U.S. Department of Transportation

United States Coast Guard

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COAST GUARD HANDBOOK

ON MILITARY AND CIVIL LAW

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NAVAL JUSTICE SCHOOL
NEWPORT RHODE ISLAND

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PREFACE

The Coast Guard Handbook is divided into five separate sections as follows:

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This publication is designed to explain the rather complex legal principles and procedures inherent in the military justice and civil law system. Its aim is to assist commanders in discharging their responsibilities under the Uniform Code of Military Justice. In some cases, the explanations of law have been somewhat over-simplified for the purpose of clarity and represent only general rules. There may be some uncommon situations where the general rule does not properly resolve the problem. Accordingly, this publication should not be utilized without supplementary legal research.

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COAST GUARD HANDBOOK

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CHAPTER I

THE LAW OF PRIVILEGES

INTRODUCTION TO THE LAW OF PRIVILEGES

The law concerning privileges, found in Section V of the Military Rules of Evidence, represents the President's determination that it is in the best interests of the public to prohibit the use of specific evidence arising from a particular relationship in order to encourage such relationships and to preserve them once formed. For instance, it is considered to be in the public's best interest that the institution of marriage be preserved. Therefore, as will be explained in this chapter, evidentiary rules exist which prohibit, under certain circumstances, compelling one spouse to testify against the other or the disclosing by one spouse of confidential communications made between the spouses during their marriage. Such prohibitions represent public policy determinations that the rules of this privilege will foster the preservation of the institution of marriage and, further, that the public need for the preservation of the marital bonds outweighs the benefits that would be obtained at court if such prohibitions did not exist.

This section will explain several of the more common privileges recognized by the military. Understanding these privileges is important because they apply not only at courts-martial, but at administrative discharge boards, NJP, pretrial investigations, courts of inquiry, and requests for search authorization.

HUSBAND-WIFE PRIVILEGE - MIL.R.EVID. 504

A. Mil.R.Evid. 504 sets forth two distinct privileges. One relates to the capacity of one spouse to testify against the other (spousal incapacity). The other privilege relates to confidential communications between the spouses while married.

1. Spousal incapacity. Under this privilege, a person has the right either to elect to testify or refuse to testify against his or her spouse, if, at the time the testimony is to be introduced, the parties are lawfully married. A lawful marriage will also include a common-law marriage if contracted in accordance with the law of a state which recognizes common-law marriages. If, at the time of testifying, the parties are divorced, or if their marriage has been legally annulled, the privilege will not be available.

Assume, for example, A commits a crime and is brought to trial when lawfully married to B. B, if called to testify against A, may refuse to testify against A. Conversely, B may elect to testify against A, even over A's objection. The privilege to refuse to testify belongs solely to the witness spouse, not to the accused spouse. If A and B were married at the time A committed the crime and, before A's trial A and B were divorced, B would have no privilege to refuse to testify against A, since this privilege is

permitted only if the parties are lawfully married at the time the testimony is to be taken.

2. Confidential communication. Any communication made between a husband and wife while they were lawfully married is privileged if the communication was made in a manner in which the spouses reasonably believed that they were conducting a discussion in confidence, i.e., the communications were made privately and not intended to be disclosed to third parties. The key concepts that trigger this privilege are: (1) The confidentiality of the communication, and (2) the existence of a lawful marriage at the time the communication was made.

This privilege may be asserted by either the testifying spouse or the accused spouse. However, the privilege will not prevent the disclosure of a confidential communication, even if otherwise privileged, if the accused spouse desires that the communication be disclosed.

Assume A and B are lawfully married when A tells B, in confidence, that he robbed a bank. B, if called to testify, even if she elects to testify about what she observed, may assert the confidential communication privilege and refuse to testify about what A told her in confidence. Also, A may assert the confidential communication privilege and prevent B from disclosing A's statement. The situation would be the same, even if A and B were legally divorced at time of trial. Unlike the refusal to testify privilege, the marital status of the parties at time of trial is irrelevant. As long as the confidential communication was made while the parties were lawfully married, the confidential communication privilege may be asserted.

B. Neither the privilege to refuse to testify nor the confidential communication privilege exist if:

1. One spouse is charged with a crime against the person or property of the other spouse or against the child of either spouse; or

2. the marriage is a sham, i.e, the marital relationship was entered into with no intention of the parties to live together as husband and wife.

CLERGY-PENITENT PRIVILEGE - MIL.R.EVID. 503

A. Under this rule, a person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal matter of religion or as a matter of conscience.

B. The rule defines a clergyman as a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting a clergyman. This definition lends itself to a broad spectrum of interpretations. It is therefore difficult to determine who may constitute a "similar functionary of a religious organization." Some guidance is provided by the Advisory Committee to the Federal Rules of Evidence. With respect to the proposed Federal Rule of Evidence concerning this clergyman-penitent privilege, the Advisory Committee noted that a "clergyman" is regularly engaged in activities conforming at least in a

general way with those of a Catholic priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis. The definition of "clergyman" in light of the Advisory Committee's considerations would not appear to be so broad as to include self-styled or self-determined ministers.

C. The privilege may be asserted by the person concerned or by the clergyman or clergyman's representative on behalf of the penitent. It may be waived only by the penitent.

DOCTOR-PATIENT PRIVILEGE - MIL.R.EVID. 501(d)

The Military Rules of Evidence do not recognize any doctor-patient privilege. Statements made by a military member to either a civilian or military physician are not privileged and, assuming such statements are otherwise admissible, the statements may be disclosed and admitted into evidence at a courts-martial. Information obtained while interviewing a member exposed to the acquired immune deficiency syndrome (AIDS) virus, for treatment or epidemiologic purposes, however, may not be used to support any adverse personnel action. These adverse personnel actions include court-martial, nonjudicial punishment, involuntary separation if for other than medical reasons, administrative or punitive reduction in grade, denial of promotion, unfavorable entries in personnel records and a bar to enlistment.

CLASSIFIED INFORMATION

As a general rule, classified information is privileged from disclosure if disclosure would be detrimental to national security. Classified information is any information or material that has been determined by the United States Government, pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security. The privilege may be invoked only by the head of the executive or military department having control over the matter. When faced with a request for disclosure of classified information, a convening authority should withhold the information and seek the advice of the trial counsel or staff judge advocate. Improper release of classified information waives the privilege and could detrimentally affect national security.

CHAPTER II

THE LAW OF SELF-INCRIMINATION

ARTICLE 31 OF THE UNIFORM CODE OF MILITARY JUSTICE

A. Text. Article 31 provides a number of protections.

1. No person subject to this chapter may compel any person to incriminate himself or to answer any questions the answer to which may tend to incriminate him.

2. No person subject to this chapter may interrogate or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected, and that any statement made by him may be used as evidence against him in a trial by court-martial.

3. No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

4. No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement, may be received in evidence against him in a trial by court-martial.

B. General discussion. The concern of Congress in enacting article 31 was the interplay of interrogations with the military relationship. Specifically, because of the effect of superior rank or official position, the mere asking of a question under certain circumstances could be construed as the equivalent of a command. Consequently, to ensure that the privilege against self-incrimination was not undermined, article 31 requires that a suspect be advised of specific rights before questioning can proceed.

C. To which interrogators does article 31 apply? Article 31(b) requires a "person subject to this chapter" (UCMJ) to warn an accused or suspect prior to requesting a statement or conducting an interrogation. The term "person subject to this chapter" has been the subject of some confusion. Basically, all military personnel, when acting for the military, must operate within the framework of the UCMJ. Thus, when military personnel act as investigators or interrogators, they must warn a suspect under article 31(b) prior to conducting an interview of the suspect.

The warning requirement similarly applies to informal counseling situations conducted in an official capacity. Statements obtained from an accused or suspect would not be admitted in a subsequent court-martial unless the "counselor" complied with article 31.

On the other hand, when military personnel are acting in a purely private capacity, no warning is required. For example, where Seaman Spano questions Seaman Yuckel about Spano's missing radio, no warning is required, assuming Spano's primary purpose is to regain his property. Yuckel's admission that he stole the radio will be admissible at trial, provided Spano did not force or coerce the statement.

D. Application to other interrogations. Military law enforcement agents must comply with article 31(b) in all military interrogations. This rule applies with equal force to civilians acting as base or station police when acting as agents of the military.

Civilian law enforcement officers are not required to give an article 31(b) warning prior to questioning a military person suspected of a military offense, so long as they are acting independently of military authorities. In such cases, the civilians are not acting in furtherance of a military investigation, unless the civilian investigation has merged with a military investigation. Situations arise where a servicemember may be investigated by both Federal and military authorities jointly. Merely because a parallel set of investigations are being conducted through cooperation by military and Federal or state authorities does not make the civilians agents of the military. Thus, no article 31(b) warning will usually be required of civilian authorities unless they act directly for the military, or the two investigations are merged into one.

E. Who must be warned? Article 31(b) requires that an accused or suspect be advised of his rights prior to questioning or interrogation. A person is an accused if charges have been preferred against him or her. On the other hand, to determine when a servicemember is a suspect is more difficult. The test applied in this situation is whether suspicion has crystallized to such an extent that a general accusation of some recognizable crime can be made against this individual. This test is objective. Courts will review the facts available to the interrogator to determine whether the interrogator should have suspected the servicemember, not whether he in fact did. Rather than speculate in a given situation, it is far preferable to warn all potential suspects before attempting any questioning.

F. When are warnings required? As soon as an interrogator seeks to question or interrogate a servicemember suspected of an offense, the member must be warned in accordance with article 31(b).

G. Fair notice as to the nature of the offense. The question frequently arises, "Must I warn the suspect of the specific article of the UCMJ allegedly violated?" There is no need to advise a suspect of the particular article violated. The warning must, however, give fair notice to the suspect of the offense or area of inquiry so that he can intelligently choose whether to discuss this matter. For example, Agent Smith is not sure of exactly what offense Seaman Jones has committed, but he knows that Seaman Jones shot and killed Private Finch. In this situation, rather than advise Seaman Jones of a specific article of the UCMJ, it would be appropriate to advise Seaman Jones that he was suspected of shooting and killing Private Finch.

H. Warning of the right to remain silent. The right to remain silent is not a limited right in the sense that an accused or suspect may be interrogated or questioned concerning matters which are not self-incriminating. Rather, the right to remain silent is an absolute right to silence -- a right to say nothing at all.

I. Warning regarding the consequences of speaking. The exact language of article 31(b) requires that the warning advise an accused or suspect that any statement made may be used as evidence against him in a trial by court-martial.

J. Cleansing warnings. When an interrogator obtains a confession or admission without proper warnings, subsequent compliance with article 31 will not automatically make later statements admissible. This is best illustrated with the following example: assume the accused or suspect initially makes a confession or admission without proper warnings. This is called an "involuntary statement" and, due to the deficient warnings, the statement is inadmissible at a court-martial. Next, assume the accused or suspect is later properly advised and then makes a second statement identical (or otherwise) to the first "involuntary" statement. Before the second statement can be admitted, the trial counsel must make a clear showing to the court that the second statement was both voluntary and independent of the first "involuntary" statement. There must be some indication that the second statement was not made only because the person felt the government already knew about the first confession and, therefore, he had "nothing to lose" by confessing again.

The Court of Military Appeals has sanctioned a procedure to be followed when a statement has been improperly obtained from an accused or suspect. In this situation, rewarn the accused giving all warnings mandated. In addition, include a "cleansing warning" to this effect: "You are advised that the statement you made on _____ cannot and will not be used against you in a subsequent trial by court-martial." Although not a per se requirement for admission, this factor, i.e., a "cleansing warning," will assist the trial counsel in meeting his burden of a "clear showing" that the second statement was not tainted by the first. Therefore, it is recommended that cleansing warnings be given.

Another problem in this area concerns the suspect who has committed several crimes. The interrogator may know of only one of these crimes, and properly advises the suspect with regard to the known offense. During the course of the interrogation, the suspect relates the circumstances surrounding desertion, the offense about which the interrogator has warned the accused. During questioning, however, the suspect tells the interrogator that while in a desertion status he or she stole a military vehicle. As soon as the interrogator becomes aware of the additional offense, the interrogator must advise the suspect of his or her rights with regard to the theft of the military vehicle before interrogating the suspect concerning this additional crime.

If the interrogator does not follow this procedure, statements about the desertion may be admissible; but, statements concerning the theft of the military vehicle that are given in response to interrogation regarding the theft probably will be excluded.

K. "Statement" defined. Up to this point, the reader has probably assumed that article 31 concerns "statements" of a suspect or accused. This is correct, but the term "statement" means more than just the written or spoken word.

First, a statement can be oral or written. In court, if the statement were oral, the interrogator can relate the substance of the statement from recollection or notes. If written, the statement of the accused or suspect may be introduced in evidence by the prosecution. Many individuals, after being taken to an NIS office and after waiving their right to remain silent and their right to counsel, have given a full confession. When asked if they made a "statement" to NIS, they will often respond, "No, I did not make a statement; I told the agent what I did, but I refused to sign anything." Provided the accused was fully advised of his rights, understood and voluntarily waived those rights, an oral confession or admission is as valid for a court's consideration as a writing. Naturally, where the confession or admission is in writing and signed by the accused, the accused will have great difficulty denying the statement or attributing it to a fabrication by the interrogator. Thus, where possible, pretrial statements from an accused or suspect should be reduced to writing, whether or not the accused or suspect agrees to sign it.

In addition to oral statements, some actions of an accused or suspect may be considered the equivalent of a statement and are thus protected by article 31. During a search, for example, a suspect may be asked to identify an item of clothing in which contraband has been located. If, as indicated, the servicemember is a suspect, these acts on his part may amount to admissions. Therefore, care must be taken to see that the suspect is warned of his article 31(b) rights or the identification of the clothing is obtained from some other source. In most cases, however, a request for the identification of an individual is not an "interrogation"; production of the identification is not a "statement" within the meaning of article 31(b) and, therefore, no warnings are required. Superiors and those in positions of authority may lawfully demand a servicemember to produce identification at any time without first warning the servicemember under article 31(b). Merely identifying one's self upon request is generally considered to be a neutral act. An exception to this general rule arises when the servicemember is suspected of carrying false identification. In such cases, the act of producing identification is an act that directly relates to the offense of which the servicemember is suspected. The act, therefore, is "testimonial" and not neutral in nature.

L. Body fluids. The Court of Military Appeals has ruled that the taking of blood and urine specimens is not protected by article 31 and, hence, article 31(b) warnings are not required before taking such specimens. The Military Rules of Evidence treat the taking of all body fluids as nontestimonial and neutral acts and thus not protected by article 31. Although the extraction of body fluids no longer falls within the purview of article 31, the laws concerning search and seizure and inspection remain applicable, and compliance with Mil.R.Evid. 312 is a prerequisite for the admissibility in court of involuntarily obtained body fluid samples. See chapter III, infra. Furthermore, even though urinalysis results are not subject to the requirements of article 31(b), they sometimes may not be admissible in courts-martial because of administrative policy restraints imposed by departmental or service regulations.

M. Other nontestimonial acts. To compel a suspect to display scars or injuries, try on clothing or shoes, place feet in footprints, or submit to fingerprinting does not require an article 31(b) warning. A suspect does not have the option of refusing to perform these acts. The reason for this rests on the fact that these acts do not, in or of themselves, constitute an admission, even though they may be used to link a suspect with a crime. The same rule applies to voice and handwriting exemplars and participation in lineups. As a rule, however, commanders should seek professional legal advice before attempting a lineup or exemplar.

N. Applicability to nonjudicial punishment (article 15) hearings. The Manual for Courts-Martial provides that the mast or office hours hearing shall include an explanation to the accused of his or her rights under article 31(b). Thus, an article 31(b) warning is required, and these rights may be exercised. That is, the accused is permitted to remain silent at the hearing.

While no statement need be given by the accused, article 15 presupposes that the officer imposing nonjudicial punishment will afford the servicemember an opportunity to present matters in his own behalf. It is recommended that compliance with article 31(b) rights at NJP be documented on forms such as those set forth in MJM, Encl. 5.

Article 15 hearings are usually custodial situations. As discussed below, when a suspect is in custody, the law requires that certain counsel warnings be given to ensure the admissibility of statements at a subsequent court-martial. Therefore, since counsel rights will not usually be given at an NJP hearing, statements made by the accused during NJP might not be admissible against him at a subsequent court-martial. For example, if, during his NJP hearing for wrongful possession of marijuana, Seaman Jones confesses to selling drugs, the confession might not be admissible against him at his subsequent court-martial for wrongful sale of drugs, provided that Seaman Jones was not given counsel warnings at NJP. Statements given at NJP by the accused, however, are admissible against the accused at the NJP itself, regardless of whether the accused was given counsel warnings.

THE RIGHT TO COUNSEL

A. Counsel warnings. Apart from a suspect's or accused's article 31(b) rights, a servicemember who is in "custody" must be advised of additional rights. These rights, which are sometimes referred to as Miranda/Tempia warnings, are codified and somewhat extended by Mil.R.Evid. 305. Counsel warnings should be stated as follows:

1. "You have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by you at your own expense, a military lawyer appointed to act as your counsel without cost to you, or both."

2. "You have the right to have such retained civilian lawyer or appointed military lawyer or both present during this or any other interview."

In addition to custodial situations, Mil.R.Evid. 305(d)(1)(B) requires that counsel warnings be given when a suspect is interrogated after preferral of charges or the imposition of pretrial restraint if the interrogation concerns matters that were the subject of the preferral of charges or that led to the pretrial restraint.

If the suspect or accused requests counsel, all interrogation and questioning must immediately cease. Questioning may not be renewed unless the accused himself initiates further conversation or counsel has been made available to the accused in the interim between his invocation of his rights and subsequent questioning.

B. "Custody." While custody might imply the "jail house" or "brig," the courts have interpreted this term in a far broader sense. Any deprivation of one's freedom of action in any significant way constitutes custody for the purpose of the counsel requirement. Suppose Seaman Apprentice Fuller is taken before his commanding officer, Commander Sparks, for questioning. Fuller is not under apprehension or arrest; furthermore, no charges have been preferred against him. Sparks proceeds to question Fuller concerning a broken window in the former's office. Sparks has been informed by Petty Officer Jenks that he saw Fuller toss a rock through the window. Here, Fuller is suspected of damaging military property of the United States. In this situation, with Fuller standing before his commanding officer, it should be obvious that Fuller has been denied his freedom of action to a significant degree. Fuller is not free simply to leave his commanding officer's office, or to refuse to appear for questioning. Thus, Commander Sparks would be required to advise Fuller of his counsel rights as well as his article 31(b) rights. If Sparks does not, Fuller's admission that he broke the window would be inadmissible in any forthcoming court-martial. Likewise, where a suspect is summoned for an interview with CGI agents, this will constitute custody necessitating article 31 and counsel warnings.

C. Spontaneous confession. One further circumstance is worthy of discussion. Suppose a servicemember voluntarily walks into the executive officer's office and, without any type of interrogation or prompting by the executive officer, fully confesses to a crime. The confession would be admissible as a "spontaneous confession" even though the executive officer never advised the servicemember of any rights. As long as the executive officer did not ask any questions, no warnings were required. There is also no legal requirement for one to interrupt a spontaneous confession and advise the person of rights under article 31 even if the spontaneous confessor continues to confess for a long period of time. If the listener wants to question the spontaneous confessor about the offense, however, proper article 31 and counsel warnings must be given for any subsequent statement to be admissible in court.

RIGHT TO TERMINATE THE INTERROGATION

Although not required by article 31, case law, or the Military Rules of Evidence, some courts have recommended that a suspect be advised that he or she has a right to terminate the interrogation at any time for any reason. Failure to give such advise probably will not render the suspect's confession inadmissible. Still, advising a suspect that he or she has a right to terminate the interview should make for a strong government argument that any confession that the suspect gives is voluntary.

FACTORS AFFECTING VOLUNTARINESS

The factors discussed below may affect the admissibility of a confession or admission. For instance, it is possible to completely advise a person of his or her rights, yet secure a confession or admission that is completely involuntary because of something that was said or done.

A. Threats or promises. To invalidate an otherwise valid confession or admission, it is not necessary to make an overt threat or promise. For example, after being advised fully of his rights, the suspect is told that it will "go hard on him" unless he tells all. This clearly amounts to an unlawful threat.

B. Physical force. Obviously, physical force will invalidate a confession or admission. Consider this situation. A steals B's radio. C, a friend of B's, learns of B's missing radio and suspects A. C beats and kicks A until A admits the theft and the location of the radio. C then notifies the investigator, X, of the theft. X has no knowledge of A's having been beaten by C. X proceeds to advise A of his rights and obtains a confession from A. Is the confession made by A to X voluntary? This situation raises a serious possibility that the confession is not voluntary if A were in fact influenced by the previous beating received at the hands of C, even though X knew nothing about this. Therefore, cleansing warnings to remove this actual taint would be required.

C. Prolonged confinement or interrogation. Duress or coercion can be mental as well as physical. By denying a suspect the necessities of life such as food, water, air, light, restroom facilities, etc., or merely by interrogating a person for extremely long periods of time without sleep, a confession or admission may be rendered involuntary. What is an extremely long period of time? To answer this, the circumstances in each case as well as the condition of the suspect or accused must be considered. As a practical matter, good judgment and common sense should provide the answer in each case.

CONSEQUENCES OF VIOLATING THE RIGHTS AGAINST SELF-INCRIMINATION

A. Exclusionary rule. Any statement obtained in violation of any applicable warning requirement under article 31, Miranda/Tempia, or Mil. R. Evid. 305 is inadmissible against the accused at a court-martial. Any statement that is considered to have been involuntary is likewise inadmissible at a court-martial.

B. Fruit of the poisonous tree. The "primary taint" is the initial violation of the accused's right. The evidence that is the product of the exploitation of this taint is labeled "fruit of the poisonous tree." The question to be determined is whether the evidence has been obtained by the exploitation of a violation of the accused's rights or has been obtained by "means sufficiently distinguishable to be purged of the primary taint."

Thus, if Private Jones is found with marijuana in her pocket and interrogated without being advised of her article 31(b) rights and confesses to the possession of 1000 pounds of marijuana in her parked vehicle located on base, the 1000 pounds of marijuana as well as Private Jones' confession will be

excluded from evidence. The reason: The 1000 pounds of marijuana were discovered by exploiting the unlawfully obtained confession.

The Acknowledgement of Understanding of Rights form (MJM, Encl. 5) contains the suspect's or accused's article 31(b) rights and a statement indicating that the accused or suspect understands his or her rights and has chosen to waive those rights. Additionally, this form contains counsel rights, and an acknowledgement and waiver of these rights. This form should be used when the command desires to take a statement from a suspect in custody. The form will help ensure that appropriate rights warnings are given and that a record of the rights given and the acknowledgement and waiver of the same will be available if a dispute later arises. It is essential that these rights be read to the suspect or accused, that they be explained, that the individual be given ample opportunity to read them before signing an acknowledgement and waiver (if this is desired) and before making any statement or answering any questions.

THE GOVERNMENT'S BURDEN AT TRIAL

The prosecution must prove that the accused was advised of his or her rights, understood them, and voluntarily waived them. The fact that an accused had previously attended classes on article 31, or had received UCMJ indoctrination during recruit training, will not meet this burden. Trial judges will not presume that an accused understands his or her rights, regardless of prior experience. Furthermore, general classes on article 31 would not include specific advice as to the suspected offense, as required by article 31(b).

GRANTS OF IMMUNITY

A. Who may issue grants of immunity

1. Military witness. The authority to grant immunity to a military witness is reserved to officers exercising general court-martial jurisdiction. R.C.M. 704; MJM, 2-W-1.

2. Civilian witness. Prior to the issuance of an order by an officer exercising general court-martial jurisdiction to a civilian witness to testify, the approval of the Attorney General of the United States or his designee must be obtained, pursuant to 18 U.S.C. §§ 6002 and 6004 (1982). MJM, 2-W-3, 4.

B. Types of immunity

1. Transactional immunity. Transactional immunity is immunity from prosecution for any offense or offenses to which the compelled testimony relates. For instance, suppose Seaman Smith has been granted transactional immunity and testifies that he sold illegal drugs to the accused on five separate occasions. Smith cannot be tried by court-martial for any of these drug sales.

2. Testimonial or use immunity. Testimonial immunity provides that neither the immunized witness' testimony, nor any evidence derived from that testimony, may be used against the witness at a later court-martial or Federal or state trial.

While testimonial immunity is the more limited of the two, and it is conceivable that the government could later successfully prosecute an accused to whom a testimonial grant of immunity had been issued, the Court of Military Appeals has indicated that it is only the exceptional case that can be prosecuted after a grant of testimonial immunity. The government must prove in such cases that the evidence being offered against the accused who had been given testimonial immunity has come from a source independent of his or her testimony. A word to the wise: When considering immunity as a prosecutorial technique, make certain the facts have been developed. The immunity might otherwise be given to the wrong person; i.e., the more serious offender or mastermind.

C. Forms. See MJM, Encl. 14 - 15(b).

D. Language of the grant

A properly worded grant of immunity must not be conditioned on the witness giving specified testimony. The witness must know and understand that the testimony need only be truthful.

E. Other problems

Be extremely careful in any case involving national security or classified information. In a case that received widespread publicity, an Air Force lieutenant accused of spying for the Russians was released and the charges against him dismissed because of binding, albeit unauthorized, promises to grant him immunity. The best advice that can be given is that higher authority should be notified before anything is done (e.g., referral, immunity, pretrial agreements) in any case involving national security, classified information, or a major Federal offense.

CHAPTER III

SEARCH AND SEIZURE/DRUG ABUSE DETECTION

PART I - SEARCH AND SEIZURE

Each military member has a constitutionally protected right of privacy. However, a servicemember's expectation of privacy must occasionally be impinged upon because of military necessity. Military law recognizes that the individual's right of privacy is balanced against the command's legitimate interests in maintaining health, welfare, discipline, and readiness, as well as by the need to obtain evidence of criminal offenses.

Searches and seizures conducted in accordance with the requirements of the United States Constitution will generally yield admissible evidence. On the other hand, evidence obtained in violation of constitutional mandates will not be admissible in any later criminal prosecution. With this in mind, the most productive approach for the reader is to develop a thorough knowledge of what actions are legally permissible (producing admissible evidence for trial by court-martial) and what are not. This will enable the command to determine, before acting in a situation, whether prosecution will be possible. The legality of the search or seizure depends on what was done by the command at the time of the search or seizure. No amount of legal brilliance by a trial counsel at trial can undo an unlawful search and seizure.

This chapter discusses the sources of the present law, the activities that constitute reasonable searches, and other command activities which, although permissible, and productive of admissible evidence, are not actually true searches or seizures.

SOURCES OF THE LAW OF SEARCH AND SEIZURE

A. United States Constitution, Amendment IV. Although enacted in the eighteenth century, the language of the fourth amendment has never been changed. The fourth amendment was not an important part of American jurisprudence until this century when courts created an exclusionary rule based on its language:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

An important concept contained in the fourth amendment is that of "probable cause." This concept is not particularly complicated, nor is it as confusing as often assumed.

In deciding whether probable cause exists, one must first remember that conclusions of others do not comprise an acceptable basis for probable cause. The person who is called upon to determine probable cause must, in all cases, make an independent assessment of facts presented before a constitutionally valid finding of probable cause can be made. The concept of probable cause arises in many different factual situations. Numerous individuals in a command may be called upon to establish its presence during an investigation. Although the reading of the constitution would indicate that only searches performed pursuant to a warrant are permissible, there have been certain exceptions carved out of that requirement, and these exceptions have been classified as searches "otherwise reasonable." Probable cause plays an important role in some of these searches that will be dealt with individually in this chapter.

Although the fourth amendment mandates that only information obtained under oath may be used as a basis for probable cause, military courts traditionally ignored this requirement. Still, it is strongly recommended that the information be given under oath. The oath is one factor that can add to the believability of the person given the oath, the importance of which will be discussed below.

The fourth amendment also provides that no search or seizure will be reasonable if the intrusion is into an area not "particularly described." This requirement necessitates a particular description of the place to be searched and items to be seized. Thus, the intrusion by government officials must be as limited as possible in areas where a person has a legitimate expectation of privacy.

The "exclusionary rule" of the fourth amendment is a judicially created rule based upon the language of the fourth amendment. The United States Supreme Court considered this rule necessary to prevent unreasonable searches and seizures by government officials. In more recent decisions, the Supreme Court has reexamined the scope of this suppression remedy and concluded that the rule should only be applied where the fourth amendment violation is substantial and deliberate. Consequently, where government agents are acting in an objectively reasonable manner (i.e, in "good faith"), the evidence seized should be admitted despite technical violations of the fourth amendment.

B. Manual for Courts-Martial, 1984. Unlike the area of confessions and admissions covered in Article 31, Uniform Code of Military Justice [UCMJ], there is no basis in the UCMJ for the military law of search and seizure. By a 1980 amendment to the Manual for Courts-Martial [MCM], the Military Rules of Evidence [Mil.R.Evid.] were enacted. The Military Rules of Evidence provide extensive guidance in the area of search and seizure in rules 311-17, and anyone charged with the responsibility for authorizing and conducting lawful searches and seizures should be familiar with those rules.

THE LANGUAGE OF THE LAW OF SEARCH AND SEIZURE

-- Definitions. Certain words and terms must be defined to properly understand their use in this chapter. These definitions are set forth below.

1. Search. A search is a quest for incriminating evidence; an examination of a person or an area with a view to the discovery of contraband or other evidence to be used in a criminal prosecution. Three factors must exist before the law of search and seizure will apply. Does the command activity constitute:

a. A quest for evidence;

b. conducted by a government agent; and

c. in an area where a reasonable expectation of privacy exists?

If, for example, it were shown that the evidence in question has been abandoned by its owner, the quest for such evidence by a government agent which led to the seizure of the evidence would present no problem, since there was no reasonable expectation of privacy in such property. See Mil.R.Evid. 316(d)(1).

2. Seizure. A seizure is the taking of possession of a person or some item of evidence in conjunction with the investigation of criminal activity. The act of seizure is separate and distinct from the search; the two terms varying significantly in legal effect. On some occasions a search of an area may be lawful, but not a seizure of certain items thought to be evidence. Examples of this distinction will be seen later in this chapter. Mil.R.Evid. 316 deals specifically with seizures, and creates some basic rules for application of the concept. Additionally, a proper person, such as anyone with the rank of E-4 or above, or any criminal investigator, such as a CGI special agent, generally must be utilized to make the seizure, except in cases of abandoned property. Mil.R.Evid. 316(e).

3. Probable cause to search. Probable cause to search is a reasonable belief, based upon believable information having a factual basis, that:

a. A crime has been committed; and

b. the person, property, or evidence sought is located in the place or on the person to be searched.

Probable cause information generally comes from any of the following sources:

(1) Written statements;

(2) oral statements communicated in person, via telephone, or by other appropriate means of communication; or

(3) information known by the authorizing official, i.e., the commanding officer.

4. Probable cause to apprehend. Probable cause to apprehend an individual is similar in that a person must conclude, based upon facts, that:

a. A crime was committed; and

b. the person to be apprehended is the person who committed the crime.

A detailed discussion of the requirement for a finding of "probable cause" to search appears later in this chapter. Further discussion of the concept of "probable cause to apprehend" also appears later in this chapter in connection with searches incident to apprehension.

5. Capacity of the searcher. The law of search and seizure is designed to prevent unreasonable governmental interference with an individual's right to privacy. The fourth amendment does not protect the individual from nongovernmental intrusions.

a. Private capacity. Under certain circumstances, evidence obtained by an individual seeking to recover his or her own stolen personal property or the property of another may be admissible in a court-martial even if the individual acted without probable cause or a command authorization. In other words, actions that would cause invocation of the exclusionary rule if taken by a governmental agent will not cause the same result if taken by a private citizen. It is crucial to note, however, that the absence of a law enforcement duty does not necessarily make a search purely personal or in an individual capacity. Except in the most extraordinary case, searches conducted by officers or senior noncommissioned officers would normally be considered "official" and therefore subject to the fourth amendment. Similarly, a search conducted by someone superior in the chain of command or with disciplinary authority over the person subject to the search normally would be considered "official" and not "private" in nature.

b. Foreign governmental capacity. Evidence produced through searches or seizures conducted solely by a foreign government may be admitted at a court-martial if the foreign governmental action does not subject the accused to "gross and brutal maltreatment." If American officials participate in the foreign government's actions, the fourth amendment and MCM standards will apply.

c. Civilian police. Any action to search or seize by what the Mil.R.Evid. 311(c)(2) calls "other officials" must be in compliance with the U.S. Constitution and the rules applied in the trial of criminal cases in the U.S. District Courts. "Other officials" include agents of the District of Columbia, or of any state, commonwealth, or possession of the United States.

6. Objects of a search or seizure. In carrying out a lawful search or seizure, agents of the government are bound to look for and seize only items that provide some link to criminal activity. Mil.R.Evid. 316 provides, for example, that the following categories of evidence may be seized:

a. Unlawful weapons made unlawful by some law or regulation;

b. contraband or items that may not legally be possessed;

c. evidence of crime, which may include such things as instrumentalities of crime, items used to commit crimes, fruits of crime, such as stolen property, and other items that aid in the successful prosecution of a crime;

d. persons, when probable cause exists for apprehension;

e. abandoned property which may be seized or searched for any or no reason, by any person; and

f. government property. With regard to government property, the following rules apply.

(1) Generally, government agents may search for and seize such property for any or no reason, and there is a presumption that no privacy expectation attaches.

(2) Footlockers or wall lockers are presumed to carry with them an expectation of privacy; thus they can be searched only when the Military Rules of Evidence permit.

CATEGORIZATION OF SEARCHES

In discussing the law of search and seizure, we can divide all search and seizure activity into two broad areas: those that require prior authorization and those that do not. Within the latter category of searches, there are two types: searches requiring probable cause (Mil.R.Evid. 315) and searches not requiring probable cause (Mil.R.Evid. 314). The constitutional mandate of reasonableness is most easily met by those searches predicated on prior authorization, and thus authorized searches are preferred. The courts have recognized, however, that some situations require immediate action, and here the "reasonable" alternative is a search without prior authorization. Although this second category is more closely scrutinized by the courts, several valid approaches can produce admissible evidence.

A. Probable cause searches based upon prior authorization

1. Military search authorization. This type of "prior authorization" search is akin to that described in the text of the fourth amendment, but is the express product of Mil.R.Evid. 315. Although the prior military law contemplated that only officers in command could authorize a search, Mil.R.Evid. 315 clearly intends that the power to authorize a search follows the billet occupied by the person involved rather than being founded in rank or officer status. Thus, in those situations where senior noncommissioned or petty officers occupy positions as officers in charge or positions analogous to command, they are generally competent to authorize searches absent contrary direction from the service secretary concerned.

In the typical case, the commander or other "competent military authority," such as an officer in charge, decides whether probable cause exists when issuing a search authorization. Although there is no per se exclusion of commanding officers, courts will decide, on a case-by-case basis, whether a particular commander was in fact neutral and detached. Mil.R.Evid. 315(d) provides that:

> An otherwise impartial authorizing official does not lose that character merely because he or she is present at the scene of a search or is otherwise readily available to

persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

2. Jurisdiction to authorize searches. Before any competent military authority can lawfully order a search and seizure, he or she must have the authority necessary over both the person and/or place to be searched, and the persons or property to be seized. This authority, or "jurisdiction," is most often a dual concept: jurisdiction over the place and over the person. Any search or seizure authorized by one not having jurisdiction is a nullity, and even though otherwise valid, the fruits of any seizure would not be admissible in a trial by court-martial if objected to by the defense.

a. Jurisdiction over the person. It is critical to any analysis concerning authority of the commanding officer over persons to determine whether the person is a civilian or military member.

(1) Civilians. The search of civilians is now permitted under Mil.R.Evid. 315(c) when they are present aboard military installations. This gives the military commander an additional alternative in such situations where the only possibility, prior to the Mil.R.Evid., was to detain that person for a reasonable time while a warrant was sought from the appropriate Federal or state magistrate. Furthermore, a civilian desiring to enter or exit a military installation may be subject to a reasonable inspection as a condition precedent to entry or exit. Such inspections have recently been upheld as a valid exercise by the command of the administrative need for security of military bases. Inspections will be discussed later in this chapter.

(2) Military. Mil.R.Evid. 315 indicates two categories of military persons who are subject to search by the authorization of competent military authority: members of that commanding officer's unit, and others who are subject to military law when in places under that commander's jurisdiction, e.g., aboard a ship or in a command area. There is military case authority for the proposition that the commander's power to authorize searches of members of his or her command goes beyond the requirement of presence within the area of the command. In one case, the court held that a search authorized by the accused's commanding officer, although actually conducted outside the squadron area, was nevertheless lawful. Although this search occurred within the confines of the Air Force base, a careful consideration of the language of Mil.R.Evid. 315(d)(1) indicates that a person subject to military law could be searched even while outside the military installation. This would hold true only for the search of the person, since personal property, located off base, is not under the jurisdiction of the commander if situated in the United States, its territories, or possessions.

b. Jurisdiction over property. Several topics must be considered when determining whether a commander can authorize the search of property. It is necessary to decide first if the property is government-owned and, if so, whether it is intended for governmental or private use. If the property is owned, operated, or subject to the control of a military person, its location determines whether a commander may authorize a search or seizure. If the private property is owned or controlled by civilians, the

commander's authority does not extend beyond the limits of the pertinent command area.

(1) Property that is government-owned and not intended for private use may be searched at any time, with or without probable cause, for any reason, or for no reason at all. Examples of this type of property include government vehicles, aircraft, ships, etc.

(2) Property that is government-owned and that has a private use by military persons (i.e., expectation of privacy) may be searched by the order of the commanding officer having control over the area, but probable cause is required. An example of this type of property is a BOQ/BEQ room.

Mil.R.Evid. 314 attempts to remove the confusion concerning which kinds of government property involve expectations of privacy. The intent of the rule in this area is to affirm that there is a presumed right to privacy in wall lockers, footlockers, etc., and in items issued for private use. With other government equipment, there is a presumption that no personal right to privacy exists.

(3) Property that is privately owned, and controlled or possessed by a military member within a military command area (including ships, aircraft, vehicles) within the United States, its territories, or possessions, may be ordered searched by the appropriate military authority with jurisdiction, if the probable cause requirement is fulfilled. Examples of this type of property include automobiles, motorcycles, luggage, etc.

(4) Private property that is controlled or possessed by a civilian (any person not subject to the UCMJ) may be ordered searched by the appropriate military authority only if such property is within the command area (including vehicles, vessels, or aircraft). If the property ordered searched is, for example, a civilian banking institution located on base, attention must be given to any additional laws or regulations that govern those places. In these situations, seek advice from the local staff judge advocate.

(5) Searches outside the United States, its territories or possessions, constitute special situations. Here the military authority or his designee may authorize searches of persons subject to the UCMJ, their personal property, vehicles, and residences, on or off a military installation. Any relevant treaty or agreement with the host country should be complied with. The probable cause requirement still exists. Except where specifically authorized by international agreement, foreign agents do not have the right to search areas considered extensions of the sovereignty of the United States. Examples are ships, aircraft, military installations, etc.

The following chart illustrates the concepts outlined above.

COMMAND AUTHORIZED SEARCHES: THE RANGE OF AUTHORITY

PERSONS			PROPERTY SUBJECT TO SEARCH BY ORDER OF CO		PROPERTY NOT SUBJECT TO SEARCH BY ORDER OF CO			
CIVILIANS	MILITARY							
	IN UNIT	NOT IN UNIT	OWNED OR CONTROLLED BY U.S.	OWNED OR CONTROLLED BY CIV. --NON-UCMJ	PRIVATE PROP. OWNED OR CONTROLLED BY MIL. MBR.	PRIVATE PROP. OF MIL. PER.	PRIVATE PROP. OF CIVILIAN (not subject to UCMJ)	
	IN CO's AREA	IN CO's AREA			that is			
ONLY WHEN IN COMPANY AREA*			that is	that is		that is	that is	
	OUT OF AREA. EITHER ON OR OFF BASE, IN OR OUT U.S.		LOCATED ANYWHERE -- on or off-base; in U.S., or abroad	LOCATED WITHIN ANY COMMAND AREA**	LOCATED ON A MIL. BASE IN U.S., TERR., POSS.	LOCATED ANYWHERE ELSE EITHER ON OR OFF BASE	LOCATED OFF-BASE IN U.S., TERR., POSS.	LOCATED OUTSIDE COMMAND AREA
			used for a					
			GOVERN-MENT PURPOSE	PRIVATE PURPOSE	PURPOSE OR USE NOT A NECESSARY CONSIDERATION			
	P.C. REQUIRED		NO P.C. REQUIRED	P.C. REQUIRED	P.C. REQUIRED	P.C. REQUIRED	P.C. REQUIRED	MAY NOT SEARCH AT ALL

** INCLUDING SHIPS, AIRCRAFT, VEHICLES

3. Delegation of power to authorize searches

Traditionally, commanders have delegated their power to authorize searches to their chief of staff, command duty officer, or even the officer of the day. This practice was held to be illegal, as the Court of Military Appeals has held that a commanding officer may not delegate the power to authorize searches and seizures to anyone except a military judge or military magistrate. The court decided that most searches authorized by delegees such as CDO's would result in unreasonable searches or seizures in violation of the fourth amendment. If full command responsibility "devolves" upon a subordinate, that person may authorize searches and seizures since the subordinate in such cases is acting as the commanding officer. General command responsibility does not automatically devolve to the CDO, SDO, OOD, or even the executive officer simply because the commanding officer is absent. Only if full command responsibilities devolve to a subordinate member of the command may that person lawfully authorize a search. If, for example, the CDO, SDO, or OOD must contact a superior officer or the CO prior to taking action on any matter affecting the command, full command responsbilities will not have devolved to that person; and, therefore, he or she could not lawfully authorize a search or seizure. Until the courts provide further guidance on this issue, readers should follow the guidance set forth by their respective CGM authority.

4. The requirement of neutrality and detachment

A commander must be neutral and detached when acting on a request for search authorization. The courts have promulgated certain rules that, if violated, will void any search authorized by a commanding officer on the basis of lack of neutrality and detachment. These rules are designed to prevent an individual who has entered the "evidence gathering process" from thereafter acting to authorize a search. The intent of both the courts' decisions and the rules of evidence is to maintain impartiality in each case. Where a commander has become involved in any capacity concerning an individual case, the commander should carefully consider whether his or her perspective can truly be objective when reviewing later requests for search authorization.

If a commander is faced with a situation in which action on a search authorization request is impossible because of a lack of neutrality or detachment, a superior commander in the chain of command or another commander who has jurisdiction over the person or place can be asked to authorize the search.

5. The requirement of probable cause

a. As discussed earlier, the probable cause determination is based upon a reasonable belief that:

(1) There was a crime committed; and

(2) certain persons, property, or evidence related to that crime will be found in the place or on the persons to be searched.

Before a person may conclude that probable cause to search exists, he or she should have a reasonable belief that the information giving rise to the intent to search is believable and has a factual basis.

The portion of Mil.R.Evid. 315 dealing with probable cause recognizes the proper use of hearsay information in the determination of probable cause, and allows such determinations to be based either wholly or in part on such information.

b. Source and quality of information. Probable cause must be based on information provided to or already known by the authorizing official. Such information can come to the commander through written documents, oral statements, messages relayed through normal communications procedures, such as the telephone or by radio, or may be based on information already known by the authorizing official (where no question of impartiality arises because of the knowledge).

In all cases, both the factual basis and believability basis should be satisfied. The "factual basis" requirement is met when an individual reasonably concludes that the information, if reliable, adequately apprises him or her that the property in question is what it is alleged to be, and is located where it is alleged to be. Information is "believable" when an individual reasonably concludes that it is sufficiently reliable to be believed.

The method of application of the tests will differ, however, depending upon circumstances. The following examples are illustrative.

(1) An individual making a probable cause determination who observes an incident firsthand must determine only that the observation is reliable and that the property is likely to be what it appears to be. For example, an officer who believes that she sees an individual in possession of heroin must first conclude that the observation was reliable, i.e., whether her eyesight was adequate and the observation was long enough, and that she has sufficient knowledge and experience to be able reasonably to believe that the substance in question is in fact heroin.

(2) An individual making a probable cause determination who relies upon the in-person report of an informant must determine both that the informant is believable and that the property observed is likely to be what the observer believes it to be. The determining individual may consider the demeanor of the informant to help determine whether the informant is believable. An individual known to have a "clean record" and no bias against the suspect is likely to be credible.

(3) An individual making a probable cause determination who relies upon the report of an informant not present before the authorizing official must determine both that the informant is believable and that the information supplied has a factual basis. The individual making the determination may utilize one or more of the following factors to decide whether the informant is believable.

(a) Prior record as a reliable informant. Has the informant given information in the past that proved to be accurate?

(b) Corroborating detail. Has enough detail of the informant's information been verified to imply that the remainder can reasonably be presumed to be accurate?

(c) Statement against interest. Is the information given by the informant sufficiently adverse to the pecuniary or penal interest of the informant to imply that the information may reasonably be presumed to be accurate?

(d) Good citizen. Is the character of the informant, as a person known by the individual making the probable cause determination, such as to make it reasonable to presume that the information is accurate?

The factors listed above are not the only ways to determine an informant's believability. The commander may consider any factor tending to show believability, such as the informant's military record, his duty assignments, and whether the informant has given the information under oath.

Mere allegations, however, may not be relied upon. Thus, an individual may not reasonably conclude that an informant is reliable simply because the informant is described as such by a law enforcement agent. The individual making the probable cause determination should be supplied with specific details of the informant's past actions to allow that individual to personally and reasonably conclude that the informant is reliable. The informant's identity need not be disclosed to the authorizing officer, but it is often a good practice to do so.

6. The use of a writing in the search authorization

Although written forms to record the terms of the authorization or to set forth the underlying information relied upon in granting the request are not mandatory, the use of such memoranda is highly recommended for several reasons. Many cases may take some time to get to trial. It is helpful to the person who must testify about actions taken in authorizing a search to review such documents prior to testifying. Further, these records may be introduced to prove that the search was lawful.

The Chief Counsel of the Coast Guard has recommended the use of the standard request for search authorization and record of search authorization forms set forth in Enclosures 38 - 40 of the MJM. Should the exigencies of the situation require an immediate determination of probable cause, with no time to use the forms, make a record of all facts utilized and actions taken as soon as possible after the events have occurred.

Finally, probable cause must be determined by the person who is asked to authorize the search without regard to the prior conclusions of others concerning the question to be answered. No conclusion of the authorizing official should ever be based on a conclusion of some other person or persons. The determination that probable cause exists can be arrived at only by the officer charged with that responsibility.

7. Execution of the search authorization. Mil.R.Evid. 315(h) provides that a search authorization or warrant should be served upon the person whose property is to be searched if that person is present. Further, the persons who actually perform the search should compile an inventory of items seized and should give a copy of the inventory to the person whose property is seized. If searches are carried out in foreign countries, the rule provides that actions should conform to any existing international agreements. Failure to comply with these provisions, however, will not necessarily render the items involved inadmissible at a trial by court-martial.

B. Probable cause searches without prior authorization

As discussed earlier, there are two basic categories of searches that can be lawful if properly executed. Our discussion to this point has centered on those that require prior authorization. We will now discuss those categories of searches that have been recognized as exceptions to the general rule requiring authorization prior to the search. Recall that within this category of searches there are searches requiring probable cause and searches not requiring probable cause.

1. Exigency search. This type of search is permitted by Mil.R.Evid. 315(g) under circumstances demanding some immediate action to prevent removal or disposal of property believed, on reasonable grounds, to be evidence of crime. Although the exigencies may permit a search to be made without the requirement of a search authorization, the same quantum of probable cause required for search authorizations must be found to justify an intrusion based on exigency.

2. Types of exigency searches. Prior authorization is not required under Mil.R.Evid. 315(g) for a search based upon probable cause under the following circumstances.

a. Insufficient time. No authorization need be obtained where there is probable cause to search, and there is a reasonable belief that the time required to obtain an authorization would result in the removal, destruction, or concealment of the property or evidence sought. Although both military and civilian case law, in the past, have applied this doctrine almost exclusively to automobiles, it now seems possible that this exception may be a basis for entry into barracks, apartments, etc. in situations where drugs are being used. The Court of Military Appeals found that an OOD, when confronted with the unmistakable odor of burning marijuana outside the accused's barracks room, acted correctly when he demanded entry to the room and placed all occupants under apprehension without first obtaining the commanding officer's authorization for his entry. The fact that he heard shuffling inside the room, and was on an authorized tour of living spaces, was considered crucial, as well as the fact that the unit was overseas. The court felt that this was a "present danger to the military mission," and thus military necessity warranted immediate action.

b. Lack of communication. Action is permitted in cases where probable cause exists and destruction, concealment, or removal is a genuine concern, but communication with an appropriate authorizing official is precluded by reasons of military operational necessity. Mil.R.Evid. 315(g)(2). For instance, where a nuclear submarine, or a Marine unit in the field maintaining radio silence, lacks a proper authorizing official (perhaps due to

some disqualification on neutrality grounds), no search would otherwise be possible without breaking the silence and perhaps imperiling the unit and its mission.

c. Search of operable vehicles. This type of search is based upon the United States Supreme Court's creation of an exception to the general warrant requirement where a vehicle is involved. Two factors are controlling. First, a vehicle may easily be removed from the jurisdiction if a warrant or authorization were necessary; and second, the court recognizes a "lesser expectation of privacy" in automobiles. In the military, the term "vehicle" includes vessels, aircraft, and tanks, as well as automobiles, trucks, etc. If probable cause exists to stop and search a vehicle, then authorities may search the entire vehicle and any containers found therein in which the suspected item might reasonably be found. All of this can be done without an authorization. It is not necessary to apply this exception to government vehicles, as they may be searched anytime, anyplace, under the provisions of Mil.R.Evid. 314(d).

C. Searches not requiring probable cause

Mil.R.Evid. 314 lists several types of lawful searches that do not require either a prior search authorization or probable cause.

1. Searches upon entry to or exit from United States installations, aircraft and vessel abroad. Commanders of military installations, aircraft, or vessels located abroad, may authorize personnel to conduct searches of persons or property upon entry to or exit from the installation, aircraft, or vessel. The justification for the search is the need to ensure the security, military fitness, or good order and discipline of the command.

2. Consent searches. If the owner, or other person in a position to do so, consents to a search of his person or property over which he has control, a search may be conducted by anyone for any reason (or for no reason) pursuant to Mil.R.Evid. 314(e). If a free and voluntary consent is obtained, no probable cause is required. For example, where an investigator asks the accused if he "might check his personal belongings" and the accused answers, "Yes . . . it's all right with me," the Court of Military Appeals has found that there was consent. The court has also said, however, that "mere acquiescence in the face of authority is not consent." Thus, where the commanding officer and first sergeant appeared at the accused's locker with a pair of bolt cutters and asked if they could search, the accused's affirmative answer was not consent. The question in each case will be whether consent was freely and voluntarily given. Voluntary consent can be obtained from a suspect who is under apprehension if all other factors indicate it is not mere acquiescence.

There is no absolute requirement that an individual who is asked for consent to search be told of the right to refuse such consent, nor is there any requirement to warn under article 31b, even when the individual is a suspect before requesting consent. (Article 20-C-3(2) of the Personnel Manual states that consent to urinalysis should be obtained in writing, however.) Both warnings can help show that consent was voluntarily given. The courts have been unanimous in finding such warnings to be strong indicia that any waiver of the right to privacy thereafter given was free and voluntary.

Additionally, use of a written consent to search form is a sound practice. Appendix III of this chapter provides a form which can be utilized for the consentual obtaining of a urine sample. Remember that since the consent itself is a waiver of a constitutional right by the person involved, it may be limited in any manner, or revoked at any time. The fact that you have the consent in writing does not make it binding on a person if a withdrawal or limitation is communicated. Refusing to give consent or revoking it does not then give probable cause where none existed before: one cannot use the legitimate claim of a constitutional right to infer guilt or that the person "must be hiding something."

Even where consent is obtained, if any other information is solicited from one suspected of an offense, proper article 31 warnings and, in most cases, counsel warnings must be given.

As previously noted, we use the term control over property rather than ownership. For instance, if Seaman Jones occupies a residence with her male companion, Jack Tripper, Jack can consent to a search of the residence. Suppose, however, that Seaman Jones keeps a large tin box at the residence to which Jack is not allowed access. The box would not be subject to a search based upon Jack's consent. He could only validly consent to a search of those places or areas where Seaman Jones has given him "control." Likewise, if Seaman Jones maintained her own private room within the residence, and Jack was not permitted access to the room by her, Jack could not give valid consent for a search of that room.

3. Stop and frisk. Although most often associated with civilian police officers, this type of limited "seizure" of the person is specifically included in Mil.R.Evid. 314(f). It does not require probable cause to be lawful, and is most often utilized in situations where an experienced officer, NCO, or petty officer is confronted with circumstances that "just don't seem right." This "articulable suspicion" allows the law enforcement officer to detain an individual to ask for identification and an explanation of the observed circumstances. This is the "stop" portion of the intrusion. Should the person who makes the stop have reasonable grounds to fear for his or her safety, a limited "frisk" or "pat down" of the outer garments of the person stopped is permitted to ascertain whether a weapon is present. If any weapon is discovered in this pat down, its seizure can provide probable cause for apprehension, and a subsequent search incident thereto. There is, however, no right to frisk or pat down a suspect in situations where no apprehension of personal danger is involved. Nor can the "frisk" be conducted in a more than cursory manner to ensure safety. Further, any detention must be brief and related to the original suspicion that underlies the stop.

4. Search incident to a lawful apprehension. A search of an individual's person, of the clothing he is wearing, and of places into which he could reach to obtain a weapon or destroy evidence is a lawful search if conducted incident to a lawful apprehension of that individual and pursuant to Mil.R.Evid. 314(g).

Apprehension is the taking into custody of a person. This means the imposition of physical restraint, and is substantially the same as civilian "arrest." It differs from military arrest which is merely the imposition of moral restraint.

A search incident to a lawful apprehension will be lawful if the apprehension is based upon probable cause. This means that the apprehending official is aware of facts and circumstances that would justify a reasonable person to conclude that:

a. An offense has been or is being committed; and

b. the person to be apprehended committed or is committing the offense.

The concept of probable cause as it relates to apprehension differs somewhat from that associated with probable cause to search. Instead of concerning oneself with the location of evidence, the second inquiry concerns the actual perpetrator of the offense.

An apprehension may not be used as a subterfuge to conduct an otherwise unlawful search. Furthermore, only the person apprehended and the immediate area where that person could easily obtain a weapon or destroy evidence may be searched. For example, a locked suitcase next to the person apprehended may not be searched incident to the apprehension, but it may be seized and held pending authorization for a search based on probable cause.

Until recently, the extent to which an automobile might be searched incident to the apprehension of the driver or passengers therein was unsettled. In 1981, however, the United States Supreme Court firmly established the lawful scope of such apprehension searches. The Court held that when a law enforcement officer lawfully apprehends the occupants of an automobile, the officer may conduct a search of the entire passenger compartment, including a locked glove compartment, and any container found therein, whether opened or closed.

Decisions of the United States Supreme Court have further limited the scope of a search incident to apprehension where the suspect possesses a briefcase, duffel bag, footlocker, suitcase, etc. If it is shown that the object carried or possessed by a suspect was searched incident to the apprehension, that is contemporaneously with the apprehension, then the search of that item is likely to be upheld. If, however, the suspect is taken away to be interrogated in room 1 and the suitcase is taken to room 2, a search of the item would not be incident to the apprehension since it is outside the reach of the suspect. Here, search authorization would be required.

5. Emergency searches to save life or for related purposes. In emergency situations, Mil.R.Evid. 314(i) permits searches to be conducted to save life or for related purposes. The search may be performed in an effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury. Such a search must be conducted in good faith and may not be a subterfuge in order to circumvent an individual's fourth amendment protections.

"PLAIN VIEW" SEIZURE

When a government official is in a place where he or she has a lawful right to be, whether by invitation or official duty, evidence of a crime observed in plain view may be seized in accordance with Mil.R.Evid. 316. An often repeated example of this type of lawful seizure arises during a wall locker inspection. While looking at the uniforms of a certain servicemember, a baggie of marijuana falls to the deck. Its seizure as contraband is justifiable under these circumstances as having been observed in plain view. Another situation could arise while a searcher is carrying out a duly authorized search for stolen property and comes upon a hand grenade in the search area. Since it is contraband, it is both seizable and admissible in court-martial proceedings.

THE USE OF DRUG-DETECTOR DOGS

Military working dogs can be used as drug-detector dogs. As such, they can be used to assist in the obtaining of evidence for use in courts-martial. Some of the ways they can be used include their use in gate searches or other inspections under Mil.R.Evid. 313, and to establish the probable cause necessary for a subsequent search. See Inspections and inventories, below.

A. One situation where the use of the dog was considered permissible was during a gate search conducted on an overseas installation. The dog's alert could be used to establish probable cause to apprehend the accused. All evidence obtained was held to be admissible. Recently, the Court of Military Appeals held that the use of detector dogs at gate searches in the United States was also reasonable.

B. In another case, the Court of Military Appeals permitted a detector dog to be brought to an automobile believed to contain marijuana. The dog alerted on the car's rear wheels and exterior which prompted the police to detain the accused. The proper commander was then notified of this "alert" and the other circumstances surrounding this case. The search of the vehicle was then conducted pursuant to the authorization of the commander.

The court held that the use of the marijuana dog in an area surrounding the car was lawful. The mere act of "monitoring airspace" surrounding the vehicle did not involve an intrusion into an area of privacy. Thus, the dog's alert was not a search, but a fact that could be relayed to the proper commander for a determination of probable cause. The Supreme Court has also held that using a dog in a common area to sniff a closed suitcase is not a search at all.

Close attention must be given to establishing the reliability of the informers in this situation, i.e., the dog and doghandler. The drug-detector dog is simply an informant, albeit with a longer nose and a somewhat more scruffy appearance. As in the usual informant situation, there must be a showing of both factual basis, i.e., the dog's alert and surrounding circumstances and the dog's reliability. This reliability may be determined by the commanding officer through either of two commonly used methods. The first method is for the commanding officer to observe the accuracy of a particular dog's alert in a controlled situation, i.e., with previously planted drugs. The

second method is for the commanding officer to review the record of the particular dog's previous performance in actual cases, i.e., the dog's success rate. Although either of these methods may be sufficient by themselves for a determination that a dog is reliable, both should be used whenever practicable.

A few words of caution about the use of drug dogs are in order. One court has stated that a military commander who participates in an inspection involving the use of detector dogs in the command area cannot later authorize a search based upon subsequent alerts by the same dogs during that use. This illustrates the point that any person swept into the evidence-gathering process may find it impossible later to be considered an impartial official. The provisions of the Military Rules of Evidence are geared to lessen the effect in this type of case, in that mere presence at the scene is not per se disqualifying; but again, the line is difficult to draw.

C. In summary, the use of dogs for the purpose of ferreting out drugs or contraband that threaten military security and performance is a reasonable means to provide probable cause:

1. When the dog alerts in a common area, such as a barracks passageway; or

2. when the dog alerts on the "air space" extending from an area where there is an expectation of privacy.

BODY VIEWS AND INTRUSIONS

Under certain circumstances defined in Mil.R.Evid. 312, evidence that is the result of a body view or intrusion will be admissible at court-martial. There are also situations where such body views and intrusions may be performed in a nonconsensual manner and still be admissible.

A. Extraction of body fluids. The nonconsensual extraction of body fluids, e.g., blood sample, is permissible under two circumstances:

1. Pursuant to a lawful search authorization; or

2. where the circumstances show a "clear indication" that evidence of a crime will be found, and that there is reason to believe that the delay required to seek a search authorization could result in the destruction of the evidence.

Involuntary extraction of body fluids, whether conducted pursuant to a or b above, must be done in a reasonable fashion by a person with the appropriate medical qualifications. (It is likely that physical extraction of a urine sample would be considered a violation of constitutional due process, even if based on an otherwise lawful search authorization.) Note that an order to provide a urine sample through normal elimination, as in the typical urinalysis inspection, is not an "extraction" and need not be conducted by medical personnel.

B. Intrusions for valid medical purposes. The military may take whatever actions are necessary to preserve the health of a servicemember. Thus, evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and will be admissible at court-martial.

INSPECTIONS AND INVENTORIES

A. General considerations. Although not within either category of searches (prior authorization/without prior authorization), administrative inspections and inventories conducted by government agents may yield evidence admissible in trials by court-martial. Mil.R.Evid. 313 codifies the law of military inspections and inventories. Traditional terms that were formerly used to describe various inspections, e.g., "shakedown search" or "gate search," have been abandoned as being confusing. If carried out lawfully, inspections and inventories are not designed to be "quests for evidence" and are thus not searches in the strictest sense. It follows that items of evidence found during these inspections are admissible in court-martial proceedings. If either of these administrative activities is primarily a quest for evidence directed at certain individuals or groups, the inspection is actually a search and evidence seized will not be admissible.

B. Inspections. Mil.R.Evid. 313(b) defines "inspection" as an "examination ... conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle." Thus, an inspection is conducted to ensure mission readiness and is part of the inherent duties and responsibilities of those in the military chain of command. Because inspections are intended to discover, correct, and deter conditions detrimental to military efficiency and safety, they are considered as necessary to the existence of any effective armed force and inherent in the very concept of a military organization.

Mil.R.Evid. 313(b) makes it clear that "an examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule." But an otherwise valid inspection is not rendered invalid solely because the inspector has as his or her secondary purpose that of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings. An examination made with a primary purpose of prosecution is no longer considered an administrative inspection.

For example, assume Colonel X suspects A of possessing marijuana because of an anonymous "tip" received by telephone. Colonel X cannot proceed to A's locker and "inspect" it because what he is really doing is searching it -- looking for the marijuana. How about an "inspection" of all lockers in A's wing of the barracks, which will give Colonel X an opportunity to "get into A's locker" on a pretext? Because it is a pretext for a search, it would be invalid; in fact, it is a search. And note that this is not a lawful probable cause search because the colonel has no underlying facts and circumstances from which to conclude that the informer is reliable or that his information is believable.

Suppose, however, that Colonel X, having no information concerning A, is seeking to remove contraband from his command, prevent removal of government property, and reduce drug trafficking. He establishes inspections at the gate. Those entering and leaving through the gate have their persons and vehicles inspected on a random basis. Colonel X is not trying to "get the goods" on A or any other particular individual. A carries marijuana through the gate and is inspected. The inspection is a reasonable one; the trunk of the vehicle, under its seats, and A's pockets are checked. Marijuana is discovered in A's trunk. The marijuana was discovered incident to the inspection. A was not singled out and inspected as a suspect. Here, the purpose was not to "get" A, but merely to deter the flow of drugs or other contraband. The evidence would be admissible.

An inspection may be made of the whole or any part of a unit, organization, installation, vessel, aircraft, or vehicle. Inspections are quantitative examinations insofar as they do not single out specific individuals or very small groups of individuals. There is, however, no legal requirement that the entirety of a unit or organization be inspected. An inspection should be totally exhaustive (i.e., every individual of the chosen component is inspected) or it should be done on a random basis, by inspecting individuals according to some rule of chance (i.e., rolling dice). Such procedures will be an effective means to avoid challenges based on grounds that the inspection was a subterfuge for a search. Unless authority to do so has been withheld by competent superior authority, any individual placed in a command or appropriate supervisory position may inspect the personnel and property within his or her control.

An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. Contraband is defined as material the possession of which is by its very nature unlawful, e.g., marijuana. Material may be declared to be unlawful by appropriate statute, regulation, or order. For example, liquor is prohibited aboard ship, and would be contraband if found in Seaman Smith's seabag aboard ship, although it might not be contraband if found in Ensign Smith's BOQ room.

Mil.R.Evid. 313(b) indicates that certain classes of contraband inspections are especially likely to be subterfuge searches and thus not inspections at all. If the contraband inspection: (1) Occurs immediately after a report of some specific offense in the unit and was not previously scheduled; (2) singles out specific individuals for inspection; or (3) "inspects" some people substantially more thoroughly than others, then the government must prove that the inspection was not actually a subterfuge search. As a practical matter, the rule expresses a clear preference for <u>previously scheduled</u> contraband inspections. Such scheduling helps ensure that the inspection is a routine command function and not an excuse to search specific persons or places for evidence of crime. The inspection should be scheduled sufficiently far enough in advance so as to eliminate any reasonable probability that the inspection is being used as a subterfuge. Such scheduling may be made as a matter of date or event. In other words, inspections may be scheduled to take place on any specific date (e.g., a commander may decide on the first of a month to inspect on the 7th, 9th, and 21st), or on the occurrence of a specific event beyond the usual control of the commander (e.g., whenever an alert is ordered, forces are deployed, a ship sails, the stock market reaches a certain level of activity, etc.). The <u>previously scheduled</u> inspection, however, need not be <u>preannounced</u>.

Mil.R.Evid. 313(b) permits a person acting as an inspector to utilize any reasonable natural or technological aid in conducting an inspection. The marijuana detection dog, for instance, is a natural aid that may be used to assist an inspector in more accurately discovering marijuana during an inspection of a unit for marijuana. If the dog should alert on an area which is not within the scope of the inspection (an area which was not going to be inspected), however, that area may not be searched without a prior authorization. Also, where the commanding officer is himself conducting the inspection when the dog alerts, he should not authorize the search himself, but should seek authorization from some other competent authority, e.g., the base commander. This is because the commander's participation in the inspection may render him disqualified to authorize searches.

C. Inventories. Mil.R.Evid. 313(c) codifies case law by recognizing that evidence seized during a bona fide inventory is admissible. The rationale behind this exception to the usual probable cause requirement is that such an inventory is not prosecutorial in nature and is a reasonable intrusion. Commands may inventory the personal effects of members who are on an unauthorized absence, placed in pretrial confinement, or hospitalized. Contraband or evidence incidentally found during the course of such a legitimate inventory will be admissible in a subsequent criminal proceeding. However, an inventory may not be used as a subterfuge for a search.

PART II - DRUG ABUSE DETECTION

While the options available to commanders in combating drug abuse are many and varied, this section deals only with the urinalysis program and its limitations.

GENERAL GUIDANCE

The urinalysis program of the Coast Guard was established primarily to provide a means for the detection of drug abuse and to serve as a deterrent against drug abuse. See Personnel Manual, Chapter 20, and COMDTINST 5355.1 (series). Additional guidance is found in the Military Rules of Evidence. These rules and directives contain detailed guidelines for the collection, analysis, and use of urine samples.

The positive results of a urinalysis test may be used for a number of distinct purposes, depending on how the original sample was obtained. Therefore, it is important to be able to recognize when, and under what circumstances, a command may conduct a proper urinalysis.

1. Search and seizure

a. Tests conducted with member's consent. Members suspected of having unlawfully used drugs may be requested to consent to urinalysis testing. For consent to be valid, it must be freely and voluntarily given. In this regard, Article 20-C-3(2) of the Personnel Manual provides that consent should be obtained in writing. A recommended urinalysis consent form is provided as appendix III to this chapter.

b. Probable cause and authorization. Urinalysis testing may be ordered, in accordance with Mil.R.Evid. 312(d) and 315, whenever there is probable cause to believe that a member has wrongfully used drugs and that a test will produce evidence of such use. For example, during a routine locker inspection in the enlisted barracks, you find an open baggie of what appears to be marijuana under some clothes in Petty Officer Jones' wall locker. Along with the marijuana you find a roach clip and some rolling papers. You notify the commanding officer of your find and he sends for Jones. A few minutes later, Petty Officer Jones staggers into the CO's office--eyes red and speech slurred. He is immediately apprehended and searched. A marijuana cigarette is found in his shirt pocket. Under these facts, a commander would have little trouble finding probable cause to order that a urine sample be given.

c. Probable cause and exigency. Mil.R.Evid. 315 recognizes that there may not always be sufficient time or means available to communicate with a person empowered to authorize a search before the evidence is lost or destroyed. While more commonly seen in the operable vehicle setting, facts could give rise to support an exigency search of a member's body fluids. Remember, to be lawful, an exigency search must still be based upon a finding of probable cause. Because drugs tend to remain in the system in measurable quantities for some time, it is unlikely that this theory will be the basis of many urinalysis tests.

2. Inspections under Mil.R.Evid. 313. Commanders may order urinalysis inspections just as they may order any other inspection to determine and ensure the security, military fitness, and good order and discipline of the command. Urinalysis inspections may not be ordered for the primary purpose of obtaining evidence for trial by court-martial or for other disciplinary purposes. This would defeat the purpose of an inspection and make it a search. Commands may use a number of methods of selecting servicemembers or groups of members for urinalysis inspection including, but not limited to:

a. Random selection of individual servicemembers from the entire unit or from any identifiable segment or class of that unit (e.g., a department, division, work center, watch section, barracks, or all personnel who have reported for duty in the past month). Random selection is achieved by ensuring that each servicemember has an equal chance of being selected each time personnel are chosen.

b. Selection, random or otherwise, of an entire subunit or identifiable segment of a command. Examples of such groups would include: an entire department, division, or watch section; all personnel within specific paygrades; all newly reporting personnel; or all personnel returning from leave, liberty, or UA. The part of the unit tested must not be so small that it essentially focuses on particular individuals.

c. Number of tests to be conducted

As a means of quota control, Bar Code labels will be issued in amounts equal to twice the number of members who may be tested in a fiscal year. Allocations must be fully used.

3. Urinalysis in conjunction with training. These include: "A" and "C" School candidates and officers and enlisted in the accession pipeline. See Article 20-C-3(6), Personnel Manual.

4. Valid medical purpose. Blood tests or urinalyses may also be performed to assist in the rendering of medical treatment (e.g., emergency care, periodic physical examinations, and such other medical examinations as are necessary for diagnostic or treatment purposes).

5. Command-directed screening. A command-directed test shall be ordered by a member's commander, commanding officer, officer in charge, or other authorized individual whenever a member's confirmed positive test result is below 50 ng/ml THC metabolite. The member shall be tested weekly until confirmed negative, then at random times for six months. See Article 20-C-7, Personnel Manual.

USES OF URINALYSIS RESULTS

Of particular importance to the commander is what use may be made of a positive urinalysis. See appendix VII to this chapter. The results of a lawful search and seizure, inspection, or a valid medical purpose may be used to refer a member to a treatment and rehabilitation program, to take appropriate disciplinary action, and to establish the basis for a separation and characterization in a separation proceeding.

The results of a command-directed urinalysis may NOT be used against the member for any disciplinary purposes except when used for impeachment or rebuttal in any proceeding in which evidence of drug abuse (or lack thereof) has been first introduced by the member. In addition, positive results obtained from a command-directed urinalysis may not be used as a basis for vacation of the suspension of execution of punishment imposed under Article 15, UCMJ, or as a result of court-martial. Such result may, however, serve as the basis for referral of a member to a treatment and rehabilitation program and as a basis for administrative separation.

THE COLLECTION PROCESS

The weakest link in the urinalysis program chain is in the area of collection and custody procedures. Commands should conduct every urinalysis with the full expectation that administrative or disciplinary action might result. A finding that a "drug incident" occurred may not be based solely on urinalysis in which the procedural safeguards (including taking a second sample, proper chain of custody, and sample handling) do not meet the standards in COMDTINST 5355.1 (series). Strict adherence to direct observation policy during urine collection to prevent substitution, dilution, or adulteration is an absolute necessity. Mail samples immediately after collection to reduce the possibility of tampering. Ensure all documentation and labels are legible and complete. Special attention should be given to the ledger and chain of custody to ensure that they are accurate, complete, and legible. Additional guidance is provided in COMDTINST 5355.1 (series), appendix V to this chapter, and Chapter 20, Coast Guard Personnel Manual, COMDTINST M1000.6 (series).

DRUG TESTING

A. Field test. Field tests are not authorized in the Coast Guard.

B. Drug screening laboratories. The Coast Guard utilizes civilian labs on a contract basis. See COMDTINST 5355.1 (series).

While a detailed discussion of the technology and laboratory procedures is far beyond the scope of this text, a basic understanding of what happens to a sample upon arrival at the lab in important. All samples are first receipted for in a secured accessioning area where shipping documentation and labels are checked, and an initial aliquot sample is poured off for screening. If the aliquot sample tests "positive," a second aliquot sample is poured for conformation testing by gas chromatography/mass spectrometry (GC/MS). Lab officials then review the test results and documentation, reporting only confirmed positives to designated commands. Positive samples are frozen and retained by the lab for sixty days. These samples will then be destroyed unless the laboratory is notified by designated commands to retain them longer because disciplinary action is contemplated.

SAMPLE SEARCH AND SEIZURE INSTRUCTION

INSTRUCTION 5510.3A

Subj: SEARCHES AND SEIZURES

Ref: (a) Mil.R.Evid. 315

1. Purpose. To establish the authority of various members of the _____ _____ to order searches of persons and property and to promulgate regulations and guidelines governing such searches.

2. Cancellation. _____ Instruction 5510.3 is hereby cancelled.

3. Objective. To insure that every search conducted by members of this command is performed in accordance with the law. For purposes of this instruction, "search" is defined as a quest for incriminating evidence.

4. Authority

(a) Reference (a), as modified by court decision, authorizes a commanding officer to order searches of:

(1) Persons subject to military law and to his authority;

(2) persons, including civilians, situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under his control;

(3) privately-owned property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under his control;

(4) U.S. Government-owned or controlled property under his jurisdiction, which has been issued to an individual or group of individuals for their private use;

(5) all other U.S. Government-owned or controlled property under his jurisdiction; and

(6) in foreign countries, persons subject to military law and to his authority and any property of such persons located anywhere in the foreign country.

(b) As to property described in paragraph 4(a)(5) above, a search may be conducted at any time, by anyone in military authority on the scene, for any reason, or for no reason at all. Any property seized as a result of such a search will be handled in accordance with paragraph 7 herein.

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(c) Items or other evidence seized as a result of a search of persons or property falling within paragraphs 4(a)(1), (2), (3), or (4), above, will be admissible in a subsequent court proceeding only if the search was based on probable cause. This means that before the search is ordered, the person ordering the search is in possession of facts and information, more than mere suspicion or conclusions provided to him by others, which would lead a reasonable person to believe that: (a) An offense has been committed; and (b) the proposed search will disclose an unlawful weapon, contraband, evidence of the offense or of the identity of the offender, or anything that might be used to resist apprehension or to escape.

(d) Before deciding whether to order any search of persons or property described in paragraphs 4(a)(1), (2), (3), or (4), above, the officer responsible is required to take all reasonable steps consistent with the circumstances to ensure that his source of information is reliable, and that the information available to him is complete and correct. He must then decide whether such information constitutes probable cause as defined above. In making this determination, the responsible officer is exercising a judicial, as opposed to a disciplinary, function.

(e) Ordinarily the Commanding Officer, _____, will be the officer responsible for authorizing searches of persons or property described in paragraphs 4(a)(1), (2), (3), or (4), above in this command. If the commanding officer is unavailable and full command responsibilities have devolved to another (normally the executive officer), that person then exercising full command responsibilities is permitted to authorize searches and seizures.

5. Criteria

(a) When so acting, the individual empowered to authorize searches will exercise discretion in deciding whether to order a search in accordance with the general criteria set forth above. No search will be ordered without a thorough review of the information to determine that probable cause, where required, exists. Due consideration will be given to the advisability of posting a guard or securing a space to prevent the tampering with or alteration of spaces while a further inquiry is conducted to effect a more complete development of the facts and circumstances giving rise to the request for a search.

(b) The following examples are intended to assist the responsible officer in placing the persons or property to be searched within the proper category (set forth in paragraph 4(a), above):

(1) Members of the armed forces and civilians accompanying armed forces in a combat zone in time of war;

(2) all persons, servicemembers and civilians, situated on or in a military installation, encampment, vessel, aircraft, or vehicle;

(3) automobiles, suitcases, civilian clothing, privately-owned parcels, etc., physically located on or in a military installation, encampment, etc., and owned or used by a servicemember or a civilian;

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(4) lockers issued for the stowage of personal effects, government quarters, or other spaces or containers issued to an individual for his private use;

(5) the working spaces of this command, including restricted-access spaces, in the custody of one or a group of individuals where no private use has been authorized, for example, a wall safe, gear lockers, government vehicles, government briefcases, and government desks; or

(6) persons under the authority of this command and their personal property, including vehicles located on or off base when located in a foreign country.

6. Exception. In circumstances involving vehicles, the interests of the safety or security of a command, or the necessity for immediate action to prevent the removal or disposal of stolen property may leave insufficient time to obtain prior authorization to conduct a search. Under such circumstances, any officer of this command, on the scene in the execution of his military duties, is authorized to conduct a search without prior authorization from the commanding officer. When so acting, such officer is limited by all the requirements set forth above. He must determine that the person or property to be searched falls within one of the categories set forth, that his information is reliable to the extent permitted by the circumstances, and that probable cause, if required, is present. He shall inform the command duty officer of all the facts and circumstances surrounding his actions at the earliest practicable time.

7. Instructions

(a) If the circumstances permit, place the person requesting the authorization to search under oath or affirmation prior to giving such authorization. This oath or affirmation is optional, and should be substantially in accordance with the one suggested in MJM, Encl. 38.

(b) Any person authorizing a search pursuant to this instruction may do so orally or in writing, but in every case the order shall be specific as to who is to conduct the search, what person(s) or property are to be searched, and what item(s) or information are expected to be found on such person(s) or property. At the time the search is ordered, or as soon thereafter as practicable, the individual authorizing the search will set forth the time of authorization, the particular persons or property to be searched, the identity of the persons authorized to conduct the search, the items or information which was expected to be found, a complete discussion of the facts and information he considered in determining whether or not to order the search, and what effort, if any, was made to confirm or corroborate these facts and information. This report will be forwarded to the commanding officer and will be supplemented at the earliest practicable time by a written report, setting forth any items seized as a result of the search, together with complete details, including location of their seizure and location of their stowage after seizure.

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(c) Where possible, searches authorized by this instruction will be conducted by at least two persons not personally interested in the case, at least one of whom will be a commissioned officer, noncommissioned officer, or petty officer.

(d) Once a search is properly ordered pursuant to this instruction, it is not necessary to obtain the consent of any individual affected by the search, however; such consent may be requested.

(e) Frequently, it will appear desirable to interrogate suspects in connection with an apparent offense. It is essential that the function of interrogation be kept strictly separate and apart from the function of conducting a search pursuant to this instruction. This instruction does not purport to establish any regulations or guidelines for the conduct of an interrogation.

(f) Personnel conducting a search properly authorized by this instruction will search only those persons or spaces ordered. If in the course of the search, they encounter facts or circumstances which make it seem desirable to extend the scope of the search beyond their original authority, they shall immediately inform the person authorizing the search of such facts or circumstances and await further instructions.

(g) Personnel conducting a search properly authorized by this instruction will seize all items which come to their notice in the course of the search which fall within the following categories:

(1) Unlawful weapons, i.e., any weapon the mere possession of which is prohibited by law or lawful regulation;

(2) contraband, i.e., any property the mere possession of which is prohibited by law or lawful regulation;

(3) any evidence of a crime, e.g., the fruits or products of any offense under the Uniform Code of Military Justice, or instrumentalities by means of which any such offense was committed; and

(4) any object or instrumentality which might be used to resist apprehension or to escape.

All such items shall be seized even if their existence was not anticipated at the time of the search.

(h) Any property seized as a result of a search shall be securely tagged or marked with the following information:

(1) Date and time of the search;

(2) identification of the person or property being searched;

(3) location of the seized article when discovered;

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(4) name of person ordering the search; and

(5) signature(s) of the person(s) conducting the search.

(i) No person conducting a search shall tamper with any items seized in any way, but shall personally deliver such items to the senior member of the search team. In the event that size or other considerations preclude the movement of any seized items, one of the persons conducting the search shall personally stand guard over them until notification is made to the person authorizing the search and receipt of further instructions.

(j) No person acting to authorize a search under the provisions of this order shall personally conduct the search. Such persons should also avoid, where possible and practical, being present during its conduct.

(k) Any person authorizing a search based upon this instruction should be careful to avoid any action which would involve him in the evidence-gathering process of the search.

(l) The person conducting a search should, when possible, notify the person whose property is to be searched. Such notice may be made prior to or contemporaneously with the search. An inventory of the property seized shall be made at the time of a seizure or as soon as practicable. At an appropriate time, a copy of the inventory shall be given to a person from whose possesion or premises the property was taken.

(m) Nothing in this instruction shall be construed as limiting or affecting in any way the authority to conduct searches pursuant to a lawful search warrant issued by a court of competent jurisdiction, or pursuant to the freely given consent of one in the possession of property, or incident to the lawful apprehension of an individual. The Military Justice Manual, COMDTINST M 5810.1 (series) contains suggested forms for recording information pertaining to the authorization for searches and the granting of consent to search. Use these forms whenever practicable.

(signed) COMMANDING OFFICER

Appendix 1(5)

FINDING THE EXISTENCE OF PROBABLE CAUSE TO ORDER A SEARCH

When faced with a request by an investigator to authorize a search, what should you know before you make the authorization? The following considerations are provided to aid you.

1. Find out the name and duty station of the applicant requesting the search authorization.

2. Administer an oath (optional) to the person requesting authorization. A recommended format for the oath is set forth below:

"Do you solemnly swear (or affirm) that the information you are about to provide is true to the best of your knowledge and belief, so help you God?"

3. What is the location and description of the premises, object, or person to be searched? Ask yourself:

a. Is the person or area one over which I have jurisdiction?

b. Is the person or place described with particularity?

4. What facts do you have to indicate that the place to be searched and property to be seized is actually located on the person or in the place your information indicates it is?

5. Who is the source of this information?

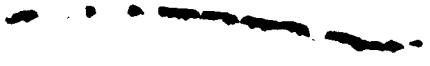
a. If the source is a person other than the applicant who is before you, that is, an informant, see the attached addendum on this subject.

b. If the source is the person you are questioning, proceed to question 6 immediately. If the source is an informant, proceed to question 6 after completing the procedure on the addendum.

6. What training have you had in investigating offenses of this type or in identifying this type of contraband?

7. Is there any further information you believe will provide grounds for the search for, and seizure of, this property?

8. Are you withholding any information you possess on this case which may affect my decision on this request to authorize the search?



Appendix II-a(1)

If you are satisfied as to the reliability of the information and that of the person from whom you receive it, and you then entertain a reasonable belief that the items are where they are said to be, then you may authorize the search and seizure. It should be done along these lines:

"(Applicant's name), I find that probable cause exists for the issuance of an authorization to search (location or person)* for the following items: (Description of items sought)" *

* See appendix II-c on describing the area or person to be searched, and items to be seized.

Appendix II-a(2)

SEARCH AUTHORIZATIONS: INFORMANT ADDENDUM

1. First inquiry. What forms the basis of his or her knowledge? You must find what facts (not conclusions) were given by the informant to indicate that the items sought will be in the place described.

2. Then you must find that either the informant is reliable or his information is reliable.

a. Questions to determine the informant's reliability:

(1) How long has the applicant known the informant?

(2) Has this informant provided information in the past?

(3) Has the provided information always proven correct in the past? Almost always? Never?

(4) Has the informant ever provided any false or misleading information?

(5) (If drug case) Has the informant ever identified drugs in the presence of the applicant?

(6) Has any prior information resulted in conviction? Acquittal? Are there any cases still awaiting trial?

(7) What other situational background information was provided by the informant that substantiates believability (e.g., accurate description of interior of locker room, etc.)?

b. Questions to determine that the information provided is reliable:

(1) Does the applicant possess other information from known reliable sources, which indicates what the informant says is true?

(2) Do you possess information (e.g., personal knowledge) which indicates what the informant says is true?

Appendix II-b

SEARCHES: DESCRIBE WHAT TO LOOK FOR AND WHERE TO LOOK

Requirement of specificity: No valid search authorization will exist unless the place to be searched and the items sought are particularly described.

1. Description of the place or the person to be searched.

a. Persons. Always include all known facts about the individual, such as name, rank, SSN, and unit. If the suspect's name is unknown, include a personal description, places frequented, known associates, make of auto driven, usual attire, etc.

b. Places. Be as specific as possible, with great effort to prevent the area which you are authorizing to be searched from being broadened, giving rise to a possible claim of the search being a "fishing expedition."

2. What can be seized. Types of property and sample descriptions. The basic rule: Go from the general to the specific description.

a. Contraband: Something which is illegal to possess.

Example: "Narcotics, including, but not limited to, heroin, paraphernalia for the use, packaging, and sale of said contraband, including, but not limited to, syringes, needles, lactose, and rubber tubing."

b. Unlawful weapons: Weapons made illegal by some law or regulation.

Example: Firearms and explosives including, but not limited to, one M-60 machine gun, M-16 rifles, and fragmentation grenades.

c. Evidence of crimes

(1) Fruits of a crime

Example: "Household property, including, but not limited to, one G.E. clock, light blue in color, and one Sony fifteen-inch, portable, color TV, tan in color with black knobs."

Appendix II-c(1)

(2) Tools or instrumentalities of crime. Property used to commit crimes.

Example: "Items used in measuring and packaging of marijuana for distribution, including, but not limited to, cigarette rolling machines, rolling papers, scales, and plastic baggies."

(3) Evidence which may aid in a particular crime solution: helps catch the criminal.

Example: "Papers, documents, and effects which show dominion and control of said area, including, but not limited to, cancelled mail, stencilled clothing, wallets, receipts."

Appendix II-c(2)

URINALYSIS CONSENT FORM

I, _____, have been requested to provide a urine sample. I have been advised that:

(1) I am suspected of having unlawfully used drugs;

(2) I may decline to consent to provide a sample of my urine for testing;

(3) if a sample is provided, any evidence of drug use resulting from urinalysis testing may be used against me in a court-martial.

I consent to provide a sample of my urine. This consent is given freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me.

_____

Signature

_____

Date

_____

Witness' Signature

_____

Date

Appendix III

U.S. Department of Transportation
United States Coast Guard

Commandant (G-PS)
United States Coast Guard

MAILING ADDRESS:
Washington, DC 20593-0001
Tel: [202] 267-2244

COMDTINST 5355.1A

24 FEB 1988

COMMANDANT INSTRUCTION 5355.1A

Subj: Drug Urinalysis Testing Procedures

Ref: (a) COMDTINST M1000.6, (series), CG PERSMAN

1. PURPOSE. This instruction establishes Coast Guard-wide procedures for collecting, recording, and testing drug urinalysis samples and supplements the guidance contained in chapter 20 of reference (a).

2. DIRECTIVES AFFECTED. Commandant Instruction 5355.1 is canceled.

3. DISCUSSION. Analysis of samples for the Coast Guard in-service drug urinalysis program is performed by a contract laboratory. Effective 1 February 1988, all drug urinalysis samples from Coast Guard members will be sent to Environmental Health Research and Testing, Inc. (EHRT), 1075 S. 13th Street, Birmingham, Alabama 35205.

4. SAMPLE COLLECTION AND MAILING MATERIALS.

   a. EHRT will make an initial issue of sample bottles, bar code labels, tamper detection seals, prepaid envelopes for mailing samples, and preaddressed chain of custody/test result forms. Commanders of maintenance and logistics commands and districts and commanding officers of Headquarters units will make allocations of bar code labels and chain of custody/test result forms to subordinate commands. Collection and shipping supplies will be shipped directly to the major commands listed in enclosure (1).

   b. Commands listed in enclosure (1) shall reorder additional materials as required, with the exception of additional bar code labels and chain of custody/test result forms, from the address given in paragraph 3, marked: SHIPPING DEPARTMENT. Bar code labels and chain of custody/test result forms will be reordered from the

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	a	b	c	d	e	f	g	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	y	z
A	3	3	3	3	3	3	2	3	2	2	2	2	2	2	2	2	1	2	2		2	2				
B		4	20	2	12	4	3	4	3	3	3	3	2	4	2	2	3	4	2	1	3	2	3	2	3	2
C	3	3	3	3	2	2	3	1	2	1	3	2	3		2	2	2	2	1	1	1	1		1		
D	3	2	1	3	1	1	1	2	1	1	1	1	2	1	1	1	1	1	2	1	1	2	1	2	2	2
E	2	2	2	2			1			1	1	1	2	2	2	1				2	1	1	2			
F	2	2	2	2	2			2	2	2	2	2	2	2	2	2	1	1		2						
G	1																									
H																										

* NON-STANDARD DISTRIBUTION:

Appendix IV

4. b. (cont'd) district, MLC, or Headquarters unit indicated in enclosure (1).

c. Requests for additional bar code labels shall be made by commands listed in enclosure (2) to Commandant (G-PS-2).

d. Test allocations are computed utilizing the active duty and selected Reserve strength of those units listed in enclosure (2). They are set at a level sufficient to ensure that every member has an equal probability of being tested and to ensure sufficient additional testing capacity exists to conduct any probable cause or probationary testing required. Allocations shall be fully used.

e. Bar code labels will be issued to commands listed in enclosure (2) for further distribution as required. Bar code labels will be issued in amounts equal to twice the number of members who may be tested per fiscal year. This will permit submission of second samples collected and retained at the command as directed by reference (a). Each set of bar code labels bears a unique number, which identifies the sample and ensures sample accountability. Commands shall maintain label sets as accountable material. Once labels are allocated, they shall not be transferred to other units without prior approval of Commandant (G-PS-2).

f. EHRT will issue chain of custody/test result forms, enclosure (3), preprinted with the reporting command's address to the commands listed in enclosure (2). These forms will be used by both the submitting command and EHRT. The original and one copy of the form shall accompany the samples and will be used as a report of testing results from EHRT to the commands listed in enclosure (2).

g. Submitting commands shall maintain a drug urinalysis sample ledger with pages formatted as shown in enclosure (4). The sample ledger is extremely important because it is the sole document by which the identity of members providing samples can be linked to sample containers. The sample ledger shall be stored in a locked location, with access limited to the designated Drug Urinalysis Sample Coordinator, when not in use.

5. SAMPLE COLLECTION PROCEDURES.

a. Commands shall designate a Drug Urinalysis Sample Coordinator and alternate in writing. Sample Coordinators shall supervise all sample collections and make all sample ledger entries; and, with the exception of the commanding officer and executive officer, shall have:

(1) sole access to the sample ledger's place of storage;

(2) sole access to the storage facility for second samples retained by the command in accordance with reference (a);

5. a. (3) sole access to sample collection and mailing materials; and,

(4) sole access to chain of custody/test result forms prepared for second samples retained by the command in accordance with reference (a).

b. Commands shall designate Drug Urinalysis Sample Observers in writing. Observers shall be of the same gender as the members providing samples.

c. When collecting samples, the Sample Coordinator shall initially verify the identity and SSN of each member selected to provide a sample against the member's military ID card and note the verification in the sample ledger.

d. The Coordinator shall inquire whether the member is currently taking any medication and, if so, the identity of the medication shall be noted in the "Comments" section of the sample ledger.

e. The Coordinator shall issue two sample containers to the Observer in the presence of the member providing the sample. The Observer shall escort the member to the collection site and provide the containers to the member at that time.

f. The Observer shall observe the member urinating into the two sample containers. Both containers shall be filled with a minimum of 70 ml of urine (fill the new 130 ml bottle slightly over 1/2 full). The member shall then secure the lid to each sample container. The container lids are tamper-proof when completely closed and separate seals are not required. It is important that the member ensure the containers are securely closed and sealed. The Observer shall escort the member to the Coordinator with the sample containers. The member shall personally deliver the two samples to the Coordinator. Members who are initially unable to provide two samples of approximately 70 ml shall remain at the sample collection site until able to do so.

g. The Coordinator, upon receiving the two sample containers, shall in the presence of the member ensure that both lids are tightly closed and sealed. A set of three identical bar code labels shall be used for each sample. One of the numbered bar code labels from the set will be affixed to the sample log book. The second bar code label from the set will be attached to the container along with two tamper detection seals. And the third label of each set will be attached to the sample's chain of custody/test result form. The bar code label and two tamper proof detection seals shall be affixed to the container as shown in enclosure (5) and the member permitted to initial the paddle-shaped end of each tamper proof detection seal.

5. g. (cont'd) Separate chain of custody/test result forms shall be used: the first listing samples which are shipped immediately and the second listing samples which are retained at the unit. The Coordinator, Observer, and member shall then sign or initial, as required, the ledger and chain of custody/test result forms. The Coordinator shall ensure that the submitting command's OPFAC number is typed on the chain of custody/test result forms in the space provided.

h. In the event the member providing the sample declines to initial the ledger or chain of custody/test result form, the Coordinator shall initial in the member's place, asterisk the entry, and comment on that fact on the document(s).

i. The Coordinator shall maintain sole custody of the samples from the time submitted by the member until they are mailed. Samples submitted to EHRT may be packaged singly or combined with other samples. Whenever practicable the Coordinator shall deliver the samples to a U. S. Postal Service mail receptacle on the same day the samples were collected. If a delay in mailing is necessary, the sample mailers shall be stored in the secured location used for retention of second samples until they are removed by the Coordinator for mailing. The Coordinator shall state the reason for any delay in mailing in the "Comments" section of the sample ledger.

j. Second samples retained at the command and their chain of custody/test result form(s) shall be stored in a secured location as directed by reference (a). If a second sample is submitted to EHRT, it shall be mailed as described above; except, since only second samples for which the first sample was confirmed positive will be shipped, bar code labels for all samples not shipped shall be lined out and initialed on the chain of custody/test result form by the coordinator. The reason and date of shipment for second samples shall be noted in the unit urinalysis sample ledger.

6. LABORATORY PROCESSING. The contract laboratory will be required to strictly follow contract specifications. The following is provided as general information to commands.

a. EHRT personnel will inspect all samples upon receipt and check for intact seals, required sample amount, leakage, and compatibility of bar code stickers between the sample container and the chain of custody/test result form. EHRT will note their findings on the form's comments section. Samples which do not pass this inspection will not be tested.

Appendix IV

6. b. (cont'd) EHRT will assign an accession number to each acceptable sample and conduct a screening test. Samples screened positive for any drug will be tested by gas chromatography with mass spectrometry (GC/MS) to confirm the presence of each drug which screened positive.

c. The chain of custody/test result form will be processed by EHRT employees to differing degrees of completion, depending on the acceptability of the sample received and the extent of testing required. If the testing process was terminated because the sample was not acceptable for testing, that fact will be noted in the "EHRT Findings" section of the form. If the sample screened negative for all drugs, that fact will be noted by a stamped entry on the "EHRT Findings" column.

d. Samples confirmed positive by GC/MS for THC will be reported in NG/ML, if the level detected is between 20 and 49 NG/ML. THC results at or above 50 NG/ML and all other drugs will be reported as "confirmed postive" only, indicating that the drug concentration level equals or exceeds the GC/MS minimum detection level specified for Coast Guard samples. A report of a positive confirmatory test shall not be considered valid unless all applicable blocks for specimen receipt and the EHRT certifying official's signature space are completed. If a receiving command doubts the form's completeness, the designated liaison with EHRT (as described in paragraph 7.b.) shall inquire into the matter and, if necessary, obtain a revised report from EHRT prior to further Coast Guard action.

e. Samples screened or confirmed as negative for all drugs will be disposed of by EHRT 72 hours after the applicable test, unless the submitting command specifically requests a sample be stored longer. In the event a command anticipates requirements for longer storage, appropriate notification should accompany the sample.

f. Samples confirmed positive for one or more drugs will be stored by EHRT in a frozen state for 60 days. EHRT will continue to store the sample, if requested in writing by commands listed in enclosure (2), pending completion of administrative or disciplinary processing. Letters requesting extended storage shall be addressed as given in paragraph 2 and marked **ATTENTION: CUSTODIAN OF COAST GUARD RECORDS.**

g. EHRT must maintain DOD certification. Part of this certification procedure requires the testing of 48 blind samples weekly and a detailed monthly quantitative analysis of the lab results. EHRT will also conduct a quality control program for both screen and confirmatory testing to ensure the reliability of test results. Test results or quality control samples must achieve a standard of

6. g. (cont'd) accuracy established by the contract specifications and be reported to Commandant (G-PS-2) monthly as a condition of contract compliance.

7. REPORTS OF TEST RESULTS.

a. EHRT will report daily sample processing results by mail to commands listed in enclosure (2).

b. Commands listed in enclosure (2) shall provide EHRT with a written designation for each principal and alternate member (by name, title, address, and commercial phone number) authorized to receive reports from EHRT and serve as the unit liaison between the command and EHRT. A copy of each designation letter will be provided to Commandant (G-PS-2).

c. EHRT will make two separate reports. A letter report will be made identifying each sample confirmed positive by GC/MS and enclosing the original chain of custody/test result form(s). A separate composite letter report will be prepared identifying just the samples that screened negative. Reports will be mailed only to the commands listed in enclosure (2).

d. Upon receipt of reports, commands listed in enclosure (2) shall identify the submitting command by the OPFAC number on the form and transmit test result information to them by message, if positive. Negative results or information on samples not tested will be transmitted by forwarding the chain of custody/test result form.

8. SUPPORT DOCUMENTATION AND EXPERT WITNESSES.

a. EHRT will provide all commands listed in enclosure (2) with a copy of their Standard Operating Procedures (SOP) document for processing Coast Guard samples, their screening and confirmatory testing protocols, a list of the concentration levels being used for all drugs to determine a positive confirmatory result, and a description of the significance of various testing results.

b. EHRT will mail the original chain of custody/test result form(s) with their letter report identifying samples confirmed positive. When necessary, copies of applicable laboratory GC/MS worksheets for samples confirmed positive for a drug(s), may be obtained upon written request to EHRT by the commands listed in enclosure (2).

c. EHRT will provide expert witnesses to convening authorities for use in courts-martial or administrative discharge/reenlistment boards as required. The costs for expert witnesses shall be borne by the convening authority.

8. d. When necessary to confirm the identity of the provider, the residue of any sample may be analyzed for the presence of other compounds or chemicals (chemical fingerprinting). Commandant (G-PS-2) should be contacted for assistance in arranging for such testing. The cost of such additional testing will be borne by the requesting unit.

   e. Only designated unit liaisons from the commands listed in enclosure (2) are authorized to communicate directly with EHRT. Authorization for legal counsel appointed to represent individual members during discharge proceedings to engage in direct contact with EHRT in the course of their representation will be coordinated through the designated liaison for the member's unit.

9. BILLING. EHRT will bill Commandant directly for all costs of drug urinalysis testing, except the costs for expert witnesses and any additional drug testing. The latter costs will be billed to the requesting unit.

10. ACTION. Area and district commanders, commanders of maintenance and logistics commands, unit commanding officers, and Commander, Coast Guard Activities Europe shall comply with the contents of this instruction.

Encl: (1) Coast Guard Commands Scheduled to Receive Collection Supplies
(2) Coast Guard Commands Authorized To Receive and Issue Bar Code Labels
(3) EHRT Sample Custody Document
(4) Drug Urinalysis Sample Ledger
(5) Bar Code Label and Tamper Detection Seal Illustration

COAST GUARD COMMANDS SCHEDULED TO RECEIVE COLLECTION SUPPLIES

Code #	Unit	Allocation	Notes
01	Commander (a) 01-71101 First Coast Guard District	7366	
	Group Woods Hole		(1)
	MSO Providence		(1)
	Air Station Cape Cod		(1)
	Group New York		(1)
	Group Boston		(1)
	Air Station Brooklyn		(1)
	Group East Moriches		(1)
	Group New Haven		(1)
	Group Highlands		(1)
	Group South Portland		(1)
	Group Southwest Harbor		(1)
02	Commander (a) 02-71102 Second Coast Guard District	2170	
	Group Lower Mississipi River and C.O. Marine Safety Office		(1)
	Group Upper Mississipi River		(1)
	Group Ohio River		(1)
	Group Tennessee River		(1)
	Marine Safety Office Paducah		(1)
	Marine Safety Office Louisville		(1)
	Marine Safety Office Huntington		(1)
	Marine Safety Office Pittsburg		(1)
	Loran Station Dana IN		(1)
05	Commander (a) 05-71105 Fifth Coast Guard District	5118	
07	Commander (a) 07-71107 Seventh Coast Guard District	5980	
	Group Charleston		(1)
	Group Key West		(1)
	Group Mayport		(1)
	Group Miami Beach		(1)
	Group St Petersburg		(1)
	Greater Antilles Section		(1)
	Reserve Center Miami Beach		(1)

08	Commander (a) 08-71108 Eighth Coast Guard District	4462	
09	Commander (a) 09-71109 Ninth Coast Guard District	3461	
	Group Buffalo		(1)
	Group Duluth		(1)
	Group Muskegon		(1)
	Air Station Traverse City		(1)
	Group Detroit		(1)
	Group Milwaukee		(1)
	Group Sault Ste. Marie		(1)
11	Commander (a) Eleventh Coast Guard District	4595	
	Group Humboldt Bay		(1)
	Group Monterey		(1)
	Group San Francisco		(1)
	Group Long Beach		(1)
	Group San Diego		(1)
	Air Station San Francisco		(1)
	Marine Safety Office Alameda		(1)
13	Commander (a) 13-71113 Thirteenth Coast Guard District	3246	
	Group Seattle		(1)
	Group Port Angeles		(1)
	Group North Bend		(1)
	Group Astoria		(1)
	Group Portland		(1)
14	Commander (a) 14-71114 Fourteenth Coast Guard District	1646	
	Base Honolulu		(1)
	Marianas Section		(1)
	Far East Section		(1)
	Air Station Barbers Point		(1)
17	Commander (a) 17-71117 Seventeenth Coast Guard District	2000	
	Air Station Kodiak		(1)
	Air Station Sitka		(1)
	Base Ketchikan		(1)

20	Commander Atlantic Area	20-75120	247	
21	Commander Pacific Area	21-75150		(2) MLCPAC
22	RIO Lockport	22-72040		(2) MLCLANT
23	RIO Bath	23-72011		(2) MLCLANT
24	Ship Intro Unit	24-64125		(2) MLCLANT
25	RIO Seattle	25-72071		(2) MLCPAC
29	APO Grand Prarie APO Marietta RIO Newport	29-72014 29-72015 29-72034		(2) MLCLANT (2) MLCLANT (2) MLCLANT
30	COMDAC Support Fac	30-59201		(2) MLCLANT
31	Marine Safety Center	31-33501		(2) HQ
32	Commander (p) Maintenance and Logistics Command Atlantic	32-75130	6000	
	USCGC CHASE (WHEC 718)			(1)
	USCGC GALLATIN (WHEC 721)			(1)
	USCGC INGHAM (WHEC 35)			(1)
	USCGC UNIMAK (WHEC 379)			(1)
	USCGC BEAR (WMEC 901)			(1)
	USCGC TAMPA (WMEC 902)			(1)
	USCGC HARRIET LANE (WMEC 903)			(1)
	USCGC NORTHLAND (WMEC 904)			(1)
	USCGC SPENCER (WMEC 905)			(1)
	USCGC SENECA (WMEC 906)			(1)
	USCGC ESCANABA (WMEC 907)			(1)
	USCGC NORTHWIND (WAGB 282)			(1)
	USCGC WESTWIND (WAGB 281)			(1)
	USCGC ACUSHNET (WMEC 167)			(1)
	USCGC ESCAPE (WMEC 6)			(1)
	USCGC LIPAN (WMEC 85)			(1)
	USCGC TAMAROA (WMEC 166)			(1)
	USCGC UTE (WMEC 76)			(1)
	USCGC CHILULA (WMEC 153)			(1)
	USCGC CHEROKEE (WMEC 165)			(1)
	USCGC EVERGREEN (WMEC 295)			(1)
	USCGC ALERT (WMEC 630)			(1)

	USCGC COURAGEOUS (WMEC 622)	(1)
	USCGC DAUNTLESS (WMEC 624)	(1)
	USCGC DECISIVE (WMEC 625)	(1)
	USCGC DEPENDABLE (WMEC 626)	(1)
	USCGC DILIGENCE (WMEC 616)	(1)
	USCGC DURABLE (WMEC 628)	(1)
	USCGC RELIANCE (WMEC 615)	(1)
	USCGC STEADFAST (WMEC 623)	(1)
	USCGC VALIANT (WMEC 621)	(1)
	USCGC VIGILANT (WMEC 617)	(1)
	USCGC VIGOROUS (WMEC 627)	(1)
	USCGC TAHOMA (WMEC 908)	(1)
	Support Center Boston	(1)
	Communication Station Boston	(1)
	Communication Station Portsmouth	(1)
	Communication Station New Orleans	(1)
	Communication Station Miami	(1)
	Communication Station San Juan	(1)
	Support Center Elizabeth City	(1)
	Commander (C3I)	(1)
	Support Center New Orleans	(1)
	Support Center Portsmouth	(1)
33	Commander (p)	4000
	Maintenance and Logistics Command Pacific	
	USCGC VENTUROUS (WMEC 625)	(1)
	USCGC MIDGETT (WMEC 726)	(1)
	USCGC MORGENTHAU (WMEC 722)	(1)
	USCGC RUSH (WMEC 723)	(1)
	USCGC CLOVER (WMEC 292)	(1)
	USCGC ACTIVE (WMEC 618)	(1)
	USCGC BOUTWELL (WMEC 719)	(1)
	USCGC POLAR SEA (WAGB 11)	(1)
	USCGC POLAR STAR (WAGB 10)	(1)
	USCGC RESOLUTE (WMEC 620)	(1)
	USCGC CITRUS (WMEC 300)	(1)
	USCGC JARVIS (WMEC 725)	(1)
	USCGC STORIS (WMEC 38)	(1)
	USCGC YOCONA (WMEC 168)	(1)
	Communication Station Kodiak	(1)
	Communication Station Wahiawa	(1)
	Communication Station Point Reyes	(1)
	Communication Station Guam	(1)
	Support Center Alameda	(1)
	Support Center Seattle	(1)
	Support Center Kodiak	(1)

	Support Center Terminal Island			(1)
	Air Station Sacramento			(1)
35	Commanding Officer U.S. Coast Guard Supply Center	35-52100	171	
40	Commanding Officer U.S. Coast Guard Aircraft Repair and Supply Center	40-50100	156	
42	Air Station Washington	42-20210		(2) HQ
44	Eastern Regional RUIT Ctr	44-68310		(2) MLCLANT
45	Central Regional RUIT Ctr	45-68320		(2) MLCLANT
46	Western Regional RUIT Ctr	46-68330		(2) MLCPAC
50	Commanding Officer Coast Guard Station Alexandria	50-30800	284	
52	OMEGA NAV SYS CEN	52-40305		(2) HQ
53	Commanding Officer Pay and Personnel Center (PPC)	53-47400	138	
54	INTEL COORD CTR	54-34320		(2) HQ
55	Commanding Officer Electronics Engineering Center	55-51210	129	
57	Gulf Strike Team	57-34340		(2) MLCLANT
58	Pacific Strike Team	58-34360		(2) MLCPAC
60	Superintendent (p) U.S. Coast Guard Academy	60-60100	1800	
	USCGC Eagle (WIX 327)			(1) Academy
62	Nat'l Motor Lifeboat Sch	62-61351		(2) MLCPAC
70	Commanding Officer Coast Guard Training Center, New York	70-61150	300	

71	Commanding Officer U.S. Coast Guard Institute	71-62100	112	
74	Commanding Officer Coast Guard Training Center, Petaluma	74-61200	720	
75	Commanding Officer U.S. Coast Guard Reserve Training Center	75-63100	1560	
76	Commanding Officer U.S. Coast Guard Aviation Training Center	76-65100	600	
77	Commanding Officer Coast Guard Training Center, Cape May	77-67100	8298	
78	Commanding Officer U.S. Coast Guard Aviation Technical Training Center	78-81300	950	
80	Commanding Officer U.S. Coast Guard Yard	80-31800	600	
81	Commanding Officer U.S. Coast Guard Research and Development Center	80-51120	55	
82	DET Data Buoy Ctr	82-51410		(2) MLCLANT
96	Commander U.S. Coast Guard Activities Europe	96-73130	156	
98	Commandant (G-CAS) U.S. Coast Guard	98-70098	2400	

NOTES:

(1) Designates units receiving collection supplies from contractor but not authorized direct receipt of test reports. District commanders assign allocations.

(2) Designates Headquarters units that will arrange with specified command for bar code labels and supplies required to conduct drug urinalysis testing.

COAST GUARD COMMANDS AUTHORIZED TO RECEIVE AND ISSUE BAR CODE LABELS

Code #	Unit Name	Allocation
01	Commander, First Coast Guard District (a)	7366
02	Commander, Second Coast Guard District (a)	2170
05	Commander, Fifth Coast Guard District (a)	5118
07	Commander, Seventh Coast Guard District (a)	5980
08	Commander, Eighth Coast Guard District (a)	4462
09	Commander, Ninth Coast Guard District (a)	3461
11	Commander, Eleventh Coast Guard District (a)	4595
13	Commander, Thirteenth Coast Guard District (a)	3246
14	Commander, Fourteenth Coast Guard District (a)	1646
17	Commander, Seventeenth Coast Guard District (a)	2000
20	Commander, Atlantic Area	247
32	Commander, Maintenance and Logistics Command Atlantic (p)	6000
33	Commander, Maintenance and Logistics Command Pacific (p)	4000
35	Commanding Officer, U.S. Coast Guard Supply Center	171
40	Commanding Officer, Aircraft Repair and Supply Center	156
50	Commanding Officer, Coast Guard Station Alexandria	284
53	Commanding Officer, Pay and Personnel Center (PPC)	138
55	Commanding Officer, Electronics Engineering Center	129
60	Superintendent, U.S. Coast Guard Academy (p)	1800
70	Commanding Officer, Training Center New York	300
71	Commanding Officer, Coast Guard Institute	112
74	Commanding Officer, Training Center Petaluma	720
75	Commanding Officer, Reserve Training Center	1560
76	Commanding Officer, Aviation Training Center	600

Appendix IV

COAST GUARD COMMANDS AUTHORIZED TO RECEIVE AND ISSUE BAR CODE LABELS

77	Commanding Officer, Training Center Cape May	8298
78	Commanding Officer, Aviation Technical Training Center	950
80	Commanding Officer, Coast Guard Yard	600
81	Commanding Officer, Research and Development Center	55
96	Commander, U.S. Coast Guard Activities Europe	156
98	Commandant (G-CAS), U.S. Coast Guard	2400

URINE SAMPLE CUSTODY DOCUMENT

24 FEB 1988

Read Instructions on Reverse Before Completion

1. SUBMITTING COMMAND/UNIT, ADDRESS, AND OPFAC#	A. NAME AND ADDRESS OF LABORATORY Environmental Health Research and Testing, Inc. 1075 South 13th Street Birmingham, AL 35205
2. COMMAND RECEIVING RESULTS	B. MODE OF TRANSPORTATION ☐ U.S. MAIL ☐ OTHER (Describe in K) C. CONDITION OF SHIP CONTAINER ☐ UNDAMAGED ☐ DAMAGED (Describe in K)
3 Date Sample(s) Obtained 4. Geographic Location At Time of Collection	D. Name and Signature of Receiving Person Date
5. Date Prepared for Shipment	E. EHRT Batch Number F. Assigned Intra-Lab Chain-of-Custody Document Number

6. # of Spec	7. Init.	8. USCG Bar Code # of Person Providing Specimen	G. EHRT Bar Code Accession #	H. EHRT Findings (Results Negative Unless Marked)
01				
02				
03				
04				
05				
06				
07				
08				
09				
10				
11				
12				

9. Chain of Custody (Continue on reverse if necessary) (a) I certify that I received all specimens, verified for accuracy both the identification on each sample bottle & this chain of custody document & properly packaged & sealed the course of specimens for shipment	I. REPORT OF RESULTS (Date/Time) J. I certify that I am the custodian of the Coast Guard urinalysis records of EHRT Laboratories, Inc., that this document was prepared in the normal business of the laboratory, that this document states the results of analysis performed on the item listed herein, and that a copy of this document is in my custody.
NAME, GRADE AND SIGNATURE OF COMMAND/UNIT COORDINATOR DATE	NAME, TITLE AND SIGNATURE OF CERTIFYING OFFICIAL DATE
NAME, GRADE AND SIGNATURE OF RELEASER DATE	K. DAMAGE TO SHIPPING CONTAINER AND/OR DISCREPANCY IN MAILING.

Appendix IV

Enclosure (3) to COMDTINST 5355.1A 24 FEB 1988

URINE SAMPLE CUSTODY DOCUMENT

9 (b) CONTINUATION OF CHAIN OF CUSTODY

PURPOSE OF CHANGE OF CUSTODY	RELEASED BY (Name, Grade/Title, Activity&Signature)	RECEIVED BY (Name, Title, Activity&Signature)	DATE

GENERAL INSTRUCTIONS

1. Forward original and one copy with the urine specimens (original envelope attached to inner sealed box or container in a waterproof mailer inside box or container)
2. Submitting unit shall retain one copy.
3. Testing laboratory shall retain the completed original for a minimum of one year.
4. All unshaded areas are to be completed by the submitting unit. All shaded areas are to be completed by the laboratory.

SUBMITTING UNIT INSTRUCTIONS

Block Number

1. Submitting Command/Unit & OPFAC #
   Address and OPFAC # of unit submitting urine samples
2. Name and Address of Coast Guard Command Receiving Results
3. Date Specimen(s) Obtained
   Time frame in which specimen(s) provided.
4. Geographic Location at Time of Collection
   Geographic location of command/unit when specimen(s) are obtained
5. Date Prepared for Shipment
   Date shipping container sealed and prepared for transportation to lab
6. # of Specimen(s)
   Preprinted on form.
7. Initials of Person Providing Specimen
8. USCG Bar Code of Person Providing Specimen
9. CHAIN OF CUSTODY
   (a) Certification of Coordinator
   (b) If/when custody of specimens changes other than for shipment, each change of custody must be documented in this block (continuation sheet must contain information from blocks 1 and 3 on the reverse side of this page)

REMARKS:

LABORATORY INSTRUCTIONS

Block Number

A. Name and Address of Laboratory
   Name and address of laboratory which will test & report the results.
B. Received from shipment
   Identify the accountable mode of transportation utilized in shipping the samples to the lab. If other is used please list mode in Block K.
C. Condition of Shipping Carton
   Indicate undamaged/damaged. Describe in Block K.
D. Receiving Official
   Name, title & signature of person receiving the shipment for the lab and date received.
E. EHRT Batch Number
   Indicate batch number assigned to the samples on this form.
F. Assigned Intra-Lab Chain of Custody Document Number
   Identify the chain of custody document which tracks samples through the lab.
G. EHRT Accession Number
   Sequential Barcode # assigned to each sample.
H. EHRT Findings
   Indicate for which drug(s) confirmed (leave blank if negative or affix a stamp indicating results negative).
   The following abbreviations are authorized:
   AMP: Amphetamine BAR: Barbiturate
   OPI: Opiate PCP: Phenocyclidine
   QUA: Methaqualone COC: Cocaine
   THC: Marijuana/Hashish
I. Report of Results (Date/Time of Report to Command.)
J. EHRT Certifying Official
   Signature of certifying official and date.
K. Damage to Shipping Container and/or Discrepancy in Mailing.
   Describe damage if "damaged" marked in C and/or

Enclosure (4) to COMDTINST 5355.1A

24 FEB 1988

BAR CODE LABELS AND TAMPER DETECTION SEALS ATTACHED:

	DATE	TIME	NAME OF PROVIDER	PROVIDER SSN	BAR CODE LABEL	SAMPLE COORDINATOR NAME	SAMPLE OBSERVER NAME	PROVIDER ID CONFIRMED	TO SAMPLE CONTAINER (LABEL & SEALS)	CHAIN OF CUSTODY REPORT FORM	PROVIDER INITIALS	OBSERVER INITIALS	COORDINATOR INITIALS	DATE SAMPLE MAILED	COORDINATOR INITIALS	COMMENTS
1.																
2.																
3.																
4.																
5.																
6.																
7.																
8.																
9.																
10.																
11.																
12.																
13.																
14.																
15.																

NOTE: Initials of Provider - If Provider declines; Coordinator initial and asteric space and note in "COMMENTS".

PLACEMENT OF BAR CODE LABEL AND TAMPER PROOF SEALS

The bar code label shall be affixed horizontally on the sample collection container approximately 1/4 inch below the edge of the cap. [See figure 1] Once the bar code label is in place, the first tamper detection seal shall be affixed so that the entire bar code label is covered by the middle portion of the seal and the two paddle shaped ends are in direct contact only with the container sides. The second tamper detection seal shall then be affixed across the lid of the sample collection container so that the bar code label (and first seal) are crossed and one paddle shaped end is in direct contact only with the container side. [See figure 2] The member should then initial both paddle shaped ends of each tamper detection seal.

Figure 1

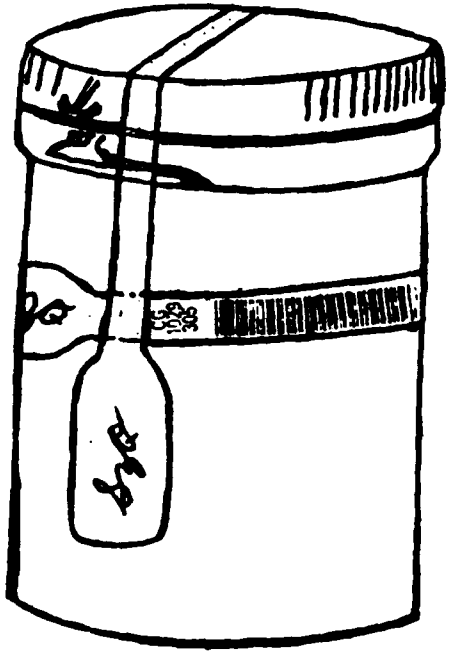
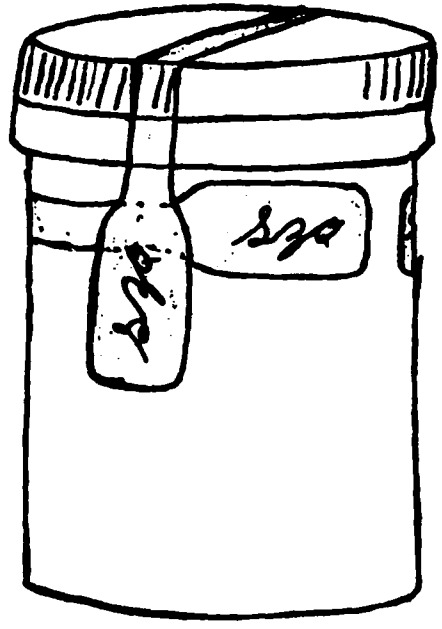


Figure 2



Enclosure (5) to COMDTINST 5355.1A
24 FEB 1988

COAST GUARD HANDBOOK

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CHAPTER IV

MILITARY JUSTICE INVESTIGATIONS

PRELIMINARY INVESTIGATION OF SUSPECTED OFFENSES

A. Complaints

1. A complaint consists of bringing to the attention of proper authority the known, suspected or probable commission of an offense under the UCMJ or a violation of a civil law.

Note: It is important to differentiate between initiating a complaint and preferring charges. The latter is accomplished by signing and swearing to charges in Block 11 on page 1 of the charge sheet (DD Form 458) by a person subject to the UCMJ.

2. Any person may initiate a complaint: military or civilian, adult or child, officer or enlisted. R.C.M. 301(a).

3. A complaint may be made to any person in military authority over the accused. R.C.M. 301(b).

B. Action upon receipt of complaint

1. R.C.M. 303 makes it mandatory for the immediate commander to make, or cause to be made, a preliminary inquiry into the charges or the suspected offenses sufficient for an intelligent disposition of them.

2. Purely military offenses and very minor offenses normally are investigated by a person assigned to the local command.

3. There are certain offenses for which referral to CGI is mandatory. COMDTINST 5520.5 (series), Investigative Assistance, provides an extensive list and guidance for those offenses that CGI must investigate.

4. Upon referral of a case to CGI, any command action on the case should be held in abeyance. However, if immediate referral to CGI is impossible, steps should be taken to preserve evidence and record changing conditions. Care should be taken not to compromise or impede any subsequent investigation.

C. The preliminary inquiry

1. The preliminary inquiry officer is designated by the XO. MJM, 1-C-4. There are no set procedures or forms for preliminary inquiries. However, for minor offenses normally disposed of at NJP, CG-4910 should be used. Instructions for the completion of the CG-4910 are contained within MJM, Encl. 2.

2. While the CG-4910 serves the dual function of an investigative form and a report chit, a locally prepared preliminary inquiry report form may be used and appended to the form. Likewise, additional information or witness statements may be appended as needed.

3. While not required, it is advisable to get sworn statements from witnesses.

4. The overall conduct of the investigation should be both informal and impartial. The investigating officer should gather all relevant evidence, both favorable and unfavorable, regarding the suspected offense and the character of the accused.

5. Charges and specifications should be drafted IAW the format provided in Part IV of the MCM.

6. An administrative investigation should not be convened solely for military justice matters. However, it is possible that an administrative investigation may incidentally address suspected criminal activity.

CHAPTER V

INFORMAL DISCIPLINARY ACTIONS: NONPUNITIVE MEASURES

INTRODUCTION

The term "nonpunitive measure" is used to refer to various leadership techniques which can be used to develop acceptable behavioral standards in members of a command. Nonpunitive measures generally fall into three areas: nonpunitive censure, extra military instruction, and administrative withholding of privileges. Commanding officers and officers-in-charge are authorized and expected to use nonpunitive measures to further the efficiency of their command. See R.C.M. 306(c)(2), MCM, 1984; MJM, 1-F.

The UCMJ and Secretarial regulations prescribe significant limitations on the use of nonpunitive measures. In this regard, it should be noted initially that nonpunitive measures may never be used as a means of informal punishment for any military offense. MJM, 1-F-1.

NONPUNITIVE CENSURE

Nonpunitive censure is nothing more than criticism of a subordinate's conduct or performance of duty by a military superior. This criticism may be made either orally or in writing. When made orally, it often is referred to as a "chewing out"; when reduced to writing, the letter is styled an "administrative letter of censure." See Personnel Manual, 8-D-4.

It should be noted that such letters are private in nature and copies may not be forwarded to the Chief, Office of Personnnel. MJM, 1-F-1d. Additionally, such letters may not be quoted in or appended to fitness reports or evaluations, included as enclosures to other investigative reports, or otherwise included in the official departmental records of the recipient. However, the deficient performance of duty or other facts which led to a letter of caution being issued can be mentioned in the recipient's next fitness report or enlisted evaluation.

There is only one exception to the rule that administrative letters of censure are not forwarded to G-PE/PO: administrative letters issued by the Commandant are submitted for inclusion in the recipients' service records.

While not forbidden, use of administrative letters of censure for enlisted personnel is not normally appropriate. See Personnel Manual, 8-D-6.

EXTRA MILITARY INSTRUCTION (EMI)

The term "extra military instruction" (EMI) is used to describe the practice of assigning extra tasks to a servicemember who is exhibiting behavioral or performance deficiencies for the purpose of correcting those deficiencies through the performance of the assigned tasks.

Normally such tasks are performed in addition to normal duties. Because this kind of leadership technique is more severe than nonpunitive censure, the law has placed some significant restraints on the commander's discretion in this area. All EMI involves an order from a superior to a subordinate to do the task assigned. However, it has long been a principle in military law that orders imposing punishment are unlawful and need not be obeyed unless issued pursuant to nonjudicial punishment or court-martial sentence. Thus, the problem that must be resolved in every EMI situation is whether a valid training purpose is involved or whether the purpose of the extra military instruction is punishment. Consequently, EMI should always involve the identification of a particular character deficiency and the assignment of a task rationally related to that deficiency. The language used in issuing the EMI order will frequently be scrutinized to determine if these steps were followed.

MJM, 1-F-1b. indicates that no more than two hours of instruction should be required each day; instruction should not be required on the individual's Sabbath; the duration of EMI should be limited to a period of time required to correct the deficiency; and after completing each day's instruction the subordinate should be allowed normal limits of liberty. In this connection, EMI, since it is training, can lawfully interfere with normal hours of liberty. One should not confuse this type of training with a denial of privileges (discussed later), which cannot interfere with normal hours of liberty. The commander must also be careful not to assign instruction at unreasonable hours. What "reasonable hours" are will differ with the normal work schedule of the individual involved, but no great interference with normal hours of liberty should be involved.

-- Authority to impose. The authority to assign EMI to be performed during working hours is not limited to any particular rank or rate but is inherent in authority vested in officers and noncommissioned petty officers. The authority to assign EMI to be performed after working hours rests in the commanding officer or officer-in-charge, but may be delegated to officers, petty officers, and noncommissioned officers. See MJM, 1-F-1b.(7).

The authority to assign EMI during working hours may be withdrawn by any superior if warranted, and the authority to assign EMI after working hours may be withdrawn by the commanding officer or officer-in-charge in accordance with the terms contained within the grant of that authority.

DENIAL OF PRIVILEGES

A third nonpunitive measure that may be employed to correct minor deficiencies is denial of privileges. A "privilege" is defined as a benefit provided for the convenience or enjoyment of an individual. MJM, 1-F-1c. Denial of privileges is a more severe leadership measure than either censure or EMI because denial of privileges does not necessarily involve or require an instructional purpose. Examples of privileges that may be withheld can be found in MJM, 1-F-1c. They include such things as special liberty, 72-hour liberty, exchange of duty, special command programs, hobby shops, parking privileges, and access to base or ship movies, enlisted or officers' clubs. It

may also encompass such things as withholding of special pay, and commissary and exchange privileges, provided such withholding complies with applicable rules and regulations, and is otherwise in accordance with law.

Final authority to withhold a privilege, even temporarily, rests with the level of authority empowered to grant that privilege. Therefore, authority of officers and petty officers to withhold privileges is, in many cases, limited to recommendations via the chain of command to the appropriate authority. Officers and petty officers are authorized and expected to initiate such actions when considered appropriate to remedy minor infractions in order to further efficiency of the command. Authority to withhold privileges may be delegated but in no event may the withholding of privileges, either by the commanding officer, officer-in-charge, or some lower echelon be tantamount to a deprivation of liberty itself.

Normal liberty is not technically a "right," but custom and regulation have made liberty a quasi-right. Thus, while one can be denied privileges, such a denial cannot extend to a deprivation of normal liberty. MJM, 1-F-1c. So, too, is it unlawful to deny liberty in order to prevent a subordinate from committing an offense the commander thinks he might commit if allowed to go on liberty. In each case, the denial of privilege relates to liberty, and liberty cannot be interfered with except as authorized by law. Always distinguish denial of privileges related to liberty (which cannot be lawfully done) from extra military instruction (training) which can lawfully interfere with normal liberty to a reasonable degree. Also note that the extension of working hours is recognized in MJM, 1-F-1c. and, if done properly, is not an unlawful denial of liberty.

ALTERNATIVE VOLUNTARY RESTRAINT

Alternative voluntary restraint is a device whereby a superior promises not to report an offense or not to impose punishment in return for a promise by the subordinate not to take normal liberty and to remain on base or aboard ship (also referred to as "hack"). These kinds of alternative voluntary restraints are <u>not</u> authorized by the UCMJ, MCM, or MJM. Their use places the commander in a tenuous position because such agreements are unenforceable. Resort to use of a voluntary restraint will probably constitute "former punishment" and thus preclude the later imposition of nonjudicial punishment or referral of charges to a court-martial should the command later desire to take official disciplinary action (for example, where the servicemember does not live up to his part of the voluntary restraint bargain).

CHAPTER VI

NONJUDICIAL PUNISHMENT

INTRODUCTION

The terms "nonjudicial punishment" and "NJP" are used interchangeably to refer to certain limited punishments which can be awarded for minor disciplinary offenses by a commanding officer or officer in charge to members of his command. In the Navy and Coast Guard, nonjudicial punishment proceedings are referred to as "captain's mast" or simply "mast." Article 15 of the Uniform Code of Military Justice (UCMJ), Part V of the Manual for Courts-Martial, 1984 (MCM), and Chapter 1 of the Military Justice Manual (MJM) constitute the basic law concerning nonjudicial punishment procedures. The legal protection afforded an individual subject to NJP proceedings is more complete than is the case for nonpunitive measures, but, by design, is less extensive than for courts-martial. NJP is both administrative and nonadversarial in nature. When punishment is imposed it is not considered a conviction, and when a case is dismissed it is not considered an acquittal.

NATURE AND REQUISITES OF NONJUDICIAL PUNISHMENT

A. The power to impose nonjudicial punishment

1. Authority under Article 15, UCMJ, may be exercised by a commanding officer, an officer in charge, or by certain officers to whom the power has been delegated. Part V, para. 2, MCM, 1984.

a. A commanding officer

(1) All commanding officers have the authority to impose NJP upon personnel assigned to their units. A unit of the Coast Guard is a separately identified organizational entity, under a duly assigned commanding officer or officer in charge, provided with personnel and material for the performance of a prescribed mission. Organizational entities established and headed by the CO of enlisted military personnel pursuant to section 3-2-5, CG Regulations (COMDTINST M5000.3), are included in the above definition. MJM, 1-A-2.

(2) The power to impose NJP is inherent in the office and not in the individual. Any officer who succeeds to command in the absence of the assigned commanding officer because of death, incapacitation, illness, TAD, or leave has the power of the assigned commanding officer to impose punishment, but the maximum punishment is limited by the rank or the successor. MJM, 1-A-2C.

b. An officer in charge

The term "commanding officer" includes officers in charge. Warrant officers or petty officers in charge of USCG units may impose NJP upon enlisted persons assigned to their unit, unless their authority is limited by their district commander. MJM, 1-A-2a. Executive petty officers have no power to impose nonjudicial punishment. However, when executive petty officers are serving in an "acting" capacity, they may impose nonjudicial punishment as if they were enlisted officers in charge. MJM, 1-A-2b.

c. Officers to whom NJP authority has been delegated

An area commander may delegate his or her powers under article 15 to his or her deputy. MLC commanders may delegate their powers under article 15 to their deputy of Chief, Personnel Division. A district commander may delegate his or her powers under article 15 to his or her chief of staff of the chief of the personnel division of his or her command. The Superintendent, USCG Academy may delegate his or her powers under article 15 to the Assistant Superintendent or the chief of the personnel division of his or her command. The Commandant of the Coast Guard may delegate his or her powers under article 15 to the Vice Commandant, the Chief of Staff, of the Chief, Office of Personnel. Any other officer of flag rank in command may delegate his or her powers under article 15 to a senior officer on his or her staff. To the extent of the authority thus delegated, the officer to whom such powers are delegated shall have the same authority as the officer who delegated the powers. Maximum limitations on punishments will be determined by the grade of the officer delegating this authority. MJM, 1-A-2d.

2. Referral of NJP to higher authority

a. If a commanding officer determines that his authority under article 15 is insufficient to make a proper disposition of the case, he may refer the case to a superior commander for appropriate disposition. R.C.M. 306(c)(5), 401(c)(2), MCM, 1984. MJM, 1-A-2e.

b. This situation could arise either when the commanding officer's NJP powers are less extensive than those of his superior, or when the prestige of higher authority would add force to the punishment, as in the case of a letter of admonition or reprimand.

B. Persons on whom nonjudicial punishment may be imposed

1. A commanding officer may impose NJP on all military personnel of his command. Art. 15(b), UCMJ.

2. An officer in charge in the Coast Guard is defined as a commanding officer for NJP purposes. MJM, 1-A-2a.

3. At the time the punishment is imposed, the accused must be a member of the command of the commanding officer (or of the unit of the officer in charge) who imposes the NJP. MJM, 1-A-3a.

a. A person is "of the command or unit" if he is assigned or attached thereto. This includes temporary additional duty (TAD) personnel

(i.e., TAD personnel may be punished either by the CO of the unit to which they are TAD or by the CO of the duty station to which they are permanently attached). Note, however, both commanding officers cannot punish an individual under article 15 for the same offense.

b. In addition, a party to an administrative investigation remains "of the command or unit" to which he was attached at the time of his designation as a party for the sole purpose of imposing a letter of admonition or reprimand as NJP. MJM, 1-A-3e.

c. Personnel of another armed force

(1) A Coast Guard commanding officer may not exercise NJP jurisdiction on other service personnel assigned or attached to their command unless expressly permitted by interservice agreement. As a matter of policy, such personnel are returned to their parent-service unit for discipline.

(2) Other service commanding officers may impose NJP on Coast Guard members in limited circumstances. MJM, 1-A-3c.

4. Imposition of NJP on reservists

a. Reservists on active duty for training or, under some circumstances, inactive duty for training, are subject to the UCMJ and therefore to the imposition of NJP.

b. While the offense which the commanding officer or officer in charge seeks to punish at NJP must have occurred while the member was on active duty or inactive duty training, it is not necessary that NJP occur (or the offense even be discovered) before the end of the active duty or inactive duty training period during which the alleged misconduct occurred. In that regard, the officer seeking to impose NJP has several options:

(1) He may impose NJP during the active duty or inactive duty training when the misconduct occurred;

(2) he may impose NJP at a subsequent period of active duty or inactive duty training (so long as this is within 2 years of the date of the offense); or

(3) he may request from the Regular component officer exercising general court-martial jurisdiction over the accused an involuntary recall of the accused to active duty or inactive duty training for purposes of imposing NJP. MJM, 1-A-3g; 1-C-6.

c. Punishment imposed on persons who were involuntarily recalled for purposes of imposition of NJP may not include confinement unless the Commandant approved the recall.

5. Right of the accused to demand trial by court-martial

a. Article 15a, UCMJ, and Part V, para. 3, MCM, 1984, provide another limitation on the exercise of NJP. Except in the case of a person attached to or embarked in a vessel, an accused may demand trial by court-martial in lieu of NJP.

b. This right to refuse NJP exists up until the time NJP is imposed (i.e., up until the commanding officer announces the punishment). Art. 15a, UCMJ. This right is not waived by the fact that the accused has previously signed a waiver indicating that he would accept NJP.

c. The category of persons who may not refuse NJP includes those persons assigned or attached to the vessel; on board for passage; or assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body.

d. The key time factor in determining whether or not a person has the right to demand trial is the time of the imposition of the NJP and not the time of the commission of the offense.

6. There is no power whatsoever for a commanding officer or officer in charge to impose NJP on a civilian.

C. Offenses punishable under article 15

1. Article 15 gives a commanding officer power to punish individuals for minor offenses. The term "minor offense" has been the cause of some concern in the administration of nonjudicial punishment. Article 15, UCMJ, and Part V, para. 1e, MCM, 1984, indicate that the term "minor offense" means misconduct normally not more serious than that usually handled at summary court-martial (where the maximum punishment is thirty days confinement). These sources also indicate that the nature of the offense and the circumstances surrounding its commission are also factors which should be considered in determining whether an offense is minor in nature. The term "minor offense" ordinarily does not include misconduct which, if tried by general court-martial, could be punished by a dishonorable discharge or confinement at hard labor for more than one year. The final determination as to whether an offense is "minor" is within the sound discretion of the commanding officer.

Imposition of NJP does not, in all cases, preclude a subsequent court-martial for the same offense. See Part V, para. 1e, MCM, 1984.

Article 43(c), UCMJ, prohibits the imposition of NJP more than two years after the commission of the offense.

2. Cases previously tried in civil courts

a. Section 1-A-5c. of the MJM does not permit the use of nonjudicial punishment to punish an accused for an offense for which he has been tried (whether acquitted or convicted) by a domestic or foreign civilian court, or whose case has been diverted out of the regular criminal process for a probationary period, or whose case has been adjudicated by juvenile court authorities, unless authority is obtained from the COMDT (G-L).

b. NJP may not be imposed for an act tried by a court that derives its authority from the United States, such as a Federal district court. MJM, 1-A-5c.

c. Clearly, cases in which a finding of guilt or innocence has been reached in a trial by court-martial cannot be then taken to nonjudicial punishment. MJM, 1-A-5d. However, the last point at which cases may be withdrawn from court-martial before findings with a view toward nonjudicial punishment is presently unclear.

3. Off-base offenses

a. Commanding officers and officers in charge may dispose of minor disciplinary infractions (which occur on or off-base) at NJP. Unless the off-base offense is a traffic offense (see para. b below) or one previously adjudicated by civilian authorities (see para. 2a, page 6-4, supra), there is no limit on the authority of military authorities to resolve such offenses at NJP.

b. As a matter of policy, in areas not under military control, the responsibility for maintaining law and order rests with civil authority. The enforcement of traffic laws falls within the purview of this principle. Off-duty, off-installation driving offenses, however, are indicative of inability and lack of safety consciousness. Such driving performance does not prevent the use of nonpunitive measures, i.e., deprivation of on-installation driving privileges.

D. Hearing procedure

1. Introduction. Nonjudicial punishment results from an investigation into unlawful conduct and a subsequent hearing to determine whether and to what extent an accused should be punished. Generally, when a complaint is filed with the commanding officer of an accused, that commander is obligated to cause an inquiry to be made to determine the truth of the matter. MJM, 1-C. When this inquiry is complete, a CG-4910 is filled out. (This inquiry is discussed in Chapter VI, supra.) The CG-4910 functions as an investigation report as well as a record of the processing of the nonjudicial punishment case. The appropriate report and allied papers are then forwarded to the commander. The ensuing discussion will detail the legal requirements and guidance for conducting a nonjudicial punishment hearing.

2. Prehearing advice. If, after the preliminary inquiry, the commanding officer determines that disposition by nonjudicial punishment is appropriate, the commanding officer must cause the accused to be given the advice outlined in Part V, para. 4, MCM, 1984. The commanding officer need not give the advice personally but may assign this responsibility to another appropriate person.

a. Right to confer with independent counsel. Because an accused who is not attached to or embarked in a vessel has the right to refuse NJP, he must be told of his right to confer with independent counsel regarding his decision to accept or refuse the NJP if the record of that NJP is to be admissible in evidence against him should the accused ever be subsequently tried by court-martial. A failure to properly advise an accused of his right to

confer with counsel, or a failure to provide counsel, will not, however, render the imposition of nonjudicial punishment invalid or constitute a ground for appeal. Therefore, if the command imposing the NJP desires that the record of the NJP be admissible for courts-martial purposes, the record of the NJP must be prepared in accordance with applicable service regulations and reflect that:

(1) The accused was advised of his right to confer with counsel;

(2) the accused either exercised his right to confer with counsel or made a knowing, intelligent, and voluntary waiver thereof; and

(3) the accused knowingly, intelligently, and voluntarily waived his right to refuse NJP. All such waivers must be in writing.

Recordation of the above so-called "Booker rights" advice and waivers should be made on the forms in enclosure 3 of the MJM and on the court memorandum. In this regard, section 2-G of the PMIS Manual, COMDTINST M1080.5 (series) explains precisely how to prepare a court memorandum which will be admissible at any subsequent trial by court-martial. If an accused waives any or all of the above rights, but refuses to execute such a waiver in writing, the fact that he was properly advised of his rights, waived his rights, but declined to execute a written waiver should be so recorded.

b. Hearing rights. If the accused does not demand trial by court-martial within a reasonable time after having been advised of his rights or if the right to demand court-martial is not applicable, the accused shall be entitled to appear personally before the commanding officer for the nonjudicial punishment hearing. At such hearing the accused is entitled to:

(1) Be informed of his rights under Article 31, UCMJ;

(2) be accompanied by a spokesperson provided by, or arranged for, the member -- however, the proceedings need not be unduly delayed to permit the presence of the spokesperson, nor is he entitled to travel or similar expenses;

(3) be informed of the evidence against him relating to the offense;

(4) be allowed to examine all evidence upon which the commanding officer will rely in deciding whether and how much nonjudicial punishment to impose;

(5) present matter in defense, extenuation, and mitigation, orally, in writing, or both;

(6) have witnesses present, including those adverse to the accused, upon request, if their statements will be relevant, if they are reasonably available, and if their appearance will not require reimbursement by the government, will not unduly delay the proceedings, or, in the case of a military witness, will not necessitate his being excused from other important duties; and

(7) have the proceedings open to the public unless the commanding officer determines that the proceedings should be closed for good cause. No special facility arrangements need to be made by the commander.

3. Forms. The forms set forth in Enclosures 3, 4, and 5 of the MJM are designed to comply with the above requirements.

4. Hearing requirement. Except as noted below, every nonjudicial punishment case must be handled at a hearing at which the accused is allowed to exercise the foregoing rights. In addition, there are other technical requirements relating to the hearing and to the exercise of the accused's rights.

a. Personal appearance waived. Under Coast Guard policy, appearance of the accused is normally required and a specific request for personal appearance is unnecessary. However, if the accused is UA, he/she may be considered to have waived or withdrawn the request for personal appearance so long as the provisions of paras. 4.a and b. of Part V, MCM, 1984 are complied with. MJM, 1-D-1b.

b. Hearing officer. Normally, the officer who actually holds the nonjudicial punishment hearing is the commanding officer of the accused. Part V, para. 4c, MCM, 1984, allows the commanding officer or officer in charge to delegate his authority to hold the hearing to another officer under extraordinary circumstances. These circumstances are not detailed but they must be unusual and significant rather than matters of convenience to the commander. This delegation of authority should be in writing and the reasons for it detailed. It must be emphasized that this delegation does not include the authority to impose punishment. At such a hearing, the officer delegated to hold the hearing will receive all evidence, prepare a summarized record of matters considered, and forward the record to the officer having nonjudicial punishment authority.

c. The record of a formal investigation or other factfinding body (e.g., an article 32 investigation) in which the accused was accorded the rights of a party with respect to an act or omission for which NJP is contemplated, may be substituted for the hearing. Part V, para. 4d, MCM, 1984; MJM, 1-H-1a. Keep in mind the right to refuse, if it exists, may still be exercised up until the time punishment is imposed.

(1) It is possible to impose NJP on the basis of a record of a formal investigation at which the accused was afforded the rights of a party because the rights of a party include all elements of the mast hearing, plus additional procedural safeguards, such as assistance of counsel. See MJM, 1-H-1a.

(2) If the record of a formal investigation or other factfinding body discloses that the accused was not accorded all the rights of a party with respect to the act or omission for which NJP is contemplated, the commanding officer must follow the regular NJP procedure or return the record to the factfinding body for further proceedings to accord the accused all rights of a party. MJM, 1-H-1d.

d. Burden of proof. The commanding officer or officer in charge must decide that the accused is "guilty" by a preponderance of the evidence.

e. Personal representative. A mast is not an adversary proceeding, and an accused does not have the right to be represented by a lawyer at mast. Whether a lawyer is permitted to be present to represent the accused at mast is a matter within the sole discretion of the commanding officer conducting the mast.

Except when the member is represented by a lawyer, a representative shall be appointed to assist the member in preparing for and at the mast proceedings unless the member specifically waives the assistance of a representative. The representative should be an officer or petty officer and must, if practicable, be attached to the unit of the commanding officer who is going to hold the mast proceedings. Appointment of the representative should be made by the executive officer at the time he or she takes initial action on the report of misconduct (form CG-4910). If there is a particular individual attached to the unit whom the member desires to have as a representative, such person should be made available, if practicable, provided that he or she is neither involved in the matter which is the subject of the mast nor expected to be a witness in the proceedings. Communications between a member and his or her mast representative shall be confidential. Their relationship is considered privileged in the same manner as is the relationship between an attorney and his or her client. MJM, 1-G-1; 1-G-3.

f. Nonadversarial proceeding. The presence of a personal representative is not meant to create an adversarial proceeding. Rather, the commanding officer is still under an obligation to pursue the truth. In this connection, he controls the course of the hearing and should not allow the proceedings to deteriorate into a partisan adversarial atmosphere.

g. Witnesses. When the hearing involves controverted questions of fact pertaining to the alleged offenses, witnesses should be called to testify if they are present on the same ship or base or are otherwise available at no expense to the government. Thus, in a larceny case, if the accused denies he took the money, the witnesses who can testify that he did take the money should be called to testify in person if they are available at no cost to the government. Part V, para. 4c(1)(F), MCM, 1984. It should be noted, however, that no authority exists to subpoena civilian witnesses for an NJP proceeding.

h. Public hearing. Part V, para. 4c(1)(G), MCM, 1984, provides that the accused is entitled to have the hearing open to the public unless the commanding officer determines that the proceedings should be closed for good cause. The commanding officer is not required to make any special arrangements to facilitate public access to the proceedings.

i. Command observers. The attendance of representative members of the command during all nonjudicial punishment proceedings to dispel erroneous perceptions concerning the fairness and integrity of the proceedings is permitted.

j. Publication of nonjudicial punishment. Commanding officers are authorized to publish the results of nonjudicial punishment.

5. Possible actions by the commanding officer at mast

a. Dismissal with or without warning

(1) This action normally is taken if the commanding officer is not convinced by the evidence that the accused is guilty of an offense, or decides that no punishment is appropriate in light of his past record and other circumstances.

(2) Dismissal, whether with or without a warning, is not considered NJP, nor is it considered an acquittal.

b. Referral to an SCM, SPCM, or pretrial investigation under Article 32, UCMJ

c. Postponement of action (pending further investigation or for other good cause, such as a pending trial by civil authorities for the same offenses)

d. Award NJP.

e. Referral to a superior for NJP. MJM, 1-A-2e; 1-D-13c.

AUTHORIZED PUNISHMENTS AT NJP

A. Limitations. The maximum imposable punishment in any Article 15, UCMJ, case is limited by several factors.

1. The grade of the imposing officer. Commanding officers in grades O-4 to O-6 have greater punishment powers than officers in grades O-1 to O-3; flag officers, general officers, and officers exercising general court-martial jurisdiction have greater punishment authority than commanding officers in grades O-4 to O-6.

2. The status of the imposing officer. Regardless of the rank of an officer in charge, his punishment power is limited to that of a commanding officer in grade O-1 to O-3; the punishment powers of a commanding officer are commensurate with his permanent grade.

3. The status of the accused. Punishment authority is also limited by the status of the accused. Is he an officer or an enlisted person attached to or embarked in a vessel?

Maximum punishment limitations apply to each NJP action and not to each offense. Note also there exists a policy that all known offenses of which the accused is suspected should ordinarily be considered at a single article 15 hearing. Part V, para. 1f(3), MCM, 1984. The chart on page 6-13 summarizes the maximum punishment limitations for NJP.

B. Nature of the punishments

1. Admonition and reprimand. Before issuing a punitive letter of admonition or reprimand based on a hearing at mast, the commanding officer shall permit the offender to make a written statement in his or her own behalf; if the offender does not wish to make a statement, he or she shall be required to so state in writing. MJM, 1-E-3a; Art. 5-D-2, Personnel Manual.

2. Arrest in quarters. The punishment is imposable only on officers. Part V, para. 5c(1), MCM, 1984. It is a moral restraint, as opposed to a physical restraint. It is similar to restriction, but has much narrower limits. The limits of arrest are set by the officer imposing the punishment and may extend beyond quarters. The term "quarters" includes military and private residences. The officer may be required to perform his regular duties as long as they do not involve the exercise of authority over subordinates. MJM, 1-E-3c.

3. Restriction. Restriction also is a form of moral restraint. Part V, para. 5c(2), MCM, 1984. Its severity depends upon the breadth of the limits as well as the duration of the restriction. If restriction limits are drawn too tightly, there is a real danger that they may amount to either confinement or arrest in quarters, which in the former case cannot be imposed as nonjudicial punishment, and in the latter case is not an authorized punishment for enlisted persons. As a practical matter, restriction ashore means that an accused will be restricted to the limits of the command except of course at larger shore stations where the use of recreational facilities might be further restricted. Restriction and arrest are normally imposed by a written order detailing the limits thereof. For a sample restriction letter, see enclosure 6, MJM.

4. Forfeiture. A forfeiture applies to basic pay and to sea or foreign duty pay, but not to incentive pay, allowances for subsistence or quarters, etc. "Forfeiture" means that the accused forfeits monies due him in compensation for his military service only; it does not include any private funds. This distinguishes forfeiture from a "fine," which may only be awarded by courts-martial. The amount of forfeiture of pay should be stated in whole dollar amounts, not in fractions, and indicate the number of months affected; e.g., "to forfeit $50.00 pay per month for two months." Where a reduction is also involved in the punishment, the forfeiture must be premised on the new lower rank, even if the reduction is suspended. Part V, para. 5c(8), MCM, 1984. Forfeitures are effective on the date imposed unless suspended or deferred. Where a previous forfeiture is being executed, that forfeiture will be completed before any newly imposed forfeiture will be executed. MJM, 1-E-3g.

5. Extra duties. Various types of duties may be assigned, in addition to routine duties, as punishment. Part V, para. 5c(6), MCM, 1984, however, prohibits extra duties which constitute a known safety or health hazard, which constitute cruel and unusual punishment, or which are not sanctioned by the customs of the service involved. Additionally, when imposed upon a petty or noncommissioned officer (E-4 and above), the duties cannot be demeaning to his rank or position. Extra duties may not be imposed on E-7 and above in the Coast Guard. MJM, 1-E-2c. The immediate commanding officer of the accused will normally designate the amount and character of

extra duty, regardless of who imposed the punishment, and that such duties normally should not extend beyond 2 hours per day. Guard duty may not be assigned as extra duties and, except in cases of reservists performing inactive training or active duty for training for periods of less than 7 days, extra duty shall not be performed on Sunday although Sunday counts as if such duty was performed.

6. Reduction in grade. Reduction in pay grade is limited by Part V, para. 5c(7), MCM, 1984, to one grade only. In the Coast Guard, reduction may not be imposed on E-7 and above. MJM, 1-E-2c. For restoration after reduction, see Art. 5-C-33, CG Personnel Manual. Reduction may not be awarded by enlisted OIC's.

7. Correctional custody. Correctional custody is a form of physical restraint during either duty or nonduty hours, or both, and may include hard labor or extra duty. Awardees may perform military duty but not watches and cannot bear arms or exercise authority over subordinates. See Part V, para. 5c(4), MCM, 1984. Specific regulations for conducting correctional custody are found in Art. 8-E-10, CG Personnel Manual. Time spent in correctional custody is not "lost time." Correctional custody cannot be imposed on grades E-4 and above. See MJM, 1-E-3d. To assist commanders in imposing correctional custody, correctional custody units (CCU's) have been established at major shore installations. The local operating procedures for the nearest CCU should be checked before correctional custody is imposed.

8. Confinement on bread and water or diminished rations. This punishment is not authorized in the Coast Guard. MJM, 1-E-3d.

C. Execution of punishments

1. General rule. As a general rule, all punishments, if not suspended, take effect when imposed. Part V, para. 5e, MCM, 1984; MJM, 1-E-5. This means that the punishment in most cases will take effect when the commanding officer informs the accused of his punishment decision. Thus, if the commanding officer wishes to impose a prospective punishment, one to take effect at a future time, he should simply delay the imposition of nonjudicial punishment altogether. There are, however, several specific rules which authorize the deferral or stay of a punishment already imposed.

a. Deferral of correctional custody. Correctional custody may be deferred when the accused is not medically fit to serve the punishment. MJM, 1-E-5e.(4).

b. Deferral of restraint punishments pending an appeal from nonjudicial punishment. Part V, para. 7d, MCM, 1984, provides that a servicemember who has appealed from nonjudicial punishment may be required to undergo any punishment imposed while the appeal is pending, except that if action is not taken on the appeal within 5 days after the appeal was submitted, and if the servicemember so requests, any unexecuted punishment involving restraint or extra duties shall be stayed until action on the appeal is taken. MJM, 1-E-5e.(2).

c. Interruption of restraint punishments by subsequent nonjudicial punishments. The execution of any nonjudicial (or court-martial) punishment involving restraint will normally be interrupted by a subsequent nonjudicial punishment involving restraint. Thereafter, the unexecuted portion of the prior restraint punishment will be executed. The officer imposing the subsequent punishment, however, may order that the prior punishment be completed prior to the service of the subsequent punishment. MJM, 1-E-5b.

d. Interruption of punishments by unauthorized absence. Service of all nonjudicial punishments will be interrupted during any period that the servicemember is UA. A punishment of reduction may be executed even when the accused is UA. MJM, 1-E-5f.

2. Responsibility for execution. Regardless of who imposed the punishment, the immediate commanding officer of the accused is responsible for the mechanics of execution.

TABLE OF MAXIMUM PUNISHMENTS FOR OFFICERS/WARRANT OFFICERS *

Type of Punishment	By Flag Officer	By LCDR or Above	By LT or Below
Admonition/reprimand	Yes	Yes	Yes
Arrest in quarters	30 days	No	No
Restriction	60 days	30 days	15 days
Forfeiture of pay	1/2 of 1 mo. pay per mo. for 2 mos.	No	No

TABLE OF MAXIMUM PUNISHMENTS FOR ENLISTED PERSONNEL *

Type of Punishment	By LCDR or Above	By LT or Below	By OINC
Admonition/reprimand	Yes	Yes	No
Correctional custody (E-3 and below)	30 days	7 days	No
Extra duties (E-6 and below)	45 days	14 days	14 days
Restriction	60 days	14 days	14 days
Forfeiture of pay	1/2 of 1 mo. pay per mo. for 2 mos.	7 days pay	3 days pay
Reduction to next inferior grade (E-6 and below)	Yes	Yes	No

* Limitations on punishments. All authorized maximum punishments may be imposed in a single mast with the following exceptions:

(1) Arrest in quarters may not be imposed in combination with restriction.

(2) Correctional custody may not be imposed in combination with restriction or extra duties. It shall not be imposed upon persons in paygrade E-4 and above unless an unsuspended reduction to E-3 is imposed.

(3) Restriction and extra duties may be combined to run concurrently. However, when both extra duty and restriction are awarded to run concurrently, they form a new "combined" punishment which cannot exceed the maximum imposable for extra duties.

(4) Detention of pay is not an authorized punishment. MJM, 1-E-2c.

(5) Arrest in quarters, correctional custody, and restriction may not be imposed on a reservist at nonjudicial punishment awarded during inactive duty training or involuntary active duty pursuant to an order under MJM, 1-C-6. (See also 1-E-3b.(8) and d.(5) for other limitations on punishments that may be awarded to reservists.)

COMBINATIONS OF PUNISHMENTS

-- General rules. Part V, para. 5d, MCM, 1984, provides that all authorized nonjudicial punishments may be imposed in a single case subject to the following limitations:

1. Arrest in quarters may not be imposed in combination with restriction;

2. correctional custody may not be imposed in combination with restriction or extra duties; or

3. restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum imposable for extra duties.

CLEMENCY AND CORRECTIVE ACTION ON REVIEW

A. Definitions. Clemency action is a reduction in the severity of punishment done at the discretion of the officer authorized to take such action for whatever reason deemed sufficient to him. Remedial corrective action is a reduction in the severity of punishment or other action taken by proper authority to correct some defect in the nonjudicial punishment proceeding and to offset the adverse impact of the error on the accused's rights.

B. Authority to act. Part V, para. 6a, MCM, 1984, indicates that, after the imposition of nonjudicial punishment, the following officials have authority to take clemency action or remedial corrective action:

1. The officer who initially imposed the NJP (this authority is inherent in the office, not the person holding the office);

2. the successor in command to the officer who imposed the punishment;

3. the superior authority to whom an appeal from the punishment would be forwarded, whether or not such an appeal has been made;

4. the commanding officer or officer in charge of a unit to which the accused is properly transferred after the imposition of punishment by the first commander; or

NOTE: If the servicemember is transferred before the punishment is completed the punishment is automatically terminated unless: (a) The sole purpose of the transfer is to provide a place to carry out the punishment; (b) the punishment is imposed at a temporary duty station and the person is being returned to his or her permanent unit after being temporarily assigned (a period not in excess of 60 days) to the command imposing the punishment; (c) the transfer was for the purpose of holding a court-martial, administrative discharge board, medical board or physical evaluation board; (d) the transfer was because the person missed the sailing of his/her unit without authority. MJM, 1-E-5c. When a mast punishment is suspended for a probationary period

and the probationer is transferred before the end of the period, the punishment shall be remitted before the probationer is transferred except when the punishment is imposed at a temporary duty station and the probationer is being returned to his or her permanent unit after being temporarily assigned (a period not in excess of 60 days) to the command imposing the punishment; the probationer is being returned to his or her ship after having missed its sailing without authority; the probationer is being returned to his or her unit after having been on temporary additional duty for the purpose of a court-martial, administrative discharge board, medical board of survey, physical evaluation board, or for medical evaluation and/or treatment. MJM, 1-E-6c.

5. the successor in command of the latter.

C. Forms of action. The types of action that can be taken either as clemency or corrective action are setting aside, remission, mitigation, and suspension.

1. Setting aside punishment. Part V, para. 6d, MCM, 1984. This power has the effect of voiding the punishment and restoring the rights, privileges, and property lost to the accused by virtue of the punishment imposed. This action should be reserved for compelling circumstances where the commander feels a clear injustice has occurred. MJM, 1-E-9e.

2. Remission. Part V, para. 6d, MCM, 1984. This action relates to the unexecuted parts of the punishment, that is, those parts which have not been completed. This action relieves the accused from having to complete his punishment, though he may have partially completed it. Rights, privileges, and property lost by virtue of executed portions of punishment are not restored, nor is the punishment voided as in the case when it is set aside. The expiration of the current enlistment or term of service of the service-member automatically remits any unexecuted punishment imposed under article 15. MJM, 1-E-5d; 1-E-9d.

3. Mitigation. Part V, para. 6b, MCM, 1984; MJM, 1-E-8. Generally, this action also relates to the unexecuted portions of punishment. Mitigation of punishment is a reduction in the quantity or quality of the punishment imposed; in no event may punishment imposed be increased so as to be more severe.

a. Quality. Without increasing quantity, the following reductions by mitigation may be taken:

(1) Arrest in quarters to restriction;

(2) correctional custody to extra duties or restriction or both (to run concurrently);

(3) extra duties to restriction; or

(4) reprimand to restriction.

b. Quantity. The length of deprivation of liberty or the amount of forfeiture or other money punishment can also be reduced and hence mitigated without any change in the quality (type) of punishment.

c. Reduction in grade. Reduction in grade, even though executed, may be mitigated to forfeiture of pay. The amount of forfeiture can be no greater than that which could have been imposed by the mitigating commander had he initially imposed punishment. This mitigation may be done only within 4 months after the date of execution. Part V, para. 6b, MCM, 1984.

4. Suspension of punishment. Part V, para. 6a, MCM, 1984. This is an action to withhold the execution of the imposed punishment for a stated period of time pending good behavior on the part of the accused. Only subsequent misconduct during the probationary period will cause the suspension to be vacated (revoked) and this misconduct must constitute an offense under the UCMJ. This action can be taken with respect to unexecuted portions of the punishment, or, in the case of a reduction in rank or a forfeiture, such action may be taken even though the punishment has been executed.

a. An executed reduction or forfeiture can be suspended only within four months of its imposition.

b. At the end of the probationary period, the suspended portions of the punishment are remitted automatically unless sooner vacated.

c. There is no known authority for the imposition of conditions of probation which could not ordinarily be made the subject of a lawful order.

d. Vacation of the suspended punishment may be effected by any commanding officer or officer in charge over the person punished who has the authority to impose the kind and amount of punishment to be vacated.

(1) Vacation of the suspended punishment may only be based upon an offense under the UCMJ committed during the probationary period.

(2) Before a suspension may be vacated, the service-member ordinarily should be notified that vacation is being considered and informed of the reasons for the contemplated action and his right to respond. A formal hearing is not required unless the punishment suspended is of the kind set forth in Article 15(e)(1)-(7), UCMJ, in which case the accused should, unless impracticable, be given an opportunity to appear before the officer contemplating vacation to submit any matters in defense, extenuation, or mitigation of the offense on which the vacation action is to be based.

(3) Vacation of a suspension is not punishment for the misconduct that triggers the vacation. Accordingly, misconduct may be punished and also serve as the reason for vacating a previously suspended punishment imposed at mast. Vacation proceedings are often handled at NJP. First, the suspended punishment is vacated; then the commanding officer can impose NJP for the new offense. If NJP is imposed for the new offense, the accused must be afforded all of his hearing rights, etc.

(4) The order vacating a suspension must be issued to the probationer in writing in a format similar to that in MJM, Encl. 8. The decision to vacate the suspended punishment is not appealable as a nonjudicial punishment appeal.

e. The probationary period cannot exceed six months from the date of suspension and terminates automatically upon expiration of current enlistment. Part V, para. 6a(2), MCM, 1984. Transfer and/or expiration of enlistment automatically terminates the suspension period, except as provided in MJM, 1-E-6.

APPEAL FROM NONJUDICIAL PUNISHMENT

A. Procedure. A person punished under Article 15, UCMJ, may appeal if he or she considers the punishment imposed to be "unjust" or "disproportionate" to the acts of misconduct for which punished. MJM, 1-E-11a. The appeal shall be submitted via the commanding officer who imposed the punishment to the next superior in the chain of command who has a law specialist regularly assigned. MJM, 1-E-11d. If the CO agrees that the appeal has merit, he or she may set aside the punishment or adjust it accordingly. MJM, 1-E-11f. If it is determined the appeal has no merit, it shall be forwarded. A superior authority who is a GCMA or a flag officer may delegate his power to act on the NJP appeal to a principal assistant as defined in MJM, 1-A-2d. MJM, 1-E-12e.

B. Time. Appeals must be submitted in writing within 5 days of the imposition of nonjudicial punishment or the right to appeal shall be waived in the absence of good cause shown. Part V, para. 7d, MCM, 1984. The appeal period runs from the date the accused is informed of his appeal rights. Normally this is the day NJP is imposed. In the case of an appeal submitted more than 5 days after the imposition of NJP (less any mailing delays), the officer acting on the appeal shall determine whether "good cause" was shown for the delay in the appeal. MJM, 1-E-11a.

1. Extension of time. If it appears to the accused that good cause may exist which would make it impracticable or extremely difficult to prepare and submit the appeal within the 5-day period, the accused should immediately advise the officer who imposed the punishment of the perceived problems and request an appropriate extension of time.

2. Request for stay of restraint punishments or extra duties. A servicemember who has appealed may be required to undergo any restraint punishment or extra duties imposed while the appeal is pending, except that if action is not taken on the appeal by the appeal authority within 5 days after the written appeal has been submitted and if the accused has so requested, any unexecuted punishment involving restraint or extra duties shall be stayed until action on the appeal is taken. Part V, para. 7d, MCM, 1984. The accused should include in his written appeal a request for stay of restraint punishment or extra duties; however, a written request for a stay is not specifically required.

C. Contents of appeal package

1. Appellant's letter (grounds for appeal). The letter of appeal from the accused should be addressed to the appropriate appeal authority via the commander who imposed the punishment and other appropriate commanding officers in the chain of command. The letter should set forth the salient

features of the nonjudicial punishment (date, offense, who imposed it, and punishment imposed) and detail the specific grounds for relief. There are only two grounds for appeal: the punishment was unjust, or the punishment was disproportionate to the offense committed. The grounds for appeal are broad enough to cover all reasons for appeal. Unjust punishment exists when the evidence is insufficient to prove the accused committed the offense; when the statute of limitations (Article 43(c), UCMJ) prohibits lawful punishment; or when any other fact, including a denial of substantial rights, calls into question the validity of the punishment. Punishment is disproportionate if it is, in the judgment of the reviewer, too severe for the offense committed. An offender who believes his punishment is too severe thus appeals on the ground of disproportionate punishment, whether or not his letter artfully states the ground in precise terminology. Note, however, that a punishment may be legal but excessive or unfair considering circumstances such as: the nature of the offense; the absence of aggravating circumstances; the prior record of the offender; and any other circumstances in extenuation and mitigation. The grounds for appeal need not be stated artfully in the accused's appeal letter, and the reviewer may have to deduce the appropriate ground implied in the letter. Unartful draftsmanship or improper addressees or other administrative irregularities are not grounds for refusing to forward the appeal to the reviewing authority. If any commander in the chain of addressees notes administrative mistakes, they should be corrected, if material, in that commander's endorsement which forwards the appeal. Thus, if an accused does not address his letter to all appropriate commanders in the chain of command, the commander who notes the mistake should merely readdress and forward the appeal. He should not send the appeal back to the accused for redrafting since the appeal should be forwarded promptly to the reviewing authority. The appellant's letter begins the review process and is a quasi-legal document. It should be temperate and state the facts and opinions the accused believes entitles him to relief. The offender should avoid unfounded allegations concerning the character or personality of the officer imposing punishment. The accused, however, should state the reasons for his appeal as clearly as possible. Supporting documentation in the form of statements of other persons, personnel records, etc., may be submitted if the accused desires. In no case is the failure to do these things lawful reason for refusing to process the appeal. Finally, should the accused desire that his restraint punishments or extra duties be stayed pending the appeal, he should specifically request this in the letter.

2. Contents of the forwarding endorsement. The commanding officer's endorsement shall be signed personally by the commanding officer, acting commanding officer, or an officer exercising delegated NJP authority and shall contain the following:

a. A statement outlining the proceedings held in the matter;

b. a statement of the facts found by the commanding officer who imposed punishment based on the information considered by him/her and which facts formed the basis for the punishment imposed;

c. a statement of the commanding officer's reasons as to why the person's appeal should not be granted;

d. a copy of the record of mast (Report of Offense and Disposition, Form CG-4910) (Original CG-4910 remains in Unit Punishment Log); and

e. all written documents relating to the person's case including, but not limited to: any written report by the individual assigned to conduct the preliminary inquiry in the person's case; any written statements of persons appearing at the mast as witnesses; and the report of any investigation or court of inquiry which served as the basis for the imposition of nonjudicial punishment if no mast hearing was held. Enclosure 7 of MJM contains a sample endorsement for a commanding officer which may be followed if desired. MJM, 1-E-11g.

D. Review guidelines

1. Procedural errors. Errors of procedure do not invalidate punishment unless the error or errors deny a substantial right or do substantial injury to such right. Part V, para. 1h, MCM, 1984. Thus, if an offender was not properly warned of his right to remain silent at the hearing, but made no statement, he has not suffered a substantial injury.

2. Evidentiary errors. Strict rules of evidence do not apply at nonjudicial punishment hearings. Evidentiary errors, except for insufficient evidence, will not normally invalidate punishment. If the reviewer believes the evidence insufficient to punish for the offense charged, but believes another offense has been proved by the evidence, the best practice would be to return the package to the commanding officer who imposed punishment and direct a rehearing on the other offense. This guidance does not apply where the other offense is a lesser included offense of the offense charged. Note that although the rules of evidence do not apply at NJP, Article 31, UCMJ, should be complied with at the hearing. Part V, para. 4c(3), MCM, 1984.

3. Lawyer review. Part V, para. 7e, MCM, 1984, requires that, before taking any action on an appeal from any punishment in excess of that which could be given by an O-3 commanding officer, the reviewing authority must refer the appeal to a lawyer for consideration and advice. The advice of the lawyer is a matter between the reviewing authority and the lawyer and does not become a part of the appeal package.

4. Scope of review. The reviewing authority and the lawyer advising him, if applicable, are not limited to the appeal package in completing their actions. Such collateral inquiry as deemed advisable can be made and the appellate decision can lawfully be made on pertinent matters not contained in the appeal package. Part V, para. 7e, MCM, 1984. Such inquiries are time consuming and should be avoided by requiring thorough appeal packages from the officer imposing punishment.

5. Delegation of authority to action appeals. Pursuant to Part V, para. 7f(5), MCM, 1984, and section 1-E-12e., MJM, an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his power to review and act upon NJP appeals to a "principal assistant" as defined in section 1-A-2d, MJM. The officer who has delegated his NJP powers may not act upon an appeal from punishment imposed by the principal assistant. In other cases, it may be inappropriate for the

principal assistant to act on certain appeals (as where an identity of persons or staff may exist with the command which imposed the punishment), and such fact should be noted by the command in the forwarding endorsement.

E. Authorized appellate action. Part V, para. 7f, MCM, 1984; MJM, 1-E-12. In acting on an appeal or even in cases in which no appeal has been filed, the superior authority may exercise the same power with respect to the punishment imposed as the officer who imposed the punishment.

In addition, the reviewing authority may authorize a rehearing on an uncharged but supported offense, or on the same offense, if there has been a substantial procedural error not amounting to a finding of insufficient evidence to impose NJP. At the rehearing, however, the punishment imposed may be no more severe than that imposed during the original proceedings unless other offenses which occurred subsequent to the date of the original proceeding are added to the original offenses. If the accused, while not attached to or embarked in a vessel, waived his right to demand trial by court-martial at the original proceedings, he may not assert this right as to those same offenses at the rehearing but may assert the right as to any new offenses at the rehearing. Upon completion of action by the reviewing authority, the servicemember shall be promptly notified of the result.

IMPOSITION OF NJP AS A BAR TO FURTHER PROCEEDINGS

A. General. Proceedings related to NJP are not a criminal trial and, as a result, the defense of former jeopardy is not available to one whose case has been disposed of at mast or office hours. The MCM, however, does provide a bar to further proceedings in certain instances.

B. Imposition of NJP as a bar to further NJP

-- Part V, para. 1f, MCM, 1984 provides that once a person has been punished under article 15, punishment may not again be imposed upon the individual for the same offense at NJP. This same provision precludes a superior in the chain of command from increasing punishment imposed at NJP by an inferior in the chain of command.

The fact that a case has been to mast or office hours and was dismissed without punishment being imposed, however, would not preclude a subsequent imposition of punishment for the dismissed offenses by the same or different commanding officer for dismissed offenses.

C. Imposition of NJP as a bar to subsequent court-martial. R.C.M. 907b(2)(D)(iv), MCM, 1984 would prohibit an accused from being tried at court-martial for a minor offense for which he has already received NJP. However, should a court-martial determine that the offense was not "minor," it may go ahead and try the offense notwithstanding the prior imposition of nonjudicial punishment.

TRIAL BY COURT-MARTIAL AS A BAR TO NJP

Imposition of NJP after dismissal or acquittal at court-martial is technically permissible; however, the Court of Military Appeals has been sharply critical of the practice. The safest course of conduct is to avoid it.

CHAPTER VII

INTRODUCTION TO THE COURT-MARTIAL PROCESS

PREREQUISITES TO COURT-MARTIAL JURISDICTION

"Jurisdiction" is the power to hear and to decide a case. In a criminal prosecution in state and Federal courts, the jurisdiction of these courts is specified by statutes which generally focus upon the geographical area within which the offense must occur. In the military, however, jurisdiction of the court is established by five prerequisites which are unique to the military. See R.C.M. 201(b), MCM, 1984 [hereinafter R.C.M. ____].

A. The court must be properly convened; i.e., a convening order must be properly executed, and the case must be properly referred for trial to that convening order.

B. The court must be properly constituted; i.e., all necessary parties must be properly appointed and present.

C. The court must have jurisdiction over the person; i.e., the offense must occur, and action must be initiated with a view toward prosecution, at some time between a valid enlistment and a valid discharge.

D. The court must have jurisdiction over the offense; i.e., have authority to try the type of offense charged.

E. Each charge before the court-martial must be referred to it by competent authority.

DISCUSSION

Proper convening procedures and the constitution of summary, special, and general courts-martial are discussed in detail in the following chapters, as these requirements and procedures vary with each type of court-martial. The requirements of jurisdiction over the person and jurisdiction over the offense vary only slightly among the three types of courts. These differences are discussed in detail below. Certain minimum criteria must be met before a criminal offense may be brought before any court-martial, i.e., jurisdiction of the court must exist over the person and the offense. Only if these two prerequisites are met can the decision be made as to which of the three courts should decide a particular case.

A. Jurisdiction over the person. Jurisdiction over the person normally commences with a valid enlistment and ends with delivery of valid discharge papers.

1. Enlistment. In most cases there is little doubt that the accused is in the military, i.e., he has validly enlisted. However, even when there is no valid enlistment, the accused may still be subject to court-martial jurisdiction. If an enlistment ceremony has occurred, but is for some reason invalid, the doctrine of constructive enlistment may apply: one who acts as if he is in the military, accepts the pay and benefits, and wears the uniform, is deemed to be in the military even though his original enlistment is invalid for some reason. Article 2 of the UCMJ now provides a statutory constructive enlistment with four basic requirements as follows:

a. Voluntary submission to military authority;

b. minimum age and mental competency standards (No one under age 17 may be subject to military jurisdiction by force of law.);

c. receipt of military pay or allowances; and

d. performance of military duties.

If these requirements are met, a person is subject to the UCMJ until properly discharged.

2. Discharge. The possibility of the exercise of military jurisdiction ends with the delivery of a discharge certificate with the intent to effect separation. This is true even though the offense was committed while on active duty.

Three potential exceptions exist to the general rule that delivery of a discharge certificate with the intention to separate the member ends military jurisdiction over the person. First, in the very unusual case contemplated by Article 3(a), UCMJ (serious offenses committed off base overseas), jurisdiction will continue into a subsequent enlistment. Second, when a person is discharged before the expiration of his term of enlistment for the purpose of reenlistment (and, thus, there has been no interruption of his active service), court-martial jurisdiction exists to try the member for offenses committed during the prior enlistment. Note, however, that jurisdiction is terminated by a discharge at the end of an enlistment even though the servicemember immediately reenters the service. Third, if a person fraudulently obtains the delivery of the discharge papers, jurisdiction is not lost.

To meet this problem, the government must insure that an individual suspected of an offense is not discharged. Processing of the individual for a discharge must cease and the government must also take certain steps to retain jurisdiction over an individual. Examples of actions which are sufficient to retain jurisdiction beyond the expiration of enlistment date are: apprehension, arrest, confinement, and filing charges. R.C.M. 202(c)(2).

3. Jurisdiction over reservists. While serving on active duty or active duty for training, reservists are subject to the UCMJ. Persons engaged in inactive duty training authorized by written orders which are voluntarily accepted by them are also subject to the UCMJ, provided that such orders expressly state that the individual concerned will be subject to the UCMJ while in that inactive duty training status.

Members of the Reserve are amenable to disciplinary jurisdiction during all periods of inactive duty training covered by such orders. Generally, members of the Reserve are relieved of liability to disciplinary action for offenses committed while subject to the UCMJ upon their discharge. Completion of a drill period is not considered a discharge from military service as that term is used in this section.

Commanding officers of Reserve components have the same authority under the UCMJ, during the drill period or other period of inactive duty training, as that of a commanding officer of a Regular component.

When members of the Reserve performing inactive duty training or active duty for training commit minor offenses, any assigned punishment shall not extend beyond the authorized period of such duty. This would particularly apply in cases where NJP or trial by summary court-martial has been effected. The fact the offense may have occurred in a period of training duty will not affect the ability to impose NJP (or to hold court-martial for that matter) subject, for example, to any statute of limitations problems that might exist.

When a breach of discipline is of such a character as to warrant trial by special or general court-martial, the offender should be retained in the present duty status until completion of disciplinary action. In order to perfect jurisdiction, positive action with a view towards trial must be taken immediately. Such positive actions could include apprehension, arrest, confinement, or the filing of charges.

B. Jurisdiction over the offense. Article 5, UCMJ, states that the Code applies "in all places." Previously, this jurisdiction was limited by a requirement of a service connection to the offense charged. A recent Supreme Court decision has eliminated the "service-connection" prerequisite for court-martial jurisdiction. Consequently, the jurisdiction of a court-martial over a particular offense depends solely on the accused's status as a member of the armed forces and not on the service connection of the offense charged.

CHAPTER VIII

THE SUMMARY COURT-MARTIAL

INTRODUCTION

A summary court-martial is the least formal of the three types of courts-martial and the least protective of individual rights. The summary court-martial is a streamlined trial process involving only one officer who theoretically performs the prosecutorial, defense counsel, judicial, and member functions. The purpose of this type of court-martial is to dispose promptly of relatively minor offenses. The one officer assigned to perform the various roles incumbent on the summary court-martial must inquire thoroughly and impartially into the matter concerned to ensure that both the United States and the accused receive a fair hearing. Since the summary court-martial is a streamlined procedure providing somewhat less protection for the rights of the parties than other forms of court-martial, the maximum imposable punishment is very limited. Furthermore, it may try only enlisted personnel who consent to be tried by summary court-martial.

CREATION OF THE SUMMARY COURT-MARTIAL

A. Authority to convene. A summary court-martial is convened (created) by an individual authorized by law to convene summary courts-martial. Article 24, UCMJ, R.C.M. 1302a, MCM, 1984, and MJM, 10-A-3a indicate those persons who have the power to convene a summary court-martial. Commanding officers authorized to convene general or special courts-martial are also empowered to convene summary courts-martial.

The authority to convene summary courts-martial is vested in the office of the authorized command and not in the person of its commander. Thus, Captain Jones has summary court-martial convening authority while actually performing his duty as commanding officer, but loses his authority when he goes on leave or is absent from his command for other reasons. The power to convene summary courts-martial is nondelegable and in no event can a subordinate exercise such authority "by direction." When Captain Jones is on leave from his ship, his authority to convene summary courts-martial passes to his temporary successor in command (usually the executive officer) who, in the eyes of the law, becomes the acting commanding officer.

B. Restrictions on authority to convene. Unlike the authority to impose nonjudicial punishment, the power to convene summary and special courts-martial may be restricted by a competent superior commander. MJM, 10-A-3c. The permission of COMDT (G-L) must be obtained before imposing nonjudicial punishment or referring a case to summary court-martial for an offense which has already been tried in a state or foreign court. Offenses which have already been tried in a court deriving its authority from the United States may not be tried by court-martial, nor can nonjudicial punishment be awarded for these offenses.

It is important to note that, even if the convening authority or the summary court-martial officer is the accuser, the jurisdiction of the summary court-martial is not affected and it is discretionary with the convening authority whether to forward the charges to a superior authority or to simply convene the court himself. R.C.M. 1302(b), MCM, 1984 [hereinafter R.C.M. _____]. MJM, 10-A-3b; 10-B-1.

C. Mechanics of convening. Before any case can be brought before a summary court-martial, the court must be properly convened (created). It is created by the order of the convening authority detailing the summary court-martial officer to the court. R.C.M. 504(d)(2) requires that the convening order specify that it is a summary court-martial and designate the summary court-martial officer. Additionally, the convening order may designate where the court-martial will meet. It must include a statement: "Designation of this convening authority is Secretarial, pursuant to Article 24, UCMJ."

While R.C.M. 1302(c) authorizes the convening authority to convene a summary court-martial by a notation on the charge sheet signed by the convening authority, the better practice is to use a separate convening order for this purpose. Enclosure 12a, MJM, contains a suggested format for the summary court-martial convening order and a completed form is included at page 8-4, infra.

The original convening order should be maintained in the command files and a copy forwarded to the summary court-martial officer. The issuance of such an order creates the summary court-martial which can then dispose of any cases referred to it. Ensure that a court-martial exists before a case is referred to it. The basic rule is that a court-martial must be created first, and only then may a case be referred to that court.

D. Summary court-martial officer. A summary court-martial is a one-officer court-martial. As a jurisdictional prerequisite, this officer must be a commissioned officer, on active duty, and of the same armed force as the accused. R.C.M. 1301(a). Where practicable, the officer's grade should not be below O-3. As a practical matter, the summary court-martial should be best qualified by reason of age, education, experience, and judicial temperament as his performance will have a direct impact upon the morale and discipline of the command. Where more than one commissioned officer is present within the command or unit, the convening authority may not serve as summary court-martial. When the convening authority is the only commissioned officer in the unit, however, he may serve as summary court-martial and this fact should be noted in the action of the convening authority. In such a situation the better practice would be to consult the SJA first.

The summary court-martial officer assumes the burden of prosecution, defense, judge, and jury as he must thoroughly and impartially inquire into both sides of the matter and ensure that the interests of both the government and the accused are safeguarded and that justice is done. While he may seek advice from a judge advocate or legal officer on questions of law, he may not seek advice from anyone on questions of fact, since he has an independent duty to make these determinations. R.C.M. 1301(b).

E. Jurisdictional limitations: persons. Article 20, UCMJ, and R.C.M. 1301(c) provide that a summary court-martial has the power (jurisdiction) to try only those enlisted persons who consent to trial by summary court-martial. The right of an enlisted accused to refuse trial by summary court-martial is absolute and is not related to any corresponding right at nonjudicial punishment. No commissioned officer, warrant officer, cadet, aviation cadet and midshipman, or person not subject to the UCMJ (Article 2, UCMJ) may be tried by summary court-martial. The form at pages 8-10 to 8-11, infra, may be used to document the accused's election regarding his right to refuse trial by summary court-martial.

F. Jurisdictional limitations: offenses. A summary court-martial has the power to try all offenses described in the UCMJ except those for which a mandatory punishment beyond the maximum imposable at a summary court-martial is prescribed by the UCMJ. Cases which involve the death penalty are capital offenses and cannot be tried by summary court-martial. See R.C.M. 1004 for a discussion of capital offenses. Any minor offense can be disposed of by summary court-martial. For a discussion of what constitutes a minor offense, refer to Chapter VI, supra.

- SAMPLE -

SUMMARY COURT-MARTIAL)
)
)
CONVENING ORDER NO. 1-CY)

Commanding Officer
USCGC NORTHLAND (WMEC 904)
Portsmouth, Virginia 23703

31 October 19CY

COMMANDING OFFICER USCGC NORTHLAND (WMEC 904)

Effective this date CWO4 Roger S. JONES is detailed as a summary court-martial and shall sit at Coast Guard Support Center, Portsmouth, Va. unless otherwise directed. Designation of this convening authority is Secretarial and pursuant to Article 24, UCMJ.

R. D. TEKBAS
Captain, U.S. Coast Guard
Commanding Officer, USCGC NORTHLAND (WMEC 804)

(NOTE: AN ALTERNATIVE TO THIS FORM OF CONVENING ORDER IS PROVIDED FOR IN R.C.M. 1302(c), MCM, 1984)

REFERRAL TO SUMMARY COURT-MARTIAL

A. Introduction. In this section, attention will be focused on the mechanism for properly getting a particular case to trial before a summary court-martial. The basic process by which a case is sent to any court-martial is called "referral."

B. Preliminary inquiry. Every court-martial case begins with either a complaint by someone that a person subject to the UCMJ has committed an offense or some inquiry which results in the discovery of misconduct. See Chapter IV, supra. In any event, R.C.M. 303 imposes upon the officer exercising immediate nonjudicial punishment (Article 15, UCMJ) authority over the accused the duty to make, or cause to be made, an inquiry into the truth of the complaint or apparent wrongdoing.

C. Preferral of charges. R.C.M. 307(a). Charges are formally made against an accused when signed and sworn to by a person subject to the UCMJ. This procedure is called "preferral of charges." Charges are preferred by executing the appropriate portions of the charge sheet. See MCM, 1984, app. 4. Implicit in the preferral process are several steps.

1. Personal data. Block I of page 1 of the charge sheet should first be completed. The information relating to personal data can be found in pertinent portions of the accused's service record.

2. The charges. Block II of page 1 of the charge sheet is then completed to indicate the precise misconduct involved in the case. Each punitive article found in Part IV, MCM, 1984, contains sample specifications. If the charges are so numerous that they will not all fit in Block II, they should be placed on a separate piece of paper and referred to as Attachment A.

3. Accuser. The accuser is a person subject to the UCMJ who signs item 11 in block III at the bottom of page 1 of the charge sheet. The accuser should swear to the truth of the charges and have the affidavit executed before an officer authorized to administer oaths. This step is important, as an accused has a right to refuse trial on unsworn charges.

4. Oath. The oath must be administered to the accuser and the affidavit so indicating must be executed by a person with proper authority. Article 136, UCMJ, authorizes commissioned officers who are judge advocates, staff judge advocates, legal officers, law specialists, summary courts-martial, adjutants, and commanding officers, among others, to administer oaths for this purpose. When the charges are signed and sworn to, they are "preferred" against the accused.

D. Informing the accused. Once formal charges have been signed and sworn to, the preferral process is complete. The preferred charges should then be receipted for by the officer exercising summary court-martial jurisdiction over the accused. This officer or his designee may formally receipt for the preferred charges. The purpose of this receipt certification is to stop the running of the statute of limitations (Art. 43, UCMJ) for the offense charged.

The next step which must be taken is to inform the accused of the charges against him. The purpose of this requirement is to provide an accused with reasonable notice of impending criminal prosecution in compliance with criminal due process of law standards. R.C.M. 308 requires the immediate commander of the accused to have the accused informed as soon as practicable of the charges preferred against him, the name of the person who preferred them, and the person who ordered them to be preferred.

After notice has been given, the person who gave notice to the accused will execute item 12 at the top of page 2 of the charge sheet. If not the immediate commander of the accused, the person signing on the "signature" line should state their rank, component, and authority. The law does not require a formal hearing to provide notice to the accused, but the charge sheet must indicate that notice has been given.

Where the accused is absent without leave at the time charges are sworn, it is permissible and proper to execute the receipt certification even though the accused cannot be advised of the existence of the charges. In such cases, a statement indicating the reason for the lack of notice should be attached to the case file. When the accused returns to military control, notice should then be given to him.

E. The act of referral. Once the charge sheet and supporting materials are presented to the summary court-martial convening authority and he makes his decision to refer the case to a summary court-martial, he must send the case to one of the summary courts-martial previously convened. This procedure is accomplished by means of completing item 14 in block V on page 2 of the charge sheet. The referral is executed personally by the convening authority and explicitly details the type of court to which the case is being referred (summary, special, general) and the specific court to which the case is being referred.

At this point, the importance of serializing convening orders becomes clear. A court-martial can only hear a case properly referred to it. The simplest and most accurate way to describe the correct court is to use the serial number and date of the order creating that court. Thus the referral might read "referred for trial to the summary court-martial appointed by my summary court-martial convening order 1-CY dated 15 January 19Cy." This language precisely identifies a particular kind of court-martial and the particular summary court-martial to try the case.

In addition, the referral on page 2 of the charge sheet should indicate any particular instructions applicable to the case such as "confinement is not an authorized punishment in this case" or other instructions desired by the convening authority. If no instructions are applicable to the case, the referral should so indicate by use of the word "none" in the appropriate blank. Once the referral is properly executed, the case is "referred" to trial and the case file forwarded to the proper summary court-martial officer.

PRETRIAL PREPARATION

A. General. After charges have been referred to trial by summary court-martial, all case materials are forwarded to the proper summary court-martial officer who is responsible for thoroughly preparing the case for trial.

B. Preliminary preparation. Upon receipt of the charges and accompanying papers, the summary court-martial officer should begin preparation for trial. The charge sheet should be carefully examined, and all obvious administrative, clerical, and typographical errors corrected. R.C.M. 1304. The summary court-martial officer should initial each correction he makes on the charge sheet. If the errors are so numerous as to require preparation of a new charge sheet, re-swearing of the charges and re-referral is required. If the summary court-martial officer changes an existing specification to include any new person, offense, or matter not fairly included in the original specification, R.C.M. 603 requires the new specification to be resworn and re-referred. The summary court-martial officer should continue his examination of the charge sheet to determine the correctness and completeness of the information on pages 1 and 2 thereof.

C. Pretrial conference with accused. After initial review of the court-martial file, the summary court-martial officer should meet with the accused in a pretrial conference. The accused's right to counsel is discussed later in this chapter. If the accused is represented by counsel, all dealings with the accused should be conducted through his counsel. Thus, the accused's counsel, if any, should be invited to attend the pretrial conference. At the pretrial conference, the summary court-martial officer should follow the suggested guide found in appendix 9, MCM, 1984, and should document the fact that all applicable rights were explained to the accused by completing blocks 4-5 of the form for the record of trial by summary court-martial found at appendix 15, MCM, 1984.

1. Purpose. The purpose of the pretrial conference is to provide the accused with information concerning the nature of the court-martial, the procedure to be used, and his rights with respect to that procedure. No attempt should be made to interrogate the accused or otherwise discuss the merits of the charges. The proper time to deal with the merits of the accusations against the accused is at trial. The summary court-martial officer should provide the accused with a meaningful and thorough briefing in order that the accused fully understands the court-martial process and his rights pertaining thereto. This effort will greatly reduce the chances of post-trial complaints, inquiries, and misunderstandings.

2. Advice to accused -- rights. R.C.M. 1304(b) requires the summary court-martial to advise the accused of the following matters:

a. That the officer has been detailed by the convening authority to conduct a summary court-martial;

b. that the convening authority has referred certain charge(s) and specification(s) to the summary court for trial (The summary court-martial officer should serve a copy of the charge sheet on the accused and complete the last block (Item 15) on page 2 of the charge sheet noting service on the accused);

c. the general nature of the charges and the details of the specifications thereunder;

d. the names of the accuser and the convening authority, and the fact that the charges were sworn to before an officer authorized to administer oaths; and

e. the names of any witnesses who may be called to testify against the accused at trial and the description of any real or documentary evidence to be used and the right of the accused to inspect the allied papers and immediately available personnel records.

The accused should then be advised that he has the legal rights listed on page 1 of the Record of Trial by Summary Court-Martial (appendix 14, MCM). The maximum punishment awardable depends upon his paygrade:

(1) E-4 and below. The jurisdictional maximum sentence which a summary court-martial may adjudge in the case of an accused who, at the time of trial, is in paygrade E-4 or below extends to reduction to the lowest paygrade (E-1); forfeiture of two-thirds of one-month's pay or a fine not to exceed two-thirds of one month's pay; confinement not to exceed one month; hard labor without confinement not to exceed forty-five days (in lieu of confinement); and restriction to specified limits for two months. R.C.M. 1301(d)(1), MCM, 1984.

NOTE: If confinement will be adjudged with either hard labor without confinement or restriction in the same case, the rules concerning apportionment found in R.C.M. 1003(b)(6) and (7) must be followed.

(2) E-5 and above. The jurisdictional maximum which a summary court-martial could impose in the case of an accused who, at the time of trial, is in pay grade E-5 or above extends to reduction, but only to the next inferior pay grade, restriction to specified limits for two months, and forfeiture of two-thirds of one month's pay. R.C.M. 1301(d)(2). Unlike NJP, where an E-4 may be reduced to E-3 and then awarded restraint punishments imposable only upon an E-3 or below, at summary court-martial an E-5 cannot be sentenced to confinement or hard labor without confinement even if a reduction to E-4 has also been adjudged.

3. Advice to accused regarding counsel

a. While the Manual for Courts-Martial, 1984 created no statutory right to detailed military defense counsel at a summary court-martial, the convening authority may still permit the presence of such counsel if the accused is able to obtain such counsel. The MCM, 1984 has created a limited right to civilian defense counsel at summary court-martial, however. R.C.M. 1301(e) now provides that the accused has a right to hire a civilian lawyer and have that lawyer appear at trial, if such appearance will not unnecessarily delay the proceedings and if military exigencies do not preclude it. The accused must, however, bear the expense involved. If the accused wishes to retain civilian counsel, the summary court-martial officer should allow him a reasonable time to do so.

b. Booker warnings

(1) An accused has no right to counsel at a summary court-martial; however, if an accused was not given an opportunity to consult with independent counsel before accepting a summary court-martial, the summary court-martial will be inadmissible at a subsequent trial by court-martial. The term "independent counsel" means a lawyer qualified in the sense of Article 27(b), UCMJ, who, in the course of regular duties, does not act as the principle legal advisor to the convening authority. (Note that these provisions mirror the provisions with respect to the right to consult with counsel prior to NJP). See Chapter VI, supra.

(2) To be admissible at a subsequent trial by court-martial, evidence of an SCM at which an accused was not actually represented by counsel must affirmatively demonstrate that:

(a) The accused was advised of his right to confer with counsel prior to deciding to accept trial by summary court-martial;

(b) the accused either exercised his right to confer with counsel or made a voluntary, knowing, and intelligent waiver thereof; and

(c) the accused voluntarily, knowingly and intelligently waived his right to refuse an SCM.

(3) If an accused has been properly advised of his right to consult with counsel and to refuse trial by summary court-martial, as well as the legal ramifications of these decisions, his elections and/or waivers in this regard should be made in writing and should be signed by the accused. The form found at pages 8-10 to 8-11, infra, may be utilized and, properly completed, contains all the necessary advice to an accused, and properly executed will establish a voluntary, knowing, and intelligent waiver of the accused's right to consult with counsel and/or his right to refuse trial by summary court-martial.

(4) Assuming Booker warnings have been given (proper advice and recordation of election/waivers), evidence of the prior summary court-martial will be admissible at a later trial by court-martial as evidence of the character of the accused's prior service pursuant to R.C.M. 1001(b)(2). The drafters of the Manual for Courts-Martial, 1984 specifically preclude the use of a prior summary court-martial to trigger the increased punishment (escalator clause) provisions of R.C.M. 1003(d).

ACKNOWLEDGMENT OF RIGHTS-ACCEPTANCE OF SCM
Article 20, UCMJ (R.C.M. 1303, MCM, 1984)

I, _____, attached to _____, acknowledge the following facts and rights regarding summary court-martial.

1. I have the right to refuse trial by summary court-martial.

2. I have the right to consult with a lawyer prior to deciding whether to accept or refuse trial by summary court-martial. Should I desire to consult with a lawyer, I understand that a military lawyer will be made available to advise me, free of charge, or I may consult with a civilian lawyer at my own expense. I do not have the right to be represented by a military lawyer at summary court-martial.

3. If I accept by summary court-martial, I have the following rights:

   a. to be represented at trial by a civilian lawyer provided by me at my own expense, or to be assisted by a nonlawyer representative;
   b. to remain silent, and to plead not guilty, thus placing upon the government the burden of proving my guilt beyond a reasonable doubt;
   c. to have the summary court-martial call, or subpoena, witnesses to testify on my behalf;
   d. to confront and cross-examine all witnesses against me; and
   e. if found guilty, to present matters which may mitigate the offense or demonstrate extenuating circumstances as to why I committed the offense(s).

4. I understand that the maximum punishment which may be adjudged by a summary court-martial is:

On E-4 and Below	On E-5 and Above
30 days confinement	60 days restriction
45 days hard labor without confinement	Forfeiture of 2/3 of one month's pay
60 days restriction	Reduction to next inferior pay grade
Forfeiture of 2/3 of one month's pay	
Reduction to the lowest pay grade	

5. Should I refuse trial by summary court-martial, my commanding officer may refer the charge(s) to trial by special court-martial or general court-martial. At a special court-martial, in addition to those rights set forth in paragraph 3, I would have the following rights:

   a. to be represented at trial by a military lawyer, free of charge, including a military lawyer of my own selection, if he is reasonably available. In addition to a military lawyer, I may have a civilian lawyer at my own expense;

b. to be tried by a court-martial composed of at least three officers as members or, at my request, at least one-third of the court members would be enlisted personnel. If tried by a court-martial with members, two-thirds of the members, voting by secret ballot, would have to agree in any finding of guilty, and two-thirds of the members would also have to agree on any sentence to be imposed, should I be found guilty; and

c. to request trial by military judge alone. If tried by military judge alone, the military judge alone would determine my guilt or innocence and, if I were found guilty, he alone would determine the sentence imposed.

6. I understand that the maximum punishment which can be imposed at a special court-martial for the offense(s) charged against me is:

a. discharge from the Coast Guard with a bad conduct discharge (delete if inappropriate);
b. confinement for _____ months;
c. forfeiture of 2/3 pay per month for _____ months; and
d. reduction to the lowest enlisted pay grade.

7. I understand that the maximum punishment which could be imposed at a general court-martial for the same offense(s) is greater than or equal to those listed in paragraph 6.

SELECT APPROPRIATE BLOCK AND SIGN
(Block need not be executed if accused does not accept)

Knowing and understanding my rights as set forth above, I do not desire to consult with a lawyer, and therefore waive this right, before deciding whether to accept or reject trial by summary court-martial. I hereby accept trial by summary court-martial.

Signature of accused and date: _____

Signature of witness: _____

Knowing and understanding my rights as set forth above and having first consulted with the following lawyer, _____,
whose address is _____,
I hereby accept trial by summary court-martial.

Signature of accused and date: _____

Signature of witness: _____

D. Final pretrial preparation

1. Gather defense evidence. At the conclusion of the pretrial interview, the summary court-martial officer should determine whether the accused has decided to accept or refuse trial by summary court-martial. If more time is required for the accused to decide, it should be provided. The summary court-martial officer should obtain from the accused the names of any witnesses or the description of other evidence which the accused wishes presented at the trial, if the case is to proceed. He should also arrange for a time and place to hold the open sessions of the trial. These arrangements should be made through the legal officer, and the summary court-martial officer should insure that the accused and all witnesses are notified of the time and place of the first meeting.

An orderly trial procedure should be planned to include a chronological presentation of the facts. Appendix 9, MCM, 1984, is a summary court-martial trial guide. It should be followed closely and precisely by the summary court-martial officer during the hearing. The admissibility and authenticity of all known evidentiary matters should be determined and numbers assigned all exhibits to be offered at trial. These exhibits, when received at trial, should be marked "received in evidence" and numbered (prosecution exhibits) or lettered (defense exhibits). The evidence reviewed should include not only that contained in the file as originally received, but also any other relevant evidence discovered by other means. The summary court-martial officer has the duty of insuring that all relevant and competent evidence in the case, both for and against the accused, is presented. It is the responsibility of the summary court-martial officer to insure that only legal and competent evidence is received and considered at the trial. Only legal and competent evidence received in the presence of the accused at trial can be considered in determining the guilt or innocence of the accused. The Military Rules of Evidence apply to the summary court-martial and must be followed. If a question regarding admissibility of evidence arises, the summary court-martial officer may seek assistance from a law specialist in resolving the issue.

2. Subpoena of witnesses. The summary court-martial is authorized by Article 46, UCMJ, and R.C.M.'s 703(e)(2)(C) and 1301(f) to issue subpoenas to compel the appearance at trial of civilian witnesses. In such a case, the summary court-martial officer will follow the same procedure detailed for a special or general court-martial trial counsel in R.C.M. 703(c) and MJM, 2-Q. Enclosure 16a, MJM, contains an illustration of a completed subpoena while MJM, 2-Q-3 details procedures for payment of witness fees.

POST-TRIAL RESPONSIBILITIES OF THE SUMMARY COURT-MARTIAL

After the summary court-martial officer has deliberated and announced findings and, where appropriate, sentence, he then must fulfill certain post-trial duties. The nature and extent of these port-trial responsibilities depend upon whether the accused was found guilty or innocent of the offenses charged.

A. Accused acquitted on all charges. In cases in which the accused has been found not guilty as to all charges and specifications, the summary court-martial must:

1. Announce the findings to the accused in open session [R.C.M. 1304(b)(2)(F)(i)];

2. inform the convening authority as soon as practicable of the findings [R.C.M. 1304(b)(2)(F)(v)];

3. prepare the record of trial in accordance with R.C.M. 1305, using the record of trial form in appendix 15, MCM, 1984;

4. cause one copy of the record of trial to be served upon the accused [R.C.M. 1305(e)(1)], and secure the accused's receipt; and

5. forward the original and one copy of the record of trial to the convening authority for his action [R.C.M. 1305(e)(2)].

B. Accused convicted on some or all of the charges. In cases in which the accused has been found guilty of one or more of the charges and specifications, the summary court-martial must:

1. Announce the findings and sentence to the accused in open session [R.C.M. 1304(b)(2)(F)(i) and (ii)];

2. advise the accused of the appellate rights under R.C.M. 1306;

3. if the sentence includes confinement, inform the accused of his right to apply to the convening authority for deferment of confinement [R.C.M. 1304(b)(2)(F)(iii)];

4. inform the convening authority of the results of trial as soon as practicable such information should include the findings, sentence, recommendations for suspension of the sentence and any deferment request [R.C.M. 1304(b)(2)(F)(v)];

5. prepare the record of trial in accordance with R.C.M. 1305, using the form in appendix 15, MCM, 1984;

6. cause one copy of the record of trial to be served upon the accused [R.C.M. 1305(e)(1)], and secure the accused's receipt; and

7. forward the original and one copy of the record of trial to the convening authority for action [R.C.M. 1305(e)(2)].

SAMPLE
SUMMARY COURT-MARTIAL SUMMARIZATION

Commander(dl)
Fifth Coast Guard District
Portsmouth, Virginia 23705

5814

30 November 1984

From: CWO4 Roger S. JONES, USCG, Summary Court
To: Commanding Officer, USCGC NORTHLAND (WMEC 904)

Subj: Summary Court-Martial case of United States v. Ivan M. SMITHY 000 00 0000, USCG; record of

Ref: (a) Your Convening Order 1-84 of 31 October 1984

1. Subject court-martial was held on 27 November 1984 at U. S. Coast Guard Support Center, Portsmouth, Virginia.

2. The accused was present at all times during the proceedings. He was not represented by a lawyer or a non-attorney representative, but had previously been counseled concerning his rights to consult with counsel and accept or reject trial by summary court-martial. The original Acknowledgement of Rights-Acceptance of SCM form, executed by the accused, is enclosed. The accused's rights were explained in accordance with R.C.M. 1304, MCM 1984. His consent to trial by summary court-martial is noted on the Record of Trial form (DD-2329).

3. The accused was arraigned on the charges as set forth in the enclosed charge sheet. No motions were made prior to the entry of the pleas. Before pleas were entered, I carefully explained to him all rights concerning them. The accused pled guilty to Charge I and its specifications and not guilty to Charge II and its specifications.

4. I conducted an appropriate inquiry to determine whether the offered guilty plea would be provident. After a thorough discussion of the facts surrounding the incident, I determined that the guilty pleas to Charge I and its specifications were provident and accepted them.

5. Because the accused pled not guilty to Charge II and its specifications but was found guilty, I am required to summarize the evidence relating to that charge and specification.

a. Prosecution evidence:

(1) Accused's enlistment contract, Page 1 of the accused's service record, was admitted.

(2) SA Ned N. GREEN, USCG, stated that while on authorized liberty at about 2200 on 25 October 1984 he was standing on the corner of Ocean Boulevard and Pine Avenue in Portsmouth, Virginia with SN Frederick F. WHITE, USCG, in uniform, when a car with two Coastguardsmen in it pulled up alongside. One of the men in the car was the accused, whom GREEN identified in court. GREEN stated he was personally acquainted with the accused, and knew him to be on active duty in the Coast Guard. GREEN had had an argument with the accused earlier in the day. The accused got out of the car, came over to GREEN and struck GREEN in the face with his fist. GREEN stated further that he and the accused both worked in the galley on the ship as messcooks.

(3) SN Frederick F. WHITE, USCG, stated that he went on authorized liberty with SA Ned N. GREEN, USCG. At about 2130 on 25 October 1984 as he and GREEN were standing on the corner of Ocean Boulevard and Pine Avenue in Portsmouth, Virginia, an automobile with two coastguardsmen in it pulled up alongside of them. One of the men in the car was the accused. WHITE stated that the accused got out of the car, came over to GREEN, and hit GREEN in the face with his fist. WHITE stated that he, GREEN, and the accused all worked in the galley on the ship as messcooks. He recalled that the accused and GREEN had argued earlier in the day over who was responsible for washing the dishes.

b. Defense evidence:

(1) BM3 Benjamin B. CUTER, USCG, was called as a witness by the defense. He stated that he and the accused departed the ship on liberty at about 1745 in his car. While they were stopped at a red light at the corner of Ocean Boulevard and Pine Avenue in Portsmouth, Virginia they saw SA GREEN and SN WHITE standing on the corner. GREEN yelled something at them, and the accused got out of the car to go see what GREEN wanted. GREEN and the accused were talking and he saw GREEN draw back as if to hit the accused but the accused beat him to the punch and hit GREEN in self-defense. The accused then got back in the car and they drove away.

6. After the findings were announced, I advised the accused of his rights concerning the presentation of evidence in extenuation and mitigation. Pages 3303-1 and 3306-1 of the accused's service record were admitted into evidence. Copies of these documents are attached as enclosures (5) and (6).

7. No previous convictions were considered in awarding sentence.

8. After sentence was announced I advised the accused of his right to submit a written request for deferment of the confinement and of his right to submit any matters to you before you acted on the record of trial.

R. S. JONES

Encl: (1) Convening Order
(2) Record of Trial form (DD-2329)
(3) Acknowledgement of Rights-Acceptance of SCM
(4) Charge Sheet
(5) Page 3303-1 of the accused's service record
(6) Page 3306-1 of the accused's service record

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL

1a. NAME OF ACCUSED (Last, First, MI)	b. GRADE OR RANK	c. UNIT OR ORGANIZATION OF ACCUSED	d. SSN
SMITHY, Ivan, M.	SN	USCGC NORTHLAND (WMEC 904)	000 00 0000

2a. NAME OF CONVENING AUTHORITY (Last, First, MI)	b. RANK	c. POSITION	d. ORGANIZATION OF CONVENING AUTHORITY
TEKBAS, Robert D.	CAPT	Commanding Officer	USCGC NORTHLAND (WMEC 904)

3a. NAME OF SUMMARY COURT-MARTIAL (If SCM was accuser, so state.)	b. RANK	c. UNIT OR ORGANIZATION OF SUMMARY COURT-MARTIAL
JONES, Roger S.	CWO4	Commander, Fifth Coast Guard District (dl)

(Check appropriate answer)	YES	NO
4. At a preliminary proceeding held on 27 November 19 84, the summary court-martial gave the accused a copy of the charge sheet.	X	
5 At that preliminary proceeding the summary court-martial informed the accused of the following:		
a. The fact that the charge(s) had been referred to a summary court-martial for trial and the date of referral.	X	
b. The identity of the convening authority.	X	
c. The name(s) of the accuser(s).	X	
d. The general nature of the charge(s).	X	
e. The accused's right to object to trial by summary court-martial.	X	
f. The accused's right to inspect the allied papers and immediately available personnel records.	X	
g. The names of the witnesses who could be called to testify and any documents or physical evidence which the summary court-martial expected to introduce into evidence.	X	
h. The accused's right to cross-examine witnesses and have the summary court-martial cross-examine on behalf of the accused.	X	
i. The accused's right to call witnesses and produce evidence with the assistance of the summary court-martial if necessary.	X	
j. That during the trial the summary court-martial would not consider any matters, including statements previously made by the accused to the summary court-martial, unless admitted in accordance with the Military Rules of Evidence.	X	
k. The accused's right to testify on the merits or to remain silent, with the assurance that no adverse inference would be drawn by the summary court-martial from such silence.	X	
l. If any findings of guilty were announced, the accused's right to remain silent, to make an unsworn statement, oral or written or both, and to testify and to introduce evidence in extenuation or mitigation.	X	
m. The maximum sentence which could be adjudged if the accused was found guilty of the offense(s) alleged.	X	
n. The accused's right to plead guilty or not guilty.	X	

6. At the trial proceeding held on 27 November 19 84, the accused, after being given a reasonable time to decide, ☐ did ☒ did not object to trial by summary court-martial.
(Note: The SCM may ask the accused to initial this entry at the time the election is made.)
(Initial)

7a. The accused ☐ was ☒ was not represented by counsel. *(If the accused was represented by counsel, complete b, c, and d below.)*

b. NAME OF COUNSEL (Last, First, MI)	c. RANK (If any)
N/A	N/A

d. COUNSEL QUALIFICATIONS
N/A

DD FORM 2329 84 AUG

8 The accused was arraigned on the attached charge(s) and specification(s). The accused's pleas and the findings reached are shown below:

CHARGE(S) AND SPECIFICATION(S)	PLEA(S)	FINDINGS (Including any exceptions and substitutions)
Charge I	G	G
Specification 1	G	G
Specification 2	G	G
Charge II	NG	G
Specification 1	NG	NG
Specification 2	NG	G
No previous conviction was considered.		

9 The following sentence was adjudged

To be confined for 30 days and to be reduced to pay grade E-2

10 The accused was advised of the right to request that confinement be deferred (Note: When confinement is adjudged.)

☒ YES ☐ NO

11 The accused was advised of the right to submit written matters to the convening authority, including a request for clemency, and of the right to request review by the Judge Advocate General.

☒ YES ☐ NO

12 AUTHENTICATION

Roger L. Jones
Signature of Summary Court Martial

27 November 1984
Date

13 ACTION BY CONVENING AUTHORITY

The sentence is approved and will be duly executed. U. S. Naval Brig, Philadelphia, Pennsylvania is designated as the place of confinement.

R. D. TEKBAS
Typed Name of Convening Authority

Commanding Officer
Position of Convening Authority

Captain
Rank

R. D. Tekbas
Signature of Convening Authority

17 December 1984
Date

* GPO : 1984 O - 421-646 (17049)

CHAPTER IX

THE SPECIAL COURT-MARTIAL

INTRODUCTION

The special court-martial is the intermediate level court-martial created by the Uniform Code of Military Justice. The maximum penalties which an accused may receive at a special court-martial are generally greater than those of a summary court-martial, but less than those of a general court-martial. The rights of an accused at a special court-martial are also generally greater than the rights at a summary court-martial, but less than the rights at a general court-martial. Basically, the special court-martial is a court consisting of at least three members, trial and defense counsel, and a judge. The maximum imposable punishment extends to a bad-conduct discharge, six months confinement, forfeiture of 2/3 pay per month for six months, and reduction to paygrade E-1. This chapter will discuss in some detail the special court-martial and the mechanics of its operation.

CREATION OF THE SPECIAL COURT-MARTIAL

A. Authority to convene. Article 23, UCMJ, and MJM, 2-A-2 prescribe who has the power to convene (create) a special court-martial. The power to convene special courts-martial is nondelegable and, in no event, can a subordinate exercise such authority. When Captain Jones is on leave from his ship, his authority to convene special courts-martial devolves upon his temporary successor-in-command (usually the executive officer) who, in the eyes of the law becomes the commanding officer. Thus, signature titles such as "Acting Commanding Officer" and "Executive Officer" should be avoided on legal documents regardless of the validity of such titles on other administrative correspondence.

B. Mechanics of convening. Before any case can be brought before a special court-martial, such a court-martial must have been convened. The special court-martial is created by the written orders of the convening authority (CA) which also details the members.

R.C.M. 504 and MJM, 2-G contain guidance for the preparation of the convening order. Basically, the order should be under the command letterhead, be dated and serialized, and be signed personally by the CA. The order should specify the names and ranks of all members detailed to serve on the court. When a proper convening order is executed, a special court-martial is created and remains in existence until dissolved. A sample convening order is set forth at page 9-7, below.

C. Amendment of convening orders

1. General rules. Changes in personnel detailed to the court should be accomplished by written amendment to the order which originally assigned such personnel. If there is insufficient time to draft a written change, an oral amendment may be made and later confirmed in writing.

An amendment to a convening order is drafted using the same format as the original convening order. It need only describe any change to be made in court membership. A sample amendment to a convening order which changes the identity of a member is set forth at page 9-8.

2. Change of members

a. Before assembly. Prior to assembly of the court, the CA may change the members of the court without showing cause. R.C.M. 505 (c)(1). In addition, the CA may delegate this authority to excuse members before assembly to his/her staff judge advocate, legal officer, or other principal assistant. No more than one-third of the total number of members detailed by the CA may be excused by the CA's delegate in any one court-martial.

b. After assembly. After assembly of the court, the CA's delegate may no longer excuse members. Furthermore, the CA may not excuse any member, except for "good cause." R.C.M. 505(c)(2)(A)(i). "Good cause" denotes a critical situation such as illness, emergency leave, combat exigencies, etc. In the case of changes after court assembly, the CA must submit to the court for inclusion in the record of trial a detailed statement of the reasons necessitating the change in members.

CONSTITUTION OF SPECIAL COURTS-MARTIAL

As previously indicated, there are several configurations of special courts-martial, depending upon either the desires of the CA or the desires of the accused. The "constitution" of the court refers to the court's composition--i.e., the personnel involved.

A. Three members. One type of special court-martial consists of a minimum of three members and counsel, but no military judge. Such a special court-martial can try any case referred to it but cannot adjudge a sentence (in enlisted cases) in excess of six months confinement, forfeiture of two-thirds pay per month for six months, and reduction to paygrade E-1. In other words, in ordinary circumstances, a punitive discharge may not be adjudged.

B. Military judge and members. This type of special court-martial involves counsel, at least three members, and a military judge. The members' role is similar to that of a civilian jury. They determine guilt or innocence and impose sentence. The senior member is, in effect, the jury foreman who presides during deliberations. The military judge functions as does a civilian criminal court judge. He resolves all legal questions that arise and otherwise directs the trial proceedings. This form of special court-martial is authorized by Article 19, UCMJ, to adjudge a punitive discharge and has become fairly standard in the naval service.

C. Military judge only. This form of special court-martial is not created by a convening order, but by the accused's exercise of a statutory right. Article 16, UCMJ, gives the accused the right to request orally on the record or in writing a trial by military judge alone -- i.e., without members. Before choosing to be tried by a military judge alone, an accused is entitled to know the identity of the judge who will sit on his case. The trial counsel (prosecutor) may argue against the request when it is presented to the military judge. The judge rules on the request and, if the request is granted, he discharges the court members for the duration of that case only. A court-martial so configured is authorized to impose a sentence extending to a punitive discharge.

QUALIFICATIONS OF MEMBERS

A. Commissioned officers. The members of a special court-martial must, as a general rule, be commissioned officers. In the cases where the accused is an enlisted servicemember, noncommissioned warrant officers are eligible to be court members. The Discussion following R.C.M. 503(a)(1) indicates that no member of the court should be junior in grade to the accused if it can be avoided. Members of an armed force other than that of the accused may be utilized, but at least a majority of the members should be of the same armed force as the accused.

B. Enlisted members. Article 25(c), UCMJ, gives an enlisted accused a right to be tried by a court consisting of at least one-third enlisted members. The accused desiring enlisted membership must submit a personally signed request before the conclusion of any Article 39(a), UCMJ, session (pretrial hearing), or before the assembly of the court at trial, or make the request orally on the record. Only enlisted persons who are not of the same unit as the accused can lawfully be assigned to the court ("unit" means company, squadron, battery, ship, or similar sized elements).

If, when requested, enlisted members cannot be detailed to the court, the CA may direct the original court to proceed with trial. Such actions should only be taken when enlisted servicemembers cannot be assigned because of extraordinary circumstances. In such a case, the CA must forward to the trial counsel for attachment to the record of trial a detailed explanation of the extraordinary circumstances and why the trial must proceed without enlisted members. See R.C.M. 503(a)(2).

C. Selection of members. The CA has the ultimate legal responsibility to select the court members, which cannot be delegated. He may choose from lists of members suggested by subordinates, but the final decision must be his. Article 25(d)2, UCMJ, indicates that a CA shall appoint as members those personnel who, in his judgment, are best qualified by reason of age, education, training, experience, length of service, and judicial temperament. These factors, of course, vary with individuals and do not necessarily depend on the grade of the particular person. No person in arrest or confinement is eligible to be a court member. Similarly, no person who is an accuser, witness for the prosecution, or has acted as investigating officer or counsel in a given case is eligible to serve as a member for that case.

QUALIFICATIONS OF THE MILITARY JUDGE

Article 26(b), UCMJ, indicates that the military judge of a special court-martial must be a commissioned officer, a member of the bar of the highest court of any state or the bar of a Federal court, and certified by the Judge Advocate General (of the armed force of which he is a member) as qualified to be a military judge. A military judge qualified to act on general court-martial cases (Article 26(c), UCMJ) can also act in special court-martial cases. See R.C.M. 502(c).

IMPROPER CONSTITUTION OF THE COURT

Requisite to the power of a court-martial to try a case are jurisdiction over the offense, jurisdiction over the defendant, proper convening, and proper constitution. A deficiency in any of these requisites renders the court powerless to adjudicate a case lawfully. The rules relating to constitution of the court must therefore be scrupulously observed.

QUALIFICATIONS OF COUNSEL

Articles 19 and 38, UCMJ, describe the accused's right to counsel at special court-martial. R.C.M. 506 discusses the subject in detail. Article 27, UCMJ, sets forth the qualifications for counsel.

A. Trial counsel. The trial counsel in military criminal law serves as the prosecutor. For a special court-martial, the trial counsel need only be a commissioned officer.

B. Defense counsel. There are various types of defense counsel in military practice. The detailed defense counsel is the defense counsel initially assigned to the case. Individual counsel is a counsel requested by the accused and can be a civilian or military lawyer.

1. Detailed defense counsel

a. Article 27(c), UCMJ, describes the qualifications for detailed counsel at special courts-martial. An Article 27(b) defense counsel must be detailed by the MLC SJA at no cost to the accused unless, due to military exigencies or physical conditions, one cannot be obtained. The accused also has a right to remote counsel assigned from a staff other than that of the convening authority. MJM, 3-C-2.

b. R.C.M. 502(d)(1) expands the protection given to accused by Article 27(c) in that it requires Article 27(b) counsel as detailed defense counsel in special courts-martial.

2. Individual counsel. The term "individual counsel" is used to refer to a counsel specifically requested by an accused. Such counsel may be military or civilian.

a. Civilian counsel. At any special court-martial, the accused has the right to be represented by civilian counsel provided by him/her at his/her own expense. Where such counsel is retained by the accused, detailed counsel remains to assist the individual counsel unless expressly excused by the accused. The accused is entitled to a reasonable delay before trial for the purpose of obtaining and consulting civilian individual counsel.

b. Individual military counsel (IMC)

(1) Availability. At a special court-martial, the accused has the right to be represented by a military counsel of his own choice at no cost to the accused if such counsel is "reasonably available." MJM, 3-C-3 provides that a military counsel is "reasonably available" to represent an accused if the requested counsel:

(a) Is on active duty and assigned to a legal billet within the Coast Guard; and

(b) is not one of the following persons: a flag or general officer; a trial or appellate military judge; a trial counsel; an appellate defense or government counsel; a principal legal advisor to a command; an instructor or student at a military or civilian school; a commanding officer, executive officer, or officer in charge; or a member of the staff of the Chief Counsel.

These criteria are relaxed in situations where the accused has formed an attorney-client relationship with a particular counsel prior to any request for such counsel to serve as an IMC.

(2) Procedure. Requests for an IMC shall be made by the accused through the trial counsel to the CA, who shall forward it to the MLC SJA. If the requested person is among those not reasonably available under paragraph (2)(a), above, the CA shall deny the request, unless the accused asserts that there is an existing attorney-client relationship. If the accused's request makes such a claim, or if the person is not among those so listed as not reasonably available, the MLC SJA shall forward the request by message to the commanding officer of the requested person. That authority then makes an administrative determination whether his subordinate is reasonably available, after first assessing the impact upon his/her command should the requested counsel be made available. In so doing, the commanding officer may consider such factors as the following:

(a) The ability of other counsel to assume the workload of the requested counsel during his/her absence;

(b) the nature and complexity of the charges or legal issues involved in the case and any special qualifications possessed by the requested counsel; and

(c) the experience level and qualifications of detailed defense counsel.

If the commanding officer of the requested counsel concludes that his subordinate is unavailable, his rationale must be set down in writing and provided to the CA and the accused. This determination is a matter within the discretion of that commanding officer, although the accused may appeal an adverse decision to the immediate superior of the decisionmaker.

3. No defense counsel. R.C.M. 506(d) recognizes the right of the defendant to represent himself at a special court-martial without assistance of counsel.

SPECIAL COURT-MARTIAL)
)
)
CONVENING ORDER NO. 2-CY)

Commanding Officer
USCGC NORTHLAND (WMEC 904)
Portsmouth, Va. 23703

18 September 19CY

COMMANDING OFFICER, USCGC NORTHLAND (WMEC 904)

A special court-martial is hereby convened. It may try such persons as may properly be brought before it, and shall meet at Coast Guard Support Center, Portsmouth, Virginia unless otherwise directed. Designation of this Convening Authority is Secretarial and pursuant to Article 23, UCMJ. The court-martial will be constituted as follows:

MEMBERS

Lieutenant Commander A. B. SEE
Lieutenant E. N. FORCE
Chief Warrant Officer (BOSN-4) H. H. SMITH

R. D. TEKBAS
Captain, U.S. Coast Guard
Commanding Officer, USCGC NORTHLAND (WMEC 904)

AMENDMENT NO. 1)
SPECIAL COURT-MARTIAL)
)
CONVENING ORDER NO. 2-CY)

Commanding Officer
USCGC NORTHLAND (WMEC 904)
Portsmouth, Va. 23703

28 September 19CY

COMMANDING OFFICER, USCGC NORTHLAND (WMEC 904)

Lieutenant X. Y. ZEE, is detailed as a member of this special court-martial convened by my order no. 2-CY, this ship, dated 18 September 19CY, vice Lieutenant E. N. FORCE, relieved.

R. D. TEKBAS
Captain, U.S. Coast Guard
Commanding Officer, USCGC NORTHLAND (WMEC 904)

(NOTE: USE THIS SAMPLE FOR REPLACING A MEMBER OF A COURT-MARTIAL)

SPECIAL COURT-MARTIAL REFERRAL

A. Introduction. The process of referring a given case to trial by special court-martial is essentially the same as that for referral to a summary court-martial. Thus, the principles that apply to the preliminary inquiry, preferral of charges, informing the accused, and receipt of sworn charges also apply to the special court-martial. As far as the referral process is concerned, the only essential difference between the referral of a summary and a special court-martial is the information contained in block 14 on page 2 of the charge sheet.

B. Referral to trial. If, after reviewing the applicable evidence, the CA determines that trial by special court-martial is warranted, he must then execute Section V of the charge sheet in the proper manner. In addition to the command data entered on the appropriate lines of block 14, the CA must indicate the type of court-martial to which the case is being referred, the particular necessary special court-martial to which the case is assigned, and any special instructions. Block 14 must then be personally signed by the CA or by his personal order reflecting the signer's authority. It might serve well to recall that a clear and concise serial system is essential to proper referral. The referral should identify a particular court to hear the case; that is, it should relate to a specific convening order. Care must always be taken in preparing convening orders and referral blocks to avoid confusion and legal complications at trial.

NOTE: A completed sample charge sheet appears at the end of this chapter.

C. Withdrawal of charges. Withdrawal of charges is a process by which the CA takes from a court-martial a case previously referred to it for trial. The CA cannot withdraw charges from one court and re-refer them to another without proper reasons. These reasons must be articulated in writing by the CA and this writing included in the record of trial when the case is tried by the second court. The CA may withdraw charges for the purpose of dismissing them for any reason deemed sufficient to him. Mechanically, the withdrawal is accomplished by drawing a diagonal line across the referral block on page 2 of the charge sheet and having the CA initial the line-out. It is also advisable to write "withdrawn" across the endorsement and date the action.

1. Disestablishment of the court. Perhaps the most frequently occurring withdrawal problem is presented when the CA wants to disestablish the court and create another to take its place. This usually happens when several members have been transferred, or the particular court has been in existence for a long time, and the CA wants to relieve the court. Such grounds are valid and constitute a "proper reason." If evidence shows that a change has been made because the CA was displeased with the leniency of the sentence or the number of acquittals, then the withdrawal would not be lawful. Whenever a new court relieves an old one, a problem is created with respect to the cases previously referred to the old court (which is disestablished) and now being referred to the new court. Remember, only the court to which a case is specifically referred can try it. The CA can withdraw each case from the old court (by lining out the referral block) and then re-refer the case to the new court. This is accomplished by executing a new block 14 referral on the charge sheet, indicating therein the serial number and date of the convening order which appointed the new court. The new referral is taped

along the top edge over the old lined-out referral to allow inspection of both referrals.

2. Change of court -- no disestablishment. Sometimes a CA may have good cause for withdrawing a case from a court that he does not intend to disestablish. For instance, one of several court panels may be backlogged and the CA may wish to redistribute the pending cases. This action is accomplished by lining out and initialing the old referral block on the charge sheet and executing a new block 14 re-referring the case to a new court. The new block 14 is taped on one edge over the old one to allow inspection of both referrals.

D. Amendment of charges. In some instances, an amendment to a specification will necessitate further administrative action with respect to the charge sheet. Minor changes in form or correction of typographical errors normally will require no more administrative action than lining out and initialing the erroneous data and substituting the correct data. If, on the other hand, the contemplated change involves any new person, offense, or matter not fairly included in the charges as originally preferred, the amended specification must go through the preferral-referral process or the accused can exercise his right to object to trial on unsworn charges.

E. Avoiding statute of limitations problems. Article 43, UCMJ, provides that most offenses must have sworn charges formally receipted for within five years after the date of the offense in order to preserve the government's ability to prosecute the crime(s). The formal receipt of charges tolls the running of the statute of limitations. Murder, mutiny, aiding the enemy, and desertion in time of war (including the conflicts in Korea or Vietnam) may be tried at any time. There is no statute of limitations as to those crimes.

F. Additional charges. If an accused awaiting trial on certain charges commits new offenses, or other previously unknown offenses are discovered, an entirely new charge sheet should be prepared. The CA should state, in the special instruction section of the referral block, that the additional charges will be tried together with the charges originally referred to the court-martial.

NOTE: A completed sample charge sheet appears at the end of this chapter.

TRIAL PROCEDURE

A. Introduction. It is not necessary to this course of instruction that the reader have a complete understanding of the many and complex rules and procedures applicable to the special court-martial. It is essential, however, that the reader have a general appreciation of the mechanics of the trial. Though an infinite number of variations may exist in any particular case, the following procedure is generally followed in most special courts-martial.

B. Service of charges. Article 35, UCMJ, states that in time of peace no person can be brought to trial in any special court-martial until three days have elapsed since the formal service of charges upon that person. In computing the three-day period, neither the date of service nor the date of trial count. Sundays and holidays do count, however, in computing the statutory period. Thus, if the accused is served on Wednesday, one must wait

Thursday, Friday, and Saturday before compelling trial. Trial in the foregoing example could not be compelled before Sunday and, as a practical matter, not before Monday. The date of service of charges upon the accused is demonstrated by a certificate in block 15 at the bottom of page 2 of the charge sheet. Trial counsel executes this certificate when he presents a copy of the charge sheet to the accused personally. He must do this even though the accused has previously been informed of the charges against him. This service of a copy of the charge sheet may also be accomplished by the command at any time after referral as long as the service is to the accused personally. Any accused can lawfully object to participation in trial proceedings before the three-day waiting period has expired. The accused may, however, waive the three-day period, so long as he understands the right and voluntarily agrees to go to trial earlier.

C. Pretrial hearings. Any time after elapse of the three-day waiting period, a military judge may hold sessions of court without members for the purpose of litigating motions, objections, and other matters not amounting to a trial of the accused's guilt or innocence. The accused may be arraigned and his pleas taken and determined at such a hearing. Art. 39(a), UCMJ. At such hearings, the judge, trial counsel, defense counsel, accused, and reporter will be present. Several such hearings may be held if desired.

D. Preliminary matters. At the initial pretrial hearing, the first order of business is to incorporate into the record those documents relating to the convening of the court and referral of the case for trial and to administer the required oaths. Thus the convening order, the charge sheet, and any amendments to either document become matters of record at this stage of the proceedings. In addition, an accounting of the presence or absence of those required to be present will be made. This accounting includes all persons named in the convening order, the counsel, the reporter, and the military judge. Qualifications of all personnel are also checked for the record.

E. The arraignment. R.C.M. 904 defines arraignment as the procedure involving the reading of the charges to the accused and asking for the accused's pleas. The pleas are not part of the arraignment. Some of this detail will be accomplished, in practice, before the accused is advised to make his motions. Nevertheless, the arraignment is complete when the accused is asked to enter his pleas. This stage is an important one in the trial for, if the accused voluntarily absents himself without authority and does not thereafter appear during court sessions, he may nevertheless be tried and, if the evidence warrants, convicted. The arraignment is also the cut-off point for the adding of additional charges to the trial. After arraignment, no new charges can be added without consent of the accused.

F. Motions. At arraignment, the military judge will advise the accused that his pleas are about to be requested and that if he desires to make any motions he should now do so. Many times all such motions (attacking jurisdiction, sufficiency of charges, speedy trial, etc.) will have been litigated at a previous pretrial hearing. Nevertheless, the accused may have decided to make additional motions and must be allowed to do so. If there are motions, they will be litigated at this time. If there are no motions, the trial will proceed to the arraignment.

G. Pleas. The arraignment is the process of asking the accused to plead to charges and specifications. The responses of the accused to each specification and charge are known as the pleas. The recognized pleas in military practice are "guilty," "not guilty," guilty to a lesser included offense and, under some circumstances, a conditional plea of guilty. Any other pleas--such as nolo contendere--are improper, and the military judge will enter a plea of not guilty for the accused.

1. Not guilty pleas. When not guilty pleas are entered by the court or accused, the trial will proceed to the presentation of evidence--first by the prosecutor and then by the defense.

2. Guilty pleas. Where guilty pleas are entered or the accused pleads guilty to a lesser included offense, the judge must determine that such pleas are made knowingly and voluntarily and that the accused understands the meaning and effect of such pleas. The accused must be advised of the maximum sentence that can be imposed in his case; that a plea of guilty is the strongest form of proof known to the law; that by pleading guilty the accused is giving up the right to a trial of the facts, the right against self-incrimination, and the right to confront and to cross-examine the witness(es) against him/her. In addition, the court must explore the facts thoroughly with the accused to obtain from the accused an admission of guilt-in-fact to each element of the offense (or offenses) to which the pleas relate.

3. Conditional pleas. With the approval of the military judge and the consent of the trial counsel, an accused may enter a conditional plea of guilty. The main purpose of such a conditional plea is to preserve for appellate review certain adverse determinations which the military judge may make against the accused regarding pretrial motions. If the accused prevails on appeal, his/her "conditional" plea of guilty may then be withdrawn.

H. Challenge procedure. Where the court is composed of members, the next stage will involve a determination of the eligibility of court members to participate in the trial. Article 25(d)(2), UCMJ, and R.C.M. 912 list numerous grounds which, if shown, disqualify a court member from participation in the trial. Mechanically, both trial and defense counsel will be given an opportunity to question each member to see if a ground for challenge exists. In this connection, there are two types of challenges: challenges for cause and peremptory challenges. A challenge, if sustained by the judge who rules upon it, excuses the challenged member from further participation in the trial. Challenges for cause are those challenges predicated on the grounds enunciated in Article 25(d)(2), UCMJ, and R.C.M. 912. The law places no limit on the number of challenges for cause which can be made at trial. A peremptory challenge is a challenge that can be made for any reason. The trial counsel and each accused is entitled to one peremptory challenge. Art. 41, UCMJ.

I. Findings. After the evidence has been presented, the court will deliberate to arrive at findings of "not guilty," "guilty," or "guilty of a lesser included offense." In order to convict an accused at a special court-martial, two-thirds of the members present at trial must agree on each finding of guilty. In computing the necessary number of votes to convict, a resulting fraction is counted as one. Thus, on a court of five members, the mathematical number of votes required to convict is 3 1/3 or, applying the rule, four votes. In a trial by military judge alone, the required number of votes is one:

the judge's. In contested member cases, after all evidence and arguments of counsel have been presented, the judge will instruct the members of the court on the law they must apply to the facts in reaching their verdict.

J. Sentence. If the accused has been convicted of any offense, the trial will normally move directly into the sentencing phase. Evidence relating to the kind and amount of punishment which should be adjudged is presented to the court after which the court will close to deliberate. Where members are present, instructions must be given on the law to be applied by the court in reaching a sentence. See R.C.M. 1001-1009 for a detailed discussion of the sentencing phase of the trial.

K. Clemency. After trial, any or all court members and/or the military judge may recommend that the CA exercise clemency to reduce the sentence, notwithstanding their vote on the sentence at trial.

L. Record of trial. After a special court-martial trial has been completed, the reporter, under supervision of the trial counsel, prepares the record of proceedings. The kind of record prepared depends upon the sentence adjudged and the wishes of the CA. In those cases in which a bad-conduct discharge has been adjudged, a verbatim transcript of everything said during open sessions of the court, all sessions held by the military judge, and all hearings held out of the presence of the court members must be made. Only the deliberations of the judge or court members are not recorded. If the CA so directs, a verbatim record, when otherwise required, need not be prepared. This normally occurs when the CA does not desire to approve the discharge portion of the sentence and wishes to save his staff the effort of preparing a verbatim record. A summarized record of court proceedings is prepared in all special court-martial cases not involving a punitive discharge and when directed by the CA in those cases involving a bad-conduct discharge. In any case, the CA may direct preparation of a verbatim record even though not required by law.

SPECIAL COURT-MARTIAL PUNISHMENT

A. Introduction. Articles 19, 55, and 56, UCMJ, and R.C.M. 1003 are the primary references concerning the punishment authority of the special court-martial. Appendix 12 and Part IV, MCM, 1984, also address punishment power. Part IV of the MCM contains the maximum permissible punishment for that offense. The other references further limit punitive authority, depending on the level of court-martial and type of punishment being considered.

B. Prohibited punishments. Article 55, UCMJ, flatly prohibits flogging, branding, marking, tattooing, the use of irons (except for safekeeping of prisoners), and any other cruel and unusual punishment. Other punishments not recognized by service custom include shaving the head, tying up by hands, carrying a loaded knapsack, placing in stocks, loss of good conduct time (a strictly administrative measure), and administrative discharge.

C. Jurisdictional maximum punishment. In no case can a special court-martial lawfully adjudge a sentence in excess of a bad-conduct discharge, confinement for six months, forfeiture of two-thirds pay per month for six months, and reduction to paygrade E-1. Art. 19, UCMJ. Within those outer limits are a number of variations of lesser forms of punishment which may be adjudged.

D. Authorized punishments. Appendix 12 and Part IV, MCM, 1984, list the specific maximum punishments for each offense as determined by statutory provision or by the President of the United States pursuant to authority delegated by Article 56, UCMJ. An accused, as a general rule, may be separately punished for each offense of which he is convicted, unlike NJP where only one punishment is imposed for all offenses. Thus, an accused convicted of UA (Art. 86), assault (Art. 128), and larceny (Art. 121) is subject to a maximum sentence determined by totaling the maximum punishment for each offense.

1. Punitive separation from the service. A special court-martial is empowered to sentence an enlisted accused to separation from the service with a bad-conduct discharge, provided the discharge is authorized for one or more of the offenses for which the accused stands convicted or by virtue of an escalator clause (discussed below). A special court-martial is not authorized to sentence any officer or warrant officer to separation from the service. A bad-conduct discharge is a separation from the service under conditions not honorable, and is designed as a punishment for bad conduct rather than as a punishment for serious military or civilian offenses. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary. R.C.M. 1003(b)(10)(C). The practical effect of this type of separation is less severe than a dishonorable discharge, where the accused automatically becomes ineligible for almost all veterans' benefits. The effect of a bad-conduct discharge on veterans' benefits depends upon whether it was adjudged by a general or special court-martial, whether the benefits are administered by the service concerned or by the Veterans' Administration, and upon the particular facts of a given case.

2. Restraint and/or hard labor. Under this category of punishment, there are three variations of sentence in addition to the basic punishment of confinement. Confinement is, of course, the most severe form.

a. Confinement. Confinement involves the physical restraint of an adjudged servicemember in a brig, prison, etc. Under military law confinement automatically includes hard labor, but the law prefers that the sentence be stated as confinement -- omitting the words "at hard labor." Omission of the words "hard labor" does not relieve the accused of the burden of performing hard labor. R.C.M. 1003(b)(8). A special court-martial can adjudge six months confinement upon an enlisted servicemember, but may not impose any confinement upon an officer or warrant officer. Part IV, MCM, 1984, limits this punishment to an even lesser period for certain offenses; e.g., failure to go to appointed place of duty (violation of Art. 86) has a maximum confinement punishment of only one month.

b. Hard labor without confinement. This form of punishment is performed in addition to routine duty and may not lawfully be utilized in lieu of regular duties. The number of hours per day and character of the hard labor will be designated by the immediate commanding officer of the accused. The maximum amount of hard labor that can be adjudged at a special court-martial is three months. This punishment is imposable only on enlisted persons and not upon officers or warrant officers. After each day's hard labor assignment has been performed, the accused should then be permitted normal liberty or leave. R.C.M. 1003(b) indicates that hard labor is a less severe punishment than confinement and more severe than restriction. "Hard labor" means rigorous work but not so rigorous as to be injurious to health. Hard labor cannot be required to be performed on Sundays, but may be performed on holidays. Hard labor can be combined with any other punishment. See R.C.M. 1003(b)(7).

c. Restriction. Restriction is a moral restraint upon the accused to remain within certain specified limits for a specified time. Restriction may be imposed on all persons subject to the UCMJ, but not in excess of two months. Restriction is a less severe form of deprivation of liberty than confinement or hard labor and may be combined with any other punishment. The performance of military duties can be required while an accused is on restriction. See R.C.M. 1003(b)(6).

3. Confinement on bread and water/diminished rations. This punishment is not authorized in the Coast Guard. MJM, 4-E-2.

4. Monetary punishments. The types of monetary punishment authorized by R.C.M. 1003(b) include forfeiture and fine.

a. Forfeiture of pay. This kind of punishment involves the deprivation of a specified amount of the accused's pay for a specific number of months. The maximum amount that is subject to forfeiture at a special court-martial is two-thirds of one month's pay per month for six months. The forfeiture must be stated in terms of pay per month for a certain number of months. A sentence "to forfeit $50.00 for six months" has been held by military appellate courts to mean $50.00 apportioned over six months or, in other words, $8.33 per month for six months. Thus the language used to express this punishment must be meticulously accurate. The basis for computing the forfeiture is the base pay of the accused plus sea or foreign duty pay. Other pay and allowances are not used as part of the basis. If the sentence is to include a reduction in grade, the forfeiture must be based upon the grade to which the accused is to be reduced. A forfeiture may be imposed by a special court-martial upon all military personnel. The forfeiture applies to pay becoming due after the forfeitures have been imposed and not to monies already paid to the accused or to his own personal independent resources. Unless suspended, forfeitures take effect on the date ordered executed by the CA when initial action is taken.

b. Fine. A fine is a lump sum judgment against the accused requiring him to pay specified money to the United States. A fine is not taken from the accused's accruing pay, as with forfeitures, but rather becomes due in one payment when the sentence is ordered executed. In order to enforce collection, a fine may also include a provision that, in the event the

fine is not paid, the accused shall, in addition to the confinement adjudged, be confined for a time. The total period of confinement so adjudged may not exceed the jurisdictional limit of the special court-martial (six months) should the accused fail to pay the fine. R.C.M. 1003(b)(3) indicates that, while a special court-martial can impose a fine upon all personnel tried before it, such punishment should not be adjudged unless the accused has been unjustly enriched by his crime. A fine cannot exceed the total of the amount of money which the court could have required to be forfeited. See R.C.M. 1003(b)(3). The court may, however, award both a fine and forfeitures, so long as the total monetary punishment does not exceed the amount which could have been required to be forfeited.

5. Punishment affecting grade. There are two punishments affecting grade authorized for special court-martial sentences. These are reduction in grade and loss of numbers.

a. Reduction in grade. This form of punishment has the effect of taking away the pay grade of an accused and placing him in a lower pay grade. Accordingly, this punishment can only be utilized against enlisted persons in other than the lowest pay grade; officers may not be reduced in grade. A special court-martial may reduce an enlisted servicemember to the lowest pay grade regardless of grade before sentencing. A reduction can be combined with all other forms of punishment. See R.C.M. 1003(b)(5).

Automatic reduction under Article 58(a), UCMJ, is not authorized in the Coast Guard. MJM, 4-E-1.

b. Loss of numbers. Loss of numbers is the dropping of an officer a stated number of places on the lineal precedence list. Lineal precedence is lost for all purposes except consideration for promotion. This exception prevents the accused from avoiding or delaying being passed over. Loss of numbers does not reduce an officer in grade nor does it affect pay or allowances. Loss of numbers may be adjudged in the case of commissioned officers, warrant officers, and commissioned warrant officers. This punishment may be combined with all other punishments. See R.C.M. 1003(b)(4).

6. Punitive reprimand. A special court-martial may also adjudge a punitive reprimand against anyone subject to the UCMJ. A reprimand is nothing more than a written statement criticizing the conduct of the accused. In adjudging a reprimand, the court does not specify the wording of the statement but only its nature.

E. Circumstances permitting increased punishments. There are three situations in which the maximum limits of Part IV, MCM, 1984 may be exceeded. These are known as the "escalator clauses" and are designed to permit a punitive discharge in cases involving chronic offenders. In no event, however, may the so-called escalator clauses operate to exceed the jurisdictional limits of a particular type of court-martial. With respect to a special court-martial, these three clauses have the following impact. See R.C.M. 1003(d).

1. Three or more convictions. If an accused is convicted of an offense for which Part IV, MCM, 1984 does not authorize a dishonorable discharge, proof of three or more previous convictions by court-martial during the year preceding the commission of any offense of which the accused is convicted will allow a special court-martial to adjudge a bad-conduct discharge, forfeiture of 2/3 pay per month for six months and confinement for six months, even though that much punishment is not otherwise authorized. In computing the one year period, any unauthorized absence time is excluded. R.C.M. 1001(d)(1).

2. Two or more convictions. If an accused is convicted of an offense for which Part IV, MCM, 1984, does not authorize a punitive discharge, proof of two or more previous convictions within three years next preceding the commission of any of the current offenses will authorize a special court-martial to adjudge a bad-conduct discharge, forfeiture of two-thirds pay per month for six months, and, if the confinement authorized by the offense is less than three months, confinement for three months. For purposes of the second escalator clause, periods of unauthorized absence are excluded in computing the three-year period. R.C.M. 1003(d)(2).

3. Two or more offenses. If an accused is convicted of two or more separate offenses, none of which authorizes a punitive discharge, and if the authorized confinement for these offenses totals six months or more, a special court-martial may adjudge a bad-conduct discharge and forfeiture of two-thirds pay per month for six months. R.C.M. 1003(d)(3).

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. GRADE OR RANK	4. PAY GRADE
SMITHY, Ivan M.	000 00 0000	SN	E-3

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
USCGC NORTHLAND (WMEC 904), U. S. Coast Guard	5 May 1982	4 yrs

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$ 742.00	NONE	$ 742.00	Confinement	8 September 1984 to present

II. CHARGES AND SPECIFICATIONS

10. CHARGE VIOLATION OF THE UCMJ, ARTICLE 86. Absent without leave

SPECIFICATION: In that Seaman Ivan M. SMITHY, U. S. Coast Guard, USCGC NORTHLAND, did, on or about 0715, 5 May 1984, without authority, absent himself from his unit, to wit: USCGC NORTHLAND, located at Portsmouth, Virginia, and did remain so absent until on or about 1600, 6 September 1984.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
JUSTICE, John E.	LT	USCGC NORTHLAND (WMEC 904)

d. SIGNATURE OF ACCUSER	e. DATE
John E. Justice	18 September 1984

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 18th day of September, 19 84, and signed the foregoing charges and specifications under oath that he/~~she~~ is a person subject to the Uniform Code of Military Justice and that he/~~she~~ either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/~~her~~ knowledge and belief.

N. W. MOUNTIE	USCGC NORTHLAND (WMEC 904)
Typed Name of Officer	*Organization of Officer*
Lieutenant Commander	Commissioned Officer
Grade	*Official Capacity to Administer Oath (See R.C.M. 307(b)—must be commissioned officer)*
N. W. Mountie	
Signature	

DD FORM 458 AUG 84 EDITION OF OCT 80 IS OBSOLETE.

12.

On 18 September, 19 84, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308 (a)) (See R.C.M. 308 if notification cannot be made.)

R. D. TEKBAS
Typed Name of Immediate Commander

USCGC NORTHLAND (WMEC 904)
Organization of Immediate Commander

Captain
Grade

R D Tekbas
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at 1100 hours, 18 September, 19 84, at USCGC NORTHLAND (WMEC 904)
Designation of Command or

Portsmouth, Virginia
Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE[1] Commanding Officer,

R. D. TEKBAS
Typed Name of Officer

USCGC NORTHLAND (WMEC 904)
Official Capacity of Officer Signing

Captain
Grade

R D. Tekbas
Signature

V. REFERRAL, SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
USCGC NORTHLAND (WMEC 904)	Portsmouth, Virginia	18 September 1984

Referred for trial to the Special court-martial convened by Order No. 2-84 of 18 September

, , 19 84, subject to the following instructions[2] NONE

By FOR THE COMMANDING OFFICER

Commanding Officer,

R. D. TEKBAS
Typed Name of Officer

USCGC NORTHLAND (WMEC 904)
Official Capacity of Officer Signing

Captain
Grade

R D. Tekbas
Signature

15

On 20 September, 19 84, I (personally) served a copy hereof on (each of) the above named accused.

Q. M. HALE
Typed Name of Trial Counsel

Lieutenant
Grade or Rank of Trial Counsel

Q. M. Hale
Signature

FOOTNOTES 1 — When an appropriate commander signs personally, inapplicable words are stricken.
2 — See R.C.M. 601(e) concerning instructions. If none, so state.

U.S. G.P.O. 1984-421-546/17048

CHAPTER X

POTENTIAL LEGAL PROBLEMS OF THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY

INTRODUCTION

The unique responsibilities of a court-martial convening authority -- to act as both a judicial officer and a commanding officer -- frequently create potentially serious legal problems for the convening authority who tries to be true to both roles. In this chapter, the relationship of command and convening authority responsibility will be explored through the discussion of legal problems that are common to both.

ACCUSER CONCEPT PROBLEMS

The Uniform Code of Military Justice is structured to give the convening authority extensive areas of permissible involvement in the military justice system. The UCMJ also defines certain areas of impermissible involvement by the convening authority. The "accuser" concept defines one of these impermissible areas (see Art. 1(9), Art. 22(b). Art. 23(b) UCMJ); illegal command influence (to be discussed later) defines another (see Art. 37, UCMJ). In the Navy and Marine Corps, the accuser concept applies only to special and general courts-martial. It does not strictly apply to summary courts-martial, nor to nonjudicial punishment. Article 24(b), UCMJ; R.C.M. 1302(b), MCM, 1984. The accuser concept is applied to summary court-martial in the Coast Guard. Section 1000-1, MJM. If the convening authority becomes an accuser, he is disqualified from taking any further action in a special or general court-martial. R.C.M. 504(c) (1). Any court convened by an accuser lacks jurisdiction (power) to hear a case. R.C.M. 1107(a). A convening authority becomes an accuser when he signs and swears to the truth of the charges against the accused (at the bottom of page 1 of a charge sheet), when he directs that someone else sign the charge sheet as a nominal accuser (distinguish the situation where the convening authority properly directs a subordinate to investigate a situation and prefer charges, if warranted, as opposed to where the CA directs the subordinate to prefer certain charges), or when he has a personal rather than official interest in the prosecution of the accused (such as when the CA or his family are the victims of a crime). A significant policy underlying the accuser concept is that the accused is entitled to have the decisions affecting his case made by a convening authority who is unbiased and impartial and is not convinced beyond a reasonable doubt of the guilt of the accused. The accuser concept does not concern itself so much with the state of mind of the convening authority as it does with the appearance of impropriety in his actions.

UNLAWFUL COMMAND INFLUENCE

It should be noted that not all command influence is unlawful, inasmuch as the convening authority is authorized by law to appoint court members, to refer cases to trial, and to review the cases he has referred to trial as well as other acts. Unlawful command influence, however, is an intentional or inadvertent act tending to impact on the trial process in such a way as to affect the impartiality of the trial process. Courts are very quick to react to even the appearance of unlawful influence. Two notions form the basis of the unlawful command influence concept. The first notion is that military justice is the fair and impartial evaluation of probative facts by judge and/or court members. The second notion is that nothing but legal and competent evidence presented in court can be allowed to influence the judge and/or court members. If unlawful command influence exists, the findings and sentence of the court may be invalidated. If the accused has pleaded guilty, it is possible that only the sentence may be invalidated. The primary prohibition against unlawful command influence is contained in Article 37, UCMJ. Those violating the provisions of Article 37, UCMJ, are subject to court-martial.

Many instances of illegal command influence arise from the good-faith efforts of the commanding officer to influence good order and discipline within his command through speeches, writings, or directives. These communications may be broadly directed (to the entire command) or more narrowly directed (to prospective court members). Ostensibly these communications may be designed to educate members of the command as to their responsibilities in regard to the military justice system. But, in reality, these communications may serve as a forum for the convening authority to express dissatisfaction with certain aspects of the military justice system. While no guidelines can be advanced that can cover every situation, it is possible to point out several areas in which the law has been very sensitive in regard to communications by the commanding officer. For example, discussing a case that is pending adjudication with prospective members is normally considered to be improper. It is improper to ask for a specific sentence, either in a particular case or in a particular class of cases. It is improper to criticize past findings or sentences from previous courts. It is also improper for the commanding officer to evidence an inflexible attitude on review (for example, no punitive discharge will ever be suspended). In addition, the commanding officer may not do indirectly what he could not do directly; that is, he cannot have someone such as the executive officer or the legal officer make statements that he, as commanding officer, could not make. Where this kind of communication is involved, military courts will presume the existence of unlawful command influence unless the existence is clearly and specifically rebutted in the record of trial.

PRETRIAL RESTRAINT PROBLEMS

The term "pretrial restraint" is used to refer to the practice of restricting the freedom of movement of an accused, prior to his trial, to insure his presence at that trial or for other permissible grounds. R.C.M. 304 and 305 discuss the various forms of such restraint.

A. Forms of restraint

1. Confinement. See R.C.M. 304(b), 305. Confinement is the physical restraint of an accused in a correctional facility, detention cell, or other areas by means of walls, locked doors, guards, or other devices. This form of restraint is the most severe, and it is not surprising that the rules governing its use are stringent. For example, commissioned officers, warrant officers, and civilians (when subject to military jurisdiction) can be confined only on order of their commanding officer; whereas enlisted persons can be ordered into confinement by any commissioned officer. A commanding officer may not delegate authority to arrest officers and civilians, but may lawfully delegate his authority to confine enlisted persons to warrant officer, petty officers, or noncommissioned officers of his command. As a practical matter, however, confinement normally is ordered only by the commanding officer, executive officer, or command duty officer. Note: When an accused is placed in pretrial confinement, his commanding officer must submit a written memorandom to the initial review officer which states the reason for his conclusion that an offense triable by court-martial has been committed; that the accused committed it; that confinement is necessary because it is foreseeable that the accused will not appear at trial or will engage in serious criminal misconduct; and that less severe forms of restraint are inadequate.

2. The initial review officer program. The law recognizes that pretrial confinement has serious consequences for an accused. Because of these consequences, a neutral and detached "initial review officer" (IRO) has been mandated to decide whether an individual should continue to be held in confinement pending his court-martial. The IRO will normally make this determination after the accused has already been confined by the accused's commanding officer. The IRO will make a determination based upon materials presented to him by the command and the accused at an informal proceeding. If he determines pretrial confinement is not warranted, there is no administrative appeal from his decision. Detail of the IRO system are outlined in R.C.M. 305(e)-(i) and MJM, 2-C. It should also be noted that, if other forms of pretrial restraint are imposed (such as arrest, restriction or conditions on liberty), the decision to impose these forms of restraint are not reviewed by an IRO.

B. Basis for restraint. The decision to impose pretrial restraint must be viewed on a case-by-case basis by the restraining authority. Blanket policies of restraining all long absence offenders, all thieves, etc., are patently unlawful. Before any form of pretrial restraint may be imposed, probable cause is required -- i.e., the person imposing the restrain must have reasonable grounds to believe: (1) that an offense triable by court-martial has been committed; (2) that the person to be restrained committed it; and (3) that the restraint ordered is required by the circumstances. Personal knowledge is not necessary. Restraint may be imposed based upon statements by witnesses.

1. Necessity for pretrial confinement. In order to impose pretrial confinement lawfully, the commander imposing the confinement must have reasonable grounds to believe that it is necessary because it is foreseeable that either: (1) the prisoner will not appear at trial, pretrial hearing, or investigation; or (2) the person will engage in serious criminal misconduct (including intimidation of witnesses, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or effectiveness of

the command). In addition, the commander must believe upon probable cause that less severe forms of restraint would be inadequate. These are the only grounds on which pretrial confinement may be imposed. It is illegal to confine an accused, for example, solely because there is probable cause to believe he has committed a serious offense or because he is a discipline problem (a pain in the neck).

In determining whether pretrial confinement is necessary to insure the presence of the accused, the imposing individual should consider all the facts and circumstances relating to the case. These factors would include the prior disciplinary history of the accused (particularly relevant would be prior unauthorized absence offenses and whether the accused had been released prior to disciplinary action on previous cases); his reputation, character, and mental condition; his family ties and relationships (whether he has a family and whether his family members are in the area); any economic connection to the area (such as home ownership); the presence or absence of responsible members of the military or of the civilian community who can vouch for his reliability; the nature of the offense charged; the apparent probability of conviction; the likely sentence; any statements made by the accused; and any other factors indicating the likelihood of his remaining for his court-martial or his fleeing prior to court-martial.

2. Necessity for restriction. The same grounds that would justify pretrial confinement or arrest will justify pretrial restriction.

C. Severity of restraint. Article 13, UCMJ, indicates that pretrial restraint shall not be more rigorous than the circumstances require to insure the accused's presence. Superior competent authority can impose restrictions on the use of pretrial restraint. Article 10, UCMJ, states that when an accused is ordered into arrest or confinement prior to trial, immediate steps will be taken to inform him of the specific offense precipitating the restraint and to either try or release him. Article 33, UCMJ, further provides that when an accused is held in confinement or arrest for trial by general court-martial, his commanding officer will, within eight days of the imposition of that restraint, forward to the general court-martial convening authority the charges and pretrial investigation (Art. 32, UCMJ) or, if that is not practicable, a detailed written explanation of the reasons for delay will be forwarded within the eight-day period.

D. Premast restraint. When an accused is charged with a minor offense, i.e. one normally tried by summary court-martial or one which authorizes a maximum penalty of less than confinement for one year or dishonorable discharge, he ordinarily shall not be placed into confinement. Art. 10, UCMJ. Since only minor offenses may be disposed of a nonjudicial punishment, premast restraint of any kind is normally prohibited.

E. Relief from pretrial restraint. The special court-martial convening authority, through his legal officer, is the best check of the pretrial restraint process. By taking direct command action to correct errors of law or judgment, a convening authority can save much difficulty at trial and insure appropriate use of pretrial restraint as indicated by Congress. There are other

alternatives for relief available to an accused. He may request mast to superior authority; he may petition for relief under Article 138, UCMJ; he may request the initial review officer to reconsider his decision; or he could petition the Court of Military Review or the Court of Military Appeals for relief. If an accused has been restrained illegally, he is, at a minimum, entitled to administrative credit against any confinement adjudged by a court-martial. This administrative credit would be computed at the rate of at least one day of credit for each day of illegal confinement served. Note also that the accused will receive administrative credit at the rate of one day of credit for each day of legal pretrial confinement, in accordance with Federal civilian sentence-computation procedures which have been specifically adopted by the Department of Defense. Although it may only involve psychological relief to the accused, it is possible for the person ordering illegal pretrial confinement to be prosecuted under Article 97, UCMJ (maximum sentence is dismissal or dishonorable discharge and three years confinement).

SPEEDY TRIAL PROBLEMS

The accused has both a constitutional and a statutory right to a speedy trial. The government is under an obligation to proceed with prosecution with all reasonable speed and, in cases where an accused has been subject to unreasonable or oppressive delay, he is entitled to dismissal of charges. In addition to this general rule, R.C.M. 707 imposes on the government the specific obligation to bring the accused to trial within 120 days of the commencement of the case (see para. B, below) or face dismissal of the charges. See Articles 10, 30(b), and 33, UCMJ, and R.C.M. 707.

A. Raising the issue. The issue of denial of speedy trial normally is raised at trial by the accused by a motion to dismiss charges. In support of this motion, the accused need only show that the trial has been delayed. The issue may also be presented prior to trial by request to the convening authority. Once the issue is raised, the burden is upon the government to show by a preponderance of evidence that the delay was not unreasonable--i.e., that the government proceeded to trial with due diligence, or that the accused was not harmed (prejudiced) by delay.

B. Commencement of accountability. The period of time for which the government must account begins either upon the imposition of any form of pretrial restraint under R.C.M. 304, other than conditions on liberty, or the date when the accused was notified of the preferral of charges, whichever occurs first. Note also that, where a military accused is held by civilian authorities for surrender to military authorities, the civilian confinement may commence the government's accountability. Also, if a military accused is held by civilian authorities on civilian charges, the government is under an obligation to make bona fide attempts to secure the accused's release for military trial. If no such effort is made, the government may be accountable for the period of civilian confinement. Each additional offense committed after an accountable period begins starts a new accountable period for that particular offense. Thus, in any case of multiple offenses, an accused could suffer a denial of speedy trial as to some offenses but not as to others. Each offense, therefore, has its own period of accountability.

C. Termination of accountability. The period of accountability, once begun, generally does not terminate until trial commences, i.e., a plea of guilty is entered or presentation to the factfinder of evidence, on the merits begins. If charges are dismissed, of a mistrial is granted, or if the accused is released from pretrial restraint for a significant period when no charges are pending, the 120-day period begins to run only from the date on which notification of charges or restraint are reinstituted.

D. Excludable periods. R.C.M. 707(c) states that certain periods will be excluded when determining whether the 120-day rule has been satisfied; e.g., periods of delay resulting from other proceedings in the case (psychiatric evaluation, hearing on pretrial motions), unavailability of military judge, defense-requested continuance, accused's absence; unusual operational requirements and military exigencies.

E. Prejudice per se. When an accused has been subjected to pretrial confinement in excess of 90 days, the law will presume prejudice to the accused and that he has been denied his right to a speedy trial. Unless the government can demonstrate extraordinary circumstances beyond manpower shortages, mistakes in drafting, or illnesses and leave that contributed to the delay, the charges against the accused will be dismissed. In computing the 90 days for these purposes, days of delay attributable to the defense and for its benefit will not be counted. Operational demands, combat environment, or a particularly complex offense or series of offenses are examples of "extraordinary circumstances" that might justify delay over three months. The bottom line is that it is imperative that an accused in pretrial confinement be brought to trial by the 90th day. It should also be noted that it is still permissible to release an accused from pretrial confinement if it appears unlikely that he can be brought to trial within 90 days. This may, however, subject the officer ordering release some judicial "second-guessing" as to the initial necessity for pretrial confinement.

F. Resolving other speedy trial claims. In addition to the 90-day (pretrial confinement) and 120-day (general) rules, it is possible for a denial of the right to speedy trial to occur when the accused is under no form of pretrial restraint and the case is tried in well under 120 days. In such cases, the court will consider several factors in determining whether the accused was denied his right to speedy trial -- for example, length of delay, defense requests for trial, complexity of the case, oppressive or arbitrary delay, the nature and duration of any pretrial restraint, and whether the delay has prejudiced the accused.

PRETRIAL AGREEMENTS

A. A pretrial agreement is an agreement between the accused and the convening authority whereby each agreement to take or refrain from taking certain action regarding the trial by court-martial. R.C.M. 705 and MJM, 2-U detail procedures for negotiating pretrial agreements and define the rules pertaining to them.

A. Negotiations. The offer to enter into a pretrial agreement must originate with the accused and his defense counsel. The convening authority must request permission to enter into negotiations from the CGMA. MJM, 2-U-2. After permission is granted, the staff judge advocate or the trial counsel may then negotiate the terms and conditions with the defense counsel unless the accused is not represented. After negotiations, the defense may elect to submit a proposed pretrial agreement to the convening authority. This agreement shall be in writing and will normally be submitted through the trial counsel and legal officer. All terms and conditions should be precisely spelled out in the agreement itself, as oral understandings, or unwritten gentlemen's agreements will not be enforced. Whenever a pretrial agreement offer is submitted, it must be forwarded to the convening authority for his personal consideration and may not be blocked by the trial counsel, legal officer or staff judge advocate. To effect the pretrial agreement, the convening authority personally signs the document or delegates the authority to sign to another person such as the staff judge advocate, legal officer or trial counsel. The convening authority may reject the offer by signing the rejection form, after which counterproposals by the convening authority are permitted. The convening authority has sole discretion in deciding whether to accept or reject the pretrial agreement proposed. MJM, 2-U-3.

B. Permissible terms and conditions. R.C.M. 705 outlines certain permissible and prohibited terms and conditions of pretrial agreements. It must be noted, however, that these are not totally inclusive as each term is subject to the scrutiny of the military judge who may disapprove the term if it appears that the accused did not freely and voluntarily agree to it, or if it deprives the accused of a substantial right otherwise guaranteed to him. Generally, the pretrial agreement consists of an agreement by the accused to plead guilty to one or more charges in exchange for the convening authority agreeing to take specified action on the sentence adjudged by the court-martial.

C. Prohibited terms and conditions. R.C.M. 705(c)(1) provides that any term or condition to which the accused did not freely and voluntarily agree will not be enforced. Additionally, any term or condition which deprives the accused of certain substantial rights will not be enforced. Among these rights are: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; and the right to complete and effective exercise of post-trial and appellate rights. Since ambiguous, vague, or arguably improper provisions in pretrial agreements will generally be interpreted strictly against the government, it is suggested that, before signing any pretrial agreement, the convening authority consult with the trial counsel so that his understanding of the agreement is placed in the proper legal form and terminology. The convening authority should always consult with the trial counsel directly or through his own staff judge advocate if one is assigned.

D. Pitfalls. The offer to plead guilty cannot be accepted of there is reason to believe that there is insufficient evidence to convict the accused of the offense concerned. Also, unreasonably multiplying offenses from an essentially single offense to coerce a pretrial agreement is improper. Also unlawful is the practice of pleading a baseless major offense on the charge sheet in order to induce a pretrial agreement on a lesser included offense.

The agreed sentence aspect of the agreement must be clear, precise, and provide for all contingencies. In this connection, it is essential to obtain the trial counsel's (prosecutor's) advice before drafting or approving any pretrial agreement. Such agreements are technically complex, and the JAG MANUAL format does not cover all situations.

E. Binding effect of the agreement. In general, the accused may always withdraw from a pretrial agreement. The convening authority may withdraw at any time before the accused begins performance if promises contained in the agreement. Additionally, the agreement will be void in the if, for example, the accused fails to fulfill any material promise or condition in the agreement (e.g., fails to plead guilty, withdraws a guilty plea, renders a guilty plea improvident, etc.); when inquiry by the military judge discloses a disagreement as to a military term in the agreement; or when finding are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

F. Judicial supervision. The military judge must inquire into the existence and the provisions of the pretrial agreement to be sure the accused acted voluntarily and knowingly in executing the agreement. Normally, a misunderstanding of the terms of an agreement will cause rejection of guilty pleas and the entry of not guilty pleas. If the intent of the parties at the time the agreement was executed can be determined, the interpretation will control the agreement.

In spite of the effect of the pretrial agreement on the trial, the court members may not be informed of any negotiations, of any existing agreement, or of any agreement made but subsequently rejected. If trial is by military judge alone, he may not examine the sentencing provisions prior to announcing the sentence in the case.

G. Major Federal offenses. In some cases, the misconduct which subjects the military member to trial by court-martial also violates other Federal laws and subjects the member to prosecution by civilian authorities in the Federal courts. In these cases, decisions must be made as to which forum the case should go and as to which agency will conduct the investigation. In order to ensure the actions by military convening authorities do not preclude appropriate action by Federal civilian authorities in such cases, convening authorities shall ensure that appropriate consultation under the Memorandum of Understanding between the Department of Defense and Justice (MCM, 1984, app. 3) has taken place prior to any trial by court-martial or approval of any pretrial agreement in cases likely to be prosecuted in the Federal courts. MJM, Encl. 41.

CHAPTER XI

PRETRIAL ASPECTS OF GENERAL COURTS-MARTIAL

INTRODUCTION

The general court-martial is the highest level of court-martial in the military justice system. Such a court-martial may impose the greatest penalties provided by military law for any offense. The general court-martial is composed of a minimum of five members, a military judge, and lawyer counsel for the government and the accused. In some cases, the court is composed of a military judge and counsel. The general court-martial is created by the order of a flag or general officer in command in much the same manner as the special court-martial is created by subordinate commanders. Before trial by general court-martial may lawfully occur, a formal investigation of the alleged offenses must be conducted and a report forwarded to the general court-martial convening authority. This pretrial investigation (often referred to as an article 32 investigation) is normally convened by a summary court-martial convening authority. This chapter will discuss the legal requisites of the pretrial investigation.

NATURE OF THE PRETRIAL INVESTIGATION

A. Scope. The formal pretrial investigation (Art. 32, UCMJ) is the military equivalent of the grand jury proceeding in civilian criminal procedure. The purpose of this investigation is to inquire formally into the truth of allegations contained in a charge sheet, to secure information pertinent to the decision on how to dispose of the case, and to aid the accused in discovering the evidence against which he must defend himself. Basically, this investigation is protection for the accused; but it is also a sword for the prosecutor who may test his case for its strength in such a proceeding and seek its dismissal if too frail or if groundless.

B. Authority to direct. An Article 32, UCMJ, investigation may be directed by the GCMA upon request from one authorized by law to convene summary courts-martial or some higher level of court-martial. See Article 24, UCMJ, and MJM, 2-O-2.

C. Mechanics of directing. When the summary court-martial or higher convening authority receives charges against an accused which are serious enough to warrant trial by general court-martial, the convening authority directs a pretrial investigation. This is done by written orders of the convening authority which assign personnel to participate in the proceedings. At the time the investigation is ordered, the charge sheet will have been completed up to, but not including, the referral block on page 2. Unlike courts-martial, pretrial investigations are directed as required, and standing orders for such proceedings are inappropriate. Also unlike courts-martial, there is no separate

referral of a case to a pretrial investigation since the order creating the investigation also amounts to a referral of the case to the pretrial investigation. The original appointing order is forwarded to the assigned investigating officer along with the charge sheet, allied papers, and a blank investigating officer's report form (DD Form 457; see also MCM, 1984, app. 5).

D. Investigating officer. The pretrial investigation is a formal one-officer investigation into alleged criminal misconduct. The investigating officer must be a commissioned officer who should be a major/lieutenant commander or above, or an officer with legal training. R.C.M. 405(d)(1). The advantages of appointing a judge advocate (when available) to act as the investigating officer are substantial, especially in view of the increasingly complex nature of the military judicial process. Neither an accuser, prospective military judge, nor prospective trial or defense counsel for the same case may act as investigating officer. Further, the investigating officer must be impartial and cannot previously have had a role in inquiring into the offenses involved (e.g., as provost marshal, public affairs officer, etc.). Mere prior knowledge of the facts of the case will not, alone, disqualify a prospective investigating officer. If such knowledge imparts a bias to the investigating officer, then he obviously is not the impartial investigator required by law. The law contemplates an investigating officer who is fair, impartial, mature, and with a judicial temperament. It is the responsibility of the convening authority to see that such an officer is appointed to pretrial investigations. If it is necessary for a nonlawyer investigating officer to obtain advice regarding the investigation, that advice should not be sought from one who is likely to prosecute the case.

E. Counsel for the government. While the pretrial investigation need not be an adversarial proceeding, current practice favors having the convening authority detail a lawyer to represent the interests of the government, especially where the investigating officer is not a lawyer. The assignment of a counsel for the government does not lessen the obligation of the investigating officer to investigate the alleged offenses thoroughly and impartially. As a practical matter, however, the presence of lawyers representing the government and the accused make the pretrial investigation an adversarial proceeding. Counsel for the government functions much as a prosecutor does at trial and presents evidence supporting the allegations contained on the charge sheet.

F. Defense counsel. The accused's rights to counsel are as extensive at the pretrial investigation as at the general court-martial. More specifically, an accused is entitled to be represented by civilian counsel, if provided by the accused at no expense to the government, and by a detailed military lawyer, certified in accordance with Article 27(b), UCMJ, or by a military lawyer of his own choice at no cost to the accused if such counsel is reasonably available. See Chapter IX, pages 9-4 through 9-6, above, regarding an accused's right to defense counsel. Detailed defense counsel at a pretrial investigation must be a certified (Art. 27(b), UCMJ) lawyer and should be designated by the appointing order. Individual counsel, military or civilian, is normally not detailed on the appointing order. An accused is not entitled to more than one military counsel in the same case.

G. Reporter. There is no requirement that a record of the pretrial investigation proceedings be made, other than the completion of the investigating officer's report. Accordingly, a reporter need not be detailed. It is common practice, however, to assign a reporter to prepare a verbatim record -- particularly in complex cases. When such a record is desired, the convening authority, or a subordinate, may detail a reporter but such assignment is usually made orally and is not part of the appointing order.

H. Sample appointing order. The order directing a pretrial investigation may be drafted in any acceptable form so long as an investigation is ordered and an investigating officer and counsel are detailed. A suggested format follows.

PRETRIAL INVESTIGATION
SAMPLE APPOINTING ORDER

U.S. COAST GUARD ACADEMY
NEW LONDON, CONNECTICUT 06320-4195

10 August 19CY

In accordance with Rule for Courts-Martial 405, Manual for Courts-Martial, 1984, Lieutenant Commander Carl Giese, U.S. Coast Guard, is hereby appointed to investigate the attached charges preferred against Seaman John G. Guildersleeve, U.S. Coast Guard. The charge sheet and allied papers are appended hereto. The investigating officer will be guided by the provisions of Rule for Courts-Martial 405, Manual for Courts-Martial, 1984, and pertinent case law relating to the conduct of pretrial investigations. In addition to the investigating officer hereby appointed, the following personnel are detailed to the investigation for the purposes indicated.

COUNSEL FOR THE GOVERNMENT

Lieutenant Andrew Bailey, U.S. Coast Guard, certified in accordance with Article 27(b), Uniform Code of Military Justice.

DEFENSE COUNSEL

Lieutenant Bernard Bridges, U.S. Coast Guard, certified in accordance with Article 27(b), Uniform Code of Military Justice.

HOPLEY YEATON
Rear Admiral, U.S. Coast Guard
Superintendent

THE HEARING PROCEDURE

A. Prehearing preparation. When the pretrial investigation officer (PTIO) receives his order of appointment, he should first study the charge sheet and allied papers to become thoroughly familiar with the case. The charge sheet should be reviewed for errors and any needed corrections should be noted. If counsel for the government has been appointed, the investigating officer should contact him to determine what additional information, if any, is available. The PTIO should then deliver a copy of the charge sheet to the accused and his counsel. No attempt should be made to interrogate the accused at this time. Prospective witnesses should then be interviewed and items of physical or documentary evidence located and either obtained by the PTIO or properly preserved in order to protect the chain of custody or unique identifying features. Once the PTIO is satisfied that he has obtained all available relevant evidence, he should consult with accused, counsel, witnesses, and the legal officer of the convening authority to set up a specific hearing date. It is not the duty of the PTIO to "build a case" against the accused, but rather to impartially investigate the alleged offense with a view toward discovering the truth.

B. Witnesses. All reasonably available witnesses who appear necessary for a thorough and impartial investigation are required to be called before the article 32 investigation. Transportation and per diem expenses are provided for both military and civilian witnesses. See R.C.M. 405(g). Witnesses are "reasonably available," and therefore subject to production, when the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay and effect on military operations of obtaining the witness' appearance. R.C.M. 405(g)(1)(A). This balancing test means that the more important the expected testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. Similar considerations apply to the production of documentary and real evidence.

For both military and civilian witnesses, the PTIO makes the initial determination concerning availability. For military witnesses, the immediate commanding officer of the witness may overrule the PTIO's determination. The decision not to make a witness available is subject to review by the military judge at trial.

A civilian witness whose testimony is material must be invited to testify, although he or she cannot be subpoenaed or otherwise compelled to appear at the investigation. Thus, the PTIO should make a bona fide effort to have such civilian witnesses appear voluntarily, offering transportation expenses and a per diem allowance if necessary. R.C.M.405(g)(3).

C. Statements. The PTIO has a number of alternatives to live testimony. When a witness is not reasonably available, even if the defense objects, the PTIO may consider that witness' sworn statements. Unless the defense objects, a PTIO may also consider, regardless of the availability of the witness, sworn and unsworn statements, prior testimony, and offers of proof of expected testimony of that witness.

Upon objection, only sworn statements may be considered. Since objections to unsworn statements are generally made, every effort should be made to get sworn statements. All statements considered by the PTIO should be shown to the accused and counsel. The same procedure should be followed with respect to documentary and real evidence.

D. Testimony. All testimony given at the pretrial investigation must be given under oath and is subject to cross-examination by the accused and counsel for the government. The accused has the right to offer either sworn or unsworn testimony. If undue delay will not result, the statements of the witnesses who testified at the hearing should be obtained under oath. In this connection, the PTIO is authorized to administer oaths in connection with the performance of his duties.

E. Rules of evidence. The rules of evidence applicable to trial by court-martial do not strictly apply at the pretrial investigation, and the PTIO need not rule on objections raised by counsel except where the procedural requisites of the investigation itself are concerned. This normally means that counsels' objections are merely noted on the record. Care should be taken to insure that evidence relating to any search and seizure authorizations, Article 31, UCMJ warnings, or similar legal issues, is fully developed at the investigation. Since the rules of evidence do not strictly apply, cross-examination of witnesses may be very broad and searching and should not be unduly restricted.

F. Hearing date. Once the prehearing preparation has been completed, the PTIO should convene the hearing. The pretrial investigation is a public hearing and should be held in a place suitable for a quasi-judicial proceeding. Accused, counsel, reporter (if one is used), and witnesses should be present. Witnesses must be examined one-by-one, and no witness should be permitted to hear another testify.

NOTE: A hearing guide for use in pretrial investigations is contained in Enclosure 43, MJM.

POST-HEARING PROCEDURES

After the hearing is completed, the investigating officer prepares his report pursuant to R.C.M. 405(j) and submits it to the GCMA who directed the investigation. The GCMA should consider the investigating officer's recommendation as to disposition, but he need not follow it. The GCMA may dispose of the charges as he sees fit pursuant to R.C.M. 401.

Before a case is referred to a general court-martial, the convening authority's SJA must review the case and prepare a written legal opinion on the sufficiency of the evidence and advisability of trial. See Article 34, UCMJ. This written legal opinion is referred to as the pretrial advice.

The advice of the staff judge advocate shall include a written and signed statement which sets forth that person's:

A. Conclusion whether each specification on the charge sheet alleges an offense under the UCMJ;

B. conclusion whether each allegation is substantiated by the evidence indicated in the article 32 report of investigation;

C. conclusion whether a court-martial would have jurisdiction over the accused and the offense(s); and

D. recommendation of the action to be taken by the convening authority.

The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice, but the staff judge advocate is responsible for it and must sign it personally.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter and endorsements, and report of investigation are forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations, by commanders or others who have forwarded the charges, for disposition of the case. There is no legal requirement to include such information, however, and failure to do so is not error. Lastly, it should be noted that the legal conclusions reached by the SJA are binding on the CA whereas, the recommendation is not.

CHAPTER XII

REVIEW OF COURTS-MARTIAL

INTRODUCTION

This chapter describes the review of trials by summary, special, and general courts-martial. A summary of the chapter follows.

Upon the completion of every trial by court-martial, a written record is prepared. This record is forwarded to the convening authority with a copy to the accused. Within certain time constraints, depending upon the type of court-martial and sentence adjudged, the accused may submit written "matters" which could affect the convening authority's decision whether to approve or disapprove the trial results. In a general court-martial or a special court-martial case involving a bad-conduct discharge, the convening authority's decision must also await the written recommendation of the staff judge advocate (SJA) or legal officer (LO). With the benefit of these inputs the convening authority determines, within his sole discretion, whether to approve or disapprove the sentence adjudged. This determination is in the form of a written legal document called the convening authority's action.

After the convening authority has taken his action, the record of trial will be forwarded for further review. Summary courts-martial, special courts-martial not involving a bad-conduct discharge, and all other noncapital courts-martial in which appellate review has been waived will be reviewed by a judge advocate assigned, in most cases, to the staff of an officer exercising general court-martial jurisdiction. This written review will generally terminate the mandatory review process, although in certain cases the officer exercising general court-martial jurisdiction himself will have to take final action.

General courts-martial and those special courts-martial which include a bad-conduct discharge, after initial review by the convening authority, will normally be reviewed further by the Court of Military Review. Under certain circumstances, the case will thereafter be considered by the Court of Military Appeals and, possibly, the United States Supreme Court.

SEQUENCE OF REVIEW

A. Report of results of trial. Immediately following the final adjournment of a court-martial, the trial counsel (TC) has an obligation to notify the convening authority and the accused's commanding officer of the results of trial. MJM, Encl. 23. Additionally, if the sentence includes confinement, the notification must be in writing with a copy forwarded to the commanding officer or officer in charge of the brig or confinement facility concerned. MJM, Encl. 23.

B. The record of a trial by court-martial

1. When proceedings at the trial court level have been completed, a record of trial must be prepared. Once prepared, the record of trial will be authenticated by the signature of a person who thereby declares that the record accurately reports the proceedings. Except in unusual circumstances, this person will be the military judge or summary court-martial officer. R.C.M. 1104(a); MJM, 5-A-2.

2. R.C.M. 1104 requires that a copy of the record of trial be served on the accused as soon as the record has been authenticated. This is to provide him with the opportunity to submit any written "matters" which may reasonably tend to affect the convening authority's decision whether or not to approve the trial results. R.C.M. 1105. The content of such "matters" is not subject to the Military Rules of Evidence and could include:

a. Allegations of error affecting the legality of the findings of sentence;

b. matters in mitigation which were not available for consideration at the trial; and

c. clemency recommendations. The defense may ask any person for such a recommendation, including the members, military judge, or trial counsel.

3. Except in a summary court-martial case, submission of matters by the accused in accordance with R.C.M. 1105 shall be made within 10 days after the accused has been served with an authenticated record of trial and, if applicable, the service on the accused of the recommendation of the staff judge advocate or legal officer under R.C.M. 1106. In a summary court-martial case, such submission shall be made within 7 days after the sentence is announced.

-- If the accused shows that additional time is required to submit such matters, the convening authority may, for good cause shown, extend the applicable period stated above for not more than an additional 20 days.

4. In addition to the input from the accused, the convening authority must receive a written recommendation from his SJA or LO before taking action on a general court-martial or a special court-martial case involving a bad-conduct discharge. R.C.M. 1106. A sample recommendation is located in enclosure 26, MJM.

The purpose of the recommendation is simply to assist the convening authority in deciding what action to take on the case. The recommendation is intended to be a concise written communication summarizing:

a. The findings and sentence adjudged;

b. the accused's service record, including length and character of service, awards and decorations, and any records of nonjudicial punishment and previous convictions;

c. the nature of pretrial restraint if any;

d. obligations imposed upon the convening authority because of a pretrial agreement; and

e. a specific recommendation as to the action to be taken by the convening authority on the sentence.

Identifying legal error is not one of the required goals of this recommendation. In cases of acquittal of all charges and specifications, and cases where the proceedings were terminated prior to findings with no further action contemplated, the SJA or LO recommendation is not required. R.C.M. 1106(a).

5. Before forwarding the record of trial and recommendation to the convening authority for action under R.C.M. 1107, the SJA or LO shall cause a copy of the recommendation to be served on counsel for the accused. Such counsel shall have 10 days to submit written comments on the recommendation pursuant to R.C.M. 1106(f), for consideration by the convening authority.

C. Responsibility for convening authority's action. The first official action to be taken with respect to the results of a trial is the convening authority's action (CA's action). All materials submitted by the accused, SJA/LO, and defense counsel are preparatory to this official review. Article 60, UCMJ, and MJM, 5-G-1 place the responsibility for this initial review and action on the convening authority. This is true even when the accused is no longer assigned to the convening authority's command.

D. Convening authority's action in general. The CA's action is a legal document attached to the record of trial setting forth, in prescribed language, the convening authority's decisions and orders with respect to the sentence, the confinement of the accused, and further disposition. The action taken with respect to the sentence is a matter falling within the convening authority's sole discretion. He may for any reason or no reason disapprove a legal sentence in whole or in part, mitigate it, suspend it, or change a punishment to one of a different nature as long as the severity of sentence is not increased. His decision is a matter of command prerogative and is to be made in the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons.

In taking his action, the convening authority is required to consider the results of trial, the SJA/LO recommendation when required, and any matter submitted by the accused as previously discussed. Additionally, the convening authority may consider the record of trial, personnel records of the accused, and such other matters deemed appropriate by the convening authority. Any matters considered outside of the record, of which the accused is not reasonably aware, should be disclosed to the accused to provide an opportunity for his rebuttal.

After taking his action, the convening authority will publish the results of trial and the CA's action in a legal document called a promulgating order. A sample CA's action and promulgating order can be found in MJM, enclosures 26 and 27 respectively.

E. Subsequent review

1. Mandatory review

The CA's action for every trial by court-martial is reviewed by higher authority. Certain reviews are mandatory; once these mandatory reviews are completed, the case is "final." Other reviews are discretionary; for example, the accused and his counsel must decide whether to petition the Court of Military Appeals for review of the case, whether to petition for review by the Judge Advocate General, or whether to petition for a new trial.

R.C.M. 1110 governs waiver and withdrawal: "After any general court-martial, except one in which the approved sentence includes death, and after any special court-martial in which the approved sentence includes a bad-conduct discharge the accused may waive or withdraw appellate review." According to the Rule, the waiver or withdrawal must be a written document establishing that the accused and defense counsel have discussed the accused's right to appellate review; that they have discussed the effect that waiver or withdrawal will have on that review; that the accused understands these matters; and that the waiver or withdrawal is submitted voluntarily. An accused must file a waiver within 10 days after being served a copy of the CA's action, unless an extension is granted. A withdrawal may be submitted any time before appellate review is completed. In either case, however, once appellate review is waived or withdrawn, it is irrevocable and the case will thereafter be reviewed locally in the same manner as a summary court-martial or a special court-martial not involving a bad conduct discharge.

2. Summary courts-martial, special courts-martial not involving a bad-conduct discharge, and all other noncapital courts-martial where appellate review has been waived.

a. Article 64, UCMJ, and R.C.M. 1112 require that all summary courts-martial, non-BCD special courts-martial, and all other non-capital courts-martial where appellate review has been waived or withdrawn by the accused, be reviewed by a judge advocate. MJM, 5-G-3 requires this officer to be the staff judge advocate (or designee) of an officer who exercises general court-martial jurisdiction and who, at the time of trial, could have exercised such jurisdiction over the accused. In all cases, the action of the convening authority will identify the officer to whom the record is forwarded by stating his official title.

b. A sample review under R.C.M. 1112 is located in enclosure 29, MJM. The judge advocate's review is a written document containing the following:

(1) A conclusion as to whether the court-martial had jurisdiction over the accused and over each offense for which there is a finding of guilty which has not been disapproved by the convening authority;

(2) a conclusion as to whether each specification, for which there is a finding of guilty which has not been disapproved by the convening authority, stated an offense;

(3) a conclusion as to whether the sentence was legal;

(4) a response to each allegation of error made in writing by the accused; and

(5) in cases requiring action by the officer exercising general court-martial jurisdiction, as noted below, a recommendation as to appropriate action and an opinion as to whether corrective action is required as a matter of law.

c. After the judge advocate has completed his review, most cases will have reached the end of mandatory review and will be considered final within the meaning of Article 76, UCMJ. If this is the case, the judge advocate review will be attached to the original record of trial and a copy forwarded to the accused. The review is not final, and a further step is required, however, in the following two situations:

(1) The judge advocate recommends corrective action; or

(2) the sentence as approved by the convening authority includes a dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.

The existence of either of these two situations will require the staff judge advocate to forward the record of trial to the officer exercising general court-martial jurisdiction for further action.

3. Special courts-martial involving a bad-conduct discharge

a. Assuming that appellate review has not been waived or withdrawn by the accused, a special court-martial involving a bad-conduct discharge, whether or not suspended, will be sent directly to the Commandant (G-LMJ). R.C.M. 1111. After detailing appellate defense and government counsel, the case will then be forwarded to the Coast Guard Court of Military Review (CGCMR). R.C.M. 1201, 1202. CGCMR has review authority similar to that of the convening authority, except that it may not suspend any part of the sentence. It is also limited to reviewing only those findings and sentence which have been approved by the convening authority. In other words, it may not increase the sentence approved by the convening authority, nor may it approve findings of guilty already disapproved by the convening authority.

b. After review by CGCMR, the case will go to the Court of Military Appeals (C.M.A.) for review in the following two instances:

(1) If certified, to the C.M.A. by the JAG; or

(2) if the C.M.A. grants the accused's petition for review. R.C.M. 1204.

c. Finally, review by the United States Supreme Court is possible under 28 U.S.C. § 1259 and Article 67(h), UCMJ.

4. General court-martial

a. All general court-martial cases in which the sentence, as approved, includes dismissal, punitive discharge, or confinement of at least one year will be reviewed in precisely the same way as a special court-martial involving a bad-conduct discharge. See paragraph 3, above. Cases involving death are reviewed in a similar fashion, except that review by C.M.A. is mandatory. Other general court-martial cases -- those not involving death, dismissal, punitive discharge, or confinement of one year or more -- are reviewed in the Office of the Judge Advocate General under Article 69(a), UCMJ, and R.C.M. 1201(b).

5. Review in the Office of the Judge Advocate General

Article 69(b), UCMJ, provides that certain cases may be reviewed in the Office of the Judge Advocate General and that the findings or sentence, or both, may be vacated or modified by the JAG on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction, or error prejudicial to the substantial rights of the accused. Review under this article may only be granted in a case which has been "finally" reviewed, but has not been reviewed by CGCMR. Even then, such review by the JAG is not automatic. The accused must petition JAG to review the case and JAG may or may not agree to review it. If the case is reviewed, the JAG may or may not grant relief. The Chief Counsel has been delegated authority to act under Article 69, UCMJ.

6. New trial

a. Article 73, UCMJ, provides that, under certain limited conditions, an accused can petition the JAG to have his case tried again even after his conviction has become final by completion of appellate review. The trial authorized by article 73 is not a rehearing such as is ordered where prejudicial error has occurred. It is not another trial such as that ordered to cure jurisdictional defects. It is a trial de novo -- a brand new trial -- as if the accused had never been tried at all. MJM, 5-U.

b. There are only two grounds for petition:

(1) Newly discovered evidence; and

(2) fraud on the court.

c. Sufficient grounds will be found to exist only if it is established that an injustice has resulted from the findings or sentence and that a new trial would probably produce a substantially more favorable result. R.C.M. 1210.

ISSUES AND OPTIONS FOR THE REVIEWING AUTHORITY

The reviewing authority has many options available to him when he takes his action on review. As an example, the convening authority may approve, substantially reduce, or outright disapprove the sentence of a court-martial as a matter of command prerogative. Though no action on findings of guilty is required, the convening authority may, as a matter within his discretion, disapprove such findings or approve a lesser included offense. These actions may be taken for many reasons including considerations of command morale, clemency for the accused, or error in the record of trial. As far as error is concerned, it must be remembered that the convening authority is not required to search for legal error or factual sufficiency. He may, on the other hand, determine that time and money may be saved by correcting error at his level of review rather than waiting for some other authority to return the record.

What follows is a discussion of the various issues and options which face the reviewing authority when he takes his action on review. Though much of the discussion will be applicable to all authorities within the chain of review, the primary emphasis will be upon the action of the convening authority.

A. Sentence

1. Generally. As long as the sentence is within the jurisdiction of the court-martial and does not exceed the maximum limitations prescribed for each offense in Part IV (Punitive Articles), MCM, 1984, it is a legal sentence and may be approved by the convening authority. Considerable discretion is given to the convening authority in acting on the sentence. R.C.M. 1107 states that "[t]he convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused." It also states, however, that he "may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased." These issues are discussed below.

2. Determining the appropriateness of the sentence. In determining what sentence should be approved or disapproved, the convening authority should consider all relevant factors including the possibility of rehabilitation, the deterrent effect of the sentence, matters relating to clemency, and requirements of a pretrial agreement.

3. Reducing and changing the nature of the sentence

a. Mitigation. When a sentence is reduced in quantity (e.g., 4 months confinement to 2 months confinement) or reduced in quality (e.g., 30 days confinement to 30 days restriction), the sentence is said to have been mitigated.

b. Commutation. When a sentence is changed to a punishment of a different nature (e.g., bad-conduct discharge to confinement), the sentence is said to have been commuted.

c. General rules. In taking action on the sentence, the convening authority must observe certain rules.

(1) When mitigating forfeitures, the duration and amounts of forfeiture may be changed as long as the total amount forfeited is not increased and neither the amount nor duration of the forfeitures exceeds the jurisdiction of the court-martial.

(2) When mitigating confinement, or hard labor without confinement, the convening authority should use the equivalencies at R.C.M 1003(b)(6), (7), and (9) as appropriate.

(3) The sentence may not be increased in severity or duration.

(4) No part of the sentence may be changed to a punishment of a more severe type.

(5) The sentence as approved must be one which the court-martial could have adjudged.

d. Application

(1) A punitive discharge cannot be commuted to an administrative discharge, as the latter could not have been adjudged by the court-martial.

(2) Example. A special court-martial adjudges a bad-conduct discharge, confinement for 6 months, forfeiture of $68/month for 6 months. The convening authority commutes the bad conduct discharge to confinement for 5 months and forfeitures of $68/month for 5 months, then approves confinement for 11 months and forfeiture of $68/month for 11 months. Result: convening authority's action is illegal; the approved confinement and forfeiture for 11 months is beyond the jurisdiction of SPCM.

(3) Confinement and forfeitures for 1 year cannot be commuted to a bad-conduct discharge, even with accused's consent. A bad conduct discharge is a more severe punishment and can only be approved when included in the sentence of the court-martial.

(4) A bad-conduct discharge can be commuted to confinement and forfeitures for 6 months. The latter is a less severe penalty. Confinement begins to run on the date the original sentence was imposed by the court-martial, rather than the date of the commutation.

(5) An unsuspended reduction in rate can be commuted to a suspended reduction and an unsuspended forfeiture of pay.

(6) It is often difficult to compare two authorized punishments of different types and decide which is less severe. The C.M.A. has opted for "...affirmance of [the CA's] judgment on appeal, unless it can be said that, as a matter of law, he has increased the severity of the sentence."

4. Suspending the sentence

a. When used

(1) R.C.M. 1108 states: "Suspension of a sentence grants the accused a probationary period during which the suspended part of an approved sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence shall be remitted." Simply stated, the accused is being given an opportunity to show, by his good conduct during the probationary period, that he is entitled to have the suspended portion of his sentence remitted. In this context:

-- Suspend means to withhold conditionally the execution.

-- Remit means to cancel the unexecuted sentence.

(2) Convening authorities and officers exercising general court-martial jurisdiction are encouraged to suspend all or any part of a sentence when such action would promote discipline and when the accused's prospects for rehabilitation would more likely be enhanced by probation than by the execution of all or any part of the sentence adjudged. The period of suspension should not exceed 18 months. MJM, 5-E-1.

b. Automatic reduction to paygrade E-1. Automatic reduction under Article 58(a), UCMJ, is not authorized in the Coast Guard. MJM, 4-E-1.

c. Requirements for a valid suspension of a sentence

(1) The conditions of the suspension must be in writing and served on the accused in accordance with R.C.M. 1108. Unless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the UCMJ.

(2) The suspension period must be for a definite period of time which is not unreasonably long. This period shall be stated in the CA action.

(3) A provision must be made for it to be remitted at the end of the suspension period, without further action. This provision shall be included in the CA's action.

(4) A provision must be made for permitting it to be vacated prior to the end of the suspension period. This provision shall be included in the CA action.

Note: Vacating means to do away with the suspension. See Proceedings to vacate suspension, below.

d. Who has the power to suspend? The convening authority, after approving the sentence, has the power to suspend any sentence except the death penalty. The military judge or members of a court-martial may recommend suspension of part or all of the sentence, but these recommendations are not binding on the convening authority or other higher authorities.

e. Proceedings to vacate suspension

(1) General requirements. An act of misconduct, to serve as the basis for vacation of the suspension of a sentence, must occur within the period of suspension. The order vacating the suspension must be issued prior to the expiration of the period of suspension. The running of the period of suspension is interrupted by the unauthorized absence of the probationer or by commencement of proceedings to vacate the suspension. R.C.M. 1109 indicates that vacation of a suspended sentence may be based on a violation of the UCMJ. Furthermore, when all or part of the sentence has been suspended as a result of a pretrial agreement, case law indicates that the suspension may be vacated for violation of any of the lawful requirements of the probation, including the duty to obey the local civilian law (as well as military law), to refrain from associating with known drug users/dealers, and to consent to searches of his person, quarters and vehicle at any time.

(2) Hearing requirements. Procedural rules for hearing requirements depend on the type of suspended sentence being vacated.

(a) Sentence of any GCM or a SPCM including approved BCD. If the suspended sentence was adjudged by any GCM, or by a SPCM which included an approved BCD, the following rules apply. After giving notice to the accused in accordance with R.C.M. 1109(d), the officer having SPCM jurisdiction over the probationer personally holds a hearing to inquire into the alleged violation of probation. The procedure for the hearing is similar to that prescribed for a formal pretrial investigation (Art. 32, UCMJ), and the accused has the right to detailed and/or civilian counsel at the hearing. The record of the hearing and the recommendations of the SPCM authority are forwarded to the officer exercising GCM jurisdiction, who may vacate the suspension. Art. 72, UCMJ; R.C.M. 1109.

(b) Sentence of SPCM not including BCD or sentence of SCM. If the suspended sentence was adjudged by a SPCM and does not include a BCD, or if the sentence was adjudged by a SCM, the following rules apply. The officer having SPCM jurisdiction over the probationer personally holds a hearing to inquire into the alleged violation of probation. The procedure for the hearing is similar to that prescribed for a formal pretrial investigation. The probationer must be accorded the same right to counsel at the hearing that he was entitled to at the court-martial which imposed the sentence, except there is no right to request individual military counsel. Such counsel need not be the same counsel who originally represented the probationer. If the officer having SPCM jurisdiction over the probationer decides to vacate all or a portion of the suspended sentence, he must record the evidence upon which he relied and the reasons for vacating the suspension in his action. Art. 72, UCMJ; R.C.M. 1109.

(c) The officer who actually vacates the suspension must execute a written statement of the evidence he is relying on and his reasons for vacating the suspension.

(d) If, based on an act of misconduct in violation of the terms of suspension, the accused is confined prior to the actual vacation of the suspended sentence, a preliminary hearing must be held before a neutral and detached officer to determine whether there is probable cause to believe the accused has violated the terms of his suspension. R.C.M. 1109. MJM, 5-E-2 indicates that this officer should be one who is appointed to review pretrial confinement under R.C.M. 305.

B. Post-trial restraint pending completion of appellate review

1. Status of the accused. The accused's immediate commander must initially determine whether the accused will be placed in post-trial restraint pending review of the case. Specifically, he must decide whether he will confine, restrict, place in arrest, or set free the accused pending appellate review. This decision is necessary because an accused, who has been sentenced to confinement by court-martial, for example, is not automatically confined as a result of the sentence announcement. Even though the sentence of confinement runs from the date it is adjudged by the court, the sentence will not be executed until the convening authority takes his action. Thus, an accused cannot be confined on the basis of his court-martial sentence alone. An order from the commanding officer is required.

2. Criteria. Since the sentence of confinement runs from the date adjudged, whether or not the accused is confined, a commanding officer will usually take prompt action with respect to restraint. R.C.M. 1101(b) indicates that post-trial confinement is authorized when the sentence includes confinement or death. The commanding officer may delegate the authority under this rule to the trial counsel.

C. Deferment of the confinement portion of the sentence

1. Definition. As indicated in the previous section, the confinement portion of a sentence runs from the date the sentence is adjudged. Art. 57(b), UCMJ. Deferment of a sentence to confinement is a postponement of the running and service of the confinement portion of the sentence. It is not a form of clemency. R.C.M. 1101(c).

2. Who may defer? Only the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial authority over the command to which the accused is attached can defer the sentence. R.C.M. 1001(c).

3. When deferment may be ordered. Deferment may be considered only upon written application of the accused. If the accused has requested deferment, it may be granted anytime after the adjournment of the court-martial, as long as the sentence has not been executed. R.C.M. 1101(c).

4. Action on the deferment request. The decision to defer is a matter of command discretion. As stated in R.C.M. 1101(c)(3), "the accused shall have the burden to show that the interests of the accused and the community in release outweigh the community's interest in confinement." Some of the factors the convening authority may consider include:

a. The probability of the accused's flight to avoid service of the sentence;

b. the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice;

c. the nature of the offenses (including the effect on the victim) of which the accused was convicted;

d. the sentence adjudged;

e. the effect of deferment on good order and discipline in the command; and

f. the accused's character, mental condition, family situation, and service record.

Although the decision to grant or deny the deferment request falls within the convening authority's sole discretion, that decision can be tested on review for abuse of discretion. In a recent decision, the Court of Military Appeals held that the CA abused his discretion by denying deferment where the accused (an Air Force captain who was a physician) showed that he had no prior record, that his conviction was not based on any act of violence, that he had made no previous attempt to flee, that he had custody of a minor child, and that he had substantial personal property in the area.

5. Imposition of restraint during deferment. No restrictions on the accused's liberty may be ordered as a substitute for the confinement deferred. An accused may, however, be restrained for an independent reason; e.g., pretrial restraint resulting from a different set of facts. R.C.M. 1101 (c)(5).

6. Termination of deferment. Deferment is terminated when:

a. The CA takes action, unless the CA specifies in the action that service of the confinement after the action is deferred (In this case, deferment terminates when the conviction is final.);

b. the sentence to confinement is suspended;

c. the deferment expires by its own terms; or

d. the deferment is rescinded by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial authority over the accused's command. R.C.M. 1101(c)(7). Deferment may be rescinded when additional information comes to the authority's attention which, in his discretion, presents grounds for denial of deferment under paragraph 4, above. The accused must be given notice of the intended rescission and of his right to submit written matters. He may, however, be required to serve the sentence to confinement pending this action. R.C.M. 1107(c)(7).

7. Procedure. Applications must be in writing and may be made by the accused at any time after adjournment of the court. The granting or denying of the application is likewise in writing. If the deferment request is used to effectuate the intent of a pretrial agreement term suspending all confinement, it may be submitted along with the pretrial agreement by the defense counsel, and the convening authority may sign both documents at once, well before trial.

8. Record of proceedings. Any document relating to deferment or rescission of deferment must be made a part of the record of trial. The dates of any periods of deferment and the date of any rescission are stated in the convening authority or supplementary actions.

D. Execution of the sentence. An order executing the sentence directs that the sentence be carried out. In the case of confinement, it directs that it be served; in the case of a punitive discharge, that it be delivered. The decision as to execution of the sentence is closely related to other post-trial decisions involving suspension, deferment of confinement, and imposition of post-trial restraint.

1. Execution authorities

a. No sentence may be executed by the convening authority unless and until it is approved by him. R.C.M. 1113(a). Once approved, every part of the sentence, except for a punitive discharge, dismissal, or death, may be executed by the convening authority in his initial action. R.C.M. 1113(b). Of course, a suspended sentence is approved, but not executed.

b. A punitive discharge may only be executed by:

(1) The officer exercising general court-martial jurisdiction who reviews a case when appellate review has been waived under R.C.M. 1112(f); or

(2) the officer then exercising general court-martial jurisdiction over the accused after appellate review is final under R.C.M. 1209.

c. Dismissal may be ordered executed only by the Secretary or as the Secretary may designate. R.C.M. 1113(c)(2).

d. Death may be ordered executed only by the President. R.C.M. 1113(c)(3).

e. Though a punitive discharge may have been ordered executed, it shall not in fact be executed until all provisions of Article 8-E-6(d)(4) CG PERSMAN have been complied with, and the discharge is approved by the Commandant.

2. Appellate leave. Under the provisions of Art. 76(a), UCMJ, the Secretary may prescribe regulations which require that an accused take leave pending completion of the appellate review process if the sentence, as approved by the convening authority, includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct discharge. The secretarial regulations

concerning appellate leave are contained in Article 12-B-44, CG PERSMAN. Stated very simply, procedures have been revised to provide authority to place a member on mandatory appellate leave; the member can also request voluntary appellate leave.

E. Speedy review

1. The accused has a right to have his case reviewed promptly and without unnecessary delay. The Court of Military Appeals has expressed great interest in protecting this right. As formerly applied, a presumption of prejudice to the accused arose whenever he was in 90 days of continuous confinement without the OEGCMJ taking action. The presumption placed a heavy burden on the government to show due diligence and, in the absence of such a showing, the charges were dismissed. Later, the court softened its stance, rejecting the rule of presumed prejudice in post-trial confinement cases. For cases after 18 June 1979, the Court has required a showing of specific prejudice to the accused, a rule which now applies regardless of his post-trial confinement status. In the absence of any articulated prejudice to the accused caused by delay, no corrective action will be required. In a letter of transmittal forwarding a case to COMDT (G-LMJ) for further review, the CA shall account for the delay in any case wherein action is not taken within 90 days from the date the sentence was adjudged. MJM, 5-G-46.

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CHAPTER XIII

PARTIES TO CRIME: PRINCIPALS AND ACCESSORIES AFTER THE FACT

INTRODUCTION

A party to a crime is one who, because of the involvement in a criminal act, is liable for punishment. The UCMJ classifies parties to crimes into two major groups: (1) Principals, and (2) accessories after the fact. Principals include the perpetrator of the crime, any aiders and abettors, and any accessories before the fact.

TYPES OF PRINCIPALS

Under Article 77, UCMJ, the following three types of parties to a crime are considered principals:

A. Perpetrator: A perpetrator of a crime is one who actually commits the crime, either personally or through an inanimate or innocent human agent, thereby causing the crime to be done.

B. Aider and abettor. An aider and abettor does not actually commit the crime but is present at the crime, participates in its commission, and shares in the criminal purpose. A person is present for purposes of being an aider and abettor when in a position to aid the perpetrator to complete the crime. Participation for purposes of being an aider and abettor requires that the aider and abettor actively participate in the crime by assisting the perpetrator. A mere bystander who doesn't try to stop the perpetrator is not an aider and abettor. A person such as a night watchman, however, who has a legal duty to prevent or stop crime, may become an aider and abettor by failing to take action.

C. Accessory before the fact. An accessory before the fact is one who counsels, commands, procures, or causes another to commit an offense. The advice must be given with the intent to encourage and promote the crime. He need not be present at the crime, nor participate in the actual commission of the offense.

SCOPE OF CRIMINAL LIABILITY OF PRINCIPALS

A principal is criminally liable for all crimes committed by another principal if those crimes are the natural and probable consequences of the principals' plan.

WITHDRAWAL BY ACCESSORY BEFORE THE FACT AND AIDER AND ABETTOR

An accessory before the fact and an aider and abettor may escape criminal liability by unequivocally disassociating themselves from the crime before the perpetrator commits the offense. For the withdrawal to be effective, three requirements must be met. First, the accused must effectively countermand or negate any assistance previously given. Second, the accessory and aider and abettor must communicate their withdrawal in unequivocal terms to all the perpetrators or to appropriate law enforcement authorities. Finally, the communication must be made before the perpetrator commits the offense.

ACCESSORY AFTER THE FACT

A. The principal's offense. In reality, two crimes must be proven in every accessory after the fact prosecution: (1) The principal's crime, and (2) the accessory's crime of illegally assisting the principal to escape apprehension, trial, or punishment. The principal need not be a person subject to the UCMJ, but the crime must be one that is recognized by the Code. There is no requirement that the principal be prosecuted and convicted before the accessory after the fact is prosecuted.

B. The accessory's knowledge. The accessory must know that the principal had committed the offense. Knowledge, for purposes of article 78, must be actual knowledge that the principal had committed the offense.

C. The accessory's assistance. Article 78, UCMJ, defines an accessory after the fact as one who "*receives, comforts, or assists*" the principal. "Receives" refers to harboring or concealing the principal. "Comforts" includes providing food, clothing, transportation, and money to the principal. "Assists" includes any act which aids the principal's efforts to avoid detection, apprehension, or punishment. Such assistance would include acts such as concealing the fact that the crime had been committed, destroying evidence, or helping the principal escape. Mere failure to report a known offense, by itself, does not make one an accessory after the fact. There must be some active assistance rendered to the perpetrator.

D. The accessory's intent. Accessory after the fact is a specific intent offense. The prosecution must prove that the accused assisted the principal in order to help the principal avoid apprehension, trial, or punishment. The type of assistance given may be strong circumstantial evidence of the accused's criminal intent.

CHAPTER XIV

SOLICITATION, CONSPIRACY, AND ATTEMPTS

SOLICITATION

Concept of criminal solicitation. A criminal solicitation is any statement or conduct which constitutes a serious request or advice to another to commit an offense. This is a specific intent offense which requires that the accused actually intended that the act solicited be carried out. The fact that the solicited crime was not attempted or completed is no defense.

CONSPIRACY

A. Concept of conspiracy. A conspiracy is an agreement by two or more persons to commit an offense against the UCMJ, accompanied by the performance of an act by at least one of the conspirators to accomplish the criminal object of the conspiracy. Conspiracy is a separate and distinct offense from the intended crime. Thus, the fact that the intended crime was never committed is no defense. On the other hand, if the intended crime is completed, the conspirators are criminally liable for both the intended crime and for the separate offense of conspiracy.

B. Form of the agreement. No specific form of agreement is required. The agreement to commit a crime need not specify the means to be used nor the part each conspirator is to play. All that is required to satisfy the agreement requirement is that the conspirators agree to commit an offense against the Code. However, mere idle talk about committing some indefinite crime in the future is not, under most circumstances, a sufficient agreement.

C. Parties to the agreement. At least two persons are required for a conspiracy. None of the accused's fellow conspirators need be persons subject to the UCMJ. If the only other member of a conspiracy is a government agent or informant, however, there can be no conspiracy.

D. The overt act. The second element of conspiracy requires that one of the conspirators must commit an overt act in furtherance of the conspiracy. The overt act must be something other than the mere act of agreeing to commit the crime. Any act in preparation for the crime is sufficient. Also, any attempt to commit the intended crime, or the commission of the crime itself, will likewise satisfy the requirement for an overt act.

E. Criminal liability of conspirators. Conspiracy is a separate offense from the intended crime. The fact that the intended crime was never attempted or completed is no defense to a conspiracy charge. If the intended crime is committed, however, all conspirators will be criminally liable not only for the conspiracy, but also as principals for the completed crime. Moreover, all conspirators are liable as principals for any other foreseeable crime committed by any conspirator acting in furtherance of the conspiracy.

F. Withdrawal. A conspirator may withdraw from the conspiracy and escape criminal liability for the conspiracy and for the intended crime. An effective withdrawal must consist of affirmative conduct which is wholly inconsistent with adherence to the unlawful agreement and which shows that the withdrawer has severed all connection with the conspiracy. The withdrawal must be made before any conspirator commits an overt act in furtherance of the conspiracy. As a practical matter, however, conspirators seldom withdraw in time to avoid liability for the conspiracy charge. Since the overt act required for conspiracy need only be a preliminary preparation, and since it may be committed by any conspirator, the withdrawing conspirator's communication of the withdrawal usually occurs after the overt act. Under such circumstances, the conspirator is guilty of conspiracy, but will not be criminally liable for the completed crime.

ATTEMPTS

A. Concept of criminal attempts. Article 80, UCMJ, defines a criminal attempt as an act, done with the specific intent to commit an offense against the Code, which amounts to more than mere preparation and which would tend to result in the intended crime being completed.

B. Specific intent to commit an offense. The accused must have intended to commit an offense against the Code. Proof of this specific intent poses several problems.

1. Proof of intent. Proof of the accused's intent to commit an offense may be accomplished by direct or circumstantial evidence. The overt act that the accused performed may itself be strong circumstantial evidence of the necessary criminal intent. The law assumes that people normally intend the natural and probable consequences of their acts. When the accused engages in conduct which normally leads to the commission of an offense, the intent to commit a crime may be inferred from his actions.

2. Factual impossibility. The law recognizes that one is guilty of a criminal attempt if he purposely engages in conduct which would constitute the intended crime if the attendant circumstances were as he mistakenly believed them to be.

C. The overt act. The overt act required for an attempt must be more than mere preparation. Distinguish, therefore, the overt act required for a conspiracy, an act which can be merely preparatory, and that required for attempts. The overt act in an attempt must be one which would normally result in the completion of the crime. In other words, the act sets in motion a sequence of events which will result in the completion of the crime, unless someone or something unexpectedly intervenes. Whether the required overt act has been committed is often a close question.

D. Voluntary abandonment. If an individual abandons the criminal scheme after the overt act, but before committing the target offense, he may have a voluntary abandonment defense to the attempt. This defense is available only if the criminal scheme is abandoned for purely humanitarian reasons; the defense is not available if the abandonment is motivated by fear of apprehension or the target crime has been made more difficult.

CHAPTER XV

ORDERS OFFENSES AND DERELICTION OF DUTY

OVERVIEW. Three types of orders offenses are proscribed under the UCMJ:

A. Violations of general orders and regulations [article 92(1)];

B. violations of other lawful orders [article 92(2)];

C. willful disobedience of the lawful orders of superiors and/or of petty officers, noncommissioned officers, and warrant officers [articles 90(2)) and 91(2)].

Closely related to orders offenses is the offense of dereliction of duty (article 92(3)). Both orders offenses and dereliction of duty involve the accused's failure to perform a military duty.

THE LAWFUL ORDER

Before an accused can be convicted of an orders offense, that particular order must be lawful. General orders and regulations, other orders requiring the performance of a military duty, and orders from superiors may be inferred to be lawful.

A. Punitive orders and regulations. Before violation of an order or regulation can be a basis for prosecution (other than for dereliction of duty), the order or regulation must be punitive, that is, it must subject the violator to the criminal penalties of the UCMJ. It must impose a specific duty on the accused to perform or refrain from certain acts. The order may be oral or written, or a combination of both. It cannot require further implementation by subordinates.

1. Nonpunitive orders and regulations. The Armed Forces have published millions of pages of instructions, regulations, directives, and manuals. Some of these regulations are merely policy statements; others detail rather complicated, specific procedures. Nonpunitive regulations are not intended to define individual conduct which will be considered criminal and which will result in prosecution under the UCMJ.

2. Punitive or nonpunitive? A frequent issue -- especially in cases involving written orders -- is whether the alleged order was a specific mandate or merely a nonpunitive regulation. The issue is always decided on a case-by-case basis. No single factor is decisive, but the issue will be determined by considering the following factors:

a. Purpose. If the stated purpose of the directive uses language such as "provide guidance," "establish policy" or "promulgate guidelines and procedures," the directive is most likely nonpunitive. If the stated purpose uses language such as "establish individual duties and responsibilities," the directive is most likely punitive.

b. Specificity. If the directive expressly commands or forbids specific acts, it is probably punitive. If it promulgates only general procedures or guidelines, it is probably nonpunitive. Specificity of language is an extremely important factor.

c. Sanctions. A nonpunitive directive will seldom provide sanctions for violations. If the directive indicates that violators will be subject to disciplinary action, the directive is probably punitive.

d. Implementation. If the directive provides that its provisions shall be implemented by subordinates, it is probably not punitive.

e. Intent. Sometimes it will be necessary to produce evidence of the intentions of the authority promulgating the directive. Any notes or memoranda that were written while the directive was being drafted may also be helpful. Intent is not a decisive factor by itself; but it permits the court to look behind the sometimes ambiguous language of a directive.

B. Was the order issued by a proper authority? The person issuing the order must have legal authority to do so. The authority to issue orders may arise by law, regulation, or custom of the service. Generally, a superior has authority to issue orders to a subordinate. A commanding officer has authority to issue orders to all persons subordinate in the chain of command, even those who may hold a higher military rank. A person in the execution of military police or shore patrol duties may issue orders related to law enforcement duties to all personnel, regardless of rank. Circumstances may control whether or not the person has the authority to give an order.

C. Did the order relate to a military duty? In order to be a lawful order under the Code, the order must relate to a military duty. Military duties include all activities reasonably necessary to safeguard or promote the morale, discipline, readiness, and mission of a command.

D. Is the order contrary to superior law? An order is unlawful if it is contrary to the Constitution or to the UCMJ. In combat, an order to commit a violation of the law of armed conflict is unlawful. An order is also unlawful when it conflicts with the lawful order of an authority superior to the person issuing it.

E. Is the order an arbitrary infringement on individual rights? Military orders frequently limit the free exercise of the service member's individual rights and liberties. Such an order will be unlawful, however, only if it arbitrarily or unreasonably interferes with individual rights. An infringement on individual rights is arbitrary when it bears no reasonable relationship to a legitimate military mission or interest. It will also be unlawful if it imposes a greater interference with individual rights than is reasonably necessary.

Conscience, ethical standards, religion, or personal philosophy must not be confused with the concept of arbitrary infringement of individual rights. The fact that an order may be contrary to an individual's morals is not, by itself, a defense.

F. Does the order unlawfully impose punishment? Punishment in the military may be lawfully imposed only as a result of nonjudicial punishment or a court-martial sentence. Any other order that either expressly or impliedly imposes punishment is unlawful. Whether an order is punishment or is merely designed to correct a performance deficiency depends on the facts of each case. An order to perform extra work as a result of a deficiency must be reasonably related to correcting the deficiency. Remedial orders, often styled as "extra military instruction" (EMI), are common in the military. To be lawful, they must order the service member to perform duties reasonably related to correcting deficient performance. Moreover, the remedial duties must not be performed at unreasonable times or under clearly unreasonable conditions.

G. Is the order unreasonably redundant? An order cannot merely restate a pre-existing duty nor repeat another order already in effect.

H. Is the order specific? The exact language of an order is insignificant so long as it amounts to a positive mandate and is so understood by the subordinate. Expressing an order in courteous language, rather than in a peremptory form, does not alter the order's legal effect. Moreover, the order must direct the accused to perform a specific act whether it is to do or refrain from doing something.

VIOLATION OF GENERAL ORDERS OR REGULATIONS [ARTICLE 92(1)]

A. General order. Part IV, para. 16c(1)(a), MCM, 1984, defines general orders or general regulations as those orders or regulations generally applicable to an armed force. General orders or regulations may be promulgated by the following authorities:

1. President of the United States;

2. Secretary of Defense (Secretary of Transportation for the U.S. Coast Guard);

3. Secretary of a military department (e.g., Secretary of the Navy);

4. flag or general officers in command, and their superior commanders; and

5. officers possessing general court-martial convening powers and their superior commanders. (Not every such commander has such authority. For example, the UCMJ gives commanders of overseas naval bases GCM authority; however, some cases have held that this grant alone is insufficient authority to issue general orders.)

B. Discussion

1. Effective date of the order. Normally, an order is effective when published. Sometimes, however, an order may provide that its provisions will not go into effect until a certain date after publication. Also, an order may be later superseded, amended, or cancelled.

2. Duty to obey the order. Not only must the general order be lawful, but the accused must also have had a duty to obey the order. Thus, the order must have been applicable to the accused. Although many general orders apply to all members within a branch of service, some may apply only to commanding officers or commissioned officers. A general order which commands certain conduct from a commissioned officer would not be applicable to an enlisted person.

3. Failure to obey the order. If the order commands certain specific acts, the accused disobeys the order by failing to perform those acts. If the order forbids acts, the accused's commission of those acts will constitute a violation. The accused's ignorance of the provisions -- or even of the existence -- of a general order is no defense.

VIOLATION OF OTHER LAWFUL ORDERS [ARTICLE 92(2)]

A. Other lawful orders. Violations of lawful orders other than general orders (and other than willful violations of orders of superiors and/or non-commissioned officers, petty officers, and warrant officers) are prosecuted under Article 92(2), UCMJ. The fundamental legal principles applicable to general orders violations also apply to article 92(2) cases, with a few exceptions which will be noted below.

B. Discussion

1. The accused had knowledge of the order. Unlike general orders offenses, the prosecution in an article 92(2) case must prove beyond a reasonable doubt that the accused had actual knowledge of the order. Actual knowledge may be proven by either direct or circumstantial evidence. Circumstantial evidence would include facts such as the order being announced at quarters when the accused was present, or the order being posted on a bulletin board that the accused normally read daily. The accused's lack of knowledge of the order is a complete defense to prosecution under article 92(2).

2. The accused failed to obey. The accused's failure to obey the order may be willful or the result of forgetfulness or negligence. If the order requires instant compliance, any delay results in a violation. If no specific time for compliance is given, then the order must be complied with within a time reasonable under the circumstances. If the order calls for performance of an act at a later time, or no later than a specified time, the order is not violated until that time has passed. If the order does not state exactly how the duty is to be performed, the accused will not be guilty of an orders violation if the acts are performed in a reasonable manner.

WILLFUL DISOBEDIENCE OF CERTAIN LAWFUL ORDERS [ARTICLES 90(2) AND 91(2)]

A. Willful disobedience. The willful disobedience offenses involve an intentional defiance of authority. Other orders offenses may be the result of either a willful or merely negligent failure to obey. Thus, willful disobedience is the most serious of the orders offenses. Article 90(2) prohibits willful disobedience of a superior commissioned officer. Article 91(2) forbids willful disobedience of a warrant (W-1), noncommissioned, or petty officer.

B. Discussion

1. The accused received a lawful order. See "THE LAWFUL ORDER," supra, of this chapter for a discussion of the lawfulness of orders. The order must be directed to the accused from a superior, either personally or by way of the superior's intermediary.

2. The "ultimate offense." This doctrine specifies that an accused should not be punished for violating an order which merely restated an existing order or commanded the accused to perform an existing duty. In such cases, the accused should be punished for the ultimate offense (the pre-existing duty).

3. Superiority. For article 90(2) violations, the order must be issued by the accused's superior commissioned officer. In its legal context, "superior" has a special, limited meaning. A superior is one who is superior to the accused either in rank or in the chain of command.

a. Superior in rank. A superior in rank is at least one paygrade senior to the accused and is a member of the accused's branch of service (the Navy and Marine Corps are considered the same branch of service). Therefore, a Navy ensign is superior in rank to a Marine corporal, but an Air Force general is not superior in rank to a Navy seaman recruit because they belong to different branches of the Armed Forces.

b. Superior in chain of command. Regardless of rank, one who is superior to the accused in the chain of command is the accused's superior. Thus, a Navy lieutenant commander who is commanding officer of a ship is superior to a Navy commander who is temporarily assigned to the ship as medical officer. Superiority in chain of command takes precedence over superiority in rank.

4. Knowledge. The prosecution must prove beyond a reasonable doubt that the accused actually knew that the person issuing the order was a superior commissioned officer or a petty officer, noncommissioned officer, or warrant officer. Knowledge may be proven by direct or circumstantial evidence.

5. The accused willfully disobeyed. The accused's failure to comply with the order must show an intentional defiance of the victim's authority. Failure to comply with an order because of forgetfulness or carelessness is not willful disobedience, although it may constitute an article 92 other-lawful-orders violation. Willful disobedience connotes an intentional flouting of the authority to issue an order to the accused.

DERELICTION OF DUTY [ARTICLE 92(3)]

A. Dereliction distinguished from orders offenses. Dereliction of duty, under Article 92(3), is closely related to the three types of orders offenses discussed previously. It is also distinguishable, however, from orders violations. The term "dereliction" covers a much wider spectrum of infractions in the performance of duties. Not only is failure to perform a duty prohibited, but also performing one's duty in a culpably inefficient manner. The accused's duty may be one imposed by statute, regulation, order, or merely by the custom of the service. See Part IV, para. 16c(3), MCM, 1984.

B. Discussion

1. The accused's duty. The duty contemplated by article 92(3) is any military duty either specifically assigned to the accused or incidental to the accused's military assignment.

2. Knowledge. Previous manuals did not have this specific element. On 15 May 1986, Change 2 to the MCM, 1984, added the constructive knowledge standard to the manual. Actual knowledge does not have to be proven if the accused "should have known" of the duties. The knowledge can be established by custom, manuals, regulations, literature, past behavior, testimony of witnesses, or other ways.

3. The accused was derelict. Dereliction of duty encompasses three specific types of failure to perform: Willful, negligent, and culpably inefficient.

a. Willful dereliction. The accused has full knowledge of the duty and deliberately fails to perform it.

b. Negligent dereliction. The accused has full knowledge of the duty, but fails to exercise ordinary care, skill, or diligence in performing it. As a result of the accused's negligence, the duty is not performed or is performed incorrectly.

c. Dereliction through culpable inefficiency. Culpable inefficiency is inefficient or inadequate performance for which there is no reasonable excuse. If the accused has the ability and opportunity to perform the required duty efficiently, but performs it in a sloppy or substandard manner, the accused is culpably inefficient. However, if the accused's failure is due to ineptitude, the poor performance is not the result of culpable inefficiency. Ineptitude is a genuine lack of ability to perform properly despite diligent efforts.

COMMON DEFENSES TO ORDERS OFFENSES AND DERELICTION OF DUTY

Three defenses which are especially applicable to orders violations and dereliction are illegality, impossibility, and conflicting orders. Other defenses may also be relevant in certain factual situations, but these three defenses are among the most common.

A. Illegality. The accused contends that the order violated was unlawful. The most common attacks on the alleged lawfulness of an order will be in the areas of the order not relating to a military duty, the order being contrary to superior law, and the order unlawfully infringing on individual rights

B. Impossibility. Impossibility may be a defense to orders violations and dereliction of duty when a physical or financial inability prevented the accused from complying with an order or properly performing a duty.

Impossibility is not a defense to article 92(1) and 92(2) orders violations or to dereliction of duty if the impossibility was the accused's own fault. In willful disobedience cases, however, impossibility will be a defense regardless of whether the accused was at fault. Willful disobedience requires a willful noncompliance. Nothing less, not even gross negligence, will suffice. Of course, if the "impossibility" is deliberately created by the accused for the specific purpose of avoiding compliance with an order, this contrived impossibility will not be a defense.

C. Subsequent conflicting orders. When a subordinate receives an order from a superior, and that order is subsequently countermanded or modified by an order from another superior, the accused is not guilty of a violation of the original order. This is so whether or not the officer who issued the second order is superior to the officer who issued the first order or was authorized to countermand the first order.

CHAPTER XVI

DISRESPECT

OVERVIEW

Article 89 prohibits disrespect toward a superior commissioned officer. Article 91(3) prohibits disrespect toward a warrant (W-1), noncommissioned, or petty officer who is in the execution of office. (Note also that only warrant officers (W-1) and enlisted persons can violate article 91.) The concept of superiority is identical to that in willful disobedience: superior in rank or superior in chain of command.

WHAT IS DISRESPECT? A common element of the two disrespect offenses is that the accused's language or conduct was, under the circumstances, disrespectful to the victim.

A. The accused's behavior. Disrespect may consist of words, acts, failures to act respectfully, or any combination of the three. Disrespect connotes contempt. The accused's disrespectful behavior detracts from the respect and authority rightfully due the position and person of a victim. The accused's disrespectful language may attack the victim's military performance or may be a personal insult unrelated to military matters. The fact that the accused's statement is true is no defense. Disrespect may also consist of contemptuous behavior, such as turning and walking away from a superior who's talking to you.

B. The circumstances. Although the accused's language or conduct is the most important factor in determining whether the accused's behavior was disrespectful, the circumstances of the alleged disrespect are also important. Social engagements may allow greater familiarity than would be permitted during the regular performance of military duties. The prior relationship between the victim and the subordinate may be considered. The accused's intent and the victim's understanding of the behavior is important. If the accused meant no disrespect, and if the victim took no offense, the accused's behavior may not have been disrespectful under the circumstances.

1. Abandonment of rank. Sometimes a victim may provoke the disrespectful behavior by his or her own outrageous conduct. When a victim's conduct is so demeaning as to be undeserving of respect, the victim is considered to have abandoned his or her rank. An accused who is provoked to disrespectful behavior by the victim's abandonment of rank will not be guilty of disrespect.

2. Private conversations. Part IV, para. 13c(4), MCM, 1984, counsels that "... ordinarily one should not be held accountable under this article for what was said or done in a purely private conversation." A private conversation is one conducted outside the course of government business and not in public. The victim concerned must not be party to the conversation. If the conversation is loud enough that others can overhear, the conversation is usually not a private one.

3. Directed toward the victim? The disrespectful language or conduct must be directed towards the victim. Contemptible language or gestures which are not directed towards the "victim" may not be disrespectful, even if said or done in the victim's presence. However, a superior commissioned officer need not be present for disrespectful language to be "directed toward" him or her.

DISRESPECT TOWARD A SUPERIOR COMMISSIONED OFFICER (ARTICLE 89)

Discussion. There are three significant distinctions between disrespect to a superior commissioned officer and disrespect to a warrant, noncommissioned, or petty officer. First, the commissioned officer must be the accused's superior. Second, the alleged disrespect to the superior commissioned officer need not occur in the presence of the commissioned officer. Third, the superior commissioned officer need not be in the performance of official duties when the disrespect occurs.

DISRESPECT TOWARD WARRANT (W-1), NONCOMMISSIONED, OR PETTY OFFICER [ARTICLE 91(3)]

A. Discussion. Unlike disrespect to a superior commissioned officer, disrespect to a warrant, noncommissioned or petty officer must occur within the sight or hearing of the victim of the disrespect. The warrant, noncommissioned, or petty officer must also be in the execution of office at the time. "Execution of office" means that the person is on duty or is performing some military function. The victim need not be the accused's superior.

B. Commissioned Warrant Officers. Disrespect to superior commissioned warrant officers (W-2 through W-4) must be charged under article 89.

OFFENSES AGAINST AUTHORITY

	Article	Offense	Perpetrator	Victim	Knowledge
DISRESPECT	89	Disrespect to superior commissioned officer	Anyone junior to victim	Need not be present nor in execution of office	Of superior status - must plead and prove
	91(3)	Disrespect to (superior) WO, NCO, PO	WO1 or Enlisted	Must be present and in execution of office	Of (superior) status - must plead and prove
ORDERS VIOLATIONS	92(1)	General order	Anyone		Of order - need not be pleaded nor proved
	92(2)	Other lawful order	Anyone		Of order - must plead and prove
	92(3)	Dereliction of duty	Anyone		Of duty - must plead and prove
WILLFUL DISOBEDIENCE	90(2)	Willful disobedience of superior comm'd off'r	Anyone junior to victim		Of superior status - must plead and prove
	91(2)	Willful disobedience of WO, NCO, PO	WO1 or Enlisted		Of status - must plead and prove
ASSAULT	90(1)	Assault on superior comm'd off'r	Anyone junior to victim	Must be in execution of office	Of superior status - must plead and prove
	91(1)	Assault on (superior) WO, NCO, PO	WO1 or Enlisted	Must be in execution of office	Of (superior) status - must plead and prove
	128	Assault on officer, WO, NCO, PO	Anyone	Need not be superior or in execution of office	Of comm'd, WO, NCO, PO status - must plead and prove

CHAPTER XVII

ABSENCE OFFENSES

OVERVIEW. The UCMJ prohibits four major types of absence offenses. They are:

A. Failure to go to, or going from, an appointed place of duty [articles 86(1) and 86(2)];

B. unauthorized absence from unit or organization [article 86(3)];

C. missing movement (article 87); and

D. desertion (article 85).

FAILURE TO GO TO, OR GOING FROM, AN APPOINTED PLACE OF DUTY [ARTICLES 86(1) AND 86(2)]

A. General concept. The two least serious absence offenses are failure to go to an appointed place of duty [article 86(1)] and going from an appointed place of duty [article 86(2)].

B. Discussion

1. Lawful authority. The accused must have been lawfully ordered to be at the appointed place of duty at the prescribed time. The order may be directed to the accused individually or as a member of a group.

2. Appointed place of duty. The appointed place of duty must be a specific location to which the accused must report at a specific time. A location such as "USS Cambria County" or "Naval Station, Norfolk, Virginia" is too general to be an appointed place of duty. Articles 86(1) and 86(2) contemplate a specific location such as "the mess decks" or "Building 17."

3. A precise time. A precise time must be appointed for the accused to report. Thus, an order to "report to Building M-6 when your duties are finished" is too general as to time. "Report to Building M-6 at 1400" is specific.

4. Knowledge. An accused must actually know that he was required to be at the appointed place of duty at the time prescribed.

5. Without authority. The common element of all absence offenses is that the accused had no authority to be absent.

6. Failure to go. Failure to go to an appointed place of duty may be either intentional or the result of negligence. Failure to go to an appointed place of duty is an instantaneous offense. If the accused does not report to the appointed place of duty at the prescribed time, the offense is completed. Reporting late is no defense.

7. Going from appointed place of duty. The offense of going from an appointed place of duty involves two distinct acts. First, the accused must have reported to the place of duty. Second, the accused must leave the appointed place of duty without authority. Like failure to go, going from appointed place of duty is an instantaneous offense. Once the accused leaves without authority, the offense is completed. The accused's subsequent return is no defense. If the accused goes too far from the appointed place to be reasonably able to perform the assigned duty, the accused has left the place of duty.

UNAUTHORIZED ABSENCE FROM UNIT OR ORGANIZATION [ARTICLE 86(3)]

A. General concept. Article 86(3) prohibits unauthorized absence from the servicemember's unit or organization. UA, as this offense is commonly called, is an instantaneous offense, complete the moment the accused becomes absent without authority. It is also an offense of duration, because the length of an absence is an important aggravating circumstance.

B. Discussion

1. Absence from unit or organization. "Unit" refers to a smaller command, such as a ship, air squadron, or company. "Organization" refers to a larger command such as a large shore installation, base, or battalion. The terms may be used interchangeably. For purposes of article 86(3) offenses, the accused's unit is usually the military activity that holds the accused's service record. It is the command having summary court-martial jurisdiction over the accused. When an accused is on temporary duty away from the permanent command, the accused is technically a member of both the permanent and the temporary unit. When a servicemember, pursuant to permanent change-of-station orders, detaches from the old command, that person immediately becomes a member of the new command. Thus, should a person traveling under PCS orders fail to report to the new command, the unauthorized absence would be from the new unit or organization even though the accused was never actually there.

2. "Place of duty" under article 86(3). The language of article 86(3) also provides for an unauthorized absence from a "place of duty." "Place of duty" under article 86(3) must not be confused with the "appointed place of duty" under articles 86(1) and 86(2). The article 86(3) "place of duty" refers to a general location to which the accused is assigned.

3. Commencement of the unauthorized absence. An unauthorized absence begins in one of three ways: The accused may leave the command without authority; the accused may fail to return to the command upon the expiration of leave or liberty; or the accused may fail to report to a permanent or temporary command pursuant to military orders.

4. Without authority. The accused's absence must be without authority from anyone competent to grant leave or liberty.

5. Intent. The accused's unauthorized absence may be intentional or the result of negligence. If unforeseen factors beyond the accused's control made it impossible to return from leave or liberty or to report on time, the accused will have a defense to unauthorized absence. Also, if the accused honestly and reasonably believed that the absence was authorized, the accused will not be guilty of unauthorized absence.

6. Termination of the unauthorized absence. An unauthorized absence terminates when there is a bona fide return to military control. The absence may be terminated either by the accused's surrender to military authorities or by the accused's apprehension.

a. Surrender. When the accused surrenders to military authorities, the unauthorized absence terminates. A surrender requires three things. First, the accused must appear in person before any military authority. Second, the accused must disclose his or her status as an unauthorized absentee. Third, the accused must actually submit (or demonstrate a willingness to submit) to military control. If these requirements are met, the absence is terminated even if the accused surrenders to a unit or armed force other than his/her own.

(1) Physical presence. Merely writing or telephoning military authorities is not sufficient.

(2) Disclosure of status. In order to end the unauthorized absence, the absentee must disclose his or her status of unauthorized absence.

(3) Actual submission to military control. The absentee must actually submit (or demonstrate a willingness to submit) to military control. The surrender must constitute a present, physical submission to military control. "Casual presence" aboard a military installation will not end an unauthorized absence.

b. Apprehension by military authorities. If military authorities apprehend someone they know to be an unauthorized absentee, the absence terminates. Usually, when military authorities apprehend a military member, they will be able to determine through reasonable inquiries and efforts if the person is an unauthorized absentee. If, however, the apprehended absentee deliberately conceals or misrepresents his status to the military authorities, and they reasonably rely on the absentee's statements and release the absentee, the absence will not usually be considered terminated.

c. Apprehension by civilian authorities. An unauthorized absence often ends in an arrest by civilian police and subsequent delivery to military authorities. The point at which the unauthorized absence terminates depends upon the circumstances of the civilian arrest.

(1) General rule: Termination upon notification. As a general rule, the unauthorized absence terminates when the civilian authorities notify the military that the absentee is in custody and is available to be returned to military control.

(2) Exception: Civilian arrest pursuant to military request. When military authorities request civilian authorities to apprehend an unauthorized absentee, the unauthorized absence will terminate when the person is apprehended pursuant to the request. After a servicemember has been an unauthorized absentee for a certain period of time, his command will issue a Form DD-553. This flyer requests (and authorizes) civilian authorities to apprehend the absentee. Whenever a military member is taken into civilian custody because of a Form DD-553, his unauthorized absence terminates immediately upon apprehension.

d. Apprehension or surrender? Sometimes it is difficult to determine whether an absence ended by apprehension or surrender. An unidentified military accused who is arrested for minor civilian offenses has nonetheless surrendered for military purposes if the accused freely and voluntarily discloses his military status. On the other hand, if the accused discloses military status only begrudgingly, or for an ulterior motive, or when faced with serious civilian charges, the absence is considered terminated by apprehension for military purposes as well.

7. Delivery of military personnel to civilian authorities. When military authorities deliver a military member to civilian authorities for prosecution of a civilian offense, the member is not in a status of unauthorized absence. The member's absence has been ordered by military authority. Even if the person is convicted of the civilian offense and sentenced to imprisonment, the entire period is an authorized absence.

MISSING MOVEMENT (ARTICLE 87)

A. General concept. Missing movement is an aggravated form of unauthorized absence from a unit or organization. The accused, while an unauthorized absentee, misses a significant movement of a ship, aircraft, or unit. The accused may have intended to miss the movement, or did so through carelessness or neglect.

B. Discussion

1. What is a movement? A movement under article 87 is a significant move of a ship, aircraft, or unit. Whether a particular operation is a significant movement is a factual issue, to be decided by evaluating all the facts and circumstances of each case.

2. Individual or group travel. If the accused misses a significant movement of his or her command, article 87 applies. Article 87 also applies, under certain circumstances, to other instances where the military member is required to perform individual or group travel. The term "unit" not only includes a permanent military component, such as a company, platoon, or squadron, but also a group organized solely for purposes of group travel.

3. Military or commercial transportation? If the accused misses a movement, the mode of transportation used, military or commercial, is irrelevant. The mode of transportation may be important, however, when the accused is ordered to perform individual travel. If the individual travel was to be by military transportation (including civilian transportation leased by the military), the accused will usually be guilty of missing movement regardless of whether he or she was a crew member or merely a passenger.

4. Knowledge of the movement. The accused must actually know the approximate time and date of the upcoming movement.

5. Missing movement by design. Missing movement by design is a specific intent offense: the accused missed movement because he or she specifically intended to do so. The accused's intent may be proven by direct or circumstantial evidence. As a practical matter, unless there is direct evidence of the accused's intent, it is difficult to prove missing movement by design.

6. Missing movement through neglect. Neglect connotes a failure to make reasonable efforts to make the movement. It also includes careless actions undertaken without considering the reasonable possibility that they might prevent the accused from making the movement.

DESERTION (ARTICLE 85)

A. General concept. Desertion is the most serious type of absence offense. Article 85a(a) prohibits unauthorized absence with the intent to remain away permanently from the unit or organization. Article 85a(2) prohibits unauthorized absence with the intent to avoid hazardous duty or to shirk important service.

B. Discussion of article 85a(1) desertion

1. Relationship to unauthorized absence. Desertion with the intent to remain away permanently is merely an aggravated form of unauthorized absence from the unit or organization. The additional element in article 85a(1) desertion is the intent to remain away permanently from the unit or organization.

2. Intent to remain away permanently. The accused must specifically intend to remain away permanently from his or her unit or organization. This intent may exist when the unauthorized absence begins, or it may be formed at a later time. Once the intent is formed, the offense of desertion is complete. A change of heart is no defense. The fact that the accused always intended to return to military control is no defense, if the accused nonetheless never intended to return to the unit or organization the accused left. An intent to return to the unit at some indefinite time in the future is a defense to article 85a(1) desertion, as is an intent to return when a certain event occurs.

C. Desertion with intent to avoid hazardous duty or to shirk important service [article 85a(2)]

1. General concept. Article 85a(2) desertion is merely unauthorized absence plus one of two specific intents: The intent to avoid hazardous duty or the intent to shirk important service.

2. "Hazardous duty" and "important service." "Hazardous duty" involves danger, risk or peril to the individual performing the duty. Hazardous duty need not involve combat. Even some training exercises would qualify as hazardous duty. "Important service" denotes service that is of substantially greater consequence than ordinary everyday military service.

COMMON DEFENSES TO ABSENCE OFFENSES

A. Ignorance or mistake of fact. The conditions under which ignorance or mistake of fact is available as a defense vary from one absence offense to another. To be a defense to a general intent offense, such as an article 86(3) unauthorized absence, the ignorance or mistake of fact must be both honest and reasonable. An honest ignorance or mistake of fact is one occurring in good faith. A reasonable ignorance or mistake of fact is one which a reasonable person would make under similar circumstances. Some other absence offenses are specific intent offenses. For example, in a "missing movement through design" case, the ignorance or mistake of fact need only be honest--it need not be reasonable.

B. Impossibility. When unforeseen circumstances beyond the accused's control prevent the accused from being at the appointed place of duty, unit, or organization when required, the accused has a defense of impossibility. The accused must not be at fault, nor can the accused contribute to the creation of the circumstances which make it impossible to be at the appointed place of duty, unit, or organization.

1. Three requirements for impossibility. In order to constitute a defense of impossibility, the circumstances must satisfy three requirements.

a. Unforeseen circumstances. The impossibility must result from circumstances or events that were not reasonably foreseeable.

b. Beyond the accused's control. The accused cannot contribute to the creation of the circumstances which caused the impossibility to arise.

c. The circumstances must cause actual impossibility. In order to be a defense, it must be actually impossible for the accused to be at the appointed place of duty, unit, or organization, not just inconvenient. The inability must be the accused's own inability and the circumstances must have actually made it impossible for the accused to avoid unauthorized absence. Thus, if the accused is already an unauthorized absentee when the impossibility arises, impossibility will not be a defense. Impossibility is a defense only when the only reason why the accused was absent was the unforeseen circumstance or event.

2. Types of impossibility. Impossibility may be an unforeseen act of God, the accused's physical or financial inability, or the unforeseen acts of third persons. "Acts of God" include sudden, unexpected, unforeseen occurrences such as natural disasters. If the accused is injured, ill, or destitute, and such condition was not reasonably foreseeable and was not the accused's fault, the accused's condition will be a defense if it makes it impossible for the accused to avoid being an unauthorized absentee. Unforeseen acts of third persons which make it impossible for the accused to avoid unauthorized absence will also give rise to a defense if the acts were not caused or provoked by the accused's acts.

3. Impossibility caused by civilian arrest. A very common type of impossibility by acts of third persons arises when the accused is unable to return when required to the unit or organization because the accused has been arrested and is in the custody of civilian authorities. Such circumstances may be a defense, depending upon the time of the arrest and the reason for the arrest.

a. Accused in status of unauthorized absence. If the civilian arrest occurs while the accused is already an unauthorized absentee, there is no defense. The arrest did not make it impossible for the accused to avoid unauthorized absence. The rule of "Once UA, always UA" governs.

b. Accused on duty, leave, or liberty. An accused who is turned over to civilian authorities by the military is not UA while held by the civilians under that delivery. If a military turnover is not involved, and if the accused is on duty, leave, or liberty when the arrest occurs, the key issue is whether the accused was at fault.

(1) Accused convicted of civilian charge. If the accused is convicted of the civilian charge, the time in civilian custody is an unauthorized absence. If the arrest prevented the accused from returning from leave or liberty, the accused's unauthorized absence begins only at the time and date the leave or liberty was to expire. Impossibility is not a defense because the accused's arrest was his or her own fault, as evidenced by the conviction.

(2) Accused acquitted of civilian charges. If the accused is acquitted of all the civilian charges, the period in civilian custody is an excused absence. It was impossible for the accused to avoid the absence because of the civilian arrest. The fact that the accused was acquitted of all civilian charges is conclusive proof that the accused was not at fault.

(3) Accused returned to military without disposition of civilian charges. If the accused is returned to the military without having been tried for the civilian charges, the accused can be found guilty of the absence only if it can be proven that the accused actually committed the civilian crimes.

C. Duress. Duress may be raised when the accused or a family member is threatened with immediate harm and there is no opportunity to prevent the danger. Duress is controlled by the actual facts and may be unavailable when the accused has a chance, but fails to seek assistance through the chain of command.

D. Condonation of desertion. Condonation applies to desertion cases only. Condonation occurs where the accused's commander, knowing about the accused's alleged desertion, unconditionally restores the accused to normal duty without taking any steps toward disciplinary action.

WHEN UA TERMINATES

SITUATION	UA TERMINATES
Apprehension by the military	at the apprehension
Surrender to the military	at the surrender
Civilian apprehension for UA pursuant to DD 553	at the apprehension
Civilian apprehension for civilian crime, detained longer due to DD 553	when the accused is being held <u>for the military</u>
Civilian apprehension for civilian crime, NO DD 553	when military informed that accused is available to it

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RELATIONSHIP BETWEEN UA STATUS AND CIVILIAN CRIMINAL CHARGE

SITUATION	UA	NOT UA	DURATION
UA, civ. arrest; acquit	X		for the entire period
UA, civ. arrest; *no trial*	X		for the entire period
UA, civ. arrest; convict	X		for the entire period
On Leave; arrest; acquit		X	no "unauthorized" absence
On Leave; arrest; no trial	X*		* if trial counsel proves accused "at fault" (for all the time over leave)
Leave; arrest; convicted	X**		** all the time over leave
Military turnover to civilians		X	always "authorized"

THE USUAL RULE: ONCE UA, ALWAYS UA

CHAPTER XVIII

THE GENERAL ARTICLE: ARTICLE 134

OVERVIEW

Article 134 offenses fall within three general categories of offenses: (1) Conduct prejudicial to good order and discipline; (2) service-discrediting conduct; and (3) Federal noncapital crimes. The concept of a general article such as article 134 is an ancient one in military law. General articles appeared in military codes as early as the fourteenth century. Much of article 134's language is substantially unchanged from the time of the American Revolution.

CONDUCT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE

The first clause of article 134 prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces." The accused's conduct must directly prejudice or tend to prejudice good order and discipline. The act must have a substantial relationship to military activity.

SERVICE-DISCREDITING CONDUCT

The second clause of article 134 prohibits "all conduct of a nature to bring discredit upon the armed forces." "Discredit" means an injury to the reputation of the armed forces. It is sufficient if the accused's conduct reasonably tends to injure the reputation of the armed forces.

CONDUCT THAT IS BOTH PREJUDICIAL AND DISCREDITING

Many of the article 134 offenses are both prejudicial to good order and discipline and service-discrediting. For this reason, article 134 pleadings need not specifically state that the accused's conduct was prejudicial or of a service-discrediting nature.

FEDERAL NONCAPITAL CRIMES

The third clause of article 134 prohibits "crimes and offenses not capital." This phrase refers to Federal, noncapital crimes, not specifically mentioned elsewhere in the UCMJ. Federal noncapital offenses may be prosecuted under one of two types of statutes: Federal statutes with unlimited application or Federal statutes of limited application or jurisdiction. One of these Federal statutes of limited jurisdiction is the Federal Assimilative Crimes Act found at 18 U.S.C. § 13. Prosecution under the third clause of article 134 is usually rather complicated, and an attorney should always be consulted.

FEDERAL ASSIMILATIVE CRIMES ACT

If conduct is not prohibited by a specific article of the UCMJ or by a Federal statute, it still may be prosecuted under article 134 if the state in which the "offense" occurred prohibits it. A court-martial cannot enforce state law; however, the state statute can be assimilated into the Federal law by use of the Federal Assimilative Crimes Act. This act assimilates state law whenever there is no Federal statute governing the accused's specific acts, provided that the acts occur in an area subject to either exclusive or concurrent Federal jurisdiction.

CHAPTER XIX

CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN

OVERVIEW

The offense of conduct unbecoming an officer and gentleman, under article 133, is closely related to theories of prosecution under article 134. Both articles 133 and 134 prohibit general types of conduct rather than specifically defined acts. Like article 134, article 133 is the product of ancient traditions in military discipline. Unlike article 134, however, article 133 includes offenses specifically mentioned elsewhere in the UCMJ, as well as those unmentioned offenses which are nonetheless established in military tradition. Offenses listed elsewhere in the Code may be charged under article 133, as long as the terminal element of conduct unbecoming an officer can also be proven beyond a reasonable doubt.

DISCUSSION

A. Status of the accused. Article 133 applies only to commissioned officers, cadets, and midshipmen.

B. Accused's conduct. To constitute an offense under article 133, the accused's conduct must have a double significance. First, it must unbecome the accused as an officer by compromising his standing in the military profession. Second, it must also unbecome the accused as a gentleman by impugning his honor or integrity or otherwise subjecting the accused to social disgrace. Article 133 does not address every departure from the moral attributes common to the ideal officer and perfect gentleman: only serious departures are covered.

CHAPTER XX

ASSAULTS

OVERVIEW

Although the UCMJ provides for more than a dozen specific types of assault, the structure of the law of assaults is rather simple. All assaults are based on the simple assault, which is merely an unlawful offer or attempt to do bodily harm. All the other varieties of assaults are merely simple assaults plus additional aggravating facts.

SIMPLE ASSAULT (ARTICLE 128)

A. General concept. The simple assault occurs when an accused unlawfully attempts or offers to do bodily harm to another person. No actual harm or striking occurs. Simple assault is significant because it is the foundation upon which all the various types of assault offenses are constructed.

B. Discussion

1. Attempt-type assault. The attempt-type simple assault occurs when the accused attempts to strike or do bodily harm to another person. Hence, there is no such crime as "attempted assault"; as soon as an attempt is made, an assault has been committed. The accused must specifically intend to strike or do bodily harm to the other person. The intended victim need not be aware of the attempt. Like any other attempt, the accused's act must be more than mere preparation.

2. Offer-type assault. An offer-type simple assault involves an unlawful demonstration of violence which causes another person to reasonably apprehend imminent bodily harm. The accused need not intend to actually harm anyone. The offer may merely be a culpably negligent act that appears menacing or threatening. A culpably negligent act is the result of more than ordinary carelessness or neglect. It involves a wrongful disregard for the foreseeable consequences of one's actions. In the offer-type assault, it is the victim's state of mind that is important. The victim must reasonably anticipate that bodily harm is imminent. The victim need not actually be afraid. The test is whether a reasonable person, in the same circumstances, would believe that unlawful force or violence was about to be applied to his or her person. Menacing or threatening words, by themselves, do not constitute an offer-type assault.

3. Conditional offers of violence. Sometimes the accused's apparently threatening gestures may be accompanied by statements which seem to negate any intent by the accused to actually carry out the threat. For example, suppose the accused raises his clenched fist towards another person and says, "Smith, if you weren't my brother-in-law, I'd slug you." This is a conditional offer of violence. Despite the accused's menacing gestures, the accused's language indicates that no harm is intended. Therefore, no offer-type assault has occurred.

4. Unlawful force or violence. In the context of simple assaults, "force or violence" refers to actions that are of a violent nature or that threaten imminent violence. An act of force or violence is unlawful if it is done without legal justification or excuse.

ASSAULT CONSUMMATED BY A BATTERY (ARTICLE 128)

A. General concept. An assault consummated by a battery is merely a simple assault which results in bodily harm or a striking of the victim.

B. Discussion

1. Bodily harm. A battery is the unlawful application of force or violence to another person. "Bodily harm" includes any physical injury to, or offensive touching of, another person however slight.

2. Accused's state of mind. A battery may be committed by the accused's intentional act or through culpable negligence. The accused need not intend to inflict any particular kind of bodily harm, nor does the accused's intent have to be directed toward any specific victim. The battery itself proves the assault, so no attempt-offer analysis is necessary. A battery may also be a result of culpable negligence. Simple negligence, which is merely the failure to exercise ordinary care, is insufficient to result in an assault.

ASSAULT WITH A DANGEROUS WEAPON OR OTHER MEANS OR FORCE LIKELY TO PRODUCE DEATH OR GRIEVOUS BODILY HARM (ARTICLE 128)

A. General concept. One of the most common aggravated forms of assault is assault with a dangerous weapon or means likely to produce death or grievous bodily harm. Like all other aggravated forms of assault, this offense is merely a simple assault plus the aggravating circumstance of the nature of the weapon, means, or force used in the assault.

B. Discussion

1. Bodily harm not required. Assault with a dangerous weapon or means likely to produce grievous bodily harm may arise from a simple offer-type or attempt-type assault, or it may involve an assault consummated by a battery. Bodily harm is not required.

2. Weapon, means, or force. This aggravated form of assault involves the use of a deadly or dangerous weapon. It also includes the use of other instruments, devices, means, or forces that are dangerous when used

in the way the accused used them. The weapon, means, or force must actually be dangerous. A means or force is likely to produce grievous bodily harm when the natural and probable result of the accused's use of the means or force would be serious physical injury. The key is the way in which the accused used the means or force.

3. Grievous bodily harm. "Bodily harm" includes any physical injury to, or offensive touching of, another person. "Grievous" bodily harm requires fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other grave physical injuries.

INTENTIONAL INFLICTION OF GRIEVOUS BODILY HARM (ARTICLE 128)

A. Grievous bodily harm inflicted. The offense of intentional infliction of grievous bodily harm requires that grievous bodily harm, as defined earlier, actually be inflicted.

B. The accused's intent. The accused must specifically intend to inflict harm. No degree of negligence, no matter now wanton or reckless, will suffice. Moreover, the accused must intend to inflict grievous harm, not just ordinary bodily harm.

ASSAULT UPON CERTAIN OFFICERS [ARTICLES 90(1) AND 91(1)]

A. General concept. Assault upon certain military authorities is one of several aggravated forms of assault where the principal aggravating circumstance is the status of the victim. Article 90(1) prohibits assaults upon superior commissioned officers in the execution of their office. Article 91(1) prohibits assaults upon warrant or noncommissioned and petty officers in the execution of office.

B. Discussion

1. Basic assault. The assault may be either a simple assault, either offer-type or attempt-type, or an assault consummated by a battery.

2. Superiority. The superiority concept is the same as is discussed with respect to willful disobedience and disrespect. Under article 90(1), the victim must be the accused's superior commissioned officer. Under article 91(1), however, superiority is merely an optional, aggravating element for victims who are noncommissioned or petty officers.

3. Accused's knowledge. The accused must have had actual knowledge that the victim was his warrant, superior commissioned, or (superior) noncommissioned or petty officer.

4. Execution of office. The victim must be in the execution of his office. One is in the execution of office when engaged in any act or service required or authorized by statute, regulation, superior orders, or military custom. The victim must be performing a lawful duty in a lawful manner in order to be in the execution of office. In order to remove one from the status of being in the execution of office, his or her actions must be definitely criminal or illegal, and not just deviations from prescribed procedures.

ASSAULT CONSUMMATED BY A BATTERY UPON A CHILD (ARTICLE 128)

A. General concept. Another aggravating circumstance arises when the victim is a child under age sixteen. This offense is the last of the three types of assaults under article 128 that require that the assault be consummated by a battery.

B. Discussion

1. Bodily harm. This offense requires that bodily harm actually occur. Bodily harm includes any physical injury to or offensive touching of the victim, however slight.

2. Unlawful force or violence. This offense is commonly used to prosecute child-abuse cases. The bodily harm must be unlawful, i.e., without legal justification or excuse. A parent is authorized by law to administer corporal punishment to his or her child. The privilege to administer corporal punishment does not include unreasonable physical abuse.

3. Child under sixteen. At the time of the assault, the victim must be under age sixteen. The accused's knowledge or belief about the child's age is immaterial.

OTHER ASSAULTS AGGRAVATED BY THE VICTIM'S STATUS (ARTICLE 128)

A. General concept. Part IV, para. 54e, MCM, 1984, provides for increased maximum punishments when the victim of the assault falls within one of several other classes.

B. Discussion

1. Commissioned, warrant, noncommissioned, or petty officer. Unlike the assaults prosecuted under articles 90(1) and 91(1), assaults on commissioned, warrant, noncommissioned, or petty officers under article 128 do not require that the victim be in the execution of office, and superiority is never an element.

2. Person in the execution of police duties. A person is in the execution of police duties whenever engaging in any law enforcement act or service authorized by statute, regulation, superior order, or military custom. The victim must perform the police duties in a lawful manner.

3. Sentinel or lookout. A sentinel or lookout is one who is assigned to a duty requiring extra alertness to constantly watch for the approach of an enemy, to look for danger, to maintain security of the perimeter of an area, or to guard stores.

4. Bodily harm. Bodily harm need not be inflicted on any of the above individuals. A simple offer-type or attempt-type asssault will suffice.

5. Accused's knowledge. The accused must actually know of the victim's status. Constructive knowledge, i.e., that the accused should have known, will not suffice.

ASSAULT WITH INTENT TO COMMIT CERTAIN SERIOUS OFFENSES (ARTICLE 134)

A. General concept. Article 134 prohibits assaults committed with the intent to commit one of several serious crimes. Such assaults can also sometimes be charged as attempts to commit the intended crime.

B. Discussion. The accused must specifically intend to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking. The accused's intent is usually proven through circumstantial evidence involving all the accused's actions before, during, and after the assault.

COMMON DEFENSES TO ASSAULT OFFENSES

A. Legal justification. An act of force or violence committed during the proper performance of a lawful duty is legally justified. This defense of legal justification has two requirements. First, the accused must be performing a lawful duty, which may be imposed by a statute, regulation, superior order, or custom of the service. Even when an order to commit an act of force or violence is not lawful, the accused has a defense if the accused honestly believed the order to be lawful, and if a person of ordinary understanding would not have known that the order was unlawful. Second, the duty must be performed in a proper manner. The accused may use only enough force reasonably necessary to carry out the duty.

B. Self-defense. One who is free from fault may use reasonable force, even deadly force if necessary, to defend against unlawful bodily harm. Self-defense will excuse an accused's acts only when both of the following questions are answered in the affirmative.

1. Was the accused free from fault? Self-defense will not excuse the accused's acts when the accused intentionally started the altercation. However, suppose that the accused provoked the other party's hostile actions and then withdrew, intending to avoid any further hostility. If the other party continues the attack, even after the accused's withdrawal, the accused may then act in self-defense. The other party has become the aggressor. Likewise, an accused who willingly engages in mutual combat, such as a barroom free-for-all, may not successfully claim self-defense. If the opponent should unexpectedly resort to deadly force (e.g., pulls a knife), thereby escalating the affray, the accused may be permitted to defend against the excessive force.

2. Did the accused use a reasonable degree of force?

a. In homicide or assault involving deadly force, or battery involving deadly force

(1) The accused reasonably believed that death was about to be inflicted. Taking into account all the circumstances, the accused's apprehension of death or grievous bodily harm must have been one which a reasonable, prudent person would have held under the circumstances.

(2) The accused honestly believed that the force used was necessary for protection against death or grievous bodily harm. This element is entirely subjective. The accused is not objectively limited to the use of reasonable force. Accordingly, such matters as the accused's emotional control, education and intelligence are relevant in determining the accused's actual belief as to the force necessary to repel the attack.

b. In other assault cases

(1) The accused reasonably believed that bodily harm was imminent. Taking into account all the circumstances, the accused's apprehension of imminent bodily harm must have been reasonable.

(2) The accused honestly believed that force used was necessary, providing it was less than force reasonably likely to result in death or grievous bodily harm. A person who perceives imminent bodily harm does not have an unlimited right to resort to force. The accused must have had an honest, good-faith belief that force was actually necessary to defend against imminent bodily harm. The accused's belief need not be the belief that the so-called "reasonable person" would have held. Thus, factors such as the accused's intelligence, emotional state, and sobriety are relevant. There is no duty imposed on the accused to retreat in the face of attack. This is a subjective test. The type and amount of force used is limited to that reasonably necessary to protect oneself. There is no requirement that the accused meet force with exactly the same kind of force.

C. Threatened use of deadly force. In order to deter an assailant, the accused may offer, but not actually apply or attempt, such means or force which might likely cause death or grievous bodily harm. Such deadly force may be threatened even though the accused only reasonably anticipated only minor bodily harm.

D. Defense of another. One may lawfully use force in defense of another person under the same conditions that self-defense could be invoked. The person aided must not be the aggressor nor a willing mutual combatant. The accused is limited to the use of that degree of force reasonably necessary to protect the victim. Mistake of fact as to who was really the aggressor is not a defense.

E. Consent. An accused is not guilty of an alleged assault consummated by a battery if the alleged victim lawfully consented to the battery. The victim's consent must be freely given before the striking or offensive touching. Consent obtained by threats, duress, or fraud is not lawful consent. No one can lawfully consent to a battery that is likely to produce death or serious physical injury, except where the act is necessary to save the victim's life. No one can lawfully consent to any act that constitutes an unlawful breach of the peace. Finally, the victim's consent may be limited. If the battery goes beyond the extent to which the victim consented, the battery will be unlawful.

F. Duress. Duress is available as a defense to any crime less serious than murder when the accused's acts were not voluntary, but the result of a reasonable, well-grounded fear that if he or she didn't commit the assault, the accused or any innocent person would be immediately killed or seriously injured.

G. Accident. In an assault case the accused will not be guilty if his or her acts were unintentional and not due to culpable negligence. An accident is an unintentional act which occurs while the accused is otherwise acting lawfully. It is not the unexpected consequence of a deliberate act.

H. Special privilege. The law recognizes certain other limited situations where one may rightfully use force against another, even without the other person's consent. A parent is privileged to use reasonable amounts and types of corporal punishment to discipline a minor child. A custodian or guardian of children or mentally incompetent persons may use limited, reasonable force to care for or control the persons in the custodian's charge. The rightful occupant of any premises, whether home or place of business, is privileged to use reasonable force to expel persons unlawfully on the premises.

CHAPTER XXI

DISTURBANCE OFFENSES

OVERVIEW. The UCMJ prohibits five major offenses involving public disturbance or threats against the peace:

A. Riot (article 116);

B. breach of peace (article 116);

C. disorderly conduct (article 134);

D. communicating a threat (article 134); and

E. provoking words or gestures (article 117).

BREACH OF THE PEACE (ARTICLE 116)

For this offense to occur, there must be a violent or turbulent act which unlawfully disturbs the peace of the community.

A. Violent or turbulent act. Examples include destroying or damaging property, discharging firearms, loud speech, or language which tends to induce or incite violence or unrest.

B. The peace of the community. A breach of the peace disturbs public tranquility or impinges upon the peace and order to which the community is entitled. Thus, the acts must disturb the public peace, not just the peace of the persons who witness the acts.

C. Community. Although "community" usually refers to the general public in the area, it also includes military communities such as a base, vessel, or confinement facility.

D. Unlawful disturbance. A breach of peace is unlawful when committed without legal justification or excuse. Legal justification refers to the proper performance of a legal duty. Legal excuse includes defenses such as self-defense.

DISORDERLY CONDUCT (ARTICLE 134)

Disorderly conduct affects the peace and quiet of persons witnessing it. It need not be violent conduct, however. An act which outrages generally held standards of public decency, such as indecent exposure or window peeping, would also constitute disorderly conduct.

COMMUNICATING A THREAT (ARTICLE 134)

A. Threat. The threat may be to the person, property, or reputation of another. It must involve an avowed present intent to injure, either now or in the future. A conditional threat may not always be an offense. Thus, "If you weren't so old, I'd beat you to a pulp" is not a threat. On the other hand, "If you don't cooperate, we'll kill you" does constitute a threat. The condition ("If you don't cooperate...") is one the accused is not entitled to impose and doesn't negate the intent to injure, but merely explains the circumstances under which the threat will be carried out. Words which all parties understand to have been said in jest would not constitute a threat.

B. Communication. The threat must be communicated to another person. The threat does not have to be communicated to the intended victim, however. Thus, if A tells B, "I'm going to beat up C," a threat has been communicated for purposes of this offense.

C. Intent. The accused need not specifically intend to carry out the threat. The gist of the offense is communication of the threatening words, not the actual intent of the speaker. The fact that the accused said the words in jest is no defense if the person to whom they were communicated believed or understood the words to be an actual threat.

D. Wrongful. The threat must be wrongful, without legal justification or excuse. Not all threats are wrongful. For example, if a witness to a crime threatens to report the perpetrator to the authorities, the threat is not wrongful, even though it will certainly injure the perpetrator's reputation if carried out.

PROVOKING WORDS OR GESTURES (ARTICLE 117)

A. Provoking. Provoking words or gestures tend to induce breaches of the peace. They are "fighting words" or challenging gestures. It is not necessary, however, that a breach of the peace actually result. The person to whom the words or gestures were used need not have been actually provoked to violence. Conditional threats may be provoking words. For instance, "If you weren't so ugly, I'd smack you" is not a threat but is chargeable as provoking words.

B. Reproachful. Reproachful words or gestures are punishable under this article and are ones that censure, blame, discredit, or otherwise disgrace another person's life or character. They also must tend to induce breaches of the peace.

C. Accused's intent. The accused need not actually intend to provoke violence or a breach of the peace. The gist of the offense is the consequences of the provoking conduct, not the intent behind it.

D. Victim's status. The person to whom the provoking or reproachful words or gestures were used must be a person subject to the UCMJ. Lack of knowledge of the victim's status is not a defense.

E. Wrongfulness. Provoking or reproachful words or gestures do not include reprimands, censures, reproofs, and other admonitions which may be properly administered in the furtherance of military training, efficiency, or discipline.

F. The person to whom directed. Unlike communicating a threat, provoking words must be communicated directly to the victim.

CHAPTER XXII

CRIMES AGAINST PROPERTY

OVERVIEW. The UCMJ prohibits a broad range of crimes against property. This chapter will discuss the more common property offenses:

A. Larceny and wrongful appropriation (article 121);

B. receiving stolen property (article 134);

C. robbery (article 122);

D. burglary, housebreaking, and unlawful entry (articles 129, 130, 134);

E. arson (article 126);

F. offenses against military property (article 108);

G. damage or destruction of nonmilitary property (article 109); and

H. bad check offenses (articles 123a and 134).

LARCENY AND WRONGFUL APPROPRIATION (ARTICLE 121)

A. General concept. Article 121 prohibits larceny and its lesser included offense of wrongful appropriation. The only difference between the two crimes is the required intent. In larceny, the accused specifically intends to deprive the owner permanently of the property stolen. In wrongful appropriation, the accused intends to deprive the owner of the property only temporarily.

B. Discussion

1. Wrongfulness. The accused's act is wrongful if it is without the lawful consent of the owner, or without legal justification or excuse. Legal excuse would include situations such as the accused's taking property he honestly believes to be his own.

2. Taking. Article 121 describes three types of larceny: wrongful taking, wrongful obtaining, and wrongful withholding. A "taking" requires two acts by the thief. First, the thief must exercise physical dominion so as to impair the owner's control over the property. Second, the thief must remove the property. Any movement, however slight, will usually suffice. Both dominion and removal are necessary.

3. Obtaining. Wrongful obtaining is larceny by fraud. The thief makes a deliberate misrepresentation which induces the owner to give the property voluntarily to the thief. The misrepresentation must have all of the following characteristics.

a. It must be a material misrepresentation. The thief's misrepresentation must concern an important matter in the relationship or dealings between the thief and the victim. The misrepresentation is material if a reasonable person would rely upon it, at least in part, in deciding whether to give the property to the thief.

b. It must be a misrepresentation of present or past fact. A statement such as "This watch lists for $500" could form the basis for a wrongful obtaining. On the other hand, a statement such as "This is the most beautiful picture in the world" is merely a statement of opinion. If, however, the thief says, "The art critic for the New York Times says that this is the most beautiful painting in the world" the thief has made a representation of fact, i.e., the fact that the art critic has expressed that opinion. A present fact includes the thief's present intentions. Thus, if the thief states "I will gladly pay you Tuesday for a hamburger today," the thief has stated the fact of his intention to pay for the hamburger in the future.

c. The representation must be false.

d. The accused must not believe that the misrepresentation is true. Any one of three possible states of mind will satisfy this requirement. First, the accused may know that the representation is untrue. Second, the accused may believe that it is untrue, without actually knowing whether it is untrue. Third, the accused may have no actual knowledge or belief about whether the statement is true or false.

e. The misrepresentation must induce the victim's transfer of the property to the thief. The victim must actually rely on the thief's misrepresentation as a basis for giving the property to the thief or to the thief's agent. The misrepresentation usually must be made before, or simultaneously with, the transfer. Although the misrepresentation must induce the transfer, it need not be the only reason why the victim parted with the property.

f. Monetary loss irrelevant. There is no requirement that the victim suffer a monetary loss as a result of the transaction.

4. Withholding. In taking and obtaining types of larceny, the thief unlawfully comes into possession of the property. In wrongful withholding, however, the thief's initial possession of the property is usually lawful. Acts which constitute the offense of unlawfully receiving, buying or concealing stolen property, or being an accessory after the fact, however, are not included within the meaning of "withholds." The act of withholding may take several forms. The thief may fail to return borrowed or rented property when lawfully required to do so. The thief may be a custodian, who fails to account for, or deliver, the property to its owner when legally required to do so. Still another example of wrongful withholding would be the custodian of property who converts the property to his own use or benefit, or who uses it in an unauthorized manner to the detriment of the owner's rights.

5. Property. The law divides property into two general classes: Real property and personal property. Real property includes land, buildings, and permanent fixtures attached to the land. Real property cannot be the subject of a larceny. Personal property may be defined as any property that is not real property. Personal property includes tangible property, which has a physical existence, and intangible property, such as contract rights, patents, and rights to services.

"Property" for purposes of article 121 is limited to tangible personal property, money, and negotiable instruments such as checks. Services, such as telephone service or labor, cannot be the subject of larceny. Theft of services may be prosecuted under article 134 when the accused wrongfully obtained the services.

6. Ownership. "Ownership" merely describes a person's right to possess, use, and dispose of property. The law identifies two types of owners of property: General owners and special owners. Owners include not only people, but also corporations, associations, governmental agencies, and partnerships.

a. General owners. The general owner has the greatest right to possess, use, and dispose of property. The general owner's rights are generally superior to those of anyone else. The general owner is often said to have "title" to the property.

b. Special owners. The special owner has ownership rights that are superior to the rights of anyone else except the general owner. Thus, a renter, borrower, or custodian of property would be a special owner (even a thief may be a special owner).

c. Relationship to larceny. A larceny may be either from a general owner or from a special owner. If the larceny is from a special owner, there is usually no need to plead or prove the general owner's identity or interest. Larcenies may occur between general and special owners. A special owner commits larceny against the general owner when the special owner wrongfully withholds the general owner's property.

7. Value. Value has a two-fold importance in larceny cases. First, one of the elements of the offense is that the property had at least some value. Second, the property's value determines the authorized maximum punishment. A property's value for purposes of article 121 is its fair market value at the time and place of the theft. The concept of value may present several problems.

a. Proof of value. Value may be proven in several ways. First, the larceny victim may testify to the property's value. Second, evidence of the prevailing retail price in the community for the same or similar items may be introduced. Third, if the property was government property, official price lists are admissible to prove value. However, if the official price list conflicts with other evidence of fair market value, the fair market value governs.

b. Unique property. Rare or one-of-a-kind items such as antiques or paintings usually have no prevailing retail price in the community. Their value may be established by the expert testimony of an appraiser or other authority on that kind of property.

c. Value of negotiable instruments. Negotiable instruments are writings which represent money value, and which can be converted to cash. The value of a negotiable instrument depends upon whether the document is in a negotiable form, i.e., whether it can be cashed. If the check is unsigned or has some other defect that renders it non-negotiable, the accused has stolen only a piece of paper of nominal value.

d. Deductions for condition and depreciation. Fair market value reflects the property's condition and any appropriate depreciation. Some types of property may be subject to commonly recognized depreciation.

8. Intent. Larceny and wrongful appropriation are specific intent offenses. In larceny, the accused must specifically intend to deprive the owner of the property permanently. Wrongful appropriation requires the specific intent to deprive temporarily.

9. Unexplained possession of recently stolen property. The law recognizes a permissive inference arising from the accused's unexplained possession of recently stolen property. If, shortly after the property was stolen, the accused was found in unexplained, knowing, exclusive possession of the stolen property, one may infer that the accused was the thief.

a. Conscious possession. The evidence must show that the accused knew that he possessed the property. It is not necessary to prove that the accused knew the property was stolen.

b. Exclusive possession. The evidence must show that the accused exercised exclusive control or dominion over the property.

c. Recently stolen property. "Recent" is a relative concept. A practical test for determining if the property was "recently" stolen is as follows: Was it reasonably possible for the accused to have innocently acquired the property in the time between its theft and its discovery?

10. Found property. Found property is property which has been inadvertently lost or mislaid by its owner and which is found by the accused. If the finder fails to make reasonable efforts to locate the property's owner, the finder may be criminally liable for larceny of the found property.

a. Clues to ownership. The extent to which the finder will be legally required to try to locate the property's owner will be determined by the clues to ownership. Clues to ownership include identifying marks, the nature of the property, where it was found, when it was found, its apparent value, and how long it had apparently been located where it was found. Sometimes there may be no clues to ownership. Whether the property presented clues to ownership must be determined by analyzing all the facts and circumstances surrounding the finding of the property.

b. Finder's duty to make reasonable efforts. The finder has a legal duty to make reasonable efforts to find the property's owner. What constitutes reasonable efforts is determined by the kind and quality of the clues to ownership. If the finder takes the found property and makes no reasonable efforts to return it to its owner, the finder commits a taking type larceny. If the finder learns of subsequent clues to ownership, but makes no reasonable efforts to return the property, the finder commits a withholding type larceny. The finder's initial possession was lawful, but the finder failed to return the property when legally required to do so.

11. Abandoned property. Abandoned property is property in which the owner has relinquished all title, rights, and possession. Anyone may lawfully take possession of abandoned property. Whether certain property was abandoned will be determined by the type of property, its condition, its location, and whether the prior owner actually abandoned the property. Moreover, even if the property was not in fact abandoned, the accused will not be guilty of larceny or wrongful appropriation if the accused honestly believed that the property was abandoned.

C. Common defenses to larceny. The following are the most frequently encountered defenses in larceny cases. Many are also applicable to other types of property crimes.

1. Lack of criminal intent. The accused claims that the alleged taking, obtaining, or withholding was not wrongful.

2. Intoxication. Although voluntary intoxication is not usually a complete defense, it may become a defense to larceny or wrongful appropriation when the accused was so intoxicated as to be unable to form the required intent.

3. Honest mistake of fact. If the accused honestly believed that the property was his own, such a mistake of fact will constitute a complete defense to larceny and wrongful appropriation. The accused's mistake need not be reasonable, only honest.

4. Return of similar property. After wrongfully taking/obtaining/withholding property, the accused's intent to return similar property is not a defense. The exception is when cash or a check is taken and an equivalent amount of currency is later returned. Because of the fungible nature of money, this return is usually a defense to larceny, but not wrongful appropriation.

RECEIVING, BUYING, OR CONCEALING STOLEN PROPERTY (ARTICLE 134)

A. General concept. Although closely related to larceny, receiving stolen property is not a lesser included offense of larceny. Thus, whenever there is doubt about whether the accused was the thief, or merely a receiver of stolen property, a receiving stolen property charge is also appropriate.

B. Discussion

1. Unlawfully received, bought, or concealed. The accused must have received, bought, or concealed the goods without the rightful owner's consent and without legal justification or excuse. One who buys stolen goods in order to return them to their rightful owner has not unlawfully bought stolen property. Any control over the property is sufficient to constitute receipt of the property.

2. Stolen property. The property must actually be stolen property. The property must have been stolen by someone other than the receiver. A thief cannot receive stolen property he has stolen.

3. Knowledge. At the time the accused receives the property, the accused must actually know that the property is stolen.

C. Relationship to larceny. Although closely related to larceny and wrongful appropriation, receiving stolen property is not a lesser included offense of either crime. Nor does receiving stolen property merge into a wrongful withholding type of larceny when the receiver fails to return the property to its owner.

ROBBERY (ARTICLE 122)

A. General concept. Robbery is essentially a larceny committed by means of an assault upon the victim. Both larceny and assault are lesser included offenses of robbery.

B. Discussion. Many of the concepts of larceny law also apply to robbery. Robbery has several other distinct principles which are discussed below.

1. From the victim's person or presence. The robber must take the property from the victim's person or must take property in the victim's presence. Property is in the victim's presence when the victim has immediate control over it.

2. Against the victim's will. The taking must be without the victim's freely given consent.

3. Force and violence. The wrongful taking must be accomplished by force, violence, or threat of force or violence. This is the assault component of robbery. The accused's force or violence need only be enough to overcome the victim's resistance. The force or violence may precede or accompany the taking. There is no requirement that the victim offer resistance.

4. Threats of force or violence. Robbery may also be accomplished by putting the victim in fear of force or violence. The threat may be to the victim's person or property. The threat may also be one which places the victim in fear of force or violence to the person or property of a relative or of another person in the victim's company. For purposes of robbery, "fear"

means a reasonably well-founded apprehension of immediate or future injury. While there need not be any actual force or violence, the threat must include demonstrations of force or menacing acts which reasonably raise an apprehension of impending harm.

C. Lesser included offenses. Both larceny and assault are lesser included offenses of robbery.

BURGLARY (ARTICLE 129), HOUSEBREAKING (ARTICLE 130), AND UNLAWFUL ENTRY (ARTICLE 134)

A. Burglary (article 129)

1. General concept. Burglary is the unlawful breaking and entering of another person's dwelling, at night, with the specific intent to commit any of certain specified serious offenses. It is immaterial whether the intended serious offense is actually committed.

2. Unlawful breaking and entering. The burglar must break into the victim's dwelling. This may be done by an actual breaking such as forcing a lock, breaking a window, or even opening a closed door. There may also be a constructive breaking, which occurs when the burglar gains entry to the dwelling by trick, fraud, or threats. The slightest entry into the dwelling, even if by only part of the body, will suffice. A breaking and entry is unlawful when done without lawful consent or legal justification.

3. Dwelling. The burglar must break into and enter the victim's dwelling. This term refers to any building occupied as a place of residence. It also usually includes apartments. The dwelling must be occupied, but there is no requirement that the occupant actually be on the premises.

4. At night. The burglary must occur at night, i.e., between sunset and sunrise.

5. Intent to commit certain specified serious offenses. The burglar must enter the dwelling with the intent to commit a serious crime. These include: murder, manslaughter, rape and carnal knowledge, larceny and wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, and assault. It is immaterial that the intended crime was not actually committed.

6. Lesser included offenses. Housebreaking (article 130) and unlawful entry (article 134) are lesser included offenses of burglary.

B. Housebreaking (article 130)

1. General concept. Housebreaking is the unlawful entry of another person's building or structure with the intent to commit a criminal offense inside. Housebreaking is less serious than burglary. The premises need not be a dwelling but can be any building, room, shop, store, office, structure, houseboat, house trailer, railroad car, or tent. An automobile, however, cannot be the subject of housebreaking. The premises need not be

occupied or in use at the time of the housebreaking. The unlawful entry can occur at any time, not just at night. Finally, the accused may intend to commit any crime except strictly military offenses.

2. Lesser included offense. Housebreaking's principal lesser included offense is unlawful entry under article 134.

C. Unlawful entry (article 134)

-- General concept. Unlawful entry occurs when the accused, without lawful consent or legal justification, enters a building or structure of another person. All those types of structures previously discussed with respect to burglary and housebreaking may be the subject of an unlawful entry. Note that the offense of unlawful entry does not require proof of an intent to commit any other offense once inside.

OFFENSES AGAINST MILITARY PROPERTY (ARTICLE 108)

A. General concept. Article 108 prohibits the unauthorized sale, disposition, damage, destruction, or loss of military property of the United States. Not only does article 108 prohibit these specific acts, it also prohibits allowing someone else to commit the unauthorized sale, disposition, damage, destruction, or loss of military property. Article 108 can be distinguished from larceny in that larceny is concerned with how the accused came into possession of the property. Article 108 deals with how the accused handled or disposed of the property.

B. Discussion

1. Military property of the United States. Military property is all property, real or personal, that is owned, held, leased, or used by one of the armed forces of the United States Government. Thus, all property owned or used by the Department of the Navy, from paper clips to aircraft carriers, is covered by article 108. Retail exchange merchandise owned or used by a non-appropriated fund activity is not military property of the United States; however, merchandise in a ship's store is military property.

2. Wrongful sale or disposition. "Sale" of military property means a sale in the usual commercial sense. "Disposition" may include abandonment, loan, lease, or surrender of military property. Sale of military property is usually permanent. Disposition, however, need only be temporary. If the accused honestly and reasonably believed that the sale or disposition was authorized, the accused will not be guilty of an article 108 violation.

3. Damage, destruction, or loss. The accused's damaging, destruction, or loss of the military property may be intentional or negligent.

4. Allowing another to sell, dispose of, damage, destroy, or lose. The accused may be guilty of an article 108 violation even if he merely allowed another person to wrongfully sell, dispose of, damage, destroy, or lose military property if the accused had a duty to protect the property and the accused either intentionally or negligently failed to perform that duty.

DAMAGE OR DESTRUCTION OF NONMILITARY PROPERTY (ARTICLE 109)

A. General concept. Article 109 prohibits certain types of damage or destruction to property other than military property of the United States. Wrongful sale or disposition of nonmilitary property is not covered by article 109.

B. Discussion

1. Nonmilitary property. Article 109 covers any property, whether real property or personal property, that is owned by someone other than a military department of the United States.

2. Wasting or spoiling real property. Damage to real property may be either intentional or the result of the accused's recklessness. More than simple negligence is required, however.

3. Damaging or destroying personal property. Damage or destruction of personal property must be intentional. No form of negligence will suffice.

C. Relationship of article 109 to article 108. The offenses in articles 108 and 109 are often confused. Actually, the distinctions between the two types of offenses are rather simple. The following checklist will be helpful.

1. Is the property military property of the United States?

a. If yes, the accused may be convicted for either intentional or negligent sale, disposition, damage, destruction or loss. The accused may also be prosecuted for allowing someone else to commit an offense against the military property. The property may be either real or personal property.

b. If no, the type of the nonmilitary property must be determined.

2. Is the nonmilitary property real property or personal property?

a. If real property, the wasting or spoiling may be caused either intentionally or through recklessness.

b. If personal property, the damage or destruction must be intentional.

BAD CHECK LAW (ARTICLES 123a AND 134)

A. Overview. The UCMJ prohibits three types of bad check offenses. Article 123a prohibits using a bad check to procure something of value with the intent to defraud, and using a bad check to pay a past-due obligation with the intent to deceive. Article 134 is used to prosecute dishonorable failure to maintain sufficient funds in an account. [Note that certain situations involving bad checks might also constitute violations of article 121 (larceny), but article 123a should be used when bad checks are involved.]

B. Using a bad check with intent to defraud [article 123a(1)]

1. Make, draw, utter, deliver. "Make" and "draw" are synonymous and constitute the acts of writing and signing the instrument. "Deliver" means to transfer the instrument to another person. Delivery also includes endorsing an instrument over to another person or depositing it in one's own account. "Utter" has a somewhat broader meaning than "deliver." "Utter" also includes an offer to transfer the instrument, with a representation that it will be paid when presented.

2. Procurement of an article of value. The instrument must be used to procure an article or thing of value. An article or thing of value includes every kind of right or interest in property, or derived from contract, including interests and rights which are intangible or contingent or which mature in the future. Payment of a past-due debt is not a thing of value. It is not necessary that the article actually be procured, only that the accused used the instrument in an attempt to procure the item.

3. Knowledge. The accused must actually know that there is not or will not be sufficient funds to pay the instrument in full upon presentment at the time the instrument was made, drawn, uttered, or delivered.

4. Intent to defraud. The accused must intend to defraud. One must be very careful not to confuse the intent to defraud, under article 123a(1), with the intent to deceive, under article 123a(2). They are separate, noninterchangeable intents. Intent to defraud denotes an intent to obtain an article or thing of value through a misrepresentation.

5. Five-day rule. If the maker or drawer an the instrument is notified that it has been dishonored, but fails to redeem it in full within five days of the notification, the court may infer both that the accused knew that there would be insufficient funds upon presentment and that the accused had an intent to defraud. The five-day rule does not apply to persons other than the maker or drawer of the instrument. Notification of dishonor can be oral or written, and can be given by a bank or any other person.

C. Using a bad check with intent to deceive [article 123a(2)]

1. Past-due obligation. Under article 123a(2), the instrument is used to pay a past-due obligation [or for any other purpose not covered under article 123a(1)]. A past-due obligation is a legal obligation to pay a debt which has matured prior to the use of the instrument.

2. Intent to deceive. An intent to deceive is an intent to cheat, trick or mislead. It involves a desire to gain an advantage for oneself, or to cause disadvantage to another person, through a misrepresentation.

3. Five-day rule. The five-day rule, discussed above, also applies to this offense for makers and drawers.

D. Dishonorable failure to maintain funds (article 134)

1. General concept. Dishonorable failure to maintain sufficient funds for the payment of checks differs from article 123a offenses in that there need be no intent to defraud or deceive at the time of making and uttering, and that the accused need not know at that time that he did not or would not have sufficient funds for payment. The gist of the offense is the accused's conduct after uttering the instrument. Dishonorable failure to maintain sufficient funds is a lesser included offense of both article 123a check offenses.

2. Dishonorable failure. A dishonorable state of mind is one characterized by fraud, deceit, deliberate misrepresentation, evasion, bad faith, or a grossly indifferent attitude toward one's obligations. Simple mistakes in bookkeeping or oversights are insufficient. Dishonorable failure to maintain funds also occurs when the accused innocently overdraws the account, but thereafter wrongfully fails to deposit enough money to cover the overdraft.

CHAPTER XXIII

DRUG OFFENSES

ARTICLE 112a

Article 112a prohibits the wrongful use, possession, manufacture, distribution, importing, exporting, introduction into a military installation, vessel, vehicle, or aircraft, or possession, manufacture, or introduction with intent to distribute, of any controlled substance. Punishment is increased if these acts occur on a ship, aircraft, or missile launch facility, or are done by persons performing certain duties.

A. Definitions

1. Wrongfulness. To be punishable under article 112a, acts involving drugs must be wrongful. Such acts are wrongful if done without legal justification or excuse. Such acts would not be wrongful if done pursuant to legitimate law enforcement activities, or pursuant to authorized medical duties, or without knowledge of the contraband nature of the substance. Possession, use, distribution, introduction, or manufacture of a substance may be inferred to be wrongful in the absence of evidence to the contrary.

2. Marijuana. Marijuana is defined as all parts of the plant cannabis sativa L. (except mature stalks). It would also include derivatives such as hashish and any other species of the plant.

3. Controlled substance. A "controlled substance" is any substance listed in Schedules I through V as established by the Controlled Substances Act of 1970.

4. Possession. "Possession" is the knowing exercise of control. Possession of a drug can be either direct physical custody, such as holding a drug in one's hand, or constructive, as in storing the drug in a locker in a bus terminal while keeping the key. Possession must be "exclusive" in the sense of having the authority to preclude control by others, but more than one person may possess a drug simultaneously. Possession does not require ownership.

5. Use. "Use" includes any other act with the drug which provides a chemical effect in the body.

6. Distribution. "Distribution" is the delivery of possession to another. Distribution replaces the previously defined drug offenses of sale and transfer.

7. Manufacture. "Manufacture" is the production, preparation, and processing of a drug. Manufacture can be accomplished either directly or indirectly. It can be effected by extraction from a substance of natural origin or independently by chemical synthesis. "Manufacture" also includes the packaging or repackaging of a substance and the labeling or relabeling of a container. "Production" includes planting, cultivating, growing, or harvesting.

8. Introduction. "Introduction" is the act of bringing a drug or causing a drug to be brought into or onto a military unit, base, station, post, ship, or aircraft.

9. Intent to distribute. The presence of an intent to distribute increases the severity of possession, manufacture, or introduction. Indicia supporting such an intent would be the possession of a quantity of drugs in excess of a normal quantity for personal use, the manner in which a substance was packaged, and the fact that an accused was not normally a user.

B. Relationships among the prohibited acts

Some very recent case law suggests that if the accused possesses a separate "stash" of drugs which is kept hidden and remote from the drugs which are distributed, separate specifications alleging possession and distribution are appropriate.

C. Proof of the substance's identity. At trial, the prosecution must prove that the substance the accused distributed, used, possessed, manufactured, imported, exported, or introduced was a controlled substance. Of course, the most reliable evidence of the substance's identity and composition will be the results of chemical analysis. Nonexpert testimony may also be admissible sometimes to prove the substance's identity. A person who has used the same substance on previous occasions and is familiar with its appearance and effects may give his or her opinion about the substance's identity. Such testimony is rather common in marijuana cases.

DRUG PARAPHERNALIA

Article 112a does not address drug paraphernalia, and resort must therefore be made to any applicable orders or regulations (or to article 134).

COMMON DEFENSES IN DRUG CASES. Three defenses commonly arise in drug cases: Lack of knowledge, entrapment, and lack of wrongfulness.

A. Lack of knowledge. Three types of lack of knowledge on the part of the accused may be pertinent in drug possession cases. First, the accused may claim a lack of knowledge that he or she possessed the substance. Second, the accused may claim lack of knowledge regarding the substance's true identity. Third, the accused may claim a lack of knowledge that possession of the substance was illegal.

The accused's possession must be knowing and conscious. Therefore, if the accused didn't know he or she possessed the substance, the accused has a complete defense. Likewise, if the accused knew he or she possessed the substance, but honestly didn't know the substance's true identity, the accused also has a complete defense. Ignorance of the fact that possession of the substance is illegal is no defense.

B. Entrapment. Entrapment may be a defense to any crime, but it often arises in prosecutions for distribution of drugs. Entrapment exists when the police or an undercover agent deliberately coerce the accused to commit a crime, even though the accused had no predisposition to do so. Entrapment involves overcoming the accused's desire to be a law-abiding person. It is not merely affording the accused an opportunity to commit a crime that the accused already was predisposed to commit; instead the accused must have had no predisposition to commit the crime. For entrapment to lie, therefore, the accused must have committed the crime only because of overbearing, insistent coercion by the police or an undercover agent.

C. Lack of wrongfulness. Another defense that may be raised on drug use is the "authorized medicinal purposes" exception.

CHAPTER XXIV

DRUNKENNESS

OVERVIEW. The UCMJ prohibits four major types of drunkenness offenses:

A. Drunk on ship, on station, in camp, or in quarters (article 134);

B. drunk on duty (article 112);

C. incapacitation for duty (article 134); and

D. drunken or reckless driving (article 111).

"DRUNK" DEFINED

"Drunkenness" is "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties." Drunkenness is therefore measured in terms of the impairment of physical abilities, such as vision, speech, balance, coordination, and reaction time. Drunkenness is also determined by the impairment of the accused's judgment. Drunkenness may be caused by alcoholic beverages, or by drugs. There is no specific point at which a person becomes drunk.

PROOF OF DRUNKENNESS

Intoxication can be proven in several ways. The results of scientific tests are the most reliable proof of intoxication when they are properly performed. Such tests may not always be sufficient by themselves, however. Tests of physical coordination, such as walking a straight line or balancing on one leg, are frequently administered when the accused is apprehended. These tests do not require article 31 warnings. Nonexpert opinion is also admissible to prove intoxication. Any witness who observed the accused can testify regarding his or her observations of the accused's behavior.

DRUNK ON SHIP, ON STATION, IN CAMP, OR IN QUARTERS (ARTICLE 134)

A. Discussion. The accused must have been drunk while voluntarily present on a military installation or in military quarters. If the accused was brought aboard the installation against his or her will the accused is not guilty of this offense. Not all instances of drunkenness on a military installation or in quarters are offenses against the Code. Drunkenness will be criminal only if the accused's behavior was directly prejudicial to good order and discipline or was service-discrediting.

B. Drunk and disorderly. The offense of drunk and disorderly is an aggravated form of drunk on ship, on station, in camp, or in quarters. This offense is also prosecuted under article 134. To be found guilty of drunk and

disorderly, the accused must be drunk aboard a military installation or in quarters, and must be engaged in disorderly conduct.

DRUNK ON DUTY (ARTICLE 112)

The term "duty" includes all types of military duties, except for those of a sentinel or lookout. Drunkenness by a sentinel or lookout is prosecuted under article 113. "Duty" includes standby duty, such as for flight crews, but it does not include liberty or leave. In order to be drunk on duty, the accused must first assume the duty and then be found drunk while still on duty. In many cases, this requirement will be satisfied by the accused's coming to work drunk. Where formal posting or assumption of duty is required, however, the accused will not be on duty until he or she properly assumes the duty. Merely being hung-over is not sufficient for this offense.

INCAPACITATION FOR DUTY THROUGH PRIOR WRONGFUL INDULGENCE IN INTOXICATING LIQUOR OR ANY DRUG (ARTICLE 134)

"Incapacitation" occurs when the accused is unable to perform assigned duties in a proper manner. Drunkenness is not required, and incapacitation can result from a bad hangover. As a practical matter, if the accused is drunk when he is to assume the duties, the accused will usually be considered to be incapacitated. This is not a lesser included offense of drunk on duty.

DRUNKEN OR RECKLESS DRIVING (ARTICLE 111)

A. Vehicle. "Vehicle" includes any mechanical conveyance for land transportation, whether or not motor-driven or passenger-carrying. One operates a vehicle when one guides the vehicle while in motion, sets the vehicle in motion, or manipulates the vehicle's controls so as to cause the vehicle to move. Water or air transportation is not included.

B. Drunk or reckless. The accused must either be drunk while driving or driving in a reckless manner. "Drunk" has the same meaning as discussed in "DRUNK" defined on page 1 of this chapter. "Reckless" involves a culpable disregard of the foreseeable consequences of one's actions. It is a significantly greater degree of carelessness than simple negligence. "Wanton" involves an even greater degree of negligence than recklessness. Wantonness involves an utter disregard of the probable consequences of one's actions.

Drunken driving is not always reckless driving. Drunkenness is a factor which, along with all the other evidence, may prove recklessness or wantonness. Thus, a drunk driver who nonetheless obeys the speed limit and is careful of the safety of others is not guilty of reckless driving, only drunken driving. There is no such offense as drunk and reckless driving.

C. Drunken or reckless driving resulting in personal injury. If the accused's drunken or reckless driving results in personal injury to a person, including the accused, this fact increases the maximum authorized punishment. A personal injury is any injury serious enough to warrant medical attention.

CHAPTER XXV

MISCONDUCT BY A SENTINEL OR LOOKOUT

OVERVIEW

Article 113 makes it a criminal offense for a sentinel or lookout to be drunk on post, to sleep on post, or to leave the post before being properly relieved. Article 134 prohibits sitting or loitering on post. Sentinel and lookout offenses involve the accused's failure to remain vigilant and alert. They constitute a distinct group of serious military offenses, some of which are punishable by death if committed during time of declared war.

WHO IS A SENTINEL OR LOOKOUT?

A sentinel or lookout is one whose military duty requires constant vigilance and alertness. A sentinel or lookout is one whose duties include the requirement to maintain constant alertness, be vigilant, and remain awake, in order to observe for the possible approach of an enemy, or to guard persons, property, or a place, and to sound the alert, if necessary. The terms include one who is detailed to use any equipment designed to locate friend, foe, or possible danger, or at a designated place to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work.

DRUNK ON POST

"Drunk" has the same meaning under article 113 as it does for other drunkenness offenses under the Code.

SLEEPING ON POST

Sleeping on post is perhaps the most common sentinel or lookout offense. Sleep is a condition of insentience sufficient to impair the full exercise of mental and physical faculties. It is more than a dulling of the senses or drowsiness, but it is not necessary that the accused be wholly comatose. The accused is guilty of sleeping on post if he either intentionally went to sleep or accidentally fell asleep. If the accused falls asleep due to factors beyond his control, the accused will not be criminally liable. If the accused could have prevented falling asleep by getting proper rest before assuming his post, however, the accused may be found guilty of this offense.

LEAVING POST BEFORE RELIEF

The accused has left the post when he goes far enough away to impair the maintenance of constant alertness.

LOITERING ON POST

Loitering connotes idle behavior and inattention by the sentinel or lookout. It includes all acts that detract from the maintenance of vigilance.

WRONGFUL SITTING

Sitting on post must be unauthorized sitting which detracts from the proper maintenance of vigilance.

CHAPTER XXVI

BREACHES OF RESTRAINT

OVERVIEW

Articles 95 and 134 prohibit five major offenses involving breaches of lawful restraint. Article 95 prohibits resisting apprehension, escape from confinement, escape from custody, and breaking arrest. Breaking restriction is prosecuted under article 134.

RESISTING APPREHENSION (ARTICLE 95)

A. Discussion

1. Apprehension. Article 7(a), UCMJ, defines apprehension as the act of taking a person into custody. Apprehension equates to a civilian arrest. In the military justice system, the terms "apprehension" and "arrest" must not be confused. They are not synonymous.

2. The attempt to apprehend. Someone must have made an overt effort to apprehend the accused. This attempt must include clear notice to the accused that he was being placed in custody. While words such as "You are under apprehension" are the clearest notification to the accused, the accused may be notified by other words or acts importing the same meaning.

3. Authority to apprehend. Article 7 of the Code and R.C.M. 302(b), MCM, 1984, authorize commissioned officers, warrant offjcers, non-commissioned officers, petty officers, and those engaged in law enforcement duties, to conduct military apprehensions.

R.C.M. 302(b) also states a policy that an enlisted member should apprehend a warrant or commissioned officer only when ordered to do so by another commissioned officer, when necessary to prevent disgrace to the service, or to prevent the escape of one who has committed a serious crime.

4. Resistance. Words, by themselves, are insufficient to constitute resisting apprehension. Some degree of physical resistance is also required. The resistance must occur before the accused has submitted to the apprehending officer's control. If the accused submits to the apprehension and then attempts to resist, the offense committed is escape from custody or attempted escape from custody.

5. Knowledge. The "clear notification" requirement for the attempt to apprehend implies that the accused must have knowledge that an apprehension is being attempted. There is apparently no requirement that the accused actually know that the person attempting the apprehension is lawfully empowered to apprehend. It is a defense, though, that the accused held a reasonable belief that the person attempting to apprehend him did not have authority to do so. Therefore, a reasonable belief that the apprehending person was acting without authority to apprehend is a complete defense.

6. Alternate offenses. An accused, who forcibly resists apprehension, may be convicted of assault even if the apprehending officers lacked probable cause to apprehend, provided the officers were acting in good faith and do not use extreme force themselves.

B. Attempt not lesser included offense. Resisting apprehension is one of the few offenses for which attempt is not a lesser included offense. If the accused attempts to resist apprehension, the accused has, in fact, resisted apprehension.

ESCAPE FROM CONFINEMENT AND ESCAPE FROM CUSTODY (ARTICLE 95)

A. General concept. Although escape from confinement and escape from custody are two separate, distinct offenses, they share many common legal principles. Both offenses involve an escape from restraint. Confinement implies physical restraint, while custody need only be moral restraint, but may be physical restraint.

B. Discussion

1. Confinement. Confinement is the physical restraint of the person. One is in confinement if his freedom of movement is restrained by physical devices, such as leg irons, handcuffs, or a jail cell. A person, however, must first be delivered to and placed in a confinement facility prior to confinement status occurring. Thus, one who is in handcuffs is still only in custody if he has not yet been placed in a confinement facility or delivered to brig personnel.

A person may pass in and out of a status of confinement depending upon the existence or absence of physical restraint at a given moment. Thus, a prisoner at a brig is in a status of confinement while inside the brig. Suppose, however, that the prisoner is permitted to leave the brig on a work-release program. The prisoner is accompanied by an unarmed escort, who is instructed not to attempt to stop a fleeing prisoner. When the prisoner leaves the brig with the escort, the prisoner passes from a status of confinement to one of custody. If, however, the prisoner is accompanied by a guard who has the duty and the means to exercise physical restraint, confinement continues outside the brig. Dereliction in the execution of the brig guard's duty to exercise physical restraint does not terminate the confinement status.

2. Custody. Custody may only involve moral, rather than physical restraint of freedom of movement. As noted above, it can also involve physical restraint. Custody is usually imposed by lawful apprehension. Custody also may be imposed by lawful orders restricting the individual's freedom of movement to extremely limited confines.

3. Lawfully placed in restraint. The accused must have been lawfully placed in confinement or custody. This merely means that the legal procedures for placing the accused in confinement or in custody must be substantially followed.

4. Freed before being properly released. The accused's escape from the restraint need only be temporary or momentary. If the accused is stopped before completely throwing off the physical or moral restraint, the accused may be found guilty of attempted escape from confinement or custody.

C. Separate offenses. Escape from confinement and escape from custody are entirely separate, distinct offenses. Custody and confinement are separate statuses. Therefore, escape from custody is not a lesser included offense of escape from confinement, even though custody would appear to be a factually less serious status. Likewise, escape from confinement is not a lesser included offense of escape from custody.

BREAKING ARREST (ARTICLE 95) AND BREAKING RESTRICTION (ARTICLE 134)

A. General concept. Breaking arrest, under article 95, and breaking restriction, under article 134, are closely related offenses. Both involve the accused going beyond certain geographical limits imposed by superior authority.

B. Discussion

1. Arrest and restriction. Arrest and restriction are both imposed by superior authority and prescribe certain geographical limits beyond which the accused may not go. As a practical matter, arrest often involves closer geographical limits than restriction. A person in arrest cannot be required to perform military duties. "Arrest" under article 95 also includes arrest in quarters, which is a status of restraint which may be imposed as nonjudicial punishment only on an officer.

2. Proper authority. The person who placed the accused in arrest or restriction must have been legally authorized to do so.

3. Breaking arrest or restriction. The breach occurs when the accused goes beyond the limits of the arrest or restriction. Merely failing to comply with some other condition of the arrest or restriction is not breaking arrest or restriction, although other violations of the Code may have been committed.

C. Lesser included offenses. Breaking restriction is a lesser included offense of breaking arrest. Attempts are lesser included offenses of both breaking arrest and breaking restriction.

CHAPTER XXVII

FALSIFICATION OFFENSES

OVERVIEW. The UCMJ prohibits five types of falsification offenses:

A. False official statements (article 107);

B. forgery (article 123);

C. perjury (article 131);

D. frauds against the United States (article 132); and

E. false swearing (article 134).

FALSE OFFICIAL STATEMENT (ARTICLE 107)

A. Discussion

1. Official statement. The statement may be oral or written, but it must be an official statement. An official statement is any one made in the line of military duties. The coverage is meant to be extremely broad. A suspect who is being interrogated normally has no duty to make a statement. Article 31, UCMJ, protects the suspect's right to remain silent. Therefore, any statement made by a suspect during an interrogation is not an official statement. On the other hand, if the suspect has an independent duty to make a statement or report, any statement such an accused makes may be an official statement.

2. Accused's knowledge. The accused must have actually known, at the time the official statement was made, that the statement was false. This element is established if the accused had no belief that the statement was true.

3. Intent. The accused must make the false statement with an intent to deceive. This denotes an intent to mislead, trick, cheat, or induce someone to believe as true something that is false. No one actually need be deceived, nor any material benefit be obtained. If the accused knew that the official statement was false, the law will permit an inference that the accused intended to deceive.

FORGERY (ARTICLE 123)

Forgery is the false making or alteration of a signature or writing. The accused's acts must affect the document in such a way that, if genuine, it would impose a legal liability on another person or would adversely change another person's legal rights or liabilities. Forgery requires the specific intent to defraud. There is no requirement, however, that anyone actually suffer financial loss or legal detriment from the accused's acts. Forgery most frequently involves unlawfully signing another's signature, or unlawfully altering a check or document.

PERJURY (ARTICLE 131)

Perjury occurs when a witness gives sworn testimony in a judicial proceeding, and the witness knows at the time that the testimony is false. The perjured testimony must concern a material fact or issue in the trial. Judicial proceedings include courts-martial and article 32 pretrial investigations. False sworn statements in other hearings, proceedings, or situations are prosecuted as false swearing in violation of article 134. Closely related to perjury is the article 134 offense of subornation of perjury, which occurs when the accused induces a witness in a judicial proceeding to give sworn testimony that the accused knows is untrue.

FRAUDS AGAINST THE UNITED STATES (ARTICLE 132)

Article 132 prohibits seven offenses which constitute, or relate to, frauds against the United States Government. These fraudulent offenses include:

A. Making a false or fraudulent claim against the United States;

B. presenting a false or fraudulent claim against the United States for approval or payment;

C. making or using a false writing or other paper in connection with a claim against the United States;

D. false oath in connection with claims against the United States;

E. forgery of a signature in connection with claims against the United States;

F. delivering less than the amount called for on a receipt; and

G. making or delivering a receipt without having full knowledge that it is true.

See Part IV, para. 58c, MCM, 1984, for an extensive discussion of the various types of frauds against the United States.

FALSE SWEARING (ARTICLE 134)

A. Oath or affirmation. The accused must make a statement under a lawfully administered oath or affirmation. Article 136, UCMJ, lists the persons authorized to administer oaths and affirmations. The oath or affirmation must actually be administered.

B. False statement. The accused's statement under oath or affirmation must be false in fact. Moreover, the accused must not have believed that the statement was true when it was made. False swearing covers both official and unofficial statements. Thus, a suspect who knowingly makes a false statement during an interrogation is not guilty of making a false official statement. But, if the statement is made under oath, the suspect may be found guilty of false swearing. Article 31, UCMJ, merely protects the suspect's right to remain silent. Once the suspect takes an oath or makes an affirmation, the suspect is under a legal duty to tell the truth.

CHAPTER XXVIII

DEFENSES

OVERVIEW

Defenses may be grouped into two categories: Defenses in bar of trial and defenses on the merits. Defenses on the merits can be subdivided into general defenses and affirmative defenses. Insanity can be both a defense in bar of trial and a defense on the merits.

DEFENSES IN BAR OF TRIAL

Defenses in bar of trial are matters which do not directly relate to the accused's guilt or innocence. They present legal grounds for preventing the trial from proceeding. A successful defense in bar of trial will usually result in a dismissal of the charges without any determination of the accused's guilt or innocence of those charges.

A. Lack of jurisdiction. See R.C.M. 201-203, MCM, 1984, for a discussion of jurisdictional matters.

B. Statute of Limitations. The Statute of Limitations under the UCMJ is Article 43. As to all offenses committed on or after 14 November 1986, the accused may not be tried unless sworn charges are received by the officer exercising summary court-martial jurisdiction over the accused within 5 years after the commission of the offense. No time limit exists, however, for capital offenses, UA in time of war, or missing movement in time of war. Any period during which the accused is in a status of unauthorized absence is excluded from the computation of the 5-year period.

C. Former jeopardy. Article 44(a) of the Code provides that no person may be tried, without his consent, a second time for the same offense. Former jeopardy does not apply to a rehearing which has been ordered to correct errors in a previous trial of the same charges, nor does former jeopardy preclude a trial by court-martial when the previous trial was by a state court or foreign court. But see JAGMAN, § 0116d. Neither does former jeopardy apply when the former adjudication of the offense was at office hours or captain's mast.

D. Former punishment. When punishment has been imposed under article 15 for a minor offense, that offense cannot be tried at a subsequent court-martial. Former punishment also applies to article 13 punishments for minor disciplinary infractions by a person in pretrial restraint. If the offense is not minor, usually carrying a punishment in excess of one year in confinement, former punishment is not a bar to a subsequent court-martial.

E. Denial of speedy trial. See R.C.M. 707, MCM, 1984.

F. Constructive condonation of desertion. See chapter XVII ("Absence Offenses") of this section.

G. Grant or promise of immunity. See R.C.M. 704 and R.C.M. 907(b)(2)(D)(ii), MCM, 1984. If the accused has been previously promised or granted immunity from prosecution in return for his or her testimony at another proceeding, the accused may not be prosecuted for any offenses covered by the grant or promise of immunity. See JAGMAN, § 0130 for procedures for granting immunity.

H. Insanity. See "INSANITY," infra, for an analysis of the insanity defense.

DEFENSES ON THE MERITS

Defenses on the merits directly relate to the issue of guilt or innocence. A successful defense on the merits will usually result in a finding of not guilty to the charges and specifications to which the defense relates. Defenses on the merits may be subdivided into two categories: General defenses and affirmative -- or special -- defenses.

A. General defenses. A general defense denies that the accused committed any or all of the acts that constitute elements of the offense charged. It may also negate one specific element of the offense. The following are the most common general defenses:

1. Lack of requisite criminal intent. The defense offers evidence that the accused committed some of the alleged acts, but that these acts were done without the required criminal intent. Mistake of fact, discussed as an affirmative defense below, may also act as a general defense when the mistake prevented the accused from forming a required intent or state of mind. Diminished mental responsibility, discussed in paragraph D of this chapter, also functions as a general defense when, because of mental disease or defect, or because of intoxication, the accused was unable to form a required specific intent.

2. Alibi. Under the alibi defense, the defense contends that the accused couldn't have committed the alleged offense because the accused was elsewhere when it occurred.

3. Illegality of orders. See chapter XV ("Orders Offenses and Dereliction of Duty"), supra.

4. Good character. Under the Military Rules of Evidence, general good character evidence is not admissible to show that a person acted in conformity therewith. This general rule has several exceptions. One exception is that evidence of a pertinent trait of character of the accused offered by the accused may be admissible. Good military character is admissible in a drug prosecution to show the accused wasn't involved. Evidence of the character trait of honesty is admissible in a larceny trial. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders to show that the accused was less likely to have committed the offense.

B. Affirmative defenses. Affirmative defenses are also known as special defenses. The accused contends that his conduct was not criminal. In essence, the accused says, "I did it, but...." It is the accused's responsibility to present evidence that raises the affirmative defense..

1. Legal justification. Legal justification is the lawful performance of a lawful duty which results in the accused committing acts that otherwise would constitute a crime. The accused must be performing a lawful duty, which may be imposed by statute, regulation, orders, or custom of the service. Furthermore, the accused must be performing the duty in a lawful manner, although not necessarily in exact compliance with precise procedural regulations.

2. Obedience to apparently lawful orders. If the accused commits acts that would otherwise constitute a crime because he was ordered by competent authority to perform those acts, the accused will not be guilty of a crime if the orders were apparently lawful. An order is not apparently lawful if a person of ordinary sense and understanding would know or believe it to be illegal.

3. Accident or misadventure. See chapter XX ("Assaults"), supra.

4. Self-defense or defense of another. See chapter XX ("Assaults"), supra.

5. Duress. See chapter XXIV ("Assaults"), supra.

6. Entrapment. See chapter XXIII ("Drug Offenses"), supra.

7. Physical or financial inability. See chapters XV ("Orders Offenses") and XVII ("Absence Offenses"), supra.

8. Lawful consent. See chapter XX ("Assaults"), supra. A person cannot usually give lawful consent to an act likely to result in grievous bodily harm or death.

9. Special privilege. See chapter XX ("Assaults"), supra.

10. Mistake of fact. See chapters XVII ("Absence Offenses") and XXIII ("Drug Offenses"), supra. When the accused's mistake of fact negates a required specific intent, mistake of fact is a general defense.

11. Insanity. The accused's lack of mental responsibility at the time of the offense is a complete defense. Insanity is discussed, infra, and in R.C.M. 916(k), MCM, 1984.

INSANITY

In 1986, Congress enacted a new insanity standard under military law which applies to all offenses committed on or after 14 November 1986.

A. General concepts. Insanity is a legal concept, not a medical or psychological one. Insanity involves two distinct phenomena:

1. Lack of mental responsibility at the time of the offense; and

2. lack of mental capacity to stand trial.

These two concepts focus more on the effects of the accused's mental condition on his actions, rather than on the precise psychological nature of the accused's mental disorder. Thus, the law is more concerned with "How did this mental condition affect the accused?" than with "What type of mental disorder did the accused suffer?"

B. Lack of mental responsibility. A person is not responsible for criminal conduct if, at the time of such conduct, as a result of a severe mental disease or defect, the person was unable to appreciate the nature and quality or the wrongfulness of the acts.

C. Lack of mental capacity to stand trial. An accused may not be tried if lacking sufficient mental capacity either:

1. To understand the nature of the proceedings; or

2. to cooperate intelligently in his own defense.

If the accused lacks mental capacity to stand trial, court-martial proceedings will be held in abeyance until such time, if ever, that the accused is mentally capable of standing trial. The focus is on the accused's mental status on the day of trial rather than on the day the crime was committed.

D. Deciding insanity issues. The accused's insanity may be raised either before trial or during trial. It may even be raised after trial, but only under limited conditions.

1. Inquiry. R.C.M. 706, MCM, 1984, outlines procedures for inquiry into the accused's sanity. The issue of insanity may be raised by the accused's commanding officer, the defense counsel, the trial counsel, or the article 32 pretrial investigating officer. If the accused's commanding officer has reason to believe that the accused is insane, or was insane at the time of the offense, the commanding officer will refer the accused to a sanity board. It is wise to refer the accused to the sanity board whenever the issue is raised, in order to avoid later delays in disciplinary proceedings. The sanity board consists of one or more physicians. At least one member of the board should be a psychiatrist. Although sanity boards without a psychiatrist are permissible when a psychiatrist is not reasonably available, they are definitely unwise, as the finding of such a board would be subject to strong attack at trial. The sanity board will evaluate, examine, and observe the accused. The sanity board is required to report findings about whether the accused was free enough from mental disease or defect to:

a. Appreciate the criminality of his conduct;

b. understand the nature of the proceedings; and

c. cooperate intelligently in his own defense.

2. Commanding officer's options

After receiving the board's report, the accused's commanding officer may take one of four possible actions:

a. Dismiss the charges (if the commanding officer is competent to convene "a court-martial appropriate to try the offense charged");

b. suspend disciplinary proceedings, if the accused lacks mental capacity to stand trial;

c. institute an administrative separation proceeding; or

d. refer the charges for trial by court-martial.

CHAPTER XXIX

FRATERNIZATION AND SEXUAL HARASSMENT

FRATERNIZATION

A. Fraternization in general. Fraternization is a viable offense and there is an increasing number of fraternization cases being tried. Though each service appears to be handling the offense differently, cases have been successfully prosecuted under articles 92, 133, and 134. Presently, it is the negative effect wrongful fraternization has on discipline and morale that has allowed the proscription to withstand all manner of legal attacks. The courts have held that wrongful fraternization compromises the chain of command, undermines a leader's integrity and, at the very least, creates the appearance of partiality and favoritism. Fraternization is now a listed offense at paragraph 83 in the MCM, 1984.

B. Definition. Because fraternization has traditionally been a breach of custom, it is more describable than definable. Frequently it is not the acts alone which are wrongful per se, but rather the circumstances under which they are performed. Part IV, para. 83c, MCM, 1984, makes no specific attempt to define fraternization. It expressly adopts the "acts and circumstances" language, and describes the offensive acts as those which are in "violation of the custom of the armed forces against fraternization." Fraternization has also been described as "...untoward association that demeans the officer, detracts from the respect and regard for authority in the military relationship between officers and enlisted and seriously compromises the officer's standing as such." The military usage of the term refers to a military superior-subordinate relationship in which mutual respect of grade is ignored.

C. Officer-enlisted fraternization. Part IV, para. 83, MCM, 1984, prohibits WO-1's and above from associating with enlisted personnel on terms of military equality in violation of a custom or tradition. A service custom or tradition which makes the alleged conduct wrongful must exist. Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them. It is the existence of a custom that makes conduct such as fornication between officers and enlisted wrongful in the naval service. Absent the existence of the service-wide custom, it is not unlawful. The government may rely on written documents to prove a custom. In the Coast Guard, there is little written policy available, but custom may be proven through testimony.

D. Officer-officer/enlisted-enlisted fraternization. For cases of overfamiliarity between ranks which do not fit the elements described in Part IV, para. 83, MCM, 1984, there may be other means of prosecution.

1. The conduct may violate a lawful order or regulation and be punishable under Article 92, UCMJ. Notice that officer-officer and enlisted-enlisted overfamiliarity may have the same detrimental effect on morale and

discipline in certain circumstances as officer-enlisted fraternization. As such, the participants may be subject to a lawful order to cease. Failure to terminate the relationship may constitute willful disobedience under Articles 90 or 91, UCMJ.

2. The underlying conduct might itself constitute a separate crime such as adultery, sodomy, drug abuse or even dereliction.

3. The conduct may be such that it would constitute conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ. However, a higher level of misconduct must be shown under this article.

SEXUAL HARASSMENT

A. Sexual harassment in general. Sexual harassment, when charged under article 93, is not an offense that requires a sexual assault; more often, the conduct proscribed involves comments or gestures of a sexual nature. It is a form of abuse of subordinates.

B. Text of Article 93, UCMJ, cruelty and maltreatment

-- Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

C. Discussion and definitions

1. "Any person subject to his orders" means not only those military personnel under the direct or immediate command of the accused, but extends to all persons including civilian employees, who by reason of some duty or employment are required to obey the lawful orders of the accused. The accused need not be in the direct chain of command over the victim. This element, that the victim was subject to orders of the accused, creates an obvious loophole in the prosecution of sexual harassment cases under this article. It does not cover harassment between personnel of the same rank unless position or duties create a senior-subordinate relationship. Assault, improper punishment, and sexual harassment may all constitute the cruelty, maltreatment or oppression for article 93 purposes. Sexual harassment includes influencing, offering to influence, or threatening the career, pay or job or another person in exchange for sexual favors and deliberate or repeated offensive comments or gestures of a sexual nature. Part IV, para. 17c(2), MCM, 1984.

2. "Deliberate or repeated offensive comments." This language suggests that the offense may be committed willfully or through culpable negligence. The phrase "or repeated" is explained as referring to those comments or gestures of a sexual nature which are initially made innocently but become wrongful by repetition, particularly after the victim has complained.

D. Difficulties with article 93

-- Necessity of complaint. There is no requirement under article 93 that the victim complain though, certainly, if an innocent comment is made and the victim complains about the remark or gesture, such notice to the accused may go a long way in proving culpable negligence if the situation is repeated. Chapter 4, COMDTINST M5350.11 (series) requires the victim to make the situation known to the appropriate authority in the chain of command. The commander is required to investigate.

E. Related orders. See Chapter 8 of COMDTINST M5000.3 (series), CG Regulations.

F. Alternatives to article 93 for sexual harassment. Prosecution of comments and acts alleged to be sexual harassment is an area as yet untested by the appellate courts. However, there are many other articles and theories under which the same misconduct could be prosecuted.

1. Comments may amount to disrespect under articles 89 or 91, provoking speech under article 117, communicating a threat under article 134, extortion under article 127, bribery under article 134, or indecent language under article 134.

2. Where contact or acts are involved, articles such as 128 assaults, 134 indecent acts, 120 rapes, 125 sodomy, or 134 adultery may also be alternatives.

3. Finally, dereliction of duty under article 92 and conduct unbecoming an officer under article 133 may also be charged when sexual harassment is alleged.

COAST GUARD HANDBOOK

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CHAPTER XXX

ADMINISTRATIVE FACTFINDING BODIES

References: (a) Administrative Investigations Manual (AIM), COMDTINST M5830.1 (series)

TYPES AND FUNCTIONS OF ADMINISTRATIVE INVESTIGATIONS

A. An administrative investigation is a factfinding body convened to search out, develop, assemble, analyze, and record all available information relative to the matter under investigation. The report of the investigation is advisory in nature, intended primarily to provide convening and reviewing authorities with adequate information upon which to base decisions. Administrative investigations also serve as a repository of lessons learned, the contents of which may be disseminated to other units.

B. In terms of composition, there are three types of administrative factfinding bodies: courts of inquiry; boards of investigation; and, single individual investigation. In terms of procedures, there are two types of factfinding bodies: a formal investigation (required to conduct a hearing) and an informal investigation (not required to conduct a hearing). The principal distinguishing features of the different factfinding bodies are set forth below.

1. Courts of inquiry. AIM, Chapter 3. A court of inquiry has a number of distinguishing features.

a. It consists of at least three commissioned officers as members and a counsel for the court.

b. It is convened by a written appointing order.

c. It must take all testimony under oath and record all proceedings verbatim whether or not directed to do so in the appointing order.

d. Persons subject to the UCMJ whose conduct is subject to inquiry must be designated parties.

e. Persons subject to the UCMJ, who have a direct interest in the subject of the inquiry, must be designated parties upon their request to the court.

f. It possesses the power to subpoena civilian witnesses. (Article 47, UCMJ, provides for prosecution in U.S. District Court for anyone failing to appear, testify, or produce evidence before a court of inquiry.)

2. Formal investigation. AIM, 1-D-3.

a. It consists of one or more commissioned officers, warrant officers, senior enlisted persons, or civilian employees of the Department of the Navy as member or members.

b. It is convened by a written appointing order.

c. The appointing order may direct that the body take all testimony under oath and/or record all proceedings verbatim.

d. It uses a hearing procedure.

e. Persons whose conduct is subject to inquiry may be designated parties by the convening authority in the appointing order. Additionally, the convening authority may authorize the factfinding body to designate parties during the proceedings.

f. It does not possess the power to subpoena witnesses, unless convened under Article 139, UCMJ.

3. Informal investigation. AIM, 1-D-4.

a. It may consist of one or more commissioned officers as member or members. Chief petty officers may be used in a one-officer investigation.

b. It is convened by a written appointing order.

c. It is ordinarily not directed to take testimony under oath or to record testimony verbatim.

d. It utilizes informal procedures in collecting evidence, including personal interviews, telephone inquiries, and correspondence.

e. It must not designate any person as a party to the investigation.

f. It does not possess the power to subpoena witnesses.

C. The informal investigation should always be considered as the preferred method of factfinding. Generally, it will satisfy factfinding requirements without strict application of rules of evidence. Evidence can be attained through memoranda of phone conversations, personal observation, unsworn statements, etc. If the matter under investigation concerns an incident of serious import, such as the substantial loss of life/property, or a matter of international consequence, an investigation requiring a hearing or a court of inquiry will be utilized.

D. Formal investigations and courts of inquiry afford a hearing to any person whose conduct of performance of duty is subject to inquiry, or who has a direct interest in the subject of the inquiry (i.e., parties).

1. It is generally considered unnecessary or undesirable to designate parties at an investigation, since such a designation may interfere with the primary function of collecting information for advisory and dissemination purposes. If an individual is designated as a party, he has the right to counsel, to present evidence, and to cross-examine witnesses.

2. The advantage in designating a party is that the record of investigation may be used in lieu of an article 32 proceeding, if a general court-martial is deemed appropriate, as a basis for NJP without an additional hearing, and in lieu of an AIM, 5-M hearing.

E. Although any officer with article 15 power may convene either type of investigation, and any general court-martial authority may convene a court of inquiry, appropriate guidance should be sought from a law specialist in the chain of command, particularly if a formal investigation or a court of inquiry is contemplated.

1. When investigations are required

a. Whether to order an investigation, what type of investigation to convene, and the type of report required to be submitted are matters which are usually within the sound discretion of the commanding officer. However, AIM, 1-G-4 states that, among others, the following types of incidents ordinarily require investigation unless the final reviewing authority concurs that no written report is required:

(1) Potential claims for or against the government;

(2) damage to or loss of government property exceeding $5000 ($15,000 for aircraft and vessels over 65 feet), or in any amount if caused intentionally or negligently;

(3) GSA vehicle accidents resulting in bodily injury or damages greater than $500;

(4) specific types of aircraft and vessel casualties;

(5) loss or accidental discharges of firearms;

(6) loss or compromise of classified material;

(7) evaluation of certain enlisted personnel for reenlistment, incompetence, or retention in the service; or

(8) whenever directed by the CO.

2. Generally, the commanding officer of the unit concerned should convene the investigation. Provisions are available, however, to allow an alternative command to perform the investigation. This might result whenever an incident occurs at a distant location from the primary command (service-member dies while on leave) or when a primary command has a practical difficulty in conducting the investigation (ship due to deploy). Whenever it is desired that an alternative command perform the investigation, a request should be made to the appropriate in whose geographic area of responsibility the incident occurred. AIM, 1-G-1/2, 1-F.

F. Appointing order

1. Form of appointing order. A written appointing order signed by a convening authority is required for all formal investigations convened under this chapter. Informal investigations may be convened by written/message/oral orders, although informal boards of investigation convened by oral orders should be confirmed by a written appointing order or a message. Letter incident reports may be ordered to be prepared by any means. When required, a written appointing order must be in official letter form addressed to the senior member of a board of investigation or to the investigating officer of a one-officer investigation. Whenever circumstances warrant, investigations requiring a written appointing order may be initially convened on oral or message orders, with signed written confirmation issues subsequently.

2. Contents of appointing order. An appointing order must name the members, and must recite the specific purposes of the investigation, and contain explicit instructions about the scope of the investigation. An appointing order must contain sufficient instructions to ensure accomplishing the purposes of the investigation. It must direct the administrative investigation to report findings of fact, opinion, and recommendations. When a hearing procedure is required, the appointing order must specify the time and place for initial meeting, name any parties designated by the convening authority, state whether or not the administrative investigation has authority to designate parties, and state the scope of that authority. See AIM, 4-A-2.c. An appointing order shall contain directions for complying with the Privacy Act of 1974 (see AIM, 2-H) and Article 31 of the UCMJ, whenever the convening authority determines in advance that either will apply, but the investigation has the independent duty and responsibility to apply these statutes wherever appropriate whether or not the appointing order makes reference to them. The appointing order shall contain an attorney work product statement in claims cases (see AIM, 4-A-3). The convening authority may direct that oaths be administered to witnesses or that a verbatim transcript of the proceedings be prepared. The appointing order may, but need not, reflect the convening authority's authorization for administrative assistance and for a separate recorder. Sample appointing orders are in AIM, Encl. 3.

3. Deadline for completion

An AIM investigation should be completed in a timely fashion, normally not later than 21 days from the date of the incident. Each subsequent review/endorsement should be completed as soon as possible. Delays should be explained in the preliminary statement and subsequent endorsements.

G. In preparing an investigation, the question of combinability is important. It is imperative that the AIM investigation not interfere with a CGI or safety investigation, and it must be stressed that the investigating officer should not utilize certain materials from other reports for enclosure in his own report. See AIM, 1-C-4.

1. The narrative summary of a CGI report may not be utilized in the record of the investigation. Enclosures to the CGI report may generally be utilized in the investigation, after receiving permission from CGI.

2. Witness statements from mishap investigations cannot be included in the record of the AIM investigation. Witnesses providing information for use in aircraft accident reports are advised that such disclosures are confidential, in order that they may be encouraged to freely provide information which, hopefully, will preclude a recurrence of the incident. If air accident report statements are incorporated into AIM investigations, witnesses would be reluctant to speak, since the veil of confidentiality would be pierced.

REPORT OF INVESTIGATION FORMAT

A. Every AIM investigation must produce either a Standard Investigative Report or a Letter Incident Report (LIR). An LIR is a simplified reporting option for a one-officer informal investigation of relatively straightforward incidents, signed by the IO or CA. See AIM, 1-D-5. LIR's are normally submitted to the next superior in the chain of command for final action. AIM, 1-J-6.

B. An Investigative Report (IR) always contains a preliminary statement, findings of fact, opinions, recommendations, and enclosures.

1. The preliminary statement should be so labeled. This paragraph discusses what difficulties, if any, were encountered in preparing the investigation. Such difficulties might include problems in contacting witnesses as well as apparent conflicts in evidence which has been gathered. If such a conflict exists, a statement as to its resolution would be appropriate. Any delay in preparing the investigation should be recorded in the preliminary statement.

2. The preliminary statement should not be a substitute for the findings of fact, opinions, or recommendations, which comprise the substance of the AIM investigation.

3. Claims investigations should include an Attorney Work Product statement.

4. State that social security numbers were obtained from official record.

C. The findings of fact follow the preliminary statement. The findings are the investigating officer's description of what happened concerning the incident, and are recorded through his evaluation of the evidence.

1. Findings of fact must be specific. It is preferable that each finding be listed separately, rather than in narrative form, in order that reviewing authorities may more easily read the investigation before preparing the necessary endorsement.

2. Findings of fact are prepared in response to relevant checklists. Negative findings should be recorded when appropriate (e.g., Seaman Brown was not wearing seatbelts at the time of the accident).

3. Each finding of fact must reference each enclosure supporting it.

4. Opinions must not be incorporated into the findings of fact.

D. Opinions are logical inferences flowing from the findings of fact.

1. All investigations must report facts, opinions, and recommendations.

2. Opinions should be separately listed. They are subject to approval/disapproval by the convening authority and other reviewing authorities in their endorsements.

3. Each opinion must reference each finding of fact supporting it.

4. Opinions concerning liability and/or negligence are normally prohibited. AIM, 4-C-7.

E. The investigating officer will provide recommendations in the investigation package.

1. Recommendations flow from the findings of fact and opinions. They provide the basis for "lessons learned" for the benefit of other units.

2. Recommendations may focus on corrective action, disciplinary action, improvements, or awards.

a. If charges are recommended, a charge sheet should be drafted by the investigating officer.

b. If an administrative letter of censure is recommended, it should be separately drafted and forwarded for issuance, but will not be a part of the investigative report.

c. If a punitive letter of reprimand is recommended, a draft of the recommended letter should be separately prepared and forwarded as an enclosure to the investigative report.

3. In the first endorsement, the convening authority should note whether the recommendations have been implemented. If action remains pending, the convening authority should so note.

F. The enclosures are separately listed at the back of the investigative report. The enclosures are the key to the investigation and serve to support the findings of fact.

1. The appointing order is generally listed as enclosure (1).

2. All evidence should be contained in the enclosures. Documentary evidence utilized as enclosures should be legible for all reviewing authorities.

a. Witness statements form a large portion of the enclosures. The following guidance is applicable.

(1) The investigating officer should encourage the witness to tell the whole story, though he may assist the witness in avoiding irrelevancies.

(2) On the other hand, the investigating officer should avoid coaching the witness or suggesting otherwise immaterial facts.

(3) It is oftentimes preferable to have the witness sign the statement. In most instances, the statement need not be sworn.

b. A Privacy Act statement is needed only if personal information is solicited for inclusion in a system of records. As such, it is generally unnecessary for every witness to sign a Privacy Act statement since personal information is not usually warranted and since the investigation will not be retrievable by a witness' name. On the other hand, the subject, if any, of the investigation should sign a Privacy Act statement.

c. AIM, 2-F must be complied with before questioning a member regarding the incurrence or aggravation of an injury.

d. Art. 31, UCMJ, must be complied with before questioning a suspect.

ACTION BY CONVENING AND REVIEWING AUTHORITIES

A. The convening authority is tasked with preparing the first endorsement to the investigating officer's report.

1. In this endorsement, the convening authority may approve, disapprove, or modify findings of fact, opinions, and recommendations.

2. Amplifying material may also be submitted with respect to additional facts or opinions, as well as information concerning whether or not the recommendations have been implemented.

3. Specific approval/disapproval should be made concerning line of duty/misconduct opinions.

4. If the investigation is patently deficient, it should be returned to the investigating officer for corrective action before preparation of the first endorsement.

5. Material improperly enclosed in the investigation, such as CGI narrative summary reports and aircraft investigation forms, should be extracted from the investigation by the convening authority.

6. In reviewing the investigation for sufficiency, reference should be made to the aforementioned checklists contained in the AIM and other internal regulations.

7. Convening and intermediate reviewing authorities should segregate comments on findings of fact from opinions and recommendations. Findings of fact and enclosures are normally releasable under FOIA, while opinions and recommendations are not. See AIM, 1-L-5.

B. Routing

1. Investigative reports are routed to a final action authority, listed in AIM, 1-K-1, via all other commands with a direct official interest. An info copy is sent to the Headquarters program manager.

2. Final action authority is normally the cognizant GCMA, or HQ units with filled legal billets. Final action documents should not address opinions or recommendations, since such documents are releasable under FOIA. AIM, 1-J-2.

3. Commandant is final action authority for all courts of inquiry, significant casualties, loss or compromise of classified documents, and Anti-Deficiency Act violations. AIM, 1-K-2.

INVESTIGATIONS OPTIONS CHART

	COURT OF INQUIRY	BOARD OF INVESTIGATION (FORMAL)	ONE-OFFICER INVESTIGATION (FORMAL)	BOARD OF INVESTIGATION (INFORMAL)	ONE-OFFICER INVESTIGATION (INFORMAL)	LETTER INCIDENT REPORT
CONVENING AUTHORITY	GCMCA	GCMCA or Chief of Staff	SPCMCA (consultation with legal off. required)	SPCMCA	SPCMCA	Any CO or OIC
APPOINTING ORDER	Written (may be preceded by oral or msg orders	Same	Same	Written, msg, or oral	Same	Same
HEARING PROCEDURE	Yes	Yes	Yes	No	No	No
PARTIES	Permitted	Same	Same	Not permitted	Same	Same
MEMBERS						
NUMBER	At least three	At least two	One	At least two	One	One
SENIORITY	Senior to all parties	Same	Same	N/A	N/A	N/A
RANK	Pres.- LCDR or higher	Senior Mem.- LCDR or higher	LCDR or higher	Senior Mem.- LT or higher	CO, CWO, or CPO	N/A
COUNSEL FOR THE COURT	Required. Must be law spec. Should be MJ	N/A	N/A	N/A	N/A	N/A
RECORDER	N/A	If separate, must be law specialist; may be junior member	N/A	N/A	N/A	N/A
COUNSEL FOR PARTIES	Art. 27(b) qualified, unless waived	Same	Same	N/A	N/A	N/A
SUBPOENA	Yes	No	No	No	No	No
REPORT						
FORMAT	Written	Written	Written	Written	Written	Written
OPIN. & RECOM.	Only if directed	Required	Required	Required	Required	Permitted
MINORITY REPORT	Permitted	Permitted	N/A	Permitted	N/A	N/A
SIGNING	By all members	Same	By IO	By all members	By IO	By CA
LINE OF DUTY/ MISCONDUCT	Addressed, if Opin. & Rec. directed	Addressed	Same	Addressed, recommendation for hearing, if appropriate	Same	Same

CHAPTER XXXI

LINE OF DUTY AND MISCONDUCT DETERMINATIONS

References: (a) AIM, Chapter 5

GENERAL

Line of Duty and Misconduct (hereinafter LOD/Misconduct) determinations are extremely important in the administration of military personnel. Since personnel injuries are, unfortunately, an all too frequent occurrence in military life, it is often necessary to make a determination as to how the injury was incurred to ensure that the rights of the individual servicemember, as well as the government, are adequately protected.

WHY LOD/MISCONDUCT DETERMINATIONS ARE REQUIRED

When a servicemember is injured, with the possibility of a permanent disability, questions immediately arise concerning the potential entitlement to benefits if the member is unable to continue on active duty. In addition, if a member is unable to perform duty for a period of time, that member may be required to make up the lost time. The determination relating to the incurrence of the injury or disease will assist military officials and the Veterans' Administration in resolving the question of entitlement to benefits.

A. There are several rights and benefits that may be affected when a servicemember is injured.

1. A servicemember who is injured and misses duty because of his own misconduct may have his enlistment extended because of the time lost. Pursuant to 10 U.S.C. § 972 (1982), an individual unable to perform duty for more than one day because of intemperate use of drugs or alcohol, or because of disease or injury resulting from misconduct, is liable to have the enlistment extended, as well as affecting longevity and retirement multipliers through computation of creditable service (lost duty through misconduct is not creditable service). It should be noted, however, that a return to "light duty" is the equivalent of returning to "full duty."

2. An adverse determination could potentially result in a forfeiture of pay. This sanction is limited to cases where a member is absent from regular duties for more than one day because of disease caused by and following the intemperate use of liquor or habit-forming drugs. If pay is forfeited for more than one month, the member is entitled to $5.00 per month for personal expenses. Pay is not forfeited for absences caused by injuries.

3. Of more important concern is the determination of disability and retirement benefits, as well as Veterans' Administration benefits, when a servicemember has incurred injury or disease. In order to receive such benefits, the disease or injury must not have been incurred pursuant to the member's misconduct or while a member was an unauthorized absentee. Disability benefits are determined by regulations contained in the Physical Disability Evaluation System Manual (COMDTINST M1850.2 (series)), while the Veterans' Administration makes its own independent determinations as to line of duty and misconduct. In both instances, substantial weight will be placed on evidence utilized by the service in developing LOD/Misconduct determinations.

4. In addition, eligibility for continued medical treatment after discharge may depend on a favorable LOD/Misconduct determination.

5. The VA will also rely on the LOD/Misconduct "investigation" material in reaching its determination regarding VA benefits.

B. It should be noted that the above concerns are strictly administrative in nature and have no disciplinary significance. If deemed appropriate, disciplinary action may still be pursued regardless of findings made pursuant to an LOD/Misconduct determination.

WHEN LOD/MISCONDUCT DETERMINATIONS ARE REQUIRED. LOD/Misconduct determinations will be made under certain conditions.

A. If a servicemember incurs an injury which might result in permanent disability.

OR

B. If an individual is unable to perform duties for more than 24 hours, an LOD/Misconduct determination must be made. With respect to the inability to perform duties for more than 24 hours, a period of hospitalization for treatment, rather than observation, should be utilized as the criteria. A light-duty chit does not trigger the requirement to make a determination.

-- The above-noted criteria apply only when a servicemember suffers an injury. With respect to a disease, an LOD/Misconduct determination is made whenever a disease is alcohol or drug induced; when a disability is incurred as a result of a member's unreasonable refusal to seek medical or dental treatment; or whenever a member has incurred a disability because of a failure to comply with regulations requiring reporting and receiving treatment for venereal disease.

WHO SHOULD INITIATE ACTION

A. Generally, the commanding officer or officer in charge of the individual concerned should make the initial determination.

B. Provisions are available, however, to allow another command to make the determination. This might result, for example, when:

1. Afloat unit is deploying, and an ashore command assumes responsibility for the incident; or

2. an incident occurs at a distant location from the primary command (servicemember injured while on leave) or when a primary command has a practical difficulty in making the determination (ship due to deploy). Whenever it is desired that another command make the determination, "a request should be made to the command in whose geographic area of responsibility the incident occurred."

WHAT CONSTITUTES LINE OF DUTY. The term "line of duty" has a particular meaning pursuant to Chapter 5 of the AIM.

A. An injury suffered by a servicemember is presumed to have been incurred in the line of duty.

B. The presumption can be overcome if clear and convincing evidence shows one of several factors.

1. If a servicemember is injured while in a deserter status, the presumption is that the injury occurred outside of the line of duty.

2. A servicemember is outside of the line of duty if the injury occurred while the member was on an unauthorized absence which materially interfered with the performance of duties. Such material interference is established when the absence is in excess of 24 hours, unless there is evidence to the contrary. (Note that this 24-hour rule refers specifically to a line of duty definition - the other 24-hour rule discussed previously related to whether an LOD/Misconduct determination was required.)

3. A servicemember is also outside of the line of duty if clear and convincing evidence shows that the injury/disease was incurred while the member was confined under a general court-martial sentence including an unremitted dishonorable discharge.

4. While a member was confined in a civilian court following a felony conviction.

5. Finally, a servicemember's injury is outside the line of duty if incurred as a result of the member's own misconduct. As such, a determination can <u>never</u> be made that an injury was incurred in the line of duty/due to the member's own misconduct.

WHAT CONSTITUTES MISCONDUCT

A. It is presumed that a servicemember's injuries were not incurred due to the member's misconduct.

B. The presumption can be overcome by clear and convincing evidence of one of the following factors.

1. An intentional injury will constitute misconduct.

2. An injury incurred as a proximate result of gross negligence will constitute misconduct. Gross negligence is a reckless disregard of the foreseeable consequences.

C. A violation of law standing alone will not constitute misconduct, unless the injury was incurred through a foreseeable consequence of the violation.

-- For example, if an individual, while in the process of robbing a bank, was struck by an out-of-control automobile, the injury incurred would not be due to his own misconduct since the runaway automobile was not a foreseeable consequence of the violation. On the other hand, if the individual is wounded by a security guard, the injury, as a foreseeable consequence of the violation, would be due to the member's own misconduct.

D. Intoxication alone is not a basis for a misconduct finding unless the following tests listed in AIM, 5-H are met.

1. There must be a clear showing that the member's physical or mental faculties were impaired due to intoxication at the time of the injury.

2. The extent of the impairment must be shown.

3. The impairment must be a proximate cause of the injury.

4. If the impairment is due to the use of illegal drugs, an injury is due to misconduct if it proximately results from acts performed while impaired. See AIM, 5-G.

E. The previous distinction between disease and injury is important with respect to the definition of misconduct. While generally, the incurrence of a disease would not constitute misconduct, an unreasonable failure to accept medical treatment for a disease might be so construed. In particular, a member suffering a disability from venereal disease, who did not comply with regulations requiring the member to report and receive treatment for the disease, could be subject to a finding of misconduct.

F. A misconduct finding can only be made if an individual is mentally responsible at the time the injury is incurred. In the absence of evidence to the contrary, it is presumed that an individual is responsible for his actions. The issue of mental responsibility is of particular concern with respect to suicide attempts.

1. Since there is a strong instinct for self-preservation, a suicide attempt creates an inference of lack of mental responsibility, which would preclude a finding of misconduct for any injury incurred.

2. If an individual had a motive to commit suicide, it is considered that he was mentally responsible since he had, in fact, formed a basis for his otherwise questionable actions.

3. A suicide gesture is different from a suicide attempt. Since a gesture normally amounts to an intentionally inflicted injury, such injury will be incurred due to the member's own misconduct, unless lack of mental responsibility is otherwise shown.

POSSIBLE LOD/MISCONDUCT DETERMINATIONS. Given the previously discussed definitions of line of duty and misconduct, there are three possible determinations that can be made.

A. The injury was incurred in the line of duty and was not due to the member's own misconduct. This is the only favorable determination.

B. The injury was incurred not in the line of duty and was not due to the member's own misconduct. For example, the member could incur an injury, neither intentionally nor through gross negligence, at a time when he was an unauthorized absentee in excess of 24 hours. This would be an adverse determination.

C. Finally, an injury could be incurred while not in the line of duty and due to the member's own misconduct. This would also be an adverse determination.

HOW FINDINGS ARE RECORDED. After an LOD/Misconduct determination is made, the findings are recorded in one of several ways.

A. The easiest method of recording a finding is a service record entry. This entry is to be utilized when:

1. The commanding officer and medical representative agree that the injury was incurred in the line of duty; and

2. it is unlikely that permanent disability will occur. It is necessary to follow up on this requirement by ensuring that medical personnel make the entry in order to protect the servicemember.

B. An injury report form (CG-3822), in addition to a service record entry

1. Is utilized when:

a. The commanding officer and medical representatives agree that the injury was incurred in the line of duty; and

b. a service record entry alone is not sufficient (e.g., possible permanent disability).

2. Is forwarded to the final action authority and provides a satisfactory record for the servicemember's benefit. Sample at AIM, Encl 7. It may also be attached to a letter incident report or investigative report when an administrative investigation is otherwise required. Once approved, a copy is filed in the service record and one is forwarded to COMDT (G-PE/PO).

C. An administrative investigation (generally informal)

1. Is utilized:

a. Whenever an adverse determination is a likelihood -- that is, that the injury was incurred not in the line of duty. This investigation would be necessary to allow the servicemember ample opportunity to rebut the unfavorable determination.

b. Whenever the commanding officer deems it appropriate. For example, if a servicemember is injured in the line of duty by working with a piece of defective equipment, the commanding officer may decide to generate the investigation to determine the extent of the defect and whether action should be taken to replace the equipment. If an AIM investigation is utilized, the checklist in AIM 5-0 is the reference point for factual issues that must be discussed.

c. When a possible claim for or against the government exists.

2. Is forwarded to the final action authority as with other investigations.

REPORTS IN DEATH CASES

A. An LOD/Misconduct determination is not made in a death case. No survivor's benefits are conditioned on such a finding and the Veterans' Administration makes its own determination. If an investigation contains findings, opinions, and/or recommendations relating to such a determination, a reviewing authority should note the error and indicate its lack of validity in the forwarding endorsement.

B. Generally, an AIM investigation is utilized for factfinding purposes when a death occurs. This investigation is required:

1. Whenever a member of the service dies from other than natural causes, particularly an apparent suicide.

2. Whenever civilians or non-CG personnel are found dead on an installation under peculiar or doubtful circumstances.

In death cases, the investigation should include the requisite autopsy report and death certificate; however, completion of a death investigation and its forwarding will not be delayed to await final autopsy reports.

C. When a factfinding body is not required, but some record of the circumstances surrounding death is deemed appropriate, a letter report may be utilized.

CONVENING AUTHORITY REVIEW OF LOD/MISCONDUCT DETERMINATIONS

A. A convening authority should endorse an LOD/Misconduct determination in order to reflect his approval, disapproval, or modification of the findings and opinions.

-- On the injury report form, his signature would constitute an approval of the favorable determination.

B. If an AIM investigation has been conducted, the convening authority, in his required endorsement, must specifically comment on the LOD/ Misconduct opinion.

C. When an adverse determination is possible (servicemember not in the line of duty), the servicemember shall be afforded a hearing pursuant to AIM, 2-F.

1. Following notification and advisement of article 31 rights, as well as warnings pursuant to AIM, 2-F and the Privacy Act, the servicemember will be given an opportunity to examine and rebut the investigation.

2. The opportunity to examine and rebut should be provided after the investigation is completed, but prior to the preparation of the first endorsement. If the hearing is not conducted at the convening authority's level, subsequent reviewing authorities must return the investigation to the convening authority for the hearing before an adverse determination may be approved.

3. Except in disability cases, a servicemember does not have a right to military counsel at the hearing; if the member requests the assistance of military counsel to prepare the rebuttal, however, he should be allowed to consult counsel for this purpose, if possible.

D. Service record time-lost entries are initiated by the local command.

E. There are some special problems to consider with respect to AIM, 5-M hearings.

1. If a member is discharged before a hearing is conducted, an adverse line of duty determination simply cannot be rendered. It would be best to make no determination whatsoever, in order that the Veterans' Administration may make its own determination.

2. If a member is an unauthorized absentee, a command may wait a reasonable time for the member to return. If he remains absent, a determination may be made in accordance with the available facts; the command should document the member's unauthorized absence to indicate why the hearing was not conducted. When the member returns, he may reopen his case and rebut an adverse determination through a subsequent hearing.

3. If the member is incompetent and unable to participate in the hearing, an adverse determination cannot be rendered. The command may document the incompetency by an enclosure to the record, and note the problem in the forwarding endorsement.

4. If a member presents favorable material at an AIM, 5-M hearing, the command may gather evidence for surrebuttal. Such evidence must be attached to the record as an additional set of enclosures, and then the member should be afforded another hearing. This approach should generally be avoided, as the command should make an effort to have all evidence available at the first hearing.

FORWARDING OF DETERMINATIONS

A. The AIM investigation, or injury report, should be forwarded to the final action authority.

B. Law specialist review is required prior to final action on adverse determinations. Adverse findings may be appealed to COMDT (G-L). AIM, 5-N.

COMMON LOD/MISCONDUCT PROBLEMS

A. Commands should ensure that determinations, whether in the form of investigations or injury reports, be forwarded for review to a final action authority.

B. Commands should ensure that AIM, 5-M hearings are conducted when there is the possibility of an adverse determination. In addition, the individual should be allowed to review the complete investigation before the hearing is held.

C. When an AIM investigation is required, a finding of fact must be made as to the duty status of involved individuals.

D. In endorsements, commands and subsequent reviewing authorities should specifically address LOD/Misconduct opinions rendered in the basic investigation.

E. Commands should make every effort to enclose autopsies and death certificates in the AIM investigation. The investigation should not, for this purpose, be delayed.

CHAPTER XXXII

FREEDOM OF EXPRESSION

INTRODUCTION

When an individual enters military service, it is necessary for the member to conduct himself in accordance with military standards and in a manner consistent with good order and discipline. By virtue of military service, such a standard can, necessarily, be quite strict. The member does not forfeit first amendment guarantees simply because of military service; however, the member must have such guarantees balanced against the demands of loyalty, discipline, good order, and morale.

BALANCING TEST

Conduct which presents a clear and present danger to discipline and morale, or which otherwise constitutes a material interference with the military mission, can be subject to sanctions by military commanders. The sanctions will generally fall within the parameters of subsequent punishment instead of prior restraint. In this chapter, it is necessary to review the protections afforded military members with respect to their first amendment rights and to consider the conditions under which sanctions may be imposed if the exercise of such rights is inconsistent with military good order, discipline, and readiness.

FREEDOM OF SPEECH

A. As a protected right, freedom of speech must be preserved to the maximum extent possible. This is generally accomplished by prohibiting a prior restraint on the right to free speech. Prior restraints, in general, can be overly broad or ambiguous. On the other hand, the right to engage in free speech does not provide an absolute immunity from later sanctions (subsequent punishment) if such an exercise is in violation of the provisions of the Uniform Code of Military Justice.

B. Possible violations of the UCMJ could include disrespect, pursuant to Article 89, UCMJ; disobedience, pursuant to Article 91, UCMJ; and use of provoking words, pursuant to Article 117, UCMJ.

C. Examples

1. In one case, an accused attempted to convince other service-members not to cooperate in an investigation concerning alleged misconduct involving the accused's wife, minor stepdaughter, and other company members. After being given a direct order "not to speak with any of the men in the company concerned with this investigation except in the line of duty," the

accused persisted in his efforts to convince other servicemembers not to provide information. The accused was convicted of a violation of a lawful order pursuant to Article 92, UCMJ, and, on appeal, his conviction was overturned on the basis that the order was far too broad and void for vagueness, thereby constituting a prior restraint.

2. In another case, Marine drum and bugle corps members who refused to perform at a Flag Day ceremony in New Orleans because of dissatisfaction with conditions in the band were properly punished for conspiracy to disobey an order and disobedience of an order pursuant to Articles 81 and 91, UCMJ. Such punishment was proper, since the conduct of band members constituted a clear violation of the UCMJ and was inconsistent with good order and discipline.

3. The above cases serve to emphasize that the concept of subsequent punishment will be applied, while prior restraint generally is to be avoided.

FREEDOM OF THE PRESS

A. Possession of printed material

1. An individual may possess material (other than classified matter) in a private capacity. For example, there would be no prohibition against the possession of pornographic material in one's individual locker.

2. On the other hand, there is a distinction to be made between the private possession and public display of material. Also, the possession of such material would be sanctioned if there was a clear and present danger that an unauthorized distribution would occur. Again, this is a prior restraint and such a clear danger must be found. See PERSMAN, 8-N-2.

B. Distribution of printed material

1. Official channels

a. A commander may completely remove a publication from an exchange or library. Although he can exercise his discretion, the same standards of review with respect to all publications must be applied.

b. The commanding officer may not, however, prohibit distribution of a specific issue (e.g., January, February) of a publication, since he might be engaging in censorship over an issue already accepted for distribution through official outlets.

2. Unofficial channels

a. The commanding officer can determine whether distribution of material on base through unofficial channels will constitute a clear and present danger to good order and discipline. Therefore, he may require that his prior approval be obtained before such distribution is made.

b. In determining whether a clear and present danger exists, the commanding officer should objectively review all material that is to be distributed and the manner in which the distribution will be conducted. All parties desiring to distribute material should have a review of the material conducted in the same objective manner.

c. On completing the review, the commanding officer should notify the applicants in writing concerning the decision to approve or disapprove the proposed distribution. A decision not to allow the distribution of material on base through unofficial channels should be supported by a finding that such a distribution would present a clear and present danger to loyalty, discipline, and morale, or would otherwise materially interfere with the accomplishment of the military mission. It would be advisable for the commanding officer to retain his written review on file for a period of time after the application.

d. Finally, the doctrine of subsequent punishment remains applicable. If military members are involved in the distribution of material and, in some manner, violate the UCMJ through the distribution, sanctions may be imposed in spite of the commanding officer's prior approval of the distribution application.

WRITING OR PUBLISHING

A. Military members cannot use duty time or government property for personal vice official writing. Such a prohibition is manifested in 49 C.F.R. 99.735-11.

B. Material originated by Coast Guard personnel concerning foreign or military policy is subject to security and policy review pursuant to Article 9-2-8b., CG Regulations. This review is required even if the material appears in a publication favorable to military interests (e.g., Naval Institute Proceedings). This review must be completed before the article is submitted to any publisher.

C. Published material which violates the UCMJ or security regulations could subject the author to disciplinary action, in accordance with the doctrine of subsequent punishment.

RIGHT TO PEACEFUL ASSEMBLY

A. On-base demonstrations

1. A commanding officer may prohibit on-base demonstrations if a legitimate finding is made that such demonstrations may present a clear and present danger to good order, discipline, and morale. For example, a pro-marijuana or anti-government demonstration may have such an impact.

2. When petitioned for the right to demonstrate on base, the commanding officer should conduct a review similar to the review provided when an application is submitted to distribute material through unofficial channels. The review should be conducted utilizing the same standards for all

applicants. The commanding officer should articulate his reasons for approving or disapproving the application and maintain a file for a period of time after the application to demonstrate is submitted.

3. Even if the demonstration is permitted, the doctrine of subsequent punishment applies for violations of the UCMJ.

B. Off-base demonstrations

1. The commanding officer may engage in a prior restraint by prohibiting servicemembers from attending off-base demonstrations under circumstances which would provide for a material interference with the military mission. Such circumstances are as follows.

a. A servicemember may be prohibited from attending a demonstration while on duty. Obviously, a member's performance of duty is the primary concern and his attendance at an off-base demonstration would place him in an unauthorized absence status. This would adversely affect the command's mission, since other members would have to assume the absent member's workload.

b. The servicemember may be prohibited from attending a demonstration while in a foreign country. This prohibition applies in order to avoid embarrassing incidents to the United States by having military members involved in foreign disputes. Again, such activity is contrary to good order and discipline.

c. If the activity constitutes a breach of law and order, the member may be prohibited from participation. In this situation, the member could be prosecuted and jailed by civilian authorities, thereby causing the member to be away from the command for an extended period of time during which duty should otherwise be performed.

d. If violence is likely, the member may be prohibited from participation, since there is the possibility that a member might be injured and, therefore, lost to the command for a substantial period of time. A commanding officer who utilizes this provision should not engage in a fanciful determination, but should clearly articulate his factual basis for concluding that violence might result.

e. If the organization overtly discriminates on the basis of race, creed, color, sex, religion or national origin, such as Neo-Nazi and white supremacy groups, the member may be prohibited from participation. Involvement with such groups is considered utterly incompatible with military service.

2. If the above-mentioned conditions do not apply, the commanding officer would simply have the authority to prohibit the attendance at demonstrations <u>while in uniform</u> under the following conditions:

a. At subversive, Fascist or Communist meetings;

b. in connection with political and commercial activities;

c. at public demonstrations and speeches, if a military sanction could be inferred;

d. if wearing the uniform would discredit the military; or

e. when specifically prohibited by regulations.

3. Generally, the prohibition against wearing a uniform at demonstrations will be broadly construed in favor of the military. See Coast Guard Uniform Regulations, COMDTINST M1020.6 (series).

4. Because of jurisdictional considerations, the doctrine of subsequent punishment may be more difficult to apply for misconduct committed at an off-base demonstration. The member, of course, may be punished for disobeying an order if he attends a demonstration after being specifically advised that he was prohibited from doing so.

C. Off-base gathering places

1. The commanding officer may himself engage in a prior restraint by placing an off-base area or activity "off-limits" in an emergency situation.

2. In most other instances, however, the provisions of COMDTINST 1620.1 (series) will apply in which the Armed Forces Disciplinary Control Board, under the control of the area coordinator, will declare places "off-limits" where conditions exist that are detrimental to good health, welfare, good order, discipline, and morale. Such places may include, but are not limited to:

a. Establishments where violence is commonplace or drugs are readily available;

b. establishments engaging in discriminatory practices; or

c. establishments where unhealthy conditions prevail.

3. A servicemember, on notice that a place is off-limits, would be subject to punitive action if he frequents the establishment.

MEMBERSHIP IN ORGANIZATIONS

A. A servicemember may engage in passive membership in an organization without any sanctions being imposed.

B. An effort to engage in further activity may be prohibited by the commanding officer if such activity presents a clear and present danger to good order, morale, and discipline. For example, the distribution of materials or the recruiting of members into an organization may be inconsistent with such good order, particularly if the organization in question actively advocates discriminatory policies, e.g., KKK.

SERVICEMEMBERS' UNIONS

Pursuant to 10 U.S.C. § 976 (1982) and PERSMAN 8-N-2c, a military member may not at any time engage in activities relating to servicemembers' unions. The servicemember is prohibited from joining a military labor organization and from negotiating terms and conditions of military service. The servicemember (and civilian employee) is also prohibited from organizing or participating in strikes that concern the terms or conditions of military service.

RIGHT OF PETITION (GRIEVANCES)

-- The servicemember does have several methods through which he may present his views:

1. The servicemember may request mast pursuant to Article 9-2-3, CG Regulations.

2. the servicemember may present his viewpoints through command-sponsored councils and committees;

3. the servicemember may write an individual letter to his congressman, pursuant to 10 U.S.C. § 1034 (1982) and Article 9-2-7, CG Regulations (This authority, however, does not extend to group petitions. Approval must be obtained from the base commander before circulation on base of petitions addressed to members of Congress.);

4. pursuant to Article 138, UCMJ, the servicemember may file a complaint against a commanding officer who engages in arbitrary and capricious action (Chapter 7 of the MJM details the procedural requirements in filing such a complaint);

a. The officer exercising general court-martial jurisdiction will conduct proceedings on the complaint. If action on the complaint is not taken at the departmental level, the officer exercising general court-martial jurisdiction is responsible for forwarding a report of the proceedings to the Secretary of Transportation via the chain of command.

b. The commanding officer against whom the complaint is filed must be provided the opportunity to redress the wrong as a condition precedent to any action pursuant to article 138.

c. A complainant may withdraw his complaint at any time.

5. pursuant to Article 9-2-2, CG Regulations, a servicemember may file a complaint against a superior in rank or command, not his commanding officer, whom the servicemember believes committed a wrongdoing (The complaint should be drafted in temperate language. The immediate commanding officer of the person submitting the report should investigate the complaint and take action he deems appropriate); and

6. pursuant to the Military Civil Rights Manual, COMDTINST M5350.11 (series), the servicemember may submit a formal complaint of discrimination or sexual harassment.

POLITICAL ACTIVITIES

A. A servicemember may participate in limited political activities while on active duty, but, in most circumstances, is prohibited from becoming a candidate for or holding partisan civil office and engaging in partisan political activities. See PERSMAN, 16-C.

B. Partisan political activity is that which is in support of, or related to, candidates representing, or issues specifically identified with national or state political parties and associated or ancillary organizations. A civil office is one which involves the exercise of the powers or authority of civil government.

C. Prohibited activity by a servicemember on active duty for more than 30 days includes the following:

1. Campaigning as a partisan candidate for civil office;

-- Such civil office includes membership on a school board or municipal board of health.

2. making a public speech in a political campaign;

3. allowing or causing to be published political articles signed or authored by the member for partisan purposes;

4. making, soliciting, or receiving a campaign contribution for another member of the armed forces, or for a Federal employee or partisan political candidate; and

5. participating in any organized effort that is associated with a party or candidate to provide voters with transportation to the polls.

D. Authorized political activity includes the following:

1. Voting and exercising personal opinions on an issue, though not as an armed forces representative;

2. writing a letter to the editor expressing personal views on public issues;

3. holding a local, part-time, nonpartisan civil office with prior Commandant approval;

4. joining a political club and attending its meetings when not in uniform; and

5. displaying a political sticker on one's private automobile.

REASONABLE ACCOMMODATION OF RELIGIOUS PRACTICES

-- Commanding officers should recognize the religious preferences of individual servicemembers, respect such preferences, and accommodate individual religious practices where such can be done without an adverse impact on readiness, unit cohesion, or good order and discipline. The policy of reasonable accommodation includes, but it not limited to, the following: Worship services, holy days, and Sabbath observance; wearing of certain visible items of religious apparel in uniform as well as underneath the uniform; allowing servicemembers to provide their own supplemental rations at sea or in the field (e.g., Kosher food products); wearing of visible religious articles in designated living spaces; and waiver of immunization requirements. Note that the policy does not require a commander to grant any specific accommodation, nor does it require accommodation where to do so would detract from military readiness or discipline, or would undermine unit morale.

CHAPTER XXXIII

STANDARDS OF CONDUCT

COMDTINST 5370.6 (series) and 49 C.F.R. Part 99 are the primary references.

A. These references prescribe required standards of ethical conduct governing all "personnel of the Department of Transportation."

-- Defined: All civilian officers and employees and all active duty military personnel, including special government employees and personnel of nonappropriated fund instrumentalities (special government employees include Reserve officers while on active duty for training, involuntarily recalled, or serving on "extended" active duty for 130 days or less).

The rationale behind the standards is that such personnel, as public servants, have been accorded special trust and confidence. Because of this position, they must be held to a higher ethical and moral standard than that prevailing in the civilian sector. Consequently, in applying these standards, the issue is not only whether there was actual wrongdoing, but equally important, whether the appearance of wrongdoing exists.

B. These references state certain policies for interpreting and executing these standards. These six prohibitions provide broad themes which are useful in resolving those situations which are otherwise not specifically discussed in the instruction. Generally, personnel must avoid any activity which might result in, or may reasonably create, the appearance of:

1. Using public office for private gain;

2. giving preferential treatment to any person or entity;

3. impeding government efficiency or economy;

4. losing complete independence or impartiality;

5. making a government decision outside official channels; or

6. doing anything which adversely affects the confidence of the public in the integrity of the government.

C. The standards regulate the following areas of conduct:

1. Affiliations and financial interests - which refers to conflicts between private and public interests which arise from a person's official position (e.g., a government purchasing agent who authorizes a purchase from a company in which he holds a financial interest);

2. using inside information - for private gain (e.g., buying or selling stock because you know a company will get a major contract or will lose a major bid);

3. using government position - to influence any person, including subordinates, to provide private gain;

4. dealing with present and former military and civilian personnel - who are themselves violators (this is the "leper rule," knowing dealings with other standards of conduct violators incriminates this individual);

5. commercial soliciting by military personnel - commercial solicitation of military personnel who are junior in rank, at any time, on or off duty, is prohibited. PERSMAN 16-E-1 gives further detailed guidance concerning commercial solicitation (e.g., selling insurance, real estate, stocks, etc. to subordinates is prohibited; however, one-time sale or lease of homes or autos is permitted);

6. assignment of Reserve personnel for training - should not be made to duties in which they will obtain information for use in the private sector or in order to obtain an unfair advantage over civilian competitors;

7. gratuities - personnel cannot accept "gifts" from Coast Guard contractors or entities regulated by the Coast Guard (a gift is any benefit for which fair market value is not paid, and a Coast Guard contractor is any entity having commercial dealings with the Coast Guard (meals, plane rides, lodging, samples, promotional items). Receipt of advertising items of nominal intrinsic value is permitted, if they were unsolicited;

8. receipts in connection with official travel - accommodations and other services can be paid for by outside groups only in certain limited situations (e.g., you could not accept a plane ride from a CG contractor even if the plane was going directly to your destination);

9. speaking, lecturing, writing, and appearance as expert witness in a nonofficial capacity - limitations are imposed upon when fees may be accepted and what resources an individual may use (e.g., if lecturing on information gained through government employment, or on government time, honoraria must be turned in to the government);

10. contributions or presents to military superior - are prohibited, except in certain infrequent situations where the contribution is voluntary, nominal, and the gift is not extravagant (weddings, retirements, and transfers are some examples, but birthdays are not such special events because they occur on a regular basis -- office Christmas gift "pools" are permissible);

11. use of government facilities, property, and manpower - must be for official purposes (e.g., cannot use government personnel for private projects, i.e., wash your car, type a personal letter, paint your privately owned off-base quarters);

12. use, by active duty personnel, of military titles or positions in connection with commercial enterprises is prohibited - cannot endorse commercial products, etc.;

13. outside employment - must not be a conflict of interest, discredit, or interfere with official duties (e.g., cannot moonlight for a government contractor when you have dealings with him in your job);

14. gambling, betting, and lotteries - are prohibited unless specifically excepted by COMDT;

15. indebtedness - personnel must pay their debts in a timely manner.

PROCEDURES FOR ENFORCING COMPLIANCE

A. Monitoring and reporting violations is the individual responsibility of all personnel. Fraud, waste, and abuse is a "hot" topic. A toll-free number is available for the public to report possible government fraud, waste, or abuse: 1-800-424-9098 for DoD, 1-800-424-5454 for GAO.

B. Enforcement is the responsibility of appropriate command authority. Sanctions may be administrative and/or punitive. Violators may suffer warnings, letters of censure, loss of job, or criminal action.

C. All flag officers and certain senior civilian employees are required to file SF-278 financial disclosure statements annually. In addition, most Headquarters and District Branch/Division Chiefs, OCMI's, COTP's, commanding officers of MSO's, and other officials listed in App. C-VIII of 49 C.F.R. Part 99 are required to file a DoT Form 3700.1 or 3700.2 confidential statement of employment and financial interest annually.

CONFLICTS OF INTEREST

A. Defined: Any personal, business, professional activity, or financial interest which places an individual in a position of conflict between private interest and the public interests of the United States related to the duties or responsibilities of the individual's official position.

B. Appearances are often what count - in this regard, this prohibition includes not only the private interest of the individual employee, but that of his/her spouse, minor children, and other household members as well.

C. Personnel are required to report all conflicts, possible conflicts, or appearances of conflict to the "appropriate supervisor." Easy test -- if, in performing government duties, that individual has to worry about how his decision will affect his private well-being, he has a conflict of interest.

D. Resolution of conflicts

1. Disqualification from participation in any duties related to the conflict.

2. If individual cannot, after disqualification, adequately perform duties:

a. Divestiture of the conflict; or

b. removal from position. This decision will be made after consultation with the "appropriate supervisor" -- the supervisor who is acquainted with the duties of the person concerned and "can best determine the existence and effect of any conflict of interest."

3. "Clearing the air" -- If, after reporting potential conflict to the appropriate supervisor, that official determines that the interest is too remote to constitute a conflict, the individual may proceed with the proposed official action.

E. Examples:

1. The Morale, Welfare and Recreation Division of a base needs new camping equipment. The CO owns a sporting goods store and tells his store manager to sell the gear to MWR <u>at cost</u>. Is this a problem? Yes! The appearance to the public is one of a conflict of interest.

2. The CO's son applies for a summer job at the Golf Pro Shop on his father's base. He was the most qualified and got the job. Any problems? Yes! At least to the other applicants, it appears that he got the job because he was the CO's son.

3. The CO owns 100 shares of Xerox stock. He purchases five new Xerox Displaywriter typewriters for his admin office. Any problems? Yes! Even though 100 shares of Xerox stock is a seemingly insignificant amount, there is the appearance of personal gain from this government purchase.

PROHIBITION AGAINST USING INSIDE INFORMATION FOR PRIVATE GAIN

A. General rule: personnel cannot use inside information obtained as a result of their official position, which is not available to the general public, to further a private gain for themselves or others.

B. Examples:

1. As a defense project officer, you know in advance that a multi-billion dollar contract will be awarded to Grumman. You buy as much Grumman stock as you can afford <u>before</u> the announcement is made public.

<u>OR</u>

2. You sell all of your McDonald-Douglas stock because of your newly acquired nonpublic information.

CIVILIAN EMPLOYMENT DURING OFF-DUTY HOURS

A. Coast Guard personnel on active duty are in 24-hour duty status and their military duties shall at all times take precedence on their time, talents, and attention. However, subject to the conditions listed below, personnel are not prohibited from engaging in legitimate and ethical enterprise or employment during their off-duty hours. Personnel who accept off-duty employment must realist that, even though they are on leave or liberty, they are subject to recall and duty at any time.

B. Personnel on active duty shall not engage in any civilian employment enterprise which:

1. Involves law enforcement duties or activities;

2. by reason of the hours or nature of the work, interferes with or is not compatible with proper and efficient performance of their military duties;

3. may reasor ably be expected to bring discredit on the service;

4. is unethical, in view of the possible exercise of influence attending the member's military position;

5. involves conflict of interest, or the appearance of conflict of interest (generally, this restriction precludes employment by any individual or business organization having a direct business relationship with the Coast Guard as a vendor, contractor, or subcontractor);

6. is contrary to the provisions of any Federal, state, or local law or ordinance;

7. permits or appears to permit the employer to gain an advantage over his/her competitors in transacting business with the government by virtue of the employee's Coast Guard affiliation;

8. involves the solicitation of life insurance, mutual funds and other investment plans, commodities, and services on any U.S. government installation with or without compensation; or

9. involves personal commercial solicitation and sale to military personnel who are junior in grade or rate. This prohibition is applicable to activities on or off an installation, in or out of uniform, while on or off duty, and includes, but is not limited to, the personal solicitation and sale of life and automobile insurance, stocks, mutual funds, real estate, or other commodities, goods or services. As used in this subparagraph, "personal commercial solicitation" refers to those situations where a military member is employed as a sales agent on commission or salary and contacts prospective purchasers suggesting they buy the commodity, real or intangible, that he/she is offering for sale. This does not prohibit the one-time sale of a member's personally owned property. It is not the intent of this subparagraph to discourage the off-duty employment of military personnel, but it is intended to prohibit business dealings among members where grade, rank or position may be brought to bear or appear to do so.

C. No enlisted member of the armed forces on active duty may be ordered or permitted to leave his/her post to engage in a civilian pursuit or business, or a performance in civil life, for emolument, hire, or otherwise, if the pursuit, business, or performance interferes with the customary or regular employment of local civilians in their art, trade, or profession.

D. Off-duty employment of military personnel by an organization involved in a strike or lock-out is permissible if the member was on the payroll of such organization prior to the commencement of the strike, if the member will not be required to work at a site or location where a strike or lock-out actually is in progress, and if the employment is otherwise in conformance with the provisions of Article 16-E-1, CG Regulations. No military member initially may accept employment by an organization at a location where that organization is involved in a strike or lock-out after commencement and during the course of such a labor dispute. Members who have accepted employment in violation of the above prohibition are required to terminate such employment immediately.

E. No distinctive parts of the uniform may be worn by personnel while engaged in off-duty employment nor shall a member engaged in such activity obligate or commit the Coast Guard or in any way create an impression to the public that he/she is acting in an official capacity.

F. Procedures

1. While personnel shall not normally be restrained from engaging in legitimate and ethical enterprise or employment during their off-duty hours, nothing herein is intended to unduly restrict a commanding officer in the exercise of his/her prerogatives and discretionary authority. Accordingly, if a commanding officer considers it to be necessary or in the best interests of the Coast Guard, he/she may require at a minimum that personnel under his/her jurisdiction apprise him/her of off-duty activities and obligations.

2. If a commanding officer prohibits an active duty member from engaging in a particular enterprise or employment, he/she shall so notify the individual in writing and forward a copy of the notification to his/her district commander (p) and Commandant (G-PS). When a commanding officer has doubt as to the applicability of the foregoing restrictions to a member's outside employment or proposed outside employment, a fully documented request for determination will be addressed to Commandant (G-PS) via the chain of command.

3. Information concerning an individual's off-duty employment shall be treated as "for official use only" if disclosure might otherwise be a source of embarrassment to the member.

PROHIBITION OF THE USE OF WORDS "U.S. COAST GUARD"

14 U.S.C. § 639 prohibits the use of the words or letters "USCG, USCGR, Coast Guard, United States Coast Guard, Coast Guard Reserve, United States Coast Guard Reserve, Coast Guard Auxiliary, United States Coast Guard Auxiliary, Lighthouse Service, or Life Saving Service," either alone or in combination with other letters or words, as the name under with the user shall do business for the purpose of trade, or by way of advertisement to induce the effect of leading the public to believe that the user has any connection with the Coast Guard. While it is true that both retired and Reserve personnel have a connection with the Coast Guard, the connection condemned by the statute has reference to inducing the public to believe that the Coast Guard officially is interested in or connected with the subject matter of the advertisement.

POST EMPLOYMENT RESTRICTIONS
STATUTE SUMMARY

STATUTE	TYPE/DURATION/PENALTY	ACTIVITY PROHIBITED
I. PRIOR TO TERMINATING FEDERAL EMPLOYMENT		
18 U.S.C. § 208	Criminal, applies throughout employment; $10,000 and 2 years' imprisonment	Participating in an official matter involving a firm with which the employee is negotiating future employment
10 U.S.C. § 2397a	Civil and administrative; applies throughout employment; 10-year ban on employment with that contractor; $10,000 penalty, additional $10,000 if employment taken	Affirmative requirement to report contact to ethics official and disqualify self from acting on pending matters with the prospective employer
II. POST-FEDERAL EMPLOYMENT		
A. SELLING		
37 U.S.C. § 801(b)	Civil; 3 years from date put on retired list; no pay from the United States	Engaging in selling naval supplies or war materials to DoD, CG, PHS, or NOAA
18 U.S.C. § 281	Criminal; 2 years from date put on retired list; fine $10,000 and 2 years' imprisonment	Representing anyone in the sale of anything to the Government through the Department in which retired status is held
B. REPRESENTING		
18 U.S.C. § 207(a)	Criminal; applies for life; $10,000 and 2 years' imprisonment	Acting as attorney/agent for another person by appearance before, or communication with, the Government in connection with a matter in which the employee participated personally and substantially while in Government service
18 U.S.C. § 207(b)	Criminal; applies for life; $10,000 and 2 years' imprisonment	Acting as attorney/agent for another person by appearance before, or communication with, the Government in connection with a matter which was actually pending under the employee's official responsibility within one year before leaving Government service

STATUTE	TYPE/DURATION/PENALTY	ACTIVITY PROHIBITED
18 U.S.C. § 283	Criminal; applies for 2 years after retirement; $10,000 and 2 years' imprisonment	Acting as attorney/agent for prosecuting or assisting in the prosecution of any claim against the Government involving the Department in which retired status is held
18 U.S.C. § 283	Criminal; applies for life; $10,000 and 2 years' imprisonment	Acting as attorney/agent for prosecuting or assisting in the prosecution of any claim against the Government involving any subject matter with which he was directly connected while in an active duty status
C. ACCEPTING EMPLOYMENT		
§ 921, 1986 DoD Auth. Act	Criminal; applies for 2 years after negotiation/settlement; $5,000 and 1 year imprisonment	Accepting employment with a DoD contractor with which he has acted in negotiating or settling a Government contract
D. POST-EMPLOYMENT REPORTING REQUIREMENT		
10 U.S.C. § 2397b	Civil; applies for 2 years after leaving Government service; $10,000 administrative penalty	Affirmative requirement for O-4's and above w/10+ years of service to file DD Form 1787 when employed at a salary of $25,000+ by a DoD contractor which was awarded contracts exceeding $10 million during the prior year
37 U.S.C. § 801(b)	Civil; applies for 3 years after retirement; withholding of retired pay	Affirmative requirement for retired Regular officers to file Statement of Employment, DD Form 1357, which indicates whether the officer is employed with a DoD contractor

CHAPTER XXXIV

LEGAL ASSISTANCE

LEGAL ASSISTANCE

A. Legal assistance officers. All active duty law specialists may be designated as legal assistance officers to perform legal assistance as time and staff resources permit. See COMDTINST 5801.4 (series).

B. Scope

-- Regular program

a. Eligible personnel include all active duty members and their dependents, allied personnel, civilians (other than local-hire) serving overseas, retired personnel and their dependents, and survivors of members of the armed forces who would be eligible were the servicemember alive. In most cases, the demand for legal assistance far exceeds the available resources. Active duty personnel and their dependents have preference.

b. Subject to the limitations below, the full range of general practice is provided to the clients. Since the vast majority of civil suits are negotiated and never go to trial, there is plenty of room for the military lawyer in the process.

C. Limitations on legal assistance services. Legal assistance may not be provided in the following area:

1. Military administrative matters (including personnel matters) (Members seeking advice on military administrative matters should be referred to the appropriate staff element or command advisor. No attorney-client relationship is established by this referral);

2. military criminal matters, whether relating to preliminary inquiries, judicial, or nonjudicial proceedings;

3. private income-producing matters, including (but not limited to) issues pertaining to the establishment and management of small business associations (i.e., partnerships and small, closely held corporations) (The lease of a principal residence shall not be considered a private income-producing matter for purposes of this section);

4. claims against the United States;

5. complex estate planning matters and probate matters; and

6. in-court representation of member and/or dependents in divorce or child custody matters;

The legal assistance officer shall provide legal advice only. If, in the course of discussions with a client, the legal assistance officer discovers that the client's needs involve or potentially involve nonlegal matters, the legal assistance officer should refer the client to an appropriate person or agency for such nonlegal counseling.

D. Expanded legal services. The district director may authorize the provision of expanded legal services to those military personnel and their dependents who cannot reasonably afford legal fees without undue financial hardship. Subject to restrictions enumerated below, and state bar requirements, expanded legal services may include in-court representation before Federal, state, and local courts and administrative agencies in minor civil and criminal matters (nonfelonies) -- except when the United States of America is an adverse party. Eligibility for representation in civilian courts shall be determined by using the guidelines of the Legal Services Corporation found in 45 C.F.R. Part 1611.

E. On occasion, the legal assistance officer may be unavailable or a client may present a complicated case requiring specialized legal skills or a case which ultimately must be handled in court. In each of these instances, the client shall be referred to a legal services office, a local bar referral service, or in rotation from a list of local attorneys who have provided competent service for reasonable fees to servicemembers in the past. The names of no fewer than three attorneys, or two attorneys and a bar or legal service office, shall be given to a client desiring referral. Referrals shall not be routinely made to retired or Reserve Coast Guard officers only.

FAMILY LAW

A. Nonsupport

1. References: PERSMAN, 8-G

2. The PERSMAN, 8-G discusses dependent support and provide guidelines for the amount of support.

3. It is the policy of the Coast Guard that all personnel will provide continuous and adequate support to their lawful dependents.

a. A member must support their spouse unless:

(1) There is a court order which relieves the member of that obligation, or a divorce decree which does not specify alimony payments;

(2) the spouse relinquished in writing their right to support;

(3) there is mutual agreement of the parties (e.g., a written separation agreement); or

(4) the Commandant grants a waiver of support. The waiver must be requested in writing and is limited to those cases involving desertion or infidelity. See PERSMAN, 8-G-4.

The above list is in descending order of precedence. Therefore, if a valid court order is in existence, it must be followed.

b. Lawful minor dependents must be supported at all times unless:

(1) The child is adopted by a stepparent or other responsible adult; or

(2) a custody and support order specifically relieves the member of his support obligation. The conduct of the custodial spouse does not affect the obligation to pay support (e.g., refusal to grant visitation rights or cohabitation). The proper remedy is a modification of the custody decree.

c. Use the support guidelines in PERSMAN 8-G-3c when counseling a member as to what constitutes "adequate support" in the absence of a court order or agreement between the parties. Keep in mind that these are only minimum guidelines.

d. If the member refuses to provide support, they should be counseled on the possible penalties. These include:

(1) Lower evaluation marks;

(2) administrative separation;

(3) garnishment of pay by a civilian court with proper jurisdiction (see para. D below);

(4) disciplinary action under the UCMJ, Art. 134, for dishonorable failure to pay a debt;

(5) the Pay and Personnel Center may recoup previously paid BAQ and withhold future BAQ;

(6) the member may not be recommended for reenlistment; and/or

(7) loss of tax exemption for the dependent.

e. A commanding officer may temporarily waive the military obligation to comply with a court order for support of dependents if a member, acting on good faith and on the advice of an attorney disputes such a claim. The CO may withhold action for a reasonable time to allow the member an opportunity to resolve the matter. See PERSMAN, 8-G-2c.

B. Paternity complaints

1. References: PERSMAN, 8-G-5.

2. Policy: Complaints alleging that a servicemember is the father of an illegitimate child may be received by the command before, as well as after, the birth of the baby. Neither civil law nor naval regulations require a man to marry the mother of his child. Local law, however, generally requires

that a father support his illegitimate offspring and Coast Guard policy concerning support of dependents applies equally to illegitimate children. In many cases, a proper solution to a paternity problem involves not only the legal assistance officer who will advise the member as to his legal obligations and liabilities, but also the chaplain, who may advise the member concerning the moral aspects of the situation.

3. Procedures: Upon receipt of a paternity complaint, the command concerned will arrange for the interview of the servicemember and action will be taken as follows:

a. Judicial order or decree of paternity or support. If a judicial order or decree of paternity or support is rendered by a State or foreign court of competent jurisdiction, the member shall be advised that he is expected to provide financial assistance to the child regardless of any doubts of paternity he may have. Questions concerning the competency of the court to enter such a decree against the servicemember, particularly one not present in court at the time the order or decree was rendered, should be directed to a legal assistance officer.

b. Acknowledgement of paternity. If, in the absence of legal action declaring him the father, a member admits to paternity or the legal obligation to support the child, he shall be informed that he is expected to furnish support payments for the child and he should be counseled as to his moral obligation to assist in the payment of prenatal expenses. He should be advised to consult with the nearest legal assistance officer before making the first support payment or before corresponding with the child's mother. The member should be advised that once support payments are begun, the child will probably qualify for an armed forces dependents' identification card.

c. Disputed or questionable cases. In instances where no legal action has fixed the paternity of the child and the servicemember disputes or is uncertain of the accusation of the child's mother, he should be referred immediately to the nearest legal assistance officer. Since many states construe an offer of, or actual payment of, any support for the child as an admission of paternity, the servicemember should not be advised or directed to make any payments or give any indication of intent to provide financial support before he has consulted with the legal assistance officer.

4. Correspondence. Replies to individuals concerning paternity cases should be as kind and sympathetic as circumstances permit. PERSMAN, 8-G-5g sets out a sample reply which may be appropriate in some cases.

C. Uniformed Services Former Spouses' Protection Act (USFSPA)

1. This act was passed in response to a 1981 Supreme Court case which found that military retirement income was not divisible as marital property upon divorce and that the retirement income was the separate property of the retired member. Since a majority of states had been routinely dividing military retirement pay as a vested pension, this decision created chaos and prompted the passage of the USFSPA in 1982.

2. Major provisions of the Act include:

a. Allowing the states to treat military retirement pay as they would any other pension under state laws.

b. Requiring the state court to have jurisdiction over the respondent member. That jurisdiction may be obtained only by:

(1) The in-state residence of the member, other than presence in the jurisdiction due to military orders;

(2) the consent of the member; or

(3) domicile in the jurisdiction.

c. The former spouse is entitled to have their court-ordered share sent directly to them by the finance center if the marriage was for at least 10 years, and those 10 years were during creditable service toward retirement. So, even if the former spouse was married to the member for 15 years, if less than 10 of those years were during military service she would not be eligible to receive the payments directly from the finance center. She would have to get them from the retired member.

d. The Act also provides limited medical, exchange, and commissary privileges to an unremarried former spouse if the following conditions are met:

(1) The marriage lasted at least 20 years; and

(2) the former spouse does not have medical coverage under an employer-sponsored health plan (this provision affects medical benefits only; dental and other coverages are still allowed); and

(3) either:

(a) The retired member was in the service for at least 20 years while married to the former spouse, or

(b) the retired member was in the service for at least 15 years while married to this former spouse if divorced before 1 April 1985. (Divorces made final after 1 April 1985, where the marriage was for less than 20 years during military service, carry medical benefits for up to 2 years from date of divorce.)

D. Garnishment

1. The authority for garnishment of Federal pay is contained in 42 U.S.C. § 659 (1982) and in the USFSPA, supra. Procedures for handling a state garnishment order are contained in PERSMAN, 8-G-2d.

2. Before the mid-1970's, Federal pay was not subject to garnishment for any reason. 42 U.S.C. § 659 now provides for garnishment of Federal pay for arrearage in court-ordered child support or alimony and for attorney's fees in pursuing the garnishment order. An additional reason for garnishment was added by USFSPA (see above) in cases of a court-ordered property settlement.

3. A garnishment order or wage/earnings withholding order served upon the member or the command should be forwarded immediately to the appropriate legal office. If, upon legal review, it is found to be legally sufficient, it will be forwarded to the cognizant authorized certifying officer for compliance.

4. Provisions for entry of an involuntary allotment against a member have been in effect since 1 October 1982. Arrearage in child support or payment under a property settlement following divorce could result in an involuntary allotment against the member.

ACTION UPON RECEIPT OF COMPLAINT OF INDEBTEDNESS

A. References. The primary references for handling letters of indebtedness are contained in PERSMAN, 8-F.

B. The commanding officer will inquire into every complaint of indebtedness and take prompt action in order to minimize further correspondence. Such action, however, will be confined to support of Coast Guard regulations and the maintenance of discipline and shall not extend to acting as a debt collector. The commanding officer shall acknowledge all correspondence promptly and courteously in a conciliatory tone. Each reply should be written in third person, couched in temperate language, and should reflect the official interest of the commanding officer rather than the personal interest of any officer in the command. The reply should state that the matter has been brought to the individual's attention and that he/she has been advised to communicate with the complainant. The individual concerned should then be directed to correspond in a courteous manner with the complainant regarding his/her intentions in the matter. Both of the foregoing actions should be accomplished within 30 days of receipt of a complaint. A commanding officer has no legal authority to adjudicate a private claim. If the claim is not supported by a court judgment and the indebtedness is denied or disputed in good faith as to facts or law, the commanding officer's reply will note the denial or dispute in brief terms and will state, in addition, that there is nothing further that the commanding officer or Coast Guard can do, and that the appropriate forum for a determination of the rights of the parties is the proper civil court having jurisdiction. In such cases, members should be counseled to seek legal assistance and be given a reasonable time to resolve the matter. See PERSMAN, 8-F-1. If there is a court judgment against the member and the commanding officer has granted a temporary waiver of compliance with article 8-f-1d, the complainant shall so be advised, relating in general terms the reason for such action.

C. The individual will advise the commanding officer and the complainant of his/her intentions in the matter. The commanding officer should urge the individual to make payments on acknowledged debts by U.S. postal money order, check, or by any positive method whereby he/she will have an actual record of receipt of payment. The commanding officer should point out the advisability of retaining receipts in connection with all such business transactions.

D. Federal Fair Debt Collection Practices Act (FDCPA) (prohibition against professional debt collectors contacting employers). Such letters shall be returned.

E. State statutes. In addition to the FDCPA, local state law applies and frequently gives even more protection to the debtor. In some states, not even the creditor may contact the employer and this also gives the debtor a cause of action. If local state law is violated, such correspondence is not "qualified" and shall be returned.

F. Penalties. The penalties or sanctions that the member should be counseled about are similar to those listed under nonsupport, section A.3.d in FAMILY LAW, supra, with the exception of garnishment and involuntary allotment.

G. Bankruptcy is not an easy way out of indebtedness. The Coast Guard neither encourages nor discourages the filing of a petition in bankruptcy. The circumstances prompting bankruptcy proceedings are considered officially since they may reflect adversely on the military character of the petitioner. If it appears that the offense of dishonorable failure to pay just debts has occurred prior to discharge of indebtedness through bankruptcy proceedings, the subsequent discharge in bankruptcy will not preclude action under the UCMJ, even though the debts themselves may have been discharged by the bankruptcy action.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT
[50 U.S.C. app. §§ 501-591 (1982)]

A. Policy. Originally passed in 1940 to cover and protect the large number of new enlistees in the services, the general policy advanced by the Act is to provide some protection against civil proceedings at which the servicemember could not adequately represent himself/herself because of his/her military duties. It is not an absolute shield against civil proceedings during military service. It affects only those proceedings where the member is away from the jurisdiction because of military service. The Act does not apply to criminal proceedings.

B. The Act provides some relief in the following areas:

1. Default judgments will not be entered against an absent servicemember. If entered, the judgment is not void, but merely voidable by the servicemember. A court may appoint counsel for the absent member and proceed in certain cases, especially those involving support and paternity.

2. A stay of proceedings may be granted until the member returns to the area and can adequately defend his position. This comes up usually during deployment. A legal assistance officer must be particularly careful not to enter an appearance for the member and thereby establish jurisdiction over the member for that proceeding.

3. The Act provides limited protection regarding eviction from rented quarters. If the rent is less than $150 per month, the Act will prevent eviction for 90 days. This is a 1968 provision and has little application in today's inflated economy.

4. The Act prevents a member from having to pay income tax on more than 100% of his income. In short, it prevents the state in which a member is stationed from taxing his military pay if he claims domicile in another state and he is in the state solely due to orders. Any income the spouse may earn is taxable, since the residence of a military spouse for tax purposes is the state in which he/she lives, no matter what state is claimed as a permanent residence.

NOTARY

A. The authority and duties of a notary can be found in UCMJ, Art. 136 and Article 7-1-8, CG Regulations. This authority is for Federal purposes. Whether the notarial act has any significance in a state is dependent upon state law.

B. Oaths

1. One of the primary duties of a notary public is to administer oaths for various purposes. The references cited above list the following as having authority to administer oaths for Federal purposes:

a. All judge advocates;

b. all law specialists;

c. all summary courts-martial;

d. all commanding officers; and

e. all staff judge advocates and legal officers.

2. Other officers are authorized to administer oaths only while performing a particular duty:

a. President and counsel for a court-martial or any court of inquiry;

b. all officers designated to take a deposition;

c. all persons designated to conduct an investigation;

d. all recruiting officers; and

e. all officers in charge, Marine Inspection in connection with the licensing and certification of Merchant Marine personnel.

3. UCMJ, Art. 136, allows each armed force to extend notarial powers by department regulation. The Coast Guard has extended such powers to the Master Chief Petty Officer of the Coast Guard and permanently assigned officers in charge for the purpose of administering oaths of enlistment.

C. Notarial acts

1. In addition to administering oaths, all commissioned officers of the Coast Guard on active duty have the general powers of a notary public outside the United States where the Coast Guard is serving.

2. Such notarial acts are effective for Federal purposes.

3. Effectiveness for nonfederal purposes (e.g., state purposes) is contingent on state law.

4. See CG Regulations, Article 7-1-8.

5. Care must be taken to insure that the notarial act will be accepted in the jurisdiction within which the document will be used (i.e., will the bank accept the notarization of a Federal officer on the power of attorney?).

CHAPTER XXXV

ENLISTED ADMINISTRATIVE SEPARATIONS

INTRODUCTION

Federal law provides that no enlisted member of the armed forces may be discharged except in accordance with regulations issued by the Secretary concerned. Such regulations for the Coast Guard are promulgated in Chapter 12 of the Personnel Manual (PERSMAN). Discharges may be voluntary or involuntary. In addition, every discharge must have an appropriate reason and characterization. While the armed forces have the right and duty to separate those members who are unqualified for retention, all members have certain liberty and property interests which cannot be deprived except by due process of law.

DEFINITIONS

A. Discharge - complete severance of all military status.

B. Release from active duty - termination of active duty status and transfer or reversion to an inactive Reserve component.

C. Separation - a general term which includes discharge and release from active duty. Every separation must normally have both a reason and a characterization of service.

D. Administrative separation - any voluntary or involuntary discharge or release from active duty except by reason of sentence of court-martial.

E. Punitive discharge - a bad-conduct or dishonorable discharge awarded as an approved sentence of a court-martial.

F. Characterization of service - an official determination reflecting a member's military and performance of duty during a specific period of service. Administrative separations are characterized as either honorable, general under honorable conditions, or under other than honorable conditions.

G. Administrative Discharge/Reenlistment Board - a formal factfinding body convened to determine desirability of retention or reenlistment in the Coast Guard, consisting of at least three commissioned officers, one serving in the grade of lieutenant commander or above, which also normally includes a separate nonvoting recorder. See PERSMAN, 12-B-31 and AIM, 6-L.

H. Respondent - A Coast Guard member who has been notified that action has been initiated for separation processing.

DETERMINATION OF REASON AND CHARACTER OF SEPARATION

A. Reason. There are ten approved reasons for administrative separation:

1. Expiration of enlistment (PERSMAN 12-B-11);

2. convenience of the government (PERSMAN 12-B-12);

3. dependency or hardship (PERSMAN 12-B-13);

4. minority (PERSMAN 12-B-14);

5. disability (PERSMAN 12-B-15, 17-A,B);

6. unsuitability (PERSMAN 12-B-16);

7. security (PERSMAN 12-B-17);

8. misconduct (PERSMAN 12-B-18);

9. entry-level separation (PERSMAN 12-B-20); and

10. for the good of the service in lieu of court-martial (12-B-21).

B. Characterization. Characterization of service is determined solely by the member's military record during that term of service. Prior service and preservice activities, including records of nonjudicial punishment, courts-martial convictions, and commission of other offenses shall **not** be considered on the issue of characterization. Such records may be considered solely for the purpose of determining whether the member should be retained or separated, but only if they involve patterns of conduct manifested over an extended time which have a direct and strong probative value in making such a determination.

C. Standards for characterization of discharge. See PERSMAN 12-B-2f.

1. Honorable discharge. Issuance of such a characterization is conditioned upon proper military behavior and performance of duty. Personnel must have a minimum characteristic average of 2.5 in each factor for the period of service. Where a member's marks are below that level, they may be awarded an honorable discharge if they have received a Coast Guard Commendation or higher personal decoration, been disabled by enemy action, or if the Commandant otherwise directs.

2. General (under honorable conditions). A general discharge is authorized when the final average marks are less than those required for an honorable discharge, when the member is being discharged for a drug incident, or when directed by the Commandant on the basis of the member's overall military record.

3. Other than honorable conditions (OTH). This characterization may only be issued if the reason for discharge is either misconduct, security, or is requested by the member in lieu of court-martial for the good of the service. If not requested by the member, it must be based on the recommendation of an administrative discharge board or waiver of such right.

ENTITLEMENT TO ADMINISTRATIVE DISCHARGE/REENLISTMENT BOARD

A member has an absolute right to have their case heard by such a board whenever:

A. The member has been recommended for an other than honorable characterization;

B. regardless of the characterization recommended, the member has more than eight (8) years of total service **and** the reason for discharge is either security, unsuitability, misconduct, or unsatisfactory performance;

C. regardless of years of service or characterization, the member is being processed by reason of misconduct as a Class I or II homosexual; OR

D. the member has eight (8) or more years of total service **and** is denied reenlistment.

A board is **not** required in the event of a prolonged absence without authority, acceptance of a conditional or unconditional written waiver of such right, or when the member requests an OTH discharge in lieu of court-martial for the good of the service.

ADMINISTRATIVE DISCHARGE/REENLISTMENT BOARD PROCEDURES

A. General. A board, other than for drug abuse, is a factfinding body appointed to render findings based on the facts obtained and to recommend reenlistment, retention, or discharge and the appropriate reason and characterization. Boards convened for drug abuse shall make findings as to the validity and reliability of the evidence, and a specific finding as to whether or not the member was involved in a drug incident as defined in PERSMAN, Chapter 20. If the board finds that the member was involved in a drug incident, it shall recommend a general or other than honorable characterization only. For drug abuse cases, a recommendation concerning retention or separation is prohibited.

1. A member may not be discharged on the basis of the same evidence which was the subject of a previous board unless the findings of the previous board were set aside for legal error, fraud, or collusion.

2. A member may not receive an other than honorable characterization for conduct which was the subject of a court-martial resulting in acquittal or equivalent disposition, unless based on a legal technicality not going to the merits.

B. Composition. Boards must have at least three (3) commissioned officers, one serving in the grade of lieutenant commander or above. A separate nonvoting recorder is also detailed. Such recorder need not be a law specialist if deemed qualified by the detailing Coast Guard legal officer. In addition to logistical arrangements, the responsibilities of the recorder include interviewing and calling witnesses, presenting the case, administering oaths, and preparing the record. The recorder is **not** a prosecutor. The recorder must bring out all the facts in an impartial manner.

1. If the respondent is a Reserve member, the board must include a majority of Reserve officers if reasonably available. If not, at least one member must be a Reserve officer.

2. If the respondent is female, or the member of a minority group, the board must include such representation upon written request if reasonably available. If not, the reason for nonavailability must be stated in the record.

C. Procedure

1. A member entitled to a board, who is being processed for involuntary separation or deemed ineligible to reenlist, must first be given written notification, acknowledged in writing, of the following:

a. The factual basis for the proposed action;

b. the right to appear before a board;

c. the right to be represented by counsel;

d. that the above rights may be conditionally or unconditionally waived in writing after consultation with a lawyer; and

e. if being processed for involuntary separation, that a general or OTH discharge may result in the loss of veterans benefits and that substantial prejudice may be encountered in civilian life in situations where the type of service rendered or discharge received may have a bearing.

2. If the member does not waive their right to a board, or if the waiver is not accepted, the board shall be convened in the same manner as a formal board of investigation. See AIM, Chapter 4. The president of the board is given a summary of military offenses, unclean habits, and civil convictions (if any), as well as a current marks sheet, any statement submitted by the respondent, and all other pertinent documents. The convening authority may not testify, comment on the facts, or present any recommendations to the board.

3. A respondent has all the rights of a party, including the right to be represented by counsel, to present evidence and cross-examine, to testify, make an unsworn written or oral statement, to be properly advised of rights against self-incrimination, and provided with a Privacy Act statement. See AIM, 2-D.

4. The rules of evidence, except privileges, do not apply. Admission of reliable evidence is a matter of discretion, however, and the board should impose reasonable bounds of relevance.

5. A board has no power to subpoena or pay for the attendance of civilian witnesses, even though their testimony may be taken if they appear voluntarily at no expense to the government. Military witnesses whose testimony is material and necessary may be produced in the same manner as at a court-martial. See MJM, 2-Q.

6. A respondent may challenge a member for cause. Such challenges are referred to the convening authority for decision.

7. Testimony need not be taken under oath, or the proceeding reported verbatim, unless so directed by the convening authority. When summarized, the record shall include a list of witnesses and a brief summary of their testimony.

8. After hearing all the evidence, the board shall adjourn for closed session deliberations. After the closed session, the board shall open and announce its recommendations -- which should include one of the following dispositions, as appropriate:

a. Retention;

b. reason and characterization of discharge;

c. eligible -- or not eligible -- for reenlistment or probationary extension not to exceed one year; or

d. whether or not the member was involved in a drug incident and, if so, a recommendation for general or OTH characterization.

9. The report of the board shall be prepared in accordance with AIM, chapters 4 and 6. The written notification of rights and member's acknowledgement must be included as enclosures, along with the appointing order, summarized or verbatim record of testimony, and all documents considered by the board. The original and one copy shall be forwarded to the appropriate separation authority via the chain of command for endorsement.

ACTION OF THE SEPARATION AUTHORITY ON BOARD PROCEEDINGS

A. The separation authority may:

1. Approve the board's recommendations and direct their execution;

2. approve a recommendation for separation, but upgrade the characterization;

3. approve a recommendation for separation, but substitute a more appropriate reason -- except that misconduct may **not** be substituted for unsuitability;

4. approve a recommendation for separation, but suspend its execution for a specified period of probation (see PERSMAN 12-B-34);

5. disapprove a recommendation for separation and retain the member in the service;

6. disapprove a recommendation for retention and direct a separation for an appropriate reason with an honorable or general characterization, as warranted;

7. direct a discharge for misconduct due to drug abuse based on an approved finding of a drug incident, with a characterization no worse than that recommended by the board;

8. disapprove a finding of no drug incident based upon a preponderance of the evidence, and direct that the member be discharged with an appropriate characterization; or

9. set aside the findings and recommendations and refer the case to a new board for legal error, fraud, or collusion. Except for the case where favorable findings were obtained through fraud or collusion by the respondent, the separation authority may not approve subsequent findings or recommendations which are less favorable than those of the previous board.

PROCESSING OF MEMBERS NOT ENTITLED TO A BOARD

A. A member being processed for an involuntary administrative separation -- who is **not** entitled to a board due either to the reason for discharge, recommended characterization, or years of service -- shall be notified in writing of the following:

1. The specific reason(s) and factual basis for the recommended discharge;

2. the right to submit a statement; and

3. if recommended for a general discharge, the right to consult with a lawyer, and that prejudice may be encountered in civilian life in circumstances where the type of discharge awarded has a bearing.

B. The member must acknowledge the above in writing, and state whether they wish to submit a statement in rebuttal or otherwise object to the discharge. The notice and acknowledgement are then sent as enclosures to a letter requesting discharge authority. All other supporting documentation must also be included (such as required counseling entries, performance evaluations, required probationary period notices, a summary of military and civil offenses, and any other pertinent documents).

SPECIFIC REASONS FOR DISCHARGE DEFINED

A. Expiration of enlistment. PERSMAN 12-B-11.

1. A commanding officer has the authority to separate a member on the day preceding the applicable anniversary date of enlistment unless voluntarily or involuntarily extended. Time lost due to unauthorized absence, confinement, and injuries due to misconduct does not count towards fulfillment of service obligation and must be made up. A member entitled to a discharge/ reenlistment board -- whose enlistment is about to expire -- must voluntarily extend or will be deemed to have waived their board. Involuntary extensions for specified periods are only authorized when, on the date of expiration, the member is:

a. On a cutter at sea;

b. attached to a shore unit outside CONUS;

c. hospitalized due to own misconduct;

d. awaiting or undergoing trial or punishment by court-martial;

e. awaiting receipt of records;

f. not physically qualified for separation;

g. needed as a witness in a pending case or for emergency duties;

h. awaiting action of the final reviewing authority on an administrative discharge/reenlistment board; or

i. required by war or national emergency, or otherwise essential to public interests.

2. To be eligible for reenlistment, a member must be serving in paygrade E-3 or above, be physically qualified, have a minimum trait average of 3.0 or greater, and be recommended by the commanding officer. See PERSMAN, 1-G-5. A person not eligible for reenlistment must be fully informed in writing on page 7 of the service record as to the specific reasons at least six (6) months prior to expiration of enlistment. A member with less than eight (8) years total service must also be informed of the right to appeal the determination within fifteen (15) days and acknowledge such notification. Upon receipt of an appeal, the Commandant may direct a board hearing. A member entitled to a board shall be processed as indicated previously. See also PERSMAN 12-B-5. A board should be convened so that it is received by the Commandant 120 days prior to expiration of enlistment.

3. An honorable or general discharge may be awarded as warranted by the member's performance. See PERSMAN 12-B-2f.

4. The commanding officer may require surrender of the uniform. See PERSMAN 12-B-53.

B. Convenience of the government. PERSMAN 12-B-12. The Commandant may authorize separation with an honorable or general discharge for any of the following subcategories of convenience of the government:

1. To facilitate a reduction in force;

2. to accept a commission;

3. for reasons of national health, safety, or interest;

4. early release up to 3 months for immediate reenlistment (see PERSMAN 12-B-7);

5. erroneous enlistments;

6. various authorized programs (such as weight control under COMDTINST 1020.6 (series). Under that program, a member is weighed within 30 days of their birthday, when selected for urinalysis, and at every physical. If a member exceeds the maximum allowable weight (MAW) for their frame size, they are given a probationary period of one week for every pound over. At the end of that time, members still exceeding the MAW are processed for separation. There are exceptions for those exceeding the standards solely due to muscle mass.);

7. inability to perform duties, repetitive absenteeism, or nonavailability for worldwide assignment due to parenthood;

8. conscientious objectors (see COMDTINST 1900.6 (series));

a. A hearing officer must be appointed to determine the sincerity of the members beliefs. Testimony from a psychiatrist and/or chaplain may be required. A member who objects to all military service is classed as 1-O, and one who objects only to combatant or law enforcement duties is classed as 1-A-O.

b. Members requesting discharge under this provision should be removed from combatant or law enforcement duties to the extent practicable while their claim is being resolved. Discharge as a conscientious objector may result in loss of all VA benefits regardless of characterization.

9. chronic motion sickness;

10. nonpathological obesity;

11. unsatisfactory performance (see PERSMAN 12-B-9);

a. A member at a unit more than 180 days -- with marks in the 1-3 range, steady or declining for two or more marking periods where improvement is unlikely -- may be processed for separation under this provision. The unsatisfactory performance must be thoroughly documented and it must be clearly shown that the member has been given adequate guidance and opportunity to improve. A member must first be given written notice of the specific deficiencies and a six-month probationary period to overcome them. A

sample notification may be found at PERSMAN, 12-B-9d. A member who makes no effort to improve may be processed for separation prior to the end of the six-month probationary period. Members with eight (8) or more years of total service are entitled to a board.

b. The GCMA is the discharge authority. A member may also be required to surrender their uniform.

12. nondisabling physical condition (such as enuresis or somnambulism);

13. up to a 30-day early release upon request to pursue a unique educational or career opportunity (The Commanding Officer is the discharge authority under this provision. See PERSMAN 12-B-8.);

14. when the member is found to be serving in a constructive enlistment; or

15. when directed by the Commandant or Secretary of Transportation for good and sufficient reasons.

C. Dependency or hardship. PERSMAN 12-B-13.

1. A member may request discharge for a genuine or undue hardship or dependency which has arisen since entry into the service and which is permanent in nature. Requests submitted purely for financial reasons or personal convenience are normally denied. In addition, the member must show that the hardship is more than the inconveniences normally incident to a seagoing military career and that discharge is required to materially alleviate the condition.

2. The member must submit a detailed written request in the format specified, accompanied by at least two affidavits. Before endorsing and forwarding the request to the Commandant via the chain of command, commanding officers are required to interview the member. The endorsement must include the status of any pending disciplinary action, service schools attended, marks, and a definite recommendation.

3. A member may be recommended for involuntary separation under this provision, and may also be required to surrender the uniform in an appropriate case. An honorable or general discharge, as warranted by the member's record of service, is authorized.

D. Minority. PERSMAN 12-B-14.

1. Discharge under this provision depends upon the age of the member at the time of processing. If the member is currently under 17 years of age, discharge processing is mandatory. If the member is over 17 -- but under 18 and enlisted without parental consent -- the parents must apply for discharge within the first 90 days of the enlistment. Otherwise, the member will be deemed to be serving in a constructive enlistment.

2. False representation as to age or parental consent alone is not considered a fraudulent enlistment.

3. A member may be eligible for reenlistment, but must surrender the uniform upon discharge.

E. Disability. PERSMAN 12-B-15; Chapter 17.

1. The Commandant may direct or authorize an honorable or general discharge (as warranted by a member's record of service) for physical disability through final action on a physical evaluation board. Members who are unfit for service may not remain on active duty except in accordance with PERSMAN, Chapter 17.

2. The policies and procedures of the physical disability evaluation system (PDES) are set forth in COMDTINST M1850.2 (series). The components of the system are:

a. Medical Board (MB). A commanding officer or medical officer may convene an MB to evaluate a member when fitness for continued duty is questioned.

b. Central Physical Evaluation Board (CPEB). The MB is endorsed by the command and forwarded to Commandant (G-KDE) for referral to a CPEB. The evaluee is then given counsel to decide whether to accept or reject the findings of the CPEB.

c. Formal Physical Evaluation Board (FPEB). The FPEB provides a hearing to evaluees who reject the CPEB findings.

d. Physical Review Council (PRC). The PRC reviews the record and any evaluee's comments. The PRC may modify and/or forward the proceedings for further review or final action.

e. Physical Disability Appeal Board (PDAB). The PDAB may make substitute findings and/or forward the case for final legal review and action.

3. Disabilities are rated under the Veterans' Administration Schedule for Rating Disabilities in Chapter 9 of the PDES Manual. If a service-incurred disability is rated at 30% or more, the member may be eligible for temporary or permanent retirement and benefits. If less than 30%, the member may be entitled to severance pay. Disabilities which existed prior to entry, or which resulted from misconduct, may result in separation without severance pay.

F. Unsuitability. PERSMAN 12-B-16. The Commandant may authorize or direct an honorable or general discharge (as appropriate under PERSMAN 12-B-2f) for unsuitability due to:

1. Inaptitude - documented lack of adaptability, skill, or inability to learn;

2. personality disorders - a diagnosis by medical authority of a condition listed in the Medical Manual, COMDTINST M6000.1 (series);

3. apathy, defective attitude, and inability to expend effort constructively - documented significant observable defect apparently beyond the control of an individual;

4. unsanitary habits;

5. financial irresponsibility - repeated, unresolved complaints of indebtedness or failure to support dependents due to negligent or careless handling of personal finances;

6. class III homosexuals - one who exhibits or admits homosexual tendencies -- or who has performed, solicited, or attempted a homosexual act prior to entering the service -- but there is no evidence of performing, soliciting, or attempting a homosexual act while on active duty (see PERSMAN 12-B-33); or

7. alcohol abuse (see also PERSMAN Chapter 20).

a. An alcohol incident is defined as any violation of law or lost time due to injury where alcohol is a significant or causative factor. Incidents prior to 18 January 1983 may not be considered for administrative purposes.

b. Members involved in an alcohol incident must be given written counseling and referred for medical screening. Commanding officers may request treatment for alcohol abusers through Commandant (G-KOM).

c. Members involved in a second alcohol incident are normally processed for separation, but may be recommended for retention and rehabilitation by the commanding officer in exceptional cases. Members involved in a third incident must be processed for separation.

d. Members who self-refer for treatment and then are involved in an alcohol incident during aftercare, as well as those who violate an aftercare program and have poor potential for recovery, shall also be processed for separation.

e. Members diagnosed as alcohol-dependent -- who are discharged -- must be advised in writing of their eligibility for VA treatment.

Prior to separation processing for unsuitability (except for personality disorders or class III homosexuals), a formal probationary period is required to be documented in writing. This period is normally for six months, unless the member is not making an effort to overcome the deficiencies. A report of a medical exam must be forwarded with the discharge recommendation to determine mental responsibility and whether there are any disqualifying mental or physical defects. Processing for personality disorders may be done by message.

Members processed for unsuitability may be required to surrender their uniform.

G. Security. PERSMAN 12-B-17. This reason for discharge is used when retention is inconsistent with national security (such as in cases of espionage or treason). It is not considered appropriate solely because a member is denied a security clearance. A discharge under other than honorable conditions is normally awarded.

H. Misconduct. PERSMAN 12-B-18. The Commandant may authorize or direct a discharge under other than honorable conditions, a general discharge, or an honorable discharge as warranted by the circumstances of the case (see PERSMAN 12-B-2f) for any of the following types of misconduct:

1. Conviction by civil authorities. Any disposition tantamount to a finding of guilty for an offense where the maximum UCMJ penalty would be greater than one year's confinement, or where the offense involves moral turpitude.

2. Fraudulent enlistment. A deliberate material misrepresentation, omission, or concealment which might have resulted in rejection if known at the time. Misrepresentation as to age or parental consent will not by itself be considered a fraudulent enlistment.

3. Absenteeism. Unauthorized absence of the following duration(s):

a. One year or more;

b. three or more unauthorized absences within six months--totaling 30 days or more; or

3. six or more unauthorized absences within six months--totaling six days or more.

4. Frequent involvement of a discreditable nature with civil or military authorities (this includes arrests and apprehensions). Conviction is not necessarily required. The member must first be given a reasonable probationary period, acknowledged in writing.

5. An established pattern of shirking, dishonorable failure to pay just debts, failure to adequately support dependents, or failure to comply with court orders for support - also requires a reasonable probationary period, acknowledged in writing, prior to separation processing.

6. Sexual perversion. Includes indecent acts and sexual assaults, as well as Class I and Class II homosexuals. See PERSMAN 12-B-33.

a. Homosexuality is incompatible with the demands of military life. In addition, homosexual acts are also criminal offenses under the UCMJ, and disciplinary action should be considered when appropriate.

b. Class I homosexuals are those who engage in homosexual acts with unwilling partners, or with children under 16 years of age.

c. Class II homosexuals are those who engage in any other type of homosexual act while on active duty. It also includes Class I homosexuals who are not referred to court-martial, or who are not awarded a punitive discharge.

d. Upon receipt of apparently reliable information, the commanding officer shall appoint a preliminary inquiry officer to investigate the charges. If the evidence is insufficient or otherwise warrants, the commanding officer may recommend retention to Commandant (G-PE). If there is sufficient evidence, the commanding officer may prefer charges and/or process for separation. All members processed for administrative separation as Class I or II homosexuals are entitled to an administrative discharge board, regardless of recommended characterization or years of service.

7. Drug involvement. See also PERSMAN, Chapter 20.

a. A drug incident is defined in PERSMAN 20-A-2h as intentional (knowing) drug abuse or wrongful possession of drugs. Any member involved in a drug incident, or in the illegal distribution or introduction of a controlled substance onto a military installation, must be processed for separation with no higher than a general discharge. In truly exceptional cases, a commanding officer may recommend retention of E-3's and below as part of the required discharge package.

b. A finding of a drug incident must be based on a preponderance of the evidence. A positive confirmed urinalysis is sufficient to meet this standard in the absence of credible evidence to the contrary (such as lack of knowledge). A commanding officer may properly consider a member's prior performance, conduct, and attitude only in determining whether to believe an explanation put forth by a member. If the evidence is inconclusive, a finding of no drug incident shall be made. A letter report to Commandant (G-PS) is required in all cases involving positive urinalysis results where a finding of no drug incident is made. See PERSMAN 20-C-6.

c. Urine specimens shall be processed in accordance with COMDTINST 5355.1 (series). A finding of a drug incident can not be made based solely on urinalysis when the procedural safeguards (such as chain of custody, second samples, and tamper-resistant seals) do not meet those standards. Except for recruits, two samples shall be collected from each member -- with one retained in secure storage at the unit. If the first sample is confirmed positive by GC/MS for any drug (at 50 ng/ml or higher for THC), except as the result of a valid medical prescription, the second sample shall be sent immediately for testing.

d. Samples confirmed positive below 50 ng/ml THC do not constitute a drug incident unless there is additional evidence indicating intentional use of drugs. Those members shall be counseled and placed in a six-month follow-up monitor program. See PERSMAN 20-C-7. A letter is given to the member -- with a copy to the commanding officer -- in the format shown in Appendix 1 to this chapter.

I. Request for discharge in lieu of court-martial for the good of the service. PERSMAN 12-B-21.

1. After preferral of charges that could result in a punitive discharge, a member may submit a request for a discharge under other than honorable conditions for the good of the service. The request must be witnessed by counsel and submitted to Commandant (G-PE) via the GCMA in the format shown in PERSMAN 12-B-21d.

2. Once submitted, the request can only be withdrawn with permission of the Commandant. The command's forwarding endorsement must include a report of a medical or psychiatric exam stating that the member is mentally competent.

J. Uncharacterized separations. PERSMAN 12-B-20.

1. Commanding Officer, Recruit Training Center Cape May, and Commandant (G-PE) may authorize an uncharacterized separation for poor performance or conduct during recruit training. The member must have less than 180 days of active service on the date of discharge to qualify.

2. Prior to processing for separation under this authority, a member should be given formal counseling concerning their deficiencies and a reasonable opportunity to overcome them.

(date)
5355

From: Commanding Officer, _____
To: _____

Subj: MANDATORY DRUG URINALYSIS TEST MONITOR PROGRAM

Ref: (a) Personnel Manual, COMDTINST M1000.6 (series)

1. On (date) you were involved in an occurrence in which it appears that drugs may have been a factor. The facts as shown by _____ indicate that you may be conducting a lifestyle which endangers your health and is incompatible with the Commandant's policy on drug abuse. Accordingly, I am taking the following action in accordance with article 20-C-7 of reference (a):

a. You are being placed on a 6 month drug urinalysis test monitor program. You will be retested by drug urinalysis weekly until confirmatory test results are negative, then at random times as I or any subsequent commanding officer deem appropriate during the 6 month period.

b. You will participate in such training on the personal dangers of drug abuse and its consequences for Coast Guard members as I deem appropriate.

c. I will retain one copy of this letter in my personal custody for a period of 6 months after your last positive test result. In the event of my relief, or your transfer, my copy will be transferred to the personal custody of your subsequent commanding officer. You will retain the only other copy.

d. At the end of 6 months, if there is no new evidence of drugs in your system and in the absence of subsequent evidence that you have intentionally and improperly used any mood altering substance, I or your subsequent commanding officer will destroy my copy of this letter and no further action will be taken.

2. While it is my intention and that of the Commandant to rid the Coast Guard of drug abusers, I wish to provide you every opportunity to demonstrate through this drug urinalysis test monitoring program that you do not fall into that category. This period of monitoring will have no impact on your performance marks or eligibility for advancement or reenlistment, unless you establish a pattern of repeated events of this nature.

(COMMANDING OFFICER'S SIGNATURE)

(date)
5355

FIRST ENDORSEMENT on CO, (unit) ltr 5355 dated _____

From: (member)
To: Commanding Officer, (unit)

1. I hereby acknowledge that I have received, read, and understand this letter.

(MEMBER'S SIGNATURE ON BOTH COPIES)

ENLISTED ADMINISTRATIVE SEPARATIONS

REASON	PERSMAN REFERENCE	AUTHORIZED CHARACTER*[1]	BOARD REQ'D	NOTES
-Expiration of Enlistment	12-B-11	HON/GEN	+8 den reenl	Must be +E-3 and marks avg of +3.0 to reenlist. See 12-B-5, 1-G-5.
-Convenience of Government	12-B-12	HON/GEN		
Reduction in Force				
Commission Program				
Other Authorized Programs (i.e. Weight Control)				SEE COMDTINST 1020.8(series). 1 wk probation for every pound over MAW. Weigh annually.
Immediate Reenlistment				
Early release	(12-B-7,8)			For gov't benefit or to pursue job, education.
Absenteeism/Parenthood				
Conscientious objectors				SEE COMDTINST 1900.6(series). Hearing req'd to determine if 1-O or 1-A-O.
Motion Sickness				
Non-pathological Obesity				
Unsat Performance	(12-B-9)		+8	Marks in 1-3 range, steady or declining for 2 periods. Formal probation (6 mos) req'd.
Non-disability medical				Bedwetting, sleepwalking.
Constructive Enlistments				
Habeas Corpus				
COMDT/SECDOT direction				
-Dependency/Hardship	12-B-13	HON/GEN		Permanent & severe. Ltr req to G-PE.
-Minority	12-B-14	HON/GEN		Under 17, or under 18 w/o consent.
-Disability	12-B-15 (17-A,B)	HON/GEN		SEE COMDTINST M1850.2(series). Medical Board req'd. May get retirement or severance pay.

*[1] Characterization determined solely by military record in current term of service. HON requires characteristic average of 2.5 or above in each factor, or special consideration. SEE 12-B-2f.(1). GEN normally requires att'y consult. Admin Bd or unconditional waiver req'd for OTH.

ENLISTED ADMINISTRATIVE SEPARATIONS (con't)

REASON	PERSMAN REFERENCE	AUTHORIZED CHARACTER*	BOARD REQ'D	NOTES
-Unsuitability	12-B-16	HON/GEN	+8	Formal probation req'd except: Class III homosexual, personality disorder
Inaptitude				
Personality Disorder				
Defective Attitude/Apathy				
Unsanitary Habits				
Alcohol Abuse	(20-A,B)			2 or more alcohol incidents or rehab failure.
Class III Homosexual	(12-B-33)			No acts in service
Financial Irresponsibility				
-Security	12-B-17	OTH	+8/OTH	Espionage or treason
-Misconduct	12-B-18	HON/GEN/OTH	+8/OTH	Class I,II Homosexuals also have board right.
Civil Conviction				
Fraudulent Enlistment				More than age or parental consent alone.
Absenteeism				
Drug Abuse	(20-C)			Intentional drug abuse or wrongful possession, introduction, or distribution. HON not auth.
Frequent Involvement				Formal probation req'd.
Sexual Perversion, and Class I, II homosexual	(12-B-33)			Acts while in service.
Pattern of Shirking				Formal Probation req'd.
Indebtedness				Formal Probation req'd.
Non-Support of Dependents				Formal Probation req'd.
Failure to pay Court ordered support				Formal Probation req'd.
-Good of the Service	12-B-21	OTH		Request to COMDT via GCMA in lieu of CM.
-Uncharacterized	12-B-20	NONE		Poor performance at Recruit Training. CO Cape May can discharge during first 180 days.

CHAPTER XXXVI

OFFICER ADMINISTRATIVE SEPARATIONS

INTRODUCTION

Officers of the Regular Coast Guard and the Coast Guard Reserve are appointed by the President and continue in such status until it is legally terminated. Each separation of an officer must be for an approved reason, with an approved characterization. Administrative separation of officers may be voluntary or involuntary.

REASONS FOR OFFICER SEPARATIONS

A. Resignation. An officer may request to resign in writing six months to one year in advance. A resignation may be unqualified, qualified, for the good of the service, or to escape trial by general court-martial. See PERSMAN 12-A-5.

B. Revocation of commission. During the first three years of commissioned service, an officer serves in a probationary status. During that time, a commission can be revoked for inability to adapt or poor potential for future development. See PERSMAN 12-A-11.

C. Failure of selection. Officers who fail selection once for lieutenant junior grade -- or twice for lieutenant or lieutenant commander -- may be separated or reverted to their permanent enlisted grade. See PERSMAN 12-A-13.

D. Dropping from the rolls. An officer may be dropped from the rolls with no discharge certificate issued if absent without authority for at least three months or sentenced to civilian confinement. See PERSMAN 12-A-14.

E. Separation for cause. Issued for substandard performance of duty, moral or professional dereliction, or reasons of national security. See PERSMAN 12-A-15.

CHARACTERIZATION OF OFFICER SEPARATIONS

The following characterizations of officer separations are authorized:

A. Honorable discharge. May be issued upon resignation, failure of selection for promotion, or as a result of separation for cause due to substandard performance of duty.

B. General discharge. May be issued upon acceptance of a qualified resignation, or as a result of separation for cause due to moral or professional dereliction.

C. Undesirable discharge. May be issued for civil conviction or upon acceptance of a resignation to escape dismissal, trial by court-martial, or for the good of the service.

D. Dismissal. A punitive discharge awarded by sentence of a general court-martial.

PROCESSING FOR SEPARATION

Officers being considered for separation for cause are processed through a three-tiered board system.

A. Determination board. A board of at least three officers senior to the respondent is convened by the Commandant to review the record and determine if the officer should be required to show cause for retention.

B. Board of inquiry. If required to show cause for retention, the officer is entitled to appear at a board of inquiry. The board and the rights of the respondent are similar to an enlisted administrative discharge board.

C. Board of review. If recommended for separation, the record if forwarded to a board of review convened by the Commandant. The board of review may retain or recommend separation. If separation is recommended, the case goes to the Commandant for final decision.

SEPARATION OF WARRANT OFFICERS

Warrant officers may be separated for unfitness or unsatisfactory performance of duty upon the recommendation of a warrant officer evaluation board convened by the Commandant in accordance with PERSMAN 12-A-21. Only those warrant officers being considered for a general discharge are entitled to appear in person. The Commandant is final discharge authority.

SEVERANCE PAY

Officers separated for failure of selection, or for cause, are entitled to severance pay by law. The method of computation is shown in PERSMAN 12-A-19.

CHAPTER XXXVII

RELATIONS WITH CIVIL AUTHORITIES

FOREIGN CRIMINAL JURISDICTION OVER U.S. SERVICEMEMBERS

A. Aboard U.S. warships. A warship is considered an instrumentality of a nation in the exercise of its sovereign power. Therefore, a U.S. warship is considered to be an extension of U.S. territory. As such, it is under the exclusive jurisdiction of the United States, and is thus immune from any other nation's jurisdiction during its entry and stay in foreign ports and territorial waters as well as on the high seas. Attachment or libel in admiralty may not be taken or effected against a warship for recovery of possession, for collision damage, or for salvage charges. The commanding officer of a ship shall not permit his ship to be searched by foreign authorities nor shall he allow personnel to be removed from the ship by foreign authorities. If the foreign authorities use force to compel submission, the commanding officer should resist with the utmost of his power. Except as provided by international agreement, the rules for a shore activity are the same. In addition, the laws, regulations, and discipline of the United States may be enforced on board a U.S. warship (personal and territorial jurisdiction) within the territorial precincts of a foreign nation without violating that nation's sovereignty. A warship present in a foreign port is expected to comply voluntarily with applicable health, sanitation, navigation, anchorage, and other regulations of the territorial nation governing her admission to the port. Failure to comply may result in the lodging of a diplomatic protest by the host nation and the possible ordering of the warship to leave the port and territorial sea. If such sanctions were imposed, immunity from seizure, arrest or detention by any legal means would remain in force.

B. Overseas ashore

1. Servicemembers. Military personnel visiting or stationed ashore overseas are subject to the civil and criminal laws of the particular foreign State ("territorial jurisdiction"). The United States has negotiated agreements, generally known as status of forces agreements (SOFA), with all countries where its forces are stationed. Under most SOFAs the question of whether the United States servicemember will be tried for crimes committed by United States authorities or by foreign authorities depends on which country has "exclusive" or "primary" jurisdiction. Exclusive jurisdiction exists when the act constitutes an offense against only one of the two states (e.g., unauthorized absence). Those areas constituting violations under both the UCMJ and foreign law are subject to concurrent jurisdiction. This situation raises the question of which state has "primary" jurisdiction. The United States will normally have primary jurisdiction over military personnel for:

a. Offenses solely against the property or security of the United States;

b. offenses arising out of any act or omission done in the performance of official duty; and

c. offenses solely against the person or property of another servicemember, a civilian employee, or a dependent.

The host country will retain the primary right to exercise jurisdiction in all other concurrent jurisdiction situations. If a servicemember commits a crime in which the host country has primary jurisdiction, the accused will be prosecuted under the laws and procedures of that country's criminal justice system and, if convicted, the accused will be punished in accordance with those laws. This rule exists unless the host country waives its primary right to exercise jurisdiction. This is possible because the United States always retains criminal jurisdiction under the UCMJ over all military personnel as an exercise of personal jurisdiction.

2. Civilians. Special privileges and exceptions from the application of foreign local law to U.S. bases overseas are governed by a "Base Rights Agreement" between the two governments. Such agreements may provide for the exercise of police power by the United States within the confines of the base, with said exercise usually being concurrent with that of the foreign sovereign. Residual sovereignty over the base usually is retained by the foreign government and criminal offenses committed by U.S. nonmilitary personnel while on the base are generally triable in foreign criminal courts. It is questionable whether any United States court has jurisdiction to try U.S. civilians for crimes committed overseas with the exception of crimes committed by civilian personnel while accompanying U.S. military forces into declared war zones.

C. United States policy. It is the policy of the United States to maximize its jurisdiction and seek waivers in cases where it does not have primary jurisdiction. This means that requests for waiver of jurisdiction should be made for all serious offenses committed by servicemembers regardless of the lack of a status agreement or exclusive jurisdiction by the host country.

D. Reporting. Whenever a servicemember is involved in a serious or unusual incident, it will be reported to higher authority. Serious or unusual incidents will include any case in which one or more of the following circumstances exist:

1. Pretrial confinement by foreign authorities;

2. actual or alleged mistreatment by foreign authorities;

3. actual or probable publicity adverse to the United States;

4. congressional, domestic or foreign public interest is likely to be aroused;

5. a jurisdictional question has arisen;

6. the death of a foreign national is involved; or

7. capital punishment might be imposed.

E. Custody rules. When a servicemember is arrested and accused of a crime, which country retains custody of the individual is determined by the existing SOFA with the host country. General rules in this area follow:

ARRESTED BY	PRIMARY JURISDICTION	CUSTODY
U.S. Authorities	U.S.	U.S.
Foreign Authorities	U.S.	Turn over to U.S.
U.S. Authorities	Foreign Country	U.S. custody until officially charged or agreement provides for U.S. custody until criminal proceedings completed
Foreign Authorities	Foreign Country	Host country may maintain custody or turn over to U.S. authorities until criminal proceedings completed

Commanding officers should be aware that, except when provided by agreement between the United States and the foreign nation concerned, there is no authority to deliver persons to foreign authorities. Where a U.S. servicemember is in the hands of foreign authorities and is charged with the commission of a crime regardless of where it took place, the commanding officer should report the matter to higher authorities for guidance. Since expeditious release from foreign incarceration is a matter of utmost interest, delay should be avoided at all cost. To secure the release of U.S. military personnel held by foreign authorities, U.S. military authorities may give assurances that the servicemember will not be removed from the host country except on due notice and adequate opportunity by the foreign authorities to object to that action. In appropriate cases, military authorities may order pretrial restraint of the servicemember in a U.S. facility to ensure his or her presence at trial on foreign charges.

F. Procedural safeguards. If a servicemember is to be tried for an offense in a foreign court, he is entitled to certain safeguards. The rights guaranteed under the NATO Status of Forces Agreement (SOFA) include the following:

1. A prompt and speedy trial;

2. to be informed in advance of trial of the specific charge or charges made against him;

3. to be confronted with the witnesses against him;

4. to compel the appearance of witnesses in his favor if they are within the jurisdiction of the state;

5. to have legal representation of his own choice;

6. to have the services of a competent interpreter if necessary; and

7. to communicate with representatives of the U.S. Government and, when the rules permit, to have such representatives present at his trial.

These rights are also provided for in most nations where status agreements exist. The in-court observer is not a participant in the defense of the servicemember but rather reports to higher authority as to whether the safeguards guaranteed by the SOFA were followed and whether or not a fair trial was received. Section 1037 of title 10, United States Code, authorizes the armed forces to pay counsel fees, bail, court costs and other related expenses, such as interpreter's fees, for servicemembers tried in foreign courts.

FEDERAL JURISDICTION OVER LAND IN THE UNITED STATES

A. Federal legislative jurisdiction. Relations between the armed forces and state civil authorities within the confines of military bases are governed by sovereignty considerations. Areas of land originally acquired by the United States or, if subsequently acquired, to which a state has made a complete cession of sovereignty to the Federal government are known as exclusive Federal reservations. As to this land, the Federal government possesses the exclusive right to legislate with respect to the particular land area and may enact general, municipal laws applying within that area.

B. Concurrent, partial and proprietary jurisdiction. There are three forms of jurisdiction, other than exclusive Federal jurisdiction, that the Federal government may exercise over land area: Concurrent legislative jurisdiction, partial legislative jurisdiction, and proprietary interest. The type of jurisdiction the Federal government maintains determines the legislative authority that is exercised over the land area. Concurrent legislative jurisdiction exists when the state grants to the Federal government the rights of exclusive jurisdiction over the land area, while reserving to itself the same authority it granted to the Federal government. Due to the supremacy clause of the Constitution the Federal government has the superior right to carry out Federal functions without state interference. Nevertheless, state laws may be applicable within a concurrent jurisdiction area. Partial legislative jurisdiction refers to the situation where the state grants a certain measure of legislative authority over the area to the Federal government but reserves to itself the right to exercise either alone or concurrently with the Federal government other authority constituting more than the right to serve civil or criminal process in the area. In this instance, each sovereign maintains partial legislative authority. The Federal government has proprietary interest only in land when it acquires the degree of ownership similar to that of a landowner, but has not attained any portion of the state legislative authority over the area. The majority of federally owned lands are proprietary interest areas. State criminal law normally extends throughout land areas in which the United States has only a proprietarial interest, throughout areas under concurrent jurisdiction, and in areas under partial jurisdiction to the extent covered by the retention of state authority under its grant of power.

CRIMINAL JURISDICTION OVER SERVICEMEMBERS IN U.S.

A. Delivery of personnel

1. Federal civil authorities. Members of the armed forces will be released to the custody of U.S. Federal authorities (FBI, DEA, etc.) upon request by an agent of the Federal agency. The only requirements which must be met by the requesting agent is that the agent display proper credentials and a Federal warrant for the arrest of the servicemember. Actual production of the warrant is required. The servicing legal officer should be consulted before delivery is effected, if reasonably practicable. When military personnel are released to U.S. Federal authorities, agreements are not required but the individual will be returned, if desired, and the costs of the return will be paid by the Justice Department. MJM, 8-G-2.

2. State civil authorities. Procedures to be followed where custody of a member of the armed forces is sought by state, local, or U.S. territorial officials depend upon whether the servicemember is within the geographical jurisdiction of the requesting authority. Like the instance where custody is requested by Federal authorities, the requesting agent must not only identify himself through proper credentials but must also display the actual warrant for the servicemember's arrest. Additionally, state, local, and U.S. territory officials must sign a delivery agreement providing for the no-cost return of the servicemember after civilian proceedings have terminated. MJM, 8-F. A sample agreement appears in enclosure 36 of the MJM. Subject to these requirements, the following examples illustrate the procedures to be followed:

a. E-3 Jones is stationed ashore or afloat in a command within the geographical territory of the requesting authority. Generally, the request will be complied with by the commanding officer. MJM, 8-D.

b. E-3 Jones is stationed ashore or afloat outside of the territorial jurisdiction of the requesting authority but not overseas. The servicemember must be informed of his right to require extradition. If he does not waive extradition, the requesting authority must complete extradition proceedings before the release of the individual. In any event, release under these conditions must be made by an officer exercising general court-martial jurisdiction (OEGCMJ) or someone designated by him. MJM, 8-E-1. If the servicemember waives extradition in writing after consultation with military or civilian legal counsel, then the OEGCMJ may release the man without an extradition order. If the state in which E-3 Jones is located requests delivery of a servicemember wanted by another state (usually based upon a fugitive warrant or other process from authorities of the other state), the OEGCMJ is authorized to release Jones to the local authorities and normally will do so; however, absent waiver by Jones, he will then have the opportunity to contest extradition within the courts of the local state. MJM, 8-E-3.

c. E-3 Jones is stationed ashore overseas or is deployed and is sought by U.S., state, territory, commonwealth, or local authorities. In this case, the request must be forwarded to the servicing legal office.

3. Restraint of military offenders for civilian authorities. R.C.M. 106, MCM (1984) provides that a servicemember may be placed in restraint by military authorities for civilian offenses upon receipt of a duly-issued warrant for the apprehension of the servicemember or upon receipt of information establishing probable cause that the servicemember committed an offense, and upon reasonable belief that such restraint is necessary. Such restraint may continue only for such time as is reasonably necessary to effect the delivery. This provision provides express authority for restraining a military offender to be delivered to law enforcement authorities of the United States or its political subdivisions, but only when such restraint is justified under the circumstances. For delivery of a servicemember to foreign authorities, the applicable treaty or status of forces agreement should be consulted. The provision does not allow the military to restrain a servicemember on behalf of civilian authorities pending trial or other disposition. The nature and extent of restraint imposed is strictly limited to that reasonably necessary to effect the delivery. Thus, if the civilian authorities are dilatory in taking custody, the restraint must cease. An analogous situation is when civilian law enforcement authorities temporarily confine a servicemember, pursuant to a DD-553, pending delivery to or receipt by military authorities.

4. Deliveries requiring advance approval of Commandant (G-L)

a. The advance approval of the Commandant (G-L) is required prior to the delivery of persons in the Coast Guard to Federal or state authorities:

(1) When disciplinary/judicial proceedings involving offenses in violation of the UCMJ are pending against the requested member;

(2) when the member is undergoing a sentence of a court-martial;

(3) when, in the opinion of the commanding officer, it is in the best interest of the Coast Guard to refuse delivery; or

(4) when, in the opinion of the commanding officer, certain requirements established should be waived in a particular case. MJM, 8-H-1.

b. It is expected that, through informal contact with local authorities, commanding officers will, in most cases, have sufficient advance notification that a request for delivery will be forthcoming to permit a letter request for the advance approval from Commandant (G-L). When circumstances dictate a more expeditious handling of the matter, a message request is authorized. In those rare cases when immediate action is an absolute must, approval may be requested and a decision communicated by telephone. All requests shall include sufficiently detailed information to permit an informed decision without additional inquiry. Requests shall be submitted to Commandant (G-LMJ). MJM, 8-H-2.

5. Reporting requirements. The commanding officer concerned shall, upon delivery or refusal, forward a letter report -- setting forth a full

statement of the facts -- to Commandant (G-LMJ), via the chain of command, in the following cases:

a. When delivery is ultimately refused;

b. when personnel are delivered from beyond the territorial limits of the requesting state; or

c. when the advance approval of the Commandant (G-L) was necessary.

B. Recovery of military personnel from civil authorities

1. General rule. For the most part, civil authorities will be able to arrest and detain servicemembers for criminal misconduct committed within their territorial jurisdiction and proceed to a final disposition of the case without interference from the military. Military authorities have no legal right or power to interfere with the civil proceedings.

2. Whenever an accused is in the custody of civil authorities charged with a violation of local or state criminal laws as a result of the performance of official duties, the commanding officer should make a request for release of the member to the custody of the Coast Guard. Personnel so released must be made available to civil authorities on demand. See PERSMAN, 8-C-4.

3. Local agreements. In many areas where major installations are located, local arrangements and agreements have been negotiated between commands and the local civilian officials with regard to the release of servicemembers to the military before trial. These agreements are local and informal. There is no established procedure. Their success depends upon the practical relationships in the particular area. It is the duty of all commands within the area to comply with the local procedures and make such reports as may be required. Normally, details of the local procedures can be obtained from the area shore patrol headquarters, base legal officer, staff judge advocate, or similar official.

4. Command representatives. The command does not owe an accused who is held by civil authorities in the U.S. legal advice and should not take any action which could be construed as providing legal counsel to represent an accused. The command, however, may send a representative to contact the civil authorities for the purpose of obtaining information for the command. As a general rule, it is improper to release any personal information from the records of the accused, such as NJP results or enlisted performance marks, without either the servicemember's voluntary written consent or an order from the court trying the case.

5. Conditions on release of accused to military authorities

a. If the release of the member is on his personal recognizance or on bail to guarantee his return for trial, there is little difficulty and there is no objection to a command receiving the servicemember. The commanding officer -- upon verification of the attending facts, date of trial, and approximate length of time that should be covered by leave of absence --

should normally grant liberty or leave to permit appearance for trial. See PERSMAN, 7-A-22. Personal recognizance is an obligation of record entered into before a court by an accused in which he promises to return to the court at a designated time to answer the charge against him. Bail involves the accused's providing some security beyond his mere promise to appear at the time and place designated and submit himself to the jurisdiction of the court. Service in the armed forces does not release an accused of the duty to conform to the requirements of release on bond or recognizance.

b. Accepting custody of an accused upon any conditions which would bind military authorities is not advised. There are dangers in receiving an accused and at the same time promising to return him for trial, since military authorities are without power to place an accused in any sort of pretrial restraint based on the civilian charges. Further, there is no authority for accepting an accused subject to any conditions whatsoever. Commands may inform civilian authorities of the customary policy of granting leave or liberty to permit attendance at civilian trials, but under no circumstances will a member be granted leave to cover a period of confinement.

c. An accused should not be accepted from civil authorities on the condition that disciplinary action will be taken against him.

C. Special situations

1. Interrogation by Federal civil authorities. Requests to interrogate suspected military personnel by the FBI or other Federal civilian investigative agencies should be honored promptly. Any refusal and the reasons therefor must be reported immediately.

2. Writs of habeas corpus or temporary restraining orders. Upon receipt of a writ of habeas corpus, temporary restraining order, or similar process, or notification of a hearing on such, the nearest U.S. attorney should be notified immediately and assistance requested. A message or telephone report of the delivery of the process or notification of the hearing must be made. An immediate request for assistance is necessary because such matters frequently require a court appearance with an appropriate response by the government in a very short period of time. When the hearing has been completed and the court has issued its order in the case, a copy of the order should be promptly forwarded to the servicing legal office.

D. Report of arrest and subsequent civil action

1. All cases of civil arrest and subsequent civil action, except for minor traffic violations, will be reported by letter to Commandant (G-PO) or (G-PE), with a copy to (G-OIS) and (G-PS). See PERSMAN 8-C-2. When it is anticipated that final action by civil authorities will occur within a few days of the arrest, a single report covering the arrest and subsequent action will be made. When final action by the civil authorities will be delayed, an arrest report will be made promptly and followed by a final action report. In prolonged cases, reports on developments should also be submitted.

2. Parking violations are normally considered minor traffic violations. A number of moving violations which do not involve injury to persons or significant damage and do not involve driving under the influence of intoxicants or reckless driving are also considered minor.

3. In addition to the required reports, commanding officers shall process members who are arrested for driving under the influence of intoxicants in accordance with chapter 20 of the Personnel Manual and COMDTINST 5100.36 (series).

4. Reports should include so much of the following required information not previously submitted as is available at the time of each report:

a. Name, social security number, and grade or rate;

b. time, date, and place of arrest;

c. identity of civil authority concerned;

d. charges stated in plain language;

e. member's status at time of arrest (UA, leave, liberty, etc.);

f. if confined by civil authorities, time and date of confinement;

g. a statement of results of the trial (i.e., acquittal, conviction, sentence, etc.); and

h. a complete report of all other pertinent information, disciplinary action taken, and a recommendation regarding any further action.

E. Disciplinary action after civil arrest and trial

1. Coast Guard policy is against trial by court-martial for the same act for which a civil trial has been had. In those cases in which trial by court-martial is not barred by reason of civil trial (see MCM, 1984) and due to special circumstances the commanding officer feels that court-martial proceedings should proceed, the case should be referred to the Commandant.

2. Conviction by a civil court -- except for a minor traffic violation -- brings discredit upon the service. Convictions of this nature shall be specifically mentioned in the comments section of the officer fitness report and shall be reflected in the performance of duty marks of enlisted personnel.

SERVICE OF PROCESS AND SUBPOENAS

A. Service of process. This is generally defined as the establishing of the court's jurisdiction over a person by the handing of a court order to the person which advises him of the subject of the litigation and orders him to appear or answer the plaintiff's allegations within a specified period of time or else be in default. When properly served, the process will make the person subject to the jurisdiction of a civil court.

1. Overseas. A servicemember's amenability to service of process issued by a foreign court depends on international agreements (such as the NATO SOFA). Where there is no agreement, guidance should be sought from the servicing legal officer.

2. Within the United States

a. Within the jurisdiction. Where the member is within the jurisdiction of the court issuing the process, the commanding officer shall permit the service except in unusual cases where he concludes that compliance with the mandate of the process would seriously prejudice the public interest. Personnel serving on a vessel within the territorial waters of a state are considered within the jurisdiction of that state for the purpose of service of process. Process should not be allowed within the confines of the command until permission of the commanding officer first has been obtained. Where practicable, the commanding officer shall require that process be served in his or her presence or in the presence of an officer designated by the commanding officer. Commanding officers are required to ensure that the nature of the process is explained to the member. This can be accomplished by a legal assistance officer.

b. Beyond the jurisdiction. Where the member is beyond the jurisdiction of the court issuing the process, commanding officers will permit the service under the same conditions as within the jurisdiction, but shall ensure that the member is advised that he need not indicate acceptance of service. Furthermore, in most cases, the commanding officer should advise the person concerned to seek legal counsel. When a commanding officer has been forwarded process with the request that it be delivered to a person within the command it may be delivered if the servicemember voluntarily agrees to accept it. When the servicemember does not voluntarily accept the service, it should be returned with a notation that the named person has refused to accept it.

c. Arising from official duties. Whenever a servicemember or civilian employee is served with Federal or state court civil or criminal process arising from activities performed in the course of official duties, the commanding officer should be notified and provided copies of the process and pleadings. The command shall ascertain the pertinent facts, notify the servicing legal office immediately by telephone, and forward the pleadings and process to that office. A military member may remove civil or criminal prosecutions from state court to Federal court when the action is on account of an act done under color of office or when authority is claimed under a law of the United States respecting the armed forces. 28 U.S.C. § 1442a. The purpose of this section is to ensure a Federal forum for cases when service-members must raise defenses arising out of their official duties. If a Federal employee is sued in his or her individual capacity, that employee may be represented by Justice Department attorneys in state criminal proceedings and in civil and congressional proceedings. When an employee believes he or she is entitled to representation, a request -- together with pleadings and process and an affidavit from the servicing legal officer -- certifying that the member was performing official duties must be submitted to the Commandant (G-LCL). See Claims and Litigation Manual (CLM), 18-C-1. If the Justice Department determines that the employee's actions reasonably appear to have been performed within the scope of employment and that representation is in the interest of the United States, representation will be provided.

3. Service not allowed. In any case where the commanding officer refuses to allow service of process, a report shall be made to the servicing legal office as expeditiously as the circumstances allow or warrant.

4. Leave/liberty. In those cases where personnel either are served with process or voluntarily accept service of process, leave or liberty may be granted in order to comply with the process. PERSMAN, 7-A-23.

B. Subpoenas. A subpoena is a court order requiring a person to testify in either a civil or criminal case as a witness. The same considerations exist in this instance as apply in the case of service of process, except for special rules where testimony is required on behalf of the U.S. in criminal and civil actions, or where the witness is a prisoner. In all cases, immediately contact the servicing legal office.

1. Witness on behalf of the Federal government. Where Coast Guard interests are involved and departmental personnel are required to testify, Commandant (G-LLA) will fund and issue orders for out-of-district CG personnel to appear. District commanders are responsible for issuing orders and funding intradistrict witness travel. See Maritime Law Enforcement Manual, App. F.

2. Witness on behalf of accused in Federal court. When military personnel are served with a subpoena and the appropriate fees and mileage are tendered, commanding officers should issue no-cost permissive orders unless the public interest would be seriously prejudiced by the member's absence from the command.

3. Witness on behalf of party to civil action or state criminal action with no Federal government interest. The commanding officer normally will grant leave or liberty to the person provided such absence will not prejudice the best interests of the service. If the member is being called as a witness for a nongovernmental party, they may only testify as to facts within their personal knowledge. Expert or opinion testimony is prohibited. 49 C.F.R. Part 9.

4. Pretrial interviews concerning matters arising out of official duties. Requests for interviews and/or statements by parties to private litigation must be forwarded to the servicing legal office. These interviews will be conducted in the presence of an officer designated by the servicing legal officer who will ensure that no line of inquiry is permitted which may disclose or compromise classified information or otherwise prejudice the security interests of the U.S. 33 C.F.R. 1.20-1.

C. Jury duty. Active-duty servicemembers are exempted from service on Federal juries. Congress passed a similar exemption for state jury duty in the Defense Authorization Act of 1986, but imposed a two-part test. Servicemembers may be excused if mission readiness is affected by the absence or if the absence unreasonably interferes with military job performance. In that case, contact the servicing legal office. CLM, 18-B-5.

GRANTING OF ASYLUM AND TEMPORARY REFUGE

A. Reference: COMDTINST 5802.1 (series)

B. Synopsis of provisions

1. The provisions of the basic references for granting asylum or temporary refuge to foreign nationals depend on where the request is made. Basically, if the request is made either in U.S. territory (the 50 states, Puerto Rico, territories or possessions) or on the high seas, the applicant will be received aboard the naval installation, aircraft or vessel where he seeks asylum. If a request for asylum or refuge is made in territory or territorial seas under foreign jurisdiction, the applicant normally will not be received aboard and should be advised to apply in person at the nearest American consulate or Embassy. Under these circumstances, an applicant may be received aboard and given temporary refuge only under extreme or exceptional circumstances where his life or safety is in imminent danger (e.g., where he is being pursued by a mob).

2. Regardless of the location of the unit involved, any action taken upon a request for asylum or refuge must be reported to the operational commander, COMDT, DOS, INS, and the U.S. Embassy by the fastest available means. Telephone or other voice communication is preferred but, in any case, an immediate precedence message (info: SECSTATE) must be sent confirming the telephone or voice radio report. All requests from foreign governments for release of the applicant will be referred to COMDT (G-TGC) and the requesting authorities shall be advised of the referral.

3. In any case, once an applicant has been received aboard an installation, aircraft or vessel, he will not be turned over to foreign officials without personal permission from the COMDT or higher authority, regardless of where the accepting unit is located.

4. Personnel are prohibited from directly or indirectly inviting persons to seek asylum or temporary refuge. No information concerning a request for political asylum or temporary refuge will be released to the public or media without the prior approval of the COMDT.

POSSE COMITATUS

A. References

1. Posse Comitatus Act, 18 U.S.C. § 1385.

2. Military Cooperation with Civilian Law Enforcement Officials, 10 U.S.C. §§ 371-378.

3. DoD Dir. 5525.5 of 15 Jan 1986, DoD Cooperation with Civilian Law Enforcement Officials.

4. SECNAVINST 5820.7B of 28 Mar 1988, Subj: COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS

B. Statutory authority. The Posse Comitatus Act provides that:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years or both.

C. Navy policy. Although not expressly applicable to the Navy and Marine Corps, the Act is regarded as a statement of Federal policy which has been adopted for the Department of the Navy by Secretarial regulation (i.e., SECNAVINST 5820.7B).

D. Execution of civil laws defined. The prohibition on use of military personnel as "a posse comitatus or otherwise to execute the laws" prohibits the following forms of direct assistance:

1. Interdiction of a vehicle, vessel, aircraft, or other similar activity;

2. a search or seizure;

3. an arrest, stop and frisk, or similar activity;

4. use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators; and

5. any other activity which subjects civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature.

E. "Armed forces" defined. The prohibitions of the Posse Comitatus Act are applicable to members of the Navy and Marine Corps acting in an official capacity. Accordingly, it does not apply to:

1. A servicemember off duty, acting in a private capacity, and not under the direction, control or suggestion of DoN authorities;

2. a member of a Reserve component not on active duty or active duty for training;

3. civilian special agents of the Naval Investigative Service performing assigned duties under SECNAVINST 5520.3; or

4. the U.S. Coast Guard.

F. Posse Comitatus exceptions

1. Use of information collected during military operations. All information collected during the normal course of military operations which may be relevant to a violation of Federal or state law shall be forwarded to the local Naval Investigative Service field office or other authorized activity

for dissemination to appropriate civilian law-enforcement officials pursuant to SECNAVINST 5320.3. The needs of civilian law-enforcement officials may even be considered in scheduling routine training missions. This does not, however, permit the planning or creation of missions or training for the primary purpose of aiding civilian law-enforcement officials, nor does it permit conducting training or missions for the purpose of routinely collecting information about U.S. citizens.

2. Use of equipment and facilities. Navy and Marine Corps activities may make available equipment, base facilities, or research facilities to Federal, state, or local civilian law-enforcement officials for law-enforcement purposes when approved by proper authority under SECNAVINST 5820.7B.

3. Use of Department of the Navy personnel

a. Military/foreign affairs purposes. Actions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States (e.g., enforcement of the UCMJ, maintenance of law and order on a military installation, protection of classified military information or equipment) are not restricted by the Posse Comitatus Act regardless of incidental benefits to civilian law-enforcement authorities.

b. Express statutory authority. Certain laws permit direct military participation in civilian law enforcement for suppression of insurrection or domestic violence, protection of the President, Vice President and other designated dignitaries, assistance in the case of crimes against members of Congress, and foreign officials and other internationally protected persons.

c. Operation and maintenance of equipment. Where the training of non-DoD personnel is infeasible or impractical, Department of the Navy personnel may operate or maintain, or assist in operating or maintaining, equipment made available to civilian law-enforcement authorities.

d. Training and expert advice. Navy and Marine Corps activities may provide training on a small scale and expert advice to Federal, state and local civilian law-enforcement officials in the operation and maintenance of equipment.

e. Secretarial authorization. The DoN Posse Comitatus Act policy is subject to Secretarial exceptions on a case-by-case basis.

4. Reimbursement. As a general rule, reimbursement is required when equipment or services are provided to agencies outside DoD. When DoN resources are used in support of civilian law-enforcement efforts, the costs shall be limited to the incremental or marginal costs incurred by DoN. SECNAV waivers are available in some instances.

U.S. Department of Transportation
United States Coast Guard

Commandant (G-PS)
United States Coast Guard

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COMDTINST M1750.7A

COMMANDANT INSTRUCTION 1750.7A

Subj: Family Advocacy Program

Ref: (a) Public Law 100-294 Child Abuse Prevention, Adoption and Family Service Act of 1988 (NOTAL)

1. PURPOSE. The purpose of this instruction is to strengthen and clarify policy and guidance which addresses family violence (spouse/child abuse and child neglect) among Coast Guard families.

2. DIRECTIVES AFFECTED. COMDTINST 1750.7 is cancelled.

3. APPLICABILITY. This instruction applies to all Coast Guard members, active and retired, and to their family members to the extent feasible. This instruction shall apply to members of other Uniformed Services and their dependents while serving with the Coast Guard or using Coast Guard facilities to the extent necessary for reporting and treatment. In the absence of agreements to the contrary, responsibility for members and their dependents remains with the parent Service.

4. BACKGROUND. In 1979, because of the identification of increased administrative and medical costs of family violence, the General Accounting Office recommended the military Services establish Family Advocacy Programs to address family violence. In 1981, the Department of Defense (DoD), in concert with the Coast Guard, published a joint Services directive tasking each Service with establishing a Family Advocacy Program tailored to meet their individual Service needs. In 1982, by direction of the Commandant, the Coast Guard established a Family Programs staff within Commandant (G-P).

5. DISCUSSION.

   a. Acts of family violence and neglect may be violations of either civil or military law depending on the nature and location of the offense. Family violence is no longer considered a private family matter. The civilian community has become increasingly aware of the issue of family violence and most communities have prevention, intervention, and treatment programs which may be accessed by Coast Guard personnel.

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5. b. Spouse and child abuse or neglect and child sexual abuse interferes with the efficiency of Coast Guard units, increases medical and administrative expenses, detracts from the reputation and prestige of the Coast Guard, and is inconsistent with the standards of professional and personal conduct required of Coast Guard members.

c. The objectives of the Coast Guard Family Advocacy Program are to:

(1) Establish Coast Guard policy and guidance for the successful prevention, intervention, and treatment of family violence. Current policy includes the administrative action for disciplining members and the rehabilitation of military personnel who have the potential for future useful military service without further abusive incidents;

(2) Prevent and reduce family violence incidents through educational programs, information and referral, and crisis intervention;

(3) Provide adequate guidance to commands through district, MLC, or Headquarters units' Family Program Administrators (FPA's), Family Advocacy Representatives (FAR's), and Commandant (G-PS-4). The optimum application of this guidance will ensure the availability of expert family advocacy resources and appropriate management of family violence incidents in order to assist all members and their dependents;

(4) Ensure reporting of all suspected or substantiated child abuse and neglect incidents to the proper civilian authorities to enable the proper intervention and treatment;

(5) Classify spouse/child abuse and child neglect as acts which cannot be condoned by the Coast Guard. (The Family Advocacy Program is not intended to replace or impede the appropriate use of the military justice system, investigations convened under the Administrative Investigations Manual COMDTINST M5527.1 (series), or the use of Coast Guard investigators, as deemed necessary by unit commanding officers.);

(6) Ensure that the Child/Spouse Abuse Incident Report Form (CG-5488) used in this program shall not be placed in the service member's record and will only be available on a need to know basis. The information from this report may be in the service member's record only if it is appropriate for court martial, non-judicial punishment, etc.

d. Definitions contained in this instruction and its enclosures are intended solely for the internal administration of the Family Advocacy Program. These definitions do not modify or influence definitions applicable to other regulations or statutes.

6. **POLICY AND SCOPE.**

a. It is the intent of the Coast Guard to significantly reduce the incidence of family violence (spouse/child abuse and child neglect) and to ensure the safety and well-being of all active duty members and their dependents. Child or spouse abuse incidents require specialized professional screening, intervention, and treatment. There are FPA's in specific MLC, district and major Headquarters units who, as trained social workers/mental health counselors, are the program administrators for the Family Support Programs. It is Coast Guard policy that FPA's are the primary Coast Guard resource for all family violence incidents. FAR's are responsible to their respective Coast Guard FPA's for program guidance as well as their commanders in family violence situations. They should all receive family advocacy training. See enclosure (1), (2) and (3) procedures for handling family violence cases.

b. Coast Guard policy is to identify and utilize Uniformed Services Medical Treatment Facilities (USMTF's) or Uniformed Services Treatment Facilities (USTF's) for screening and treatment for active duty members. If no USMTF or USTF is in close proximity to the command, local or State facilities will be used to provide services to active duty members.

7. **PROCEDURES.**

a. Area and district commanders, commanders of maintenance and logistics commands, and commanding officers of Headquarters units shall:

(1) Implement policy and program objectives as described herein;

(2) Provide family advocacy support to all commands in their vicinity or geographic area of responsibility;

(3) Ensure all suspected or substantiated family violence incidents are promptly reported to the servicing FPA by the informed Coast Guard command or designated personnel; and

(4) Ensure widest dissemination of this instruction.

b. Commandant (G-PS-4) will:

(1) Provide coordination of Coast Guard support of all family violence cases;

(2) Review and maintain documentation on all family violence cases provided by military or civilian social workers, FAR's, detailers, medical staff, districts, and commands to ensure that appropriate action has been taken or make case recommendations when necessary;

(3) Maintain accurate monthly and annual reports and statistics for all family violence cases Service-wide in accordance with the Paperwork Management Manual, COMDTINST M5212.12 (series) and the Privacy and Freedom of Information Acts Manual, COMDTINST 5260.2 (series);

7. b. (4) Provide assistance and guidance to all Coast Guard personnel regarding family violence incidents;

(5) Assist FPA's and commands to establish policies and directives for the implementation of the Family Advocacy Program; and

(6) Establish training and written materials to provide education Service-wide on family violence for all involved Coast Guard personnel (FPA's, FAR's, medical staff, chaplains, commanding officers, officers in charge, security personnel, etc.).

c. Family Program Administrators (FPA's) shall:

(1) Be designated, in writing, as the primary point of contact for providing family advocacy support and guidance to all commands in the geographic area of responsibility for family violence cases;

(2) Report all suspected or confirmed incidents of family violence in accordance with local laws and this instruction;

(3) Convene a Family Advocacy Case Review Committee if appropriate;

(4) Notify the involved command of any suspected or substantiated family violence incident(s) reported and any intervention, treatment, and/or followup required;

(5) Review documentation on all family violence cases provided by district, MLC commands, unit, or FAR's to ensure that appropriate action has been taken. Make case recommendations when necessary;

(6) Ensure that the reporting of all suspected or substantiated cases complies with enclosures (1), (2), and (3) and are properly reported using enclosure (4) of this instruction. The reports are to be maintained in accordance with the Paperwork Management Manual (COMDTINST M5212.12 (series)) and used with restricted disclosure in accordance with the Privacy and Freedom of Information Acts Manual (COMDTINST M5260.2 (series));

(7) Keep monthly statistics of all family violence cases in their area of responsibility and, on the last day of each month, submit those statistics to Commandant (G-PS-4);

(8) Represent and advise area and district commanders, MLC commands, and commanding officers in all areas pertaining to family violence;

(9) Provide assistance and guidance to all unit FAR's, commanding officers, and officers in charge in family violence incidents;

(10) Assist area and district commanders, MLC commands, FAR's, and unit commanding officers in establishing policies and directives for the implementation of the Family Advocacy Program at the local level:

7. c. (10) (a) Consult with Coast Guard legal and personnel staff to ensure that developed procedures are in accordance with existing Coast Guard investigative policies, do not interfere with the responsibilities of a convening authority, do not usurp the responsibilities of civil authorities, and do not lead to unwarranted intrusions into domestic affairs or personal privacy; and

(b) Establish liaison with local and State law enforcement and child protective agencies to facilitate timely intervention in cases brought to the FPA's attention.

(11) Establish training and resources to provide education on family violence or neglect to MLC, district or unit Coast Guard personnel who are involved in the identification, intervention, and/or treatment of families, including but not limited to FAR's, CO's, OIC's, XO's, medical and dental staff, personnel officers, security personnel, chaplains, and OOD's.

d. Unit commanding officers shall:

(1) Implement policy and program objectives as described herein;

(2) Ensure that the reporting of all suspected or substantiated cases complies with enclosures (1), (2), and (3) and are properly reported using enclosure (4) of this instruction;

(3) Select an active duty member from their unit to serve as the FAR (see enclosure (5));

(4) Report all cases of suspected or substantiated family violence in accordance with local laws and this instruction;

(5) Notify their district or unit FPA of suspected or substantiated family violence incidents; and

(6) Obtain assistance and guidance from their district, MLC, and Headquarters unit FPA or Commandant (G-PS-4) for the intervention and treatment necessary for each family violence incident.

e. Family Advocacy Representatives (FAR's) shall:

(1) Report all suspected and substantiated incidents of family violence in accordance with local laws and this instruction;

(2) Notify their command and servicing FPA of all suspected or substantiated family violence incidents;

(3) Secure all written case notes or information in a locked area with limited access in accordance with the Paperwork Management Manual (COMDTINST M5212.12 (series));

(4) Establish liaison with local law enforcement and child protective agencies to facilitate timely intervention in incidents brought to the FAR's attention;

7. e. (5) Identify local/State suicide intervention resources;

(6) Represent and advise the commanding officer, as directed, in matters pertaining to family advocacy;

(7) Establish a file of local community resources to provide assistance with professional intervention, prevention, and referral identification and to establish a procedure for referral during duty and non-duty hours. If disclosure of case particulars is made to an agency outside the Department of Transportation (DOT), a record of the name and address of the person or agency, the date, agency involved, and purpose for the disclosure must be made part of the Family Advocacy file and retained for 5 years after the last disclosure or for the life of the record, whichever is longer; and

(8) Obtain assistance and guidance from their servicing FPA or Commandant (G-PS-4) for the intervention and treatment necessary for each family violence incident. Notify member that a family programs case file has been opened.

f. Child Care Center and Youth Center Directors shall:

(1) Report all suspected or substantiated incidents of family violence in accordance with local laws and this instruction; and

(2) Notify their command and servicing FPA of all suspected or substantiated incidents of family violence.

8. ACTION. Area and district commanders, commanders of maintenance and logistics commands, unit commanding officers, and Commander, CG Activities Europe shall ensure the widest dissemination of this information.

9. REPORTS AND FORMS REQUIRED. Area and district commanders, commanders of maintenance and logistics commands, unit commanding officers, and Commander, CG Activities Europe shall submit the original copy of the Child/Spouse Abuse Incident Report, CG-5488, (RCS-G-PS-5173), to Commandant (G-PS-4), as required. The CG-5488 will be reproduced locally.

G. F. WOOLEVER
Acting

Encl: (1) Procedure for Handling Family Advocacy Cases
(2) Definitions
(3) Terms and Instructions for Completing CG-5488, Child/Spouse Abuse Incident Report
(4) Child/Spouse Abuse Incident Report, CG-5488 (RCS-G-PS-5173)
(5) Selection of Family Advocacy Representative

PROCEDURE FOR HANDLING FAMILY ADVOCACY CASES

A. In any suspected or substantiated case of family violence (child/spouse abuse and child neglect) involving persons subject to this instruction, Family Program Administrators (FPA's), Family Advocacy Representatives (FAR's), or other personnel designated by the commanding officer shall take the following action:

1. Secure protection and treatment for the victim;

a. Protection:

(1) Maintain the safety and well-being of the victim(s) at all times by removing either the victim or abuser from the abusive situation or environment as quickly as possible and to the extent necessary. Commanding officers may temporarily separate parties to family violence by intervention to remove service members from Government quarters and/or by restricting members from the area of such quarters for a reasonable period. Military dependents may be provided access to safe houses, emergency foster care, or similar facilities but are not normally removed from Government quarters unless such removal is required by local civil authorities exercising concurrent jurisdiction. A memorandum of understanding should be developed with local authorities to define intervention procedures, regardless of jurisdictional authority; and

(2) Immediately notify the proper professional authorities to adequately assess the seriousness of each situation.

b. Treatment:

(1) Assess the available civilian or military resources/services needed to meet the individual needs of each case;

(2) Obtain professional consultation and recommendations as to which programs or services are necessary for each violence situation;

(3) Create a follow-up plan whenever treatment is required to monitor the progress of each case; and

(4) Inform appropriate Coast Guard personnel of the intervention, prevention, treatment, and followup considered necessary.

2. Alert the proper child protective service unit in all cases of suspected or substantiated child abuse, neglect, or sexual abuse;

a. While the command has no jurisdiction over civilian child protective service agencies and in a few cases the agency may have no jurisdiction over the Coast Guard family, cooperative relationships shall be established with such agencies. Encourage them to notify the command of Coast Guard abuse cases coming to their attention.

A. 2. b. Commands must report any suspected or substantiated incidents of child abuse or neglect as required by State law and reference (a).

3. Conduct a discreet inquiry into each case, over which the Coast Guard has jurisdiction, whether occurring on or off Coast Guard property, of suspected or substantiated family violence;

a. The FPA/FAR conducting such assessment must be aware of the complex and volatile emotions involved in such cases, including those of the members conducting the investigation.

b. An accusation can place professional standing, social acceptance, and career progression at risk. Therefore, accusations and classifications of individuals short of judicial conviction or administrative separation from military service, shall be protected with the highest degree of confidentiality.

c. Maintain all reports in accordance with the Paperwork Management Manual (COMDTINST M5212.12 (series)) and assure that program information is used with restricted disclosure in accordance with the Privacy and Freedom of Information Acts Manual (COMDTINST M5260.2 (series)).

d. Information for Family Support Programs case management will be collected and released in compliance with the Privacy and Freedom of Information Acts Manual (COMDTINST M5260.2 (series), Chapters 3, 4, 5, 7, and 9).

(1) All contents of a Family Support Programs case file shall be kept confidential.

(2) Disclosure of case information will be approved by the FPA/FAR within the following guidelines:

(a) Disclosure to officers and employees of the Coast Guard who have a need for the information within the record during the performance of their duties, as determined by the FPA/FAR. Such officers and employees may include personnel from Commandant (G-PE), (G-PO), (G-L), (G-OIS), (G-PS) and (G-P). (Review the Privacy and Freedom of Information Acts Manual (COMDTINST M5260.2 (series), Chapter 5, pages 5-1, 5-2);

(b) Disclosure outside the Coast Guard in compliance with the routine uses of records published in the system of records notice; specifically, this pertains to:

(1) Federal, State and local government or private agency for coordination of family advocacy programs, medical care, mental health treatment, civil or criminal law enforcement and research into the causes and prevention of family domestic violence.

3. d. (2). (b)(2) To individuals or organizations providing family support program care under contract to the Federal Government (Review Chapter 5 of the Privacy and Freedom of Information Acts Manual (COMDTINST M5260.2 (series), pages 5-1, 5-2).

(3) Case records will not leave the office of Commandant (G-PS-4) without the notification/approval of the FPA/FAR, in compliance with the Privacy and Freedom of Information Acts Manual (COMDTINST M5260.2 (series)).

e. Advise individuals reporting suspected or substantiated child and/or spouse abuse incidents of the following:

(1) The purpose for which the information is sought and its intended use;

(2) The fact that the information provided, including the identity of the source, may be disclosed to the individual being investigated if that individual so requests and the reporting source does not request confidentiality; and

(3) The fact that the reporting source does have the right to ask their identity not be disclosed. The identity of the reporting source will not be disclosed if requested. The commanding officer, FPA, FAR, investigator, and other affected Coast Guard personnel shall grant a pledge of confidence to the source and note in the case file/report that confidentiality was granted.

4. Complete and forward enclosure (4) for each suspected or substantiated family violence incident. Strict confidentiality must be maintained. Mail the completed form in a double envelope to Commandant (G-PS-4) with copies to the appropriate servicing FPA.

5. Initiate administrative or disciplinary actions if the incident warrants. The seriousness of the case and the type of injury to the victim, as well as the extent of the treatment necessary for the abuser to prevent repetition, should be factors in this decision.

6. Treat the abuser at the appropriate facilities to the extent the individual's motivation and problems permit.

7. Support the family unit to the maximum extent determined by the professionals providing treatment, i.e., child care, permissive leave, and flexible hours to facilitate treatment times.

8. There have been rare cases of neighbors or estranged spouses making false reports in an effort to intimidate or seek revenge. While this is always a possibility, each report must be treated as valid until proven otherwise. Strict confidentiality plus a vigorous and professional inquiry will preserve the rights of all parties.

B. Members should be allowed to seek emergent or nonemergent short-term mental health counseling and/or treatment without regard to retention issues. Retention is a separate but clearly related issue which will ultimately be resolved by the command and Commandant (G-PE) or (G-PO). Commands shall decide the suitability of the abuser for long-term, nonemergency treatment according to the following criteria:

1. Member's potential for further useful service;

2. Assessment of previous military performance as documented in the individual's service record;

3. Rehabilitative potential as diagnosed by an experienced therapist trained in working with such families. If appropriate, a complete psychosocial evaluation of the offender should be obtained to screen for those individuals who are not acceptable candidates for treatment. This evaluation should be conducted by professionals skilled in the treatment of child and spouse abuse;

4. Clear acceptance of responsibility for the behavior prior to entering treatment; and

5. When indicated, results of drug and/or alcohol screening.

C. Treatment for family violence cases shall continue until the command and treating therapist concur that the member:

1. Has successfully completed all treatment, legal requirements, and obligations;

2. Has had no recurrence within 1 year of the abusive behavior; and

3. Continues to meet command-determined work performance requirements.

D. Participation in the treatment program is considered a failure for any one of the following reasons:

1. Any recurrence of the abuse toward the victim or any other person;

2. Failure to attend treatment; or

3. Offender is determined to be unresponsive and treatment is no longer appropriate.

E. Failed treatment is grounds for command consideration for separation.

DEFINITIONS

1. Family Advocacy Program (FAP). A program designed to address all aspects of intervention concerned with maltreatment involving military personnel and/or their dependents. This intervention includes identification, evaluation, treatment and education, and prevention.

2. Case. Case refers to all incidents involving one particular victim. Each victim in a family is a separate case.

3. Case Status. The finding of the case review. Includes Substantiated, Suspected, At Risk, and Unsubstantiated as follows:

   a. At Risk. A case for which there is insufficient evidence for a case determination of Substantiated or Suspected, but the family requires support services and monitoring. Family members are considered to be vulnerable without intervention.

   b. Substantiated. A case that has been investigated and the preponderance of available information indicates that abuse and/or neglect has occurred. This means that the information that supports the occurrence of abuse is of greater weight or more convincing than the information that indicates that the abuse/and or neglect did not occur.

   c. Suspected. A case determination is pending further investigation. Duration for a case to be considered Suspected and under investigation must not exceed 12 weeks.

   d. Unsubstantiated. An alleged case that has been investigated and the available information is insufficient to support the claim that abuse and/or neglect did occur.

4. Child Abuse/Neglect. The physical injury, sexual maltreatment, emotional maltreatment or neglect, deprivation of necessities, or other maltreatment or neglect of a child under the age of 18 by a parent, guardian, employee of a residential facility, or any staff person responsible for circumstances that indicate that the child's welfare is harmed or threatened. The term encompasses both acts and omissions on the part of a responsible person.

5. Child Sexual Abuse/Maltreatment. This category includes the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or having the child assist any other person to engage in, any sexually explicit conduct (or any simulation of such conduct) for the purpose of producing any visual depiction of such conduct, or the rape, molestation, prostitution, or other such form of sexual exploitation of children, or incest with children, the purpose of which is to provide sexual gratification or financial benefit to the offender; all sexual activity between an offender and a child when the offender is in a position of power over the child is considered sexual maltreatment.

   a. Exploitation. Forcing a child to look at the offender's genitals, exposure of a child's genitals, talking to a child in a sexually explicit manner, or involving a child in sexual or immoral activity such as pornography or prostitution; the offender does not have direct physical contact with the child.

5. b. Rape/Intercourse. Sexual intercourse with a child involving physical force or emotional manipulation; taking advantage of a child's naivete in encouraging and having sexual intercourse with the child.

   c. Molestation. Fondling or stroking of breasts or genitals, oral sex or attempted penetration of the child's vagina or rectum.

   d. Incest. Sexually explicit activity identified above between a child and a parent, or an older sibling, for the sexual gratification of the offender. This relationship may evidence an ongoing pattern of sexual involvement.

   e. Other Sexual Maltreatment. Other sexual activity with a child not mentioned above.

6. Clergy-Penitent Relationship. The clergy-penitent relationship is an evidentiary rule, contained in the Manual for Courts Martial, Chapter 27, MRE 503, which restricts the right of courts to require testimony in the relationship between clergy and penitent in matters of religion or conscience.

7. Extrafamiliar. Term used to describe a child abuse/neglect case in which the offender's relationship to the child is outside the family. This category ranges from known individuals living or visiting in the same residence who are unrelated to the victim by blood or marriage to individuals unknown to the victim.

8. Family Advocacy Review Committee. A multi-disciplinary team at major commands that may include the FPA, C.O., X.O., CEA, medical or dental personnel, chaplain, legal and security personnel and the FAR. This committee oversees the functioning of the Family Advocacy Program at the local command level. It may meet on a regular or ad hoc basis as needed.

9. Incest. For the purposes of the FAP only. Any sexual activity between persons who are closely related by blood or adoption. Sexual abuse by familiar caretakers (other live-in guardians) may sometimes be viewed as incest depending upon the specifics of the case. For purposes of the FAP, any sexual activity occurring between a parent/step-parent and a child in their care and custody is considered incest. Sexual activity between parent/step-parent and the same sex child is to be treated as incest, not homosexuality.

10. Incident. An occurrence that may include one or more types of maltreatment. Involves one victim and one occurrence. An incident report (CG Form 5488) is completed on each incident.

11. Intrafamilial. Term used to describe a child abuse/neglect case in which the offender has responsibility for the child's welfare and is either a parent or is related by blood or marriage.

12. Offender. The person directly or indirectly responsible for the resulting neglect or abuse which occurs to an individual. Any person whose act, or failure to act, substantially impaired the health or well-being of the victim.

13. Maltreatment. A generic term which includes all forms of abuse and/or neglect covered in the FAP.

14. Spouse. A partner in a lawful marriage where one or both of the partners is a military member.

15. Spouse Abuse. This category includes assault, battery, threat to injure or kill, other acts of force or violence, or emotional maltreatment or neglect inflicted on a partner in a lawful marriage when one or both of the partners is a military member, and/or incidents in which a live-in relationship results in abuse. A spouse under 18 years of age shall be treated in this category.

16. Victim. An individual who is the subject of abuse or neglect, or whose welfare is harmed or threatened by acts of omission or commission by another individual.

Terms and Instructions for Completing CG-5488, Child/Spouse Abuse Incident Report

1. Case Number: Leave blank. The case number designation is for Commandant (G-PS-4) use.

2. Report Sequence Code: Leave blank.

3. Date Case Opened: The year, month, and day that the case was reported to the Family Advocacy Representative (FAR) or command and entered into the administrative system.

4. Medical Treatment Facility Code: Name of the Medical Treatment Facility (MTF) generating the report.

5. Major Command Code: Unit OPFAC code.

6. Case Status Determination Date: Leave blank.

7. Source of Initial Referral: The identification of an individual or group actually notifying the Family Advocacy Representative (FAR) or other command representative of the alleged maltreatment or neglect. Select the category most descriptive of the referral source:

   a. Military: Uniformed or civilian employee of the Coast Guard who, representing an organization, refers a case to the FAR or other command representative in the interest of protecting the child or spouse.

      (1) Law Enforcement: This includes military police, staff in a law enforcement organization, attorneys, and legal assistance personnel.

      (2) Medical/Dental Treatment Facility: A member of the medical/dental staff assigned to a medical treatment facility.

      (3) Family Centers: This includes social workers, counselors, and staff of the Coast Guard or DoD Service Centers. This does not include individuals assigned to a medical treatment facility.

      (4) Child Care Provider: Includes babysitters, day care (home or center) staff, nursery school, preschool staff, or other out-of-home child care providers.

      (5) School: Includes any administrator, teacher, or other staff member employed by or volunteering in DOD dependents schools.

      (6) Recreation Center: Includes league directors, officials, coaches, and other program staff members.

7. a. (7) Command Representative: Includes any referral from the individual's chain of command.

(8) Chaplain: A military representative of a religious group or order.

(9) Other: This source includes other than those listed above who act in a professional capacity and represent a military organization not included in other categories, such as drug and alcohol program staff or emergency relief. Please specify.

b. Civilian: This includes any civilian not employed by the Coast Guard who, representing an organization, refers a case to the FAR or other command representative in the interest of protecting the child or spouse.

(1) Law Enforcement: This includes peace officers, officers of the court, personnel assigned to a law enforcement organization, court personnel, and attorneys.

(2) Medical/Dental: A member of the medical/dental staff and/or clinicians in private practice.

(3) Social Services: A staff member of a private or public social service agency, to include a staff member of a State Child Protective Service (CPS).

(4) Child Care Provider: Includes babysitters, day care (home or center) staff, nursery school, preschool staff, or other out-of-home child care providers.

(5) School: Includes any administrator, teacher, or other staff member employed by or volunteering in the schools.

(6) Recreation Center: Includes league directors, officials, coaches, and other program staff members.

(7) Other: This source is other than those listed above who are acting in a professional capacity and represent civilian organizations. Please specify.

c. Nonaffiliated: This category includes all reporting individuals who become aware of the maltreatment or neglect and make the report in a private, nonprofessional capacity. This includes family members, relatives, friends, neighbors, the victim, and the offender.

(1) Neighbor/Friend/Acquaintance/Relative: A parent or guardian, neighbor, friend, acquaintance, or relative of the individual involved in reporting the case.

7. c. (2) Self-Referral, Victim: Report initiated by the victim involved in the maltreatment or neglect.

(3) Self-Referral, Offender: Report initiated by the perpetrator involved in the maltreatment or neglect.

(4) Other source: This source is other than those listed above, such as an anonymous reporter or an unknown source. Please specify.

8. Type of Victim: This category pertains to all cases of abuse under investigation whether "suspected" or "substantiated."

a. Child Abuse/Neglect: The physical injury, sexual maltreatment, emotional maltreatment or neglect, deprivation of necessities, or other maltreatment or neglect of a child under the age of 18 by a parent, guardian, employee of a residential facility, or any staff person responsible for circumstances that indicate that the child's welfare is harmed or threatened. The term encompasses both acts and omissions on the part of a responsible person.

b. Spouse Abuse: This category includes assault, battery, threat to injure or kill, other acts of force or violence, or emotional maltreatment or neglect inflicted on a partner in a lawful marriage when one or both of the partners is a military member, and/or incidents in which a live-in relationship results in abuse. A spouse under 18 years of age shall be treated in this category.

9. Notification to Child Protective Services (CPS): Coast Guard policy prescribes the reporting of known or suspected incidents of child abuse/neglect to civilian agencies tasked with receiving such reports. Specify whether or not report was made to CPS. In the case of incidents occurring overseas where there is no agency to receive reports, "not applicable" is the appropriate response. If 8.b. is completed, leave blank.

10. Type of Report to Registry: This identifies the report to the district or maintenance and logistics command FAR for proper coding.

a. Initial: This is the first report filed in the case.

b. Updated Report: New information is available in a current case.

(1) Status Change: For example, the case status has changed from "suspected" to "substantiated," from "suspected" to "unsubstantiated," or other such changes.

(2) Subsequent Incident: Another occurrence of the same type or of a different type of maltreatment or neglect has occurred in the case.

10. c. Closed, No Recurrence: The case is closed when no incident of maltreatment or neglect has occurred within 1 year of the previous reported incident.

(1) Closed, Resolved: The case is closed when no incident has occurred, and treatment is deemed complete, or family members are separated and the threat of maltreatment or neglect is no longer present.

(2) Closed, Unresolved: The case is closed when no incident has occurred, despite incomplete treatment and/or lack of client cooperation.

(3) Closed, Separated from Service: The case is closed when the sponsor is released from active military service.

d. Transferred: The sponsor is reassigned to an installation outside the geographical area serviced by the reporting facility. Specify the receiving assigned installation.

e. Reopened Case: An incident of maltreatment or neglect has recurred in a closed case and is identified as a reopened (new) case.

11. Case Status: The status of the case at the time of the report.

a. Substantiated: A case that has been investigated and evaluated by the appropriate FAR or civilian agency and an occurrence of maltreatment or neglect has been substantiated.

b. Suspected: A case determination is pending further investigation. Duration for a case to be "suspected" and under investigation should not exceed 12 weeks.

c. Unsubstantiated: A report for which investigators reveal that there is insufficient evidence to support the claim that child abuse/ neglect or spouse abuse did occur. The family needs no family advocacy services.

12. Sponsor Data: The sponsor is the active duty military member or the individual employed by the Coast Guard to whom benefits accrue as a result of the member's employment.

13. Type of Child Maltreatment or Neglect: The particular form of abuse or neglect or injury experienced by the individual.

a. Major Physical Injury: This includes brain damage, skull fracture, subdural hemorrhage or hematoma, bone fracture, dislocation, sprain, internal injury, poisoning, burn, scald, severe cut, laceration,

13.a. (cont'd) bruise, welt, or any combination thereof, which constitutes a substantial risk of the life or well-being of the individual.

(1) Brain Damage/Skull Fracture: The individual has experienced a severe injury resulting in the fracture of the skull and/or damage to the brain.

(2) Subdural Hemorrhage or Hematoma: Bleeding or a blood clot occurring under the outer covering of the brain.

(3) Bone Fracture: Any breaking or cracking of a bone; does not include skull fracture. All bone fractures are considered major physical injuries.

(4) Dislocation/Sprain: Displacement of bone at a joint; injury to tendons, ligaments, or muscles. All dislocations/sprains are considered major physical injuries.

(5) Internal Injury: Injury to the organs within the body; does not include brain damage.

(6) Poisoning: The willfull oral administration of a substance that is known to cause harm, or ingestion of a poisonous substance due to negligence by a caretaker.

(7) Burn/Scald: Injury or damage by excessive heat due to flame, steam, liquid, cigarette, etc.

(8) Severe Cut/Laceration/Bruise: Damage to the skin, including slashing of the skin, or damage to the blood vessels directly underneath the skin as a result of a blow or sharp instrument; involves excessive bleeding; includes stabbing.

(9) Other Major Physical Injury: Any other physical injury not listed above that seriously impairs the health or physical well-being of an individual.

b. Minor Physical Injury: This includes twisting, shaking, minor cut, bruise, welt or any combination thereof, which do not constitute a substantial risk to the life or well-being of the individual.

(1) Minor Cut/Bruise/Welt: Minor damage to the skin or to the blood vessels directly underneath the skin caused by a blow or a cut; does not involve extensive bleeding.

(2) Twisting/Shaking: Twisting of a limb or shaking of the individual, as by the shoulders, that does not result in any injury, such as sprains or fractures.

13. b. (3) Other Minor Injury: Any other physical injury that does not pose serious risk to the health or physical well-being of the individual.

c. Child Sexual Maltreatment: This category includes the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or having the child assist any other person to engage in, any sexually explicit conduct (or any simulation of such conduct) for the purpose of producing any visual depiction of such conduct, or the rape, molestation, prostitution, or other such form of sexual exploitation of children, or incest with children, the purpose of which is to provide sexual gratification or financial benefit to the offender; all sexual activity between an offender and a child when the offender is in a position of power over the child is considered sexual maltreatment.

(1) Exploitation: Forcing a child to look at the offender's genitals, exposure of a child's genitals, talking to a child in a sexually explicit manner, or involving a child in sexual or immoral activity such as pornography or prostitution; the offender does not have direct physical contact with the child.

(2) Rape/Intercourse: Sexual intercourse with a child involving physical force or emotional manipulation; taking advantage of a child's naivete in encouraging and having sexual intercourse with the child.

(3) Molestation: Fondling or stroking of breasts or genitals, oral sex or attempted penetration of the child's vagina or rectum.

(4) Incest: Sexually explicit activity identified above between a child and a parent, or an older sibling, for the sexual gratification of the offender. This relationship may evidence an ongoing pattern of sexual involvement.

(5) Other Sexual Maltreatment: Other sexual activity with a child not mentioned above.

d. Child Deprivation of Necessities: This category includes neglecting to provide the child with the following when able to do so: nourishment, clothing, shelter, health care, education, supervision, or causing a failure to thrive.

(1) Neglecting to Provide Nourishment: Failure to provide adequate or appropriate food, which results in a malnourished condition for the child.

13. d. (2) Neglecting to Provide Shelter: Failure to provide protection against the elements, locking out, unsanitary living facilities.

(3) Neglecting to Provide Clothing: Failure to provide the child with clothing that protects the child from the weather and allows the child to conform to common standards of modesty and decency.

(4) Neglecting to Provide Health Care: Failure to provide for appropriate medical or dental care which adversely affects or could adversely affect the physical well-being of the child.

(5) Failure to Thrive: A condition of a child indicated by not meeting developmental milestones; i.e., height and weight or developmental retardation if the conditions are secondary to abuse and/or neglect.

(6) Lack of Supervision: Inattention on the part of, or absence of, the caretaker which results in injury to the child or leaves the child unprovided for. Failure to monitor the child's behavior in a reasonable manner to prevent the possibility of injury to the child or others.

(7) Educational Neglect: Allowing for extended or frequent absence from school; neglecting to enroll the child in school; preventing the child from attending school except when reasonable (illness, inclement weather, etc.).

(8) Abandonment: The absence of a caretaker when the caretaker does not intend to return.

e. Child Emotional Maltreatment or Neglect: This category includes behavior on the part of the caretaker which causes low self-esteem in the child, undue fear or anxiety, or other damage to the child's emotional well-being.

(1) Emotional Abuse: Active, intentional berating, disparaging, or other abusive behavior toward the individual which adversely affects the emotional well-being of the child.

(2) Emotional Neglect: Passive or passive/aggressive inattention to the child's emotional needs, nurturing, or emotional well-being.

f. Fatality: The victim died as a result of the maltreatment or neglect.

14. Type of Treatment: The services necessary to protect and treat the victim.

a. Social Services: The victim receives social services.

14. b. Medical Outpatient: The victim receives outpatient care.

c. Medical Inpatient: The victim is admitted as an inpatient.

15. Victim: The victim is an individual who is the subject of abuse or neglect or whose welfare is harmed or threatened by acts of omission or commission by another individual or individuals. A "child" is a person under 18 years of age for whom a parent, guardian, foster parent, or caretaker is legally responsible, such as a natural child, adopted child, stepchild, foster child, ward, or child of any age incapable of self-support because of a mental or physical incapacity and for whom treatment in a military medical facility is authorized. A "spouse" is a partner in a lawful marriage. An incident report is to be completed for each victim.

a.- e. Self-explanatory.

f. Substance Involvement: The victim's known involvement with alcohol and/or drugs prior to (12 hours) or during the incident.

g. Victim Resides: Identify location of victim's home.

(1) On Installation: Located on a military installation or in military housing.

(2) Off Installation: Located in the civilian community.

h. Number of Children in Victim's Home: Children living in the household environment who have not been identified as victims may be at risk for abuse/neglect. This number will provide an accurate accounting of all children potentially involved in the case.

i. Incident Occurred: Identify location where the incident took place.

(1) On Installation: Located on a military installation or in military housing.

(2) Off Installation: Located in the civilian community.

16. Alleged Offender: The alleged offender is any person who allegedly caused the abuse and/or neglect of a child, or the abuse of a spouse, or who may be suspected of having knowingly allowed such abuse or neglect to occur or whose alleged act, or failure to act, substantially impaired the health or well-being of the abuse victim.

a.- d. Self-explanatory.

16. e. Branch of Service: The categories include Army, Navy, Air Force, Marine Corps, Coast Guard, Public Health Service (PHS), National Oceanic and Atmospheric Administration (NOAA), and for report purposes a category including civilian/retired/other.

f. Number of Secondary Offenders in the Case: If there is more than the one primary maltreater, indicate a number representing the additional individual(s) allegedly involved in the abuse of the victim. If offenders are equally involved in the alleged abuse, consider the active duty member as primary offender.

g. Pay Grade: Select appropriate grade code: E-1 to E-10, W-1 to W-4, and O-1 to O-10.

h. Rate/MOS/AFSC: Provide the Coast Guard member's rating.

i. Alleged Offender Relationship to Victim:

(1) Intrafamilial: The alleged offender has responsibility for the child's welfare and is a parent, or is related by blood, or in the case of spouse abuse, is married to the victim.

(a) Natural parent of the child.

(b) Stepparent or adoptive parent of the child.

(c) Spouse: Partner in a lawful marriage where one or both of the partners is a military member or employed by Coast Guard and eligible for treatment.

(d) Sibling: Victim's sister, brother, stepsister, or stepbrother.

(e) Other: Grandparent or other relative.

(2) Extrafamilial: The alleged offender's relationship to the child is outside the family. This may range from having 24-hour out-of-home care to having temporary responsibility for care and supervision of the child, such as a teacher or a babysitter. This category ranges from known individuals living in the same residence to individuals unknown to the victim.

(a) Neighbor/Friend/Acquaintance: Any person who is known personally to the victim and is not related.

(b) Teacher: Any school staff member.

(c) Military Child Care: Military service employed, contracted, or licensed staff member in a child care center

16. i. (2) (c) (cont'd) or preschool, a "home" or "family" child care provider, or a staff member in a Coast Guard dependents or DOD school, or a recreation program charged with responsibility for the individual on a temporary basis. Please specify the type of care provider in the block marked "other."

(d) Other Child Care: Civilian or private nursery school or child care staff member, recreation program staff member, or individual such as a babysitter, charged with responsibility for the individual on a temporary basis. Please specify the type of care provider in the space marked "other."

(e) Other: Specify any relationship not mentioned above and known or unknown by the individual, spouse, or child's parents. This category includes foster parent(s) and individual(s) living in the victim's dwelling.

j. Previous History of Violence, Abuse, or Both:

(1) Alcohol Rehabilitation: The alleged offender has been assigned to an alcohol rehabilitation program.

(2) Drug Rehabilitation: The alleged offender has been assigned to a drug rehabilitation program.

(3) Child Abuse: An established case of child abuse is recorded for the perpetrator.

(4) Spouse Abuse: An established case of spouse abuse is recorded for the perpetrator.

(5) Abused as Child: Alleged offender admits being abused as a child.

(6) History Unknown: Insufficient records on alleged offender's history.

(7) No Record: No record of involvement in substance abuse or domestic violence.

k. Marital Status: Self-explanatory.

l. Substance Involvement: The alleged offender's known involvement with alcohol and/or drugs prior to (12 hours) or during the incident.

m. Racial/Ethnic Group: Self-explanatory.

17. Actions Involved in Case to Date: All services that are being provided or arranged for the family or individual involved in the case.

17. a. Military Actions:

(1) Military Medical: All medical/dental services provided after the incident were for the purpose of treating attendant injuries or for the purpose of gathering medical evidence. This category includes military social services. The caseworker's response to a family violence report involves reporting to State authority, investigation, evaluation by the FAR, protection, and provision of services as required.

(2) Military Family Services: Services provided by the Army Community Services Center, the Navy/Marine Corps Family Service Center, or the Air Force Family Support Center.

(3) Military Police Investigation: The military police have at some point been involved in responding to a call for assistance or in investigating the incident of maltreatment or neglect.

(4) Military Justice Involvement: The military justice system has at some point dealt with the incident of maltreatment or neglect and the offender as the subject of disciplinary proceedings under the Uniform Code of Military Justice (UCMJ). This includes nonjudicial punishment, court martial, and all article 32 UCMJ proceedings. Excluded are administrative measures such as reprimand, admonition, or counseling. This category does not include legal services to individuals.

(5) Administrative Action: This category includes administrative separation, rehabilitative action, administrative reductions, letters of reprimand, and similar actions or counseling whether pecuniary liability for misconduct or negligence is imposed. This category does not include legal services to individuals.

b. Civilian Actions:

(1) Civilian Medical: Services provided after the incident were received from civilian medical/dental personnel. The purposes were to treat the attendant injuries and gather medical evidence of maltreatment.

(2) Civilian Social Services: The caseworker's response to a family violence report to include investigation, reporting to a State authority (in cases of child abuse/neglect), evaluation, protection, and provision of services as required. This category includes all types of assistance and advice to support the family.

17. b. (3) Civilian Police Investigation: The civilian police have at some point been involved in responding to a call for assistance or in investigating the incident of maltreatment or neglect.

(4) Civilian Court Involvement: Includes civil and criminal judicial proceedings before Federal, State, or foreign courts.

c. CHAMPUS Referral: Client referred for reimbursement for civilian treatment through the Office of Civilian Health and Medical Programs for the Uniformed Services.

d. No Services Provided: Self-explanatory.

e. Other Services: Specify services or actions not identified in the previous categories.

18. Incident Notes: Notes for the caseworker and for Service-specific information collection.

19. Authenticating Official: Incident reports are prepared and signed by the FAR.

CHILD / SPOUSE ABUSE INCIDENT REPORT

REPORT CONTROL SYMBOL
G-PS-5173

PRIVACY ACT STATEMENT

Collection of information to identify and record incidents of child/spouse abuse and provide protection and medical treatment to military members and their families is authorized by 42 U.S.C. 5101, et. seq., 14 U.S.C. 632 and E.O. 9397. Information concerning family member abuse and neglect is provided to the Department of Health and Human Services and is used for counseling and treatment of individuals, and in cases involving minors, may be provided to other agencies for law enforcement purposes. Furnishing information is voluntary, however, failure to provide the information may delay receipt of services.

1. CASE NUMBER	2. REPORT SEQUENCE	3. DATE CASE OPENED (YYMMDD)
4. MEDICAL TREATMENT FACILITY	**5. UNIT OPFAC CODE**	**6. CASE STATUS DETERMINATION DATE (YYMMDD)**

7. SOURCE OF INITIAL REFERRAL TO FAMILY ADVOCACY (X as applicable)

a. MILITARY	b. CIVILIAN	c. NON-AFFILIATED
(1) Law Enforcement	(1) Law Enforcement	(1) Neighbor/Friend/Relative
(2) Medical/Dental	(2) Medical/Dental	(2) Self-Referral, Victim
(3) Family Center	(3) Social Services	(3) Self-Referral, Offender
(4) Child Care/School/Recreation Center	(4) Child Care/School/Recreation Center	(4) Other (Specify)
(5) Command	(5) Clergy	
(6) Chaplain	(6) Other (Specify)	
(7) Other (Specify)		

8. TYPE OF VICTIM (X one)

- a. Child Abuse/Neglect (If 8a. is checked, proceed to item 9.)
- b. Spouse Abuse (If 8b. is checked, proceed to item 10.)

9. NOTIFICATION FORWARDED TO CHILD PROTECTIVE SERVICES? (X one)

- a. Yes
- b. No
- c. Not Applicable (Overseas)

10. TYPE OF REPORT TO REGISTRY (X as applicable)

- a. Initial
- b. Updated Report
  - (1) Status Change
  - (2) Subsequent Incident
- c. Case Closed
  - (1) Resolved
  - (2) Unresolved
  - (3) Separated from Service
- d. Transferred (Specify)
- e. Reopened Case

11. CASE STATUS (X one)

- a. Substantiated
- b. Suspected
- c. Unsubstantiated
- d. At Risk

12. SPONSOR DATA (If sponsor is alleged offender, X this box ☐ and go to item 13.)

a. NAME (Last, First, Middle Initial)

b. SOCIAL SECURITY NUMBER ___ - ___ - ____

c. PAY GRADE /RATE

d. BRANCH OF SERVICE (X one)

- (1) Army
- (2) Navy
- (3) Air Force
- (4) Marine Corps
- (5) Coast Guard
- (6) Retired Military
- (7) Civilian/Other

13. TYPE OF MALTREATMENT (X as applicable)

- a. Major Physical Injury
- b. Minor Physical Injury
- c. Sexual Maltreatment
- d. Deprivation of Necessities
- e. Emotional Maltreatment
- f. Fatality

14. TYPE OF TREATMENT (X as applicable)

- a. Social Services
- b. Medical Outpatient
- c. Medical Inpatient

15. VICTIM DATA

a. NAME (Last, First, Middle Initial)

b. SOCIAL SECURITY NUMBER (If available) FOR MILITARY MEMBERS ONLY ___ - ___ - ____

c. SEX

d. DATE OF BIRTH (YYMMDD)

e. RACE/ETHNIC GROUP (X one)

- (1) White, not of Hispanic Origin
- (2) Black, not of Hispanic Origin
- (3) Hispanic
- (4) Asian/Pacific Islander
- (5) American Indian/Alaskan Native

f. SUBSTANCE INVOLVEMENT (X one)

- (1) Alcohol
- (2) Drugs
- (3) Alcohol and Drugs
- (4) Unknown
- (5) No Involvement

g. VICTIM RESIDES (X one)

- (1) On Installation
- (2) Off Installation

h. NUMBER OF CHILDREN IN HOME

i. INCIDENT OCCURRED (X one)

- (1) On Installation
- (2) Off Installation

16. ALLEGED OFFENDER DATA

a NAME (Last, First, Middle Initial)

b SOCIAL SECURITY NUMBER FOR MILITARY MEMBERS ONLY

c DATE OF BIRTH (YYMMDD)

d. SEX

e BRANCH OF SERVICE

- (1) Army
- (2) Navy
- (3) Air Force
- (4) Marine Corps
- (5) Coast Guard
- (6) Retired Military
- (7) Civilian/Other

f NUMBER OF SECONDARY OFFENDERS IN THIS CASE

g PAY GRADE

h. RATE/MOS/AFSC

i RELATIONSHIP TO VICTIM (X one)

(1) Intrafamilial

- (a) Natural Parent
- (b) Step/Adoptive Parent
- (c) Spouse
- (d) Sibling
- (e) Other (Specify)

(2) Extrafamilial

- (a) Neighbor/Friend/ Acquaintance
- (b) Teacher
- (c) Military Child Care
- (d) Other Child Care
- (e) Other (Specify)

j HISTORY OF VIOLENCE AND/OR ABUSE (X as applicable)

- (1) Has been referred to an alcohol rehabilitation program
- (2) Has been referred to a drug rehabilitation program
- (3) Involvement in previous established case of child abuse
- (4) Involvement in previous established case of spouse abuse
- (5) Offender was abused as a child
- (6) Previous abuse history unknown
- (7) No previous record of abuse

k MARITAL STATUS (X one)

- (1) Single
- (2) Married
- (3) Divorced/ Separated

l. SUBSTANCE INVOLVEMENT (X one)

- (1) Alcohol
- (2) Drugs
- (3) Alcohol and Drugs
- (4) Unknown
- (5) No Involvement

m RACE/ETHNIC GROUP (X one)

- (1) White, not of Hispanic Origin
- (2) Black, not of Hispanic Origin
- (3) Hispanic
- (4) Asian/Pacific Islander
- (5) American Indian/ Alaskan Native

17. ACTIONS INVOLVED IN CASE TO DATE (X as applicable)

a MILITARY

- (1) Medical
- (2) Family Services
- (3) Police Investigation
- (4) Court Involvement
- (5) Administrative Action

b CIVILIAN

- (1) Medical
- (2) Social Services
- (3) Police Investigation
- (4) Court Involvement

c. CHAMPUS Referral? (X one)

- (1) Yes
- (2) No

d NO SERVICES PROVIDED

e. OTHER SERVICES (Specify)

18. INCIDENT NOTES (If additional space is needed, continue on plain paper)

19. AUTHENTICATING OFFICIAL

a TYPED NAME (Last, First, Middle Initial)

b SIGNATURE

c DATE SIGNED

d TITLE

e. TELEPHONE NO.

SELECTION OF FAMILY ADVOCACY REPRESENTATIVE

1. The following qualifications are recommended for selection of a unit Family Advocacy Representative (FAR). Consultation with the servicing FPA is highly recommended. The member should:

   a. Background. Have a background in personnel or medical administration, if possible. (A chaplain, although trained in pastoral counseling, will not be appointed as a FAR since the dual role involves a potential conflict of interest and breach of confidentiality. See Manual for Courts Martial (MCM), Chapter 27, Military Rule of Evidence (MRE) 503 i.e., Clergy-Penitent Relationship.). With the sole exception of small units, such as Search and Rescue stations with twenty members or less, commanding officers and executive officers shall not be designated FAR's as these officers must remain impartial in order to evaluate and implement disciplinary action brought under the Uniform Code of Military Justice. If these officers become accusers, they may not convene a general or special court-martial for the trial or trials of persons accused. See section 504, pp 11-55, Manual for Courts-Martial.

   b. Interest. Have a genuine interest in this collateral duty responsibility.

   c. Objectivity. Be sensitive to the needs of families and able to maintain an objective, nonjudgmental position when dealing with family violence.

   d. Confidentiality. Be able to preserve confidentiality and possess good interpersonal skills, i.e., the ability to listen and communicate well with others at all levels.

   e. Implementation. Have 2 or more years remaining at the unit to enable the individual to attend ongong training, implement the Family Advocacy Program, implement prevention programs, and establish resources within the community.

   f. Skills. Possess strong public relations skills to be used in developing a working relationship with local child protection agencies, law enforcement personnel, and mental health providers.

2. As the FAR is not to act in a counseling capacity, but only as an information and referral specialist, counseling skills are not a prerequisite for this responsibility.

CHAPTER XXXIX

FREEDOM OF INFORMATION ACT

Reference: (a) Privacy and Freedom of Information Acts Manual, COMDTINST M5260.2

INTRODUCTION

The Freedom of Information Act (5 U.S.C. § 552) requires government agencies to make their records available to the public, subject to specific and limited exemptions. The Act requires agencies to notify requestors of the initial determination to grant or deny access within ten (10) working days of receipt. Requests must be in writing and reasonably describe the records being sought. There is no requirement to create records not in existence. Those units having release and denial authority are listed in sections 12-B and 12-C of reference (a). Release authority may be redelegated.

RELEASE OF RECORDS

Records should be released, even though an exemption would otherwise permit them to be withheld, unless:

A. The records are currently and properly classified (see section 6-H, COMDTINST M5500.11 (series));

B. a statute (other than the Privacy Act) requires withholding;

C. the privacy interests of individuals outweigh the public interest in release of the records; or

D. there is some identifiable harm to a government interest which could be caused by the release of the records.

EXEMPTIONS

A. The following records are exempt from disclosure:

1. Classified national security information;

2. internal personnel rules and practices;

3. records exempt by statue (except Privacy Act);

4. trade secrets;

5. internal decisionmaking memoranda;

6. where release would be an unwarranted invasion of personal privacy;

7. records compiled for specified law enforcement purposes;

8. records of financial institutions; and

9. geological or geophysical data.

B. Reasonably segregable parts of records containing exempt material should be made available.

C. Guidance concerning specific records, such as SAR files, CGI and administrative investigations, merchant seamen records, marine casualty investigations, and ELT program records can be found in section 11-F of reference (a). Guidance concerning unusual cases should be sought from the servicing legal office.

PROCEDURES FOR HANDLING REQUESTS

A. All units that have been delegated FOIA release authority (consult the legal annex of your SOP) must designate an FOIA control officer in accordance with section 12-F of reference (a).

B. Upon receipt of any written request for records, the unit FOIA control officer must date-stamp the request, attach a cover control document, and determine whether or not the records are available. If one of the exemptions listed above applies, contact the control office (normally the servicing legal office) and forward the request to the appropriate denial authority. Otherwise, release the records or forward the request to the holder of the record and notify the requestor. If unable to reply to the request within ten (10) days, notify the requestor and seek an extension of time. See section 12-F of reference (a).

C. Section 12-I of reference (a) addresses search and duplication fees and waivers. Any fees received should be forwarded to the control officer or collection clerk. Fees under $10.00 are normally waived automatically. Only denial authorities can deny requests for fee waivers.

D. Denials of requests for records and fee waivers may be appealed to Commandant (G-CCS).

REPORTS

Denial authorities must submit consolidated annual reports in accordance with section 12-J of reference (a) for all units under their cognizance.

CHAPTER XXXX

PRIVACY ACT

Reference (a) Privacy and Freedom of Information Acts Manual, COMDTINST M5260.2

INTRODUCTION

The purpose of the Privacy Act is to prevent the improper use, collection, maintenance, or disclosure of personal information in a system of government records which can be retrieved by use of a personal identifier. Privacy Act requests are third or first-party written requests for information from Coast Guard records about individuals. Only systems managers (generally Headquarters office chiefs) may deny a first-party request. Third-party requests are processed under the Freedom of Information Act.

PRIVACY ACT STATEMENTS

When asked to provide personal information which can be retrieved by use of a personal identifier from a system of government records, an individual must be informed of: (1) The authority for collection of the information, (2) the purposes for collection of the information, (3) the routine users and uses of the information, and (4) the consequences of the failure to provide the information.

REQUESTS FOR DISCLOSURE OF INFORMATION

Disclosure of information to third parties, without the consent of the subject of the record, is normally prohibited. Exceptions to this rule are found in Chapter 5 of reference (a) and include law enforcement, official, and routine uses. Disclosure to the subject of the record is normally required unless one of the exemptions in chapter 9 of reference (a) applies. Those exemptions include classified, law enforcement, and confidential source material. Disclosures must be accounted for in the record, unless made under FOIA or within DOT to someone with a need to know.

REQUESTS FOR CORRECTIONS TO RECORDS

Under the Privacy Act, individuals may request factual amendments to their own records. If denied by proper authority, an individual may attach a statement of dispute to the record.

PROCESSING PRIVACY ACT REQUESTS

Privacy Act requests must be date-stamped upon receipt and acknowledged in ten (10) working days. Commanding officers may grant Privacy Act requests, but only systems managers may deny a request. When a command believes denial is required, the request should be forwarded to the Privacy Act coordinator (normally the servicing legal office). Denials may be appealed to Commandant (G-CMA) within 180 days.

THIRD-PARTY REQUESTS

A. Information about an individual which may normally be disclosed to third parties includes:

1. A member's name, grade, base pay, duty assignments, duty address and telephone;

2. releases to CG personnel with a need to know;

3. releases for listed routine uses;

4. releases required under FOIA; and

5. releases authorized in writing by the subject of the record.

B. Information about an individual which should <u>not</u> normally be released to third parties includes:

1. Date and place of birth;

2. home address and telephone number;

3. marital status;

4. religious preference;

5. allegations of misconduct or arrest;

6. performance evaluations; and

7. social security number.

PENALTIES

Violations of the Privacy Act which are willful or intentional may subject the offender to a criminal fine of up to $5000.00, and may make the agency liable for civil damages.

SECTION FIVE

GLOSSARY OF WORDS AND PHRASES

The following words and phrases are those most frequently encountered in Military Justice which have special connotations in Military Law. This list is by no means complete and is designed solely as a ready reference for the meaning of certain words and phrases. Where it has been necessary to explain a word or phrase in the language of or in relation to a rule of law, no attempt has been made to set forth a definitive or comprehensive statement of such rule of law.

ABANDONED PROPERTY - property to which the owner has relinquished all right, title, claim, and possession with intention of not reclaiming it or resuming ownership, possession, or enjoyment.

ABET - to intentionally encourage or assist another in the commission of a crime.

ACCESSORY AFTER THE FACT - one who, knowing that an offense punishable by the UCMJ has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment.

ACCESSORY BEFORE THE FACT - one who counsels, commands, procures, or causes another to commit an offense -- whether present or absent at the commission of the offense.

ACCUSED - one who is charged with an offense under the UCMJ.

ACCUSER - any person who signs and swears to charges; any person who directs that charges nominally be signed and sworn to by another; and any person who has an interest other than an official interest in the prosecution of the accused.

ACTIVE DUTY - the status of being in the active Federal service of any of the Armed Forces under a competent appointment or enlistment or pursuant to a competent muster, order, call, or induction.

ACTUAL KNOWLEDGE - a state wherein a person in fact knows of the existence of an order, regulation, fact, etc. in question.

ADDITIONAL CHARGES - new and separate charges preferred after others have been preferred against the same accused.

ADMISSION - a statement made by an accused which may admit part of an element, an element, or more than one element of an offense charged, but which falls short of a complete confession to every element of an offense charged.

AFFIDAVIT - a statement or declaration reduced to writing and confirmed by the party making it by an oath taken before a person who had authority to administer the oath.

AFFIRMATION - a solemn and formal external pledge, binding upon one's conscience, that the truth will be stated.

AIDER AND ABETTOR - one who shares the criminal intent or purpose of the perpetrator, and seeks to help him carry out his scheme, and, hence, is liable as a principal.

ALIBI - a defense that the accused could not have committed the offense alleged because he was somewhere else when the crime was committed.

ALLEGE - to assert or state in a pleading; to plead in a specification.

ALLEGATION - the assertion, declaration, or statement of a party to an action made in a pleading -- setting out what he expects to prove.

ALL WRITS ACT - a Federal statute, 28 U.S.C. 1651(a) (1982), which empowers all courts established by Act of Congress, including the Court of Military Appeals, to issue such extraordinary writs as are necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

APPEAL - a complaint to a superior court of an injustice done or error committed by an inferior court whose judgment or decision the court above is called upon to correct or reverse.

APPELLATE REVIEW - the examination of the records of cases tried by courts-martial by proper reviewing authorities, including, in appropriate cases, the convening authority, the Court of Military Review, the Court of Military Appeals, the U.S. Supreme Court, and the Judge Advocate General.

APPREHENSION - the taking into custody of a person.

ARRAIGNMENT - the reading of the charges and specifications to the accused, or the waiver of their reading, coupled with the request that the accused plead thereto.

ARREST - a moral restraint, not intended as punishment, imposed upon a person by oral or written orders of competent authority limiting the person's liberty pending disposition of charges.

ARREST IN QUARTERS - a moral restraint limiting an officer's liberty, imposed as a nonjudicial punishment by a flag or general officer in command.

ARTICLE 39a SESSION - a session of a court-martial called by the military judge, either before or after assembly of the court, without the members of the court being present, to dispose of matters not amounting to a trial of the accused's guilt or innocence.

ASPORTATION - a carrying away; felonious removal of goods.

ASSAULT - an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated.

ATTEMPT - an act, or acts, done with a specific intent to commit an offense under the UCMJ, amounting to more than mere preparation, and tending to effect the commission of such offense.

AUTHENTICITY - the quality of being genuine in character, which in the law of evidence refers to a piece of evidence actually being what it purports to be.

BAD-CONDUCT DISCHARGE - one of two types of punitive discharges that may be awarded an enlisted member; designed as a punishment for bad conduct; a separation under conditions other than honorable; may be awarded by a GCM or SPCM.

BATTERY - an unlawful, and intentional or culpably negligent, application of bodily harm to the person of another by a material agency used directly or indirectly.

BEYOND A REASONABLE DOUBT - the degree of persuasion based upon proof such as to exclude not every hypothesis or possibility of innocence, but any fair and rational hypothesis except that of guilt; not an absolute or mathematical certainty but a moral certainty.

BODILY HARM - any physical injury to or offensive touching of the person of another, however slight.

BONA FIDE - in good faith.

BREACH OF THE PEACE - an unlawful disturbance of the public tranquility by an outward demonstration of a violent or turbulent nature.

BREAKING ARREST - going beyond the limits of arrest before being released by proper authority.

BURGLARY - the breaking and entering in the nighttime of the dwelling house of another with intent to commit murder, manslaughter, rape, carnal knowledge, larceny, wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, or assault.

BUSINESS ENTRY - any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, made in the regular course of any business, profession, occupation, or calling of any kind.

CAPTAIN'S MAST - the term applied, through tradition and usage in the Navy and Coast Guard, to nonjudicial punishment proceedings.

CAPITAL OFFENSE - an offense for which the maximum punishment includes the death penalty.

CARNAL KNOWLEDGE - an act of sexual intercourse with a female not the accused's wife and who has not attained the age of 16 years.

CHALLENGE - a formal objection to a member of a court or the military judge continuing as such in subsequent proceedings; either for cause, based on a fact or circumstance which has the effect of disqualifying the person challenged from further participation in the proceedings, or peremptorily, without grounds or basis.

CHARGE - a formal statement of the article of the UCMJ which the accused is alleged to have violated.

CHARGE AND SPECIFICATION - a formal description in writing of the offense which the accused is alleged to have committed; each specification, together with the charge under which it is placed, constitutes a separate accusation.

CHIEF WARRANT OFFICER - a warrant officer of the Armed Forces who holds a commission or warrant in warrant officer grades W-2 through W-4.

CIRCUMSTANTIAL EVIDENCE - evidence which tends directly to prove or disprove not a fact in issue, but a fact or circumstance from which, either alone or in connection with other facts, a court may, according to the common experience of mankind, reasonably infer the existence or nonexistence of another fact which is in issue; sometimes called indirect evidence.

CLEMENCY - discretionary action by proper authority to reduce the severity of a punishment.

COLLATERAL ATTACK - an attempt to impeach or challenge the integrity of a court judgment in a proceeding other than that in which the judgment was rendered and outside the normal chain of appellate review.

COMMAND - (1) the authority which a commander in the military service lawfully exercises over his subordinates by virtue of rank or assignment; (2) a unit or units, an organization, or an area under the authority of one individual; (3) an order given by one person to another who, because of the relationship of the parties, is under an obligation or sense of duty to obey the order.

COMMANDING OFFICER - a commissioned officer in command of a unit or units, an organization, or an area of the Armed Forces.

COMMISSIONED OFFICER - an officer of the Naval Service or Coast Guard who holds a commission in an officer grade, Chief Warrant Officer (W-2) and above.

COMMON TRIAL - a trial in which two or more persons are charged with the commission of an offense which, although not jointly committed, was committed at the same time and place and is provable by the same evidence.

COMPETENCY - the presence of those characteristics, or the absence of those disabilities (i.e., exclusionary rules), which renders a particular item of evidence fit and qualified to be presented in court.

CONCURRENT JURISDICTION - jurisdiction which is possessed over the same parties or subject matter at the same time by two or more separate tribunals.

CONCURRENT SERVICE OF PUNISHMENTS - two or more punishments being served at the same time.

CONFESSION - a statement made by an accused which admits each and every element of an offense charged.

CONFINEMENT - physical restraint, imposed by either oral or written orders of competent authority, depriving a person of his freedom.

CONSECUTIVE SERVICE OF PUNISHMENTS - two or more punishments being served in series, one after the other.

CONSPIRACY - a combination of two or more persons who have agreed to accomplish, by concerted action, an unlawful purpose or some purpose not in itself unlawful by unlawful means, and the doing of some act by one or more of the conspirators to effect the object of that agreement.

CONSTRUCTIVE ENLISTMENT - a valid enlistment arising where the initial enlistment was void but the enlistee submits voluntarily to military authority, is mentally competent and at least 17 years old, receives pay, and performs duties.

CONSTRUCTIVE KNOWLEDGE - a state wherein a person is inferred to have knowledge of an order, regulation, fact, etc. as a result of having a reasonable opportunity to gain such knowledge (e.g., presence in an area where the relevant information was commonly available.

CONTEMPT - in Military Law, the use of any menacing word, sign, or gesture in the presence of the court, or the disturbance of its proceedings by any riot or disorder.

CONTRABAND - items, the possession of which is in and of itself illegal.

CONVENING AUTHORITY - the officer having authority to create a court-martial and who created the court-martial in question, or his successor in command.

CONVENING ORDER - the document by which a court-martial is created, which specifies the type of court, details the members, and, when appropriate, the specific authority by which the court is created.

CORPUS DELICTI - the body of a crime; facts or circumstances showing that the crime alleged has been committed by someone.

COUNSELING - directly or indirectly recommending or advising another to commit an offense.

COURT-MARTIAL - a military court, convened under authority of government and the UCMJ for trying and punishing offenses committed by members of the Armed Forces and other persons subject to Military Law.

COURT OF INQUIRY - a formal administrative factfinding body convened under the authority of Article 135, UCMJ, whose function it is to search out, develop, analyze, and record all available information relative to the matter under investigation.

COURT OF MILITARY APPEALS - the highest appellate court established under the UCMJ to review the records of certain trials by court-martial, consisting of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years.

COURT OF MILITARY REVIEW - an intermediate appellate court established by each Judge Advocate General to review the record of certain trials by court-martial -- formerly known as Board of Review.

CREDIBILITY OF A WITNESS - his worthiness of belief.

CULPABLE - deserving blame; involving the breach of a legal duty or the commission of a fault.

CULPABLE NEGLIGENCE - Culpable negligence is a degree of negligence greater than simple negligence. This form of negligence is also referred to as recklessness and arises whenever an accused recognizes a substantial unreasonable risk yet consciously disregards that risk.

CUSTODIAL INTERROGATION - questioning initiated by law enforcement officers or others in authority after a suspect has been taken into custody or otherwise deprived of his freedom of action in any significant way.

CUSTODY - that restraint of free movement which is imposed by lawful apprehension.

CUSTOM - a practice which fulfills the following conditions: (a) it must be long continued; (b) it must be certain or uniform; (c) it must be compulsory; (d) it must be consistent; (e) it must be general; (f) it must be known; (g) it must not be in opposition to the terms and provisions of a statute or lawful regulation or order.

DAMAGE - any physical injury to property.

DANGEROUS WEAPON - a weapon used in such a manner that it is likely to produce death or grievous bodily harm.

DECEIVE - to mislead, trick, cheat, or to cause one to believe as true that which is false.

DEFERRAL - discretionary action by proper authority, postponing the running of the confinement portion of a sentence, together with a lack of any post-trial restraint.

DEFRAUD - to obtain, through a misrepresentation, an article or thing of value and to apply it to one's own benefit or to the use and benefit of another -- either permanently or temporarily.

DEMONSTRATIVE EVIDENCE - anything (such as charts, maps, photographs, models, drawings, etc.) used to help construct a mental picture of a location or object which is not readily available for introduction into evidence.

DEPOSITION - the testimony of a witness taken out of court, reduced to writing, under oath or affirmation, before a person empowered to administer oaths, in answer to interrogatories (questions) and cross-interrogatories submitted by the parties desiring the deposition and the opposite party, or based on oral examination by counsel for accused and the prosecution.

DERELICTION IN THE PERFORMANCE OF DUTY - willfully or negligently failing to perform assigned duties or performing them in a culpably inefficient manner.

DESIGN - on purpose, intentionally, or according to plan and not merely through carelessness or by accident; specifically intended.

DESTROY - sufficient injury to render property useless for the purpose for which it was intended, not necessarily amounting to complete demolition or annihilation.

DIRECT EVIDENCE - evidence which tends directly to prove or disprove a fact in issue.

DISCOVERY - the right to examine information possessed by the opposing side before or during trial.

DISHONORABLE DISCHARGE - the most severe punitive discharge; reserved for those warrant officers (W-1) and enlisted members who should be separated under conditions of dishonor, after having been convicted of serious offenses of a civil or military nature warranting severe punishment; it may be awarded only by a GCM.

DISORDERLY CONDUCT - behavior of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby.

DISRESPECT - words, acts, or omissions that are synonymous with contempt and amount to behavior or language which detracts from the respect due the authority and person of a superior.

DOCUMENTARY EVIDENCE - evidence supplied by writings and documents.

DOMINION - control of property; possession of property with the ability to exercise control over it.

DRUNKENNESS - (1) as an offense under the UCMJ, intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties; (2) as a defense in rebuttal of the existence of a criminal element involving premeditation, specific intent, or knowledge, intoxication which amounts to a loss of reason preventing the accused from harboring the requisite premeditation, specific intent, or knowledge; (3) as a defense to general intent offenses, involuntary intoxication which amounts to a loss of reason preventing the accused from knowing the nature of his act or the natural and probable consequences thereof.

DUE PROCESS - a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights; such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe.

DURESS - unlawful constraint on a person whereby he is forced to do some act that he otherwise would not have done.

DYING DECLARATION - a statement by a victim, concerning the circumstances surrounding his death, made while in extremis and while under a sense of impending death and without hope of recovery.

ELEMENTS - the essential ingredients of an offense which are to be proved at the trial; the acts or omissions which form the basis of any particular offense.

ENTRAPMENT - a defense available when actions of an agent of the government intentionally instill in the mind of the accused a disposition to commit a criminal offense, when the accused has no notion, predisposition, or intent to commit the offense.

ERROR - a failure to comply with the law in some way at some stage of the proceedings.

EVIDENCE - any species of proof, or probative matter, legally presented at trial, through the medium of witnesses, records, documents, concrete objects, demonstrations, etc., for the purpose of inducing belief in the minds of the triers of fact.

EXCULPATORY - anything that would exonerate a person of wrongdoing.

EXECUTION OF HIS OFFICE - engaging in any act or service required or authorized to be done by statute, regulation, the order of a superior, or military usage.

EX POST FACTO LAW - a law passed after the occurrence of a fact or commission of an act which makes the act punishable, imposes additional punishment, or changes the rules of evidence to the disadvantage of a party.

EXTRA MILITARY INSTRUCTION - extra tasks assigned to one exhibiting behavioral or performance deficiencies for the purpose of correcting those deficiencies through the performance of the assigned tasks; also known as Additional Military Duty or Additional Military Instruction.

FEIGN - to misrepresent by a false appearance or statement, to pretend, to simulate or to falsify.

FINE - a type of court-martial punishment in the nature of a pecuniary judgment against an accused, which, when ordered executed, makes him immediately liable to the United States for the entire amount of money specified.

FORMER JEOPARDY - a defense in bar of trial that no person shall be tried for the same offense by the same sovereign a second time without his consent; also known as Double Jeopardy.

FORMER PUNISHMENT - a defense in bar of trial that no person may be tried by court-martial for a minor offense for which punishment under Articles 13 or 15, UCMJ, has been imposed.

FORMER TESTIMONY - testimony of a witness given in a civil or military court at a former trial of the accused, or given at a formal pretrial investigation of an allegation against the accused, in which the issues were substantially the same.

FORFEITURE OF PAY - a type of punishment depriving the accused of all or part of his pay as it accrues.

GRIEVOUS BODILY HARM - a serious bodily injury; does not include minor injuries (such as a black eye or a bloody nose) but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs and other serious bodily injuries.

HABEAS CORPUS - "You have the body"; an order from a court of competent jurisdiction which requires the custodian of a prisoner to appear before the court to show cause why the prisoner is confined or detained.

HARMLESS ERROR - an error of law which does not materially prejudice the substantial rights of the accused.

HAZARD A VESSEL - to put a vessel in danger of damage or loss.

HEARSAY - an assertive statement, or conduct, which is offered in evidence to prove the truth of the assertion, but which was not made by the declarant while a witness before the court in the hearing in which it is offered.

IN CONCERT WITH - together with, in accordance with a design or plan, whether or not such design or plan was preconceived.

INCAPACITATION - the physical state of being unfit or unable to perform properly.

INCULPATORY - anything that implicates a person in a wrongdoing.

INDECENT - an offense to common propriety; offending against modesty or delicacy; grossly vulgar, or obscene.

INFERENCE - a fact deduced from another fact or facts shown by the state of the evidence.

INSANITY - see, MENTAL CAPACITY and MENTAL RESPONSIBILITY, infra.

INSPECTION - an official examination of persons or property to determine the fitness or readiness of a person, organization, or equipment, not made with a view to any criminal action.

INTENTIONALLY - deliberately and on purpose; through design, or according to plan, and not merely through carelessness or by accident.

IPSO FACTO - by the very fact itself.

JOINT OFFENSE - an offense committed by two or more persons acting together in pursuance of a common intent.

JOINT TRIAL - the trial of two or more persons charged with committing a joint offense.

JURISDICTION - the power of a court to hear and decide a case and to award an appropriate punishment.

KNOWINGLY - having actual knowledge; consciously, intelligently.

LASCIVIOUS - tending to excite lust; obscene; relating to sexual impurity; tending to deprave the morals with respect to sexual relations.

LESSER INCLUDED OFFENSE - an offense necessarily included in the offense charged; an offense containing some but not all of the elements of the offense charged, so that if one or more of the elements of the offense charged is not proved, the evidence may still support a finding of guilty of the included offense.

LEWD - lustful or lecherous; incontinence carried on in a wanton manner.

LOST PROPERTY - property which the owner has involuntarily parted with by accident, neglect, or forgetfulness and does not know where to find or recover it.

MATTER IN AGGRAVATION - any circumstances attending the commission of a crime which increases the enormity of the crime.

MATTER IN EXTENUATION - any circumstances serving to explain the commission of the offense, including the reasons that actuated the accused, but not extending to a legal justification.

MATTER IN MITIGATION - any circumstance having for its purpose the lessening of the punishment to be awarded by the court and the furnishing of grounds for a recommendation of clemency.

MENTAL CAPACITY - the ability of the accused at the time of trial to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense.

MENTAL RESPONSIBILITY - the ability of the accused at the time of commission of an offense to appreciate the nature and quality or the wrongfulness of his or her acts.

MILITARY DUE PROCESS - due process under protections and rights granted military personnel by the Constitution or laws enacted by Congress.

MILITARY JUDGE - a commissioned officer, certified as such by the respective Judge Advocates General, who presides over all open sessions of the court-martial to which he is detailed.

MISLAID PROPERTY - property which the owner has voluntarily put, for temporary purposes, in a place afterwards forgotten or not easily found.

MISTRIAL - discretionary action of the military judge, or the president of a special court-martial without a military judge, in withdrawing the charges from the court where such action appears manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the trial.

MITIGATION - action by proper authority reducing punishment awarded at NJP or by court-martial.

MORAL TURPITUDE - an act of baseness, vileness, or depravity in private or social duties, which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

MOTION TO DISMISS - a motion raising any defense or objection in bar of trial.

MOTION FOR APPROPRIATE RELIEF - a motion to cure a defect of form or substance which impedes the accused in properly preparing for trial or conducting his defense.

MOTION TO SEVER - a motion by one or more of several co-accused that he be tried separately from the other or others.

NEGLIGENCE - unintentional conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. The failure of a person to exercise the care that a reasonably prudent person would exercise under similar circumstances; something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would, or would not, do.

NONJUDICIAL PUNISHMENT - punishment imposed under Article 15, UCMJ, for minor offenses, without the intervention of a court-martial.

NONPUNITIVE MEASURES - those leadership techniques, not a form of informal punishment, which may be used to further the efficiency of a command.

OATH - a formal external pledge, coupled with an appeal to the Supreme Being, that the truth will be stated.

OBJECTION - a declaration to the effect that the particular matter or thing under consideration is not done or admitted with the consent of the opposing party, but is by him considered improper or illegal, and referring the question of its propriety or legality to the court.

OFFICE HOURS - the term applied, through tradition and usage in the Marine Corps, to nonjudicial punishment proceedings.

OFFICER - any commissioned or warrant officer of the Armed Forces, Warrant Officer (W-1) and above.

OFFICER IN CHARGE - a member of the Armed Forces designated as such by appropriate authority.

OFFICIAL RECORD - a writing made as a record of a fact or event, whether the writing is in a regular series of records or consists of a report, finding, or certificate and made by any person within the scope of his official duties provided those duties included a duty to know, or to ascertain through appropriate and trustworthy channels of information, the truth of the fact or event, and to record such fact or event.

ON DUTY - in the exercise of duties of routine or detail, in garrison, at a station, or in the field: does not relate to those periods when, no duty being required of them by order or regulations, military personnel occupy the status of leisure known as "off duty" or "on liberty."

OPERATING A VEHICLE - driving or guiding a vehicle while in motion, either in person or through the agency of another, or setting its motive power in action or the manipulation of the controls so as to cause the particular vehicle to move.

OPINION OF THE COURT - a statement by a court of the decision reached in a particular case, expounding the law as applied to the case, and detailing the reasons upon which the decision is based.

ORAL EVIDENCE - the sworn testimony of a witness received at trial.

OWNER - a person who has a right to possession of property which is superior to that of the accused, in the light of all conflicting interests therein.

PAST RECOLLECTION RECORDED - memoranda prepared by a witness, or read by him and found to be correct, reciting facts or events which represent his past knowledge possessed at a time when his recollection was reasonably fresh as to the facts or events recorded.

PER CURIAM - "by the court"; a phrase used in the report of the opinion of a court to distinguish an opinion of the whole court from an opinion written by any one judge.

PER SE - taken alone; in and of itself; inherently.

PERPETRATOR - one who actually commits the crime, either by his own hand, by an animate or inanimate agency, or by an innocent agent.

PLEADING - the written formal indictment by which an accused is charged with an offense; in Military Law, the charges and specifications.

POSSESSION - actual physical control and custody over an item of property.

PREFERRAL OF CHARGES - the formal accusation against an accused by an accuser signing and swearing to the charges and specifications.

PREJUDICIAL ERROR - an error of law which materially affects the substantial rights of the accused and requiring corrective action.

PRESUMPTION - a fact which the law requires the court to deduce from another fact or facts shown by the state of the evidence unless that fact is overcome by other evidence before the court.

PRETRIAL INVESTIGATION - an investigation pursuant to Article 32, UCMJ, that is required before convening a GCM, unless waived by the accused.

PRIMA FACIE CASE - introduction of substantial evidence which, together with all proper inferences to be drawn therefrom and all applicable presumptions, reasonably tends to establish every essential element of an offense charged or included in any specification.

PRINCIPAL - (1) one who aids, abets, counsels, commands, or procures another to commit an offense which is subsequently perpetrated in consequence of such counsel, command or procuring, whether he is present or absent at the commission of the offense; (2) the perpetrator.

PROBABLE CAUSE - (1) for apprehension, a reasonable grounds for believing that an offense has been committed and that the person apprehended committed it; (2) for pretrial restraint, reasonable grounds for believing that an offense was committed by the person being restrained; and (3) for search, a reasonable grounds for believing that items connected with criminal activity are located in the place or on the person to be searched.

PROVOKING - tending to incite, irritate, or enrage another.

PROXIMATE CAUSE - that which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces a result, and without which the result would not have occurred.

PROXIMATE RESULT - a reasonably foreseeable result ordinarily following from the lack of care complained of, unbroken by any independent cause.

PUNITIVE ARTICLES - Articles 78 and 80 through 134, UCMJ, which generally describe various crimes and offenses and state how they may be punished.

PUNITIVE DISCHARGE - a discharge imposed as punishment by a court-martial, either a bad-conduct discharge or a dishonorable discharge.

RAPE - an act of sexual intercourse with a female, not the accused's wife, done by force and without her consent.

REAL EVIDENCE - any physical object offered into evidence at trial.

RECKLESSNESS - an act or omission exhibiting a culpable disregard for the foreseeable consequences of that act or omission; a degree of carelessness greater than simple negligence.

RECONSIDERATION - the action of the convening authority in returning the record of trial to the court for renewed consideration of a ruling of the court dismissing a specification on motion, where the ruling of the court does not amount to a finding of not guilty.

REFERRAL OF CHARGES - the action of a convening authority in directing that a particular case be tried by a particular court-martial previously created.

RELEVANCY - that quality of evidence which renders it properly applicable in proving or disproving any matter in issue; a tendency in logic to prove or disprove a fact which is in issue in the case.

REMEDIAL ACTION - action taken by proper reviewing authorities to correct an error or errors in the proceedings or to offset the adverse impact of an error.

REMISSION - action by proper authority interrupting the execution of a punishment and canceling out the punishment remaining to be served, while not restoring any right, privilege, or property already affected by the executed portion of the punishment.

REPROACHFUL - censuring, blaming, discrediting, or disgracing of another's life or character.

RESISTING APPREHENSION - an active resistance to the restraint attempted to be imposed by the person apprehending.

RESTRICTION - moral restraint imposed as punishment, or pretrial restraint upon a person by oral or written orders limiting him to specified areas of a military command, with the further provision that he will participate in all military duties and activities of his organization while under such restriction.

REVISION - a procedure to correct an apparent error or omission or improper or inconsistent action of a court-martial with respect to a finding or a sentence.

SALE - an actual or constructive delivery of possession of property in return for a valuable consideration and the passing of such title as the seller may possess, whatever that title may be.

SEARCH - a quest for incriminating evidence.

SEIZURE - to take possession of forcibly, to grasp, to snatch, or to put into possession.

SELF-DEFENSE - the use of reasonable force to defend oneself against immediate bodily harm threatened by the unlawful act of another.

SELF-INCRIMINATION - the giving of evidence against oneself which tends to establish guilt of an offense.

SET ASIDE - action by proper authority voiding the proceedings and the punishment awarded and restoring all rights, privileges, and property lost by virtue of the punishment imposed.

SIMPLE NEGLIGENCE - the absence of due care (i.e., an act or omission by a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances).

SOLICITATION - any statement, oral or written, or any other act or conduct, either directly or through others, which may reasonably be construed as a serious request or advice to commit a criminal offense.

SPECIFICATION - a formal statement of specific acts and circumstances relied upon as constituting the offense charged.

SPONTANEOUS EXCLAMATION - an utterance concerning the circumstances of a startling event made by a person while he was in such a condition of excitement, shock, or surprise, caused by his participation in or observation of the event, as to warrant a reasonable inference that he made the utterance as an impulsive and instinctive outcome of the event, and not as a result of deliberation or design.

STATUTE OF LIMITATIONS - the rule of law which, unless waived, establishes the time within which an accused must be charged with an offense to be tried successfully.

STRAGGLE - to wander away, to rove, to stray, to become separated from, or to lag or linger behind.

STRIKE - to deliver a blow with anything by which a blow can be given.

SUBPOENA - a formal written instrument or legal process that serves to summon a witness to appear before a certain tribunal and to give testimony.

SUBPOENA DUCES TECUM - a formal written instrument or legal process which commands a witness who has in his possession or control some document or evidentiary object that is pertinent to the issues of a pending controversy to produce it before a certain tribunal.

SUBSCRIBE - to write one's signature on a written instrument as an indication of consent, approval, or attestation.

SUPERIOR COMMISSIONED OFFICER - a commissioned officer who is superior in rank or command.

SUPERVISORY AUTHORITY - an officer exercising general court-martial jurisdiction who acts as reviewing authority for SCM and SPCM records after the convening authority has acted.

SUSPENSION - action by proper authority to withhold the execution of a punishment for a probationary period pending good behavior on the part of the accused.

THREAT - an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future.

TOLL - to suspend or interrupt the running of.

USAGE - a general habit, mode or course of procedure

UTTER - to make any use of, or attempt to make any use of, an instrument known to be false by representing, by words or actions, that it is genuine.

VERBATIM - in the exact words; word-for-word.

WANTON - behavior of such a highly dangerous and inexcusable character as to exhibit a callous indifference or total disregard for the probable consequences to the personal safety or property of other persons; heedlessness.

WARRANT OFFICER - an officer of the Armed Forces who holds a commission or warrant in a warrant officer grade, paygrades W-1 through W-4.

WILLFUL - deliberate, voluntary, and intentional, as distinguished from acts committed through inadvertence, accident, or ordinary negligence.

WRONGFUL - contrary to law, regulation, lawful order or custom.