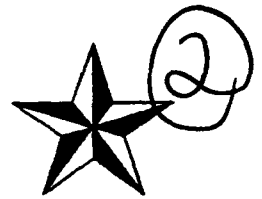
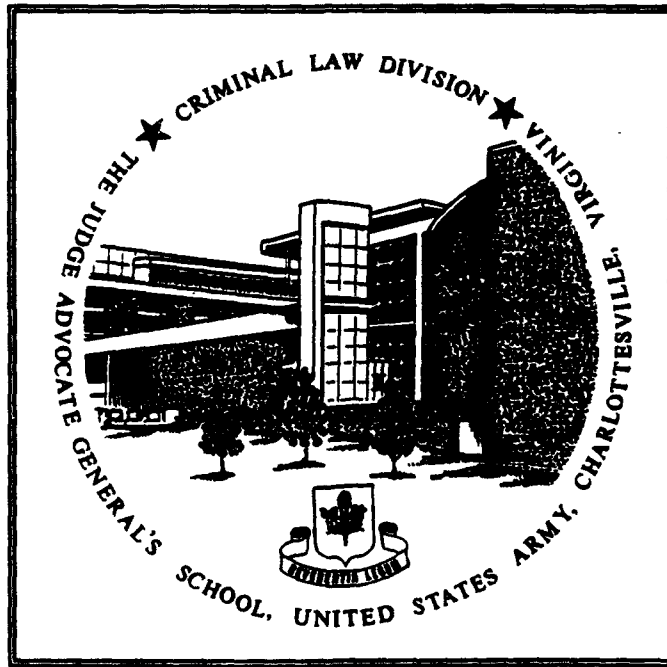


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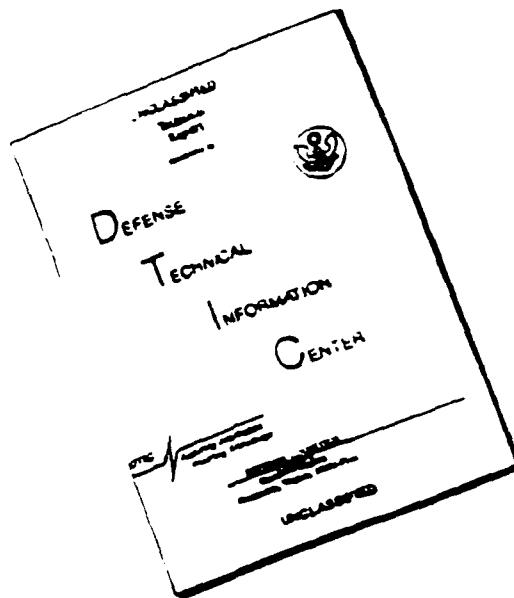


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SENIOR OFFICERS' LEGAL ORIENTATION

CRIMINAL LAW TEXT

PREFACE

This text is prepared by the Criminal Law Division, The Judge Advocate General's School, for the Senior Officers' Legal Orientation (SOLO) course. This text and the references provide background reading and research materials for the course. They also form the basis of the legal instruction presented at the Pre-Command Course conducted at Fort Leavenworth, Kansas. This deskbook may also serve as a convenient source of legal information for the commander in the field and as a guide to understanding the many criminal law problems which confront today's Army commander. The local staff judge advocate should be consulted on any legal problem which arises in the field of criminal law.

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SOLO CRIMINAL LAW DESKBOOK

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CHAPTER 1

INTRODUCTION TO CRIMINAL LAW

Introduction

We grow up believing that the law is fixed and eternal, but in reality, the law is man-made, fallible, dynamic, and ever-changing. Today's rules can become tomorrow's anachronisms. Today's commander cannot rely on knowledge acquired in the past, and it is self-defeating to long for a return to "brown-shoe" military justice. Today's commander must be aware of the system that exists here and now, and strive to apply it fairly and with intelligence. This book will assist you in understanding the recent changes in the Uniform Code of Military Justice and the Manual for Courts-Martial, and in utilizing the military justice system as it now exists.

It is not the purpose of this book to make commanders experts in military justice. Rather, it is to provide an awareness of the major requirements of military justice. This book is not intended to replace the basic sources to which it refers, nor to do the commander's thinking. It is only an aid, to be applied with sound discretion and mature judgment. There is a recurring theme throughout this guide; that is, the commander must seek the advice and assistance of the staff judge advocate. The "SJA" is your expert and adviser on military law; don't wait until your problem is out of control before seeking the staff judge advocate's counsel and advice.

A. Sources

1. The Constitution. The basic source for the separate system of criminal law which prevails in the military is the Constitution of the United States. Article I, section 8, of that document provides that Congress shall have the power to "make Rules for the Government and Regulation of the land and naval Forces."

2. The UCMJ. In 1950, Congress used its constitutional powers to enact the Uniform Code of Military Justice (UCMJ), which was substantially revised by the Military Justice Acts of 1968 and 1983. This statute provides a separate system of military criminal law for the armed services, much the same as the State of California and the State of Maryland have separate systems of criminal justice to meet their societal needs.

3. The Manual for Courts-Martial. Like most other statutes, the Uniform Code of Military Justice requires a detailed set of rules to supplement and explain its various provisions. Article 36 of the UCMJ authorizes the President to make rules prescribing the procedures to be followed before military tribunals, including the rules of evidence. In addition, Article 56 empowers the President to establish the levels of punishment for most offenses. These rules are issued in the form of an Executive Order by the President and are found in the Manual for Courts-Martial, 1984. Therefore, the Manual has the force and effect of law, and it must be complied with.

4. Army Regulations. In addition to the Manual for Courts-Martial, AR 27-10, Military Justice, fine tunes the everyday administration of military justice. This regulation announces additional rules and procedures which must be followed. Furthermore, supplemental military justice regulations have been issued by many local commands. Commanders must also consult and comply with these regulations.

5. Court Decisions. While the Manual and Army regulations supplement and explain the UCMJ, the various courts involved with military criminal law interpret all of these sources of law. The Supreme Court of the United States and lower federal courts hear cases involving military criminal law. These cases are usually limited to (1) appeals based upon lack of jurisdiction and (2) appeals based upon a denial of some constitutional right. The United States Court of Military Appeals is the highest appellate court within the military judicial structure. This court is composed of five civilian judges appointed by the President. In addition, there is the United States Army Court of Military Review, an intermediate appellate court of review consisting of military appellate judges. The decisions of these courts interpreting statutes and regulations have the force of law and are binding upon commanders.

6. The Staff Judge Advocate. You can readily see from the above discussion that the sources of military criminal law are varied. To solve most military justice problems, you must refer to one or all of these sources. This is what the staff judge advocate is trained to do. The SJA is your legal adviser. Just as corporations consult with their general counsel before making legal and business decisions, commanders should contact their staff judge advocate for advice in dealing with disciplinary problems.

B. Background and Development

1. Background. The Uniform Code of Military Justice had its beginnings early in our history. Rules for the government of our Army have been in force since the time of the American Revolution, when the Army law consisted of the Articles of War. The first Articles of War were adopted by the Second Continental Congress on 30 June 1775, just three days before George Washington took command of the Continental Army. These Articles were patterned after the British Army Articles, which were derived from earlier European articles traceable to the middle ages. Our system of military justice is the product of centuries of experience in many countries. Do not get the idea, however, that our present Uniform Code of Military Justice is an outmoded historical relic. On the contrary, while retaining the substance of what has proven sound, Congress has periodically reconsidered and revised the military justice system to be in accord with new knowledge, experiences, and changing law.

2. The Uniform Code of Military Justice, 1950. A significant revision in the military criminal law system occurred with the adoption of the Uniform Code of Military Justice. It combined the laws formerly governing the Army, Navy, and Air Force into one uniform code which governs all armed forces of the United States.

3. The Military Justice Act of 1968. A major revision of the Code and the Manual occurred with the Military Justice Act of 1968. The revised Code and Manual incorporated changes in the law since 1951 and made substantial modifications to the military justice system.

Among the changes brought about by the 1968 Act is a provision which gives soldiers the right to a qualified lawyer at a special court-martial, in all but the rarest of circumstances. Article 27(c) provides that an accused shall be represented by a qualified lawyer except where a lawyer cannot be obtained due to physical conditions or military exigencies. AR 27-10, Military Justice, paragraph 5-5a, provides that in all special courts-martial the accused must be afforded the opportunity to be represented by qualified counsel. Remember, this right to counsel is in addition to the accused's right to hire a civilian lawyer or request individual military counsel. If the accused requests individual military counsel, however, the detailed military counsel will normally be excused by the detailing authority.

Besides providing for legal counsel at special courts-martial, the Military Justice Act of 1968, as implemented by AR 27-10, provides that a military judge should be detailed to special courts-martial whenever possible. In the event that the special court-martial is empowered to adjudge a bad conduct discharge, a military judge must be detailed. The Military Justice Act of 1968 also gives an accused the right to request trial by a military judge alone in all cases except those which are referred to trial as capital cases. If the accused elects trial by judge alone, the military judge determines the guilt or innocence of the accused and, if there is a finding of guilty, the sentence. The Act also placed a number of added responsibilities upon the military judge. Under the Act the military judge is the presiding officer of the court-martial. The judge makes all legal and procedural rulings at trial and cannot be overruled on these decisions.

4. New Developments in the System.

a. Changes to the UCMJ. Since 1979, Congress has amended the Uniform Code of Military Justice several times in order to increase the efficiency of our military criminal law system. In November 1979, Public Law 96-107 amended Article 2, UCMJ, authorizing court-martial jurisdiction over service members entering the armed forces as a result of recruiter misconduct.

The Military Justice Amendment of 1981 became effective in January 1982. One significant change is that the accused is no longer entitled to be represented by more than one military lawyer. If the accused requests individual military counsel and that counsel is reasonably available, detailed military counsel shall be excused at the detailing authority's discretion. Reasonable availability may be defined by the Service Secretaries. AR 27-10, chapter 5, defines reasonable availability in the Army.

Another change allows the commander or convening authority to direct excess leave for an accused who has been convicted by court-martial, given a punitive discharge but not sentenced to confinement. Since a punitive discharge is not effective until the completion of appellate review, the soldier would, prior to the change, return to his or her unit. Under the old rule, excess leave was not possible unless the accused requested it.

The Military Justice Act of 1983 substantially revised the Uniform Code of Military Justice. In an

effort to improve the efficiency and administration of our military justice system, several necessary changes were made. The Act relieved commanders of the administrative burden connected with personally excusing court-members before trial, eliminated requirements that commanders make certain legal determinations, and alleviated many redundancies that existed in the system. The most significant revisions in the Act provide for direct review of Court of Military Appeals decisions by the United States Supreme Court and authorize Government appeal of certain rulings by military judges at the trial level. This major revision was incorporated into the 1984 Manual for Courts-Martial and took effect on 1 August 1984.

The Military Justice Amendments of 1986, signed on 14 November 1986, further refine the military justice system. The most significant change involves the expansion of court-martial jurisdiction to include jurisdiction over reserve component soldiers who commit offenses while in an Inactive Duty Training (IDT) status. In addition, the Act authorizes, in limited circumstances, reserve component soldiers to be involuntarily called to active duty for the purpose of trial by court-martial, investigation under Article 32, UCMJ, or nonjudicial punishment.

After 1986, several national defense authorization acts made many minor changes to the UCMJ.

b. Changes to the Manual for Courts-Martial.

In 1980, the Joint Service Committee on Military Justice rewrote the Manual for Courts-Martial which took effect on 1 August 1984 and replaced the Manual for Courts-Martial, 1969 (Rev. ed.).

5. The Trend. The trend in military justice legislation and court decisions is to increase the efficiency of our criminal justice system while at the same time balancing and protecting the rights of the accused. In light of these developments and continued public scrutiny of military justice matters, commanders must have a thorough knowledge of the system, and seek the advice of the staff judge advocate on all but routine matters.

C. Why a Separate System of Military Justice?

One of the unique features of our military society is its separate system of criminal justice. Most justice problems involving military personnel are resolved within

this separate military justice system and only infrequently reach civilian criminal courts. Why do we have a separate justice system?

This question can be answered with three words: mission and location. The mission of the military is to defend the United States. No other institution has this mission. Because of this, many crimes in the military--AWOL, disobedience, disrespect--have no counterpart in civilian law. Our military justice system must also function in wartime as well as in peacetime. This raises not only substantive, but geographical problems for our state or federal civilian systems. Would a state or federal court be available in every part of the world where the United States might go to war? The answer is clearly no. Accordingly, we have our own military justice system that reinforces the military mission and goes whenever we go.

It is inevitable in a democratic society such as ours that the military justice system will be compared with the civilian court system. While there are differences, in almost every instance, military accuseds receive rights and protections equal to or superior to those enjoyed by civilian defendants. Commanders, however, must continue to administer military justice with utmost fairness and efficiency. By doing so, the trust and confidence bestowed upon military leadership by the American people and the Congress will be preserved.

D. Jurisdiction of Courts-Martial

1. Active Duty Jurisdiction. On June 25, 1987, the Supreme Court decided the case of Solorio v. United States. This case dramatically changed the rules concerning court-martial jurisdiction. The Court held that jurisdiction of a court-martial depends solely on the accused's status as a member of the armed forces, and not on whether the offense is service-connected. The case overruled the "service-connection test" established by the Court in O'Callahan v. Parker. Now jurisdiction will be established by simply showing that the accused is a member of the armed forces.

Solorio creates a situation where both the military and civilian authorities may have jurisdiction over a soldier and his offense, e.g., an offense committed off post. This will require SJA coordination with the local civilian prosecutor. Between the two, they will decide who can best prosecute the offender.

Civilians, including family members, are not tried before courts-martial. If they commit offenses on post, they may be tried in the local state or federal court. Commanders should consult with their SJA when issues arise involving misconduct by civilians.

2. Jurisdiction over Reservists. As a part of the Military Justice Amendments of 1986, Congress amended Articles 2 and 3 of the UCMJ. The new amendments extend jurisdiction over reservists on all types of training; and, in short, if the reservist is training, he or she is subject to military jurisdiction for crimes committed during the training period. The most significant change allows the military to exercise authority over reservists who commit crimes while performing weekend drill in IDT status.

Recognizing that IDT periods are brief, usually lasting only one weekend, the amendments to Article 3 allow reservists to return home at the end of IDT drill without divesting the military of jurisdiction. As a result, nonjudicial punishment may be handled during successive drill periods. Specifically, while punishment can be imposed during one drill period, it can be served during successive drill periods. Additionally, under the new Article 2(d), the government can order to involuntary active duty those reservists who violate the UCMJ during a training period. Reservists can be involuntarily ordered to active duty for Article 32 investigations, courts-martial, and nonjudicial punishment.

Active duty convening authorities must be familiar with the changes in reserve jurisdiction because all general and special courts-martial will be tried at the active duty post which supports the reserve component unit (includes National Guard units when federalized). In addition, only the active duty general court-martial convening authority can authorize an involuntary recall to active duty of a reservist for the purpose of an Article 32 investigation, court-martial, or nonjudicial punishment. Army Regulation 5-9, appendix B-1, contains a list of active duty posts and the areas they support with regard to reserve component legal matters.

3. Jurisdiction and Convening Authority.

A general court-martial convening authority may establish contingency plans which, when ordered executed, designate provisional units whose commanders may convene special courts-martial. A deploying general court-martial convening authority may, for example, establish a rear detachment whose commander has special court-

martial convening authority.

A superior convening authority may withhold the authority of a subordinate convening authority to dispose of individual cases, types of cases, or generally. A general court-martial convening authority establishing area court-martial jurisdiction is an example of a superior convening authority withholding authority from subordinate convening authorities. Establishing area court-martial jurisdiction usually results in more expeditious processing of military justice actions.

E. The Commander's Role in Military Justice

1. The Increasing Burden. Anyone who has compared the size and weight of the 1951 Manual for Courts-Martial with the 1969 or 1984 editions knows that military criminal law has greatly expanded in the past decades. The law of search and seizure, self-incrimination, lineups, and many other areas has burgeoned. Also, commanders now confront new civil and administrative legal problems in the areas of personnel law, environmental law, funding requirements, and labor law--to name only a few. In all contexts, the legal decisions commanders must make are increasingly technical. To help resolve these problems, the Judge Advocate General's Corps conducts training for commanders, provides military lawyers to commanders at all levels, and in many instances relieves commanders of administrative burdens associated with those increasing responsibilities.

2. The Commander and the Defense Function. The military defense counsel is frequently the lightning rod for criticism and hostility directed at the legal protections of the accused. Defense counsel occasionally succeed in getting cases dismissed because of excessive government delay, in having evidence excluded because of illegal searches or interrogations, and in winning acquittals or lenient sentences for the accused. In response, some have suggested, in a variety of phrases, that the military defense counsel ought to "ease off," ought to do less than can be done in order to ensure that "justice" is accomplished. ANYTHING LESS THAN FULL AND ZEALOUS REPRESENTATION WITHIN THE LIMITS OF THE LAW IS INSUFFICIENT UNDER ETHICAL AND CONSTITUTIONAL STANDARDS. The defense counsel who does not fully and vigorously represent a client is professionally derelict. Those who fear that defense counsel are unfettered in their efforts for the accused should be aware that counsel practice under strict criteria of professional conduct; these are found in the UCMJ itself, the Manual for Courts-Martial,

the Rules of Professional Conduct for Lawyers (DA Pam 27-26), and ethical standards established by the American Bar Association. These criteria are vigorously enforced. The Judge Advocate General's Professional Responsibility Advisory Committee investigates allegations of counsel misconduct and recommends disciplinary action to The Judge Advocate General.

Unfortunately, recent changes in military law may have given new company grade commanders less tolerance for the defense function. Before the 1968 legislation which injected military lawyers into special courts-martial, officers from all branches prosecuted and defended cases in that forum. That experience created in most an understanding for both the prosecution and defense role. Without this experience, new commanders participate only in the law enforcement or court member functions. Some tend to be intolerant of the defense function. Many commands are alleviating this problem by providing young Army leaders a more balanced picture of the prosecution and defense function through temporary assignment to local JAG offices and other educational programs. These include requiring lieutenants to attend the court-martial of a member of the battalion and officer professional development classes taught by judge advocates.

On a practical level, commanders should recognize that defense counsel are fellow officers who provide an important service to the command. They should acknowledge the importance of this service by following these simple rules: 1) allow the defense counsel easy access to you and your soldiers to discuss a case or locate a witness; 2) provide soldiers with a copy of the Article 15 specification(s) and witness statements so the defense counsel can provide thorough and proper advice on whether to accept the Article 15 proceeding; and (3) avoid derogatory comments, instead teach your officers and NCOs the importance of the defense functions.

3. The Commander's Prosecutorial Discretion. One of the commander's greatest powers in the administration of military justice is the exercise of prosecutorial discretion--to decide whether a case will be resolved administratively or referred to trial, and what the charges will be. The Manual for Courts-Martial mandates two rules in this area. First, cases should be resolved at the lowest possible level consistent with the seriousness of the offense and the record of the offender.

Secondly, a commander should refer a case to a court-

martial only when there is probable cause to believe a crime was committed and the accused did it. Although further advice can be sought from your staff judge advocate, the commander must ultimately decide how to dispose of alleged misconduct.

Any decision should be made with an understanding of the array of alternatives. Military justice procedures are not always the best way to dispose of disciplinary problems; courts-martial and Article 15's are sometimes slow, cumbersome, and blunt instruments, unsuited to the incident, the accused, or the commander's purpose. Short of military justice remedies, a variety of administrative alternatives exist:

- a. Counseling.
- b. Written or oral reprimands and admonitions.
- c. Withdrawal of pass privileges.
- d. Withdrawal or limitation of other privileges--commissary, PX, on-post driving, etc.
- e. Extra training.
- f. Alcohol and drug rehabilitation programs.
- g. Administrative separation.
- h. EER and OER.
- i. MOS reclassification.
- j. Reduction for inefficiency.
- k. Bar to reenlistment.
- l. Compassionate reassignment.
- m. Transfer.

And the list goes on. The rapid development of these alternatives to court-martial has highlighted the past decade of military law, and with almost all of these remedies, the power to take final action has been passed down to field commanders. In the case of any minor incident, the commander exercising prosecutorial discretion should first decide that none of the varied

administrative remedies is sufficient before considering punitive options.

The decision to refer offenses to trial by court-martial is difficult. Occasionally the decision is made for the wrong reasons. When an apparently serious offense occurs, there is great pressure on a commander to "do something." Congressional inquiries and expressions of interest in the incident from higher command tempt some to refer cases to trial to settle the matter. "Let the court decide whether or not the accused is guilty." A CASE SHOULD NEVER BE REFERRED TO TRIAL UNLESS THE CONVENING AUTHORITY IS PERSONALLY SATISFIED BY LEGAL AND COMPETENT EVIDENCE THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THE ACCUSED IS GUILTY AND SHOULD BE PUNISHED. The perceptive commander will find occasions when the accused's conduct satisfies the legal elements of a crime, but for reasons of compassion, interests of justice, or other considerations, the accused should not be punished. Similarly, commanders must not fail to use the military justice system in order to create a rosy statistical picture of morale and discipline; serious crime is an unfortunate but inevitable facet of human conduct and should be prosecuted.

The military justice system requires commanders to exercise Solomon-like judgment--and, if necessary, to stand alone for the right as they see it. At all times your staff judge advocate will be available to advise, but the final decision rests with commanders.

In any case of public interest, a commander's decision will be examined and reexamined in the public arena. Because of restrictions on pretrial publicity, commanders are often unable to defend decisions in public. Do not permit possible public reaction to deter you from making a decision you believe to be a correct one. Think long and hard in making these decisions, and be certain that the decision to refer a case to trial on particular charges can withstand the kind of close scrutiny it may receive. This does not mean that you need hesitate to take necessary disciplinary action or that an atmosphere of permissiveness must be tolerated. Rather, your actions must be proportionate to the misconduct you seek to sanction.

REFERENCE: R.C.M. 306(c)(2); AR 600-20; AR 600-37; AR 600-200; AR 635-200.

CHAPTER 1

INTRODUCTION TO CRIMINAL LAW

TEACHING OUTLINE

At least since the harsh days of Gustavus Adolphus, governments have striven to strike a perceived balance of fairness in substantive and procedural law as applied to members of the military force, a balance which primarily takes into account the vital mission of the force itself. Often this balance is described in a specialized criminal code.

General William C. Westmoreland
Major General George S. Prugh
Harvard Journal of Law and Public Policy 1 (1980)

I. TRENDS.

	<u>FY91</u>
A. Total Courts-Martial	2,758
B. Article 15s	60,269
C. GCM & BCD-SPCM Conviction Rate	94%
D. GCM & BCD-SPCM Guilty Plea Cases	59%
E. GCM & BCD-SPCM Judge Alone Cases	68%

II. MILITARY JUSTICE SYSTEM--LEGAL BASIS.

A. Constitution of the United States.

Article I, section 8, clause 14.
"The Congress shall have Power . . .
to make rules for the Government and
Regulation of the land and naval
Forces."

B. Uniform Code of Military Justice.

1. Congress exercised its power in 1950 to provide one statute to govern all the Armed Forces.
2. Provides President with authority to decide pretrial, trial, and post-trial procedures (Article 36) and maximum punishments (Article 56).

C. Manual for Courts-Martial.

1. Executive Order of the President; implements Congress' grant of authority to decide procedures and maximum punishments.
2. Organized into five parts plus appendices.

I. Preamble

II. Rules for Courts-Martial
(R.C.M.)

III. Military Rules of Evidence (M.R.E.)

IV. Punitive Articles

- a. Text of Article from UCMJ
- b. Elements of the offense
- c. Explanation
- d. Lesser included offenses
- e. Maximum punishment
- f. Sample specification

V. Nonjudicial Punishment
Procedure

VI. Appendices

- a. Constitution
- b. U.C.M.J.
- c. 22. Appendices of forms, Trial Guides, Analysis

D. Regulation.

AR 27-10 prescribes the policies and procedures pertaining to the administration of military justice within the Army and implements the Manual for Courts-Martial, United States, 1984.

E. Court Decisions.

III. THE MILITARY COURT SYSTEM.

A. Trial Courts (see chart - page 1-17).

1. Summary Court-Martial.
2. Special Court-Martial.
3. BCD Special Court-Martial.
4. General Court-Martial.

B. Appellate Courts.

1. Courts of Military Review (CMR).

Appellate military judges review cases in which sentence includes death, punitive discharge (Dismissal, DD, BCD) or confinement for one year or more.

2. United States Court of
Military Appeals (CMA).

Five civilian judges review cases which include death penalty, or which The Judge Advocate General certifies for review, or in which the court grants accused's petition for review.

3. United States Supreme Court.

Accused or government may appeal cases decided by the CMA to the Supreme Court.

IV. THE MILITARY JUSTICE SYSTEM -- PERSONNEL.

- A. Commander.
- B. Staff Judge Advocate.
- C. Trial Counsel.
- D. Defense Counsel.
- E. Military Judge.
- F. Court Members.
- G. Legal Specialist/Court Reporter.

IV. JURISDICTION. (R.C.M. 201).

A. Court.

1. Court must be promptly convened.
2. Area court-martial jurisdiction.
3. Designation of court-martial convening authority.

B. Person.

Accused must be subject to court-martial jurisdiction, i.e., a member of the armed forces.

C. Offense.

1. The offense must be subject to court-martial jurisdiction.
2. Court-martial jurisdiction depends on the accused's status as a member of the Armed Forces.

D. Reserve Jurisdiction.

1. UCMJ jurisdiction continues over Reservists after a period of active duty for any offenses committed during the active duty.
2. Reservists may be involuntarily recalled to active duty for court-martial, Article 32 investigations, and nonjudicial punishment.

VI. CONCLUSION.

COURTS-MARTIAL IN THE ARMY

	Summary	Regular Special (SPCH)	Bad-Conduct Discharge (BCD) SPCM	General
Convening Authority	Battalion Cdr	Brigade Cdr	Division/Corps/Major Installation Cdr (GCM CA)	Division/Corps/Major Installation Cdr***
Composition	One Commissioned Officer	Military Judge*, minimum of 3 court members	Military Judge,* minimum of 3 court members	Military Judge, minimum of 5 court members
Counsel	None detailed. Accused may consult with military lawyer prior to trial. May hire Civilian lawyer.	Trial Counsel (lawyer)** Defense Counsel (lawyer). Accused may request individual military legal counsel or hire civilian lawyer.	Same as SPCM	Same as SPCM (trial counsel must be a lawyer)
Accused's Options	May refuse by SCH.	May request enlisted personnel on court (minimum of 1/3 must be enlisted); may request trial by MJ alone.	Same as SPCM	Same as SPCM
Jurisdiction	Only enlisted personnel Noncapital offenses	All personnel Noncapital offenses	All personnel Noncapital offenses	All personnel All offenses
"Reporter"	Legal Specialist	Legal Specialist	Court Reporter	Court Reporter
Record of Trial	Abbreviated	Summarized	Verbatim	Verbatim

*There are provisions for convening a regular special court-martial without a military judge. A military judge must be detailed to a BCD SPCM unless prohibited by physical conditions or military exigencies. In practice, military judges are detailed to all special courts-martial.

**The trial counsel in a special court-martial need not be a lawyer. In practice the government is always represented by a lawyer.

***A formal investigation under Art. 32, UCMJ and a written pretrial advice by the SJA are prerequisites for referral to a GCM.

MAXIMUM PUNISHMENT CHART

Type	Confinement	Forfeitures	Reduction ¹	Punitive Discharge
Summary	1 Month ²	2/3 pay per month for 1 month	E5 and above - one grade E4 and below - lowest Enlisted grade	None
Special	6 months ³	2/3 pay per month for 6 months	Lowest Enlisted Grade	None
BCD Special	6 months ³	2/3 pay per month for 6 months	Lowest Enlisted Grade	BCD ⁴ (enlisted)
General ⁵	See Part IV, MCH, 1984 and Maximum Punishment Chart, Appendix 12, MCH	Total forfeitures of all pay and allowances	Lowest Enlisted Grade	BCD (enlisted) DD enlisted, warrant officer) Dismissal (officer)

¹Only enlisted soldiers may be reduced by courts-martial.

²A summary Court-Martial may impose confinement and hard labor without confinement only on soldiers in the grade of E-4.

³A special Court-martial may impose confinement only on enlisted soldiers.

⁴In order to impose a BCD, A Special Court-Martial must:

- (1) Be convened by a General Court-Martial Convening Authority.
- (2) Have a military judge detailed (Unless a military judge cannot be detailed because of physical conditions or military exigencies).
- (3) Have a defense counsel within the meaning of Article 27(b), U.C.M.J., detailed.
- (4) Have a verbatim record of trial prepared.

⁵A General Court-Martial may impose the death penalty when authorized by Part IV, MCH, 1984, and the conditions in R.C.M. 1004 are met.

ARMY-WIDE COURTS-MARTIAL STATISTICS

	<u>FY83</u>	<u>FY84</u>	<u>FY85</u>	<u>FY86</u>	<u>FY87</u>	<u>FY88</u>	<u>FY89</u>	<u>FY90</u>	<u>FY91</u>
GCM	1,581	1,442	1,420	1,431	1,462	1,631	1,585	1,451	1,173
BCD	2,075	1,403	1,304	1,247	1,051	923	850	771	585
SPCM	768	461	363	271	214	182	185	150	92
SCM	2,856	1,645	1,308	1,373	1,492	1,410	1,365	1,121	931
TOTAL	7,280	4,951	4,395	4,322	4,219	4,146	3,985	3,493	2,758

NONJUDICIAL PUNISHMENT STATISTICS

	<u>FY83</u>	<u>FY84</u>	<u>FY85</u>	<u>FY86</u>	<u>FY87</u>	<u>FY88</u>	<u>FY89</u>	<u>FY90</u>	<u>FY91</u>
ART 15s	132,045	113,914	121,153	111,750	99,886	91,915	83,413	76,152	60,269

OFFICER MISCONDUCT

	<u>FY83</u>	<u>FY84</u>	<u>FY85</u>	<u>FY86</u>	<u>FY87</u>	<u>FY88</u>	<u>FY89</u>	<u>FY90</u>	<u>FY91</u>
GCM	55	41	50	54	37	27	35	27	45
SPCM	1	2	0	0	0	0	0	0	1
TOTAL	56	43	50	54	37	27	35	27	46
ART 15s	301	265	278	269	254	207	262	220	254

CHAPTER 10

6,888	4,207	3,843	5,283	5,048	4,345	4,110	4,318	3,062
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GENERAL COURTS-MARTIAL

<u>FY</u>	<u>Cases</u>	<u>Conv Rate</u>	<u>Disch Rate</u>	<u>Pleas</u>	<u>Judge Alone</u>	<u>Courts w/Enl.</u>	<u>Drug Cases</u>	<u>Child Abuse</u>
1987	1,462	96%	89%	69%	71%	18%	34%	4.7%
1988	1,631	96%	88%	67%	68%	20%	33%	6.1%
1989	1,585	95%	88%	63%	64%	25%	31%	8.2%
1990	1,451	95%	87%	61%	69%	20%	24%	10%
1991	1,173	95%	87%	58%	67.5%	18%	17%	10%

BAD-CONDUCT DISCHARGE SPECIAL COURTS-MARTIAL

1987	1,051	95%	70%	67%	78%	14%	25%	0.1%
1988	923	95%	65%	63%	73%	17%	25%	0.7%
1989	850	93%	63%	64%	69%	22%	26%	0.2%
1990	771	93%	62%	64%	70%	21%	23%	1.2%
1991	585	93%	65%	61%	70%	20%	12%	2.5%

OTHER SPECIAL COURTS-MARTIAL

1987	214	83%	NA	48%	66%	25%	7%	0.9%
1988	182	85%	NA	50%	65%	22%	7%	1%
1989	185	81%	NA	40%	52%	36%	6%	0.5%
1990	150	76%	NA	35%	57%	31%	4%	2%
1991	92	82%	NA	46%	57%	27%	5%	1%

SUMMARY COURTS-MARTIAL

<u>FY</u>	<u>Cases</u>	<u>Conv Rate</u>	<u>Pleas</u>	<u>Drug Cases</u>
1987	1,492	94%	47%	13%
1988	1,410	93%	49%	13%
1989	1,365	94%		10%
1990	1,121	95%	42%	8%
1991	931	92%	---	5%

NONJUDICIAL PUNISHMENT

<u>FY</u>	<u>Total</u>	<u>Formal</u>	<u>Summarized</u>	<u>Drugs</u>
1987	99,886	79%	21%	13%
1988	91,915	80%	20%	12%
1989	83,413	80%	20%	10%
1990	76,152	79%	21%	6%
1991	60,269	80%	20%	5%

CHAPTER 2

OPTIONS AND DUTIES OF THE COMMANDER

PART I - COMMANDER'S OPTIONS

Introduction

At every level of command a number of options are available to a commander who is confronted by a military justice problem. This part concerns the various measures for dealing with an accused prior to trial as well as an examination of the various forums and administrative measures which a commander may use.

A. Pretrial Restraint

1. In General. [Caution: Pretrial restraint is an actively developing area of the law. Also, some locations have other specific rules or procedures. Consult your local judge advocate]. A soldier in your unit has committed an offense under the Uniform Code of Military Justice. What do you do with him or her pending court-martial? The short answer is "[a]n accused pending charges should ordinarily continue the performance of normal duties within his or her organization while awaiting trial." AR 27-10, para. 5-13a. Specific circumstances, such as the need to ensure the soldier's presence at trial, to prevent criminal misconduct such as intimidation of witnesses, injury to others, or threatening the safety of the community or the effectiveness, morale, or discipline of the command, may move a commander to place a soldier under pretrial restraint. UCMJ art. 10; R.C.M. 305(h)(2)(B). As the soldier is presumed innocent until convicted, the restraint may not be punishment and must be the least restrictive restraint adequate to meet the circumstances which require the restraint. UCMJ art. 13; R.C.M. 305(h)(2)(B)(iv).

2. Types of Pretrial Restraint. The 1984 Manual for Courts-Martial specifies four types of pretrial restraint. From least severe to most severe they are:

a. Conditions on liberty. Conditions on liberty is defined as "orders directing a person to do or refrain from doing specified acts." R.C.M. 304(a)(1). Conditions on liberty would include orders to a soldier not to go to the location of an offense or not to approach a victim of an offense or witnesses. Conditions may be imposed separately or with other forms of

restraint. R.C.M. 304(a)(1). Imposing conditions on liberty does not trigger the 120-day speedy trial rule.

b. Restriction. Formally called "restriction in lieu of arrest," restriction is "the restraint of a person by oral or written orders directing the person to remain within specified limits." R.C.M. 304(a)(2). A soldier under restriction normally performs his or her usual duties. Common terms of restriction are, "to your place of duty, company (or battalion) area, dining facility, and chapel." Restriction triggers the 120-day speedy trial rule. (If "tantamount" to confinement, it may trigger a 90-day rule; see Part II, paragraph F).

c. Arrest. "Arrest" is defined as orders "directing the person to remain within specified limits." R.C.M. 304(a)(3). The limits of arrest are generally tighter than those of restriction and a person in arrest may not perform "full military duties," such as bearing arms or serving guard, but may "do ordinary cleaning or policing," or "routine training and duties." R.C.M. 304(a)(3). The distinction between "arrest" and "restriction" is largely a matter of degree and is important as arrest triggers more stringent speedy trial requirements. The meaning of arrest in military practice as pretrial restraint should be distinguished from the common civilian meaning of the term to be taken into custody. In military usage "apprehension" is the equivalent of "arrest" in civilian terminology. R.C.M. 302(a)(1) and discussion. Arrest triggers the 120-day speedy trial rule and may trigger a 90-day rule (see Part II, paragraph F).

d. Pretrial Confinement. Pretrial confinement is the physical restraint of a soldier pending trial. R.C.M. 304(a)(4). It also triggers the 120-day speedy trial rule and may trigger a 90-day rule (see Part II, paragraph F).

3. Administrative restraint. Administrative restraint should be distinguished from pretrial restraint. Limitations placed on a soldier for operational, medical, or other military purposes, independent of military justice are not pretrial restraint. "Administrative restraint" placed on a soldier pending trial, however, will be scrutinized to ensure it serves purposes wholly independent of military justice.

4. Authority to Order Pretrial Restraint. Generally, any commissioned officer may order the pretrial restraint of an enlisted soldier. A commanding

officer may delegate authority to impose restraint on enlisted soldiers to noncommissioned officers. Authority may also be withheld by a superior commander. R.C.M. 304(b). Since imposing pretrial restraint is an important decision can affect speedy trial requirements and result in credit against a subsequent court-martial sentence, the company level commander is the one who normally imposes any restraint required by the circumstances or advises the soldier pending trial that no restraint is imposed. The commander must review the decision to order to pretrial confinement within 72 hours. Prior to imposing restraint, the commander should consult the supporting judge advocate.

5. Pretrial Confinement.

a. In General. As pretrial confinement is the most stringent pretrial restraint, specific procedures must be followed in putting a soldier in pretrial confinement. "In any case of pretrial confinement, the SJA concerned, or that officer's designee, will be notified prior to the accused's entry into confinement or as soon as practicable afterwards." AR 27-10, para. 5-13a. Upon confinement, the soldier must be informed of the nature of the offenses for which held, the right to remain silent and that any statement made may be used against him or her, the right to civilian counsel at no expense to the United States and to assignment of military counsel, and the procedures by which the confinement will be reviewed. R.C.M. 305(e). A soldier charged only with an offense normally tried by a summary court-martial will not ordinarily be put in pretrial confinement. When no court-martial charges are pending, a person pending administrative separation will not be placed in pretrial confinement.

b. Requisites For Pretrial Confinement.
Pretrial confinement of a soldier is illegal unless:

[T]he commander has probable cause (reasonable grounds) to believe that

- (i) An offense triable by a court-martial has been committed;
- (ii) The person to be confined committed it;
and
- (iii) Confinement is necessary because it is foreseeable that:

(a) The person to be confined will not appear at a trial, pretrial hearing, or investigation, or

(b) The person to be confined will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

R.C.M. 305(h)(2)(B).

In Europe and some other places, the power of subordinate commanders to order pretrial confinement is withheld by the General Court-Martial Convening Authority and delegated to the SJA. The rationale for this delegation is that a military magistrate (usually a military judge) must review the pretrial confinement within 7 days of imposition to ensure it is legal. If illegal, the soldier will be released.

"'Serious criminal misconduct' includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States." R.C.M. 305(h)(2)(B). The soldier who is an "irritant" and a "pain in the neck" in the unit may not be confined on that basis, but the soldier who is a "quitter," who disobeys orders and refuses to perform duties, is an "infection" in the unit and a serious threat to the effectiveness, morale, or discipline of the unit may properly be confined. R.C.M. 305(h) analysis. Less severe forms of restraint must be considered first.

c. Commander's Memorandum. When the commander (or the SJA, depending on local procedures) determines that the requisites for pretrial confinement are met, the commander must document the determination in a memorandum. R.C.M. 305(h)(2)(C). The "Checklist for Pretrial Confinement," DA Form 5112-R, satisfies the memorandum requirement. AR 27-10, para. 9-5b(2).

d. Prompt Determination of Probable Cause.

Within 48 hours after a soldier enters pretrial confinement, a neutral and detached probable cause review of a warrantless apprehension must occur. The review may be conducted by a commander who is not an accuser or otherwise involved in the case or by an

official designated to approve a commander's pretrial confinement decision. Local procedures will normally prescribe how the 48 hour review will be conducted.

e. Review of Pretrial Confinement by the Military Magistrate (the "neutral and detached officer" of R.C.M. 305(i)(2)). Within 7 days after a soldier enters pretrial confinement, the confinement will be reviewed by a military magistrate who will approve continued confinement or order the release of the soldier. R.C.M. 305(i). If a soldier is ordered released from pretrial confinement, he or she may not be confined again before completion of trial except upon discovery of new evidence or misconduct which justifies confinement either alone or together with all other available information. R.C.M. 305(l).

6. Sentence Credit for Pretrial Restraint. A commander should consider that, if convicted and sentenced, a soldier will receive day for day credit on the sentence for pretrial confinement and for restriction or arrest which is "tantamount" to confinement. Restriction or arrest is "tantamount" or equivalent to confinement when the limits and conditions of restriction, taken together, show circumstances amounting to physical restraint. When a soldier is restricted to a relatively small area (such as to a floor of a barracks), has sign-in requirements each hour or less, is escorted from place to place, and does not perform normal duties, the restriction would likely be found tantamount to confinement.

In addition to the day for day sentence credit a soldier will receive for all pretrial confinement and restriction tantamount to confinement, a soldier will receive additional credit for pretrial restraint which violates R.C.M. 305 or Article 13, UCMJ. R.C.M. 305 is violated when pretrial confinement or restriction tantamount to confinement is served as a result of an abuse of discretion or in violation of the procedural requirements of R.C.M. 305 procedural requirements include providing military counsel to a confinee upon request, a commander's properly applying the standard for restraint and documenting the decision in a memorandum. R.C.M. 305(j)(2) and (k). Commanders should be aware that imposing restriction tantamount to confinement may result in the soldier receiving day for day credit for the restriction tantamount to confinement, plus an additional day for day credit for any failure to follow the procedural rules for confinement.

4

A soldier will also receive credit for pretrial restraint which violates Article 13, UCMJ, which prohibits punishment prior to trial. When the conditions of pretrial restraint do not serve a legitimate, nonpunitive purpose, the restraint will be found to be punishment. Specifically prohibited are punitive labor, duty hours, training, or wear of a special uniform. R.C.M. 304(f).

7. Conclusion. A soldier pending charges should ordinarily continue the performance of normal duties in the unit while awaiting trial. If specific circumstances require some pretrial restraint, the commander has ample tools available to meet the circumstances. If a soldier is put in pretrial confinement or under restriction tantamount to confinement, he or she will receive day for day credit on their sentence. If restraint is imposed in violation of certain procedural rules, or as punishment, the soldier will receive additional credit on his or her sentence.

B. **Nonjudicial Punishment Under Article 15, UCMJ (see Chapter 4).**

C. **Preferring Charges**

Any person subject to the Uniform Code of Military Justice may prefer charges; however, normally the unit commander prefers charges. A person subject to the Uniform Code of Military Justice "cannot be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility." Thus, a superior commander may not order a subordinate to prefer charges in a particular case. If a superior authority directs that charges be preferred, that superior authority becomes the accuser and, as will be explained later, is barred from convening a court-martial to try the charges. When a superior authority has only an official interest in a case, he or she ordinarily will transmit the available information about the case to an officer of the command "for preliminary inquiry and report, including, if appropriate in the interest of justice and discipline, the preferring of any charges which appear to you to be sustained by the expected evidence."

REFERENCE: R.C.M. 307(a).

D. **Summary Court-Martial**

1. Function. The summary court-martial is the lowest level trial court in the military legal system. A summary court-martial is designed for disposition of minor offenses under simple procedures. It is composed of one commissioned officer. The law specifies no particular grade for a summary court officer, and the powers are the same regardless of the individual's grade. Ordinarily, the summary court officer should be a senior captain or a field grade officer.

A summary court-martial is normally convened by a battalion commander. It may also be convened by anyone having the authority to convene a special or general court-martial. The summary court officer is detailed by personal direction of the convening authority.

A summary court-martial may try only enlisted soldiers for any non-capital offense punishable under the Uniform Code of Military Justice; that is, for any offense for which the punishment is something less than death. The summary court-martial should be limited to relatively minor military offenses, however, and is often used only after an accused has been offered and refused nonjudicial punishment for the offense.

An accused may not be tried by summary court-martial over his or her objection. Prior to trial, an accused should indicate on the summary court form in writing an acceptance of disciplinary action under summary court-martial. If the accused objects to trial by summary court-martial, the summary court officer will note the objection and return the charge sheet to the convening authority for disposition. If the accused consents to trial by summary court-martial, the summary court officer will proceed with the trial.

The punishment powers of the summary court-martial are outlined in the chart on page 1-18. A summary court-martial may only confine enlisted soldiers who are serving in the grade of E-4 or below.

In a trial by summary court-martial, an accused is not entitled to be represented by military counsel. If the accused desires to be represented by a civilian attorney at no expense to the Government, or if the accused has secured the services of a reasonably available individual military counsel, the summary court officer should allow such counsel to be present.

2. Mechanics of Referral. Charges are referred to summary court-martial by the convening authority.

This is accomplished by completing Section V (Referral; Service of Charges) on page 2 of the charge sheet (DD Form 458). Completion of Section V is particularly important if charges are returned to the summary court-martial convening authority by a superior command with instructions to handle the matter at the lowest level. Even if the case was referred to a higher court and subsequently withdrawn, the summary court-martial convening authority must actually refer the case to a summary court-martial by completing Section V.

3. Summary Court-Martial Procedure. Trial by summary court-martial is conducted according to the procedure outlined in Chapter 13, Part II (R.C.M. 1301-1306) of the Manual for Courts-Martial. This has been incorporated into DA Pam 27-7, which also provides a script that should be used if an accused pleads guilty to ensure that the accused understands the meaning and effect of the plea. The Military Rules of Evidence and the standard of proof of beyond a reasonable doubt do apply to summary courts-martial.

4. Review. At the conclusion of a trial by summary court-martial, the record of trial is forwarded to the convening authority for review. Following this initial review and action by the convening authority, the summary court-martial record may be forwarded to the staff judge advocate at the supervisory general court-martial jurisdiction, usually division level, for a further review.

REFERENCE: R.C.M. 403, 601, 1301-1306; DA Pam 27-7.

E. Special Court-Martial (Non-BCD)

1. Functions. The special court-martial is the intermediate court in our system. It is normally convened by a brigade commander. It has more sentencing power than the summary court-martial, but less than the general court-martial. Unlike the Article 15 and summary court-martial, an accused may not turn down a special or higher court-martial.

The punishment powers of the non-BCD special court-martial are outlined on page 1-18. A special court-martial may not confine an officer.

The membership of a non-BCD special court-martial may take any one of three different forms. It may consist of (1) at least three members; (2) at least three members and a military judge; or (3) solely of a

military judge if the accused so requests. Special courts-martial are not presently tried without military judges. In some instances an accused's request for trial by military judge alone may be denied by the military judge; however, special courts-martial are tried by military judge alone in the vast majority of cases when requested. If an enlisted accused requests that the court have enlisted membership, at least one-third of the court members must be enlisted soldiers.

The military judge of a special court-martial is detailed by the U.S. Army Trial Judiciary. AR 27-10, chapter 8, covers the detailing of military judges and their administrative and logistical support.

Trial and defense counsel are detailed for each special court-martial. The trial counsel need not be a lawyer; however, the accused has a right to be represented at the trial by counsel who is a lawyer and certified by The Judge Advocate General. As a matter of practice, both counsel are lawyers. The administrative task of making counsel available is generally handled through the offices of the responsible staff judge advocate and senior defense counsel.

A special court-martial may try anyone subject to the Uniform Code of Military Justice for any non-capital offense made punishable by the Uniform Code of Military Justice; that is, for any offense for which the maximum punishment is less than death.

Charges are referred for trial by a special court-martial by completing the referral portion of Section V on page 2 of the charge sheet, as in the summary court-martial described above.

2. Procedure for the Special Court-Martial. Ordinarily, a military judge presides over the special court-martial. In the rare event a judge is unavailable, the senior officer member present presides as president.

REFERENCE: R.C.M. 404, 601.

F. "BCD" Special Court-Martial

1. Distinctive Features of a "BCD" Special Court-Martial. The "BCD" special court-martial is basically the same type of court as the special court-martial outlined above except that this court-martial has the power to impose a bad conduct discharge as punishment.

There are certain requirements which must be met before such punishment may be imposed.

In order for a special court-martial to have the authority to impose a BCD, a qualified defense counsel and a military judge must be detailed (unless a military judge could not be detailed because of physical conditions or military exigencies), and a verbatim record must be made. In addition, AR 27-10 provides that the military judge be assigned to the U.S. Army Legal Services Agency (Trial Judiciary) and that only a general court-martial convening authority may convene a BCD special court-martial. In practice, all Army special courts-martial will have a military judge detailed to them.

2. "BCD" Special as an Option. The BCD special court-martial option provides a forum for those cases where a convening authority deems a punitive discharge warranted but does not feel that the charges are serious enough to deserve more than six months confinement. Where the discharge is warranted and the case is referred to a special rather than general court, the effort that would have been expended by the Article 32 investigation process described below is saved.

REFERENCE: R.C.M. 404, 601; AR 27-10, para. 5-24.

G. General Court-Martial

1. Function. The general court-martial is the highest level trial court in the military legal system and must be convened by a general court-martial convening authority upon the formal pretrial advice of the staff judge advocate. This court-martial tries military personnel for the most serious types of crimes.

The punishment powers of the court are only limited by the maximum punishments for each offense found in Part IV of the Manual for Courts-Martial.

The general court-martial may take either of two possible forms. It may consist of a military judge and not less than five members, or solely of a military judge, if the accused so requests. The accused may elect trial by judge alone in all cases except those which are referred to trial as capital cases. In all cases a military judge must be detailed to the court. An enlisted soldier is also entitled to at least one-third enlisted membership upon oral or written request.

Trial and defense counsel are detailed for each general court-martial. Both the detailed trial counsel and defense counsel at a general court-martial must be lawyers certified by The Judge Advocate General.

REFERENCE: R.C.M. 406, 407, 601.

2. Article 32 Investigation. No charge may be referred to a general court-martial until a thorough and impartial investigation has been made in accordance with Article 32, UCMJ. The officer appointed to conduct this investigation should be a field grade officer or an officer with legal training and experience. Many commanders appoint line officers in all cases except the most complex in order to educate young officers in the procedures of our military justice system. The purposes of the investigation are to inquire into the truth of the matters set forth in the charge sheet, to determine the correctness of the form of the charges, and to secure information upon which to determine the proper disposition of the case. The Article 32 investigating officer performs a judicial function and must obtain legal advice from a source not involved in prosecution or defense functions.

The investigation will be conducted with the accused present and represented by a defense counsel. After the investigation, a report of investigation will be made to the officer directing the investigation. The recommendations of the Article 32 investigating officer are advisory only. The Article 32 investigation is discussed more fully in Part II of this chapter.

REFERENCE: Article 32, UCMJ; R.C.M. 405.

H. Dismissing Charges

Charges should be dismissed whenever the preliminary investigation reveals that the charges are trivial or unfounded. They should also be dismissed when no further action is deemed warranted; for example, if administrative separation is more appropriate, the charges should be dismissed. Dismissal of charges is within command discretion and if such dismissal is later deemed inappropriate, the charges may be restored.

REFERENCE: 401(c)(1).

I. Discharge In Lieu of Court-Martial (Chapter 10)

1. General. Administrative separations are important tools for dealing with minor offenses. Most

separations are accomplished before charges are ever preferred against a soldier. One separation, the Chapter 10, is especially designed to operate after charges are preferred, but before action by the convening authority.

2. Discharge for the Good of the Service. AR 635-200, chapter 10, provides that an individual who is charged with an offense or offenses punishable by a bad conduct discharge or dishonorable discharge may submit a request for discharge for the good of the service in lieu of trial by court-martial. The general court-martial convening authority is the approval and disapproval authority for these requests.

The request is initiated by the accused and must be forwarded through channels, with intermediate commanders recommending approval or disapproval. If approval is recommended, the type of discharge to be issued also will be recommended. A discharge under other than honorable conditions normally is issued, but either an honorable or general discharge may be approved. A number of items must ordinarily accompany the form and the individual's unit commander is responsible for aiding the accused in obtaining this information. For example, the request should include a copy of the court-martial charge sheet (DD Form 458), a medical report, all reports of investigation, a statement as to the accused's mental responsibility (often a psychiatric evaluation), and the recommendations of subordinate commanders.

This administrative option must not be used indiscriminately. In the words of the regulation:

Commanders . . . must be selective in approving of requests for discharges for the good of the Service. The discharge authority should not be used when the nature, gravity and circumstances surrounding an offense require a punitive discharge and confinement. Nor should it be used when the facts do not establish a serious offense, even though the punishment, under the Uniform Code of Military Justice, may include a bad conduct discharge or dishonorable discharge. Consideration should be given to the member's potential for rehabilitation and his or her entire record should be reviewed before taking action. . . . Use of this discharge authority is encouraged when the commander determines that the offense is sufficiently serious to warrant separation

from the Service and the member has no rehabilitation potential. (AR 635-200, para. 10-4)

J. Pretrial Agreements with the Accused

1. Definition. Negotiated pleas are an integral part of the military justice system. A negotiated plea is an agreement between the accused and the convening authority to the effect that the accused will plead guilty in exchange for some favorable action by the convening authority--generally a promise to limit an approved sentence.

2. Advantages. A commander may question why to agree to anything if the chances are good that the Government will prevail. One obvious advantage is that a plea of guilty results in saving time and personnel involved in processing charges. Also, there are specific considerations in some trials, such as the fact that a distant witness will not have to be made available at trial. Thus, economy results from such an agreement. A negotiated plea lessens the possibility of error. The chance for reversible error in a guilty plea case is considerably less than it is in a contested case.

3. The Rights of the Accused. Because of the obvious possibility of abuse, it is essential that the rights of the accused be fully protected when entering into a pretrial agreement. The agreement must be written so that the court and the reviewing authorities know exactly what was agreed upon. In addition, since the agreement involves the rights and prerogatives of both the accused and the convening authority, both individuals must personally sign the agreement.

4. Illegal Actions. An accused's guilty pleas must be entirely voluntary. An accused may not be forced to plead guilty to any specification. For example, it is illegal for a convening authority to prefer a number of multiplicitous charges and then drop some of them in exchange for a plea of guilty. Also, it is improper to force an accused to go judge alone or waive the Article 32 investigation in return for a pretrial agreement. Only the convening authority can enter into a pretrial agreement with the accused. Subordinate commanders must avoid "promises" or "deals" that could be construed to bind the convening authority in some sort of pretrial agreement.

5. Permissible Agreements. In exchange for a plea of guilty by the accused, the convening authority will often agree to (a) reduce the offense charged to a lesser included offense; (b) withdraw certain specifications; or (c) agree to approve only a particular sentence. If the convening authority agrees to approve a particular sentence, such as confinement for two months, the accused gets the advantage of the agreed-upon sentence or the sentence of the court, whichever is less. Thus, if the court imposes a sentence of three months, the accused is confined for only two months because of the agreement. If, on the other hand, the court imposes a sentence of only one month, the accused is confined for one month because he or she gets the advantage of whichever sentence is less.

6. Criticism. Critics generally object to plea bargaining for two reasons: (1) it forces innocent people to plead guilty to offenses they did not commit; and (2) serious criminals get off with light sentences. In the military, a service member must admit under oath every element of the offense before the military judge will accept his or her guilty plea. This process is called the "providence" inquiry. Because of the "providence" inquiry, it is virtually impossible for an accused to admit to a crime he or she did not commit. Convening authorities must be vigilant to only approve just and appropriate sentence limitations for each accused and the offense(s) committed.

REFERENCE: R.C.M. 705.

PART II - COMMANDER'S DUTIES

Introduction

Upon receiving a charge sheet with its allied papers, a commander must examine the file and determine a proper course of action. If the commander decides to refer a case to trial, the commander must perform the duties described below.

A. Ensure There Is a Case

1. Ensure That Charges Allege Offenses. One of a commander's most irritating experiences is to send charges to trial only to have the military judge dismiss the case for failure of the specification to state an offense. The result is that the soldier who is a disciplinary problem will return to the unit. The responsibility for properly alleging an offense rests at the company level. All specifications should be checked by the trial counsel before charges are preferred.

If all elements of the offense are not implied or specifically alleged in the specification, the specification is deficient and may be dismissed by the military judge. Even if the military judge does not dismiss the specification, findings of guilty to specifications that do not allege an offense will be reversed on appeal. Failure to allege an offense cannot be remedied by a plea of guilty or proof of guilt beyond a reasonable doubt, nor can it be waived by a failure to object. Careful examination of the specification before trial prevents this error and permits corrective action to be taken.

Part IV of the Manual for Courts-Martial contains a description of the various offenses under the Uniform Code of Military Justice. Each description also includes a discussion of the proof required to sustain a conviction for each offense. The elements of the offense are those facts that the Government must prove beyond a reasonable doubt.

The practice of charging several separate offenses from what is basically a single transaction is called multiplicitous charging and is prohibited. For example, if a soldier enters a billeting at night and steals three items from someone's locker, the soldier should be charged with one larceny of three items, not three separate larcenies. Multiplicity is a difficult area of the law and the trial counsel should review all charges prior to referral to prevent multiplicitous charging.

Duplicity, that is, alleging more than one offense in a single specification, must also be avoided. If a soldier assaults Jones at 1500 and at 1530 assaults Smith, he or she has committed two separate offenses and should be charged with two different specifications of assault. Again, if there is doubt as to what should be charged, consult your trial counsel.

2. Ensure Thorough Investigation. Trial results are based upon evidence. Without enough evidence, there can be no conviction. Too often a case will seem to fit together immediately based upon the circumstantial evidence of the moment or the commander's close proximity to the situation. It is natural to suspect that a soldier who has been a disciplinary problem is the one who committed a particular offense. It is even more inviting to assume that this soldier can be convicted of that offense. In fact, there must be admissible evidence to support each of the allegations in the specification.

At trial each element of an offense must be established by competent evidence beyond a reasonable doubt. Many proof problems concern witnesses. A witness who is not available or not credible is of little use. A convening authority should inquire of the S-1 or legal specialist as to the nature and whereabouts of the witnesses. It is also important to ensure that key witnesses do not rotate out of the unit or leave the Army prior to trial. Trial counsel must be made aware of witnesses who may be unavailable for trial because of separation from the unit so they may legally preserve the evidence. The law requires the presence of material witnesses when requested by an accused, so potential defense witnesses should also be identified and their evidence preserved. If a material defense witness has been properly requested but not produced at trial, the case is subject to abatement or dismissal.

Although an investigation must be thorough, it is not necessary for a commander to await the results of a CID laboratory analysis before forwarding the charge sheet. If a soldier has been found in possession of marijuana and the company commander desires to charge the soldier with a violation of Article 112a, UCMJ, the commander should begin processing the charge sheet and send it forward even though the lab analysis has not been completed. The notion that one must await the lab analysis is common in the Army and superior commanders should make their subordinates aware that there is no such requirement. Of course, the lab analysis may

ultimately be required for proof of the offense at trial.

Command emphasis must be put on expeditious and accurate processing of charges. Military Police and CID Reports of Investigation, if available, should be forwarded with the charges. If these investigative reports are not completed when the company commander is ready to forward the charges, the charges should be forwarded with a statement saying that the reports will follow when they become available. Initial and interim reports, as well as the underlying witness statements, should be forwarded with the charge sheet. Under no circumstances should a commander delay the forwarding of charges until completion of the final MP or CID Report.

REFERENCE: MCM, Part IV; R.C.M. 303, 306.

B. Disposition of Charges

1. Referral to Trial. Where an accused's prior record, the seriousness of the offense, and the needs for justice and discipline indicate that trial by court-martial is warranted, the convening authority may dispose of the charge by referring it for trial by court-martial. The referral of a case to trial is accomplished by an appropriate endorsement on page 2 of the charge sheet, authenticated by the signature of an adjutant under the command line of the convening authority.

The determination to refer a case to trial is not governed by any hard and fast rules. Each accused's case must be separately studied, and disposition made on an individual basis. The application of policies requiring that the cases of all persons committing certain offenses be referred for trial to a particular type of court is forbidden. The determination to refer a case to trial must be based on probable cause that an offense was committed and the accused did it. The convening authority must personally make the decision to refer a case to trial.

2. Considerations Affecting the Decision. In deciding what options are appropriate for disposition of alleged misconduct, a commander must consider several factors. The Manual for Courts-Martial states that charges should be referred to the lowest court-martial which can adjudge an appropriate punishment.

In determining which court is the lowest court-martial which can adjudge an appropriate punishment, the Table of Maximum Punishments in Appendix 12 of the Manual for Courts-Martial should be consulted. It lists the maximum punishments which can be imposed for various offenses. A quick look at this table will indicate that a violation of Article 121, UCMJ, larceny, is more serious than a three-day AWOL. The amount of punishment is one factor that the convening authority should consider.

It is also necessary to understand the jurisdictional limitation of the court to which a case is referred. For example, a case which warrants referral to a court that can confine an officer should not be referred to a special court-martial, which cannot confine an officer. Court-martial jurisdictional punishment limitations are set out on page 1-18.

The commander must carefully analyze the nature of the offense and must treat the offense in a manner that ensures that the policies described above are implemented; a serious civilian-type offense should not be tried by a summary court-martial, nor should a minor military-type offense tried by a "BCD" special court-martial. Consistent with the needs of discipline and justice, there should be consistency in military justice matters.

A commander should analyze the offense to determine if an individual victim is involved, as in an assault, or if the crime has no individual victim, such as AWOL. Also, a commander should look to see what injury or threat, if any, was inflicted upon the victim. An assault that results from an argument in the NCO Club in which the argument was initiated by the victim is perhaps not as serious as an assault where the victim was minding his or her own business and was assaulted for no reason at all. Whether a commander administers equal and effective justice to the unit depends in large measure upon how well the commander comes to a reasoned decision based on proper analysis. A commander who sends a simple military disorder to a general court-martial because the accused is a chronic troublemaker but disposes of a serious aggravated assault by special court-martial may create an impression that military justice is not fairly administered.

In deciding upon an action or a recommendation, a commander should take into account the character and prior service of the accused. A number of the soldiers who commit offenses are very young and perhaps on their

own for the first time. Many young soldiers still have a good deal of maturing to do. Thus, in some cases, a 30-year-old who becomes involved in the black market on his third tour to Korea should be dealt with more severely than an 18-year-old who had never left home before being assigned to Korea. In other cases, an older soldier with a long record of good service may merit a less severe disposition.

In addition to the soldier's age, a commander should look into the accused's military and civilian history. If a commander pursues a policy of giving everyone the "max," that commander's military justice system will have no flexibility. Soldiers who have never been in trouble before may become a permanent problem to the command if they do not feel that they were dealt with fairly by the system. Thus, it would probably be unwise to impose the "max" under Article 15, UCMJ upon a soldier who has committed his first offense by failing to report to a formation. The offender's prior military and civilian record is, of course, only one of a number of factors that the commander must consider.

An offender's mental state is also a matter to consider. This may include mental disease, intoxication, or merely low intelligence. A commander, upon examining a file, may discover that a chronic AWOL offender has a GT score of 80 and, upon interviewing the individual, may find that the soldier just does not understand the responsibilities to the unit. If there is reason to believe that an individual is not mentally responsible, a sanity board should be convened under the provisions of R.C.M. 706 of the Manual for Courts-Martial.

A number of environmental factors may have influenced the actions of an accused. Before referring a case to trial, the convening authority should inquire into any problems the soldier might have. Perhaps the accused stole a small amount of money because of family financial problems. While a "personal history" is often included with the allied papers, it is sometimes incomplete and inaccurate. The convening authority should carefully review the personal history and make an additional inquiry into the soldier's background if warranted.

The convening authority should consider any rehabilitation the soldier demonstrates. In the case of a chronic offender with no hope of rehabilitation, it may be appropriate to refer the case to a court-martial

that can adjudge a punitive discharge. If the soldier has performed well since the commission of the offense and seems to have rehabilitation potential, a referral to special court-martial might be appropriate.

In addition to considering the nature of the offense and the background of the offender, a commander should consider a number of command factors in disposing of a case. The recommendations of subordinates should be given due weight. The subordinates are closest to the situation and most likely know the facts. Generally, commanders rely greatly upon recommendations of their subordinates. As with everything else in military justice, however, such reliance should be tempered by caution. In addition to being closer to the facts, subordinates are also plagued by having troublemakers in their units. A court-martial may just be an easy way to get rid of an unwanted soldier.

The previous disposition of similar offenses within the same command should be considered. The administration of justice should be even-handed in order to be and appear to be fair. If one soldier is given an Article 15 for an offense and another soldier is given a special court-martial for the same offense under the same circumstances, the soldiers may perceive the justice system within a command as unfair.

A commander should determine whether or not an offense is a product of ineptness or unsuitability. If this is the case, an administrative separation might be the proper course of action. Consideration also should be given to whether or not the individual can continue to perform in the Army or whether he or she should be separated. If a separation is appropriate, the next inquiry is whether the separation should be punitive or administrative.

Another consideration is what impact, if any, the offense under consideration has had on unit morale. A commander may be confronted with an 18-year-old accused of low intelligence who has written several bad checks at the very time that the bad check rate of the command is higher than it has ever been. A commander should consider all of the factors involved and avoid the temptation to jump immediately to the discipline and morale of the unit as the primary reason for a decision to court-martial the accused.

3. Alternative Dispositions. Upon receipt of a charge sheet and allied papers, a battalion or brigade

commander has three basic choices in disposing of the charges:

a. The commander may return the charges to the subordinate commander for whatever action the subordinate deems appropriate. This action would follow in a situation where the battalion or brigade commander did not feel the offense was as serious as did the subordinate commander. Remember that the higher commander cannot direct the lower commander to take a particular action e.g., give an Article 15.

b. The battalion or brigade commander may dispose of the charges at his or her own level. A commander who pursues this course should review the options outlined in this chapter and select the one most appropriate for disposition of the charges.

c. The commander may feel that his or her power is inadequate to handle the case. If so, the commander must forward the case to a superior authority whose judicial powers are greater. For example, if a summary court-martial convening authority believes that a punitive discharge is warranted, the charges will have to be forwarded through channels to a general court-martial convening authority, the only authority who can convene a "BCD" special or a general court-martial.

REFERENCE: R.C.M. 306, 401, 402, 403, 404, 407.

C. Article 32 Investigating Officer

1. Before Referral to General Court-Martial. An Article 32 investigation, or defense waiver thereof, is required before any charge may be referred to a general court-martial. Any convening authority may appoint an Article 32 investigating officer, but in practice it is the special court-martial convening authority who normally performs this duty.

2. Functions and Duties. The investigating officer's functions are: (1) to make a thorough and impartial investigation into the truth of the matters; (2) to consider the correctness and the form of the charges; and (3) to recommend a proper disposition of the charges in the interest of justice and discipline.

The duties of an Article 32 investigating officer should take precedence over other military duties. Officers detailed to perform these duties must be familiar with the contents of DA Pam 27-17, Article 32, UCMJ, and R.C.M. 405, Manual for Courts-Martial. In

preparing for and conducting the investigation, the investigating officer must bear in mind that he or she is performing a judicial function. The investigating officer must be impartial in appearance and in actuality.

3. Legal Advice. The Article 32 investigating officer should seek legal advice from an impartial judge advocate, who is assigned by the staff judge advocate to perform this function. This judge advocate officer should be consulted prior to the investigation and whenever advice is needed thereafter. The investigating officer must not rely upon the trial or defense counsel for legal advice. The conclusions and recommendations of the investigating officer should be his or her own.

The accused may be represented at the Article 32 investigation by (1) a detailed military lawyer, (2) a military lawyer of the accused's own selection if that counsel is reasonably available, or (3) a civilian lawyer provided by the accused at no expense to the Government.

Counsel may also be detailed to represent the Government at the Article 32 investigation. Such counsel represents a party to the investigation just as the defense counsel and should not be relied upon by the investigating officer for legal advice. Remember, the investigating officer should obtain legal advice from a judge advocate who does not represent either party.

4. Procedure. Generally, the testimony of the witnesses given at the investigation is recorded by having them sign and swear to the truth of the substance of their statements after the testimony has been reduced to writing. In certain instances an accused may be entitled to the presence of live witnesses in lieu of sworn statements in the file. The investigating officer should have the services of a clerk to summarize the substance of what the witnesses say. A verbatim record is not required. In certain cases, however, the officer appointing the Article 32 investigating officer may desire to have the entire proceedings tape-recorded or reported verbatim by a court reporter. Where the proceedings are taped, great care should be taken to safeguard the tapes until after the accused's trial. In addition to hearing witnesses, the investigating officer will examine any documentary evidence in the case. Usually there will be documentary evidence in cases involving bad checks, illegal money transactions, or larcenies where business records are involved in the proof.

The Article 32 investigating officer considers the evidence from both sides and makes recommendations based upon that evidence. The conclusions and recommendations of the Article 32 investigating officer along with a report of investigation and attached exhibits are submitted on DD Form 457 to the officer who directed the investigation. This officer is free to accept or reject the recommendations as they are advisory only.

REFERENCE: Article 32, UCMJ; R.C.M. 405; DA Pamphlet 28-17.

D. Appointment of Court Members

1. Basic Policies. Some commanders regard court-martial duty as an unnecessary burden and therefore seek to avoid this important duty or select as members those officers who can best be spared by the unit without interrupting its normal operations. Officers who can best be spared under such circumstances are normally those least useful to the command. A commander can make no greater mistake than to disregard the primary policy for selection of members, that is, those with the best qualifications. Persons should be appointed as court members who are best qualified by reason of age, education, training, experience, length of service, and judicial temperament. This selection must be made personally by the convening authority. As a general rule, a convening authority will avoid the appearance of "packing" the court-martial if he or she selects court members with a wide variety of ranks, ages, and job positions.

Certain individuals may not serve as court members. For example, an accuser (one who refers charges) may not be a court member, nor may an investigating officer or one who has acted as counsel for either side in the case. In addition, AR 27-10 prohibits chaplains and Inspectors General from serving as court members, and generally precludes the selection of medical officers, dental officers, and Army nurses.

2. Other Considerations. An effort should be made to appoint officers from another unit who are unfamiliar with the accused and the offense. The accused is entitled to be tried by an impartial court. To avoid the appearance of evil, officers who deal closely with disciplinary matters within the chain of command, such as an S-1, should not normally be selected as court members. For these same reasons it is unwise

for a summary court-martial convening authority to appoint his or her executive officer as the summary court officer. Arrangements should be made to appoint an impartial officer from another battalion. Upon request, an enlisted accused is entitled to have at least one-third of the membership of the court composed of enlisted soldiers, from a different company-size unit than his or her own.

The selection of court members by convening authorities is the focus of much criticism by civilians, and every effort should be made to avoid any charge of unlawful command influence in the selection of court members (see Chapter 3).

REFERENCE: Art. 25, UCMJ; R.C.M. 502, 503, 505.

E. Pretrial Requests of the Convening Authority

1. Severance. A request for severance may arise where two or more accused are being tried together. In such a case, one accused may ask to be tried separately by requesting a severance.

An accused may ask the convening authority for a severance before trial for several reasons. For example, the evidence against one co-accused may be more prejudicial. An accused may also want to be tried separately in a case where the defense desires to use the testimony of the co-accused. In such a case the accused does not want the defense witnesses being judged by the same court hearing his or her case. If one accused is also charged with an unrelated offense, the co-accused may desire a separate trial.

The convening authority should carefully consider the reasons set forth by the accused for a severance and grant the request on a showing of good cause.

2. Change of Venue. A request for a change of venue is a request to move the location of the trial. Once a case is before a military judge, the judge decides such requests. Initially, however, the trial site is selected by the convening authority. The reasons an accused might make such a request include an allegation that the accused cannot get a fair trial at the present location of the trial due to local publicity. The burden rests with the accused to convince the convening authority that local prejudice exists, but a convening authority should seek the advice of a judge advocate officer before making a determination.

3. Amendment of the Specification. Occasionally a case will work its way through the entire pretrial process and be referred to trial and still contain a defective specification. In this event the trial counsel may request to amend the specification to correct the defect. If trial counsel recommends dismissal or amendment of a specification due to insufficient evidence, the convening authority should normally accede to this request. If the specification will mislead the accused or fail to protect against a second trial for the same offense, the request to amend should be granted.

4. Immunity. Occasionally the Government or defense will want the testimony of a witness who may incriminate himself if he testifies. Soldiers cannot be forced to incriminate themselves, but they may be granted immunity either from prosecution completely or from use of their testimony. This solves the incrimination problem and a soldier who is immunized may be ordered to testify. Only the general court-martial convening authority may grant immunity. R.C.M. 704.

5. Psychiatric Examination. In some cases it may be desirable to have the accused examined by a psychiatrist to determine if he or she was mentally responsible at the time of the act or at time of trial. The law does not permit the conviction of one who was not mentally responsible at the time of the act or at time of trial. If there is any question as to the mental status of the accused at the time of the commission of the offense or at the time of trial, the convening authority should arrange for a psychiatric examination of the accused.

Either counsel or some other appropriate party may bring the question of an accused's mental status to the attention of the convening authority. If the defense counsel does not request a sanity board under R.C.M. 706 of the Manual for Courts-Martial, often the Article 32 investigating officer will recommend such a board. The board is composed of physicians and conducts an inquiry into the mental condition of the accused. At least one member of the board should be a psychiatrist. Any request for such a board should be coordinated with the judge advocate officer serving the command.

REFERENCE: R.C.M. 706, 905(j).

F. Speedy Trial

1. In General. After an offense occurs, effective law enforcement and discipline require that a timely inquiry be made into the incident by the company commander while the facts are fresh and any appropriate charges be brought and expeditiously resolved by trial. Delay in investigation and disposition of offenses undercuts morale and discipline. Also, an accused soldier has a right to a speedy trial. If the Government violates an accused's right to a speedy trial, the charges will be dismissed.

2. Speedy Trial Rules. There are several rules which define an accused's right to a speedy trial. Under R.C.M. 707 all accused soldiers must be brought to trial within 120 days after the earlier of imposition of restraint; preferral of charges; or entry on active duty under R.C.M. 204. Under limited circumstances, some periods of time may be excluded from this 120 day period, giving the Government additional time. Although R.C.M. 707 prescribes a 120-day rule, the Court of Military Appeals has applied. A more stringent rule if an accused is in pretrial confinement, arrest, or restriction tantamount to confinement: the accused must be tried within 90 days. Until the Court of Military Appeals decides to accept a 120-day rule, there will be uncertainty as to which period of time applies in cases of pretrial confinement, arrest or restriction tantamount to confinement.

3. Avoiding Speedy Trial Problems. As a general rule, the commander should seek to have cases resolved within 90 days of the day of an incident, and even more quickly if circumstances permit. Immediately upon learning of an incident, the company commander should begin the preliminary inquiry called for by R.C.M. 303. As appropriate, law enforcement assistance should be requested. Early coordination should be made with the unit's supporting judge advocate. Any witnesses needed for trial must be identified and put on hold. Case files should be handcarried. Necessary charges should be brought without waiting for final MP or CID reports. Timely action from incident to final disposition will best serve law enforcement and discipline, and the right to a speedy trial.

REFERENCE: Articles 10 and 33, UCMJ; R.C.M. 707.

CHAPTER 2

OPTIONS AND DUTIES OF THE COMMANDER

TEACHING OUTLINE

I. INTRODUCTION.

An incident occurs, now what?

Key terms: prefer - to swear out charges;
any person subject to the Code
may prefer charges.

refer - to order charges tried by a
specified court-martial;
convening authorities refer
charges.

II. PROCESS AND OPTIONS.

A. Investigate.

1. Preliminary (informal) investigation.
R.C.M. 303

"Upon receipt of information that a member of the command is accused or suspected of committing an offense . . . triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses."

2. Formal investigation. Article 32, UCMJ;
R.C.M. 405.

"[N]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in

substantial compliance with this rule."
R.C.M. 405(a).

- a. May be directed by any court-martial convening authority, but usually directed by Special Court-Martial Convening Authority.
 - b. Investigating officer should be a field grade officer.
 - c. Accused entitled to be present. Trial counsel may attend.
3. **BOTTOM LINE.** Get the facts. Company commander should do most investigations, but it's okay to do 15-6 investigation if not sure a criminal offense has been committed. If criminal offense involved, but not sure of evidence, use Art. 32 investigation to sort out.

B. Consider Alternatives. R.C.M. 306.

1. No action/dismissal.
2. Nonpunitive action, e.g. reprimand, bar to reenlistment, administrative separation.
3. Nonjudicial punishment. Summarized, Company-grade, Field-grade.
4. Judicial action. Summary, Special, BCD Special, General Court-Martial.

C. Pretrial Restraint. R.C.M. 304.

1. Types of pretrial restraint. R.C.M. 304(a).

a. Conditions on liberty.

b. Restriction.

c. Arrest.

d. Pretrial confinement.

e. **BOTTOM LINE.** Restriction starts 120 day speedy trial clock. Pretrial arrest or confinement may start 90-day clock.

2. Who may order pretrial restraint? R.C.M. 304(b).

a. Of officers - commander to whose authority they are subject. May not be delegated.

b. Of enlisted soldiers - any commissioned officer.

3. When may a person be restrained? R.C.M. 304(c). Person ordering the restraint must have reasonable grounds to believe that:

a. Soldier has committed offense triable by court-martial; and

b. Restraint is required by the circumstances.

4. Pretrial confinement considerations. R.C.M. 305.

a. Grounds. Pretrial confinement may be ordered when it is foreseeable that the accused

(1) Will not appear at trial, pretrial hearing, or investigation (also known as flight risk), or

(2) Will engage in serious criminal misconduct.

(3) Less severe forms of restraint are inadequate.

b. Review of pretrial confinement. R.C.M. 305(i); AR 27-10, para. 9-5.

(1) A neutral and detached probable cause determination within 48 hours of the imposition of confinement.

(2) Military magistrate will review each case of pretrial

confinement within 7 days of
the imposition of confinement.

- c. **BOTTOM LINE.** No bail in military, so tough rules to confine soldier before he is even tried. Should not confine soldier just because he's a pain in the rear end. But if flight risk, or serious threat, and unit restriction not good enough, do it. Get SJA involved so magistrate is not bouncing soldiers back to you.

D. Credit for Pretrial Restraint.

1. Accused in pretrial confinement receives day for day credit against sentence to confinement.
2. Accused also receives day for day credit against sentence to confinement for restriction "tantamount to confinement," e.g. sign in every hour, escort to leave room, etc.
3. Accused may receive double credit against sentence if pretrial confinement or restriction tantamount to confinement is done improperly.
4. **BOTTOM LINE.** If accused gets light sentence to confinement, he may receive enough pretrial restraint credit so he does not have to serve any confinement. Then he comes back to your unit.

E. Speedy Trial Discussion.

1. "120-Day Rule." R.C.M. 707.

- a. The accused shall be brought to trial within 120 days after the earlier of:
 - (1) preferral of charges, or
 - (2) the imposition of restraint i.e. restriction.
 - (3) Entry on active duty under R.C.M. 204.
- b. Defense delays are excludable.
- c. Remedy - dismissal of charges.

Note: Conditions on liberty do not start 120-day clock.

- 2. "90 Day Rule." The Court of Military Appeals has ruled that no accused shall be held in pretrial arrest or confinement in excess of 90 days. Defense delays are excludable. Remedy - dismissal of charges.

F. Request for Discharge in Lieu of Trial.
Chapter 10, AR 635-200.

- 1. Requirements.
 - a. Offense must carry a punitive discharge as a possible punishment or,
 - b. Combination of charges would permit a BCD under R.C.M. 1003(d) and if referred to a court authorized to adjudge a punitive discharge.
- 2. Only a GCM convening authority may approve.

3. Type of discharge - usually Under Other than Honorable Conditions.
4. When to recommend/accept?: Answer" unlikely court will give much of a sentence; saves child victims from testifying; precludes massive outlay of resources; no negative effect on command disciplinary climate.

G. Pretrial Agreements. R.C.M. 705.

1. Made between accused and convening authority.
2. When to accept? Answer: good sentence; saves resources; speeds process.

H. Court Personnel Selection. R.C.M. 502, 503.

1. Members.

Convening authority shall detail as members those who are "best qualified . . . by reason of age, education, training, experience, length of service, and judicial temperament." Art. 25(d), UCMJ.

2. Other Personnel.

Trial Counsel - detailed by SJA.

Defense Counsel - detailed by Senior Defense Counsel.

Military Judge - detailed by Trial Judiciary.

I. Action on Findings and Sentence. R.C.M. 1107.

1. Clemency.

a. Findings - convening authority may set aside finding of guilty or change to lesser included offense.

b. Sentence - convening authority may disapprove sentence in whole or part. Cannot increase sentence.

2. Deferment of confinement.

3. Excess leave.

III. FINAL THOUGHT.

1. Military Justice Goals

2. Swift investigation

3. Fair and proper action.

4. Each case individually considered in the context of a consistent disciplinary philosophy

CHAPTER 3

COMMAND INFLUENCE

Introduction

Articles 37 and 98, UCMJ, make it unlawful for a convening authority to attempt to influence the members of a court-martial as to the outcome of the trial. This is an area where the commander must exercise a great deal of care. There must be no appearance of unlawful command influence in the operation of the military justice system. The appearance or perception that an accused is not receiving a fair trial can have an adverse affect on the morale and discipline of the command as well as public confidence in the military justice system.

A. Lawful Versus Unlawful Command Influence

1. General.

Commanders get involved with the criminal justice system during three different stages of a case--pretrial, trial, and post-trial. In each stage commanders have many tools and powers to properly control discipline and the military justice system.

2. Pretrial Stage.

One of the commander's most important powers in the military justice system is the power to gather the facts. In addition to the power to personally gather facts during the commander's preliminary inquiry by interviewing witnesses, authorizing the search and seizure of evidence, and accumulating documentary evidence, the commander can obtain additional investigative assistance from law enforcement agencies or by appointing an investigating officer. Cases recommended for general court-martial must be investigated at an Article 32, UCMJ, pretrial investigation before the charges are actually referred to general court-martial. Any convening authority can appoint an investigating officer and direct an investigation. Choosing a well-qualified investigating officer who musters all the available evidence, identifies witnesses who may not be available to testify at trial, ensures that the charges are in proper form, and makes a sound recommendation as to disposition can go a long way toward ensuring ultimate success at trial.

Commanders also have the power to affect the disposition of cases involving one of their subordinates. This includes the power to take any nonpunitive or punitive action authorized at their level of command or authorized at any inferior level of command. A field grade commander, for example, has the authority to administer a field grade Article 15 but may decide to impose only a company grade level of punishment. Similarly, a general court-martial convening authority has the power to refer a case to a summary or special court-martial. When taking a punitive action, the commander acts in a judicial capacity and must make an independent determination that punishment is appropriate. If a field grade commander feels that a case deserves company grade Article 15 punishment, that commander can either impose the appropriate punishment personally or send the case down to the company level commander for "appropriate disposition at that level." The field grade commander cannot send the case to the company level commander with instructions that "a company grade Article 15 should be administered" or a specific type of punishment should be imposed.

Finally, a commander who feels that a case demands a more serious disposition than can be administered at his or her level can forward the case to a higher authority with a recommendation as to disposition. An accused is entitled to have each level of command make an independent recommendation. A commander cannot have a fixed, inflexible policy regarding level of disposition and cannot establish guidelines "suggesting" an appropriate punishment for any category of cases. Although policy letters are not absolutely prohibited, appellate courts have strongly discouraged their use. Superior commands, however, often promulgate various policy directives. For example, a division commander may express concern over the high rate of motor vehicle violations. The expression of concern does not violate Article 37 unless it causes the subordinate to surrender discretion he or she might have under the Uniform Code of Military Justice. A statement which expresses concern over a high motor vehicle accident rate would be permissible while a directive requiring all motor vehicle accident cases to be tried by court-martial would be unlawful. Subordinate commanders must be free to make an honest, independent assessment of how each case should be handled. This assessment necessarily requires individualized treatment of each soldier's case. Allowing subordinates to make honest recommendations in no way jeopardizes the system, because superior commanders are not bound by their subordinate's recommended disposition. As long as a superior commander

acts before jeopardy attaches, which is defined as when evidence is presented at trial, a case generally can be escalated from a subordinate disposition level to a higher level.

3. Trial Stage.

Once the trial begins, commanders usually are not actively involved beyond providing administrative support. If the convening authority has fulfilled the statutory responsibility to pick the best qualified personnel to sit as court members, there should be no reason why the convening authority cannot just sit back and let justice take its course. If the convening authority selects a panel full of "expendable" officers or enlisted soldiers, more likely than not the personal qualities which made them expendable to their military organization will carry over into their military justice duties and the court-martial results will be disappointing.

The only "contact" that a commander normally should have with witnesses is arranging for their presence at court. General court-martial convening authorities can grant immunity to witnesses if they do not usurp the interests of the Department of Justice. Subordinate commanders should scrupulously avoid negotiating "deals" with witnesses under circumstances that could be construed as involving a promise, express or implied, of immunity.

The most egregious incidents of unlawful command influence are those that impact directly on the trial process by pressuring court members to convict (or punish) contrary to their actual conscience. Direct, overt attempts to subvert justice by putting command pressure on court members are illegal and can be charged as criminal offenses. These incidents, however, are extremely rare.

The more common problem is perceived criticism of soldiers who participate as witnesses at a court-martial. Many subordinates, naturally eager to please their superior commanders, will read more into their superior's remarks than the superior ever intended. When they do so in the area of military justice, there is often prejudicial impact. The appellate courts do not focus solely on the intentions of the commander. Unlawful command influence can result from the misperceptions of the subordinate. If subordinates reasonably misunderstand or reasonably misinterpret the superior commander's intentions and, as a result, the accused is

prejudiced at trial, unlawful command influence has occurred.

Another problem in this area is one of instruction. Certain orientation courses on military justice may violate the prohibition against unlawful command influence. For example, instruction to court members immediately before trial of an AWOL case as to the need for severe punishment in that type of case is unlawful. The only instructional or informational courses which should be given in the area of military justice are those outlined in appropriate Army regulations (see Chapter 19, AR 27-10).

4. Post-Trial Stage.

After trial, the commander has the opportunity to review the results of the trial; take action to approve or disapprove findings; and approve, suspend or reduce the adjudged sentence.

Convening authorities also have the power to request reconsideration of a military judge's legal ruling, other than a finding of not guilty, if he or she believes the ruling is erroneous. The Military Justice Act of 1983 now gives the government the right to appeal an order or ruling of the military judge that "terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceedings." Finally, the convening authority may order a rehearing if there was a legal error in the trial that may substantially affect the findings or sentence.

Again, in the post-trial scenario, Article 37 applies and places two restrictions on the commander's authorized activity. Article 37 prohibits censuring, reprimanding, or admonishing "the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings." Commanders are also prohibited from giving unfavorable efficiency ratings for participating as a court member.

Many commanders are disturbed when they review court-martial results, especially where favorable testimony has been given on behalf of a soldier. As mentioned previously, admonishing the members or witnesses is prohibited. Post-trial criticism or lecturing will become an issue in future cases if such conduct has a "chilling effect" on the independence of

court members or the willingness of witnesses to testify. The proper use of lawful controls can ameliorate the commander's concern. If the commander picks the best qualified court members, they will be able to properly evaluate the testimony of a witness who says that "even though the accused sells drugs or rapes children he can be rehabilitated and remain the Army." Additionally, changes in the 1984 Manual enable the government and defense to introduce more evidence in the presentencing phase of trial. Commanders should encourage their subordinates to cooperate with counsel and to make themselves available to testify on relevant matters.

In the area of military justice, Congress has attempted to balance the rights of the military accused and the power of the commander to control military justice. The Code and the Manual give commanders the tools to achieve legitimate disciplinary objectives without engaging in improper activity.

B. Convening Authority as Accuser

It is unlawful for a commander who is an accuser to convene a court-martial for the trial of that accused. An "accuser" is ordinarily the person who actually signs and swears to the charges. This is the person who completes the signature block of the accuser on page 1 of the charge sheet. Another "accuser" is the commander who directs another individual to sign and swear to the charges as the nominal accuser. Also, a convening authority who has other than an official interest in a case may be disqualified from convening the court because he or she is an accuser. For example, a soldier burglarizes the house of General Jones and also the home of General Smith. General Jones is the convening authority and dismisses the charge concerning the burglary at his own home. He nonetheless refers to general court-martial charges involving the accused's burglary of the home of General Smith. Despite the fact that the charge involving General Jones as a victim has been dismissed, he is still an accuser in this case because he has more than just an official interest in the prosecution of this soldier.

A general court-martial convening authority or a special court-martial convening authority who is an accuser cannot lawfully convene a court. This restriction does not apply to the summary court-martial convening authority, but a commander would be well advised to forward the case to a superior convening authority for trial by summary court-martial. A commander in the foregoing situation who is a general or

special court-martial convening authority should forward the charges to a "superior competent authority" if the commander feels a trial is required. A superior competent authority would be the next superior commander in the chain of command for military justice purposes. In the event the commander develops more than an official interest after the charges are referred to trial, that commander can no longer act as convening authority and any convening authority duties must be handled by superior competent authority.

REFERENCE: R.C.M. 104; 504(c)(1); 601(c).

APPENDIX A

Art. 37. Unlawfully influencing action of court.

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given to open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel represented any accused before a court-martial.

COMMAND INFLUENCE

Outline of Instruction

INTRODUCTION

A. References:

1. Article 37, UCMJ
2. Article 25, UCMJ
3. R.C.M. 104
4. R.C.M. 601(f)
5. AR 27-10, para. 5-10c
6. DA Pam 27-173, ch. 2.

B. The Convening Authority is a Judicial Authority. Understand the Implications.

C. Understand why avoiding unlawful command influence is so important to command, morale and discipline, and to military justice.

THE 10 COMMANDMENTS OF COMMAND INFLUENCE

COMMANDMENT 1: THE COMMANDER MAY NOT ORDER A SUBORDINATE TO DISPOSE OF A CASE IN A CERTAIN WAY.

Each judicial authority, at every level, is vested with independent discretion, by law, which may not be impinged upon. There is no need to dictate dispositions to a lower-level commander.

A. However, the commander MAY:

1. Personally dispose of a case at the level authorized for that offense and for that commander or at any lower level.
2. Send a case back to a lower commander for that lower commander's independent action.
3. Send a case to a higher commander with a recommendation for disposition.
4. Withdraw subordinate authority on particular types of cases.
5. Escalate a lower disposition, except
 - a. An executed Article 15 for a minor crime, or
 - b. After evidence is presented at trial.
 - c. Note R.C.M. 601(f). "Superior convening authorities. Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to that authority for further consideration, including, if appropriate, referral." See also United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983).
6. Mentor subordinates, but note, e.g.,

United States v. Rogers, CM 442663 (A.C.M.R. 29 March 1983) (unpub.). "While a commander may not preclude subordinate commanders from exercising their independent judgment, he may express his opinion and provide guidance to them. The fine line between lawful command guidance and unlawful command control is determined by whether the subordinate commander, though he may give consideration to the policies and wishes of his superior, fully understands and believes that he has a realistic choice to accept or reject them."

B. WATCH OUT FOR:

1. Advice before the offense (Policy Letters).

United States v. Hawthorne, 22 C.M.R. 83 (C.M.A. 1956). A directive or policy that soldiers with two prior convictions be tried by GCM is an unlawful interference with the subordinate's duty to exercise independent discretion.

United States v. Carr, SPCM 1983/5341. (Article 69 Review). Guidelines on appropriate levels of disposition and punishment are inappropriate. An accused is entitled to have the immediate commander exercise independent discretion in the disposition of charges.

2. "Advice" after the offense.

Cryptic note on the blotter. United States v. Bartlett, SPCM 18091 (A.C.M.R. 19 August 1983) (unpub.). Battalion commander forwarded a copy of the MP report to the accused's company commander with a handwritten marginal note stating, "Need Cmt 1 today. Process CM." Affirmed, but only because company commander had "already decided" to recommend trial by court-martial.

COMMANDMENT 2: THE COMMANDER MUST NOT HAVE AN INFLEXIBLE POLICY ON DISPOSITION OR PUNISHMENT.

As a judicial authority, the convening authority must consider each case individually on its own merits. If unable to do so, the power to act must be taken away.

COMMANDMENT 3: AN ACCUSER, ACTUAL OR NOMINAL, MAY NOT DISPOSE OF THE CASE.

As a judicial authority, the convening authority who possesses more than an official interest cannot fairly decide the case. Remember: The appearance of impropriety is just as bad as the impropriety itself.

Exceptions:

- (1) General Regulations
- (2) Article 15
- (3) Summary Court-Martial

COMMANDMENT 4: THE COMMANDER MAY NOT SELECT OR REMOVE COURT MEMBERS IN ORDER TO OBTAIN A PARTICULAR RESULT IN A PARTICULAR TRIAL.

- A. The convening authority chooses court members based on criteria of Article 25, UCMJ:
 1. Age
 2. Education
 3. Training
 4. Experience
 5. Length of service
 6. Judicial temperament

- B. The convening authority must avoid the appearance of impropriety in replacing a panel, and then only for a proper reason, using Article 25 criteria.

COMMANDMENT 5: NO OUTSIDE PRESSURES MAY BE PLACED ON THE JUDGE OR COURT MEMBERS TO ARRIVE AT A PARTICULAR DECISION.

A. AR 27-10, para. 5-10c. "Court members . . . may never be oriented or instructed on their immediate responsibilities in court-martial proceedings except by . . . [t]he military judge. . . ."

B. Bringing in Command Policy.

a. United States v. Brice, 19 M.J. 170 (C.M.A. 1985). USMC Commandant speech on drugs at Quantico during recess of a drug trial required granting the accused's motion for a mistrial.

b. United States v. Walk, 26 M.J. 665 (A.F.C.M.R. 1988). Military judge's instruction during sentencing which related a command policy of generally not retaining those involved in drugs constituted plain error and was not waived by the parties failure to object.

C. In the Deliberation Room.

United States v. Accordino, 20 M.J. 102 (C.M.A. 1985). Senior ranking court members are free to express opinions in strong terms and engage in robust discussions without fear of "appellate sniping." But when rank is used to enhance an argument - i.e. to coerce a subordinate to vote in a particular manner - the line is crossed.

COMMANDMENT 6: WITNESSES MAY NOT BE INTIMIDATED OR DISCOURAGED FROM TESTIFYING.

1. Direct attempts to influence.

- a. United States v. Charles, 15 M.J. 509 (A.F.C.M.R. 1982). Commander's advice to a potentially favorable witness for the accused to modify his comments if possible held to be "inexcusable and highly improper."
- b. United States v. Saunders, 19 M.J. 763 (A.C.M.R. 1984). Commander counselled all defense witnesses on drugs two days before trial. Commander approached defense witnesses in the witness waiting room on the day of trial and expressed a desire that the accused get the maximum punishment. The court found the commander's actions intolerable and inexcusable. Rehearing ordered.
- c. United States v. Levite, 25 M.J. 334 (C.M.A. 1987). The chain of command briefed members of the command individually and as a whole before trial on the "bad character" of the accused. During trial the 1SG "ranted and raved" outside the court room about NCOs condoning drug use. After trial the NCOs who testified for the accused were told "that they had embarrassed" the unit. CMA found unlawful command influence necessitated setting aside findings of guilty and the sentence.

2. Indirect or unintended influence is just as bad.

The most difficult and dangerous areas are those of communications, perceptions, and possible effects on the trial, despite good intentions.

- a. Prior to trial. United States v. Kitts, 23 M.J. 105 (C.M.A. 1986). Staff judge advocate briefing to crew of ship on pending courts-martial had potential for unlawfully influencing the outcome of trials.

- b. United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984); United States v. Yslava, 18 M.J. 670 (A.C.M.R. 1984). The CG addressed groups of commanders and senior NCO's over a period of several months discussing the inconsistency of recommending a GCM or BCD Special Court and then having members of the chain of command testify that the accused was a "good soldier" and should be retained. The message received by many was "don't testify for convicted soldiers." ACMR held en banc in Treakle and Yslava that the speeches resulted in unlawful command influence.
- c. Effects after trial. United States v. Lowery, 18 M.J. 695 (A.F.C.M.R. 1984). The commander and first sergeant "debriefed" the defense witness after trial. The court found no prejudice in this accused's trial but stated, "The policy of 'lecturing' a defense witness or any witness after they have testified cannot help but have a chilling effect on our judicial system."
- c. When command policies butt heads with military justice policies. United States v. Jones, 30 M.J. 849 (N.M.C.M.R. 1990). When two witnesses were relieved of drill sergeant duties immediately after testifying favorably for the accused charged with engaging in lesbian activities, the hesitancy of potential witnesses to testify in a companion or similar case is evidence of unlawful command influence.
- c. Mass Apprehension and Pretrial Punishment. United States v. Cruz, 25 M.J. 326 (C.M.A. 1987). Berating and humiliating suspected soldiers utilizing a mass apprehension in front of a formation found to be unlawful command influence and unlawful punishment.

**COMMANDMENT 7: THE COURT DECIDES PUNISHMENT. AN ACCUSED
MAY NOT BE PUNISHED BEFORE TRIAL.**

- A. The Effect of Pretrial Punishment on Potential Witnesses. See, Cruz above.

- B. Pretrial Confinement is not pretrial punishment.

The commander may confine those awaiting trial who are:

- a. A flight risk
- b. A serious threat to themselves or others
- c. Quitters

**COMMANDMENT 8: NO PERSON MAY INVADE THE INDEPENDENT
DISCRETION OF THE MILITARY JUDGE.**

- A. Questioning sentences. United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976). Commander and SJA inquiries which question or seek justification for a judge's decision are prohibited (unless by an independent judicial commission in line with guidelines of section 9.1(a), ABA Standards, The Function of the Trial Judge).

- B. Subtle pressure.

United States v. Rice, 16 M.J. 770 (A.C.M.R. 1983). Deputy staff judge advocate request that the senior judge telephone the magistrate to explain the seriousness of a certain pretrial confinement issue is improper.

United States v. Mabe, 30 M.J. 1254 (N.M.C.M.R. 1990). Chief Trial Judge's letter, written to increase sentence severity in a particular circuit, subjected the judges of that circuit to unlawful command influence.

COMMANDMENT 9: THE COMMANDER MAY NOT HAVE AN INFLEXIBLE ATTITUDE TOWARD CLEMENCY.

- A. The convening authority may approve or disapprove findings, and suspend and reduce sentences. As a judicial appellate authority, the convening authority has a duty to impartially review military justice actions. An inflexible attitude towards clemency necessitates a loss of command/judicial authority.

United States v. Howard, 48 C.M.R. 939 (C.M.A. 1974). Division commander's letter stated that "all convicted drug dealers say the same things . . . drug peddling and drug use are the most insidious form of criminal attack on troopers . . . [s]o my answer to . . . appeals is, 'No, you are going to the Disciplinary Barracks . . . for the full term of your sentence and your punitive discharge will stand.' Drug peddlers, is that clear?" Convening authority held to be disqualified to perform reviewing function. See also United States v. Toon, 48 C.M.R. 139 (A.C.M.R. 1973).

United States v. Glidewell, 19 M.J. 797 A.C.M.R. (1985). General who indicated that he could not understand how a battalion commander could allow a soldier to be court-martialed and then testify at trial about the soldier's good character did not possess the requisite impartiality to perform post-trial review function.

Consider United States v. Fernandez, 24 M.J. 77 (C.M.A. 1987). Commander's letter characterized illegal drugs as a "threat to combat readiness"; reminded commanders that "detection and treatment of drug abusers" should "be a primary goal"; and stated that the drug problem would not be eliminated until drug trafficking ceased. He directed commanders to "work closely" with law enforcement officials "to ferret out drug dealers;" to "consult with" appropriate "trial counsel before initiating any . . . action against" drug dealers to ensure "appropriate legal action"; to educate troops regarding the effects of drugs; and to "personally screen the names of all court member nominees . . . to insure that only the most mature officers and NCO's . . . [would be] detailed for court-martial duty." CMA did not find an inelastic attitude.

COMMANDMENT 10: IF A MISTAKE IS MADE, RAISE THE ISSUE IMMEDIATELY.

Remedial actions may be taken:

A. By the offending party.

United States v. Sullivan, 26 M.J. 442 (C.M.A. 1988). In response to 1SG's criticism of those who testify on behalf of drug offenders as contravention of Air Force policy, the command instructed all personnel that testifying was their duty if requested as defense witnesses and transferred the 1SG to eliminate his access to the rating process.

B. By the convening authority.

R.C.M. 1102: Anytime before action the convening authority may direct a post-trial session to resolve any matter which affects the legal sufficiency of any findings of guilty or the sentence. See United States v. Levite, 25 M.J. 334 (C.M.A. 1987). ("An informal administrative investigation . . . is an inadequate substitute.")

C. By the trial judge.

1. United States v. Southers, 18 M.J. 795 (A.C.M.R. 1984). Challenges for cause sustained against those who heard offensive comments, subordinates of those who heard offensive comments, and those in the unit at the time of unlawful command influence prior to the issuance of a retraction and clarification letter."

2. United States v. Giarratano, 22 M.J. 388 (C.M.A. 1986). Automatic challenges for cause against those in the unit and no unfavorable character evidence permitted against the accused. Commander disqualified as reviewing authority.

3. United States v. Sullivan, 26 M.J. 442 (C.M.A. 1988). Government given blanket order to produce all defense-requested witnesses; each advised of duty to testify truthfully and that no adverse consequences would be taken. Liberal continuances granted to allow other cleansing actions to work.
4. Post-trial. R.C.M. 1102. Any time before authentication the military judge may direct a post-trial session to resolve matters affecting the legal sufficiency of any findings of guilty or the sentence.

D. By the appellate courts.

1. New recommendation and action ordered. United States v. Howard, 48 C.M.R. 943 (C.M.A. 1974).
2. DuBay hearing ordered. United States v. Madril, 26 M.J. 87 (C.M.A. 1988).
3. Findings and sentence overturned. United States v. Levite, 25 M.J. 334 (C.M.A. 1987). "We have no confidence as a matter of law in this verdict, and it must be overturned.

Note: Remedial action may not work. See United States v. Howard, 248 C.M.R. 939 (1961); United States v. Kitchens, 31 C.M.R. 175 (1961); United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984)(en banc).

CONCLUSION

A. Past.

Justice Douglas: "[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties

of constitutional law." O'Callahan v. Parker, 395 U.S. 158 (1969).

Results:

1. Reduction of off-post offense jurisdiction.
2. Reduced authority of commanders to search/inspect.

B. Present.

"[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment." Solorio v. United States, 107 S.Ct. 2924 (1987).

Results:

1. Increased authority to inspect. MRE 313.
2. Government may appeal. Art. 62; RCM 908.
3. Increased pretrial confinement powers. RCM 305.
4. Increased sentencing evidence in aggravation. RCM 1001.

C. Future.

"Recognizing that military commanders and judge advocates usually exert themselves in every way to comply with both the spirit and the letter of the law, we are confident that events like those involved here will not be repeated. However, if we have erred in this expectation, this Court--and undoubtedly other tribunals--will find it necessary to consider much more drastic remedies." United States v. Thomas, 22 M.J. 388, 400 (C.M.A. 1986).

CHAPTER 4

NONJUDICIAL PUNISHMENT

Introduction

One of the most valuable disciplinary tools available to the commander is the authority to impose nonjudicial punishment in Article 15 of the Uniform Code of Military Justice (UCMJ). In the case of United States v. Booker, 5 M.J. 238 (C.M.A. 1977), the Court of Military Appeals recognized the role of nonjudicial punishment in the military:

We wholeheartedly express our firm belief that those exercising the command function need the disciplinary action provided for under Article 15 . . . to meet and complete their military mission.

The provisions of Article 15 are also discussed in Part V of the Manual for Courts-Martial, 1984, and Chapter 3, Army Regulation 27-10. These three sources are the primary authorities on nonjudicial punishment.

A. Applicable Policies

A commanding officer is encouraged to use nonpunitive measures to the maximum extent possible in furthering the efficiency of the command without resorting to the imposition of nonjudicial punishment. Resort to nonjudicial punishment is proper only in cases in which administrative measures are considered inadequate or inappropriate. Nonjudicial punishment may be imposed in appropriate cases to--

- Correct, educate, and reform offenders who have shown that they cannot benefit by less stringent measures;

- Preserve an offender's military record from unnecessary stigma by a court-martial conviction; and

- Further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial (AR 27-10, para. 3-2).

Before imposing punishment under Article 15 the commander should consider all options. In reviewing these options, the commander should be aware of the ultimate impact of his action upon the soldier's record and upon the discipline of the command. He should also

consider the number of manhours required to effect his decision. When an offense has occurred, one or more of the following options may be available to the commander:

1. No Action.
2. Nonpunitive Action.
 - a. Administrative Reprimand/Admonition (AR 640-10, AR 600-37).
 - b. Administrative Reduction in Grade for inefficiency (AR 600-200).
 - c. Extra Training.
 - d. Magistrate's Court (generally traffic offenses).
 - e. Administrative Separation.
3. Nonjudicial Punishment.
4. Court-Martial.

REFERENCE: MCM, Part V, paras. 1c, d; AR 27-10, paras. 3-2, 3-3.

B. Imposition Authority

1. Who May Give an Article 15?

The general rule is that any "commander" is authorized to impose punishment under Article 15. The term "commander," when speaking of Article 15 authority, refers to a "commissioned officer or warrant officer who by virtue of grade and assignment exercises primary command authority over a military organization or prescribed territorial area which under pertinent official directives is recognized as a command" (AR 27-10, para. 3-7). Whether a unit constitutes a "command" sometimes raises questions. AR 27-10 indicates that "commands" include companies, troops, batteries, numbered units and detachments, missions, Army elements of unified commands and joint task forces, service schools, and area commands. This list is not exhaustive.

The commander's discretion to impose an Article 15 is personal and must not be hampered by any superior's "guidelines" or "policies" (AR 27-10, para. 3-4b). Although a superior commander may not tell a subordinate

when to impose an Article 15 or how much punishment should be assessed, the superior commander may:

a. Totally withhold the subordinate's imposition authority, or

b. Partially limit imposition authority regarding (1) a particular category of offenses (e.g., all larcenies), (2) a certain category of personnel (e.g., all officers), or (3) a particular case (e.g., a fight involving soldiers at a local bar).

Because the authority to impose an Article 15 is an attribute of command, a commander may not, as a general rule, delegate that authority to a subordinate. The exception to that rule is that an officer authorized to exercise general court-martial jurisdiction and any commanding general may delegate Article 15 powers to a commissioned officer actually acting as a deputy or assistant commander. A general court-martial convening authority or a commanding general may also delegate the authority to the chief of staff, provided the chief of staff is a general officer. These delegations must be in writing and may be exercised only when the delegate is senior in rank to the person being punished (AR 27-10, para. 3-7**b**). A commander's delegation of the authority does not prevent that commander from personally acting in any case. An appeal from punishment imposed under a delegation of power will be acted upon by the authority next superior to the officer who delegated the authority.

2. Who May Receive an Article 15?

A commander may impose nonjudicial punishment upon military members of the command. Individuals are considered to be members of the command if they are assigned to the command or affiliated with the command under conditions, either expressed or implied, which indicate that the commander of the unit is to exercise administrative or disciplinary authority over them. If there is any question as to whether an individual is within the command, written or oral orders which affect the individual's status should be examined. If the orders indicate that the soldier is attached for administration of military justice, or simply attached for administration, the individual will normally be considered to be a member of the command for purposes of Article 15. Otherwise, consider where the soldier slept, ate, was paid, performed duty, the duration of the status, and other similar factors (AR 27-10, para. 3-8**a**).

A soldier could be a member (for the purposes of Article 15) of several commands. For example, PFC Frank Jones, who is a member of Company A at Fort Sticks, goes on TDY to Fort Acres where he is temporarily assigned to Company B. Theoretically, he is a member of both Company A and Company B for purposes of nonjudicial punishment.

An Article 15 may not be imposed upon an individual once military status as a member of the command has terminated. For example, once Jones returns to his parent unit (Company A), he is no longer amenable to punishment by the commander of Company B. The commander of Company B may forward reports of offenses to Company A's commander for possible Article 15 punishment (AR 27-10, para. 3-8b).

3. When is an Article 15 Appropriate?

The general rule is that an Article 15 should be offered only for minor offenses. A rule of thumb found in the Manual for Courts-Martial indicates that an offense is minor if the maximum authorized punishment for the offense does not include a dishonorable discharge or confinement for more than one year (MCM, Part V, para. 1e). That, of course, is only a guideline. The standard for determining whether the offense is minor is flexible and requires examination of the surrounding circumstances. For example, possession of cocaine is normally considered a "major" offense, but the circumstances of the possession may dictate that it is a minor offense for the purposes of an Article 15.

Occasionally, an Article 15 is given for a major offense. If this occurs, a higher level commander may still refer the case to a court-martial if he deems the Article 15 inappropriate for the magnitude of the offense. The Article 15 may then be admitted into evidence during the sentencing phase of the trial and the soldier must be given full credit for the Article 15 punishment that was imposed. This type of situation should occur only rarely. A commander should not proceed with an Article 15 if he or she is planning to court-martial the soldier for the same offense later.

REFERENCE: MCM, Part V, para. 2; AR 27-10, paras. 3-7, 3-8.

C. Procedures in Formal Proceedings

1. Notice.

The commander who is considering the imposition of an Article 15 must give written and oral notice to the soldier (MCM, Part V, para. 4a; AR 27-10, para. 3-18a). AR 27-10 allows the notice to be given by an officer or noncommissioned officer designated by the imposing commander. The noncommissioned officer must be a SFC or above and must be senior to the individual being notified. The officer or NCO who conducts the notice portion of the proceeding does not sign in Item 2; the imposing commander must always sign the Article 15. The vehicle for providing the written notice is DA Form 2627, a copy of which is located at Appendix A on page 4-19. A boilerplate notice/advice can be found at Appendix B of AR 27-10 and at Appendix C of this text, page 4-23. Normally, the commander presents the form to the individual and orally explains the various options and rights that are available. These options and rights include the following:

- a. Article 31b Rights.
- b. Right to Demand Trial.
- c. Right to Consult with Counsel.
- d. Right to Request an Open Hearing.
- e. Right to Request a Spokesperson.
- f. Right to Call Witnesses.
- g. Right to Appeal.

2. Rights and Rules.

The soldier is not entitled to know the type or amount of punishment that the soldier will receive if nonjudicial punishment ultimately is imposed. The soldier will be informed of the maximum punishment which may be given under Article 15, and, upon the soldier's request, the maximum punishment that could be adjudged by a court-martial upon conviction for the offense(s) (AR 27-10, para. 3-18f(2)). In addition, the soldier should be advised that the commander is not limited to the Article 15 charges if trial is demanded. This should not be a threat to add additional charges if trial is demanded, but may reflect that a commander selected one or two primary offenses to be dealt with by Article 15 and could list all offenses for a court-martial.

- a. Article 31b, UCMJ, Rights Warnings. The soldier should initially be advised that: (1) he or she is suspected of having committed an offense; (2) he or

she has the right to remain silent; and (3) anything said may be used against him or her in the Article 15 proceeding or in a court-martial.

b. Right to Demand Trial. Unless the individual is attached to or embarked in a vessel, he or she may demand trial by court-martial in lieu of an Article 15. If the soldier does not demand a court-martial, then the commander may proceed under Article 15. If the soldier demands trial by court-martial, the Article 15 proceedings must stop. The commander must then decide whether to prefer court-martial charges. As a practical matter, a commander considering punishment under Article 15 should ensure, before proceeding, that a "good case" exists against the individual; otherwise, the commander could find himself in the unenviable position of not being able to prefer charges in the case of an Article 15 turn-down because of the strong likelihood of acquittal or even dismissal. An Article 15 generally should not be offered unless the commander is satisfied that the case can be won at trial.

c. Right to Consult with Counsel. The soldier must be informed of the right to consult with counsel before making any further decisions regarding the Article 15. For purposes of nonjudicial punishment, "counsel" means (1) a judge advocate, (2) a Department of the Army civilian attorney, or (3) an officer who is a member of the bar of a federal court or of the highest court of a state. Included within this right is notice of the location of qualified counsel and a reasonable time (suggested to be 48 hours) to consult with the counsel.

d. Open Hearing. The soldier may request that the proceedings be open to the public. In all cases the imposing commander decides if the hearing is open or closed. Whether the proceeding is open or not, it is still informal and nonadversarial. The individual has the right to have this proceeding in the presence of the commander who intends to impose the punishment unless such an "appearance is prevented by the unavailability of the commander or by extraordinary circumstances." In those circumstances, the commander will appoint a commissioned officer to hear the soldier's case and make a written summary and recommendations. The commander then makes his decision based on the written summary and recommendations (AR 27-10, para. 3-18g).

e. Spokesperson. The soldier may wish to have a spokesperson present during the proceedings. The spokesperson need not be a lawyer, and no travel costs

or other unusual costs may be incurred at Government expense for the spokesperson's presence. The role of spokesperson must be voluntary; he or she may not be ordered to participate. Neither the spokesperson nor the soldier has a right to question or cross-examine any witnesses who may appear unless the commander agrees. The spokesperson or the soldier may, however, propose lines of questioning or relevant areas to pursue.

f. Witnesses. Should the soldier request witnesses, the commander decides whether they are available. If the witnesses are located at the installation or nearby, they are considered available if their attendance would not unnecessarily delay the proceedings. No witness fees or transportation fees are authorized.

g. Right to Appeal. The soldier should be advised of the right to appeal the punishment (more on this later).

3. Consultation with Counsel.

The commander will provide a reasonable opportunity (normally 48 hours) for the soldier to consult with counsel and decide whether to demand court-martial. If at the end of the designated time (including extensions) the soldier has not demanded trial by court-martial, the commander may impose punishment. The commander may also impose the Article 15 if the individual refuses to complete or sign Block 3 of the DA Form 2627 after having been given a reasonable time to do so. The individual should be told during the initial notification that punishment can be imposed if he or she fails to make a timely demand for trial or refuses to sign. If punishment is imposed under these conditions, the DA Form 2627 will reflect that fact at item 4 (see AR 27-10, para. 3-18f(4)).

4. Hearing.

After consulting with counsel, the soldier returns to the commander and completes DA Form 2627 indicating what options are to be exercised (demand trial, open hearing, etc.). If the soldier elects to proceed under Article 15, a hearing takes place at which the commander determines the guilt or innocence of the soldier. During the hearing the commander hears and considers all the evidence for and against the soldier, and if the soldier is found guilty, evidence of extenuating and/or mitigating factors. See Appendix B, AR 27-10

(reproduced at Appendix C, page 4-23), for further guidance in conducting the hearing.

The commander is not bound by the formal rules of evidence and may consider any matter, including unsworn statements, he or she reasonably believes to be relevant to the offense; however, the standard for guilt is proof beyond a reasonable doubt. AR 27-10, IO1, para. 3-18j.

REFERENCE: MCM, Part V, para. 4; AR 27-10, paras. 3-17, 3-18.

D. Article 15 Punishments

A field grade officer has substantially more punishment power than a company grade officer. See the punishment chart at Appendix E, page 4-27. If a company grade officer does not feel that his or her punishment authority is sufficient, the case may be forwarded to the first field grade officer in the chain of command. The company grade officer may recommend that the field grade officer exercise Article 15 power in the case; however, AR 27-10 prohibits a specific recommendation as to the nature or extent of the punishments which should be imposed. (AR 27-10, para. 3-5).

There are four general types of Article 15 punishments: censure, loss of liberty, deprivation of pay, and reduction in grade.

1. Censure.

There are two types of censure: admonition and reprimand. They may be either oral or written. The admonition is a warning that if the particular conduct is repeated, adverse action will follow. The reprimand is a means of condemning past conduct. The censure should specifically indicate that it is being imposed as punishment under Article 15 (AR 27-10, para. 3-3b).

2. Loss of Liberty.

There are five types of punishment involving loss of liberty that can be imposed under Article 15:

a. Correctional Custody may be imposed upon enlisted soldiers in the grade of E-3 or below. The stated purpose of this punishment is to provide close supervision not amounting to confinement and its attendant stigma. The facilities used for this purpose

are usually austere and conducive to rigorous correction. Correctional custody may be imposed unless the authority to impose has been withheld or limited by a superior authority and provided a correctional custody facility is available for use. An E-4 may be reduced to E-3 and placed in correctional custody as punishment under the same Article 15.

b. Arrest in Quarters is reserved for commissioned officers or warrant officers. While in this status the individual may not exercise command. If a superior commander, knowing of the arrest status, assigns command duties to the officer, the arrest terminates (AR 27-10, para. 3-19b(4)).

c. Extra Duty may be performed at any time and for any length of time within the duration of the punishment. Normal extra duties might include fatigue details, but no duty may be imposed as extra duty which constitutes cruel or unusual punishment, or a punishment not sanctioned by service customs, is normally intended as an honor (e.g., guard of honor), requires the soldier to perform in a ridiculous or unnecessarily degrading manner, constitutes a safety or health hazard to the offender, or would demean the soldier's position as a NCO or specialist.

d. Restriction is the least severe form of deprivation of liberty (moral rather than physical restraint). The individual must remain within specified limits (e.g., company area). The limits may be changed later as long as the new limits are not more restrictive than the original limits. Unless otherwise specified, the individual continues to perform military duties.

e. Confinement on diminished rations may be imposed only upon enlisted personnel in the grade of E-3 or below who are attached to or embarked on a vessel (MCM, Part V, para. 5c(5) and AR 27-10, para. 3-19b(2)).

3. Deprivation of Pay.

Forfeiture of pay is a permanent loss of basic pay, sea pay, and foreign duty pay. If the imposed punishment includes a reduction, the forfeiture is based on the lower pay grade. Forfeitures can be applied against a soldier's retirement pay. AR 27-10, IO1, para. 3-19(b)(7)(c).

An imposed punishment of forfeiture of pay should be indicated in dollar amounts as follows (AR 27-10, para. 3-19b(7)):

When the forfeiture is to be applied for not more than 1 month:

"Forfeiture of \$ _____,"

When the forfeiture is to be applied for more than 1 month:

"Forfeiture of \$ _____ per month for 2 months."

4. Reduction in Grade.

A reduction in grade is the most severe form of nonjudicial punishment. It affects not only the amount of pay the individual will receive but often results in loss of privileges and responsibilities.

The following rules relate to this form of punishment:

a. A reduction may be imposed only by a commander who has general authority to promote to the grade that the soldier currently holds. Paragraph 7-4a, AR 600-200 provides:

The commanders below may promote, subject to authority and responsibility by higher commanders, as follows:

Grades

Promotion Authority

E-4 and below

Company grade commanders may advance or promote assigned soldiers and those of the Reserve Components. They may advance eligible attached soldiers to Grades E-2, E-3, and E-4 subject to the concurrence of the assigned commander.

E-5 and E-6

Field grade commanders of any unit authorized a commander in the grade of lieutenant colonel (05) or higher may promote soldiers assigned to units that are attached/assigned, or on TDY or attached (for military justice and administration) to their command or installation.

E-7, E-8 and E-9

Headquarters, Department of the Army.

Paragraph 6-3, AR 600-200, prohibits the reduction for misconduct of personnel in grades E-7 through E-9 under Article 15.

b. An individual in grade E-5 or E-6 or above may be reduced only one grade at a time in peacetime (MCM, Part V, para. 5b(2)(B)(iv)).

c. The new date of rank is the date the reduction is imposed. If the commander suspends the reduction, the date of rank for the grade held before imposition remains the same (AR 27-10, para. 3-19b(6)(c)).

d. Any reduction imposed by an officer not having the authority to do so is void and must be set aside.

5. Combinations of Punishments.

Normally, no two or more punishments involving deprivation of liberty may be combined to run either consecutively or concurrently. Restriction and extra duties may be combined, however, in any manner to run for a length of time not exceeding the maximum period for extra duties (45 days for field grade punishment, 14 days for company grade punishment).

6. Effective Date of Punishments.

A punishment is "imposed" on the date the commander signs the DA Form 2627 (Items 4-6, DA Form 2627, or Items 1-3, DA Form 2627-1). All punishments, if unsuspended, take effect the date they are imposed unless the commander, or a superior authority, prescribes otherwise.

If, when punishment is imposed, the soldier indicates a desire to appeal the punishment, the command has five calendar days (3 days for summarized proceedings) excluding the date of submission, to decide the appeal. If the appeal is not decided in this five-day period, punishments involving loss of liberty (correctional custody, extra duty, restriction, etc.) will be interrupted at the soldier's request pending decision on the appeal (AR 27-10, para. 3-21).

REFERENCE: MCM, Part V, para. 5; AR 27-10, paras. 3-19 through 3-22.

E. Appeals

As noted earlier, one of the rights available to an individual being punished under Article 15 is the right to appeal. The recognized grounds for appeal are:

- Based on the evidence, the soldier was not guilty.
- Punishment was disproportionate to the offense.
- Punishment was unjust because it did not comply with the law and regulations (MCM, Part V, para. 7a).

The appeal is started with a notation on the DA Form 2627 in Item 7, when the soldier indicates a desire to appeal the punishment. Only one appeal is permissible in Article 15 proceedings. An appeal not made within a reasonable period of time may be rejected by the appellate authority. Normally, an appeal submitted within 5 days after imposition of the punishment is considered timely. Extraordinary circumstances may dictate an extension of that time (AR 27-10, para. 3-29). If, at the time of imposition of punishment, the soldier indicates a desire not to appeal, the superior authority may reject a subsequent election to appeal, even if it is made within the 5-day period (AR 27-10, para. 3-29). The decision to file the Article 15 in the performance or restricted fiche (Item 5, DA Form 2627) is not subject to appeal (AR 27-10, para. 3-37b(2)).

Who acts on the appeal? The soldier's appeal is routed through the commander who imposed the punishment. This commander may reconsider and take mitigating action. If the commander so acts, the individual should be informed and asked whether, in view of the commander's clemency action, he or she wants to withdraw the appeal. Unless the appeal is voluntarily withdrawn, it is forwarded to the appellate authority, who is the authority "next superior" to the commander who imposed the punishment. For example, an appeal from an Article 15 imposed by a company commander would be sent to the soldier's battalion commander (AR 27-10, para. 3-30).

If the individual is transferred before the appeal is started, the appeal would be sent to the "new" appellate authority (i.e., the new battalion commander if we extend the example given above).

You will also recall that when we discussed the delegation of authority to impose an Article 15, we noted that in limited cases the authority could be

delegated. The same holds true here. A "superior authority" who is a commander exercising general court-martial jurisdiction or is a general officer in command may delegate appellate powers to a commissioned officer of the command who is actually serving as a deputy or assistant commander. Such a commander may also delegate Article 15 appellate authority to a chief of staff who is a general officer.

1. Review by Judge Advocate.

Before an appellate authority may act, a judge advocate must review the case (Item 8, DA Form 2627; Note 9, back of DA Form 2627) if the punishment includes any of the following:

- a. Arrest in quarters for more than seven (7) days;
- b. Correctional custody for more than seven (7) days;
- c. Forfeiture of more than seven (7) days' pay;
- d. Reduction of one or more pay grades from the fourth or a higher pay grade;
- e. Extra duties for more than 14 days;
- f. Restriction for more than 14 days.

2. Options.

The appellate authority has a number of available options in deciding what action to take on an Article 15. The punishment may be approved as it stands (assuming that it is valid), but it may not be increased in either quality or quantity. The remaining options are actions which are viewed as lessening the imposed punishment.

a. Suspension. The purpose of suspending the punishment (or portions thereof) is to provide a probationary period for the soldier. If the soldier commits further misconduct amounting to an offense under the UCMJ, or violates a written condition of suspension during the period of suspension, the suspension may be "vacated" and the punishment executed. If the punishment is not vacated before the end of the period of suspension, however, the punishment will be automatically cancelled. Note that misconduct which

causes a suspension to be vacated may also be the subject of a new Article 15.

Several special rules on suspension should be noted (MCM, Part V, para. 6a):

(1) An executed punishment of reduction or forfeiture may be suspended only within a period of four months after the date of imposition.

(2) Suspension of a punishment may not be for a period longer than six months from the date of suspension.

(3) Expiration of enlistment or term of service automatically terminates the suspension.

(4) Although a formal hearing is not required to vacate a suspension, the soldier should, unless impracticable, be given an opportunity to appear before the commander and present matters in defense, extenuation, or mitigation, if the punishment in question is one of those which would require judge advocate review (see preceding section).

b. Mitigation. Mitigation is a reduction of the quantity or quality of the punishment while the general nature of the punishment remains the same (AR 27-10, para. 3-26).

Example: Restriction for 14 days is reduced to restriction for seven days, or extra duties for 14 days is reduced to restriction for 14 days.

Example: Reduction in grade is converted to forfeiture of pay. Note: This is an exception to the rule which requires the general nature of the punishment to remain the same. Furthermore, in this instance care should be exercised to ensure that the mitigated punishment of forfeiture of pay, added to any other forfeitures which might have been originally imposed, does not exceed the maximum amount of loss of pay which could have been originally imposed.

c. Remission. This action cancels any unserved portion of the punishment. Remission does not cancel the Article 15 itself, only that portion of the punishment which has not been served. Note that an unsuspended reduction in grade is executed immediately and therefore, can never be remitted. A discharge automatically remits the unserved portion of the

punishment (A person punished under Article 15 may not be held past his or her ETS to complete unserved punishments.) (AR 27-10, para. 3-27).

d. Setting Aside. If the punishment results in a clear injustice, the punishment or any portion thereof may be set aside and the soldier's rights and property restored. The punishment set aside may be executed or unexecuted (AR 27-10, para. 3-28). Set aside actions should normally be taken within four months of the imposition of the punishment (MCM, Part V, para. 6d), but such actions may be taken even after four months where there are unusual circumstances.

Although mitigating actions are normally taken on "appeal," the commander who imposed the punishment could take these steps even in the absence of an appeal, formal or otherwise. In addition, a "successor in command" to the commander who imposed the punishment may also take action on the punishment. Furthermore, any "superior authority" may take these actions. For example, Jones appeals her Article 15 (imposed by her company commander) to her battalion commander, who in turn approves the punishment. The brigade commander may learn of the situation and suspend a portion of the punishment even though Jones has no right of appeal to the brigade commander (AR 27-10, para. 3-35). A quick reference to all mitigating actions is located at Appendix F at page 4-28 of this text.

REFERENCE: MCM, Part V, paras. 6, 7; AR 27-10, paras. 3-23 through 3-35.

F. Summarized Procedures

A commander may utilize summarized proceedings when dealing with the misconduct of an enlisted member of the command. The punishment imposed may not exceed 14 days restriction, 14 days extra duty, an oral reprimand or admonition, or any combination of these sanctions. The imposing commander or a designated subordinate (officer or noncommissioned officer in the grade of E-7 or above) will inform the soldier of the following:

1. The intent to proceed under Article 15, UCMJ.
2. The intent to use summarized proceedings.
3. The maximum punishment under summarized proceedings.
4. The right to remain silent.

5. The offenses allegedly committed and the articles of the UCMJ violated.

6. The right to demand trial.

7. The right to confront witnesses, examine adverse evidence, and submit matters in defense, extenuation and mitigation.

8. The right to appeal.

The soldier will be given a reasonable time (normally 24 hours) to decide whether to demand trial or to gather matters in defense, extenuation, and mitigation. There is no right to consult with legally qualified counsel. A spokesperson will not accompany the soldier at the proceedings. The soldier will be given a reasonable time (normally 5 days) to appeal. If an appeal is taken, punishment may be served pending a decision on appeal. Appeals should be promptly decided. If not decided within 3 calendar days, and if the soldier so requests, further performance of any punishment involving deprivation of liberty (extra duty and restriction) will be delayed pending decision on the appeal. The summarized proceedings will be legibly recorded on DA Form 2627-1, an example of which is located at Appendix B, page 4-21. The form may be handwritten.

G. Filing

For soldiers in pay grade E-4 and below, all formal Article 15s (DA Form 2627) are filed locally in unit nonjudicial punishment files. They remain there for two years or until transfer to another general court-martial convening authority, whichever occurs first. For all other soldiers, records of formal Article 15s are filed in the Official Military Personnel File (OMPF). The imposing commander decides whether the Article 15 will be filed in the performance fiche or the restricted fiche of the OMPF. If, however, a soldier has an Article 15 in his or her restricted fiche, received while the soldier was a sergeant (E-5) or above, then any subsequent Article 15 will be filed in the soldier's performance fiche, regardless of the imposing commander's filing designation. The performance fiche is routinely used by career managers and selection boards, and a filing on this fiche will likely have an adverse impact on the soldier's career. On the other hand, the restricted fiche is typically not used by

career managers or selections boards and is unlikely to adversely affect the soldier's career.

Summarized Article 15s (DA Form 2627-1) are maintained locally. They remain there for two years or until transfer from the unit. Summarized Article 15s may not be used in subsequent court-martial proceedings, but they may be used in adverse administrative actions.

REFERENCE: AR 27-10, paras. 3-36 through 3-40.

H. Supplemental Action

Even after action has been taken on an appeal and/or after DA Form 2627 has been properly filed, a commander can still take supplemental action on the Article 15. Such action may include mitigation, remission, suspension, set aside, or vacation, so long as it is taken within the time limits prescribed for each action (see Appendix F at page 4-28). The supplemental action is recorded on DA Form 2627-2 (see Appendix G at page 4-29 for an example).

REFERENCE: AR 27-10, para. 3-38.

I. Publicizing of Article 15s

Article 15 punishment may be announced at the next unit formation after punishment is imposed or, if appealed, after the decision on the appeal. It also may be posted on the unit bulletin board. The purpose of announcing the results of punishments is to preclude perceptions of unfairness of punishment and to deter similar misconduct by other soldiers. An inconsistent or arbitrary policy should be avoided regarding the announcement of punishment, to preclude the appearance of vindictiveness or favoritism. In deciding whether to announce punishment of soldiers in the grade of E5 or above, the following should be considered:

- a. The nature of the offense.
- b. The individual's military record and duty position.
- c. The deterrent effect.
- d. The impact on unit morale or mission.
- e. The impact on the victim.

f. The impact on the leadership effectiveness of the individual concerned.

REFERENCE: AR 27-10, para. 3-22.

J. Administrative Consequences

Records of nonjudicial punishment may result in serious consequences not directly associated with the punishment imposed. Under some circumstances, the Article 15 must be reported to the National Criminal Information Center (NCIC). This is generally true only for serious offenses (see Appendix H at page 4-31). The NCIC can be accessed by certain governmental agencies nationwide and could adversely impact the soldier's ability to obtain certain civilian jobs. In addition, a formal Article 15 is generally admissible at trial if the soldier is subsequently court-martialed. On the other hand, summarized Article 15s are not generally admissible at courts-martial. Any type of Article 15 can be considered in Army administrative proceedings or actions such as administrative separation boards and bars to reenlistment. An Article 15 is not, however, an automatic bar to reenlistment.

REFERENCE: AR 27-10, paras. 3-44 and 5-25a(4); AR 601-280, para. 6-4d(7); AR 635-200.

RECORD OF PROCEEDINGS UNDER ARTICLE 15, UCMJ

For use of this form see AR 27 10, the proponent agency is TJAG.

See Notes on Reverse Before Completing Form

NAME AGER, Robert L.	GRADE E-4	SSN 000-00-0000	UNIT Co D, 175 Inf Ft Blank, VA 12345-6789	PAY (Basic & Sea/Foreign) \$830.40
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1. I am considering whether you should be punished under Article 15, UCMJ, for the following misconduct: ✓
At Ft Blank, VA, on or about 0600 hours, 5 Sep 9X, you did, without authority, fail to go at the time prescribed to your appointed place of duty, to wit: Formation, Co D, 1/5 Inf, in front of Building 13. This is in violation of Article 86, UCMJ.

2. You are not required to make any statements, but if you do, they may be used against you in this proceeding or at a trial by court-martial. You have several rights under this Article 15 proceeding. First I want you to understand I have not yet made a decision whether or not you will be punished. I will not impose any punishment unless I am convinced beyond a reasonable doubt that you committed the offense(s). You may ordinarily have an open hearing before me. You may request a person to speak on your behalf. You may present witnesses or other evidence to show why you shouldn't be punished at all (matters of defense) or why punishment should be very light (matters of extenuation and mitigation). I will consider everything you present before deciding whether I will impose punishment or the type and amount of punishment I will impose. ✓ If you do not want me to dispose of this report of misconduct under Article 15, you have the right to demand trial by court-martial instead. ✓ In deciding what you want to do you have the right to consult with legal counsel located at Room 7, Building 10, Ft Blank, VA. You now have 48 hours to decide what you want to do. ✓

DATE 6 Sep 9X	NAME, GRADE, AND ORGANIZATION OF COMMANDER JAMES A. SMITH, CPT, Co D, 1/5 Inf	SIGNATURE <i>James A. Smith</i>
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3. Having been afforded the opportunity to consult with counsel, my decisions are as follow: (Initial appropriate blocks, date, and sign)
a. I demand trial by court-martial.
b. I do not demand trial by court-martial and in the Article 15 proceedings:
(1) I request the hearing be Open Closed. (2) A person to speak in my behalf Is Is not requested.
(3) Matters in defense, mitigation, and/or extenuation: Are not presented Will be presented in person Are attached.

DATE 7 Sep 9X	NAME AND GRADE OF SERVICE MEMBER ROBERT L. AGER, SPC	SIGNATURE <i>Robert L. Ager</i>
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4. In a(n) Open Closed hearing ✓ all matters presented in defense, mitigation, and/or extenuation, having been considered, the following punishment is imposed: ✓ Reduction to Private First Class (E-3), suspended, to be automatically remitted if not vacated before 5 Nov 9X; and forfeiture of \$100.00.

(NOTE: REFER TO AR 27-10 PARA 3-37b(1) PRIOR TO COMPLETING ITEM 5.)

5. I direct the original DA Form 2627 be filed in the Performance file Restricted file of the OMPF. ✓
6. You are advised of your right to appeal to the CAF 1/5 within 5 calendar days. An appeal made after that time may be rejected as untimely. Punishment is effective immediately unless otherwise stated above.

DATE 7 Sep 9X	NAME, GRADE, AND ORGANIZATION OF COMMANDER JAMES A. SMITH, CPT, Co D, 1/5 Inf	SIGNATURE <i>James A. Smith</i>
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7. (Initial appropriate block, date, and sign)
a. I do not appeal b. I appeal and do not submit additional matters 8/9/ c. I appeal and submit additional matters 8/9/

DATE 7 Sep 9X	NAME AND GRADE OF SERVICE MEMBER ROBERT L. AGER, SPC	SIGNATURE <i>Robert L. Ager</i>
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8. I have considered the appeal and it is my opinion that: The proceedings were conducted in accordance with law and regulation and the punishments imposed were not unjust or disproportionate to the offense committed.

DATE 8 Sep 9X	NAME AND GRADE OF JUDGE ADVOCATE LEWIS H. RANE, MAJ	SIGNATURE <i>Lewis H. Rane</i>
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9. After consideration of all matters presented in appeal, the appeal is:
 Denied Granted as follows: 10/

DATE 9 Sep 9X	NAME, GRADE, AND ORGANIZATION OF COMMANDER LYMAN Z. LIPE, LTC, 1/5 Inf	SIGNATURE <i>Lyman Z. Lipe</i>
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10. I have seen the action taken on my appeal. DATE 9 Sep 9X SIGNATURE OF SERVICE MEMBER *Robert L. Ager*

11. ALLIED DOCUMENTS AND/OR COMMENTS 11/12/13/
Statement by SFC Jones, dated 5 Sep 9X

NOTES

- 1/ Insert a concise statement of each offense in terms stating a specific violation and the Article of the UCMJ (*Part IV MCM*). If additional space is needed, use item 11 or continuation sheets as described in note 11 below.
- 2/ Inform the member of the maximum punishment which may be imposed under Article 15
- 3/ Inform the member that if he or she demands trial, trial could be by SCM, SPCM, or GCM. Additionally, inform the member that he or she may object to trial by SCM and that at SPCM or GCM he or she would be entitled to be represented by qualified military counsel, or by civilian counsel at no expense to the government. If the member is attached to or embarked in a vessel, he or she is not permitted to refuse Article 15 punishment. In such cases, all reference to a demand for trial will be lined out and an appropriate remark will be made in item 11 indicating the official name of the vessel and that the member was attached to or embarked in the vessel at the time punishment was imposed.
- 4/ Give the member copy 5 of this form.
- 5/ Offenses determined not to have been committed will be lined out. If the imposing commander decides not to impose any punishment, the member will be notified and all copies of this form destroyed.
- 6/ Amounts of forfeitures of pay will be rounded off to the next lower whole dollar. If a punishment is suspended, the following statement should be added after it: To be automatically remitted if not vacated before (date). If punishment includes a written admonition or reprimand, it will be attached to this form and listed in item 11.
- 7/ The imposing commander will initial the appropriate block. The OMPF performance fiche is routinely used by MOS specialty career managers and DA selection boards. The OMPF restricted fiche is not given to MOS/specialty career managers or DA selection boards without approval of the Cdr. MILPERCEN or selection board proponent.
- 8/ If the member appeals, this form and all written evidence considered by the imposing commander will be forwarded to the superior authority
- 9/ Before acting on an appeal, it must be referred to a judge advocate for advice when the punishment, whether or not suspended, includes reduction of one or more pay grades from the fourth or a higher pay grade, or is in excess of one of the following: 7 days arrest in quarters, 7 days correctional custody, 7 days forfeiture of pay, or 14 days of either extra duties or restriction. (See Article 15e(1) to (7), UCMJ.)
- 10/ The superior authority will initial the appropriate block. If the appeal is granted, the specific relief granted will be stated according to note 12.
- 11/ In this space indicate the number of pages attached as follows: Allied documents on appeal consist of _____ pages. Allied documents include all written matters considered by the imposing commander submitted by the member on appeal and the commander's rebuttal, if applicable. If additional space is needed for completion of any item(s), use plain bond headed "Continuation Sheet 1", etc
- 12/ Applicable portions of the following format may be used to record action taken on appeal. Appropriate language should be entered in item 11 or, if necessary, on a continuation sheet. Supplementary actions (*para 3-38, AR 27-10*) will be recorded on DA Form 2627-2.

Suspension, Mitigation, Remission, or Setting Aside

(DATE)

On (date), the punishment(s) of _____
imposed on (date of punishment) (was) (were) (suspended and will be automatically remitted if not vacated before (date))
(mitigated to) (set aside, and all rights, privileges, and property affected restored) (by my order) (by order of) (the officer who
imposed the punishment) (the successor in command to the imposing commander) (as superior authority).

(Typed name, grade, and organization of commander) /s/ _____
- 13/ Racial/ethnic identifiers will be placed in Item 11 (*Chapter 15, AR 27-10*).

SUMMARIZED RECORD OF PROCEEDINGS UNDER ARTICLE 15, UCMJ

For use of this form, see AR 27-10; the proponent agency is TJAG.

See Notes on Reverse Before Completing Form

This form will be used only in cases involving enlisted personnel and then ONLY when no punishment OTHER THAN oral admonition or reprimand, restriction for 14 days or less, extra duties for 14 days or less, or a combination thereof has been imposed.

NAME HABE, Alfred H.	GRADE E-3	SSN 111-11-1111	UNIT A Btry 9/10 FA, 13th Inf Div Ft Blank, VA
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1. On 15 June 199X, the above service member was advised that I was considering imposition of nonjudicial punishment under the provisions of Article 15, UCMJ, Summarized Proceedings, for the following misconduct:

On or about 0900 hours 13 June 199X, you were absent without authority from A Btry, 9/10 FA, 13th Inf Div, located at Ft Blank, VA, and remained so absent until on or about 0800 hours, 14 June 199X, in violation of Article 86, UCMJ.

2. The member was advised that no statement was required, but that any statement made could be used against him or her in the proceeding or in a court-martial. The member was also informed of the right to demand trial by court-martial, the right to present matters in defense, extenuation and/or mitigation, that any matters presented would be considered by me before deciding whether to impose punishment, the type or amount of punishment, if imposed, and that no punishment would be imposed unless I was convinced beyond a reasonable doubt that the service member committed the misconduct. The service member was afforded the opportunity to take 24 hours to make a decision regarding these rights. No demand for trial by court-martial was made. After considering all matters presented, the following punishment was imposed:

Oral reprimand and restriction for 14 days.

3. The member was advised of the right to appeal to the Cdr 9/10 FA, 13 Inf Div within 5 calendar days, that an appeal made after that time could be rejected as untimely, and that the punishment was effective immediately unless otherwise stated above. The member:

Elected immediately not to appeal Requested time to decide whether to appeal and the decision is indicated in item 4, below.

DATE 15 June 199X	NAME, GRADE, AND ORGANIZATION OF IMPOSING COMMANDER RICHARD J. MOAD, CPT, A Btry, 9/10 FA	SIGNATURE <i>Richard J. Moad</i>
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4. (Initial appropriate block, date, and sign)

a. I do not appeal b. I appeal and do not submit matters for consideration c. I appeal and submit additional matters

DATE 15 June 199X	NAME AND GRADE OF SERVICE MEMBER ALFRED H. HABE, E-3	SIGNATURE <i>Alfred H. Habe</i>
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5. After consideration of all matters presented in appeal, the appeal is:

Denied Granted as follows:

DATE	NAME, GRADE, AND ORGANIZATION OF COMMANDER	SIGNATURE
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6. I have seen the action taken on my appeal.	DATE	SIGNATURE OF SERVICE MEMBER
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7. ALLIED DOCUMENTS AND/OR COMMENTS

[SEE CHAPTER 15]

NOTES

- 1/ See AR 27-10 for further guidance. Ordinarily entries on this form will be handwritten in ink.
- 2/ Insert a concise statement of each offense in terms stating a specific violation and the Article of the UCMJ. If additional space needed, use item 7 and/or continuation sheets as described in note 9 below.
- 3/ Inform the member that if he or she demands trial, trial could be by SCM, SPCM, or GCM. Additionally, inform the member that he or she may object to trial by SCM and that at SPCM or GCM he or she would be entitled to be represented by qualified military counsel, or by civilian counsel at no expense to the government. If the member is attached to or embarked in a vessel, he or she is not permitted to refuse Article 15 punishment. In such cases, all reference to a demand for trial will be lined out and an appropriate remark will be made in item 7 indicating the official name of the vessel and that the member was attached to or embarked in the vessel at the time punishment was imposed.
- 4/ Offenses determined not to have been committed will not be listed. If the imposing commander decides not to impose punishment, the member will be notified and no copies of this record will be prepared. If a punishment is suspended, the following statement should be added after it: "To be automatically remitted if not vacated before (date)."
- 5/ If the member immediately elects not to appeal, item 5 will not be completed.
- 6/ The imposing commander will initial the appropriate block.
- 7/ If the individual appeals, this form and all matters set forth in item 7 will be forwarded to the superior authority.
- 8/ The superior authority will initial the appropriate block. Refer to note 10, below.
- 9/ In this space indicate the number of pages as follows: Allied documents on appeal consist of _____ pages. Allied documents include all written matters considered by the imposing commander, submitted by the member on appeal, commander's rebuttal, and copies of supplementary actions taken on the punishment. Supplementary actions will be recorded in accordance with note 10. If additional space is needed for completion of any item(s), use plain bond headed "Continuation Sheet 1," etc.
- 10/ Applicable portions of the following suggested formats may be used to record action taken on an appeal and supplementary actions for summarized Article 15 proceedings. Appropriate language should be entered in item 7 or, if necessary, on continuation sheets.
 - a. Suspension, Mitigation, Remission, or Setting Aside.

On (date) the punishment(s) of _____
imposed on (date of punishment) (was) (were) (suspended and will be automatically remitted if not vacated before (date))
(mitigated to) (set aside, and all rights, privileges, and property affected restored) (by my order) (by order of) (the officer who
imposed the punishment) (the successor in command to the imposing commander) (as superior authority).

(Typed name, grade, and organization of commander) /s/ _____
 - b. Vacation of Suspension

The suspension of the punishment(s) of _____
imposed on (date of punishment) (is) (are) hereby vacated. The unexecuted portion(s) of the punishment(s) will be duly executed.

(Typed name, grade, and organization of commander) /s/ _____
- 11/ Racial/ethnic identifiers will be placed in item 7 (Chap 15, AR 27-10).

Suggested Guide for Conduct of Nonjudicial Punishment Proceedings

(NOTE: This guide is designed to ensure that the proceedings comply with all legal requirements. It contemplates a three-step process, conducted in the presence of the member, consisting of (1) notification, (2) hearing (that may be omitted if the member admits guilt), and (3) imposition of punishment (if the findings result in a determination of guilt).

Section 1 Notification

If the notification of punishment is to be accomplished by other than the imposing commander, the procedures under this provision should be appropriately modified (see note (d) below).

CO: As your commander, I have disciplinary powers under Article 15 of the UCMJ. I have received a report that you violated the Uniform Code, and I am considering imposing nonjudicial punishment. This is not a formal trial like a court-martial. As a record of these proceedings I will use DA Form 2627. I now hand you this form. Read items 1 and 2. Item 1 states the offense(s) you are reported to have committed and item 2 lists the rights you have in these proceedings. Under the provisions of Article 31 of the UCMJ, you are not required to make any statement or provide any information concerning the alleged offense(s). If you do, it may be used against you in these proceedings or in a trial by court-martial. You have the right to consult with a lawyer as stated in item 2.

1. Note for CO:

Wait for the member to read items 1 and 2 of DA Form 2627. Allow him or her to retain copy of the form until the proceedings are finished and you have either imposed punishment or decided not to impose it.

CO: Do you understand item 1? Do you understand the offense(s) you are reported to have committed?

M(member). (Yes) (No)

2. Note for CO:

If the member does not understand the offense(s), explain the offense(s) to him.

CO: Do you understand item 2? Do you have any questions about your rights in these proceedings?

M: (Yes) (No)

3. Note for CO:

If the member does not understand his or her rights, explain them in greater detail. If the member asks a question you cannot answer, recess the proceedings. You probably can find the answer in one of the following sources:

- Article 15, UCMJ.
- Part V of the Manual for Courts-Martial (MCM).
- Chapter 3, AR 27-10.

If you cannot find the answer in one of these sources, contact your JA office.

CO: There are some decisions you have to make:

- You have to decide whether you want to demand trial by court-martial. If you demand a court-martial these proceedings will stop. I then will have to decide whether to initiate court-martial proceedings against you. If you were to be tried by court-martial for the offense(s) alleged against you, you could be tried by summary court-martial, special court-martial, or general court-martial. If you were to be tried by special or general court-martial you would be able to be represented by a military lawyer appointed at no expense to you or by a civilian lawyer of your choosing at no expense to the government.
- If you do not demand trial by court-martial, you must then decide whether you want to present witnesses or submit other evidence in defense, extenuation, and/or mitigation. Your decision not to demand trial by court-martial will not be considered as an admission that you committed the offense(s); you can still submit evidence in your behalf.

(1) Evidence in defense are facts showing that you did not commit the offense(s) stated in item 1. Even if you cannot present any evidence in defense, you can still present evidence in extenuation or mitigation.

(2) Evidence in extenuation are circumstances surrounding the offense, showing that the offense was not very serious.

(3) Evidence in mitigation are facts about you, showing that you are a good soldier and that you deserve light punishment.

c. You can make a statement and request to have a spokesperson appear with you and speak on your behalf. I will interview any available witnesses and consider any evidence you think I should examine.

d. Finally, you must decide whether you wish to request that the proceedings be open to the public. Do you understand the decisions you have to make?

M: (Yes) (No)

CO: If you do not demand trial by court-martial and after you have presented your evidence, I am convinced that you committed the offense, I could then punish you. The maximum punishment I could impose on you would be

4. Note to CO:

See table 3-1 for maximum punishments.

CO: You should compare this punishment with the punishment you could receive in a court-martial. (If the member requests to be informed of the maximum court-martial sentence you may state the following: The maximum sentence you could receive in a court-martial is for the offense(s).)

5. Note to CO:

Part IV, MCM lists for each punitive article the punishments a court-martial may impose for violations of the various Articles of the UCMJ.

b. You may inform the member that reducing the charges to a summary or special court-martial would reduce the maximum sentence. For example, a summary court may not impose more than 1 month of confinement at hard labor. A special court may not impose more than 6 months of confinement at hard labor.

c. You should not inform the member of the particular punishment you may consider imposing until all evidence has been considered.

CO: As item 2 points out, you have a right to talk to an attorney before you make your decisions. A military lawyer whom you can talk to free of charge is located at Would you like to talk to an attorney before you make your decisions?

M: (Yes) (No)

6. Note to CO:

If the member desires to talk to an attorney, arrange for the member to consult an attorney. The member should be encouraged to consult the attorney promptly. Inform the member that consultation with an attorney may be by telephone. The member should be advised that he or she is to notify you if any difficulty is encountered in consulting an attorney.

CO: You now have 48 hours to think about what you should do in this case. You may advise me of your decision at any time within the 48-hour period. If you do not make a timely demand for trial or if you refuse to sign that part of DA Form 2627 indicating your decision on these matters, I can continue with these Article 15 proceedings even without your consent. You are dismissed.

7. Note to CO:

At this point, the proceedings should be recessed unless the service member affirmatively indicates that he or she has made a decision and does not want additional time or to consult with an attorney. In the event the member does not make a decision within the specified time or refuses to complete or sign item 3 of DA Form 2627, see paragraph 3-18f. When you resume the proceedings, begin at item 3, DA Form 2627.

CO: Do you demand trial by court-martial?

M: (Yes) (No)

8. Note to CO:

If the answer is yes, continue as follows:

CO: Initial block a, sign and date item 9. Because you have demanded trial by court-martial, these proceedings will stop. You now must decide whether to initiate court-martial proceedings against you. I will notify you when I have reached a decision. You are dismissed.

9. Note to CO:

If the answer is no, continue as follows:

CO: An open hearing means that the proceeding is open to the public. If the hearing is closed, only you, I, designated members of the chain of command, available witnesses and a spokesperson, if designated, will be present. Do you request an open hearing?

M: (Yes) (No)

CO: Do you wish to be accompanied by a spokesperson?

M: (Yes) (No)

CO: Initial block 3b(1) and (2) indicate any evidence showing that you did not commit the offense(s), or explaining why you committed the offense(s), or any other information about yourself that you would like me to know? Do you wish to have any witnesses testify, including witnesses who would testify about your good past military record or character?

M: (Yes) (No)

CO: Now initial block 3b(3) indicating your decision, and sign and date the form in the space provided under that item.

10. Note to CO:

Wait until the member initials the blocks and signs and dates the form. If the answer to all the questions are no, you may proceed to impose punishment.

If the answer regarding witnesses and evidence is yes, and the member is prepared to present his or her evidence immediately, proceed as follows: Consider the evidence presented. If the evidence convinces you that you should not punish the member, terminate the proceedings in favor of the member, and destroy all copies of DA Form 1637. If you are convinced that the member committed the offense(s) beyond a reasonable doubt and deserves to be punished, proceed to impose punishment.

Section III Appellate Advice

12. Note to CO:

Read the DA Form 1637 to the member.

CO: Read item 4 which lists the punishment I have just imposed on you. Now read item 6 which points out that you have a right to appeal this punishment to (title and organization of next superior authority). You can appeal if you believe that you should not have been punished at all, or that the punishment is too severe. Any appeal should be submitted within 5 calendar days. An appeal submitted after that time may be rejected. Even if you appeal, the punishment is effective today (unless the imposing commander sets another date). Once you submit your appeal, it must be acted upon by (title and organization of next superior) within 5 calendar days, excluding the day of submission. Otherwise, any punishment involving deprivation of liberty (confinement, restriction or extra duty), at your request, will be interrupted pending the decision on the appeal. Do you understand your right to appeal?

M: (Yes) (No)

CO: Do you desire to appeal?

M: (Yes) (No)

13. Note to CO:

If the answer is yes, go to item 15. If the answer is no, continue as follows:

CO: If you do not want to appeal, initial block a in item 7 and sign the blank below item 7.

14. Note to CO:

Now give the member detailed orders as to how you want him or her to carry out the punishment.

CO: You are dismissed.

15. Note to CO:

If the answer is yes, continue as follows:

CO: Do you want to submit any additional matters to be considered in an appeal?

M: (Yes) (No)

16. Note to CO:

If the answer is yes, go to item 17. If the answer is no, continue as follows:

CO: Initial block b in item 7 and sign the blank below item 7. I will notify you when I learn what action has been taken on your appeal. You are dismissed.

17. Note to CO:

If the answer is yes, continue as follows:

CO: If you intend to appeal and do not have the additional matters with you, item 7 will not be completed until after you have obtained all the additional material you wish to have considered on appeal. When you have obtained this material, return with it by (specify a date 5 calendar days from the date punishment is imposed) and complete item 7, by initialing the box and signing the blank below. After you complete item 7, I will send the DA Form 1637 and the additional matters you submit to (title and organization of next superior authority). Remember that the punishment will not be delayed (unless the imposing commander sets another date). You are dismissed.

APPENDIX D

M TAB TAB TAB TAB TAB

ARTICLE 15 - RECONCILIATION LOG

For use of this form, see AR 27-10; the proponent agency is TJAG.

SEQUENCE NUMBER	DATE IMPOSED	NAME OF MEMBER	PUNISHMENT	DATE POSTED BY FAO*	DATE VERIFIED*

- ** The reconciliation log is a handy tool that the commander can use to monitor whether forfeitures imposed as punishment under Article 15 are properly and timely collected from a soldier's pay. On the day punishment is imposed, the commander or his delegate should record in the log the sequence number, date imposed, name of soldier, and the punishment imposed. When the appropriate copy of the DA Form 2627 is returned by the finance office (FAO) to the unit, the date the Article 15 entries were posted by finance (date will be noted on form by FAO) should be entered in the log (date posted by FAO), as well as the date the finance copy is returned to the unit (date verified).

REMARKS:

*Applies only to unexpended reductions or forfeitures.



APPENDIX E

Table 3-1
Maximum Punishments

A. MAXIMUM PUNISHMENT FOR ENLISTED MEMBERS*

*NOTE: The maximum punishment imposable by any commander under Summarized Procedures will not exceed extra duty for 14 days, restriction for 14 days, oral reprimand, or any combination thereof.

Punishment	Imposed By Company Grade Officers	Imposed By Field Grade and General Officers
Admonition/Reprimand AND Extra Duties AND ¹ Restriction or Correctional Custody ² (E1 thru E3) or Restricted Diet Confinement (E1 thru E3 attached or embarked on vessel) AND Reduction: (E1 thru E4) (E5 thru E6) AND Forfeiture: ³	Yes 14 days 14 days 7 days 3 days One grade 7 days' pay ³	Yes 45 days 60 days 30 days 3 days One or more grades One grade in peacetime ⁴ ½ of 1 month's pay for 2 months

B. PUNISHMENT FOR COMMISSIONED AND WARRANT OFFICERS

Punishment	Imposed By Company Grade Officers	Imposed By Field Grade Officers	Imposed By General Officers or GCM Convening Authorities
Admonition/Reprimand ⁷ AND Arrest or Restriction AND Forfeiture	Yes No 30 days No	Yes No 30 days No	Yes 30 days 60 days 1/2 of 1 month's pay for 2 months

C. COMPUTING MONTHLY AUTHORIZED FORFEITURES OF PAY UNDER ARTICLE 15, UCMJ

1. UPON ENLISTED PERSONS

a. $\frac{(\text{Monthly Basic Pay}^{3.5}) + (\text{Foreign Pay}^{3.6})}{2}$ = Maximum forfeiture per month if imposed by major or above.

b. $\frac{(\text{Monthly Basic Pay}^{3.5}) + (\text{Foreign Pay}^{3.6})}{30} \times 7$ = Maximum forfeiture if imposed by captain or below.

2. UPON COMMISSIONED AND WARRANT OFFICERS WHEN IMPOSED BY AN OFFICER WITH GENERAL COURT-MARTIAL JURISDICTION OR BY A GENERAL OFFICER IN COMMAND.

$\frac{(\text{Monthly Basic Pay}^5)}{2}$ = Maximum authorized forfeiture per month.

1. Combinations of extra duties and restriction cannot exceed the maximum allowed for extra duty.
2. Subject to limitations imposed by superior authority, and presence of adequate facilities under AR 190-34, if punishment includes reduction to E3 or below, reduction must be unsuspended.
3. Amount of forfeiture is computed at the reduced grade, even if suspended, if reduction is part of the punishment imposed. For Reserve Component (RC)

soldiers, use monthly basic pay for the grade and time in service of an Active Component (AC) soldier. (See para 21-8.)

4. Only if imposed by a field grade commander of a unit authorized a commander in the grade of O5 or higher. In the RC, reduction is only authorized from grade E5. RC soldiers of grade E6 and higher may not be reduced by Article 15 punishment.

5. At the time punishment is imposed.
8. If applicable.

7. In the case of Commissioned officers and warrant officers, admonitions and reprimands given as nonjudicial punishment must be administered in writing (para 5c(1), Part V, MCM 1984).

APPENDIX F

COMMAND OPTIONS ON APPEAL

<u>ACTION</u>	<u>PURPOSE</u>	<u>WHEN APPROPRIATE</u>	<u>LIMITATIONS</u>
Approve	Allows punishment to stand as imposed by subordinate commander.	Punishment is legal and not excessive, and soldier does not deserve clemency.	None
Suspend	Suspend all or any part of punishment conditioned on soldier's good conduct.	<ol style="list-style-type: none"> 1. Soldier deserves a second chance. 2. Soldier may perform better with the punishment "hanging" over him. 	<ol style="list-style-type: none"> 1. Executed punishment of reduction in grade or forfeiture may be suspended only within 4 months after punishment imposed. 2. Can't suspend for more than 6 months.
Mitigate	Reduce the quantity or quality of the punishment.	<ol style="list-style-type: none"> 1. Original punishment imposed was too harsh for the circumstances. 2. Soldier's subsequent good conduct merits a less severe punishment. 	<ol style="list-style-type: none"> 1. Can only mitigate unserved punishments (except reduction in grade, which can be mitigated to a forfeiture of pay). 2. A suspended punishment cannot be mitigated to an unsuspended punishment.
Remit	Cancel any portion of the punishment which has not been served.	<ol style="list-style-type: none"> 1. Original punishment imposed was too harsh for the circumstances. 2. Soldier's subsequent good conduct merits a less severe punishment. 	<p>Unsuspend reduction in grade is executed immediately and cannot be remitted (can be mitigated or set aside).</p>
Set Aside	Removes punishment and restores soldier to status before the punishment was imposed.	Punishment was a "clear injustice," i.e., something was wrong with the proceeding or the evidence was insufficient.	Can be exercised only within 4 months after the punishment was executed (except in unusual circumstances, which must be documented).

RECORD C SUPPLEMENTARY ACTION UNDER ARTICLE 15, UCMJ

For use of this form, see AR 27-10; the proponent agency is the Judge Advocate General.

NAME AND GRADE AGER, Robert L., E4	SSN 000-00-0000	UNIT Co D, 1/5 Inf, Ft Blank, VA 00000-0000
TYPE OF SUPPLEMENTARY ACTION (OTHER THAN BY SUPERIOR AUTHORITY ACTING ON APPEAL) (Check appropriate box)		
<input type="checkbox"/> SUSPENSION (Complete item 1 below)	<input type="checkbox"/> MITIGATION (Complete item 2 below)	<input type="checkbox"/> REMISSION (Complete item 3 below)
<input type="checkbox"/> SETTING ASIDE (Complete item 4 below)	<input checked="" type="checkbox"/> VACATION OF SUSPENSION (Complete item 5 below)	

1. SUSPENSION

The punishment(s) of _____
 imposed on the above service member on _____ (is) (are) suspended and will automatically remitted if not vacated
 before _____
 (date)

2. MITIGATION

The punishment(s) of _____
 imposed on the above service member on _____ (is) (are) mitigated to _____
 (date of punishment)

3. REMISSION

The punishment(s) of _____
 imposed on the above service member on _____ (is) (are) remitted.
 (date of punishment)

4. SETTING ASIDE

The punishment(s) of _____
 imposed on the above service member on _____ (is) (are) set aside on the basis that _____
 (date of punishment)

All rights, privileges, and property affected are hereby restored.

5. VACATION OF SUSPENSION

- a. The suspension of the punishment ~~(of)~~ of reduction to Private First Class (E3)
 imposed on the above service member on 7 Sep 9X (is) (~~are~~) hereby vacated. The unexecuted portion ~~(of)~~ of the punish-
 ment ~~(s)~~ will be duly executed.
- b. Vacation is based on the following offense(s): At Fort Blank, VA, on or about 0600 hours, 15 Sep 9X,
SP4 Robert L. Ager, did, without authority, fail to go at the time prescribed to his
appointed place of duty, to wit: Formation, Co D, 1/5 Inf, in front of Building 13.
This is in violation of Article 86, UCMJ.
- c. The member ~~was~~ was not given an opportunity to rebut.
- d. The member ~~was~~ was not present at the vacation proceeding (para 3-25, AR 27-10).

AUTHENTICATION (Check appropriate boxes)

BY MY ORDER: THE OFFICER WHO IMPOSED THE PUNISHMENT
 THE SUCCESSOR IN COMMAND TO THE IMPOSING COMMANDER AS SUPERIOR AUTHORITY

DATE <u>16 Sep 9X</u>	NAME, GRADE, AND ORGANIZATION OF COMMANDER JAMES A. SMITH, CPT, Co D, 1/5 Inf	SIGNATURE <u>James A. Smith</u>
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DAJA-CL
25 August 1987

INFORMATION PAPER

SUBJECT: Reporting Article 15s to the NCIC

1. Purpose. To advise conferees on a new DOD IG requirement to report certain criminal history information to the National Criminal Information Center (NCIC).

2. Facts.

a. DOD IG Memorandum Number 10, "Criminal History Reporting Requirements", dated 25 March 1987, requires reporting data to the FBI's computerized NCIC if:

- (1) CID (rather than MPI) investigates the offense,
- (2) the offense is one of the serious offenses (generally subject to punishment by one or more years of confinement) listed at enclosure 1, and
- (3) disciplinary action (whether court-martial or Art. 15) is initiated.

This policy becomes effective 1 October 1987.

b. CID is tasked with reporting initial information at the initiation of disciplinary action and ultimate disposition information to include any exculpatory appellate action. CID has published a memorandum dated 21 July 1987, implementing the DOD memo of the same subject. Disposition information, particularly appeals on affected Art. 15s, will have new significance and require close coordination to ensure fairness.

c. Designating restricted fiche filing of an Art. 15 will not prevent data being reported to the NCIC if the conditions in para. a, above, are present. This may be of importance to commanders as well as accused in officer and senior NCO cases.

LTC Canner/51893

OFFENSES UNDER THE UCMJ WHICH MUST BE REPORTED BY FD FORM 249.

This enclosure lists those offenses under the UCMJ the titling for which (together with initiation of military judicial or nonjudicial action) requires the forwarding of a Criminal History Fingerprint Card (FD Form 249) to the FBI.

<u>Article</u>	<u>Specific Offense</u>
78	Accessory after the fact to other offenses listed in this enclosure.
80	Attempts to commit other offenses listed in this enclosure
81	Conspiracy to commit other offenses listed in this enclosure.
106a	Espionage
107	False official statements
108	Military property, selling or otherwise wrongfully disposing of. Military property willfully damaging, destroying, losing or suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, of a value of more than \$100.00 or any firearm, explosive, or incendiary device.
112a	Wrongful use, possession, etc. of controlled substances.
118	Murder
119	Manslaughter
120	Rape, carnal knowledge
121	Larceny of property of a value of more than \$100.00, or of an aircraft, vessel, or vehicle.
122	Robbery
123	Forgery
124	Maiming
125	Sodomy
126	Arson
127	Extortion

Encl 1

- 128 Assault upon, in execution of office, person serving as sentinel, lookout, security policeman, military policeman, shore patrol, master at arms, or civil law enforcement officer.
- Assault with dangerous weapon or means likely to produce grievous bodily harm or death.
- 129 Burglary
- 130 Housebreaking
- 131 Perjury
- 132 Frauds against the United States under Article 132(1) or (2)
- Frauds against the United States under Article 132(3) or (4) involving more than \$100.00
- 134 Assault, indecent
- Assault with intent to commit murder, rape, voluntary manslaughter, robbery, sodomy, arson, or burglary
- Bomb threat or hoax
- Bribery
- Burning with intent to defraud
- Correctional custody, escape from
- False pretenses, obtaining services under, of a value of more than \$100.00
- False swearing
- Firearm, discharging wrongfully so as to endanger human life
- Graft
- Homicide, negligent
- Indecent act or liberties with a child
- Indecent acts with another
- Kidnapping

Mail, taking, opening, secreting, destroying or stealing

Mails, depositing or causing to be deposited obscene matter in

Misprision of a serious offense (felony)

Obstructing justice

Pandering

Property, destruction, removal, or disposal of to prevent seizure

Prostitution

Perjury, subornation of

Public record, altering, concealing, removing, mutilating, obliterating, or destroying

Stolen property, knowingly receiving, buying, or concealing, of a value of \$100.00 or more

Threat, communicating

Weapon, concealed, carrying

Offenses under the federal Assimilative Crimes Act (18 USC 13) charged as a violation of Article 134, UCMJ, which has a maximum

CHAPTER 4
NONJUDICIAL PUNISHMENT
TEACHING OUTLINE

I. INTRODUCTION.

II. AUTHORITY TO IMPOSE ARTICLE 15s.

A. Who May Impose?

Commanders.

B. Can Article 15 Authority Be Delegated?

1. Article 15 authority may not be delegated.

2. Exception: General court-martial convening authorities and commanding generals can delegate Article 15 authority to a deputy or assistant commander or to chief of staff (if general officer). Delegation must be written.

C. Can Article 15 Authority Be Limited? Yes.

1. Permissible limitations.

a. Superior commander may totally withhold.

b. Superior commander may partially withhold (e.g., over categories of personnel, offenses, or individual cases).

c. No requirement that limitations be written but probably a good idea (e.g., publish in post regulation).

2. Impermissible limitations.

a. Superior commander cannot direct a subordinate commander to impose an Article 15.

b. Superior commander cannot issue regulations, orders, or guides that either directly or indirectly suggest to subordinate commanders that --

(1) Certain categories of offenders or offenses be disposed of under Article 15.

(2) Predetermined kinds or amounts of punishment be imposed for certain categories of offenders or offenses.

III. OFFENSE

A. When is an Article 15 Appropriate?

1. Minor offenses.

2. Correct, educate, reform offenders.

3. Preserve a soldier's record of service from unnecessary stigma.

4. Further military efficiency.

B. Double Jeopardy Issues.

1. Prior trial by civilians.

2. Subsequent court-martial.

IV. TYPES OF ARTICLE 15s.

A. Formal Article 15.

1. Appropriate if soldier is an officer

or

2. Punishment (for any soldier) might exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.

3. Recorded on DA Form 2627. See Appendix A, page 4-19.

B. Summarized Article 15.

1. Appropriate where soldier is enlisted and punishment should not exceed 14 days extra duty, 14 days restriction, oral admonition or reprimand, or any combination thereof.

2. Recorded on DA Form 2627-1. See Appendix B, page 4-21. Handwritten OK.

V. NOTICE REQUIREMENT. Soldier must be notified of the following:

A. Commander's Intention to Dispose of the Matter under Article 15.

B. Maximum Punishment Which the Commander Could Impose under Article 15.

C. Notice includes Soldier's Rights Under Article 15. See Appendix A, DA Form 2627, item 2, page 4-19.

1. Formal.

- (a) A copy of DA Form 2627 with items 1 and 2 completed so defense counsel may review and properly advise soldier.
- (b) Consult with counsel (usually 48 hours).
- (c) Demand trial by court-martial (unless attached to or embarked in a vessel).
- (d) Request an open hearing.
- (e) Request a spokesperson.
- (f) Examine available evidence.
- (g) Present evidence and call witnesses.
- (h) Appeal.

2. Summarized.

- (a) Reasonable decision period (normally 24 hours).
- (b) Demand trial by court-martial.
- (c) Remain silent.
- (d) Hearing.
- (e) Present matters in defense, extenuation, and mitigation.
- (f) Confront witnesses.
- (g) Appeal.

D. Delegating the Notice Responsibility.

- 1. Commander may delegate the notice responsibility to any subordinate who is a SFC or above (if senior to soldier being notified).

2. Good way to involve first sergeant or command sergeant major?
-
- E. How to Give Notice. See Script, Appendix C, page 4-23, Appendix B, AR 27-10.

VI. HEARING.

- A. In the Commander's Presence.

- B. "Open" v. "Closed" Hearing.

- C. Witnesses.

- C. Spokesperson.

- E. Defense counsel's role.

- F. Rules of Evidence.
 1. Commander is not bound by the formal rules of evidence.

 2. May consider any matter the commander believes relevant (including, e.g. unsworn statements and hearsay).

- G. Decision on Guilt or Innocence.
Proof beyond a reasonable doubt required.

VI. PUNISHMENTS.

A. Maximum Punishment. See Appendix E, page 4-27; Table 3-1, AR 27-10.

B. Four Types of Punishment.

1. Reduction in grade.

2. Loss of liberty punishments.

a. Correctional custody.

b. Extra duty.

c. Restriction.

3. Forfeiture of pay.

a. Forfeitures are based on grade to which reduced, whether or not reduction is suspended.

b. Reconciliation log, DA Form 5110-R, may be used to monitor pay forfeitures. See Appendix D, page 4-25.

c. Forfeitures can be applied against retirement pay.

4. Admonition and reprimand.

C. Combination of Punishments.

VIV. FILING OF ARTICLE 15s.

A. Formal Article 15s.

1. E-4 and below.

- a. Original DA Form 2627 filed locally in unit nonjudicial punishment files. Copies two and three to the MILPO that services the MPRJ if the punishment includes an unsuspended reduction and/or forfeiture of pay.
 - b. Destroyed two years after imposition or upon transfer to another general court-martial convening authority.
2. All other soldiers.
- a. Performance fiche or restricted fiche of OMPF.
 - b. Imposing commander's determination is final unless soldier has an Article 15, received while he was a sergeant (E-5) or above, filed in his restricted fiche - bumps all subsequent 15s to performance fiche.
 - c. Superior commander cannot withhold subordinate commander's filing determination authority.
3. Petition to the Department of the Army Suitability Evaluation Board (DASEB).
- a. Sergeants and above may petition to have DA Form 2627 transferred from the performance to the restricted fiche.
 - b. Soldier must present evidence that the Article 15 has served its purpose and transfer would be in the best interest of the Army.
 - c. Petition normally not considered until at least one year after imposition of punishment.

B. Summarized Article 15s.

1. DA Form 2627-1 filed locally.
2. Destroyed two years after imposition or upon transfer from the unit.

IX. APPEALS.

A. Soldier only has one right to appeal under Article 15.

B. Time Limits to appeal.

1. Reasonable time.
2. After 5 days, appeal presumed untimely and may be rejected.

C. Who Acts on an Appeal?

1. Next superior commander.
2. Any superior commander, senior to the appellate authority, may act on an appeal.
3. Successor in command or imposing commander can take action on appeal.
4. Appellate authority has 5 calendar days to act on formal article 15 appeal; 3 days to act on summarized article 15 appeal.

D. Procedure for Submitting Appeal.

1. Indicate on DA Form 2627, item 7 or DA Form 2627-1, item 4. See Appendices A and B, pages 4-19 and 4-21, respectively.
2. Submitted through imposing commander.

E. Action by Appellate Authority.

1. May conduct independent inquiry.
2. Must refer certain appeals to the SJA office for a legal review before taking appellate action. See note 9, back of DA Form 2627, page 4-20.
3. May refer an Article 15 for legal review in any case, regardless of punishment imposed.
4. May take appellate action even if soldier does not appeal.
5. See Appendix F, page 4-28, for commander's options on appeal.
 - a. Approve punishment.
 - b. Suspend (consider vacation if subsequent misconduct or violation of a condition imposed by the commander).
 - c. Mitigate.
 - d. Remit.
 - e. Set Aside.

6. Use DA Form 2627-2, Appendix G, page 4-29 if relief granted on appeal after distribution of DA Form 2627 (including copies).

X. PUBLICIZING ARTICLE 15s.

XI. ADMINISTRATIVE CONSEQUENCES OF AN ARTICLE 15.

A. Formal Article 15 - DA Form 2627.

1. Admissible at trial by court-martial.
2. May be reported to National Criminal Information Center (NCIC). See Appendix H, page 4-31.
3. May be considered in administrative proceedings.
4. Not an automatic bar to reenlistment.

B. Summarized Article 15 - DA Form 2627-1.

1. Not admissible at trial by court-martial.
2. May be considered in administrative proceedings.
3. Not an automatic bar to reenlistment.

XII. CONCLUSION.

CHAPTER 5

SEARCH AND SEIZURE

Introduction

The fourth amendment protects individuals from "unreasonable" searches and seizures, and prefers that searches and seizures be based upon probable cause and a warrant.

The fourth amendment applies to soldiers - it is not true that a soldier waives all fourth amendment rights when he or she joins the army. But it is true that the fourth amendment applies to soldiers differently than it does to civilians. This is because a soldier's privacy rights are balanced against not only law enforcement needs but also against military necessity and national security.

An example of how the fourth amendment applies to soldiers differently than it does to civilians is search authorizations. A civilian search "warrant" must be in writing, under oath, and issued by a civilian magistrate. A military search "authorization," on the other hand, need not be in writing, need not be under oath, and may be issued by a commander. Despite these primarily technical distinctions, the terms "search warrant" and "search authorization" basically mean the same thing and are often used interchangeably.

Another example of how the fourth amendment applies to soldiers differently than to civilians is urinalysis testing. Most civilians presently are not subject to random urinalysis testing for illegal drug use. Soldiers, however, must give urine samples during routine health and welfare inspections. This greater intrusion into a soldier's privacy is justified because of the detrimental impact that illegal drug use has on military operations and national security.

Search and seizure issues do not always require a probable cause determination and issuance of a search authorization. In fact, there are three general areas of search and seizure law that will be discussed in this chapter. Only one requires the traditional notion of probable cause and, usually, a search authorization. They are described as follows and will be discussed in this order:

-- Administrative inspections, such as health and welfare inspections, urinalysis inspections, gate inspections, and inventories;

-- Situations where the fourth amendment does not apply or where warrants are not required, for example, a search of government property or seizure of items in plain view; and

-- Traditional criminal searches, which focus on a person suspected of committing a crime and require probable cause and, usually, a search authorization.

The search and seizure rules for each of these areas is different and constantly changing because of court interpretations; therefore, the best advice is to contact your legal adviser whenever a fourth amendment issue comes up. Your legal adviser can consider the reasonableness of a proposed action in light of recent court decisions and army policies, and recommend alternatives which will lessen the likelihood that evidence may be found inadmissible at a court-martial.

A. Administrative Inspections

1. Inspections.

a. General. Inspections are a function of command. The commander has the inherent right to inspect the barracks to ensure the command is properly equipped, maintained, and ready, and that personnel are present and fit for duty. A commander conducting an inspection may find items that could aid in a criminal prosecution. These items may be seized and used as evidence for an article 15 or court-martial.

b. Unlawful drugs and weapons. Inspections may include an examination to locate and confiscate unlawful weapons and other contraband if the primary purpose of the inspection is to determine if the unit is functioning properly, maintaining standards of readiness, and is fit for duty. Inspections may also include an order to produce body fluids, such as urine. A unit urinalysis may be part of a general health and welfare inspection or a separate inspection by itself. See Part E.

c. Primary purpose test. An inspection for primarily an administrative purpose (to ensure security, readiness, cleanliness, order, and discipline) is permissible. Discovery of unlawful drugs or weapons is

a means of ensuring security, readiness, and order. An inspection whose primary purpose is to obtain evidence for an article 15 or court-martial is not permissible, and any evidence discovered will be inadmissible. An inspection may have a dual purpose (both administrative and criminal) so long as the primary purpose is administrative.

d. Scope. The scope of an inspection must reflect its purpose. If the purpose is broad (general security, readiness, fitness for duty - traditional health and welfare scope) than the intrusion may be broad (unroll sleeping bags, check inside pockets, unlock containers). If the purpose of the inspection is narrow (for example, only to check helmet accountability), then one cannot inspect beyond that purpose (for example, look inside a shaving kit). Commanders should articulate broad purposes for inspections, with emphasis on particular administrative areas.

e. Subterfuge rule. An inspection may not be used as a subterfuge for a search. Subterfuge normally takes place when a commander "feels" an individual has contraband in his possession or living area but lacks sufficient information to amount to probable cause, and uses an "inspection" to search that person for the contraband. Evidence discovered during an improper inspection usually is not admissible for court-martial or article 15 purposes.

If an inspection (1) immediately follows a report of a specific offense and was not previously scheduled, or (2) specific persons are targeted, or (3) persons are subjected to substantially different intrusions, then the government must show by clear and convincing evidence that the primary purpose of the examination was administrative, and that the inspection was not a ruse for an illegal criminal search. The commander's testimony is crucial to this issue.

f. Security checks. Commanders normally conduct periodic security checks to ensure that wall lockers and footlockers are locked. If the commander or a representative conducts a security inspection and notices a wall locker or footlocker unsecured, the valuables from the locker may be secured and kept in the unit supply room until the individual returns to the unit. The person conducting the inspection may seize any items that would aid in a criminal prosecution if they are seen while securing the valuables.

g. Lost weapons. The commander has the right to conduct an inspection for weapons or ammunition after a unit has been firing or has found a weapon missing. The commander or designated representatives may inspect all persons who were on the range and others who were in a position to steal the weapon, and their barracks and private automobiles.

h. Drug Dogs. A commander conducting an inspection may use a drug detector dog to extend the natural senses of individuals conducting the inspection. Drug detector dogs may be used to inspect barracks, automobiles, and other areas, but as a matter of DA policy, will not be used to inspect persons. Drug dogs may not sniff individual soldiers or formations.

When a request is made for a handler and dog to go to a particular unit, the commander requesting the team should inquire from the provost marshal about the reliability of the dog and handler. Before the dog is used, the handler should demonstrate the reliability of the dog. The test for reliability consists of certification from an approved training course, the training and utilization alert record, and performance demonstrated to the commander.

REFERENCE: Mil. R. Evid. 313(b).

2. Gate Inspections.

a. General. A gate inspection is another form of an administrative inspection. An installation commander may authorize gate inspections to check drivers' licenses and vehicle registrations, to deter drug traffic, to reduce DWI incidents, to prevent terrorist attacks, to deter larcenies, or for any other legitimate administrative purposes. Inspections may include all vehicles, or only those designated by the commander, such as every tenth vehicle.

b. Written guidance. Gate inspections are governed by paragraph 2-23c, AR 210-10, Installations, Administration. The installation commander must issue written instructions defining the purpose (e.g. security, drugs, or and DWIs), scope, and means (times, locations, methods) for gate inspections. It is important to limit the discretion of the gate guards conducting the inspection so that the means and scope of the administrative purpose of the gate inspection are not violated. Some discretion to consider traffic patterns is permissible so long as it is provided by the written guidance.

c. Notice. All persons must receive notice in advance that they are subject to inspection upon entry, while within the confines, and upon departure. A warning sign or visitor's pass are common ways to give notice. See AR 420-70.

d. Drug dogs. Metal detectors, drug dogs, and other technological aids may be used during gate inspections.

e. Civilian employees. Civilian employees may be entitled to overtime pay when their working conditions are affected by gate inspection delays. Check the local collective bargaining agreement to gauge this impact.

f. Entry inspections. Civilians must consent to be inspected or their entry is denied. Soldiers may be ordered to comply with an inspection, and may be inspected over their objection, using reasonable force, if necessary.

g. Exit inspections. Exit inspections create enormous logistical and manpower demands unless they are limited in scope and area. Civilians who refuse to comply with an exit inspection should be informed of possible administrative sanctions (loss of post driving privileges, bar letter). Then they may be inspected over objection, using reasonable force if necessary. Immediately notify the installation commander if this happens. If contraband is found, detain the civilians and notify the local civilian police. The standard for exit inspections for soldiers is the same as for entry inspections. They may be ordered to submit to an inspection and reasonable force may be used if necessary.

REFERENCE: Mil. R. Evid. 313(b); AR 210-10.

3. Inventories.

a. General. A commander is required to conduct an inventory of a soldier's property when the soldier is AWOL, admitted to the hospital, or on emergency leave. See AR 700-84. The commander or a designated representative should also inventory the property of an individual who has been placed in military or civilian confinement. See AR 190-47. If the person conducting the inventory discovers items that would aid in a criminal prosecution, those items may be seized and used as evidence.

b. Automobiles. Under some circumstances, automobiles may also be inventoried. When a person is arrested for DWI or for some other offense which requires transportation to the MP station, the person's vehicle may be secured. If the vehicle is impounded, it may be inventoried. If a person is arrested for DWI just as he pulls into his quarters' parking lot, there is no reason to impound the vehicle. But if arrested on an outer road of the post and there is a possibility that items may be stolen, the vehicle may be impounded and inventoried.

REFERENCE: Mil. R. Evid. 313(c); AR 700-84; AR 190-47.

B. Situations Where There May Be No Need For A Warrant

1. Consent Searches.

A soldier may voluntarily consent to a search. To ensure that consent is voluntary, and not coerced by the influence of rank or position, a soldier should be advised that (1) he has the right not to consent; (2) if he consents, he can withdraw his consent at any time; (3) he can consent to a partial search (for example, everything but his wall locker). Article 31 rights are recommended but not required. Written consent is recommended but not required. Do not "threaten" a soldier that he or his property can be searched even if he refuses to give consent, unless you actually have proper authorization to search and are seeking consent only as a precautionary alternative.

2. Government Property.

A soldier has no reasonable expectation of privacy in most government property, including military vehicles, tents, common tool kits, and desks. No authorization is required to search these places. But the fourth amendment does cover items issued for personal use, such as wall lockers, foot lockers, and field gear. These items may be examined only during inspections and authorized searches.

3. Private Searches.

The fourth amendment protects against governmental conduct and does not prohibit searches by private persons (roommates or family members), unless the private search was directed by a commander or police investigator. Be careful when working with unit informants -telling them to "keep your eyes open" is permissible; telling them to

bring you evidence may violate the fourth amendment and render the evidence inadmissible.

4. Foreign Searches.

The fourth amendment applies only to the U.S. Government. Searches by German or Korean police need not comply with the fourth amendment unless the foreign search is directed, conducted, or participated in by U.S. agents. Police may freely exchange criminal information.

5. Abandoned Property.

There is generally no expectation of privacy in abandoned property, such as a car abandoned on a public road, on-post quarters after a person has checked out, items thrown from a window or to the ground, garbage containers placed on a street curb, or a building destroyed by fire. Therefore, no authorization or probable cause is required to search or seize these items.

6. Open View.

What a person knowingly exposes to the public is not subject to fourth amendment protection, for example, a tattoo, a gold tooth, the exterior of a car parked on a public street, or a conversation overheard in a conventional manner.

7. Sensory Enhancement Devices.

So long as a person is lawfully present at a place, sensory aids are allowable. For example, flashlights may be used to look inside cars. Dogs may sniff autos, luggage, or field gear. Beepers may track a car's movement on a highway, but not a person's movement in his home. Special rules exist for the use of wiretaps and electronic "bugs." See AR 190-53 and your trial counsel.

8. Exigent Circumstances.

In certain cases a warrant is not required even though probable cause to search is still necessary. In emergencies, where delay to get a warrant would result in the removal, destruction, or concealment of the evidence sought, a warrant is not required. For example, a staff duty officer walking through a barracks who smells marijuana coming from a soldier's room may enter the room and "freeze" the situation. If he apprehends the soldier for using marijuana, he may conduct a search of the soldier incident to apprehension and may also

seize any items in plain view. He should then seek authorization before he searches the rest of the room.

9. Search Incident to Apprehension.

Any person who has been properly apprehended may be searched in order to ensure the safety of the apprehending person and others, and to prevent destruction of evidence. The scope of the search is the person's clothing and body and any areas within arm's reach, commonly referred to as within the "wingspan." Usually the person is patted down and his pockets and any items he is carrying are searched. When a person is apprehended in an automobile, the entire passenger compartment may be searched. This includes the glove box, console, back seat and under the seats, but does not include the trunk.

C. **Criminal Searches And Search Authorizations**

1. The Authorization to Search.

a. **Commander's Authorization.** A commander may authorize searches of his or her soldiers and equipment, or areas they control, when there is probable cause to believe that items connected with criminal activity are located in the place or on the person to be searched. When time permits, the commander should consult a legal adviser first. A commander may not delegate the authority to authorize searches to others in the unit. The power to authorize a search, however, may devolve to the next senior person present when the commander is absent and cannot be contacted.

b. **Magistrate's and Judge's Authorization.** Ordinarily, when there is a magistrate (designated JAG officer) or a judge on the installation, law enforcement or unit personnel should get the magistrate's or judge's authorization to search by following the procedures set forth in Chapter 9, AR 27-10. Using a magistrate to authorize a search may be preferable to requesting authorization from a commander for several reasons. First, commanders may be involved in an investigation related to a search and their neutrality and detachment could become an issue. Second, the magistrate may authorize searches anywhere on an installation; therefore, issues of scope of authority are avoided. And third, if a search authorization is contested at trial, the commander need not appear to testify.

c. **Procedures for Obtaining an Authorization to Search.** AR 27-10 sets out the procedures for

obtaining an authorization to search. Written or oral statements (including those obtained by telephone or radio), sworn or unsworn, should be presented to the commander, magistrate, or military judge. The authorizing official will then decide whether probable cause to search exists, based upon the statements and will issue either a written or an oral authorization to search. Written statements and authorizations are preferred to avoid problems later if the search is challenged at trial. When granting authority to search, the authorizing official must specify the place to be searched and the things to be seized. Sample forms for obtaining an authorization to search are in the back of AR 27-10.

d. Scope of an Authorized Search. Once authorization to search has been obtained, the person conducting the search must carefully comply with the limitations imposed by the authorization. Only those locations which are described in the authorization may be searched and the search may be conducted only in areas where it is likely that the object of the search will be found. For example, if an investigator has authority to search the quarters of a suspect, the investigator may not search a car parked on the road outside. Likewise, if an authorization states that an investigator is looking for a 25-inch television, the investigator may not look into areas unlikely to contain a TV, such as a medicine cabinet or file cabinet. The bottom line is that an authorization to search is not a ticket to go on a fishing expedition.

e. Detention Pending Execution of Search Authorizations. An authorization to search for contraband implicitly carries the limited authority to detain occupants of a home, apartment, or barracks room while the search is conducted. Police may also detain occupants leaving the premises at the time police arrive to execute the search authorization.

REFERENCE: Mil. R. Evid. 315; AR 27-10, chapter 9.

2. The Commander as a Neutral and Detached Magistrate.

A commander, much like a judge, must remain objective when deciding whether there is sufficient information to justify a search authorization. When a commander is actively involved in a criminal investigation, he or she is disqualified from acting as the authorizing official. In short, a commander is

disqualified when he or she has acted in a law enforcement capacity.

Factors suggesting that a commander has or is acting in a law enforcement capacity include initiating and orchestrating an investigation, selecting and "handling" informants, and being present at the scene of a search that he or she has authorized. On the other hand, knowledge of an on-going investigation within the unit, a great disdain for certain kinds of crime, and personal information or knowledge about a suspect's character do not disqualify a commander from granting a search authorization.

If a commander is unsure whether a court will view the involvement in a particular case as disqualifying, he should play it safe by sending the person seeking the authorization to the military magistrate or to the next higher commander who has no involvement with the case.

3. Establishing Probable Cause.

a. Probable Cause Defined. There is probable cause to search when there are reasonable grounds to believe that items connected with criminal activity are located in the place or on the person to be searched.

b. Evaluating Probable Cause. A commander who is determining whether probable cause exists may receive information from a variety of sources. It may be based on the commander's personal observations and knowledge, informants who have seen certain things, or information in the form of hearsay (passed from person to person until reported to the commander). The commander's task is to determine from the totality of the circumstances whether it is reasonable to conclude that items related to criminal activity are in the place described. Commanders and other officials should ensure that the information presented has some indication of trustworthiness before acting on it. In determining whether probable cause exists, the following method for evaluating the factual basis (basis of knowledge test) and the believability (reliability test) of the information should be employed.

(1) Basis of knowledge test. The commander should be satisfied that the information was obtained in a reliable manner; did the officer, NCO, or informant actually see, hear or smell the information being reported. This has been called the basis of knowledge test and may be satisfied in any of the following ways:

-Personal observation by the informant (he saw the items).

-Admission to the informant by the person to be searched or an accomplice.

-Such detail that first-hand knowledge can be inferred (when the tip is anonymous or based on hearsay).

(a) Personal observation. The trustworthiness of information can be established by showing that the informant personally observed the criminal activities or that he or she is basing the authorization on the fact that a third party personally observed the criminal activity.

In drug cases, personal observation must also include facts indicating there is a basis for belief that what was seen was drugs, for instance, the informant has had a class on drug identification, has furnished reliable information in the past, or has substantial experience with drugs cases.

(b) Admission of the person to be searched or an accomplice. An informant's information is considered reliable if based on statements he heard the suspect or an accomplice make.

(c) Self-verifying detail. One way to pass the basis of knowledge test is by showing that the tip was so detailed that the information must have been obtained as a result of a personal observation by the informant or from a statement of the accused or an accomplice.

(2) Reliability test. The commander should also be satisfied as to the credibility of the person furnishing the information or the reliability of information. This has been called the reliability test and may be established by one or more of the following:

-Demeanor of the individual furnishing the information to the commander.

-Statement of past reliability.

-Corroboration.

-Statement from victim or eyewitness.

-Declaration against interest.

-Good citizen informants.

(a) Demeanor. When the information is personally given to the commander, the commander can judge the individual informant's reliability at that time. In many cases the individual may be a member of the commander's unit; thus, the commander is in the best situation to judge the credibility of the person. Even when the person is not a member of the authorizing commander's unit, the commander can personally question the individual and determine the consistency of statements made by the individual. The eyeball-to-eyeball contact may either lend to or detract from establishing credibility.

(b) Statements of past reliability. This is one of the easiest methods for passing the reliability test - knowledge that the informant has proven reliable in the past. There may be some indication as to the underlying circumstances of past reliability, such as a record that the informant has furnished correct information three times in the past about wrongful possession of a particular type of drug.

(c) C o r r o b o r a t i o n . Corroboration means that other facts back up the information provided. Corroboration and the demeanor of the person are particularly important when questioning first-time informants with no established record of past reliability.

(d) Declaration against interest. The person furnishing the information may provide information that is against that person's penal interest - for example, when he knowingly admits an offense and has not been promised any benefit. Thus, he may be prosecuted himself. This lends a great degree of reliability to the information furnished.

(e) Good citizen informants. Often, the informant's background renders him or her credible. For instance, a victim or a bystander with no reason to lie may be considered reliable. In addition, law enforcement officers and good soldiers are generally considered reliable sources of information.

REFERENCE: Mil. R. Evid. 315.

D. Apprehensions

1. Contacts and Stops.

a. Initiating a contact. Officers, NCOs, and MPs may initiate "contact" with persons in any place they are lawfully situated. It is difficult to define when a person is lawfully situated. Generally, this includes inspecting the barracks, making a walk-through of the barracks or unit area, and presence in any place for a legitimate military purpose.

It is erroneous to equate every contact between an official and soldier with a detention subject to the fourth amendment. Many contacts do not result from suspicion of criminal activity. Examples of lawful contacts include questioning witnesses to crimes and warning pedestrians that they are entering a dangerous neighborhood. These types of contacts are entirely reasonable, permissible, and within the normal activities of law enforcement personnel and commanders. They are not detentions in any sense.

b. Basis for a stop. An officer, NCO, or MP who reasonably suspects that a person has committed, is committing, or is about to commit a crime has the obligation to stop that person. Both pedestrians and occupants of vehicles may be stopped. If the person is a suspect and is to be questioned, article 31 and Miranda warnings should be read. The stop must be based on more than a hunch. The official making the stop should be able to state specific facts to support the decision to stop an individual.

2. Probable Cause to Apprehend.

a. Arrests in the military are called apprehensions. Any officer (commissioned or warrant), noncommissioned officer, or military policeman may apprehend individuals when there is probable cause to apprehend.

b. Probable cause to apprehend exists when you have a reasonable belief that the person has committed a crime. Probable cause to apprehend is a common sense appraisal based on all of the facts and circumstances present. An example of probable cause to apprehend is when you or some other reliable person has seen an individual commit a violation of the UCMJ, such as using marijuana, assaulting someone, breaking another's property, or being drunk and disorderly.

3. How to Apprehend.

Identify yourself as an officer. Show your ID card if not in uniform. Tell the soldier you are placing him under apprehension and explain the reason, such as disorderly conduct, assault, or possession of marijuana. You may enlist the aid of others to assist you. Read the soldier his article 31 rights, preferably from a rights warning card, as soon as practicable. If the soldier resists apprehension by running away or assaulting you, enlist others to help catch him; he may be prosecuted for resisting apprehension or disobeying an order. Civilians may be detained until military or civilian police arrive.

4. Search Incident to Apprehension.

See earlier discussion in Part B.

5. Arrest Warrants.

Generally, if there is probable cause, no authorization to apprehend (arrest warrant) is required in the military. There is one important exception, however; that is when you apprehend someone in a "private dwelling," such as on-post family quarters, the BOQ or BEQ, or any off-post quarters.

If the person to be apprehended is in a "private dwelling," the apprehending officer must obtain authorization to make the apprehension from a military magistrate or the commander with authority over the private dwelling (usually the installation commander). It is important to note that the barracks and field encampments are not considered private dwellings; therefore, no special authorization is needed to apprehend someone there. Also, to apprehend a person at off-post quarters requires coordination with civilian authorities.

REFERENCE: R.C.M. 302.

E. Urine Tests

1. Four kinds.

a. In determining admissibility at a court-martial, article 15, or administrative elimination, there are four kinds of urine tests: inspection, probable cause, consent, and fitness-for-duty. It is important to understand these different kinds of tests because whether a commander should offer a soldier an article 15

for a positive urinalysis depends on which kind of test was taken.

b. Use of test results. Results from inspection, probable cause, and consent urine tests may be used for article 15 and administrative elimination purposes, or for a court-martial. The results of a fitness-for-duty test may not be used as a basis for an article 15 or court-martial. In addition, a positive fitness-for-duty test result may not be used to determine the "character of service" in an administrative elimination action. Unless there is other derogatory information, drug use discovered during a fitness-for-duty test cannot be the basis for a general or other than honorable discharge; the soldier will receive an honorable discharge. See AR 600-85 and AR 635-200.

c. Command-directed. Be wary of the term "command-directed" urinalysis. Any urine test ordered by the commander (inspection, probable cause, fitness-for-duty) is "command-directed." The ability or inability to use the test results for UCMJ or separation purposes depends on the type of test (inspection, probable cause, consent), not on whether or not it is labeled "command-directed." A fitness-for duty test is normally "command-directed," but a positive result cannot be used for UCMJ or "character of service" purposes.

2. Urinalysis inspections.

a. Unit integrity. A unit urinalysis test is merely another form of inspection. During the early years of the urine testing program soldiers were "randomly" selected, usually based on the final digit of their social security number. Today urinalysis inspections are conducted on units or parts of units (platoons, sections, squads). This method is preferable to random selection because "unit" testing ensures unit integrity, involves the chain of command in the conduct and discipline of the testing, and eliminates problems of locating specific persons for same-day unannounced testing. The presence of the leadership of that element usually ensures reliable test results.

b. Chain of custody and the drug NCO. When the government loses a urinalysis case it is rarely due to lab errors. Army urine testing laboratories are now widely regarded as the models for comparison and employ the most stringent scientific testing equipment and techniques. Take the time to visit the lab that handles your unit's samples and see for yourself. When the government loses a urine case or decides not to prosecute

one, it is primarily due to problems at the unit level, usually with the chain of custody. Experience indicates that many of these problems stem from the drug NCO. If a commander takes a soldier who cannot perform adequately as a squad leader and makes that soldier the drug NCO, it is likely that there will be problems.

c. Confirmatory testing.

(1) When to use it. One of the most difficult cases that a commander must handle is when a senior NCO, particularly one who is a "good soldier," tests positive for drug use. The soldier almost inevitably denies drug use and challenges the validity of the testing procedures at the unit and the lab, often focusing on minor irregularities that do not invalidate the results. A commander has a few options to resolve these dilemmas.

(2). Polygraphs. Offer the soldier the opportunity to take a polygraph. A soldier may not be required to take a polygraph, but if he consents to take one the local CID polygrapher can be invaluable in distinguishing those who did not use drugs from those who only swear that the urine test was wrong. Few of these "wronged" soldiers will be willing to take a polygraph, and many of those who do will admit to the drug use in the pre-test interview with the polygrapher.

(3) Blood testing. When a soldier cries "that's not my sample" the urine sample can be tested to ensure that the blood type of the positive sample is the same as the soldier's blood type, for example A+. This method does not eliminate any possibility of error, but if the soldier has one of the less common blood types and the urine sample is of the same type, it is probative of accuracy. The technology to perform DNA testing to verify that the positive sample came from the charged soldier presently exists within the government, and may be an option that the soldier can pursue.

3. Probable cause urine tests.

Probable cause urine tests follow the same rules as other probable cause searches. If, under the totality of the facts and circumstances, a commander has a reasonable belief that a soldier has used marijuana, then he may order the soldier to provide a urine sample. The results of that test are admissible. Common examples of probable cause urine tests are (1) when marijuana is discovered on a soldier's person, in his car, or in his wall locker or field gear; as (2) when a soldier has been

observed using marijuana and the person who saw him is reliable and believable.

4. Consent urine tests.

a. A consent urine test is a form of consent search. See consent searches at Part B. No probable cause or authorization is required, but the commander must be able to show that the soldier voluntarily consented to provide a urine sample and was not coerced by the rank or position of the person requesting the sample. When a commander asks a soldier to provide a urine sample, he may advise the soldier of his article 31 rights and ask the soldier to sign a consent form. If the soldier has no questions, then the consent will normally be viewed as voluntary.

b. What are my options? If a soldier asks the commander, "What are my options?", a new problem arises. If a soldier does not consent to provide a urine sample, the commander may order him to provide one (fitness for duty test). This is what the court has called the commander's "ace in the hole." Once a commander informs a soldier that "if you don't consent to provide a sample I will order you to provide one," it is difficult to show that consent was truly voluntary. In response to the "what are my options" question, the commander should explain the different article 15 ramifications between a consent urine test and one ordered by the commander. The results of a consent urine test may be the basis for an article 15 (or court-martial or administrative elimination). The results of a fitness for duty urine test may not. If the soldier understands these differences and nevertheless consents, then the consent will probably be viewed as voluntary.

c. Consent as a back-up. If a commander has probable cause to order a urine test, he may still request a consent sample as a precautionary alternative. If the soldier asks "what are my options" the commander should explain that the results of a consent urine test are admissible, and that if the soldier refuses to consent, the commander has probable cause to order a urine test and the results of that test are also admissible. The bottom line is -- if a commander has probable cause to order a urine sample, consent is not so important; but when a commander is relying solely on consent, then he or she must ensure that the soldier gives an "informed consent" to provide the urine sample.

5. Fitness-for-duty urine tests.

a. Results inadmissible. The drug and alcohol regulation, AR 600-85, provides that a commander may order a urine test to determine the "fitness-for-duty" of any soldier when the commander observes, suspects, or otherwise becomes aware that the soldier may be affected by illegal drug use. The results of such a fitness-for-duty test are inadmissible for article 15 or court-martial purposes. They are inadmissible because AR 600-85 balances the needs of the military with the individual privacy rights of the soldier and will not allow test results based on mere suspicion to be used for criminal punishment. A commander can order a soldier to provide a urine sample based solely on mere suspicion; but because this is not based upon probable cause, an inspection, or consent, the results may only be used to refer the soldier for rehabilitative treatment or separate him from the service with an honorable discharge. When a commander orders a soldier to provide a urine sample, the commander should understand the admissibility of the urine test so that there will be no confusion when the test result returns.

b. Suspicion versus probable cause. The difference between a probable cause urine test and a fitness-for-duty urine test is the difference between a commander having a suspicion of drug use versus demonstrable facts which amount to probable cause. For example, a commander who orders a soldier to provide a urine sample because the soldier drops out of a morning PT run has ordered a fitness-for-duty test. The results are inadmissible for article 15 or court-martial purposes because the test is based on mere suspicion--there is no probable cause that drug impairment caused the soldier to stop running. Here is another example. If a soldier reports that he "heard" that another soldier had used cocaine, but he had no personal knowledge, no specific facts about where, when, or with whom, and was relying solely on uncorroborated hearsay, then there are insufficient facts to authorize a probable cause urine test. The commander may call the other soldier to his office and confront him with the allegation. But unless the soldier consents to provide a sample, the results of a urine test ordered by the commander are inadmissible because this would be a fitness-for-duty test. A commander would have probable cause if a reliable soldier had seen the soldier use drugs and reported this to the commander. Then the test result would be admissible for an article 15.

APPENDIX A

HOW TO ARTICULATE PROBABLE CAUSE TO SEARCH

Probable cause to authorize a search exists if there is a reasonable belief, based on facts, that the person or evidence sought is at the place to be searched. Reasonable belief is more than mere suspicion and is best described as "more likely than not".

Three main questions:

1. What is where and when? Get the facts!
 - a. Be specific: how much, size, color, etc.
 - b. Is it still there? Stale information?
 - (1) saw joint in barracks room 5 days ago.
 - (2) saw 10-15 bags of marijuana in apartment last week.

2. How do you know?
 - a. "I saw it there" - personal observation; strong.
 - b. "he told me" - admission; strong.
 - c. "roommate/wife/friend told me" - hearsay; get details.
 - d. "heard it in the barracks" - weak; get corroborating and verifying details.

3. Why should I believe you? Reasons to believe:
 - a. "good, honest, soldier" - know informant from personal knowledge or by reputation or opinion of chain of command.
 - b. unique truth-telling effect of an identified soldier giving information to a commanding officer (because greater accountability in the military).
 - c. given reliable info before - good track record (CID may have records).
 - d. no reason to lie.

- e. demeanor.
- f. under oath.
- g. other information corroborates or verifies details.
- h. admission against own interests.

The determination that probable cause exists must be based on facts, not only on the conclusions of others.

The determination should be a common sense appraisal of the totality of all the facts and circumstances presented.

APPENDIX B

SEARCH AND SEIZURE

PRACTICE PROBLEMS AND SOLUTIONS

Incident #1. You are the battalion commander and your unit has just returned from a field training exercise that included several live fire exercises and the use of pyrotechnics. You wish to conduct a thorough inspection of your unit to ensure that none of your soldiers has any ammunition or pyrotechnics, and to ensure that their field gear is complete, clean, and serviceable.

1. Can you conduct an inspection? If you wish to use any discovered contraband as evidence, what should you do?

2. How should each room or area be inspected? Who should inspect? Where can they look? Wall lockers? Locked containers? How long in each area?

3. You have heard rumors that PFC High is a drug user and may be a seller. Can you use this inspection as an opportunity to give PFC High's room "an extra special going over?" Why or why not?

4. If you find drugs or stolen property in a soldier's wall locker during the inspection, can you use it as evidence?

Incident #1. Health and welfare inspection.

1. Yes, as commander you may inspect the persons and property under your command. Ensure that any evidence discovered is accurately identified and promptly turned over to the MPs (chain of custody).
2. The commander determines the purpose and scope of the inspection before it begins - it may be as broad or as narrow as he feels is necessary. Usually NCOs inspect, but officers and drug dogs may participate. They may look anywhere within the scope of the inspection (where ammo or pyrotechnics may be found, or to check field gear). Soldiers may be ordered to unlock wall lockers and locked containers so that they may be inspected. The length of time inspecting each person or unit should be about the same, but may certainly be increased if unpreparedness is shown or contraband is discovered.
3. An inspection cannot be used as a subterfuge for an illegal search. If you give PFC High's room "an extra special going over," that would violate the subterfuge rule and be an illegal search, and any discovered contraband would probably be inadmissible. High's room should be treated the same as the others.
4. Yes, any evidence within the scope of a lawful inspection can be used against the soldier for article 15, court-martial, or administrative elimination purposes.

Incident #2. You are the battalion commander. It is the end of the duty day and your command sergeant major has just read an Article 15 to PFC Mason, whose recent urine sample tested positive for marijuana. PFC Mason asks to talk to you. He tells you that he is tired of getting in trouble because of all the marijuana in the unit. Last night SPC Dealer showed Mason a small plastic bag of greenish vegetable matter that Dealer said was "good pot." Dealer removed the bag from the wall locker in his room, room 203, and Mason saw fifteen or twenty other plastic bags filled with the same material. Dealer said the bags were "going for \$50 a lid" and if Mason were interested he could contact him anytime during the week. Dealer said to hurry though, because it was payday and the stuff would go fast.

1. Who can authorize a search of Dealer's locker?
2. What facts support a search? Why? Is there probable cause?
3. What is the scope of the search? What are you looking for? What if some ammunition is discovered, or a switchblade, or stolen property?
4. Where can you search? Only the wall locker? The entire room? Dealer's car, parked in the unit parking lot? What if it is parked at the post exchange?
5. How do you authorize the search? Oral or written? Who should conduct the search? What do you do with any evidence you find?
6. Dealer's wall locker is locked. Should you ask him for consent to search his room and belongings? Should you tell him that you have authority to search (a search warrant) if he refuses? If he refuses consent, can you cut his lock off?

Answers to Incident #2

Incident #2. Probable cause search.

1. Any commander (CO, BN, BDE, DIV) in Dealer's chain of command, or the military magistrate or military judge (JAGs) may authorize this search.
2. Use the probable cause appendix. Mason's statement is the main evidence, and is one of the strongest forms of probable cause. The details about the location, amount, and description of the marijuana are based on personal observation. The report is fresh so it is likely the marijuana is still there. Mason realizes the consequences of lying to his battalion commander (although mere lying to a commander, unless an official statement, is not an offense). Mason should be placed under oath. Considering all the facts and circumstances there is probable cause to believe that marijuana is presently located in room 203.
3. The scope of the search is anywhere within room 203 where marijuana may be hidden, but particularly SPC Dealer's wall locker. Any other contraband discovered during the search is admissible as evidence and should be properly safeguarded (for fingerprints, chain of custody, identification).
4. The wall locker may certainly be searched. It is also reasonable that marijuana may be hidden elsewhere within the room, so the entire room may be searched. Nothing in Mason's statement indicated that Dealer's car was being used as part of his drug trade. That subject is something the commander should always inquire about. Unless there is some information linking Dealer's car and the marijuana (does he sell from his car? where did he buy it? did he transport it in his car?) the car is beyond the scope of the search. If the car is implicated, the battalion commander could authorize the search of a car parked in his battalion area. If the car is in the PX parking lot, it is best to have the installation commander or magistrate authorize the search, if there is time; but under the automobile exception, an authorization to search Dealer's car is not mandatory so long as there is probable cause that drugs are in the car.
5. A commander may authorize a search orally or in writing. Anyone, except the commander authorizing the search, may conduct the search. Safeguard any evidence found and notify the MPs.

6. . It is always a good idea to ask for consent to search. Do not coerce Anderson into consenting by telling him "if you don't consent we have a warrant anyhow," but if he asks "what happens if I refuse," you should truthfully and accurately inform him that you have authorization to search his property. If Anderson refuses to unlock his wall locker, the searcher may cut the lock off.

Incident #3. Your brigade XO is checking the motor pool. He sees a soldier from another battalion removing parts from three of your vehicles. The soldier stuffs the parts in his pockets, glances around hurriedly, and quickly begins to leave the motor pool.

1. Can the XO apprehend the soldier?
2. Does he need a search warrant or authorization to search the soldier? Why or why not?
3. If the XO searches him, what, if any, are the limits of the search?

Incident #4. You are the battalion commander. Your headquarters company commander has been having unexplained losses of government tools. One of the HHC mechanics tells the headquarters company commander that he thinks PFC Larsen has been removing tools from the motor pool and taking them home in his car. When the CO asks the mechanic for details he cannot give him any facts to back up his feeling. He has not seen Larsen taking any tools, he has just heard some loose talk. The CO comes to you for advice. You call your trial counsel and she tells you that what you have seems to be far short of probable cause to search Larsen's car. You would still like to search his car.

1. Is there any way you can lawfully search his car? How?
2. If you ask Larsen for consent to search, what should you do to show consent was voluntary?
3. Larsen gives you consent to search his car. His platoon sergeant searches the passenger compartment, and finds nothing, and is about to open the trunk when Larsen says "wait a minute, don't look in there." What must you do?

Answers to Incidents #3 and #4

Incident #3. Search Incident to Apprehension.

1. Yes, an officer can apprehend a soldier when he has probable cause that a crime has been committed and the soldier is involved.
2. No, a search incident to apprehension (arrest search) does not require a warrant or authorization.
3. The limits of an arrest search are the person and the area immediately around him (within his "wingspan" or lunging distance). If apprehended in a car, the entire passenger compartment may be searched, but not the trunk.

Incident #4. Consent search.

1. You could ask Larsen for consent.
2. Inform him that:
 - a. you wish to search his car with his consent;
 - b. he has the right not to consent;
 - c. if he consents he can change his mind and withdraw consent at anytime;

You may also tell him that:

- d. he may consent to a partial search (for example, everything but the trunk);
 - e. he is suspected of stealing tools (and read him his article 31 rights);
 - f. he may sign a consent form (if you have one).
3. You must stop. Unless you have probable cause that there are stolen tools in the trunk (for example, because you found some in the front) any items seized from the trunk would be the fruits of an illegal search.

Incident #5. You are the brigade commander. A CID agent calls you and says that he has apprehended one of your soldiers at the railroad station with 2 grams of marijuana in his coat pocket. The agent wants authority to search the soldier's room and wall locker.

1. What should you do?

2. Should you authorize the search? Why or why not?

Incident #6. One of your company commanders reports a barracks larceny--\$500.00 and a new coat are missing from PVT Victim's wall locker. Three days later SPC Smith, who lives in the room next to Victim, buys a new stereo from the post exchange for \$350. Victim, suspicious of SPC Smith, informs his commander, who calls you for advice.

1. What should you do?

2. Should you authorize a search based solely on this information?

Answers to Incidents #5 and #6

Incident #5. CID report.

1. Consult with your trial counsel for advice. Ask the agent for more information. What facts would lead you to believe that there is marijuana in the soldier's room, wall locker, or car?
2. Presently there is insufficient information to authorize a search. There is, however, probable cause to order a urine test for use of marijuana.

Incident #6. Barracks larceny.

1. Consult with your trial counsel for advice. Get more information. What is and was PFC Smith's financial situation? What else does Victim know or suspect? Talk to Smith's roommates.
2. No. Suspicion alone, however strong, does not support a finding of probable cause to search. Continue the investigation until additional information is uncovered (such as a report about the coat, or Smith flashing newfound money). The battalion commander must now be wary of his role as a neutral and detached magistrate. It can be argued that he is now directing the investigation as opposed to being kept informed of the investigation. Consider getting any subsequent search authorization from the brigade commander or military magistrate.

CHAPTER 5
SEARCH AND SEIZURE
TEACHING OUTLINE

I. The Fourth Amendment.

"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."

- A. The Fourth Amendment Applies to All Soldiers.
- B. But the Balancing of Competing Interests is Different.
- C. The Exclusionary Rule: items seized in violation of the Fourth Amendment cannot be used in a court-martial.
- D. Distinguish Administrative Inspections from Criminal Searches.
 - 1. Criminal search: law enforcement purpose.
 - a. follows a specific crime (rape, larceny, drugs);
 - b. focus on a specific person.
 - c. requires probable cause and a warrant.
 - 2. Administrative inspection: administrative purpose.
 - a. primary purpose is a unit problem (readiness, security, DWI, drugs);
 - b. focus on the unit problem;
 - c. "reasonableness" standard (treat all the same).

Examples: health and welfare inspection,
unit urinalysis, gate inspection.

II. Administrative Inspections.

A. Inspections - A Function of Command.

1. Health and welfare inspections.

a. Articulate the primary purpose:

- (1) An inspection for primarily an administrative purpose is permissible.
- (2) An inspection primarily to obtain evidence for an article 15 or court-martial is not permissible.
- (3) An inspection may have a dual purpose so long as the primary purpose is administrative.

b. Scope of the inspection must reflect the purpose.

c. Inspect everyone alike; don't target specific persons for a solely criminal purpose.

d. The subterfuge rule.

If an inspection

- (1) immediately follows a report of a specific offense and was not previously scheduled, or
- (2) specific persons are targeted, or

(3) persons are subjected to substantially different intrusions,

then the commander must be able to testify that the primary purpose of the examination was administrative, and that the inspection was not a ruse for an illegal criminal search.

2. Lost weapon lock-downs.

a. Keeping all of the unit members in the unit area to continue to search for a lost weapon is a legitimate military purpose. It makes transfer of the missing item less likely and protects the community.

b. Mass punishment is not a proper purpose, although it is often perceived as a side-effect of a lock-down due to the inconveniences to soldiers and families.

c. How long? Consider

(1) what's lost: pistol, rifle, LAW, explosives, CEOI, night vision goggles, classified material

(2) size of unit

(3) progress: inspections, area sweeps, interviews, statements, focus on persons or groups

(4) morale and leadership problems.

d. Be wary of subterfuge rule.

3. Gate inspections.

a. See AR 210-10, Installations, Administration, para. 2-23c.

b. Procedures

- (1) Written instructions.
- (2) Notice.
- (3) Technological aids.
- (4) Civilian employees.
- (5) Female patdowns.
- (6) Manpower and morale.

c. Entry gate inspections.

d. Exit gate inspections.

B. Inventories. Evidence obtained during an inventory is admissible.

III. Nine Situations Where There May Be No Need for a Warrant.

- A. Consent Searches.**
- B. Government Property.**
- C. Private Searches.**
- D. Foreign Searches.**
- E. Abandoned Property.**
- F. Open View.**
- G. Sensory Aids.**
- H. Exigent Circumstances.**
- I. Search Incident to Arrest.**

IV. Warrants and Probable Cause.

- Search warrants in the military are called search authorizations.
- Search warrants must be in writing, under oath, and issued by a civilian magistrate.
- Search authorizations may be oral, need not be under oath, and may be authorized by a military commander.
- Three questions when deciding to authorize a search:
 1. Who can give this search authorization?
 2. Is the commander neutral and detached?
 3. Is there probable cause?

A. Who Can Authorize a Search?

1. Any commander of the place to be searched (king-of-the-turf standard).
2. It is preferable to use the military magistrate -avoids problems and eliminates chance that commander may have to testify.

B. Is the Commander Neutral and Detached?

1. Cannot wear "investigator" hat and "judicial" hat for the same case.
2. Examples. Is the commander neutral and detached when he
 - a. orchestrates the investigation? No
 - b. conducts the search? No
 - c. is present at the search? Maybe
 - d. has personal knowledge of the suspect's reputation. OK

- e. makes public comments about crime in his command? OK
- f. is aware of an on-going investigation? OK

- 3. Alternatives -
 - a. next higher commander
 - b. military magistrate

C. Is there Probable Cause? See Appendix A, page 5-17.

- 1. What is where and when?
- 2. How do you know?
- 3. Why should I believe you?

V. Urine Tests.

A. Four Kinds of Urine Tests.

	Art 15	CM	Admin	Elim
1. inspection	Yes	Yes	Yes	Yes
2. probable cause	Yes	Yes	Yes	Yes
3. consent	Yes	Yes	Yes	Yes
4. fitness-for-duty	No	No	Yes	*

* Usually limited to honorable discharge because can not consider the drug use in determining character of service for elimination under chapter 14, AR 635-200.

B. Urinalysis Issues.

- 1. What drugs are tested?
- 2. Screening and confirmatory testing.
- 3. Inspections.
 - a. chain of custody problems.
 - b. "part of a unit" testing (AWOLEes, new soldiers, return from leave testing).

- c. how long between tests?
-
- 4. What to do when a "super soldier" tests positive.
 - a. Polygraphs.
 - b. Blood typing.
 - c. DNA.
 - d. Hair testing.
-
- 5. Defenses.
 - a. Passive inhalation (marihuana).
 - b. Spiked food or drink (cocaine).

VI. Conclusion.

CHAPTER 6

SELF-INCRIMINATION, CONFESSIONS, AND IMMUNITY

Introduction

The fifth amendment protects a person from self-incrimination. To enforce this right enjoyed by all Americans, the Supreme Court decided in 1966 that before the police could talk to a suspect who was in custody, they had to advise him of his right to remain silent and that he could have a lawyer present during questioning. This was the Miranda case. A commander may ask - why do I need to know about rights warnings? The answer is that in our military justice system the commander plays a key law enforcement role. They frequently conduct investigations and regularly interview people as part of their investigation. In fact, Rule of Court-Martial 303 requires the commander to make a preliminary inquiry when a member of the command is accused or suspected of an offense triable by court-martial. During the nonjudicial punishment process, the commander is required by AR 27-10 personally to determine whether the soldier committed an offense. Commanders also can appoint or be appointed to either formal or informal boards or investigations under AR 15-6.

In order to properly conduct an investigation or article 15 proceeding, the commander must talk to the persons involved in the incident. Those persons can be classified as witnesses or suspects. Witnesses are persons who have information about the incident, but did not do anything criminally wrong. You are not required to read rights warnings to witnesses before questioning them. Suspects are those persons you reasonably believe or should believe committed a criminal offense. A soldier may initially be a witness, but during the interview may reveal information that makes you suspect the soldier of involvement in a crime. At that point, the soldier should be treated as a suspect. The soldier-suspect has the same privilege against self-incrimination and right to counsel that other citizens have. You must, therefore, read rights warnings before questioning a soldier suspected of committing an offense. The suspect may waive the rights and choose to make a statement or may invoke his or her rights. If a soldier invokes his or her rights, the questioning must immediately stop. At that point, the commander should consult with their trial counsel to determine how best to proceed.

If the suspect talks to you, it may be a statement, an admission, or a confession. A statement is a report of facts or opinions. An admission is a self-incriminating statement falling short of an acknowledgment of guilt. A confession is an acknowledgment of guilt. Mil. R. Evid. 304(c). If proper rights warnings have been given, admissions and confessions are admissible at trial against an accused and frequently will constitute the key evidence in the case. One further rule governs confessions - before being admitted, there must be independent evidence which corroborates the essential facts of the confession. Mil. R. Evid. 304(g). This protects the system from people who admit to crimes for publicity, because of mental imbalance, or because of improper police conduct.

A. Sources of the Rights

A soldier's privilege against self-incrimination and right to counsel come from four sources:

1. The Fifth Amendment.

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

2. Uniform Code of Military Justice.

a. Article 31(a), UCMJ.

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

b. Article 31(b).

"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. . . ."

3. The Sixth Amendment.

"In all criminal prosecutions, the accused shall . . . enjoy the right to have the Assistance of Counsel for his defence."

4. Army Regulations.

a. AR 15-6 - Investigations

- (1) No military witness or respondent will be compelled to incriminate himself (see Article 31, UCMJ).
- (2) No witness or respondent not subject to the UCMJ will be deprived of his rights under the Fifth Amendment.

b. AR 27-10 - Nonjudicial Punishment.

The imposing commander will ensure that the soldier is notified of his right to remain silent and his right to consult with counsel.

c. AR 635-200 - Enlisted Personnel Separations.

Article 31, UCMJ will apply to board procedures.

d. This list of regulations is not exhaustive; other regulations also impose a rights warning requirement. Always review regulations governing a specific type of investigation or proceeding to decide if rights warnings are required.

B. Due Process Voluntariness

Any confession used as evidence must be voluntary. This is a fundamental requirement of the due process clause to the Constitution and is also required by the UCMJ. Article 31(d) prohibits the use of any statement obtained through the use of "coercion, unlawful influence, or unlawful inducement." These protections are separate from the protections of rights warnings, but one purpose of the rights warning requirement is to ensure that statements are voluntary.

The courts have condemned such practices as beating the suspect, depriving the suspect of food, water, or sleep, threatening the suspect, removing the suspect's clothing, and interrogating the suspect for extremely long periods without a rest or break. Confessions

obtained through the use of such tactics are not admissible because they are not voluntary.

C. Scope of the Rights

Both Article 31 of the UCMJ and the fifth amendment to the Constitution apply only to criminal proceedings or where there is a risk of criminal prosecution. Army regulations, however, extend these protections to nonjudicial and administrative proceedings. When conducting an administrative investigation you should always check the governing regulations for provisions that require rights warnings.

Not all evidence provided by a soldier is protected by Article 31 or the Constitution. In order to be protected, the evidence must be both incriminating and "testimonial or communicative." Mil. R. Evid. 301(a). Clearly, oral and written statements fit the definition and are protected by the privileges. So are a soldier's actions that have a commonly understood meaning, such as nodding his or her head in response to a question.

Other evidence is not protected, even though it is gathered from a suspect, because it does not require the suspect to "communicate" or "testify" against himself or herself. Physical characteristics such as fingerprints, scars, tatoos, footprints, or trying on clothing are not protected. This evidence may be incriminating, but its value is in its physical characteristics, not in what the suspect tells you about it. The fingerprint of the suspect will have value if it matches a print from the crime scene, but the suspect is not required to say anything about the crime. If clothing found at a burglary scene fits the suspect, that may incriminate the suspect, but he or she is not required to say anything about the burglary. Likewise, body fluids such as blood or urine can incriminate a suspect, but do not require the suspect to testify or communicate information. Instead, the physical characteristics of the blood and urine are the important element. The same is true for voice and handwriting samples, even though they require the suspect's cooperation. The investigator compares the physical aspects of the suspect's handwriting or voice prints to the physical aspects of the handwriting or voice of the person who committed the crime. The investigator is using the way the words were spoken, not what was spoken, and those physical characteristics are not protected. Finally, identification is not protected even though the soldier provides the information. This is because a person's

identity is neutral information that does not tend to prove a crime. The commander can generally require a soldier to identify himself and produce his identification card, even though no rights warnings are given.

D. The Rights Warning Decision

You now know where rights warnings come from and what kind of evidence is protected, but how do you decide if you must actually read the rights warnings? The simple answer is: whenever you intend to conduct official questioning of a suspect or accused, you must read rights warning. Remember that simple phrase and you can't go wrong. Let's discuss each element in order.

1. Official.

Article 31 was enacted to protect soldiers from the subtle pressures to respond to questioning by a superior. Soldiers are trained to respond to orders. That training may cause them to respond to a superior's questioning because of rank, duty, or similar relationships, even though the response is incriminating. The warning makes it clear that the soldier is not required to respond.

The first part of the rule, then, is that rights warnings are required when the questioner is acting in an official capacity. Law enforcement personnel and commanders are almost always seen as acting in an official capacity. In contrast, when a soldier brags about criminal conduct in response to a friend's question, those statements may be used against the soldier because the friend is not acting in an "official" capacity and is not required to read rights warnings to the soldier. The soldier's act of bragging indicates that he or she did not feel pressured or coerced into talking about the crime, so the rationale underlying the rights warning requirement does not apply.

There is one exception to the official questioning rule. Undercover agents are not required to read rights warnings even though they are military police acting in an official capacity. Such a requirement would pose an obvious threat to the safety of undercover agents. More importantly, however, the suspect does not realize he is dealing with a police officer or government agent, so there are neither subtle nor coercive pressures that would justify rights warnings. There are, however,

limitations on the use of undercover agents. Once a suspect has (1) invoked his or her rights, (2) has been placed in pretrial restraint, or (3) has had charges preferred against him or her, the suspect is entitled to consult with counsel, to be given rights warnings again, and to have counsel present at any subsequent interrogation. A commander (or the police) cannot circumvent this rule by sending an undercover agent to question the suspect; the commander cannot use the undercover agent to do what the commander cannot do on his own.

2. Questioning.

Questioning is a broad term and includes any formal or informal words or actions that are designed to elicit an incriminating response. Mil. R. Evid. 305. If, in your official capacity, you are trying to get the soldier to tell you something that you can use against him or her, you are questioning the soldier. It is questioning, for example, if you bring a soldier suspected of stealing a rifle into your office and attempt to get a response by showing the soldier the recently recovered stolen weapon.

It is not questioning when a soldier volunteers information or spontaneously gives information without any "words or actions reasonably likely to elicit an incriminating response" from the commander. If you simply listen to the soldier, there is no requirement to stop the soldier and advise him or her of their rights. If you want to question the soldier after the volunteered information, then you must give rights warnings.

3. Suspect or accused.

You do not have to advise all soldiers of their rights before questioning them. Witnesses, who are not suspected or accused of offenses, need not be advised of their rights, even though you are conducting official questioning. A soldier is the "accused" after court-martial charges have been preferred against him. A soldier is a suspect when you have enough information to reasonably believe that the soldier committed an offense. The questioner cannot avoid rights warnings by saying that he did not suspect the soldier being questioned. The test is whether the questioner reasonably should have suspected the soldier based on the evidence available at the time the questioning took place.

4. Summary.

When you officially question a suspect or accused, you must read the rights warnings prior to the questioning. If you must re-interview the suspect, you should complete another rights advisement before beginning your questioning.

E. Rights Warnings

Rights warnings should be read verbatim from DA Form 3881, Rights Warning Procedure/Waiver Certificate (Appendix A, page 6-12) or GTA 19-6-5, How To Inform Suspect/Accused Persons of Their Rights (Rights Warning Card) (Appendix B, page 6-13).

F. Voluntary Waiver of Rights

After reading the rights warnings to the suspect, ask these questions:

1. Do you understand your rights? (Yes)
2. Do you want a lawyer? (No)
3. Are you willing to make a statement? (Yes)

If the answers in the parentheses are given, the suspect has waived his or her rights and you may proceed with your interview. If the suspect doesn't understand his or her rights, explain them further; if he or she wants to remain silent or see an attorney, stop the interview, make a note of the request, and call your trial counsel. Be sure to specifically note whether the suspect wants to remain silent, have an attorney, or both. Different rules apply to each request.

In order to use a suspect's statement in a later court-martial, the trial counsel must prove that the suspect voluntarily waived his or her rights. If you obtained the statement, you may be called to testify about the rights warnings you gave and the suspect's waiver of those rights. This may be a long time after you actually took the statement, so it's important that you make a record of what occurred. If possible, use the DA Form 3881 because it provides not only a written record of the rights warning, but also the suspect's signature which indicates the suspect waived his or her rights. If you use GTA 19-6-5 (rights warning card), you may wish to write the date and time of the rights advisement on the card and have the suspect place his initials by each of the rights warnings. A written memo

can be prepared later. Although these steps are not required, they will assist you when testifying under oath about what happened during the rights warning process.

One final note: it is not permissible to use trickery to obtain a suspect's waiver of rights, e.g., telling a suspect his accomplice confessed, but laid the blame completely on him; or telling a suspect his fingerprints were found at the crime scene when none was found. If the suspect is tricked or misled into waiving his or her rights, the waiver will be considered involuntary and the admission or confession will be ruled inadmissible at trial. The courts have allowed law enforcement agents to use some trickery in obtaining a confession, but only after the suspect freely and voluntarily agreed to talk. This is an area fraught with danger and should be avoided by commanders.

G. Notice to Counsel

The soldier has an additional protection which is found in Mil. R. Evid. 305(e).

"When a person . . . intends to question an accused or person suspected of an offense and knows or reasonably should know [the suspect has counsel] . . . with respect to that offense, the counsel must be notified . . . and given a reasonable time in which to attend. . . ."

If you think a soldier is represented by a defense counsel, you must notify the defense counsel and give him or her a reasonable opportunity to be present before talking to the soldier. If, however, the soldier is represented by a defense counsel only on an unrelated offense, there is no need to give notice. Because this area is very complicated, contact your trial counsel before questioning a soldier who has either asked for a lawyer or is represented by a lawyer.

H. Remedy: Exclusion

If a questioner violates the requirements of the voluntariness doctrine, warnings, waiver, or notice to counsel, any statement obtained from a suspect which might have been used against the suspect at trial is excluded from evidence. Also, any evidence derived from the statement must be excluded. This may not, however, be the end of the government's case. If the trial counsel can prove the case with evidence which is

independent of the inadmissible statement, the prosecution may go forward.

I. Immunity

When a soldier refuses to testify because of the privilege against self-incrimination, the soldier can be forced to testify if he is granted immunity. Basically, immunity is the government's promise that the soldier's testimony will not be used against the soldier. Because the grant of immunity removes the criminal consequences of talking, the soldier must talk with authorities.

Rule of Court-Martial 707 sets out the procedures for granting immunity and specifies that only the General Court-Martial Convening Authority may grant immunity. There are two types of immunity:

1. Transactional immunity - the witness cannot be prosecuted at all for the criminal transaction that he testifies about. This is seldom used.

2. Testimonial immunity - the witness's testimony and derivative evidence cannot be used against him. Prosecution is possible if the government can show that all evidence is from an independent source, but this is very difficult for the government to do.

A soldier with a grant of immunity is not free from all subsequent prosecution. If the soldier lies or refuses to talk with government authorities, the soldier may be prosecuted for perjury, false swearing, making a false official statement, or failure to comply with an order to testify.

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APPENDIX A

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

For use of this form, see AR 190-30; the proponent agency is DCSPER.

DATA REQUIRED BY THE PRIVACY ACT

AUTHORITY: Title 10, United States Code, Section 3012(g).
PRINCIPAL PURPOSE: To provide commanders and law enforcement officials with means by which information may be accurately identified.
ROUTINE USES: Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.
DISCLOSURE: Disclosure of your Social Security Number is voluntary.

LOCATION		DATE	TIME	FILE NO.
NAME (Last - First - MI)		ORGANIZATION OR ADDRESS		
SOCIAL SECURITY NO.	GRADE/STATUS			

SECTION A - RIGHTS WAIVER/NON-WAIVER CERTIFICATE

RIGHTS

The investigator whose name appears below told me that he/she is with the United States Army _____
 _____ and wanted to question me about the following offense(s) of
 which I am suspected/accused: _____

Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:

1. I do not have to answer any questions or say anything.
2. Anything I say or do can be used as evidence against me in a criminal trial.
3. (For personnel subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both.

- or -

(For civilians not subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. However, I understand that I must make my own arrangements to obtain a lawyer and this will be at no expense to the Government. I further understand that if I cannot afford a lawyer and want one, arrangements will be made to obtain a lawyer for me in accordance with the law.

4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below.

COMMENT (Continue on reverse side)

WAIVER

I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.

WITNESSES (If available)		SIGNATURE OF INTERVIEWEE	
1. NAME (Type or Print)		SIGNATURE OF INVESTIGATOR	
ORGANIZATION OR ADDRESS AND PHONE			
2. NAME (Type or Print)		TYPED NAME OF INVESTIGATOR	
ORGANIZATION OR ADDRESS AND PHONE		ORGANIZATION OF INVESTIGATOR	

NON-WAIVER

I do not want to give up my rights:
 I want a lawyer. I do not want to be questioned or say anything.

SIGNATURE OF INTERVIEWEE

ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT (DA FORM 2823) SUBSEQUENTLY EXECUTED BY THE SUBJECT SUSPECT/ACCUSED.

SECTION B - RIGHTS WARNING PROCEDURE

THE WARNING

1. **WARNING** - Inform the suspect/accused of:
- Your official position.
 - Nature of offense(s).
 - The fact that he/she is a suspect/accused.
2. **RIGHTS** - Advise the suspect/accused of his/her rights as follows:
- "Before I ask you any questions, you must understand your rights."
- "You do not have to answer my questions or say anything."
 - "Anything you say or do can be used as evidence against you in a criminal trial."
 - (For personnel subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during

questioning. This lawyer can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."

- or -

(For civilians not subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. However, you must make your own arrangements to obtain a lawyer and this will be at no expense to the Government. If you cannot afford a lawyer and want one, arrangements will be made to obtain a lawyer for you in accordance with the law."

- "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate."

Make certain the suspect/accused fully understands his/her rights.

THE WAIVER

"Do you understand your rights?"
(If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)

"Do you want a lawyer at this time?"
(If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)

"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?"
(If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)

SPECIAL INSTRUCTIONS

WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.

IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY: In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.

PRIOR INCRIMINATING STATEMENTS:

- If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions.
- If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal.

NOTE: If (1) or (2) apply, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused.

COMMENT (Continued)

APPENDIX B

HOW TO INFORM SUSPECT/ACCUSED PERSONS OF THEIR RIGHTS

Use this card only when DA Form 3881, Rights Warning Procedure/Waiver Certificate, cannot be used. Complete DA Form 3881 as soon as possible.

VERBAL RIGHTS WARNING

Inform the person of your official position, the nature of the offense(s), and the fact that he/she is a suspect/accused. Then read him/her the following—do not paraphrase; read verbatim:

"BEFORE I ASK YOU ANY QUESTIONS, YOU MUST UNDERSTAND YOUR RIGHTS."

1. "YOU DO NOT HAVE TO ANSWER MY QUESTIONS OR SAY ANYTHING."
2. "ANYTHING YOU SAY OR DO CAN BE USED AS EVIDENCE AGAINST YOU IN A CRIMINAL TRIAL."
3. (For personnel subject to the UCMJ) "YOU HAVE THE RIGHT TO TALK PRIVATELY TO A LAWYER BEFORE, DURING, AND AFTER QUESTIONING AND TO HAVE A LAWYER PRESENT WITH YOU DURING QUESTIONING. THIS LAWYER CAN BE A CIVILIAN YOU ARRANGE FOR AT NO EXPENSE TO THE GOVERNMENT OR A MILITARY LAWYER DETAILED FOR YOU AT NO EXPENSE TO YOU, OR BOTH."

(For civilians not subject to the UCMJ) "YOU HAVE THE RIGHT TO TALK PRIVATELY TO A LAWYER BEFORE, DURING, AND AFTER QUESTIONING AND TO HAVE A LAWYER PRESENT WITH YOU DURING QUESTIONING. THIS LAWYER CAN BE ONE YOU ARRANGE FOR AT YOUR OWN EXPENSE, OR IF YOU CANNOT AFFORD A LAWYER AND WANT ONE, A LAWYER WILL BE APPOINTED FOR YOU BEFORE ANY QUESTIONING BEGINS."

4. "IF YOU ARE NOW WILLING TO DISCUSS THE OFFENSE(S) UNDER INVESTIGATION, WITH OR WITHOUT A LAWYER PRESENT, YOU HAVE A RIGHT TO STOP ANSWERING QUESTIONS AT ANY TIME, OR SPEAK PRIVATELY WITH A LAWYER BEFORE ANSWERING FURTHER, EVEN IF YOU SIGN A WAIVER CERTIFICATE."

Make certain the suspect/accused fully understands his/her rights, then say:

"DO YOU WANT A LAWYER AT THIS TIME?"

"AT THIS TIME, ARE YOU WILLING TO DISCUSS THE OFFENSE(S) UNDER INVESTIGATION AND MAKE A STATEMENT WITHOUT TALKING TO A LAWYER AND WITHOUT HAVING A LAWYER PRESENT WITH YOU?"

(See DA Form 3881 for more detailed instructions.)
Department of the Army Graphic Training Aid
Supersedes GTA 19-6-6, July 1965

GTA 19-6-6, June 1991

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CHAPTER 6

CONFESSIONS, SELF-INCRIMINATION, AND IMMUNITY

TEACHING OUTLINE

I. QUESTIONING DURING INVESTIGATIONS.

- A. Commanders and MP/CID Investigate.

- B. Every Investigation Involves Talking to People.
 - 1. Witnesses - rights warnings not required.
 - 2. Suspects - rights warnings required.

- C. Admission - statement admitting some elements of an offense. Admissible if proper rights warnings given.

Confession - statement admitting all elements of an offense. Admissible if proper warnings given and corroborating evidence exists.

II. SOURCES OF THE RIGHTS.

- A. The Fifth Amendment. Right to silence.

- B. Article 31, UCMJ. Military rights to silence.

- C. The Sixth Amendment. Right to counsel.

- D. Army Regulations.

III. SCOPE OF THE RIGHTS.

- A. What is Protected? ". . . evidence of a testimonial or communicative nature." Mil. R. Evid. 301(a).
1. Written or oral statements.
 2. Verbal acts.
- B. What is Not Protected?
1. Physical Characteristics: fingerprints, footprints, scars, tatoos, trying on clothing, shaving a beard.
 2. Body fluids - blood, urine.
 3. Voice and handwriting samples.
 4. Identification (e.g. line-ups and producing I.D. card).

IV. RIGHTS WARNING METHODOLOGY.

- A. Who Must Warn? (Official)
1. "Subtle pressure" rationale.
 2. Personnel acting in an official capacity.
 3. Suspect perceives more than casual conversation.
- B. When Must Warnings Be Given? (Questioning)
1. Words or actions can be questioning.

2. Spontaneous or volunteered statements are not questioning.
3. Requesting consent to search is not questioning, but warnings are recommended.
4. Successive questioning.
 - a. If you question again, read rights again.
 - b. Ask the chain of command and the police if they read the suspect his rights. Their knowledge is imputed to you.
 - c. Tell your chain of command and the police if you read the suspect his rights. Your knowledge is imputed to them.

C. Who Must Be Warned? (Suspect or Accused)

1. Accused--after preferral.
2. Suspect -- objective test.

D. The Rights Warnings.

V. **VOLUNTARY WAIVER OF RIGHTS.**

- A. The Burden of Showing a Waiver is on the Government.
- B. Be Prepared to Testify. Use GTA 19-6-6 or DA Form 3881, have a witness, prepare a memo.

C. If Rights are Invoked.

Stop the questioning and call your trial counsel.

VI. REMEDY: EXCLUSION.

A. Article 31(d). "No statement obtained in violation of this article . . . may be received in evidence against him in a trial by court-martial."

B. "An involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused. . . ." Mil. R. Evid. 304(a).

VII. NOTICE TO COUNSEL.

A. Know or Reasonably Should Know About Representation by an Attorney.

B. Counsel may have to be present. Consult your trial counsel before conducting any questioning.

VIII. IMMUNITY.

A. Concept: Remove the Consequences of Talking.

B. Types of Immunity.

1. Transactional immunity.

2. Testimonial immunity.

C. Only a GCMCA May Grant Immunity.

IX. SUMMARY.

Before you question a suspect you must give a rights warning. Use a rights warning form or card and, if possible, have a witness present. Be sure the suspect clearly answers the waiver questions. If the suspect invokes his rights, stop the questioning and call your trial counsel.

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CHAPTER 7

SENTENCING AND MILITARY CORRECTIONS

Introduction

Commanders are the cornerstone of the military justice system. When deciding whether to court-martial a soldier in their unit, commanders must remember that courts-martial serve two distinct purposes: enforcing unit discipline and administering justice.

What expectations should commanders have regarding court-martial sentences? The discussion that follows covers various aspects of sentencing. Commanders should consider these matters when determining what action to take on pending charges. Additionally, court members should consider these matters when determining an appropriate court-martial sentence.

A. Purposes of Punishment

An organization comprised of well disciplined soldiers will carry out its mission and function efficiently. Although good leadership is the best method of achieving discipline, deterrence of crime and protection of the military community are closely associated with discipline. A few undisciplined soldiers in an organization can cause disciplinary problems to spread and result in an organization with impaired efficiency.

An essential ingredient of good leadership is fair treatment of subordinates by superiors. A soldier who is treated fairly will learn to respect the Army's disciplinary procedures. A sentence which is either too light or too severe can be an adverse influence on discipline and result in disrespect for the law; whereas, fair sentences tend to foster good discipline and thereby protect the interests of the military community.

There are four recognized theories of punishment:

1. Retribution. Retribution has long been high on the list of reasons for punishment. Under this theory, the purpose of punishment is to make the offender pay for a crime by pain and suffering. The amount and type of punishment are based solely upon the offense(s). Retribution is based upon retaliation and vengeance. Punishment based upon retribution is not the dominant objective of modern criminal law. Today we believe that

punishment should fit the offender and not merely the crime.

2. Deterrence. A second purpose of punishment is deterrence. Deterrence has two objectives: to provide the offender with a sentence that deters him or her from committing future crimes (specific deterrence); and to dissuade others who might engage in similar criminal conduct (general deterrence). Deterrence is effective in punishing an individual only when he or she knows in advance that breaking the law will be followed by certain and swift punishment. As a result, commanders should publish court-martial findings and sentences throughout the command.

3. Rehabilitation. The dominant theme of modern penology is rehabilitation of the offender. Most offenders do come out of prison some day, and their sentences should be formulated to promote rehabilitation. Rehabilitation contemplates individualized treatment permitting the offender to return as a useful and productive member of society, whether military or civilian.

Under this theory, emphasis is placed on the offender as an individual, and the sentence is merely a means by which he or she can be compelled to receive individualized treatment which will enable his or her return as a useful and responsible member of society. The first step is to determine what caused the offender to commit the crime; the second, to train the offender to become a law-abiding citizen. This presupposes sufficient data on the offender and his or her problems.

4. Protection of Society. The protection of society theory combines retribution, deterrence, and rehabilitation. In practical terms, this concept involves isolating an individual who cannot participate in a social environment without displaying some type of criminal conduct when efforts at rehabilitation are unavailable or have failed and there is no reason for commitment to a mental institution. The only alternative left is to confine the individual to prevent further criminal conduct.

B. Functions of the Commander

1. Disposition of Cases. Congress has given disciplinary powers to certain members of the armed forces as a public trust. These powers must be exercised in the name of the United States in a manner befitting this trust.

A commander must initially be aware of the severity of punishments which may be adjudged by the various forums in order to make an intelligent disposition of the case.

The initial punishing authority is required by law to exercise absolute and unfettered individual judgment. One should not be concerned with possible future actions of higher authority on the punishment; rather the punishing authority should adjudge an appropriate punishment under the circumstances of the case.

2. Review. As a convening authority, the commander refers charges to the lowest court that has the power to adjudge an appropriate sentence. As the reviewing authority, the commander approves the sentence or part of the sentence found to be correct in law and fact and determined to be appropriate.

REFERENCE: R.C.M. 1107.

C. Duties as a Court Member

1. In General. Court members deliberate and vote after the military judge instructs them on sentence. Only the members are present during deliberations and voting. Panel members may not use seniority in rank to control the independence of junior members in the exercise of their judgment.

2. Deliberations. Deliberations include a full and free discussion of the sentence to be imposed in the case. Members may normally take their notes with them during deliberations and will also be allowed to examine any exhibits which have been admitted and any written instructions. If requested, the military judge may allow the court to be reopened to allow the members to have portions of the record played back or to have more evidence introduced.

3. Proposal of Sentences. Any member may propose a sentence. Each proposal shall be in writing and shall contain the complete sentence proposed. The junior member collects the proposed sentences and submits them to the president.

4. Voting. Each member votes for a proper sentence for the offenses of which the court-martial found the accused guilty, regardless of the member's vote

or opinion as to the guilt of the accused. The president places the sentence proposals in voting order beginning with the least severe. The vote is by secret written ballot beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under the circumstances. Normally, a two-thirds vote is required to adopt a sentence; however, a three-quarters vote is required for sentences that include more than 10 years of confinement and a unanimous vote is required to impose the death penalty.

REFERENCE: R.C.M. 1006.

D. Matters to Consider

1. Aggravation. Anyone who attempts to judge another's conduct should be aware of what is involved. Court members must make an impartial diagnosis of the problem and must have an understanding of the remedies available within the military. In almost all civilian jurisdictions, the judge--not the jury--imposes sentence on a convicted offender. A thorough investigation of the offender's record, termed the "presentence report," is prepared to assist the judge in assessing a proper sentence. In the military, either the judge or the court members arrive at an appropriate sentence; there is no presentence report. Court-martial procedure authorizes both the prosecution and defense to present, after findings, certain material which will assist the court in determining the kind and amount of punishment.

The Government will present admissible evidence of the accused's past record. Regardless of the plea, after findings of guilty, the trial counsel may present evidence which is directly related to the offense for which an accused is to be sentenced so that the aggravating circumstances surrounding that offense may be understood by the sentencing body.

In addition to matters in aggravation, the trial counsel may present evidence of admissible prior convictions. The trial counsel is also permitted to introduce certain matters from the personnel records of the accused which reflect past conduct or performance to include any Article 15s which are properly maintained in the accused's personnel records. Finally, the trial counsel may call witnesses to express opinions about the accused's past duty performance and potential for rehabilitation. The trial counsel may not inquire into the specific bases of witnesses' opinions.

REFERENCE: R.C.M. 1001(a), (b).

2. Extenuation. Matters in extenuation of an offense serve to explain the circumstances surrounding the commission of the offense, including the reasons that motivated the accused. For example, an accused convicted of a 5-day AWOL may explain the absence by relating a chain of events involving the death of a close relative, which at the time seemed to justify the unauthorized absence. While this does not excuse the absence, it may help explain why this accused acted, and such an explanation, coupled with an otherwise unmarred record, could motivate a court to be lenient.

3. Mitigation. Matters in mitigation of an offense serve to bring to the court's attention evidence of the accused's prior good conduct, background, character of service, responsibilities, and other reasons that indicate leniency may be appropriate. The military judge will allow the defense counsel latitude at this stage of the proceedings. For example, a properly authenticated letter from the accused's high school principal detailing the accused's good background could be considered as a matter in mitigation.

Also, examples of specific acts of bravery or prior good conduct may be presented. This may be done by producing prior conduct and efficiency ratings of the accused or by producing witnesses to testify as to the accused's prior good conduct. The accused may also bring awards and decorations to the attention of the court. The accused may make a sworn or unsworn statement to the court. If the accused elects to make a sworn statement, the prosecution may cross-examine. If the accused makes an unsworn statement, the trial counsel may not cross-examine the accused about the statement but can rebut any factual inaccuracies with contradictory evidence. The accused may also elect to have counsel make an unsworn statement on his or her behalf.

REFERENCE: R.C.M. 1001(c).

E. Punishment Limitations and Effective Dates

1. General. The various types of punishment available to the sentencing authority are limited in two ways: (1) the sentence may not exceed the jurisdiction of the court-martial as to punishment; and (2) the sentence may not exceed the limitations on punishment for

the convicted offense(s) defined in Part IV of the Manual for Courts-Martial.

2. Reprimand. Any level court-martial may impose a reprimand as a lawful punishment. If a reprimand is imposed, the members do not determine the wording of the reprimand. Rather, the convening authority issues the reprimand as a part of the action.

3. Forfeiture of Pay. Forfeitures are a permanent loss of pay coming due in the future. The amount of the forfeiture depends on the base pay due the member at the grade to which he or she is reduced. Forfeitures are effective on action by the convening authority.

4. Fine. All courts-martial have the authority to adjudge fines instead of forfeitures. While a forfeiture deprives the accused of pay as it accrues, a fine is a judgment making the accused immediately liable to the United States for the total amount of money specified. General courts-martial have the power to adjudge fines in addition to forfeitures. Special and summary courts-martial have authority to impose fines instead of forfeitures. Fines should normally not be adjudged unless the accused was unjustly enriched as a result of the offenses committed. Fines are effective on action by the convening authority.

5. Reduction in Grade. General and special courts-martial may reduce enlisted soldiers to the lowest or any intermediate enlisted grade. A reduction carries both the loss of military status and corresponding reduction of military pay. A commissioned or warrant officer, or a cadet or midshipman may not be reduced in grade by any court-martial. In time of war or national emergency, however, the Secretary concerned may commute a sentence of dismissal to reduction to any enlisted grade. Reductions are effective on action by the convening authority. Thus it is wrong for a commander or first sergeant to remove the stripes of a soldier sentenced to reduction immediately after a court-martial. The soldier retains his or her rank until the convening authority approves the reduction and orders it executed.

6. Restriction. Restriction is a moral restraint requiring that an individual remain within a specific geographic area. For example, a sentence could include restriction to the company area. Regardless of the level of the court-martial, restriction may not exceed 60 days. In order to aid in the enforcement of this punishment, a person undergoing restriction may be required to report

to a specified individual at a specified time. Restriction is effective upon convening authority action.

7. Hard Labor Without Confinement. A sentence to hard labor without confinement envisions an individual performing hard labor during available time in addition to regular military duties. Normally, the immediate commanding officer of the accused will determine the nature and amount of the extra duties which will constitute the hard labor. Hard labor without confinement may be adjudged only for enlisted soldiers. Hard labor without confinement may not exceed three months for a general or special court-martial and 45 days for a summary court-martial. A summary court-martial is without authority to impose hard labor without confinement upon enlisted members serving in the pay grade of E-5 and above. This punishment is effective upon convening authority action. Article 58a, UCMJ, provides that a sentence that includes any hard labor without confinement, automatically results in the accused being reduced to E-1.

8. Confinement. Only a general court-martial may impose confinement upon a commissioned officer or a warrant officer. A special court-martial may adjudge confinement for six months. A summary court-martial has the jurisdiction to confine an enlisted member below the grade of E-5 for one month. Confinement is effective immediately after the court-martial. A sentence that includes any confinement automatically reduces an enlisted soldier to the grade of E-1.

9. Bad-Conduct Discharge (BCD). Only enlisted soldiers may receive bad-conduct discharges. Bad-conduct discharges may only be adjudged by a general court-martial or by a special court-martial specifically authorized to impose a bad-conduct discharge. In order for a special court-martial to impose a bad-conduct discharge, the court must have been convened by a convening authority who has the power to convene a general court-martial. The bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad conduct rather than as a punishment for serious offenses of either a civil or military nature. A bad-conduct discharge is effective only after appellate review is completed.

10. Dishonorable Discharge (DD). A dishonorable discharge may be adjudged only at general courts-martial and may be imposed upon appointed warrant officers and enlisted soldiers. The Manual for Courts-Martial provides that a dishonorable discharge should be reserved

for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized by the civilian legal system as felonies, or offenses of a military nature requiring severe punishment. A dishonorable discharge is effective only after appellate review is completed.

11. Dismissal. Dismissal may only be adjudged by a general court-martial upon commissioned officers and commissioned warrant officers. It is the equivalent of a punitive discharge. Dismissal may be adjudged to a commissioned officer or warrant officer for any violation of any article of the UCMJ. A dismissal is effective only after appellate review is completed.

12. Death Penalty. The death penalty may be adjudged only if an accused is unanimously convicted of certain offenses, (for example, premeditated murder or espionage). Additionally, the case must have been referred to a court-martial which may adjudge the death penalty (referred capital). A death sentence may not be adjudged unless all the court members find, beyond a reasonable doubt, that one or more aggravating factors exist. An example of an aggravating factor for premeditated murder is that the victim was a commissioned, warrant, or noncommissioned officer in the execution of the victim's office. If one or more aggravating factors are found beyond a reasonable doubt, a sentence of death may be adjudged only upon the unanimous vote of all the members that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances. A sentence of death includes a dishonorable discharge or dismissal and confinement as a necessary incident of a sentence of death but not a part of it. A sentence of death may not be suspended. The death penalty is effective only after appellate review is completed and after it is ordered executed by the President.

REFERENCE: R.C.M. 1003.

F. Reduction in Grade (Article 58a, UCMJ)

Article 58a is an important provision of the Uniform Code of Military Justice. The provision applies to three situations. If an enlisted soldier in the Army is sentenced to: (1) a dishonorable or a bad conduct discharge; (2) any confinement; or (3) any hard labor without confinement, then the enlisted soldier is automatically reduced to the grade of Private E-1 (even if the court did not expressly include such a reduction

in its sentence). Thus, if an approved court-martial sentence includes hard labor without confinement, because of the operation of Article 58a, the soldier automatically is reduced to Private E-1. To determine when the provision applies, look to the approved sentence. Recognizing that in some cases the reduction may be more severe than any confinement adjudged, a convening authority may desire to lessen the blow by not approving that portion of the sentence which would bring Article 58a into operation.

G. Additional Punishments (Recidivist Provisions)

R.C.M. 1003(d) of the Manual for Courts-Martial sets forth a number of circumstances which authorize increased punishment beyond that authorized by the maximum punishment listed in Part IV.

1. Three or More Convictions During the Past Year. If an accused has three or more previous convictions during the year prior to the commission of any offense for which he or she is convicted, the court may adjudge a dishonorable discharge, total forfeitures, and confinement for one year notwithstanding the lesser punishments authorized for the offense.

2. Two or More Convictions During the Past Three Years. If an accused has two or more previous convictions during the three years prior to the commission of any offense for which he or she is convicted, the court may adjudge a bad-conduct discharge, total forfeitures, and confinement for three months notwithstanding the lesser punishments authorized for the offense.

3. Offenses - Six Months. Finally, if an accused is found guilty of two or more offenses, none of which authorizes a bad-conduct discharge but the combined authorized confinement exceeds six months, the court-martial may also impose a bad-conduct discharge.

These rules are important to you as a commander both in your role as a court member arriving at a sentence and in your role as a convening authority seeking to dispose of a case. For example, if you are a convening authority and are confronted with an accused who has committed two offenses for which no BCD is authorized, your immediate reaction may be to convene a special court-martial despite the fact that you feel the offender should be punitively discharged. If the authorized confinement for the offenses exceeds six months, you may forward the case to a general court-martial convening authority with a recommendation that the case be referred to a special

court-martial authorized to impose a bad-conduct discharge.

REFERENCE: R.C.M. 1003(d).

H. Powers of the Convening Authority with Regard to Sentence

1. Review. The convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused. There is no requirement that the convening authority approve the sentence adjudged by the court. The convening authority may not, however, increase the sentence imposed by the court.

2. Alternatives. The convening authority may decide upon one of three courses of action when reviewing the sentence imposed by the court-martial. The convening authority may approve the sentence without change, approve a less severe sentence, or disapprove the entire sentence.

3. Legal Sentence. Many factors are involved in a commander's exercise of his discretion as the convening authority to approve a sentence which he or she feels is appropriate. The convening authority has a duty to approve only so much of a sentence as is legal. For example, if a summary court-martial sentences an accused to confinement for three months, the convening authority can only approve so much of the sentence as amounts to confinement for one month (the maximum sentence to confinement a summary court-martial legally can impose).

4. Suspension. The convening authority may take mitigating action by suspending all or part of a sentence. Suspension creates a probationary period for the accused. The period of suspension and the conditions upon which the suspension is granted are within the discretion of the convening authority. The suspension must be for a reasonable time, and in no case may the suspension extend beyond the current enlistment of the offender. (See also Army Reg. 27-10, Legal Services: Military Justice, para. 5-29 (22 December 1989), that defines "reasonable periods" of suspensions.) The convening authority should suspend sentences as a tool to rehabilitate. R.C.M. 1108 governs the suspension process and commanders should consult with their staff judge advocate before ordering any suspension.

Should the offender commit another offense while serving a suspended sentence, the suspension may be vacated. If the case involves a bad-conduct discharge or a general court-martial sentence, a hearing must be held before the suspension can be vacated. The staff judge advocate should be consulted in such cases.

5. Reduction in Sentence. In addition to having the ability to suspend punishments, the convening authority may remit or commute the sentence in whole or in part. This authority does not extend to a death sentence. Reductions in sentences are usually due to special circumstances and are always considered on a case-by-case basis. Examples of when a reduction in sentence may be appropriate are when a family requires support and substantial forfeitures have been adjudged, or when a co-accused has been sentenced to a significantly less severe sentence and the interests of justice would be served by the reduction.

6. Deferment of Confinement. If the accused has been sentenced to a term of confinement, he or she may petition the convening authority to defer the service of the confinement. The accused has the burden of showing that the interests of the accused and the community in release outweigh the community's interests in immediate and continued confinement. Among the factors which the convening authority can consider are the nature of the offenses, the effect of the crime on the victim, the command's need for the accused, and the effect of deferment on good order and discipline in the command. The commander's decision must be in writing. It is subject to judicial review only for abuse of discretion. If deferment is granted, the commander can include appropriate restrictions or conditions on the accused during the period of deferment. For example, the accused may be ordered not to enter a certain service club, housing area, or geographic area. These conditions must not be a substitute form of punishment. After deferment is granted, the convening authority may rescind the deferment but the accused is entitled to notice and an opportunity to be heard on the issue.

7. Excess Leave. If an approved sentence includes an unsuspended dismissal or punitive discharge, the general court-martial convening authority may direct the soldier to take excess leave involuntarily to await discharge. Confinement must have been served, deferred, or suspended prior to the beginning of leave when included as part of the approved sentence. A soldier does not accrue pay or allowances while on excess leave awaiting discharge.

REFERENCE: R.C.M. 1101(c); 1107; 1108; Para. 5-4, AR 630-5.

I. Problem Areas

1. Inconsistent Sentences. Commanders should be aware of two problem areas in particular with respect to inconsistent sentences. Occasionally, a court-martial may adjudge a sentence which includes confinement for one month and a reduction to E-4. As explained, under Article 58(a), UCMJ, any confinement automatically reduces the soldier to the grade of E-1. The question in such a situation is what did the court intend: a one-grade reduction or confinement regardless of the included reduction to E-1?

Another problem of a similar nature involves a sentence to a suspended bad-conduct discharge. Only the convening authority can suspend a sentence, not the court. The question is, would the court have awarded a bad-conduct discharge if they had known that the suspension would have no effect? In either event, the staff judge advocate should be consulted.

2. Improper Forfeitures. The wording of the sentence is critical in adjudging or approving forfeitures. A sentence which reads "forfeiture of \$40 for six months" amounts to a total forfeiture of \$40. On the other hand, a sentence which reads "forfeiture of \$40 pay per month for six months" amounts to a forfeiture of a total of \$240.

J. Confinement Facilities

1. United States Disciplinary Barracks (USDB). The USDB is located at Fort Leavenworth, Kansas. The general rule (at least until 1 October 1992) is that the USDB confines Army enlisted prisoners with confinement sentences in excess of three years. Additionally, the USDB confines all officer prisoners from all services. The USDB averages approximately 1,475 prisoners.

The mission of the USDB is two-fold: (1) to confine prisoners who are legally sentenced to confinement under the provisions of the UCMJ in a safe, secure environment; and (2) to provide the correctional treatment, training, care, and supervision necessary to

return inmates to civilian life as useful, productive citizens with improved attitudes and motivation. Military discipline and courtesy are maintained within the USDB. Discipline and Adjustment Boards, convened by the Commandant of the USDB, review alleged violations of institutional rules and make recommendations to the Commandant for corrective action. The rules, programs, and activities of the USDB are discussed in USDB Regulation 600-1.

Shortly after arrival at the USDB, every inmate is evaluated by the staff of the Directorate of Mental Health. Specialized treatment is provided for many categories of inmates, such as child sex offenders and alcohol or drug abusers. The inmates also receive vocational training to prepare them for civilian employment.

2. United States Army Correctional Brigade. The United States Army Correctional Brigade is located at Fort Riley, Kansas. The general rule (at least until July 1992) is that the Correctional Brigade confines Army enlisted prisoners with sentences that include confinement over 6 months and up to and including three years.

Approximately two-thirds of the prisoners are housed in minimum custody, open bay barracks with neither wire enclosures nor armed guards. Inmates who engage in misconduct are subject to Disciplinary and Adjustment Boards, punishment under the UCMJ, or possible transfer to the USDB. All prisoners assigned to the Correctional Brigade receive individual evaluation, counseling, and treatment by social workers.

3. Installation Detention Facility (IDF). There are 15 IDFs on Army installations. One is located at Mannheim, Federal Republic of Germany, and one is located at Camp Humphreys, Korea. The IDFs are used for pretrial confinement and for post-trial confinement of six months or less. After 1 October 1992, the 13 stateside IDFs will be replaced with eight Regional Confinement Facilities.

4. Recent Developments. On 29 November 1990, the Deputy Secretary of Defense approved Option 2A of the Report to the Secretary of Defense on the Consolidation of Corrections under DoD (dated 1 June 1990). The effective date of consolidation of all DoD confinement assets is 1 October 1992 (see Appendix A, time line for implementation).

The following characteristics describe Option 2A:

a. DA is the executive agency for all Dod "long-term" confinement at no cost to other services.

b. Option 2A defines "long-term" ~~as more~~ than one year remaining on a sentence after convening authority action and initial clemency consideration. All other prisoners will be "short-term."

c. ~~Services will have the option~~ of retaining long-term prisoners at the USDB or transferring them to the Federal Bureau of Prisons.

d. Short-term prisoners will be retained at regional confinement facilities.

e. DA may retain the following facilities: The USDB and eight regional confinement facilities at Forts Riley, Knox, Campbell, Carson, Hood, Lewis, Benning, and Sill. The U.S. Army Correctional Brigade will close on 1 September 1992.

SENIOR OFFICER LEGAL ORIENTATION
SENTENCING, CORRECTIONS, AND THE CHILD ABUSER

I. INTRODUCTION.

II. PURPOSES OF PUNISHMENT.

- A. Retribution.
- B. Deterrence.
- C. Protection of society/protection of the victim.
- D. Rehabilitation.

III. COURT-MARTIAL PUNISHMENTS.

- A. No punishment.
- B. Reprimand.
- C. Forfeiture of pay and allowances.
- D. Fine.
- E. Reduction in pay grade.
- F. Restriction to specified limits.
- G. Hard labor without confinement.
- H. Confinement.

I. Punitive separations.

1. Bad conduct discharge.
2. Dishonorable discharge.
3. Dismissal.

J. Death.

IV. CONFINEMENT.

A. Installation Detention Facility (IDF).

1. Mission.
2. Criteria.

B. United States Army Correctional Brigade, Fort Riley, Kansas.

1. Mission.
2. Criteria.

C. United States Army Disciplinary Barracks, Fort Leavenworth, Kansas.

1. Mission.
2. Criteria.

D. Recent developments.

E. Clemency and parole.

1. Clemency.

2. Parole.

3. Good time.

V. SENTENCING PROCEDURES.

A. Full and free discussion.

B. Sentences proposed.

C. Ranking of sentences.

D. Voting.

1. Secret written ballot.

2. Start with least severe.

3. The required concurrence.

E. The sentence worksheet (See Appendix B).

VI. COLLATERAL CONSEQUENCES (See Appendix C).

A. Housing.

B. Medical benefits.

C. Educational benefits.

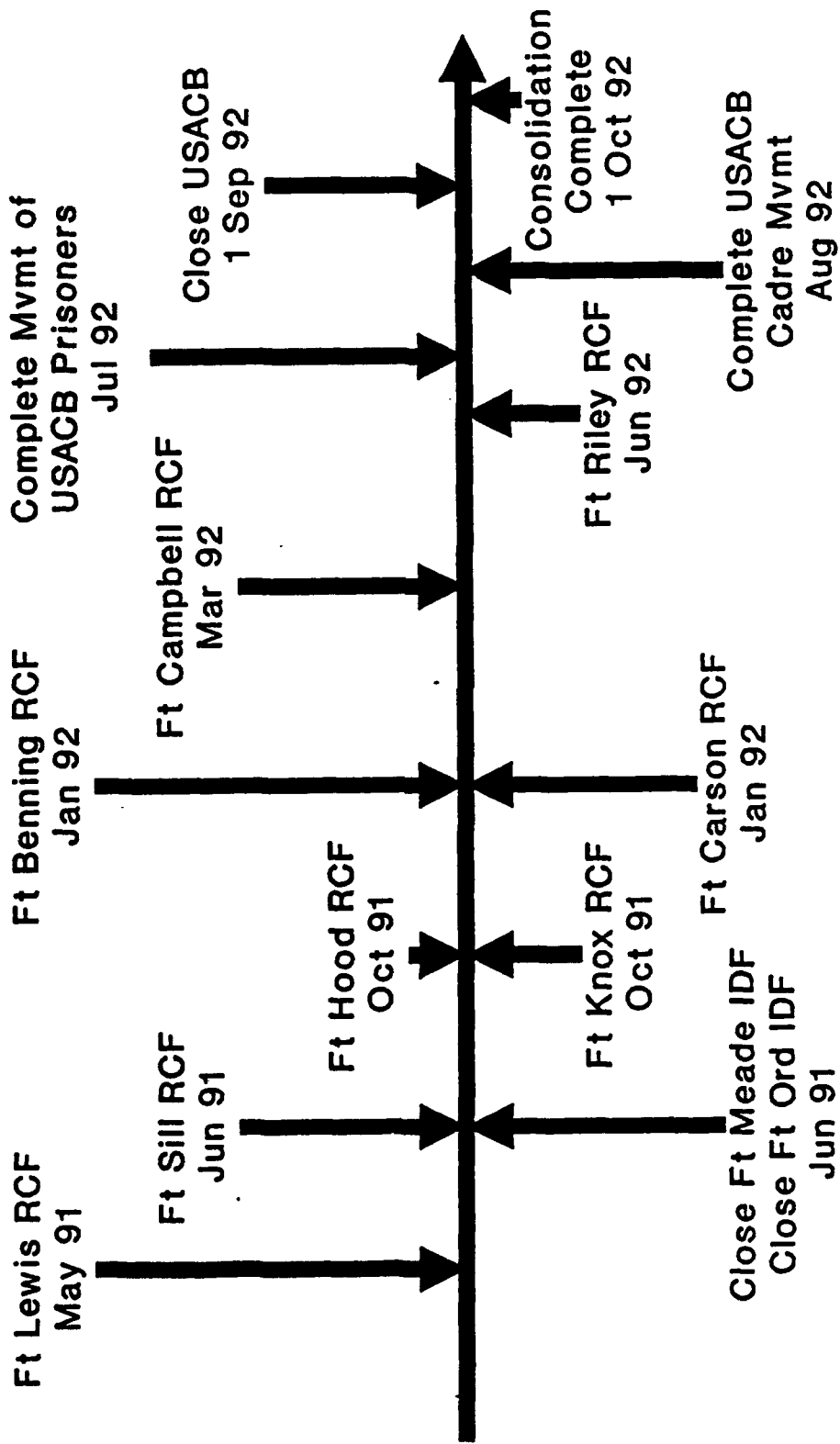
D. Veterans Administration benefits.

E. Retirement benefits (See Appendix D).

VII. FACTS OF THE CASE (See Appendix E).

VIII. THE VOTE.

IX. CONCLUSION.



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JAGS-ADC

24 March 1992

Information Memorandum

SUBJECT: Prisoner Transfer Criteria

1. The following guidelines control the transfer of post-trial confinees:

a. CONUS:

Less than 4 months:	Installation Detention Facility
4 months - 2 years:	United States Army Correctional Brigade
Greater than 2 years:	United States Disciplinary Barracks

* The only exception to these rules is that FORSCOM posts will retain prisoners at Installation Detention Facilities for sentences less than 6 months.

b. USAREUR:

(1) General Rules:

Less than 6 months:	Installation Detention Facility (either Fort Sill or Fort Knox)
6 months - 3 years:	United States Army Correctional Brigade
Greater than 3 years:	United States Disciplinary Barracks

(2) Army Correctional System 2000 (ACS 2000):

Less than 3 years:	ACS 2000 Facility (Either Fort Sill or Fort Meade)
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Applies to accused convicted of crimes that do not include violence, drugs or sex. Accused must not have a permanent profile which precludes full-time employment.

CPT Cuculic

General Court-Martial Sentence Worksheet

After the Court has reached a sentence, the President shall circle the punishment(s) selected and accomplish any filling in or crossing out within the punishments selected.

_____, this court-martial sentences you:

1. To no punishment.

Reprimand

2. To be reprimanded.

Forfeitures, Etc.

3. To forfeit \$_____ pay per month for _____ month(s).
4. To forfeit all pay and allowances.
5. To pay the United States a fine of \$_____ (and to serve (additional) confinement of _____ (days/months/years) if the fine is not paid).

Reduction of Enlisted Personnel

6. To be reduced to _____.

Restriction

7. To be restricted to the limits of _____ for _____ (days/months).

Hard Labor

8. To perform hard labor without confinement for _____ (days/months).

Confinement

9. To be confined for _____ (days/months/years) (the length of your natural life).

Punitive Discharge

10. To be discharged from the service with a bad-conduct discharge (enlisted personnel only).

11. To be dishonorably discharged from the service (enlisted personnel and noncommissioned warrant officers only).

12. To be dismissed from the service (commissioned officers, commissioned warrant officers, cadets, and midshipmen only).

Appellate Exhibit

BENEFITS-DISCHARGES

BENEFITS ADMINISTERED BY THE ARMY

	Honorable OFF & EM DD Form 258A	General OFF & EM DD Form 257A Under Honorable Conditions	Other Than Honorable OFF DD Form 258A EM DD Form 258A	Bad Conduct EM DD Form 258A Under Conditions Other Than Honorable	Dishonorable (General Court Martial) EM & WO DD Form 260A (Including Dismissal of an Officer) ¹		AUTHORITY AND REFERENCES ²
1. Payment for Accrued Leave	E	E	NE	NE	NE		37 USC 501-503; DODPEM par. 40401a
2. Death Gratuity (six months pay)	E	E	E	E	NE		10 USC 1480; DODPEM par. 40501b
3. Transportation to Home ¹	E	E	E	E	E		37 USC 404; JTR par. U7500-7506
4. Transportation of Dependents and Household Goods to Home	E	E	TBD	TBD	TBD		37 USC 406; JTR par. U5225, U5370
5. Wearing of Military Uniform	E	E	NE	NE	NE		10 USC 771a, 772; AR 670-1
6. Admission to Soldiers' Home ²	E	E	NE	NE	NE		24 USC 49, 50
7. Burial in Army National Cemeteries	E	E	NE	NE	NE		38 USC 1002; AR 290-5
8. Burial in Army Post Cemeteries ³	E	E	NE	NE	NE		AR 210-190
9. Army Board for Correction of Military Records	E	E	E	E	E		10 USC 1552; AR 15-185
10. Army Discharge Review Board	E	E	E	NE ⁴	NE		10 USC 1553; AR 15-180

BENEFITS ADMINISTERED BY THE VETERANS ADMINISTRATION¹⁰

1. Dependency and Indemnity Compensation	E	E	TBD	TBD	NE		38 USC 410(c)
2. Pension for Non-Service-Connected Disability or Death	E	E	TBD	TBD	NE		38 USC 521; 38 USC 3103
3. Medal of Honor Roll Pension	E	E	TBD	TBD	NE		38 USC 562; 38 USC 3103
4. Insurance	E	E	TBD ¹¹	TBD ¹¹	TBD ¹¹		38 USC 711, 773; AR 608-2.
5. Vocational Rehabilitation (DV)	E	E	TBD	TBD	NE		38 USC 1502, 1503
6. Educational Assistance (including Fight Training & Apprenticeship Training)	E	E	TBD	TBD	NE		38 USC 1652; 38 USC 1661, 1662
7. Survivors & Dependents Educational Assistance	E	E	TBD	TBD	NE		38 USC 1701-1765
8. Home and other Loans	E	E	TBD	TBD	NE		38 USC 1802, 1818
9. Hospitalization & Domiciliary Care	E	E	TBD	TBD	NE		38 USC 610; 38 USC 3103
10. Medical and Dental Services	E	E	TBD	TBD	NE		38 USC 612; 38 USC 3103
11. Prosthetic Appliances (DV)	E	E	TBD	TBD	NE		38 USC 614; 38 USC 612(d); 38 USC 3103
12. Guide Dogs & Equipment for Blindness (DV)	E	E	TBD	TBD	NE		38 USC 614; 38 USC 3103
13. Special Housing (DV)	E	E	TBD	TBD	NE		38 USC 801; 38 USC 3103
14. Automobiles (DV)	E	E	TBD	TBD	NE		38 USC 1901; 38 USC 3103
15. Funeral and Burial Expenses	E	E	TBD	TBD	NE		38 USC 902; 38 USC 3103
16. Burial Flag	E	E	TBD	TBD	NE		38 USC 901; 38 USC 3103
17. Burial in National Cemeteries	E	E	TBD	TBD	NE		38 USC 1002
18. Headstone Marker	E	E	TBD	TBD	NE		38 USC 906; 38 USC 1003

BENEFITS ADMINISTERED BY OTHER FEDERAL AGENCIES

1. Preference for Farm Loan (Department of Agriculture)	E	E	E	E	NE		7 USC 1983(e)
2. Preference for Farm and other Rural Housing Loans (Department of Agriculture)	E	E	E	E	NE		42 USC 1477
3. Civil Service Preference (Office of Personnel Management)	E	E	NE	NE	NE		5 USC 2108, 3309-3316, 3502, 3504
4. Civil Service Retirement Credit	E	NE	NE	NE	NE		5 USC 8331, 8332
5. Reemployment Rights (Department of Labor)	E	E	E	E	NE		38 USC 2021-2026
6. Job Counseling and Employment Placement (Department of Labor)	E	E	E	E	NE		38 USC 2001-2014
7. Unemployment Compensation for Ex-Servicemembers (Department of Labor)	E	TBD	NE	NE	NE		5 USC 8501, 8521
8. Naturalization Benefits (Department of Justice Imm. & Nat. Service)	E	E	NE	NE	NE		8 USC 1439, 1440; AR 608-3, par. 2-2, 2-3
9. Old Age, Survivors & Disability Insurance (Social Security Administration)	E	E	TBD	TBD	NE ¹²		42 USC 417
10. Job Preference, Public Works Projects ¹³ (Department of Commerce)	E	E	TBD	TBD	NE		42 USC 6706; 13 CFR 317.35

GENERAL EXPLANATION: The applicability of benefits are based on the type of discharge received, and also on the extent of the service performed. The nature and amount of benefits are also affected by the type of discharge, and are subject to change without notice.

E	Eligible
NE	Not Eligible
TBD	To Be Determined by Agency administering the benefit
NE ¹²	Not Eligible
NE ¹³	Eligible for those benefits which have specific requirements of the statute

FOOTNOTES

1. Only if no application is received, or if application is received based on report from a US Federal Government agency or a governmental agency approved under US law.
2. The statute provides that the veteran must have served "honorable and faithful" for 70 days or more and must have been discharged with preference. The statute also provides that the veteran must have been discharged with preference.
3. Only if an individual member is buried in the cemetery.
4. This discharge category includes the discharge of an officer under Article 15 of the Uniform Code of Military Justice (UCMJ) and under the provisions of the UCMJ. See AR 15-180 par. 1-10.
5. This discharge category includes the discharge of an officer under Article 15 of the UCMJ and under the provisions of the UCMJ. See AR 15-180 par. 1-10.

1. An officer who accepts pay and allowances of the highest grade to which he is entitled, and who is discharged with preference, is entitled to the benefits of the highest grade to which he is entitled. 38 USC 1148.

2. Additional information regarding these benefits can be found in the following publications: 38 USC 1148, 38 USC 1149, and 38 USC 1150. See also AR 608-2, 608-3, and 608-4.

3. Information on benefits which may be received by the veteran's dependents can be found in the following publications: 38 USC 1148, 38 USC 1149, and 38 USC 1150.

4. Only if the Discharge Review Board has the record of service on file with the General Court-Martial.

5. Benefits from the Civil Service Preference Act are not payable to a veteran who is discharged with preference, or to a veteran who is discharged with preference and who is also a member of the Civil Service. See 5 USC 2108, 3309-3316, 3502, 3504.

6. This benefit is payable to a veteran who is discharged with preference and who is also a member of the Civil Service. See 5 USC 8331, 8332.

7. This benefit is payable to a veteran who is discharged with preference and who is also a member of the Civil Service. See 38 USC 2021-2026.

8. This benefit is payable to a veteran who is discharged with preference and who is also a member of the Civil Service. See 38 USC 2001-2014.

9. This benefit is payable to a veteran who is discharged with preference and who is also a member of the Civil Service. See 5 USC 8501, 8521.

10. This benefit is payable to a veteran who is discharged with preference and who is also a member of the Civil Service. See 8 USC 1439, 1440; AR 608-3, par. 2-2, 2-3.

11. This benefit is payable to a veteran who is discharged with preference and who is also a member of the Civil Service. See 42 USC 417.

12. This benefit is payable to a veteran who is discharged with preference and who is also a member of the Civil Service. See 42 USC 6706; 13 CFR 317.35.

13. This benefit is payable to a veteran who is discharged with preference and who is also a member of the Civil Service. See 42 USC 6706; 13 CFR 317.35.

Other than regular discharges, the following discharges are eligible for benefits: (1) Discharge with preference, (2) Discharge with preference and honor, (3) Discharge with preference and honor, (4) Discharge with preference and honor, (5) Discharge with preference and honor, (6) Discharge with preference and honor, (7) Discharge with preference and honor, (8) Discharge with preference and honor, (9) Discharge with preference and honor, (10) Discharge with preference and honor, (11) Discharge with preference and honor, (12) Discharge with preference and honor, (13) Discharge with preference and honor, (14) Discharge with preference and honor, (15) Discharge with preference and honor, (16) Discharge with preference and honor, (17) Discharge with preference and honor, (18) Discharge with preference and honor, (19) Discharge with preference and honor, (20) Discharge with preference and honor, (21) Discharge with preference and honor, (22) Discharge with preference and honor, (23) Discharge with preference and honor, (24) Discharge with preference and honor, (25) Discharge with preference and honor, (26) Discharge with preference and honor, (27) Discharge with preference and honor, (28) Discharge with preference and honor, (29) Discharge with preference and honor, (30) Discharge with preference and honor, (31) Discharge with preference and honor, (32) Discharge with preference and honor, (33) Discharge with preference and honor, (34) Discharge with preference and honor, (35) Discharge with preference and honor, (36) Discharge with preference and honor, (37) Discharge with preference and honor, (38) Discharge with preference and honor, (39) Discharge with preference and honor, (40) Discharge with preference and honor, (41) Discharge with preference and honor, (42) Discharge with preference and honor, (43) Discharge with preference and honor, (44) Discharge with preference and honor, (45) Discharge with preference and honor, (46) Discharge with preference and honor, (47) Discharge with preference and honor, (48) Discharge with preference and honor, (49) Discharge with preference and honor, (50) Discharge with preference and honor, (51) Discharge with preference and honor, (52) Discharge with preference and honor, (53) Discharge with preference and honor, (54) Discharge with preference and honor, (55) Discharge with preference and honor, (56) Discharge with preference and honor, (57) Discharge with preference and honor, (58) Discharge with preference and honor, (59) Discharge with preference and honor, (60) Discharge with preference and honor, (61) Discharge with preference and honor, (62) Discharge with preference and honor, (63) Discharge with preference and honor, (64) Discharge with preference and honor, (65) Discharge with preference and honor, (66) Discharge with preference and honor, (67) Discharge with preference and honor, (68) Discharge with preference and honor, (69) Discharge with preference and honor, (70) Discharge with preference and honor, (71) Discharge with preference and honor, (72) Discharge with preference and honor, (73) Discharge with preference and honor, (74) Discharge with preference and honor, (75) Discharge with preference and honor, (76) Discharge with preference and honor, (77) Discharge with preference and honor, (78) Discharge with preference and honor, (79) Discharge with preference and honor, (80) Discharge with preference and honor, (81) Discharge with preference and honor, (82) Discharge with preference and honor, (83) Discharge with preference and honor, (84) Discharge with preference and honor, (85) Discharge with preference and honor, (86) Discharge with preference and honor, (87) Discharge with preference and honor, (88) Discharge with preference and honor, (89) Discharge with preference and honor, (90) Discharge with preference and honor, (91) Discharge with preference and honor, (92) Discharge with preference and honor, (93) Discharge with preference and honor, (94) Discharge with preference and honor, (95) Discharge with preference and honor, (96) Discharge with preference and honor, (97) Discharge with preference and honor, (98) Discharge with preference and honor, (99) Discharge with preference and honor, (100) Discharge with preference and honor.

THE TOWER AMENDMENT REVISITED

Lt Colonel Jim Young
USAF Trial Judiciary, Second Circuit

1. Comptroller General Opinion B-225150, dated May 4, 1987, interprets 10 U.S.C. 1401a(f) (the so-called Tower Amendment) to provide that military retirement pay is calculated at the highest grade held after the service member became eligible to retire (20 years), even if the member was subsequently reduced as a result of a court-martial sentence.
2. Public Law 100-456 (Defense Authorization Act), Section 622, 29 September 1988, modified 10 U.S.C. 1401a(f) by providing that "in the case of a member who, after initially becoming eligible for retired pay, is reduced in grade pursuant to a sentence of a court-martial, such computation may not be based on a grade higher than the grade in which the member is retired." This modification became effective 1 October 1988 and applies "to the computation of the retired or retainer pay of members who initially become entitled to such pay on or after such" date.
3. An accused was eligible to retire before 1 October 1988 after 20 years of credible service. As a result of his 1989 court-martial conviction, he was reduced in grade. What is the effect on his retired pay? Although he was "eligible" for retirement before 1 October 1988, he does not become "entitled" to retired pay until he actually retires. Thus, the modification applies. Our accused's retired pay is based on the reduced grade.
4. The modification does "grandfather" those military members who actually retired before 1 Oct. 1988 after being reduced in grade as a result of a court-martial sentence. Their retired pay will continue to be based on the highest rank held after they became "eligible" to retire.

GENERAL COURT-MARTIAL

CASE FACTS

SFC John Smith has been found guilty, contrary to his pleas, of committing indecent acts upon and raping his now eleven-year-old daughter. You are on the panel that convicted him of the following offenses:

Charge I: Rape, a violation of article 120, U.C.M.J.

Charge II: Indecent Acts or Liberties with a Child,
a violation of article 134, U.C.M.J.

The specific facts of United States v. Smith are as follows:

Since SFC Smith's step-daughter, Lola, was nine, SFC Smith has been fondling Lola's breasts and vaginal area. These illegal acts took place approximately twice a month during the past two years. During approximately 10 of these encounters, SFC Smith forced Lola to have sexual intercourse with him.

SFC Smith was careful to commit these acts only when Mrs. Smith was working at the Post Exchange (evenings and weekends). SFC Smith continuously threatened Lola that if she told anyone of her father's sexual abuse, he would deny everything. He also told her that the police would take her away from her mom and dad and make her live in a foster home with other bad children.

As a result of instruction in her fifth grade class about physical awareness, Lola finally confided in her best friend. Lola told her friend what her father had been doing to her for the past two years. Her friend told her parents, who reported it to the Criminal Investigation Division (CID). When interviewed, Lola broke down and told the CID agents everything her father had been doing to her.

Contrary to what SFC Smith had threatened Lola, when confronted by CID with Lola's allegations, he confessed to fondling her the past two years; he denied, however, raping her. He asked for CID's help for his "condition." CID immediately briefed SFC Smith's company commander. The company commander moved SFC Smith into the barracks and gave SFC Smith an order not to return to his quarters.

At his general court-martial, SFC Smith entered a plea of guilty to indecent acts with a child, but not guilty to the rapes.

Lola testified during the court-martial on the contested rape charge.

It was extremely apparent that her father's misconduct the past two years seriously affected her emotionally. Several times during the court-martial, Lola broke down in tears and the court had to recess. Reliving the past two years was very traumatic.

SFC Smith testified on his own behalf during the trial on the rape charge. Consistent with his earlier statement to CID, he admitted the sexual assaults but vehemently denied the rapes. As panel members, you believed Lola and found him guilty of the rapes as charged.

Mrs. Smith testified as a sentencing witness. Mrs. Smith stated that Lola totally withdrew after she came forward with the allegations. At first, Lola could not speak to Mrs. Smith at all. Lola apparently felt that she had betrayed her mother. Mrs. Smith testified that Lola has been in therapy at the Army Family Counseling Center the past 8 weeks. According to Mrs. Smith, the counseling has had a very positive effect on Lola. Lola has finally started to come out of her "shell." Lola's counsellor informed Mrs. Smith that Lola would need therapy for at least another year. Mrs. Smith pleaded that her husband receive no confinement.

During the sentencing phase of trial, SFC Smith made an unsworn statement. He begged the court's forgiveness. He begged that he be returned to his wife and daughter without any confinement so that he could begin to rebuild his family.

SFC Smith produced numerous awards and decorations he received during his 16 years of Army service (to include 2 Meritorious Service Medals, 2 Army Commendation Medals, 2 Overseas Service Ribbons, and 5 Good Conduct Ribbons). SFC Smith's First Sergeant testified that SFC Smith always wears a meticulous uniform and performed his military duties well.

The maximum punishment the accused could receive for his crimes is confinement for life, a dishonorable discharge, total forfeitures of all pay and allowances, and reduction to E-1.

CHAPTER 8

POST-TRIAL RESPONSIBILITIES

Introduction

This chapter addresses the convening authority's powers and responsibilities after the court-martial has adjourned. Historically, the commander/convening authority performed in a quasi-judicial manner by reviewing a court-martial's findings and sentence for legal correctness, factual sufficiency, and overall appropriateness. The Military Justice Act of 1983 significantly modified the responsibilities of the convening authority. The commander retains all the same powers to deal with the case as before, but the staff judge advocate now conducts the legal review and makes recommendations to the convening authority.

A. Results of Trial

Article 60, UCMJ, and R.C.M. 1101(a), MCM, 1984, require that the convening authority or a designated delegate of the convening authority such as the SJA or chief of staff, be promptly notified of the results of each trial after the court-martial adjourns. As a practical matter, the SJA notifies the chief of staff and convening authority of all results of trial.

B. Post-trial Sessions

The convening authority may direct that the court-martial re-convene in either an Article 39(a), UCMJ, session (a portion of the trial conducted outside the presence of the court members) or a proceeding in revision. These procedures can correct apparent errors or omissions in the proceedings or inquire into allegations of misconduct during the trial by a court member or counsel.

REFERENCE: R.C.M. 1102.

C. The Record of Trial

After the record of trial has been prepared and authenticated by the military judge, it is forwarded to the convening authority for initial review and action. In general court-martial cases or special court-martial

cases in which a bad-conduct discharge was adjudged, the SJA must prepare a recommendation before the convening authority takes action.

REFERENCE: R.C.M. 1103 and 1106.

D. Convening Authority's Initial Action

R.C.M. 1107 governs the convening authority's action on a case. If the convening authority has other than an official interest in the case or has participated in the trial in a manner which creates or appears to create a lack of impartiality or objectivity, the convening authority may be disqualified from taking action. If this occurs, the record must be forwarded to another convening authority for action.

As noted in the introduction, the nature of the action to be taken on the findings and the sentence is a matter of command prerogative within the sole discretion of the convening authority. The convening authority is not required to review the case for legal or factual sufficiency. Thus, the commander's concerns in acting on a case will reflect considerations such as justice, clemency, discipline, mission requirements, or other appropriate considerations. Legal errors may, of course, be corrected by the convening authority but the commander is not required to analyze the record for legal errors.

There are certain limitations on the convening authority's action. The convening authority cannot take action before the time periods specified for submission of written matters by the accused expire or are waived by the accused. For general and special courts-martial, this waiting period is the later of 10 days after the accused is given an authenticated record of trial or, if applicable, 10 days after the accused is served with the recommendation of the SJA. For summary courts-martial, a seven-day period after sentencing is the only limit. The convening authority may extend these time limits upon request by an accused.

Another limit on the convening authority is that in taking action certain matters must be considered. They are: the result of trial in the case; the SJA's recommendation, if one is required; and the matters submitted by the accused, if any.

The accused's right to submit matters to the convening authority after trial, is guaranteed in Article

60, UCMJ, and R.C.M. 1105, MCM, 1984. The accused may submit anything deemed reasonably likely to influence the commander's action on the sentence or the findings of the court. As noted above, the convening authority must consider these matters before acting on the case.

The SJA's post-trial recommendation in general courts-martial and special courts-martial with an adjudged BCD must also be considered before action is taken. R.C.M. 1106 governs the contents of this recommendation. It is to be a concise written communication. It will relate the findings and sentence of the court, the accused's service record in summary fashion, the pretrial restraint, if any, the effects of any pretrial agreement, and the specific recommendation of the SJA for action on the sentence. If the defense submitted an allegation of legal error in their post-trial submissions, the SJA must respond to that allegation in the post-trial recommendation. The response may merely state agreement or disagreement. No explanatory rationale is required. The SJA may include other appropriate matters in the recommendation also. The post-trial recommendation must be served on the defense counsel and the accused who then have 10 days to respond before the convening authority can take action. This response by the defense to the recommendation, together with the accused's R.C.M. 1105 submissions, comprise the defense matters which must be considered by the convening authority before action is taken.

In addition to what must be considered, the commander may consider the record of trial, the accused's personnel records, and any other appropriate matters. If such matters are outside the record and are adverse to the accused, then the defense must be given notice and an opportunity to respond.

In taking action, the convening authority need not act on the findings. The convening authority may however, set aside the findings in whole or in part, reduce the findings to lesser included offenses, or order a rehearing as to some or all of the guilty findings.

In acting on the sentence, the convening authority may approve or disapprove the sentence in whole or in part, mitigate it, or change it, so long as the severity is not increased. The commander may act on the sentence for any reason or for no reason; but, the action taken must be explicitly stated.

E. Promulgating the Action

After the convening authority has taken action on a case, an order promulgating the results of trial and the commander's action must be published. Under Article 71, UCMJ, the convening authority may now order executed in the initial action any part of the adjudged and approved sentence except a DD, BCD, dismissal, or death. These latter punishments go into effect only after appellate review is completed and in the case of death the President orders it executed. The convening authority does not designate a place of confinement in the action or order. Military Police regulations establish the place of confinement depending on the length of sentence. A sample action and court-martial order are included at pages 8-5 and 8-6.

F. Conclusion

The Military Justice Act of 1983 and the Manual for Courts-Martial, United States, 1984, significantly reduced the commander's post-trial legal review functions. The burden of post-trial legal review shifted to the trial defense counsel and the military appellate courts. The convening authority, however, may still be required to consider legal issues at the time of initial action based upon defense submissions and the SJA's response. As a result, the convening authority must maintain an active interest in the development and administration of military justice. Additionally, the commander must never appear to be unfair or inconsiderate in the use of judicial authority. The proper use of judicial authority by the convening authority ensures high morale and discipline, and guarantees the commander's effective exercise of command responsibilities.

ACTION

**DEPARTMENT OF ARMY
HEADQUARTERS, 2D BRIGADE, 26TH CAVALRY DIVISION (AM)
Fort Arlington, Virginia**

20 December 199X

In the case of Private First Class (E-3) Thomas L. Amherst, 429-86-4723, Company B, 1st Battalion, 16th Infantry, 26th Cavalry Division (AM), Fort Arlington, Virginia 22901, only so much of the sentence as provides for confinement for three months, forfeiture of \$100.00 pay per month for three months, and reduction to the lowest enlisted grade is approved and will be executed.

**JAMES E. WALKER
COL, IN
Commanding**

DEPARTMENT OF THE ARMY
HEADQUARTERS, 2D BRIGADE, 26TH CAVALRY DIVISION (AM)
Fort Arlington, VA 22901

SPECIAL COURT-MARTIAL ORDER
NUMBER 8

20 December 199X

Private First Class (E-3) Thomas L. Amherst, 429-86-4723, U.S. Army, Company B, 1st Battalion, 16th Infantry, Arlington, VA 22901, was arraigned at Fort Arlington, Virginia, on the following offenses at a special court-martial convened by Commander, 2d Brigade, 26th Cavalry Division.

Charge I. Article 121. Plea: Guilty. Finding: Guilty.

Specification: Larceny of property of a value of \$180.00 on 14 November 199X. Plea: Not Guilty. Finding: Guilty except the word "steal", substituting "wrongfully appropriate".

Charge II. Article 95. Plea: Not Guilty. Finding: Not Guilty.

Specification: Resisting apprehension on 15 November 199X.

Plea: Not Guilty. Finding: Not Guilty.

SENTENCE

Sentence adjudged on 5 December 199X: Confinement for six months, forfeiture of \$100.00 pay per month for six months, and reduction to the lowest enlisted grade.

ACTION

Only so much of the sentence as provides for confinement for three months, forfeiture of \$100.00 pay per month for three months, and reduction to the lowest enlisted grade is approved and will be executed.

BY ORDER OF COLONEL WALKER:

CHARLES N. EAST
CW3, USA
Legal Administrator

DISTRIBUTION:
(Refer to para. 12-7, AR 27-10)

CHAPTER 9

The Amherst Problem -- Pretrial Disposition

1. General Facts:

You are the Commander of the 2d Brigade of the 26th Cavalry Division (AM). A 21-year-old rifleman of B Company, 1st Bn, 16th Inf, PFC Thomas Amherst, was apprehended 72 hours ago for the larceny of \$180 in U.S. currency from SPC Alvin Northfield, a fellow squad member. The larceny occurred four days ago in the company barracks.

At the time of the apprehension, PFC Amherst is alleged to have resisted the military police who had been called by the unit commander, Captain Leader, to the company area. When Amherst arrived in Captain Leader's office, he was noticeably apprehensive about the presence of the military police but was verbally restrained by his commander. The unit commander then orally advised him of his rights and informed Amherst that he was to accompany the military police to the PMO for questioning about the suspected larceny. PFC Amherst then refused and ran for the door. He was pursued, caught, and transported to the PMO. During a subsequent interview with MP Captain Hoover and CID, PFC Amherst was readvised of his Article 31 rights. He waived his rights and voluntarily signed a written confession to the taking of the money.

Continuing the investigation, the military police obtained written statements from various witnesses involved, including the victim, SPC Northfield, and the two MPs who pursued and captured the suspect.

Although there were no eyewitnesses, PFC Amherst admitted taking Northfield's cash, denied any intent to steal, and attributed his hasty departure from Captain Leader's office to unclear thinking, coupled with an acknowledged fear of the racial attitudes of SPC Klein, one of the military police sent to apprehend him.

The larceny victim, SPC Northfield, described the circumstances of his securing his cash in a footlocker prior to the loss and his awareness of Amherst's presence in the barracks at the time he left for the field. Both Northfield and the unit first sergeant (to whom the loss was first reported) related their knowledge of Amherst's temporary deferment from the unit's field problem, which had required Northfield to be sent out of the barracks at the time of the loss.

The two military policemen involved in the apprehension provided statements of their observations of Amherst following his entry into custody.

2. Personal Background:

PFC Thomas Amherst's formal education consists of completion of high school. He lived most of his childhood with his divorced mother, who relies on him today for most of her support. Amherst scored 90 on his GT entry test and Captain Leader states that his conduct and efficiency ratings have been excellent. Similar ratings were received from previous commanders during Amherst's 18 months service on his current three-year enlistment. He has no combat experience but has completed airborne training and qualified as an expert rifleman. He has no prior military or civilian criminal record. His record reflects no evidence of mental instability.

The following pages include copies of the actual witness statements, charge sheet (DD Form 458), and allied papers. More specific details are found there.

3. Requirement:

- a. Examine the court-martial packet for administrative accuracy.
- b. Indicate your evaluation of the available evidence and the validity of each of the specifications.
- c. Discuss the relevant considerations and your disposition of Amherst's request for discharge for the good of the service UP Chapter 10, AR 635-200 (page 9-23).
- d. Discuss your disposition of the pending charges in this case and the reasons why you have elected that disposition.

4. Continuation:

Assume that you have referred the case to trial by special court-martial on both charges and specifications. The accused has submitted the inclosed "Offer to Plead Guilty" (page 9-27).

5. Requirement:

Indicate your disposition of the offer of a negotiated plea and be prepared to justify your disposition.

6. Additional Background:

Dates are indicated by 199X, 199X-1, etc. 199X is the current year (e.g., 1991). 199X-1 is the current year minus 1 (e.g., 1990) and so on. For purposes of this problem, you have been concerned of late about your Brigade's "indiscipline index." While Amherst's battalion, 1/16th Inf. has no major problem, another of your battalions has experienced a rash of barracks larcenies.

DEPARTMENT OF THE ARMY
COMPANY B, 1ST BATTALION, 16TH INFANTRY
FORT ARLINGTON, VIRGINIA 22901

AFZW-Z

17 November 199X

MEMORANDUM FOR Commanding Officer, 1st Battalion, 16th
Infantry, Fort Arlington, Virginia 22901

SUBJECT: Court-Martial Charges in the Case of Private
First Class (E3) Thomas L. Amherst, 429-86-4723,
Company B, 1/16 Infantry

1. In compliance with R.C.M. 401(c)(2)(A), there are forwarded herewith (Encl 1) court-martial charges for disposition. The accused has not been offered nonjudicial punishment for these offenses.
2. Statements of witnesses upon which the charges are based are enclosed (Encl 2).
3. All material witnesses are expected to be available at the time of trial.
4. There is evidence of no previous convictions and no records of prior nonjudicial punishment of the accused. A duly authenticated extract copy of accused's Record of Court-Martial Convictions is enclosed (Encl 3).
5. The character of the accused's military service before the offenses charged has been excellent.
6. I recommend trial by general court-martial.

3 Encls

1. Charge Sheet (5 cys)
2. Witness Statements (5 cys)
3. Record of Previous Convictions (5 cys)

RONALD C. LEADER
Captain, IN
Commanding

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (<i>Last, First, MI</i>) AMHERST, THOMAS L.			2. SSN 429-76-4723		3. GRADE OR RANK PFC	4. PAY GRADE E-3
5. UNIT OR ORGANIZATION Company B, 1st Bn, 16th INF, 26th Cav Div (AM)					6. CURRENT SERVICE	
					a. INITIAL DATE 7 May 199X-2	b. TERM 3 years
7. PAY PER MONTH			3. NATURE OF RESTRAINT OF ACCUSED		9. DATE(S) IMPOSED	
a. BASIC \$965.40	b. SEA/FOREIGN DUTY N/A	c. TOTAL \$965.40				

II. CHARGES AND SPECIFICATIONS

10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE

SPECIFICATION: In that Private First Class (E-3) Thomas L. Amherst, US Army, Company B, 1st Battalion, 16th Infantry, 26th Cavalry Division (AM), did at Fort Arlington, Virginia, on or about 14 November 199X, hold \$180.00 in U.S. currency, the property of Specialist Alvin R. Northfield, U.S. Army.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 95.

Specification: In that Private First Class (E-3) Thomas L. Amherst, US Army, Company B, 1st Battalion, 16th Infantry, 26th Cavalry Division (AM) did, at Fort Arlington, Virginia, on or about 15 November 199X, resist being apprehended by Specialist Karl W. Klein and Specialist Thomas J. Caster, 55th Military Police Company, Fort Arlington, Virginia, military policemen authorized to apprehend the accused.

III. PREFERRAL

11a. NAME OF ACCUSER (<i>Last, First, MI</i>) Leader, Ronald C.		b. GRADE CPT	c. ORGANIZATION OF ACCUSER Co B 1/16 Inf	
d. SIGNATURE OF ACCUSER			e. DATE 17 November 199X	

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 17 day of November, 19 9X, and stated the foregoing charges and specifications under oath that he/she is a ~~genuine~~ 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.

Wallace L. Bloor
Typed Name of Officer

1st Bn, 16th Inf
Organization of Officer

1LT
Grade

Acting Assistant Adjutant
*Official Capacity to Administer Oath
(See R.C.M. 307(b)—must be commissioned officer)*

Signature

9-5

12.

On 17 November, 19 9X, 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.)

Ronald C. Leader
Typed Name of Immediate Commander
CPT
Grade
[Signature]
Signature

Co B, 1/16 Inf
Organization of Immediate Commander

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at 1100 hours, 17 November 19 9X at 1st Battalion, 16th Infantry
Designation of Command or

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE [Signature]
Acting Assistant Adjutant
Official Capacity of Officer Signing

Wallace L. Bloor
Typed Name of Officer

1LT
Grade
[Signature]
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
--	----------	---------

Referred for trial to the _____ court-martial convened by _____

_____, _____ 19 _____, subject to the following instructions:² _____

By _____ of _____
Command or Order

[Signature]
Typed Name of Officer
[Signature]
Grade
[Signature]
Signature
[Signature]
Official Capacity of Officer Signing

15.

On _____, _____, I (accused to be served a copy hereof on (each of) the above named accused).

[Signature]
Typed Name of Trial Counsel
[Signature]
Grade or Rank of Trial Counsel
[Signature]
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.

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

For use of this form, see AR 190-30; the proponent agency is DCSPER.

DATA REQUIRED BY THE PRIVACY ACT

AUTHORITY: Title 10, United States Code, Section 3012(g).
PRINCIPAL PURPOSE: To provide commanders and law enforcement officials with means by which information may be accurately identified.
ROUTINE USES: Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.
DISCLOSURE: Disclosure of your Social Security Number is voluntary.

LOCATION Fort Arlington, Virginia 22901		DATE 15 Nov 9X	TIME 1400	FILE NO.
NAME (Last - First - MI) Amherst, Thomas Lincoln		ORGANIZATION OR ADDRESS		
SOCIAL SECURITY NO. 429-86-4723	GRADE/STATUS PFC E-3			

SECTION A - RIGHTS WAIVER/NON-WAIVER CERTIFICATE

RIGHTS

The investigator whose name appears below told me that he/she is with the United States Army 8th Criminal

Investigation Detachment, 12th MP Group (CI) and wanted to question me about the following offense(s) of Larceny of \$180.00 from SPC Northfield and resisting
 which I am suspected/accused: apprehension by Military Police

Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:

1. I do not have to answer any questions or say anything.
2. Anything I say or do can be used as evidence against me in a criminal trial.
3. (For personnel subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both.

- OR -

(For civilians not subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. However, I understand that I must make my own arrangements to obtain a lawyer and this will be at no expense to the Government. I further understand that if I cannot afford a lawyer and want one, arrangements will be made to obtain a lawyer for me in accordance with the law.

4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below.

COMMENT (Continue on reverse side)

WAIVER

I understand my rights as stated above, I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.

WITNESSES (If available)	SIGNATURE OF INTERVIEWEE
1. NAME (Type or Print) <u>Richard Templin</u>	<u>Thomas Lincoln Amherst</u>
ORGANIZATION OR ADDRESS AND PHONE SSG Richard Templin 55th MP Co., Ft Arlington, VA	SIGNATURE OF INVESTIGATOR <u>Miranda Tempia</u>
2. NAME (Type or Print)	TYPED NAME OF INVESTIGATOR CWO Miranda Tempia
ORGANIZATION OR ADDRESS AND PHONE	ORGANIZATION OF INVESTIGATOR 8th CID, 12th MP Group (CI) Fort Arlington, VA 22901

NON-WAIVER

I do not want to give up my rights:

I want a lawyer.

I do not want to be questioned or say anything.

SIGNATURE OF INTERVIEWEE

ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT (DA FORM 2823) SUBSEQUENTLY EXECUTED BY THE SUBJECT SUSPECT/ACCUSED.

SECTION B - RIGHTS WARNING PROCEDURE

THE WARNING

1. WARNING - Inform the suspect/accused of:
 - a. Your official position.
 - b. Nature of offense(s).
 - c. The fact that he/she is a suspect/accused.
2. RIGHTS - Advise the suspect/accused of his/her rights as follows:

"Before I ask you any questions, you must understand your rights."

 - a. "You do not have to answer my questions or say anything."
 - b. "Anything you say or do can be used as evidence against you in a criminal trial."
 - c. *(For personnel subject to the UCMJ)* "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during

questioning. This lawyer can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."

or

(For civilians not subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. However, you must make your own arrangements to obtain a lawyer and this will be at no expense to the Government. If you cannot afford a lawyer and want one, arrangements will be made to obtain a lawyer for you in accordance with the law."

- d. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate."

Make certain the suspect/accused fully understands his/her rights

THE WAIVER

"Do you understand your rights?"

(If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)

"Do you want a lawyer at this time?"

(If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)

"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?"

(If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)

SPECIAL INSTRUCTIONS

WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.

IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.

PRIOR INCRIMINATING STATEMENTS:

- (1) If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights, he/she should be told that such statements do not obligate him/her to answer further questions.
- (2) If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal.

NOTE: If (1) or (2) apply, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused.

COMMENT: *Continued.*

SWORN STATEMENT

For use of this form, see AR 190-46; this statement is prepared by the Office of The Deputy Chief of Staff for Personnel.

LOCATION Arlington, Virginia 22901	DATE 15 Nov 90	TIME 1400	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME AMHERST, Thomas Lincoln	SOCIAL SECURITY NUMBER 429-86-4723	GRADE/STATUS PFC E3	
ORGANIZATION OR ADDRESS Company B, 1st Battalion, 16th Inf, 26th Cav Div (AM), Fort Arlington, Virginia			

Thomas Lincoln Amherst WANTS TO MAKE THE FOLLOWING STATEMENT UNDER OATH

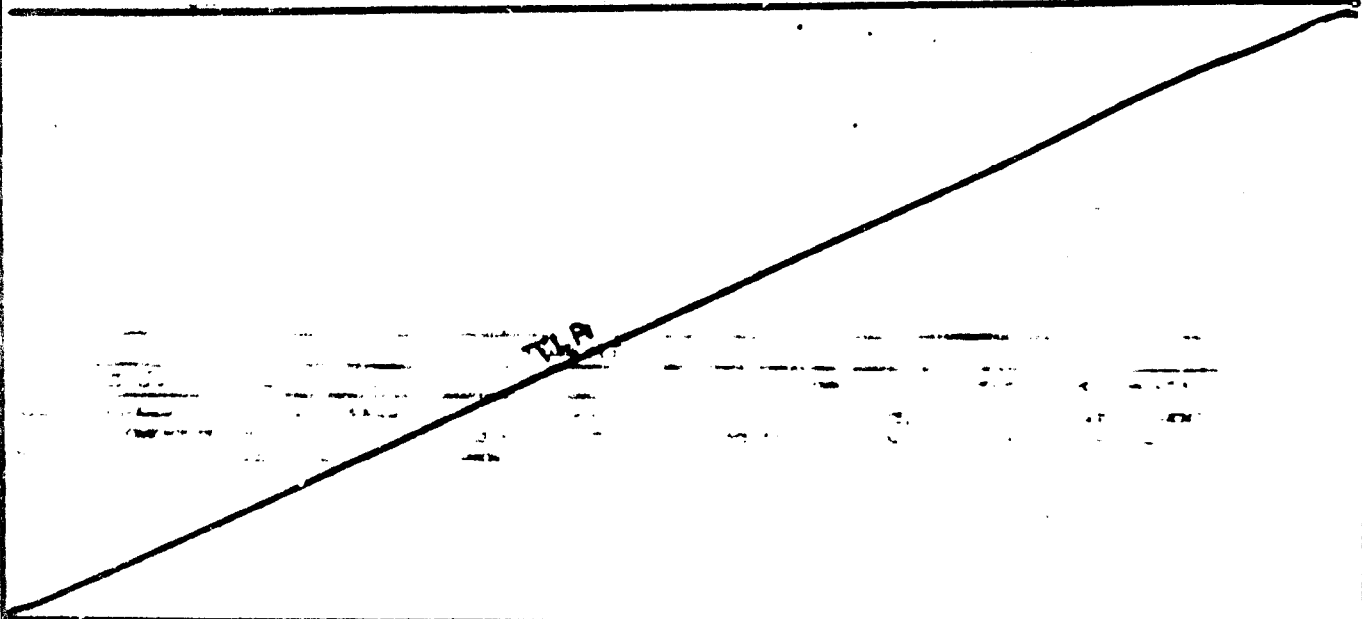
On 14 Nov 1990, at about 1245 hours, I saw SPC Alvin Northfield in our squad bay counting some money. He put it in his footlocker. It was in a Blitz cloth box. He ~~locked~~ locked his footlocker and put the combination card in his field jacket in the wall locker. After the squad went on the problem in the afternoon I was reading a letter from my mother where she said she was sick and needed some more money for a doctor and medicine. I supported her. She doesn't have any more income except what I give her. I ~~borrowed~~ borrowed the money from Northfield's ~~footlocker~~ footlocker and went to the PX, got a money order and mailed the money to my mother. There was \$180 in US currency. I wasn't going to keep the money but I didn't ask Bro Northfield if I could borrow it because he was in the field. I was going to pay him back next payday.

I've been ~~on~~ on Light duty the last three days because of a reaction to some medicine the doctor gave me. Because of the medicine and my mother's problems, I guess I haven't been thinking very clearly. I didn't mean to run away from the MP's but I was scared. I'd heard about a couple of brothers getting beat up by the MP's when they were taken to the MP station. The big German guy, I think his name is Kline, has a reputation for being rough on blacks. So when he ~~told me to go~~ started to grab me I got scared and ran.

"Let's go boy"

TLA

TLA



IDENTITY	INITIALS OF PERSON MAKING STATEMENT TLA	PAGE 1 OF 2 PAGES
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ADDITIONAL PAGES MUST CONTAIN THE HEADINGS "STATEMENT OF _____ TAKEN AT _____ DATED _____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE _____ OF _____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

DA FORM 2823

REPLACES DA FORM 2823, 1 JAN 68, WHICH WILL BE USED.

TLA

AFFIDAVIT

I, Thomas Lincoln Amerst

HAVE READ OR HAVE HAD READ TO ME THIS STATE-

MENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 2. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE MADE ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

Thomas Lincoln Amerst
(Signature of Person Making Statement)

WITNESSES

Charles P. Rose

Charles P. Rose
55th MP Co.

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 15 day of November, 1998 at Fort Arlington, Virginia

Frederick K. Hoover
(Signature of Person Administering Oath)

Frederick K. Hoover, CPT, USA

(Typed Name of Person Administering Oath)

Article 136, U. C. M. J.

(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

TLA

PAGE 2 OF 2 PAGES

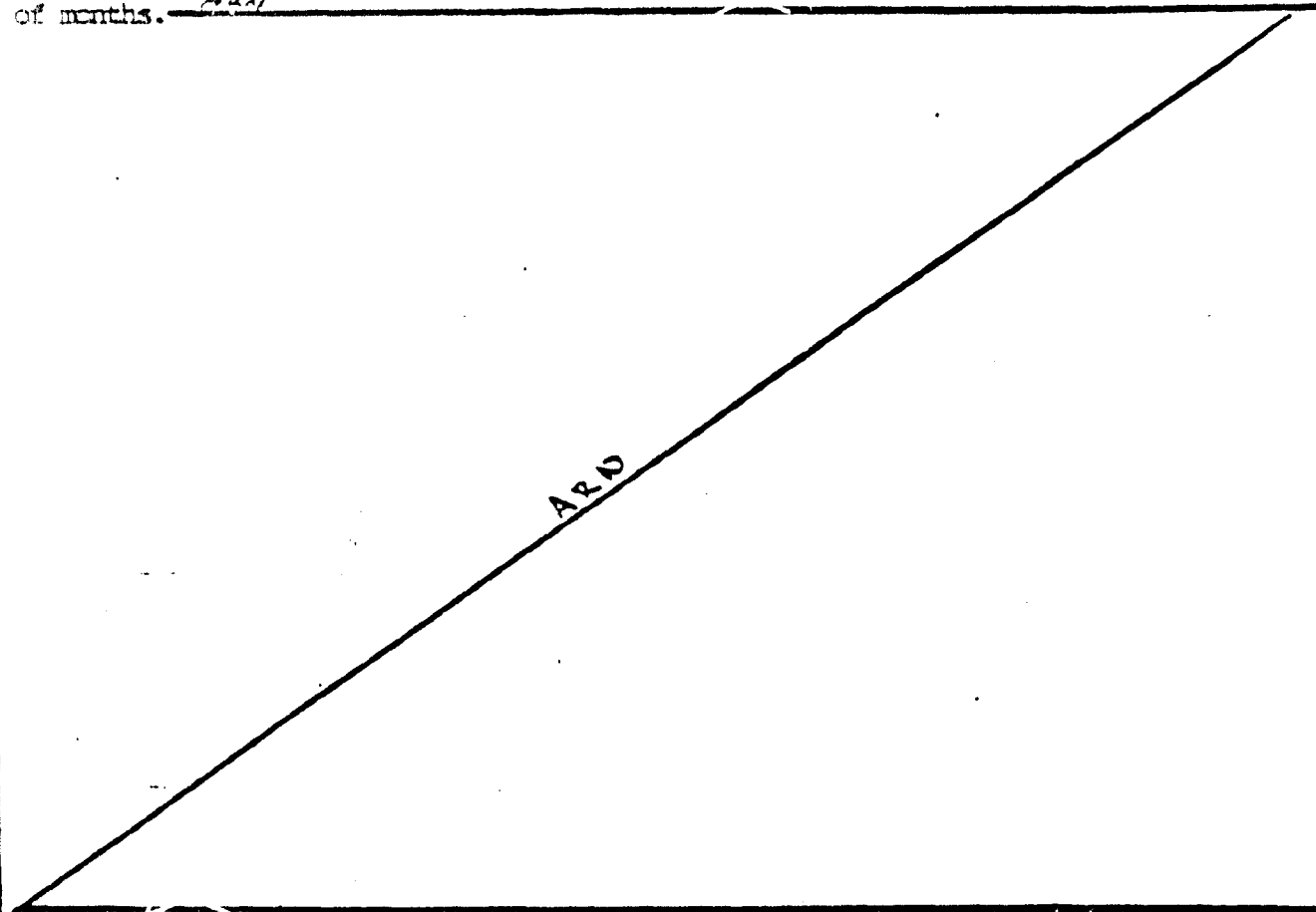
SWORN STATEMENT

For use of this form, see AR 198-46 the approved agency is Office of The Deputy Chief of Staff for Personnel.

LOCATION Fort Arlington	DATE 15 Nov 98	TIME 0930	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME NORTHFIELD, Alvin Roosevelt	SOCIAL SECURITY NUMBER 204-71-3491	GRADE/STATUS SPC	
ORGANIZATION OR ADDRESS Company B, 1st En, 16th Inf, 26th Cav Div (AM)			

I, Alvin R. Northfield, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH

On 14 November 1998, at about 1800, I returned to my squad bay in Bravo barracks after a 4 hour ambush problem. I unlocked my footlocker to get my money I had saved to buy a record player. I had \$180 hidden in a Blitz cloth box, eight \$20 bills and two \$10 bills. I know it was exactly \$180 because I had counted it just after noon chow before ^{we} we went to the field for the ambush problem. When I opened the box the money was gone. I checked all over but it wasn't anywhere around so I told Top. Only Bro Amherst was around when I counted the ~~the~~ money. My lock is combination and I haven't told anybody the combination. I keep the combination in my field jacket hanging in my wall locker. The lock to my wall locker is broke. Bro Amherst wasn't with the squad at the ambush problem because he has a three day light duty ~~case~~. ^{we} we get along ok though he's only been in our squad for a couple of months.



CORRECT	INITIALS OF PERSON MAKING STATEMENT ARND	PAGE 1 OF 2 PAGES
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ADDITIONAL PAGES MUST CONTAIN THE HEADINGS "STATEMENT OF _____ TAKEN AT _____ DATED _____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE _____ OF _____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

DA FORM 2823 JUL 78

SUPPLEMENTED ON FORM 2823, 1 JAN 68, WHICH WILL BE USED.

ARW

AFFIDAVIT

I, Alvin R. Northfield HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

Alvin R. Northfield
(Signature of Person Making Statement)

WITNESSES:

Charles P. Rose

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 15 day of NOVEMBER, 199X

CHARLES P. ROSE

Frederick K. Hoover

ORGANIZATION OR ADDRESS

(Signature of Person Administering Oath)

Frederick K. Hoover, CPT, MRC

ORGANIZATION OR ADDRESS

(Typed Name of Person Administering Oath)

Commanding Officer, 55th MP Co.

(Authority To Administer Oath)

INITIALS OF PERSON MAKING STATEMENT

ARW

PAGE 2 OF 2 PAGES

SWORN STATEMENT

This form of data form, use AR 190-46 is the prescribed report to Office of The Deputy Chief of Staff for Personnel

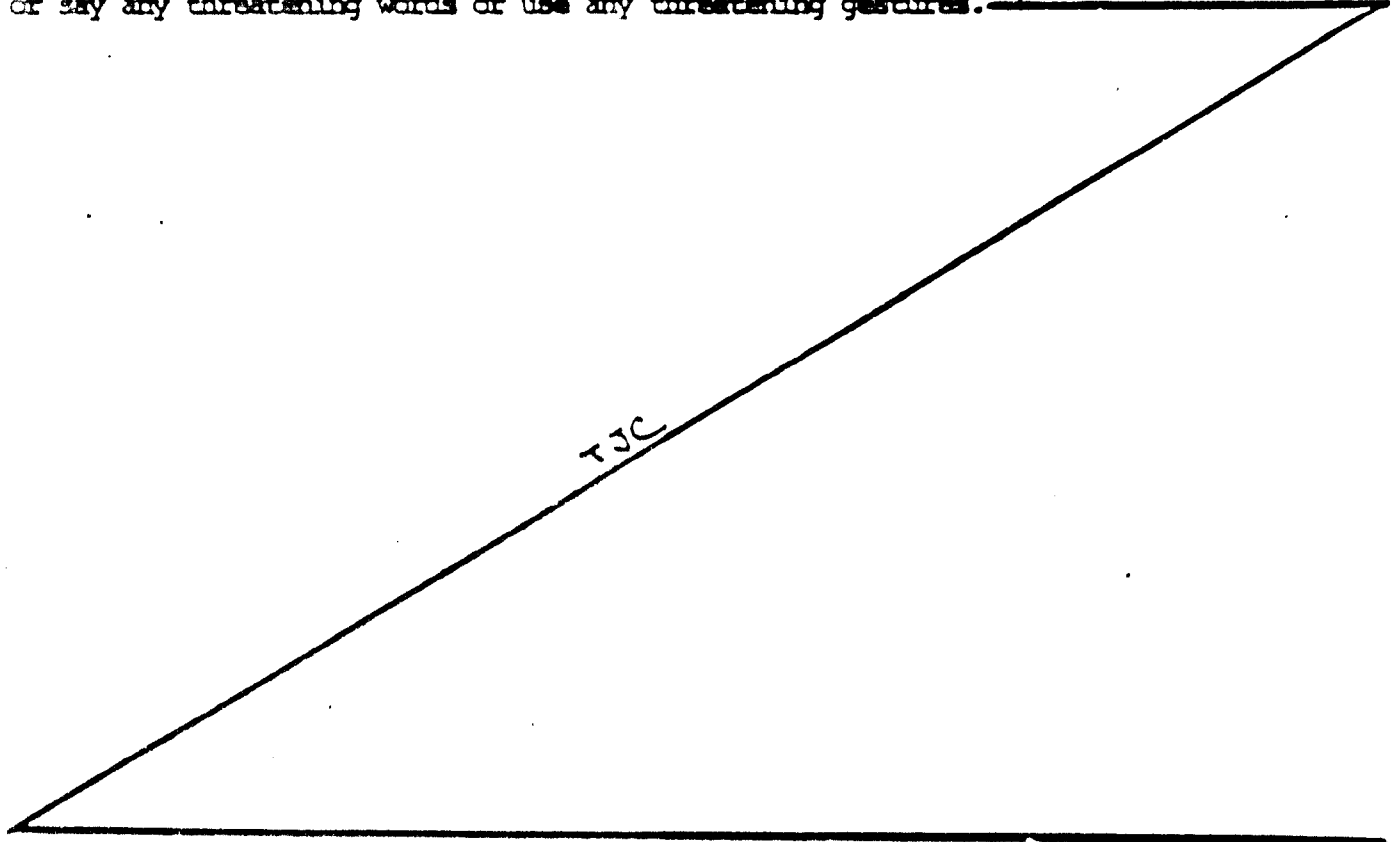
LOCATION	DATE	TIME	FILE NUMBER
Fort Arlington, Virginia	15 Nov 94	1030 hrs	
LAST NAME, FIRST NAME, MIDDLE NAME	SOCIAL SECURITY NUMBER		GRADE/STATUS
CASTER, Thomas Joseph	402-29-4727		SPC
ORGANIZATION OR ADDRESS			
55th MP Co, Fort Arlington, Virginia			

I, THOMAS J. CASTER, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH

I am a military policemen working patrol with my partner, SPC Carl W. Klein. On the morning of 15 Nov 94 we were instructed to report to the CO, Co B, 1/16 Inf, Fort Arlington, to pick up a subject, PFC Thomas Amharst, and bring him in for questioning regarding a larceny.

When we reached the CO's office, the subject came in and CPT Leader advised him of his rights, asked him if he had anything to say, and instructed him to go with us to the MP station for questioning. Subject stood silent and my partner said "Let's go." Subject shouted "No" and ran out the door. We gave pursuit and overtook the fleeing subject in the orderly room, using necessary force to subdue him. We then took him to the PM detention facility. Neither SPC ^{TJC} Klein nor I was injured in the fight. The subject was bruised on the back of the head and the wrists.

At no time did SPC ^{TJC} Klein or I make any reference to the race of the subject or say any threatening words or use any threatening gestures. ^{TJC}



INITIALS	INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 2 PAGES
	TJC	

ADDITIONAL PAGES MUST CONTAIN THE HEADINGS "STATEMENT OF... TAKEN AT... DATED... CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE... OF... PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

DA FORM 2823

SUPPLEMENTAL OR FORM 2823, 1 JAN 66, THERE WILL BE USED.

TJC

AFFIDAVIT

I, Thomas J. Carter HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

Thomas J. Carter

(Signature of Person Making Statement)

WITNESSES

Charles P. Rose

CHARLES P. ROSE

ORGANIZATION OR ADDRESS

55th MP Co.

ORGANIZATION OR ADDRESS

TJC

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 15 day of November, 1954 at Fort Arlington, Virginia

Frederick K. Hoover

(Signature of Person Administering Oath)

Frederick K. Hoover, CPT, MFC

(Typed Name of Person Administering Oath)

Commanding Officer, 55th MP Co.

(Authority To Administer Oath)

INITIALS OF PERSON MAKING STATEMENT

PAGE 2 OF 2 PAGES

SWORN STATEMENT

For use of this form, see AR 190-46; this statement is prepared in Office of The Deputy Chief of Staff for Personnel.

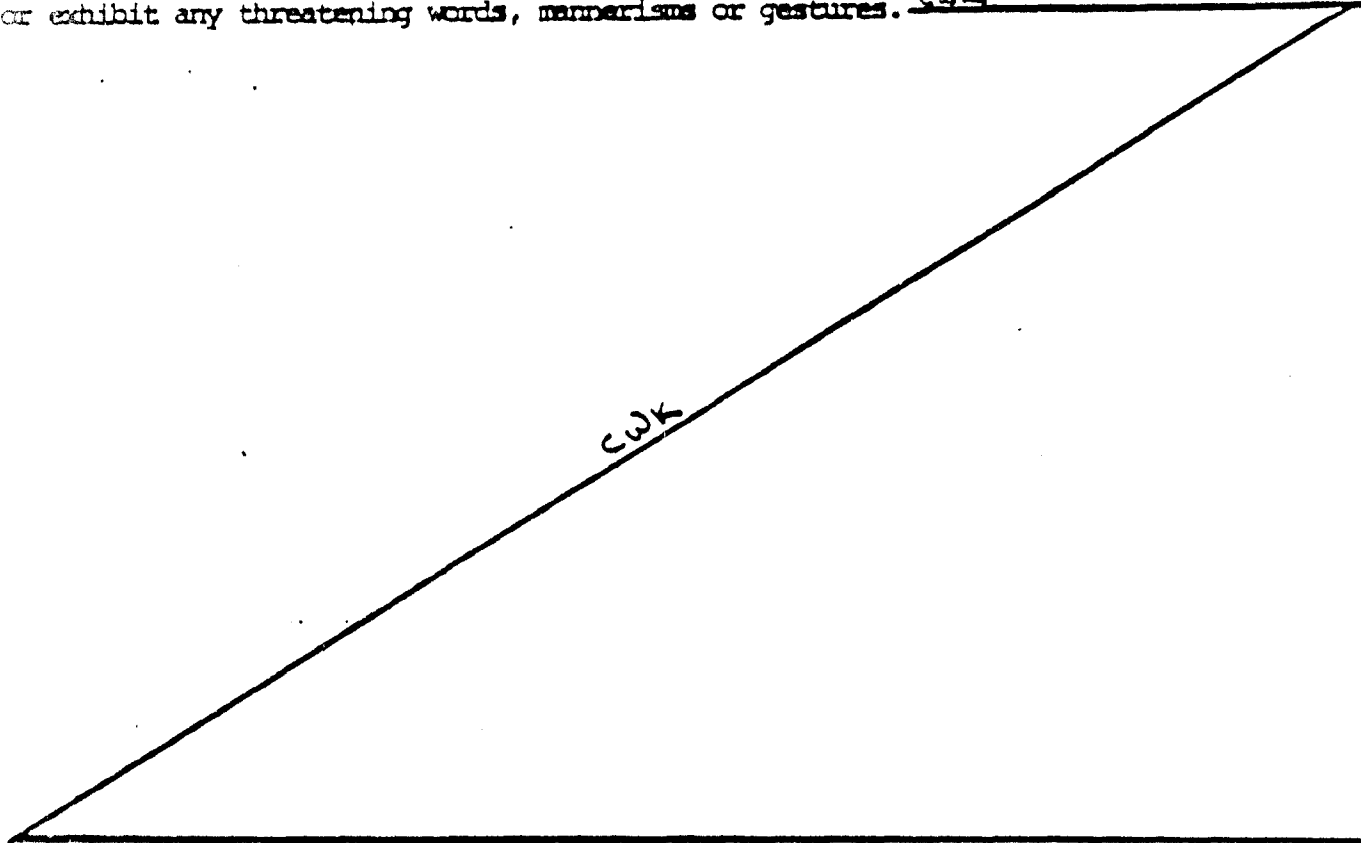
LOCATION Fort Arlington, Virginia	DATE 15 Nov 9X	TIME 1000 hrs	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME KLEIN, Carl Waldon	SOCIAL SECURITY NUMBER 291-51-4045		GRADE/STATUS Specialist
ORGANIZATION OR ADDRESS 55th MP Co, Fort Arlington, Virginia			

I, Carl W. KLEIN, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH

I am a military policeman working patrol with my partner, SPC Thomas Caster. On the morning of 15 Nov 9X, we were instructed to report to the CO, Co B, 1/16 Inf, Fort Arlington, to pick up a subject, PFC Thomas Amberst, and bring him in for questioning regarding a larceny.

When we arrived at Co B, subject came in and the CO, CPT Leader, advised him of his rights and instructed him to go with us to the MP station for questioning. When we were dismissed, I told subject "Let's go" and he shouted "No" and ran. My partner and I gave pursuit on foot, overtook the fleeing subject in the orderly room and used necessary force to apprehend him. He was then transported to the PM detention facility. Neither my partner nor I were injured in the altercation. The subject received minor lacerations.

At no time did my partner or I make any references to the race of the subject or exhibit any threatening words, mannerisms or gestures. ^{SWK}



IDENTITY	INITIALS OF PERSON MAKING STATEMENT <u>CWK</u>	PAGE 1 OF <u>2</u> PAGES
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ADDITIONAL PAGES MUST CONTAIN THE HEADINGS "STATEMENT OF _____ TAKEN AT _____ DATED _____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE _____ OF _____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

DA FORM 2823

SUPERSEDES DA FORM 2823, 1 JAN 62, WHICH WILL BE USED.

CWK

AFFIDAVIT

I, Carl W. Klein HAVE READ OR HAVE HAD READ TO ME THE STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE _____, I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

Carl W. Klein

(Signature of Person Making Statement)

WITNESSES

Charles P. Rose

CHARLES P. ROSE
ORGANIZATION OR ADDRESS
55th MP Co.

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 15 day of November, 19 98 at Fort Arlington, Virginia

Frederick K. Hoover

(Signature of Person Administering Oath)

Frederick K. Hoover, CPT, MPC

(Typed Name of Person Administering Oath)

Commanding Officer, 55th MP Co

(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

CWK

FORM 2 OF 2

SWORN STATEMENT

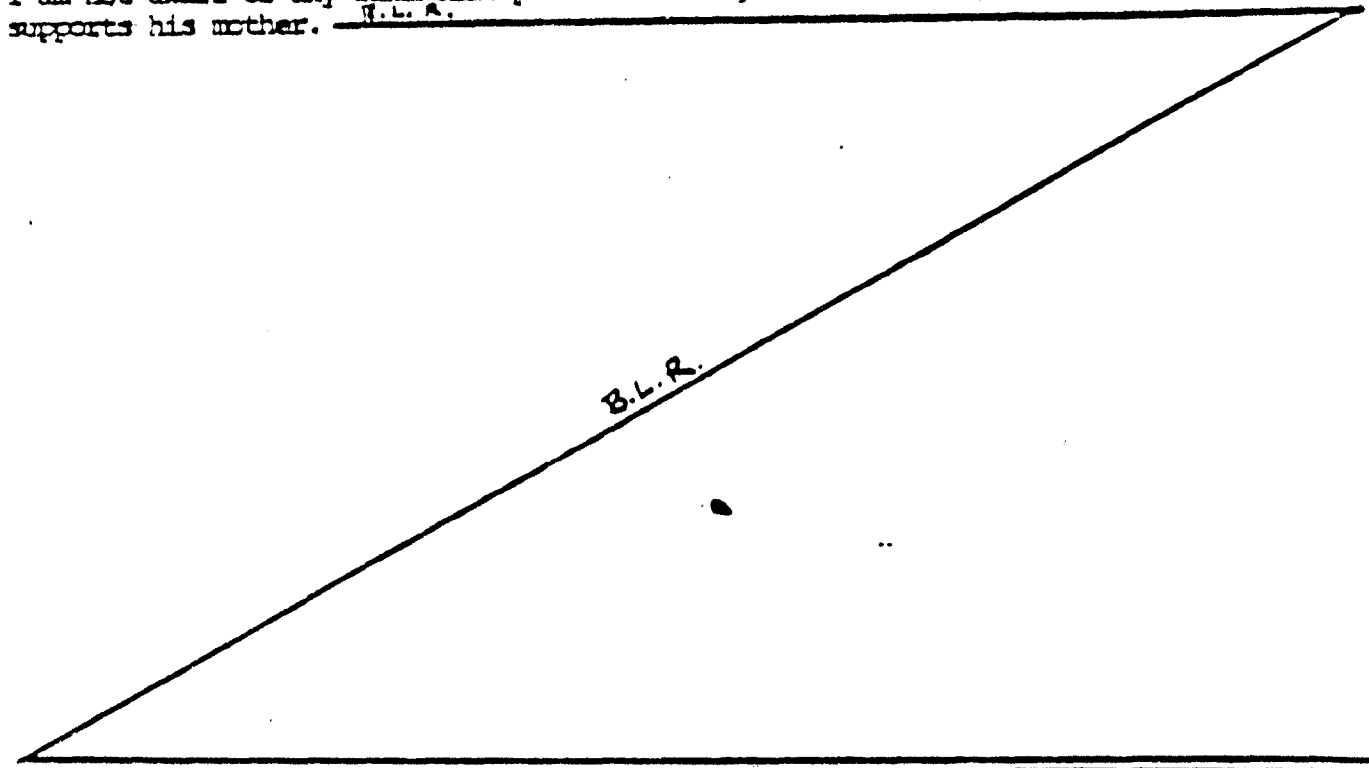
For use of this form, see AF 198-48; the program agency is Office of The Deputy Chief of Staff for Personnel.

LOCATION Fort Arlington, Virginia	DATE 15 Nov 9X	TIME 0900 hrs	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME RANDOLPH, Bertrand Lee	SOCIAL SECURITY NUMBER 405-94-7723		GRADE/STATUS SFC (E-7)
ORGANIZATION OR ADDRESS Bravo Company, 1st Bn, 16th Inf, 26th Cav Div (AM)			

I, Bertrand L. Randolph, WANT TO MAKE THE FOLLOWING STATEMENT (AND/OR OATH)

I am acting 1st Sergeant of Bravo Company, 1/16 Inf, Fort Arlington, Va. On 14 Nov 9X, at about 1830 hours, Corporal Alvin Northfield came to see me and said somebody had stolen \$180 from his footlocker. The other three individuals who occupy the squad bay with Northfield are PFC Amando Gomez, PFC Dillon Banfield and PFC Thomas Amherst. I immediately interviewed Gomez and Banfield but they couldn't provide any information because they had been on the ambush problem with Bravo company all afternoon. Amherst was not in the company area so I didn't get to interview him. I know Amherst wasn't on the ambush problem because he has been put on light duty because of a reaction to some medicine he took a couple of days ago. The company barracks and individual squad bays were not locked during the afternoon but I was in the area during this entire time and did not observe any strangers. I did see PFC Amherst leave the billets at about 1400 hours and heard him tell the CQ that he was going to the doctor and the PX.

At about 1930 I reported the theft to the military police. PFC Amherst has been in the unit about two months and seems to get along well with everybody else. I am not aware of any financial problems he might have although I do know that he supports his mother. B.L.R.



REPORT	INITIALS OF PERSON MAKING STATEMENT <u>B.L.R.</u>	PAGE 1 OF <u>2</u> PAGES
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ADDITIONAL PAGES MUST CONTAIN THE HEADINGS "STATEMENT OF _____ TAKEN AT _____ DATED _____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE DETAILED AS "PAGE _____ OF _____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

DA FORM 2823

EXPERIENCE ON FORM 2823, 1 JAN 62, FORM WILL BE USED.

B.L.R.

AFFIDAVIT

I, Bertrand L. Randolph HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE . I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

Bertrand L. Randolph
(Signature of Person Making Statement)

WITNESS

Charles P. Rose

CHARLES P. ROSE
ORGANIZATION OR ADDRESS
55th MP Co.

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 15 day of November, 1951 at Fort Arlington, Virginia

Frederick K. Hoover
(Signature of Person Administering Oath)

Frederick K. Hoover, CPT, MPC
(Typed Name of Person Administering Oath)
Commanding Officer, 55th MP Co.
(Membership To Administer Oath)

INITIALS OF PERSON MAKING STATEMENT
B.L.R.

SWORN STATEMENT

For use of this form, see AR 170-46; the governing agency is Office of The Deputy Chief of Staff for Personnel.

LOCATION Fort Arlington, Virginia	DATE 15 Nov 9X	TIME 1130 hrs	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME LEADER, Ronald Charles	SOCIAL SECURITY NUMBER 505-27-2722		GRADE/STATUS CPT IN
ORGANIZATION OR ADDRESS Company B, 1st Bn, 16th Inf, 26th Cav Div (AM)			

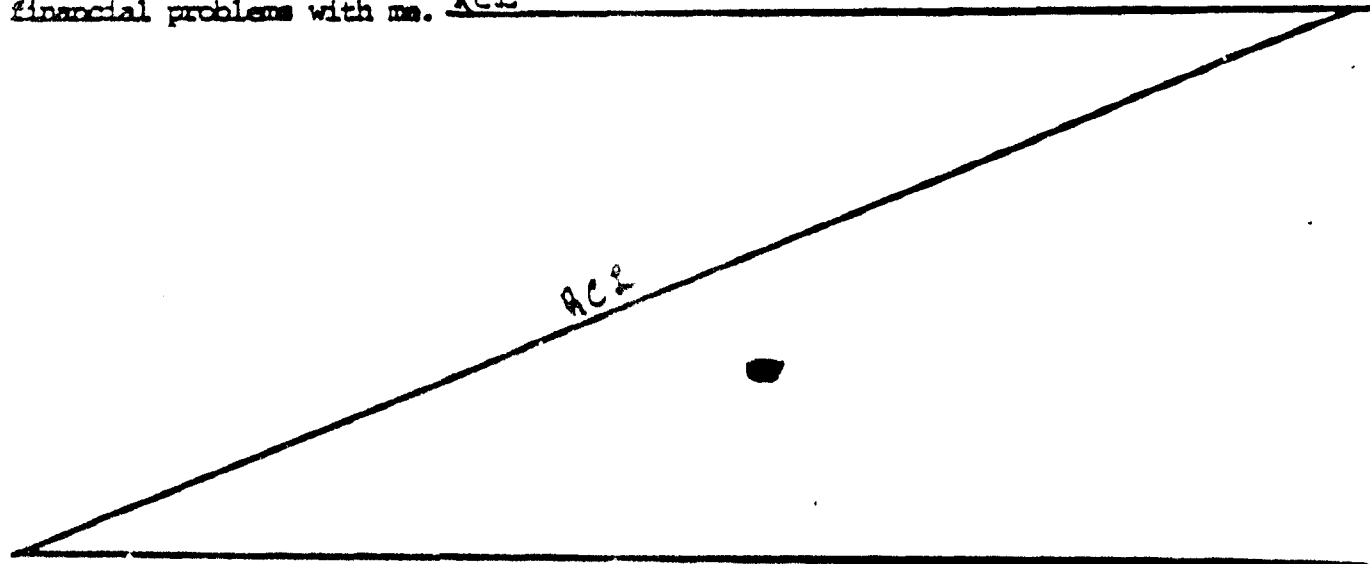
Ronald C. Leader

WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH

I am the commanding officer of Bravo Company, 1/16 Inf, at Fort Arlington, Virginia. On 14 Nov 9X, my 1SGT, SFC Randolph, advised me that a larceny had occurred in the first squad. After SFC Randolph briefed me, I talked with the victim, SPC Northfield, and his roommates, PFC Gomez, PFC Banfield, and PFC Amherst. Gomez and Banfield denied any knowledge of the incident. After I advised Amherst of his rights, he said that he had just returned from the doctor, who had given him some medication, and that he couldn't think straight. He requested permission to talk about it in the morning. I agreed, believing that any information I might receive would not be proper since Amherst was clearly woozy.

I called the MP's and made arrangements for them to pick Amherst up for questioning at 0800 the next morning. When the MP's arrived the next morning, I had Amherst brought to my office. When he saw the MP's he started to leave. I ordered him to halt and ~~to~~ stand at ease. He complied and I again advised him of his rights and told him that the MP's were going to take him to the PMD for questioning. I asked him if he wanted to say anything before he left. He just stood silent. I dismissed the men and one of the MP's, SPC Klein, told Amherst "Let's go." Amherst shouted "No" and ran for the door. The MP's gave chase, caught him in the orderly room, subdued him, and transported him to the detention facility at the office of the PM.

PFC Amherst has been in my unit for about two months and, except for his medical problems which came up recently, has gotten along well. He has not discussed any financial problems with me. RCZ



DESIGN	INITIALS OF PERSON MAKING STATEMENT <u>RCZ</u>	PAGE 1 OF <u>2</u> PAGES
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ADDITIONAL PAGES MUST CONTAIN THE HEADINGS "STATEMENT OF _____ TAKEN AT _____ DATED _____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE _____ OF _____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

DA FORM 2823
1 JUN 78

REPRODUCED ON FORM 888, 1 JAN 68, THERE WILL BE USED.

RCT

AFFIDAVIT

I, Ronald C. Leader

HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT

WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 2. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE OR UNLAWFUL INDUCEMENT.

Ronald C. Leader

(Signature of Person Making Statement)

WITNESSES

Charles P. Rose

CHARLES P. ROSE

ORGANIZATION OR ADDRESS

55th MP Co.

ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 15 day of November, 199X at Fort Arlington, Virginia

Frederick K. Hoover

(Signature of Person Administering Oath)

Frederick K. Hoover, CPT, MPC

(Typed Name of Person Administering Oath)

Commanding Officer, 55th MP Co.

(Authority To Administer Oath)

INITIALS OF PERSON MAKING STATEMENT

RCT

PAGE 2 OF 2 PAGES

EXTRACT OF MILITARY RECORDS OF PREVIOUS CONVICTIONS

IDENTIFICATION			
LAST NAME - FIRST NAME - MOBILE INITIAL	SERVICE NO./SERIAL	GRADE	ORGANIZATION
Amherst, Thomas L.	429-86-4723	PFC (E3)	Company B, 1/16 Infantry
RECORD OF PREVIOUS CONVICTIONS BY COURTS-MARTIAL//			
TYPE OF COURT-MARTIAL	CM ORDER OR SCM NO.	HEADQUARTERS	ARTICLE(S)
SYNOPSIS OF SPECIFICATION(S) INCLUDING DATE OF OFFENSE			
SENTENCE AS FINALLY APPROVED			
DATE SENTENCE ADJUDGED	DATE SENTENCE FINALLY APPROVED	I CERTIFY THE FOREGOING IS CORRECT //	
		(Signed)	(Type or print name and grade of person signing original entry in military record)
			(Type or print name and grade of person signing original entry in military record)
TYPE OF COURT-MARTIAL	CM ORDER OR SCM NO.	HEADQUARTERS	ARTICLE(S)
SYNOPSIS OF SPECIFICATION(S) INCLUDING DATE OF OFFENSE			
SENTENCE AS FINALLY APPROVED			
DATE SENTENCE ADJUDGED	DATE SENTENCE FINALLY APPROVED	I CERTIFY THE FOREGOING IS CORRECT //	
		(Signed)	(Type or print name and grade of person signing original entry in military record)
			(Type or print name and grade of person signing original entry in military record)
TYPE OF COURT-MARTIAL	CM ORDER OR SCM NO.	HEADQUARTERS	ARTICLE(S)
SYNOPSIS OF SPECIFICATION(S) INCLUDING DATE OF OFFENSE			
SENTENCE AS FINALLY APPROVED			
DATE SENTENCE ADJUDGED	DATE SENTENCE FINALLY APPROVED	I CERTIFY THE FOREGOING IS CORRECT //	
		(Signed)	(Type or print name and grade of person signing original entry in military record)
			(Type or print name and grade of person signing original entry in military record)
TYPE OF COURT-MARTIAL	CM ORDER OR SCM NO.	HEADQUARTERS	ARTICLE(S)
SYNOPSIS OF SPECIFICATION(S) INCLUDING DATE OF OFFENSE			
SENTENCE AS FINALLY APPROVED			
ORGANIZATION OF CUSTODIAN		PLACE OF ORGANIZATION	DATE
1st Battalion, 16th Infantry		Fort Arlington, Virginia	17 Nov 9K
I CERTIFY THAT I AM THE OFFICIAL CUSTODIAN OF THE MILITARY PERSONNEL RECORDS PERTAINING TO PREVIOUS CONVICTIONS BY COURT-MARTIAL OF THE ABOVE-NAMED PERSON, AND THAT THE FOREGOING IS A TRUE COPY OF THE ENTRIES CONTAINED THEREIN. //			
TYPE NAME, GRADE, AND OFFICIAL CAPACITY OF CUSTODIAN		SIGNATURE	
HAROLD P. WHITE, CNO, W-2, Personnel Officer		Harold P White	
<p>// Only admissible previous convictions will be listed. To determine applicability, see rules on the reverse hereof. For Army personnel, the extract will be prepared from the Service Record or DA Form 16. For Air Force personnel, the extract will be prepared from AF Form 1270. For Navy personnel, the extract will be prepared from NAVPER 1 Form 687-6. For Marine Corps personnel, the extract will be prepared from NAVMC Form 118713-PDT.</p> <p>// If the service record certification block being corrected fails to contain the records: (a) Signature of the personnel records custodian, remove that officer to the immediate corrective action; (b) grade and organization of the custodian of the conviction record, enter "None" with an "affirmative", "Grade not shown", "Organization not shown", as appropriate, on the second line of this block of the extract.</p>			

RULES FOR DETERMINING ADMISSIBILITY OF PREVIOUS CONVICTIONS

(See MCM, 1949 (Rev.), Paragraphs 68d and 75h(2))

Previous convictions must relate to offenses committed during the six-year period preceding the commission of any offense of which the accused stands convicted. In computing the six-year period, periods of unauthorized absence as shown by the findings in the case or by the evidence of previous convictions should be included.

Evidence is only admissible as evidence of a previous conviction when the accused has been tried for an offense within the meaning of Article 44(b), UCMJ. Therefore, no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall, as to that charge or

specification, be admissible as a previous conviction until the finding of guilty has become final after review of the case has been fully completed. Moreover, a pending request to the Judge Advocate General to vacate or modify the findings and sentence of a court-martial on grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused is not a part of the review within the meaning of Article 76, UCMJ and it does not affect the admissibility of that court-martial as a previous conviction. A vacation of a suspended sentence does not itself qualify as a previous conviction and will not be entered on this form.

INTRODUCING EVIDENCE OF PREVIOUS CONVICTIONS

NOTE: To be considered by a court-martial, previous convictions must be ADMITTED in evidence. Ordinarily, they are proved by introducing in evidence a duly authenticated exact copy of accused's military personnel record (DD Form 493). They may also be proved by the record of previous convictions or by the order promulgating the results of trial. After the Record of Previous Convictions has been marked for identification (See page A8-24, MCM, 1949 (Rev.) and shown to the defense counsel, the introduction proceeds as follows:

TC: Prosecution Exhibit _____ for identification, a duly authenticated exact copy of the accused's military personnel record of previous conviction(s) by court-martial, is offered in evidence as Prosecution Exhibit _____

DC: (No objection). (The accused objects to _____ on the grounds that _____.)

MJ (Pres): Prosecution Exhibit _____ for identification is (to not) admitted in evidence as Prosecution Exhibit _____

DEPARTMENT OF THE ARMY
COMPANY B, 1st BATTALION, 16th INFANTRY
FORT ARLINGTON, VIRGINIA 22901

Data Required by the Privacy Act of 1974
(5 U.S.C. 552a)

AUTHORITY: Section 301, Title 5, U.S.C. and Section 3012, Title 10, U.S.C.

PURPOSE: To be used by the commander exercising general court-martial jurisdiction over you to determine approval or disapproval of your request.

ROUTINE USES: Request, with appropriate documentation including the decision of the discharge authority, will be filed in the MPRJ as permanent material and disposed of in accordance with AR 640-10, and may be used by other appropriate Federal agencies and State and local governmental activities where use of the information is compatible with the purpose for which the information was collected.

Submission of a request for discharge is voluntary. Failure to provide all or a portion of the requested information may result in your request being disapproved.

18 November 199X

MEMORANDUM THRU

Commander, B Company, HQ, 1/16th Infantry, Fort
Arlington, Virginia

Commander, HQ, 1/16th Infantry, Fort Arlington,
Virginia

Commander, HQ, 2d Brigade, 26th Cavalry Division (AM),
Fort Arlington, Virginia

FOR Commanding General, 26th Cavalry Division (AM),
Fort Arlington, Virginia

SUBJECT: Request for Discharge for the Good of the
Service (Chapter 10, AR 635-200)

1. I, THOMAS L. AMHERST, SSN 429-86-4723, hereby
voluntarily request discharge for the good of the

Service under chapter 10, AR 635-200. I understand that I may request discharge for the good of the Service because of the following charge(s) which ~~(has)~~ (have) been preferred against me under the Uniform Code of Military Justice, each of which authorizes the imposition of a bad conduct or dishonorable discharge: larceny; resisting apprehension.

2. I am making this request of own free will and have not been subjected to any coercion whatsoever by any person. I have been advised of the implications that are attached to it. By submitting this request for discharge, I acknowledge that I am guilty of the charge(s) against me or of (a) lesser included offense(s) therein contained which also authorize(s) the imposition of a bad conduct or dishonorable discharge. Moreover, I hereby state that under no circumstances do I desire further rehabilitation, for I have no desire to perform further military service.

3. Prior to completing this form, I have been afforded the opportunity to consult with appointed counsel for consultation (*in addition, I have consulted with ~~(civilian counsel retained at no expense to the Government))~~, ~~(**Although I have received a lawful order to see consulting counsel, I persist willfully in my refusal to see him.)~~ (***) I have consulted with counsel for consultation who has fully advised me of the nature of my rights under the Uniform Code of Military Justice, (the elements of the offenses(s) with which I am charged, any relevant less included offenses(s) thereto, and the facts which must be established by competent evidence beyond a reasonable doubt to sustain a finding of guilty; the possible defenses which appear to be available at this time; and the maximum permissible punishment if found guilty) ~~(and of the legal effect and significance of my suspended discharge)~~. (Although he has furnished me legal advice, this decision is my own.) (****I understand that, pursuant to a delegation of authority per paragraph 1-211, my request for discharge for the good of the Service may be approved by the commander exercising special court-martial convening authority (a lower level of approval than the general court-martial convening authority or higher authority, but the authority to disapprove a request for discharge for the good of the Service may not be delegated.))

4. I understand that, if my request for discharge is accepted, I may be discharged under other than honorable conditions and furnished an Under Other Than Honorable Discharge Certificate. I have been advised

and understand the possible effects of an Under Other Than Honorable Discharge and that, as a result of the issuance of such a discharge, I will be deprived of many or all Army benefits, that I may be ineligible for many or all benefits administered by the Veterans Administration, and that I may be deprived of my rights and benefits as a veteran under both Federal and State law. I also understand that I may expect to encounter substantial prejudice in civilian life because of an Under Other Than Honorable Discharge. I further understand that there is no automatic upgrading nor review by any Government agency of a less than honorable discharge and that I must apply to the Army Discharge Review Board or the Army Board for the Correction of Military Records if I wish review of my discharge. I realize that the act of consideration by either board does not imply that my discharge will be upgraded.

5. I understand that, once my request for discharge is submitted, it may be withdrawn only with consent of the commander exercising court-martial authority, or without that commander's consent, in the event trial results in an acquittal or the sentence does not include a punitive discharge even though one could have been adjudged by the court. Further, I understand that if I depart absent without leave, this request may be processed and I may be discharged even though I am absent.

6. I have been advised that I may submit any statements I desire in my own behalf, which will accompany my request for discharge. Statements in my own behalf ~~(are)~~ (are not) submitted with this request.

7. I hereby acknowledge receipt of a copy of this request for discharge and of all inclosures submitted herewith.

THOMAS L. AMHERST
PFC, 429-86-4723
B Company, 1/16th Infantry
Fort Arlington, Virginia

Having been advised by me of (the basis for his or her contemplated trial by court-martial and the maximum permissible punishment authorized under the Uniform Code of Military Justice) ~~(the significance of his or her suspended sentence to a bad conduct or dishonorable discharge)~~; of the possible effects of an Under Other Than Honorable Discharge if this request is approved; and of the procedures and rights available to him ~~or her~~, Thomas L. Amherst personally made the choice indicated in the foregoing request for discharge for the good of the Service.

HAROLD R. BEEKER
Captain, JAGC
Defense Counsel

United States) Fort Arlington, Virginia
)
v.) 2 Dec 199X
)
THOMAS L. AMHERST)
Private First Class)
429-86-4723)

OFFER TO PLEAD GUILTY

I, Private First Class Thomas L. Amherst, the accused in a court-martial now pending, have had an opportunity to examine the charges preferred against me and all statements and documents attached thereto; and after consulting with my defense counsel, Captain Harold R. Beeker, and being fully advised that I have a legal and moral right to plead not guilty to the Charges and Specifications upon which I am about to be tried, to wit:

Charge I: Violation of Article 121, Uniform Code of Military Justice, containing one specification of larceny of \$180.00

Charge II: Violation of Article 95, Uniform Code of Military Justice, containing one specification of resisting apprehension,

make the following offer.

I offer to plead guilty to the lesser included offense of wrongful appropriation with respect to Charge I, by substituting the words "wrongfully appropriate" for the word "steal," provided that the government will present no evidence on the greater offense of Charge I or on Charge II, and further provided that the convening authority will not approve any sentence in excess of the sentence on Appendix 1 to this offer.

I agree to enter into a stipulation of fact concerning the offense to which I am pleading guilty, in accordance with R.C.M. 705(c)(2)(A).

I am satisfied with the defense counsel detailed to defend me.

This offer to plead guilty originated with me and no person has made any attempt to force or coerce me into making this offer or to plead guilty.

My defense counsel has advised me of the meaning and effect of my guilty plea and I understand the meaning and effect thereof.

I understand that I may request to withdraw my plea of guilty at any time before the sentence is adjudged, but that my request may not be granted.

I further understand that this agreement will be cancelled if either I or the convening authority withdraws from it before trial, or if I fail to fulfill any material promises or conditions in the agreement, or if the findings are set aside because my plea of guilty is held improvident on appellate review, or if an inquiry by the military judge discloses a disagreement concerning a material term in the agreement.

HAROLD R. BEEKER
CPT, JAGC
Defense Counsel

THOMAS L. AMHERST
PFC, 429-86-4723
Accused

Recommend Approval.

HENRY J. HOBIT
CPT, JAGC
Trial Counsel

The foregoing offer is (accepted) (not accepted).

(Date)

JAMES E. WALKER
COL, IN
Commanding

Amherst Problem--Post-Trial Problems

1. Facts:

You are the Commander of the 2d Brigade of the 26th Cavalry Division (AM) Fort Arlington, Virginia. This afternoon you are informed by the trial counsel in the case of United States v. Private First Class Thomas L. Amherst, a member of your command, that Amherst was tried this morning and was found guilty of larceny. The trial counsel tells you that the accused's sentence as announced by the court was confinement for six months, forfeiture of \$100 pay per month for six months, and reduction to the lowest enlisted grade.

Upon being informed of this, you ask her to give you some more details as to what happened at trial. She informs you that PFC Amherst had little difficulty at the trial before a military judge, sitting without court members, in pleading guilty to wrongful appropriation even though the judge seemed concerned that Amherst did not have a criminal state of mind when he took the \$180. Pursuant to the pretrial agreement, the Government presented no evidence on the offense of resisting apprehension. However, she indicates that the defense counsel introduced substantial evidence at trial to indicate that it was Amherst's intent to return the money as Amherst had done on prior occasions with other members of the unit when he "borrowed" money without their knowledge. (In fact, on one prior occasion he took \$20 from Northfield without Northfield's knowledge, but repaid him three days later). The evidence during sentencing indicated that Amherst needed the \$180.00 to pay his mother's doctor bill, and that Amherst intended to repay Specialist Northfield on payday. He also testified that he had attempted to see his company commander but was delayed by the first sergeant to the point where he did not feel the bill could remain unpaid. She also indicates that upon completion of the trial, Amherst complained vigorously that his serial number as shown on page 1 of the charge sheet was erroneous.

Trial counsel also relates that Amherst has submitted a written request to you that his sentence to confinement be deferred under Article 57(d) of the Uniform Code of Military Justice.

2. Requirement:

a. May you take action as to the findings and sentence in the case as a result of your conversation with the trial counsel?

b. If not, at what point and time may you take action?

c. What matters should you consider prior to taking action to approve or disapprove the findings and/or sentence in the case?

CHAPTER NINE
THE AMHERST PROBLEM
TEACHING OUTLINE

I. INTRODUCTION.

II. COURT-MARTIAL PACKET.

A. Forwarding Endorsement.

1. What if endorsement is missing?

2. Contents.
 - a. Personal recommendation as to disposition.

 - b. Summary of evidence to be attached.

 - c. Character of accused's service.

 - d. Whether accused offered nonjudicial punishment.

 - e. Statements of witnesses to be attached.

- f. Statement as to whether witnesses will be available for trial.

B. Charge Sheet.

1. Heading.

- a. Personal data.

- b. Nature of restraint.

- (1) 90 day speedy trial clock if in arrest, confinement, or restriction tantamount to confinement.

- (2) 120 day speedy trial clock otherwise.

2. Charges and specifications.

- a. Larceny.

- b. Resisting apprehension.

- c. Jurisdiction over the offense -- Solorio.

3. Block 11 -- Accuser/Preferral of charges.

4. Block 12 -- Notice of preferral.

5. Block 13 -- Receipt by SCMCA.

6. Block 14 -- Referral.
 - a. UCMJ options.

 - b. Administrative options.

7. Block 15 -- Trial counsel's service of charges.
 - a. Time limit for GCM: 5 days.

 - b. Time limit for SPCM: 3 days.

C. Evaluation of the Evidence.

1. Rights warning and accused's statement.

2. Witness statements.

3. Note: AR 190-30, para 3-7f.

"Barracks larcenies of property of a value of less than \$1000 and simple assaults not requiring hospitalization that occur in unit areas will be reported to law enforcement activities for statistical and crime reporting

urposes, but a law enforcement investigation will not be required ... [but normally will] when requested by a field grade commander in the chain of command of the unit concerned."

4. Considerations for decision on disposition.

III. INVOLVEMENT WITH DEFENSE COUNSEL.

- A. Request for Discharge in Lieu of Court-Martial (Ch 10, AR 635-200).

1. Procedures.
2. When appropriate?

- B. Pretrial Agreement.

1. Contents/Negotiations.
2. Procedure at trial.

IV. SENTENCING AT COURTS-MARTIAL.

- A. Effective dates.
 - 1. Confinement.
 - 2. Other punishments.
- B. Excess leave (appellate leave).

V. POST-TRIAL RESPONSIBILITIES.

- A. Preparation of Record.
- B. Authentication of Record.
- C. Action by Convening Authority.
- D. Requests for Deferment of Confinement.

VI. CONCLUSION.

CHAPTER 10

MOST FREQUENTLY ASKED QUESTIONS

1. Is it proper to publicize the results of Article 15s and courts-martial?

Yes, for both.

Article 15s - AR 27-10, para. 3-22 permits Article 15 punishments to be announced at unit formations or posted on the bulletin board to preclude perceptions of unfairness and to deter similar misconduct. Special consideration should be given before publicizing Article 15s involving E-5s and above.

Courts-Martial - It is permissible to publicize the results of courts-martial in the post newspaper or otherwise. Those are public proceedings. A couple of tips: publicize the fact of an acquittal in addition to convictions, but not the name of the soldier acquitted. It is permissible to use the names of soldiers convicted, but wait until the soldier's family has departed the command. This will spare the family needless embarrassment.

2. As a court member, why doesn't someone tell us there is a pretrial agreement before we decide on a sentence?

The simple answer is that this information is not relevant to your task of deciding on a fair and just sentence based on the evidence presented at trial. An accused has the right to offer to plead guilty in return for a sentence limitation, or some other advantage. The convening authority can accept or reject the offer. Whether the offer to plead guilty is accepted or rejected is the prerogative of the convening authority. Court members may be more likely to "max" an accused if they knew a pretrial agreement existed. For this reason, this information is not given to the court panel, nor should the members let the possibility of an agreement affect their sentencing decision.

3. As a court member, why doesn't someone tell us that the reason we're in court for relatively minor offenses is because the accused turned down an Article 15?

This information is not relevant to the case at hand. All soldiers have a right under the UCMJ to refuse an Article 15 or a Summary Court-Martial. No reason need

be stated. A court member may be harder on an accused who demanded trial in lieu of Article 15 because "he is wasting our time."

This is an improper consideration, and may lead to a finding and sentence not based solely on the evidence presented at trial.

4. As a commander, can I offer a soldier an Article 15 while I begin processing court-martial charges for the same offense(s)?

No. A commander can do one or the other, but not both. The law does provide that if a commander administers Article 15 punishment for a "major" offense (punishment for the offense includes a dishonorable discharge or more than 1 year confinement as listed in the MCM), a higher commander may still initiate court-martial charges for the same offense, and if convicted, the accused may submit his Article 15 punishment on sentencing to receive full credit against his court-martial punishment.

5. When a soldier "turns down" an Article 15, and then later asks that it be reinstated, must a commander reinstate it?

No. Reinstating the Article 15 is at the discretion of the commander. Timing may be the key factor here. If the soldier requests reinstatement soon after the initial turn down, and the government has expended little or no additional resources in preferring and referring charges, fairness dictates that the commander favorably consider reinstatement. This is especially so if the soldier turned down the Article 15 before consulting with defense counsel.

6. How does a Chapter 10 discharge affect a soldier's educational benefits?

From 1976 to 1985, we operated under a system where a soldier could contribute up to \$2700 and get \$2 for every \$1 contributed (\$8100 max). The soldier could reclaim his contributions unless he received a dishonorable discharge.

Under the new G.I. Bill (Montgomery Bill), effective July 1985, the soldier can contribute up to \$1200. The soldier can get up to \$8 for every \$1 contributed. The soldier, however, loses all money, including contributions, unless he receives an honorable discharge.

7. If I want to apprehend a soldier in his government quarters or his off-post housing, I am required to get a search warrant. Does this make it illegal for me to call a soldier on the phone and order them to report to my unit and then apprehend him?

No. Most courts that have addressed this issue agree that the warrant requirement is designed to protect an individual's right to privacy in their home. Therefore, as long as the commander doesn't cross the threshold of the front door, no warrant is required.

8. I'm walking through my barracks and I walk into a room and see three soldiers and a bag of marijuana on a desk in a common area. If I want to question those soldiers about the marijuana, must I advise them of their rights?

Yes, if you suspect a soldier of criminal activity then you must advise them of their rights. Therefore, if you suspect any or all three of the soldiers, you must read them their rights, preferably, one at a time.

9. How can a soldier seek redress regarding military discharge classifications, and what are the effects of military discharge classifications on veterans' benefits eligibility?

Two avenues are available to discharged soldiers who wish to have their discharge classifications upgraded. One alternative is to petition the Army Discharge Review Board, which is empowered to hear and decide motions for upgrading filed within 15 years of discharge. A second option is to petition the Army Board for Correction of Military Records, which has broad authority to correct any military record including discharge certificates.

Discharged soldiers are not generally eligible for VA benefits if their discharge is classified as being dishonorable by the VA. The VA has limited discretion in making this classification. Soldiers who receive dishonorable or bad conduct discharges at general courts-martial are per se barred from receiving VA benefits. The eligibility of soldiers for VA benefits who receive a bad-conduct discharge at a special court-martial, or an administrative discharge under other than honorable conditions, will be considered by the VA on a case-by-case basis. The VA rules provide that the conditions of the discharge are disqualifying if they involve mutiny or spying, moral turpitude (generally, conviction of a felony), acceptance of a discharge to escape trial by

general court-martial, willful and persistent misconduct, and in some cases homosexual acts. The VA classification has no effect on the changing of the classification of the discharge assigned by the Army.