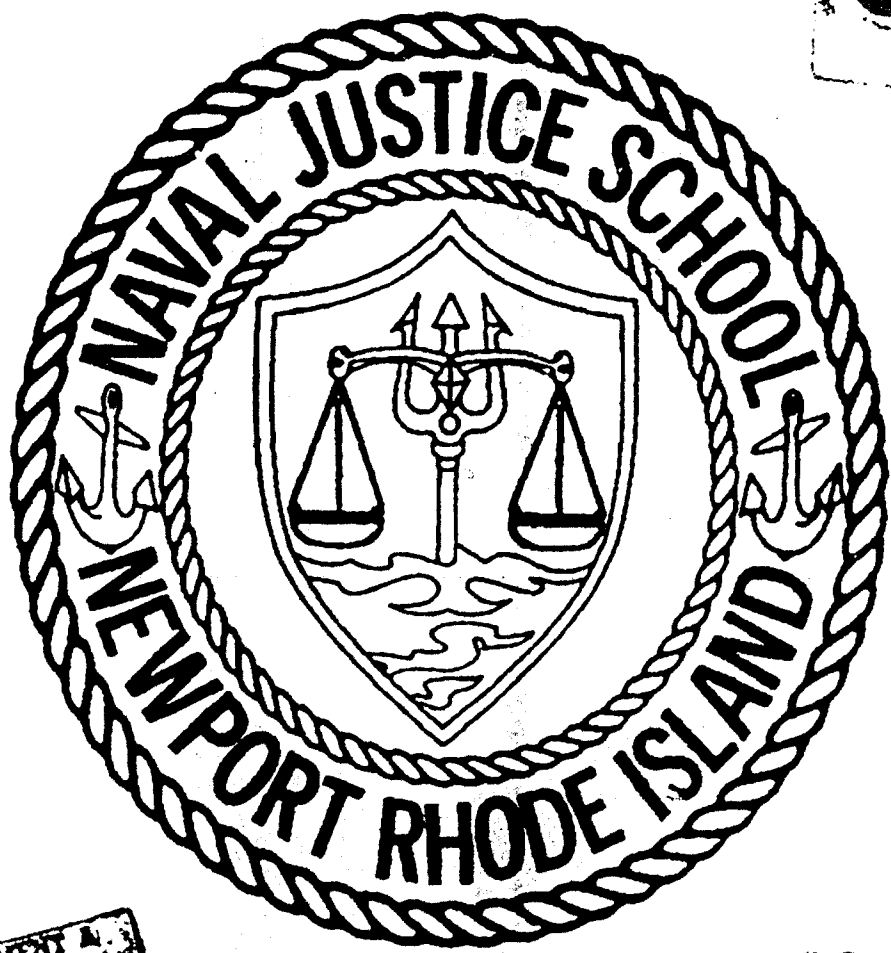
COMMANDER'S HANDBOOK



ON MILITARY AND CIVIL LAW

January 1992

NAVAL JUSTICE SCHOOL

NEWPORT, RHODE ISLAND 02841-5030

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PREFACE

The Commander's 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.

Rev. 1/92

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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 (Part III, MCM, 1984), 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 (Mil.R.Evid. 504(a)). Under this privilege, a person has the privilege 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, that A commits a crime and is brought to trial while 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. 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 commences A and B were divorced, then B would not have the spousal incapacity privilege to refuse to testify. The spousal incapacity privilege is permitted only if the parties are lawfully married at the time the testimony is to be taken. A legal separation does not defeat the spousal incapacity privilege.

2. Confidential communication. Any communication made between a husband and wife while they were lawfully married and not legally separated 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 communication was 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 other matters, 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 spousal incapacity privilege to refuse to testify, 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, and not legally separated, the confidential communication privilege may be asserted.

B. In the event that the testifying spouse elects to testify against the accused spouse, and the accused spouse invokes the confidential privilege to prevent his spouse from testifying, the latter privilege will prevail.

C. 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, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman." This definition lends itself to broad interpretation. 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 penitent 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 - MIL.R.EVID. 505

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.

IDENTITY OF INFORMANT - MIL.R.EVID. 507

A. Under this rule, the United States has a privilege to refuse to disclose the identity of an informant. An informant is defined as a person who has furnished information relating to a possible violation of law to law enforcement personnel. It is the informant's identity, not the substance of his/her communications, which is protected.

B. The privilege is typically claimed by an agent of the Naval Investigative Service or by the prosecutor.

C. Exceptions. No privilege exists once:

1. The informant appears as a witness for the prosecution; or

2. the military judge determines that disclosure of the informant's identity is necessary to the accused's defense on the issue of guilt or innocence.

VOLUNTARY DISCLOSURE FOR DRUG ABUSE REHABILITATION

Voluntary self-referral for counseling, treatment, or rehabilitation is a one-time procedure that enables drug-dependent servicemembers to obtain help without risk of disciplinary action. Disclosure of use or possession incident to use to

designated officials will be considered confidential as long as the disclosure is solely to obtain assistance under the self-referral program. There is no confidentiality for disclosure of drug distribution. Any evidence obtained directly or derivatively from a qualified disclosure may not be used at disciplinary proceedings, on the issue of characterization of service in separation proceedings, or for vacating previously suspended punitive action. Participation in the self-referral program does not preclude disciplinary action or adverse administrative action based upon "independent" evidence. Personnel in the program are subject to valid unit sweep and random urinalysis inspections pursuant to Mil.R.Evid. 313. The results of such testing can be used for all disciplinary purposes. See OPNAVINST 5350.4 (series), enclosure (5), for more information on self-referral.

NOTES

NOTES (continued)

CHAPTER II

THE LAW OF SELF-INCRIMINATION

FIFTH AMENDMENT

The fifth amendment of the U.S. Constitution provides: "nor shall [any person] be compelled in any criminal case to be a witness against himself."

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. All military personnel, when acting for the military, must operate within the framework of the UCMJ. As a result, military personnel acting as investigators or interrogators must warn a suspect under article 31(b) prior to conducting an interview of a suspect.

D. Application to other interrogations. The agents of the Naval Investigative Service and the Marine Corps Criminal Investigation Division 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 investigators are acting jointly with military investigators. Situations arise where a servicemember may be investigated by both Federal and military authorities. Merely because a parallel set of investigations are being conducted 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 speculating in a given situation, 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, "[M]ust 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 only 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. "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.

K. 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.

L. 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.

M. 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 JAGMAN, app. A-1-b, A-1-c, or A-1-d.

Article 15 hearings are 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, it is recommended that the accused be given counsel warnings at XOI and article 15. 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 expanded 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 to the NIS office for an interview with NIS 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 legal officer's office and, without any type of interrogation or prompting by the legal officer, fully confesses to a crime. The confession would be admissible as a "spontaneous confession" even though the legal officer never advised the servicemember of any rights. As long as the legal 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, then proper article 31 and counsel warnings must be given for any subsequent statement to be admissible in court.

COUNSELING SESSIONS AND PERSONS ACTING IN A PRIVATE CAPACITY

The warning requirements apply to formal and informal counseling conducted in an official capacity. Statements obtained from an accused or suspect would not be admitted in a subsequent court-martial unless the "counselor" provided both article 31(b) and counsel warnings. This is not to suggest that counseling sessions include such warnings as a matter of course, but rather that "counselors" be cognizant of the command's intended forum for disposition of an offense prior to such counseling.

Military personnel acting in a purely private capacity are not required to warn a suspect. For example, where Seaman Spano questions Seaman Yuchel about Spano's missing radio, no warning is required where Spano's primary purpose is to regain his own property. Yuchel's admission that he had stolen the radio would be admissible at trial, provided that Yuchel's statement was voluntary.

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.

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 will not render the suspect's confession inadmissible; however, 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

To be admissible, statements must be completely voluntary. 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 1,000 pounds of marijuana in her parked vehicle located on base, the 1,000 pounds of marijuana, as well as Private Jones' confession, will be excluded from evidence. The reason: The 1,000 pounds of marijuana were discovered by exploiting the unlawfully obtained confession.

The Suspect's Rights Acknowledgement/Statement form (JAGMAN, app. A-1-m(1)) 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; JAGMAN, § 0138.

2. Civilian witness. Prior to the issuance of an order by an officer exercising general court-martial jurisdiction granting immunity to a civilian witness, 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). JAGMAN, § 0138c.

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 JAGMAN, app. A-1-i(1)-(3).

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. Procedural steps, reflected in JAGMAN, § 0138d and OPNAVINST 5510.1H, require the forwarding of any proposed grants of immunity to the Judge Advocate General in all such cases. Furthermore, JAGMAN, §§ 0137b and 0138d discuss the requirement for coordinating with Federal authorities in any case involving a major Federal offense. The best advice that can be given is that higher headquarters 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.

NOTES

NOTES (continued)

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 knowledge will enable the command to determine, before acting in a situation, whether prosecution is 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 which "excludes" evidence from trial if obtained in violation of the fourth amendment. The United States Supreme Court considered this rule necessary as a deterrent 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. Anyone charged with the responsibility for authorizing and conducting lawful searches and seizures should be familiar with these 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, only a proper person, such as anyone with the rank of E-4 or above, or any criminal investigator, such as an NIS special agent or a CID agent, may 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 exists when there 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 may only look for and seize 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 a 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 government property for any or no reason, and there is a presumption that no privacy expectation attaches.

(2) Footlockers or wall lockers utilized for private use 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 seizures 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. The authorizing official must be neutral and detached. Courts will determine neutrality on a case-by-case basis. 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 will 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 COMMAND 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 MILITARY 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. REQ'D		NO P.C. REQ'D	P.C. REQ'D	P.C. REQ'D	P.C. REQ'D	P.C. REQ'D	MAY NOT SEARCH AT ALL

** INCLUDING SHIPS, AIRCRAFT, VEHICLES

3. Delegation of power to authorize searches

Formerly, commanders delegated their power to authorize searches to their chief of staff, command duty officer, or even the officer of the day. This practice was found to be illegal by the Court of Military Appeals which 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 when 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 responsibilities have not devolved to that person; and, therefore, he or she can not lawfully authorize a search or seizure. Guidance on this matter has been promulgated by CINCLANTFLT, CINCPACFLT, and CINCUSNAVEUR. Until the courts provide further guidance on this issue, readers should follow the guidance set forth by their respective CINC's/CG's.

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) A crime has been 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 an authorized official may conclude that probable cause to search exists, he or she must have a reasonable belief that the information giving rise to the intent to search is believable and has a factual basis.

Mil.R.Evid. 315 allows probable cause to be based either wholly or in part on hearsay 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 Judge Advocate General of the Navy has recommended the use of a standard record of authorization for search set forth in appendix A-1-n(1) of the JAG Manual. 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, there still must be sufficient reliable information to support probable cause.

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 of the commander 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 believe that evidence will be found in 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.

Except under the Navy's urinalysis program, 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. (OPNAVINST 5350.4B currently requires the Navy to inform a member of his right to refuse a consent urinalysis. The Marine Corps program, as outlined in MCO P5300.12 of 25 June 1984, as amended, change 3 has no such requirement.) 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. See JAGMAN, app. A-1-o. Appendix II of this chapter provides a form which can be utilized for the consensual 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. Normally, he could only validly consent to a search of those places or areas where Seaman Jones has given him "control." However, if officials requesting consent reasonably believed in "good faith" that Tripper had authority to give consent, even though he in fact did not, the consent is valid.

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 (i.e. probable cause to apprehend must precede the apprehension). Furthermore, only the person apprehended and the immediate area within which 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; in addition, consent to search may always be requested of the apprehendee.

The extent to which an automobile might be searched incident to the apprehension of the driver or passengers therein was settled in 1981 when 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 (i.e. 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, a 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. If incriminating evidence is obtained during such a search, it may be used against the individual in any resulting disciplinary proceeding. This is true even though no search authorization was issued, no consent was obtained, and no probable cause existed.

"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(d) (4)(C). 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 drug 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 also not a search.

Close attention must be given in this situation to establishing the reliability of the informers (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 a 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. For more information on the use of military working dogs as drug detectors, and establishing their reliability as such, see OPNAVINST 5585.2A (Military Working Dog Manual) of 17 June 1988.

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. The better advice is for the commanding officer to distance him/herself from the evidence-gathering process.

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., a 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 (i.e. its elimination from the body).

Involuntary extraction of body fluids, whether conducted pursuant to 1 or 2 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 conducted pursuant to Mil.R.Evid. 313 and OPNAVINST 5350.4B, is not an "extraction" and need not be conducted by medical personnel.

B. Intrusions for valid medical purposes. Mil.R.Evid. 312(f) permits the military to 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 strict 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 an illegal subterfuge for 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 anonymous 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 legitimate 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 previously scheduled 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, etc.). The previously scheduled inspection, however, need not be preannounced.

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, and all such inventories must be conducted in a reasonable manner. For example, it would be unreasonable to slice the linings of a servicemember's clothing in the course of conducting an inventory.

PART II - DRUG ABUSE DETECTION

"Not in My Navy" and "Standby" are the respective Navy and Marine Corps calls to arms in the war on drugs. These succinct statements reflect our commitment to the elimination of illicit drugs and drug abusers from the naval establishment and the increased emphasis placed on deterrence, leadership, and expeditious action. 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 programs of the Navy, Marine Corps, and Coast Guard were established primarily to provide a means for the detection of drug abuse and to serve as a deterrent against drug abuse. Some of the important directives concerning the program are: DoD Dir. 1010.1 of 28 Dec. 1984; OPNAVINST 5350.4B; MCO P5300.12 of 25 June 1984, as amended, change 3; 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. See the grid at Appendix III to this chapter. It is most important to be able to recognize when, and under what circumstances, a command may conduct a proper urinalysis.

-- Types of tests. OPNAVINST 5350.4 (series) directs that commanders, commanding officers, and officers in charge shall conduct an aggressive urinalysis testing program, adapted as necessary to meet unique unit and local situations. The specific types of urinalysis testing and authority to conduct them are outlined below.

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, OPNAVINST 5350.4 (series) provides that, prior to requesting consent, commands should advise the member that he or she is suspected of drug use and may decline to provide a sample. A recommended urinalysis consent form is provided as appendix II to this chapter. This additional advice is not required in the Marine Corps and Coast Guard.

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 drug paraphernalia (e.g., 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 should 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.

c. Urinalysis testing of an entire unit

As a means of quota control, Navy commands are required to obtain second-echelon approval prior to conducting all unit sweeps and random inspections involving more than 20% of a unit, or 200 members. Failure to obtain such approval, however, will not invalidate the results of the testing. The Marine Corps and Coast Guard have no such requirement.

3. Service-directed testing. Service-directed testing is actually nothing more than inspections of units expressly designated by the Chief of Naval Operations. These include: rehabilitation facility staff; security personnel; fleet "A" School candidates; officers and enlisted in the accession pipeline; and those executing PCS orders to an overseas duty station.

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). Do not confuse this with a fitness-for-duty examination ordered by a servicemember's command.

5. Fitness-for-duty testing. Categories of fitness-for-duty urinalysis testing are briefly described below. Generally, all urinalyses NOT service-directed or the product of a lawful search and seizure, inspection, or valid medical purpose fall within fitness-for-duty/command-directed categories. In the Coast Guard, however, probable cause is required before a fitness for duty urinalysis can take place.

a. Command-directed testing. 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 behavior, conduct, or involvement in an accident or other incident gives rise to a reasonable suspicion of drug abuse and a urinalysis has not been conducted based upon consent or probable cause. Command-directed tests are often ordered when suspicious behavior does not amount to probable cause.

b. Aftercare and surveillance testing. Aftercare testing is periodic command-directed testing of identified drug abusers as part of a plan for continuing recovery following a rehabilitation program. Surveillance testing is periodic command-directed testing of identified drug abusers, who do not participate in a rehabilitation program, as a means of monitoring for further drug abuse.

c. Evaluation testing. This refers to command-directed testing when a commander has doubt as to the member's wrongful use of drugs following a laboratory-confirmed urinalysis result. Evaluation testing should be

conducted twice a week for a maximum of eight weeks and is often referred to a "two-by-eight."

d. Safety investigation testing. A commanding officer or any investigating officer may order urinalysis testing in connection with any formally convened mishap or safety investigation.

USES OF URINALYSIS RESULTS

Of particular importance to the commander is what use may be made of a positive urinalysis. See Appendix III 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 DoD 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/fitness-for-duty urinalysis may NOT be used against the member for any disciplinary purposes, nor on the issue of characterization of service in separation proceedings, 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/fitness-for-duty 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 DoD treatment and rehabilitation program and as a basis for administrative separation.

What administrative or disciplinary action can be taken against servicemembers identified as drug abusers through service-directed urinalysis testing varies, depending upon which CNO-designated unit was tested. The only constant is that all service-directed testing may be considered as the basis for administrative separation. For further guidance on the uses of service-directed urinalysis results, see OPNAVINST 5350.4B, Enclosure (4), Appendix A, reproduced as Appendix III of this chapter.

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. The use of chiefs, staff NCO's, and officers as observers and unit coordinators is strongly encouraged. 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 OPNAV 5350.4B, Appendix B, Appendix IV to this chapter, and the Coast Guard Personnel Manual, COMDTINST M1000.6 (series), chapter 20.

DRUG TESTING

A. Field test. As the name suggests, field tests are methods employed outside the laboratory to screen many of the commonly abused substances. Actual procedures employed vary, depending upon which testing equipment is being used, but general operation and quality assurance guidance can be found in OPNAVINST 5350.4B, Enclosure (4), Appendix C. Field tests are not authorized in the Coast Guard.

Positive field-test results may not be used as the basis for any disciplinary action, administrative separation proceeding, or other adverse administrative action until confirmed by a DoD-certified drug laboratory or by the servicemember's admission of drug use. Field-test results alone may be used for temporary referral to a treatment program, temporary suspension from sensitive duty positions or positions where drug abuse threatens the safety of others, or to temporarily suspend a servicemember's access to classified materials.

B. Navy drug screening laboratories. The Navy operates five drug screening laboratories in support of the Navy and Marine Corps urinalysis program worldwide. Their addresses, phone numbers, and areas of responsibility are contained in appendix V to this chapter. 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 is 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 by radioimmunoassay (RIA). 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 the command by message. Positive samples are frozen and retained by the lab for one year. These samples will then be destroyed unless the laboratory is notified by the command to retain them longer because disciplinary action is contemplated.

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 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?

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

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)

Appendix I-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 I-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.

Appendix I-c(1)

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."

(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 I-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 II

USE OF DRUG URINALYSIS RESULTS

	Usable in disciplinary proceedings	Usable as basis for separation	Usable for (other than honorable) characterization of service
1. Search or Seizure -	YES	YES	YES
- member's consent	YES	YES	YES
- probable cause	YES	YES	YES
2. Inspection			
- random sample	YES	YES	YES
- unit sweep	YES	YES	YES
3. Medical - general diagnostic purposes (e.g., emergency room treatment, annual physical exam, etc.)	YES	YES	YES
4. Fitness for duty			
- command-directed	NO	YES	NO
- competence for duty	NO	YES	NO
- aftercare testing	NO	YES	NO
- surveillance	NO	YES	NO
- evaluation	NO	YES	NO
- mishap/safety investigation	NO	NO	NO
5. Service directed			
- rehab facility staff (military members)	YES	YES	YES
- drug/alcohol rehab testing	NO	YES	NO
- PCS overseas, naval brigs	YES	YES	YES
- entrance testing	NO	YES	*NO (R
- accession training pipeline	YES	YES	YES (R

*YES for reservists recalled to active duty only (except Delayed Entry Program participants)

Appendix A to
Enclosure (4)

Appendix IV

URINALYSIS

Each urinalysis should be conducted with the understanding that positive samples could result in administrative or disciplinary action. Collection procedures should be designed to avoid problems during administrative and disciplinary proceedings.

At court-martial, the trial counsel must establish that the positive urine sample originated with the accused. During the government's case, the military judge or members, as factfinders, will closely scrutinize the command's procedures.

Based upon courtroom experience, certain procedures have proven to be most effective in establishing the source of the urine sample.

The unit coordinator should:

1. Ask for the member's ID card.
2. Compare the ID picture with the face of the member.
3. Copy the social security number from the ID card onto the urinalysis label and chain of custody.
4. Copy the name and social security number from the card into the urinalysis ledger.
5. Allow the subject to verify the label information and chain of custody form.
6. Place the label on a urine sample bottle and hand the bottle to member for production of a sample under supervision of observer.
7. When member returns the sample, ask the member if the bottle contains his/her urine.
8. Again, allow member to verify the information on the label, chain of custody form, and ledger.
9. Have member initial label.
10. Take sample bottle from bottom to confirm that it is warm.

Appendix IV(1)

11. Have member sign ledger.

12. Have observer sign ledger.

13. Have coordinator sign ledger.

14. Place bottle in original cardboard container.

15. After collecting all samples, sign the chain of custody document as releaser and hand carry/mail urine samples to the appropriate screening laboratory.

The observer should:

1. Walk with member from unit coordinator's table to the head.

2. Ensure male members use urinal only. If there are two urinals, side-by-side, only one member should provide a sample at any one time. If there are more than two urinals, no more than two members should give samples at one time and each should use one of the two end urinals. If member is female, keep the stall door open.

3. Stand and clearly view the urine actually entering the bottle.

4. Accompany the member back to the unit coordinator's table.

5. Initial the ledger.

6. Sign the ledger.

If the above procedures are followed, an accused will have difficulty claiming that the sample was not personally produced. At the court-martial, trial counsel will be able to call the unit coordinator and observer as witnesses to introduce the ledger, chain of custody document, and urine sample bottle into evidence. In addition, a diagram of the urinalysis area may be offered to show the relevant distances.

Problems arise in the following situations:

1. When one individual tries to observe multiple members at one time.

2. When the observer is unprepared.

Appendix IV(2)

3. When the observer fails to initial the ledger.

4. When the observer fails to sign the ledger, or no ledger is maintained.

5. When the member is absent at the time that the label is finally attached to the bottle.

6. When the observer does not accompany the member from the unit coordinator's table to the head and back.

7. When the same exact procedures are not used on every member.

8. When an atmosphere of confusion surrounds the collection.

9. When only the last four digits of the social security number are printed on the label.

Be aware that urinalysis cases take approximately three months from collection to trial. If the observer was only TAD to the testing command at the time of collection, the observer may have to return to his/her parent command before trial. Also, if either the observer or unit coordinator is planning to transfer or deploy within three months of the urinalysis, he/she may be unavailable for trial. In all these cases, personnel may have to return to testify at convening authority expense.

Appendix IV(3)

DRUG SCREENING LABS

Address	Telephone/Message Address
Commanding Officer Navy Drug Screening Laboratory Naval Air Station, Bldg. H-2033 Jacksonville, FL 32212-0113	AUTOVON: 942-7755 Commercial: (904) 777-7755 NAVDRUGLAB JACKSONVILLE FL
Commanding Officer Navy Drug Screening Laboratory Bldg. 38-H Great Lakes, IL 60088-5223	AUTOVON: 792-2045 Commercial: (708) 688-2045 NAVDRUGLAB GREAT LAKES IL
Commanding Officer Navy Drug Screening Laboratory Naval Air Station, Bldg. S-33 Norfolk, VA 23511-6295	AUTOVON: 564-8120/8089 Commercial: (804) 444-8120/8089 NAVDRUGLAB NORFOLK VA
Commanding Officer Navy Drug Screening Laboratory Bldg. 65B, 8750 Mountain Blvd. Oakland, CA 94627-5050	AUTOVON: 828-6184 Commercial: (415) 633-6184 NAVDRUGLAB OAKLAND CA
Commanding Officer Navy Drug Screening Laboratory Naval Hospital, Bldg. 10-2 San Diego, CA 92134-6900	AUTOVON: 522-9372 Commercial: (619) 532-9372 NAVDRUGLAB SAN DIEGO CA

AREAS OF RESPONSIBILITY

NDSL Jacksonville: Those units designated by CINCLANTFLT or CMC and those undesignated units in geographic proximity.

NDSL Great Lakes: All activities assigned to CNET, all USMC accession points as designated by CMC, and selected naval activities located in the Great Lakes area.

NDSL Norfolk: Those units designated by CINCLANTFLT, CMC, or CINCUSNAVEUR and those undesignated units in geographic proximity.

NDSL Oakland: Those units designated by CINCPACFLT or CMC and those undesignated units in geographic proximity.

NDSL San Diego: Those units designated by CINCPACFLT or CMC and those undesignated units in geographic proximity.

NOTE: Recruit Training Centers will send recruit accession specimens to the geographically nearest NDSL for confirmation testing.

Appendix V

NOTES

NOTES (continued)

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 NIS is mandatory. SECNAVINST 5520.3A of 17 August 1990 and ALNAV 013/87 (2218/02 June 87) provide an extensive list and guidance for those offenses that NIS must investigate.

4. Upon referral of a case to NIS, any command action on the case should be held in abeyance; however, if immediate referral to NIS 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. There are no set procedures or forms for preliminary inquiries; however, for minor offenses normally disposed of at NJP, NAVPERS 1626/7 for the Navy and the UPB for the Marine Corps should be used. Instructions for the completion of the UPB are contained within chapter 2, MCO P5800.8B (LEGADMINMAN).

2. While NAVPERS 1626/7 serves the dual function of an investigative form and a report chit, the UPB does not. Consequently, a locally prepared preliminary inquiry report form may be used and appended to the UPB. Likewise, additional information or witness statements may be appended to NAVPERS 1626/7 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; however, the preliminary inquiry officer should not sign and swear to the charges at this time. To do so constitutes "preferring charges" and may start the speedy trial clock discussed in Chapter 10.

6. A JAGMAN investigation should not be convened solely for military justice matters; however, it is possible that a JAGMAN investigation may incidentally address suspected criminal activity.

NOTES

NOTES (continued)

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; JAGMAN, § 0102.

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. JAGMAN, § 0102.

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 a "nonpunitive letter of caution."

A sample nonpunitive letter of caution is set forth in Appendix A-1-a of the JAG Manual. It should be noted that such letters are private in nature and copies may not be forwarded to the Commander, Naval Military Personnel Command (CNMPC) or to Headquarters Marine Corps (HQMC). JAGMAN, § 0105b(2). Additionally, such letters may not be quoted in or appended to fitness reports or evaluations, included as enclosures to JAG Manual or 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 nonpunitive letters of caution are not forwarded to CNMPC or HQMC: nonpunitive letters issued by the Secretary of the Navy are submitted for inclusion in the recipients' service records.

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 EMI 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.

JAGMAN, § 0103 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 OPNAVINST 3120.32B; para. 1300.1b, Marine Corps Manual.

For the Navy, OPNAVINST 3120.32B discusses EMI in detail and clearly states that the delegation of authority to assign EMI outside normal working hours is to be encouraged. Ordinarily such authority should not be delegated below the chief petty officer (E-7) level. However, in exceptional cases, as where a qualified

petty officer is filling a CPO billet in a unit which contains no CPO, authority may be delegated to a mature senior petty officer.

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. JAGMAN, § 0104. 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 JAGMAN, § 0104. 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. See, e.g., DOD Directive 5525.4 of 2 November 1981, as it applies to enforcement of traffic laws on DOD installations.

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 technically a "privilege," but custom and regulation permit the deprivation of liberty only for certain recognized grounds. Those include authorized pretrial restraint, or deprivation of normal liberty in a foreign country or in foreign territorial waters, when such action is deemed essential for the protection of the foreign relations of the United States or as a result of international legal-hold restriction. Moreover, it is necessary to the efficiency of the naval service that official functions be performed and that certain work be accomplished in a timely manner. It is, therefore, not punishment when persons in the naval service are required to remain on board and be physically present outside of normal working hours for work

assignments which should have been completed during normal working hours, or for the accomplishment of additional essential work, or for the achievement of the currently required level of operational readiness. JAGMAN, § 0104. Other grounds for deprivation of liberty include the health or safety of the individual or the public. This is the basis for ordering the military spouse into the barracks or back to the ship when the other reports an assault.

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 not authorized by the UCMJ, MCM, or JAGMAN. 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).

NOTES

NOTES (continued)

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." In the Marine Corps, the process is called "office hours," and, in the Army and Air Force, it is referred to as "Article 15." Article 15 of the Uniform Code of Military Justice (UCMJ), Part V of the Manual for Courts-Martial, 1984 (MCM), and Part B of Chapter I of The Manual of the Judge Advocate General 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 in accordance with regulations of the Secretary of the Navy. Part V, para. 2, MCM, 1984.

a. A commanding officer

(1) In the Navy and the Marine Corps, billet designations by the Commander, Naval Military Personnel Command (NMPC) and Headquarters Marine Corps (HQMC) identify those persons who are "commanding officers." In other words, the term "commanding officer" has a precise meaning and is not used arbitrarily. Also, in the Marine Corps, a company commander is a "commanding officer" and may impose NJP.

(2) The power to impose NJP is inherent in the office and not in the individual. Thus, the power may be exercised by a person acting as CO, such as when the CO is on leave and the XO succeeds to command. See Articles 1074-1087, U.S. Navy Regulations, 1990, for complete "succession-to-command" information.

b. An officer in charge

Officers in charge exist in the naval service and the Coast Guard. In the Navy and Marine Corps, an officer in charge is a commissioned officer who is designated as officer in charge of a unit by departmental orders, tables of organization, manpower authorizations, orders of a flag or general officer in command, or orders of the Senior Officer Present. See JAGMAN, § 0106b; see also Art. 0801, U.S. Navy Regulations, 1990.

c. Officers to whom NJP authority has been delegated

(1) Ordinarily, the power to impose NJP cannot be delegated. One exception is that a flag or general officer in command may delegate all or a portion of his article 15 powers to a "principal assistant" (a senior officer on his staff who is eligible to succeed to command) with the express approval of the Chief of Naval Personnel or the Commandant of the Marine Corps. Art. 15(a), UCMJ; JAGMAN, § 0106c.

(2) Additionally, where members of the naval service are assigned to a multiservice command, the commander of such multiservice command may designate one or more naval units and, for each unit, shall designate a commissioned officer of the naval service as commanding officer for NJP purposes over the unit. A copy of such designation must be furnished to the Commander, Naval Military Personnel Command or the Commandant of the Marine Corps, as appropriate, and to the Judge Advocate General. JAGMAN, § 0106d.

2. Limitations on power to impose NJP

No officer may limit or withhold the exercise of any disciplinary authority under article 15 by subordinate commanders without the specific authorization of the Secretary of the Navy. JAGMAN, § 0106e.

3. 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.

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 may impose NJP only upon enlisted members assigned to the unit of which he is in charge. Art. 15(c), UCMJ.

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. JAGMAN, § 0107a(1).

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 a JAG Manual 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. JAGMAN, § 0107b(2).

c. Personnel of another armed force

(1) Under present agreements between the armed forces, a Navy commanding officer should not exercise NJP jurisdiction on Army or Air Force personnel assigned or attached to a naval command. As a matter of policy, such personnel are returned to their parent-service unit for discipline. If this is impractical and the need to discipline is urgent, NJP may be imposed, but a report to the Department of the Army or Department of the Air Force is required. See MILPERSMAN, art. 1860320.5a, b, as to the procedure to follow.

(2) Express agreements do not extend to Coast Guard personnel serving with a naval command, but other policy statements indicate that the naval commander should not attempt to exercise NJP over such personnel assigned to his unit. Sec. 1-3(c), Coast Guard Military Justice Manual, COMDTINST M5810.1.

(3) Because the Marine Corps is part of the Department of the Navy, no general restriction extends to the exercise of NJP by Navy commanders over Marine Corps personnel or by Marine Corps commanders over Navy personnel.

4. Imposition of NJP on embarked personnel

The commanding officer or officer in charge of a unit attached to a ship for duty should, as a matter of policy, refrain from exercising his power to impose NJP and should refer all such matters to the commanding officer of the ship for disposition. JAGMAN, § 0108a. This policy does not apply to Military Sealift Command (MSC) vessels operating under masters or to organized units embarked on a Navy ship for transportation only. Nevertheless, the commanding officer of a ship may permit a commanding officer or officer in charge of a unit attached to that ship to exercise nonjudicial punishment authority.

The authority of the commanding officer of a vessel to impose NJP on persons embarked on board is further set forth in Articles 0720-0722, U.S. Navy Regulations, 1990.

5. Imposition of NJP on reservists

a. Reservists on active duty for training or 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);

(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; or

(4) if the accused waives his right to be present at the NJP hearing, the commanding officer or officer in charge may impose NJP after the period of active duty or inactive duty training of the accused has ended. JAGMAN, § 0107b; R.C.M. 204, MCM.

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

6. 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. Note that such a demand does not require that charges be referred to a court-martial. Referral is a decision exercised by the convening authority, not by the member.

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 "report chit" (NAVPERS Form 1626/7 or UPB Form NAVMC 10132) 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. Case law interprets "vessel" as commissioned ships of the U.S. Navy and precommissioning units which have been duly designated "in commission, special," or "in service." Whether the ship is at sea or in dry-dock is irrelevant. Case law also interprets "attached" to include submarine off-crews.

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.

7. 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 Navy and Marine Corps, however, have taken the position that 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. Sections 0108b and 0124d of the JAG Manual 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 state 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, if authority is obtained from the officer exercising general court-martial jurisdiction (usually the general or flag officer in command over the command desiring to impose nonjudicial punishment).

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. JAGMAN, §§ 0108b, 0124d.

c. Clearly, cases in which a finding of guilty or not guilty has been reached in a trial by court-martial cannot be then taken to nonjudicial punishment. JAGMAN, §§ 0108b and 0124d. The last point at which cases may be withdrawn from court-martial before findings with a view toward nonjudicial punishment, however, 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. C.2a, supra), there is no limit on the authority of military authorities to resolve such offenses at NJP.

b. OPNAVINST 11200.5C and MCO 5110.1C state, as a matter of policy, that, 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. When this inquiry is complete, a NAVPERS Form 1626/7 or the UPB Form NAVMC 10132 is filled out. (This inquiry is discussed in Chapter VI, supra.) The Navy NAVPERS 1626/7 functions as an investigation report as well as a record of the processing of the nonjudicial punishment case. The Marine Corps NAVMC 10132 is a document used to record nonjudicial punishment only (MCO P5800.8B provides details for the completion of the UPB form). 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 advised of his rights outlined in Part V, para. 4, MCM, 1984. The commanding officer need not give the advice personally, but may assign this responsibility to the legal officer or 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.

In addition to the foregoing, Marine Corps commands are also required to advise an accused that acceptance of NJP/SCM does not preclude the command from taking other possible adverse administrative action against him. Recordation of the above so-called "Booker rights" advice and waivers should be made on page 13 (Navy) or page 12 (Marine Corps) of the accused's service record. The accused's Notification and Election of Rights Form (see JAGMAN appendices A-1-b, A-1-c, or A-1-d, as appropriate) should be attached to the 1026/7 or UPB. A simple, straightforward recordation of the three statements given above complies with these requirements. In this regard, sections 0109 and 0110 of the JAG Manual explain precisely how a Navy command may prepare service record entries which will be admissible at any subsequent trial by court-martial. Marine Corps commands should refer to para. 4014.2b(2) of the IRAM for the format required to document compliance with "Booker rights." 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 Appendices A-1-a, A-1-b, and A-1-c of the JAG Manual 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. Part V, para. 4c(2), MCM, 1984, provides that, if the accused waives his right to personally appear before the commanding officer, he may choose to submit written matters for consideration by the commanding officer prior to the imposition of nonjudicial punishment. Should the accused make such an election, he should be informed of his right to remain silent and that any matters so submitted may be used against him in a trial by court-martial. Notwithstanding the accused's expressed desire to waive his right to personally appear at the nonjudicial punishment hearing, he may be ordered to attend the hearing if the officer imposing nonjudicial punishment desires his presence. NAVY JAG MSG 231630Z NOV 84. If the accused waives his personal

appearance and NJP is imposed, the commanding officer must ensure that the accused is informed of the punishment as soon as possible.

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 JAG Manual investigation or other fact-finding 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; JAGMAN, § 0110d. 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 JAG Manual 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 JAGMAN, § 0209c.

(2) If the record of a JAG Manual investigation or other fact-finding 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 fact-finding body for further proceedings to accord the accused all rights of a party. JAGMAN, § 0110d.

d. Burden of proof. The commanding officer or officer in charge must decide that the accused is "guilty" by a preponderance of the evidence. JAGMAN, § 0110b.

e. Personal representative. The concept of a personal representative to speak on behalf of the accused at an Article 15, UCMJ, hearing has caused some confusion. The burden of obtaining such a representative is on the accused. As a practical matter, he is free to choose anyone he wants -- a lawyer or a nonlawyer, an officer or an enlisted person. This freedom of the accused to choose

a representative does not obligate the command to provide lawyer counsel, and current regulations do not create a right to lawyer counsel to the extent that such a right exists at court-martial. The accused may be represented by any lawyer who is willing and able to appear at the hearing. While a lawyer's workload may preclude the lawyer from appearing, a blanket rule that no lawyers will be available to appear at article 15 hearings would appear to contravene the spirit if not the letter of the law. It is likewise doubtful that one can lawfully be ordered to represent the accused. It is fair to say that the accused can have anyone who is able and willing to appear on his behalf without cost to the government. While a command does not have to provide a personal representative, it should help the accused obtain the representative he wants. In this connection, if the accused desires a personal representative, he must be allowed a reasonable time to obtain someone. Good judgment should be utilized here, for such a period should be neither inordinately short nor long.

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. Section 0110c of the JAG Manual encourages 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.

j. Publication of nonjudicial punishment. Commanding officers are authorized to publish the results of nonjudicial punishment under section 0115 of the JAG Manual. Within one month following the imposition of nonjudicial

punishment, the name of the accused, his rate, offense(s), and their disposition may be published in the plan of the day, provided it is intended for military personnel only, posted upon command bulletin boards, and announced at daily formations (Marine Corps) or morning quarters (Navy).

5. Possible actions by the commanding officer at mast/office hours (listed on NAVPERS 1626/7)

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.

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 6-17 summarizes the maximum punishment limitations for NJP.

B. Nature of the punishments

1. Admonition and reprimand. Punitive censure for officers must be in writing, although it may be either oral or written for enlisted personnel. Procedures for issuing punitive letters are detailed in section 0105 and in appendix A-1-g of the JAG Manual. See also SECNAVINST 1920.6 series. These procedures must be complied with. It should be noted that reprimand is considered more severe than admonition.

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. JAGMAN, § 0111f.

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 and usually require the accused to log in at certain specified times during the restraint. Article 1103.1 of U.S. Navy Regulations, 1990, provides that an officer placed in the status of arrest or restriction shall not be confined to his room unless the safety or the discipline of the ship requires such action.

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. JAGMAN, § 0113a.

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. Section 0111d of the JAG Manual indicates that 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, and section 0111e of the JAG Manual to one grade only. The grade from which reduced must be within the promotional authority of the CO imposing the reduction. NAVMILPERSMAN 3420140.2; MARCORPROMAN, Vol. 2, ENLPROM, para. 1200.

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 OPNAVINST 1640.7 and MCO 1626.7B. Time spent in correctional custody is not "lost time." Correctional custody cannot be imposed on grades E-4 and above. See JAGMAN, § 0111b. 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. These punishments can be utilized only if the accused is attached to or embarked on a vessel. These punishments involve physical confinement and are tantamount to solitary confinement because contact is allowed only with authorized personnel, but should not be so-called since "solitary confinement" may not be imposed. A medical officer must first certify in writing that the accused will suffer no serious injury and that the place of confinement will not be injurious to the accused. Diminished rations is a restricted diet of 2100 calories per day, and instructions for its use are detailed in SECNAVINST 1640.9 series. These punishments cannot be imposed upon E-4 and above.

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; JAGMAN, § 0113. 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 or confinement on bread and water or diminished rations. Section 0113b(3) of the JAG Manual permits a commanding officer or an officer in charge to defer correctional custody, confinement on bread and water, or confinement on diminished rations for a period of up to 15 days when:

(1) Adequate facilities are not available;

(2) the exigencies of the service so require; or

(3) the accused is found to be not physically fit for the service of these punishments.

b. Deferral of restraint punishments pending an appeal from nonjudicial punishment. Part V, para. 7d, MCM, 1984, provides that a service-member 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.

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. JAGMAN, § 0113b(2). This rule does not apply to forfeiture of pay which must be completed before any subsequent forfeiture begins to run. JAGMAN, § 0113a.

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. JAGMAN, § 0113b(2).

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

LIMITS OF PUNISHMENTS UNDER UCMJ, ART. 15 -- TABLE ONE

Imposed by	Imposed by	Confinement on B&W or DIMSRTS (2)	Correctional Custody (3)	Arrest in Quarters (1)	Forfeiture (6) (5)	Reduction (6) (8)	Extra Duties (4)	Restrictions to Limits (4)	Admonition (6)	Reprimand (6)
General Officers in Command	Officers	No	No	30 days	1/2 one mo. for 2 mos.	No	No	60 days	Yes	Yes
	E-4 to E-9	No	No	No	1/2 one mo. for 2 mos.	1 grade	45 days	60 days	Yes	Yes
	E-1 to E-3	3 days	30 days	No	1/2 one mo. for 2 mos.	1 grade	45 days	60 days	Yes	Yes
O-4 to O-6	Officers	No	No	No	No	No	No	30 days	Yes	Yes
	E-4 to E-9	No	No	No	1/2 one mo. for 2 mos.	1 grade	45 days	60 days	Yes	Yes
	E-1 to E-3	3 days	30 days	No	1/2 one mo. for 2 mos.	1 grade	45 days	60 days	Yes	Yes
O-3 below and OINC's (7)	Officers	No	No	No	No	No	No	15 days	Yes	Yes
	E-4 to E-9	No	No	No	7 days	1 grade	14 days	14 days	Yes	Yes
	E-1 to E-3	3 days	7 days	No	7 days	1 grade	14 days	14 days	Yes	Yes

(1) May not be combined with restriction

(2) May be awarded only if attached to/embarked in a vessel and may not be combined with any other restraint punishment or extra duties

(3) May not be combined with restriction or extra duties

(4) Restriction and extra duties may be combined to run concurrently but the combination may not exceed the maximum imposable for extra duties

(5) Shall be expressed in whole dollar amounts only

(6) *May be imposed in addition to or in lieu of all other punishments*

(7) OINC's have NJP authority over enlisted personnel only

(8) Chief petty officers (E-7 through E-9) may not be reduced at NJP in the Navy: Marine Corps NCO's (E-6 through E-9) may not be reduced at NJP (check current directives relating to promotions)

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. confinement on bread and water or diminished rations may not be imposed in combination with correctional custody, extra duties, or restriction;

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

4. 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, and section 0118 of the JAG Manual indicate 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, activity, or command to which the accused is properly transferred after the imposition of punishment by the first commander (JAGMAN, § 0118b); and

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. This means normally that the commander believes the punishment of the accused was clearly a mistake. If the punishment has been executed, executive action to set it aside should be taken within a reasonable time--normally within four months of its execution. The commanding officer who wishes to reinstate an individual reduced in rate at NJP is not bound by the provisions of MILPERSMAN 2230200 limiting advancement to a rate formerly held only after a minimum of 12 months' observation of performance. Such action can be taken with respect to the whole or a part of the punishment imposed. All entries pertaining to the punishment set aside are removed from the service record of the accused. MILPERSMAN 5030500; LEGADMINMAN 2006.

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 servicemember automatically remits any unexecuted punishment imposed under article 15.

3. Mitigation. Part V, para. 6b, MCM, 1984. 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) confinement on bread and water or diminished rations to correctional custody;

(3) correctional custody or confinement on bread and water or diminished rations to extra duties or restriction or both (to run concurrently); or

(4) extra duties 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. 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. An action suspending a punishment includes an implied condition that the servicemember not commit an offense under the UCMJ. The NJP authority who imposed punishment may specify in writing additional conditions on the suspension.

(1) Customized conditions of suspension must be lawful and capable of accomplishment.

(2) Examples include: duty to obey local civilian law(s); refrain from associating with particular individuals (i.e., known drug users); not to enter particular establishments or trouble spots; requirement to agree to searches of person, vehicles, or lockers; to successfully graduate from a particular rehabilitation course (i.e., ARS, CAAC); to make specified restitution to a victim; to conduct specified GMT on a topic related to the offense; or any variety of conditions designed to rehabilitate or curtail risk-oriented conduct.

(3) The probationer's acknowledgement should be obtained on the original for the commanding officer's retention, and a copy of the signed conditions should be served on the probationer.

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 be based only upon a violation of the UCMJ (implied condition) or a violation of the conditions of suspension (express condition) which occurs during the period of suspension.

(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, but not for a violation of a condition of suspension unless it is itself a violation of the UCMJ. 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 within ten working days of the commencement of the vacation proceedings and the decision to vacate the suspended punishment is not appealable as a nonjudicial punishment appeal. JAGMAN, § 0118d.

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. The running of the period of suspension will be interrupted, however, by the unauthorized absence of the accused or the commencement of any proceeding to vacate the suspended punishment. The running of the period of probation resumes again when the unauthorized absence ends or when the suspension proceedings are terminated without vacation of the suspended punishment. JAGMAN, § 0118c.

APPEAL FROM NONJUDICIAL PUNISHMENT

A. Procedure. If punishment is imposed at NJP, the commanding officer is required to ensure that the accused is advised of his right to appeal. Part V, para. 4c(4)(B)(iii), MCM, 1984; JAGMAN, § 0110e and app. A-1-f. A person punished under article 15 may appeal the imposition of such punishment through proper channels to the appropriate appeal authority. Art. 15e, UCMJ; JAGMAN, § 0117. If, however, the offender is transferred to a new command prior to filing his appeal, the immediate commanding officer of the offender at the time the appeal is filed should forward the appeal directly to the officer who imposed punishment. JAGMAN, § 0116b.

1. When the officer who imposed the punishment is in the Navy chain of command, the appeal will normally be forwarded to the area coordinator authorized to convene general courts-martial. JAGMAN, § 0117a.

2. When the officer who imposed the punishment is in the chain of command of the Commandant of the Marine Corps, the appeal will be made to the officer next superior in the chain of command to the officer who imposed the punishment.

3. When the officer who imposed the punishment has been designated a commanding officer for naval personnel of a multiservice command pursuant to JAGMAN, § 0106d, the appeal will be made in accordance with JAGMAN, § 0117c.

4. A flag or general officer in command may, with the express prior approval of the Commander, Naval Military Personnel Command or the Commandant of the Marine Corps, delegate authority to act on appeals to a principal assistant. JAGMAN, § 0117d.

5. An officer who has delegated his NJP power to a principal assistant under JAGMAN, § 0106c may not act on an appeal from punishment imposed by that assistant. JAGMAN, § 0117d.

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. JAGMAN, § 0116.

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. The officer imposing NJP shall determine whether good cause was shown and shall advise the accused whether an extension of time will be permitted. JAGMAN, § 0116a(2).

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. See Article 1108, U.S. Navy Regulations, 1990. 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. All via addressees should use a simple forwarding endorsement and should not comment on the validity of the appeal. The exception to this rule is the endorsement of the officer who imposed the punishment. Section 0116c of the JAG Manual requires that his endorsement should normally include the following information. Marine Corps units should also refer to LEGADMINMAN, chapter 2 for more specific information.

a. Comment on any assertions of fact contained in the letter of appeal which the officer who imposed the punishment considers to be inaccurate or erroneous;

b. recitation of any facts concerning the offenses which are not otherwise included in the appeal papers (If such factual information was brought out at the mast or office hours hearing of the case, the endorsement should so state and include any comment in regard thereto made by the appellant at the mast or office hours. Any other adverse factual information set forth in the endorsement, unless it recites matters already set forth in official service record entries, should be referred to appellant for comment, if practicable, and he should be given an opportunity to submit a statement in regard thereto or state that he does not wish to make any statement.);

c. as an enclosure, a copy of the completed mast report form (NAVPERS 1626/7) or office hours report form (NAVMC 10132);

d. as enclosures, copies of all documents and signed statements which were considered as evidence at the mast or office hours hearing or, if the nonjudicial punishment was imposed on the basis of the record of a court of inquiry or other fact-finding body, a copy of that record, including the findings of fact, opinions, and recommendations, together with copies of any endorsements thereon; and

e. as enclosures, copies of the appellant's record of performance as set forth on service record page 9 (Navy) or page 3 (Marine Corps), administrative remarks set forth on page 13 (Navy) or page 11 (Marine Corps), and disciplinary records set forth on page 7 (Navy) or page 12 (Marine Corps).

The officer who imposed the punishment should not, by endorsement, seek to "defend" against the allegations of the appeal but should, where appropriate, explain the rationalization of the evidence. For example, the officer may have chosen to believe one witness' account of the facts while disbelieving another witness' recollection of the same facts, and this should be included in the endorsement. This officer may properly include any facts relevant to the case as an aid to the reviewing authority, but should avoid irrelevant character assassination of the accused. Finally, any errors made in the decision to impose nonjudicial punishment or in the amount of punishment imposed should be corrected by this officer and the corrective action noted in the forwarding endorsement. Even though corrective action is taken, the appeal must still be forwarded to the reviewer.

3. Endorsement of the reviewing authority. There are no particular legal requirements concerning the content of the reviewer's endorsement except to inform the offender of his decision. A legally sound endorsement will include the reviewer's specific decision on each ground of appeal, the basic reasons for his decision, a statement that a lawyer has reviewed the appeal, if such review is

required, and instructions for the disposition of the appeal package after the offender receives it. The endorsement should be addressed to the accused via the appropriate chain of command. Where persons not in the direct chain of command (such as finance officers) are directed to take some corrective action, copies of the reviewer's endorsement should be sent to them. Words of exhortation or admonition, if temperate in tone, are suitable for inclusion in the return endorsement of the reviewer.

4. Via addressees' return endorsement. If any via addressee has been directed by the reviewer to take corrective action, the accomplishment of that action should be noted in that commander's endorsement. The last via addressee should be the offender's immediate commander. This endorsement should reiterate the steps the reviewer directed the accused to follow in disposing of the appeal package. These instructions should always be to return the appeal to the appropriate commander for filing with the records of his case.

5. Accused's endorsement. The last endorsement should be from the accused to the commanding officer holding the records of the nonjudicial punishment. The endorsement will acknowledge receipt of the appeal decision and forward the package for filing.

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. Many commands now require that all nonjudicial punishment appeals be reviewed by a lawyer prior to action by the reviewing authority.

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 0117d of the JAG Manual, 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 0106c of the JAG Manual. 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 and such fact should be noted by the command in the forwarding endorsement. JAGMAN, § 0117d.

E. Authorized appellate action. Part V, para. 7f, MCM, 1984; JAGMAN, § 0117. 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. JAGMAN, § 0117e. 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. Should a court-martial determine that the offense was not "minor," however, 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.

NOTES

NOTES (continued)

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 elements which must be satisfied to terminate military jurisdiction at discharge are the delivery of a valid discharge certificate, a final accounting of pay, and completion of the clearing process required under appropriate service regulations.

Three potential exceptions exist to the general rule. First, in the very unusual case contemplated by Article 3(a), UCMJ (serious offenses committed 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 approaching the end of his enlistment and suspected of an offense is not discharged. The individual should be placed on "legal hold" 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 preferral of 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 are also subject to the UCMJ while in that inactive duty training status. Additionally, Article 3(d), UCMJ, states that a reservist is not relieved from amenability to military jurisdiction for an offense committed while subject to the UCMJ by virtue of the termination of a period of active duty or inactive duty training.

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 Naval 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 during a previous 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 should be taken immediately. Such positive actions could include apprehension, arrest, confinement, or the preferral 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 between the military and 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.

NOTES

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 JAGMAN, § 0120c 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, U.S. Navy, has summary court-martial convening authority while actually performing his duty as Commanding Officer, USS Brownson, 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, is 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.

Commanding officers or officers in charge not empowered to convene summary courts-martial may request such authority by following the procedures contained in JAGMAN, § 0121e.

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. JAGMAN, § 0122a(1). Further, the commander of a unit which is attached to a naval vessel for duty therein should, as a matter of policy, refrain from exercising his summary or special court-martial convening powers and should refer such cases to the commanding officer of the ship for disposition while the unit is embarked therein. JAGMAN, § 0122b. This policy does not apply to commanders of units which are embarked for transportation only. Finally, JAGMAN, § 0122b requires that the permission of the officer exercising general court-martial jurisdiction over the command 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. JAGMAN, § 0124a.

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. _____].

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. If the convening authority derives his power from designation by SECNAV, this should also be stated in the order. JAGMAN, § 0133 further requires that the convening order be assigned a court-martial convening order number; be personally signed by the convening authority; and show his name, grade and title, including organization and unit.

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. Appendix 6b of the Manual for Courts-Martial, 1984, 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. Confusion can be avoided by maintaining a standing summary court-martial convening order to insure 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 (The Navy and Marine Corps are part of the same armed force: the naval service). 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 convening order attached to the record of trial. In such a situation the better practice would be to appoint a summary court-martial officer from outside the command, as the summary court-martial officer need not be from the same command as the accused.

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 8-12 to 8-13, 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 -

DEPARTMENT OF THE NAVY
USS FOX (DD-983)
FPO New York 09501

1 July 19CY

SUMMARY COURT-MARTIAL CONVENING ORDER 1-CY

Lieutenant John H. Smith, U.S. Navy, is detailed a summary court-martial.

ABLE B. SEEWEED
Commander, U. S. Navy
Commanding Officer, USS FOX (DD-983)

NOTE: This format may be used for convening all summary courts-martial. Of particular importance are the date, the convening order number, the signature and title of the convening authority (which demonstrates his authority to convene the court-martial).

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 Marine Corps and Navy commanding officers, among others, to administer oaths for this purpose. JAGMAN, § 0902a(5) further authorizes officers certified by the Judge Advocate General of the Navy as counsel under Article 27, UCMJ, all officers in pay grade 0-4 and above, executive officers, and administrative officers of Marine Corps aircraft squadrons to administer oaths. Often the legal officer will administer the

oath regardless of who conducted the preliminary inquiry. 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: A chart which lists punishments authorized at each type of court-martial is included at page 9-23.

(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 [convening authority may apportion collection over no more than three months; JAGMAN, § 0152a(2)] 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. Also, if the accused is attached to or embarked in a vessel and is in paygrade E-3 or below, he may be sentenced to serve 3 days confinement on bread and water/diminished rations and 24 days confinement in lieu of 30 days confinement. 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 paygrade E-5 or above extends to reduction, but only to the next inferior paygrade, 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. Recordation of the advice/waiver should be made on page 13 (Navy) or page 11 (Marine Corps) of the accused's service record with a copy attached to the record of trial. The form found at pages 8-12 to 8-13, infra, may be utilized. The "Acknowledgement of Rights and Waiver," 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).

SUMMARY COURT-MARTIAL
ACKNOWLEDGEMENT OF RIGHTS AND WAIVER

I, _____, assigned to _____, acknowledge the following facts and rights regarding summary courts-martial:

1. 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 counsel, I understand that a military lawyer may be made available to advise me, free of charge, or, in the alternative, I may consult with a civilian lawyer at my own expense.

2. I realize that I may refuse trial by summary court-martial, in which event the commanding officer may refer the charge(s) to a special court-martial. My rights at a summary court-martial would include:

a. The right to confront and cross-examine all witnesses against me;

b. the right to plead not guilty and the right to remain silent, thus placing upon the government the burden of proving my guilt beyond a reasonable doubt;

c. the right to have the summary court-martial call, or subpoena, witnesses to testify in my behalf;

d. the right, if found guilty, to present matters which may mitigate the offense or demonstrate extenuating circumstances as to why I committed the offense; and

e. the right to be represented at trial by a civilian lawyer provided by me at my own expense, if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.

3. I understand that the maximum punishment which may be imposed at a summary court-martial is:

<u>On E-4 and below</u>	<u>On E-5 and above</u>
Confinement for one month	60 days restriction
45 days hard labor without	Forfeiture of 2/3 pay for one month
60 days restriction	Reduction to next inferior paygrade
Forfeiture of 2/3 pay for one month	
Reduction to the lowest pay grade	

4. Should I refuse trial by summary court-martial, the commanding officer may refer the charge(s) to trial by special court-martial. At a special court-martial, in addition to those rights set forth above with respect to a summary court-martial, I would also have the following rights:

a. The right 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. I would also have the right to be represented by a civilian lawyer at my own expense.

b. The right to be tried by a special 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 written 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.

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

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

discharge from the naval service with a bad-conduct discharge (delete if inappropriate);

confinement for _____ months;

forfeiture of 2/3 pay per month for _____ months;

reduction to the lowest enlisted pay grade (E-1).

Knowing and understanding my rights as set forth above, I (do) (do not) desire to consult with counsel before deciding whether to accept trial by summary court-martial.

Knowing and understanding my rights as set forth above (and having first consulted with counsel), I hereby (consent) (object) to trial by summary court-martial.

_____
Signature of accused and date

_____
Signature of witness and date

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 the NLSO or Law Center 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 JAGMAN, § 0146. Appendix 7 of the Manual for Courts-Martial, 1984, contains an illustration of a completed subpoena while JAGMAN, § 0146 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)].

A sample of Record of Trial By Summary Court-Martial is included at page 8-17/18.

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
SMITH, John J.	SN, USN	USS OLDSHIP (DD 111)	123-45-6789

2a. NAME OF CONVENING AUTHORITY (Last, First, MI)	b. RANK	c. POSITION	d. ORGANIZATION OF CONVENING AUTHORITY
HIGH, Hang M.	CDR, USN	Commanding Officer	USS OLDSHIP (DD 111)

3a. NAME OF SUMMARY COURT-MARTIAL (If SCM was accuser, so state.)	b. RANK	c. UNIT OR ORGANIZATION OF SUMMARY COURT-MARTIAL
NEW, Brand S.	LT, USN	USS OLDSHIP (DD 111)

(Check appropriate answer)	YES	NO
4. At a preliminary proceeding held on 1 January 19 CY, 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 14 January 19, CY, 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.)

JJS
(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

S/N 0102-LF-002-3290

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:	Guilty	Guilty
Specification 1:	Guilty	Guilty
Specification 2:	Not Guilty	Not Guilty
Charge II:	Not Guilty	Guilty
Specification 1:	Not Guilty	Guilty, except for the figure "$74.00", substituting therefor the figure "$25.00". Of the excepted figure, not guilty. Of the substituted figure, guilty.
Specification 2:	Not Guilty	Not Guilty

9. The following sentence was adjudged: To be confined for 15 days; to forfeit $150.00 pay per month for the period of 1 month; and to be reduced to the grade of paygrade E-1.

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

Brand S. New

BRAND S. NEW, LT, USN
Signature of Summary Court-Martial

14 January 19CY
Date

13. ACTION BY CONVENING AUTHORITY

Approved and ordered executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated the place of confinement.

The record of trial is forwarded to the Staff Judge Advocate, Commander, Naval Education and Training Center, Newport, Rhode Island, for review under Article 64(a), UCMJ.

HANG M. HIGH
Typed Name of Convening Authority

COMMANDING OFFICER
Position of Convening Authority

CDR, USN
Rank

/s/
Signature of Convening Authority

22 January 19CY
Date

DD Form 2329 Reverse, 84 AUG

NOTES

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 JAGMAN, § 0120b 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.

The commander of a unit embarked on a naval vessel, who is authorized to convene special courts-martial, should refrain from exercising such authority and defer instead to the desires of the ship's commander. JAGMAN, § 0122b.

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 JAGMAN, § 0133 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 9-8, 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. The amendment is serialized in the same manner as the original convening order, but additional letters or numbers are used to identify the amendment as a separate order. Thus, convening order serial 1-CY could be amended by serial 1-CYA, 1-CYB, or 1A-CY, 1B-CY, or any other combination of letters and numbers. These serializations are important and must be carefully organized. A sample amendment to a convening order which changes the identity of a member is set forth at page 9-9.

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 at no cost to the accused unless, due to military exigencies or physical conditions, one cannot be obtained.

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." JAGMAN, § 0132 provides that a Navy or Marine Corps military counsel is "reasonably available" to represent an accused if the requested counsel:

(a) Is assigned to an activity within the same Navy-Marine Corps trial judiciary circuit, or within 100 miles of where the trial will be held; 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 certain high-level DoD and Navy organizations.

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. 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 CA shall forward the request 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.

DEPARTMENT OF THE NAVY
NAVAL EDUCATION AND TRAINING CENTER
Newport, Rhode Island 02841-5030

23 Aug 19CY

SPECIAL COURT-MARTIAL CONVENING ORDER 4-CY

A special court-martial is convened with the following members and shall meet at Naval Education and Training Center, Newport, Rhode Island, unless otherwise directed:

Lieutenant Lance Q. Lawrence, U.S. Navy;
Lieutenant Junior Grade Edward Sherman, U.S. Navy;
Lieutenant Junior Grade Calvin N. Murray, U.S. Naval Reserve;
Ensign Miles T. Kennedy, U.S. Naval Reserve;
Chief Boatswain W3 Samuel F. Prescott, U.S. Navy.

/s/
ABLE B. SEEWEED
Captain, U. S. Navy
Commander, Naval Education and
Training Center
Newport, Rhode Island

DEPARTMENT OF THE NAVY
NAVAL EDUCATION AND TRAINING CENTER
Newport, Rhode Island 02841-5030

25 Aug CY

SPECIAL COURT-MARTIAL AMENDING ORDER 4A-CY

Commander Roy Beane, U.S. Navy, is detailed as a member of the special court-martial convened by order 4-CY this command, dated 23 Aug 19CY, vice Lieutenant Lance Q. Lawrence, U.S. Navy, relieved.

/s/
ABLE B. SEEWEED
Captain, U. S. Navy
Commander, Naval Education and
Training Center
Newport, Rhode Island

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; JAGMAN, § 0135. 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 the 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. A chart which lists punishments authorized at each type of court-martial is included at page 9-23.

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 without confinement 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. As its name suggests, this punishment involves confinement coupled with a diet of bread and water or diminished rations. A diet of bread and water allows the accused as much bread and water as he/she can eat. Diminished rations is food from the regular daily ration constituting a nutritionally balanced diet, but limited to 2100 calories per day. No hard labor may be required to be performed by an accused undergoing this punishment. Confinement on bread and water/diminished rations may be imposed only upon enlisted persons in paygrades E-1 to E-3 who are attached to or embarked in a vessel and then only for a maximum of three days. Further, both the prisoner and the confinement facility must be inspected by a medical officer who must certify in writing that the punishment will not be injurious to the accused's health and that the facility is medically adequate for human habitation. R.C.M. 1003(b)(9).

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. JAGMAN, § 0157a.

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).

In accordance with the power granted in Article 58(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Article 58(a), UCMJ, shall be effected in the Navy and Marine Corps in accordance with JAGMAN, § 0152d. Under the provisions of this section, a court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the CA, that includes a punitive discharge or confinement in excess of 90 days (if the sentence is awarded in days) or 3 months (if awarded in other than days) automatically reduces the member to the pay grade E-1 as of the date the sentence is approved. As a matter within his sole discretion, the CA or the supervisory authority may retain the accused in the pay grade held at the time of sentence or at an intermediate pay grade and suspend the automatic reduction to pay grade E-1 which would

otherwise be in effect. Additionally, the CA may direct that the accused serve in pay grade E-1 while in confinement, but be returned to the pay grade held at the time of sentence or an intermediate pay grade upon release from confinement. Failure of the CA to address automatic reduction will result in the automatic reduction to pay grade E-1 on the date of the CA's action.

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. JAGMAN, § 0152c contains guidance for drafting the reprimand.

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
LEE, Crumb B.	110-12-3456	LTJG	O-2

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
Naval Air Station Oceana Virginia Beach, Virginia	a. INITIAL DATE	b. TERM
	15 Jan 88	Indef

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$1,892.00	NONE	$1,892.00	NEW PAY SCALES	N/A

II. CHARGES AND SPECIFICATIONS

10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE

SPECIFICATION: In that Lieutenant Junior Grade Crumb B. Lee, U.S. Navy, Naval Air Station Oceana, Virginia Beach, Virginia, on active duty, who knew of his duties at Naval Air Station Oceana, Virginia Beach, Virginia, on or about 16 June 1991, was derelict in the performance of those duties in that he negligently failed to properly inspect and record temperature readings of Ordnance Magazines at Naval Air Station Oceana, Virginia Beach, Virginia, as it was his duty to do.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
ROBERTS, Willie M.	LT, USN	NAS Oceana, Virginia Beach, VA

d. SIGNATURE OF ACCUSER	e. DATE
	1 August 1991

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 1 day of August, 19 91, 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.

Woodrow E. Wilson
Typed Name of Officer

LCDR, JAGC, USN
Grade

Woodrow E. Wilson
Signature

NAVLEGSVCOFF
NAS Oceana, Virginia Beach, VA
Organization of Officer

Judge Advocate
Official Capacity to Administer Oath (See R.C.M. 307(b)—must be commissioned officer)

DD FORM 458 (84 AUG) EDITION OF OCT 68 IS OBSOLETE. S/N 0102-LF-000-4580

12.

On 2 August, 19 91, 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.)*

John E. Command — *Typed Name of Immediate Commander*

NAS Oceana, Virginia Beach, VA — *Organization of Immediate Commander*

CAPT, USN — *Grade*

John E. Command — *Signature*

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at 1100 hours, 2 August 19 91 at NAS Oceana, Virginia Beach, VA — *Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)*.

[redacted]

John E. Command — *Typed Name of Officer*

Commanding Officer — *Official Capacity of Officer Signing*

CAPT, USN — *Grade*

John E. Command — *Signature*

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
NAS Oceana	Virginia Beach, VA	4 August 1991

Referred for trial to the special court-martial convened by Special Court-Martial Convening Order 3-91 of 1 August 1991, as amended by Special Court-Martial Amending Order 3A-91 of , 2 August 19 91, subject to the following instructions:[2] None.

XX — *Command or Order*

John E. Command — *Typed Name of Officer*

Commanding Officer — *Official Capacity of Officer Signing*

CAPT, USN — *Grade*

John E. Command — *Signature*

15.

On 4 August, 19 91, I (caused to be) served a copy hereof on (each of) the above named accused.

Joe E. Lawyer — *Typed Name of Trial Counsel*

LCDR, JAGC, USNR — *Grade or Rank of Trial Counsel*

Joe E. Lawyer — *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.

DD Form 458 Reverse, 84 AUG

PUNISHMENT CHART

PUNISHMENT	SCM		SPCM		GCM		
	E-4 & below	E-5 & above	EM's	O's & WO's	EM's	WO's	O's
1. Death	NO	NO	NO	NO	YES (*1)	YES(*1)	YES (*1)
2. Dismissal	NO	NO	NO	NO	NO	NO	YES
3. Dishonorable Discharge	NO	NO	NO	NO	YES	YES	NO
4. Bad-Conduct Discharge	NO	NO	YES	NO	YES	NO	NO
5. Confinement	30 days	NO	6 mos.	NO	YES (*5)	YES (*5)	YES (*5)
6. Solitary Confinement	NO	NO	NO	NO	NO	NO	NO
7. Confinement on Bread and Water or Diminished Rations	3 days(*2)	NO	3 days(*2)	NO	3 days(*2)	NO	NO
8. Restriction	2 mos.	2 mos.	2 mos.	2 mos.	2 mos.	2 mos.	2 mos.
9. Hard Labor w/o confinement	45 days	NO	3 mos.	NO	3 mos.	NO	NO
10. Forfeiture all pay and allowances	NO	NO	NO	NO	YES	YES	YES
11. Forfeiture 2/3 pay per mo.	1 mo.(*3)	1 mo.(*3)	6 mos.	6 mos.	YES (*5)	YES	YES
12. Fine	YES(*4)	YES(*4)	YES(*4)	YES(*4)	YES	YES	YES
13. Reduction to next inferior rate	YES	YES	YES	NO	YES	NO	NO
14. Reduction to lowest pay grade	YES	NO	YES	NO	YES	NO	NO
15. Loss of numbers	NO	NO	NO	YES	NO	YES	YES
16. Reprimand	YES	YES	YES	YES	YES	YES	YES

(*1) Where authorized or mandatory

(*2) If attached to or embarked in a naval vessel

(*3) May extend payment up to 3 months [JAGMAN, § 0052a(2)]

(*4) If given, a fine or a fine and forfeiture combination may not exceed the maximum amount of forfeitures which may be adjudged in a case

(*5) Maximum punishment listed for each offense in Part IV, MCM

NOTES

NOTES (continued)

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 conven-ing 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 imper-missible 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 jurisdic- tion (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. 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 mem-bers. 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.

PRETRIAL RESTRAINT PROBLEMS

The term "pretrial restraint" is used to refer to the practice of restrict-ing 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 which include confinement, arrest, restriction, and conditions on liberty.

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 review the decision to impose pretrial confinement within 72 hours. If his decision is to continue confinement, the commanding officer must submit a written memorandum 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. Such a memorandum must be submitted to the IRO within seven days after the accused was confined. A sample memorandum is included at pages 10-9,10.

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 adminis-trative appeal from his decision. Detail of the IRO system are outlined in R.C.M. 305(e)-(i) and JAGMAN, § 0127. It should also be noted that, if other forms of pretrial restraint are imposed (such as arrest, restriction

or con-ditions 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 reason-able 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 prac- ticable, a detailed written explanation of the reasons for delay will be forwarded within the eight-day period.

D. 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 judg-ment, 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 Navy-Marine Corps 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 accor-dance 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 to trial 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 (90 days in pretrial confinement cases) 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. 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. Under case law, "notification" will be deemed to occur where the command has preferred charges against an accused, but has failed to notify the accused as soon a practicable. Therefore, charges should not be preferred until fully investigated and the government is prepared to proceed to trial. 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. 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 require-ments 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 "extraordi-nary 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.

PRETRIAL AGREEMENTS

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 JAGMAN, § 0137 detail procedures for negotiating pretrial agreements and define the rules pertaining to them. Appendix A-1-h of the JAG Manual contains suggested forms for the finalized agreement, but these forms will require careful tailoring in all cases as the agreement must be clear, precise, and should cover all contingencies.

A. Negotiations. Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. 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 counter-proposals by the convening authority are permitted. The convening authority has sole discretion in deciding whether to accept or reject the pretrial agreement proposed.

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 inter-preted 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 investi-gation. In order to ensure the actions by military convening authorities do not preclude appropriate action by Federal civilian authorities in such cases, JAGMAN, § 0137b requires that convening authorities shall ensure that ap-propriate 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.

1640
Ser 00/
3 Jan CY

From: Commanding Officer, USS PUGET SOUND (AD 38)
To: Initial Review Officer, Naval Station, Rota, Spain

Subj: PRETRIAL CONFINEMENT ICO YN3 DAVID L. TYPIST, USN, 222-22-2222

Ref: (a) R.C.M. 305, MCM, 1984

1. In accordance with reference (a), the following information is provided for the purpose of conducting a hearing into the pretrial confinement of YN3 David L. Typist, USN, 222-22-2222.

a. Hour, date, and place of pretrial confinement

1400, 2 January CY, Navy Brig, Naval Station, Rota

b. Offenses charged

Violation of UCMJ, Article 86 -- Unauthorized absence from USS PUGET SOUND (AD 38) from 23 October CY(-1) until apprehended on 2 January CY

c. General circumstances

(1) Petty Officer Typist's absence commenced over liberty which expired on board at 0700, 23 October CY(-1). The circumstances, as related by Petty Officer Typist to his division officer, are that YN3 Typist was dissatisfied working in the admin office and did not like his immediate supervisor and felt "picked on." He also relates that, at the time of his absence, he was working "undercover" with the Naval Investigative Service and the ship's master-at-arms force in identifying drug abusers on board the Naval Station. He states that a fellow petty officer (whom he identified as a drug user) found out that YN3 Typist was the one responsible for a "bust" in which this petty officer was involved. This unidentified petty officer had threatened YN3 Typist with bodily harm. Apparently becoming scared, Petty Officer Typist fled the area.

(2) These facts are unfounded. I have learned, through conversations with the Naval Investigative Service and my chief master-at-arms, that they have never used Petty Officer Typist in their programs nor have they ever heard of YN3 Typist.

Subj: PRETRIAL CONFINEMENT ICO YN3 DAVID L. TYPIST, USN, 222-22-2222

(3) Petty Officer Typist was apprehended by the shore patrol at 1300, 2 January CY, at a local bar in Palma de Mallorca, Spain. I found it appropriate to place YN3 Typist in confinement due to the duration of the absence (approximately 72 days) and considering the absence was terminated by apprehension.

2. Previous disciplinary action

a. CO's NJP, USS PUGET SOUND (AD 38) on 3 April CY(-1). Violation of UCMJ, Article 86 -- Unauthorized absence from appointed place of duty. Awarded: 10 days extra duties.

b. CO's NJP, USS PUGET SOUND (AD 38) on 10 June CY(-1). Violation of UCMJ, Article 86 -- Unauthorized absence from unit (approximately 3 days). Awarded: Forfeiture of $100.00 pay per month for one month and 30 days restriction.

c. CO's NJP, USS PUGET SOUND (AD 38) on 12 July CY(-1). Violation of UCMJ, Article 86 (6 specifications) -- Failure to go to appointed place of duty, to wit: Restricted men's muster. Awarded: 30 days extra duties and Forfeiture of $100.00 pay per month for two months.

3. Extenuating or Mitigating circumstances: None.

4. Due to the aforementioned information, continued pretrial confinement is deemed appropriate in this case. Petty Officer Typist has a history of unauthorized absences, which indicates to me the solution to any of his problems is to absent himself without authority. YN3 Typist has shown that a lesser form of restraint would be inadequate as evidenced by paragraph 2.c., above (failure to go to restricted men's muster). Charges have been preferred to trial by special court-martial, and no unusual delays are expected in this case. Given the nature of the offense charged and the sentence which could be imposed by court-martial for this offense, it is felt YN3 Typist would again flee to avoid prosecution.

ROBERT R. ROBERTS

NOTES

NOTES (continued)

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 one authorized by law to convene summary courts-martial or some higher level of court-martial. See Article 24, UCMJ. As is true of all other forms of convening authority, the power to order the Article 32, UCMJ, investigation [hereinafter pretrial investigation] vests in the office of the commander. See Chapter VIII, Authority to convene, page 8-1, above.

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 upto, 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 9-5 through 9-7, 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

NAVAL JUSTICE SCHOOL
Newport, Rhode Island 02840-5030

10 August 19CY

In accordance with Rule for Courts-Martial 405, Manual for Courts-Martial, 1984, Lieutenant Commander Carl Giese, U.S. Navy, is hereby appointed to investigate the attached charges preferred against Seaman John G. Guildersleeve, U.S. Navy. 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, JAGC, U.S. Naval Reserve, certified in accordance with Article 27(b), Uniform Code of Military Justice.

DEFENSE COUNSEL

Lieutenant Bernard Bridges, JAGC, U.S. Navy, certified in accordance with Article 27(b), Uniform Code of Military Justice.

THOMAS HART
Captain, U.S. Navy
Commanding Officer

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. The PTIO should consult the accused, counsel, and the legal officer of the convening authority to set up a specific hearing date.

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. JAGMAN, § 0902a(2)(d).

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 may be obtained from your local NLSO or LSSC.

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 commanding officer who directed the investigation. The commanding officer should consider the investigating officer's recommendation as to disposition, but he need not follow it. The commanding officer may dispose of the charges as he sees fit pursuant to R.C.M. 401. In Navy commands, if he deems a general court-martial appropriate, but lacks the authority to convene such a court-martial, he must forward the report to the area coordinator, absent direction to the contrary from the general court-martial convening authority in his chain of command, pursuant to JAGMAN, § 0128a(1). In Marine commands, the charges are forwarded to the general court-martial convening authority in the chain of command, pursuant to JAGMAN, § 0128b.

Forwarding of the report is accomplished by means of an endorsement which includes the recommendations of the officer directing the pretrial investigation, the recommendations of the investigating officer, a detailed and explanatory chronology of events in the case, and any comments deemed appropriate. A sample endorsement follows on page 11-8.

If the commander who ordered the investigation is also a general court-martial convening authority, he may refer the case to trial by general court-martial if he believes the charges are warranted by the evidence and such disposition is appropriate.

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.

DEPARTMENT OF THE NAVY
Naval Justice School
Newport, Rhode Island 02841-5030

2 Sep CY

FIRST ENDORSEMENT on LCDR Pretrial I. Officer, JAGC, USN,
Investigating Officer's Report of 30 Aug CY

From: Commanding Officer, Naval Justice School
To: Commander, Naval Education and Training Center, Newport

Subj: ARTICLE 32 INVESTIGATION ICO SEAMAN WATT A. ACCUSED, U.S. NAVY, 123-45-6789

1. Forwarded.

2. Recommend trial by general court-martial.

CONVENING T. AUTHORITY

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 this input, 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 Navy-Marine Corps 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. JAGMAN, § 0149. 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. See JAGMAN A-1-j for a recommended form.

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).

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.

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 JAGMAN, § 0151a 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.

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 noncapital courts-martial where appellate review has been waived or withdrawn by the accused, be reviewed by a judge advocate. JAGMAN § 0153a(1) requires this officer to be the staff judge advocate 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. 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, 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 Office of the Judge Advocate General of the Navy. R.C.M. 1111. After detailing appellate defense and government counsel, the case will then be forwarded to the Navy-Marine Corps Court of Military Review (NMCMR). R.C.M. 1201, 1202. NMCMR 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 NMCMR, 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 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 NMCMR. 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.

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.

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 on bread and water or diminished rations, 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. For example, confinement on bread and water may be changed to confinement at the rate of 1 day of confinement on bread and water equaling 2 days of confinement.

(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. For example, is the loss of 500 lineal numbers more or less severe than forfeiture of $25 per month for 12 months? 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. JAGMAN, § 0151a(3).

b. Automatic reduction to paygrade E-1. In accordance with the power granted in Art. 58(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Art. 58(a), UCMJ, shall be effected in the Navy and Marine Corps in accordance with JAGMAN § 0152d. Under the provisions of JAGMAN, § 0152d, a court-martial sentence of an enlisted member in a paygrade above E-1, as approved by the convening authority, that includes a punitive discharge, whether or not suspended, or confinement in excess of 90 days (if the sentence is stated in days) or 3 months (if stated in other than days) automatically reduces the member to the paygrade E-1 as of the date the sentence is approved. As a matter within his sole discretion, the convening authority may retain the accused

in the paygrade held at the time of sentence or at an intermediate paygrade and suspend the automatic reduction to paygrade E-1 which would otherwise be in effect. Additionally, the convening authority may direct that the accused serve in paygrade E-1 while in confinement, but be returned to the paygrade held at the time of sentence or an intermediate paygrade upon release from confinement. Failure of the convening authority to address automatic reduction will result in the automatic reduction to paygrade E-1 on the date of the CA's action. The convening authority may, in a pretrial agreement, agree to suspend or disapprove automatic reduction to paygrade 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 an SPCM including approved BCD. If the suspended sentence was adjudged by any GCM, or by an 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 an SPCM and does not include a BCD, or if the sentence was adjudged by an 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. JAGMAN, § 0160a indicates that this officer should be one who is appointed to review pretrial confinement under R.C.M. 305. A guide for procedures for vacation of suspended sentences is included at page 12-17.

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 of the Navy or by such Under Secretary or Assistant Secretary 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 SECNAVINST 5815.3 series, concerning Naval Clemency and Parole Board action, are in compliance. JAGMAN, § 0157d.

2. Appellate leave. Under the provisions of Art. 76(a), UCMJ, the Secretary of the Navy 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 3420280 of the MILPERSMAN for Navy personnel and paragraph 3025 of MCO P1050.3g, Regulations for Leave, Liberty and Administrative Absence, for Marine Corps personnel. Stated very simply, procedures applicable to Navy and Marine Corps personnel 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

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.

PROCEDURES FOR VACATION OF SUSPENDED SENTENCES

References:
Art. 72, UCMJ
R.C.M. 1109

COURT-MARTIAL SENTENCE:	ANY GCM, BCD SPCM	NON-BCD SPCM, SCM
HEARING REQUIRED	Similar to Art. 32, UCMJ investigation	Similar to Art. 32, UCMJ investigation
RIGHT TO COUNSEL	Same as at GCM	Same as at type of C-M which adjudged the sentence
	No right to IMC	No right to IMC
WHO MAY VACATE	OEGCMJ	OESPCMJ, OESCMJ
REQUIRED RECORD	Written statement of evidence and reasons for vacating	Written statement of evidence and reasons for vacating

The accused may be confined pending the decision to vacate the suspended sentence. Unless the proceedings are completed within 7 days, a preliminary hearing must be held by an independent officer to determine whether there is probable cause to believe that the accused has violated the conditions of the suspension.

The commencement of the proceedings to vacate the suspension interrupts the running of the period of suspension.

The hearing must be conducted personally by the officer exercising special/summary court-martial jurisdiction over the probationer.

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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 by causing the crime to be done through an animate/inanimate agency or innocent human agent.

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 it. 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.

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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, with 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.

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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)]; and

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 servicemember'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 servicemember 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 canceled.

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 their 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 noncommissioned 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 (W-2 and above). 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 performing one's duty in a culpably inefficient manner is also prohibited. 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. If the accused's failure is due to ineptitude, however, 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. See Article 1024, U.S. Navy Regulations, 1990 for specific guidance.

NOTES

NOTES (continued)

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 comm'd off'r	Anyone junior to the victim	Need not be present nor in execution of office	Of superior status
		91(3) (superior = aggravation)	Disrespect to WO, NCO, PO	Enlisted or WO	Must be present and in execution of office	Of status
ORDERS	VIOLATIONS	92(1)	General order	Anyone		Need not be pleaded nor proved
		92(2)	Other lawful order	Anyone		Must be pleaded and proved
		92(3)	Dereliction of duty	Anyone		Must plead and prove that accused knew of duty
WILLFUL	DISOBEDIENCE	90(2)	Willful disobedience of superior comm'd off'r	Anyone junior to the victim	comm'd off'r	Of superior status of victim and of order
		91(2)	Willful disobedience of WO, NCO, PO	Enlisted or WO	WO, NCO, PO	Of status of victim and of order
ASSAULT		90(1)	Assault on superior comm'd off'r	Anyone junior to the victim	Must be in execution of office	Of superior status
		91(1) (superior = aggravation)	Assault on WO, NCO, PO	Enlisted or WO	Must be in execution of office	Of status
		128	Assault on comm'd, WO, PO	Anyone	Need not be in execution of office or superior	Of comm'd, WO, NCO, PO status

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(1) 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 for the military
Civilian apprehension for civilian crime, NO DD 553	when military informed that accused is available to it

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

NOTES

NOTES (continued)

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. An accused cannot be charged for a violation of article 134 for an offense specifically mentioned elsewhere in the UCMJ.

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.

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NOTES

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.

NOTES

NOTES (continued)

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 assault 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.

NOTES

NOTES (continued)

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.

NOTES

NOTES (continued)

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. If the official price list conflicts with other evidence of fair market value, however, 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 nonappropriated 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 of an 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.

NOTES

NOTES (continued)

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.

DESIGNER DRUGS

The Controlled Substances Act of 1970 classifies illegal drugs by their precise molecular structure. A designer drug is a drug created by chemically altering the molecular structure of an existing controlled substance. Such an alteration of an illegal controlled substance removes the new drug, or analog, from the list of schedules established by the Controlled Substances Act. Offenses involving designer drugs may be prosecuted, however, under article 134 as a violation of the Controlled Substances Analogue Enforcement Act of 1986 or as a violation of state law.

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). For the Navy and Marine Corps, a service-wide drug paraphernalia regulation was promulgated in SECNAVINST 5300.28A, dated 17 January 1984.

Analysis. Although the instruction uses somewhat broad language to define drug abuse paraphernalia, it is clear that nothing can be considered paraphernalia unless it is used, possessed, sold, or transferred with the intent that it be used as a medium through which illegal drugs are to be introduced into the body. Hence, the intent of an accused determines whether any given form of property is drug abuse paraphernalia. Possession of an item commonly associated with drug abuse, such as a water pipe, may not be banned if it is possessed for an innocent purpose. The regulation also contains an exception for "authorized medicinal purposes." Hence, if an accused possesses a syringe with the purpose of injecting a controlled substance into his body, he is not guilty of an offense if his possession was incident to an authorized medicinal purpose. Violations of this SECNAV instruction are meant to be enforced by "disciplinary or punitive action as may be ... appropriate..." under article 92 (violation of a lawful general order).

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. Article 1138, U.S. Navy Regulations, 1990, permits handling of an otherwise illegal drug or controlled substance if such handling is for authorized medicinal purposes.

NOTES

NOTES (continued)

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 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.

NOTES

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.

NOTES

NOTES (continued)

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 officers, noncommissioned 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 the prisoner is accompanied by a guard who has the duty and the means to exercise physical restraint, however, 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 may also 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.

NOTES

NOTES (continued)

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. However, if article 31 warnings are given to a suspect, the suspect's duty to respond truthfully to investigators, if he responds at all, is sufficient to impute officiality to his statements. Therefore, a suspect who lies to investigators, after being advised of his article 31 rights, could be charged with a violation of article 107. However, one must be cautious in dealing with false statements made by a suspect to investigators. Careful consideration should be given to alternative charges such as false swearing. 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, and section 0902 of the Manual of the Judge Advocate General list the persons authorized to administer oaths and affirmations in the Department of the Navy. 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 under oath 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.

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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, § 0124. 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, § 0138 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 could not 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.

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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 Part IV, paragraph 83, 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. OPNAVINST 5370.2, dated 6 February 1989 provides detailed information regarding the implementation of the Navy's policy concerning fraternization. OPNAVINST 5370.2 defines fraternization as follows:

> (1) Any personal relationship between an officer and an enlisted member which is unduly familiar and does not respect differences in rank and grade.
>
> (2) Any personal relationship between officers or between enlisted personnel which is unduly familiar and does not respect differences in rank and grade where a senior-subordinate supervisory relationship exists.

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 commissioned or warrant officers 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. In the past, the government has relied on written documents (such as the Marine Corps Manual, para. 1100.4 or NAVMC 2767 of 12 March 1984 "User's Guide to Marine Corps Leadership Training") to prove a custom. In the Navy, there was little written policy available; this has changed with the promulgation of OPNAVINST 5370.2.

D. Officer-officer/enlisted-enlisted fraternization. Although cases of overfamiliarity between senior and junior officers, or between noncommissioned or petty officers and their subordinates, do not appear to fit the elements described in Part IV, para. 83, MCM, 1984, it is clear from a reading of subsequent cases, as well as the analysis of Part IV, para. 83, MCM, 1984 (Appendix A21-101), that Part IV, para. 83, MCM, 1984 is not intended to preclude prosecution for such offenses. In addition, the following bases for prosecution should be explored as appropriate.

1. Fraternization may be charged as a violation of a general lawful regulation under article 92(1), UCMJ. Article 1165, U.S. Navy Regulations, 1990, prohibits officer-officer/enlisted-enlisted fraternization in those instances where an unduly familiar senior-subordinate supervisor relationship exists. Such conduct must also be prejudicial to good order and discipline or service-discrediting.

2. The conduct may violate an other lawful order or regulation and be punishable under Article 92(2), 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.

3. The underlying conduct might itself constitute a separate crime (such as adultery, sodomy, drug abuse, or even dereliction).

4. 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 initially may be made innocently but become wrongful by repetition -- particularly after the victim has complained.

D. 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. Both SECNAVINST 5300.26A and MCO 5300.10 state that the victim should complain and make the situation known to the immediate superior. The commander is required to investigate and take whatever actions are necessary to ensure a work environment free from sexual harassment.

E. Related orders. SECNAVINST 5300.26A of 2 August 1989 and MCO 5300.10 of 4 February 1981 contain identical prohibitions against sexual harassment. They were generated in response to Office of Personnel Management and the Secretary of Defense requests that the service secretaries issue policy statements proscribing sexual harassment. Because of their origin as policy statements, it is unlikely that either would be found to be a punitive order for article 92 prosecutions.

1. SECNAVINST 5370.2J of 15 March 1989, Standards of Conduct and Government Ethics, is a punitive order. Paragraph 904, captioned "Using Official Position," prohibits naval personnel from misusing their official position for personal gain. This paragraph could be the basis for a sexual harassment prosecution. It applies to officers, enlisted, and civilians without reference to chain of command.

2. There are numerous other military orders and directives that deal with sexual harassment, including: OPNAV 12720.3, NAVAIR 5350.1, NAVSEA 5350.1, OPNAV 5350.5, and CMC White Letter Number 18080 of 2 December 1980.

F. Alternatives to article 93 for sexual harassment. There are many other articles of the Uniform Code of Military Justice under which the same misconduct could be prosecuted.

1. Comments may amount to disrespect under articles 89 or 91, provoking speech or gestures 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 physical acts are involved, articles 128 (assaults), 134 (indecent acts), 120 (rape), 125 (sodomy), or 134 (adultery) may be viable alternatives.

3. Finally, dereliction of duty under article 92, or conduct unbecoming an officer under article 133, may also be appropriate vehicles to allege sexual harassment.

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CHAPTER XXX

ADMINISTRATIVE FACT-FINDING BODIES

Reference: (a) JAG MANUAL, Chapter II

TYPES AND FUNCTIONS OF JAGMAN INVESTIGATIONS

A. A JAG Manual investigation is an administrative fact-finding 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. JAG Manual investigations also serve as a repository of lessons learned, the contents of which may be disseminated to other naval units.

B. There are three types of administrative fact-finding bodies: courts of inquiry; investigations required to conduct a hearing; and investigations not required to conduct a hearing. The principal distinguishing features of the different fact-finding bodies are set forth below.

1. Courts of inquiry. JAGMAN, § 0204b.

a. It consists of at least three commissioned officers, all of whom should be senior to any person whose conduct is subject to inquiry.

b. Counsel is appointed to the court to assist in matters of law, presentation of evidence, and in keeping and preparing the record.

c. It is convened by a written appointing order.

d. It must take all testimony under oath and record all proceedings verbatim (except for a person designated as a party who may make an unsworn statement).

e. Persons subject to the UCMJ whose conduct is subject to inquiry must be designated parties.

f. Persons subject to the UCMJ or employed by the Department of Defense who have a direct interest in the subject of the inquiry must be designated parties upon their request to the court.

g. 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. Fact-finding bodies required to conduct a hearing (other than a court of inquiry). JAGMAN, § 0204c.

a. It consists of one or more commissioned officers, warrant officers, senior enlisted persons, or civilian employees of the Department of the Navy.

b. It is convened by a written appointing order.

c. The appointing order should direct that all testimony be under oath and/or a verbatim record be prepared.

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 fact-finding body to designate parties during the proceedings.

f. It does not possess the power to subpoena witnesses, unless convened under Article 139, UCMJ, and Chapter IV of the JAG Manual.

3. Fact-finding bodies not required to conduct a hearing. JAGMAN, § 0204d.

a. It may consist of one (typically) 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. It is ordinarily not directed to take testimony under oath or to record testimony verbatim.

d. It uses informal methods to collect 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. Deciding which type of fact-finding body to convene depends upon the purpose of the inquiry, the relative seriousness of the subject under inquiry, the complexity of the factual issues involved, the time allotted for completion of the investigation, and the nature and extent of powers required to conduct the investigation. Before convening an investigation, the convening authority must consider the powers the fact-finding body will require and the desirability of designating parties. If the subject of the inquiry involves disputed issues of fact and a risk of substantial injustice if an individual is not afforded the rights of a party, a court of inquiry or an investigation required to conduct a hearing should be ordered. If the ability to subpoena witnesses is necessary, a court of inquiry should be convened. Generally speaking, however, the preferred method of investigation for most incidents is the investigation not required to conduct hearings.

D. If the subject of the investigation is a major incident, a court of inquiry should be convened. For less serious cases, an investigation not requiring a hearing will normally be adequate.

1. Section 0202a(3) of the JAG Manual describes a major incident as "[A]n extraordinary incident occurring during the course of official duties ... where the circumstances suggest a significant departure from the expected level of professionalism, leadership, judgment, communication, state of material readiness, or other relevant standard" resulting in:

a. Multiple deaths;

b. substantial property loss, that which greatly exceeds what is normally encountered in the course of day-to-day operations; or

c. substantial harm to the environment, that which greatly exceeds what is normally encountered in the course of day-to-day operations.

2. These cases are often accompanied by national public/press interest and significant congressional attention, as well as having the potential of undermining public confidence in the naval service. It may be apparent when first reported that the case is a major incident, or it may emerge as additional facts become known.

E. Death cases

1. "If at any time during the course of an investigation into a major incident it appears ... that the intentional acts of a deceased servicemember were a contributing cause to the incident," JAG will be notified and the appropriate safeguards will be implemented to ensure a fair hearing regarding the deceased member's actions. JAGMAN, § 0207b(4).

2. A death case is normally not a major incident; however, the circumstances surrounding the death or resulting media attention may warrant the convening of a court of inquiry or investigation required to conduct a hearing as the appropriate means of investigating the incident. JAGMAN, § 0226c(2).

3. This investigation is required:

a. Whenever a member of the naval service dies from other than a previously known medical condition, particularly an apparent suicide.

b. Whenever civilians or non-naval personnel are found dead on a naval installation under peculiar or doubtful circumstances. This would not apply in a case where the Naval Investigative Service has exclusive jurisdiction, such as whenever criminal conduct cannot be excluded.

c. In any case in which the adequacy of medical care is reasonably in issue.

4. In death cases, an advance copy of a required JAG Manual investigation must be sent to the Office of the Judge Advocate General. 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. MILPERSMAN 4210100 outlines personnel casualty reporting requirements in death cases, as well as status investigation reports on the death investigation required to COMNAVMILPERSCOM every fourteen days.

5. In the Marine Corps, deaths or serious injuries that occur at the battalion/squadron level must be convened by a higher authority than the battalion/squadron commander. This will usually be the next senior in command. JAGMAN, § 0206e.

F. Cognizance over major incidents. The first flag or general officer exercising general court-martial convening authority over the incident or in the chain of command, or any superior flag or general officer, will take immediate control over the case as the convening authority. JAGMAN, § 0207b(2).

G. Preliminary investigation of major incidents. To determine the appropriate type of investigation to convene, the officer with cognizance (discussed above) may wish to convene a one-officer investigation not required to conduct a hearing to immediately begin to collect and preserve evidence and locate and interview witnesses. If, upon review, the convening authority determines that an incident initially considered major is not, or that a court of inquiry is not warranted under the circumstances, those conclusions must be reported to the next flag or general officer in the chain of command before any other type of investigation is convened.)

H. Investigations required to conduct a hearing 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). JAGMAN, § 0205.

1. Designating parties to such an investigation may interfere with the primary function of collecting information for advisory and dissemination purposes.

2. If an individual is designated as a party, he has the right, inter alia, to counsel, to present evidence, and to cross-examine witnesses. JAGMAN, § 0205. Furthermore, the record of investigation may be used as a basis for NJP without an additional hearing or, if a GCM is contemplated, in lieu of an article 32 pretrial investigation.

I. 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 may well be sought from superiors in the chain of command, particularly if an investigation requiring a hearing or a court of inquiry is contemplated.

1. A commanding officer may convene a JAG Manual investigation whenever desired. In some circumstances, regulations promulgated by superiors in his chain of command will require that a JAG Manual investigation be convened. Chapter 2, Part B, of the JAG Manual contains specific instances when a JAG Manual investigation has to be convened.

2. The commanding officer of the unit concerned is responsible for convening the investigation. Provisions are available, however, to allow an alternative command to perform the investigation if an incident occurs at a distant location from the primary command (servicemember dies while on leave) or when a primary command has a practical difficulty in conducting the investigation (ship due to deploy). Requests for an alternative command to perform the investigation should be made to the area coordinator, or to the subordinate commander authorized to

convene general courts-martial and designated by the area coordinator for this purpose, in whose geographic area of responsibility the incident occurred. JAGMAN, § 0206.

J. JAG Manual investigations are initiated by an appointing order which delineates the action expected of an investigating body. JAGMAN, § 0211. It must be in writing for future enclosure in the investigation, as well as to give the investigating officer leverage in obtaining much needed information (i.e., death certificate, police reports) from civilian authorities. The appointing order must contain certain items:

1. Subject line information for proper filing (see OPNAVNOTE 5211)

2. Name, as appropriate, of member(s), separate counsel, and parties

3. Explicit instructions about scope of inquiry

   a. Specific purposes

   b. Answer questions as to who, what, when, where, why, how?

   c. To report findings of fact, it may also direct opinions and recommendations to be made

4. Authority or lack of authority to designate parties

5. Warnings

   a. Privacy Act warning - JAGMAN, § 0202

   b. Warning concerning origin of disease/injury - JAGMAN, § 0215b

   c. Article 31, UCMJ, warnings

6. Identification of references, including specific JAG Manual sections and any relevant chain of command directives

7. Attorney work product statement if claims for or against the government are contemplated - JAGMAN, § 0211c

8. Identification of available assistance

a. Technical advice may be provided by engineering or scientific experts

b. Clerical support may be provided by the administrative officer

c. Legal advice on how to proceed, and which issues to address, may be provided by a staff judge advocate

9. Deadline for completion

a. The convening authority prescribes the time period an administrative fact-finding body has to complete its investigation. This period should not exceed 30 days from the date of the appointing order. Each subsequent review/endorsement should be completed within 30 days, unless the investigation concerns a death incident -- in such a case, the review must be completed within 20 days. Extensions of such deadlines must be approved by higher authority and should be documented in the written report as additional enclosures. JAGMAN, § 0202c.

b. Since the processing guidelines are concrete, the appointing order should designate a 15- to 20-day time frame for completion of the report. Any deficient investigation may be returned for corrective action and still be completed within the overall 30-day time frame provided by JAGMAN, § 0202c.

K. In preparing an investigation, the question of combinability is important. It is imperative that the JAG Manual investigation not interfere with an NIS or safety investigation. The investigating officer should not use certain materials from other reports for enclosure in his own report. JAGMAN, § 0208.

1. The narrative summary of an NIS report may not be used in the record of the JAG Manual investigation. Enclosures to the NIS report may generally be used in the JAG Manual investigation, after receiving permission from NIS. JAGMAN, §§ 0208, 0214.

2. Witness statements from aircraft mishap investigations report cannot be included in the record of the JAG Manual 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 JAG Manual investigations, witnesses would be reluctant to speak, since the veil of confidentiality would be pierced. OPNAVINST 3750.6.

CONDUCTING THE INVESTIGATION

A. The investigating officer's starting point should be a review of the appointing order, so that the scope of the investigation may be more directly ascertained. Through the appointing order, the investigator will be able to review his responsibilities in terms of the issues that must be addressed. Available assistance, JAG Manual references, and internal instructions will also be listed to allow the investigating officer to commence the assignment.

B. In acquiring information, the investigating officer should collect relevant documentary evidence, including police reports, suicide notes, maps, photographs, records, death and autopsy certificates, since such items will be most persuasive and meaningful when utilized as enclosures. Unnecessarily explicit or morbid photographs should not be enclosed in a death/injury investigation. Such items add no substance and may unnecessarily upset next of kin if the investigation is released pursuant to the Freedom of Information Act.

C. Information from all relevant witnesses should be obtained. The following guidance is applicable.

1. The investigating officer should encourage the witness to tell the whole story and avoid suggesting otherwise immaterial facts, though he may assist the witness in preparing the statement to avoid irrelevancies.

2. Witness statements should be in writing. If summarized or, in the case of an oral statement, if results of the interview are reduced to writing, the statement/interview should be signed by the witness or certified by the investigator as being accurate. Care should be taken to ensure that the statement is phrased in the actual language of the witness.

3. A Privacy Act statement is needed only if personal information is solicited for inclusion in a system of records. Personal information is not usually warranted and, since the investigation will not be retrievable by a witness' name, Privacy Act statements are unnecessary. Social security numbers, if used, may be obtained from official sources which obviates the need for a Privacy Act statement.

4. Compliance with JAGMAN, § 0215 is necessary before questioning a member about the incurrence or aggravation of an injury.

5. Compliance with Article 31, UCMJ, is necessary before questioning an individual suspected of any misconduct under the UCMJ.

INVESTIGATIVE REPORT - JAGMAN, § 0214

A. The investigative report, in letter format, will consist of: list of enclosures, preliminary statement, findings of fact, opinions, recommendations, and enclosures. See JAGMAN, App. A-2-e-1 for the format of the investigation.

B. A preliminary statement should be prepared by the investigating officer as part of the report. JAGMAN, § 0214b.

1. This paragraph discusses what difficulties, if any, were encountered in preparing the investigation. These might include problems in contacting witnesses or apparent conflicts in evidence which has been gathered. If such a conflict exists, a statement as to its resolution would be appropriate. Any delay or assistance received 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 JAG Manual.

3. If a claim or litigation for or against the United States is reasonably possible, an Attorney Work Product statement must be included. JAGMAN, §§ 0211c, 0214b.

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. JAGMAN, § 0214c.

1. Findings of fact must be specific. Each finding must be listed separately in order that reviewing authorities may more easily read the investigation before preparing the necessary endorsement. Findings of fact usually follow the chronology of events leading to the incident in question, the incident itself, and action taken subsequent to the incident.

2. The fact-finding body may not speculate on the cause of an incident. Inferences from enclosures or general descriptions are permitted, but it would be improper to theorize on the thought processes of an individual that resulted in certain courses of conduct. JAGMAN, § 0213c.

3. Findings of fact are prepared in response to relevant checklists in the JAG Manual, local instructions, and points unique to the subject of the investigation. Negative findings should be recorded when appropriate (e.g., Seaman Brown was not wearing seat belts at the time of the accident).

4. Findings of fact must be supported by a preponderance of the evidence (except in limited circumstances -- adverse LOD, mental responsibility, or where act of deceased caused injury -- where clear and convincing standard applies). JAGMAN, § 0213b.

5. Each finding of fact must reference each enclosure supporting it.

6. Opinions must not be incorporated into the findings of fact.

D. Opinions are logical inferences flowing from the findings of fact. JAGMAN, § 0214d.

1. Opinions should be separately listed. They are subject to approval/disapproval by the convening authority and other reviewing authorities in their endorsements.

2. Each opinion must reference each finding of fact supporting it.

E. Recommendations flow from the findings of fact and opinions. They provide the basis for "lessons learned" for the benefit of other commands. JAGMAN, § 0214e.

1. 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 a nonpunitive letter of caution 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.

2. In the first endorsement, the convening authority should note whether any recommendations have been implemented. If action remains pending, the convening authority should so note. The endorsement should not be delayed beyond the 20- or 30-day requirements of JAGMAN, § 0202c.

F. The enclosures are listed beginning on the first page of the investigative report. The actual enclosures are attached to the back of the investigative report, usually numbered in order of use in supporting each finding of fact. The enclosures are the key to the investigation and serve to support the findings of fact. JAGMAN, § 0214f.

1. The appointing order is listed as enclosure (1). Any requests for and granting of extensions in time, follow enclosure (1).

2. All evidence should be contained in the enclosures. Documentary evidence utilized as enclosures should be legible for all reviewing authorities.

ACTION BY CONVENING AND REVIEWING AUTHORITIES

A. The convening authority is tasked with preparing the first endorsement to the investigating officer's report. JAGMAN, § 0209.

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 NIS 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 JAG Manual and other internal regulations.

B. Routing - JAGMAN, §§ 0209, 0210

1. The convening authority should ensure that adequate copies of the investigation are prepared. Each "via" addressee should receive a copy of the investigation, and an extra copy should be prepared for JAG. Copies should be legible.

2. Whether superiors in the chain of command will be made "via" addressees will be determined by internal instructions. Such superiors will normally be via addressees for investigations involving substantial loss of life or property damage; investigations concerning mission degradation; or investigations in which significant conflicting issues cannot be resolved by subordinate commanders.

3. JAG will receive three extra copies of death/serious injury investigations. JAG shall receive an advance copy of investigations concerning death, medical malpractice, or admiralty issues. Naval Safety Center, Norfolk, shall receive an advance copy of an investigation concerning material property damage. A copy of an investigation with claims considerations shall be forwarded to the claims designee, usually the local Naval Legal Service Office.

COMMON ERRORS

A. The following includes a list of some common errors in JAG Manual investigations.

1. Investigations received at the Office of the Judge Advocate General that have been poorly assembled (not stapled, improperly wrapped).

2. Investigations containing a poor choice of language (this accident was "all his fault," this was a "stupid mistake").

3. Investigations containing findings of fact which are not supported by enclosures or endorsements which fail to address the status of pending recommendations.

4. Investigations failing to indicate where photos and autopsy reports may be obtained, if not already included in the investigation.

5. Investigations improperly combining AMIR or NIS narratives in the body of the investigation.

6. Investigations containing unnecessary use of Privacy Act/UCMJ forms.

7. Statements should be typed or written in ink. Statements written in pencil are poorly reproduced.

8. Foreign terms contained in reports should be translated, if possible.

9. Forcing servicemembers to make restitution for property damage must be avoided.

10. Investigations that are unnecessarily delayed without an explanation as to the cause of the delay.

11. Failing to support opinions with findings of fact.

B. Individuals with questions are encouraged to call the Office of the Judge Advocate General, Code 21, AUTOVON 221-9530, commercial (202) 325-9530.

NOTES

NOTES (continued)

CHAPTER XXXI

LINE OF DUTY AND MISCONDUCT DETERMINATIONS

Reference: (a) JAG Manual, Chapter II

GENERAL

Line of Duty and Misconduct (hereinafter LOD/Misconduct) determinations are extremely important in the administration of military personnel. Since personnel injuries are, unfortunately, occurring all too frequently in military life, it is often necessary to make a determination as to how the injury was incurred to ensure the rights of the servicemember, as well as the government, are protected.

WHY LOD/MISCONDUCT DETERMINATIONS ARE REQUIRED

When a servicemember is injured, with the possibility of a permanent disability, questions arise concerning the 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 (VA) in resolving questions of entitlement to benefits. JAGMAN, § 0216.

A. Several rights and benefits 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. Under 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 for the period of time lost. Similarly, lost time is not "creditable service" and will not be counted in computing longevity or retirement multipliers. In this context, however, a return to "light duty" is the equivalent of returning to "full duty."

2. An adverse determination could 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. Perhaps more important is the determination of disability and retirement benefits, as well as VA benefits, when a servicemember has incurred injury or disease. To receive such benefits, the disease or injury must not have been incurred as a result of the member's misconduct or while a member was an unauthorized absentee. Disability benefits are determined by regulations contained in the Disability Evaluation Manual (SECNAVINST 1850.4). The VA makes its own independent determinations as to line of duty and misconduct. In both instances, substantial weight will be placed on evidence used by the Department of the Navy in developing LOD/Misconduct determinations.

4. Eligibility for continued medical treatment after discharge may depend on a favorable LOD/Misconduct determination.

5. The VA will also rely on the Navy LOD/Misconduct "investigation" material in reaching its determination regarding VA benefits.

B. The consequences discussed above are strictly administrative in nature and have no disciplinary significance. If deemed appropriate, disciplinary action may be pursued independent of any LOD/Misconduct determination.

WHEN LOD/MISCONDUCT DETERMINATIONS ARE REQUIRED. JAGMAN, § 0215. LOD/Misconduct determinations will be made if a servicemember incurs an injury which:

A. Might result in permanent disability;

OR

B. renders the individual unable to perform duties for more than 24 hours.

1. 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. A treating physician should be consulted to determine if the hospitalization was for treatment or observation.

2. 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 determination. JAGMAN, § 0206.

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 area coordinator, or to the subordinate commander authorized to convene general courts-martial and designated by the area coordinator for this purpose, in whose geographic area of responsibility the incident occurred." JAGMAN, § 0206b.

WHAT CONSTITUTES LINE OF DUTY. JAGMAN, § 0207. The phrase "line of duty" is a term of art under the JAG Manual.

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 the servicemember was injured:

1. While avoiding duty by deserting;

2. while in an unauthorized absence status which materially interfered with the performance of duties (Such material interference is presumed when the absence exceeds 24 hours, unless there is evidence to the contrary. This 24-hour rule refers specifically to a line of duty definition; the 24-hour rule discussed above related to whether an LOD/Misconduct determination was required.);

3. while confined under a general court-martial sentence including an unremitted dishonorable discharge;

4. while confined in a civilian court following a felony conviction; or

5. as a result of the member's own misconduct, as defined below (NOT merely as a result of a violation of the UCMJ).

WHAT CONSTITUTES MISCONDUCT. JAGMAN, § 0218.

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 that the injury:

1. Was intentional (typically self-inflicted); or

2. was incurred as a proximate result of the member's gross negligence. "Gross negligence" is a reckless disregard for the foreseeable consequences of one's actions.

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 test listed in JAGMAN, § 0221 is 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; and

3. the impairment must be the proximate cause of the injury.

E. The previous distinction between disease and injury is important with respect to the definition of misconduct. While the incurrence of a disease would generally not constitute misconduct, an unreasonable failure to accept medical treatment for a disease might be deemed misconduct. 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. JAGMAN, § 0222.

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, an individual is presumed responsible for his actions. The issue of mental responsibility is of particular concern with respect to suicide attempts, as noted in JAGMAN, § 0220.

1. Since there is a strong instinct for self-preservation, a legitimate suicide attempt creates an inference of lack of mental responsibility, which would preclude a finding of misconduct for any injury incurred if not rebutted by clear and convincing evidence to the contrary. Rebuttal evidence typically includes a psychiatric evaluation.

2. A suicide gesture is different from a suicide attempt. Since a gesture normally amounts to an intentionally inflicted injury, such injury will normally be incurred due to the member's own misconduct. Because a "gesture" does not indicate an intent to take one's own life, the gesture is consistent with the instinct for self-preservation and mental responsibility.

POSSIBLE LOD/MISCONDUCT DETERMINATIONS. Given the definitions of line of duty and misconduct, three possible determinations can be made. JAGMAN, § 0219b.

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, while an unauthorized absentee. 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 (e.g., a deserter who intentionally shoots himself in the foot). 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 three ways. JAGMAN, § 0224.

A. A JAG Manual investigation (generally a single individual fact-finding body not required to conduct a hearing)

1. Is used:

a. Whenever an adverse determination is a likelihood - that is, that the injury was incurred not in the line of duty or due to the member's own misconduct.

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.

c. When a JAG Manual investigation is required for other reasons (e.g., a possible claim against the government exists).

2. Is forwarded to JAG via GCMA as with other investigations.

3. Checklist: JAGMAN, § 0229.

B. An injury report form (NAVJAG 5800/15)

1. Is used when:

a. The commanding officer and medical representatives agree that the injury was incurred in the line of duty and not due to the member's own misconduct;

b. a JAG Manual investigation is not otherwise required; and

c. possible permanent disability exists.

2. Is forwarded to JAG via the GCM authority and provides a satisfactory record for the servicemember's benefit. Additional evidence may be attached to, and submitted with, the form.

C. The easiest method of recording a finding is a health record entry. This entry is to be used when:

1. The commanding officer and medical representative agree that the injury was incurred in the line of duty and not due to the member's own misconduct; 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 to protect the servicemember.

REPORTS IN DEATH CASES

A. An LOD/Misconduct determination is never made in a death case. No Navy 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. JAGMAN, § 0226.

CONVENING AUTHORITY REVIEW. JAGMAN, § 0225.

A. A convening authority must specifically endorse an LOD/Misconduct determination to reflect approval, disapproval, or modification of the findings and opinions. On the injury report form, NAVJAG 5800/15, signature constitutes an approval of the favorable determination.

B. If a JAG Manual 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 may,in the convening authority's discretion, be afforded an opportunity to examine the report and rebut its contents.

1. Following notification and advisement of article 31 rights, as well as warnings pursuant to JAGMAN, § 0215 and the Privacy Act, the servicemember will be given an opportunity to examine and rebut the JAG Manual 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. The member's rebuttal can take the form of a statement or other additional evidence. If

the member elects not to make a statement, the convening authority should note this in the endorsement.

3. 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 made by the local command, subject to GCMA approval.

FORWARDING OF DETERMINATIONS

The JAG Manual investigation, or NAVJAG 5800/15, should be forwarded for filing to OJAG (Code 33) via the GCM authority for final review of the LOD/Misconduct finding.

COMMON LOD/MISCONDUCT PROBLEMS

A. Commands should ensure that determinations, whether in the form of investigations or injury reports, be forwarded for review via a GCM authority.

B. When a JAG Manual investigation is required, a finding of fact must be made as to the duty status of involved individuals.

C. In endorsements, commands and subsequent reviewing authorities should specifically address LOD/Misconduct opinions rendered in the basic investigation.

D. Commands should make every effort to enclose autopsies and death certificates in the JAG Manual investigation. The investigation should not, for this purpose, be delayed beyond the established processing times without written permission from higher authority. If the autopsy is not received prior to forwarding the investigation, forward it upon receipt to the command presently reviewing the investigation. It will then be included as an enclosure to that command's endorsement.

E. Failure to send an advance copy of a death investigation with the first endorsement to OJAG (Code 33).

F. Compliance with the reporting requirements in Item Papa MILPERSMAN 4210100.

G. Questions should be referred to the Office of the Judge Advocate General (Code 33), AUTOVON 221-9530, commercial (202) 325-9530.

NOTES

CHAPTER XXXII

ENLISTED ADMINISTRATIVE SEPARATIONS

PRIMARY REFERENCES

A. SECNAVINST 1910.4 series, Subj: Enlisted Administrative Separations
B. SECNAVINST 1050.1 series, Subj: Leave for Members Awaiting Review of Punitive or Administrative Separation
C. SECNAVINST 5300.28 series, Subj: Alcohol and Drug Abuse Prevention and Control
D. Navy

1. MILPERSMAN, arts. 3610100 - 3640500
2. NAVMILPERSCOMINST 1910.1 series, Subj: Administrative Separation Procedures
3. OPNAVINST 5350.4 series, Subj: Alcohol and Drug Abuse Prevention and Control
4. NAVOP 057/86, 058/86, 013/87

Best advice: If any doubt, call separation authority

-- NMPC AUTOVON (note: NMPC commercial (703) 614-____)

-- Status of unfavorable separation cases (NMPC-832) -- 224-8245/8266/8194/8222
-- Advice (NMPC-83) -- 224-8269
-- Voluntary separations (NMPC-24) -- 224-1285/3893
-- Medical separations (NMPC-242) -- 224-1412
-- Conscientious objectors (NMPC-2E) -- 224-8372
-- Policy (OP-135) -- 224-5392/5559/5560
-- CHNAVRES SJA (commercial (504) 948) -- 363-5303

E. Marines

1. MARCORSEPMAN, CH 6
2. MCO P5300.12, Alcohol and Drug Abuse Prevention and Control
3. Marines = GCMA or SJA of CMC -- 224-4250/4197; Reserves - 9100; Medical - 2091; MMSR - 1288/3288

F. HIV and AIDS Policy

1. References

a. SECNAVINST 5300.30
b. NAVOP 013/86, 118/86, 026/87, 069/87

2. Policy -- OP-13Bb -- A/V 224-5562/5552
3. Assignment -- NMPC-453 -- A/V 224-3785
4. Retention - NMPC-831 -- A/V 224-8223
5. Marines -- MPP-39 -- A/V 224-1931/1519
6. Penalties -- 10 U.S.C. § 1002

INTRODUCTION. There are two types of separations given by the armed forces of the United States to enlisted servicemembers: (1) punitive discharges; and (2) administrative separations.

PUNITIVE DISCHARGES. Punitive discharges are authorized punishments of courts-martial and can only be awarded as an approved sentence of a court-martial pursuant to a conviction for a violation of the UCMJ. There are two types of punitive discharges: (1) a dishonorable discharge, which can only be adjudged by a general court-martial and is a separation under dishonorable conditions; and (2) a bad-conduct discharge, which can be adjudged by either a general court-martial or a special court-martial and is a separation under conditions other than honorable.

ADMINISTRATIVE SEPARATIONS

A. Characterized separations. Separations are characterized as either honorable, general (under honorable conditions), or under other than honorable conditions (OTH).

1. Honorable. An honorable separation (discharge) is with honor, and is appropriate when the quality of the member's service has met the standards of acceptable conduct and performance of duty or is otherwise so meritorious that any other characterization would be clearly inappropriate.

a. In the Navy:

(1) An honorable separation requires a minimum final average for the current enlistment in performance and conduct marks of 2.8 and a minimum average in personal behavior of 3.0. MILPERSMAN, art. 3610300.3a(1).

(2) A member whose marks do not otherwise qualify for an honorable separation may nevertheless receive an honorable separation if he was awarded certain personal decorations (e.g., Medal of Honor, Combat Action Ribbon) during the period of service or prior service.

b. In the Marine Corps:

(1) For paygrades E-4 and below, overall conduct marks for the current enlistment averaging 4.0 and proficiency marks averaging 3.0 are prima facie qualifications for an honorable separation. The Marine Corps places great weight on the commanding officer's recommendation of appropriate characterization and a strong recommendation can turn what would otherwise be a general discharge into an honorable discharge and vice versa. MARCORSEPMAN, paras. 6107, 6305.

(2) For paygrades E-5 and above, an honorable discharge is automatic unless unusual circumstances warrant other characterization and such characterization is approved by the GCM authority or higher. MARCORSEPMAN, Table 1-1.

2. General (under honorable conditions). A general separation (discharge) is issued to servicemembers whose military record is satisfactory, but less than that required for an honorable discharge. It is a separation under honorable conditions and entitles the individual to all veterans' benefits. A servicemember will normally receive a general discharge when the member's service has been under honorable conditions, but either the overall average evaluation mark or the overall average personal behavior mark does not meet the 2.8/3.0 (Navy) or 3.0/4.0 (Marine) E-4 and below standards, respectively, and the member is not otherwise being processed for separation under other than honorable conditions.

3. Under other than honorable conditions (OTH). A characterization of other than honorable is appropriate when the reason for separation is based upon a pattern of adverse behavior or one or more acts that constitute a significant departure from the conduct expected from members of the naval service. An OTH discharge is an administrative separation that is now used in place of the former undesirable discharge.

a. Persons given an OTH discharge are not entitled to retain their uniforms (although they may be furnished civilian clothing at a cost of not more than $40), must accept transportation in kind to their homes, are subject to recoupment of any reenlistment bonus they may have received, are not eligible for notice of discharge to employers, and do not receive mileage fees from the place of discharge to their home of record.

b. The Veterans' Administration will make its own determination with respect to the benefits listed in the table at pages 32-20/21 of this chapter as to whether the discharge was under conditions other than honorable.

c. The adverse effects of an OTH discharge, the large number of them issued as compared with punitive discharges, and the absence in administrative separations of the extensive review procedures comparable to those afforded servicemembers awarded a punitive discharge have resulted in significantly increased protections being afforded persons being processed for an OTH discharge.

d. As a general rule, in order for a member to be processed for an administrative separation under conditions other than honorable, the member must be offered an administrative board with the advice and assistance of lawyer counsel. Exceptions to the foregoing are as follows:

(1) The servicemember may request an OTH in lieu of trial by court-martial, in which case the member will not be entitled to an administrative board. MILPERSMAN, art. 3630650; MARCORSEPMAN, para. 6419.

(2) A member can unconditionally waive his rights to a board and counsel, as well as any other right. Such a waiver will ordinarily be accomplished in writing.

(3) A member of the naval service may be separated, while absent without authority, after receiving notice of separation processing. MILPERSMAN, art. 3640300.1c; MARCORSEPMAN, para. 6312.

(4) If a member is out of military control because of civil confinement, and if the civil authorities are unwilling to release the member, the member's case may be heard by the board in his absence (following appropriate notice to the confined servicemember) and the case may be presented on respondent's behalf by counsel for respondent. MILPERSMAN, art. 3640300.2n; MARCORSEPMAN, para. 6303.4a.

B. Uncharacterized separations

1. Entry level separation (ELS). A member in an entry level status (generally within the first 180 days of a period of continuous active military service) will ordinarily be separated with an ELS. MILPERSMAN, art. 3610300.5a; MARCORSEPMAN, para. 6107.3a.

2. Void enlistment or induction. A member whose enlistment or induction is void will be separated with an order of release from custody and control of the Navy or Marine Corps and will not receive a discharge certificate (honorable, general, or OTH) or an ELS. MILPERSMAN, art. 3610300.5b; MARCORSEPMAN, para. 6107.3b.

C. Additional procedural matters

1. When the sole basis for separation is an offense for which the member was convicted by special or general court-martial but not awarded a punitive discharge (BCD or DD), characterization of service as OTH must be approved by the Secretary of the Navy on a case-by-case basis. MILPERSMAN, art. 3610300.4c; MARCORSEPMAN, para. 6107.2c(3).

2. Generally, a member may not be separated on the basis of conduct that has been the subject of judicial proceedings resulting in an acquittal or an action having the effect of an acquittal (MILPERSMAN, art. 3610200.12a; MARCORSEPMAN, para. 6106.1a).

3. Although a servicemember is processed and appropriately recommended for an OTH, the member may nevertheless still be awarded an honorable or general discharge if the separation or higher authority considers such to be warranted based on an overall evaluation of the member's current period of service. MILPERSMAN, art. 3640370.1c(2)(C); MARCORSEPMAN, para. 6309.2b(2)(b). Contrary to popular myth, there is no "automatic upgrading" of discharge characterizations for good behavior.

BASES FOR SEPARATING ENLISTED PERSONNEL

A. Bases for separation defined. This subsection lists the types of separations available for the particular bases of separation, the applicable procedures, including counseling, where required, and defines these bases in general terms.

1. Expiration of enlistment or fulfillment of service obligation. MILPERSMAN, art. 3620150; MARCORSEPMAN, para. 1005.

a. Honorable, general, or ELS.

b. Self-explanatory.

2. Selected change in service obligation. MILPERSMAN, art. 3620100; MARCORSEPMAN, para. 6202.

a. Honorable, general, or ELS.

b. General demobilization, reduction in strength, and other "early-outs."

3. Convenience of the government

a. Honorable, general, or ELS.

b. Notification procedure used generally.

c. Specific grounds. These are the subcategories of the convenience-of-the-Government basis for discharge.

(1) Dependency or hardship. MILPERSMAN, art. 3620210; MARCORSEPMAN, para. 6407. This ground envisions a member voluntarily initiating a request setting forth:

(a) Genuine dependency or undue hardship;

(b) not temporary in nature;

(c) arisen or aggravated since the member's entry into service;

(d) in which every reasonable effort has been made to eliminate the hardship;

(e) that a discharge will in fact alleviate the hardship; and

(f) that no other means are available.

Unlike the Navy, the Marine Corps provides for a three-member advisory board to be convened by the commander exercising special court-martial jurisdiction over the servicemember to hear the case. MARCORSEPMAN, para. 6407.6.

(2) Pregnancy or childbirth. This is a voluntary separation initiated upon written request by the female servicemember. The request may be denied in the best interest of the naval service if, for example, the member

is serving in a critical rate, has received special compensation during the current enlistment, has not completed obligated service incurred, or has executed orders in a known pregnancy status. MILPERSMAN, art. 3620220; MARCORSEPMAN, para. 6408.

(3) Parenthood. MILPERSMAN, art. 3620200.1c; MARCORSEPMAN, para. 6203.1.

(a) Notification procedures.

(b) Counseling required.

(c) Applicable when member is unable to perform duties satisfactorily, or is unavailable for worldwide assignment, due to parenthood.

(4) Conscientious objection. Persons who by reason of religious training or belief have a firm, fixed, and sincere objection against participating in war in any form or the bearing of arms, which crystallized after they came on active duty, may claim conscientious objector status. MILPERSMAN, arts. 3620200.1d, 1860120; MARCORSEPMAN, para. 6409.

(5) Surviving family member (inductees only). MILPERSMAN, art. 3620240; MARCORSEPMAN, para. 6410.

(6) Sole surviving son or daughter. MILPERSMAN, art. 3620245.

(7) Alien. This is a voluntary request initiated upon the written request of the servicemember. The request may be denied in the best interest of the naval service if, for example, the member is serving in a critical rate, has received special compensation during the current enlistment, or has not completed obligated service incurred. MILPERSMAN, art. 3620260.

(8) Other designated physical or mental conditions. These are involuntary separations where counseling is required, unless otherwise indicated, and notification procedures are used.

(a) Obesity. The Navy treats obesity in general as a convenience-of-the-government matter. The Marine Corps considers only pathologically caused obesity (certified by a medical board) as a convenience-of-the-government matter. If a Marine's obesity is not pathological and results simply from lack of will, the Marine Corps processes the individual for unsatisfactory performance instead of convenience of the government. MARCORSEPMAN, paras. 6203.2a(1), 6206.1.

(b) Motion/air sickness, when verified by medical opinion.

(c) Enuresis (bed-wetting)/somnambulism (sleep-walking). The Navy and Marine Corps process only such individuals whose behavior has been medically confirmed.

(d) Allergies (e.g., uniform material, bee stings).

(e) Excessive height.

NOTE: (b), (c), (d), and (e) do not require counseling prior to processing.

(f) Personality disorder. Separation processing is discretionary with the member's commanding officer. For this to be a proper basis for separation, a two-part test must be satisfied. First, a psychiatrist or psychologist must diagnose the member as having a personality disorder which is such as to render the member incapable of serving adequately in the naval service. Second, there must be documented interference with the member's performance of duty. Counseling is required unless the member is a danger to himself or others. MILPERSMAN, art. 3620200; MARCORSEPMAN, para. 6203.3.

4. Disability. MILPERSMAN, art. 3620270; MARCORSEPMAN, ch.8.

a. Honorable, general, or ELS. A member may be separated for disability in accordance with the Disability Evaluation Manual, SECNAVINST 1850.4 series.

b. A medical board must determine that a member is unable to perform the duties of their rate in such a manner as to reasonably fulfill the purpose of their employment on active duty.

5. Defective enlistment and induction

a. Minority. MILPERSMAN, art. 3620285; MARCORSEPMAN, para. 6204.1.

(1) Notification procedures.

(2) Member may be separated for enlisting without proper parental consent prior to reaching the age of majority. The type of uncharacterized separation is governed by the member's age when separation processing is commenced/completed.

(a) If member is under age 17 at the time the problem is discovered, the enlistment is void and the member will be separated with an order of release from the custody and control of the Navy or Marine Corps.

(b) If the member is 17 at the time the problem is discovered, the member will be separated with an ELS only upon the request of the member's parent or guardian within 90 days of the member's enlistment.

(c) If the member has attained the age of 18 at the time the problem is discovered, separation is not warranted, since the member has effected a constructive enlistment. MARCORSEPMAN, para. 6107.3b.

b. Erroneous enlistment. MILPERSMAN, art. 3620280; MARCORSEPMAN, para. 6204.2.

(1) Notification procedures.

(2) Honorable, ELS, or order of release (OOR) by reason of void enlistment.

(3) A member may be separated for erroneous enlistment if the enlistment would not have occurred had certain facts been known and there was no fraudulent conduct on the part of the member, and the defect is unchanged in material respects.

c. Fraudulent entry into naval service. MILPERSMAN, art. 3630100; MARCORSEPMAN, para. 6204.3.

(1) Honorable, general, OTH or ELS, or order of release.

(2) Notification procedure used unless issuance of OTH is desired, or misrepresentation includes preservice homosexuality, in which case the administrative board procedure must be used. Processing is unnecessary where the commanding officer opts to retain and the defect is no longer present or the defect is waivable and the waiver is obtained from the Commander, Naval Military Personnel Command or the Commandant of the Marine Corps, as appropriate.

(3) A member may be separated for fraudulent entry for any knowingly false representation or deliberate concealment pertaining to a qualification of military service [other than the false representation of age by a minor (Navy only)].

d. New Entrant Drug and Alcohol Testing. MILPERSMAN, pending; MARCORSEPMAN, para. 5215.

(1) Enlistment to be voided; however, instead of OOR or ELS, member receives the number zero -- a new uncharacterized discharge normally called a "void enlistment."

(2) Member separated under this basis if tests prove positive for drugs or alcohol during entrant testing, and is dependent.

(3) If not dependent, may be separated under erroneous enlistment.

e. Other defective enlistment. MILPERSMAN, art. 3620283; MARCORSEPMAN, para. 6402.

(1) Honorable, ELS, or OOR.

(2) A member may be separated on this basis if:

(a) As the result of a material misrepresentation by recruiting personnel, upon which the member reasonably relied, the member was induced to enlist or reenlist for a program for which the member was not qualified;

(b) the member received a written enlistment commitment from recruiters which cannot be fulfilled; or

(c) the enlistment was involuntary.

6. Entry level performance and conduct. MILPERSMAN, art. 3630200; MARCORSEPMAN, para. 6205.

a. ELS.

b. Notification procedures.

c. Counseling required.

d. This basis for separation is only applicable to members in an entry level status; in essence, the first 180 days of continuous, active military service. A member may be separated if it is determined that he or she is unqualified for further military service by reason of unsatisfactory performance or conduct, or both, as evidenced by incapability, lack of reasonable effort, failure to adapt to the naval environment, or minor disciplinary infractions. Nothing in this provision precludes separation of a member in an entry level status under another basis for separation discussed in this chapter.

7. Unsatisfactory performance. MILPERSMAN, art. 3630300; MARCORSEPMAN, para. 6206.

a. Honorable or general.

b. Notification procedures.

c. Counseling required.

d. A member may be separated for unsatisfactory performance, as characterized by performance of assigned tasks and duties that is not contributory to unit readiness and/or mission accomplishment as documented in the service record, or failure to maintain required proficiency in rate as demonstrated by below average evaluations (Marine Corps) or two consecutive enlisted performance evaluations (Navy), regular or special, with unsatisfactory marks for professional factors of 1.0 in either military or rating knowledge or with an overall evaluation, where applicable, of 2.0. This basis for separation may not be used for separation of a member in an entry level status. Unsatisfactory performance is not evidenced by disciplinary infractions; cases involving only disciplinary infractions should be processed under misconduct. The Marine Corps includes unsanitary habits and failure to conform to weight standards (not the result of a pathological or organic condition) as examples of unsatisfactory performance. MARCORSEPMAN, para. 6206.

8. Homosexuality. MILPERSMAN, art. 3630400; MARCORSEPMAN, para. 6207.

a. Policy

(1) Homosexuality is considered to be incompatible with military service. Members are to be separated administratively if one or more of the following three approved findings is made:

(a) The member has engaged in, attempted to engage in, or solicited another to engage in, a homosexual act or acts, unless there are approved further findings that:

-1- Such conduct is a departure from the member's usual and customary behavior;

-2- such conduct under all the circumstances is unlikely to recur;

-3- such conduct was not accomplished by use of force, coercion, or intimidation by the member during the period of military service;

-4- under the particular circumstances of the case, the member's continued presence in the naval service is consistent with the interest of the naval service in proper discipline, good order, and morale; and

-5- the member does not desire to engage in or intend to engage in homosexual acts.

(b) The member has stated that he or she is a homosexual or bisexual, unless there is a further finding that the member is not a homosexual or bisexual.

(c) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

(2) A member may be administratively separated from the naval service on the basis of preservice, prior service, or current service homosexual conduct or statements.

(3) Undisclosed preservice homosexuality constitutes a fraudulent enlistment. The standards and procedures for separation by reason of homosexuality shall apply, but the basis for, and characterization of, separation are to be in accordance with regulations governing separation by reason of defective enlistment due to fraudulent entry into the naval service.

b. Procedure. Administrative board procedure used.

(1) Inquiry. A commanding officer or officer in charge, who receives apparently reliable information indicating that a member has made an admission of homosexuality or committed a homosexual act, shall inquire thoroughly into the matter to determine all the facts and circumstances of the case.

(2) Disposition. If, upon completion of the inquiry, the commanding officer determines that there is not probable cause to believe that one or more of the circumstances for which separation is authorized has occurred, the commander should promptly terminate all action on the case. Otherwise, the commanding officer shall initiate administrative separation proceedings in accordance with applicable regulations. MILPERSMAN, art. 3630400.4a.

c. Characterization of separation. Honorable, general, OTH, or ELS.

(1) A separation under other than honorable conditions by reason of homosexuality may be issued only if there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act in one or more of the following circumstances:

(a) By using force, coercion, or intimidation;

(b) with a person under 16 years of age;

(c) with a subordinate in circumstances that violate customary military superior-subordinate relationships;

(d) openly in public view;

(e) for compensation;

(f) aboard a military vessel or aircraft; or

(g) in another location subject to military control under aggravating circumstances noted in the findings that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

(2) In all other cases, the characterization of the separation is to reflect the character or description of the member's service.

9. Drug abuse rehabilitation failure. MILPERSMAN, art. 3630500; MARCORSEPMAN, para. 6208.

a. Honorable, general, or ELS.

b. Notification procedures.

c. A member who has been referred to a formal program of rehabilitation for personal drug abuse, in accordance with OPNAVINST 5350.4 series or MCO 5300.12 series, may be separated for failure through inability or refusal to participate in, cooperate in, or successfully complete such a program when:

(1) There is a lack of potential for continued naval service; or

(2) long-term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation.

d. Nothing in this provision precludes the separation under any other basis for separation discussed in this chapter, in appropriate cases, of a member who has been referred to such a program. For example, a member who abuses drugs, after having completed a drug abuse rehabilitation program, may also be separated by reason of misconduct due to drug abuse, discussed later in this chapter.

10. Alcohol abuse rehabilitation failure. MILPERSMAN, art. 3630550; MARCORSEPMAN, para. 6209.

a. Honorable, general, or ELS.

b. Notification procedures.

c. A member who has been referred to a formal program of rehabilitation for personal alcohol abuse, per OPNAVINST 5350.4 series or MCO 5370.6 series, may be separated for failure, through inability or refusal, to participate in, cooperate in, or successfully complete such a program when:

(1) There is a lack of potential for continued naval service; or

(2) long-term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation.

d. Nothing in this provision precludes the separation under any other basis for separation discussed in this chapter, in appropriate cases, of a member who has been referred to such a program.

11. Misconduct. MILPERSMAN, arts. 3630600, 3630620; MARCORSEPMAN, para. 6210.

a. Honorable, general, OTH, or ELS.

b. Administrative board procedure are used in all cases except, as noted below, with respect to the subcategories of minor disciplinary infractions and pattern of misconduct.

c. Counseling required only for the subcategories of minor disciplinary infractions and pattern of misconduct.

d. Subcategories. There are five subcategories under misconduct: Minor disciplinary infractions, pattern of misconduct, drug abuse, commission of a serious offense, and civilian convictions.

(1) Minor disciplinary infractions

(a) "Minor disciplinary infractions" is defined as a series of at least three minor disciplinary infractions appropriately disciplined under Article 15, UCMJ, and documented in the service record, within one enlistment. The Marine interpretation of this provision is that it is not even necessary that the infractions resulted in NJP, only that they be documented in the service record, e.g., a page 11 counseling/warning regarding extra military instruction. The Navy interpretation of this provision is that the UCMJ violations must be between 3 and 8 in number, non-drug related, and, in fact, punished under the UCMJ. If one or more of the violations cited could have resulted in a punitive discharge, or there are three or more periods of unauthorized absence of more than three days duration each, or there are three or more punishments under the UCMJ (NJP's) within the current enlistment, processing in the Navy should be effected for pattern of misconduct rather than minor disciplinary infractions. If separation of a member in entry level status is warranted solely by reason of minor disciplinary infractions, processing should be under entry level performance and conduct rather than misconduct (minor disciplinary infractions).

(b) Counseling required.

(c) In the Marine Corps, a commanding officer may elect to use the notification procedure, vice the administrative board procedure, if an OTH will not be recommended in the case. If the commanding officer contemplates recommending an OTH, the administrative board procedure must be used.

(d) In the Navy, notification procedures should always be used for minor disciplinary infractions; however, if any of the offenses for which the member is being processed have a punitive discharge authorized in the table of maximum punishments, then misconduct commission of a serious offense is the proper basis for processing.

(2) Pattern of misconduct

(a) "Pattern of misconduct" is defined as a pattern of more serious misconduct consisting of two or more discreditable involvements with civil or naval authorities or two or more instances of conduct prejudicial to good order and discipline within one enlistment. Such a pattern may include both minor and more serious infractions. (For the Navy, the latest offense and counseling must have

occurred while assigned to the parent command.) A pattern of misconduct includes the following:

-1- Any established pattern of involvement of a discreditable nature with civil or naval authorities [the Navy interprets this provision to include two or more civilian convictions for misdemeanors, three or more punishments under the UCMJ (NJP's or courts-martial), or any combination of three minor civilian convictions for misdemeanors or punishments under the UCMJ. MILPERSMAN, art. 3630600.1a(2)];

-2- an established pattern of minor unauthorized absences;

-3- an established pattern of dishonorable failure to pay just debts; or

-4- an established pattern of dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments of a civil court concerning support of dependents.

(b) Counseling required.

(c) A commanding officer may elect to use the notification procedure, vice the administrative board procedure, in a case in which an OTH is not sought or will not be recommended.

(3) Drug abuse

(a) A member may be separated for even a single drug-related incident. OPNAVINST 5350.4 series defines a drug-related incident, in pertinent part, as: "Any incident in which drugs are a factor. For the purposes of this instruction, voluntary self-referral, use or possession of drugs or drug paraphernalia, or drug trafficking constitute an incident."

(b) If the drug incident involves drug trafficking, processing for separation is mandatory. Processing is also mandatory for drug incidents involving E-4's and above in the Navy and Marine Corps.

(c) In the Navy, the policy governing separation processing for junior enlisted personnel (E-1 through E-3) depends on the number of incidents and the member's drug dependency and potential for future service. OPNAVINST 5350.4 series.

-1- First incident and nondependent. A member may be retained if they exhibit exceptional potential and desire for further useful service as determined by the CO. If retained, the member shall be disciplined, as appropriate, and afforded Level I or II drug education/ rehabilitation. A member not meeting these criteria shall be processed for separation.

-2- First incident and drug-dependent. A member who is E-1 to E-3 who is drug-dependent is considered to have no potential for further useful service. They shall be detoxified when appropriate, processed for immediate separation, and offered VA treatment at the time of separation.

-3- Second incident. A junior enlisted member who commits a second drug offense will be processed immediately for separation after completion of disciplinary action, as appropriate. No waivers of the requirement to process for separation with two separate drug incidents will be authorized.

(d) In the Marine Corps, the policy governing separation processing for junior enlisted personnel (E-1 through E-3) is as follows:

-1- First drug incident. The CO must process if the Marine is on his second or later enlistment.

-2- Second drug incident. The CO must process.

(e) A medical officer's opinion or Counseling and Assistance Center evaluation of the member's drug dependency as evaluated subsequent to the most recent drug incident must be included with the case submission.

(f) Characterization of discharge. Under most circumstances involving possession, use and/or trafficking, the member will receive an other than honorable (OTH) discharge. If evidence of the drug-related incident was derived from a urinalysis test, the characterization of the discharge depends upon the circumstances under which the urine sample was obtained. Generally, if the urinalysis results could be used in disciplinary proceedings, it can be used to characterize an administrative discharge as less than honorable. Some reasons for ordering urinalysis tests which yield results which can be used in disciplinary proceedings, and therefore can be utilized to characterize a discharge as other than honorable, include:

-1- Search or seizure (member's consent, or probable cause);

-2- inspections [random samples, unit sweeps, service-directed samples, rehabilitation facility staff (military only)]; and

-3- medical tests for general diagnostic purposes.

(g) Examples of fitness-for-duty urinalysis results which cannot be used in disciplinary proceedings, and therefore cannot be used to characterize a discharge as other than honorable, include: Command-directed tests, competence-for-duty exams, drug rehabilitation tests, mishap/safety investigation tests, aftercare testing, and self-referral.

(h) If the urinalysis result is not usable to characterize the discharge as other than honorable, the commanding officer may then elect to use the notification procedure vice the administrative board procedures.

(4) Commission of a serious offense. A member may be separated for commission of a serious military or civilian offense under the following circumstances:

(a) The specific circumstances of the offense warrant separation; and

(b) a punitive discharge would be authorized for the same, or a closely related, offense under the UCMJ.

Generally, a member may not be separated on the basis of conduct that has been the subject of judicial proceedings resulting in an acquittal or its equivalent.

In the Navy, if the basis for processing under this provision is evidenced solely by a court-martial conviction and the court-martial convening authority has remitted or suspended a punitive discharge, the case should be forwarded to that court-martial convening authority for endorsement prior to forwarding the case to Commander, Naval Military Personnel Command. MILPERSMAN, art. 3630600.1(b)(3).

(5) Civilian conviction

(a) A member may be separated upon conviction by civilian authorities, foreign or domestic, or action taken which is tantamount to a finding of guilty, including similar adjudications in juvenile proceedings, when the specific circumstances of the offense warrant separation, and the following conditions are present:

-1- A punitive discharge would be authorized for the same, or a closely related, offense under the Manual for Courts-Martial, 1984; or

-2- the sentence by civilian authorities includes confinement for one year or more regardless of whether suspended.

(b) Separation processing may be initiated whether or not a member has filed an appeal of a civilian conviction or has stated an intention to do so. However, execution of an approved separation should be withheld pending the outcome of the appeal.

e. While sexual perversion is not a specific basis for separation, para. 6210.4 of the MARCORSEPMAN indicates that Marines involved in the commission of lewd and lascivious acts, sodomy, indecent exposure, indecent act(s) with, or assault upon, a child, or acts for compensation shall be processed for separation under commission of a serious offense or civilian conviction, as appropriate.

12. Separation in lieu of trial by court-martial. MILPERSMAN, art. 3630650; MARCORSEPMAN, para. 6419.

a. Characterization of service will ordinarily be OTH, but a higher characterization may be warranted in some circumstances.

b. Both the Navy and Marine Corps permit a member to request in writing a discharge to avoid trial by general or special court-martial, provided that a punitive discharge is authorized for the offense(s).

The request shall include:

(1) An acknowledgement of guilt of one or more offense(s) charged, or of any lesser included offenses, for which a punitive discharge is authorized (The incriminating statement by the member or member's counsel is not admissible against the servicemember in a courts-martial except as provided in the Military Rules of Evidence 410.);

(2) a summary of the evidence or a list of documents (or copies thereof) provided to the member pertaining to the offense(s) for which a punitive discharge is authorized; and

(3) a request by the member for administrative reduction to paygrade E-3.

(4) The Navy also requires that the member's request, when forwarded by the command to the separation authority, include the results of a medical exam attesting to the member's mental competence. MILPERSMAN, art. 3630650.3c(1).

13. Security. MILPERSMAN, art. 3630700; MARCORSEPMAN, para. 6212.

a. Honorable, general, OTH, or ELS.

b. The notification procedure is used, except when an OTH discharge is warranted, in which case the administrative board procedure is used.

c. A member may be separated by reason of security when retention is clearly inconsistent with interests of national security (i.e., cases of treason or espionage).

14. Unsatisfactory participation in the Ready Reserve. MILPERSMAN, art. 3630800; MARCORSEPMAN, para. 6213.

a. Honorable, general, or OTH.

b. The notification procedure is used, except when an OTH discharge is warranted -- in which case the administrative board procedure is used.

c. A member may be separated by reason of unsatisfactory performance under criteria established in BUPERSINST 5400.12 series or MCO P1000R.1, as applicable. In the Navy, unsatisfactory participation includes the member's failure to report for physical examination or failure to submit additional information in connection therewith as directed. Discharge proceedings shall not be initiated until 30 days after second notice has been given to the member.

15. Separation in the best interest of the service. MILPERSMAN, art. 3630900; MARCORSEPMAN, para. 6214.

a. Honorable, general, or ELS.

b. The notification procedure is used, but the member has no right to an administrative board -- regardless of years in service.

c. The Secretary of the Navy may direct the separation of any member in those cases where none of the previous reasons for separation apply, or where retention is recommended following separation processing under any other bases for separation discussed above, and separation of the member is considered in the best interest of the service by the Secretary.

THIS CHART SHOWS THE ELIGIBILITY FOR BENEFITS BASED ON THE TYPE OF DISCHARGE A MEMBER IS AWARDED. IT DOES NOT INDICATE ANY OTHER CRITERIA THAT MAY ALSO BE REQUIRED FOR AN INDIVIDUAL TO BE ELIGIBLE FOR THE BENEFITS INDICATED.

DD -- **Dishonorable Discharge**

BCD GCM -- **Bad-Conduct Discharge awarded at a General Court-Martial**

BCD SPCM -- **Bad-Conduct Discharge awarded at a Special Court-Martial**

OTH -- **Other than Honorable**

GEN -- **General (under honorable conditions)**

HON -- **Honorable Discharge**

E -- **Eligible**

NE -- **Not Eligible**

A -- **Eligible only if the administering agency determines that, for its purposes, the discharge was not under dishonorable conditions.**

	DD	BCD GCM	BCD SPCM	OTH	GEN	HON
VA Benefits						
Wartime disability compensation	NE	NE	A	A	E	E
Wartime death compensation	NE	NE	A	A	E	E
Peacetime disability compensation	NE	NE	A	A	E	E
Peacetime death compensation	NE	NE	A	A	E	E
Dependency and indemnity compensation to survivors	NE	NE	A	A	E	E
Education assistance	NE	NE	A	A	E	E
Pensions to widows and children	NE	NE	A	A	E	E
Hospital and domiciliary care	NE	NE	A	A	E	E
Medical and dental care	NE	NE	A	A	E	E
Prosthetic appliances	NE	NE	A	A	E	E
Seeing-eye dogs, mechanical and electronic aids	NE	NE	A	A	E	E
Burial benefits (flag, national cemeteries, expenses)	NE	NE	A	A	E	E
Special housing	NE	NE	A	A	E	E
Vocational rehabilitation	NE	NE	A	A	E	E
Survivor's educational assistance	NE	NE	A	A	E	E
Autos for disabled veterans	NE	NE	A	A	E	E
Inductees reenlistment rights	NE	NE	A	A	E	E

THIS CHART SHOWS THE ELIGIBILITY FOR BENEFITS BASED ON THE TYPE OF DISCHARGE A MEMBER IS AWARDED. IT DOES NOT INDICATE ANY OTHER CRITERIA THAT MAY ALSO BE REQUIRED FOR AN INDIVIDUAL TO BE ELIGIBLE FOR THE BENEFITS INDICATED.

	DD	BCD	BCD GCM	OTH SPCM	GEN	HON
Military Benefits						
Mileage		NE	NE	NE	NE	E	E
Payment for accrued leave		NE	NE	NE	NE	E	E
Transportation for dependents & household goods		NE	NE	NE	NE	E	E
Retain and wear uniform home		NE	NE	NE	NE	E	E
Notice to employer of discharge		NE	NE	NE	NE	E	E
Award of medals, crosses, and bars		NE	NE	NE	NE	E	E
Admission to Naval Home		NE	NE	NE	NE	E	E
Board for Correction of Naval Records		E	E	E	E	E	E
Death gratuity		NE	NE	A	A	E	E
Use of wartime title and wearing of uniform		NE	NE	NE	NE	E	E
Naval Discharge Review Board		NE	NE	E	E	E	E

	DD	BCD GCM	BCD SPCM	OTH	GEN	HON
Other Benefits						
Homestead preference		NE	NE	NE	NE	E	E
Civil Service employment preference		NE	NE	NE	NE	E	E
Credit for retirement benefits		NE	NE	NE	NE	E	E
Naturalization benefits		NE	NE	NE	NE	E	E
Employment as District Court bailiffs		NE	NE	NE	NE	E	E
D.C. police, fireman, & teacher retirement credit		NE	NE	NE	NE	E	E
Housing for distressed families of veterans		NE	NE	A	A	E	E
Farm loans and farm housing loans		NE	NE	A	A	E	E
Jobs counseling, training, placement		NE	NE	A	A	E	E
Social Security wage credits for WW-II service		NE	NE	A	A	E	E
Preference in purchasing defense housing		NE	NE	A	A	E	E

NOTES

NOTES (continued)

CHAPTER XXXIII

ADMINISTRATIVE SEPARATION PROCEDURES

MANDATORY ENLISTED ADMINISTRATIVE SEPARATION PROCESSING. The decision whether to process an enlisted member for administrative separation is normally a matter within the discretion of the commanding officer. In certain instances, however, the bases for separation mandate separation processing. Those grounds are:

A. Homosexuality;

B. minority under the age of 17 at the time of discovery;

C. fraudulent enlistment by reason of deserter from another service, or preservice acts which could have resulted in separation with an OTH had they been committed on active duty;

D. drug abuse that involves the illegal use and/or possession of drugs, if the individual has been involved in two drug incidents (Navy);

E. drug abuse by an E-4 or above (Navy), or E-6 or above (Marine Corps);

F. drug abuse that includes sale or trafficking in drugs or drug paraphernalia or possession of drugs in amounts in excess of that reasonably considered to be for personal use;

G. a felony conviction or commission of a felonious offense (Navy only); and

H. commission of a serious offense that reflects sexual perversion [including, but not limited to, lewd and lascivious acts, sodomy, indecent exposure, and indecent acts with, or assault upon, a child (Preliminary notification should be provided to NMPC-66/83 before the initiation of administrative processing in incest cases.)].

MILPERSMAN, arts. 3610200.2, 3620285.1a; MARCORSEPMAN, paras. 1004, 6204, 6207, 6210. All involuntary enlisted separations require the use of either the notification procedure or administrative board procedure. Primary references for administrative separation processing are MILPERSMAN and NMPCINST 1910.1 series, Subj: ADMINISTRATIVE SEPARATION PROCEDURES, for the Navy and

MARCORSEPMAN for the Marine Corps. In addition, for processing Navy members, NAVOP 013/87 should be consulted to ascertain the appropriate separation authority. NAVOPS 057/86 and 058/86 allow Navy commands that are going on deployment, in some cases, to transfer personnel to a TPU for processing.

DUAL PROCESSING. If a member is processed for separation, the member must be processed for every basis which exists under the circumstances. NMPC routinely rejects cases in which processing is incomplete.

COUNSELING

A. Bases for separation. Counseling and rehabilitation efforts are a prerequisite to the initiation of separation processing for the following bases for separation discussed above:

1. Convenience of the government due to parenthood, personality disorder, obesity and (Marines only) other designated physical or mental conditions [MILPERSMAN 3620200; MARCORSEPMAN, para. 6203.];

2. entry level performance and conduct (MILPERSMAN, art. 3630200.2; MARCORSEPMAN, para. 6205.);

3. unsatisfactory performance (MILPERSMAN, art. 3630300.2; MARCORSEPMAN, para. 6206.); and

4. misconduct due to minor disciplinary infractions or pattern of misconduct (MILPERSMAN, art. 3630600.2; MARCORSEPMAN, para. 6210.).

B. When required. For Navy personnel, the counseling requirements must be accomplished by the member's parent command. For Marine Corps personnel, the counseling requirement can be accomplished at any command to which the member was assigned during the current enlistment. If more than one entry is made, the last entry applies (i.e., it must be violated prior to initiating administrative separation processing). Thus, administrative separation cases which contain an unviolated counseling warning must be rejected by the separation authority.

C. Content and form. In any case in which counseling is required, the member should be afforded an opportunity to overcome the identified deficiencies. The command's efforts to counsel the member should be documented in the member's service record and must include the following information:

1. Written notification concerning deficiencies or impairments;

2. specific recommendations for corrective action, indicating any assistance that is available to the member;

3. comprehensive explanation of the consequences of failure to undertake successfully the recommended corrective action; and

4. reasonable opportunity for the member to undertake the recommended corrective action.

Forms for the counseling warning are contained in enclosure (2) of NMPCINST 1910.1 series and MARCORSEPMAN, para. 6105. This counseling warning may be a page 13 entry or a letter in the Navy and a page 11 entry in the Marine Corps. It must be dated and signed by the servicemember. If the member refuses to sign, a notation to that effect should be made in the service record entry and signed and dated by an officer. A copy of the counseling warning must be included in the administrative separation package.

NOTIFICATION AND ADMINISTRATIVE BOARD PROCEDURES

A. Notification procedure

1. Notice. MILPERSMAN, art. 3640200.2; MARCORSEPMAN, para. 6303.3a. If the notification procedure is required, the respondent shall be notified in writing of the matter by the commanding officer. Such written notice, called the Letter of Notification, states:

a. Each of the specific reasons for separation that forms the basis of the proposed separation, including the circumstances upon which the action is based for each of the specified reasons and a reference to the applicable provisions of the MILPERSMAN or MARCORSEPMAN;

b. whether the proposed separation could result in discharge, release from active duty to a Reserve component, transfer from the Selected Reserve to the Individual Ready Reserve (IRR), transfer to the Fleet Reserve/ retired list, if requested, release from the custody or control of the naval service, or other form of separation;

c. the least favorable characterization of service or description of separation authorized for the proposed separation;

d. the respondent's right to obtain copies of documents that will be forwarded to the separation authority supporting the basis of the proposed separation (Classified documents summarized.);

e. the respondent's right to submit statements;

f. the respondent's right to consult with counsel, if available;

g. the right to request an administrative board, if the respondent has six or more years of total active and Reserve naval service;

h. the right to waive the rights afforded in subparagraphs d through g above after being afforded a reasonable opportunity to consult with counsel, and that failure to respond shall constitute a waiver of these rights;

i. for eligible members, that the proposed separation could result in a reduction in paygrade prior to transfer to the Fleet Reserve/retired list; and

j. in the Navy, that the respondent's proposed separation will continue to be processed in the event that, after receiving notice of separation, the respondent begins a period of unauthorized absence.

Forms for this notification may be found for the Navy in MILPERSMAN, art. 3640200.3, and NMPCINST 1910.1 series, encl. (3), and for the Marine Corps in MARCORSEPMAN, fig. 6-2.

2. Counsel. MILPERSMAN, art. 3640200.2c; MARCORSEPMAN, para. 6303.3b.

a. A respondent has the right to consult with qualified counsel (Article 27b, UCMJ, counsel who does not have any direct responsibility for advising the convening authority or separation authority about the proceedings involving the respondent) at the time the notification procedure is initiated, except under the following circumstances:

(1) The respondent is attached to a vessel or unit operating away from or deployed outside the United States or away from its overseas home port, or to a shore activity remote from judge advocate resources;

(2) no qualified counsel is assigned and present at the vessel, unit, or activity;

(3) the commanding officer does not anticipate having access to qualified counsel from another vessel, unit, or activity for at least the next five days; and

(4) the commanding officer determines that the needs of the naval service require processing before qualified counsel will be available.

b. Nonlawyer counsel shall be appointed whenever qualified counsel is not available. Any appointed nonlawyer counsel shall be a commissioned officer with no prior involvement in the circumstances leading to the basis of the proposed separation and no involvement in the separation process itself. This process is rarely used.

c. The respondent may also consult with a civilian counsel at the respondent's own expense. Respondent's use of a civilian counsel does not eliminate the requirement to furnish judge advocate counsel as discussed above. Consultation with civilian counsel shall not delay orderly processing.

3. Response. MILPERSMAN, art. 3640200.2d; MARCORSEPMAN, para. 6303.2c. The respondent shall be provided a reasonable period of time, not less than two working days, to respond to the notice. This response is called the Statement of Awareness. An extension may be granted upon a timely showing of good cause by the respondent. The respondent's election as to each of the rights set forth above shall be recorded and signed by the respondent and witnessed by respondent's counsel, if available.

The respondent's commanding officer shall forward a copy of the notice and the respondent's reply to the separation authority. Forms for the respondent's statement of awareness may be found for the Navy in MILPERSMAN, art. 3640200.4 and NMPCINST 1910.1 series, encl. (4).

4. Additional notification requirements

a. Member confined by civil authorities. MILPERSMAN, art. 3640200.2b; MARCORSEPMAN, para. 6303.4a. If separation proceedings have been initiated against a respondent confined by civil authorities, the case may be processed in the absence of the respondent. When a board is appropriate or required, there is no requirement that the respondent be present at the board hearing. Rights of the respondent before the board can be exercised by counsel on behalf of the respondent.

b. Certain reservists. MILPERSMAN, art. 3640200.2b; MARCORSEPMAN, para. 6303.4b.

(1) If separation proceedings have been initiated against a reservist not on active duty, the case may be processed in the absence of the member in the following circumstances:

(a) At the request of the member;

(b) if the member does not respond to the notice of proceedings on or before the suspense date provided therein; or

(c) if the member fails to appear at a hearing without good cause.

B. Administrative board procedure

1. General. The administrative board procedures must be used:

a. If the proposed basis for separation is homosexuality;

b. if the proposed characterization of service is under other than honorable conditions (except when the basis of separation is separation in lieu of trial by court-martial); or

c. if the respondent has 6 or more years of total active and Reserve military service (except when the basis for separation is in the best interests of the service).

2. Notice. If an administrative board is required, the member shall be notified in writing by the commanding officer of the following matters, in addition to those matters discussed for notification procedures [Note: forms for this notice may be found in MILPERSMAN 3640300, and NMPCINST 1910.1 series, encls. (6)-(7); MARCORSEPMAN, fig. 6-3.]:

a. The respondent's right to an administrative board;

b. the respondent's right to present written statements to the administrative board or to the separation authority in lieu of the administrative board;

c. the respondent's right to representation before the administrative board by counsel as set forth in para. 4 below;

d. the right to representation at the administrative board by civilian counsel at the respondent's own expense;

e. the right to waive the rights discussed above;

f. that failure to respond after being afforded a reasonable opportunity to consult with counsel constitutes a waiver of the rights in subparagraphs a through d above; and

g. that failure to appear without good cause at a hearing constitutes waiver of the right to be present at the hearing.

3. Additional notice requirements. MILPERSMAN, 3640300.2; MARCORSEPMAN, para. 6304.2.

4. Counsel. MILPERSMAN, art. 3640300.3; MARCORSEPMAN, para. 6304.3.

a. If an administrative board is requested, the respondent shall be represented by qualified counsel appointed by the convening authority or by individual counsel of the respondent's own choice, if that counsel is determined to be reasonably available.

b. The respondent shall have the right to consult with civilian counsel of the respondent's own choice and may be represented at the hearing by that or any other civilian counsel, all at the respondent's own expense. Exercise by the respondent of this right shall not waive any of the respondent's other counsel rights. Consultation with civilian counsel shall not unduly delay administrative board procedures. *If undue delay appears likely, the convening authority may direct the* board to proceed without the desired civilian counsel after properly documenting the facts.

c. Nonlawyer counsel may represent a respondent before an administrative board if:

(1) The respondent expressly declines appointment of qualified counsel and requests a specific nonlawyer counsel; or

(2) the separation authority assigns nonlawyer counsel as assistant counsel.

5. Response. MILPERSMAN, art. 3640300.4; MARCORSEPMAN, para. 6304.4. The respondent shall be provided a reasonable period of time, but not less than two working days, to respond to the notice. An extension may be granted upon a timely showing of good cause. The election of the respondent as to each of the rights set forth in para. B.2 shall be recorded and signed by the respondent and respondent's counsel.

Forms for the respondent's statement of awareness may be found for the Navy in MILPERSMAN, art. 3640300.7, and NMPCINST 1910.1 series, encl. (7), and for the Marine Corps in MARCORSEPMAN, fig. 6-3.

6. Waiver. MARCORSEPMAN, para. 6304.5.

a. If the right to an administrative board is waived, the case shall be forwarded to the separation authority who will direct either retention, separation, or suspended separation.

b. A Marine respondent entitled to an administrative board may request a "conditional waiver" after a reasonable opportunity to consult with counsel in accordance with para. B.4 above. A conditional waiver is a statement initiated by a respondent and their counsel, waiving the right to a hearing, contingent upon receiving a characterization of service or description of separation higher than the least favorable characterization or description authorized for the basis of separation set forth in the notice to the respondent, but no higher than general.

c. In the Marine Corps, when a respondent requests a conditional waiver, the commanding officer shall forward the same aforementioned documentation to the separation authority, unless he has been delegated authority by the separation authority to disapprove requests for conditional waivers and so elects. Upon receipt of a conditional waiver, the separation authority may either grant the waiver or deny it depending upon the circumstances of the case. The Navy considers conditional waivers inappropriate.

D. Message submissions by Navy commanding officers. In the Navy, when command processing of a member for administrative separation has been completed, commanding officers are authorized to submit the case to Commander, Naval Military Personnel Command, by message for final action, except where the member's case has been heard by an administrative board. Message submissions are to be transmitted by routine precedence in the format provided in NMPCINST 1910.1 series, encls. (13)-(14). When an administrative separation case is submitted by message, formal submission of the case by letter of transmittal in accordance with MILPERSMAN is still required. Moreover, the letter of transmittal must be forwarded within 15 working days after submission of the message to Commander, Naval Military Personnel Command.

E. Processing goals. MILPERSMAN, art. 3610100.9; MARCORSEPMAN, para. 6102. To ensure efficient administration of enlisted separations, the Secretary of the Navy has established processing time goals.

1. Discharges without board action. When board action is not required, or is waived, separation action should be completed in 15 working days from

the date the command notifies a member of the commencement of separation proceedings to the date of separation, except when the initiating authority and the separation authority are not located in the same geographical region; in which case, separation action should be completed in 30 working days (10 days of which is allocated in the Navy to the initiating command).

2. Separations with board action. Separations which involve an administrative board should be completed within 50 working days from the date of notification of the member of commencement of proceedings to the date of separation (30 days of which is allocated in the Navy to the initiating command).

3. Separations with Secretarial action. When action is required by the Secretary, final action should be completed in 55 working days.

ADMINISTRATIVE BOARDS

A. Convening authority. MILPERSMAN, art. 3640350.1b; MARCORSEPMAN, para. 6314. An administrative board may, by written order, be appointed by the following:

1. In the Navy, any commanding officer with authority to convene special courts-martial (SPCM); and

2. in the Marine Corps, any Marine commander exercising SPCM authority when authorized by an officer who has GCM authority.

B. Composition. MILPERSMAN, art. 3640350.1b; MARCORSEPMAN, para. 6315.1. Administrative boards are composed of three or more experienced Regular or Reserve officers, or senior enlisted, E-7 or above, senior to the respondent, in the naval service, at least one of whom must be a line officer serving in the grade of 0-4 or higher. An officer frocked to the grade of O-4 is not eligible to be the senior member. In the Navy, if an O-4 line officer is not available at the command, an O-4 staff corps officer may be used. An explanation as to why an O-4 line officer is not reasonably available should be included in the comments of the commanding officer in the letter of transmittal. A majority of the board shall be commissioned or warrant officers. Where the respondent is a member of a Reserve component, at least one member of the board shall be a Reserve commissioned officer and all members must be commissioned officers if characterization of service as other than honorable is warranted. When the respondent is an active-duty member, the senior member must be on the active-duty list of the service. The opportunity to serve on administrative boards should be given to women and minorities. The mere appointment or failure to appoint a member of such a group to the board, however,

does not provide a basis for challenging the proceedings. An odd number of board members should be appointed to avoid evenly divided decisions.

C. Recorder. MILPERSMAN, art. 3640350.1; MARCORSEPMAN, para. 6315.3. The convening authority details an officer on active duty as recorder. The recorder's duties include clerical and preliminary preparation, as well as presenting to the board, in an impartial manner, all available information concerning the respondent. The recorder also prepares the report of the board which, together with all allied papers, is forwarded to the separation authority.

D. Reporter. There is no requirement that a reporter be appointed. Where witnesses are expected to testify, however, the presence of a reporter is desirable.

E. Legal advisor. MILPERSMAN, art. 3640350.1; MARCORSEPMAN, para. 6315.4. At the discretion of the convening authority, a nonvoting legal advisor who is a judge advocate certified in accordance with Article 27(b), UCMJ, may be appointed to the administrative board. If appointed, the legal advisor shall rule finally on all matters of procedure, evidence, and challenges, except challenges to himself. A legal advisor shall not be junior to, and in the same chain of command as, any voting member of the board. This procedure is rarely used.

F. Hearing procedure. MILPERSMAN, art. 3640350.2; MARCORSEPMAN, paras. 6316, 6317.

1. Rules of evidence. An administrative board functions as an administrative, rather than a judicial, body; consequently, the strict rules of evidence applicable at courts-martial do not apply. Other than Article 31, UCMJ, limitations and witness privileges, the board should consider any competent evidence which is relevant and material in the case. The respondent must be provided a Privacy Act statement whenever personal information is solicited.

2. Preliminaries. MILPERSMAN, art. 3640350.3; MARCORSEPMAN, para. 6316.2. At the outset of the hearing, the president of the board should inquire of the respondent concerning his knowledge of his rights, including the right:

a. To appear in person, with or without counsel, or, in his absence, have counsel represent him at all open board proceedings;

b. to challenge any voting member of the board, for cause only (The member cannot render a fair and impartial decision.):

(1) In the Navy, if a member is challenged, the convening authority or the legal advisor, if any, decides the challenge (MILPERSMAN 3640350.1b.);

(2) in the Marine Corps, the board, excluding the challenged member, or the legal advisor, if any, determines the propriety of a challenge to any member. (A tie vote or a majority vote in favor of sustaining the challenge disqualifies that member from sitting. MARCORSEPMAN, para. 6316.7c.);

c. to request the personal appearance of witnesses;

d. to submit sworn or unsworn statements, depositions, affidavits, certificates or stipulations, including depositions of witnesses not reasonably available or unwilling to appear voluntarily;

e. to testify under oath and submit to cross-examination or, in the alternative, to make or submit an unsworn statement and not be cross-examined;

f. to question any witness who appears before the board;

g. to examine all evidence available to the board;

h. to notice of, and to interview, all witnesses to be called;

i. to have witnesses excluded except while testifying; and

j. to make argument.

Note: A failure on the part of the respondent to exercise any of these rights, after being advised of them, will not bar the board's proceeding.

3. Presentation of evidence. The recorder presents the case for the government, providing the board with complete and impartial information. Next, the respondent has the opportunity to present matters in his behalf. Following any matter presented by the respondent, the recorder may present rebuttal evidence. When the recorder introduces rebuttal evidence, the respondent is entitled to do likewise. Finally, prior to closing for deliberation, the board may call any witness or hear other evidence it deems appropriate.

4. Burden of proof. The burden of proof before administrative boards is on the government and the standard of proof to be employed is the "preponderance of evidence" test. MILPERSMAN, art. 3640350.5b; MARCORSEPMAN, para. 6316.10.

G. Witness requests. MILPERSMAN, art. 3640350.4c(2); MARCORSEPMAN, para. 6317.

1. General. The respondent may request the attendance of witnesses in his behalf at the hearing.

2. Respondent's witness request involving expenditure of funds. If production of a witness will require expenditure of funds by the convening authority, the written request for the attendance of a witness shall also contain the following:

a. A synopsis of the testimony that the witness is expected to give;

b. an explanation of the relevance of such testimony to the issues of separation or characterization; and

c. an explanation as to why written or recorded testimony would not be sufficient to provide for a fair determination.

3. Convening authority's action. The convening authority may authorize expenditure of funds for production of witnesses only if the presiding officer (after consultation with a judge advocate, if reasonably available, or the legal advisor, if appointed) determines that:

a. The testimony of a witness is not cumulative;

b. the personal appearance of the witness is essential to a fair determination on the issues of separation or characterization;

c. written or recorded testimony will not accomplish adequately the same objective;

d. the need for live testimony is substantial, material, and necessary for a proper disposition of the case; and

e. the significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness, favors production of the witness. Guidance for funding the travel may be found in section 0137 of the JAG Manual.

4. Postponement of the hearing. If the convening authority determines that the personal testimony of a witness is required, the hearing shall be postponed or continued, if necessary, to permit the attendance of the witness.

5. Witness unavailable. The hearing shall be continued or postponed to provide the respondent with a reasonable opportunity to obtain a written statement from the witness, if the witness requested by the respondent is unavailable, when:

a. The presiding officer determines that the personal testimony of the witness is not required;

b. the commanding officer of a military witness determines that military necessity precludes the witness's attendance at the hearing; or

c. a civilian witness declines to attend the hearing.

6. Civilian government employee. Paragraph G.5.c above does not authorize a Federal employee to decline to appear as a witness if directed to do so in accordance with applicable procedures of the employing agency.

H. Board decisions. MILPERSMAN, art. 3640350.5; MARCORSEPMAN, para. 6319. The board shall determine its findings and recommendations in closed session. The board must make:

1. Findings of fact related to each basis for processing;

2. recommendations as to retention or separation;

3. if the board recommends separation, it may recommend that the separation be suspended;

4. if separation is recommended, the basis therefor, as well as the character of the separation must be stated (In determining the character of the discharge to be recommended, the board may consider only those matters that occurred during the current enlistment or period of service.);

5. recommendations as to whether the respondent should be retained in the Ready Reserve;

6. in homosexual cases:

a. If the board finds that one or more of the circumstances authorizing separation is supported by the evidence, the board shall recommend separation -- unless the board finds that retention is warranted under the limited circumstances described;

b. if the board does not find that there is sufficient evidence that one or more of the circumstances authorizing separation has occurred, the board shall recommend retention -- unless the case involves another basis for separation of which the member has been duly notified; and

7. a recommendation as to whether the member should be transferred in the paygrade held or the next inferior paygrade (when the respondent is eligible for transfer to the Fleet Reserve/retired list) and the board recommends separation.

I. Record of proceedings

1. General. The record of proceedings shall be kept in summarized form, unless the convening authority or separation authority directs that a verbatim transcript be kept. The record of proceedings is authenticated in the Navy by the president and in the Marine Corps by the president and the recorder. The record is then forwarded, together with all exhibits and the board's report, to the convening authority who will concur or nonconcur in a letter of transmittal.

2. Contents of the record of proceedings

a. Navy. In the Navy, the record of proceedings shall, as a minimum, contain (MILPERSMAN, art. 3640350.6-7):

(1) A summary of the facts and circumstances;

(2) supporting documents on which the board's recommendation is based, including (at least) a summary of all testimony;

(3) the identity of the respondent's counsel and the legal advisor, if any, including their legal qualifications;

(4) the identity of the recorder and members;

(5) a verbatim copy of the board's majority findings and recommendations signed by all members making the findings and recommendations;

(6) the authenticating signature of the president on the entire record of proceedings or, in his absence, any member of the board;

(7) signed, dissenting opinions of any member, if applicable, regarding findings and recommendations; and

(8) counsel for the respondent's authentication of findings.

NOTE: It is no longer necessary for counsel for respondent (or respondent, if not represented by counsel) to review the record of proceedings and all supporting documentation before forwarding to CNMPC. A statement of deficiencies can be submitted separately via the convening authority to CNMPC.

b. Marine Corps. In the Marine Corps, the record of proceedings shall contain as a minimum (MARCORSEPMAN, para. 6320):

(1) An authenticated copy of the appointing order;

(2) any other communication from the convening authority;

(3) a summary of the testimony of all witnesses, including the respondent when the respondent testifies under oath or otherwise;

(4) a summary of any sworn or unsworn statements made by absent witnesses, if considered by the board;

(5) the identity of the counsel for the respondent and the recorder with their legal qualifications, if any;

(6) copies of the letter of notification to the respondent, advisement of rights and acknowledgement of rights;

(7) a complete statement of facts upon which the board's recommendation for discharge is based, accompanied by appropriate supporting documents;

(8) a summary of any unsworn statement submitted by the respondent or his counsel; and

(9) the respondent's signed acknowledgement that he was advised of, and fully understood, all of his rights before the board.

J. Actions by the convening authority

1. In the Navy. MILPERSMAN, art. 3640350.1.

a. If the commanding officer determines that the respondent should be retained, the case may be closed, except for any case in which processing is mandatory in accordance with MILPERSMAN, in which case the matter must be referred to NMPC for disposition.

b. If the commanding officer decides that separation is warranted or separation processing is mandatory, it is sent directly to NMPC for action. In the Navy, any discharge recommendation must be signed by the commanding officer.

c. For Navy members, NAVOP 013/87 authorizes the special court-martial convening authority to be the separation authority in certain cases where the authorized discharge is honorable, general, or ELS and the member does not object to separation. In those cases where an administrative board is held and an honorable or general discharge is recommended, the special court-martial convening authority may act as the separation authority. In all cases, refer to NAVOP 013/87 for additional guidance, a copy of which appears at the end of this chapter.

2. In the Marine Corps. MARCORSEPMAN, para. 6305.

a. If the convening authority is not the appropriate separation authority, the convening authority will forward the case with a recommendation in a letter of transmittal to the appropriate separation authority.

b. If the convening authority is the appropriate separation authority, before taking final action, he will refer the case to his staff judge advocate for a written review to determine the sufficiency in fact and law of the processing, including the board's proceedings, record, and report. MARCORSEPMAN, para. 6308.1c.

K. Action by the separation authority

1. General rules (other than homosexuality cases). When the separation authority receives the record of the board's proceedings and report in an administrative separation case, he may specifically take one of the following actions (MILPERSMAN, art. 3640370; MARCORSEPMAN, para. 6309.2):

a. Approve the board's recommendation for retention;

b. disagree with the administrative board's recommendation for retention and refer the entire case to the Secretary of the Navy for authority to direct a separation under honorable conditions with an honorable or general discharge or, if appropriate, ELS or, if eligible, transfer to the Fleet Reserve/retired list in the current or next inferior paygrade;

c. approve the board's recommendation for separation and direct execution of the recommended type/description of separation (including, if applicable, transfer to the Fleet Reserve/retired list in the current or next inferior paygrade);

d. approve the board's recommendation for separation, but upgrade the type of characterization of service or description of service to a more creditable one;

e. approve the board's recommendation for separation, but change the basis therefore, when the record indicates that such action would be appropriate;

f. disapprove the recommendation for separation and retain the member;

g. disapprove the board's recommendation concerning transfer to the IRR;

h. approve the recommendation for separation, but suspend its execution for a specific period of time;

i. approve the separation, but disapprove the board's recommendation as to suspension of the separation; or

j. set aside the findings and recommendations of the board and send the case to another board hearing if the separation authority finds legal prejudice to the substantial rights of the respondent, or that findings favorable to the respondent were obtained by fraud or collusion.

2. Suspension of separation. MILPERSMAN, art. 3610200.14; MARCORSEPMAN, para. 6310.

a. Except when the bases for separation is fraudulent enlistment or homosexuality and, in the Marine Corps, when the approved separation is an OTH, a separation may be suspended by the separation authority or higher authority for a specified period of not more than 12 months, if the circumstances of the case indicate a reasonable likelihood of rehabilitation.

b. Unless sooner vacated, execution of the approved separation shall be remitted (rescinded) upon completion of the probationary period, upon termination of the member's enlistment or period of obligated service, or upon decision of the separation authority that the goal of rehabilitation has been achieved.

c. During the period of suspension, if further grounds for separation arise, or if the member fails to meet appropriate standards of conduct and performance, one or more of the following actions may be taken:

(1) Disciplinary action;

(2) new administrative action; or

(3) vacation of the suspension and execution of the separation.

d. Prior to vacation of a suspension, the member shall be notified in writing of the basis for the action and shall be afforded the opportunity to consult with counsel and to submit a statement in writing to the separation authority. The respondent must be afforded at least two days to act on the notice.

3. Homosexuality

a. If the board recommends retention, the separation authority will:

(1) Approve the finding and direct retention; or

(2) forward the case to the Secretary of the Navy with a recommendation that the Secretary separate the member in the best interest of the service.

b. If the board recommends separation, the separation authority will:

(1) Approve the finding and direct separation; or

(2) disapprove the finding on the basis that:

(a) There is insufficient evidence to support the finding; or

(b) there is sufficient evidence to warrant a finding that supports retention under the limited circumstances described.

c. If there has been a waiver of board proceedings, the separation authority may dispose of the case as follows:

(1) If the separation authority determines that there is insufficient evidence to support separation, the separation authority should direct retention, unless there is another basis for separation of which the member has been duly notified.

(2) If the separation authority determines that one or more of the circumstances authorizing separation has occurred, the member will be separated, unless retention is warranted under the limited circumstances described.

d. Presuming evidence supporting the finding of homosexuality, the burden of proving that retention is warranted rests with the member, except in cases where the member's conduct was solely the result of a desire to avoid or terminate military service.

e. Findings regarding the existence of the limited circumstances warranting a member's retention are required only if:

(1) The member, either personally or through counsel, asserts to the board or, when there has been a waiver of board proceedings, to the separation authority, that one or more such limited circumstances exists; or

(2) the board or separation authority relies upon such circumstances to justify the member's retention.

f. Suspension of a separation by reason of homosexuality or fraudulent enlistment is not authorized. Retention of a member for a limited period of time in the interests of national security may be authorized by the Secretary of the Navy.

ADMINISTRATIVE SEPARATION OF OFFICERS. Reference: SECNAVINST 1920.6A of 21 Nov 1983, with Change 1 of Apr 1984.

RELATED REFERENCES

A. Punitive separations: Manual for Courts-Martial, 1984

B. Detachment for cause

1. MILPERSMAN, art. 3420200.5
2. MCO P1000.6 (ACTSMAN), para. 2209
3. NAVMILPERSCOMINST 1611.A, CH-2
4. CG PERSMAN, CH-12

C. Resignation

1. MILPERSMAN, art. 3830340
2. MARCORSEPMAN, ch. 5
3. CG PERSMAN, CH-12

D. Disability retirement

1. SECNAVINST 1850.4A
2. MILPERSMAN, arts. 3860340-3860400
3. MARCORSEPMAN, ch. 8
4. COMDTINST M1850.2A; CG PERSMAN, CH-17

E. Retirement/separation

1. SECNAVINST 1811.3 series, Subj: Voluntary retirement of members of the Navy and Marine Corps Serving on Active duty; policy governing

2. SECNAVINST 1420.1 series, Subj: Selection boards for the promotion, continuation and selective early retirement of commissioned officers on the active-duty list

3. SECNAVINST 1821.1 series, Subj: Regulations to govern the computation of total commissioned service for purposes of involuntary retirement or discharge of certain Staff Corps officers

4. SECNAVINST 1900.7 series, Subj: Eligibility for separation pay upon discharge or involuntary release from active duty

5. MILPERSMAN, arts. 3860100-3860600

6. MARCORSEPMAN, chs. 2-5

OFFICER SEPARATION FLOW CHART

I. PROBATIONARY OFFICER

Substandard Performance ---------- Notification
Parenthood

Misconduct ---------- CNP/CMC _____ Rec ------- Notification
National Security Hon/Gen (SECNAV approval)

Board Procedures
(3-tier)

II. NONPROBATIONARY OFFICER

Any Basis---B/O---Show---B/I---Sep---B/R---Sep---SECNAV---Sep
For Sep Cause

(Record) (Hearing) (Review)

Close Case Close Case Close Case Close Case

III. RESERVE OFFICER

R.A.D. ---------- No Board ---------- No Notification

Less Than -------- Substandard -------- No Board ------- Notification
3 years Performance/Parenthood

Otherwise ---------- B/I ---------- CNP/CMC ------ Sep/Retain

IV. PERMANENT REGULAR WARRANT OFFICER

Less Than ---------- Substandard Performance ---------- Notification
3 years Parenthood

Other Basis ---------- B/I ---------- CNP/CMC -------- Sep/Retain

V. TEMPORARY LIMITED DUTY OFFICER / WARRANT OFFICER

Any Basis ---------- Notification

For Termination of Temporary Appointment

TAKEN FROM NAVOP 013/87 -- 201614Z FEB 87 MSG

Subj: DELEGATION OF ADMINISTRATIVE SEPARATION AUTHORITY FOR ENLISTED PERSONNEL

A. MILPERSMAN
B. NMPCINST 1910.1C
C. CNO WASHINGTON DC 051927Z JUN 86 NAVOP 058/86
D. SECNAVINST 1910.4A NOTAL
E. OPNAVINST 5350.4
F. NMPCINST 1900.1B
G. ASN (M&RA) MEMO OF 27 OCT 86 NOTAL

1. SUMMARY. THIS NAVOP DELEGATES AUTHORITY TO SPECIAL COURT-MARTIAL CONVENING AUTHORITIES (SPCMCA'S) TO ADMINISTRATIVELY SEPARATE ENLISTED MEMBERS IN CERTAIN CIRCUMSTANCES. COPIES ARE TO BE FILED IN FRONT OF CHAP 36 OF REF A AND WITH REF B. ALSO, THIS MSG PROVIDES ADDITIONAL INFORMATION AMPLIFYING REF C, AND PROVIDES NEW GUIDANCE ON ISSUANCE OF DISCHARGE CERTIFICATES.

2. EFFECTIVE IMMEDIATELY, OFFICERS EXERCISING SPCMCA ARE DELEGATED AUTHORITY UNDER PARA 6 OF REF D TO SEPARATE ENLISTED MEMBERS WITH HONORABLE, GENERAL, OR ENTRY LEVEL DISCHARGES FOR FOLLOWING REASONS WHERE MEMBER DOES NOT OBJECT TO SEPARATION. (SEE REF A ARTICLES)

A. PARENTHOOD (3620200.1C)

B. CERTAIN DESIGNATED PHYSICAL OR MENTAL CONDITIONS (3620200.1F(1), (2), (3), (6), (7))

C. DEPENDENCY OR HARDSHIP (3620210)

D. PREGNANCY/CHILDBIRTH (3620220)

E. SURVIVING FAMILY MEMBER (3620240, 3620245)

F. OBESITY (3620250)

G. ERRONEOUS ENLISTMENT (3620280). IF DISCHARGE INVOLVES AN IMMEDIATE REENLISTMENT OR A REENLISTMENT-BONUS-ELIGIBLE INACTIVE-DUTY NAVAL RESERVIST, THEN NMPC-913 IS SEPARATION AUTHORITY.

H. FRAUDULENT ENLISTMENT (3630100). RETENTION OR WAIVER FROM PROCESSING FOR FRAUDULENT ENLISTMENT MUST BE AUTHORIZED BY CNMPC. IN CASES WHERE OTHER THAN HONORABLE IS APPROPRIATE, CNMPC IS SEPARATION AUTHORITY.

I. ENTRY LEVEL PERFORMANCE AND CONDUCT (3630200)

J. UNSATISFACTORY PERFORMANCE (3630300)

K. HOMOSEXUALITY (3630400) BUT ONLY IN CIRCUMSTANCES NOTED IN PARA 3 BELOW

L. DRUG ABUSE REHABILITATION FAILURE (3630500)

M. ALCOHOL ABUSE REHABILITATION FAILURE (3630550)

N. MISCONDUCT (3630600) BUT ONLY AS NOTED IN PARA 3 BELOW.

O. MISCONDUCT DRUG ABUSE (3630620) BUT ONLY IN CASES WHERE NONE OF THE EVIDENCE OF DRUG ABUSE MAY BE USED TO CHARACTERIZE SERVICE. SEE REF E.

3. IN ANY CASE WHICH MUST BE INITIATED UNDER ADMINISTRATIVE BOARD PROCEDURES VICE THOSE INITIATED UNDER THE NOTIFICATION PROCEDURES, A SPCMCA IS DELEGATED AUTHORITY TO SEPARATE THE MEMBER ONLY IF AN ADMIN DISCHARGE BOARD (ADB) RECOMMENDS SEPARATION WITH A GENERAL OR HONORABLE DISCHARGE, MEMBER DOES NOT OBJECT TO THE DISCHARGE, AND THAT CHARACTERIZATION IS CONSISTENT WITH GUIDANCE IN MILPERSMAN 3610300. THIS GENERAL LIMITATION DOES NOT LIMIT SPCMCA'S FROM EXERCISING SEPARATION AUTHORITY IN MISCONDUCT CASES USING NOTIFICATION PROCEDURES WHERE APPROPRIATE PER ARTICLE 3630600.4A OF REF A FOR REASONS SUCH AS MISCONDUCT PATTERN OF MISCONDUCT OR MISCONDUCT MINOR DISCIPLINARY INFRACTIONS WHERE AN OTH IS UNWARRANTED. WHEN SOLE REASON FOR PROCESSING IS MISCONDUCT DRUG ABUSE, CNMPC IS SEPARATION AUTHORITY, EVEN THOUGH AN ADB RECOMMENDS SEPARATION UNDER GENERAL OR HONORABLE CONDITIONS.

4. SEPARATION AUTHORITY REMAINS AS PROVIDED BY REF A FOR FOLLOWING LISTED SEPARATIONS (SEE REF A ARTICLES):

A. CONSCIENTIOUS OBJECTORS (3860120)

B. SELECTED CHANGES IN SERVICE OBLIGATION (3620100)

C. EXPIRATION OF ENLISTMENT, SERVICE OBLIGATION, OR ACTIVE SERVICE TOUR (3620150)

D. MOTION/AIR SICKNESS (3620200.1F(4))

E. ALLERGIES (3620200.1F(5))

F. ALIENS (3620260)

G. DISABILITY (3620270, 3620275)

H. DEFECTIVE ENLISTMENT (3620283)

I. MINORITY (3420285)

J. MISCONDUCT DRUG ABUSE (3630620) EXCEPT IN CASES WHERE UNDER REF E THE EVIDENCE OF DRUG ABUSE CANNOT BE USED TO CHARACTERIZE SERVICE THEN SPCMCA MAY SEPARATE. (USE NOTIFICATION PROCEDURES)

K. IN LIEU OF COURT-MARTIAL (3630650)

L. SECURITY (3630700)

M. UNSATISFACTORY PARTICIPATION IN READY RESERVE (3630800)

N. BEST INTEREST OF SERVICE (3630900)

5. THE FOLLOWING FURTHER CLARIFIES THIS DELEGATION OF AUTHORITY:

A. SPCMCA'S AND SUPERIORS IN CHAIN OF COMMAND MUST ENSURE VALUE OF AN HONORABLE DISCHARGE IS MAINTAINED AND REQUIREMENTS OF REFS A AND B ARE MET. COMMANDERS WITH QUESTIONS ARE ENCOURAGED TO OBTAIN ADVICE OR REVIEW FROM CNMPC BEFORE APPROVING DISCHARGE.

B. AUTHORITY TO SEPARATE A MEMBER WITH AN OTH DISCHARGE RESTS IN CNMPC AND IS NOT FURTHER DELEGATED.

C. IN CASES WHERE SPCMCA IS NOT SEPARATION AUTHORITY, E.G., AN OTH IS RECOMMENDED, ADB RECOMMENDS RETENTION, MEMBER OBJECTS TO THE DISCHARGE OR CHARACTERIZATION, ETC., PROCEDURES FOR PROCESSING AND FORWARDING CASES ARE UNCHANGED.

D. IN CASES WHERE SPCMCA'S ARE DESIGNATED SEPARATION AUTHORITIES, THEY SHALL FOLLOW ARTICLES 3640200.7 AND 3640370 OF REF A AS APPLICABLE.

E. ALL RELEVANT REASONS FOR SEPARATION SHALL BE USED WHEN PROCESSING A MEMBER FOR SEPARATION.

F. SPCMCA'S MAY EXERCISE THIS SEPARATION AUTHORITY ONLY OVER RESPONDENTS WHO ARE UNDER THEIR CHAIN OF COMMAND IN A PERMANENT OR TEMPORARY DUTY STATUS (NOT TAD). REF C IS STILL IN EFFECT.

G. IF A MEMBER BECOMES UA BEFORE APPROVAL OF SEPARATION, SPCMCA'S MAY NOT SEPARATE THE MEMBER SINCE IN-ABSENTIA SEPARATIONS MUST BE AUTHORIZED BY CNMPC.

H. SPCMCA'S MUST PROTECT AGAINST WASTE OF FUNDS PAID FOR SRB'S, MILITARY EDUCATION PROGRAMS, ETC. SEPARATION AUTHORITIES MUST ENSURE MAXIMUM COLLECTION OF INDEBTEDNESS USING DODPM TABLE 7-7-6 AND NAVCOMPTMAN.

I. BEFORE APPROVING A SEPARATION UNDER THIS AUTHORITY, COMMANDERS MUST ENSURE THAT RESPONDENT HAS STATED IN WRITING THAT RESPONDENT DOES NOT OBJECT TO SEPARATION AND CHARACTERIZATION OF SERVICE.

J. ALL ADSEP DOCUMENTATION MUST BE FORWARDED TO NMPC-832, NMPC-913 OR NMPC-24, AS APPROPRIATE, IMMEDIATELY AFTER SEPARATION. DOCUMENTATION MUST INCLUDE A REPRODUCED COPY OF DD-214. REF F APPLIES WHEN ASSIGNING SEPARATION PROGRAM DESIGNATOR (SPD) AND REENLISTMENT (RE) CODES.

K. WHEN A MEMBER HAS 18 OR MORE YEARS OF TOTAL SERVICE, CHNAVPERS IS SEPARATION AUTHORITY, REGARDLESS.

L. PREVIOUS DELEGATION OF SEPARATION AUTHORITY REMAINS UNCHANGED.

6. TO FURTHER ASSIST SEPARATION AUTHORITIES IN PROCESSING ALCOHOL ABUSE CASES, FOLLOWING IS PROVIDED. ALCOHOL ABUSE REHABILITATION FAILURE IS DEFINED AS:

A. REFUSAL TO PARTICIPATE IN LEVEL II OR III TREATMENT WHEN DIAGNOSED AS ABUSER OR DEPENDENT.

B. FAILURE TO COMPLETE LEVEL II OR III TREATMENT WHEN DIAGNOSED AS ABUSER OR DEPENDENT.

C. RETURN TO ABUSE OF ALCOHOL WITHIN 180 DAYS OF COMPLETING LEVEL II OR III TREATMENT (AFTERCARE PERIOD) AND EVALUATED BY CO AS HAVING NO POTENTIAL FOR FURTHER SERVICE. A FORTHCOMING REVISION TO REF E WILL PROVIDE ADDITIONAL INFORMATION AND CLARIFY REHAB FAILURE WITH REGARD TO LENGTH OF LIABILITY PERIOD.

7. IF DRUG OR ALCOHOL INVOLVEMENT IS INDICATED, REGARDLESS OF BASIS/REASON FOR PROCESSING, ALCOHOL AND/OR DRUG DEPENDENCY EVAL MUST BE CONDUCTED BY COUNSELING AND ASSISTANCE CENTER (CAAC) OR MEDICAL OFFICER TO SATISFY STATUTORY REQUIREMENTS. IF THE MEMBER IS DEPENDENT, VETERANS' ADMINISTRATION IN-SERVICE TREATMENT MUST BE OFFERED THE MEMBER. REFER TO TRANSMAN ART A1.0323 FOR PROCEDURAL GUIDANCE. A COPY OF THE DEPENDENCY EVAL MUST BE FORWARDED WITH SUPPORTING DOCUMENTATION.

8. IN AMPLIFICATION OF REF C, WHEN PROCESSING REQUIRES ACTION BY ADB, THE CONVENING AUTHORITY SHALL FORWARD RECORD OF PROCEEDINGS WITH THE SENIOR MEMBER'S AUTHENTICATING SIGNATURE AND REPORT OF

ADMINISTRATIVE BOARD (REPORT) PREPARED IN IAW APPEN. B, ENCL 12, REF A. REPORT SHALL BE COMPLETED INCLUDING OBTAINING ALL NECESSARY SIGNATURES IMMEDIATELY AFTER ADB ADJOURNS. RESPONDENT'S COUNSEL SHOULD INDICATE ON REPORT AT THE TIME HE SIGNS IT WHETHER HE/SHE INTENDS TO SUBMIT A LETTER OF DEFICIENCIES.

9. REF G PROVIDES NEW DIRECTION FOR THE ISSUANCE OF DISCHARGE CERTIFICATES. EFFECTIVE UPON RECEIPT OF THIS NAVOP, ALL COMMANDS EFFECTING SEPARATIONS WILL NO LONGER ISSUE DISCHARGE CERTIFICATES FOR ADVERSE DISCHARGES (OTH, BCD, AND DD). THE DD-214 SATISFIES NECESSARY LEGAL AND ADMINISTRATIVE REQUIREMENTS FOR ADVERSE DISCHARGES. ACCORDINGLY, CERTIFICATES SHOULD ONLY BE ISSUED FOR HONORABLE OR GENERAL DISCHARGES.

10. FURTHER ADSEP PROCESSING CHANGES ARE CURRENTLY UNDER CONSIDERATION. ASSISTANCE MAY BE OBTAINED FROM NMPC-83, NMPC-24, AND NMPC-913. ADDITIONALLY, SEPARATION ACTIVITIES AND TRANSIENT PERSONNEL UNITS CAN PROVIDE GUIDANCE IN THIS AREA.

NOTES

CHAPTER XXXIV

STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

The purpose of the standards of conduct rules is to provide ethical standards for all DON personnel. The primary reference for these rules is SECNAVINST 5370.2 (series), which applies to the military (Regular and reservist, active or ACDUTRA) as well as to civilians (including nonappropriated fund activities personnel and special government employees).

The standards of conduct rules in this chapter that are shown in bold type are punitive and, therefore, military violators of those rules are subject to the UCMJ, while civilian violators are subject to disciplinary action.

ETHICS COUNSELORS

A. Are responsible for giving commanders advice and assistance on standards of conduct, ethics, conflicts of interest, and post-government service employment restriction issues. An appendix to SECNAVINST 5370.2 lists the ethics counselor billets in the naval service.

B. Are designated as the delegated authority for initially reviewing Financial Disclosure Statements (SF-278) and for finally reviewing Confidential Statements of Affiliations and Financial Interests (DD Form 1555) submitted by DON personnel within their organization, activity, or geographic area.

GENERAL POLICIES FOR ALL DON PERSONNEL

A. Know their scope of authority and do not exceed it.

B. Are familiar with statutory prohibitions on conduct.

C. Consult designated ethics counselors as needed.

D. Avoid any action that results in or reasonably can be expected to 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 independence or impartiality;

5. making a government decision outside official channels; or

6. adversely affecting the confidence of the public in the integrity of the government.

AFFILIATIONS AND FINANCIAL INTERESTS

DON personnel shall not engage in personal, business, or professional activity nor hold a direct or indirect financial interest that conflicts with the duties and responsibilities of the DON positions. Unless expressly authorized below, all DON personnel who have or acquire an affiliation or a financial interest that conflicts or creates the appearance of a conflict with their official duties shall report the matter to their appropriate superior in the chain of command.

A. For purposes of this rule, the private financial interests of an individual's spouse, minor child, immediate household member, or partner are considered the private financial interests of the individual.

B. Situations where conflicts of interest are likely to arise include those in which DON personnel have government duties or responsibilities related to persons or business entities with which they, their spouses, minor children, or immediate household members:

1. Are associated as employees, officers, owners, directors, members, trustees, partners, advisers, or consultants;

2. have established contact, are negotiating, or have arrangements for future employment; or

3. have interests such as ownership of stock, stock options, bonds, real estate, or other securities or financial arrangements, such as trusts, or through participation in certain types of pension or retirement plans.

C. Examples of conflict situations include:

1. A commanding officer who holds a position in an insurance company, or an employee welfare or benefit organization, that sells insurance to its members violates the rule because the official duties of a commanding officer require the exercise of control over the solicitation of insurance within the command.

2. A contracting officer violates the rule by holding shares of stock in one of the companies submitting an official bid on a government contract and, at the same time, serving in an evaluative capacity of the procurement.

D. The commander of the activity concerned must resolve a conflict, and the action taken may involve the individual's disqualification from duties related to the conflict, his or her transfer, the removal of the individual from the position, or a change in duties.

E. However, disqualification is not required for these financial interests:

1. Shares of a widely held and diversified mutual, money market, trust, or similar funds offered for sale by a financial institution or by a regulated investment company;

2. deposits in and loans from banks or other financial institutions, provided they are at customary and generally available terms and conditions; and

3. Federal, state, municipal, or local government bonds.

F. DON personnel who are members or officers of nongovernmental associations or organizations must avoid activities on behalf of such groups that are incompatible with their official government positions.

1. Individuals are not disqualified from rendering advice or making recommendations within their chain of command on particular matters affecting private, nonprofit associations or organizations that foster and promote the general interests of the naval service and which depend upon the voluntary leadership efforts of DON personnel if:

a. Such individuals disclose their interest or affiliation to their superior prior to rendering advice or making recommendations;

b. the final decision is made by higher authority; and

c. the individual's commander does not otherwise find disqualification to be necessary.

2. For additional policy guidance in this Private Associations area, see SECNAVINST 5760.4C.

OUTSIDE EMPLOYMENT

DON personnel shall not engage in any outside employment activity, with or without compensation, that:

A. Interferes with or is not compatible with the performance of their government duties;

B. may reasonably be expected to bring discredit upon the government or the Department of the Navy; or

C. is otherwise inconsistent with the requirements of the instruction.

1. Commanders and individuals must assess each outside activity individually and prohibit those which can reasonably be expected to create the appearance of impropriety.

2. Commanders may require all individuals in their commands desiring to engage in outside employment to obtain advance permission.

3. There are many limitations on outside activities in Federal statutes and regulations, including:

a. Enlisted naval personnel on active duty cannot leave their post to engage in a civilian pursuit, business, or professional activity if it interferes with the customary or regular employment of local civilians in their art, trade, or profession.

b. Active duty Regular officers of the Navy and Marine Corps, including those on terminal leave, cannot be employed by any person or entity furnishing naval supplies or war materials to the United States. If so employed, that officer would not be entitled to payment from the United States during the duration of that employment.

c. DON personnel cannot receive pay or allowances from any source other than the United States for the performance of any official service or duty unless specifically authorized by law. Officers on active duty (except while on terminal leave) may not accept employment if it requires separation from their organization, branch, or unit, or interferes with the performance of military duties.

4. Examples of outside employment rule violations include:

a. An 0-5 violates the rule by accepting a consulting position that requires that officer to travel extensively during the workweek; or

b. an E-8 violates the rule by taking a part-time job working for an E-6 in the same chain of command because of the potential adverse impact on discipline.

COMMERCIAL DEALINGS INVOLVING DON PERSONNEL

DON personnel shall not knowingly solicit or make solicited sales to DOD personnel who are junior in rank, grade, or position or their family members, at any time, on or off duty. In the absence of actual coercion, intimidation, or pressure, this prohibition does not include:

A. The sale or lease by an individual of his or her privately owned real or personal property not held for commercial or business purposes; and

B. sales in commercial establishments incident to employment by individuals working part-time on their off-duty hours.

1. The reasoning behind this rule is the elimination of the appearance of coercion, intimidation, or pressure from rank, grade, or position. In addition, SECNAVINST 1740.2D prohibits solicitation of members in the same or lesser grade and civilian employees under the member's direct or indirect supervision.

2. This rule applies to both the act of soliciting and to the act of selling as a result of soliciting, although in both cases a solicitation is necessary for a violation to occur.

3. This prohibition includes, for example, the solicited sale of insurance, stocks, mutual funds, real estate, household supplies, and other goods and services.

4. Additionally, officers are prohibited by Article 1111, U.S. Navy Regulations, 1990, from having any pecuniary dealings with enlisted personnel except as required in the performance of official duties.

5. While this rule prohibits a senior from making a solicited sale to a junior or to the junior's family, sales made because a junior approaches the senior and requests the sale be made are not prohibited.

a. Examples of commercial dealing situations:

(1) A GS-13 violates this rule if he circulates to his subordinates his business card showing that he is a certified life insurance underwriter with a note that he will be happy to advise them on his company's products, since such an act is a subtle form of solicitation.

(2) An 0-7 does not violate the rule by selling his personal residence to an 0-1 when the 0-7 receives PCS orders.

COMMERCIAL USE OF GOVERNMENT GRADE, RANK, TITLE, POSITION OR UNIFORM

Naval personnel shall not use nor permit the use of their grade, rank, title, position, or uniform to promote any commercial enterprise or to endorse any commercial product, except that:

A. Retired military personnel and members of Reserve components not on active duty may use their military titles in connection with commercial enterprises if they indicate clearly their inactive or retired status, the use of which does not discredit DON or DOD, and the use does not give the appearance of DOD or DON sponsorship; and

B. all personnel may identify themselves as authors or speakers who publish or lecture in accordance with prescribed procedures.

1. DON personnel cannot indicate support for any private enterprise, whether commercial or not, where such support is or appears to be equivalent to preferential treatment or official endorsement.

2. The limited exception for inactive Reserve or retired personnel is also subject to the control of DON commanders in foreign countries who may limit or eliminate the exception in areas under their jurisdiction to avoid confusing foreign governments or nationals.

-- Examples of commercial use violations:

(1) An 0-5 violates the rule by using his rank and title in advertising his part-time realtor services.

(2) A Reserve officer not on active duty violates the rule by using his rank and military affiliation on his professional letterhead and implies that DON supports his activities in the substance of his letters.

CONTRIBUTIONS AND GIFTS TO SUPERIORS

DON personnel shall not solicit from a subordinate or give any contribution or gift to a superior or to the superior's immediate family, nor accept any gift or contribution from a subordinate or the subordinate's immediate family, unless the gift or total of gifts is:

A. Voluntary;

B. of reasonable value under the circumstances;

C. if procured with contributions, the contributions are voluntarily donated and of nominal amounts; and

D. presented to mark significant personal occasions such as marriage, transfer out of chain of command, death of a family member, illness or retirement.

All four of these conditions must be met. What is "reasonable" or "nominal" depends on the circumstances prevailing at the time and place that the gift is presented. As used in this rule, these terms are limited to $300.00 and $10.00, respectively. A contribution of $1.00 is of nominal value, but a gift purchased with 1,000 such contributions is not reasonable and cannot be presented or accepted. The $300.00 limit pertains to the event, not a particular group of donors. Superiors are forbidden from soliciting gifts. Examples of contributions and gifts rule violations include:

1. An O-4 violates this rule by suggesting that a senior would be "gravely disappointed" if all hands did not contribute to a farewell present, since any contributions from subordinate personnel under these circumstances are not voluntary.

2. A GS-7 violates the rule by giving a Christmas present to his boss, even if it is of reasonable value, since the present does not mark a significant personal occasion -- and his boss violates the rule by accepting the present. Significant personal occasions do <u>not</u> include promotions or events which recur annually.

GIFTS OR GRATUITIES FROM OUTSIDE SOURCES

DON personnel and their spouses, minor children, and members of their immediate family shall not solicit, accept, or agree to accept any gratuity for themselves, members of their families, or others, either directly or indirectly, from or on behalf of a defense contractor or other entity that is engaged in or seeks business or financial relations of any sort with any DOD component.

A. Unless a specific exception to this general prohibition permits a gratuity to be accepted, DON personnel must refuse it. And, even if accepting a gift is permissible under a liberal reading of one of the exceptions, it should be refused if the appearance of impropriety is created by accepting it. If in doubt, an ethics counselor should be consulted before accepting the gift.

B. This rule is based in part on a Federal statute which prohibits both the offering or giving and the soliciting or accepting of a gratuity. That criminal statute does not require proof that the gratuity was given in order to influence a particular matter pending before the public official receiving it. Thus, if the motivation for the gratuity is to keep a public official "happy" or to create a better "working atmosphere," the gratuity may form the basis for a criminal charge.

C. Exceptions to gift or gratuity from outside sources rule:

1. Accepting unsolicited advertising or promotional items that have less than $10.00 retail value in the United States;

2. accepting trophies, entertainment, prizes, or awards for public service or achievement in an individual capacity (not in an official capacity), or in games or contests that do not relate to official duties and are clearly open to a broad segment of the public generally, or that are approved officially for participation by DON personnel;

3. benefits available to the public;

4. discounts or concessions realistically available to all DON personnel, provided that such discounts or concessions are not used to obtain any item for the purpose of resale at a profit;

5. participation by DON personnel in civic and community activities when the involvement of DOD contractors is remote from the business purposes of any contractor sponsoring, supporting, or participating in the activity;

6. activities engaged in by senior officials of a DON component or officers in command, or their representatives, with local civic leaders as part of a DON community relations program authorized by SECNAVINST 5720.44A, Department of the Navy Public Affairs Policy and Regulations;

7. the participation of DON personnel in widely attended gatherings of mutual interest to government and industry, sponsored or hosted by higher institutions of higher learning -- or by industrial, technical, or professional associations (not by individual contractors), provided that, in the case of associations, their programs have been approved under DOD Instruction 5410.20 of 16 Jan 74, Public Affairs Relations with Business and Nongovernmental Organizations Representing Business;

-- This exception permits lunch, dinner, or refreshments that are part of the gathering to be accepted, but does not extend to the acceptance of transportation or accommodations unless otherwise authorized in the Travel and Transportation section of SECNAVINST 5370.2.

8. participation by naval personnel in public ceremonial activities of mutual interest to industry or local communities and DON -- such as ship launchings or aircraft rollouts -- if the activities serve the interests of the government and accepting the invitation is approved, after consultation with the appropriate ethics official or counselor, by the commanding officer or head of the activity to which the invitee is attached;

9. attending vendor training sessions when the vendor's products or systems are provided under DOD contract, the training facilitates use of those products or systems by DON personnel, and the appropriate supervisor determines that the training is in the best interests of the government, as long as the contractor waives any claim against the government for such training;

10. attending tuition-free training or refresher courses, or other educational meetings, offered by defense contractors (although not required to do so by DOD contract) and the appropriate supervisor determines that the training is in the best interests of the government, and the contractor waives any claim against the government for such training;

11. continued participation in employee welfare or benefit plans of a former employer when permitted by law and approved by the appropriate supervisor with advice of the cognizant ethics official or counselor;

12. customary exchanges of gratuities between DON personnel and their friends and relatives and the friends and relatives of their spouses, minor children, and members of their immediate household when the circumstances clearly

indicate that it is the relationship, rather than the business of the person concerned, that is the motivating factor for the gratuity, and it is clear that the gratuity is not paid for by the government or any DOD contractor;

13. accepting benefits resulting from the business activities of a spouse, where it is clear that such benefits are accorded the spouse in the normal course of the spouse's employment or business, and have not been proffered or made more attractive because of the DON individual's status;

14. on an infrequent basis only, accepting coffee, doughnuts, and similar refreshments of nominal value offered as a normal courtesy incidental to the performance of duty; or

15. situations in which, in the sound judgment of the individual concerned or of his or her supervisor, the government's best interests are served by the individual participating in activities otherwise prohibited.

In any such case, a written report of the circumstances must be submitted in advance or, when an advance report is not possible, within 48 hours, by the individual to the commander via the appropriate ethics counselor. This last exception is not intended to be a "catch-all," and the burden of decision and accountability is placed on the individual who exercises it. Each time the exception is used, reasons why accepting an otherwise prohibited gratuity is or was in the best interests of the government must be made in writing to the chain of command.

D. Examples of gift or gratuity from outside sources rule violations include the following:

1. A contracting officer violates the rule if he accepts an unsolicited gift worth $9.00 on his birthday from a DOD contractor, since the pertinent exception applies only to promotional or advertising items;

2. a DON employee violates the rule if he requests a promotional coffee mug worth $5.95 from a DOD contractor, since the exception permits only unsolicited items to be accepted; or

3. a newly qualified pilot violates the rule by accepting a model of the aircraft in which he qualified (worth more than $10.00) from the plane's manufacturer.

REPORTING GRATUITIES

In addition to the reporting requirements detailed in SECNAVINST 5370.2 series, DON personnel who receive gratuities under circumstances not covered by the instruction, or have gratuities received for them, must report the matter in writing to their commander via the cognizant ethics counselor for appropriate action and disposition of the gratuity.

SPEAKING, LECTURING, WRITING AND APPEARANCES

DON personnel shall not, either with or without compensation, engage in speaking, lecturing, or writing activities that are dependent on information obtained as a result of their government employment, except when the information does not focus specifically on the agency's responsibilities, policies and programs, and:

A. The information has been published or is generally available to the public;

B. the information is available to the public under the Freedom of Information Act; or

C. the concerned service secretary authorizes in writing nonpublic information to be used on the basis that the use is in the public interest.

This rule contains the general prohibition against using inside information for the benefit of oneself or for others; but, it does not preclude DON personnel from writing or speaking on matters in which they have developed expertise because of their DON experience. The propriety of payment for such activities is discussed in the next section.

HONORARIA

DON personnel shall not accept honoraria, or suggest charitable contributions in place thereof, for any speech, article, or appearance -- regardless of whether the activity is related to the performance of official duties.

A. An honorarium is any payment of money or other thing of value (excluding expenses for travel, subsistence, and agent fees or commissions) to DON personnel as consideration for an appearance, speech, writing, or presentation. DON personnel may not accept any honoraria without first consulting an ethics counselor.

B. A "speech" is any oral presentation, regardless of whether made in person, recorded, or broadcast. An "appearance" is attendance and making remarks at any conference, convention, or similar gathering. An "article" is a writing intended for publication, but does not include books, fiction, poetry, or scripts. Teaching is outside employment, not a speech or an appearance. These rules, however, cannot be circumvented by maintaining that one has a part-time job in the speechmaking or article-writing business.

C. Government officers and employees are prohibited under 18 U.S.C. § 209 from accepting any contribution or supplementation of salary for the performance of official duties from any source other than the United States. Therefore, DON personnel are prohibited from receiving compensation for lectures or articles which focus specifically on DON's responsibilities, policies, and programs, or when it may be perceived by the public that the article or speech conveys DON policies, or when the activity interferes with the individual's official duties.

D. If preparing or delivering a speech, writing, or other work was properly assigned by a superior, or was properly self-assigned within the context of one's position or billet description, the speaker or writer cannot accept compensation for doing so, even if the work was prepared and delivered outside of normal working hours.

E. Prior to publishing or delivering any work or speech pertaining to military matters, national security issues, or subjects of significant concern to DOD, DON authors or speakers must ensure that cognizant DON authorities have reviewed it and cleared it for dissemination. In general, each such work must be subjected to both security and policy reviews. For additional guidance, see the Freedom of Expression chapter in this handbook.

TRAVEL AND TRANSPORTATION

Except as authorized [in SECNAVINST 5370.2 series], naval personnel and their spouses, minor children, and members of their immediate household shall not solicit, accept, or agree to accept in-kind transportation or accommodations or reimbursement for transportation or travel-related expenses from -- or on behalf of -- a DOD contractor or other entity that:

A. Is engaged in or seeks business or financial relations of any sort with any DOD component;

B. conducts operations or activities that are either regulated by a DOD component or significantly affected by DOD functions;

C. has interests that may be substantially affected by the performance or nonperformance of the official duties of DOD personnel; or

D. is a foreign government, or any representative or subdivision thereof, engaged in selling to or buying from any DOD component (including foreign military sales), and the payment or service is tendered in the context of the foreign government's commercial activities.

Exceptions to DOD contractor travel expense payment rule include:

1. Accepting such services, payments, or reimbursements from a potential employer in connection with a job interview if reporting requirements are met;

2. situations in which the recipient is on official government business and reports the circumstances in writing to his/her superior or supervisor and to the ethics counselor before accepting, if possible, or as soon as possible thereafter and accepts:

a. Space-available, previously scheduled, ground transportation to, from, or around a contractor's place of business provided by the contractor to its own employees; or

b. contractor-provided transportation, meals, or overnight accommodations when arrangements for government or commercial transportation, meals, or accommodations are clearly impracticable and refusing the contractor's offer would interfere significantly with the performance of official duties.

The exceptions listed in SECNAVINST 5370.2 are the only occasions in which DON personnel may accept transportation or travel-related expense payments or reimbursement from a DOD contractor.

3. Examples of DOD contractor travel expense payment rule violations:

a. An 0-6 violates the rule by accepting hotel accommodations in a foreign country at a foreign government's expense if the 0-6 is present to negotiate a U.S. weapons purchase from that country; or

b. a GS-13 violates the rule by sharing a taxi ride with a DOD contractor representative without paying for his share even if both are going to the same destination.

NON-DOD CONTRACTOR TRAVEL EXPENSE PAYMENTS

DON personnel shall not accept from any non-DOD source transportation, accommodations, or subsistence in connection with official travel unless:

A. The recipient is a speaker, panelist, project officer, or other bona fide participant in a seminar, symposium, or similar event;

B. the recipient obtains the prior written approval of his or her commanding officer or designee;

C. the transportation, accommodations, or subsistence are provided in-kind;

D. the provider is a nonprofit, tax-exempt organization, association, or institution listed in 26 U.S.C. § 501 (c)(3) (1982) or authorized by 5 U.S.C. § 4111 (1982); and

E. the transportation, accommodations, or subsistence are not extravagant or excessive.

1. An example of non-DOD contractor travel expense payment rule violation would be:

-- A GS-11 violates the rule by using his personal charge card to pay travel expenses in connection with attending a seminar hosted by the American Cancer Society to give a lecture as a representative of the Navy and subsequently accepting the Cancer Society's check in reimbursement, since the rule's exception is limited to the acceptance of in-kind services only.

2. Promotional benefits in connection with official travel

a. DON personnel may accept, but must surrender to their commanding officer or designee, promotional items or benefits such as "frequent flyer" airline tickets, coupons, dividends, seat upgrades, and the like.

b. "Credits," miles," "points," etc. accumulated in commercial airline frequent-flyer clubs or programs pursuant to official travel may be used to obtain free travel for official purposes. If additional travel is considered impractical, mileage points may be redeemed to upgrade accommodations from "coach" to "first-" or "business-"class on later official flights.

GAMBLING

While on government owned, leased, or controlled property, or while on duty for the government, DON personnel shall not participate in any gambling activity, including a lottery or pool, a game of chance for money or property, or the sale or purchase of a number slip or ticket, unless:

A. Necessitated by an individual's law enforcement duties; or

B. the activity is specifically authorized by the Secretary of the Navy; or

C. otherwise authorized by law (such as the sale on DOD premises of state lottery tickets by blind vendors licensed pursuant to the laws of that state).

1. For the purpose of this rule, military personnel are "on duty" except when on leave or liberty.

2. This rule prohibits all forms of gambling (including lotteries, football pools, numbers, raffles, wagering, and other games of chance) on government property. While games of skill are not prohibited, betting on them is.

3. A raffle to support Navy Relief, authorized by SECNAV, conducted in accordance with local law, and subject to adequate administrative controls is permitted. Additionally, CNO or CMC may authorize the playing of bingo on board Navy or Marine activities or vessels.

4. Exceptions to this rule may be authorized by SECNAV. Such requests must be forwarded via the chain of command, including CNO or CMC as appropriate, and must include a complete statement of local gambling laws, proposed administrative controls, and a copy of the proposed implementing order.

5. Examples of violations of this gambling prohibition include:

a. An E-5 violates the rule by running a weekly football pool on his ship, even if all winners are paid their winnings ashore and away from military property and even though half of the proceeds are donated to Navy-Marine Corps Relief; or

b. DON personnel who attend a dance aboard a naval installation if the price of their admission includes the cost of a door prize to be awarded to one of the attendees whose name will be drawn at random.

USE OF TITLE, RANK, OR POSITION TO RAISE FUNDS FOR CHARITIES

DON personnel shall not use or allow the use of their titles, rank, or positions in connection with charitable or nonprofit organizations -- except that:

A. DON personnel may assist charitable programs administered by the Office of Personnel Management (OPM) under delegation from the President (Combined Federal Campaign, United Way) and other specifically authorized programs (e.g., Navy Relief); and

B. this prohibition does not preclude speeches before such organizations by DON personnel if the speech is designed to express an official position in a public forum.

This prohibition does not preclude volunteer efforts in a private capacity on behalf of charitable or nonprofit organizations by individuals who do not use their official titles, ranks, or positions.

SOLICITATION OF GIFTS AND CONTRIBUTIONS

Unless authorized by the Secretary of the Navy, requests for gifts or contributions for institutions or organizations of the Department shall not be initiated by DON personnel.

VOLUNTARINESS

DON personnel shall not take or permit actions or practices that involve actual or apparent compulsion, coercion, or reprisal in connection with fundraising events or campaigns.

A. Among the coercive practices proscribed by this rule are:

1. Supervisory solicitation of supervised employees;

2. setting 100 percent participation goals;

3. providing or using contributor lists for purposes other than the routine collection and forwarding of contributions and pledges;

4. establishing mandatory personal dollar goals or quotas;

5. developing or using noncontributor lists; and

6. "counseling" or grading individual service personnel or civilian employees about their failure to contribute or about the size of their donation.

B. An example of a violation of this voluntariness rule would be:

-- A CO who violates the rule by designating his leading chief as a "key person" and directing him to personally solicit all the command personnel -- including individuals whom the chief directly supervises.

PROTECTING GOVERNMENT ASSETS

Naval personnel shall not directly or indirectly use, take, dispose of, or allow the use, taking, or disposing of government manpower, property, facilities, or information of any kind, including property leased to the government, for other than official government business or purposes.

-- This rule covers all government property, including telecommunication services, stationery, typing and word-processing assistance, duplication equipment, transportation services, computers, and information.

USE OF INSIDE INFORMATION

Current and former naval personnel shall not use, directly or indirectly, inside information to further a private gain for themselves or others.

A. "Inside information" is information about the business of the Navy or the Marine Corps which is:

1. Not generally available to the public and not releasable to the public under a Freedom of Information Act request; and

2. was obtained by virtue of an individual's DOD position.

B. An example of a violation of the inside information rule would be:

-- A personnel officer who provides her realtor husband with the names and addresses of personnel ordered to report to her unit in the future so that he can contact them about the purchase of new homes.

ACQUISITION INFORMATION

Current and former naval personnel shall not release any information concerning proposed acquisitions or purchases by any DOD contracting activity, except per authorized procedures. Naval personnel, other than contracting officers, shall not make any commitment or promise relating to the award of a contract nor make any representation that could reasonably be construed as such a commitment.

This rule bars the unauthorized release of acquisition data even if no gain or benefit to the discloser, or to another person, is contemplated and even after the individual has left the naval service.

USING OFFICIAL POSITION

Naval personnel shall not use their official positions to improperly induce, coerce, or influence any person, particularly subordinates, defense contractors, and potential defense contractors, to provide any benefit, financial or otherwise, to themselves or to others.

-- Examples of improper use of government position include:

1. A commanding officer who permits dinner in the captain's mess to be "auctioned" by a local charity to raise funds for the charity; or

2. a member of the shore patrol who uses his position to obtain favors at the bars along his patrol route.

PRIVATE INTEREST DISCLOSURE SYSTEM

There are two separate and distinct private interest disclosure systems in the Department of the Navy

A. Confidential Statement of Affiliations and Financial Interests (DD Form 1555); and

B. Financial Disclosure Report (SF 278).

For the first of the two main disclosure systems, the Confidential Statement of Affiliations and Financial Interests (DD Form 1555), the interests of a spouse, minor child, or member of the immediate household must be reported as if they were interests of the filing individual. That report must be filed initially and then annually by:

1. Regular Navy and Marine Corps officers frocked to 0–7, and Reserve Navy and Marine Corps officers frocked to 0–7 serving on voluntary extended duty in excess of 130 days.

2. Commanding officers (or heads of) and executive officers (or deputy heads of):

a. Navy shore installations with 500 or more military and civilian personnel (including foreign national and indirect-hire personnel regularly attached, but excluding personnel attached for duty under instruction); and

b. all Marine Corps bases and air stations.

3. DON civilian personnel classified at GS/GM–15 or below under 5 U.S.C. § 5332 (1982), or a comparable pay level under other authority.

4. DON military personnel below the rank of 0–7, when their official responsibilities require them to exercise judgment in making government decisions or in taking government actions regarding contracting or procurement, regulation or audit of private or nonfederal enterprises, or other activities in which final decision or action may economically affect the interests of any nonfederal activity.

5. Special government employees [except those excluded in SECNAVINST 5370.2].

6. Those DON personnel serving in positions in which the concerned commanding officer determines this disclosure report should be filed.

Individuals who must initially, and then annually, file the second of the two main disclosure reports, the Financial Disclosure Report (SF–278), include:

1. Regular Navy and Marine Corps officers who have been promoted (not frocked) to 0–7, or above;

2. Reserve Navy and Marine Corps officers serving on voluntary extended active duty in excess of 130 days who have been promoted (not frocked) to 0-7 or above;

3. special government employees; and

4. members of the Senior Executive Service.

C. All Navy officer filers must submit their SF-278 to JAG via their appropriate supervisor and ethics counselor, and all Marine Corps officer filers must submit their SF-278 to Director, Judge Advocate Division, Headquarters, U.S. Marine Corps, unless their position requires a different submission chain [outlined in SECNAVINST 5370.2].

D. Both the DD Form 1555 and the SF-278 report are initially reviewed by both the individual's appropriate supervisor and the ethics counselor. If there is a disagreement between those individuals concerning whether there is or may be a conflict, based on the information provided on DD Form 1555, the filing individual's commanding officer or activity head will resolve the matter or forward the report to the cognizant deputy ethics official for resolution.

E. All DD Form 1555's and SF-278's must be retained for six years at the command or activity to which the reporting individual was assigned when the report was filed.

SEARCHING FOR POST-GOVERNMENT SERVICE EMPLOYMENT

A. DON personnel shall not participate personally and substantially on behalf of the government in any particular matter in which an organization with which they are pursuing or have an agreement concerning post-government service employment has a financial interest.

Federal law prohibits DON personnel from participating "personally and substantially" in any particular government matter in which any private entity with which they are negotiating or with which they have an arrangement for future employment has a financial interest. That statute provides for a fine of not more than $10,000, or imprisonment for not more than 2 years, or both.

-- To participate "personally" means to do so directly and includes the participation of a subordinate when actually directed by a superior in the matter. To participate "substantially" means that the individual's involvement was of significance in the matter.

B. If, at any time during their DOD service, either a military member 0-4 or above or a civilian employee serving in a position for which the rate of pay is equal to, or greater than, the minimum rate of pay for a GS-11 -- who performed a "procurement function" in connection with a DOD-awarded contract which involved a contractor who does at least $25,000 a year in DOD business -- should contact or be contacted by the DOD contractor to whom that contract was awarded regarding future employment, said personnel must report the contact in writing to their ethics counselor and to their reporting senior.

1. This reporting requirement does not apply to the first contact if it is initiated by the contractor and the DON personnel involved immediately terminates the contact. However, if the contact is renewed by either the contractor or the DON individual within 90 days of the first contact, all contacts must be reported.

2. Additionally, such DON personnel must disqualify themselves from participating in any "procurement function" relating to contracts of that contractor for any period for which future employment opportunities have not been rejected. The term "procurement function" is defined very broadly. Consult your ethics counselor for detailed guidance.

C. Active-duty Regular officers of the Navy and Marine Corps, including those on terminal leave, cannot be employed by any person or entity furnishing naval supplies or war materials to the United States. If so employed, that officer would not be entitled to payment from the United States during the duration of that employment.

D. After military retirement, Article 1, section 9, clause 8 of the U.S. Constitution is interpreted as prohibiting former members of the armed forces from accepting any compensation, office, or title from a foreign government without the consent of Congress, unless those members have received the approval of both the Secretary of State and the Secretary of their service. This need for preemployment approval would also apply to domestic corporations which are ultimately controlled by a foreign government and the domestic corporation acts as an agent or instrumentality of the foreign government. Approval will not be given for post-retirement employment in a foreign military service.

POST-GOVERNMENT SERVICE REPORTING REQUIREMENTS

A. Report of defense contractor employment (DD Form 1787)

1. Former DON personnel as specified below, who are employed by a DOD contractor within 2 years of leaving DON service, are required to file a report of Defense Contractor Employment (DD Form 1787) within 90 days after beginning such employment if that contractor was awarded $10,000,000 in DOD contracts during the year preceding the employment of that former DON employee. Personnel must file this report if they left DON service on or after 8 November 1985, and if they are either:

a. A former or retired military officer who served on active duty for at least 10 years and held the paygrade of 0-4; or

b. a former civilian officer or employee who attained pay rate GS-13 at any time during the 3 years preceding the end of their DOD service.

2. The personal and substantial participation standard discussed above is also relevant here. A former or retired member of the armed forces (defined to not include the Coast Guard), while performing duties in paygrade 0-4 or above, or a former officer or employee of DOD in a pay rate of at least GS-13, may not accept compensation from a contractor for a period of two years after separation from DOD service if that person:

a. Spent a majority of his working days during a two-year period (ending on the date of that person's separation from service) in DOD or performed a procurement function relating to a DOD contract (principally at a site owned and operated by the contractor); or

b. performed a procurement function during a majority of his working days during that two-year period, involving his substantial and personal participation in decisionmaking responsibilities, with respect to a contract with that contractor.

A person who violates this prohibition is subject to a civil fine up to $250,000. If it was an intentional or knowing violation, a civil fine of up to $500,000 is authorized.

B. Statement of employment (DD Form 1357)

-- All retired Regular officers of the Navy and Marine Corps whose names have been on the retired list for 3 years or less must file a statement of employment (DD Form 1357) to advise the DON of that former officer's post-

retirement employment activities. The initial statement of employment must be submitted within 30 days of retirement, and again within 30 days if that employment changes. After 3 years the use of that form is encouraged, but not mandatory unless that former officer is employed by the Federal Government.

PROCEDURES FOR ENFORCING COMPLIANCE

A. Reporting instances of suspected fraud, waste, or abuse is the responsibility of all naval personnel. Toll-free numbers are available to report suspected violations. Those numbers are 1-800-

1. 424-9098 (DOD);

2. 424-5454 (GAO);

3. 522-3451 (DON) (also use: A/V 288-6743 for DON; A/V 224-2172 for USMC IG)

4. 356-8464 (NAVSEA IG);

5. 424-9071 (DOT IG);

6. 538-8429 (USAF); and

7. 752-9747 (USA) (also use: A/V 225-1578).

B. Enforcement is the responsibility of appropriate command authority. Sanctions may be administrative and/or punitive in nature. Violators may receive warnings, letters of caution, loss of job, or criminal action.

Bedrock Standards of Conduct for Department of the Navy Personnel

To maintain the public's confidence in our institutional and individual integrity, all Department of the Navy (DON) personnel shall --

1. Avoid any action, whether or not specifically prohibited by the rules of conduct, which might result in or reasonably be expected to create an appearance of:

   a. Using public office for private gain,

   b. giving preferential treatment to any person or entity,

   c. impeding Government efficiency or economy,

   d. losing complete independence or impartiality,

   e. making a Government decision outside official channels, or

   f. adversely affecting the confidence of the public in the integrity of the Government;

2. not engage in any activity or acquire or retain any financial or associational interest that conflicts or appears to conflict with the public interests of the United States related to their duties;

3. not accept gratuities from Department of Defense contractors unless specifically authorized by law or regulation;

4. not use their official positions to improperly influence any person to provide any private benefit;

5. not use inside information to further a private gain;

6. not wrongfully use rank, title, or position for commercial purposes;

7. avoid outside employment or activities incompatible with their duties or which may discredit the Navy;

8. never take or use Government property or services for other than officially approved purposes;

9. not give gifts to your superiors or accept them from your subordinates when it is not appropriate to do so;

10. not conduct official business with persons whose participation in the transaction would violate law or regulation;

11. seek ways to promote efficiency and economy in Government operations;

12. preserve the public's confidence in the Navy and its personnel by exercising public office as a public trust;

13. put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department;

14. uphold the Constitution, laws, and regulations of the United States and never be a party to their evasion;

15. give a full day's labor for a full day's pay, providing earnest effort to the performance of duties;

16. never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not, and never accept for himself or herself or for family members, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of Governmental duties;

17. make no private promises of any kind binding upon the duties of office;

18. not engage in business with the Government, either directly or indirectly, inconsistent with the conscientious performance of Government duties; and

19. expose corruption wherever discovered.

NOTES

NOTES (continued)

CHAPTER XXXV

FREEDOM OF EXPRESSION

INTRODUCTION

The five rights which collectively comprise the Freedom of Expression are found in the First Amendment to the U.S. Constitution, which states: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

When an individual enters military service, the member must perform in accordance with military standards and in a manner consistent with good order and discipline. While these constitutionally protected rights are preserved in the military, they must be balanced against the need for military effectiveness.

BALANCING TEST

The guiding directive, DoD Directive 1325.6, embodies the need for a balancing test when it states: "It is the mission of the Department of Defense to safeguard the security of the United States. The service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security. On the other hand, no commander should be indifferent to conduct which, if allowed to go unchecked, would destroy the effectiveness of his unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible commander."

This chapter presents a review of these constitutional protections in light of 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 subsequent punishment if the speech violates the Uniform Code of Military Justice.

B. Possible violations of the UCMJ include disrespect under Article 89, UCMJ; disobedience under Article 91, UCMJ; and use of provoking words or gestures under Article 117, UCMJ.

FREEDOM OF THE PRESS

A. Possession of printed material

1. A member 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, private possession is different from public display of material. Display could be prohibited if the servicemember's interest in expression is outweighed by the command interest in maintaining morale, good order, and discipline. 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. Under some circumstances, display could constitute sexual harassment.

3. DoD Dir 5030.49, which contains the U.S. Customs Inspection Regulations, specifically prohibits the importation into the customs territory of the United States of obscene and immoral articles, books, pictures, films, or publications. Prohibited obscene material is defined by U.S. Customs as pictorial matter devoted solely to the portrayal of sexual acts, including homosexual acts or acts with an animal. It does not include the mere exposure, even in a grossly offensive way, of a person's "private parts." See JAGMAN, § 1111e.

B. Distribution of printed material

1. Official channels

a. A commander may completely remove a publication from an exchange or library. Although some discretion exists, the same standards of review must be applied to all publications.

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.

c. Article 4134f of the Navy Exchange Manual contains broad guidance for screening pornographic materials not acceptable for sale or circulation within the military establishment. See NAVRESSOINST 4066 (Navy Exchange Manual) Such unacceptable materials include those that:

(1) Are printed or circulated in violation of moral and ethical standards of civil and military law;

(2) feature illicit acts, whether heterosexual or homosexual, in such a way as to create sympathy for such acts or encourage their practice; and

(3) encourage or generally tend to promote violence, crime, horror, sadism, masochism, or similar attitudes or acts.

2. Unofficial channels

a. The installation commander can determine whether distribution of material on base through unofficial channels will constitute a clear and present danger to good order and discipline. Prior approval may be established as a requirement 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. The commanding officer should retain the written review on file for two years after the application. Commanders should consult their staff judge advocates in making these decisions.

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 despite 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. SECNAVINST 5370.2J (Standards of Conduct and Government Ethics).

B. Material originated by naval personnel concerning foreign or military policy is subject to security and policy review, per sections 401.2 and 403.4 of SECNAVINST 5720.44A (Department of the Navy Public Affairs Manual). See SECNAVINST 5510.25 (Responsibility for Security Review Department of the Navy Information); DoD Directive 5230.9 (Clearance of DoD Information for Public Release); U.S. Navy Regulations, 1990, art. 1121. 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. Published material which violates the UCMJ or security regulations could subject the author to disciplinary action.

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. See SECNAVINST 5511.36 (Authority of Military Commanders under the Internal Security Act of 1950 to Issue Security Orders and Regulations for the Protection or Security of Property or Places under their Command); MCO 5510.15 (Control and Access to Property and Places under Military Control).

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 using the same standards for all applicants. The commanding officer should articulate the reasons for approving or disapproving the application and maintain a file for two years after the application to demonstrate is submitted. Even if the demonstration is permitted, the doctrine of subsequent

punishment applies for violations of the UCMJ, for servicemembers, or the Federal trespass statute, 18 U.S.C. § 1382, for civilians.

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.

b. The servicemember may be prohibited from attending a demonstration while in a foreign country. This prohibition applies to avoid embarrassing the United States by having military members involved in foreign disputes.

c. If the activity constitutes a breach of law and order, the member may be prohibited from participating. 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 participating, 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 uses this basis should not engage in a fanciful determination, but should clearly articulate the reasons 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. Mere membership in such groups, without active participation, cannot be prohibited.

2. If the above conditions do not apply, the commanding officer would simply have the authority to prohibit the attendance at demonstrations while in uniform under the following conditions:

a. At subversive, Fascist or Communist meetings;

b. in connection with political and commercial activities;

c. if wearing the uniform would discredit the military;

d. when specifically prohibited by regulations; or

e. when the member's appearance in uniform would suggest an endorsement of the group's views by the Department of Defense.

3. Generally, the prohibition against wearing a uniform at demonstrations will be broadly construed in favor of the military. See DOD Dir. 1334.1 (Wearing of the Uniform).

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 OPNAVINST 1620.2/MCO 1620.2_ 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 would be subject to punitive action under article 92 for visiting the establishment after the off-limits order.

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 actively advocates discriminatory policies, e.g., KKK.

SERVICEMEMBERS' UNIONS

Pursuant to 10 U.S.C. § 976 (1982) and SECNAVINST 1600.1A (Relationships with Organizations which Seek to Represent Members of the Armed Forces in Negotiation or Collective Bargaining), 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)

-- Servicemembers have several methods through which they may present complaints or grievances, including:

1. Requesting mast pursuant to Article 1151, U.S. Navy Regulations, 1990;

2. presenting viewpoints through command-sponsored councils and committees;

3. writing an individual letter to his Congressman, pursuant to 10 U.S.C. § 1034 (1982) and Article 1155, U.S. Navy Regulations, 1990 (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, filing a complaint against a commanding officer who engages in arbitrary and capricious action (Chapter III of the JAG Manual 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 the Navy.

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 complaint may be withdrawn at any time.

5. pursuant to Article 1150 of U.S. Navy Regulations, 1990, filing 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 officer exercising general court-martial jurisdiction should investigate the complaint and take appropriate action); and

6. per SECNAVINST 5430.57__, communicating with the Naval Inspector General.

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 DOD Dir. 1344.10 (Political Activities by Members of the Armed Services); MCO 5370.7__ (Political Activities); MILPERSMAN 6210240 (Political Activities by Members on Active Duty); SECNAVINST 5370.2J.

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, whether appointed or elected.

C. 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 SECNAV 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.

D. 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 (this 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 transport voters to the polls.

REASONABLE ACCOMMODATION OF RELIGIOUS PRACTICES

The accommodation of a member's religious practice depends upon military necessity, and that determination of military necessity rests entirely with the commanding officer. For example, if a servicemember -- who is scheduled to stand duty on Friday evening -- requests, based on his religious principles, that he not be directed to stand duty between sundown Friday and sundown Saturday, the commanding officer should carefully consider granting that accommodation request if others are available to stand duty during those hours. However, if no other person is reasonably available to stand duty at that time, the commanding officer could order that member to stand duty based on his determination of military necessity.

SECNAVINST 1730.8 provides guidelines to be used in the exercise of command discretion concerning the accommodation of religious practices, including requests based on religious and dietary observances, requests for immunization waivers, and requests for the wearing of religious items or articles other than religious jewelry -- which is subject to the same uniform regulations as nonreligious jewelry -- with the uniform.

The issue of religious accommodation and the military uniform has been an area of particular concern in recent years. In that regard, SECNAVINST 1730.8 provides that:

A. Religious items or articles which are not visible may be worn with the uniform as long as they do not interfere with the performance of the member's military duties; and that

B. religious items or articles which are visible may be authorized for wear with the uniform if:

1. The item or article is "neat and conservative" (meaning that it is discreet and not showy in style, color, design, or brightness), that it does not replace or interfere with the proper wearing of any authorized article of the uniform, and that it is not temporarily or permanently affixed or appended to any article of the member's uniform;

2. the wearing of the item or article will not interfere with the performance of the member's military duties due to either the characteristics of the item or article, the circumstances of its intended wear, or the particular nature of the member's duties; and

3. the item or article is not worn with historical or ceremonial uniforms, or while the member is participating in review formations, honor or color guards and similar ceremonial details and functions, or during basic and initial military skills or specialty training -- except during off-duty hours designated by the cognizant commander.

a. For example, within the guidelines given above, a skullcap (yarmulke) may be worn:

(1) Whenever a military cap, hat, or other headgear is not prescribed; or

(2) it may be worn underneath military headgear as long as it does not interfere with the proper wearing, function, or appearance of the prescribed headgear.

b. Several factors for commanding officers to consider when examining requests for religious accommodations are:

(1) The importance of military requirements, including individual readiness, unit cohesion, health, safety, morale, and discipline;

(2) the religious importance of the accommodation by the requester;

(3) the cumulative impact of repeated accommodations of a similar nature;

(4) alternative means available to meet the requested accommodation; and

(5) previous treatment of the same or similar requests made for other than religious reasons.

c. Any visible item or article of religious apparel may not be worn with the uniform until approved.

d. When a commanding officer denies a request for religious accommodation, the member must be advised of the right to request a review of that refusal by CNO or CMC. That review will normally occur within 30 days following the request for review for cases arising in the United States, and within 60 days for cases overseas.

e. Administrative action (including reassignment, reclassification, or separation in the best interests of the service) consistent with SECNAV and service regulations is authorized if:

(1) Requests for accommodation are not in the best interests of the unit; and

(2) continued tension is apparent between the unit's requirements and the individual's religious beliefs.

NOTES

NOTES (continued)

CHAPTER XXXVI

RELATIONS WITH CIVIL AUTHORITIES

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. A judge advocate of the Navy or Marine Corps should be consulted before delivery takes place, 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. *JAGMAN, § 0608.*

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. As 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. JAGMAN, § 0607. A sample agreement appears in appendix A-6-b of the JAG Manual. 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. JAGMAN, § 0603.

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 Navy will release the individual. In any event, release under these conditions must be made by an officer exercising general court-martial jurisdiction (OEGCMJ), someone designated by him, or a commanding officer after consulting with a judge advocate. JAGMAN, § 0604. If the servicemember waives extradition in writing after consulting with military or civilian legal counsel, the OEGCMJ may authorize release without an extradition order. A sample waiver of jurisdiction appears in app. A-6-a of the JAG Manual. 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. JAGMAN, § 0604c.

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 by the Department of Justice or the governor of the state addressed to SECNAV (JAG). If received by the command, it must be forwarded to JAG. The request must allege that the man is charged, or is a fugitive from that state, for an extraditable crime. When all the requirements are met, the Secretary will issue the authorization to transfer the servicemember to the military installation in the United States most convenient to the Department of the Navy, where he will be held until the requesting authority is notified and complies with the provisions of the JAG Manual, as appropriate. JAGMAN, § 0605; SECNAVINST 5820 series.

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 (Deserter/Absentee Wanted by the Armed Forces form), pending delivery to or receipt by military authorities.

4. Circumstances in which delivery is refused

a. If a servicemember is alleged to have committed several offenses, including major Federal offenses and serious -- but purely military -- offenses, the military offenses may be investigated and the accused servicemember retained for prosecution. This must be reported immediately to JAG and to the cognizant OEGCMJ. When military disciplinary proceedings are pending, guidance from a judge advocate of the Navy or Marine Corps should be obtained, if reasonably practicable, before delivery to Federal, state, or local authorities. JAGMAN, §§ 0610, 0125.

b. Where a servicemember is serving the sentence of a court-martial, Article 14, UCMJ, and JAGMAN, § 0613, permit delivery.

c. If a commanding officer considers that extraordinary circumstances exist which indicate that delivery should be denied, then such denial is authorized by JAGMAN, § 0610b(2). This provision is rarely invoked.

d. In any case where it is intended that delivery will be refused, the commanding officer shall report the circumstances to the Judge Advocate General and the area coordinator by message (or by telephone if circumstances warrant). The initial report shall be confirmed by letter setting forth a full statement of the facts. JAGMAN, § 0610d, app. A-6-c.

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 to the nearest U.S. attorney for legal representation. This should be accomplished via the area coordinator, or naval legal service office, if practicable.

a. A full report of all circumstances surrounding the incident and any difficulties in securing the assistance of the U.S. attorney should be forwarded to JAG.

b. Where the U.S. attorney declines or is unable to provide legal services, the Judge Advocate General shall be advised of the circumstances.

3. Local agreements. In many areas where major naval installations are located, local arrangements and agreements have been negotiated between naval 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 Navy-wide 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 United States 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 JAGMAN, § 0611. 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 naval 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 Navy's customary policy of granting leave or liberty to permit attendance at civilian trials, but the JAG Manual states only that Navy policy is to permit servicemembers to attend their trials, not to force such attendance.

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 to JAG. JAGMAN, § 0612.

2. Writs of habeas corpus or temporary restraining orders. JAGMAN, § 0615. 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 to SECNAV (JAG). See JAGMAN, app. A-5-a for the appropriate OJAG litigation point of contact. 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 JAG.

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 a local judge advocate or OJAG. JAGMAN, § 0616a(2).

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. JAGMAN, § 0616a(1).

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. JAGMAN, § 0616a(2).

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 JAG (Code 34) 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 (1982). The purpose of this section is to ensure a Federal forum for cases when servicemembers 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 -- must be submitted to the Judge Advocate General via the individual's commanding officer. The commanding officer shall endorse the request and submit all pertinent data as to whether the employee was acting within the scope of employment at the time of the incident out of which the suit arose. 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. JAGMAN, § 0616b.

3. Service not allowed. In any case where the commanding officer refuses to allow service of process, a report shall be made to SECNAV (JAG) by telephone or message as expeditiously as the circumstances allow or warrant. JAGMAN, § 0616e.

4. Leave/liberty. In those cases where personnel either are served with process or voluntarily accept service of process, leave or liberty should be granted in order to comply with the process, unless it will prejudice the best interests of the naval service. JAGMAN, § 0616d.

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.

1. Witness on behalf of the Federal government. Where Department of the Navy interests are involved and departmental personnel are required to testify for the Navy, the Naval Military Personnel Command or CMC will direct the activity to which the witness is attached to issue TAD orders. Costs of such orders shall be borne by that same command. In the event Department of Navy interests are not involved, the Navy will be reimbursed by the concerned Federal agency. JAGMAN, § 0618a.

2. Witness on behalf of accused in Federal court. When naval 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. JAGMAN, § 0618b.

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 naval service. If the member is being called as a witness for a nongovernmental party only because of performance of official duties, the commanding officer is authorized to issue the member permissive orders at no expense to the government. JAGMAN, §§ 0617, 0618b.

4. Witness is a prisoner. JAGMAN, § 0619.

a. Criminal cases. SECNAV (JAG) must be contacted for permission which normally will be granted. Failure to produce the prisoner as a witness may result in a court order requiring such production.

b. Civil action. The member will not be released to appear, regardless of whether it is a Federal or state court making the request. A deposition may be taken at the place of confinement subject to reasonable conditions and limitations imposed by the prisoner's command.

5. 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 commanding officer/officer in charge of the cognizant naval legal service office or Marine Corps staff judge advocate. These interviews will be conducted in the presence of an officer designated by the commanding officer/officer in charge, naval legal service office, or Marine Corps staff judge advocate 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 United States.

6. Release of official information for litigation purposes and testimony by Department of the Navy personnel. SECNAVINST 5820.8 series provides that Department of the Navy personnel shall not provide official information, testimony, or documents; submit to interview; or permit a view or visit for use in Federal courts, state courts, foreign courts, and other governmental proceedings without proper authorization. Additionally, DON personnel shall not provide, with or without compensation, opinion or expert testimony concerning DoD information, subjects, personnel, or activities -- except on behalf of the United States or a party represented by the Department of Justice -- or with written special authorization. The above instruction outlines determining authorities, the required contents of a proper request by a requester, and consideration in granting or denying a request for official information. JAGMAN, §§ 0522 - 0529.

C. Jury duty. Active-duty servicemembers are exempted from service on Federal juries. DoD Directive 5525.8 (Service of the Armed Forces on State and Local Juries). Servicemembers are exempt from jury duty when it unreasonably interferes with performance of their military duties or adversely affects the readiness of a unit, command, or activity. Special court-martial convening authorities are empowered to make the decision and the decision is final. All personnel assigned to operating forces, in a training status, or stationed outside the United States are exempt from serving on a state or local jury. Servicemembers who serve on state and local juries shall not be charged leave or lose any pay entitlements during the period of service. All fees accrued to members for jury service are payable to the U.S. Treasury. Members are entitled to any reimbursement from the state or local jury authority for expenses incurred in the performance of jury duty (such as for transportation, costs of parking fees, etc.). Commanding officers are responsible for notifying the responsible state or local official of this exemption when a servicemember is summoned. SECNAVINST 5822.2.

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. U.S. Navy Regulations, 1990, art. 0828. 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. JAGMAN, § 0609.

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's), with all countries where its forces are stationed. Under most SOFA's, the question of whether the U.S. servicemember will be tried for crimes committed by U.S. 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 the 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 U.S. 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. U.S. 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. SECNAVINST 5820.4 series of 1 Dec 1978, Subj: Status of Forces Policies, Procedures, and Information, directs in paragraph 1-4(a) that "[c]onstant efforts will be made to establish relationships and methods of operation with host country authorities which will maximize US jurisdiction to the extent permitted by applicable agreements." 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 the Judge Advocate General. 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.

The reporting provisions of OPNAVINST 3100.6 series (OPREP-3 Navy Blue Reports) apply in appropriate circumstances. Local regulations and chain-of-command directives will also dictate what reports are required.

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 military or civilian persons in the Department of the Navy, or their dependents, to foreign authorities. JAGMAN, § 0609. 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 JAG and other 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.

GRANTING OF ASYLUM AND TEMPORARY REFUGE

A. References

1. U.S. Navy Regulations, 1990, art. 0939

2. SECNAVINST 5710.22 of 7 Oct 1972, with change 1 of 15 Aug 1973 and change 2 of 23 Sep 1983, Subj: Procedures for handling requests for political asylum and temporary refuge

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 onboard 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 onboard and should be advised to apply in person at the nearest American consulate or Embassy. Under these circumstances, an applicant may be received onboard 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 CNO or CMC, as appropriate, 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 CNO/CMC and the requesting authorities shall be advised of the referral.

3. In any case, once an applicant has been received onboard an installation, aircraft, or vessel, he will not be turned over to foreign officials without personal permission from the Secretary of the Navy or higher authority -- regardless of where the accepting unit is located.

4. Personnel of the Department of the Navy 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 Assistant Secretary of Defense for Public Affairs.

POSSE COMITATUS

A. References

1. Posse Comitatus Act, 18 U.S.C. § 1385 (1982).

2. Military Cooperation with Civilian Law Enforcement Officials, 10 U.S.C. §§ 371-378 (1982).

3. DoD Dir. 5525.5 of 15 Jan 1986, DoD Cooperation with Civilian Law Enforcement Officials.

4. SECNAVINST 5820.7 series 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; or

3. civilian special agents of the Naval Investigative Service performing assigned duties under SECNAVINST 5520.3.

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 5820.7 series.

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; and assistance in the case of crimes against members of Congress, 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.

NOTES

NOTES (continued)

CHAPTER XXXVII

LEGAL ASSISTANCE

LEGAL ASSISTANCE

A. Legal assistance officers. All active duty judge advocates are legal assistance officers.

B. Scope

1. 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. Active duty personnel and their dependents have preference.

b. The statutory authority for permitting legal assistance to servicemembers [10 U.S.C. § 1044] provides that "subject to the availability of legal staff resources, the Secretary concerned may provide legal assistance in connection with their personal civil legal affairs...."

2. Expanded Legal Assistance Program (ELAP). This program is available only in a limited number of areas because of the amount of time needed to process a case through the civil courts. Single personnel E-3 and below, and married personnel E-4 and below and their dependents, are eligible for the program. Personnel in other paygrades could be eligible for the program if it can be shown that they cannot afford the services of a civilian attorney.

FAMILY LAW

A. Nonsupport

1. References: MILPERSMAN, art. 6210120; LEGADMINMAN, para. 8002.

2. The MILPERSMAN and LEGADMINMAN discuss dependent support and provide guidelines for the amount of support. These tables are only guidelines for use in counseling members on their obligations.

3. It is the policy of the Navy and Marine Corps that all personnel will provide continuous and adequate support to their lawful dependents.

a. Members must support their spouses unless:

(1) There is a court order (i.e., divorce decree, legal separation, etc.) which relieves the member of that obligation;

(2) the spouse gave up their right to support in writing;

(3) there is mutual agreement of the parties (e.g., a written separation agreement); or

(4) the Navy Family Allowance Activity or Commandant of the Marine Corps grants a waiver of support. The waiver must be requested in writing and is limited to those cases involving desertion, infidelity, or physical abuse.

b. Lawful minor dependents must be supported at all times unless:

(1) The child is adopted by another; or

(2) a custody and support order specifically relieves the member of any 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 the MILPERSMAN and LEGADMINMAN when counseling a member as to what constitutes "adequate support." Keep in mind that these are only guidelines.

d. If the member refuses to provide support, they should be counseled on the possible penalties. These include:

(1) Lower evaluation marks, especially in the areas of reliability and personal behavior;

(2) administrative separation for misconduct, pattern of misconduct (this could result in an OTH 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 finance 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.

B. Paternity complaints

1. References: MILPERSMAN, art. 6210125; LEGADMINMAN, para. 8005.

2. 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 natural children, and Navy and Marine Corps policy concerning support of dependents applies equally here. 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. See NAVMILPERSCOMINST 1750.1 series.

c. Disputed or questionable cases. When no legal action has determined 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. MILPERSMAN, art. 6201025; LEGADMINMAN, para. 8005. Article 6210125.5 of the MILPERSMAN sets out sample replies which may be appropriate in some cases.

C. Uniformed Services Former Spouses' Protection Act (USFSPA)

1. This Federal law permits, but does not require, state courts to treat disposable military retired or retainer pay as community property, in accordance with state law, in marital dissolution actions. In effect, military retirement pay can be treated by the state court as a pension fund constituting a marital asset which can be divided and distributed as part of a court order of divorce, dissolution, or legal separation.

2. Major provisions of this Act include:

a. A limit of 50% on the total amount of the disposable retired or retainer pay that can be distributed by the state court order. However, the payment of this maximum amount will not relieve a member from liability for the payment of alimony, child support, or other payments required by a court order.

b. A requirement that the spouse or former spouse to whom payments are to be made must have been married to the servicemember whose retired or retainer pay is to be divided for a period of at least ten years, which overlap ten years of creditable military service, in order for that spouse or former spouse to be able to receive the court-ordered payments directly from the military finance center.

c. 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.

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 SECNAVINST 7200.16 of 14 March 1979, Subj: Garnishment of pay of naval military and civilian personnel for collection of child support and alimony; and, in the Marine Corps, LEGADMINMAN, chapter 8.

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 finance center.

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.

INDEBTEDNESS

A. References. The primary references for handling letters of indebtedness are contained in MILPERSMAN, art. 6210140 and LEGADMINMAN, chapter 7.

B. Policy. The Navy and Marine Corps will not be debt collectors, nor will the military services be a haven for debtors and shirkers. Each member is responsible for handling financial affairs in a responsible manner. Commands in the naval service will forward only "qualified correspondence" to the member concerning financial matters.

C. "Qualified correspondence." To be considered as qualified correspondence, a letter of indebtedness must meet at least one of the following criteria:

1. The creditor certifies in writing his compliance with the Truth in Lending Act and the DoD Standards of Fairness for financial transactions;

-- In the Marine Corps, a creditor not subject to Regulation Z should submit with the request a certification that no interest, finance charges, or other fee is in excess of that permitted by the law of the state in which the obligation was incurred.

2. the debt has been reduced to a judgment from a court of competent jurisdiction;

3. the credit given has facilitated the rendering of a service for the benefit of the members, e.g., utilities or delivering milk and collecting at the end of the month;

4. the debt results from a real estate transaction of any kind;

5. the debt is less than $50; or

6. the debt is from an open-end charge account, e.g., SEARS, revolving charge accounts, VISA, MASTERCARD, etc.

D. Federal Fair Debt Collection Practices Act (FDCPA) (prohibition against professional debt collectors contacting employers). Such letters are not considered qualified correspondence and 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, above, with the exception of garnishment and involuntary allotment.

G. For dishonored personal checks written or endorsed by military personnel for purchases made at resale and nonappropriated fund activities, see SECNAVINST 7200.18 series.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT
[50 U.S.C. app. §§ 501-591 (1982)]

A. Policy. The Act seeks 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. The Act does not apply to criminal proceedings.

B. Major provisions of this Act provide some measure of court protection in several areas, including:

1. If a court grants a default judgment in a civil case against a servicemember who did not enter a court appearance in the case, who has a meritorious or legal defense to the action brought against him, and whose military service prejudiced his ability to present a defense in the case, that servicemember can request that the court set aside the default judgment and reopen the case so that he can present his defense to the court. Members are strongly urged to consult a legal assistance officer in these areas. This relief only exists if the servicemember did not enter "an appearance" in the case, and the courts are divided on exactly what is necessary to constitute an appearance (e.g., whether a letter or telegram from the

servicemember -- or someone acting on his behalf, including a legal assistance officer -- to the court while the case is pending is sufficient to constitute an appearance in the proceeding).

2. A servicemember who is either the plaintiff or the defendant in a civil action or proceeding may request, at any stage in the proceedings, that the court grant a stay (delay) in the proceedings due to the member's military service. That delay will normally be granted by the court unless, in the court's opinion, the ability of the servicemember to proceed as the plaintiff or to conduct his defense is not materially affected by reason of his military service. In this regard, many courts consider what efforts the servicemember has made to obtain leave to attend to the court proceedings, or otherwise exercised due diligence or acted in good faith in order to make himself available for those proceedings.

3. Servicemembers are protected from double taxation due to their temporary duty in a state other than their domicile. This protection prevents multiple-state taxation of the property and military income of servicemembers. However, any income earned by a nonmilitary spouse would normally be taxable in the state in which that spouse lives, even if that state is not that spouse's permanent state of residence. See JAGMAN, § 0632.

NOTARY

A. The authority and duties of a notary can be found in UCMJ, Art. 136 and the JAG Manual, ch. 9. This authority is for Federal purposes. Whether the notarial act has any significance in a state is dependent upon state law (i.e., will the bank accept the notarization of a Federal officer on the power of attorney?) See JAGMAN, chapter 9, for compendium of state laws.

B. Oaths

-- 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 and law specialists;

b. all summary courts-martial;

c. all commanding officers and executive officers;

d. all legal officers;

e. all persons designated to conduct an investigation;

f. all officers in the performance of recruiting duties;

g. officers in paygrade O-4 and above;

h. administrative officers of Marine Corps aviation squadrons;

i. USMC officers with an MOS of 4430, while assigned as legal administrative officers;

j. officers designated as Casualty Assistance Call Officers (CACO), while so acting; and

k. all persons empowered to authorize a search.

NOTES

NOTES (continued)

CHAPTER XXXVIII

FAMILY ADVOCACY PROGRAM

References:
(a) DoD Dir. 6400.1 (Family Advocacy Program)
(b) SECNAVINST 1752.3 (NOTAL) (Family Advocacy Program)
(c) SECNAVINST 1754.1 (Department of the Navy Family Services Center Program)
(d) SECNAVINST 5800.1 (Protection and Assistance of Crime Victims and Witnesses)
(e) OPNAVINST 1752.2 (Family Advocacy Program)
(f) OPNAVINST 1752.1 (Rape Prevention and Victim Assistance)
(g) MCO 1752.3 (Marine Corps Family Advocacy Program)
(h) MCO 1710.30 (Child Care Center Policy and Operational Guidelines)
(i) MCO 1700.24 (Marine Corps Family Services Center Program)
(j) BUMEDINST 6320.57 (NOTAL) (Family Advocacy Program)
(k) COMDINST 1750.7 (Family Advocacy Program)

Headquarters sponsoring sections: Good numbers to keep handy

Marine Corps	Navy
Commandant of the Marine Corps (Code MHF) A/V 224-2895	Naval Military Personnel Command (NMPC-663) A/V 224-1006
U.S. Coast Guard (COMDT (G-PS))	

OVERVIEW OF FAMILY VIOLENCE

A. Extent of family violence

Family violence is a significant social problem in American society. Each succeeding year the number of reported cases increases, as does the severity. The Navy and Marine Corps are not immune from the problems of spouse abuse and child maltreatment.

B. Causes of family violence

1. Family violence is a complex and multidimensional problem. There are many factors that contribute to the incidence of violence and neglect in families, for example, experiencing or witnessing abuse as a child or the stress a family experiences due to the member's return from extended sea duty. Also, abuse and neglect in families tends to be passed on from one generation to the other.

2. The costs of family violence are incalculable. The human costs are the most obvious and the most immediately tragic. There are, however, significant costs to the DON as well (e.g., jeopardizing mission of operating forces). Our ultimate goal, then, is to break the cycle of violence and neglect and to prevent it from recurring. This is not achieved easily. Just as the problem is complex, so must our intervention be varied and flexible.

MILITARY RESPONSE TO FAMILY VIOLENCE

A. Like the civilian community, the military began to seriously address the problem of family violence in the early 1970's. In 1976, the Navy established the Child Advocacy Program within the Navy Medical Department. In 1979, this program, which had addressed only the maltreatment of children, was expanded to include spouse abuse, sexual assault, and rape. The program was redesignated the Family Advocacy Program (FAP) and, in 1980, became line managed -- with NMPC-66 serving as program manager. In 1981, Department of Defense Directive 6400.1 established guidelines for the "Family Advocacy" program for all military services. In 1984, SECNAVINST 1752.3 was signed, setting Navy policy in the area of family violence. OPNAVINST 1752.2, signed in March 1987, and Marine Corps Order (MCO) 1752.3 provide detailed information regarding the implementation of the Family Advocacy Program.

B. DoD Directive 6400.1

1. As stated previously, DoD Directive 6400.1 established a DoD-wide Family Advocacy Program. It encouraged each of the services to:

a. Develop programs to promote healthy family life and to treat families experiencing violence and neglect;

b. relinquish legislative jurisdiction as may be required to ensure the applicability of state laws regarding child and spouse protection;

c. identify suspected perpetrators of violence and neglect, so that further injury can be prevented and therapy for dysfunctional families provided;

d. cooperate with relevant civil authorities and report cases of child maltreatment as required by state law;

e. make specific efforts to fully serve families living on and off base; and

f. combine the management of the FAP with similar medical and social programs.

2. DoD Directive 6400.1 was revised in July 1986. The reissued directive specifically addresses the need to minimize further trauma to victims of family violence. It further established the Military Family Resource Center. This Center is available to assist the services to establish, develop, and maintain comprehensive FAP's.

C. SECNAVINST 1752.3

1. SECNAVINST 1752.3 states "[f]amily violence and neglect can detract from military performance, efficient functioning of military units, and can diminish the reputation and prestige of the military service in the civilian community. It is incompatible with the high standards of professional and personal discipline required of members of the Naval service." The SECNAVINST established DON policy on the prevention, evaluation, identification, intervention, treatment, follow-up, and reporting of all child and spouse maltreatment, sexual assault, and rape. SECNAVINST 1752.3 states that the objectives of the FAP are to:

a. Prevent family maltreatment;

b. deter illegal actions through knowledge that administrative or disciplinary action may be taken;

c. provide treatment for victims;

d. identify, support, and treat at-risk (having high potential for family violence) families; and

e. assist military personnel who have the potential for further useful service.

2. Further, the SECNAV Instruction states that it is DON policy to provide the following program components in its FAP.

a. Prevent family violence by:

(1) Establishing and maintaining education and awareness programs; and

(2) developing programs that contribute to healthy family life.

b. Intervene effectively by:

(1) Recognizing the sensitive nature of family advocacy and responding, while ensuring careful handling of case information and following confidentiality guidelines scrupulously;

(2) identifying suspected abusers and/or neglecters;

(3) encouraging voluntary self-referral;

(4) cooperating with civilian agencies by observing local law pertaining to child/spouse abuse and neglect;

(5) ensuring that all involved agencies and individuals cooperate and coordinate; and

(6) applying disciplinary or administrative sanctions for maltreatment, when appropriate.

c. Treat family members involved in violence and neglect by:

(1) Breaking the cycle of abuse and neglect through identification and treatment -- diversion into treatment/rehabilitation is encouraged for proven performers;

(2) ensuring that victims of maltreatment receive proper care and treatment; and

(3) ensuring that nonmedical personnel involved in treatment/counseling are properly trained and credentialed.

2. Finally, the SECNAVINST provides for the establishment and maintenance of a central registry of cases. Information on substantiated and suspected cases is maintained by the Naval Medical Command. Unsubstantiated cases are listed by social security number and are expunged after four years.

D. OPNAVINST 1752.2; MCO 1752.3

1. In purpose, objective, and scope, OPNAVINST 1752.2 and MCO 1752.3 are similar. Perhaps the most notable difference is that the Marine Corps, unlike the Navy, does not centrally manage incest cases, although a treatment option is available at many installations. For purposes of the following sections, the organization and language is taken substantially from the OPNAV Instruction. However, where appropriate, the MCO reference is provided.

2. The following brief definitions, from the Family Advocacy SECNAV and OPNAV Instructions, guide the administration of the Family Advocacy Program. They do not modify or influence definitions applicable to statutory provisions and regulations that relate to determinations of misconduct and line of duty, and criminal responsibility for a person's acts or omissions.

3. OPNAVINST 1752.2 defines the problems of child maltreatment and spouse abuse as:

a. Physical abuse of children which includes any major physical injury such as brain damage, skull or bone fracture, and severe lacerations or bruises which constitute a substantial risk to the life and/or well-being of the child. It also includes minor injuries such as twisting or shaking which do not constitute a substantial risk to the life or well-being of the child. These nonaccidental injuries are inflicted on a child by the child's parent(s) or caretaker.

b. Sexual abuse of children includes the involvement of a child in any sexual act or situation, the purpose of which is to provide sexual gratification or financial benefit to the perpetrator; and all sexual activity between a caretaker and child is considered sexual abuse.

c. Neglect is defined as deprivation of necessities (when the caretaker is able to provide them) including failure to provide nourishment, shelter, clothing, health care, education, and supervision. Neglect is further defined as

inadequate or improper care that results or could reasonably result in injury, trauma, or emotional harm, including failure to thrive.

d. Emotional maltreatment of children is defined as an act or commission (e.g., intentional berating, or disparaging a child) or an omission (such as passive/aggressive inattention to a child's emotional needs by a caretaker). These acts must cause such effects in children as low self-esteem or undue fear or anxiety.

e. Spouse abuse includes any direct, nonaccidental physical injury inflicted on a partner in a lawful marriage.

4. While the MCO does not contain these specific definitions, it covers the same categories of maltreatment. MCO 1752.3, para. 3.b.

5. As a practical matter, most prosecutions for family violence in the DON involve physical and sexual child abuse. Child neglect, unless in conjunction with physical or sexual abuse charges, rarely results in disciplinary or administrative actions. Spouse abuse too has seen little prosecution in the DON.

6. The SECNAV Instruction sets forth the following policy regarding family advocacy:

a. The family advocacy program is a line program, and commanding officers will ensure that FAP is a cooperative effort. See MCO 1752.3, para. 4(a).

b. Providing assistance to abusers will not be the basis for adverse action, such as:

(1) Revocation of security clearances;

(2) removal from Personnel Reliability Program (PRP);

(3) disqualification from warfare speciality; and

(4) removal of Navy Enlistment Classification Code.

c. Perpetrators of family violence must be held accountable for their behavior. Swift and certain intervention and subsequent disciplinary action is one of the most effective deterrents to family violence. See MCO 1752.3, para. 7.d(2).

d. The decision to pursue disciplinary action should consider the following:

(1) When the member is judged treatable and has the potential for further effective service, the Navy's interests, justice, and the family/victim can be served by taking disciplinary action, then suspending sentence while the member is in treatment. See MCO 1752.3, para. 6(b).

(2) Disciplinary/administrative action is most appropriate when: the perpetrator does not acknowledge the unlawful behavior and assume responsibility for it; the perpetrator's behavior is compulsive and likely to recur; the victim receives a serious injury; there is sufficient evidence for conviction; and/or when court testimony is in the best interest of the victim. See MCO 1752.3, para. 7.d(1)(d).

E. Family Advocacy Program Components

1. OPNAVINST 1752.2 and MCO 1752.3 describe the operation of the FAP, which consists of several program components: voluntary self-referral; prevention; identification and referral; intervention; rehabilitation/ treatment; and coordination. The relevant components are described below.

a. Identification and referral. In the Navy, everyone has the responsibility to report suspected and known cases of abuse/neglect (except for privileged communications within the clergy-penitent relationship - see OPNAVINST 1752.2, para. 4.a(1)). This policy is supported by state child abuse and neglect reporting laws. In addition, all reports should be made to the Family Advocacy Representative (FAR) who will report the incident to the appropriate civilian authorities, usually child protective services (CPS). See MCO 1752.3, paras. 7.b., 7.d(1), which encourage servicemembers to comply with local child abuse reporting laws.

b. Intervention. The intervention strategies available to commanding officers include:

(1) Temporary removal of the military member;

(2) development of written memorandums of understanding (MOU's) with civilian social service agencies to establish cooperative intervention in child maltreatment cases (see MCO 1752.3, para. 7.c); and

(3) establishment of a safe house or other overnight accommodation in order to protect victims and provide shelter.

c. Rehabilitation. The following guidance is provided regarding rehabilitation/treatment.

(1) The Medical Treatment Facility (MTF) has primary responsibility for determining the need for medical treatment. MTF's are responsible for referring individuals and families to other professional resources, as needed.

(2) Some problems are not amenable to treatment. In these cases, separation from the service should be recommended to the member's commanding officer.

(3) Counseling/treatment is recommended when the member has positive previous performance and good potential for treatment. At the same time, appropriate disciplinary accountability should be implemented. See MCO 1752.3, para. 6.b.

(4) When the member repeats the offense, fails to cooperate, to progress or to satisfactorily complete treatment, disciplinary/ administrative action will occur. See MCO 1752.3, para. 7.d(1)(d).

(5) Treatment is generally limited to one year. See MCO 1752.3, para. 7.d(5).

(6) A member's case will be considered closed upon successful completion of treatment. Treatment is considered successfully completed when the abuse/neglect has stopped, the problems contributing to the maltreatment have been remedied, and it is determined that it is very unlikely that any further maltreatment will occur.

(7) Dependents and retired members who are victims or perpetrators should be offered appropriate intervention and encouraged to participate voluntarily. See MCO 1752.3, para. 7.d(5).

F. Family Advocacy Program Operation

1. This section describes how the Family Advocacy Program is implemented at the installation level. The Marine Corps relies on the Navy Medical Command, through naval medical facilities, to provide primary management of child and spouse abuse treatment, evaluation, and reporting programs.

a. Medical Treatment Facility (MTF). The MTF plays a central role in the implementation of the FAP. The commanding officer of the MTF cooperates with the installation CO in establishing local policies and directives necessary to implement the FAP. The MTF CO's representative co-chairs the Area

Family Advocacy Committee (FAC) and the MTF appoints the Family Advocacy Representative (FAR). The FAR, typically a social worker, is responsible for implementing and managing the FAP in the MTF. The specific responsibilities of the FAR are to:

(1) Receive all reports of maltreatment and refer them to the civilian authorities (as appropriate);

(2) ensure protection of victims when civilian authorities are unavailable;

(3) make clinical assessments, provide treatment, refer for treatment/action, and coordinate all aspects of case management; and

(4) report cases to the Family Advocacy Case Review Subcommittee, the member's commander, and the command judge advocate and/or NSIC, as appropriate.

b. Family Advocacy Officer (FAO). The FAO, typically the Family Service Center (FSC) Director:

(1) Serves as the point of contact for coordination of nonmedical family advocacy matters;

(2) serves as the point of contact for unit commanders concerning the medical/intervention issues related to family advocacy;

(3) coordinates local efforts designed to achieve FAP objectives; and

(4) monitors and provides staff support for the program.

c. Area Family Advocacy Committee (FAC). The FAC is charged with the responsibility to:

(1) Provide recommendations for FAP policy and procedures;

(2) facilitate military and civilian interface and interaction of social service delivery;

(3) ensure a team approach to prevention and intervention in family violence;

(4) conduct ongoing needs assessment and evaluation of the FAP;

(5) recommend new resources and programs;

(6) identify long-range, intermediate, and immediate needs and ensure that the needs are met; and

(7) serve as advocates for families and children.

The members of the FAC include, but are not limited to, the: FAO, FAR, pediatrician, nurse, psychiatrist, social worker, dentist, drug/alcohol counselor, FSC, command judge advocate, chaplain, base security, NSIC, ombudsman, and child care and youth services. In addition, membership may include others such as child protective services (CPS) worker and housing representative.

d. Family Advocacy Case Review Subcommittee. On each installation, there is at least one FAC subcommittee(s) to manage cases of spouse abuse, child maltreatment, sexual assault, and rape. The subcommittee(s) review and perform case management functions and determine the status of cases (i.e., substantiated, suspected, unsubstantiated, or at risk).

NOTES

NOTES (continued)

CHAPTER XXXIX

ENVIRONMENTAL LAW

References:
(a) SECNAVINST 6240.6 series, Subj: Assignment of Responsibility for Department of the Navy Environmental Protection and Natural Resources Management Program
(b) OPNAVINST 5090.1 series, Subj: Environmental and Natural Resources Program Manual
(c) Executive Order No. 12,088, "Federal Compliance with Pollution Control Standards"
(d) Article 0832, U.S. Navy Regulations, 1990
(e) Executive Order No. 11,990, "Protection of Wetlands"
(f) CNO msg 311935Z of Oct 88
(g) ALNAV 138/88
(h) Deputy Assistant Secretary of Defense (Installations) memorandum of 4 June 1984, "State Environmental Taxes"
(i) Naval Law Review, vol. 38 (1989)
(j) Federal Facilities Compliance Manual
(k) JAGMAN, Chapter XIII
(l) MCO P11000.8B, Vol. V, Real Property Facilities Manual
(m) NJS Environmental Law Deskbook for Judge Advocates

INTRODUCTION

In the 1950's and 1960's, Federal agencies did not concern themselves much with the few environmental laws which then existed. The principles of sovereign immunity and Federal supremacy excused Federal entities from compliance and, as a result, environmental concerns were often seen as irrelevant or incompatible with mission accomplishment. During the course of the 1970's, that situation changed dramatically. With the signing of the National Environmental Policy Act on 1 January 1970, the United States had its first real statement of national environmental policy. That policy required all Federal agencies, including the Navy, to heed environmental concerns. Public sentiment over the spoiling of the environment ran high, as demonstrated during the first Earth Day, 22 April 1970. On 2 December 1970, the Environmental Protection Agency (EPA) was established, unifying fifteen environmental control projects which had been scattered among various Federal agencies. And so continued the "decade of environment," with the passage of many environmental statutes and regulations intended to protect and enhance our natural resources.

In keeping with the general sentiment of the country at large, the Navy became increasingly aware of the fragile nature of the environment and officially committed itself to actively protecting and enhancing environmental quality. Today, the Navy is responsible for fully cooperating with Federal, state, interstate, and local EPA's and for complying with all their standards and criteria as well as with their procedural administrative requirements such as permitting, recordkeeping, reporting, payment of reasonable fees and service charges (but not taxes), and provisions for injunctive relief.

THE COMMANDING OFFICER'S RESPONSIBILITIES

A. Article 0832, U.S. Navy Regulations, 1990, places primary responsibility for environmental matters, including cooperation and coordination with environmental regulatory agencies, on the commanding officer. Commanding officers must:

1. Plan, program, budget, and execute adequate environmental quality and natural resources management programs;

2. maintain accurate, current information about all aspects of their operations which significantly affect the environment;

3. identify and report to the chain of command existing or impending environmental deficiencies in a timely manner;

4. train command personnel to recognize and be sensitive to environmental issues and regulatory requirements;

5. document every command effort at environmental compliance; and

6. actively seek funding for compliance efforts through the chain of command. (The Navy has established a central environmental compliance account which meets the requirements of the Office of Management and Budget A-106 process for identifying Federal agency pollution abatement projects. Procedures for requesting such funds are discussed in OPNAVINST 5090.1 series, Subj: Environmental and Natural Resources Protection Manual.)

B. Because of the absolute need for a consistent and uniform position throughout the Navy with respect to facilities compliance, commanding officers must maintain effective, frequent contact with the cognizant Navy Facilities Command (NAVFAC) Engineering Field Division (EFD) for technical compliance assistance. Commanders can also get help from their staff judge advocate, staff civil engineer, the joint Office of General Counsel (OGC)/Office of the Judge Advocate General

(OJAG) environmental law office, and the Navy Environmental Protection Support Service (NEPSS) office. See this chapter, infra, for a telephone listing of these, and other, resources.

C. Compliance must be the commanding officer's watchword. Failure to comply promptly and completely with environmental laws can endanger both human health and the environment. Noncompliance also invites disruptive enforcement actions and can result in civil and criminal penalties, cost the Navy vast sums of money, and lead to unfavorable public sentiment. Past instances of noncompliance have been used to justify the passage of even stricter laws limiting the Navy's ability to solve its problems "in-house" and potentially affecting its operational capabilities.

REPORTING COMPLIANCE DIFFICULTIES

A. Whenever it is impracticable for a commanding officer to comply with applicable requirements, for any reason, the matter should be referred via the chain of command to the Chief of Naval Operations (OP-04) or Commandant of the Marine Corps (MC-LFL-7), as appropriate, for resolution.

B. Chapter VI of the JAG Manual requires commands to notify the Judge Advocate General (JAG) whenever there is any likelihood of civilian court involvement.

NOTICES OF VIOLATION, ENVIRONMENTAL LITIGATION, CITATIONS, AND FINES

A. Notices of violation (NOV's) and notices of noncompliance (NON's) issued by environmental regulatory agencies can lead to penalties and litigation. They should never be ignored. Instead, prompt compliance and a timely response to the agency should be the norm.

B. Report NOV's and NON's immediately by message to CNO (OP-45) with information copies to the chain of command, Navy JAG, CHINFO, the appropriate NAVFAC EFD, and the Naval Energy and Environmental Support Activity (NEESA) in accordance with OPNAVINST 5090.1 series or Volume V, MCO P11000.8B.

C. Report any citation by a regulatory agency for any alleged failure to meet substantive or administrative requirements, or any attempt to levy a fine against a naval facility, immediately by message (as in paragraph B, above). Conduct a preliminary inquiry and create a written investigative report in accordance with the procedures established by the major claimant (the format may be either a JAGMAN investigation or letter report). Forward the report to the major claimant via the

chain of command, with copies to CNO (OP-45), the Office of the Judge Advocate General (OJAG) (Code 34), NEESA, and the appropriate NAVFAC EFD. Coordinate all communications with the regulatory agency with the NAVFAC EFD and obtain a legal opinion as to whether a defense exists. If there is no viable defense, negotiate the lowest possible amount of penalty, arrange for payment from the operating funds of the activity or major claimant, and advise all concerned. Where a defense does exist, refer the case to OJAC litigation (Code 34).

D. Handle any documents received in connection with litigation in accordance with Chapters V and VI of the JAG Manual and SECNAVINST 5820.8, Subj: Release of official information for litigation purposes and testimony by Department of the Navy personnel.

POTENTIAL CIVIL AND CRIMINAL LIABILITY

A. Although noncompliance with environmental laws can have serious legal consequences (both civil and criminal) for commanders, as well as for their military and civilian subordinates, as a practical matter, government officials who are acting within the scope of their official duties will have only limited exposure to litigation against them.

B. Nonetheless, the potential exists for personal civil liability under both statutory and state common law tort theories (such as for personal injury or property damage). For instance, the Clean Air Act (CAA), the Clean Water Act (CWA), and the Resource Conservation and Recovery Act (RCRA) allow statutory civil penalties to be assessed for violations. The CAA and the CWA, however, provide specific protections for persons acting within the scope of their official duties. On the other hand, RCRA has no similar shielding provision. So, commanders and their subordinates are potentially exposed to state civil enforcement penalties under RCRA, which governs hazardous waste disposal, even while performing official duties.

C. There are also areas of potential exposure to suit under the recently enacted Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA). Enacted in response to the Supreme Court case of Westfall v. Erwin, FELRTCA allows the United States to be substituted as the sole defendant in cases where a Federal employee is sued for a common law tort as a result of actions he took within the scope of his official duties. FELRTCA will not, however, shield that same employee from statutory civil penalties nor will it shield him from criminal liability. Again, a commander who acts in good faith within the scope of his official duties and actively attempts to comply with all applicable environmental laws is unlikely to face prosecution for violations. On the other hand, he tempts fate when he fails to meet recordkeeping requirements, report hazardous waste spillage, document compliance efforts, request needed funds to bring his facility into compliance, or falsifies data.

D. Since all commanders are expected to be knowledgeable of and comply with environmental laws and regulations, ignorance of the state of his facility's compliance is not an excuse for noncompliance. A commander need only know that an act, such as a given manner of waste storage, is happening to be criminally liable. He does not need to know that the act was a violation of the law, nor does he need to be directly involved in the act himself.

E. The Aberdeen Proving Ground cases aptly illustrate the fact that criminal prosecution of Federal employees for environmental violations is possible. In those cases, three senior civilian employees who worked for the Army as engineers on a binary weapons project were convicted for Resource Conservation and Recovery Act (RCRA) violations involving storage and disposal of hazardous waste. They received sentences of three years' probation and 1,000 hours of community service.

FEDERAL STATUTES

A. Federal environmental statutes can be divided roughly into three categories by subject matter:

1. Pollution Control and Abatement;

2. Resource Protection and Land Use; and

3. Environmental Response and Remediation.

B. The following discussion briefly summarizes the statutes which most frequently impact naval operations. Among them, the RCRA, the CAA, and the Federal Water Pollution Control Act (FWPCA) (better known as the Clean Water Act) are of primary importance to most commanders.

POLLUTION CONTROL AND ABATEMENT STATUTES

A. **Resource Conservation and Recovery Act of 1976 (RCRA)**, formerly known as the **Solid Waste Disposal Act (SWDA)**, 42 U.S.C. § 6901 et seq.

1. RCRA was the first comprehensive Federal statute to deal with solid and hazardous wastes. Its objectives are "to promote the protection of health and the environment and to conserve valuable material and energy resources..." by, among other things:

a. Prohibiting open dumping on the land and requiring the conversion of existing open dumps to facilities not posing a danger to health or the environment;

b. encouraging process substitution, materials recovery, recycling and reuse, and treatment so as to minimize the generation of hazardous waste and its land disposal; and

c. promoting a national research and development program to improve solid waste management and resource conservation techniques.

2. RCRA applies to active waste facilities (unlike CERCLA which deals with cleanup of closed or abandoned sites) and provides for "cradle to grave" tracking of hazardous wastes through a permitting and manifesting scheme. It covers "persons" (including Federal agencies such as the Navy) who generate, transport, treat, store, or dispose of hazardous waste.

3. The Federal EPA establishes the basic regulatory scheme under RCRA. The states then pattern programs on the Federal model. Upon EPA approval of the state plan, which must have requirements at least as strict as the EPA's, the state becomes the primary permitting, inspecting, licensing, and enforcement authority. The Federal EPA maintains oversight authority and remains empowered to issue orders to non-Federal facilities requiring corrective action or other response measures it deems necessary in order to minimize the effect of releases of hazardous wastes into the environment.

4. With regard to Federal facilities, Executive Order No. 12,088 requires compliance with applicable pollution control standards, but does not give the EPA authority to issue administrative orders or to institute court action against another Federal agency. Instead, corrective actions are negotiated in the form of Federal Facilities Enforcement Agreements. Where agreement cannot be reached, the Office of Management and Budget (OMB) resolves the matter. Legislation is under consideration, however, which would allow the EPA to issue administrative orders to other Federal agencies, assess civil penalties against them, and institute criminal action against Federal authorities through the office of a special prosecutor within EPA.

5. Legislation is also being considered which would allow states to fine Federal facilities for RCRA violations.

6. The EPA is empowered to bring enforcement actions against non-Federal agencies when necessary, including suspension or revocation of permits, civil penalties of $25,000 for each day of continued noncompliance, and criminal penalties

of up to $250,000 and/or 15 years imprisonment for a knowing violation which places a person in imminent danger of death or serious bodily injury.

7. RCRA also provides that citizens may bring suit on their own behalf against "any person, including the United States" who is believed to be in violation of a permit, standard, regulation, requirement, prohibition, or order. The citizen bringing the suit must give 60 to 90 days advance notice of an intent to sue.

8. Situations which signal potential RCRA waste problems for the commander include painting, paint stripping, electroplating, solvent cleaning, degreasing, and boiler cleaning operations.

B. **Clean Air Act (CAA)**, 42 U.S.C. § 7401 et seq.

1. The CAA is the major Federal legislation concerning control of the nation's air quality. It was enacted to "promote public health and welfare" and "to encourage and assist the development and operation of regional air pollution control programs." To accomplish this end, the Act waives the United States' immunity from state actions and subjects all Federal agencies, including the Navy, to state and local air pollution requirements, both procedural and substantive. It also provides for Federal criminal and civil enforcement sanctions which can be levied in addition to state and local sanctions.

2. Under the Act, every state must develop and implement a Federal EPA-approved program, called a State Implementation Plan (SIP), to control the release of certain regulated pollutants (such as carbon monoxide, nitrogen dioxide, lead, and particulates) into the air. Each state is divided into Air Quality Control Regions (AQCR's) which may cross state lines. Each AQCR seeks to be "in attainment" with federally established acceptable quantitative pollution levels for each regulated pollutant emitted from each major stationary source within its boundaries. (Pollution from vessels is not addressed by the CAA, but is often included in state and/or local air pollution regulations.)

3. Without close attention to all operations, even seemingly innocuous ones, it is relatively easy to founder on state air regulations. California presently has the strictest clean air standards in the country. (Although at this writing a new Clean Air Act is about to be enacted which is expected to make standards throughout the country equally tough.) For instance, painting of aircraft, ships, or yellow gear can be violations, as can leaving paint cans uncovered, if the paint gives off an unacceptable level of volatile organic compounds (VOC's). Certain southern California counties require installations to have a permit limiting the amount of paint which may be used each month. One base received an NOV (and subsequently paid a fine) when well-meaning aircraft maintenance personnel used aircraft paint to stripe their CO's parking space. Similarly, ships in San Diego are

often fined for lighting off when their smoke exceeds a given opacity as determined by visual comparison of its darkness to a color-coded Ringleman chart. Perhaps the most serious Navy violation to have yet occurred involved the use of Methylethylketone (MEK), a banned solvent, to clean aircraft parts at North Island, California. A state inspection in 1988 resulted in a $5,000 per day fine totaling $2.9 million. After extensive negotiations, the Navy ultimately paid California $90,000.

C. **Federal Water Pollution Control Act (FWPCA) or Clean Water Act (CWA), 33 U.S.C. §§ 1251-1376**

1. The CWA is the major Federal legislation concerning improvement of the nation's surface water resources. Enacted to restore and maintain the chemical, physical, and biological integrity of the nation's waters, the Act encourages construction of publicly owned treatment works (POTW's) by establishing Federal grants and provides for the development of municipal and industrial waste water treatment standards.

2. The CWA also requires that a permit be obtained from the Army Corps of Engineers (COE) before any pollutant is discharged from a point source into the "navigable waters" of the United States or before any dredge spoil is discharged into them. The EPA maintains veto power over the permit process. Where a state has an approved state permit program, both the EPA and COE will suspend their issuance of permits for activities covered under the state's program. Permits establish effluent limitations and monitoring, recordkeeping, reporting, and inspection requirements. "Navigable waters" has been defined broadly and clearly includes wetlands and other areas in which one would not expect to see shipping.

3. The CWA also contains specific provisions for the regulation of ships' waste waters, including the use of marine sanitation devices.

4. The Act further prohibits the discharge of oil or hazardous substances into navigable or territorial waters and provides for the establishment of a national contingency plan (NCP) for the containment, removal, and dispersal of oil and hazardous wastes. Any discharge of any radiological, chemical, or biological warfare agent, high-level radioactive waste, or medical waste into navigable waters is also prohibited.

5. When the commander of a vessel or facility becomes aware that there has been an unlawful release of oil or hazardous waste, he must immediately report the release and all relevant facts.

a. All shore activities worldwide must report to the National Response Center (NRC) and the Navy On-Scene Coordinator (NOSC) by the most expeditious means possible, followed up with a message in the format found in

OPNAVINST 5090.1 series. The NRC hotline, reachable in the continental United States, is: 1-800-424-8802.

b. Shipboard Navy On-Scene Commanders (NOSCDR's) must report oil spills occurring within the contiguous zone to the appropriate shoreside NOSC and the NRC by message. Outside the zone, immediate notification should be given to the fleet NOSC by the most expeditious means practicable, followed by a message in the format prescribed by OPNAVINST 5090.1 series.

c. OPREP-3 reporting pursuant to OPNAVINST 3100.6C series may also be required for oil discharges resulting from catastrophic events or subject to geopolitical implications. Following the OPREP-3 report, the cognizant fleet or shoreside NOSC must forward an amplifying report in the format prescribed by OPNAVINST 5090.1 series.

6. Regulators of affected states will be greatly interested in the report of release as well. It is absolutely essential that commanders provide state officials with accurate release information in good faith. As this is being written, the state of Florida is considering bringing criminal charges against the commanding officer of a naval vessel for grossly underreporting the extent of an oil release.

7. Federal facilities are required by the Act to comply with all Federal, state, interstate, and local water pollution laws. And, although a provision for Presidential exemption exists, it is rarely invoked.

8. The Act provides for the assessment of judicial civil and criminal penalties in addition to administrative civil penalties and allows for citizen suits against alleged violators or against the Administrator of the EPA. For a knowing violation that puts any person in imminent danger of serious bodily harm, the CWA provides for criminal sanctions of up to 15 years imprisonment and a $250,000 fine. Permit violations are civilly punishable up to $25,000 per day of violation.

9. The CWA most frequently impacts the Navy in the area of pretreatment standards for waste water discharged into public sewer systems. These standards are set out in the facility's National Pollution Discharge Elimination System (NPDES) permit and they must be strictly followed. Failure to meet the standards can result in the state shutting down the offending operation.

D. **Marine Protection Research and Sanctuaries Act of 1972 (MPRSA)** or **Ocean Dumping Act (ODA)**, 33 U.S.C. § 1403 et seq.

1. The MPRSA regulates the dumping of all types of materials into ocean waters and prohibits or strictly limits the dumping of materials which could "adversely affect human health, welfare, or amenities, or the marine environment,

ecological systems, or economic potentialities." These purposes are accomplished through a permitting scheme. Permits for dumping of dredged materials are issued by the COE. Those for all other materials are issued by the Federal EPA, with the EPA having veto authority over the COE with respect to disputed permits.

2. "Dumping" is defined as a "disposition of material" not including "routine discharge of effluent incidental to the propulsion or operation of motor driven equipment on vessels."

3. "Material" includes dredged matter, solid waste, munitions, chemicals, biological and laboratory waste, and medical wastes, but vessel sewage covered by the CWA is excluded.

4. No permits may be issued for radiological, chemical, and biological warfare agents, high-level waste, or medical waste.

5. Enforcement provisions include civil penalties of $50,000 per violation and criminal penalties of one year imprisonment and a $50,000 fine. Citizen suits are also authorized.

6. Violations of the medical waste dumping provisions are punishable by civil penalties of $125,000 per incident, and criminal penalties of 5 years imprisonment and/or a $250,000 fine.

E. **Marine Plastic Pollution Research and Control Act of 1987 (MPPRCA)**, 33 U.S.C. § 1901 et seq.

1. The MPPRCA was enacted to implement the MARPOL Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships. The general provisions of the legislation do not apply to "warships, naval auxiliaries, or other ships owned or operated by the United States in noncommercial service," but the specific provisions regarding marine plastics will apply to these classes of vessels beginning 31 December 1993.

2. Present Navy plastics disposal policy is geared to the length of time a ship is at sea:

a. Three continuous days or less: retain all plastic waste onboard. Dispose ashore.

b. Four or more continuous days:

(1) Food contaminated plastics: retain onboard the last three days before reaching port; or

(2) non-food contaminated plastics: retain onboard at least 20 days, longer if possible.

c. More than 20 continuous days:

(1) Only plastic waste generated after the twentieth day may be dumped, and then only if retaining it would endanger health or safety, create an unacceptable nuisance, or compromise combat readiness.

(2) If dumped, the waste must be properly packaged, weighted so it will sink to the bottom, and discharged more than 50 miles from land.

(3) The dumping must be approved by the commanding officer, logged, and reported by message at port.

3. After 1993, violations of the MPPRCA could result in criminal penalties of a $50,000 fine and/or 5 years imprisonment. Each day of continuous violation will be considered a separate violation, and up to half of any fine assessed will be payable to informants.

RESOURCE PROTECTION AND LAND USE STATUTES

A. **National Environmental Policy Act of 1969 (NEPA)**, 42 U.S.C. § 4321 et seq.

1. The NEPA is procedural in nature; that is, it sets up a mandatory decisionmaking process with regard to Federal actions which have the potential for affecting the environment in a significant way. According to the Council on Environmental Quality (CEQ) (which was established by the Act): "The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore and enhance the environment." Although NEPA requires a specific assessment process, it does not mandate any particular decision upon completion of the process.

2. NEPA relies upon a three-tiered scheme for environmental impact analysis:

a. Major Federal actions which have little environmental effect (such as reductions in force, or most repair, maintenance, and minor construction projects) are categorically excluded from analysis. These actions are called "CATEX's."

b. Where the impact of a Federal action may or may not be severe, or where a proposed action is likely to be controversial with respect to environmental effects, an environmental assessment (EA) must be made. As a result of the EA, it may be concluded that the proposed activity is a "major federal action significantly affecting the quality of the human environment" ("MFASAQHE"), or a "finding of no significant impact" ("FONSI") may be made.

-- All EA's must be forwarded to the Chief of Naval Operations (OP-45) for review by a CNO Environmental Impact Review Panel which will determine whether an Environmental Impact Statement (EIS) or FONSI is appropriate.

c. If a proposed action is an MFASAQHE or is likely to be controversial, an EIS must be prepared.

-- Generally, an EA or an EIS will be necessary if the proposed action requires a permit from the Army Corps of Engineers or if consultation with the U.S. Fish and Wildlife Service or the State Historic Preservation Officer (SHPO) is required.

3. An EIS must fully discuss:

a. The environmental impact of the proposed action;

b. any adverse environmental effects which cannot be avoided if the proposal is implemented;

c. alternatives to the proposed action;

d. the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and

e. any irreversible and irretrievable commitments of resources which would be involved in the proposed action, if implemented.

4. Before actually preparing a draft environmental impact statement (DEIS), request comments on the appropriate scope of the statement from other Federal, state, and local agencies which have jurisdiction by law or special expertise with respect to any environmental impact involved or which are authorized to develop and enforce standards applicable to the proposed action, and from the public. DEIS's are normally forwarded, along with 15 copies, to CNO (OP-45) for Federal Register publication and filing with the EPA. After a DEIS has been written and published, allow a minimum of 45 days from the date of publication for additional comments.

If CNO (OP-45) so decides, you may hold a public hearing to solicit comments. This process of determining the appropriate focus of the EIS is called "scoping."

5. A final environmental impact statement (FEIS) can be filed with the EPA after 60 days from the date of Federal Register publication. The FEIS must incorporate all comments received on the DEIS.

6. Ninety days after publication of the Federal Register notice announcing the filing of the DEIS with EPA, or thirty days after publication of the Federal Register notice of the filing of the FEIS with EPA, CNO (OP-45) can prepare a public record of decision (PRD) for publication in the Federal Register.

7. Detailed guidance on the NEPA process and the preparation of EIS's is contained in OPNAVINST 5090.1.

8. Federal projects can be stopped by the issuance of a Federal injunction when a command has failed to prepare an EIS or has prepared an inadequate one. For example, a 200-unit housing project at one base was delayed two years at an additional cost of $9 million because of deficiencies in the NEPA process identified by public controversy. Consequently, it is essential that commanders carefully direct and monitor the EIS process, keep close liaison with the appropriate NAVFAC EFD, and ensure that all alternatives are addressed in the EIS.

B. **National Historic Preservation Act of 1966 (NHPA)**, *16 U.S.C. § 470 et seq.*

1. The policy of the NHPA is to protect federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship and to protect archeological resources and sites on public land. To this end, the Act establishes the National Register of Historic Places and requires that Federal agencies, such as the Navy, take into account the effects of any Federal "undertaking" on any district, site, building, structure, or object included in or eligible for inclusion in the Register. Like NEPA, NHPA is a procedural, rather than substantive, statute intended to force consideration of environmental issues in the Federal decisionmaking process.

2. With facilities dating back to the 1700's, the Navy has many structures which require adherence to NEPA. A yellow flag should be raised when demolition of any structure 50 or more years old is considered.

C. **Archaeological Resources Protection Act of 1979 (ARPA)**, 16 U.S.C. § 470aa et seq.

The ARPA provides criminal sanctions against individuals who excavate, remove, damage, or alter any archaeological resource located on public or Indian lands without a permit and against individuals who sell, purchase, exchange, transport, or receive, or offer to sell, purchase, or exchange any archaeological resource which was unlawfully obtained.

D. **Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA)** or **Ocean Dumping Act (ODA)**, 33 U.S.C. § 1401 et seq.

1. The MPRSA allows the Secretary of Commerce to establish and promulgate regulations with regard to ocean marine sanctuaries in order to preserve or restore the area of their establishment for conservation, recreational, ecological, or aesthetic values.

2. The Act also provides for civil penalties of up to $50,000 per day for each day of violation.

E. **Marine Mammal Protection Act of 1972 (MMPA)**, 16 U.S.C. § 1361 et seq.

1. The MMPA protects certain marine mammals by proscribing their "taking," and by establishing a marine mammal commission.

2. Harassment of seals and dolphins is a violation of the Act which provides for both civil and criminal penalties.

F. **Endangered Species Act of 1973 (ESA)**, 16 U.S.C. § 1531 et seq.

1. The ESA prevents Federal agencies from taking any action that is likely to jeopardize the continued existence of any "endangered species" or "threatened species" or result in the destruction or adverse modification of the "critical habitat" of those species unless an exemption has been granted.

2. The Supreme Court clearly addressed the potential conflicts between endangered species preservation and mission accomplishment in Tennessee Valley Authority v. Hill, 98 S. Ct. 2276, at 2297 (1978).

> It was the intent of Congress in passing the ESA "to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every

> section of the statute. All persons, including federal agencies, are specifically instructed not to "take" endangered species, meaning that no one is 'to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect' such life forms. (Citations omitted) .... Agencies in particular are directed by sections 2(c) and 3(2) of the Act to "use ... all methods and procedures which are necessary" to preserve endangered species. (Citations omitted). In addition, the legislative history ... reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species (and) ... to give endangered species priority over the "primary missions" of federal agencies. (Emphasis added.)

3. The ESA also makes it illegal to attempt to "possess, sell, deliver, carry, transport, or ship, by any means whatsoever," any taken endangered species.

4. The Act provides for civil penalties of $10,000 for each violation and criminal penalties of $20,000 and one years' imprisonment.

5. Suits may be brought by citizens on their own behalf to enforce the ESA's provisions by injunction. They may recover attorney fees and court costs, but cannot be awarded damages.

6. Camp Lejeune, North Carolina is an outstanding example of a military installation whose day-to-day operations have been significantly impacted by the ESA. The camp is considered by the North Carolina Department of Natural Resources and Community Development (DNRCD) to have as many as 10 animal species and 28 plant species considered endangered, threatened, or rare.

Chief among the endangered species is the red-cockaded woodpecker. The woodpecker's critical habitat is mature southern pine forests containing "over mature," 60- to 80-year-old trees with red heart disease. The woodpeckers nest in the pulp of the diseased trees. Because of widespread timber management practices, few trees of this age remain on private lands.

In a biological opinion, the North Carolina DNRCD determined that the training activities in the camp's mechanized training area (such as cutting of pine trees for barricades, driving heavy vehicles over tree roots, digging foxholes, and girdling trees with communications lines) were destroying the species' critical habitat.

After several consultations with the DNRCD, Base Order 11015.6B was issued establishing a red-cockaded woodpecker program prohibiting, among other things, the use of any vehicle off designated trails; the cutting or damaging of pine trees, any digging which might cause root damage to pine trees, bivouacking, and the firing of any artillery within established habitat areas and buffer zones; and the removal or destruction of signs marking restricted areas.

G. **Coastal Zone Management Act of 1972 (CZMA)**, 16 U.S.C. § 1451 et seq.

The CZMA is intended to preserve, protect, develop, restore, and enhance the national coastal zone and to encourage intergovernmental participation and cooperation in connection with it. The Act requires that, where an approved state coastal zone management program exists, any Federal development project -- the effects of which spill over to non-Federal coastal areas -- must be consistent with the state program to the maximum extent practicable. Like NEPA and NHPA, CZMA mandates a decisionmaking process, the "consistency determination process," without creating substantive rights.

ENVIRONMENTAL RESPONSE AND REMEDIATION

A. **Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)**, as amended by the **Superfund Amendments and Authorization Act of 1986 (SARA)**

1. CERCLA is a nonpenal, strict liability statute intended to enforce the cleanup of nonoperating or abandoned hazardous waste sites known as "treatment, storage, or disposal facilities" (TSDF's) through "remedial actions." Owners/operators of contaminated facilities, generators of hazardous waste who arrange for disposal, and transporters of the waste to the site are jointly and severally liable for all costs of CERCLA response/remedial actions incurred by the Federal EPA, a state, or any other person.

2. CERCLA also establishes a National Priorities List (NPL) as a means of ranking hazardous waste sites nationwide to ensure that those posing the greatest environmental hazard are cleaned up first. When a site is listed on the NPL, a "remedial investigation" (RI) and "feasibility study" (FS) are undertaken. A proposed plan for cleanup is then published for public comment after which a "record of decision" (ROD) is made. Finally, a "remedial design" (RD) is established to fully detail the planned "remedial action" (RA) for the site. Throughout this process, the state will actively participate in long-term planning and must be given notice and an opportunity to comment on each major facet of the proposed cleanup.

3. Sites located on former and active Navy and Marine Corps shore activities are covered by the Installation Restoration Program (IRP). Phase I of the IRP involves a Preliminary Assessment and Site Investigation to determine the nature and extent of any contamination followed by consideration for listing on the NPL. In Phase II, which must begin within six months of any listing on the NPL, a Technical Review Committee (TRC) is established and a cleanup plan -- which takes into account comments from the TRC and the public -- is developed after the study. At the completion of the study, the commanding officer must sign a Record of Intent (ROI) and forward it to the EPA which will ultimately issue a Record of Decision (ROD) on the plan. Phase III is the implementation of the approved plan.

4. In addition to the NPL, Congress established a Federal Facilities Hazardous Waste Compliance Docket (FFHWCD) when it enacted SARA. The purpose of the FFHWCD is to provide Congress with a means of monitoring Federal agencies to ensure that they are expeditiously addressing the cleanup of hazardous waste at Federal facilities.

5. SARA also establishes the "Defense Environmental Restoration Program" (DERP) and the "Defense Environmental Restoration Account" (DERA) under which DoD hazardous waste cleanups are planned, monitored, and funded. The Secretary of Defense is charged with ultimate responsibility for the program and for reporting annually to Congress on the status of cleanup efforts within DoD.

6. Although DERA provides funds for hazardous waste cleanup, recurring requirements for environmental compliance must be funded at the activity level.

7. CERCLA further requires the immediate reporting of any unpermitted release (land), discharge (water), or emission (air) of designated hazardous substances to the National Response Center (NRC). The NRC hotline is the same number as is used for reporting oil spills under CWA: 1-800-424-8802.

EPA REGIONAL OFFICES

Region I

Environmental Protection Agency
John F. Kennedy Federal Bldg.
Room 2203
Boston, MA 02203
(617) 565-3715

Region II

Environmental Protection Agency
Jacob K. Javitz Federal Bldg.
26 Federal Plaza
New York, NY 10278
(212) 264-2657

Region III

Environmental Protection Agency
841 Chestnut Building
Philadelphia, PA 19107
(215) 597-9800

Region IV

Environmental Protection Agency
345 Courtland Street, NE.
Atlanta, GA 30365
(404) 347-4727

Region V

Environmental Protection Agency
230 South Dearborn Street
Chicago, IL 60604
(312) 353-2000

Region VI

Environmental Protection Agency
First Interstate Bank Tower
at Fountain Place
1445 Ross Avenue 12th Floor Suite 1200
Dallas, TX 75202
(214) 655-6444

Region VII

Environmental Protection Agency
726 Minnesota Avenue
Kansas City, KS 66101
(913) 551-7000

Region VIII

Environmental Protection Agency
999 18th Street, Suite 500
Denver, CO 80202-2405
(303) 293-1603

Region IX

Environmental Protection Agency
1235 Mission Street
San Francisco, CA 94103
(415) 556-6322

Region X

Environmental Protection Agency
1200 Sixth Avenue
Seattle, WA 98101
(206) 442-1200

ENVIRONMENTAL LAW ISSUES - Useful Telephone Numbers

National Response Center

(Oil and Hazardous Substance Spills or Releases)	(800) 424-8802

DOD Environmental Policy

COL Larry Hourcle, USAF	(202) 697-9136
Office of the Assistant General Counsel (Logistics)	A/V 227-9136

Navy Policy

Navy Environmental Law Office	(202) 692-2247
Ms. Elsie Munsell	A/V 222-2247
CDR Thomas N. Ledvina (Navy environmental policy)	

Litigation

Office of the Judge Advocate General	(202) 325-9870
General Litigation Division (Code 34)	A/V 221-9870
CDR Ron Borro, LCDR Rick Evans	
Office of the General Counsel	(202) 746-1053
Litigation Office	A/V 286-1053
Mr. Dick Eddy, Mr. Steve Banks, Ms. Nancy Glasier	

Area Coordinators

Commander in Chief, U.S. Atlantic Fleet	(804) 444-6165
(Code N02LE)	A/V 564-6165
CDR Patrick A. Genzler	
(Environmental expert for activities for which CINCLANTFLT is area coordinator)	
Commander in Chief, U.S. Pacific Fleet	(808) 471-0624
LCDR John Quinn	
(Environmental expert for activities for which CINCPACFLT is area coordinator)	

Regional Coordinators

Commander, Naval Base, San Diego CDR Don Blake (Environmental expert for activities in and about San Diego)	(619) 532-1418 A/V 522-1418
Commander, Naval Base, San Francisco CDR Joe M. Parnell (Environmental expert for activities in and about San Francisco)	(415) 395-3931 A/V 475-3931

NAVFAC
(Environmental counsel for NAVFAC issues, especially hazardous wastes, air and water permits, etc.)

Headquarters Office of Counsel Mr. Bill Mahn, Mr. Ray Goldstein, Ms. Angie Ryan	(202) 325-8552 A/V 221-8552
Northern Division (Philadelphia and north) Office of Counsel Mr. Ralph Lombardo, Ms. Patricia Chalfant, Mr. David Patrone	(215) 897-6105 A/V 443-6105
Atlantic Division (Norfolk, Puerto Rico, Mid-Atlantic states) Office of Counsel Mr. Stephen Anderson	(804) 444-9507 A/V 564-9507
Southern Division (Charleston and points south) Office of Counsel Mr. Stan Barnett	(803) 743-0865 A/V 563-0707
Southwestern Division (San Diego and vicinity) Office of Counsel Mr. Perry Sobel	(619) 556-2312 A/V 522-2312
Western Division (west coast except San Diego & Seattle) Office of Counsel Ms. Cynthia Hall	(415) 877-7113 A/V 859-7113

OICC Northwest
(Seattle, Alaska, greater Northwest)
Office of Counsel — (206) 476-8666
Mr. John H. Wright, Ms. Judy Conlow — A/V 439-8666

Pacific Division
(Hawaii, Guam, islands and points west)
Office of Counsel — (808) 471-8469
Rebecca Greenway

Office of Legislative Affairs

CDR Larry D. Wynne — (202) 695-0451
LCDR Mike McGregor — A/V 225-0451
(Legislative comment and input on environmental matters)

OPNAV Contacts

OP-45, Environmental Protection, Safety and Occupational Health Division
Director — (202) 692-5577
CAPT John P. Collins — A/V 222-5577

Head, Shore Facilities Branch — (202) 692-5595
Mr. Paul Yaroschak — A/V 222-5595

Head, Ship & Systems Branch — (202) 692-5572
Mr. Larry Koss — A/V 222-5572

OP-04E1, NEPA Coordinator
Mr. Thomas J. Peeling, Ms. Anne Anderson — (202) 325-7344
(Approval of EIS's, EA's) — A/V 221-7344

NAVSEA Contacts

Office of Counsel — (202) 602-8446
Ms. Iona Evans, Ms. Pam Morris

Marine Corps

Headquarters
LtCol O. E. Nangle (202) 694-2150
(Overall coordination) A/V 224-2150

East Coast Counsel Office
LtCol D. B. Mercier (919) 451-5053
A/V 484-5053

West Coast Counsel Office
Randall B. Pyles (619) 725-5610
A/V 365-5610

ENVIRONMENTAL COMPLIANCE SUPPORT SERVICES

Naval Energy and Environmental Support Activity (NEESA)
(NEESA acts as Executive Manager of NEPSS below)

Gary Gasperino	(805) 982-2638 A/V 551-2638

Naval Environmental Protection Support Service (NEPSS)

George Wandrocke	(805) 982-4984 A/V 551-4984

Specialty offices

Ships Environmental Support Office (SESO) A. E. Lardis	(301) 267-3229 A/V 281-3229
Ordnance Environmental Support Office (OESO) Pam Clements	(301) 743-4534/4906 A/V 364-4534/4906
Aircraft Environmental Support Office (AESO) Dr. E. L. Douglas	(619) 545-2914 A/V 735-2914
Marine Environmental Support Office (MESO) R. K. Johnston	(619) 553-5330 A/V 553-5330

FREEDOM OF INFORMATION - SECNAVINST 5720.42D

QUICK REFERENCE GUIDE

Definition	Allows public access to Federal access to Federal Government files and records
Requester	Anyone
Requirements	Must be in writing. Reference or imply FOIA with description of the record along with payment or promise to pay.
Action Upon Receiving Request	Ascertain if your command has cognizance. Ten working days to answer once received by appropriate command. Disclose material or send copy of forwarding letter to requester.
Guidelines	Provide material unless item is exempted and government interest at jeopardy. Consult SECNAVINST 5720.42(series) for exemptions.
Denial Route	OEGCMA only sends denial letter. Letter sent when matter is exempt, there is a dispute over payment, or record is lost.
Appeals	Service Secretary, Judicial Review
Report	Annual

PRIVACY ACT - SECNAVINST 5211.5C

QUICK REFERENCE GUIDE

Definition	Safeguard personal information in custody of Federal government, permit individual access to own records to review or correct		
Requester	Federal Government seeking information from member	DoD, DoN, DoT, other gov't agencies	Member seeking information re: self
Requirements	Information collected will be stored in system of records by identifier	Must have need to know	Request in writing if you want access to info, correction of records
Action Upon Receiving Request	None	Release/deny	Answer in 10 working days; action must be taken by 30 working days
Guidelines	Use Privacy Act statement when asking for info that will be stored by identifier	Third person must have right to know	Given access unless matter is exempted. Consult SECNAVINST 5211.5 (series) for exemption.
Denial Route	Person who refuses to sign must be told possible consequences	Custodian	OEGCMA denies request
Appeals	None	None, but criminal penalties for wrongful access	Service Sec'y; Statement of Dispute; Judicial Review
Report	1. Annual 2. Must account for disclosure in record		

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 fact-finding 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.

NOTES

NOTES (continued)

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.

☆ U.S. GOVERNMENT PRINTING OFFICE:1992-600-085/43502