	PRIMARY NAME	EMPLOYMENT RANGE*
1	St. Luke's Health System	13,000+
2	Walmart	7,000+
3	Micron Technology, Inc.	6,000+
4	**IDAHO MILITARY DIVISION**	**6,452**
5	BYU-Idaho	5,000+
6	Boise State University	5,000+
7	St.Alphonsus Health System	5,000+
8	University of Idaho	4,000+
9	West Ada School District #2	4,000+
10	Battelle Energy Alliance LLC	4,000+
*Source: Quarterly Report of Employment & Wages, Idaho Department of Labor		




IMD OGC
GS-14 GC
GS-12 AA
GS-9 Paralegal
Idaho AG
Idaho Deputy AG
NGB TDS Chief
RDC
SDC
248th JAG Field Det.
IOEM
CoS
G Staff
IDARNG OSJA
DoS
A Staff
IDANG SJA
SAO
RTI
116
ITC
1-183
1-183 BPL
116 CBCT BLS
124 FW
124 FW OSJA
Companies
Battalions
Groups
OR
MT
NV

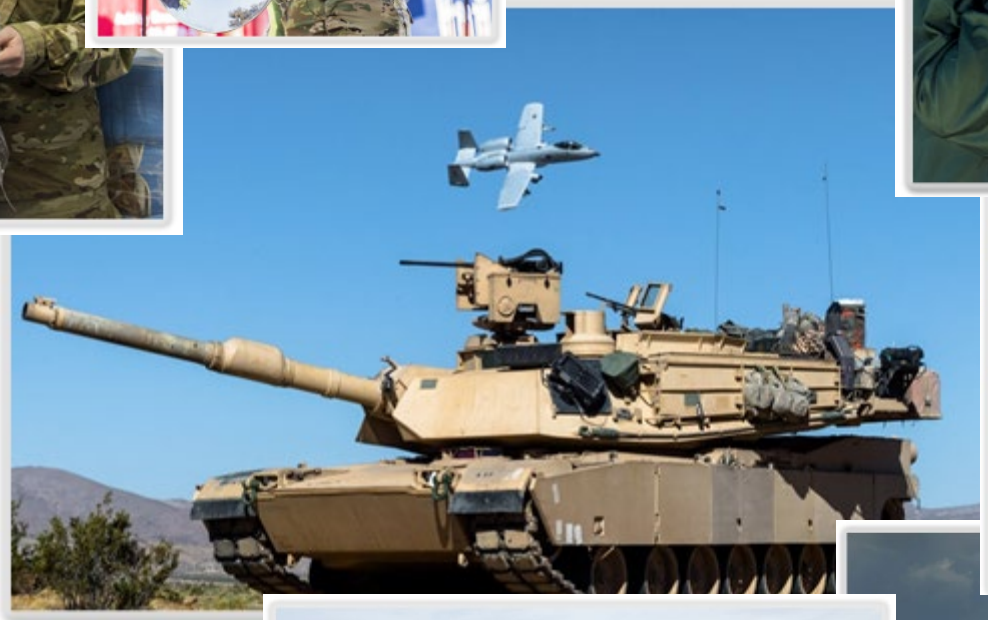
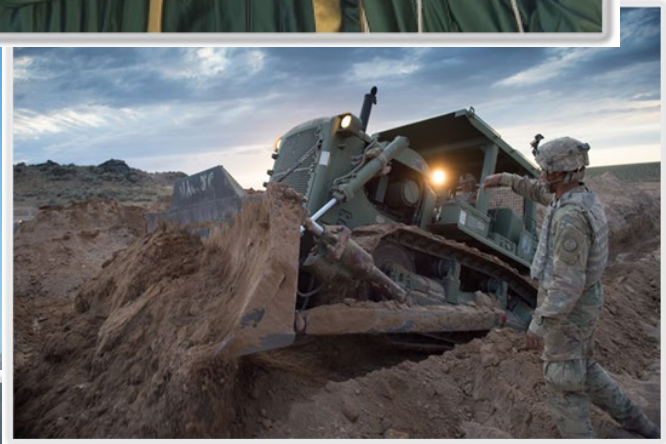
IMD OGC Mission: FAST, RIGHT, and USEFUL. The IMD OGC provides quick, correct, and useful legal support to the Adjutant General, Commanders, and Soldiers/Airmen of the IMD to ensure **maximum lethality of forces**, **maximum organizational** and personal legal **readiness**, and **lawful execution of the IMD's mission**.

IMD OGC Intent: Build THE premier JAG Corps team by training, developing, and retaining proactive professionals, forged by the Warrior Ethos, who deliver wise counsel and mission-focused legal services.




ARMY




Background and Authorities for Investigations/Discipline

Sources of Legal Authority for Military Justice

- Title 10 (Active Duty and Reserves)
  - President is Commander-in-Chief, authority delegated thru SECDEF, Service Secretaries, and Chain of Command
  - Uniform Code of Military Justice, 10 USC 801 et. seq
  - Manual for Courts-Martial (2019 Edition)
  - Rules for Courts-Martial
  - Military Rules of Evidence
  - Service-specific Military Justice Regulations and Forms, e.g., Army Regulation 27-10
- Title 32 (National Guard, when in a Federal Status)
  - Governor is Commander-in-Chief, authority delegated to the Adjutant General, Assistant Adjutants-General, and Chain of Command
  - Idaho Code of Military Justice, I.C. 46-1102
  - IMD 22
  - Rules for Courts-Martial
  - Military Rules of Evidence
  - Service-specific Military Justice Regulations and Forms
- State Active Duty (National Guard, when in a State Status)
  - Governor is Commander-in-Chief, authority delegated to the Adjutant General, Assistant Adjutants-General, and Chain of Command
  - Idaho Code of Military Justice

What are the legal authorities for IDNG MJ Ops?

- Prosecuting cases under the ICMJ is fundamentally a state criminal justice action within a military tribunal!
- Idaho Code Section 46-112
  - (1) "The adjutant general is responsible to the governor for the … discipline … of the national guard."
  - (2)(c) "The adjutant general, as the military chief of staff, will: supervise and direct the … discipline … of the national guard.
- Idaho Code of Military Justice, I.C. 46-1102, et. Seq
  - Updated in 2015 and 2019
  - Mirrors the UCMJ, with a few exceptions, e.g. Judge certification, NJP turndown
- Idaho Code Section 46-1104
  - "The adjutant general shall have the authority to promulgate such regulations as he deems necessary and proper to carry out the intent of this code."

What are the legal authorities for IDNG MJ Ops?

- IMD-22, Idaho Code of Military Justice
  - Adopts the Uniform Code of Military Justice, 10 USC 801, et. Seq (Elements of the Offenses, Common Definitions, Model Specifications, etc.) -- procedural, not substantive
  - Adopts the Rules for Courts-Martial
  - Adopts the Military Rules of Evidence
  - Adopts all relevant DoD, Army, and Air Force forms
  - "Unless contrary to Idaho Law"
- Uniform Code of Military Justice
  - Punitive Articles and Model Specifications
  - Various procedures for actions, e.g., NJP procedure
- Military Rules of Evidence
- Rules for Court-Martial

Who Does the ICMJ Apply to?

- All members of the state military forces when serving in a title 32 or a state active duty status.
- Jurisdiction is established if a nexus exists between an offense, either military or non-military, and the state military forces, regardless of duty status.
  - 24/7 jurisdiction, so long as there is a nexus
  - Case law provides 12 factors to determine nexus
- **Civilian courts have primary jurisdiction of non-military offenses when an act violates both the ICMJ and local criminal law.** Punitive actions may only be initiated after the civilian authority has declined to prosecute.

What Crimes does the ICMJ Cover?

- Common Criminal Crimes
  - Examples: Rape, Murder, Theft, Arson, Assault, Battery, DUI, Etc.
  - Must defer to civilian courts
  - Article 2, ICMJ, “A proper civilian court has primary jurisdiction of a nonmilitary offense when an act or omission violates both this code and local criminal law. In such a case, a court-martial may be initiated only after the civilian authority has declined to prosecute or dismissed the charge, provided jeopardy has not attached.”
- Military Crimes
  - Examples: AWOL, Disrespect, Drunk on Duty, Malingering, Conduct Unbecoming, Etc.
  - Article 2, ICMJ, “Courts-martial convened by the governor or his designated representative have primary jurisdiction of military offenses.”
- Generic Catch All Provision – Article 134
  - "All disorders and neglects to the prejudice of good order and discipline" and/or
  - "All conduct of a nature to bring discredit upon the state military forces" and/or
  - "Those offenses set out in the manual for courts-martial …, those offenses that violate the criminal laws of the state where the offense occurred, and those offenses that violate the criminal laws of the United States."

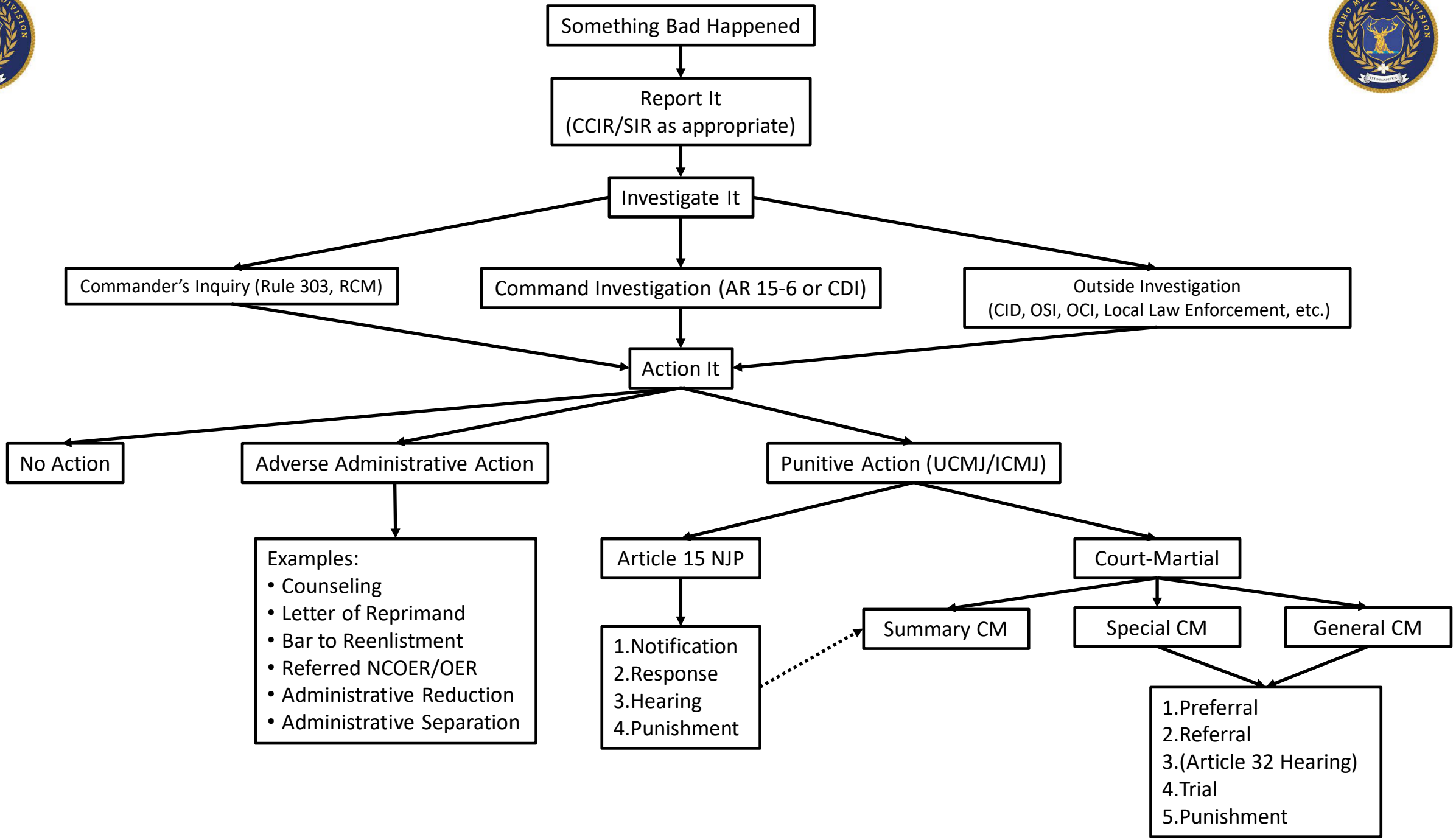
What is the Purpose of the Military Justice System?

- Basic Purpose of Any Criminal Justice System
  - Discover the truth
  - Acquit the innocent without unnecessary delay or expense
  - Punish the guilty proportionately for their crimes
  - Rehabilitate the guilty (if possible)
  - Prevent and deter future crime
- Specific Purposes of Military Justice System
  - Discover the truth
  - Promote justice
  - Assist in maintaining good order and discipline in the armed forces
  - Promote efficiency and effectiveness in the military establishment
  - Punishment, rehabilitation, deterrence
  - Strengthen the national security of the United States

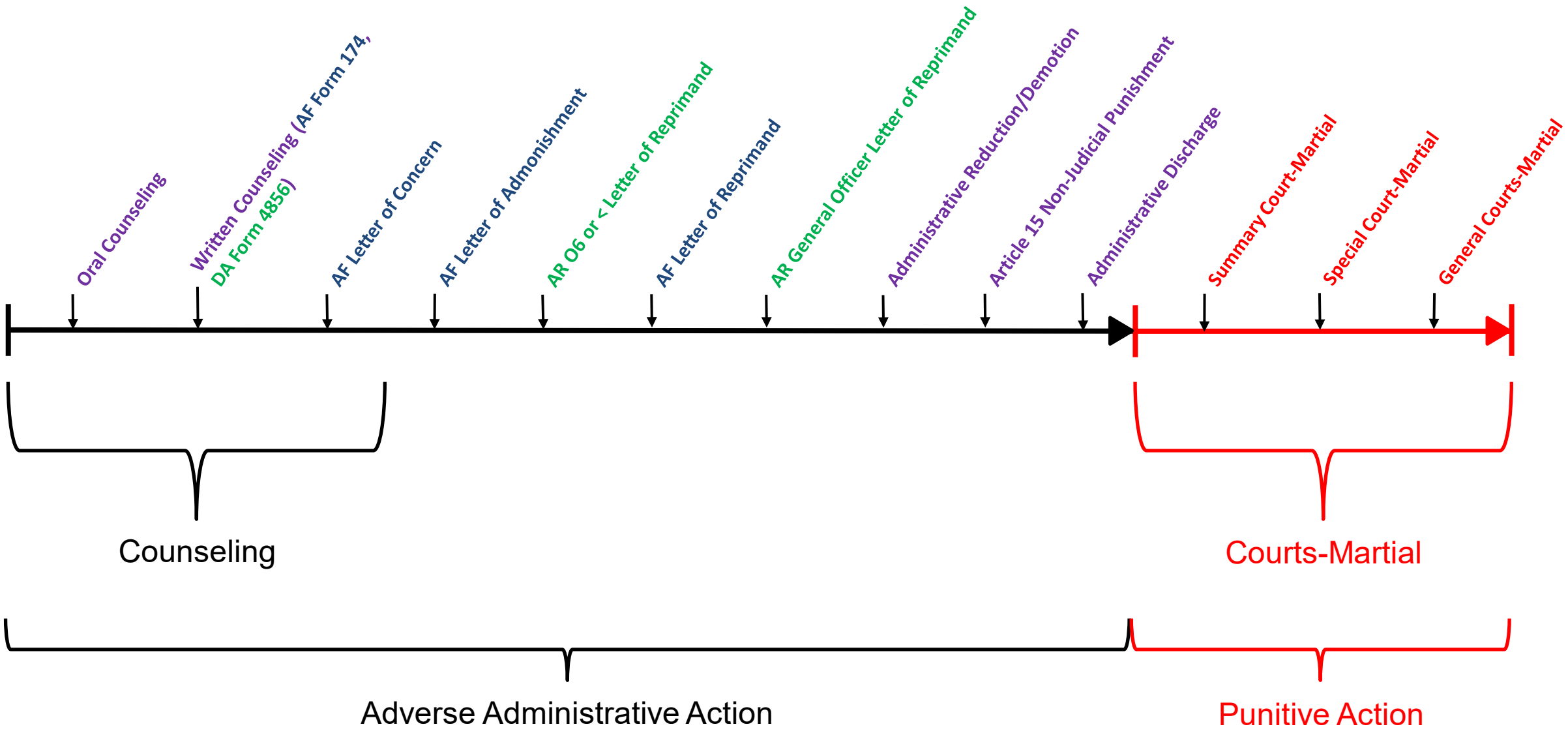
What is the Role of the Commander?

- "A Commander's System"
- Commander's Discretion
- Commander's Roles
  - Reporter
  - Investigator
  - Prosecutor
  - Judge (Sometimes)
  - Jury (Sometimes)
- Beware of Unlawful Command Influence

Investigations/Disciplinary Framework

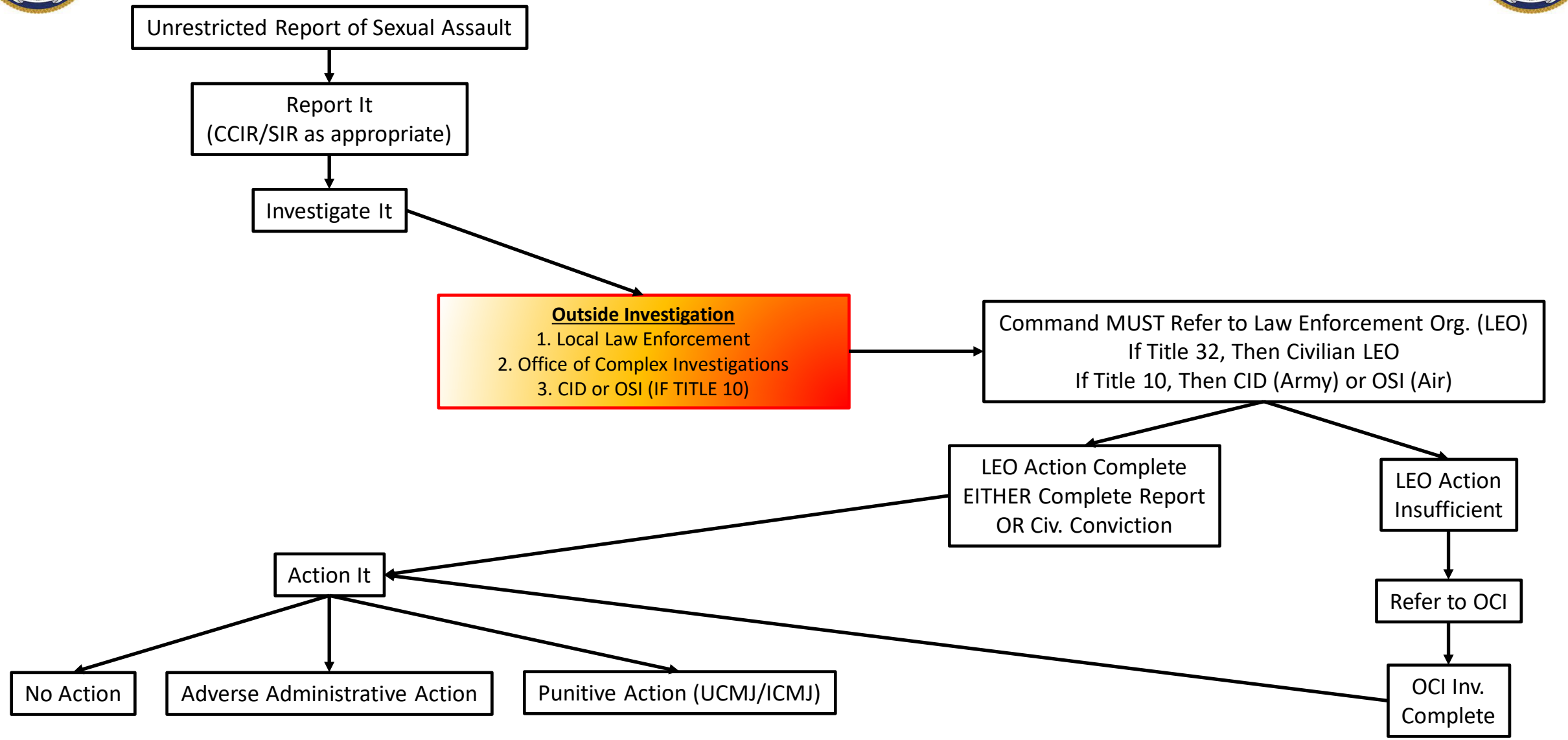

Something Bad Happened
Report It
(CCIR/SIR as appropriate)
Investigate It
Commander's Inquiry (Rule 303, RCM)
Command Investigation (AR 15-6 or CDI)
Outside Investigation
(CID, OSI, OCI, Local Law Enforcement, etc.)
Action It
No Action
Adverse Administrative Action
Punitive Action (UCMJ/ICMJ)
Examples:
• Counseling
• Letter of Reprimand
• Bar to Reenlistment
• Referred NCOER/OER
• Administrative Reduction
• Administrative Separation
Article 15 NJP
1.Notification
2.Response
3.Hearing
4.Punishment
Court-Martial
Summary CM
Special CM
General CM
1.Preferral
2.Referral
3.(Article 32 Hearing)
4.Trial
5.Punishment

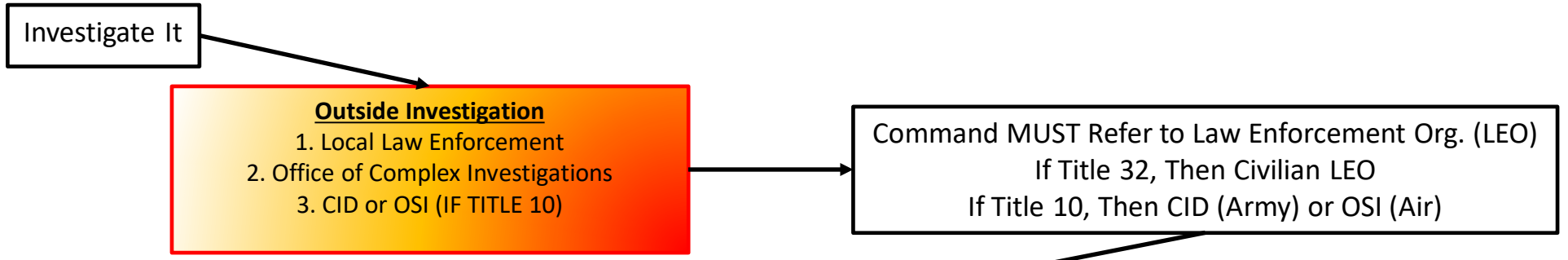
“Action It” - Disciplinary Continuum

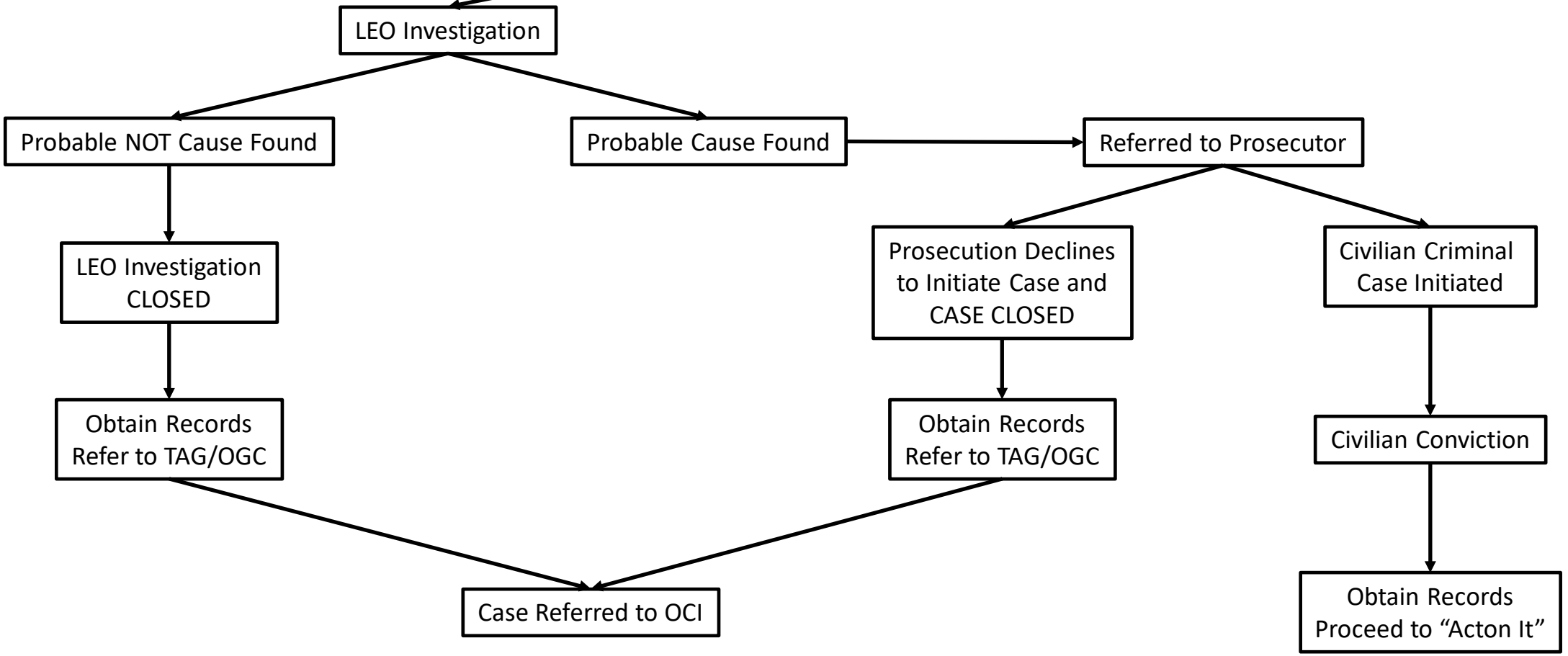


Special Considerations for SA Cases

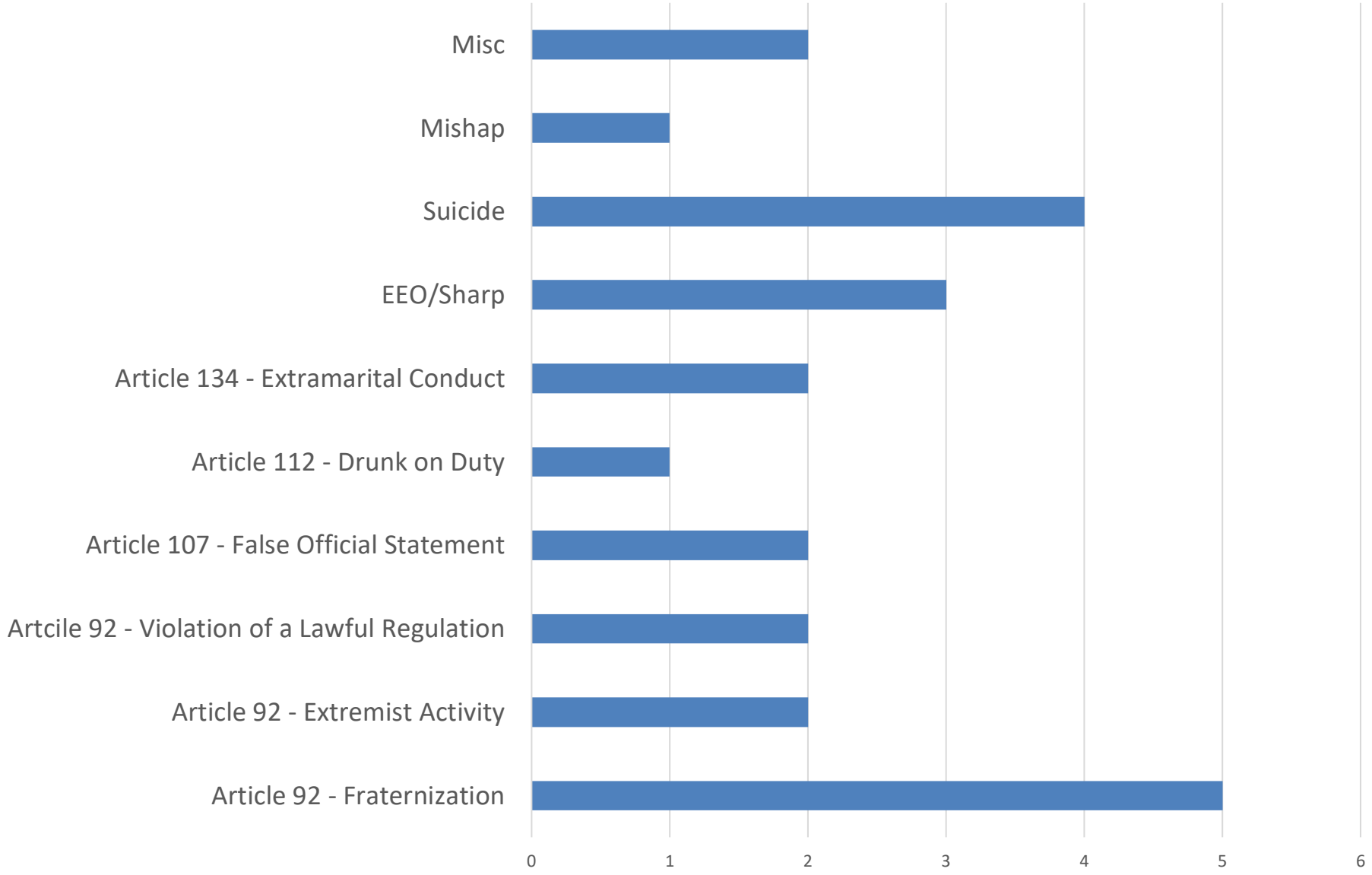
Investigations/Disciplinary Framework


Unrestricted Report of Sexual Assault
Report It
(CCIR/SIR as appropriate)
Investigate It
Outside Investigation
1. Local Law Enforcement
2. Office of Complex Investigations
3. CID or OSI (IF TITLE 10)
Command MUST Refer to Law Enforcement Org. (LEO)
If Title 32, Then Civilian LEO
If Title 10, Then CID (Army) or OSI (Air)
LEO Action Complete
EITHER Complete Report
OR Civ. Conviction
LEO Action
Insufficient
Refer to OCI
OCI Inv.
Complete
Action It
No Action
Adverse Administrative Action
Punitive Action (UCMJ/ICMJ)

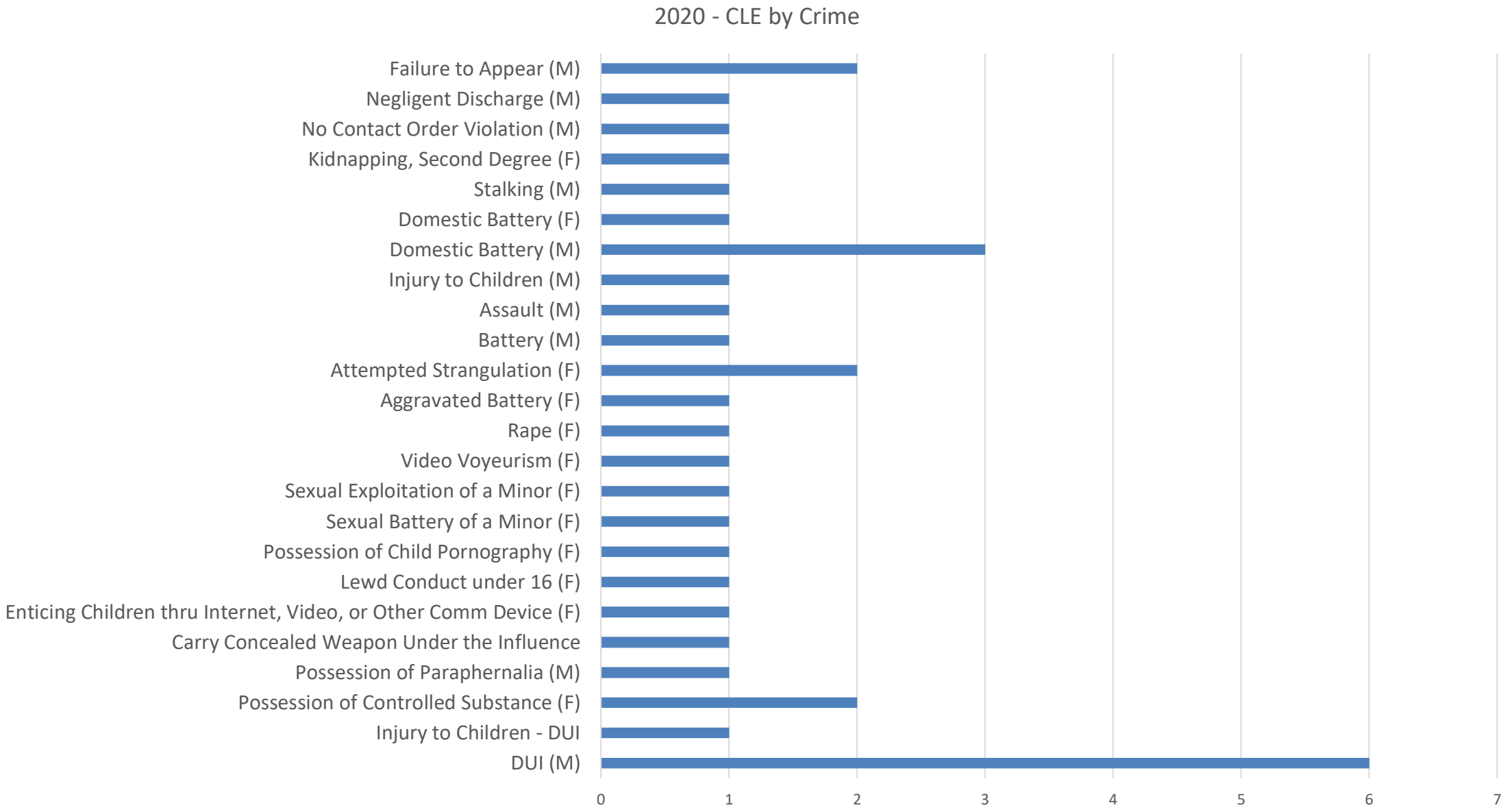

Investigate It
Outside Investigation
1. Local Law Enforcement
2. Office of Complex Investigations
3. CID or OSI (IF TITLE 10)
Command MUST Refer to Law Enforcement Org. (LEO)
If Title 32, Then Civilian LEO
If Title 10, Then CID (Army) or OSI (Air)


LEO Investigation
Probable NOT Cause Found
Probable Cause Found
Referred to Prosecutor
LEO Investigation CLOSED
Prosecution Declines to Initiate Case and CASE CLOSED
Civilian Criminal Case Initiated
Obtain Records Refer to TAG/OGC
Obtain Records Refer to TAG/OGC
Civilian Conviction
Case Referred to OCI
Obtain Records Proceed to “Acton It”

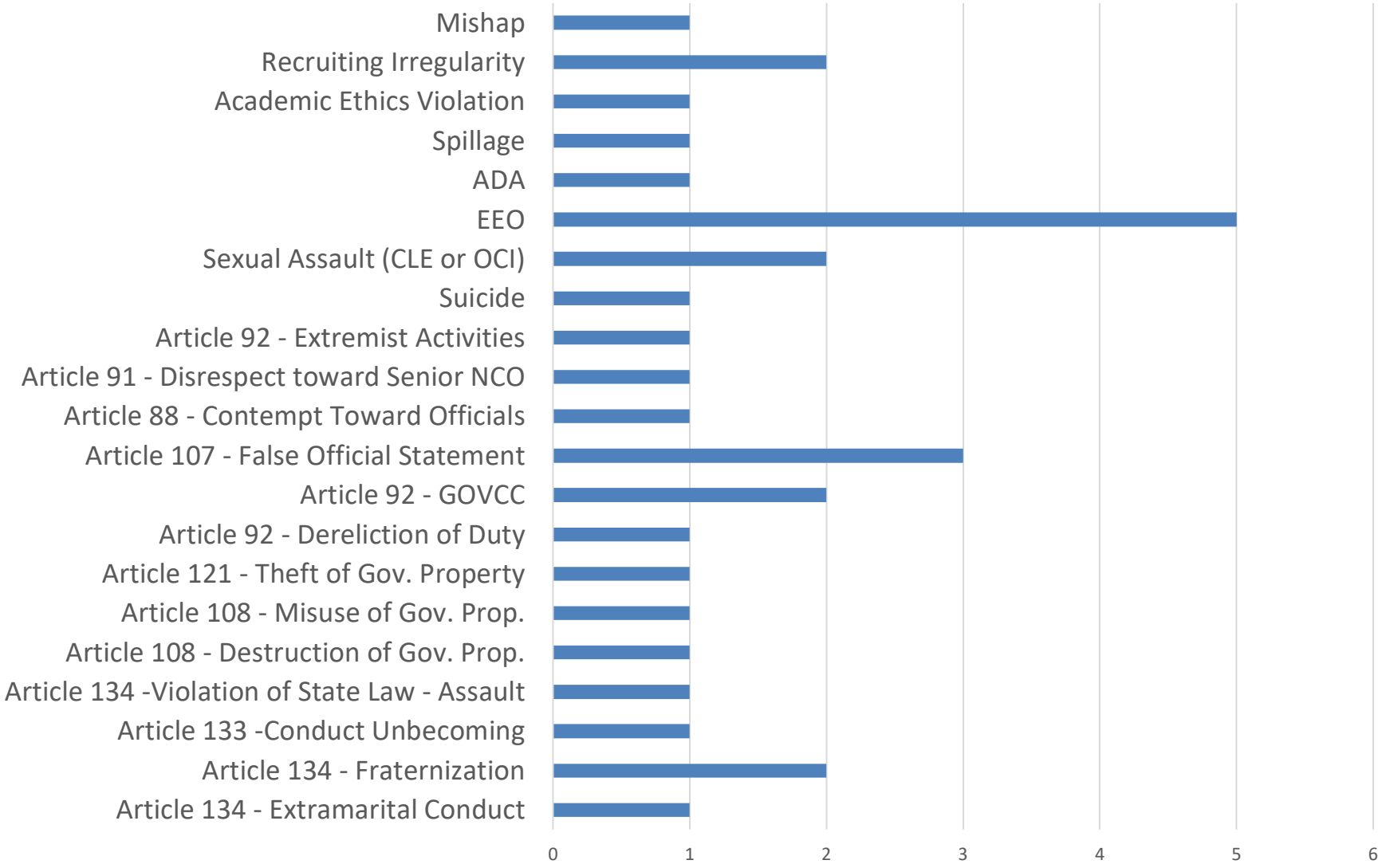
2020 Military Misconduct/Investigations



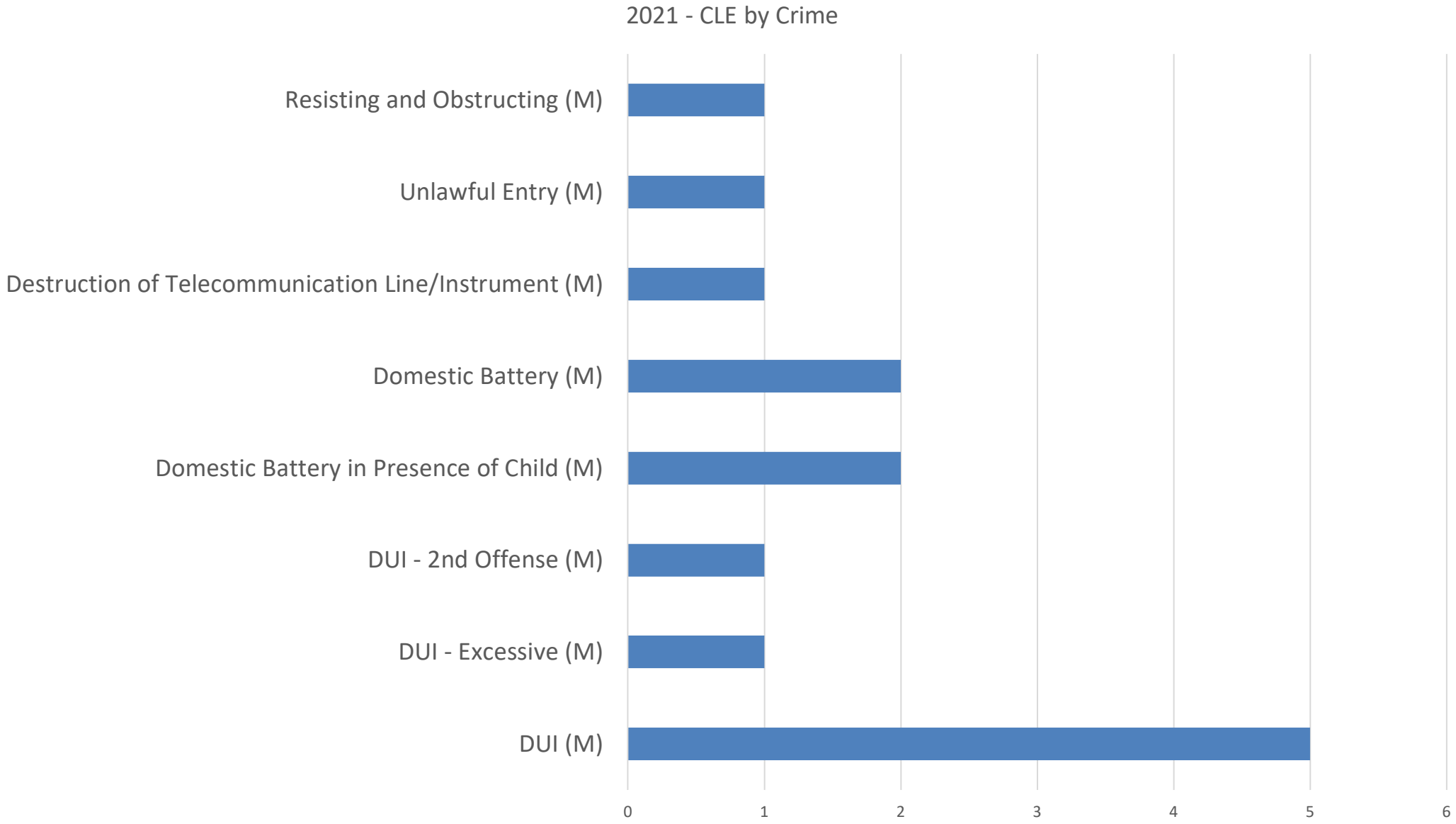
2020 Civilian Criminal Misconduct



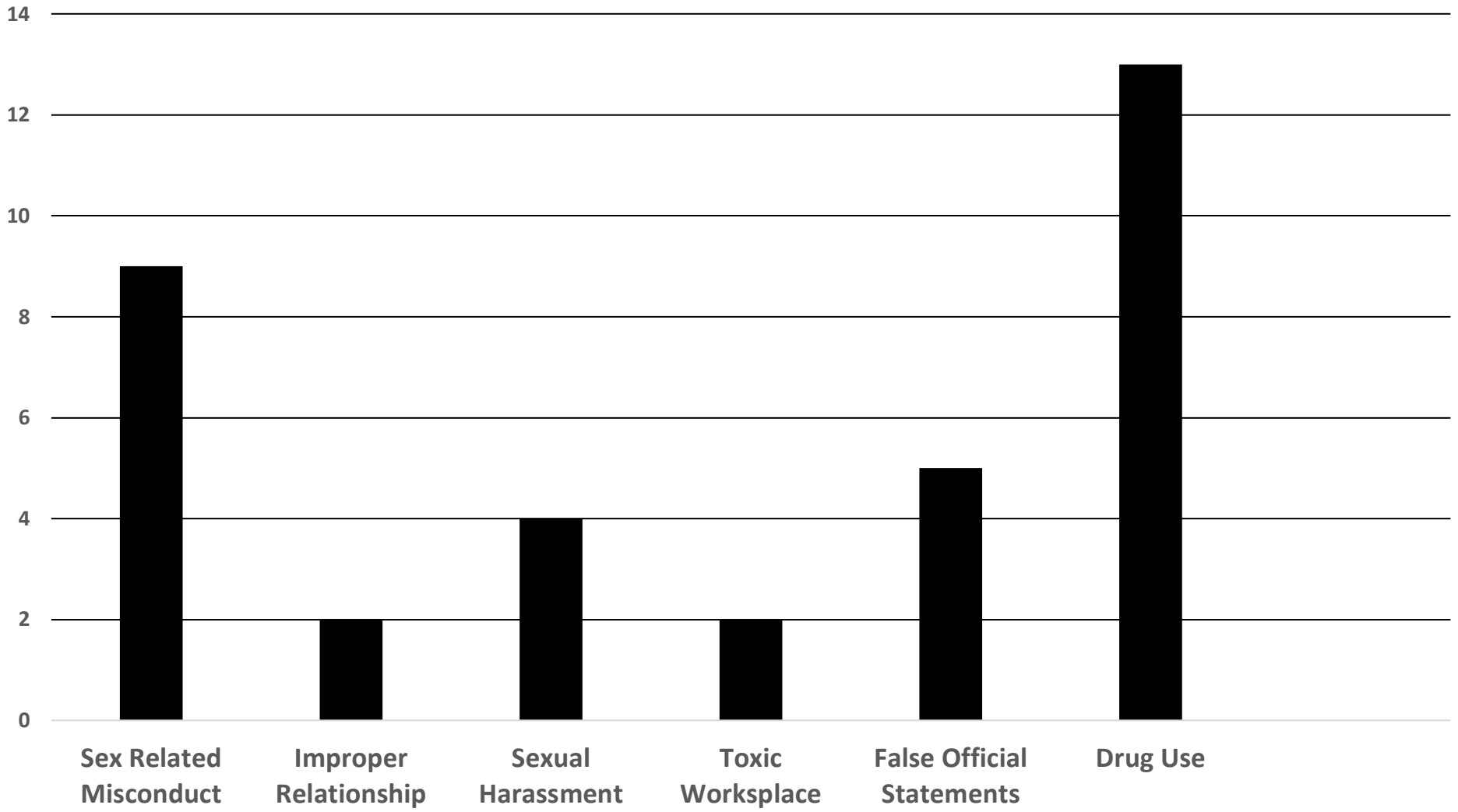
2021 Military Misconduct/Investigations



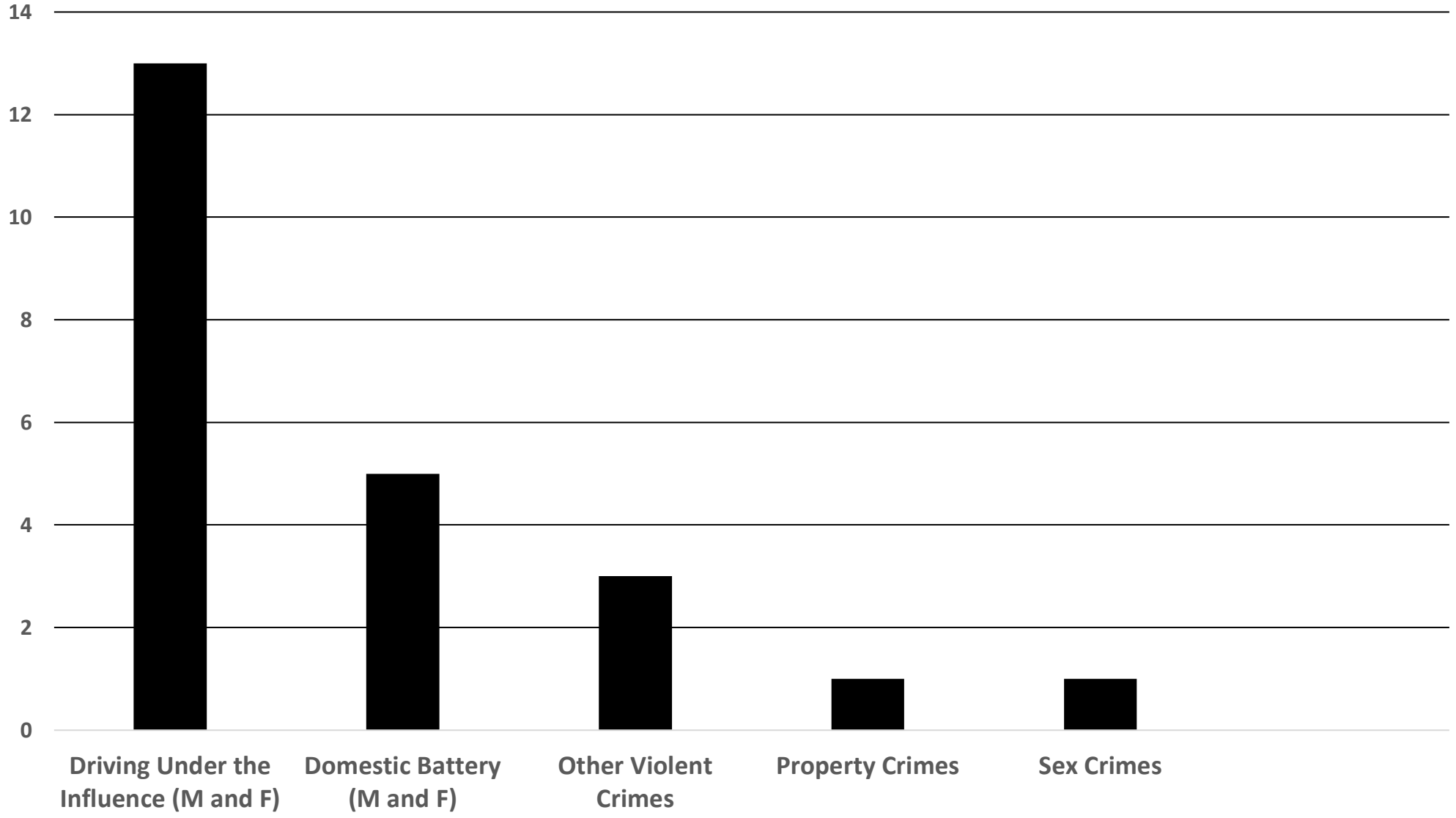
2021 Civilian Criminal Misconduct



2023 Military Misconduct/Investigations



2023 Civilian Criminal Misconduct



Military Misconduct Resulting in Adverse Action
TY2023 (Data Incomplete)

Offense	Rank
Hostile Workplace	2: O5, E6
Sexual Harassment	5: E4, E6 (x2), O6
Extramarital Sexual Conduct	8: E6 (x4) E8 (x4)
Indecent Exposure	1: E6
Government Ethics/Contracting	2: E6, E7
Fraternization	2: E5 (x2)
Dereliction of Duty	1: E7
Improper Disclosure of PII	1: E7
Accessory/Conspiracy/False Official Statement	2: E7 (x2)
False Official Statement	3: E6, E8, O3
Failure to Follow a Lawful Order	1: E6
Communicating Indecent Language	1: E6
Wrongful Use of Controlled Substance	13: E3 (x2), E4 (x5), E5 (x4), E6, E7

Common Issues in Civilian Criminal Cases

Lautenberg

Domestic Violence

- 18 USC §922 prohibits the possession of firearms and ammunition by persons:
  - Convicted of Misdemeanor Crime of Domestic Violence
  - Subject to certain protective orders, and
  - Convicted of a felony
- Army Regulation 600-20, Paragraph 4-22 dictates command responsibility for persons convicted of domestic violence
  - Must notify Soldier
  - Soldier is exempt from weapon's handling requirements
  - Soldier has a period of time to have conviction set-aside

Protection Orders

- 18 USC §922(g) prohibits possession of firearms when subject to certain orders if order prohibits contact with an “intimate partner” or “child of intimate partner”
- “Intimate partner” also includes former cohabitation
- See 18 USC §922(g)(8) Outlines notice and hearing requirements, and required terms of the order
- Standard Supreme Court form Language:
  - “do not harass, stalk, threaten, use, attempt to use or threaten use of physical force, engage in any other conduct that would place the protected person(s) in reasonable fear of bodily injury”
  - Triggers 18 USC §922(g)(8) prohibition

Separation Based on Civilian Criminal Conduct

Basis for Separation

- Separation may be based on:
  - Conduct that has not been charged or is still pending final adjudication
  - Convicted in civilian court (may be presentencing)
- Separation may result in an unfavorable characterization of service, which could have long-lasting effects on the member's life

Security Clearance Issues

AR 380-67 (Personnel Security Program)

- Security clearances are necessary for all but the most junior positions.
- A conviction is not required for revocation of clearance
- Revocation of clearance may result in separation or a bar to continued service (Soldier cannot reenlist)

Open Discussion/Questions

Summary

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