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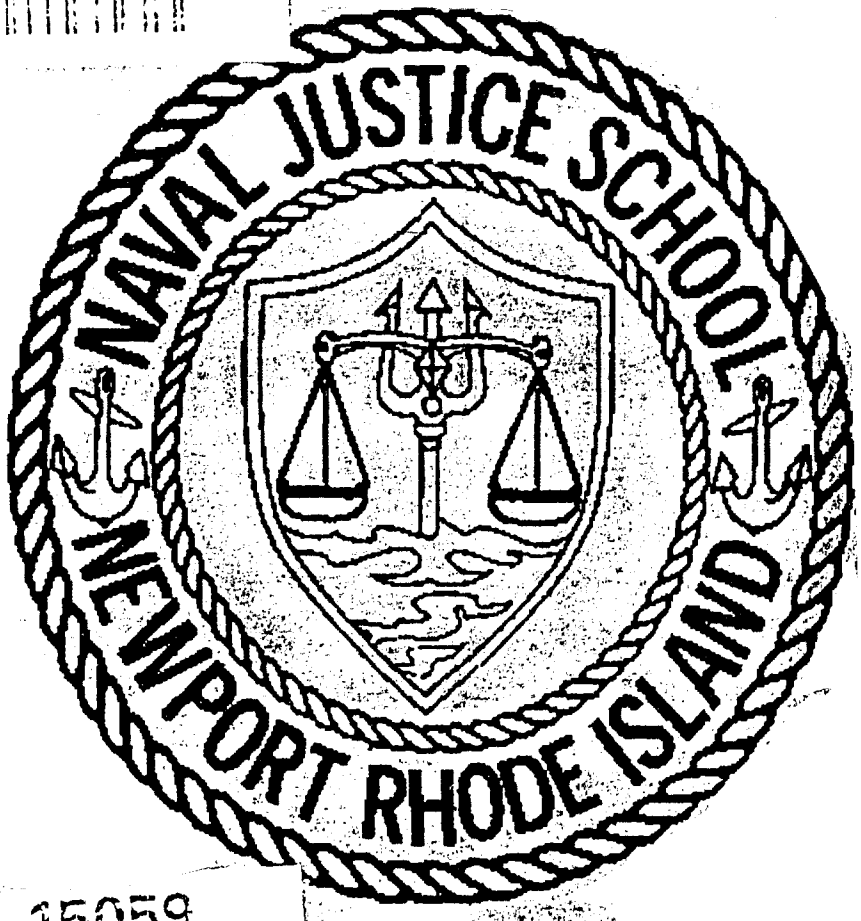

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MILITARY JUSTICE STUDY GUIDE

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Appendix I SOLUTIONS TO REVIEW QUESTIONS

MILITARY JUSTICE STUDY GUIDE

CHAPTER I

INTRODUCTION TO EVIDENCE

A. **General**. It has long been recognized that a legal proceeding is one of the most important events in the lives of those who stand to gain or lose by its outcome. Hence, the information received by those charged with deciding the facts in a particular case should be the most reliable, trustworthy, and accurate available. To guarantee that this information meets these standards, certain rules of evidence have evolved. Literally hundreds of years were consumed in this process and, indeed, the process continues in our courts today.

When speaking of "the law of evidence," one does not refer to a single set of laws contained in a particular book; the law of evidence is to be found in the Constitution, statutes, court rules, court decisions, service regulations, scholarly writings, administrative decisions, and the common law.

B. **Sources of the law of evidence**. Because the chief focal point of our discussion of the law of evidence is its application to the military, the basic source, as would be expected, is found in Article I, Section 8, of the U.S. Constitution: "The Congress shall have Power ... [T]o make Rules for the Government and Regulation of the land and naval Forces ...."

Pursuant to Article I, Section 8, Congress enacted the Uniform Code of Military Justice (UCMJ), which contains a number of articles dealing with evidentiary matters. Article 36, UCMJ, vests the President of the United States with power to prescribe rules of evidence for the military.

The President has done this in the *Manual for Courts-Martial, 1984* [hereinafter MCM], which incorporates a change promulgated in September 1980 that instituted a new body of rules in the mold of the Federal Rules of Evidence, and are the rules followed in the Federal district courts. These Military Rules of Evidence [hereinafter Mil.R.Evid.] are found in Part III, MCM, 1984. Although the bulk of evidentiary rules are set forth in this section of the MCM, other chapters of the MCM deal with matters related to the law of evidence as well.

Where the Military Rules of Evidence do not prescribe an applicable rule, one may look to Mil.R.Evid. 101(b). This rule permits reference to the rules of evidence followed in U.S. district courts (the Federal Rules of Evidence) or the rules of evidence at common law (the law of a country based on custom, usage, and judicial decisions), as long as these two sources are not inconsistent with or contrary to the provisions of the UCMJ or the MCM.

The MCM, either in Part III or in other sections, could not interpret every possible point of law relating to evidence. For that reason, the Courts of Military Review and the Court of Military Appeals were established to interpret points of law on particular issues. In effect, they have the function of making new law through their interpretation of existing law. If a point of law is not covered in the MCM -- or if it is not clear -- in many instances, military trial courts will be able to refer to the decisions of these appellate courts to find a clear statement of the law. Therefore, in addition to the MCM, the military judicial system itself is a source of the law of evidence.

Finally, other sources of the law of evidence are to be found in Federal court decisions interpreting rules of evidence; opinions of the Judge Advocates General; various administrative publications such as *U.S. Navy Regulations, 1990*, the *Manual of the Judge Advocate General of the Navy*, the *Naval Military Personnel Manual* or the *Marine Corps Individual Records Administration Manual*, and various orders and instructions; the decisions of state courts; and, finally, scholarly works on evidence.

During this course, our attention will be focused chiefly on three of the above-discussed areas: the UCMJ, the MCM, and decisions by the military's appellate courts.

C. Applicability of the rules of evidence

Rule 101 of the Mil.R.Evid. makes the rules of evidence applicable to general, special, and summary courts-martial. The Mil.R.Evid., except for the rules concerning privileges, are not applicable at article 32 pretrial investigations nor at proceedings conducted pursuant to Article 15, UCMJ. Part V, para. 4c, MCM, 1984, however, requires that the accused's rights against self-incrimination (article 31b) be explained at mast or office hours.

The purpose of a trial is to decide the "ultimate issue"; that is, the innocence or guilt of the accused with regard to particular charges and specifications. In order to resolve this issue, the government has the burden of proving the accused's guilt beyond a reasonable doubt by the introduction of evidence.

Besides the ultimate issue of guilt or innocence, there are other issues which may arise at trial. For example, one right of the accused is to have access to information the government possesses which pertains to his case; the law of evidence operates to guarantee that this right is observed. If the government has not allowed the defense to examine that information, the government may be prevented from using it at trial.

D. **Forms of evidence**. Evidence can be divided into at least three basic forms: oral evidence, documentary evidence, and real evidence.

1. **Oral evidence**. Oral evidence is sworn testimony received at trial. The fact that an oath is administered is some guarantee that the information related by the witness will be trustworthy. If the witness makes statements under oath which are not true, the witness may be prosecuted for false swearing or perjury. There are other forms of "oral" evidence. For example, if a witness makes a gesture or assumes a position in order to convey information, this too is considered "oral" evidence. Generally, witnesses will relate what they actually saw, heard, smelled, felt, or tasted, and state certain conclusions they reached based upon these sensory perceptions.

2. **Documentary evidence**. Documentary evidence is usually a writing that is offered into evidence. For example, an accused is charged with making a false report. The government, in order to prove its case, would want to introduce the report into evidence. Another example involves the unauthorized absence of a servicemember from his or her command. In order to prove the absence, the government may introduce a properly prepared entry from the accused's service record.

3. **Real evidence**. Any physical object which is offered into evidence is called "real evidence." For example, a murder weapon -- a pistol -- could be offered to establish what means was used to take the life of the victim.

4. **Demonstrative evidence**. Although, strictly speaking, there are three main forms of evidence, a hybrid category of real or documentary evidence appears in the form of "demonstrative evidence." An example of demonstrative evidence is a chart or diagram of a particular location. Often, court members have problems forming a mental picture of a location or object which is not readily available for introduction into evidence. A chart, diagram, map, or photograph may be used in this regard to help construct a mental picture of the subject matter. Partly documentary and partly real, evidence in this form is frequently categorized separately from the three basic forms of evidence.

E. **Types of evidence**. All evidence introduced at trial must operate to prove or disprove a fact in issue either directly or circumstantially. Direct evidence and circumstantial evidence are types of evidence and may take any of the forms already discussed.

1. **Direct evidence**. Evidence is relevant if it tends directly, without recourse to any inferences, to prove or disprove a fact in issue. For example, a confession from the accused is direct evidence of the offense charged.

2. **Circumstantial evidence**. Circumstantial evidence, on the other hand, is evidence which tends to establish a fact from which a fact in issue may be inferred. For example, a pistol found at the scene of the crime and inscribed with the name "John Jones" is circumstantial evidence that he was either at the scene or that the pistol is his. The pistol may not be his at all, or, this pistol which is his, may have been lost, stolen, etc.

Circumstantial evidence is not inherently inferior to direct evidence. If the trier of fact is convinced of the accused's guilt beyond a reasonable doubt, the fact that all evidence was circumstantial will not dictate an acquittal. In fact, the reliability of eyewitness testimony (the most common form of direct evidence) has been challenged by a variety of studies.

F. **Admissibility of evidence**. Apart from the form and type of evidence is the subject of the admissibility of evidence. When will certain matters be admitted into evidence and when will they not?

Admissibility depends upon several factors: authenticity, relevancy, and competency. For evidence to be admissible, it must qualify with regard to each of these factors.

1. **Authenticity**. The term authenticity refers to the genuine character of evidence. Authenticity simply means that a piece of evidence is what it purports to be. First, with regard to oral evidence, consider the testimony of a witness. We know that his testimony is what it purports to be by virtue of the fact that he has taken an oath to tell the truth, the whole truth, and nothing but the truth. Next, consider a piece of documentary evidence (a service record entry for example). How do we know that the service record entry is what it purports to be? Sometimes the custodian of the record, the personnel officer, will be called to "identify" the service record entry. He will testify under oath that he is the custodian of the record and that he has withdrawn a particular entry or page from the service record and that this is, in fact, that entry or page. Again, it is established that the service record entry is what it purports to be. With regard to real evidence, take, for example, a pistol which was recovered from the person of the accused as the result of a search by a police officer. The police officer is called and sworn as a witness. He gives

testimony with regard to the circumstances of the search. Finally, he is presented with the pistol and he identifies it, perhaps from the serial number or perhaps from a tag he attached to the pistol at the time it was seized. His testimony establishes that the pistol is what it purports to be.

Testimony is not the only way to authenticate certain types of evidence. For example, in the case of documentary evidence, a certificate from the custodian may be attached to a particular piece of documentary evidence. This "attesting certificate" establishes that the document is what it purports to be. An "attesting certificate" is a certificate or statement, signed by the custodian of the record, which indicates that the writing to which the certificate or statement refers is a true copy of the record. The "attesting certificate" also indicates that the signer of the certificate or statement is the official custodian of the record. Once it is admitted in evidence, the certificate takes the place of a witness. In effect, the certificate speaks for itself.

Another way to achieve authentication is to have the trial counsel and the defense counsel agree that a certain item sought to be introduced into evidence is what it purports to be. The accused must consent to the agreement. This type of agreement is called a "stipulation."

2. **Relevancy**. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *See* Mil.R.Evid. 401. The question or test involved is: "[D]oes the evidence aid the court in answering the question before it?" Consider a situation in which an accused is charged with theft of property of the United States. In most cases, the fact that he beat his wife regularly would probably have nothing to do with his theft of property of the United States. Therefore, any testimony to this effect would be objectionable as irrelevant.

3. **Competency**. "Competent," as used to describe evidence, means that the evidence is appropriate proof in a particular case. Several considerations bear on this determination.

a. **Public policy**. First, the evidence sought to be introduced must not be obtained contrary to public policy. An "exclusionary rule" is a recognition by the courts that in certain instances there is a public policy that requires the exclusion of certain evidence because of a counterbalancing need to encourage or prevent certain activity or types of conduct. The exclusionary rule in action will be discussed at length in subsequent chapters of this text as it relates to evidence obtained in violation of the law of self-incrimination (chapter III) and evidence obtained in violation of the law of search and seizure (chapter IV). Additionally, public policy sometimes acts to further certain relationships at the expense of excluding certain

evidence (e.g., the husband-wife privilege precludes under certain circumstances the calling of one spouse to testify against the other). Similar privileges protect the relationships of attorney-client and clergyman-penitent. There is no such protection afforded in military law to a doctor and his patient.

b. **Reliability**. A second factor which relates to competence is that of reliability. Evidence which is hearsay (an out-of-court statement offered in court for the proof of its contents) is considered unreliable and is inadmissible. Exceptions to the hearsay rule are allowed only where the circumstances independently establish the reliability of the evidence. With respect to documentary evidence, the rules require that either the original document be presented or an exact duplicate be offered to prove the contents of the original document. Only if the original is lost, destroyed, in the possession of the accused, or otherwise not obtainable, may other evidence of the contents of a document be received into evidence. These rules exist with one purpose in mind: evidence which is offered must be reliable.

c. **Undue prejudice**. The third consideration, with regard to competence, rests in the area of undue prejudice. Here, certain matters (such as prior convictions of an accused) or certain physical evidence may be relevant, but their value as evidence may be outweighed by the danger that they might unfairly prejudice the accused by emotionally affecting the court members.

ADMISSIBILITY FORMULA CHART

A + R + C = AE

AUTHENTICITY

ORAL	DOCUMENTARY	REAL
1. The witness must be sworn	1. Witness 2. Self-authentication 3. Stipulations 4. Judicial Notice 5. Attesting Certificates	1. Identification 2. Chain of custody

RELEVANCY

The offered evidence must assist the court in determining an issue properly before it; otherwise it is irrelevant.

COMPETENCY

I. Public Policy, e.g.,
   1. Self-incrimination
   2. Marital Privilege
   3. H - W Communication
   4. Clergyman-Penitent Communication
   5. Attorney-Client Communication
   6. Illegal S & S

II. Unreliability, e.g.,
   1. Hearsay
   2. Opinion
   3. Requirement of original document

III. Undue Prejudice, e.g.
   1. Prior convictions
   2. Inflammatory matters

ADMISSIBLE EVIDENCE

Evidence that may be considered by the court in determining the issues of fact.

MILITARY JUSTICE STUDY GUIDE

CHAPTER II

THE LAW OF PRIVILEGES

A. Introduction to the law of privileges

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

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

B. Husband-wife privilege - Mil.R.Evid. 504

1. As previously stated, the husband-wife privilege is based on the policy that societies need to protect the marital relationship is greater than the benefit that society would reap by the use of the testimony of one spouse against the other, or the use of statements made in confidence by one spouse to the other while married. Mil.R.Evid. 504 sets forth two distinct privileges. One relates to the capacity of one spouse to testify against the other (spousal incapacity). The other privilege relates to confidential communications between the spouses while married.

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

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

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

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

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

2. Note: The communication privilege only applies to communications. Noncommunicative acts observed by the witness spouse are not covered by the communication privilege. They may, however, be privileged under the spousal incapacity rule.

Assume A and B are lawfully married. A robs the exchange and brings stolen items to his home. B sees the stolen items in their home. At trial, A may not prevent B from testifying about what B saw; but B, the witness spouse, may claim the spousal privilege and refuse to testify.

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

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

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

c. the marriage was entered into to circumvent immigration laws.

C. **Lawyer-client privilege - Mil.R.Evid. 502**

1. In order to uphold the public policy of encouraging open and candid dialogue between a lawyer and client, the law recognizes a privilege which generally prohibits the admission, in court, of confidential communication made between the lawyer and the client.

2. Under this rule, the client has the privilege to refuse to disclose and to prevent any other person from disclosing confidential communication made:

a. Between the client and/or the client's representative and the lawyer and/or the lawyer's representative; or

b. by the client or the client's lawyer to a lawyer representing another in a matter of common interest (a joint conference between clients and their respective lawyers).

3. Not every confidential communication made between a lawyer and client, or between those persons listed above, is privileged. Only those confidential communications made for the purpose of facilitating the rendition of professional legal services to the client are privileged under Mil.R.Evid. 502. Confidential communications made between lawyer and client for the purpose of facilitating the rendition of legal services are privileged, even if the lawyer does not take the client's

case or later withdraws from the case. If a client charges the lawyer with malpractice or other improprieties in rendering legal services, however, the privilege will no longer exist and the lawyer may disclose the confidential communication. Also, the privilege will not apply to situations in which the client reveals to the lawyer a plan or intent to commit a fraud or other crime in the future. Discussion of past crimes, however, is privileged under this rule.

4. As a general rule, a "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law. Both military judge advocates and civilian lawyers fall within this privilege. The privilege also may be applicable, however, in situations where the client reasonably believes that he/she is consulting in private with a person authorized to practice law even if the person consulted is not so authorized. It is therefore important that nonlawyers, and command legal officers, not intentionally or inadvertently hold themselves out as persons authorized to practice law. Otherwise, the consultation/counseling session, etc., may be deemed to be privileged.

5. As previously noted, confidential communication between the client and the "lawyer's representative" are privileged. A "lawyer's representative" is a person employed by, or assigned to assist, a lawyer in providing professional legal services. In the military community, personnel (such as legalmen and Marine legal clerks), when assisting the military lawyer in processing a client's case, are considered "lawyer's representatives" and confidential communication between them and the client or between the lawyer and legalman or legal clerk would be privileged under Mil.R.Evid. 502.

6. The defense may request that the convening authority assign a medical, scientific, or other expert to assist in the preparation of the defense case. Once assigned, the expert is considered to be a "lawyer's representative" for purposes of the lawyer-client privilege under Mil.R.Evid. 502.

7. The privilege may be claimed by the client, or by the lawyer or lawyer's representative on behalf of the client. Unless the communication relates to the commission of a claim of malpractice or other breach of duty of the lawyer, only the client may waive the privilege.

D. **Clergy-penitent privilege - Mil.R.Evid. 503**

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

2. The rule defines a clergyman as a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting a clergyman. This definition lends itself to a broad spectrum of interpretations. It is therefore difficult to determine who may constitute a "similar functionary of a religious organization." Some guidance is provided by the Advisory Committee to the Federal Rules of Evidence. With respect to the proposed Federal Rule of Evidence concerning this clergyman-penitent privilege, the Advisory Committee noted that a "clergyman" is regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis. The definition of "clergyman," in light of the Advisory Committee's considerations, would not appear to be so broad as to include self-styled or self-determined ministers.

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

E. Informant privilege - Mil.R.Evid. 507

1. It is not uncommon, especially in drug cases, for an individual to secretly furnish information to, or to render assistance in, a criminal investigation to a local, state, Federal, or military law enforcement activity. Such an individual is considered an "informant" under Mil.R.Evid. 507.

2. Under this Military Rule of Evidence, the government is granted a privilege to refuse to disclose the identity of an informant. The privilege belongs to the government and may not be asserted by the informant. This privilege only applies to the informant's identity. It does not apply to the substance of the information rendered by the informant.

3. The government will not be able to successfully assert the privilege if:

a. The identity of the informant had been previously disclosed;

b. the informant appears as a witness for the prosecution; or

c. the military judge determines, upon motion by the defense, that disclosure of the identity of the informant is necessary to the accused's defense on the issue of guilt or innocence.

F. Doctor-patient privilege - Mil.R.Evid. 501(d)

The Military Rules of Evidence do not recognize any doctor-patient privilege. Statements made by a military member to either a civilian or military physician are not privileged and, assuming such statements are otherwise admissible, the statements may be disclosed and admitted into evidence at a courts-martial. Information obtained while interviewing a member exposed to the acquired immune deficiency syndrome (AIDS) virus, for treatment or epidemiologic purposes, however, may not be used to support any adverse personnel action. These adverse personnel actions include court-martial, nonjudicial punishment, involuntary separation if for other than medical reasons, administrative or punitive reduction in grade, denial of promotion, unfavorable entries in personnel records, and a bar to enlistment. See SECNAVINST 5300.30C (14 March 1990).

G. Classified information - Mil.R.Evid 505

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

H. Voluntary disclosure for drug abuse rehabilitation

Voluntary self-referral for counseling, treatment, or rehabilitation is a one-time procedure that enables drug-dependent servicemembers to obtain help without risk of disciplinary action. Disclosure of use or possession incident to use will be considered confidential as long as the disclosure is solely to obtain assistance under the self-referral program. There is no confidentiality for disclosure of drug distribution. Any evidence obtained directly or derivatively from a qualified disclosure may not be used at disciplinary proceedings, on the issue of characterization of service in separation proceedings, or for vacating previously suspended punitive action. Participation in the self-referral program does not preclude disciplinary action or adverse administrative action based upon "independent" evidence. Personnel in the program are subject to valid unit sweep and random urinalysis inspections. The results of such testing can be used for all disciplinary purposes. See SECNAVINST 5350.4B, encl. (5).

MILITARY JUSTICE STUDY GUIDE

CHAPTER III

THE LAW OF SELF-INCRIMINATION

A. Article 31 of the Uniform Code of Military Justice

1. **Text**. Article 31 provides a number of protections.

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

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 of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected, and that any statement made by him may be used as evidence against him in a trial by court-martial.

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

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

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

3. **To which interrogators does article 31 apply**? Article 31(b) requires a "person subject to this chapter" (UCMJ) to warn an accused or suspect prior to requesting a statement or conducting an interrogation. The term "person subject to this chapter" has been the subject of some confusion. If this provision was applied literally, all persons in the military would be required to give warnings regardless of their position in the command structure or their involvement in a case. It is clear from the legislative history, however, that Congress never intended a literal application of this portion of the Code. Basically, all military personnel, when acting for the military, must operate within the framework of the UCMJ. Thus, when military personnel act as investigators or interrogators, they must warn a suspect under article 31(b) prior to conducting an interview of the suspect.

The warning requirement similarly applies to informal counseling situations conducted in an official capacity. Statements obtained from an accused or suspect would not be admitted in a subsequent court-martial unless the "counselor" complied with article 31. *United States v. Seay*, 1 M.J. 201 (C.M.A. 1975).

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

When and who must warn, particularly in unofficial interrogations, has led to considerable confusion in the judicial system. The Court of Military Appeals clarified this area in *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981). In *Duga*, the court held that the article 31(b) warnings are required if:

a. The questioner was acting in an official instead of a private capacity; and

b. the person being questioned perceived that the inquiry involved more than a casual conversation.

Unless both of the *Duga* requirements are met, article 31(b) warnings will not be required for any statement made to be admissible. Thus, where an undercover informant obtains incriminating statements from a narcotics dealer, the statements usually will be admissible regardless of the absence of warnings. Though the informant is acting in an official capacity, anything said by the suspect regarding the drug transaction is obviously a casual conversation rather than perceived as a response to official interrogation.

In *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990), the court modifies the *Duga* rule by redefining who is acting in an official capacity. Historically, someone was acting in an official capacity when acting for the benefit of the armed forces. Under *Loukas*, we see someone acting in an official capacity when an individual is acting in a law enforcement capacity or one is taking part in a disciplinary investigation.

4. **Application to other interrogations**. The agents of the Naval Investigative Service and the Marine Corps' Criminal Investigation Division must comply with article 31(b) in all military interrogations. This rule applies with equal force to civilians acting as base or station police when acting as agents of the military. Likewise, other civilian investigators, such as Federal and state investigators, must warn an accused or suspect of his article 31(b) rights when acting as agents of the military. Additionally, Article 8, UCMJ, contains the following provision: "Any civil officer having authority to apprehend offenders under the laws of the United States or of a State, Territory, Commonwealth, or possession, or the District of Columbia may summarily apprehend a deserter from the armed forces and deliver him into the custody of those forces." With regard to FBI apprehension of deserters, the Court of Military Appeals has specifically held that no article 31(b) warning was required prior to such apprehension. *United States v. Temperley*, 22 C.M.A. 383, 47 C.M.R. 235 (1973).

A close look at *Temperley* is necessary to see precisely what is authorized. All that the court allowed to be done was to ask the suspect questions about his identity without advising him under article 31. The FBI agents here approached Temperley and asked him if his name was "Mr. John Charles Rose," and he replied that it was. It was only after this conversation, and the determination that "Mr. Rose" was actually Temperley, that he was apprehended and taken into custody as a deserter wanted by the armed forces. This initial conversation, including the use of the alias by the accused, was held to be properly admissible evidence, relevant to the charges of desertion. The court, however, also held that, once agents have taken the individual into custody or otherwise deprived him of his freedom of action in any significant way, appropriate warnings must be given -- including warnings as to counsel rights -- if there is to be further questioning.

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

civilian authorities unless they act directly for the military or the two investigations are merged into one.

Does article 31 apply to interrogations of military suspects conducted by foreign officials? Case law and the Military Rules of Evidence indicate that, unless foreign authorities are acting as agents of the military or the interrogation is instigated or participated in by military personnel or their agents, no article 31(b) warning is required. Still, any statement given by a suspect to foreign authorities must be voluntary if the statement is to be used at a subsequent court-martial. Mil.R.Evid. 305(h)(2). Thus, if the foreign authorities use physical or psychological coercion or inducements, the suspect's statements may be held to be inadmissible.

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

6. **When are warnings required**? As soon as an interrogator seeks to question or interrogate a servicemember suspected of an offense, the member must be warned in accordance with article 31(b). An interrogation exists when questioning, conversation, acts, or lack thereof, are intended to, or reasonably likely to, elicit an incriminating response. Mil.R.Evid. 305(h)(2).

7. **What warnings are required**? (Article 31(b) UCMJ)

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

b. **Warning of the right to remain silent**. The right to remain silent is not a limited right in the sense that an accused or suspect may be interrogated or questioned concerning matters which are not self-incriminating. Rather, the right to remain silent is an absolute right to silence -- a right to say nothing at all. Concerning this point, the Court of Military Appeals has said: "We are not disposed to adopt the view ... that Article 31(b) should be interpreted to require ... that the suspect can refuse to answer only those questions which are incriminating." *United States v. Williams*, 2 C.M.A. 430, 9 C.M.R. 60, 62-63 (1953).

c. **Warning regarding the consequences of speaking**. The exact language of article 31(b) requires that the warning advise an accused or suspect that any statement made may be used as evidence against him in a trial by court-martial. In one older case, the interrogator merely advised the accused that anything that the accused said could be used against him. The words "in a trial by court-martial" were omitted. The Court of Military Appeals held that this was not error, reasoning that the advice was actually broader in scope than the provisions of article 31. While this might be entirely true, there is no excuse for lack of precision in language when advising an accused or suspect of his rights. Many convictions have been reversed merely because the interrogator attempted to advise an accused or suspect "off the top of his head."

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

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

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

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

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

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

In addition to oral statements, some actions of an accused or suspect may be considered the equivalent of a statement and are thus protected by article 31. During a search, for example, a suspect may be asked to identify an item of clothing in which contraband has been located. If, as indicated, the servicemember is a suspect, these acts on his part may amount to admissions. Therefore, care must be taken to see that the suspect is warned of his article 31(b) rights or the identification of the clothing is obtained from some other source. In most cases, however, a request for the identification of an individual is not an "interrogation"; production of the identification is not a "statement" within the meaning of article 31(b) and, therefore,

no warnings are required. Superiors and those in positions of authority may lawfully demand a servicemember to produce identification at any time without first warning the servicemember under article 31(b). Merely identifying one's self upon request is generally considered to be a neutral act. An exception to this general rule arises when the servicemember is suspected of carrying false identification. In such cases, the act of producing identification is an act that directly relates to the offense of which the servicemember is suspected. The act, therefore, is "testimonial" and not neutral in nature.

In *United States v. Nowling*, 9 C.M.A. 100, 25 C.M.R. 363 (1958), the accused was suspected by an air policeman of possessing a false pass. The air policeman asked the accused to produce the pass; the accused did so and was subsequently tried for possession of the false pass. The Court of Military Appeals observed:

> We conclude, therefore, that the accused's conduct in producing the pass at the request of the air policeman was the equivalent of language which had relevance to the accused's guilt because of its content .... Under such circumstances the request to produce amounts to an interrogation and a reply either oral or by physical act constitutes a "statement" within the purview of Article 31.

25 C.M.R. at 364-65

Thus, when a servicemember is suspected of an offense involving false identification, article 31 warnings are required prior to asking the servicemember to produce the identification. Failure to give warnings will result in the exclusion of the evidence obtained when the suspect produces the identification.

Essentially the same situation occurred in *United States v. Corson*, 18 C.M.A. 34, 39 C.M.R. 34 (1968), except that there the accused was suspected of possessing marijuana. Based upon a rumor that the accused was in possession of certain drugs, he was told: "I think you know what I want; give it to me." The accused produced the marijuana. His conviction was overturned on the basis of the rationale in *Nowling*. The theory behind all of these "testimonial act" cases is that a suspect may not be requested to produce evidence against himself (self-incrimination) without being warned that he is not required to do so.

10. **Body fluids**. From 1957 to October 1980, the same rationale which has been applied to "testimonial acts" was also applied to the taking of body fluids. Thus, prior to October 1980, the law had been that the taking of blood, urine, and other body fluids required an article 31(b) warning to the effect that the individual was suspected of a specific crime; that he did not have to produce the body fluid

requested; and that if he did produce the fluid it could be subjected to tests, the results of which could be used against him in a trial by court-martial. *United States v. Ruiz*, 23 C.M.A. 181, 48 C.M.R. 797 (1974). In *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980), however, the Court of Military Appeals ruled that the taking of blood specimens is not protected by article 31 and, hence, article 31(b) warnings are not required before taking such specimens. In *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983), the Court of Military Appeals extended the *Armstrong* rationale to urine specimens. The Military Rules of Evidence treat the taking of all body fluids as nontestimonial and neutral acts and thus not protected by article 31. Although the extraction of body fluids no longer falls within the purview of article 31, the laws concerning search and seizure and inspection remain applicable, and compliance with Mil.R.Evid. 312 is a prerequisite for the admissibility in court of involuntarily obtained body fluid samples. *See* chapter IV, *infra*. Furthermore, even though urinalysis results are not subject to the requirements of article 31(b), they sometimes may not be admissible in courts-martial because of administrative policy restraints imposed by departmental or service regulations.

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

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

While no statement need be given by the accused, article 15 presupposes that the officer imposing nonjudicial punishment will afford the servicemember an opportunity to present matters in his own behalf. It is recommended that compliance with article 31(b) rights at NJP be documented on forms such as those set forth in JAGMAN, app. A-1-b, A-1-c, or A-1-d.

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

marijuana, Seaman Jones confesses to selling drugs, the confession might not be admissible against him at his subsequent court-martial for wrongful sale of drugs, provided that Seaman Jones was not given counsel warnings at NJP. Statements given at NJP by the accused, however, are admissible against the accused at the NJP itself, regardless of whether the accused was given counsel warnings.

B. **The right to counsel**

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

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

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

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

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

2. "**Custody**." While custody might imply the "jail house" or "brig," the courts have interpreted this term in a far broader sense. Any deprivation of one's freedom of action in any significant way constitutes custody for the purpose of the counsel requirement. Suppose Seaman Apprentice Fuller is taken before his commanding officer, Commander Sparks, for questioning. Fuller is not under apprehension or arrest; furthermore, no charges have been preferred against him. Sparks proceeds to question Fuller concerning a broken window in the former's office. Sparks has been informed by Petty Officer Jenks that he saw Fuller toss a rock through the window. Here, Fuller is suspected of damaging military property of the United States. In this situation, with Fuller standing before his commanding officer, it should be obvious that Fuller has been denied his freedom of action to a significant

degree. Fuller is not free simply to leave his commanding officer's office, or to refuse to appear for questioning. Thus, Commander Sparks would be required to advise Fuller of his counsel rights as well as his article 31(b) rights. If Sparks does not, Fuller's admission that he broke the window would be inadmissible in any forthcoming court-martial. Likewise, where a suspect is summoned to the NIS office for an interview with NIS agents, this will constitute custody necessitating article 31 and counsel warnings.

Suppose that a servicemember is being held by civilian authorities on civilian charges (e.g., speeding) and a member of the military visits him to question him concerning on-base drug use. Even though the servicemember was not being questioned about the offense for which he was incarcerated, he will be considered to be in custody. Thus, advice as to counsel is required.

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

4. **Notice to counsel**. In *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976), the Court of Military Appeals created a procedural rule affecting the admissibility of confessions and admissions. This was codified in Mil.R.Evid. 305(e) and states that, if an investigator knows or reasonably should know that a suspect is represented by counsel, counsel must be given an opportunity to attend before a suspect can be interrogated. In *United States v. Fassler*, 29 M.J. 193 (C.M.A. 1989), the Court of Military Appeals judicially modified Mil.R.Evid. 305(e), holding that, if an interrogator knows or reasonably should know that an accused or suspect has requested counsel, the interrogator cannot question the accused or suspect about any offense, including offenses unrelated to the offense for which counsel has been requested, without notifying the attorney and affording the attorney a reasonable opportunity to be present at the interrogation. Violation of this rule will make any resulting statement inadmissible.

C. **Right to terminate the interrogation**

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

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

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

When confronted with an accused or suspect who asks: "What will happen to me if I don't make a statement?" the reply should be: "I do not know; all of the evidence will be referred to the convening authority [commanding officer] who will examine it and make a determination as to what disposition to make of the case." If the commanding officer is confronted with this situation, he should simply advise the suspect that he will study the facts and decide upon a disposition of the case, while reminding the suspect that it is his right not to make a statement and this fact will not be held against him in any way.

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

3. **Prolonged confinement or interrogation**. Duress or coercion can be mental as well as physical. By denying a suspect the necessities of life (such as food, water, air, light, restroom facilities, etc.), or merely by interrogating a person for extremely long periods of time without sleep, a confession or admission may be

rendered involuntary. What is an extremely long period of time? To answer this, the circumstances in each case, as well as the condition of the suspect or accused, must be considered. As a practical matter, good judgment and common sense should provide the answer in each case.

E. Consequences of violating the rights against self-incrimination

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

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

Thus, if Private Jones is found with marijuana in her pocket and interrogated without being advised of her article 31(b) rights and confesses to the possession of 1,000 pounds of marijuana in her parked vehicle located on base, the 1,000 pounds of marijuana -- as well as Private Jones' confession -- will be excluded from evidence. The reason: The 1,000 pounds of marijuana were discovered by exploiting the unlawfully obtained confession.

The converse of this situation also represents the same principle. As the result of an illegal search, marijuana is found in Private Jones' locker. Private Jones confesses because she was told that "they had the goods on her" and was confronted with the marijuana that was found in her locker. This confession is not admissible because it was obtained by exploiting the unlawfully obtained evidence.

When a command is concerned about what procedure to follow, or whether or not a confession or admission can be allowed into evidence, a lawyer should be consulted. Unlike practical engineering, basic electronics, or elementary mathematics, many legal questions do not have definite answers. On the basis of his or her training, however, a lawyer's professional opinion should provide the best available answer to difficult questions that arise daily.

The Suspect's Rights Acknowledgement/Statement form [JAGMAN, app. A-1-m(1)] contains the suspect's or accused's article 31(b) rights and a statement indicating that the accused or suspect understands his or her rights and has chosen to waive those rights. Additionally, this form contains counsel rights and an acknowledgement and waiver of these rights. This form should be used when the

command desires to take a statement from a suspect in custody. The form will help ensure that appropriate rights warnings are given and that a record of the rights given and the acknowledgement and waiver of the same will be available if a dispute later arises. It is essential that these rights be read to the suspect or accused, that they be explained, that the individual be given ample opportunity to read them before signing an acknowledgement and waiver (if this is desired) and before making any statement or answering any questions.

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

While it is true that no particular form must be used to properly advise the accused, deviating from a sufficient statement of rights (such as that found in appendix A-1-m of the *JAG Manual*) could cause the interrogator to give an incomplete or incorrect warning.

Several examples will serve to illustrate the point. In a number of cases, the following "right to counsel" was explained to the accused.

a. "You have a right to consult with legal counsel, if desired."

b. "You have a right to consult with legal counsel at any time you desire."

c. "You are entitled to legal assistance from the staff judge advocate officer or representation by a civilian lawyer at your own expense."

d. "You can consult with counsel and have counsel present at the time of the interview."

Each of these warnings was held to be insufficient to convey to the suspect or accused his or her rights to counsel. This is not to say that the advice should be entirely mechanical. While the specific warning or advice should be read to the accused or suspect, an explanation should follow with questions such as, "Do you understand what I have told you?" The idea is to convey the thought in precise language and to explain it further if need be.

G. Grants of immunity

1. Who may issue grants of immunity

a. **Military witness**. The authority to grant immunity to a military witness is reserved to officers exercising general court-martial jurisdiction. R.C.M. 704; JAGMAN, § 0138.

b. **Civilian witness**. Prior to the issuance of an order by an officer exercising general court-martial jurisdiction to a civilian witness to testify, the approval of the Attorney General of the United States or his designee must be obtained, pursuant to 18 U.S.C. §§ 6002 and 6004 (1982). JAGMAN, § 0138c.

2. Types of immunity

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

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

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

3. Forms. *See* JAGMAN, app. A-1-i(1)-(3).

4. Language of the grant

A properly worded grant of immunity must not be conditioned on the witness giving specified testimony. The witness must know and understand that the testimony need only be truthful. *United States v. Garcia*, 1 M.J. 26 (C.M.A. 1975).

5. **Other problems**

Be extremely careful in any case involving national security or classified information. In a case that received widespread publicity, *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982), an Air Force lieutenant accused of spying for the Russians was released and the charges against him dismissed because of binding, albeit unauthorized, promises to grant him immunity. Subsequent procedural changes, reflected in JAGMAN, § 0138 and OPNAVINST 5510.1H, require final approval by the DoD general counsel in all such cases. Furthermore, JAGMAN, § 0137 discusses the requirement for coordinating with Federal authorities in any case involving a major Federal offense. The best advice that can be given is that higher headquarters should be notified before anything is done (e.g., referral, immunity, pretrial agreements) in any case involving national security, classified information, or a major Federal offense.

SUSPECT'S RIGHTS ACKNOWLEDGEMENT/STATEMENT (See JAGMAN 0170)

SUSPECT'S RIGHTS AND ACKNOWLEDGEMENT/STATEMENT

FULL NAME (ACCUSED/ SUSPECT)	SSN	RATE/RANK	SERVICE(BRANCH)
ACTIVITY/UNIT			DATE OF BIRTH
NAME (INTERVIEWER)	SSN	RATE/RANK	SERVICE(BRANCH)
ORGANIZATION		BILLET	
LOCATION OF INTERVIEW		TIME	DATE

RIGHTS

I certify and acknowledge by my signature and initials set forth below that, before the interviewer requested a statement from me, he warned me that:

(1) I am suspected of having committed the following offense(s):_____

_____ ☐

_____

(2) I have the right to remain silent; ---------- ☐

(3) Any statement I do make may be used as evidence against me in trial by court-martial; ---------- ☐

(4) I have the right to consult with lawyer counsel prior to any questioning. This lawyer counsel may be a civilian lawyer retained by me at my own expense, a military lawyer appointed to act as my counsel without cost to me, or both; and- ☐

A-1-m(1)

(5) I have the right to have such retained civilian lawyer and/or appointed military lawyer present during this interview,- ---------- ☐

WAIVER OF RIGHTS

I further certify and acknowledge that I have read the above statement of my rights and fully understand them, and that, ---------- ☐

(1) I expressly desire to waive my right to remain silent; ---------- ☐

(2) I expressly desire to make a statement; ------ ☐

(3) I expressly do not desire to consult with either a civilian lawyer retained by me or a military lawyer appointed as my counsel without cost to me prior to any questioning; ---------- ☐

(4) I expressly do not desire to have such a lawyer present with me during this interview; and ---------- ☐

(5) This acknowledgement and waiver of rights is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me. ---------- ☐

SIGNATURE (ACCUSED/SUSPECT)	TIME	DATE
SIGNATURE (INTERVIEWER)	TIME	DATE
SIGNATURE (WITNESS)	TIME	DATE

A-1-m(2)

The statement which appears on this page (and the following _____ page(s), all of which are signed by me), is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me.

_____
SIGNATURE (ACCUSED/SUSPECT)

_____

_____

_____

A-1-m(3)

MILITARY JUSTICE STUDY GUIDE

CHAPTER IV

SEARCH AND SEIZURE/DRUG ABUSE DETECTION

PART I - SEARCH AND SEIZURE

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

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

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

A. Sources of the law of search and seizure

1. **United States Constitution, Amendment IV**. Although enacted in the eighteenth century, the language of the fourth amendment has never been changed. The fourth amendment was not an important part of American jurisprudence until this century, when courts created a rule which excluded from trial any evidence obtained in violation of its terms:

> 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.

This language should be carefully considered in its entirety, and each part examined in its relationship to the whole. Note that there is no general constitutional rule against all searches and seizures, only those that are "unreasonable." The definition of "unreasonable" has provided much of the litigation in the area, and a substantial portion of this chapter will be devoted to this topic.

The next important term contained in the fourth amendment is that of "probable cause." Probable cause exists when there is reliable information based in facts which indicates that evidence will be found in a particular location

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

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

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

2. ***Manual for Courts-Martial, 1984***. Unlike the area of confessions and admissions covered in Article 31, Uniform Code of Military Justice (UCMJ), there is no basis in the UCMJ for the military law of search and seizure. By a 1980 amendment to the *Manual for Courts-Martial* [hereinafter MCM], the Military Rules of Evidence [hereinafter Mil.R.Evid.] were enacted. The Military Rules of Evidence provide extensive guidance in the area of search and seizure in rules 311-17, and anyone charged with the responsibility for authorizing and conducting lawful searches and seizures should be familiar with those rules. It must be noted, however, that, since the MCM is an Executive order, promulgated by the President as Commander in Chief, it is subordinate to both the Constitution, the UCMJ, and other laws applicable to the military that are legislatively enacted. Accordingly, decisions of the Supreme Court, the Court of Military Appeals, and the Navy-Marine Corps Court of Military Review interpreting the fourth amendment and applying it to the military will take precedence over, and effectively overrule or rescind, any MCM provisions to the contrary.

3. **Purpose and effect**. The purpose of both the constitutional and Mil.R.Evid. provisions dealing with searches and seizures is to protect the right of privacy guaranteed to all persons. Both provisions attempt this protection by forbidding use at trial (apply the exclusionary rule) of evidence obtained during or by exploiting an unlawful search or seizure.

B. The language of the law of search and seizure

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

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

(1) A quest for evidence;

(2) conducted by a government agent; and

(3) in an area where a reasonable expectation of privacy exists?

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

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

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

(1) A crime has been committed; and

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

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

(1) Written statements;

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

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

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

(1) A crime was committed; and

(2) the person to be apprehended is the person who committed the crime.

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

e. **Civil liability**. This is a term relatively new to the area of search and seizure law. It is a concept that assumes some importance as a result of the case of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court held that an agent of the Federal Government (an FBI agent) who violates the provisions of the fourth amendment (i.e., conducts an illegal search) while acting under color of Federal authority can be sued for money damages by the persons whose constitutional rights to privacy were violated. The Supreme Court, however, has held that military personnel may not maintain suits such as that authorized in *Bivens* to recover money damages from superior officers for alleged constitutional violations. *See Chappel v. Wallace*, 462 U.S. 296 (1983). Even so, military officials, like other Federal agents, have no absolute immunity against such suits brought by nonmilitary personnel. A military official will be afforded limited immunity from personal liability for the exercise of proper duties, provided the officer does not violate a constitutional right which a reasonable person should have known existed. Accordingly, care must be taken to ensure that every effort is made to comply with the requirements of the fourth amendment when authorizing or conducting searches or seizures. This is not to say that every erroneously authorized or conducted search will give rise to civil liability on the part of the commanding officer authorizing the search or the officer conducting it. What is required is that the search be premised on a reasonable belief in its validity, and that its conduct be reasonable under the circumstances of the case. This basis in good faith or reasonableness would be demonstrated by the facts that led the person in question to authorize the search or conduct it in a certain manner.

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

(1) **Private capacity**. Under certain circumstances, evidence obtained by an individual seeking to recover his or her own stolen personal property or the property of another may be admissible in a court-martial even if the individual acted without probable cause or a command authorization. In other words, actions that would cause invocation of the exclusionary rule if taken by a governmental agent will not cause the same result if taken by a private citizen. Thus, in the case of *United States v. Volante*, 4 C.M.A. 689, 16 C.M.R. 263 (1954), the Court of Military Appeals upheld a Marine's larceny conviction where the evidence had been obtained by a co-worker's forcible entry into Volante's wall locker, after the co-worker was told that he might have to pay for the missing property if the thief were not found. This action clearly invaded a protected privacy area but, since it was taken by the co-worker for his own purposes and not as an agent of the government, no exclusion of evidence at trial was warranted. The remedy for Volante would have been to sue his co-worker in civil court for the forcible entry. It is crucial to note, however, that the absence of a law enforcement duty does not necessarily make a search purely personal or in an individual capacity. Except in the most extraordinary case, searches conducted by officers or senior noncommissioned officers would normally be considered "official" and therefore subject to the fourth amendment. Similarly, a search conducted by someone superior in the chain of command or with disciplinary authority over the person subject to the search normally would be considered "official" and not "private" in nature.

(2) **Foreign governmental capacity**. Evidence produced through searches or seizures conducted solely by a foreign government may be admitted at a court-martial if the foreign governmental action does not subject the accused to "gross and brutal maltreatment." If American officials participate in the foreign government's actions, the fourth amendment and MCM standards will apply. Mil.R.Evid. 311(c)(3) specifically provides that presence at a search or seizure conducted by a foreign government will not alone establish "participation" by U.S. officials, nor will action as an interpreter or intervention to prevent property damage or physical harm to the accused cause automatic application of fourth amendment standards.

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

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

(1) Unlawful weapons made unlawful by some law or regulation;

(2) contraband or items that may not legally be possessed;

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

(4) persons, when probable cause exists for apprehension;

(5) abandoned property which may be seized or searched for any or no reason, and by any person; and

(6) government property. With regard to government property, the following rules apply.

(a) Generally, government agents may search for and seize such property for any or no reason, and there is a presumption that no privacy expectation attaches. Mil.R.Evid. 316(d)(3).

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

C. Categorization of searches

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

1. **Probable cause searches based upon prior authorization**

a. **Civilian search warrants**. The Mil.R.Evid. specifically make use of the term "search warrant" only in connection with an express permission to search issued by competent civilian authority [*see* Mil.R.Evid. 315(b)(2)]. As we have seen from the fourth amendment, a search made by civilian authorities, whether Federal or state, must generally be based upon a written warrant, supported by oath or affirmation, authorized by a magistrate, and based upon probable cause. Where the military case relies upon a civilian search warrant, the military courts will look to procedures in that civilian jurisdiction and will assess the admissibility of any evidence based upon compliance with those requirements by the governmental agents involved.

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

In the typical case, the commander or other "competent military authority," such as an officer in charge, decides whether probable cause exists when issuing a search authorization. The practice of using commanding officers rather than military judges or magistrates to determine probable cause was challenged in *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979). In *Ezell*, the defense argued that, due to the obligations and considerations of command, commanding officers could never possess the necessary neutrality and detachment to fairly decide the issue of probable cause. This broad argument was rejected by the Court of Military Appeals. Still, although there is no per se exclusion of commanding officers, courts will decide, on a case-by-case basis, whether a particular commander was in fact neutral and detached. In reaction to some very stringent guidelines for commanders that were set forth in the *Ezell* decision, Mil.R.Evid. 315(d) provides that:

> An otherwise impartial authorizing official does not lose that character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a

pretrial authorization made by the United States district courts.

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

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

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

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

(2) **Jurisdiction over property**. Several topics must be considered when determining whether a commander can authorize the search of property. It is necessary to decide first if the property is government-owned and, if so, whether it is intended for governmental or private use. If the property is owned, operated, or subject to the control of a military person, its location determines whether a commander may authorize a search or seizure. If the private property is owned or controlled by civilians, the commander's authority does not extend beyond the limits of the pertinent command area.

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

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

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

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

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

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

d. **Delegation of power to authorize searches**

(1) Formerly, commanders delegated their power to authorize searches to their chief of staff, command duty officer, or even the officer of the day. This practice was found to be illegal in *United States v. Kalscheuer*, 11 M.J. 373 (C.M.A. 1981). In *Kalscheuer*, the court held that a commanding officer may not delegate the power to authorize searches and seizures to anyone except a military judge or military magistrate. The court decided that most searches authorized by delegees such as CDO's would result in unreasonable searches or seizures in violation of the fourth amendment. The *Kalscheuer* case did recognize an exception to this general prohibition against delegation of authority. If full command responsibility "devolves" upon a subordinate, that person may authorize searches and seizures since the subordinate in such cases is acting as the commanding officer. General command responsibility does not automatically devolve to the CDO, SDO, OOD, or even the executive officer simply because the commanding officer is absent. Only when full command responsibilities devolve to a subordinate member of the command may that person lawfully authorize a search. If, for example, the CDO, SDO, or OOD must contact a superior officer or the CO prior to taking action on any matter affecting the command, full command responsibilities will not have devolved to that person; and, therefore, he or she could not lawfully authorize a search or seizure. Guidance on this matter has been promulgated by CINCLANTFLT, CINCPACTFLT, and CINCUSNAVEUR. Until the courts provide further guidance on this issue, readers should follow the guidance set forth by their respective CINC's/CG's.

(2) *Kalscheuer* held that delegation of authority to authorize searches and seizures would be lawful if the delegation were to either a military judge or military magistrate. No procedures presently exist in the Navy or Marine Corps to delegate the power to authorize searches or seizures to military judges or military magistrates. Unless such a procedure is authorized by the Secretary of the Navy, no such delegation should be attempted.

e. The requirement of neutrality and detachment

As noted earlier, the defense argued in *Ezell* that a military commander could never be neutral and detached when authorizing searches because a commanding officer's duties include prosecutorial functions. The court did not agree and instead held that whether a commander was neutral and detached when acting on a request for search authorization would be determined on a case-by-case basis. The court promulgated certain rules that, if violated, will void any search authorized by a commanding officer on the basis of lack of neutrality and detachment. These rules are designed to prevent an individual who has entered the "evidence-gathering process" from thereafter acting to authorize a search. They are spelled out to a certain degree in the *Ezell* decision, but were clarified to a greater extent by the drafters of the new rules. The intent of both the court's decision and the rules of evidence is to maintain impartiality in each case. Where a commander has become involved in any capacity concerning an individual case, the commander should carefully consider whether his or her perspective can truly be objective when reviewing later requests for search authorization.

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

f. The requirement of probable cause

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

(a) A crime has been committed; and

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

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

Mil.R.Evid. 315 allows probable cause to be based either wholly or in part on hearsay information.

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

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

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

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

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

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

-1- **Prior record as a reliable informant**. Has the informant given information in the past that proved to be accurate?

-2- **Corroborating detail**. Has enough detail of the informant's information been verified to imply that the remainder can reasonably be presumed to be accurate? This would be particularly applicable where the informant is not known (e.g., an anonymous telephone call).

-3- **Statement against interest**. Is the information given by the informant sufficiently adverse to the pecuniary or penal interest of the informant to imply that the information may reasonably be presumed to be accurate?

-4- **Good citizen**. Is the character of the informant, as a person known by the individual making the probable cause determination, such as to make it reasonable to presume that the information is accurate?

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

Until 1984, Mil.R.Evid. 315(f)(2) followed the prevailing Federal rule that absolutely required the authorizing official to inquire into the informant's basis of knowledge and believability. This "two-prong" test was taken from *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969). Most appellate courts felt that each prong of the test had to be satisfied before a magistrate could conclude that probable cause to search existed. In *Illinois v. Gates*, 462 U.S. 213 (1983), however, the Supreme Court rejected the notion that rigid compliance with both parts of the *Aguilar-Spinelli* test is required. Instead, the Court fashioned a totality of circumstances test to determine the existence of probable cause. The question for the authorizing official is simply whether there is a "fair probability" that the evidence sought will be found in the place to be searched. Although the informant's basis of knowledge and believability are still extremely important factors, reviewing courts need not strictly rely on the *Aguilar-Spinelli* test if the authorizing official had a "substantial basis" for determining that probable cause existed.

The totality of the circumstances test enunciated in *Illinois v. Gates, supra,* was endorsed by the Court of Military Appeals in *United States v. Tipton,* 16 M.J. 283 (C.M.A. 1983) and formed the basis for a 1984 amendment to Mil.R.Evid. 315(f)(2), deleting the *Aguilar-Spinelli* standard. Although the two prongs of this standard are no longer independent requirements, they continue to provide a useful structure to probable cause determination.

In *United States v. Fimmano,* 8 M.J. 197 (C.M.A. 1980), the court held that individuals presenting information to an authorizing officer while requesting a search authorization must do so under oath or affirmation. In *United States v. Stuckey,* 10 M.J. 347 (C.M.A. 1981), the majority of the court overruled *Fimmano* and held that an oath or affirmation was not strictly required. Nevertheless, Chief Judge Everett recommended that an oath or affirmation be administered because it enhances believability of the information presented. Therefore, if circumstances permit, an oath or affirmation should be administered.

g. The use of a writing in the search authorization

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

The Judge Advocate General of the Navy has recommended the use of the standard request for search authorization and record of search authorization form set forth in appendix A-1-n to the *JAG Manual.* Should the exigencies of the situation require an immediate determination of probable cause, with no time to use the form, make a record of all facts utilized and actions taken as soon as possible after the events have occurred.

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

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

2. **Probable cause searches without prior authorization**

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

a. **Exigency search**. This type of search is permitted by Mil.R.Evid. 315(g) under circumstances demanding some immediate action to prevent removal or disposal of property believed, on reasonable grounds, to be evidence of crime. Although the exigencies may permit a search to be made without the requirement of a search authorization, there still must be sufficient reliable information to support probable cause.

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

(1) **Insufficient time**. No authorization need be obtained where there is probable cause to search, and there is a reasonable belief that the time required to obtain an authorization would result in the removal, destruction, or concealment of the property or evidence sought. Although both military and civilian case law, in the past, have applied this doctrine almost exclusively to automobiles, it now seems possible that this exception may be a basis for entry into barracks, apartments, etc. in situations where drugs are being used. In *United States v. Hessler*, 7 M.J. 9 (C.M.A. 1979), the Court of Military Appeals found that an OOD, when confronted with the unmistakable odor of burning marijuana outside the accused's barracks room, acted correctly when he demanded entry to the room and placed all occupants under apprehension without first obtaining the commanding officer's authorization for his entry. The fact that he heard shuffling inside the room, and was on an authorized tour of living spaces, was considered crucial, as well as the

fact that the unit was overseas. The court felt that this was a "present danger to the military mission," and thus military necessity warranted immediate action.

(2) **Lack of communication**. Action is permitted in cases where probable cause exists and destruction, concealment, or removal is a genuine concern, but communication with an appropriate authorizing official is precluded by reasons of military operational necessity. Mil.R.Evid. 315(g)(2). For instance, where a nuclear submarine, or a Marine unit in the field maintaining radio silence, lacks a proper authorizing official (perhaps due to some disqualification of the commander on neutrality grounds), no search would otherwise be possible without breaking the silence and perhaps imperiling the unit and its mission.

(3) **Search of operable vehicles**. This type of search is based upon the United States Supreme Court's creation of an exception to the general warrant requirement where a vehicle is involved. Two factors are controlling. First, a vehicle may easily be removed from the jurisdiction if a warrant or authorization were necessary; and second, the Court recognizes a "lesser expectation of privacy" in automobiles. In the military, the term "vehicle" includes vessels, aircraft, and tanks, as well as automobiles, trucks, etc. In 1982, the U.S. Supreme Court attempted to clear up the confusion resulting from a number of earlier contradictory cases by defining a clear rule for searches of operable automobiles. If probable cause exists to believe that evidence will be found in the vehicle, then authorities may search the entire vehicle and any containers found therein in which the suspected item might reasonably be found. All of this can be done without an authorization. It is not necessary to apply this exception to government vehicles, as they may be searched anytime, anyplace, under the provisions of Mil.R.Evid. 314(d).

3. **Searches not requiring probable cause**

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

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

b. **Consent searches**. If the owner, or other person in a position to do so, consents to a search of his person or property over which he has control, a search may be conducted by anyone for any reason (or for no reason) pursuant to Mil.R.Evid. 314(e). If a free and voluntary consent is obtained, no probable cause is required. For example, where an investigator asks the accused if he "might check his

personal belongings" and the accused answers, "Yes ... it's all right with me," the Court of Military Appeals has found that there was consent. The court has also said, however, that "mere acquiescence in the face of authority is not consent." Thus, where the commanding officer and first sergeant appeared at the accused's locker with a pair of bolt cutters and asked if they could search, the accused's affirmative answer was not consent. The question in each case will be whether consent was freely and voluntarily given. Voluntary consent can be obtained from a suspect who is under apprehension if all other factors indicate it is not mere acquiescence.

Except under the Navy's urinalysis program, there is no absolute requirement that an individual who is asked for consent to search be told of the right to refuse such consent, nor is there any requirement to warn under article 31b, even when the individual is a suspect before requesting consent. (OPNAVINST 5350.4B currently requires the Navy to inform a member of his right to refuse a consent urinalysis. The Marine Corps program, as outlined in MCO P5300.12 of 25 June 1984, Change 3, 1988 has no such requirement.) Both warnings can help show that consent was voluntarily given. The courts have been unanimous in finding such warnings to be strong indicia that any waiver of the right to privacy thereafter given was free and voluntary.

Additionally, use of a written consent to search form is a sound practice. *See* JAGMAN, app. A-1-o. Appendix II of this chapter provides a form which can be utilized for the consensual obtaining of a urine sample. Remember that, since the consent itself is a waiver of a constitutional right by the person involved, it may be limited in any manner or revoked at any time. The fact that you have the consent in writing does not make it binding on a person if a withdrawal or limitation is communicated. Refusing to give consent, or revoking it, does not then give probable cause where none existed before: one cannot use the legitimate claim of a constitutional right to infer guilt or that the person "must be hiding something."

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

As previously noted, we use the term control over property rather than ownership. For instance, if Seaman Jones occupies a residence with her male companion, Jack Tripper, Jack can consent to a search of the residence. Suppose, however, that Seaman Jones keeps a large tin box at the residence to which Jack is not allowed access. The box would not be subject to a search based upon Jack's consent. Normally, he could only validly consent to a search of those places or areas where Seaman Jones has given him "control." However, if officials requesting consent reasonably believed in "good faith" that Tripper had authority to authorize a search of Jones' box, even though in fact he did not, his consent is valid.

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

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

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

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

(1) An offense has been or is being committed; and

(2) the person to be apprehended committed or is committing the offense.

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

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

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

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

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

D. "Plain view" seizure

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

E. The use of drug-detector dogs

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

1. The first situation is based on *United States v. Rivera*, 4 M.J. 215 (C.M.A. 1978). Rivera was apprehended at the installation gate after a drug-detector dog alerted on his person and the area in which he had been seated in a taxicab. The use of the dog during a gate search conducted on an overseas installation was considered permissible. The dog's alert could be used to establish probable cause to apprehend the accused. All evidence obtained was held to be admissible. Recently, the Court of Military Appeals held that the use of detector dogs at gate searches in the United States was also reasonable.

2. In *United States v. Grosskreutz*, 5 M.J. 344 (C.M.A. 1978), the Court of Military Appeals permitted the use of a detector dog to obtain admissible evidence in a situation other than a gate search. In this case, a detector dog was brought to an automobile believed to contain marijuana. The dog alerted on the car's rear wheels and exterior, which prompted the police to detain the accused. The proper commander was then notified of this "alert" and the other circumstances surrounding this case. The search of the vehicle was then conducted pursuant to the authorization of the commander.

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

The facts of this case indicate that close attention must be given to establishing the reliability of the informers in this situation (i.e., the dog and dog handler). The drug-detector dog is simply an informant, albeit with a longer nose and a somewhat more scruffy appearance. As in the usual informant situation, there must be a showing of both factual basis (i.e., the dog's alert and surrounding circumstances and the dog's reliability). This reliability may be determined by the commanding officer through either of two commonly used methods. The first method is for the commanding officer to observe the accuracy of a particular dog's alert in a controlled situation (i.e., with previously planted drugs). The second method is for the commanding officer to review the record of the particular dog's previous performance in actual cases (i.e., the dog's success rate). Although either of these

methods may be sufficient by themselves for a determination that a dog is reliable, both should be used whenever practicable. For more information on the use of military working dogs as drug detectors, and establishing their reliability as such, see OPNAVINST 5585.2A (*Military Working Dog Manual*) of 7 June 1988.

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

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

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

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

F. Body views and intrusions

Under certain circumstances defined in Mil.R.Evid. 312, evidence that is the result of a body view or intrusion will be admissible at court-martial. There are also situations where such body views and intrusions may be performed in a nonconsensual manner and still be admissible. Despite this fact, article 31 need not be complied with if all requirements of Mil.R.Evid. 312 are met. Body views and intrusions fall into three categories: visual examinations of the body; intrusion into body cavities; and seizure of body fluids.

1. **Visual examinations of the body**. Visual examinations of the unclothed body are admissible evidence when the subject of the examination consents to the view. In essence, this type of examination is treated like any other consent search pursuant to Mil.R.Evid. 314(e). In addition to these consensual views, involuntary views will produce admissible evidence if taken under any of the following circumstances:

a. Pursuant to a valid inspection or inventory performed in accordance with Mil.R.Evid. 313, discussed below;

b. pursuant to a search upon entry to a U.S. installation, aircraft, or vessel abroad performed in accordance with Mil.R.Evid. 314(c), or a border search performed in accordance with Mil.R.Evid. 314(b) (visual examinations may be performed pursuant to one of these two provisions only if there is a reasonable suspicion that a weapon, contraband, or evidence of a crime is concealed on the body of the person to be searched);

c. pursuant to a search within a jail or confinement facility performed in accordance with Mil.R.Evid. 314(h) (such a visual examination may be performed only if it is reasonably necessary to maintain the security of the institution or its personnel);

d. pursuant to a search incident to a lawful apprehension performed in accordance with Mil.R.Evid. 314(g);

e. pursuant to an emergency search conducted to save an individual's life, or for related purposes, and performed in accordance with Mil.R. Evid. 314(i); or

f. pursuant to any probable cause search performed in accordance with Mil.R.Evid. 315.

Any visual examination of the unclothed body should be conducted whenever practicable by a person of the same sex as that of the person being examined.

2. **Intrusion into body cavities**. A reasonable nonconsensual intrusion into the mouth, nose, and ears is permissible when an examination of the unclothed body would be permitted, as discussed above. Nonconsensual intrusions into other body cavities are permitted only under the following circumstances:

a. To seize weapons, contraband, or evidence of a crime discovered pursuant to a lawful search (the seizure must be conducted in a reasonable fashion by a person with the appropriate medical qualifications); or

b. to search for weapons, contraband, or evidence of a crime pursuant to a lawful search authorization (the search must also be conducted by a person with the appropriate medical qualifications).

3. **Extraction of body fluids**. The nonconsensual extraction of body fluids (e.g., blood sample) is permissible under two circumstances:

a. Pursuant to a lawful search authorization; or

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

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

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

G. Inspections and inventories

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

2. **Inspections**. Mil.R.Evid. 313(b) defines "inspection" as an "examination ... conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle." Thus, an inspection is conducted to ensure mission readiness and is part of the inherent duties and responsibilities of those in the military chain of command. Because inspections are

intended to discover, correct, and deter conditions detrimental to military efficiency and safety, they are considered as necessary to the existence of any effective armed force and inherent in the very concept of a military organization.

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

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

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

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

command or appropriate supervisory position may inspect the personnel and property within his or her control.

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

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

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

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

For example, in *United States v. Mossbauer*, 20 C.M.A. 584, 44 C.M.R. 14 (1971), the accused was apprehended in town by civilian authorities for possession of marijuana and for indecent exposure. At 0530 the following morning, the commanding officer arrived at his office and read the log recording notification of the apprehension. A call to the local police revealed that the accused would not be released until later in the day. There existed an Army regulation in effect at that time which required the inventory of an absentee's personal effects immediately upon discovery of his absence in order to protect the absentee from theft or loss of his property. The commanding officer ordered an inventory of the accused's property. The inventory was conducted in such a way that it did not include major items of clothing contained in the accused's locker, but it did note minute particles of green vegetable matter found in the accused's field jacket. It was held that the inventory was merely a subterfuge for a search of the accused's locker without probable cause.

PART II - DRUG ABUSE DETECTION

"Not in My Navy" and "Standby" are the Navy and Marine Corps call to arms in the war on drugs. These succinct statements reflect our commitment to the elimination of illicit drugs and drug abusers from the naval establishment and the continued emphasis placed on deterrence, leadership, and expeditious action. While the options available to commanders in combatting drug abuse are many and varied, this section deals only with the urinalysis program and its limitations.

A. **General guidance**. The urinalysis programs of the Navy, Marine Corps, and Coast Guard were established primarily to provide a means for the detection of drug abuse and to serve as a deterrent against drug abuse. Some of the important directives concerning the program are: DoD Dir. 1010.1 of 16 Mar. 1983; OPNAVINST 5350.4B of 13 Sep. 1990; MCO P5300.12 of 25 June 1984, *as amended*, change 3; and COMDTINST 5355.1B of 21 Dec 89. Additional guidance is found in the Military Rules of Evidence. These rules and directives contain detailed guidelines for the collection, analysis, and use of urine samples.

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

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

1. **Search and seizure**

a. **Tests conducted with member's consent**. Members suspected of having unlawfully used drugs may be requested to consent to urinalysis testing. For consent to be valid, it must be freely and voluntarily given. In this regard, OPNAVINST 5350.4B provides that, prior to requesting consent, commands should advise the member that he or she is suspected of drug use and may decline to provide a sample. A recommended urinalysis consent form is provided as appendix II to this chapter. This additional advice is not required in the Marine Corps and Coast Guard.

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

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

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

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

b. selection, random or otherwise, of an entire subunit or identifiable segment of a command (e.g., an entire department, division, or watch section; all personnel within specific paygrades; all newly reporting personnel; or all personnel returning from leave, liberty, or UA); or

c. urinalysis testing of an entire unit.

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

3. **Service-directed testing**. Service-directed testing is actually nothing more than inspections of units expressly designated by the Chief of Naval Operations. These include: rehabilitation facility staff; security personnel; fleet "A" School candidates; officers and enlisted in the accession pipeline; and those executing PCS orders to an overseas duty station. *See* OPNAVINST 5350.4B, encl. (4).

4. **Valid medical purpose**. Blood tests or urinalyses may also be performed to assist in the rendering of medical treatment (e.g., emergency care, periodic physical examinations, and such other medical examinations as are necessary for diagnostic or treatment purposes). Do not confuse this with a fitness-for-duty examination ordered by a servicemember's command.

5. **Fitness-for-duty testing**. Categories of fitness-for-duty urinalysis testing are briefly described below. Generally, all urinalyses NOT the product of a lawful search and seizure, inspection, or valid medical purpose fall within fitness-for-duty/command-directed categories.

a. **Command-directed testing**. A command-directed test shall be ordered by a member's commander, commanding officer, officer in charge, or other authorized individual whenever a member's behavior, conduct, or involvement in an accident or other incident gives rise to a reasonable suspicion of drug abuse and a urinalysis has not been conducted on a probable cause or consensual basis. Command-directed tests are often ordered when suspicious or bizarre behavior does not amount to probable cause.

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

c. **Evaluation testing**. This refers to command-directed testing when a commander has doubt as to the member's wrongful use of drugs following a laboratory-confirmed urinalysis result. Evaluation testing should be conducted twice a week for a maximum of eight weeks and is often referred to as a "two-by-eight" evaluation.

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

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

The results of a command-directed/fitness-for-duty urinalysis may NOT be used against the member for any disciplinary purposes, nor on the issue of characterization of service in separation proceedings, except when used for impeachment or rebuttal in any proceeding in which evidence of drug abuse (or lack thereof) has been first introduced by the member. In addition, positive results obtained from a command-directed/fitness-for-duty urinalysis may not be used as a basis for vacation of the suspension of execution of punishment imposed under Article 15, UCMJ, or as a result of court-martial. Such result may, however, serve as the basis for referral of a member to a DoD treatment and rehabilitation program and as a basis for administrative separation.

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

D. **The collection process**. The weakest link in the urinalysis program chain is in the area of collection and custody procedures. Commands should conduct every urinalysis with the full expectation that administrative or disciplinary action might result. The use of chiefs, staff NCO's, and officers as observers and unit coordinators is strongly encouraged. Strict adherence to direct observation policy during urine collection to prevent substitution, dilution, or adulteration is an absolute necessity. Mail samples immediately after collection to reduce the possibility of tampering. Ensure all documentation and labels are legible and complete. Special attention

should be given to the ledger and chain of custody to ensure that they are accurate, complete, and legible. Additional guidance is provided in OPNAV 5350.4B, encl.(2), Appendix B, and appendix IV to this chapter.

E. Drug testing

1. **Field test**. As the name suggests, field tests are methods employed outside the laboratory to screen many of the commonly abused substances. Actual procedures employed vary, depending upon which testing equipment is being used, but general certification and quality assurance guidance can be found in OPNAVINST 5350.4B, encl.(4), Appendix C.

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

2. **Navy drug screening laboratories**. The Navy operates five drug screening laboratories in support of the Navy and Marine Corps urinalysis program worldwide. Their addresses, phone numbers, and areas of responsibility are contained in appendix V to this chapter.

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

FINDING THE EXISTENCE OF PROBABLE CAUSE TO ORDER A SEARCH

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

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

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

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

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

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

b. Is the person or place described with particularity?

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

5. Who is the source of this information?

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

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

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

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

Appendix I-a(1)

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

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

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

Appendix I-a(2)

SEARCH AUTHORIZATIONS: INFORMANT ADDENDUM

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

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

a. Questions to determine the informant's reliability:

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

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

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

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

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

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

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

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

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

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

Appendix I-b

SEARCHES: DESCRIBE WHAT TO LOOK FOR AND WHERE TO LOOK

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

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

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

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

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

a. Contraband: Something which is illegal to possess.

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

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

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

c. Evidence of crimes

(1) Fruits of a crime

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

Appendix I-c(1)

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

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

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

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

Appendix I-c(2)

URINALYSIS CONSENT FORM

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

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

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

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

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

_____

Signature

_____

Date

_____

Witness' Signature

_____

Date

Appendix II

USE OF DRUG URINALYSIS RESULTS

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

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

Appendix A to
Enclosure (4)

URINALYSIS

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

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

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

The unit coordinator should:

1. Ask for the member's ID card.

2. Compare the ID picture with the face of the member.

3. Copy the social security number from the ID card onto the urinalysis label and chain of custody.

4. Copy the name and social security number from the card into the urinalysis ledger.

5. Allow the subject to verify the label information and chain of custody form.

6. Place the label on a urine sample bottle and hand the bottle to member for production of a sample under supervision of observer.

7. When member returns the sample, ask the member if the bottle contains his/her urine.

8. Again, allow member to verify the information on the label, chain of custody form, and ledger.

9. Have member initial label.

10. Take sample bottle from bottom to confirm that it is warm.

Appendix IV(1)

11. Have member sign ledger.

12. Have observer sign ledger.

13. Have coordinator sign ledger.

14. Place bottle in original cardboard container.

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

The observer should:

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

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

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

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

5. Initial the ledger.

6. Sign the ledger.

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

Problems arise in the following situations:

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

2. When the observer is unprepared.

Appendix IV(2)

3. When the observer fails to initial the ledger.

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

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

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

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

8. When an atmosphere of confusion surrounds the collection.

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

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

Appendix IV(3)

DRUG SCREENING LABS

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

AREAS OF RESPONSIBILITY

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

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

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

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

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

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

Appendix V

RECORD OF AUTHORIZATION FOR SEARCH (see JAGMAN 0170)

RECORD OF AUTHORIZATION FOR SEARCH

1. At _____ (Time) on _____ (Date) I was approached by _____ (Name) in his capacity as _____ (Duty) who having been first duly sworn, advised me that he suspected _____ (Name) of _____ (Offense) and requested permission to search his _____ (Object or Place) for _____ (Items).

2. The reasons given to me for suspecting the above named person were:

_____

_____

_____

_____

_____

_____

_____

3. After carefully weighing the foregoing information, I was of the belief that the crime of _____ [had been] [was being] [was about to be] committed, that _____ was the likely perpetrator thereof, that a search of the object or area stated above would probably produce the items stated and that such items were [the fruits of crime] [the instrumentalities of a crime] [contraband] [evidence].

4. I have therefore authorized _____ to search the place named for the property specified, and if the property be found there, to seize it.

_____
Grade Signature Title

_____
Date and Time

INSTRUCTIONS

1. Although the person bringing the information to the attention of the individual empowered to authorize the search will normally be one in the execution of investigative or police duties, such need not be the case. The information may come from one as a private individual.

2. Other than his own prior knowledge of facts relevant thereto, all information considered by the individual empowered to authorize a search on the issue of probable cause must be provided

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under oath or affirmation. Accordingly, prior to receiving the information which purports to establish the requisite probable cause, the individual empowered to authorize the search will administer an oath to the person(s) providing the information. An example of an oath is as follows: Do you solemnly swear (or affirm) that the information you are about to provide is true to the best of your knowledge and belief, so help you God? (This requirement does not apply when all information considered by the individual empowered to authorize the search, other than his prior personal knowledge, consists of affidavits or other statements previously duly sworn to before another official empowered to administer oaths.)

3. The area or place to be searched must be specific, such as wall locker, wall locker and locker box, residence, or automobile.

4. A search may be authorized only for the seizure of certain classes of items: (1) fruits of a crime (the results of a crime such as stolen objects); (2) instrumentalities of a crime (example: search of an automobile for a crowbar used to force entrance into a building which was burglarized); (3) contraband (items, the mere possession of which is against the law--marijuana, etc.); or (4) evidence of crime (example: bloodstained clothing of an assault suspect).

5. Before authorizing a search, probable cause must exist. This means reliable information that would lead a reasonably prudent and cautious man to a natural belief that:

a. An offense probably is about to be, or has been committed;

b. Specific fruits or instrumentalities of the crime, contraband or evidence of the crime exist; and

c. Such fruits, instrumentalities, contraband, or evidence are probably in a certain place.

In arriving at the above determination it is generally permissible to rely on hearsay information, particularly if it is reasonably corroborated or has been verified in some substantial part by other facts or circumstances. However, unreliable hearsay cannot alone constitute probable cause, such as where the hearsay is several times removed from its source or the information is received from an anonymous telephone call. Hearsay information from an informant may be considered if the information is reasonably corroborated or has been verified in some substantial part by other facts, circumstances, or events. The mere opinion of another that probable cause exists is not sufficient; however, along with the pertinent facts, it may be considered in reaching the conclusion as to whether or not probable cause exists. If the information available does not satisfy the foregoing, additional investigation to produce the necessary information may be ordered.

CONSENT TO SEARCH (See JAGMAN 0170)

CONSENT TO SEARCH

I, _____, have been advised that inquiry is being made in connection with _____ _____ _____. I have been advised of my right not to consent to a search of [my person] [the premises mentioned below]. I hereby authorize _____ and _____, who [has] [have been] identified to me as _____ _____ to conduct a complete

Position(s)

search of my [person] [residence] [automobile] [wall locker] [_____] [_____] located at _____ _____.

I authorize the above listed personnel to take from the area searched any letters, papers, materials, or other property which they may desire. This search may be conducted on _____.

Date

This written permission is being given by me to the above named personnel voluntarily and without threats or promises of any kind.

_____

Signature

WITNESSES

_____

_____

A-1-o

MILITARY JUSTICE STUDY GUIDE

CHAPTER V

DISCOVERY AND REQUESTS FOR WITNESSES

A. **Introduction to discovery.** Discovery is the right before or during trial to examine (i.e., discover) information possessed by the other party to the trial. There are at least four basic reasons why discovery is valuable:

1. It helps to put the defense on an equal footing with the prosecution in terms of investigative resources;

2. it enables the defense to prepare a rebuttal to the charges (in this sense, discovery complements Articles 10, 30, and 35, UCMJ, which require that the accused be informed of the charges and be served with a copy of them);

3. it allows the government to identify and interview defense witnesses and to prepare to respond to the defense case-in-chief; and

4. it provides the basis for cross-examination and impeachment of witnesses at trial.

Both the government's and the accused's right to discovery under the UCMJ is implemented by various provisions of the *Manual for Courts-Martial, 1984* [hereinafter MCM] and rules developed by case law. Each of these MCM provisions sets forth certain limits relating to what may be discovered. These limits are rather broad compared to civilian procedures.

B. **Methods of discovery**

1. **Right to interview witnesses.** Article 46, UCMJ, provides that the "trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence . . . ." R.C.M. 701(e), MCM, 1984 [hereinafter R.C.M. ___], indicates that both counsel may interview a prospective witness for the other side (except the accused) without the consent of opposing counsel. The defense counsel must be given an ample opportunity to interview the accused and any other person.

2. **Pretrial investigation, Article 32, UCMJ**. When a general court-martial is contemplated, the Article 32, UCMJ, pretrial investigation provides a means for discovery. The pretrial investigating officer is bound to ascertain all available facts, "limited to the issues raised by the charges and to the proper disposition of the case." R.C.M. 405. The pretrial investigating officer is not limited by the rules of evidence and may consider the sworn statements of unavailable witnesses. Additionally, unsworn statements of available witnesses may be considered if the defense does not object. All available witnesses who appear reasonably necessary for a thorough and impartial investigation are required to be called at the article 32 investigation; however, an article 32 investigating officer does not have the power to subpoena civilian witnesses. Military witnesses are directed to attend by military orders.

The accused and the counsel are entitled to be present at all sessions of the pretrial investigation and to be confronted by all witnesses who testify, except as otherwise stated in R.C.M. 804(b)(2). R.C.M. 405(f). The accused is entitled to a copy of the report of investigation. R.C.M. 405(j)(3). Under R.C.M. 405(h), the accused has the right to cross-examine the witnesses and examine all other evidence considered by the investigating officer.

3. **Documents and other information possessed by the prosecution**. R.C.M. 701 implements the "equal access" doctrine embodied in Article 46, UCMJ, and provides for discovery in six areas:

a. **Papers accompanying the charges and the convening order**. As soon as practicable after charges have been served on the accused, the trial counsel shall provide copies of (or allow the defense to inspect) any paper which accompanied the charges when referred, the convening order and any amending order, and any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel. Normally, the following papers will accompany the charges:

(1) The report of the preliminary inquiry officer and statements of witnesses;

(2) the report of the Naval Investigative Service (NIS) and statements of witnesses;

(3) recommendations as to disposition by officers subordinate to the convening authority;

(4) the report of the pretrial investigating officer, either formal or informal, and the transcript of pretrial investigation;

(5) the staff judge advocate's advice to the officer exercising general court-martial jurisdiction pursuant to Article 34, UCMJ;

(6) any papers relating to previous withdrawal or referral or charges; and

(7) the accused's service record.

b. **Documents, tangible objects, and reports**. Upon defense request, the government shall permit the defense to inspect books, papers, documents, photographs, objects, buildings or places which are in the possession, custody, or control of military authorities and are material to defense preparation or are to be used by the government or were obtained from the accused. Additionally, any results or reports of physical or mental examination and of scientific tests or experiments which are material to the preparation of the defense or are to be used by the prosecution need be revealed to the defense if requested.

c. **Witnesses**. Before trial, the trial counsel shall notify the defense of the names and addresses of the witnesses the government intends to call in the case-in-chief or to specifically rebut an announced defense of alibi, innocent ingestion in a drug-use case, or lack of mental responsibility.

d. **Prior conviction of accused offered on the merits**. Before arraignment, the trial counsel shall notify the defense of any records of prior civilian or court-martial convictions that the government may attempt to introduce at trial.

e. **Information to be offered at sentencing**. Upon defense request, the trial counsel shall permit the defense to inspect written material that will be presented by the prosecution at the presentencing proceedings and notify the defense of the names and addresses of the witnesses the trial counsel intends to call at the presentencing proceedings.

f. **Evidence favorable to the defense**. The trial counsel shall disclose to the defense the existence of evidence known to the trial counsel which tends to negate or reduce the guilt of the accused of the offense charged or reduce the punishment.

R.C.M. 701 does provide, however, that nothing in this rule should be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence (e.g., classified information or the identity of informants).

4. **Disclosure by the defense**

a. Before the beginning of trial, the defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, that the defense intends to call in the defense case-in-chief. The defense shall also provide all sworn or signed statements made by the witnesses that it is aware of to the trial counsel.

b. Before the beginning of trial, the defense shall notify the trial counsel of its intent to offer the defense of alibi, lack of mental responsibility or, in a drug-use case, the defense of innocent ingestion. The defense shall also notify the government of its intent to use expert testimony as to the accused's mental condition.

c. The defense shall also notify the trial counsel of the names and addresses of all witnesses that it intends to call at the presentencing proceeding. Furthermore, the defense shall allow the trial counsel to inspect all written material it intends to offer in presentencing.

5. **Depositions**. Article 49, UCMJ; R.C.M. 702.

a. R.C.M. 702 provides that oral or written depositions are normally taken to preserve the testimony of a witness who may not be available for trial. However, since Article 49, UCMJ, and R.C.M. 702, indicate that the convening authority may deny a request for a deposition only for "good cause," circumstances may exist where the defense counsel is entitled to use a deposition for discovery purposes. The term "good cause" has not as yet been judicially defined by military cases. Where a deposition is the only means by which defense counsel is able to interview a government witness, good cause may not exist for its denial. For example, assume that a witness claims he is unable to make any arrangements for an interview before trial. Only with the legal compulsion afforded by a deposition can defense counsel have the ample opportunity to contact this witness. In *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976), the Court of Military Appeals considered the trial judge's failure to grant the defense a continuance for a deposition inconsistent with the broad discovery concepts within the military judicial system. The witness was unavailable for the article 32 investigation and the deposition of the witness was subsequently requested because of that fact. The failure to grant a motion for continuance to depose the witness required reversal by the court.

b. Article 49, UCMJ, and R.C.M. 702, authorize both oral and written depositions. The Court of Military Appeals has held that the right to confront witnesses guaranteed by the sixth amendment requires that the accused be afforded the opportunity to be present at the taking of depositions which are to be considered on the merits of the case.

6. Prior statements

The Jencks Act, 18 U.S.C. § 3500 (1982), requires the government to produce any statements, upon defense request, made by a witness whom the government has called to testify at a court-martial. Mil.R.Evid. 612 requires disclosure by the government of any report or other document that the witness has used to refresh his memory for the purpose of testifying, before or during trial. With the creation of R.C.M. 914, we see a codification of the Jencks Act which now allows both the government and defense to request to examine any statement of a witness, except the accused, that relates to their testimony. Of practical importance is the fact that a possible sanction for failure to comply with the Jencks Act, Mil.R.Evid. 612, or R.C.M. 914 is for the military judge to strike the witnesses' testimony. Legal officers should take care to ensure that all notes of interviews with witnesses, handwritten statements, or drafts of statements are kept and turned over to the trial counsel prior to court-martial. Failure to preserve such items, as discussed, could result in lost cases at courts-martial. For a more thorough discussion on the issue of loss/destruction, however, see *United States v. Jones*, 20 M.J. (N.M.C.M.R. 1985).

C. Requests for witnesses

1. Compulsory process

a. **Introduction**. The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . ." This is the basic provision relating to compulsory process. In the military, Articles 46, 47, and 49, UCMJ, implement this constitutional provision.

(1) **Article 46** gives the trial and defense counsel equal opportunity to obtain witnesses and other evidence in accordance with such rules as the President may prescribe. These rules are found in the MCM and will be discussed below.

(2) **Article 47** provides criminal sanctions for military or civilian witnesses who have been subpoenaed and fail to appear or testify.

(3) **Article 49** allows for the taking of depositions at any time after charges have been preferred (that is, signed and sworn to by the accuser).

(4) **Subpoena**. A subpoena is an order issued to a witness to appear at a designated proceeding and testify. A subpoena *duces tecum*, which is a similar order, requires the witness to bring with him to the proceeding certain documents or evidentiary objects. In the military, there is no distinction; the

subpoena contained in Appendix 7 of the MCM, a copy of which appears on page 5-7, below, contains a section where the witness may be ordered to bring with him any documents, evidentiary items, etc.

b. Articles 46 and 47, UCMJ implement the sixth amendment right to compulsory process in the military justice system. Article 46 provides that the prosecution, defense, and the court-martial "shall have equal opportunity to obtain evidence in accordance with such regulations as the President may prescribe." Travel expenses and witness fees incurred in the production of defense witnesses are paid for by the government. These funds come from the operating budget of the command convening the court-martial. Article 47(d), UCMJ. Where the parties desire to preserve the testimony of a witness who may be unavailable for trial, article 47 provides for compelling the attendance of such a witness at the taking of a deposition. There are three ways in which this production of evidence can be compelled: subpoena (for civilian witnesses), subpoena *duces tecum* (for production of records, writings, etc.), and military orders (for military witnesses, including civilian employees). The following table illustrates when the subpoena power and depositions may be utilized.

LEGAL REFERENCES FOR COMPULSORY PROCESS

TYPE	SUBPOENA	DEPOSITION
NJP	No provision	Art. 49*, UCMJ
PTI Article 32	No provision (except for military witnesses; by military order), invitational travel orders may be issued to civilians requested to testify. *See* R.C.M. 702.	Art. 49*, UCMJ
SCM	Art. 46, UCMJ R.C.M. 703	Art. 49, UCMJ R.C.M. 702
SPCM	Art. 46, UCMJ R.C.M. 703	Art. 49, UCMJ R.C.M. 702
GCM	Art. 46, UCMJ R.C.M. 703	Art. 49, UCMJ R.C.M. 702
Court of Inquiry	Art. 135(f), UCMJ JAGMAN, § 0204(b)(7)	Art. 49*, UCMJ
Other Fact-finding Bodies	No provision *See* JAGMAN, § 0204(c)(6) +	Art. 49*, UCMJ

* Deposition may be used before these bodies and may be taken if charges have been preferred. *See* Article 49(a), UCMJ; R.C.M. 702.
+ Unless convened under article 139, UCMJ, and JAGMAN, Ch. 4

SUBPOENA

The President of the United States, to _____.
(Name and Title of Person being Subpoenaed)

You are hereby summoned and required to appear on the _____ day of _____, 19 _____, at _____ o'clock _____ .M., at _____, (before _____
(Place of Proceeding) *(Name and Title of Deposition Officer)*
designated to take your deposition) (a _____ court-martial of the United States) (a court of inquiry), appointed by _____, dated _____
(Identification of Convening Order or Convening Authority)
19 _____, to testify as a witness in the matter of _____
(Name of Case)
(and bring with you _____).
(Specific Identification of Documents or Other Evidence)

Failure to appear and testify is punishable by a fine of not more than $500 or imprisonment for a period not more than six months, or both. 10 U.S.C. § 847. Failure to appear may also result in your being taken into custody and brought before the court-martial (_____)under a Warrant of Attachment (DD Form 454). Manual for Courts-Martial R.C.M. 703(e)(2)(G).

Bring this subpoena with you and do not depart from the proceeding without proper permission.

Subscribed at _____ this _____ day of _____ 19 _____

_____
(Signature (See R.C.M. 703(e)(2)(C))

The witness is requested to sign one copy of this subpoena and to return the signed copy to the person serving the subpoena.

I hereby accept service of the above subpoena.

_____
Signature of Witness

NOTE: If the witness does not sign, complete the following:

Personally appeared before me, the undersigned authority, _____,
who, being first duly sworn according to law, deposes and says that at _____, on _____
19 _____, he personally delivered to _____ in person a duplicate of this subpoena.

_____ _____
Grade *Signature*

Subscribed and sworn to before me at _____, this _____ day of _____ 19 _____.

_____
Grade

_____ _____
Official Status *Signature*

DD FORM 453 84 AUG — EDITION OF OCT 80 IS OBSOLETE. — S/N 0102-LF-000-4530

2. **The process for determining who will be called as witnesses.** Under R.C.M. 703, the trial counsel must take timely and appropriate action to provide for the attendance of the witnesses who have personal knowledge of the facts at issue in the case for both the prosecution and defense.

a. **Prosecution witnesses.** If trial counsel is satisfied that a prosecution witness on the merits is both relevant and necessary, then the convening authority should produce the witness for trial. Although the ultimate decision belongs to the convening authority, failure to produce these witnesses may have a detrimental impact on the outcome of the case. As to the issue of presentencing, the trial counsel and the convening authority should be further satisfied that production of the witness is appropriate under R.C.M. 1001(e).

b. **Defense witnesses.** Trial counsel shall arrange for the presence of any witness listed by the defense unless the trial counsel contends that the witness' production is not required under the rules of court-martial. If the trial counsel contends production is not required, the defense can renew the matter at trial before the military judge. R.C.M. 703(c)(2)(D).

(1) The defense request for the personal appearance of a witness on the merits must be submitted in writing together with a statement signed by counsel requesting the witness. The request must contain the following:

(a) The telephone number, if known, as well as the location or address of the witness; and

(b) a synopsis of the expected testimony of the witness that is sufficient to show its relevance and necessity.

(2) In determining whether the personal appearance of a defense witness requested on the merits is necessary, the convening authority and/or the military judge will refer to the following factors for guidance:

(a) The issues involved in the case;

(b) the importance of the requested witness to these issues (Does the testimony of the witness tend to prove or disprove a fact in issue in the case?);

(c) the cumulative impact of the witness' testimony in light of other witnesses; and

(d) the availability of any acceptable evidentiary substitutes for the production of the witness.

(3) The defense request for the personal appearance of a witness on presentencing shall contain:

(a) The telephone number, if known, as well as the location or address of the witness;

(b) a synopsis of the expected testimony of the witness; and

(c) the reasons why the personal appearance of the witness is necessary under the standards set forth in R.C.M. 1001(e).

(4) R.C.M. 1001(e) states that the requirement for the personal appearance of a witness in the presentencing proceeding differs substantially from the requirement for the personal appearance of a witness to be offered on the merits. Accordingly, when a defense counsel requests a witness on presentencing, and the convening authority or military judge makes a determination as to the production of the witness, the defense request should set forth, and the convening authority or military judge must consider, the following factors:

(a) Whether the testimony is necessary for consideration on a matter of substantial significance to a determination of an appropriate sentence, including evidence needed to resolve alleged inaccuracies or disputes as to the material facts;

(b) whether the weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(c) whether the trial counsel is unwilling to enter into a stipulation of fact containing the matters to which the witness is expected to testify, provided the case is not so extraordinary that a stipulation would be an insufficient substitute for the testimony;

(d) whether other forms of evidence are available, such as a deposition or former testimony, and such alternative forms of evidence are sufficient to meet the needs of a court-martial in the determination of an appropriate sentence; and

(e) whether the significance of the personal appearance of the witness is outweighed by the practical difficulties involved in the production of the witness. Such practical difficulties include, but are not limited to, costs involved, potential delays, significant interference with command functions if the witness is produced, and the timeliness of the request.

Only if all of the five above-stated factors are considered and resolved in favor of the defense must a witness be produced for presentencing proceedings through a subpoena or travel orders at government expense. As a practical matter, it is very difficult for the defense to compel the command to produce a presentencing witness.

c. Action taken to produce required witness

-- If the military judge determines that a defense witness is required to be present to testify at a trial either on the merits or at presentencing, the government must produce the witness (at government expense) or abate the proceedings. The government may secure the attendance of a witness as follows:

(a) Military witnesses in the same location as the trial or other proceeding may be informally requested to attend through their respective commanding officers. If a formal written request is required, it should be forwarded through the regular channels.

In the event that a military witness is located at a place other than the location of the trial, and travel at government expense is required, "the appropriate superior will be requested to issue the necessary orders." Practically speaking, the convening authority will contact the command to which the witness is attached and will furnish the accounting data for the witness. "The cost of travel and per diem of military personnel and civilian employees of the Department of the Navy . . . will be charged to the operation and maintenance allotment which supports temporary additional duty travel for the convening authority of the court-martial." JAGMAN, § 0145(a)(1).

(b) Civilian witnesses are obtained by the issuance of a subpoena. The subpoena is prepared in duplicate. Both copies will be mailed to the witness, along with a return envelope addressed to the trial counsel of the case for return of one of the copies. The witness will bring the other copy of the subpoena with him to trial. If the trial counsel has not verbally explained this procedure to the witness prior to mailing the two copies of the subpoena, he may wish to include a letter of explanation.

In some cases, particularly where doubt exists as to whether or not a civilian witness will appear for trial, formal service of a subpoena will be required. Usually an officer is detailed personally to carry a copy of the subpoena to the witness, ascertain the witness' identity, and present the witness with the copy of the subpoena. When this is done, the officer serving the subpoena on the witness will execute an oath to the effect that he personally delivered a copy of the subpoena to the witness.

For both Navy and Marine Corps convening authorities, costs for military or civilian witnesses are charged to the operating budget which supports the temporary additional duty travel for the convening authority. JAGMAN, § 0145(a).

MILITARY JUSTICE STUDY GUIDE

CHAPTER VI

MILITARY JUSTICE INVESTIGATIONS

A. **Introduction.** This chapter discusses the procedure for receiving and investigating complaints of misconduct and also considers the responsibility of a commanding officer in exercising his prosecutorial discretion in disposing of such complaints.

B. **Preliminary investigation of suspected offenses**

1. **Initiation of charges**

a. ***Complaints.*** *This is nothing* more than bringing to the attention of proper authority the known, suspected, or probable commission of an offense under the UCMJ or a violation of a civil law. R.C.M. 301, MCM, 1984 [hereinafter R.C.M. ___].

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

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

c. **How may a complaint be initiated?** Common examples are:

(1) The complaint of a victim or his parents or friends or a spectator;

(2) receipt of a Shore Patrol report;

(3) receipt of an investigative report from NIS;

(4) receipt of sworn charges on a charge sheet (i.e., the actual preferral of charges);

(5) receipt of a NAVPERS 1626/7 (Report and Disposition of Offense(s) form), by far the most common source in the Navy, or by receipt of a Unit Punishment Book (UPB) form (NAVMC 10132), the Marine Corps equivalent to the NAVPERS 1626/7; and

(6) receipt of a locally prepared report chit.

d. **Duty to report offenses.** Article 1137, *U.S. Navy Regulations, 1990*, requires personnel of the naval service to report to proper authority offenses committed by persons in the naval service which come under their observation.

e. **To whom made**

(1) A complaint may be made to any person in military authority over the accused. R.C.M. 301(b), Discussion. This may be the CO, but normally it is submitted to a designated subordinate (such as the OOD, CDO, XO, the discipline officer, or the legal officer).

(2) The great majority of reports will be initiated by persons in military authority over the accused. These reports normally will be in writing on a report chit, and, regardless of who originally receives the report, it should be forwarded to the discipline/legal officer.

2. **Action upon receipt of complaint**

a. **Prompt action to determine disposition.** Upon receipt of charges or information of a suspected offense, proper authority (ordinarily the immediate commanding officer of the accused) shall take prompt action to determine what disposition should be made thereof in the interests of justice and discipline. R.C.M. 306(b), (c), Discussion.

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

(1) **Investigation by the Naval Investigative Service.** SECNAVINST 5520.3A of 17 August 1990.

(a) **General.** The Naval Investigative Service (NIS) is the primary investigative and counterintelligence agency for the Department of the Navy.

(b) **Mandatory referral to NIS.** Certain offenses, such as purely military offenses and very minor offenses, may be investigated by a person assigned to the local command. SECNAVINST 5520.3A, however, lists certain other offenses which must be referred to NIS for investigation. Specified on this list are the following offenses:

-1- Incidents of actual, suspected, or alleged major criminal offenses (defined as punishable by confinement for a term of more than one year), except those which are purely military in nature;

-2- actual, potential, or suspected sabotage, espionage, subversive activities, or defection;

-3- loss, compromise, leakage, unauthorized disclosure, or unauthorized attempts to obtain classified information;

-4- incidents involving ordnance;

-5- incidents of perverted sexual behavior;

-6- damage to government property which appears to be the result of arson or other deliberate attempt;

-7- incidents involving narcotics, dangerous drugs, or controlled substances;

-a- It is NIS policy to decline investigation in cases involving "user amounts" of marijuana, amphetamines, and barbiturates.

-b- Note that such instances must still be reported to NIS, but NIS has the discretion to decline the investigation, in which case the incident should be investigated within the command. If the base/installation has a Criminal Investigation Department (CID), consideration should be given to requesting their assistance.

-8- thefts of personal property when ordnance, contraband, or controlled substances are involved and thefts of items of a single or aggregate value of $500 or more, and situations where morale and discipline are adversely affected by an unresolved series of thefts of privately owned property;

-9- death of military personnel, dependents, or Department of the Navy employees, occurring on Navy or Marine Corps property, when criminal causality cannot be firmly excluded; and

-10- fire or explosion of questionable origin affecting property under Navy or Marine Corps control.

Note: Most, if not all, of the incidents listed in -2- through -10- would constitute major criminal offenses as defined in subparagraph -1- above, but these incidents are separately enumerated in SECNAVINST 5520.3A as matters which must be referred to NIS.

(c) **NIS may decline investigation**. NIS may decline to investigate any case which in its judgment would be fruitless and unproductive.

(d) **Command action held in abeyance**. Upon referral of a case to NIS, commanding officers shall refrain from taking action with a view to trial by court-martial, but shall refer the matter to the senior resident agent of the cognizant NIS office or his nearest representative.

(e) **Referral by NIS to other investigative agencies**. *See* MCM, 1984, app. 3. If a case is referred by NIS to another Federal investigative agency, any resulting prosecution will be handled by the cognizant U.S. Attorney with the following exceptions:

-1- If both a major Federal offense and a military offense have been committed, naval authorities may investigate all military offenses and such civil offenses as may be practicable and may hold the accused for prosecution. Such actions must be reported to the Judge Advocate General and the cognizant officer exercising general court-martial jurisdiction (OEGCMJ).

-2- If the U.S. Attorney declines prosecution, NIS may resume investigation and the command may prosecute.

-3- If, while Federal authorities are investigating the matter, existing conditions require immediate prosecution by naval authorities, the OEGCMJ may seek approval from the U.S. Attorney or refer the issue to the Judge Advocate General.

-4- If an initial command investigation is necessary, either because immediate referral to NIS is impossible or because the necessity for such referral is not apparent, steps should be taken to preserve evidence and record changing conditions, and care should be taken not to compromise or impede any subsequent investigation.

(2) **Fact-finding bodies**

(a) Certain types of incidents or offenses may require exhaustive scrutiny. Examples are: ship groundings; shortages in accounts of ship's store, Navy Exchanges, etc.; extensive fire or explosion; capsizing of small boat; and other complex or serious incidents.

(2) In such cases, a fact-finding body should be convened. The regulations covering fact-finding bodies are contained in the *JAG Manual*. These bodies have thus become known as "*JAG Manual* investigations."

-1- The primary purpose of an administrative fact-finding body is to search out, develop, assemble, analyze, and record all available information about the matter under investigation. JAGMAN, § 0202b. Under appropriate circumstances, they may constitute the ideal method of investigating an alleged or suspected offense. If the only basis for an investigation is disciplinary action, a preliminary inquiry under R.C.M. 303, or a pretrial investigation under R.C.M. 405 and Article 32, UCMJ, should be conducted. JAGMAN, § 0208a.

-2- *JAG Manual* investigations are covered extensively in the Civil Law portion of the course.

3. **The preliminary inquiry**

a. **Command investigation.** The usual procedure, if the offense is relatively minor and is not under investigation by NIS or a fact-finding body, is for the command to appoint an individual to conduct a preliminary inquiry into the complaint. R.C.M. 303, Discussion. The following are recommended procedures which will facilitate the flow of cases through a command. Not all of the procedures are absolute requirements, and modifications should be made to suit the particular requirements of an individual command.

(1) Upon receipt of a report of an offense, the discipline/legal officer should draft charge(s) and specification(s) against the accused (in court-martial specification language whenever possible), using information set forth on the locally prepared report chit (or Shore Patrol report or base police report) and Part IV, MCM, 1984 for guidance. These charges should then be set forth on the NAVPERS 1626/7 for the Navy or the UPB for the Marine Corps.

(2) Using the accused's service record, the NAVPERS 1626/7 should be filled in, setting forth the data called for on the front page.

(3) The UPB does not serve the dual function of an investigative format and report chit. The initial information required on the UPB may be filled in. Instructions for the completion of the UPB are contained within chapter 2, MCO P5800.8B (LEGADMINMAN). Alternatively, a locally prepared preliminary inquiry report form may be used and later appended to the UPB.

(4) Type in charges and specifications as drafted by the discipline/legal officer in "DETAILS OF OFFENSE(S)." If there is inadequate space on the NAVPERS 1626/7 for the charges and specifications, type them on a separate sheet and staple it to the form. Type in the name and duty stations or residences of all witnesses then known. This information should be on the report chit.

(5) The person submitting the initial report will sign the NAVPERS 1626/7 in ink in the "PERSON SUBMITTING REPORT" block.

(6) The accused is called in for a personal interview with the discipline/legal officer for the limited purpose of informing the accused of his rights under Article 31(b), UCMJ. When the discipline/legal officer is completely satisfied that the accused understands the nature and effect of the Article 31(b), UCMJ warning, he will cause the accused to sign the "ACKNOWLEDGED" blank in the Article 31(b), UCMJ warning block on the NAVPERS 1626/7 and sign the "WITNESS" blank himself. For the Marine Corps, this would be Item 5 of the UPB.

(a) The discipline/legal officer should not interrogate the accused at this stage.

(b) Questioning the accused with a view toward obtaining a statement concerning the offenses of which he is suspected is better left to the preliminary inquiry officer (PIO), if one is appointed, who will be in a better position to give necessary warnings and ask appropriate questions after he has explored the evidence in the case.

(7) If authorized by the commanding officer, the discipline/ legal officer should determine and impose whatever restraint upon the accused is necessary pending disposition of the case and indicate the restraint imposed on the NAVPERS 1626/7. This could be accomplished by other officers designated by the commanding officer, such as the executive officer.

b. **Preliminary inquiry**. At this stage, Navy and Marine Corps procedures differ significantly. In the Marine Corps, the file containing the report chit and UPB are forwarded to the commanding officer who will conduct an inquiry

into the offense at office hours before imposing punishment. At small Navy commands, frequently the discipline/legal officer will conduct a more formal preliminary inquiry into the reported offense. If the discipline/legal officer does not perform the functions of a PIO, he should, after completing the above, forward the file to an officer of the command appointed to conduct a preliminary inquiry of the alleged offenses.

(1) The preliminary inquiry usually is conducted informally. The function of the person appointed to conduct the inquiry is to collect and examine all evidence that is essential to determine the guilt or innocence of the accused, as well as evidence in mitigation or extenuation. It is not the function of the PIO merely to prepare a case against the accused. R.C.M. 303, Discussion.

(2) After being given all of the information in the hands of the discipline officer, the PIO should obtain the following:

(a) Signed, and preferably sworn, statements from all material witnesses setting forth everything that they know about the case (Note: All witnesses interviewed should be listed in the appropriate blanks on the reverse side of the NAVPERS 1626/7);

(b) any real or documentary evidence which sheds light on the case;

(c) complete and accurate personal data concerning the accused in the "INFORMATION CONCERNING ACCUSED" block on the NAVPERS 1626/7; and

(d) complete and accurate information for the "REMARKS OF THE DIVISION OFFICER" block, based on a personal interview with the division officer of the accused. If the PIO is the division officer, he should so indicate.

(3) **Statement of the accused.** After examining other available evidence, the PIO should interview the accused with a view toward obtaining a statement concerning the offense(s). At the outset of the interview, the PIO must see that the accused is properly advised of his rights under Article 31(b), UCMJ.

Additionally, R.C.M. 303, Discussion sets forth basic considerations to be followed regarding actions on charges and emphasizes that the Military Rules of Evidence apply to the inquiry.

Because an accused being interviewed by an officer conducting a preliminary inquiry is likely to be deemed to be "in custody" at the time of the interview, prudence dictates that he be advised by the PIO of his right to consult with counsel. If an accused indicates that counsel consultation is desired, and either counsel is not physically available or the command declines to make counsel available, the appropriate remedy is to terminate any questioning of the accused.

(4) A summary of the above information should be set forth in the "COMMENT" block of the NAVPERS 1626/7, along with the signature of the PIO. He should attach to the NAVPERS 1626/7 the statements and documents collected during his investigation.

The PIO should prepare whatever charges he has probable cause to believe the accused committed if he feels the offense may be handled at a court-martial. This action is accomplished by filling out a charge sheet. The PIO should not sign and swear to the charges at this time. To do so constitutes "preferring charges" and may start the speedy trial clock discussed in chapter 12.

The PIO need not prepare a charge sheet in every case, but should in those cases which he feels are of sufficient gravity to warrant at least a trial by summary court-martial. If he has doubts, the discipline officer should be consulted.

(5) Recommendations should be made to the CO as to disposition of the case by filling in the "RECOMMENDATION AS TO DISPOSITION" block of the NAVPERS 1626/7. Such recommendations normally include the proper level of disposition, the proper punishment, together with rationale and/or supporting facts.

4. Final premast screening

a. After the PIO has completed his investigation and filed his report with the discipline/legal officer, the discipline/legal officer should review the material in order to make a recommendation as to disposition of the offense charged and to ensure completeness of the report.

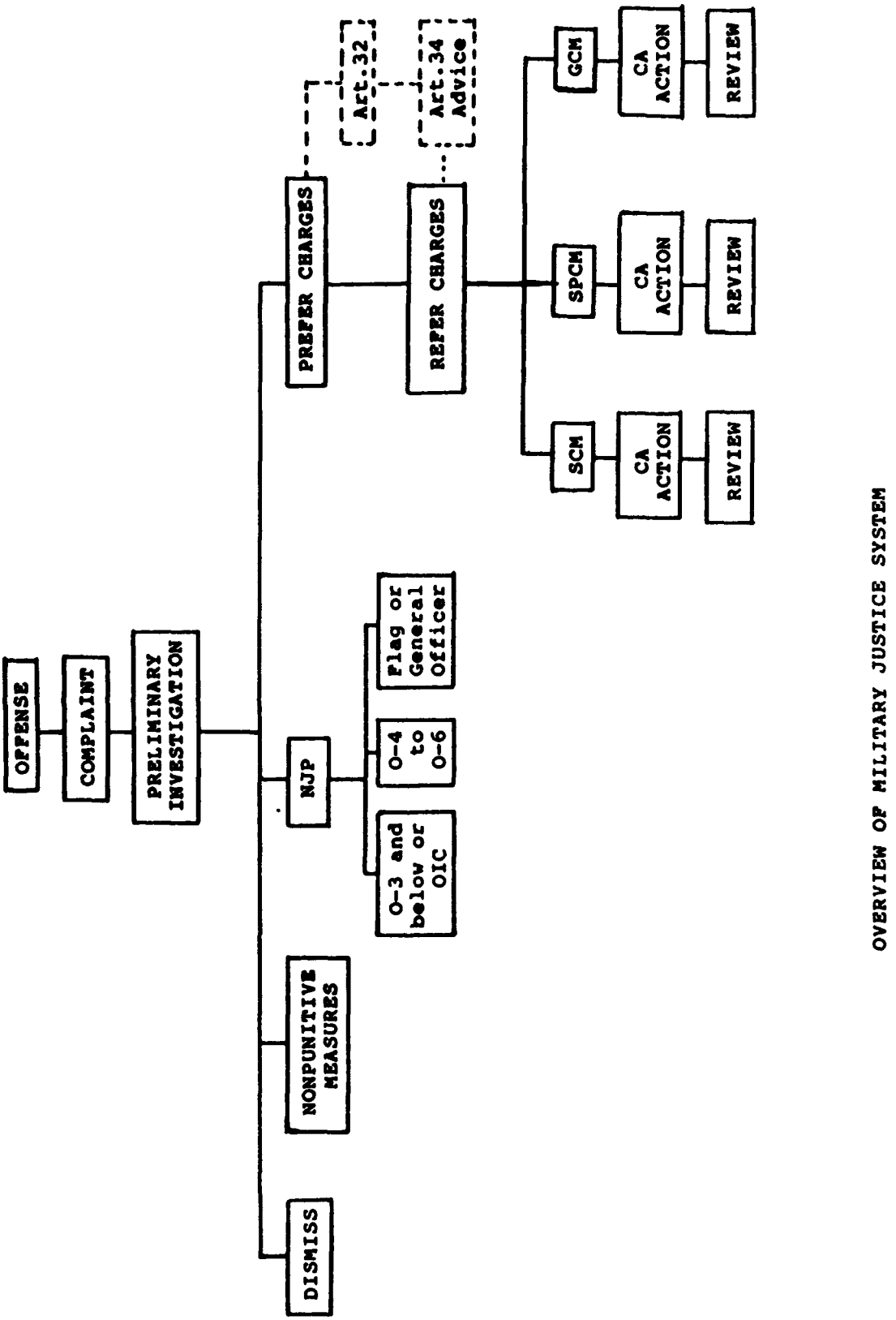
b. After screening by the discipline/legal officer, the whole file is forwarded to the executive officer for final screening.

c. The executive officer reviews the report and calls the accused before him, whereupon he is advised of his rights under Article 31(b), UCMJ and, if the accused is not attached to or embarked in a naval vessel, his right to refuse nonjudicial punishment pursuant to Article 15(a), UCMJ.

d. The executive officer may hold a formal screening mast of reported offenses in order to accomplish the above review and to ascertain that an accused has been advised of his rights. If the formal screening mast is utilized, the executive officer should not attempt to conduct a preliminary hearing to develop evidence, but should only review the information against the accused and determine that he has been properly advised.

e. Depending upon the working relationship between the commanding officer and the executive officer, the executive officer may dismiss minor violations without referral to the commanding officer for nonjudicial punishment. This dismissal may include the imposition of nonpunitive measures.

f. If the preliminary investigation reveals an offense which warrants trial by court-martial, it is not necessary for the accused to be taken to a nonjudicial punishment hearing. The commanding officer can refer sworn charges directly to a court-martial for trial.



OVERVIEW OF MILITARY JUSTICE SYSTEM

Appendix I

REPORT AND DISPOSITION OF OFFENSE(S)
NAVPERS 1626/7 (REV. 8-81) S/N 0106-LF-016-3636

To: Commanding Officer, Naval Justice School, Newport, Rhode Island — Date of Report: 1 June 19CY

1. I hereby report the following named person for the offense(s) noted:

NAME OF ACCUSED	SERIAL NO.	SOCIAL SECURITY NO	RATE/GRADE	SP. & CLASS	DIV/DEPT
FERNDOCK, Clyde E.		000-00-0000	YN3	USN	ADMIN

PLACE OF OFFENSE(S)	DATE OF OFFENSE(S)
Naval Education and Training Center Newport, Rhode Island	25 May 19CY

DETAILS OF OFFENSE(S) (Refer by article of UCMJ, if known. If unauthorized absence, give following info: time and date of commencement, whether over leave or liberty, time and date of apprehension or surrender and arrival on board, loss of ID card and/or liberty card, etc.):

Viol. UCMJ, Art. 121: Larceny of $50.00, the property of YN2 Alvin P. Jones, USN, on 25 May 19CY.

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT
Hugh C. Caughtem	MACM	MAA			
Michael L. Orlando	MS2	Billeting			
Alvin P. Jones	YN2	Paralegal			

MACM/CMAA for NETC Newport (Rate/Grade/Title of person submitting report)

Hugh C. Caughtem
HUGH C. CAUGHTEM (Signature of person submitting report)

I have been informed of the nature of the accusation(s) against me. I understand I do not have to answer any questions or make any statement regarding the offense(s) of which I am accused or suspected. However, I understand any statement made or questions answered by me may be used as evidence against me in event of trial by court-martial. Article 31, UCMJ

Witness: Andrew S. Lookin
ANDREW S. LOOKIN, LT, USN (Signature)

Acknowledged: Clyde E. Ferndock
CLYDE E. FERNDOCK, YN3, USN (Signature of Accused)

PRE-TRIAL RESTRAINT

☐ PRE TRIAL CONFINEMENT

☐ RESTRICTED: You are restricted to the limits of _____ in lieu of arrest by order of the CO. Until your status as a restricted person is terminated by the CO, you may not leave the restricted limits except with the express permission of the CO or XO. You have been informed of the times and places which you are required to muster.

☒ NO RESTRICTIONS

(Signature and title of person imposing restraint) (Signature of Accused)

INFORMATION CONCERNING ACCUSED

CURRENT ENL. DATE	EXPIRATION CURRENT ENL. DATE	TOTAL ACTIVE NAVAL SERVICE	TOTAL SERVICE ON BOARD	EDUCATION	QCT	AGE
6 Jun CY(-2)	5 Jun CY(+2)	2 yrs	10 mos	12	50	22

MARITAL STATUS	NO. DEPENDENTS	CONTRIBUTION TO FAMILY OR GSRA ALLOWANCE (Amount required by law)	PAY PER MONTH (Including sea or foreign duty pay, if any)
Single	None	Not Applicable	$779.10

RECORD OF PREVIOUS OFFENSE(S) (Date, type, action taken, etc. Nonjudicial punishment incidents are to be included.)

CY(-1)JUN04: CO'S NJP: Viol. UCMJ, Art. 86, UA (0800-2100, CY(-1)MAY28). Awarded: 10 days Rest.; and FF $100.00 x 2 mos.

CY(-1)JUN23: CO'S NJP: Viol. UCMJ, Art. 121, Larceny ($100 on CY(-1)JUN17). Awarded: 10 days Correctional Custody.

CY(-1)JUL15: CO'S NJP: Viol. UCMJ, Art. 91, Disrespect (to a PO on CY(-1)JUL03). Awarded: Reduction in Rate to E-3; suspended x 6 months.

**(Or: If no record of previous offense(s) -- "No prior NJP's or previous Courts-Martial.")

Appendix II-a(1)

PRELIMINARY INQUIRY REPORT

From: Commanding Officer
To: LT Andrew S. Lookin, USN
Date: 2 June 19CY

1. Transmitted herewith for preliminary inquiry and report by you, including, if appropriate in the interest of justice and discipline, the preferring of such charges as appear to you to be sustained by expected evidence.

REMARKS OF DIVISION OFFICER (Performance of duty, etc.)

See attached statement.

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT
Hugh C. Caughtem	MACM	MAA	Alvin P. Jones	YN2	Paralegal
Michael L. Orlando	MS2	Billet	ng		

RECOMMENDATION AS TO DISPOSITION:

☐ REFER TO COURT MARTIAL [redacted]

☒ DISPOSE OF CASE AT MAST ☐ NO PUNITIVE ACTION NECESSARY OR DESIRABLE ☐ OTHER

COMMENT (Include data regarding availability of witnesses, summary of expected evidence, conflicts in evidence, if expected. Attach statements of witnesses, documentary evidence such as service record entries in UA cases, items of real evidence, etc.)

See attached investigator's report.

Andrew S. Lookin
ANDREW S. LOOKIN, LT, USN
(Signature of Investigation Officer)

ACTION OF EXECUTIVE OFFICER

☐ DISMISSED ☒ REFERRED TO CAPTAIN'S MAST

SIGNATURE OF EXECUTIVE OFFICER
K. Vanderbeer
K. VANDERBEER, CDR, JAGC, USN

RIGHT TO DEMAND TRIAL BY COURT-MARTIAL
(Not applicable to persons attached to or embarked in a vessel)

I understand that nonjudicial punishment may not be imposed on me if, before the imposition of such punishment, I demand in lieu thereof trial by court-martial. I therefore ☐ (do not) demand trial by court-martial.

WITNESS
John Righteous
JOHN RIGHTEOUS, LN1, USN

SIGNATURE OF ACCUSED
Clyde E. Ferndock
CLYDE E. FERNDOCK, YN3, USN

ACTION OF COMMANDING OFFICER

☐ DISMISSED
☐ DISMISSED WITH WARNING (Not considered NJP)
☐ ADMONITION: ORAL/IN WRITING
☐ REPRIMAND: ORAL/IN WRITING
☒ REST. TO NETC Newport FOR 10 DAYS
☐ REST. TO _____ FOR ____ DAYS WITH SUSP. FROM DUTY
☒ FORFEITURE: TO FORFEIT $100.00 PAY PER MO. FOR 2 MO(S)

☐ CONF. ON _____ 1, 2, OR 3 DAYS
☐ CORRECTIONAL CUSTODY FOR _____ DAYS
☒ REDUCTION TO NEXT INFERIOR PAY GRADE
☐ REDUCTION TO PAY GRADE OF _____
☐ EXTRA DUTIES FOR _____ DAYS
☐ PUNISHMENT SUSPENDED FOR _____
☐ ART. 32 INVESTIGATION
☐ RECOMMENDED FOR TRIAL BY GCM

[redacted] ☐ AWARDED SPCM ☐ AWARDED SCM

DATE OF MAST: 25 Jun CY
DATE ACCUSED INFORMED OF ABOVE ACTION: 25 Jun CY
SIGNATURE OF COMMANDING OFFICER
Will E. Sutton
WILL E. SUTTON, CAPT, USN

It has been explained to me and I understand that if I feel this imposition of nonjudicial punishment to be unjust or disproportionate to the offenses charged against me, I have the right to immediately appeal my conviction to the next higher authority within ~~48 hours~~ 5 days JBJ

SIGNATURE OF ACCUSED
Clyde E. Ferndock
DATE: 25 Jun CY

I have explained the above rights of appeal to the accused.
SIGNATURE OF WITNESS: Joe B. Jones DATE: 25 Jun CY

FINAL ADMINISTRATIVE ACTION

APPEAL SUBMITTED BY ACCUSED
DATED: 26 Jun CY
FORWARDED FOR DECISION ON: 27 Jun CY

FINAL RESULT OF APPEAL:
Appeal denied on 30 Jun CY

APPROPRIATE ENTRIES MADE IN SERVICE RECORD AND PAY ACCOUNT ADJUSTED WHERE REQUIRED
DATE: 25 Jun CY IMP (Initials)

FILED IN UNIT PUNISHMENT BOOK
DATE: 25 Jun CY JBJ (Initials)

NAVPERS 1626/7 (REV. 8-81)(BACK)

Appendix II-a(2)

WITNESS' STATEMENT

Alvin P. Jones	YN2/USN	002-02-0002
Name	Rank/Rate	Social Security Number
Naval Justice School, Newport, Rhode Island		Paralegal (Student)
Command		Division
N/A		
TAD from/to	until (give date)	
Naval Justice School, Newport, Rhode Island		3255
Whereabouts for next 30 days		Phone

I, YN2 Alvin P. Jones, USN, hereby make the following statement to LT Andrew S. Lookin, USN, who has identified himself/herself as a preliminary inquiry officer for the Naval Justice School, Newport, Rhode Island.

On 25 May 19CY, I received a phone call at the Justice School, from Master Chief Caughtem. He stated he was the Base CMAA. He told me he had caught some one, I forget the name, coming out of my room in the Barracks, Room 346. This person came out of my room with $50.00 in his hand. I did have a fifty dollar bill in my room at the time of the incident. It was in the drawer of my locker, which was unlocked. I am the only person occupying the room, and to my knowledge, I am the only person to have a key to the room. I have heard others in the barracks talk about money being stolen from their rooms also. I am willing to testify at a hearing or proceeding in regard to this case. However, I am scheduled to graduate from Justice School on 5 July 19CY. I do not know at this time where I will be stationed after graduation.

(use additional pages if necessary)

I swear (or affirm) that the information in the statement above and on the 0 attached page(s) is true to the best of my knowledge or belief.

Alvin P. Jones	1 June	19 CY	1200
ALVIN P. JONES, YN2, USN	(Date)		(Time)
(Witness' Signature)			

Sworn to before me this date.

Andrew S. Lookin	1 June	19 CY	1200
ANDREW S. LOOKIN, LT, USN	(Date)		(Time)
(Investigator's Signature)			

Appendix II-b

NAVJUSTSCOLINST 5811.1C
22:RLR:cas
15 November 1988

NAVJUSTSCOL INSTRUCTION 5811.1C

Subj: DUTIES OF PRELIMINARY INQUIRY OFFICERS

Ref: (a) Rule for Courts-Martial 303, Manual for Courts-Martial, 1984
(b) Uniform Code of Military Justice
(c) SECNAVINST 5520.3 (Series)

Encl: (1) Instructions for preliminary inquiry officers
(2) Investigator's report, NJS Form 5811/1
(3) Witness' statement, NJS Form 5811/2
(4) Suspect's statement, NJS Form 5811/3

1. Purpose. To promulgate instructions pertaining to the duties of preliminary inquiry officers.

2. Cancellation. NAVJUSTSCOL Instruction 5811.1B is hereby canceled.

3. Information

a. Reference (a) requires the commanding officer, upon receipt of charges or information indicating that a member of the command has committed an offense punishable under reference (b), to cause to be made a preliminary inquiry into the case sufficient to permit an intelligent disposition of the matter. This may consist only of an examination of the charges and a summary of the expected evidence which accompanies them, while in other cases it may involve a more extensive investigation.

b. An informative preliminary inquiry report is of utmost importance to the proper administration of military justice. The report is utilized initially by the commanding officer in determining the proper disposition of the case. Options include dismissal of the charge(s), imposition of nonpunitive measures, nonjudicial punishment, referral to trial by court-martial, and referral to a formal pretrial investigation. If the commanding officer determines nonjudicial punishment to be appropriate, the preliminary inquiry report will be of assistance in determining the accused's guilt or innocence and the amount of punishment to be imposed. In the event of an appeal from nonjudicial punishment, the report will assist the appellate authority in deciding whether relief is warranted. If the case is referred to trial by court-martial or to a formal pretrial investigation, the report will assist the summary court-martial officer, counsel for both sides, or a pretrial investigating officer in preparing to discharge their duties. Appendix III(1)

NAVJUSTSCOLINST 5811.1C
15 November 1988

c. This instruction uses a check-off sheet to assist preliminary inquiry officers in performing all required procedures and collecting all necessary evidence.

4. Action

a. The executive officer, upon receipt of information indicating an offense has been committed by a member of this command, shall determine who should investigate the case. The executive officer shall be guided by reference (c) in making this determination. If an investigation by one of the command's personnel is considered appropriate, the executive officer will assign a preliminary inquiry officer from the Naval Justice School staff. It may be expedient for more than one case to be assigned to the same person for concurrent investigation where the cases are closely related.

b. Preliminary inquiry officers will proceed in accordance with enclosure (1).

c. In each case the executive officer will review the report of the preliminary inquiry officer and may remand the report for further investigation where appropriate.

//S//
T. C. WATSON, JR.

Distribution:
NAVJUSTSCOLINST 5216.3 (Series)
List 2

NAVJUSTSCOLINST 5811.1C
15 November 1988

INSTRUCTIONS FOR PRELIMINARY INQUIRY OFFICERS

1. The preliminary inquiry officer (PIO) will conduct an investigation by executing the following steps substantially in the order presented below. The report of investigation will consist of the following:

a. NAVPERS 1626/7, Report and Disposition of Offense(s);

b. an NJS Form 5811/1 (Investigator's Report) (See enclosure (2). This form provides a chronological checklist for conduct of the preliminary inquiry.);

c. statements or summaries of interviews with all witnesses (sworn statements will be obtained if practicable);

d. statements of the accused's supervisor(s), sworn if practicable;

e. originals or copies of documentary evidence;

f. if the accused waives all rights, a signed sworn statement by the accused; or a summary of interrogation of the accused, signed and sworn to by the accused; or both; and

g. any additional comments by the investigator as desired.

2. Objectives

a. The primary objective of the PIO is to collect all available evidence pertaining to the alleged offense(s). As a first step, the PIO should be familiar with those paragraphs of the Manual for Courts-Martial, 1984, describing the offense(s). Each of the common offenses is described in Part IV, MCM, 1984. Within each paragraph is a section entitled "elements," which lists the elements of proof for that offense. The PIO must be careful to focus on the correct variation. The elements of proof should be copied down to guide the PIO in searching for the relevant evidence. The PIO is to consider everything which tends to prove or disprove an element of proof.

Enclosure (1)

Appendix III(3)

b. The secondary objective of the PIO is to collect information about the accused which will aid the commanding officer in making a proper disposition of the case and, in the event nonjudicial punishment is to be imposed, what the appropriate punishment, if any, should be. Items of interest to the commanding officer include: the accused's currently assigned duties; evaluation of performance; attitudes and ability to get along with others; and particular personal difficulties or hardships which the accused is willing to discuss. Information of this sort is best reflected in the statements of the accused's supervisors, peers, and the accused himself.

3. Interrogate the witnesses first (not the accused)

a. In most cases, a significant amount of the information must be obtained from witnesses. The person initiating the report and the persons listed as witnesses are starting points. Other persons having relevant information may be discovered during the course of the investigation.

b. The PIO should not begin by interrogating the accused. The accused is the person with the greatest motive for lying or otherwise distorting the truth, if in fact he/she is guilty. Before encountering such a person, the interrogator should be thoroughly prepared. Therefore, meeting with the accused should be left until last. Even when the accused confesses guilt, the PIO should, nevertheless, collect independent evidence corroborating the confession.

c. Witnesses who have relevant information to offer should be requested to make a sworn statement. Where a witness is interviewed by telephone and is unavailable to execute a sworn statement, the PIO must summarize the interview and certify it to be true.

d. In interviewing a witness, the PIO should seek to elicit all relevant information. One method is to start with a general survey question, asking for an account of everything known about the subject of inquiry, and then following up with specific questions. After conversing with the witness, the PIO should assist in writing out a statement that is thorough, relevant, orderly, and clear. The substance must always be the actual thoughts, knowledge, or beliefs of the witness; the assistance of the PIO must be limited to helping the witness express himself accurately and effectively in a written form. The witness may write the statement on a copy of enclosure (3).

4. Collect the documentary evidence. Documentary evidence such as Shore Patrol reports, log entries, watchbills, service record entries, local instructions, or organization manuals should be obtained. The original or a certified copy of relevant documents should be attached to the report. As an appointed investigator, the PIO has the authority to certify copies to be true by subscribing the words "CERTIFIED TO BE A TRUE COPY" with his/her signature.

5. Collect the real evidence. Real evidence is a physical object, such as the knife in an assault case or the stolen camera in a theft case, etc. Before the PIO seeks out the real evidence, if any, he/she must be completely familiar with the Military Rules of Evidence concerning searches and seizures. If the item is too big to bring to a nonjudicial punishment hearing or into a courtroom (for instance, the wrecked government bus in a "damaging government property" case), a photograph of it should be taken. If real evidence is already in the custody of a law enforcement agency, it should be left there unless otherwise directed. The PIO should inspect it personally.

6. Advise the accused of his/her rights during interrogation

a. Before questioning the accused, the PIO should also have the accused sign the acknowledgement line on the front of the Report and Disposition of Offense (NAVPERS 1626/7) and initial any additional pages of charges that may be attached. The PIO should sign the witness line on the front of NAVPERS 1626/7, next to the accused's acknowledging signature.

b. NJS Form 5811/3 (enclosure 4) has been provided to assure that the PIO correctly advises the accused of his/her rights before asking any questions. Filling in that page must be the first order of business when meeting with the accused. Only one witness is necessary, and that witness may be the PIO.

7. Interrogate the accused

a. The accused may be questioned only if he/she has knowingly and intelligently waived all constitutional and statutory rights. Such waiver, if made, should be recorded on NJS Form 5811/3 (Suspect's Statement), appended to this instruction as enclosure (4). If the accused asks questions regarding the waiver of these rights, the PIO must decline to answer or give any advice on that question. The decision must be left to the accused. Other than advising the accused of the rights as stated in paragraph 6b above, the PIO should never give any other form of legal advice to the accused. If the accused desires a lawyer, the Naval Legal Service Office judge advocates are available to give legal advice.

b. If the accused has waived all rights, the PIO may commence questioning. The PIO should begin in a low-key manner so as not to disquiet the accused. Once he/she have spoken their piece, the PIO may probe with pointed questions and confront the accused with inconsistencies in the story or contradictions with other evidence. The PIO should, with respect to his own conduct, keep in mind that if a confession is not "voluntary," it cannot be used as evidence. To be admissible, a confession or admission which was obtained through the use of coercion, unlawful influence, or unlawful inducement is not voluntary. The presence of an impartial witness during the interrogation of the accused is recommended.

Some instances of coercion, unlawful influence, and an unlawful inducement in obtaining a confession or admission are: infliction of bodily harm (including questioning accompanied by deprivation of the necessities of life, such as food, sleep, or adequate clothing); threats of bodily harm; imposition or threats of confinement, or deprivation of privileges or necessities; promises of immunity or clemency as to any offense allegedly committed by the accused; and promises of reward or benefit, or threats of disadvantage, likely to induce the accused to make the confession or admission.

c. If the accused is willing to make a written statement, ensure the accused has acknowledged and waived all rights. While the PIO may help the accused draft the statement, he/she must be meticulous in refraining from putting words in the accused's mouth or from tricking the accused into saying something unintended. If the draft is typed, the accused should read it over carefully and be permitted to make any desired changes. All changes should be initialed by the accused and witnessed by the PIO.

d. Oral statements, even though not reduced to writing, are admissible into evidence against a suspect. If the accused does not wish to reduce his/her statement to writing, the PIO must attach a certified summary of the interrogation to the report. Where the accused has reduced less than all of the statement to writing, but has made a written statement, the PIO must add a certified summary of matters omitted from the accused's written statement.

e. If the accused initially waives all rights, but during the interview indicates a desire to consult with counsel or to stop the interview, the PIO will scrupulously adhere to such request and terminate the interview. The interview may not resume unless the accused approaches the PIO and indicates a desire to once again waive all rights and submit to questioning.

NJS Form 5811/1

INVESTIGATOR'S REPORT IN THE CASE OF _____

1. Read paragraphs in MCM concerning offenses/charges Yes: /___/
2. Witnesses interviewed (not the accused).

	(NAME)	(PHONE)	signed statement attached		summary of interview attached
a.	_____	_____	/___/	or	/___/
b.	_____	_____	/___/	or	/___/
c.	_____	_____	/___/	or	/___/
d.	_____	_____	/___/	or	/___/
e.	_____	_____	/___/	or	/___/
f.	_____	_____	/___/	or	/___/

3. Accused's supervisor(s) interviewed: /___/ or /___/

a.	_____	_____	/___/	or	/___/
b.	_____	_____	/___/	or	/___/

4. Documentary evidence:

		(ORIG.)		(COPY)/(ATTACHED)			(LOCATION)
a.	_____	/___/	or	/___/	/___/	or	_____
b.	_____	/___/	or	/___/	/___/	or	_____
c.	_____	/___/	or	/___/	/___/	or	_____
d.	_____	/___/	or	/___/	/___/	or	_____

5. Real evidence:

	(DESCRIPTION)	(NAME OF CUSTODIAN)	(CUSTODIAN'S PHONE)
a.	_____	_____	_____
b.	_____	_____	_____

6. Permit the accused to inspect Report Chit. Yes____No____
7. Accused initialed second page of charges (if any). N/A___ Yes____No____
8. Accused signed Acknowledgement line on NAVPERS 1626/7. Yes____No____
9. Investigator signed witness line on NAVPERS 1626/7. Yes____No____
10. Accused waived rights. Yes____No____
11. Accused made statement (only when #10 is Yes), and

a. /___/ Accused's signed statement attached.

b. /___/ Summary of interrogation attached.

Enclosure (2)
Appendix III(7)

NAVJUSTSCOLINST 5811.1C
15 November 1988

WITNESS' STATEMENT
NJS Form 5811/2

Name Grade/Rate Social Security No.

Command Division

TAD from/to _____ until _____

Whereabouts for next 30 days Phone

I, _____, hereby make the following statement to _____, who has identified himself/herself as a preliminary inquiry officer for the Naval Justice School, Newport, Rhode Island.

(use additional pages if necessary)

I swear (or affirm) that the information in the statement above (and on the _____ attached page(s), all of which are signed by me) is true to my knowledge or belief.

_____ _____ 19__ _____
(Witness' Signature) (Date) (Time)

Sworn to before me this date.

_____ _____ 19__ _____
(Investigator's Signature) (Date) (Time)

Enclosure (3)
Appendix III(8)

NAVJUSTSCOLINST 5811.1C
15 November 1988

SUSPECT'S RIGHTS ACKNOWLEDGMENT/STATEMENT
NJS Form 5811/3

_____
(Date)

Full Name (Accused/suspect)	Social Security No.	Grade/Rate
Interviewer	Social Security No.	Grade/Rate

RIGHTS

I certify and acknowledge by my signature and initials set forth below that, before the interviewer requested a statement from me, he/she warned me that:

(1) I am suspected of having committed the following offense(s):
_____
_____
_____

(2) I have the right to remain silent;---------- Initial _____

(3) Any statement I do make may be used as evidence against me in trial by court-martial;---------- Initial _____

(4) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at my own expense, or, if I wish, Navy or Marine Corps authority will appoint a judge advocate to act as my counsel without cost to me; or both---------- Initial _____

(5) I have the right to have such retained civilian lawyer and/or appointed judge advocate present during this interview---------- Initial _____

WAIVER OF RIGHTS

I further certify and acknowledge that I have read the above statement of my rights and fully understand them,---------- Initial _____
and that,

(1) I expressly desire to waive my right to remain silent-- Initial _____

Enclosure (4)
Appendix III(9)

(2) I expressly desire to make a statement---------- Initial ____

(3) I expressly do not desire to consult with either a civilian lawyer retained by me or a judge advocate appointed as my counsel without cost to me prior to any questioning---------- Initial ____

(4) I expressly do not desire to have such a lawyer present with me during this interview---------- Initial ____

(5) This acknowledgment and waiver of rights is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me.------ Initial ____

(6) I further understand that, even though I initially waive my rights to counsel and to remain silent, I may, during the interview, assert my right to counsel or to remain silent.---------- Initial ____

Signature (Accused/suspect) Time Date

Signature (Interviewer) Time Date

Signature (Witness) Time Date

The statement which appears on this page (and the following ___ page(s), all of which are signed by me), is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me.

Signature (Accused/suspect)

[INSERT STATEMENT]

Appendix III(10)

UNIT PUNISHMENT BOOK (5812)
NAVMC 10132 (REV. 10-81) (6-79 edition will be used)
SN: 0000-00-000-1306 U/I: PD (100 sheets per pad)

Staple Additional pages here.

1. See Chapter 2, Marine Corps Manual for Legal Administration, MCO P5800.8.
2. Form is prepared for each accused enlisted person referred to Commanding Officer's Office Hours.
3. Reverse side may be used to summarize proceedings as required by MCO P5800.8.

1. INDIVIDUAL (Last name, first name, middle initial)	2. GRADE	3. SSN
ADAMS, John Q.	PFC E-2	456 64 5080

4. UNIT
ScolsCo, ScolsBn, MCB, CamPen

5. OFFENSES (To include specific circumstances and the date and place of commission of the offense.)

Art. 86: UA 1300, 5 Jul CY - 2344, 15 Jul CY, fr ScolsCo, ScolsBn, MCB, CamPen

6. I have been advised of and understand my rights under Article 31, UCMJ. I also have been advised of and understand my right to demand trial by court martial in lieu of non-judicial punishment. I (do) (do not) demand trial and (will) (will not) accept non-judicial punishment subject to my right of appeal. I further certify that I (have) (have not) been given the opportunity to consult with a military lawyer, provided at no expense to me, prior to my decision to accept non-judicial punishment.

(Date) 18 Jul CY (Signature of accused) /s/ J. Q. ADAMS

7. The accused has been afforded these rights under Article 31, UCMJ, and the right to demand trial by court-martial in lieu of non-judicial punishment.

(Date) 18 Jul CY (Signature of immediate CO of accused) /s/ A.J. JACKSON

8. FINAL DISPOSITION TAKEN AND DATE

Reduction to Pvt, restriction to limits of ScolsCo, ScolsBn, for 7 days, without suspension from duty, and forfeiture $25.00 per month for 1 month. 18 Jul CY

9. SUSPENSION OF EXECUTION OF PUNISHMENT, IF ANY.

None.

10. FINAL DISPOSITION TAKEN BY (Name, grade, title)
ANDREW J. JACKSON, Major, USMC, Commanding Officer

11. Upon consideration of the facts and circumstances surrounding (this offense) (the offenses) and upon further consideration of the needs of military discipline in this command, I have determined the offense(s) involved herein to be minor and properly punishable under Article 15, UCMJ, such punishment to be that indicated in 8 and 9.

(Signature of CO who took final disposition in 8 and 9) /s/ A.J. JACKSON

12. DATE OF NOTICE TO ACCUSED OF FINAL DISPOSITION TAKEN.
18 JulCY

13. The accused has been advised of the right of appeal.

18 Jul CY (Date) /s/ A.J. JACKSON (Signature of CO who took final action in 11)

14. Having been advised of and understanding my right of appeal, at this time I (intend) (do not intend) to file an appeal.

18 Jul CY (Date) /s/ J. Q. ADAMS (Signature of accused)

15. DATE OF APPEAL, IF ANY.
21 Jul CY

16. DECISION ON APPEAL (IF APPEAL IS MADE), DATE THEREOF, AND SIGNATURE OF CO WHO MADE DECISION.

Appeal granted. See 2d enclosure on the basic letter for decision

24 Jul CY (Date) /s/ M. J. VAN BUREN (Signature of CO making decision on appeal)

17. DATE OF NOTICE TO ACCUSED OF DECISION ON APPEAL.
24 Jul CY

18. REMARKS

18 Jul CY - Intent to appeal indicated.

19. Final administrative action, as appropriate, has been completed.
/s/ [Leg Off]

Appendix IV-a

18 Jul CY

Private John Q. Adams 456 64 5080 USMC

Summary of evidence presented:

The accused admitted to the offense contained in Item 5. Accordingly, he was found to have committed the alleged act of misconduct.

Extenuating or mitigating factors considered: Relating to the UA, the accused stated that he received a phone call from his brother who said he was seriously ill and not expected to live. The accused went UA to see his brother after getting the call. Private Adams said he was sorry for going UA and knew it was wrong.

Based on the recommendation of his First Sergeant, Platoon Sergeant, and his past record, the punishment appearing in block 8 was imposed.

Appendix IV-b

MILITARY JUSTICE STUDY GUIDE

CHAPTER VII

INFORMAL DISCIPLINARY ACTIONS: NONPUNITIVE MEASURES

A. **Introduction**. While many violations of the Uniform Code of Military Justice could be handled formally, by imposition of nonjudicial punishment or referral to various levels of courts-martial, this is not necessary -- or even desirable -- in every case. Often, wise use of nonpunitive measures can be as effective in dealing with minor disciplinary problems. Consequently, the military justice system recognizes the need to provide for informal disciplinary measures. *See, e.g.*, OPNAVINST 3120.32B, Standard Organization and Regulations of the U.S. Navy; para. 1300.1b, *Marine Corps Manual*.

The term "nonpunitive measure" is used to refer to various leadership techniques which can be used to develop acceptable behavioral standards in members of a command. Nonpunitive measures generally fall into three areas: nonpunitive censure, extra military instruction, and administrative withholding of privileges. Commanding officers and officers in charge are authorized and expected to use nonpunitive measures to further the efficiency of their command. *See* R.C.M. 306(c)(2), MCM, 1984; JAGMAN, § 0102.

While it is commonly believed that a commander's discretion is virtually unlimited in the area of nonpunitive measures, in fact the UCMJ and Secretarial regulations prescribe significant limitations on the use of nonpunitive measures. In this regard, it should be noted initially that nonpunitive measures may <u>never</u> be used as a means of informal punishment for any military offense. JAGMAN, § 0102. This chapter discusses the various types of nonpunitive measures and provides guidelines for their correct application.

B. **Nonpunitive censure**. Nonpunitive censure is nothing more than criticism of a subordinate's conduct or performance of duty by a military superior. This criticism may be made either orally or in writing. When made orally, it often is referred to as a "chewing out"; when reduced to writing, the letter is styled a "nonpunitive letter of caution" (NPLOC).

A sample NPLOC is set forth in Appendix A-1-a of the *JAG Manual*. It should be noted that such letters are private in nature and copies may not be forwarded to the Commander, Naval Military Personnel Command (CNMPC), or to Headquarters Marine Corps (HQMC). JAGMAN, § 0105b(2). Additionally, such letters may not be quoted in or appended to fitness reports or evaluations, included as enclosures to *JAG Manual* or other investigative reports, or otherwise included in the official departmental records of the recipient. However, the deficient performance of duty or other facts which led to a letter of caution being issued can be mentioned in the recipient's next fitness report or enlisted evaluation. In this regard, the requirements of the *JAG Manual* are met by avoiding any reference to the fact that a nonpunitive letter of caution was issued.

There is only one exception to the rule that NPLOC's are not forwarded to CNMPC or HQMC: nonpunitive letters issued by the Secretary of the Navy are submitted for inclusion in the recipients' service records.

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

Normally, such tasks are performed in addition to normal duties. Because this kind of leadership technique is more severe than nonpunitive censure, the law has placed some significant restraints on the commander's discretion in this area. All EMI involves an order from a superior to a subordinate to do the task assigned; however, it has long been a principle in military law that orders imposing punishment are unlawful and need not be obeyed unless issued pursuant to NJP or a court-martial sentence. Thus, the problem that must be resolved in every EMI situation is whether a valid training purpose is involved or whether the purpose of the EMI is punishment. The resolution of this problem requires some thought, but the analysis involved is not complex and should be used to avoid legal complications.

1. **Identification of deficiency**. The initial step in analyzing EMI in a given case is to identify properly the deficiency of the subordinate. Consider this example: Seaman Roberts is assigned the responsibility to secure the doors and windows in his office each night, but routinely forgets to secure some of the windows. Although at first glance it would appear that his deficiency is the failure to close windows, a more accurate perception of his deficiency is either a lack of knowledge or a lack of self-discipline -- depending upon the specific reason for the failure. In other words, the "deficiency" refers to shortcomings of character or personality as opposed to shortcomings of action. The act (the failure to close the windows) is an objective manifestation of an underlying character deficiency which may be overcome with EMI.

2. **Rationally related task.** Once the deficiency has been correctly identified, the task assigned to correct that deficiency must be logically related to the deficiency noted or courts will view the order to perform EMI as one imposing punishment. Appellate military courts have relied heavily on this analysis to determine the real purpose for giving an EMI order. It is this criterion that makes it absolutely essential that the military commander properly identify the deficiency in terms of a character trait. Few tasks assigned as EMI will be logically related to *a deficient act.*

For example, what extra task could be assigned to correct one who inadvertently leaves windows unsecured? Perhaps an assignment to close all the windows in the command area each night for two weeks -- or is that task indicative of a punishment motive? How about close-order drill? Close-order drill logically has nothing to do with windows. On the other hand, if a failure to close windows is the result of lack of knowledge of one's duty (ignorance being the deficiency), it would not be illogical to require the subordinate to study the pertinent security orders for an hour or two each night until he learns his responsibility. Perhaps the delivery of a short lecture by the individual would demonstrate his new knowledge of this responsibility.

Where the military superior has analyzed the subordinate's deficiency as relating to some trait of character and assigned a task correctionally or instructionally related to the deficiency, the military courts have readily accepted the superior's opinion that the task he assigned was logically related to the deficiency he noted in the subordinate. Where the facts show that the superior assigned a task because the subordinate did some unacceptable act, military courts see the assigned task as retaliatory and, hence, view the task as punishment. In the latter situation, the superior cannot help but appear to be reacting to a breach of discipline instead of undertaking valid training.

3. **Language used.** Whenever courts or judges try to determine the purpose of an order, they essentially become involved in trying to determine the state of mind of the issuer of the order. Since mind-reading is not yet a perfected science, courts look to objective facts which manifest state of mind. Thus, if a character deficiency is identified as being involved in a delinquent act and a task logically related to the correction of that character trait is ordered by the commander, then, as explained above, these facts tend to indicate, in the eyes of the law, that the task assigned was given for training purposes. Equally important as this "logic" test is the language used when the order is given. Seaman Roberts forgets to close the windows, and the commander retaliates with:

> Roberts, you're assigned close-order drill for two hours each night. It'll be a long time before you forget to secure a window around here! You'll close your windows or you'll wear a trench in the sidewalk!

In this example, the words used by the commander make the task assigned look like it was directed for punishment purposes. Conversely, the task looks more like training when the commander says:

> Roberts, you've been forgetting to secure your windows lately and I know you're familiar with the security considerations involved. This lack of self-discipline is not important in peacetime, nor are the windows that important. But bad habits learned in peacetime can be fatal in war. I am assigning you to close the windows in the command area for seven days. This added responsibility will help you to develop the self-discipline you need to survive in combat.

The commander should understand the importance of language in these matters to avoid having his purpose misinterpreted in court should he be forced to back up his order with prosecution of a defiant subordinate. In this connection, if a commander views a deficient act as symptomatic of a character deficiency, the chances that he will use appropriate language in issuing the EMI order are greatly enhanced and, conversely, it is less likely the courts will misconstrue his purpose.

4. **Judicious quantity**. Assuming all other factors indicate a valid training purpose, EMI may still be construed by the courts as punishment if the quantity of instruction is excessive. JAGMAN, § 0103b indicates that no more than two hours of instruction should be required each day; instruction should not be required on the individual's Sabbath; the duration of EMI should be limited to a period of time required to correct the deficiency; and, after completing each day's instruction, the subordinate should be allowed normal limits of liberty. In this connection, EMI, since it is training, can lawfully interfere with normal hours of liberty. One should not confuse this type of training with a denial of privileges (discussed later) which cannot interfere with normal hours of liberty. The commander must also be careful not to assign instruction at unreasonable hours. What "reasonable hours" are will differ with the normal work schedule of the individual involved, but no great interference with normal hours of liberty should be involved.

5. **Authority to impose**. The authority to assign EMI to be performed during working hours is not limited to any particular rank or rate, but is inherent in authority vested in officers and noncommissioned petty officers. The authority to

assign EMI to be performed after working hours rests in the commanding officer or officer in charge, but may be delegated to officers, petty officers, and noncommissioned officers. *See* OPNAVINST 3120.32B; para. 1300.1b, *Marine Corps Manual*.

For the Navy, OPNAVINST 3120.32B discusses EMI in detail and clearly states that the delegation of authority to assign EMI outside normal working hours is to be encouraged. Ordinarily, such authority should not be delegated below the chief petty officer (E-7) level; however, in exceptional cases, as where a qualified petty officer is filling a CPO billet in a unit which contains no CPO, authority may be delegated to a mature senior petty officer.

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

6. **Summary**. In the eyes of the law, EMI is a leadership tool and not a retributive punishment device. Keeping this in mind will help a superior avoid difficulties related to the lawfulness of his order to perform the instruction and aid the legal officer in resolving questions of lawfulness of such orders. Difficulties will also be avoided if each superior and legal officer is careful to analyze deviant behavior in terms of the underlying character trait. Attention should also be given to acts or words which may indicate a punishment purpose and to the quantity and timing of the instruction. Though some facts have in the past been given more weight than others when courts have had to consider EMI cases, all of the facts related to the circumstances of the EMI order, the facts precipitating its promulgation, and the task assigned will be carefully considered.

D. **Denial of privileges**. A third nonpunitive measure that may be employed to correct minor deficiencies is denial of privileges. A "privilege" is defined as a benefit provided for the convenience or enjoyment of an individual. JAGMAN, § 0104. Denial of privileges is a more severe leadership measure than either censure or EMI because denial of privileges does not necessarily involve or require an instructional purpose. Examples of privileges that may be withheld can be found in JAGMAN, § 0104. They include such things as special liberty, 72-hour liberty, exchange of duty, special command programs, hobby shops, parking privileges, and access to base or ship movies, enlisted or officers' clubs. It may also encompass such things as withholding of special pay and commissary and exchange privileges, provided such withholding complies with applicable rules and regulations and is otherwise in accordance with law. *See, e.g.*, DOD Directive 5524.4 of 2 November 1981, as it applies to enforcement of traffic laws on DOD installations.

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

Normal liberty is not technically a "privilege," but custom and regulation permit the deprivation of liberty only for certain recognized grounds. Those include authorized pretrial restraint or deprivation of normal liberty in a foreign country or in foreign territorial waters, when such action is deemed essential for the protection of the foreign relations of the United States, or as a result of international legal hold restriction. Moreover, it is necessary to the efficiency of the naval service that official functions be performed and that certain work be accomplished in a timely manner. It is, therefore, not punishment when persons in the naval service are required to remain onboard and be physically present outside of normal working hours for work assignments which should have been completed during normal working hours or for the accomplishment of additional essential work or for the achievement of the currently required level of operational readiness. JAGMAN, § 0104. Other grounds for deprivation of liberty include the health or safety of the individual or the public. This is the basis for ordering the military spouse into the barracks or back to the ship when the other reports an assault.

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

MILITARY JUSTICE STUDY GUIDE

CHAPTER VIII

NONJUDICIAL PUNISHMENT

A. **Introduction**. The terms "nonjudicial punishment" and "NJP" are used interchangeably to refer to certain limited punishments which can be awarded for minor disciplinary offenses by a commanding officer or officer in charge to members of his command. In the Navy and Coast Guard, nonjudicial punishment proceedings are referred to as "captain's mast" or simply "mast." In the Marine Corps, the process is called "office hours," and in the Army and Air Force, it is referred to as "Article 15." Article 15 of the Uniform Code of Military Justice (UCMJ), Part V of the *Manual for Courts-Martial, 1984* (MCM), Part B of Chapter I of *The Manual of the Judge Advocate General* (short title *JAG Manual*, cited as JAGMAN), and Chapter 1 of the *Coast Guard Military Justice Manual* COMDTINST M5810.1 (MJM) constitute the basic law concerning nonjudicial punishment procedures. The legal protection afforded an individual subject to NJP proceedings is more complete than is the case for nonpunitive measures; but, by design, it is less extensive than for courts-martial.

Note that this chapter addresses NJP procedures established by Part V, MCM, 1984. NJP proceedings initiated before 1 August 1984 must be completed in accordance with the procedures established by Chapter XXVI, MCM, 1969 (Rev.).

1. In the Navy, the word "mast" also is used to describe three different types of proceedings: "request mast," "meritorious mast," and "disciplinary mast."

a. Request mast (Articles 1151 and 0820c, *U.S. Navy Regulations, 1990*) is a hearing before the CO, at the request of service personnel, for the purpose of making requests, reports, and statements and for airing grievances.

b. Meritorious mast (Article 0820d, *U.S. Navy Regulations, 1990*) is held for the purpose of publicly and officially commending a member of the command for noteworthy performance of duty.

c. This chapter discusses disciplinary mast. When the term "mast" is used henceforth, that is what is meant.

2. "Mast" and "office hours" are procedures whereby the commanding officer or officer in charge may:

a. Make inquiry into the facts surrounding minor offenses allegedly committed by a member of his command;

b. afford the accused a hearing as to such offenses; and

c. dispose of such charges by dismissing the charges, imposing punishment under the provisions of Article 15, UCMJ, or referring the case to a court-martial.

3. What "mast" and "office hours" are not:

a. As the term "nonjudicial" implies, they are not trials;

b. a determination of "guilt" is not a conviction; and

c. a determination by the commanding officer not to impose punishment is not an acquittal precluding later NJP for the offense(s).

B. Nature and requisites of NJP

1. The power to impose NJP

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

(1) A commanding officer

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

(b) The power to impose NJP is inherent in the office and not in the individual. Thus, the power may be exercised by a person acting as CO,

such as when the CO is on leave and the XO succeeds to command. *See* Articles 1074-1087, *U.S. Navy Regulations, 1990*, for complete "succession-to-command" information.

(2) **An officer in charge.** Officers in charge exist in the naval service and the Coast Guard. In the Navy and Marine Corps, an officer in charge is a commissioned officer who is designated as officer in charge of a unit by departmental orders, tables of organization, manpower authorizations, orders of a flag or general officer in command, or orders of the senior officer present. *See* JAGMAN, § 0106b.

(3) **Officers to whom NJP authority has been delegated**

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

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

b. **Limitations on power to impose NJP.** No officer may limit or withhold the exercise of any disciplinary authority under article 15 by subordinate commanders without the specific authorization of the Secretary of the Navy. JAGMAN, § 0106e.

c. **Referral of NJP to higher authority**

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

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

2. Persons on whom NJP may be imposed

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

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

c. At the time the punishment is imposed, the accused must be a member of the command of the commanding officer (or of the unit of the officer in charge) who imposes the NJP. JAGMAN, § 0107a(1).

(1) A person is "of the command or unit" if he is assigned or attached thereto. This includes temporary additional duty (TAD) personnel (i.e., TAD personnel may be punished either by the CO of the unit to which they are TAD or by the CO of the duty station to which they are permanently attached). Note, however, both commanding officers cannot punish an individual under article 15 for the same offense.

(2) In addition, a party to a *JAG Manual* investigation remains "of the command or unit" to which he was attached at the time of his designation as a party for the sole purpose of imposing a letter of admonition or reprimand as NJP. JAGMAN, § 0107b(2).

(3) Personnel of another armed force

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

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

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

d. Imposition of NJP on embarked personnel

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

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

(2) Similar policy provisions apply to the withholding of the exercise of the authority to convene SPCM's or SCM's by the commanding officer of the embarked unit. JAGMAN, § 0122b.

e. Imposition of NJP on reservists

(1) Reservists on active duty for training or inactive duty for training are subject to the UCMJ and therefore to the imposition of NJP.

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

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

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

(c) he may request from the Regular component officer exercising general court-martial jurisdiction over the accused an involuntary recall of the accused to active duty or inactive duty training for purposes of imposing NJP; or

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

(3) Punishment imposed on persons who were involuntarily recalled for purposes of imposition of NJP may not include confinement unless the Secretary of the Navy approved the recall.

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

(1) Article 15a, UCMJ, and Part V, para. 3, MCM, 1984, provide another limitation on the exercise of NJP. Except in the case of a person attached to or embarked in a vessel, NJP may not be imposed if the member demands trial by court-martial. Note that such a demand does not require that charges be referred to a court-martial. Referral is a decision exercised by the convening authority, not by the member.

(2) This right to refuse NJP exists up until the time NJP is imposed (i.e., up until the commanding officer announces the punishment). Art. 15a, UCMJ. This right is not waived by the fact that the accused has previously signed a "report chit" (NAVPERS Form 1626/7 or UPB Form NAVMC 10132) indicating that he would accept NJP.

(3) The category of persons who may not refuse NJP includes those persons assigned or attached to the vessel; on board for passage; or assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body. Case law interprets "vessel" as commissioned ships of the U.S. Navy and precommissioning units which have been duly designated "in commission special," or "in service." Whether the ship is at sea or in drydock is irrelevant. Case law also interprets "attached" to include submarine off-crews.

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

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

3. **Offenses punishable under article 15**

a. Article 15 gives a commanding officer power to punish individuals for minor offenses. The term "minor offense" has been the cause of some concern in the administration of NJP. Article 15, UCMJ, and Part V, para. 1e, MCM, 1984,

indicate that the term "minor offense" means misconduct normally not more serious than that usually handled at summary court-martial (where the maximum punishment is thirty days confinement). These sources also indicate that the nature of the offense and the circumstances surrounding its commission are also factors which should be considered in determining whether an offense is minor in nature. The term "minor offense" ordinarily does not include misconduct which, if tried by general court-martial, could be punished by a dishonorable discharge or confinement for more than one year. The Navy and Marine Corps, however, have taken the position that the final determination as to whether an offense is "minor" is within the sound discretion of the commanding officer.

(1) **Maximum penalty**. Begin the analysis with a consultation of punitive articles (Part IV, MCM, 1984) and determine the maximum possible punishment for the offense. Although the MCM does not so state, it appears that, if the authorized confinement is thirty days to three months, the offense is most likely a minor offense; if the authorized confinement is six months to a year, the offense may be minor; and, if authorized confinement is one year or more, the offense is usually not minor.

(2) **Nature of offense**. The *Manual for Courts-Martial, 1984*, also indicates in Part V, para. 1e, that, in determining whether an offense is minor, the "nature of the offense" should be considered. This is a significant statement and often is misunderstood as referring to the seriousness or gravity of the offense. Gravity refers to the maximum possible punishment, however, and is the subject of separate discussion in that paragraph. In context, nature of the offense refers to its character, not its gravity. In military criminal law, there are two basic types of misconduct -- disciplinary infractions and crimes. Disciplinary infractions are breaches of standards governing the routine functioning of society. Thus, traffic laws, license requirements, disobedience of military orders, disrespect to military superiors, etc., are disciplinary infractions. Crimes, on the other hand, involve offenses commonly and historically recognized as being particularly evil (such as robbery, rape, murder, aggravated assault, larceny, etc.). Both types of offenses involve a lack of self-discipline, but crimes involve a particularly gross absence of self-discipline amounting to a moral deficiency. They are the product of a mind particularly disrespectful of good moral standards. In most cases, criminal acts are not minor offenses, and usually the maximum imposable punishment is great. Disciplinary offenses, however, are serious or minor depending upon circumstances, and thus, while some disciplinary offenses carry severe maximum penalties, the law recognizes that the impact of some of these offenses on discipline will be slight. Hence, the term "disciplinary punishment" used in the *Manual for Courts-Martial, 1984*, is carefully chosen.

(3) **Circumstances.** The circumstances surrounding the commission of a disciplinary infraction are important to the determination of whether such an infraction is minor. For example, willful disobedience of an order to take ammunition to a unit engaged in combat can have fatal consequences for those engaged in the fight and hence is a serious matter. Willful disobedience of an order to report to the barbershop may have much less of an impact on discipline. The offense must provide for both extremes, and it does because of a high maximum punishment limit. When dealing with disciplinary infractions, the commander must be free to consider the impact of circumstance since he is considered the best judge of it; whereas, in disposing of crimes, society at large has an interest coextensive with that of the commander, and criminal defendants are given more extensive safeguards. Hence, the commander's discretion in disposing of disciplinary infractions is much greater than his latitude in dealing with crimes. Where the commander determines the offense to be minor, a statement is recommended on the NAVPERS 1626/7 (Navy) and is required on the UPB NAVMC 10132 (Marine Corps) indicating that the commander, after considering all facts and circumstances, has determined that the offense is minor.

b. The Navy has taken the position that the final determination as to what constitutes a "minor offense" is within the sound discretion of the commanding officer. Imposition of NJP does not, in all cases, preclude a subsequent court-martial for the same offense. *See* Part V, para. 1e, MCM, 1984.

c. **The statute of limitations is applicable to NJP.** Article 43(c), UCMJ, prohibits the imposition of NJP more than two years after the commission of the offense. This is true notwithstanding the receipt of sworn charges by the officer exercising summary court-martial jurisdiction, which normally tolls the running of the statute of limitations for purposes of trial by court-martial.

d. **Cases previously tried in civil courts**

(1) Sections 0108b and 0124d of the *JAG Manual* permit the use of NJP to punish an accused for an offense for which he has been tried (whether acquitted or convicted) by a state or foreign civilian court, or whose case has been diverted out of the regular criminal process for a probationary period, or whose case has been adjudicated by juvenile court authorities, if authority is obtained from the officer exercising general court-martial jurisdiction (usually the general or flag officer in command over the command desiring to impose NJP).

(2) Nonjudicial punishment may not be imposed for an act tried by a court that derives its authority from the United States, such as a Federal district court. JAGMAN, §§ 0108b, 0124d.

(3) Clearly, cases in which a finding of guilty or not guilty has

been reached in a trial by court-martial cannot be then taken to NJP. JAGMAN, §§ 0108b and 0124d. However, the last point at which cases may be withdrawn from court-martial before findings with a view toward NJP is presently unclear.

e. **Off-base offenses**

(1) Commanding officers and officers in charge may dispose of minor disciplinary infractions (which occur on or off-base) at NJP. Unless the off-base offense is a traffic offense (*see* para. (2) *infra*) or one previously adjudicated by civilian authorities (*see* para. d(1), *supra*), there is no limit on the authority of military authorities to resolve such offenses at NJP.

(2) OPNAVINST 11200.5C and MCO 5110.1C state (as a matter of policy) that, in areas not under military control, the responsibility for maintaining law and order rests with civil authority. The enforcement of traffic laws falls within the purview of this principle. Off-duty, off-installation driving offenses, however, are indicative of inability and lack of safety consciousness. Such driving performance does not prevent the use of nonpunitive measures (i.e., deprivation of on-installation driving privileges).

4. **Hearing procedure**

a. **Introduction**. Nonjudicial punishment results from an investigation into unlawful conduct and a subsequent hearing to determine whether, and to what extent, an accused should be punished. Generally, when a complaint is filed with the commanding officer of an accused, that commander is obligated to cause an inquiry to be made to determine the truth of the matter. When this inquiry is complete, a NAVPERS Form 1626/7 or the UPB Form NAVMC 10132 is filled out. (This inquiry is discussed in Chapter VI, *supra*.) The Navy NAVPERS 1626/7 functions as an investigation report as well as a record of the processing of the NJP case. The Marine Corps NAVMC 10132 is a document used to record NJP only (MCO P5800B provides details for the completion of the UPB form). The appropriate report and allied papers are then forwarded to the commander. The ensuing discussion will detail the legal requirements and guidance for conducting an NJP hearing.

b. **Prehearing advice**. If, after the preliminary inquiry, the commanding officer determines that disposition by NJP is appropriate, the commanding officer must cause the accused to be advised of his rights before imposition of NJP. Part V, para. 4, MCM, 1984. The commanding officer need not give the advice personally, but may assign this responsibility to the legal officer or another appropriate person. The rights are as follows:

(1) **Contemplated action**. The accused must be informed that the commanding officer is considering the imposition of NJP for the offense.

(2) **Suspected offense.** The suspected offense(s) must be described to the accused and such description should include the specific article of the UCMJ which the accused is alleged to have violated.

(3) **Government evidence.** The accused should be advised of the information upon which the allegations are based or told that he may, upon request, examine all available statements and evidence.

(4) **Right to refuse NJP.** Unless the accused is attached to or embarked in a vessel (in which case he has no right to refuse NJP), he should be told of his right to demand trial by court-martial in lieu of NJP; of the maximum punishment which could be imposed at NJP; of the fact that, should he demand trial by court-martial, the charges could be referred for trial by summary, special, or general court-martial; of the fact that he could not be tried at summary court-martial over his objection; and that, at a special or general court-martial, he would have the right to be represented by counsel.

(5) **Right to confer with independent counsel.** *United States v. Booker*, 5 M.J. 238 (C.M.A. 1977), held that, because an accused who is not attached to or embarked in a vessel has the right to refuse NJP, he must be told of his right to confer with independent counsel regarding his decision to accept or refuse the NJP if the record of that NJP is to be admissible in evidence against him should the accused ever be subsequently tried by court-martial. A failure to properly advise an accused of his right to confer with counsel, or a failure to provide counsel, will not, however, render the imposition of NJP invalid or constitute a ground for appeal. Therefore, if the command imposing the NJP desires that the record of the NJP be admissible for courts-martial purposes, the record of the NJP must be prepared in accordance with applicable service regulations and reflect that:

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

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

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

(d) In addition to the foregoing, Marine Corps commands are also required to advise an accused that acceptance of NJP/SCM does not preclude the command from taking other possible adverse administrative action. Recordation of the above so-called "*Booker* rights" advice and waivers should be made on page 13 (Navy) or page 12 (Marine Corps) of the accused's service record. The accused's Notification and Election of Rights Form (*see JAG Manual* appendices A-1-b, A-1-c,

or A-1-d, as appropriate) should be attached to the 1026/7 or UPB. A simple straightforward recordation of the three statements given above complies with these requirements. In this regard, sections 0109 and 0110 of the *JAG Manual* explain precisely how a Navy command may prepare service record entries which will be admissible at any subsequent trial by court-martial. Marine Corps commands should refer to para. 4014.2b(2) of the IRAM for the format required to document compliance with "*Booker* rights." If an accused waives any or all of the above rights, but refuses to execute such a waiver in writing, the fact that he was properly advised of his rights, waived his rights, but declined to execute a written waiver, should be so recorded. *See* appendix V at the end of this chapter.

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

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

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

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

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

(e) present matters in defense, extenuation, and mitigation -- orally, in writing, or both;

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

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

c. **Forms**

(1) **Prehearing advice**. The forms set forth in Apps. A-1-b, A-1-c, and A-1-d of the *JAG Manual* are designed to comply with the above requirements. Appendix A-1-b is to be used when the accused is attached to or embarked in a vessel. Appendix A-1-c is to be used when the accused is not attached to or embarked in a vessel, and the command does not desire to afford the accused the right to consult with a lawyer to assist the accused in deciding whether to accept or refuse NJP. (Note: In this case, the record of NJP will not be admissible for any purpose at any subsequent court-martial.) Appendix A-1-d is to be used when an accused is not attached to or embarked in a vessel, and the command does afford the accused the right to consult with a lawyer to decide whether to accept or reject NJP. Use and retention of the proper form are essential. Whatever form is used should be attached to the 1626/7 (Navy) or UPB (USMC) and retained in the command unit punishment book. Completed copies of JAGMAN A-1-b and A-1-d forms are included at appendices in this chapter.

(2) ***Booker* rights**. For those members not attached to a vessel and given the opportunity to consult with counsel, the "*Booker* rights" advice should be documented on a page 13 (Navy) or page 12 (USMC) of the member's service record book, in addition to Appendix A-1-d. This is necessary because the A-1-d stays in the command unit punishment book. If the member is subsequently transferred out of the area and charged with offenses referred to a court-martial, the trial counsel can prove the *Booker* rights advice was given with the page 13 or page 12. Samples of both forms are provided at the end of this chapter. The Navy form is based on JAGMAN, § 0109 and the USMC form is based on IRAM para. 4014.2b(2).

(3) **Refusal to sign**. If the member refuses to sign the forms, simply record that he was advised of his rights but declined to sign the forms. Note that the member must demand trial by court-martial. If the member fails to make such demand, the command may proceed with NJP.

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

(1) **Personal appearance waived**. Part V, para. 4c(2), MCM, 1984, provides that, if the accused waives his right to personally appear before the commanding officer, he may choose to submit written matters for consideration by the commanding officer prior to the imposition of NJP. Should the accused make such an election, he should be informed of his right to remain silent and that any matters so submitted may be used against him in a trial by court-martial. Notwithstanding the accused's expressed desire to waive his right to personally appear at the NJP

hearing, he may be ordered to attend the hearing if the officer imposing NJP desires his presence. NAVY JAG MSG 231630Z NOV 84. If the accused waives his personal appearance and NJP is imposed, the commanding officer must ensure that the accused is informed of the punishment as soon as possible.

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

(3) The record of a formal *JAG Manual* investigation or other fact-finding body (e.g., an article 32 investigation) in which the accused was accorded the rights of a party with respect to an act or omission for which NJP is contemplated may be substituted for the hearing. Part V, para. 4d, MCM, 1984; JAGMAN, § 0110d.

(a) It is possible to impose NJP on the basis of a record of a *JAG Manual* investigation at which the accused was afforded the rights of a party because the rights of a party include all elements of the mast hearing, plus additional procedural safeguards such as assistance of counsel. *See* JAGMAN, § 0209c.

(b) If the record of a *JAG Manual* investigation or other fact-finding body discloses that the accused was not accorded all the rights of a party with respect to the act or omission for which NJP is contemplated, the commanding officer must follow the regular NJP procedure or return the record to the fact-finding body for further proceedings to accord the accused all rights of a party. JAGMAN, § 0110d.

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

(5) **Personal representative**. The concept of a personal representative to speak on behalf of the accused at an Article 15, UCMJ, hearing has caused some confusion. The burden of obtaining such a representative is on the

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

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

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

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

(9) **Command observers**. Section 0110c of the *JAG Manual* encourages the attendance of representative members of the command during all NJP proceedings to dispel erroneous perceptions concerning the fairness and integrity of the proceedings.

(10) **Publication of NJP**. Commanding officers are authorized to publish the results of NJP under section 0115 of the *JAG Manual*. Within one month following the imposition of NJP, the name of the accused, his rate, offense(s), and their disposition may be published in the plan of the day, provided it is intended for military personnel only, posted upon command bulletin boards, and announced at daily formations (Marine Corps) or morning quarters (Navy).

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

(1) **Dismissal with or without warning**

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

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

(2) **Referral to an SCM, SPCM, or pretrial investigation under Article 32, UCMJ**

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

(4) **Imposition of NJP**. When Marine Corps commanding officers and officers in charge impose NJP, para. 3004.3, MCO P5354.1 (Marine Corps Equal Opportunity Manual) requires racial/ethnic identifiers (e.g., Male/Female/White/Black/Hispanic/Other) should be reflected in unit punishment books and records of NJP proceedings.

C. **Authorized punishments at NJP**

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

a. **The grade of the imposing officer**. Commanding officers in grades 0-4 to 0-6 have greater punishment powers than officers in grades O-1 to O-3; flag officers, general officers, and officers exercising general court-martial jurisdiction have greater punishment authority than commanding officers in grades O-4 to O-6.

b. **The status of the imposing officer**. Regardless of the rank of an officer in charge, his punishment power is limited to that of a commanding officer in grade 0-1 to 0-3; the punishment powers of a commanding officer are commensurate with his permanent grade.

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

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

2. **Maximum limits -- specific**

a. **Officer accused**. If punishment is imposed by officers in the following grades, the limits are as indicated below.

(1) By officer exercising general court-martial jurisdiction or a flag/general officer in command, or designated principal assistant. Part V, para. 5b(1)(B), MCM, 1984; JAGMAN, § 0106c.

(a) Punitive admonition or reprimand.

(b) Arrest in quarters: not more than 30 days.

(c) Restriction to limits: not more than 60 days.

(d) Forfeiture of pay: not more than 1/2 of 1 month's pay per month for two months.

(2) **By officers 0-4 to 0-6**. Part V, para. 5b(1)(A), MCM, 1984; JAGMAN, § 0111.

(a) Admonition or reprimand.

(b) Restriction: not more than 30 days.

(3) **By officers 0-1 to 0-3**. JAGMAN, § 0111.

(a) Admonition or reprimand.

(b) Restriction: not more than 15 days.

(4) **By officer in charge**: none.

b. **Enlisted accused.** Part V, para. 5b(2), MCM, 1984; JAGMAN, § 0111.

(1) **By commanding officers in grades 0-4 and above**

(a) Admonition or reprimand.

(b) Confinement on bread and water/diminished rations: imposable only on grades E-3 and below, attached to or embarked in a vessel, for not more than 3 days.

(c) Correctional custody: not more than 30 days and only on grades E-3 and below.

(d) Forfeiture: not more than 1/2 of 1 month's pay per month for two months.

(e) Reduction: one grade, not imposable on E-7 and above (Navy) or on E-6 and above (Marine Corps).

(f) Extra duties: not more than 45 days.

(g) Restriction: not more than 60 days.

(2) **By commanding officers in grades O-3 and below or any commissioned officer in charge**

(a) Admonition or reprimand.

(b) Confinement on bread and water/diminished rations: not more than 3 days and only on grades E-3 and below attached to or embarked in a vessel.

(c) Correctional custody: not more than 7 days and only on grades E-3 and below.

(d) Forfeiture: not more than 7 days' pay.

(e) Reduction: to next inferior paygrade; not imposable on E-7 and above (Navy) or E-6 and above (Marine Corps).

(f) Extra duties: not more than 14 days.

(g) Restriction: not more than 14 days.

3. **Nature of the punishments**

a. **Admonition and reprimand.** Punitive censure for officers must be in writing, although it may be either oral or written for enlisted personnel. Procedures for issuing punitive letters are detailed in section 0114 and app. A-1-g of the *JAG Manual*. *See also* SECNAVINST 1920.6 series. These procedures must be complied with. It should be noted that reprimand is considered more severe than admonition.

b. **Arrest in quarters.** The punishment is imposable only on officers. Part V, para. 5c(1), MCM, 1984. It is a moral restraint, as opposed to a physical restraint. It is similar to restriction, but has much narrower limits. The limits of arrest are set by the officer imposing the punishment and may extend beyond quarters. The term "quarters" includes military and private residences. The officer may be required to perform his regular duties as long as they do not involve the exercise of authority over subordinates. JAGMAN, § 0111f.

c. **Restriction**. Restriction also is a form of moral restraint. Part V, para. 5c(2), MCM, 1984. Its severity depends upon the breadth of the limits as well as the duration of the restriction. If restriction limits are drawn too tightly, there is a real danger that they may amount to either confinement or arrest in quarters -- which in the former case cannot be imposed as NJP and in the latter case is not an authorized punishment for enlisted persons. As a practical matter, restriction ashore means that an accused will be restricted to the limits of the command except of course at larger shore stations where the use of recreational facilities might be further restricted. Restriction and arrest are normally imposed by a written order detailing the limits thereof and usually require the accused to log in at certain specified times during the restraint. Article 1103.1 of *U.S. Navy Regulations, 1990*, provides that an officer placed in the status of arrest or restriction shall not be confined to his room unless the safety or the discipline of the ship requires such action.

d. **Forfeiture**. A forfeiture applies to basic pay and to sea or foreign duty pay, but not to incentive pay or allowances for subsistence or quarters, etc. "Forfeiture" means that the accused forfeits monies due him in compensation for his military service only; it does not include any private funds. This distinguishes forfeiture from a "fine," which may only be awarded by courts-martial. The amount of forfeiture of pay should be stated in whole dollar amounts, not in fractions, and indicate the number of months affected (e.g., "to forfeit $50.00 pay per month for two months"). Where a reduction is also involved in the punishment, the forfeiture must

be premised on the new lower rank, even if the reduction is suspended. Part V, para. 5c(8), MCM, 1984. Forfeitures are effective on the date imposed unless suspended or deferred. Where a previous forfeiture is being executed, that forfeiture will be completed before any newly imposed forfeiture will be executed. JAGMAN, § 0113a.

e. **Detention of pay**. Effective 1 August 1984, detention of pay is no longer an authorized punishment in the military.

f. **Extra duties**. Various types of duties may be assigned, in addition to routine duties, as punishment. Part V, para. 5c(6), MCM, 1984, however, prohibits extra duties which constitute a known safety or health hazard, which constitute cruel and unusual punishment, or which are not sanctioned by the customs of the service involved. Additionally, when imposed upon a petty or noncommissioned officer (E-4 and above), the duties cannot be demeaning to his rank or position. Section 01111d of the *JAG Manual* indicates that the immediate commanding officer of the accused will normally designate the amount and character of extra duty, regardless of who imposed the punishment, and that such duties normally should not extend beyond 2 hours per day. Guard duty may not be assigned as extra duties and, except in cases of reservists performing inactive training or active duty for training for periods of less than 7 days, extra duty shall not be performed on Sunday (although Sunday counts as if such duty was performed).

g. **Reduction in grade**. Reduction in paygrade is limited by Part V, para. 5c(7), MCM, 1984, and section 0111e of the *JAG Manual* to one grade only. The grade from which reduced must be within the promotional authority of the CO imposing the reduction. MILPERSMAN 3420140.2; MARCORPROMAN, Vol. 2; ENLPROM, para. 1200.

h. **Correctional custody**. Correctional custody is a form of physical restraint during either duty or nonduty hours or both and may include hard labor or extra duty. Awardees may perform military duty -- but not watches -- and cannot bear arms or exercise authority over subordinates. *See* Part V, para. 5c(4), MCM, 1984. Specific regulations for conducting correctional custody are found in OPNAVINST 1640.7 and MCO 1626.7B. Time spent in correctional custody is not "lost time." Correctional custody cannot be imposed on grades E-4 and above. *See* JAGMAN, § 0111b. To assist commanders in imposing correctional custody, correctional custody units (CCU's) have been established at major shore installations. The local operating procedures for the nearest CCU should be checked before correctional custody is imposed.

i. **Confinement on bread and water or diminished rations**. These punishments can be utilized only if the accused is attached to or embarked in a vessel. These punishments involve physical confinement and are tantamount to solitary confinement because contact is allowed only with authorized personnel, but

should not be so-called because "solitary confinement" may not be imposed. A medical officer must first certify in writing that the accused will suffer no serious injury and that the place of confinement will not be injurious to the accused. Diminished rations is a restricted diet of 2100 calories per day, and instructions for its use are detailed in SECNAVINST 1640.9 series. These punishments cannot be imposed upon E-4 and above.

4. **Execution of punishments**

a. **General rule**. As a general rule, all punishments, if not suspended, take effect when imposed. Part V, para. 5e, MCM, 1984; JAGMAN, § 0113. This means that the punishment in most cases will take effect when the commanding officer informs the accused of his punishment decision. Thus, if the commanding officer wishes to impose a prospective punishment -- one to take effect at a future time -- he should simply delay the imposition of NJP altogether. There are, however, several specific rules which authorize the deferral or stay of a punishment already imposed.

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

(a) Adequate facilities are not available;

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

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

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

(3) **Interruption of restraint punishments by subsequent NJP's**. The execution of any nonjudicial (or court-martial) punishment involving restraint will normally be interrupted by a subsequent NJP involving restraint. Thereafter, the unexecuted portion of the prior restraint punishment will be executed. The officer imposing the subsequent punishment, however, may order that the prior

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

(4) **Interruption of punishments by unauthorized absence**. Service of all NJP's will be interrupted during any period that the servicemember is UA. A punishment of reduction may be executed even when the accused is UA. JAGMAN, § 0113b(2).

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

D. Combinations of punishments

1. **General rules**. Part V, para. 5d, MCM, 1984, provides that all authorized NJP's may be imposed in a single case subject to the following limitations:

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

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

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

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

2. **Examples**

a. If an O-4 commanding officer wishes to impose the maximum amount of all permissible NJP's upon an E-3, the maximum that could be imposed would be:

(1) A punitive letter of reprimand or admonition (or an oral reprimand or admonition);

(2) reduction to E-2;

(3) forfeiture of one-half pay per month for two months (based upon the reduced rate); and

(4) forty-five days restriction and extra duties to be served concurrently.

b. If an O-3 commanding officer (or any officer in charge, regardless of grade) wishes to impose the maximum amount of all permissible NJP's upon an E-3, the maximum that could be imposed would be:

(1) A punitive letter of reprimand or admonition (or an oral reprimand or admonition);

(2) reduction to E-2;

(3) forfeiture of 7 days' pay (based upon the reduced rate); and

(4) fourteen days restriction and extra duties to be served concurrently.

E. Clemency and corrective action on review

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

2. **Authority to act**. Part V, para. 6a, MCM, 1984, and section 0118 of the *JAG Manual* indicate that, after the imposition of NJP, the following officials have authority to take clemency action or remedial corrective action:

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

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

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

d. the commanding officer or officer in charge of a unit, activity, or command to which the accused is properly transferred after the imposition of punishment by the first commander (JAGMAN, § 0118b); and

e. the successor in command of the latter.

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

a. **Setting aside punishment**. Part V, para. 6d, MCM, 1984. This power has the effect of voiding the punishment and restoring the rights, privileges, and property lost to the accused by virtue of the punishment imposed. This action should be reserved for compelling circumstances where the commander feels a clear injustice has occurred. This means normally that the commander believes the punishment of the accused was clearly a mistake. If the punishment has been executed, executive action to set it aside should be taken within a reasonable time -- normally within four months of its execution. The commanding officer who wishes to reinstate an individual reduced in rate at NJP is not bound by the provisions of MILPERSMAN 2230200 limiting advancement to a rate formerly held only after a minimum of 12 months' observation of performance. Such action can be taken with respect to the whole or a part of the punishment imposed. All entries pertaining to the punishment set aside are removed from the service record of the accused. MILPERSMAN 5030500; LEGADMINMAN 2006.

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

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

(1) **Quality**. Without increasing quantity, the following reductions by mitigation may be taken:

(a) Arrest in quarters to restriction;

(b) confinement on bread and water or diminished rations to correctional custody;

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

(d) extra duties to restriction.

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

(3) **Example**: As was mentioned, in mitigating NJP's, neither the quantity nor the quality of the punishment may be increased. For example, it would be impermissible to mitigate 3 days' confinement on bread and water to 4 days' restriction because this would increase the quantity of the punishment. It would also be impermissible to mitigate 60 days' restriction to one day of confinement on bread and water because this would increase the quality of the punishment.

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

d. **Suspension of punishment**. Part V, para. 6a, MCM, 1984. This is an action to withhold the execution of the imposed punishment for a stated period of time. This action can be taken with respect to unexecuted portions of the punishment, or, in the case of a reduction in rank or a forfeiture, such action may be taken even though the punishment has been executed.

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

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

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

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

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

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

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

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

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

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

(d) The order vacating a suspension must be issued within ten working days of the commencement of the vacation proceedings and the decision to vacate the suspended punishment is not appealable as an NJP appeal. JAGMAN, § 0118d.

(5) The probationary period cannot exceed six months from the date of suspension and terminates automatically upon expiration of current enlistment. Part V, para. 6a(2), MCM, 1984. The running of the period of suspension will be interrupted, however, by the unauthorized absence of the accused or the commencement of any proceeding to vacate the suspended punishment. The running of the period of probation resumes again when the unauthorized absence ends or when the suspension proceedings are terminated without vacation of the suspended punishment. JAGMAN, § 0118c.

F. Appeal from NJP

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

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

(1) A GCM authority superior to the officer imposing punishment may, however, set up an alternate route for appeals.

(2) When the area coordinator is not superior in rank or command to the officer imposing punishment, or when the area coordinator is the officer imposing punishment, the appeal will be forwarded to the GCM authority next superior in the chain of command to the officer who imposed the punishment.

(3) An immediate or delegated area coordinator who has authority to convene GCM's may take action in lieu of an area coordinator if he is superior in rank or command to the officer who imposed the punishment.

(4) For mobile units, the area coordinator for the above purposes is the area coordinator most accessible to the unit at the time of forwarding the appeal.

b. When the officer who imposed the punishment is in the chain of command of the Commandant of the Marine Corps, the appeal will be made to the officer next superior in the chain of command to the officer who imposed the punishment (e.g., an appeal from company office hours should be submitted to the battalion commander). JAGMAN, § 0117b.

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

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

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

2. **Time**. Appeals must be submitted in writing within 5 days of the imposition of NJP or the right to appeal shall be waived in the absence of good cause shown. Part V, para. 7d, MCM, 1984. The appeal period begins to run from the date of the imposition of NJP even though all or any part of the punishment imposed is suspended. This presumes that the accused was notified of the specifics of the NJP awarded and his rights of appeal on the same day NJP was imposed. If not, the 5-day period begins when such notice is given to the accused. In computing the 5-day period, allowance must be made for the time required to transmit the notice of imposition of NJP and the appeal itself through the mails. In the case of an appeal submitted more than 5 days after the imposition of NJP (less any mailing delays), the officer acting on the appeal shall determine whether "good cause" was shown for the delay in the appeal. JAGMAN, § 0116.

a. **Extension of time**. If it appears to the accused that good cause may exist which would make it impracticable or extremely difficult to prepare and submit the appeal within the 5-day period, the accused should immediately advise the officer who imposed the punishment of the perceived problems and request an appropriate extension of time. The officer imposing NJP shall determine whether good cause was shown and shall advise the accused whether an extension of time will be permitted. JAGMAN, § 0116a(2).

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

3. **Contents of appeal package.** Sample NJP appeal packages are included as appendices at the end of this chapter. One is a suggested format for Marine Corps use and the other is for use in Navy cases.

a. **Appellant's letter (grounds for appeal).** The letter of appeal from the accused should be addressed to the appropriate appeal authority via the commander who imposed the punishment and other appropriate commanding officers in the chain of command. The letter should set forth the salient features of the NJP (date, offense, who imposed it, and punishment imposed) and detail the specific grounds for relief. There are only two grounds for appeal: the punishment was unjust, or the punishment was disproportionate to the offense committed. The grounds for appeal are broad enough to cover all reasons for appeal. Unjust punishment exists when the evidence is insufficient to prove the accused committed the offense; when the statute of limitations (Article 43(c), UCMJ) prohibits lawful punishment; or when any other fact, including a denial of substantial rights, calls into question the validity of the punishment. Punishment is disproportionate if it is, in the judgment of the reviewer, too severe for the offense committed. An offender who believes his punishment is too severe thus appeals on the ground of disproportionate punishment, whether or not his letter artfully states the ground in precise terminology. Note, however, that a punishment may be legal but excessive or unfair considering circumstances such as: the nature of the offense; the absence of aggravating circumstances; the prior record of the offender; and any other circumstances in extenuation and mitigation. The grounds for appeal need not be stated artfully in the accused's appeal letter, and the reviewer may have to deduce the appropriate ground implied in the letter. Inartful draftsmanship or improper addressees or other administrative irregularities are not grounds for refusing to forward the appeal to the reviewing authority. If any commander in the chain of addressees notes administrative mistakes, they should be corrected, if material, in that commander's endorsement which forwards the appeal. Thus, if an accused does not address his letter to all appropriate commanders in the chain of command, the commander who notes the mistake should merely readdress and forward the appeal. He should not send the appeal back to the accused for redrafting, since the appeal should be forwarded promptly to the reviewing authority. The appellant's letter begins the review process and is a quasi-legal document. It should be temperate and

state the facts and opinions the accused believes entitles him to relief. The offender should avoid unfounded allegations concerning the character or personality of the officer imposing punishment. *See* Article 1108, *U.S. Navy Regulations, 1990.* The accused, however, should state the reasons for his appeal as clearly as possible. Supporting documentation in the form of statements of other persons, personnel records, etc. may be submitted if the accused desires. In no case is the failure to do these things lawful reason for refusing to process the appeal. Finally, should the accused desire that his restraint punishments or extra duties be stayed pending the appeal, he should specifically request this in the letter.

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

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

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

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

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

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

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

c. **Endorsement of the reviewing authority**. There are no particular legal requirements concerning the content of the reviewer's endorsement except to inform the offender of his decision. A legally sound endorsement will include the reviewer's specific decision on each ground of appeal, the basic reasons for his decision, a statement that a lawyer has reviewed the appeal, and instructions for the disposition of the appeal package after the offender receives it. The endorsement should be addressed to the accused via the appropriate chain of command. Where persons not in the direct chain of command (such as finance officers) are directed to take some corrective action, copies of the reviewer's endorsement should be sent to them. Words of exhortation or admonition, if temperate in tone, are suitable for inclusion in the return endorsement of the reviewer.

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

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

4. **Review guidelines**. As a preliminary matter, it should be noted that NJP is not a criminal trial but rather an administrative proceeding, primarily corrective in nature, designed to deal with minor disciplinary infractions without the stigma of a court-martial conviction. As a result, the standard of proof applicable at article 15 hearings is "preponderance of the evidence" vice "beyond reasonable doubt." JAGMAN, § 0110b.

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

b. **Evidentiary errors.** Strict rules of evidence do not apply at NJP hearings. Evidentiary errors, except for insufficient evidence, will not normally invalidate punishment. If the reviewer believes the evidence insufficient to punish for the offense charged, but believes another offense has been proved by the evidence, the best practice would be to return the package to the commanding officer who imposed punishment and direct a rehearing on the other offense. The reviewer should then review the new action and complete his review. Such a practice, though not required, comports with the basic due-process-of-law notion that an accused is entitled to fair notice as to what he must defend against. This guidance does not apply where the other offense is a lesser included offense of the offense charged. Note that, although the rules of evidence do not apply at NJP, Article 31, UCMJ, should be complied with at the hearing. Part V, para. 4c(3), MCM, 1984.

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

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

e. **Delegation of authority to action appeals.** Pursuant to Part V, para. 7f(5), MCM, 1984, and section 0117d of the *JAG Manual*, an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his power to review and act upon NJP appeals to a "principal assistant" as defined in section 0106c of the *JAG Manual*. The officer who has delegated his NJP powers may not act upon an appeal from punishment imposed by

the principal assistant. In other cases, it may be inappropriate for the principal assistant to act on certain appeals (as where an identity of persons or staff may exist with the command which imposed the punishment), and such fact should be noted by the command in the forwarding endorsement. JAGMAN, § 0117d.

5. **Authorized appellate action.** Part V, para. 7f, MCM, 1984; JAGMAN, § 0117. In acting on an appeal, or even in cases in which no appeal has been filed, the superior authority may exercise the same power with respect to the punishment imposed as the officer who imposed the punishment. Thus, the reviewing authority may:

a. Approve the punishment in whole;

b. mitigate, remit, or set aside the punishment to correct errors;

c. mitigate, remit, or suspend (in whole or in part) the punishment for reasons of clemency;

d. dismiss the case (If this is done, the reviewer must direct the restoration of all rights, privileges, and property lost by the accused by virtue of the imposition of punishment.); or

e. authorize a rehearing on an uncharged but supported offense, or on the same offense, if there has been a substantial procedural error not amounting to a finding of insufficient evidence to impose NJP. At the rehearing, however, the punishment imposed may be no more severe than that imposed during the original proceedings, unless other offenses which occurred subsequent to the date of the original proceeding are added to the original offenses. If the accused, while not attached to or embarked in a vessel, waived his right to demand trial by court-martial at the original proceedings, he may not assert this right as to those same offenses at the rehearing but may assert the right as to any new offenses at the rehearing. JAGMAN, § 0117e.

Upon completion of action by the reviewing authority, the servicemember shall be promptly notified of the result.

G. Imposition of NJP as a bar to further proceedings

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

2. **Imposition of NJP as a bar to further NJP**

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

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

b. A superior in the chain of command may require that certain types of cases be forwarded to him prior to the immediate commanding officer's imposing NJP. *See* R.C.M. 401, MCM, 1984. But, a superior may not withhold or limit the exercise of a subordinate's NJP authority without the express authorization of the Secretary of the Navy. *See* JAGMAN, § 0106e.

3. **Imposition of NJP as a bar to subsequent court-martial**. R.C.M. 907b(2)(D)(iv), MCM, 1984 would prohibit an accused from being tried at court-martial for a minor offense for which he has already received NJP. Part V, para. 1e, MCM, 1984, defines "minor" offenses, in part, as "offense(s) for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial." The rule further provides, however, that the commanding officer imposing punishment has the discretion to consider as "minor" even certain offenses carrying punishments in excess of that provided in the rule. Should the court-martial determine that the offense was not minor," it may go ahead and try the offense notwithstanding the prior imposition of NJP.

H. Trial by court-martial as a bar to NJP

1. **General**. In two cases, the Court of Military Appeals has considered the propriety of the imposition of NJP for offenses which have already been litigated (at least to some degree) before a court-martial. A reading of these cases would appear to indicate that the question of whether the offense may lawfully be taken to NJP following a court-martial will depend upon whether trial on the merits had begun on the offenses at court-martial prior to the imposition of NJP.

2. **Imposition of NJP after dismissal at court-martial before findings**. In *Dobzynski v. Green*, 16 M.J. 84 (C.M.A. 1983), a charge of possession of marijuana was referred to special court-martial. After the military judge granted

the defense motion to suppress the marijuana, the convening authority withdrew the charge and imposed NJP upon the accused for the offense. As the accused was then attached to a vessel, he was unable to refuse the NJP. On petition for extraordinary relief before the Court of Military Appeals, the accused argued that the military judge violated his due process rights by allowing withdrawal of the charge after arraignment and prior to the presentation of evidence on the merits. In denying the petition for extraordinary relief, the court held not only that the military judge properly allowed the withdrawal, but also that the "convening authority acted in accordance with the law and within his discretion in withdrawing the charges from the special court-martial." *Id.* at 86.

3. **Imposition of NJP after acquittal at court-martial.** In *Jones v. Commander, Naval Air Force, U.S. Atlantic Fleet*, 18 M.J. 198 (C.M.A. 1984), the accused's motion for a finding of not guilty was granted by the military judge following the presentation of the government's case-in-chief. The convening authority then imposed NJP upon the accused for substantially the same offense. Here, the court again denied the petition for extraordinary relief but in dicta condemned the imposition of NJP following the earlier court-martial conviction as an "unreasonable abuse of command disciplinary powers which cannot be tolerated in a fundamentally fair military justice system." *Id.* at 198-99.

4. **Cases arising after 1 August 1984.** Significantly, both *Dobzynski, supra*, and *Jones, supra*, involved offenses committed and punished prior to 1 August 1984. For cases arising after this date, the provisions of section 0124d of the *JAG Manual* would apply. This section provides that "[p]ersonnel who have been tried by courts which derive their authority from the United States, such as U.S. District Courts, shall not be tried by court-martial *or be awarded nonjudicial punishment for the same act or acts*" (emphasis added). Assuming that the term "tried" [as used in JAGMAN, § 0124d] means that point in the trial after which jeopardy would attach and prevent the retrial of charges to a subsequent forum, the rule would appear to be consistent with that mandated by *Dobzynski, supra*, and *Jones, supra*. Thus, NJP would be barred for an offense previously referred to court-martial at which jeopardy had attached and which could not be retried at a subsequent court.

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

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

(1) May not be combined with restriction

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

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

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

(5) Shall be expressed in whole dollar amounts only

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

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

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

Requirements of *United States v. Booker*, 5 M.J. 238 (C.M.A. 1977)
5 M.J. 246 (C.M.A. 1978)

Nonjudicial punishment (NJP)

1. The *Booker* requirements do not apply to NJP received by members who are attached to or embarked on ships and who, therefore, have no right to refuse NJP.

2. Shore-based members who are facing NJP may be given the opportunity to consult with a lawyer prior to deciding whether to accept NJP. The purpose of this consultation is to assist the accused in deciding whether to accept NJP.

3. If the accused makes a knowing, intelligent, and voluntary waiver of that opportunity to consult with counsel, that waiver should be in writing. If the accused consults with counsel, that fact should be recorded in writing.

4. Waiver of the right to refuse NJP must also be in writing.

5. Failure to afford the member the opportunity to consult with independent counsel before accepting NJP renders the NJP inadmissible under R.C.M. 1011(b)(2) at a subsequent court-martial and, in USMC cases, at subsequent administrative proceedings.

Summary court-martial (SCM)

1. An accused may be given the opportunity to consult with an independent counsel prior to accepting trial by SCM. The purpose of this consultation is to assist the accused in deciding whether to accept an SCM and whether to request representation by counsel at the SCM.

2. If the accused makes a knowing, intelligent, and voluntary waiver of that opportunity to consult with counsel, that waiver should be in writing. If the accused consults with counsel, that fact should be recorded in writing.

3. The accused's consent to trial by SCM must also be in writing.

4. If the accused consults with an independent counsel prior to accepting trial by SCM, or if he waives that right, the record of that SCM may then be introduced at a subsequent court-martial in accordance with R.C.M. 1001(b)(2).

5. For USMC cases, failure to comply with the above requirements will prevent the use of a record of SCM by the government at any subsequent administrative proceeding.

Appendix II

ADMINISTRATIVE REMARKS
NAVPERS 1070/613 (Rev. 1-76)
S/N 0106-LF-010-6990

E-32

SEE BUPERSMAN 5030420

SHIP OR STATION

PERSUPPDET, NETC, NEWPORT, RI

25 Jun CY: YNSN Clyde E. Ferndock, USN, signed JAG Manual Appendix A-1-t, prior to his captain's mast which was held on 25 June 19CY.

The accused talked to a lawyer prior to deciding whether to demand trial by court-martial in lieu of captain's mast. In completing the remainder of the form, the accused did not demand trial by court-martial in lieu of captain's mast.

J. M. Perfect

J. M. PERFECT, PNC, USN
By direction of the Officer in Charge

NOTE TO STUDENT: This page 1070/613 (page 13) entry represents documentation that the accused talked with an attorney prior to accepting NJP.

THIS ENTRY IS TO BE USED ONLY WHEN THE ACCUSED IS NOT EMBARKED IN A VESSEL AND WHERE THE RECORD MAY BE USED IN AGGRAVATION IN THE EVENT OF A LATER COURT-MARTIAL.

Reference for sample format: JAGMAN, 0104a(3)

Appendix III-a

NAME (Last, First, Middle)	SSN	BRANCH AND CLASS
FERNDOCK, Clyde Elrod	000-00-0000	USN

*U.S. Government Printing Office: 1981—703-100/8427 2-1

13

ADMINISTRATIVE REMARKS
NAVPERS 1070/613 (Rev. 1-76)
S/N 0106-LF-010-6990

E-32

SEE BUPERSMAN 5030420

SHIP OR STATION

PERSUPPDET, NETC, NEWPORT, RI

25 Jun CY: YNSN Clyde E. Ferndock, USN, signed JAG Manual Appendix A-1-t, prior to his captain's mast which was held on 25 June 19CY.

The accused gave up his right to talk to a lawyer prior to deciding whether to demand trial by court-martial in lieu of captain's mast. In completing the remainder of the form, the accused did not demand trial by court-martial in lieu of captain's mast.

I. M. PERFECT, PNC, USN
By direction of the Officer in Charge

NOTE TO STUDENT: This page 1070/613 (page 13) entry represents documentation that the accused had given up his right to talk to a lawyer prior to deciding whether to demand trial by court-martial in lieu of NJP.

THIS ENTRY IS TO BE USED ONLY WHEN THE ACCUSED IS NOT EMBARKED IN A VESSEL AND WHERE THE RECORD MAY BE USED IN AGGRAVATION IN THE EVENT OF A LATER COURT-MARTIAL.

Reference for sample format: JAGMAN, 0104a(3)

Appendix III-b

NAME (Last, First, Middle)	SSN	BRANCH AND CLASS
FERNDOCK, Clyde Elrod	000-00-0000	USN

* U.S. Government Printing Office: 1981—703-100/8427 8-1

13

ALMAR 097/87

Because of recent litigation in Federal court involving an attack on the Navy for issuing a discharge under other than honorable conditions based, at least in part, on prior nonjudicial punishments, the Commandant of the Marine Corps has directed that the *Booker* advice and service record book entry reflecting compliance with *Booker* contain the following language:

> DATE. I CERTIFY THAT I HAVE BEEN GIVEN THE OPPORTUNITY TO CONSULT WITH A LAWYER, PROVIDED BY THE GOVERNMENT AT NO COST TO ME, IN REGARD TO A PENDING (NJP/SCM) FOR VIOLATION OF ARTICLE(S) (ART. NO.(S)) OF THE UCMJ. I UNDERSTAND THAT I HAVE THE RIGHT TO REFUSE THAT (NJP/SCM): I (DO) (DO NOT) CHOOSE TO EXERCISE THAT RIGHT. I FURTHER UNDERSTAND THAT ACCEPTANCE OF (NJP/SCM) DOES NOT PRECLUDE MY COMMAND FROM TAKING OTHER ADVERSE ADMINISTRATIVE ACTION AGAINST ME. I (WILL) (WILL NOT) BE REPRESENTED BY CIVILIAN/MILITARY LAWYER. SIGNATURE OF ACCUSED.

This change has been incorporated into the IRAM at para. 4014.2b(2).

Appendix IV

SAMPLE

NAVY APPEAL PACKAGE

OF

NONJUDICIAL PUNISHMENT

Appendix V-1

5800
27 Jun 19cy

From: RMSN John P. Williams, USN, 434-52-9113
To: Commander, Cruiser-Destroyer Flotilla FIVE
Via: Commanding Officer, USS BENSON (DD-895)

Subj: APPEAL FROM NONJUDICIAL PUNISHMENT

Ref: (a) Art. 15(e), UCMJ
(b) Part V, para. 7, MCM, 1984
(c) JAGMAN, § 0116

Encl: (1) (Statements of other persons of facts or matters in mitigation which support the appeal)
(2) " " "
(3) " " "

1. As provided by references (a) through (c), appeal is herewith submitted from nonjudicial punishment imposed upon me on 25 June 19cy by CDR S. D. Dunn, Commanding Officer, USS BENSON (DD-895) as follows:

a. Offenses

Charge: Violation of Article 134, UCMJ

Specification: In that RMSN John P. Williams, USN, on active duty, did, on board USS BENSON (DD-895), on or about 16 June 19cy, unlawfully carry a concealed weapon, to wit: a switchblade knife.

b. Punishment: Forfeiture of $100.00 pay per month for 2 months

c. Grounds of Appeal

Punishment for the Charge is unjust because I, in fact, did not know there was a knife in my pants pocket. The clothes were borrowed.

//S//
JOHN P. WILLIAMS

SAMPLE

5800
Ser /
29 Jun 19cy

FIRST ENDORSEMENT on RMSN John P. Williams, USN, 434-52-9113 ltr 5800 of 27 Jun 19cy

From: Commanding Officer, USS BENSON (DD-895)
To: Commander, Cruiser-Destroyer Flotilla FIVE

Subj: APPEAL FROM PUNISHMENT ICO RMSN JOHN P. WILLIAMS, USN, 434-52-9113

Encl: (4) NAVPERS 1626/7 with attachments thereto
(5) SR Accused's Service Record (Record of Performance)

1. Forwarded for action. Enclosures (4) and (5) are attached in amplification of the appeal.

2. (Statement of facts or circumstances or other matters which are not contained in appellant's letter of appeal and which would aid the command acting on appeal in arriving at a proper determination. This should not be argumentative nor in the form of a "defense" to the matters stated in appellant's letter of appeal.)

//S//
S. D. DUNN

See JAGMAN, § 0116c

REPORT AND DISPOSITION OF OFFENSE(S)
NAVPERS 1626/7 (REV. 6-81) S/N 0106-LF-016 2636

To: Commanding Officer, USS BENSON (DD-895) Date of Report: 16 June 19CY

1. I hereby report the following named person for the offense(s) noted:

NAME OF ACCUSED	SERIAL NO	SOCIAL SECURITY NO	RATE/GRADE	AR & CLASS	DIV/DEPT
WILLIAMS, John P.	NA	434 52 9113	RMSN	USN	OPS

PLACE OF OFFENSE(S)	DATE OF OFFENSE(S)
Quarterdeck, USS BENSON (DD-895)	16 June 19CY

DETAILS OF OFFENSE(S) (Refer by article of UCMJ, if known. If unauthorized absence, give following info: time and date of commencement, whether over leave or liberty, time and date of apprehension or surrender and arrival on board, loss of ID card and/or liberty card, etc.):

Violation of Art.134, UCMJ. In that RMSN John P. Williams, USN, did on board the USS BENSON (DD-895), on or about 16 June 19CY unlawfully carry a concealed weapon, to wit: a switchblade knife.

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT
Harold B. Johnson	CPO	OPS			
Robert A. Hudson	WO1	ENG			

QMC, USN /s/ Harold B. Johnson
(Rate/Grade/Title of person submitting report) (Signature of person submitting report)

I have been informed of the nature of the accusation(s) against me. I understand I do not have to answer any questions or make any statement regarding the offense(s) of which I am accused or suspected. However, I understand any statement made or questions answered by me may be used as evidence against me in event of trial by court-martial (Article 31, UCMJ).

Witness: /s/ H. O. Kay Legal Officer (Signature) Acknowledged: /s/ John P. Williams (Signature of Accused)

PRE-MAST RESTRAINT

☐ PRE TRIAL CONFINEMENT

☐ RESTRICTED: You are restricted to the limits of _____ in lieu of arrest by order of the CO. Until your status as a restricted person is terminated by the CO, you may not leave the restricted limits except with the express permission of the CO or XO. You have been informed of the times and places which you are required to muster.

☒ NO RESTRICTIONS

(Signature and title of person imposing restraint) (Signature of Accused)

INFORMATION CONCERNING ACCUSED

CURRENT ENL DATE	EXPIRATION OF PRESENT ENL DATE	TOTAL ACTIVE NAVAL SERVICE	TOTAL SERVICE ON BOARD	EDUCATION	GCT	AGE
24 May 19CY+2	23 May 19CY+2	2yr 1mo	10 mos	HS	57	19

MARITAL STATUS	NO. DEPENDENTS	NATURE OF ALLOTMENT (Amount required by law)	RATE OF BASIC PAY (including sea or foreign duty pay, if any)
Single	none	none	$612.00

RECORD OF PREVIOUS OFFENSE(S): (Date, type, action taken, etc. Nonjudicial punishment incidents are to be listed.)

None

Appendix V(6)

PRELIMINARY INQUIRY REPORT

From: Commanding Officer
Date: 20 June 19CY
To: ENS David S. Willis, USNR

1. Transmitted herewith for preliminary inquiry and report by you, including, if appropriate in the interest of justice and discipline, the preferring of such charges as appear to you to be sustained by expected evidence.

REMARKS OF DIVISION OFFICER (Performance of duty, etc.)

SN Williams is a good worker who is learning his rate thru on-the-job training. He needs occasional supervision, but works willingly when assigned a job to do. I consider him petty officer material. This is the first time he's been in trouble. /s/LT G.V. Jones

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT
Harold B. Johnson	CPO	OPS			
Robert A. Hudson	WO1	ENG			

RECOMMENDATION AS TO DISPOSITION:

[ ] REFER TO COURT MARTIAL FOR TRIAL OF ATTACHED CHARGES (Complete Charge Sheet (DD Form 458) through Page 2)

[X] DISPOSE OF CASE AT MAST [ ] NO PUNITIVE ACTION NECESSARY OR DESIRABLE [ ] OTHER

COMMENT (Include data regarding availability of witnesses, summary of expected evidence, conflicts in evidence, if expected. Attach statements of witnesses, documentary evidence such as service record entries in UA cases, items of real evidence, etc.)

SN Williams was discovered to be carrying a switchblade with a 5" blade by QMC Johnson when he was the JOOD on 16 June. SN Williams was about to depart the ship on liberty at approx. 1630, when QMC Johnson noticed a bulge in his front pocket. The knife was discovered when Williams was ordered to empty his pockets. All witnesses are available. WO1 Hudson observed the incident.

/s/ D. S. Willis, ENS, USNR
(Signature of Investigation Officer)

ACTION OF EXECUTIVE OFFICER

[ ] DISMISSED [X] REFERRED TO CAPTAIN'S MAST

SIGNATURE OF EXECUTIVE OFFICER: /s/ R. D. LINE, LCDR, USN

RIGHT TO DEMAND TRIAL BY COURT-MARTIAL
(Not applicable to persons attached to or embarked in a vessel)

I understand that nonjudicial punishment may not be imposed on me if, before the imposition of such punishment, I demand in lieu thereof trial by court-martial. I therefore (do) (do not) demand trial by court-martial.

WITNESS: NA

SIGNATURE OF ACCUSED: NA

ACTION OF COMMANDING OFFICER

[ ] DISMISSED
[ ] DISMISSED WITH WARNING (Not considered NJP)
[ ] ADMONITION: ORAL/IN WRITING
[ ] REPRIMAND: ORAL/IN WRITING
[ ] REST. TO _____ FOR ____ DAYS
[ ] REST. TO _____ FOR ____ DAYS WITH SUSP. FROM DUTY
[X] FORFEITURE: TO FORFEIT $ 100 PAY PER MO. FOR 2 MO(S)
[ ] DETACH FOR DUTY TO MAKE A _____ DET REP NO. FOR (1, 2, 3) MO(S) DETACHED FOR ____ MO(S)

[ ] CONF. ON _____ 1, 2, OR 3 DAYS
[ ] CORRECTIONAL CUSTODY FOR _____ DAYS
[ ] REDUCTION TO NEXT INFERIOR PAY GRADE
[ ] REDUCTION TO PAY GRADE OF _____
[ ] EXTRA DUTIES FOR _____ DAYS
[ ] PUNISHMENT SUSPENDED FOR _____
[ ] ART. 32 INVESTIGATION
[ ] RECOMMENDED FOR TRIAL BY GCM

[ ] AWARDED SPCM [ ] AWARDED SCM

DATE OF MAST	DATE ACCUSED INFORMED OF ABOVE ACTION	SIGNATURE OF COMMANDING OFFICER
25 June 19CY	25 June 19CY	/s/ S. D. DUNN, CDR, USN

It has been explained to me and I understand that if I feel this imposition of nonjudicial punishment to be unjust or disproportionate to the offenses charged against me, I have the right to immediately appeal my conviction to the next higher authority within XXXXX 5 days.

SIGNATURE OF ACCUSED: /s/ J. P. WILLIAMS DATE: 25 Jun19CY

I have explained the above rights of appeal to the accused.
SIGNATURE OF WITNESS: /s/H.O. KAY DATE: 25 Jun19CY

FINAL ADMINISTRATIVE ACTION

APPEAL SUBMITTED BY ACCUSED
DATE: 27 Jun 19CY
FORWARDED FOR DECISION ON: 28 Jun 19CY

FINAL RESULT OF APPEAL: Denied

APPROPRIATE ENTRIES MADE IN SERVICE RECORD AND PAY ACCOUNT ADJUSTED WHERE REQUIRED
DATE: 25 Jun 19CY /s/ Leg Off (Initials)

FILED IN UNIT PUNISHMENT BOOK
DATE: 25 Jun19CY /s/ Leg Off (Initials)

NAVPERS 1626/7 (REV. 8-81)(BACK)

US GOVERNMENT PRINTING OFFICE 1985-505-012 17977 2-1

Appendix V(7)

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S NOTIFICATION AND ELECTION OF RIGHTS
ACCUSED ATTACHED TO OR EMBARKED IN A VESSEL
(See JAGMAN 0109)

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case of _____, SSN _____, assigned or attached to _____.

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM, 1984, you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:

(Note: Here describe the offenses, including the UCMJ article(s) allegedly violated.)

2. The allegations against you are based on the following information:

(Note: Here provide a brief summary of that information.)

3. You may request a personal appearance before the commanding officer or you may waive this right.

a. Personal appearance waived. If you waive your right to appear personally before the commanding officer, you will have the right to submit any written matters you desire for the commanding officer's consideration in determining whether or not you committed the offenses alleged, and, if so, in determining an appropriate punishment. You are hereby informed that you have the right to remain silent and that anything you do submit for consideration may be used against you in a trial by court-martial.

b. Personal appearance requested. If you exercise your right to appear personally before the commanding officer, you shall be entitled to the following rights at the proceeding:

(1) To be informed of your rights under Article 31(b), UCMJ;

(2) To be informed of the information against you relating to the offenses alleged;

(3) To be accompanied by a spokesperson provided or arranged for by you. A spokeskperson is not entitled to travel or similar expenses, and the proceedings will not be delayed to permit the presence of a spokesperson. The spokesperson may speak on your behalf, but may not question witnesses except as the commanding officer may permit as a matter of discretion. The spokesperson need not be a lawyer;

(4) To be permitted to examine documents or physical objects against you that the commanding officer has examined in the case and on which the commanding officer intends to rely in deciding whether and how much nonjudicial punishment to impose;

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

(6) To have witnesses attend the proceeding, including those that may be against you, if their statements will be relevant and they are reasonably available. A witness is not reasonably

A-1-b(1)

available if the witness requires reimbursement by the United States for any cost incurred in appearing, cannot appear without unduly delaying the proceedings, or if a military witness, cannot be excused from other important duties; and

(7) To have the proceedings open to the public unless the commanding officer determines that the proceedings should be closed for good cause. However, this does not require that special arrangements be made to facilitate access to the proceeding.

ELECTION OF RIGHTS

4. Knowing and understanding all of my rights as set forth in paragraphs 1 through 3 above, my desires are as follows:

a. Personal appearance. (Check one)

_____ I request a personal appearance before the commanding officer.

_____ I waive a personal appearance. (Check one)

_____ I do not desire to submit any written matters for consideration.

_____ Written matters are attached.

(Note: The accused's waiver of personal appearance does not preclude the commanding officer from notifying the accused, in person, of the punishment imposed.)

b. Elections at personal appearance. (Check one or more)

_____ I request that the following witnesses be present at my nonjudicial punishment proceeding:

_____

_____

_____

_____

_____

_____ I request that my nonjudicial punishment proceeding be open to the public.

_____ _____
(Signature of witness) (Signature of accused)

_____ _____
Name of witness) (Name of accused)

A-1-b(2)

SUSPECT'S RIGHTS ACKNOWLEDGEMENT/STATEMENT (See JAGMAN 0170)

SUSPECT'S RIGHTS AND ACKNOWLEDGEMENT/STATEMENT

FULL NAME (ACCUSED/ SUSPECT)	SSN	RATE/RANK	SERVICE(BRANCH)
ACTIVITY/UNIT			DATE OF BIRTH
NAME (INTERVIEWER)	SSN	RATE/RANK	SERVICE(BRANCH)
ORGANIZATION		BILLET	
LOCATION OF INTERVIEW		TIME	DATE

RIGHTS

I certify and acknowledge by my signature and initials set forth below that, before the interviewer requested a statement from me, he warned me that:

(1) I am suspected of having committed the following offense(s):_____

_____

_____ ☐

(2) I have the right to remain silent; ---------- ☐

(3) Any statement I do make may be used as evidence against me in trial by court-martial; ---------- ☐

(4) I have the right to consult with lawyer counsel prior to any questioning. This lawyer counsel may be a civilian lawyer retained by me at my own expense, a military lawyer appointed to act as my counsel without cost to me, or both; and- ☐

A-1-m(1)

(5) I have the right to have such retained civilian lawyer and/or appointed military lawyer present during this interview,- ---------- ☐

WAIVER OF RIGHTS

I further certify and acknowledge that I have read the above statement of my rights and fully understand them, and that, ---------- ☐

(1) I expressly desire to waive my right to remain silent; ---------- ☐

(2) I expressly desire to make a statement; ------ ☐

(3) I expressly do not desire to consult with either a civilian lawyer retained by me or a military lawyer appointed as my counsel without cost to me prior to any questioning; ---------- ☐

(4) I expressly do not desire to have such a lawyer present with me during this interview; and ---------- ☐

(5) This acknowledgement and waiver of rights is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me. ---------- ☐

SIGNATURE (ACCUSED/SUSPECT)	TIME	DATE
SIGNATURE (INTERVIEWER)	TIME	DATE
SIGNATURE (WITNESS)	TIME	DATE

A-1-m(2)

The statement which appears on this page (and the following _____ page(s), all of which are signed by me), is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me.

_____
SIGNATURE (ACCUSED/SUSPECT)

_____

_____

_____

A-1-m(3)

18 June 19CY

I, Harold B. Johnson, QMC, USN, have been asked by Ens. D. S. Willis to make the following statement:

On 16 July 19CY I was the JOOD on board the USS Benson (DD 897). At approximately 1630, I was on the quarterdeck and RDSN John P. Williams passed me in civilian clothes. He had on a tight pair of double-knit pants and I noticed an oblong bulge in the right-hand front pocket. I suspected that he might have a knife in this pocket. I knew that a number of the crew had bought knifes when we were in the Med.

I told Williams to ~~stop~~ HBJ-DSW stop and asked him what he had in his pocket. He started to stutter and so I told him to empty his right-hand pocket. He did and he handed me a switch-blade knife. I asked him what he planned to do with the knife and he said he did not intend to use it but just wanted to have it with him in case of trouble. I then took the knife and Williams to the OOD, WO1 Hudson. He told me to put Williams on report. I turned the knife which had a 5-inch blade over to the legal officer, LTjg Kay.

Harold B. Johnson
QMC, USN

Witness:

David S. Willis
ENS, USNR

Appendix V(11)

18 June 19--

I, Robert A. Hudson, WO-1, USN, have been asked by Ens. O. S. Willis to make the following statement:

On 16 June 19--, I was the OOD on board the USS Benson. My JOOD was Chief Harold B. Johnson At approximately 1645 Chief Johnson brought RDSN Williams to me and showed me a switch blade knife which he said he had found on Williams. I asked Williams if he had anything to say and he said he had no intention of using the knife but was only carrying it to protect himself.

I told Chief Johnson to put Williams on report and instructed Williams to report to the legal office the next morning after quarters.

Robert A. Hudson
WO-1, USN

Witness: David S. Willis
ENS., USNR

Appendix V(12)

19 JUN 1994

I, JOHN P. WILLIAMS, RDSN, USN, having been advised of my rights by ENS. DAVID S. WILLIS, which I have acknowledged on the attached rights form, make the following statement, freely and voluntarily, understanding my right to remain silent and to consult a lawyer.

I bought the knife that Chief Johnson took from me during the ship's last med. deployment. I bought it for my own protection. I never intended to use it on anyone. I did not know that just carrying a knife around was a crime.

When Chief Johnson stopped me I had intended to mail the knife home to my father and have him keep it for me to use when we go fishing. It was a good knife and I did not want to just throw it away.

John P. Williams

Witness: David S. Willis
ENS, USNR

Appendix V(13)

(CAPTAIN'S MAST) (OFFICE HOURS) ACCUSED'S ACKNOWLEDGEMENT OF APPEAL RIGHTS

(CAPTAIN'S MAST) (OFFICE HOURS) ACCUSED'S ACKNOWLEDGEMENT OF APPEALS RIGHTS

I, _____, SSN _____,
(Name and grade of accused)

assigned or attached to _____, have been informed of the following facts concerning my rights of appeal as a result of (captain's mast) (office hours) held on _____:

a. I have the right to appeal to (specify to whom the appeal should be addressed).

b. My appeal must be submitted within a reasonable time. Five days after the punishment is imposed is normally considered a reasonable time, in the absence of unusual circumstances. Any appeal submitted thereafter may be rejected as not timely. If there are unusual circumstances which I believe will make it extremely difficult or not practical to submit an appeal within the 5 day period, I should immediately advise the officer imposing punishment of such circumstances, and request an appropriate extension of time in which to file my appeal.

c. The appeal must be in writing.

d. There are only two grounds for appeal; that is:

(1) The punishment was unjust, or

(2) The punishment was disproportionate to the offense(s) for which it was imposed.

e. If the punishment imposed included reduction from the pay grade of E-4 or above, or was in excess of: arrest in quarters for 7 days, correctional custody for 7 days, forfeiture of 7 days' pay, extra duties for 14 days, restriction for 14 days, or detention of 14 days' pay, then the appeal must be referred to a military lawyer for consideration and advice before action is taken on my appeal.

_____ _____
(Signature of Accused and Date) (Signature of Witness and Date)

A-1-f

5800
Ser /
1 Jul 19cy

From: Commander, Cruiser-Destroyer Flotilla FIVE
To: RMSN John P. Williams, USN, 434-52-9113
Via: Commanding Officer, USS BENSON (DD-895)

Subj: APPEAL FROM PUNISHMENT ICO RMSN JOHN P. WILLIAMS

1. Returned, appeal (granted) (denied).

2. Your appeal has been referred to a lawyer for consideration and advice prior to my action.

3. (Statement of reasons for action on appeal, and remarks of admonition and exhortation, if desired.)

4. You are directed to return this appeal and accompanying papers to your immediate commanding officer for file with the record of your case.

//S//
M. J. HUGHES

5800
Ser /
6 Jul 19cy

FIRST ENDORSEMENT on Commander, Cruiser-Destroyer Flotilla FIVE ltr 5800
Ser / of 1 Jul 19cy

From: Commanding Officer, USS BENSON (DD-895)
To: RMSN John P. Williams, USN, 434-52-9113

Subj: APPEAL FROM PUNISHMENT ICO RMSN JOHN P. WILLIAMS

1. Returned for delivery.

//S//
S. D. DUNN

5800
Ser /
6 Jul 19cy

SECOND ENDORSEMENT on Commander, Cruiser-Destroyer Flotilla FIVE ltr 5800
Ser / of 1 Jul 19cy

From: RMSN John P. Williams, USN, 434-52-9113
To: Commanding Officer, USS BENSON (DD-895)

Subj: APPEAL FROM NONJUDICIAL PUNISHMENT

1. I acknowledge receipt, and have noted the contents, of the first endorsement on my appeal from nonjudicial punishment.

2. The appeal and all attached papers are returned for file with the record of my case.

//S//
JOHN P. WILLIAMS

SAMPLE

MARINE CORPS APPEAL PACKAGE

OF

NONJUDICIAL PUNISHMENT

Appendix VI-1

UNITED STATES MARINE CORPS
Schools Company, Schools Battalion
Marine Corps Base
Camp Pendleton, California 92055

5812
21 July 19cy

From: Private John Q. Adams 456 64 5080/0311 USMC
To: Commanding Officer, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055
Via: Commanding Officer, Schools Company, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) MCM, 1984

1. In accordance with reference (a), I am appealing the punishment awarded me at company office hours on 18 July 19cy.

2. Because this was my first offense, I feel that the punishment handed down to me at office hours was too hard and disproportionate to the offense that I committed. Additionally, I feel that my commanding officer did not consider my state of mind at the time I went UA.

//S//
JOHN Q. ADAMS

UNITED STATES MARINE CORPS
Schools Company, Schools Battalion
Marine Corps Base
Camp Pendleton, California 92055

5812
23 Jul 19cy

FIRST ENDORSEMENT on Private John Q. Adams 456 64 5080/0311 USMC ltr 5812 of 21 July 19cy

From: Commanding Officer
To: Commanding Officer, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) JAGMAN
(b) LEGADMINMAN

Encl: (1) Unit Punishment Book
(2) Summary of Hearing
(3) Acknowledgment of Rights Forms

1. In accordance with the provisions of references (a) and (b), the following information setting forth a summary recitation of facts of the office hours' proceedings and a summary of the assertion of facts made by Private Adams are submitted:

a. Summary of recitation of facts

(1) Private Adams appeared at Company Office Hours on 18 July 19cy for the following offense:

Article 86, UA 1300, 5 July 19cy to 2344, 15 July 19cy, from Schools Company, Schools Battalion, Marine Corps Base, Camp Pendleton, California 92055.

(2) The offense was read to Private Adams and then discussed with him. He was asked at least twice if he understood the offense, and he replied that he did.

(3) Private Adams' rights were explained to him and thereafter he signed item 6 on enclosure (1).

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

(4) Private Adams was asked what he pled to the offense; he pleaded guilty and was found guilty.

(5) Private Adams was awarded reduction to Private, restriction to the limits of Schools Company, Schools Battalion, for seven days, without suspension from duty, and forfeiture of $25.00 per month for one month.

b. Summary assertion of facts made by Private Adams:

The findings of guilty are appealed because he feels the punishment is too harsh.

c. Basic record data

(1) Summary of military offenses:

None.

(2) Performance, Proficiency, and Conduct marks are 4.3 and 4.5, respectively.

2. In summary, Private Adams was found guilty of the offense against the Uniform Code of Military Justice. Subject-named Marine was aware of regulations pertaining to unauthorized absence and the steps he should have taken to obtain leave. Private Adams' age, length of service, SRB, and matters presented in extenuation and mitigation were also considered in arriving at an appropriate punishment. A brief summarization of the office hours is contained on the attached sheet of enclosure (1)

//S//
ANDREW JACKSON
Major USMC

Copy to:
Private Adams

NOTE: When a Marine makes an appeal, the original UPB is forwarded as an enclosure with the commanding officer's endorsement. A duplicate is retained by the commanding officer pending final disposition. The duplicate copy may be used as the Marine's copy upon completion of the appeal.

UNIT PUNISHMENT BOOK (5812)
NAVMC 10132 (REV 10-81) (8-75 edition will be used.)
SN: 0000-00-002-1306 U/I: PD (100 sheets per pad)

Staple Additional pages here.

1. See Chapter 2, Marine Corps Manual for Legal Administration, MCO P5800.8.
2. Form is prepared for each accused enlisted person referred to Commanding Officer's Office Hours.
3. Reverse side may be used to summarize proceedings as required by MCO P5800.8.

1. INDIVIDUAL (Last name, First name, middle initial)	2. GRADE	3. SSN
ADAMS, John Q.	PFC E-2	456 64 5080

4. UNIT
ScolsCo, ScolsBn, MCB, CamPen

5. OFFENSES (To include specific circumstances and the date and place of commission of the offense.)

Art. 86: UA 1300, 5 Jul CY - 2344, 15 Jul CY, fr ScolsCo, ScolsBn, MCB, CamPen

6. I have been advised of and understand my rights under Article 31, UCMJ. I also have been advised of and understand my right to demand trial by court martial in lieu of non-judicial punishment. I (do) (do not) demand trial and (will) (will not) accept non-judicial punishment subject to my right of appeal. I further certify that I (have) (have not) been given the opportunity to consult with a military lawyer, provided at no expense to me, prior to my decision to accept non-judicial punishment.

(Date) 18 Jul CY (Signature of accused) /s/ J. Q. ADAMS

7. The accused has been afforded these rights under Article 31, UCMJ, and the right to demand trial by court-martial in lieu of non-judicial punishment.

(Date) 18 Jul CY (Signature of immediate CO of accused) /s/ A.J. JACKSON

8. FINAL DISPOSITION TAKEN AND DATE

Reduction to Pvt, restriction to limits of ScolsCo, ScolsBn, for 7 days, without suspension from duty, and forfeiture $25.00 per month for 1 month. 18 Jul CY

9. SUSPENSION OF EXECUTION OF PUNISHMENT, IF ANY.

None.

10. FINAL DISPOSITION TAKEN BY (Name, grade, title)
ANDREW J. JACKSON, Major, USMC, Commanding Officer

11. Upon consideration of the facts and circumstances surrounding (this offense) and upon further consideration of the needs of military discipline in this command, I have determined the offense(s) involved herein to be minor and properly punishable under Article 15, UCMJ, such punishment to be that indicated in 8 and 9.

(Signature of CO who took final disposition in 8 and 9) /s/ A.J. JACKSON

12. DATE OF NOTICE TO ACCUSED OF FINAL DISPOSITION TAKEN.
18 JulCY

13. The accused has been advised of the right of appeal.
18 Jul CY (Date) /s/ A.J. JACKSON (Signature of CO who took final action in 11)

14. Having been advised of and understanding my right of appeal, at this time I (intend) to file an appeal.
18 Jul CY (Date) /s/ J. Q. ADAMS (Signature of accused)

15. DATE OF APPEAL, IF ANY.
21 Jul CY

16. DECISION ON APPEAL (IF APPEAL IS MADE), DATE THEREOF, AND SIGNATURE OF CO WHO MADE DECISION.

Appeal granted. See 2d enclosure on the basic letter for decision

24 Jul CY (Date) /s/ M. J. VAN BUREN (Signature of CO making decision on appeal)

17. DATE OF NOTICE TO ACCUSED OF DECISION ON APPEAL.
24 Jul CY

18. REMARKS

18 Jul CY - Intent to appeal indicated.

19. Final administrative action, as appropriate, has been completed.
/s/ Illeg Off)

Appendix VI(4)

18 Jul CY

Private John Q. Adams 456 64 5080 USMC

Summary of evidence presented:

The accused admitted to the offense contained in Item 5. Accordingly, he was found to have committed the alleged act of misconduct.

Extenuating or mitigating factors considered: Relating to the UA, the accused stated that he received a phone call from his brother who said he was seriously ill and not expected to live. The accused went UA to see his brother after getting the call. Private Adams said he was sorry for going UA and knew it was wrong.

Based on the recommendation of his First Sergeant and his Platoon Sergeant, and his past record, the punishment appearing in block 8 was imposed.

Appendix VI(5)

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S NOTIFICATION AND ELECTION OF RIGHTS
ACCUSED NOT ATTACHED TO OR EMBARKED IN A VESSEL
RECORD MAY BE USED IN AGGRAVATION IN EVENT OF LATER COURT-MARTIAL
(See JAGMAN 0109)

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case of _____, SSN _____, assigned or attached to _____.

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM, 1984, you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:

(Note: Here describe the offenses, including the UCMJ article(s) allegedly violated.)

2. The allegations against you are based on the following information:

(Note: Here provide a brief summary of that information.)

3. You have the right to refuse imposition of nonjudicial punishment. If you refuse nonjudicial punishment, charges could be referred for trial by court-martial by summary, special, or general court-martial. If charges are referred to trial by summary court-martial, you may not be tried by summary court-martial over your objection. If charges are referred to a special or general court-martial you will have the right to be represented by counsel. The maximum punishment that could be imposed if you accept nonjudicial punishment is:

_____

4. If you decide to accept nonjudicial punishment, you may request a personal appearance before the commanding officer or you may waive this right.

a. Personal appearance waived. If you waive your right to appear personally before the commanding officer, you will have the right to submit any written matters you desire for the commanding officer's consideration in determining whether or not you committed the offenses alleged, and, if so, in determining an appropriate punishment. You are hereby informed that you have the right to remain silent and that anything you do submit for consideration may be used against you in a trial by court-martial.

b. Personal appearance requested. If you exercise your right to appear personally before the commanding officer, you shall be entitled to the following rights at the proceeding:

(1) To be informed of your rights under Article 31(b), UCMJ;

(2) To be informed of the information against you relating to the offenses alleged;

(3) To be accompanied by a spokesperson provided or arranged for by you. A spokeskperson is not entitled to travel or similar expenses, and the proceedings will not be delayed to permit the presence of a spokesperson. The spokesperson may speak on your behalf, but may not question witnesses except as the commanding officer may permit as a matter of discretion. The spokesperson need not be a lawyer;

A-1-d(1)

(4) To be permitted to examine documents or physical objects against you that the commanding officer has examined in the case and on which the commanding officer intends to rely in deciding whether and how much nonjudicial punishment to impose;

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

(6) To have witnesses attend the proceeding, including those that may be against you, if their statements will be relevant and they are reasonably available. A witness is not reasonably available if the witness requires reimbursement by the United States for any cost incurred in appearing, cannot appear without unduly delaying the proceedings, or if a military witness, cannot be excused from other important duties; and

(7) To have the proceedings open to the public unless the commanding officer determines that the proceedings should be closed for good cause. However, this does not require that special arrangements be made to facilitate access to the proceeding.

5. In order to help you decide whether or not to demand trial by court-martial or to exercise any of the rights explained above should you decide to accept nonjudicial punishment, you may obtain the advice of a lawyer prior to any decision. If you wish to talk to a lawyer, a military lawyer will be made available to you, either in person or by telephone, free of charge, or you may obtain advice from a civilian lawyer at your own expense.

ELECTION OF RIGHTS

6. Knowing and understanding all of my rights as set forth in paragraphs 1 through 5 above, my desires are as follows:

a. Lawyer. (Check one or more, as applicable)

_____ I wish to talk to a military lawyer before completing the remainder of this form.

_____ I wish to talk to a civilian lawyer before completing the remainder of this form.

_____ I hereby voluntarily, knowingly, and intelligently give up my right to talk to a lawyer.

_____ _____
(Signature of witness) (Signature of accused)

_____
(Date)

(Note: If the accused wishes to talk to a lawyer, the remainder of this form shall not be completed until the accused has been given a reasonable opportunity to do so.)

A-1-d(2)

____ I talked to _____ , a lawyer, on _____.

_____ _____
(Signature of witness) (Signature of accused)

_____
(Date)

b. Right to refuse nonjudicial punishment. (Check one)

_____ I refuse nonjudicial punishment.

_____ I accept nonjudicial punishment.

(Note: If the accused does not accept nonjudicial punishment, the matter should be submitted to the commanding officer for disposition.)

c. Personal appearance. (Check one)

_____ I request a personal appearance before the commanding officer.

_____ I waive a personal appearance. (Check one)

_____ I do not desire to submit any written matters for consideration.

_____ Written matters are attached.

(Note: The accused's waiver of personal appearance does not preclude the commanding officer from notifying the accused, in person, of the punishment imposed.)

d. Elections at personal appearance. (Check one or more)

_____ I request that the following witnesses be present at my nonjudicial punishment proceeding:

_____

_____

_____

_____

_____

A-1-d(3)

_____ I request that my nonjudicial punishment proceeding be open to the public.

_____	_____
(Signature of witness)	(Signature of accused)
_____	_____
(Name of witness)	(Name of accused)

A-1-d(4)

(CAPTAIN'S MAST) (OFFICE HOURS) ACCUSED'S ACKNOWLEDGEMENT OF APPEAL RIGHTS

(CAPTAIN'S MAST) (OFFICE HOURS) ACCUSED'S ACKNOWLEDGEMENT OF APPEALS RIGHTS

I, _____, SSN _____,
(Name and grade of accused)

assigned or attached to _____, have been informed of the following facts concerning my rights of appeal as a result of (captain's mast) (office hours) held on _____:

a. I have the right to appeal to (specify to whom the appeal should be addressed).

b. My appeal must be submitted within a reasonable time. Five days after the punishment is imposed is normally considered a reasonable time, in the absence of unusual circumstances. Any appeal submitted thereafter may be rejected as not timely. If there are unusual circumstances which I believe will make it extremely difficult or not practical to submit an appeal within the 5 day period, I should immediately advise the officer imposing punishment of such circumstances, and request an appropriate extension of time in which to file my appeal.

c. The appeal must be in writing.

d. There are only two grounds for appeal; that is:

(1) The punishment was unjust, or

(2) The punishment was disproportionate to the offense(s) for which it was imposed.

e. If the punishment imposed included reduction from the pay grade of E-4 or above, or was in excess of: arrest in quarters for 7 days, correctional custody for 7 days, forfeiture of 7 days' pay, extra duties for 14 days, restriction for 14 days, or detention of 14 days' pay, then the appeal must be referred to a military lawyer for consideration and advice before action is taken on my appeal.

_____ _____
(Signature of Accused and Date) (Signature of Witness and Date)

A-1-f

UNITED STATES MARINE CORPS
Schools Battalion, Marine Corps Base
Camp Pendleton, California 92055

5812
Ser /
23 Jul 19cy

From: Commanding Officer
To: Staff Judge Advocate, Marine Corps Base, Camp Pendleton, CA 92055

Subj: REVIEW AND ADVICE OF NJP APPEAL IN THE CASE OF PRIVATE JOHN Q. ADAMS 456 64 5080/0311 USMC

Ref: (a) MCM, 1984

Encl: (1) NJP Appeal Package

1. In accordance with reference (a), enclosure (1) is forwarded for review and advice by a judge advocate.

2. It is noted that the Commanding Officer, Schools Company, Schools Battalion, has the authority to promote up to and including the grade of E-3.

//S//
MARTIN VAN BUREN

UNITED STATES MARINE CORPS
Marine Corps Base
Camp Pendleton, California 92055

5812
24 Jul 19cy

MEMORANDUM ENDORSEMENT

From: Staff Judge Advocate
To: Commanding Officer, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055

Subj: REVIEW AND ADVICE OF NJP APPEAL IN THE CASE OF PRIVATE JOHN Q. ADAMS 456 64 5080/0311 USMC

1. The basic correspondence has been reviewed by a judge advocate. The proceedings are considered to be correct in law and fact, and the punishment awarded is not considered to be unjust or disproportionate to the offense committed.

2. Rejection of the appeal is recommended.

//S//
WILLIAM H. HARRISON

NOTE: Once the battalion commander has received a reply from a judge advocate, his letter requesting review and advice and the reply are not provided to the Marine. This correspondence is retained by the battalion.

UNITED STATES MARINE CORPS
Schools Battalion, Marine Corps Base
Camp Pendleton, California 92055

5812
Ser /
24 Jul 19cy

From: Commanding Officer
To: Private John Q. Adams, 456 64 5080/0311 USMC, Schools Company, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055
Via: Commanding Officer, Schools Company, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

1. Returned.

2. Your case has been reviewed by a judge advocate. The proceedings in this case are considered to be correct in law and fact, and the punishment is not considered to be unjust or disproportionate to the offense committed. However, as an act of clemency, only so much of the punishment as provides for reduction to private, restriction to the limits of Schools Company, Schools Battalion, for five days, without suspension from duty, and forfeiture of $25.00 per month for one month will take effect. That portion of the punishment providing for forfeiture of $25.00 per month for one month and restriction to the limits of Schools Company, Schools Battalion, for five days, without suspension from duty, is suspended for six months and, unless sooner vacated, will be remitted at that time.

//S//
MARTIN VAN BUREN

UNITED STATES MARINE CORPS
Schools Company, Schools Battalion
Marine Corps Base
Camp Pendleton, California 92055

5812
Ser /
25 Jul 19cy

FIRST ENDORSEMENT on Commanding Officer, Schools Battalion ltr 5812
Ser / of 24 Jul 19cy

From: Commanding Officer
To: Private John Q. Adams, 456 64 5080/0311 USMC

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

1. Returned.

2. Action has been taken on your appeal, and your attention is invited to the Commanding Officer, Schools Battalion ltr 5812 of 24 Jul 19cy.

3. Inasmuch as the original correspondence is to be filed in the Unit Punishment Book, you are provided with a copy of your appeal.

//S//
ANDREW JACKSON

Copy to:
Private Adams

NOTE: Once the commanding officer has received the decision, any necessary administrative action should be taken. The Marine is provided with a copy of the entire appeal package, excluding the battalion commander's letter to the SJA and the memorandum endorsement from the SJA.

MILITARY JUSTICE STUDY GUIDE

CHAPTER IX

INTRODUCTION TO THE COURT-MARTIAL PROCESS

A. **Introduction.** Many of the rules and procedures utilized in courts-martial closely resemble those employed in state and Federal criminal courts. This close parallel is dictated by Article 36, UCMJ, which states:

> [P]rocedures, including the modes of proof . . . in cases before courts-martial . . . may be prescribed by the President by regulations which shall, so far as . . . practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the U.S. district courts, but which may not be contrary to or inconsistent with this Chapter.

The result of this delegation of authority by the Congress to the President is the *Manual for Courts-Martial, 1984.* Military necessity has dictated certain procedures in the MCM which are quite different than civilian Federal practice. These differences are implicitly recognized and authorized by the last phrase of Article 36, UCMJ, quoted above. The chief ways in which these differences manifest themselves are in the procedural steps necessary to create a court-martial and to bring a case before the court.

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

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

2. The court must be properly constituted (i.e., all necessary parties must be properly appointed and present).

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

4. The court must have jurisdiction over the offense (i.e., have authority to try the type of offense charged).

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

Note that, unlike the jurisdiction of a Federal court, the jurisdiction of a court-martial is not totally dependent upon where the offense was committed, since Article 5, UCMJ, states that the UCMJ is applicable "in all places."

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

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

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

(1) Voluntary submission to military authority;

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

(3) receipt of military pay or allowances; and

(4) performance of military duties.

If these requirements are met, a person is subject to the UCMJ until properly discharged -- despite any recruiting defect.

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

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

To meet this problem, the government must insure that an individual approaching the end of his enlistment and suspected of an offense is not discharged. The individual should be placed on "legal hold" and the government must also take certain steps to retain jurisdiction over an individual. Examples of actions which are sufficient to retain jurisdiction beyond the expiration of enlistment date are: apprehension, confinement, and preferral of charges. R.C.M. 202(c)(2). Congress originally attempted to authorize the military to try persons for certain serious offenses even though they had since been discharged and had become civilians. *See, e.g.*, Article 3, UCMJ, and the accompanying note. This and similar attempts, however, generally have been held to be unconstitutional.

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

MILITARY JUSTICE STUDY GUIDE

CHAPTER X

THE SUMMARY COURT-MARTIAL

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

As the SCM has no "civilian equivalent," but is strictly a creature of statute within the military system, persons unfamiliar with the military justice system may find the procedure something of a paradox at first blush. While it is a criminal proceeding at which the technical rules of evidence apply, and at which a finding of guilty can result in loss of liberty and property, there is no constitutional right to representation by counsel and it, therefore, is not a true adversary proceeding. The United States Supreme Court examined the SCM procedure in *Middendorf v. Henry*, 425 U.S. 25 (1976). Holding that an accused at SCM was not a "criminal prosecution" within the meaning of the sixth amendment, the Supreme Court cited its rationale previously expressed in *Toth v. Quarles*, 350 U.S. 11 (1955):

> [I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served . . . [M]ilitary tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.

B. Creation of the summary court-martial

1. **Authority to convene.** An SCM is convened (created) by an individual authorized by law to convene SCM's. Article 24, UCMJ, R.C.M. 1302a, MCM, 1984, and JAGMAN, § 0120c indicate those persons who have the power to convene an SCM. Commanding officers authorized to convene GCM's or SPCM's are also empowered to convene SCM's. Thus, the commanding officer of a naval vessel, base, or station, all commanders and commanding officers of Navy units or activities, commanding officers of Marine Corps battalions, regiments, aircraft squadrons, air groups, barracks, etc., have this authority.

The authority to convene SCM's is vested in the office of the authorized command and not in the person of its commander. Thus, Captain Jones, U.S. Navy, has SCM convening authority while actually performing his duty as Commanding Officer, USS *Brownson*, but loses his authority when he goes on leave or is absent from his command for other reasons. The power to convene SCM's is nondelegable and in no event can a subordinate exercise such authority "by direction." When Captain Jones is on leave from his ship, his authority to convene SCM's devolves upon his temporary successor in command (usually the executive officer) who, in the eyes of the law, becomes the commanding officer.

Commanding officers or officers in charge not empowered to convene SCM's may request such authority by following the procedures contained in JAGMAN, § 0121b.

2. **Restrictions on authority to convene.** Unlike the authority to impose NJP, the power to convene SCM's and SPCM's may be restricted by a competent superior commander. JAGMAN, § 0122a(1). Further, the commander of a unit which is attached to a naval vessel for duty therein should, as a matter of policy, refrain from exercising his SCM or SPCM convening powers and should refer such cases to the commanding officer of the ship for disposition. JAGMAN, § 0122b. This policy does not apply to commanders of units which are embarked for transportation only. Finally, JAGMAN, § 0124c(2) requires that the permission of the officer exercising general court-martial jurisdiction over the command be obtained before imposing NJP or referring a case to SCM for an offense which has already been tried in a state or foreign court. Offenses which have already been tried in a court deriving its authority from the United States may not be tried by court-martial. JAGMAN, § 0124d.

It is important to note that, even if the convening authority or the SCM officer is the accuser, the jurisdiction of the SCM is not affected and it is discretionary with the convening authority whether to forward the charges to a superior authority or to simply convene the court himself. R.C.M. 1302(b).

3. **Mechanics of convening.** Before any case can be brought before an SCM, the court must be properly convened (created). It is created by the order of the convening authority detailing the SCM officer to the court. R.C.M. 504(d)(2) requires that the convening order specify that it is an SCM and designate the SCM officer. Additionally, the convening order may designate where the court-martial will meet. If the convening authority derives his power from designation by SECNAV, this should also be stated in the order. JAGMAN, § 0133 further requires that the convening order be assigned a court-martial convening order number; be personally signed by the convening authority; and show his name, grade, and title -- including organization and unit.

While R.C.M. 1302(c) authorizes the convening authority to convene an SCM by a notation on the charge sheet signed by the convening authority, the better practice is to use a separate convening order for this purpose. Appendix 6b of the *Manual for Courts-Martial, 1984*, contains a suggested format for the SCM convening order and a completed form is included at page 10-5, *infra*.

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

4. **Summary court-martial officer.** An SCM is a one-officer court-martial. As a jurisdictional prerequisite, this officer must be a commissioned officer, on active duty, and of the same armed force as the accused. (The Navy and Marine Corps are part of the same armed force: the naval service.) R.C.M. 1301(a). Where practicable, the officer's grade should not be below O-3. As a practical matter, the SCM should be best qualified by reason of age, education, experience, and judicial temperament as his performance will have a direct impact upon the morale and discipline of the command. Where more than one commissioned officer is present within the command or unit, the convening authority may not serve as SCM. When the convening authority is the only commissioned officer in the unit, however, he may serve as SCM and this fact should be noted in the convening order attached to the record of trial. In such a situation, the better practice would be to appoint an SCM officer from outside the command, as the SCM officer need not be from the same command as the accused.

The SCM officer assumes the burden of prosecution, defense, judge, and jury as he must thoroughly and impartially inquire into both sides of the matter and ensure that the interests of both the government and the accused are safeguarded

and that justice is done. While he may seek advice from a judge advocate or legal officer on questions of law, he may not seek advice from anyone on questions of fact, since he has an independent duty to make these determinations. R.C.M. 1301(b).

5. **Jurisdictional limitations: persons**. Article 20, UCMJ, and R.C.M. 1301(c) provide that an SCM has the power (jurisdiction) to try only those enlisted persons who consent to trial by SCM. The right of an enlisted accused to refuse trial by SCM is absolute and is not related to any corresponding right at nonjudicial punishment. No commissioned officer, warrant officer, cadet, aviation cadet and midshipman, or person not subject to the UCMJ (Article 2, UCMJ) may be tried by SCM. The forms at pages 10-17 to 10-19, *infra*, may be used to document the accused's election regarding his right to refuse trial by SCM.

The accused must be subject to the UCMJ at the time of the offense and at the time of trial; otherwise, the court-martial lacks jurisdiction over the person of the accused. *See* Chapter IX, *supra*.

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

In 1977, the United States Court of Military Appeals ruled that the jurisdiction of SCM's is limited to "disciplinary actions concerned solely with minor military offenses unknown in the civilian society." *United States v. Booker*, 3 M.J. 443 (C.M.A. 1977). Read literally, this would have precluded SCM's from trying civilian crimes such as assault, larceny, drug offenses, etc. Following a reconsideration of that decision, the court rescinded that ruling and affirmed that "'with the exception of capital crimes, nothing whatever precludes the exercise of summary court-martial jurisdiction over serious offenses' in violation of the Uniform Code of Military Justice." *United States v. Booker*, 5 M.J. 246 (C.M.A. 1978).

- SAMPLE -

USS FOX (DD-983)
FPO New York 09501

1 July 19CY

SUMMARY COURT-MARTIAL CONVENING ORDER 1-CY

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

ABLE B. SEEWEED
Commander, U.S. Navy
Commanding Officer, USS FOX
FPO New York 09501

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

C. Referral to summary court-martial

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

2. **Preliminary inquiry**. Every court-martial case begins with either a complaint by someone that a person subject to the UCMJ has committed an offense or some inquiry which results in the discovery of misconduct. *See* Chapter IV, *supra*. In any event, R.C.M. 303 imposes upon the officer exercising immediate NJP (Article 15, UCMJ) authority over the accused the duty to make, or cause to be made, an inquiry into the truth of the complaint or apparent wrongdoing. This investigation is impartial and should touch on all pertinent facts of the case, including extenuating and mitigating factors relating to the accused. Either the preliminary investigator or other person having knowledge of the facts may prefer formal charges against the accused if the inquiry indicates such charges are warranted.

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

a. **Personal data**. Block I of page 1 of the charge sheet should be completed first. The information relating to personal data can be found in pertinent portions of the accused's service record, the preliminary inquiry, or other administrative records.

b. **The charges**. Block II of page 1 of the charge sheet is then completed to indicate the precise misconduct involved in the case. Each punitive article found in Part IV, MCM, 1984, contains sample specifications. A detailed treatment of pleading offenses is contained in the criminal law portion of the course.

c. **Accuser**. The accuser is a person subject to the UCMJ who signs item 11 in block III at the bottom of page 1 of the charge sheet. (As previously discussed, this person is only one of several possible types of accusers. This is relevant when considering potential disqualification of a convening authority. See Chapter XII, *infra*.) The accuser should swear to the truth of the charges and have the affidavit executed before an officer authorized to administer oaths. This step is important, as an accused has a right to refuse trial on unsworn charges.

d. **Oath**. The oath must be administered to the accuser and the affidavit so indicating must be executed by a person with proper authority. Article 136, UCMJ, authorizes commissioned officers who are judge advocates, staff judge

advocates, legal officers, law specialists, summary courts-martial, adjutants, and Marine Corps and Navy commanding officers, among others, to administer oaths for this purpose. JAGMAN, § 0902a(1) further authorizes officers certified by the Judge Advocate General of the Navy as counsel under Article 27, UCMJ, all officers in paygrade 0-4 and above, executive officers, and administrative officers of Marine Corps aircraft squadrons to administer oaths. No one can be ordered to prefer charges to which he cannot truthfully swear. Often, the legal officer will administer the oath regardless of who conducted the preliminary inquiry. When the charges are signed and sworn to, they are "preferred" against the accused.

4. **Informing the accused**. Once formal charges have been signed and sworn to, the preferral process is completed when the charges are submitted to the accused's immediate commanding officer. Normally, the legal officer or discipline officer will actually receive these charges and, indeed, may have drafted them. Often, in the Navy, the accused's immediate commanding officer for Article 15, UCMJ, purposes is also the SCM convening authority (commanding officer of a ship, base, or station, etc.). In the Marine Corps, the company commander is normally the immediate commander for Article 15, UCMJ cases, and he does not possess SCM convening authority. Thus, the remaining discussion is premised on the assumption that the Marine Corps company commander has forwarded the charges to the battalion commander (who has convening authority) recommending trial by SCM.

Assuming that the legal/discipline officer of the SCM convening authority has the formal charges and the preliminary inquiry report, the first step which must be taken is to inform the accused of the charges against him. The purpose of this requirement is to provide an accused with reasonable notice of impending criminal prosecution in compliance with criminal due process of law standards. R.C.M. 308 requires the immediate commander of the accused to have the accused informed as soon as practicable of the charges preferred against him, the name of the person who preferred them, and the person who ordered them to be preferred.

The important aspect of this requirement is that notice must be given from official sources. The accused should appear before the immediate commander or other designated person giving notice and should be told of the existence of formal charges, the general nature of the charges, and the name of the person who signed the charges as accuser. A copy of the charges can also be given to the accused, although not required by law at this time. No attempt should be made to interrogate the accused. After notice has been given, the person who gave notice to the accused will execute item 12 at the top of page 2 of the charge sheet. If not the immediate commander of the accused, the person signing on the "signature" line should state their rank, component, and authority. The law does not require a formal hearing to provide notice to the accused, but the charge sheet must indicate that notice has been

given. A failure to properly record the notice to the accused will not necessarily void subsequent processing steps or trial, but care should be taken to avoid such possibilities.

5. **Formal receipt of charges**. R.C.M. 403(a). Item 13 in block IV on page 2 of the charge sheet records the formal receipt of sworn charges by the officer exercising SCM jurisdiction. Often this receipt certification and the notice certification will be executed at the same time, although it is not unusual for the notice certification to be executed prior to the receipt certification -- especially in Marine Corps organizations. The purpose of the receipt certification is to establish that sworn charges were preferred before the statute of limitations operated to bar prosecution.

Article 43, UCMJ, sets forth time limitations for the prosecution of various offenses. If sworn charges are not received by an officer exercising SCM jurisdiction over the accused within the time period applicable to the offense charged, then prosecution for that offense is barred by Article 43, UCMJ. The time period begins on the date the offense was committed and ends on the date appropriate to that offense.

For example, assume Seaman Jones unlawfully absents himself from his ship, USS *Brownson*, on 1 October 19CY(-5). Article 43, UCMJ, requires (in peacetime) that sworn charges of UA be received within two years of its commission. Accordingly, if sworn charges are not received by the officer exercising SCM jurisdiction by 2400, 30 September 19CY, article 43 prohibits trial for that offense unless the accused knowingly agrees to be tried notwithstanding the bar.

Periods of time during which the accused was in the hands of the enemy, in the hands of civilian authorities for reasons relating to civilian matters, or absent without authority in territory where the United States could not apprehend him do not count in computing the limitations set forth in Article 43, UCMJ. Thus, the receipt certification is extremely important and must be completed in exacting detail to preserve the right to prosecute the accused.

Where the accused is absent without leave at the time charges are sworn, it is permissible and proper to execute the receipt certification even though the accused has not been advised of the existence of the charges. In such cases, a statement indicating the reason for the lack of notice should be attached to the case file. When the accused returns to military control, notice should then be given to him. The receipt certification need not be executed personally by the SCM convening authority and is often completed for him by the legal officer, discipline officer, or adjutant.

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

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

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

D. Pretrial preparation

1. **General**. After charges have been referred to trial by SCM, all case materials are forwarded to the proper SCM officer, who is responsible for thoroughly preparing the case for trial.

2. **Preliminary preparation**. Upon receipt of the charges and accompanying papers, the SCM officer should begin preparation for trial. The charge sheet should be carefully examined, and all obvious administrative, clerical, and typographical errors corrected. R.C.M. 1304. The SCM officer should initial each correction he makes on the charge sheet. If the errors are so numerous as to require preparation of a new charge sheet, reswearing of the charges and rereferral is required. In this connection, Article 30, UCMJ, requires that the person who swears to the charges be subject to the UCMJ. In addition, the accuser must either have knowledge of or have investigated the charges and swear that the charges are true in fact to the best of his/her knowledge and belief. The accuser may rely upon the results of an investigation conducted by others in preferring charges. The oath that the accuser takes must be administered by a commissioned officer authorized to administer such oaths [the form of the oath is found in R.C.M. 307(b)]. If the SCM officer changes an existing specification to include any new person, offense, or matter

not fairly included in the original specification, R.C.M. 603 requires the new specification to be resworn and rereferred. The SCM officer should continue his examination of the charge sheet to determine the correctness and completeness of the information on pages 1 and 2 thereof:

a. The accused's name, social security number, rate, unit, and pay grade;

b. pay per month;

c. initial date and term of current service;

d. data as to restraint, including the correct type and duration of pretrial restraint;

e. signature, rank or rate, and armed force of the accuser;

f. signature and authority of the officer who administered the oath to the accuser;

g. date of receipt of sworn charges by the officer exercising SCM jurisdiction (important, as it stops the running of the statute of limitations);

h. block V, referring charge(s) to a specific SCM for trial (compare with convening order to ensure proper referral); and

i. the charge(s) and specification(s). Check for proper form and determine the elements of the offense. "Elements" are facts which must be proved in order to convict the accused of an offense. Part IV, MCM, 1984, contains some guidance in this respect, but for more detailed guidance consult the *Military Judge's Benchbook*, DA Pam. 27-9. The SCM officer should also review the evidence relating to the charges. Problems in connection with proof of the charges should be brought to the attention of the convening authority.

3. **Pretrial conference with accused**. After initial review of the court-martial file, the SCM officer should meet with the accused in a pretrial conference. The accused's right to counsel is discussed later in this chapter. If the accused is represented by counsel, all dealings with the accused should be conducted through his counsel. Thus, the accused's counsel, if any, should be invited to attend the pretrial conference. At the pretrial conference, the SCM officer should follow the suggested guide found in appendix 9, MCM, 1984, and should document the fact that all applicable rights were explained to the accused by completing blocks 1, 2, and 3 of the form for the record of trial by SCM found at appendix 15, MCM, 1984.

a. **Purpose**. The purpose of the pretrial conference is to provide the accused with information concerning the nature of the court-martial, the procedure to be used, and his rights with respect to that procedure. It cannot be overemphasized that no attempt should be made to interrogate the accused or otherwise discuss the merits of the charges. The proper time to deal with the merits of the accusations against the accused is at trial. The SCM officer should provide the accused with a meaningful and thorough briefing in order that the accused fully understands the court-martial process and his rights pertaining thereto. This effort will greatly reduce the chances of post-trial complaints, inquiries, and misunderstandings.

b. **Advice to accused -- rights**. R.C.M. 1304(b) requires the SCM to advise the accused of the following matters:

(1) That the officer has been detailed by the convening authority to conduct an SCM;

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

(3) the general nature of the charges and the details of the specifications thereunder;

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

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

The accused should then be advised that he has the following legal rights:

(a) The right to refuse trial by SCM;

(b) the right to plead "not guilty" to any charge and/or specification and thereby place the burden of proving his guilt, beyond reasonable doubt, upon the government;

(c) the right to cross-examine all witnesses called to testify against him or to have the SCM officer ask a witness questions desired by the accused;

(d) the right to call witnesses and produce any competent evidence in his own behalf and that the SCM officer will assist the accused in securing defense witnesses or other evidence which the accused wishes presented at trial;

(e) the right to remain silent, which means that the accused cannot be made to testify against himself nor will the accused's silence count against him in any way should he elect not to testify;

(f) rights concerning representation by counsel (see subparagraph 3 below);

(g) that, if the accused refuses SCM, the convening authority may take steps to dismiss the case or refer it to trial by special or general court-martial;

(h) the right, if the accused is found guilty, to call witnesses or produce other evidence in extenuation or mitigation and the right to remain silent or to make a sworn or unsworn statement to the court; and

(i) the maximum punishment which the SCM could adjudge if the accused is found guilty of the offense(s) charged.

-1- **E-4 and below**. The jurisdictional maximum sentence which an SCM may adjudge in the case of an accused who, at the time of trial, is in paygrade E-4 or below extends to reduction to the lowest paygrade (E-1); forfeiture of two-thirds of one-month's pay [convening authority may apportion collection over three months; JAGMAN, § 0152a(2)] or a fine not to exceed two-thirds of one month's pay; confinement not to exceed one month; hard labor without confinement for forty-five days (in lieu of confinement); and restriction to specified limits for two months. Also, if the accused is attached to or embarked in a vessel and is in paygrade E-3 or below, he may be sentenced to serve 3 days confinement on bread and water/diminished rations and 24 days confinement in lieu of 30 days confinement. R.C.M. 1301(d)(1).

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

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

c. Advice to accused regarding counsel

(1) In 1972, the Supreme Court held, with respect to "criminal prosecutions," that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at this trial." *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S.Ct. 2006, 2007, 32 L.Ed.2d 530 (1972).

(2) The Supreme Court, in *Middendorf v. Henry*, 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976), held that an SCM was <u>not</u> a "criminal prosecution" within the meaning of the sixth amendment, reasoning that the possibility of loss of liberty does not, in and of itself, create a proceeding at which counsel must be afforded. Rather, it reasoned that an SCM was a brief, nonadversary proceeding, the nature of which would be wholly changed by the presence of counsel. It found no factors that were so extraordinarily weighty as to invalidate the balance of expediency that has been struck by Congress.

(3) In *United States v. Booker*, 5 M.J. 238 (C.M.A. 1977), *reconsidered at* 5 M.J. 246 (C.M.A. 1978), the C.M.A. considered the Supreme Court's decision in *Middendorf* and concluded that there existed no right to counsel at an SCM.

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

(5) ***Booker* warnings**

(a) Although holding that an accused had no right to counsel at an SCM, the C.M.A. ruled in *Booker*, *supra*, that if an accused was not given an opportunity to consult with independent counsel before accepting an SCM, the SCM will be inadmissible at a subsequent trial by court-martial. The term "independent counsel" has been interpreted to mean a lawyer qualified in the sense of Article 27(b), UCMJ, who, in the course of regular duties, does not act as the principle legal advisor to the convening authority. (Note that these provisions mirror the provisions with respect to the right to consult with counsel prior to NJP). *See* Chapter VIII, *supra*.

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

-1- The accused was advised of his right to confer with counsel prior to deciding to accept trial by SCM;

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

-3- the accused voluntarily, knowingly and intelligently waived his right to refuse an SCM.

(c) If an accused has been properly advised of his right to consult with counsel and to refuse trial by SCM, as well as the legal ramifications of these decisions, his elections and/or waivers in this regard should be made in writing and should be signed by the accused. Recordation of the advice/waiver should be made on page 13 (Navy) or page 11 (Marine Corps) of the accused's service record with a copy attached to the record of trial. The forms found at pages 10-17 to 10-19, *infra*, may be utilized to comply with the requirements of *United States v. Booker*, *supra*. The "Acknowledgement of Rights and Waiver," properly completed, contains all the necessary advice to an accused and, properly executed, will establish a voluntary, knowing, and intelligent waiver of the accused's right to consult with counsel and/or his right to refuse trial by SCM. The "Waiver of Right to Counsel" may be used to establish a voluntary, knowing, and intelligent waiver of counsel at an SCM. Should the accused elect to waive his rights, but refuse to sign these forms, this fact should be recorded on page 13 of the service record with a copy attached to the record of trial.

(d) Assuming that the requirements of *Booker* have been complied with (proper advice and recordation of election/waivers), evidence of the prior SCM will be admissible at a later trial by court-martial as evidence of the character of the accused's prior service pursuant to R.C.M. 1001(b)(2). Unless the accused was actually represented by counsel at his SCM or affirmatively rejected an offer to provide counsel, however, the SCM would not be considered a "criminal conviction" and would not be admissible as a prior conviction under R.C.M. 1001(b)(3), nor for purposes of impeachment under Mil.R.Evid. 609, MCM, 1984. *See United States v. Booker*, 3 M.J. 443, 448 (C.M.A. 1977). *See also United States v. Rivera*, 6 M.J. 535 (N.C.M.R. 1978); *United States v. Kuehl*, 9 M.J. 850 (N.C.M.R. 1980); *United States v. Cofield*, 11 M.J. 422 (C.M.A. 1981). While these cases would seem to allow a prior SCM's use as a "conviction" to trigger the increased punishment provisions of R.C.M. 1003(d) if the accused had been actually represented by counsel or had rejected the services of counsel provided to him, the discussion following R.C.M. 1003(d) opines that convictions by SCM may not be used for this purpose. As the discussion and analysis sections of MCM, 1984, have no binding effect and represent only the drafters' opinions, this issue remains unresolved.

SUMMARY COURT-MARTIAL
ACKNOWLEDGMENT OF RIGHTS AND WAIVER

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

1. I have the right to consult with a lawyer prior to deciding whether to accept or refuse trial by summary court-martial. Should I desire to consult with counsel, I understand that a military lawyer may be made available to advise me, free of charge, or, in the alternative, I may consult with a civilian lawyer at my own expense.

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

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

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

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

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

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

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

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

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

a. The right to be represented at trial by a military lawyer, free of charge, including a military lawyer of my own selection if he is reasonably available. I would also have the right to be represented by a civilian lawyer at my own expense.

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

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

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

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

confinement for _____ months;

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

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

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

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

_____
Signature of accused and date

_____
Signature of witness and date

WAIVER OF RIGHT TO COUNSEL

SUMMARY COURT-MARTIAL

I have been advised by the summary court-martial officer that I cannot be tried by summary court-martial without my consent. I have also been advised that if I consent to trial by summary court-martial I may be represented by civilian counsel provided at my own expense. If I do not desire to be represented by civilian counsel provided at my own expense, a military lawyer may be appointed to represent me upon my request, if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it. It has also been explained to me that if I am represented by a lawyer (either civilian or military) at the summary court-martial, or if I waive (give up) the right to be represented by a lawyer, the summary court-martial will be considered a criminal conviction and will be admissible as such at any subsequent court-martial. On the other hand, if I request a military lawyer to represent me and a military lawyer is not available to represent me, or is not provided, and I am not represented by a civilian lawyer, the results of the court-martial will not be admissible as a prior conviction at any subsequent court-martial. I further understand that the maximum punishment which can be imposed in my case will be the same whether or not I am represented by a lawyer. Understanding all of this, I consent to trial by summary court-martial and I waive (give up) my right to be represented by a lawyer at the trial.

Signature of Summary Court-Martial	Signature of Accused
Date	Typed Name, Rank, Social Security Number of Accused

4. **Final pretrial preparation**

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

An orderly trial procedure should be planned to include a chronological presentation of the facts. The admissibility and authenticity of all known evidentiary matters should be determined and numbers assigned all exhibits to be offered at trial. These exhibits, when received at trial, should be marked "received in evidence" and numbered (prosecution exhibits) or lettered (defense exhibits). The evidence reviewed should include not only that contained in the file as originally received, but also any other relevant evidence discovered by other means. The SCM officer has the duty of insuring that all relevant and competent evidence in the case, both for and against the accused, is presented. It is the responsibility of the SCM officer to insure that only legal and competent evidence is received and considered at the trial. Only legal and competent evidence received in the presence of the accused at trial can be considered in determining the guilt or innocence of the accused. The Military Rules of Evidence apply to the SCM and must be followed.

b. **Subpoena of witnesses**. The SCM is authorized by Article 46, UCMJ, and R.C.M.'s 703(e)(2)(C) and 1301(f) to issue subpoenas to compel the appearance at trial of civilian witnesses. In such a case, the SCM officer will follow the same procedure detailed for an SPCM or GCM trial counsel in R.C.M. 703(c) and JAGMAN, § 0146. Appendix 7 of the *Manual for Courts-Martial, 1984*, contains an illustration of a completed subpoena, while JAGMAN, § 0146 details procedures for payment of witness fees. Depositions may also be used, but the advice of a lawyer should be first obtained. *See* Article 49, UCMJ; R.C.M. 702.

E. **Trial procedure**. *See* app. 9, MCM, 1984.

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

1. **Accused acquitted on all charges.** In cases in which the accused has been found not guilty as to all charges and specifications, the SCM must:

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

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

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

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

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

2. **Accused convicted on some or all of the charges.** In cases in which the accused has been found guilty of one or more of the charges and specifications, the SCM must:

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

b. advise the accused of the following appellate rights under R.C.M. 1306:

(1) The right to submit in writing to the convening authority any matters which may tend to affect his decision in taking action (*see* R.C.M. 1105) and the fact that his failure to do so will constitute a waiver of this right (Additionally, the accused may be informed that he may expressly waive, in writing, his right to submit such written matters [R.C.M. 1105(d)].); and

(2) the right to request review of any final conviction by SCM by the Judge Advocate General in accordance with R.C.M. 1201(b)(3).

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

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

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

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

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

NOTE: The convening authority's action and the review procedures for SCM's are discussed in chapter XIV, *infra*.

ADDENDA TO TRIAL GUIDE

SPECIAL EVIDENCE PROBLEM -- CONFESSIONS

NOTE: Before you consider an out-of-court statement of the accused as evidence against him, you must be convinced by a preponderance of the evidence that the statement was made voluntarily and that, if required, the accused was properly advised of his rights. Mil.R.Evid. 304, 305.

A confession or admission is not voluntary if it was obtained through the use of coercion, unlawful influence, or unlawful inducement, including obtaining the statement by questioning an accused without complying with the warning requirements of Article 31(b), UCMJ, and without first advising the accused of his rights to counsel during a custodial interrogation. You must also keep in mind that an accused cannot be convicted on the basis of his out-of-court self-incriminating statement alone, even if it was voluntary, for such a statement must be corroborated if it is to be used as a basis for conviction. Mil.R.Evid. 304(g). If a statement was obtained from the accused during a custodial interrogation, it must appear affirmatively on the record that the accused was warned of the nature of the offense of which he was accused or suspected, that he had the right to remain silent, that any statement he made could be used against him, that he had the right to consult lawyer counsel and have lawyer counsel with him during the interrogation, and that lawyer counsel could be civilian counsel provided by him at his own expense or free military counsel appointed for him. After the above explanation, the accused or suspect should have been asked if he desired counsel. If he answered affirmatively, the record must show that the interrogation ceased until counsel was obtained. If he answered negatively, he should have been asked if he desired to make a statement. If he answered negatively, the record must show that the interrogation ceased. If he affirmatively indicated that he desired to make a statement, the statement is admissible against him. The record must show, however, that the accused did not invoke any of these rights at any stage of the interrogation. In all cases in which you are considering the reception in evidence of a self-incriminating statement of the accused, you should call the person who obtained the statement to testify as a witness and question him substantially as follows:

SCM: (After the routine introductory questions) Did you have occasion to speak to the accused on _____?

WIT: (Yes) (No) _____.

SCM: Where did this conversation take place, and at what time did it begin?

WIT: _____.

SCM: Who else, if anyone, was present?

WIT: _____.

SCM: What time did the conversation end?

WIT: _____.

SCM: Was the accused permitted to smoke as he desired during the period of time involved in the conversation?

WIT: _____.

SCM: Was the accused permitted to drink water as he desired during the conversation?

WIT: _____.

SCM: Was the accused permitted to eat meals at the normal meal times as he desired during the conversation?

WIT: _____.

SCM: Prior to the accused making a statement, what, if anything, did you advise him concerning the offense of which he was suspected?

WIT: (I advised him that I suspected him of the theft of Seaman Jones' Bulova wristwatch from Jones' locker in Building 15 on 21 January 19CY.)

SCM: What, if anything, did you advise the accused concerning his right to remain silent?

WIT: (I informed the accused that he need not make any statement and that he had the right to remain silent.)

SCM: What, if anything, did you advise the accused of the use that could be made of a statement if he made one?

WIT: (I advised the accused that, if he elected to make a statement, it could be used as evidence against him at a court-martial or other proceeding.)

SCM: Did you ask the accused if he desired to consult with a lawyer or to have a lawyer present?

WIT: (Yes.) (No.)

SCM: (If answer to previous question was affirmative) What was his reply?

WIT: (He stated he did (not) wish to consult with a lawyer (or to have a lawyer present).)

NOTE: If the interrogator was aware that the accused had retained or appointed counsel in connection with the charge(s), then such counsel was required to be given notice of the time and place of the interrogation.

SCM: To your knowledge, did the accused have counsel in connection with the charge(s)?

WIT: (Yes.) (No.)

SCM: (If answer to previous question was affirmative) Did you notify the accused's counsel of the time and place of your interview with the accused?

WIT: (Yes.) (No.)

SCM: What, if anything, did you advise the accused of his rights concerning counsel?

WIT: (I advised the accused that he had the right to consult with a lawyer counsel and have that lawyer present at the interrogation. I also informed him that he could retain a civilian lawyer at his own expense and additionally a military lawyer would be provided for him. I further advised him that any detailed military lawyer, if the accused desired such counsel, would be provided at no expense to him.)

SCM: Did you provide all of this advice prior to the accused making any statement to you?

WIT: (Yes.)

SCM: What, if anything, did the accused say or do to indicate that he understood your advice?

WIT: (After advising him of each of his rights, I asked him if he understood what I had told him and he said he did. (Also, I had him read a printed form containing a statement of these rights and sign the statement acknowledging his understanding of these rights.))

SCM: (If accused has signed a statement of his rights) I show you Prosecution Exhibit #2 for identification, which purports to be a form containing advice of a suspect's rights and ask if you can identify it?

WIT: (Yes. This is the form executed by the accused on _____ 19___. I recognize it because my signature appears on the bottom as a witness, and I recognize the accused's signature, which was placed on the document in my presence.)

SCM: Did the accused subsequently make a statement?

WIT: (Yes.)

SCM: Was the statement reduced to writing?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, threaten the accused in any way?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, make any promises of reward, favor, or advantage to the accused in return for his statement?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, strike or otherwise offer violence to the accused should he not make a statement?

WIT: (Yes.) (No.)

SCM: (If the accused's statement was reduced to writing) Describe in detail the procedure used to reduce the statement in writing.

WIT: _____.

SCM: Did the accused at any time during the interrogation request to exercise any of his rights?

WIT: (Yes.) (No.)

NOTE: If the witness indicates that the accused did invoke any of his rights at any stage of the interrogation, it must be shown that the interrogation ceased at that time and was not continued until such time as there had been compliance with the request of the accused concerning the rights invoked. If the witness testifies that he obtained a written statement from the accused, he should be asked if and how he can identify it as a written statement of the accused. When a number of persons have participated in obtaining a statement, you may find it necessary to call several or all of them as witnesses in order to inquire adequately into the circumstances under which the statement was taken.

SCM: I now show you Prosecution Exhibit 3 for identification, which purports to be a statement of the accused, and ask if you can identify it?

WIT: (Yes. I recognize my signature and handwriting on the witness blank at the bottom of the page. I also recognize the accused's signature on the page.)

SCM: (To accused, after permitting him to examine the statement when it is in writing) The Uniform Code of Military Justice provides that no person subject to the Code may compel you to incriminate yourself or answer any question which may tend to incriminate you. In this regard, no person subject to the Code may interrogate or request any statement from you if you are accused or suspected of an offense without first informing you of the nature of the offense of which you are suspected and advising you that you need not make any statement regarding the offense of which you are accused or suspected; that any statement you

do make may be used as evidence against you in a trial by court-martial; that you have the right to consult with lawyer counsel and have lawyer counsel with you during the interrogation; and that lawyer counsel can be civilian counsel provided by you or military counsel appointed for you at no expense to you. Finally, any statement obtained from you through the use of coercion, unlawful influence, or unlawful inducement, may not be used in evidence against you in a trial by court-martial. In addition, any statement made by you that was actually the result of any promise of reward or advantage, or that was made by you after you had invoked any of your rights at any time during the interrogation, and your request to exercise those rights was denied, is inadmissible and cannot be used against you. Before I consider receiving this statement in evidence, you have the right at this time to introduce any evidence you desire concerning the circumstances under which the statement was obtained or concerning whether the statement was in fact made by you. You also have the right to take the stand at this time as a witness for the limited purpose of testifying as to these matters. If you do that, whatever you say will be considered and weighed as evidence by me just as is the testimony of other witnesses on this subject. I will have the right to question you upon your testimony, but if you limit your testimony to the circumstances surrounding the taking of the statement or as to whether the statement was in fact made by you, I may not question you on the subject of your guilt or innocence, nor may I ask you whether the statement is true or false. In other words, you can only be questioned upon the issues concerning which you testify and upon your worthiness of belief, but not upon anything else. On the other hand, you need not take the witness stand at all. You have a perfect right to remain silent, and the fact that you do not take the stand yourself will not be considered as an admission by you that the statement was made by you under circumstances which would make it admissible or that it was in fact made by you. You also have the right to cross-examine this witness concerning his testimony, just as you have that right with other witnesses, or, if you prefer, I will cross-examine him for you along any line of inquiry you indicate. Do you understand your rights?

ACC: _____.

SCM: Do you wish to cross-examine this witness?

ACC: _____.

SCM: Do you wish to introduce any evidence concerning the taking of the statement or concerning whether you in fact made the statement?

ACC: _____.

SCM: Do you wish to testify yourself concerning these matters?

ACC: _____.

SCM: Do you have any objection to my receiving Prosecution Exhibits 2 and 3 for identification into evidence?

ACC: (Yes, sir (stating reasons).) (No, sir.)

SCM: (Your objection is sustained.)

--

(Your objection is overruled. These documents are admitted into evidence as Prosecution Exhibits 2 and 3.)

--

(There being no objection, these documents are admitted into evidence as Prosecution Exhibits 2 and 3.)

NOTE: If the accused's statement was given orally, rather than in writing, anyone who heard the statement may testify as to its content if all requirements for admissibility have been met.

SAMPLE INQUIRY INTO THE FACTUAL BASIS OF A PLEA OF GUILTY TO THE OFFENSE OF UNAUTHORIZED ABSENCE

1. Assumption. Assume the accused has entered pleas of guilty to the following charge and specification:

   Charge: Violation of the Uniform Code of Military Justice, Article 86

   Specification: In that Seaman Virgil A. Tweedy, U.S. Navy, on active duty, Naval Justice School, Newport, Rhode Island, did, on or about 5 July 19 --, without authority, absent himself from his unit, to wit: Naval Justice School, Newport, Rhode Island, and did remain so absent until on or about 23 July 19--.

2. Procedure. The summary court-martial officer, after he has completed the inquiry indicated in the TRIAL GUIDE as to the elements of the offense, should question the accused substantially as follows:

   SCM: State your full name and rank.

   ACC: Virgil Armond Tweedy, Seaman.

   SCM: Are you on active duty in the U.S. Navy?

   ACC: Yes, sir.

   SCM: Are you the same Seaman Virgil A. Tweedy who is named in the charge sheet?

   ACC: Yes, sir.

   SCM: Were you on active duty in the U.S. Navy on 5 July 19--?

   ACC: Yes, sir.

   SCM: What was your unit on that date?

   ACC: The Naval Justice School.

   SCM: Is that located in Newport, Rhode Island?

   ACC: Yes, sir.

SCM: Tell me in your own words what you did on 5 July that caused this charge to be brought against you.

ACC: I stayed at home.

SCM: Had you been at home on leave or liberty?

ACC: Yes, sir.

SCM: Which one was it?

ACC: I had liberty on the 4th of July.

SCM: When were you required to report back to the Naval Justice School?

ACC: At 0800 on the 5th of July.

SCM: And did you fail to report on 5 July 19--?

ACC: Yes, sir.

SCM: When did you return to military control?

ACC: On 23 July 19--.

SCM: How did you return to military control on that date?

ACC: I took a bus to Newport and turned myself in to the duty officer at the Naval Justice School.

SCM: When you failed to report to the Naval Justice School on 5 July, did you feel you had permission from anyone to be absent from your unit?

ACC: No, sir.

SCM: Where were you during this period of absence?

ACC: I was at home, sir.

SCM: Where is your home?

ACC: In Blue Ridge, West Virginia.

SCM: Is that where you were for this entire period?

ACC: Yes, sir.

SCM: During this period, did you have any contact with military authorities? By "military authorities" I mean not only members of your unit, but anyone in the military.

ACC: No, sir.

SCM: During this period, did you go on board any military installations?

ACC: No, sir.

SCM: Were you sick or hurt or in jail, or was there anything which made it physically impossible for you to return?

ACC: No, sir.

SCM: Could you have reported to the Naval Justice School on 5 July 19-- if you had wanted to?

ACC: Yes, sir.

SCM: During this entire period, did you believe you were an unauthorized absentee from the Naval Justice School?

ACC: Yes, sir; I knew I was UA.

SCM: Do you know of any reason why you are not guilty of this offense?

ACC: No, sir.

MILITARY JUSTICE STUDY GUIDE

CHAPTER XI

THE SPECIAL COURT-MARTIAL

A. Introduction

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

B. Creation of the Special Court-Martial

1. **Authority to convene.** Article 23, UCMJ, and JAGMAN, § 0120b prescribe who has the power to convene (create) a special court-martial. The power to convene special courts-martial is nondelegable and, in no event, can a subordinate exercise such authority. When Captain Jones is on leave from his ship, his authority to convene special courts-martial devolves upon his temporary successor-in-command (usually the executive officer) who, in the eyes of the law, becomes the commanding officer. Thus, signature titles such as "Acting Commanding Officer" and "Executive Officer" should be avoided on legal documents regardless of the validity of such titles on other administrative correspondence.

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

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

R.C.M. 504 and JAGMAN, § 0133 contain guidance for the preparation of the convening order. Basically, the order should be under the command letterhead, be dated and serialized, and be signed personally by the CA. The order should specify the names and ranks of all members detailed to serve on the court. When a proper convening order is executed, a special court-martial is created and remains in existence until dissolved. A sample convening order is set forth at page 9-8, below.

3. **Amendment of convening orders**

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

An amendment to a convening order is drafted using the same format as the original convening order. It need only describe any change to be made in court membership. The amendment is serialized in the same manner as the original convening order, but additional letters or numbers are used to identify the amendment as a separate order. Thus, convening order serial 1-CY could be amended by serial 1-CYA, 1-CYB, or 1A-CY, 1B-CY, or any other combination of letters and numbers. These serializations are important and must be carefully organized. A sample amendment to a convening order which changes the identity of a member is set forth at page 9-9.

b. **Change of members**

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

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

record of trial a detailed statement of the reasons necessitating the change in members.

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

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

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

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

D. **Qualifications of members**

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

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

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

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

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

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

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

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

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

a. **Detailed defense counsel**

(1) Article 27(c), UCMJ, describes the qualifications for detailed counsel at special courts-martial. An article 27(b) defense counsel must be detailed at no cost to the accused unless, due to military exigencies or physical conditions, one cannot be obtained.

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

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

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

(2) **Individual military counsel** (IMC)

(a) **Availability**. At a special court-martial, the accused has the right to be represented by a military counsel of his own choice at no cost to the accused if such counsel is "reasonably available." JAGMAN, § 0131 provides that

a Navy or Marine Corps military counsel is "reasonably available" to represent an accused if the requested counsel:

-1- Is assigned to an activity within the same Navy-Marine Corps trial judiciary circuit, or within 100 miles of where the trial will be held; and

-2- is not one of the following persons: a flag or general officer; a trial or appellate military judge; a trial counsel; an appellate defense or government counsel; a principal legal advisor to a command; an instructor or student at a military or civilian school; a commanding officer, executive officer, or officer in charge; or a member of the staff of certain high-level DoD and Navy organizations.

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

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

-1- The ability of other counsel to assume the workload of the requested counsel during his/her absence;

-2- the nature and complexity of the charges or legal issues involved in the case and any special qualifications possessed by the requested counsel; and

-3- the experience level and qualifications of detailed defense counsel.

If the commanding officer of the requested counsel concludes that his subordinate is unavailable, his rationale must be set down in writing and provided to the CA and the accused. This determination is a matter within the discretion of

that commanding officer, although the accused may appeal an adverse decision to the immediate superior of the decisionmaker.

c. **Recapitulation -- right to counsel**. At a special court-martial, the accused has the right to be represented by civilian counsel (if provided at no expense to the government) and either detailed article 27(b) military counsel or IMC of the accused's own selection, if reasonably available. If IMC is made available, detailed defense counsel is normally relieved. The accused may request that detailed defense counsel remain on the case; however, it is in the sole discretion of the convening authority to grant or deny the request.

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

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

23 Aug 19CY

SPECIAL COURT-MARTIAL CONVENING ORDER 4-CY

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

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

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

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

25 Aug CY

SPECIAL COURT-MARTIAL AMENDING ORDER 4A-CY

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

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

H. Special court-martial referral

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

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

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

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

a. **Disestablishment of the court**. Perhaps the most frequently occurring withdrawal problem is presented when the CA wants to disestablish the court and create another to take its place. This usually happens when several members have been transferred, or the particular court has been in existence for a long time, and the CA wants to relieve the court. Such grounds are valid and constitute a "proper reason." If evidence shows that a change has been made because the CA was displeased with the leniency of the sentence or the number of acquittals, then the withdrawal would not be lawful. Whenever a new court relieves an old one,

a problem is created with respect to the cases previously referred to the old court (which is disestablished) and now being referred to the new court. Remember, only the court to which a case is specifically referred can try it. The CA can withdraw each case from the old court (by lining out the referral block) and then re-refer the case to the new court. This is accomplished by executing a new block 14 referral on the charge sheet, indicating therein the serial number and date of the convening order which appointed the new court. The new referral is taped along the top edge over the old lined-out referral to allow inspection of both referrals.

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

c. **Withdrawal before arraignment.** Withdrawal before the accused is arraigned (asked how he pleads) is lawful only where "proper reason" is shown. This means that the CA must attach to the record of trial a comprehensive statement of the reasons necessitating the withdrawal. Proper reasons for withdrawal before arraignment include receipt of additional charges, absence of the accused, reconsideration by the CA of the seriousness of the offenses, questions concerning the mental capacity of the accused, or routine duty rotation of court-martial personnel. After evidence has been received on the guilt or innocence of the accused, withdrawal cannot lawfully be accomplished unless an urgent and unforeseen military necessity exists requiring such action in the manifest interest of justice. Such circumstances would be exceedingly rare.

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

5. **Avoiding statute of limitations problems.** Article 43, UCMJ, provides that most offenses must have sworn charges formally receipted for within five years after the date of the offense in order to preserve the government's ability to prosecute the crime(s). The formal receipt of charges tolls the running of the statute of limitations. Murder, mutiny, aiding the enemy, and desertion in time of

war (including the conflicts in Korea or Vietnam) may be tried at any time. There is no statute of limitations as to those crimes.

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

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

I. Trial procedure

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

2. **Service of charges**. Article 35, UCMJ, states that, in time of peace, no person can be brought to trial in any special court-martial until three days have elapsed since the formal service of charges upon that person. In computing the three-day period, neither the date of service nor the date of trial count. Sundays and holidays do count, however, in computing the statutory period. Thus, if the accused is served on Wednesday, one must wait Thursday, Friday, and Saturday before compelling trial. Trial in the foregoing example could not be compelled before Sunday and, as a practical matter, not before Monday. The date of service of charges upon the accused is demonstrated by a certificate in block 15 at the bottom of page 2 of the charge sheet. Trial counsel executes this certificate when he presents a copy of the charge sheet to the accused personally. He must do this even though the accused has previously been informed of the charges against him. This service of a copy of the charge sheet may also be accomplished by the command at any time after referral as long as the service is to the accused personally. Any accused can lawfully object to participation in trial proceedings before the three-day waiting period has expired. The accused may, however, waive the three-day period, so long as he understands the right and voluntarily agrees to go to trial earlier.

3. **Pretrial hearings**. Any time after elapse of the three-day waiting period, a military judge may hold sessions of court without members for the purpose of litigating motions, objections, and other matters not amounting to a trial of the accused's guilt or innocence. The accused may be arraigned and his pleas taken and

determined at such a hearing. Art. 39(a), UCMJ; JAGMAN, § 0135. At such hearings, the judge, trial counsel, defense counsel, accused, and reporter will be present. Several such hearings may be held if desired.

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

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

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

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

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

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

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

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

9. **Findings.** After the evidence has been presented, the court will deliberate to arrive at findings of "not guilty," "guilty," or "guilty of a lesser included offense." In order to convict an accused at a special court-martial, two-thirds of the members present at trial must agree on each finding of guilty. In computing the necessary number of votes to convict, a resulting fraction is counted as one. Thus, on a court of five members, the mathematical number of votes required to convict is 3 1/3 or, applying the rule, four votes. In a trial by military judge alone, the required number of votes is one: the judge's. In contested member cases, after all evidence and arguments of counsel have been presented, the judge will instruct the members of the court on the law they must apply to the facts in reaching their verdict.

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

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

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

J. Special court-martial punishment

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

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

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

4. **Authorized punishments.** Appendix 12 and Part IV, MCM, 1984, list the specific maximum punishments for each offense as determined by statutory provision or by the President of the United States pursuant to authority delegated by Article 56, UCMJ. An accused, as a general rule, may be separately punished for each offense of which he is convicted, unlike NJP where only one punishment is imposed for all offenses. Thus, an accused convicted of UA (art. 86), assault (art. 128), and larceny (art. 121) is subject to a maximum sentence determined by totaling the maximum punishment for each offense. A chart which lists punishments authorized at each type of court-martial is included at page 11-24.

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

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

(1) **Confinement.** Confinement involves the physical restraint of an adjudged servicemember in a brig, prison, etc. Under military law, confinement automatically includes hard labor; but, the law prefers that the sentence be stated as confinement -- omitting the words "at hard labor." Omission of the words "hard labor" does not relieve the accused of the burden of performing hard labor. R.C.M. 1003(b)(8). A special court-martial can adjudge six months confinement upon an enlisted servicemember, but may not impose any confinement upon an officer or

warrant officer. Part IV, MCM, 1984, limits this punishment to an even lesser period for certain offenses (e.g., failure to go to appointed place of duty (violation of art. 86) has a maximum confinement punishment of only one month).

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

(3) **Restriction**. Restriction is a moral restraint upon the accused to remain within certain specified limits for a specified time. Restriction may be imposed on all persons subject to the UCMJ, but not in excess of two months. Restriction is a less severe form of deprivation of liberty than confinement or hard labor without confinement and may be combined with any other punishment. The performance of military duties can be required while an accused is on restriction. *See* R.C.M. 1003(b)(6).

c. **Confinement on bread and water/diminished rations**. As its name suggests, this punishment involves confinement coupled with a diet of bread and water or diminished rations. A diet of bread and water allows the accused as much bread and water as he/she can eat. Diminished rations is food from the regular daily ration constituting a nutritionally balanced diet, but limited to 2100 calories per day. No hard labor may be required to be performed by an accused undergoing this punishment. Confinement on bread and water/diminished rations may be imposed only upon enlisted persons in paygrades E-1 to E-3 who are attached to or embarked in a vessel and then only for a maximum of three days. Further, both the prisoner and the confinement facility must be inspected by a medical officer who must certify in writing that the punishment will not be injurious to the accused's health and that the facility is medically adequate for human habitation. R.C.M. 1003(b)(9).

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

(1) **Forfeiture of pay**. This kind of punishment involves the deprivation of a specified amount of the accused's pay for a specific number of

months. The maximum amount that is subject to forfeiture at a special court-martial is two-thirds of one month's pay per month for six months. The forfeiture must be stated in terms of pay per month for a certain number of months. A sentence "to forfeit $50.00 for six months" has been held by military appellate courts to mean $50.00 apportioned over six months or, in other words, $8.33 per month for six months. Thus the language used to express this punishment must be meticulously accurate. The basis for computing the forfeiture is the base pay of the accused plus sea or foreign duty pay. Other pay and allowances are not used as part of the basis. If the sentence is to include a reduction in grade, the forfeiture must be based upon the grade to which the accused is to be reduced. A forfeiture may be imposed by a special court-martial upon all military personnel. The forfeiture applies to pay becoming due after the forfeitures have been imposed and not to monies already paid to the accused or to his own personal independent resources. Unless suspended, forfeitures take effect on the date ordered executed by the CA when initial action is taken. JAGMAN, § 0157a.

(2) **Fine**. A fine is a lump sum judgment against the accused requiring him to pay specified money to the United States. A fine is not taken from the accused's accruing pay, as with forfeitures, but rather becomes due in one payment when the sentence is ordered executed. In order to enforce collection, a fine may also include a provision that, in the event the fine is not paid, the accused shall, in addition to the confinement adjudged, be confined for a time. The total period of confinement so adjudged may not exceed the jurisdictional limit of the special court-martial (six months) should the accused fail to pay the fine. R.C.M. 1003(b)(3) indicates that, while a special court-martial can impose a fine upon all personnel tried before it, such punishment should not be adjudged unless the accused has been unjustly enriched by his crime. A fine cannot exceed the total of the amount of money which the court could have required to be forfeited. *See* R.C.M. 1003(b)(3). The court may, however, award both a fine and forfeitures, so long as the total monetary punishment does not exceed the amount which could have been required to be forfeited.

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

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

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

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

f. **Punitive reprimand**. A special court-martial may also adjudge a punitive reprimand against anyone subject to the UCMJ. A reprimand is nothing more than a written statement criticizing the conduct of the accused. In adjudging a reprimand, the court does not specify the wording of the statement but only its nature. JAGMAN, § 0152c contains guidance for drafting the reprimand.

5. **Multiplicity**. As a general rule, an accused convicted of more than one offense at a trial is subject to a maximum sentence computed by aggregating the maximum punishments for each offense. R.C.M. 1003(c)(1)(C) states the rule that the accused can be punished in the maximum for each of two or more separate offenses even though arising out of a series of acts. What is essentially a single transaction, however, may not be subject to multiple punishment simply because the circumstances can be characterized as more than one offense. To allow an aggregation in the latter case would be to subject an accused to a higher maximum for one offense. The determination of when two or more offenses are separate is not easy. The Court of Military Appeals has applied many tests for separateness, and no single test can be relied upon. Some examples:

a. **Separate elements**. Offenses are separate if each requires proof of an element not required to prove the other.

b. **One offense included in the other**. If one offense is a lesser included offense of the other, the offenses may not be separate.

c. **Evidence sufficient to prove one also proves the other**. If the evidence which is sufficient to prove one offense also is sufficient to prove another offense, the two may not be separate.

d. **Single impulse**. Where both offenses were prompted by a single impulse, the two offenses may not be separate. This test is particularly difficult to apply inasmuch as fast-moving circumstances of some offenses make impulse determination difficult.

e. **Single transaction**. A single transaction is a combination of a single objective and a continuous flow of events. If several offenses are committed in the course of accomplishing a single purpose, they are probably not separate. One who steals an automobile and its contents is punished for only one offense, since the purpose is singular (steal property) and the events are integrated. One who wrongfully appropriates the auto and then later steals the contents, however, commits separate offenses.

f. **Summary**. If two or more offenses are multiplicious, the accused can lawfully be punished only for the maximum authorized for the most severe case. In no event may the jurisdictional limitations of the special court-martial be exceeded. To minimize multiplicity problems, apply the facts of each case to all of the foregoing tests. If each test results in a determination of separateness, the offenses are probably not multiplicious.

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

a. **Three or more convictions**. If an accused is convicted of an offense for which Part IV, MCM, 1984 does not authorize a dishonorable discharge, proof of three or more previous convictions by court-martial during the year preceding the commission of any offense of which the accused is convicted will allow a special court-martial to adjudge a bad-conduct discharge, forfeiture of 2/3 pay per month for six months and confinement for six months, even though that much

punishment is not otherwise authorized. In computing the one-year period, any unauthorized absence time is excluded. R.C.M. 1001(d)(1).

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

c. **Two or more offenses.** If an accused is convicted of two or more separate offenses, none of which authorizes a punitive discharge, and if the authorized confinement for these offenses totals six months or more, a special court-martial may adjudge a bad-conduct discharge and forfeiture of two-thirds pay per month for six months. R.C.M. 1003(d)(3).

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. GRADE OR RANK	4. PAY GRADE
LEE, Crumb B.	110-12-3456	LTJG	0-2

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Naval Air Station, Oceana Virginia Beach, Virginia	15 Jan 84	Indef

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$1,740.00	None	$1,740.00	None	N/A

II. CHARGES AND SPECIFICATIONS

10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE 92.

SPECIFICATION: In that Lieutenant Junior Grade Crumb B. Lee, U.S. Navy, Naval Air Station, Oceana, Virginia Beach, Virginia, on active duty, who knew of his duties at Naval Air Station, Oceana, Virginia Beach, Virginia, on or about 16 June 1986, was derelict in the performance of those duties in that he negligently failed to properly inspect and record temperature readings of Ordnance Magazines at Naval Air Station, Oceana, Virginia Beach, Virginia, as it was his duty to do.

III. PREFERRAL

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

d. SIGNATURE OF ACCUSER	e. DATE
Willie M. Roberts	1 August 1986

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 1st day of August, 19 86, and signed the foregoing charges and specifications under oath that he/~~she~~ is a person subject to the Uniform Code of Military Justice and that he/~~she~~ either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/~~her~~ knowledge and belief.

Woodrow E. Wilson	NAVLEGSVCOFF NAS, Oceana, Virginia Beach, VA
Typed Name of Officer	*Organization of Officer*
LCDR, JAGC, USN	Judge Advocate
Grade	*Official Capacity to Administer Oath (See R.C.M. 307(b)—must be commissioned officer)*

Woodrow E. Wilson 11-25

Signature

Appendix II(1)

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

12. On 2 August, 19 86, the accused was informed of the charges against him/~~her~~ and of the name(s) of the accuser(s) ~~is~~ known to me *(See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)*

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

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

CAPT, USN — *Grade*

John E. Command — *Signature*

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1100 hours, 2 August 19 86 at NAS, Oceana, Virginia Beach, Virginia — *Designation of Command or Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)*

~~XXXXXX~~

John E. Command — *Typed Name of Officer*

Commanding Officer — *Official Capacity of Officer Signing*

CAPT, USN — *Grade*

John E. Command — *Signature*

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
NAS, Oceana	Virginia Beach, VA	4 August 1986

Referred for trial to the special court-martial convened by Special Court-Martial Convening Order 3-86 of 1 August 1986, as amended by Special Court-Martial Amending Order 3A-86 of 2 August 19 86, subject to the following instructions:[2] None.

~~XX~~ — *Command or Order* — ~~XX~~

John E. Command — *Typed Name of Officer*

Commanding Officer — *Official Capacity of Officer Signing*

CAPT, USN — *Grade*

John E. Command — *Signature*

15. On 4 August, 19 86, I ~~caused a copy hereof to be~~ served a copy hereof on ~~each~~ the above named accused.

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

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

Joe E. Lawyer — *Signature*

11-26

Appendix II(2)

FOOTNOTES: 1 — When an appropriate commander signs personally, inapplicable words are stricken.
2 — See R.C.M. 601(e) concerning instructions. If none, so state.

DD Form 458 Reverse, 84 AUG

PUNISHMENT CHART

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

(*1) Where authorized or mandatory

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

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

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

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

MILITARY JUSTICE STUDY GUIDE

CHAPTER XII

POTENTIAL LEGAL PROBLEMS OF THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY

A. **Introduction**. The unique responsibilities of a court-martial convening authority -- to act as both a judicial officer and a commanding officer --frequently create potentially serious legal problems for the convening authority who tries to be true to both roles. There is no getting around the fact that it is extremely difficult for an aggressive commanding officer to discharge his responsibilities of command and, at the same time, remain completely impartial in his attitude toward each wrongdoer. Frequently, the necessity for decisive command action clashes directly with legal rights designed to protect the individual from arbitrary or unjust action. In this chapter, the relationship of command and convening authority responsibility will be explored through the discussion of common legal problems. If commanders are sensitive to both the principles of command and the principles of convening authority responsibility, the apparent friction between the two roles can be minimized.

B. **Accuser concept problems**. The Uniform Code of Military Justice is structured to give the convening authority extensive areas of permissible involvement in the military justice system. For example, he may administer NJP; he may determine to what type of court-martial a case may be referred; he may choose the members at a court-martial; he may determine what charges will be prosecuted; he may authorize searches and seizures; he may order an accused into pretrial restraint; he may approve or deny pretrial agreements; he may suspend a punishment imposed at a court-martial; and he may review the actions of a court-martial. The Uniform Code of Military Justice also defines, however, certain areas of impermissible involvement by the convening authority. The "accuser" concept defines one of these impermissible areas (*see* Art. 1(9), Art. 22(b), Art. 23(b) UCMJ); illegal command influence (to be discussed later) defines another (*see* Art. 37, UCMJ). In the Navy and Marine Corps, the accuser concept applies only to special and general courts-martial. Arts. 22(b) and 23(b), UCMJ. It does not strictly apply to summary courts-martial nor to NJP. Art. 24(b), UCMJ; R.C.M. 1302(b), MCM, 1984. The accuser concept is applied to summary court-martial in the Coast Guard. Section 1001-1, MJM. If the convening authority is an accuser, he is disqualified from convening a

special or general court-martial. R.C.M. 504(c)(1). Any court convened by an accuser lacks jurisdiction (power) to hear a case. In some situations, the convening authority does not become an accuser until after the court has been convened. If this occurs, the convening authority is then disqualified from taking any action to review the case. R.C.M. 1107(a). A convening authority becomes an accuser when he signs and swears to the truth of the charges against the accused, when he directs that someone else sign the charge sheet as a nominal accuser, or when he has other than an official interest in the prosecution of the accused. A significant policy underlying the accuser concept is that the accused is entitled to have the decisions affecting his case made by a convening authority who is unbiased and impartial and is not convinced beyond a reasonable doubt of the guilt of the accused. The accuser concept does not concern itself so much with the state of mind of the convening authority as it does with the appearance of impropriety in his actions. In other words, if a reasonable man would conclude from observing the actions of the convening authority that he cannot be unbiased and impartial in the case, the convening authority will be considered by the law to be an accuser, regardless of whether the convening authority himself believes that he is impartial.

1. **Signs charges**. A convening authority becomes an accuser by signing the accuser certificate at the bottom of page 1 of the charge sheet. The effect of this signature, and the subsequent oath, is to represent that the allegations contained in the charges are true. A person who makes such a manifest judgment of the facts of the case in its preliminary stages cannot reasonably be expected to be impartial when making quasi-judicial decisions at later stages of the trial process. The circumstance of the convening authority preferring charges is very rare (e.g., when a subordinate officer succeeds to command after having signed the charge sheet as the accuser).

2. **Direct nominal signing of charges**. A convening authority may become an accuser by ordering another to sign charges as an accuser. In such a situation, the law concludes that the convening authority is doing indirectly that which he cannot do directly. The obvious cases are easily distinguishable, but some accuser problems arise in subtle ways. A convening authority may, in many instances, be the commander who first receives information that the accused has committed an offense. It is entirely lawful and appropriate for the convening authority to direct a subordinate to investigate the complaint with a view toward preferring whatever charges the subordinate deems appropriate. Such action is strictly official and involves no accuser concept problems unless the convening authority directs the subordinate to prefer certain specific charges against a certain accused. In the latter circumstances, the convening authority may be an accuser in fact.

There are two common practices that involve this basic problem. In the first instance, a criminal investigation report may be submitted to the convening authority by the Naval Investigative Service or some other organized investigating

unit. The convening authority may then read the report, decide upon the propriety of certain charges, and order his legal officer to ". . . take this report and prepare a charge sheet on Jones charging him with larceny and have it on my desk for referral to special court-martial this afternoon." The other situation exists when a subordinate commander forwards a case, without a charge sheet, to a superior commander for NJP. The superior commander, also a convening authority, decides to refer the case to trial and issues an order to his legal officer similar to that issued in the first instance. While, in a sense, the convening authority's interest in these cases is, in fact, official, he, nevertheless, has given an order which amounts to a directive to the legal officer or his subordinate to prefer certain charges against a certain person. In such a posture, the convening authority technically may have become an accuser and disqualified from convening a court-martial in the affected cases. To avoid this problem, it behooves the convening authority to have all potential criminal cases forwarded through his legal officer or, if he has none, the executive officer. By working closely together, the subordinate can determine safely whether there is any reasonable possibility that the convening authority will refer the potential case to trial. If there is a reasonable chance, a charge sheet can then be prepared before the case is actually presented to the convening authority. Such a procedure is not unduly cumbersome and will avoid legal complications of a technical nature with the accuser concept. There are several related problems which do not involve a violation of the accuser principle though, at first examination, it may so seem.

a. **Direct change in charges**. The convening authority of all types of court-martial is under a legal obligation to see that the charges against an accused accurately conform to available evidence. If a convening authority receives a charge sheet in due course, which contains charges which do not conform to available evidence, he may lawfully direct a subordinate to amend the charge sheet in order that there be accurate charges. The convening authority may do this for this limited purpose only and not for any other reason. The rule in this situation is consistent with the notion that the convening authority may act in the interest of justice on charges preferred by others because it protects the accused from trial on baseless charges and protects the interest of the government in ensuring justice.

b. **Orders to subordinates**. When the convening authority discovers that a subordinate commander is about to impose NJP or that other administrative action is about to be taken against an accused, and the convening authority believes such action is inappropriate, he may lawfully direct that an investigation be conducted and appropriate charges be forwarded to him for action. This is also an example of a convening authority acting impartially on charges preferred by others. He may do so in this instance because senior commanding officers have overall responsibility for justice and discipline within their commands. Other kinds of orders are more dangerous, however. Policy letters or directives which indicate that certain offenders or kinds of offenses will be prosecuted by court-

martial or by a specific level of court-martial are nothing more than orders to prefer charges as the law views them. Historically, thieves, bad-check artists, and various firearm offenders have been targets of such directives. Command guidance is sometimes issued for the control of certain problem offenders, but should never contain references to the disposition of such cases. Such letters are of dubious value and should be avoided because of their legal complications. Such letters also create problems with regard to illegal command influence.

3. **Personal interest**. The third type of accuser is the convening authority who exhibits a personal interest in a given case. A personal interest exists if a reasonable man, viewing the facts of the convening authority's actions in a case, would believe the convening authority was too personally involved in the case to be impartial and fair. Though state of mind is not a critical factor by itself, the personal views of the convening authority may help explain the import of his actions. When the convening authority is the victim of an offense, the law will assume his interest is personal and hold him disqualified from exercising convening authority in that case. If a direct order of the convening authority is violated by the accused, the law will assume the convening authority has a personal interest even though the order may have been issued through another party. This situation contemplates orders specifically directed at the accused and not standing orders, routine transfer orders, etc. If the offense involves a pet project of the convening authority and he has manifested a great interest in its enforcement by speeches, directives, and follow-up disciplinary action, the court will most likely find a disqualifying personal interest. If the convening authority is a witness for the prosecution, he may have a disqualifying personal interest. This disqualifying interest would normally arise if the convening authority were an eyewitness to an offense and not if he took such official actions as authenticating unit diaries, although in the latter situation he might be disqualified from reviewing the case.

4. **Effect of disqualification**. Once the convening authority violates the accuser principle, neither he [R.C.M. 504(c)(1)], nor any subordinate or junior commander, nor anyone junior in grade who succeeds him [R.C.M. 504(c)(2)], may lawfully refer the particular case to trial by special or general court-martial as the court would then be without jurisdiction to try the case. While an accuser in the Navy or Marine Corps may refer such a case to a summary court-martial without divesting it of jurisdiction, the better practice would be to exercise discretion and forward the charges to a superior authority with a recommendation that the charges be referred. R.C.M. 1302(b). In this regard, JAGMAN, § 0129a and § 0129b define the "superior competent authority" in both the Navy and Marine Corps to whom the charges should be forwarded. The letter of transmittal should indicate in general terms the reasons necessitating the unusual referral procedures. Should the disqualification occur after charges have already been referred, the convening authority should forward the record of trial for review and action in the same manner.

C. **Unlawful command influence**. Perhaps no single legal issue relating to the military criminal system arouses as much emotion as the issue of command influence of court-martial cases. It should be noted initially that not all command influence is unlawful, inasmuch as the convening authority is authorized by law to appoint court members, to refer cases to trial, and to review the cases he has referred to trial as well as other acts. Unlawful command influence is an intentional or inadvertent act tending to impact on the trial process in such a way as to affect the impartiality of the trial process. Since the court-martial is no longer viewed as an instrument of executive power subordinate to the will of its creator, courts are very quick to react to even the appearance of unlawful influence. (As an historical note, in 1951, the primary evil that the UCMJ was enacted to correct was unlawful command influence.) Two notions form the basis of the unlawful command influence concept. The first notion is that military justice is the fair and impartial evaluation of probative facts by judge and/or court members. The second notion is that nothing but legal and competent evidence presented in court can be allowed to influence the judge and/or court members. If unlawful command influence exists, the findings and sentence of the court may be invalidated. If the accused has pleaded guilty, it is possible that only the sentence may be invalidated. In some instances, the unlawful command influence could arise from an impermissible personal interest so that the convening authority is also an accuser. In other instances, the convening authority may be disqualified from taking an action on review. There are several ways in which command influence issues may arise.

1. **Article 37, UCMJ**. The primary prohibition against unlawful command influence is contained in Art. 37, UCMJ. *See also* R.C.M. 104. This provision prohibits commanders and others from censuring, reprimanding, or admonishing any court personnel (members, counsel, judge, reporter, or accused) for their in-court performance on findings, sentence, or other court-related functions. The Code also prohibits the attempt by any person subject to the Code to coerce or, through any unauthorized means, to influence the court-martial process or any personnel connected therewith. Basically, the Code addresses itself to overt attempts directly to influence court results through the application of various administrative techniques available to all commanders and others by virtue of grade or position in the service. Those violating the provisions of Art. 37, UCMJ, are subject to court-martial prosecution.

2. **Other direct influence**. Many instances of illegal command influence arise from the good-faith efforts of the commanding officer to influence good order and discipline within his command through speeches, writings, or directives. These communications may be broadly directed (to the entire command) or more narrowly directed (to prospective court members). Ostensibly, these communications may be designed to educate members of the command as to their responsibilities in regard to the military justice system. But, in reality, these communications may serve as a forum for the convening authority to express dissatisfaction with certain aspects of

the military justice system. While no guidelines can be advanced that can cover every situation, it is possible to point out several areas in which the law has been very sensitive in regard to communications by the commanding officer.

Discussing a case that is pending adjudication with prospective members is normally considered to be improper. It is improper to ask for a specific sentence, either in a particular case or in a particular class of cases. For example, it would be improper to ask that all thieves be given a bad-conduct discharge or to state that the only reason a case is sent to a special court-martial is that a bad-conduct discharge is desired. It is improper to criticize past findings or sentences from previous courts. It is also improper for the commanding officer to evidence an inflexible attitude on review (for example, no punitive discharge will ever be suspended). While illegal command influence may be found regardless of the size of the audience, it is more likely to be found if the communication is directed to a smaller group (such as prospective court members) than if it is directed to the whole command. In addition, the commanding officer may not do indirectly what he could not do directly; that is, he cannot have someone such as the executive officer or the legal officer make statements that he, as commanding officer, could not make.

In regard to the specific problem of addressing prospective court members, theoretically the law recognizes the propriety of convening authorities making sure that court personnel understand their duties and court-martial procedure. In practice, it is difficult for a communication or lecture to avoid the expression or apparent expression of personal views respecting the court-martial process. Before embarking on such education methods, the convening authority should seek the advice of a lawyer. The safest practice is to avoid this type of communication, if possible.

3. **Trial counsel influence**. This type of unlawful influence is not the direct result of an act by the convening authority. It occurs when the trial counsel, in an effort to insure a conviction or a severe sentence, injects the personal or command view of the convening authority through evidentiary procedures or by way of argument. Historically, most of these cases have involved various department-level policies regarding homosexuals and thieves, but many have involved local policies. To be sure, the trial counsel errs when he argues to the court that ". . . the convening authority considers the accused worthy of a punitive discharge." A convening authority cannot control the words of others so as to preclude inadvertent interjection of his personal views or policies, but he can avoid public expressions of these views by keeping his views to himself. He can only avoid this kind of unlawful influence by realizing that his convening authority responsibilities necessitate more closely held views and policies on military criminal matters.

4. **Court's independent knowledge**. Another form of unlawful influence exists when a court member is aware of certain personal views of the convening

authority through some independent source rather than through the trial counsel or through direct policy statements. This influence problem usually arises from wardroom expressions of the convening authority, or a staff member, which detail certain views or policies regarding certain offenses, severity of sentences, a certain case, etc. A person who hears these views may be unduly influenced by those views when he sits on a related case as a court member. A court member so influenced is not an impartial member. Accordingly, when the challenge procedure discloses to the judge such knowledge by a member, the law treats the matter as relating to the qualification of the member in the particular case and the court member would be discharged from sitting on the case. Moreover, if it appears that the convening authority has been using an informal setting deliberately to affect the trial process, then he may be involved with criminal command influence and he would force the trial counsel to disprove such influence or the appearance of it. The best solution to the problem is for the convening authority to keep his personally held views and policies between himself and his legal officer. He should not discuss criminal cases or problems at staff conferences, meetings, social hours, etc. Article 6, UCMJ, was designed to protect such conversations between commanders and legal officers and to discourage public discussion of these important matters.

D. **Pretrial restraint problems**. The term "pretrial restraint" is used to refer to the practice of restricting the freedom of movement of an accused, prior to his trial, to insure his presence at that trial or for other permissible grounds. R.C.M. 304 and 305 discuss the various forms of such restraint.

1. **Forms of restraint**

a. **Confinement**. *See* R.C.M. 304(b), 305. Confinement is the physical restraint of an accused in a correctional facility, detention cell, or other areas by means of walls, locked doors, guards, or other devices. Confinement is a status which commences when the accused is delivered to the facility with an order to confine him. This form of restraint is the most severe, and it is not surprising that the rules governing its use are stringent. Commissioned officers, warrant officers, and civilians (when subject to military jurisdiction) can be confined only on order of their commanding officer. In these cases, the commanding officer's authority cannot be delegated. Enlisted persons can be ordered into confinement by any commissioned officer. A commanding officer may lawfully delegate his authority to confine enlisted persons to warrant officers, petty officers, or noncommissioned officers of his command. In such cases, those possessing delegated authority may confine enlisted persons of that command -- meaning enlisted persons assigned to, attached to, or temporarily in the jurisdiction of the command (e.g., on-base, onboard ship, on-post, etc.). As a practical matter, however, confinement normally is ordered only by the commanding officer, executive officer, or command duty officer (examples of completed pretrial and post-trial confinement orders are provided at the end of this chapter). Note that, when an accused is placed in pretrial confinement, his commanding officer

must review his decision to impose pretrial confinement within 72 hours. If his decision is to continue confinement, the commanding officer must submit a written memorandum to the initial review officer which states the reasons for his conclusion that an offense triable by court-martial has been committed; that the accused committed it; that confinement is necessary because it is foreseeable that the accused will not appear at trial or will engage in serious criminal misconduct; and that less severe forms of restraint have been considered and found to be inadequate. Such memorandum must be submitted within seven days after the accused is confined. (*See* appendix III-a at the end of this chapter for examples.)

b. **The initial review officer program**. The law recognizes that pretrial confinement has serious consequences for an accused. Loss of liberty is, in reality, a form of punishment. It punishes not only the accused, but also his family. Pretrial confinement also hampers an accused in the preparation of his defense. Studies have indicated that the conviction rate for confined accuseds exceeds the rate for those who are not confined. In addition, a confined accused may be more likely to receive additional confinement as a sentence than a released accused. Because of these consequences, a neutral and detached "initial review officer" (IRO) has been mandated to decide whether an individual should be confined pending his court-martial. The IRO will normally make this determination after the accused has already been confined by the accused's commanding officer. The IRO will make a determination based upon materials presented to him by the command and the accused at an informal proceeding. If he determines pretrial confinement is not warranted, there is no administrative appeal from his decision. Details of the IRO system are outlined in R.C.M. 305(e)-(i) and JAGMAN, § 0127.

c. **Arrest**. Arrest is a moral restraint of an accused involving no physical measures whatever. The person in the status of arrest is morally bound to remain within certain narrowly defined limits (such as a room, quarters, or building). The accused, while in arrest, cannot be required to perform military duties (such as commanding or supervising personnel, serving as guard, or bearing arms); he may, however, be required to take part in routine training and duties and to perform normal housekeeping duties. Authority to order an accused into the status of arrest is governed by the same principles applicable to confinement; however, the decision to place the accused in the status of arrest is not reviewed by an IRO.

d. **Restriction**. Restriction is the moral restraint of an accused within limits which are broader than arrest. Authority to order an accused into the status of restriction is governed by the same principles applicable to confinement. The decision to restrict is not reviewed by an IRO.

e. **Conditions on liberty**. This form of pretrial restraint was first authorized by the 1984 revision of the *Manual for Courts-Martial*. *See* R.C.M. 304(a). It is imposed by orders directing the accused to do or refrain from doing

specified acts. Such conditions may be imposed in conjunction with other forms of pretrial restraint or separately. Examples are: orders to report periodically to a designated officer; not to go to a specific place (such as the scene of the alleged crime); or not to associate with specific persons (such as the alleged victim). Conditions on liberty must not hinder pretrial preparation; however, if imposed, they must be sufficiently flexible to permit pretrial preparation. Authority to impose conditions on liberty as a form of partial restraint is governed by the same principles applicable to confinement. The decision to impose conditions on liberty is not reviewed by an IRO.

2. **Basis for restraint**. Pretrial restraint is the subject of five separate articles of the UCMJ, more than any other single subject covered in the Code. This fact is a significant indication of the gravity of congressional concern over the use of pretrial restraint and an indication of the gravity which should attend any decision to impose pretrial restraint. Each case must be viewed on its own merits by the restraining authority. Blanket policies of restraining all long absence offenders, all thieves, etc. are patently unlawful. Before any form of pretrial restraint may be imposed, probable cause is required (i.e., the person imposing the restraint must have reasonable grounds to believe: (1) that an offense triable by court-martial has been committed; (2) that the person to be restrained committed it; and (3) that the restraint ordered is required by the circumstances). Personal knowledge is not necessary. Restraint may be imposed based upon statements by witnesses.

a. **Necessity for pretrial confinement**. In order to impose pretrial confinement lawfully, the commander imposing the confinement must have reasonable grounds to believe that it is necessary because it is foreseeable that either: (1) the prisoner will not appear at a trial, pretrial hearing, or investigation; or (2) the prisoner will engage in serious criminal misconduct (including intimidation of witnesses, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or effectiveness of the command). In addition, the commander must believe upon probable cause that less severe forms of restraint are inadequate. These are the only grounds on which pretrial confinement may be imposed. It is illegal to confine an accused, for example, solely because there is probable cause to believe he has committed a serious offense or because he is a discipline problem (a pain in the neck).

In determining whether pretrial confinement is necessary to insure the presence of the accused, the imposing individual should consider all the facts and circumstances relating to the case. These factors would include the prior disciplinary history of the accused (particularly relevant would be prior unauthorized absence offenses and whether the accused had been released prior to disciplinary action on previous cases); his reputation, character, and mental condition; his family ties and relationships (whether he has a family and whether his family members are in the area); any economic connection to the area (such as home ownership); the

presence or absence of responsible members of the military or of the civilian community who can vouch for his reliability; the nature of the offense charged; the apparent probability of conviction; the likely sentence; any statements made by the accused; and any other factors indicating the likelihood of his remaining for his court-martial or his fleeing prior to court-martial.

b. **Necessity for restriction.** The same grounds that would justify pretrial confinement or arrest will justify pretrial restriction.

3. **Severity of restraint.** Article 13, UCMJ, indicates that pretrial restraint shall not be more rigorous than the circumstances require to insure the accused's presence. Implicit in this principle is the notion that the accused is not to be punished prior to trial, only detained to insure his presence at trial. In no event will a pretrial confinee be required to perform punitive labor or wear a uniform other than that prescribed for unsentenced prisoners. Military courts have included other criteria for determining whether the accused is compelled to work with sentenced prisoners: whether duty hours or work schedules are the same as those for sentenced prisoners; whether the type of work assigned is the same as that for sentenced prisoners; whether the facility policy is to have all prisoners subject to the same set of instructions; and any other factors indicating that pretrial confinees are treated as sentenced prisoners. Though these principles apply specifically to confinement, they are also relevant to other forms of pretrial detention. Superior competent authority can impose further restrictions on the use of pretrial restraint. Article 10, UCMJ, states that, when an accused is ordered into arrest or confinement prior to trial, immediate steps will be taken to inform him of the specific offense precipitating the restraint and to either try or release him. Article 33, UCMJ, further provides that, when an accused is held in confinement or arrest for trial by general court-martial, his commanding officer will, within eight days of the imposition of that restraint, forward to the general court-martial convening authority the charges and pretrial investigation (Art. 32, UCMJ) or, if that is not practicable, a detailed written explanation of the reasons for delay will be forwarded within the eight-day period.

4. **Premast restraint.** When an accused is charged with a minor offense (i.e., one normally tried by summary court-martial or one which authorizes a maximum penalty of less than confinement for one year or dishonorable discharge), he ordinarily shall not be placed into confinement. Art. 10, UCMJ. Since only minor offenses may be disposed of at NJP, confinement normally is not authorized. Arrest would be covered by the same general prohibitions. Restriction, however, is authorized as a form of restraint prior to NJP.

5. **Relief from pretrial restraint.** The special court-martial convening authority, through his legal officer, is the best check of the pretrial restraint process. By taking direct command action to correct errors of law or judgment, a convening authority can save much difficulty at trial and insure appropriate use of pretrial

restraint as indicated by Congress. In this connection, the convening authority should not await application for relief by the accused, but should initiate corrective action where appropriate. There are other alternatives for relief available to an accused. He may request mast to superior authority; he may petition for relief under Art. 138, UCMJ; he may request the initial review officer to reconsider his decision; or he could petition the Navy-Marine Corps Court of Military Review or the Court of Military Appeals for relief. If an accused has been restrained illegally, he is, at a minimum, entitled to administrative credit against any confinement adjudged by a court-martial. This administrative credit would be computed at the rate of at least one day of credit for each day of illegal confinement served. Note also that the accused will receive administrative credit at the rate of one day of credit for each day of legal pretrial confinement, in accordance with Federal civilian sentence-computation procedures which have been specifically adopted by the Department of Defense. *See United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Although it may only involve psychological relief to the accused, it is possible for the person ordering illegal pretrial confinement to be prosecuted under Art. 97, UCMJ (maximum sentence is dismissal or dishonorable discharge and three years confinement).

E. **Speedy trial problems**. The accused has both a constitutional and a statutory right to a speedy trial. The government is under an obligation to proceed to trial with all reasonable speed and, in cases where an accused has been subject to unreasonable or oppressive delay, he is entitled to dismissal of charges. In addition to this general rule, R.C.M. 707 imposes on the government the specific obligation to bring the accused to trial within 120 days of the commencement of the case (*see* para. 2, below) or face dismissal of the charges. Since the essence of a denial of speedy trial is delay, an analysis of the issue must begin with the period of time for which the government is responsible.

1. **Raising the issue**. The issue of denial of speedy trial is raised at trial by the accused by a motion to dismiss charges. In support of this motion, the accused need only show that the trial has been delayed. Once the issue is raised, the burden is upon the government to show by a preponderance of evidence that the delay was not unreasonable (i.e., that the government proceeded to trial with due diligence) or that the accused was not harmed (prejudiced) by the delay.

2. **Commencement of accountability**. The period of time for which the government must account begins either upon the imposition of any form of pretrial restraint under R.C.M. 304, other than conditions on liberty, or the date when the accused was notified of the preferral of charges, whichever occurs first. Under case law, "notification" will be deemed to occur where the command has preferred charges against an accused, but has failed to so advise the accused as soon as practicable. Therefore, charges should not be preferred until fully investigated and the government is prepared to proceed to trial. Note also that, where a military accused is held by civilian authorities for surrender to military authorities, the civilian

confinement will commence the government's accountability under R.C.M. 707. Each additional offense committed after an accountable period begins starts a new accountable period for that particular offense. Thus, in any case of multiple offenses, an accused could suffer a denial of speedy trial as to some offenses, but not as to others. Each offense, therefore, has its own period of accountability.

3. **Termination of accountability**. The period of accountability, once begun, generally does not terminate until trial commences (i.e., a plea of guilty is entered or presentation to the fact-finder of evidence on the merits begins). If charges are dismissed, if a mistrial is granted, or if the accused is released from pretrial restraint for a significant period when no charges are pending, the 120-day period begins to run only from the date on which notification of charges or restraint are reinstituted.

4. **Excludable periods**. R.C.M. 707(c) states that all periods of time covered by stays issued by appellate courts and all other pretrial delays approved by a military judge or the convening authority shall be excluded when determining whether the 120-day rule has been satisfied. Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

-- **Reasons to grant delay**. The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge. This decision should be based on the facts and circumstances then and there existing. Reasons to grant delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the Reserve Component to active duty for disciplinary action; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or time for other good cause. Pretrial delays should not be granted ex parte and, when practicable, the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing.

5. **Prejudice per se**. Although the 90-day rule previously established in R.C.M. 707(d) has been eliminated, judicial decisions have held that, when an accused has been held in pretrial confinement for more than 90 days, a presumption arises that the accused's right to a speedy trial under Art. 10, UCMJ has been violated. In such cases, the government must demonstrate due diligence in bringing the case to trial. Unless the government can demonstrate extraordinary circumstances beyond manpower shortages, mistakes in drafting, or illnesses and leave that contributed to the delay, the charges against the accused will be dismissed. In computing the 90

days for these purposes, days of delay attributable to the defense and for its benefit will not be counted. This is known as the *Burton* speedy-trial rule (so-named after the Court of Military Appeals case that first announced the rule in 1971). Operational demands, combat environment, or a particularly complex offense or series of offenses are examples of "extraordinary circumstances" that might justify delay over three months. So far, this principle has not been applied to other forms of restraint; but, it may very well apply if the restriction or arrest is so severe as to be tantamount to confinement. In practical application, the *Burton* rule has made it very difficult for the government to justify delays beyond the 90th day. It is therefore imperative that an accused in pretrial confinement be brought to trial by the 90th day. While many delays will be beyond the control of the line commander, others may be shortened by expeditious processing. The preliminary inquiry and article 32 investigation (where applicable) should be done thoroughly and quickly. Before witnesses are sent on leave, liaison should be made with the trial counsel in the case. Since the time spent in a civilian confinement facility while awaiting return to military control may be counted as part of the 90 days, reasonable efforts should be made to return an accused to military control as quickly as possible. It should also be noted that it is still permissible to release an accused from pretrial confinement if it appears unlikely that he can be brought to trial within 90 days.

6. **Remedy**. A failure to comply with the right of a speedy trial will result in dismissal of the affected charges. This dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

7. **Recapitulation**. The strictures relating to speedy trial are such that commanders must be ever mindful of them to avoid untoward dismissal of criminal cases. In practice, speedy trial should be viewed as a limitation on the use of pretrial restraint as much as a limitation on time of trial. The law does not demand unusual action in a case until pretrial restraint is imposed or charges preferred. At that point, the government must proceed with all reasonable speed. Thus, the commander/convening authority should insure that pretrial restraint is utilized only when necessary, as opposed to convenient or desirable. Difficulties in obtaining service records or other documents held by department level offices will have to be resolved by bringing to bear as much command pressure as possible. Therefore, regardless of the level of command responsible in an administrative sense for delay, the convening authority must assume total responsibility once pretrial restraint is involved or charges preferred.

F. **Pretrial agreements**. A pretrial agreement is an agreement between the accused and the convening authority whereby each agrees to take or refrain from taking certain action regarding the trial by court-martial. R.C.M. 705 and JAGMAN, § 0137, detail procedures for negotiating pretrial agreements and define the rules pertaining to them. Appendix A-1-h of the *JAG Manual* contains suggested forms for the finalized agreement, but these forms will require careful tailoring in all cases as the agreement must be clear and precise and should cover all contingencies.

1. **Negotiations**. Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. After negotiations, the defense may elect to submit a proposed pretrial agreement to the convening authority. This agreement shall be in writing and will normally be submitted through the trial counsel and legal officer. All terms and conditions should be precisely spelled out in the agreement itself, as oral understandings, or unwritten gentlemen's agreements will not be enforced. Whenever a pretrial agreement offer is submitted, it must be forwarded to the convening authority for his personal consideration and may not be blocked by the trial counsel, legal officer, or staff judge advocate. To effect the pretrial agreement, the convening authority personally signs the document or delegates the authority to sign to another person such as the staff judge advocate, legal officer, or trial counsel. The convening authority may reject the offer by signing the rejection form, after which counter-proposals by the convening authority are permitted. The convening authority has sole discretion in deciding whether to accept or reject the pretrial agreement proposed.

2. **Permissible terms and conditions**. R.C.M. 705 outlines certain permissible and prohibited terms and conditions of pretrial agreements. It must be noted that these are not totally inclusive, as each term is subject to the scrutiny of the military judge who may disapprove the term if it appears that the accused did not freely and voluntarily agree to it, or if it deprives the accused of a substantial right otherwise guaranteed to him.

a. **Concessions by the convening authority**. The convening authority may agree:

(1) To refer the charges to a certain type of court-martial;

(2) to refer a capital case as noncapital;

(3) to withdraw one or more charges or specifications from the court-martial;

(4) to have the trial counsel present no evidence as to one or more specifications or portions thereof; and

(5) to take certain specified action on the sentence adjudged by the court-martial.

b. **Concessions by the accused.** The accused may agree:

(1) To plead guilty or to enter a confessional stipulation as to one or more charges or specifications (including lesser included offenses); and

(2) to fulfill other terms and conditions which are not expressly prohibited under R.C.M. 705. The following, for example, would be permitted:

(a) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or confessional stipulation will be entered;

(b) a promise to testify as a witness in a trial of another person;

(c) a promise to provide restitution;

(d) a promise to conform the accused's conduct to certain conditions of probation before action of the convening authority as well as during any period of suspension of the sentence (subject to the requirements concerning vacations of suspensions found in R.C.M. 1109); and

(e) a promise to waive procedural requirements (such as the article 32 investigation, the right to trial by members, the right to request trial by military judge alone, and the opportunity to obtain the personal appearance of witnesses at sentencing proceedings).

3. **Prohibited terms and conditions.** R.C.M. 705(c)(1) provides that any term or condition to which the accused did not freely and voluntarily agree will not be enforced. Additionally, any term or condition which deprives the accused of certain substantial rights will not be enforced. Among these rights are: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; and the right to complete and effective exercise of post-trial and appellate rights. Since ambiguous, vague, or arguably improper provisions in pretrial agreements will generally be interpreted strictly against the government, it is suggested that, before signing any pretrial agreement, the convening authority consult with the trial counsel so that his understanding of the agreement is placed in the proper legal form and

terminology. The convening authority should always consult with the trial counsel directly or through his own staff judge advocate if one is assigned.

4. **Pitfalls**. The offer to plead guilty cannot be accepted if there is reason to believe that there is insufficient evidence to convict the accused of the offense concerned. Also, unreasonably multiplying offenses from an essentially single offense to coerce a pretrial agreement is improper. Also unlawful is the practice of pleading a baseless major offense on the charge sheet in order to induce a pretrial agreement on a lesser included offense. The agreed sentence aspect of the agreement must be clear and precise and it must provide for all contingencies. In this connection, it is essential to obtain the trial counsel's (prosecutor's) advice before drafting or approving any pretrial agreement. Such agreements are technically complex, and the *JAG Manual* format does not cover all situations.

5. **Binding effect of the agreement**. In general, the accused may always withdraw from a pretrial agreement. The convening authority may withdraw at any time before the accused begins performance of promises contained in the agreement. Additionally, the agreement will be void in the following circumstances:

a. When the accused fails to fulfill any material promise or condition in the agreement (e.g., fails to plead guilty, withdraws a guilty plea, renders a guilty plea improvident, etc.);

b. when inquiry by the military judge discloses a disagreement as to a material term in the agreement; or

c. when findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

6. **Judicial supervision**. The military judge must inquire into the existence and the provisions of the pretrial agreement to be sure the accused acted voluntarily and knowingly in executing the agreement. Normally, a misunderstanding of the terms of an agreement will cause rejection of guilty pleas and the entry of not guilty pleas. If the intent of the parties at the time the agreement was executed can be determined, that interpretation will control the agreement.

In spite of the effect of the pretrial agreement on the trial, the court members may not be informed of any negotiations, of any existing agreement, or of any agreement made but subsequently rejected. If trial is by military judge alone, he may not examine the sentencing provisions prior to announcing the sentence in the case.

7. **Major Federal offenses.** In some cases, the misconduct which subjects the military member to trial by court-martial also violates other Federal laws and subjects the member to prosecution by civilian authorities in the Federal courts. In these cases, decisions must be made as to which forum the case should go and as to which agency will conduct the investigation. In order to ensure that actions by military convening authorities do not preclude appropriate action by Federal civilian authorities in such cases, JAGMAN, § 0137b, requires that convening authorities shall ensure that appropriate consultation under the Memorandum of Understanding between the Departments of Defense and Justice (MCM, 1984, app. 3) has taken place prior to any trial by court-martial or approval of any pretrial agreement in cases likely to be prosecuted in the Federal courts.

CONFINEMENT ORDER
NAVPERS 1640/4 (Rev. 7-82) S/N 0106-LF-016-4023

NAME (Last, first, middle)	SSN	RATE/GRADE	BRANCH SER
TYPIST, David L.	222-22-2222	YN3/E-4	U.S. Navy

SHIP OR ORGANIZATION	DATE
USS PUGET SOUND (AD 38)	2 January 19CY

STATUS

DETAINED *(Alleged violation of UCMJ Articles)*
Viol. UCMJ, Art. 86 - Unauthorized absence from unit (fm 230CTCY(-1) to 2JANCY).

"I have been informed that I am being confined for the above alleged offense(s)"

2 JAN CY — *Date*
David L. Typist — *Signature of accused*

2 JAN CY — *Date*
I. O. Ewe — *Signature of witness*

CONFINED AS RESULT OF
☐ VACATED SUSPENSION
☐ NJP ☐ SCM ☐ SPCM ☐ GCM

CHARGES AND SPECIFICATION CONVICTED OF

SENTENCE ADJUDGED: | DATE

IF SENTENCE DEFERRED, DATE DEFERMENT TERMINATED:

SENTENCE APPROVED	APPROVED BY	DATE
	CA	
	SA	
	NCMR	
	COMA	
	OTHER	

PRE-TRIAL CONFINEMENT NECESSARY-

☒ TO ENSURE THE PRESENCE OF THE ACCUSED AT THE TRIAL ☐ BECAUSE OF THE SERIOUSNESS OF THE OFFENSE CHARGED

CONFINEMENT DIRECTED AT	
HOUR	DATE
1400	2 January 19CY

TYPED NAME/RANK/TITLE ROBERT R. ROBERTS, CAPT, USN, CO, USS PUGET SOUND (AD 38)
SIGNATURE Robert R. Roberts

MEDICAL CERTIFICATE

The above named individual was examined by me at _____ *(HOUR)* *on* _____ *(DATE)* *and found to be*

☐ *fit* ☐ *unfit for confinement. The following irregularities were noted during the examination; (If none, so state):*

☐ *I certify that from an examination of* _____ *Name* _____ *Rate* _____ *SSN*
and of the place where he/she is to be confined, I am of the opinion that the execution of the foregoing sentence to confinement on (bread and water) (diminished rations) will/ will not produce serious injury to his/her health.

TYPED NAME/RANK/TITLE | SIGNATURE

RECEIPT FOR PRISONER

The above named individual was received at _____ *(NAME OF BRIG/CORRECTIONAL FACILITY)*

at _____ *(HOUR)* *on* _____ *(DATE)*

TYPED NAME/RANK/TITLE | SIGNATURE

SAMPLE CONFINEMENT ORDER - PRETRIAL CONFINEMENT
Appendix I-a

CONFINEMENT ORDER
NAVPERS 1640/4 (Rev. 7-82) S/N 0106-LF-016-4023

NAME (Last, first, middle)	SSN	RATE/GRADE	BRANCH SER
BYERS, Thomas G.	987-65-4321	BT3/E-4	U.S. Navy

SHIP OR ORGANIZATION	DATE
USS IOWA (BB 61)	28 February 19CY

STATUS

DETAINED *(Alleged violation of UCMJ Articles)*

"I have been informed that I am being confined for the above alleged offense(s)"

Date _____ *Signature of accused* _____

Date _____ *Signature of witness* _____

CONFINED AS RESULT OF

☐ VACATED SUSPENSION

☐ NJP ☐ SCM ☒ SPCM ☐ GCM

CHARGES AND SPECIFICATION CONVICTED OF
VIOL ART. 128, UCMJ
VIOL ART. 134, UCMJ

SENTENCE ADJUDGED:	DATE
CONF x 2 mos.	28 Feb CY

IF SENTENCE DEFERRED, DATE DEFERMENT TERMINATED:

SENTENCE APPROVED	APPROVED BY	DATE
	CA	
	SA	
	NCMR	
	COMA	
	OTHER	

PRE-TRIAL CONFINEMENT NECESSARY-

☐ TO ENSURE THE PRESENCE OF THE ACCUSED AT THE TRIAL ☐ BECAUSE OF THE SERIOUSNESS OF THE OFFENSE CHARGED

CONFINEMENT DIRECTED AT	
HOUR	DATE
1600	28 February 19CY

TYPED NAME/RANK/TITLE C. MEMMESHEIMER, LT, JAGC USN, BYDIRCO USS IOWA (BB 61)

SIGNATURE C. Memmesheimer

MEDICAL CERTIFICATE

The above named individual was examined by me at _____ *(HOUR)* *on* _____ *(DATE)* *and found to be*

☐ *fit* ☐ *unfit for confinement. The following irregularities were noted during the examination: (if none, so state):*

☐ *I certify that from an examination of* _____ *(Name)* *(Rate)* *(SSN)*
and of the place where he/she is to be confined, I am of the opinion that the execution of the foregoing sentence to confinement on (bread and water) (diminished rations) will/will not produce serious injury to his/her health.

TYPED NAME/RANK/TITLE	SIGNATURE

RECEIPT FOR PRISONER

The above named individual was received at _____ *(NAME OF BRIG/CORRECTIONAL FACILITY)*

at _____ *(HOUR)* *on* _____ *(DATE)*

TYPED NAME/RANK/TITLE	SIGNATURE

Appendix I-b

INITIAL REVIEW OFFICER PROGRAM

(R.C.M. 305, MCM, 1984; JAGMAN § 0127)

I. **Who must appoint?**

A. All officers exercising general court-martial jurisdiction over a shore activity having a place of confinement.

B. All area coordinators exercising authority over a shore activity who have made arrangements with civil authorities for the confinement of military personnel in civilian facilities.

II. **Applicability of pretrial confinement review procedures**

A. These rules apply to members of the naval service confined ashore in naval places of confinement or in civilian confinement pursuant to an authorized agreement, including individuals in naval places of confinement awaiting transportation to their parent commands (unless confined for less than 72 hours in any particular facility).

B. Members of the naval service confined afloat shall be transferred as soon as practicable to the nearest shore command having an approved confinement facility. The required report must be forwarded to the initial review officer (IRO) immediately upon this transfer.

C. The confinement of members of the naval service confined in naval places of confinement in connection with foreign criminal proceedings shall not be reviewed under the terms of this program.

D. The review of the pretrial confinement of members of the naval service confined in places of confinement under the jurisdiction of other armed forces shall be governed by the IRO regulations of the armed force that has jurisdiction over the place of confinement.

E. The review of the pretrial confinement of members of the Army, Air Force, or Coast Guard confined in naval places of confinement shall be in accordance with the IRO regulations of the member's own armed force, but, if no action is taken within 72 hours by an IRO of that armed force, then the review shall be promptly conducted by a naval service IRO as if the confinee were a member of the naval service.

Appendix II(1)

III. **Qualifications of the IRO:**

A. Shall be O-4 or above;

B. need not be a judge advocate;

C. not connected with law enforcement;

D. not connected with the prosecution or defense function;

E. not a member of the Navy-Marine Corps Trial Judiciary;

F. otherwise eligible inactive duty Reserve officers may be appointed when it is impracticable to appoint an active duty IRO; and

G. although appointed by a GCM authority, the IRO is not subject to the direction or control of the officer who appointed him/her.

IV. **Advice to the accused upon confinement.** Each person confined shall be promptly informed of:

A. The nature of the offense(s) for which held;

B. the right to remain silent and that any statement made by the person may be used against the person;

C. the right to retain civilian counsel at his own expense and the right to request assignment of military counsel; and

D. the procedures by which pretrial confinement will be reviewed.

V. **Information to be furnished by officer ordering pretrial confinement** (in a written memorandum submitted to the IRO):

A. Hour, date and place of confinement;

B. offense(s) charged and general circumstances known (specifically, information showing that an offense triable by court-martial was committed and that this accused committed it; may include hearsay and may incorporate by reference other documents -- e.g., witness statements, investigative reports, or official records);

Appendix II(2)

C. previous disciplinary record;

D. any extenuating or mitigating circumstances known; and

E. specific reason(s) why continued pretrial confinement is considered necessary (specifically, information showing that the accused either is a flight risk or will engage in serious criminal misconduct and that less severe forms of restraint are inadequate).

VI. **The informal hearing** (within 7 days of the imposition of pretrial confinement):

A. Servicemember shall be present;

B. servicemember shall be advised pursuant to Article 31, UCMJ;

C. servicemember shall be advised of the purpose of the hearing and of the right to present evidence concerning the continuation of confinement;

D. if requested by the accused, military counsel shall be provided and he shall be present and may speak on the accused's behalf; and

E. except for the rules regarding privileges, the Military Rules of Evidence do not apply, and there is no right to confront and cross-examine witnesses during the nonadversarial proceeding.

VII. **IRO shall determine:**

A. Whether there is probable cause to believe the confinee committed the offense(s);

B. whether there is apparent court-martial jurisdiction over the confinee for the offense(s) involved;

C. whether the confinee should be continued in pretrial confinement; and

D. whether the time limit for completion of the initial review should be extended to 10 days after the imposition of pretrial confinement.

Appendix II(3)

VIII. **The IRO's decision**

A. Continued confinement

1. In writing

2. Statement of reasons in support of decision

3. Copies to:

a. Officer ordering confinement

b. Accused

c. Commanding officer of confinement facility

4. Confinee's CO may order release notwithstanding decision of IRO to continue confinement.

5. A rehearing may be held by the IRO on own motion or on petition by confinee prior to an article 39a session. Once a military judge has held an article 39a session in the confinee's (accused's) case, the IRO is divested of authority to order the confinee's release.

B. Release from confinement

1. In writing

2. To commanding officer of the confinee

3. Commanding officer of the confinee must order release of the servicemember immediately (copy of release order to GCM authority)

4. Commanding officer may not reconfine unless:

a. Discovery of a NEW OFFENSE which may authorize pretrial confinement; or

Appendix II(4)

b. discovery of NEW EVIDENCE which may indicate that the servicemember will flee to avoid trial; or

c. discovery of any other evidence establishing both a lawful basis and a need for pretrial confinement.

5. Commanding officer may impose another form of pretrial restraint if all legal requirements are met. IRO may have recommended this if release was ordered, but not necessarily.

6. The decision of the IRO is final in all cases. The commanding officer MAY NOT appeal the decision.

Appendix II(5)

DEPARTMENT OF THE NAVY
USS PUGET SOUND (AD 38)
FPO New York 09501

1640
Ser 00/
3 Jan CY

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

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

Ref: (a) R.C.M. 305, MCM, 1984
(b) SECNAVINST 1640.10

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

a. Hour, date, and place of pretrial confinement:

1400, 2 January 19CY, Navy Brig, Naval Station, Rota

b. Offenses charged:

Violation of UCMJ, Article 86 -- Unauthorized absence from USS PUGET SOUND (AD 38) from 23 October 19CY(-1) until apprehended on 2 January 19CY.

c. General circumstances:

(1) Petty Officer Typist's absence commenced over liberty which expired on board at 0700, 23 October 19CY(-1). The circumstances, as related by Petty Officer Typist to his Division Officer, are than YN3 Typist was dissatisfied working in the Admin Office and did not like his immediate supervisor and felt "picked on." He also relates that, at the time of his absence, he was working "undercover" with the Naval Investigative Service and the ship's Master-at-Arms force in identifying drug abusers on board the Naval Station. He states that a fellow

Appendix III-a(1)

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

petty officer (whom he identified as a drug abuser) found out that YN3 Typist was the one responsible for a "bust" in which this petty officer had threatened YN3 Typist with bodily harm. Apparently becoming scared, Petty Officer Typist fled.

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

(3) Petty Officer Typist was apprehended by Shore Patrol at 1300, 2 January 19CY, at a local bar in Palma de Mallorca, Spain. I found it appropriate to place YN3 Typist in confinement due to the duration of the absence (approximately 72 days) and considering the absence was terminated by apprehension.

2. Previous disciplinary action:

a. CO's NJP, USS PUGET SOUND (AD 38) on 3 April 19CY(-1). Violation of UCMJ, Article 86 -- Unauthorized absence from appointed place of duty. Awarded: 10 days extra duties.

b. CO's NJP, USS PUGET SOUND (AD 38) on 10 June 19CY(-1). Violation of UCMJ, Article 86 -- Unauthorized absence from unit (approximately 3 days). Awarded: Forfeiture of $100.00 pay per month for one month and 30 days restriction.

c. CO's NJP, USS PUGET SOUND (AD 38) on 12 July 19CY(-1). Violation of UCMJ, Article 86 (6 specifications) -- Failure to go to appointed place of duty, to wit: Restricted men's muster. Awarded: 30 days extra duties and forfeiture of $100.00 pay per month for two months.

3. Extenuating or mitigating circumstances: None

Appendix III-a(2)

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

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

//S//
ROBERT R. ROBERTS

Appendix III-a(3)

4 Jan CY

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

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

Ref: (a) R.C.M. 305, MCM, 1984
(b) SECNAVINST 1640.10
(c) CO, USS PUGET SOUND (AD 38) ltr 1640 Ser 00/ dtd 3 Jan CY

1. In accordance with the provisions of references (a) and (b), a hearing concerning the pretrial confinement of YN3 Typist was conducted on 4 January 19CY. All information available at the time of the hearing, in addition to the comments and recommendations set forth in reference (c), have been reviewed.

2. At the hearing, YN3 Typist was afforded all rights set forth in reference (a). Petty Officer Typist was represented by LT P. T. Pertee, JAGC, USNR, Naval Legal Service Office Detachment, Rota, Spain, who was detailed pursuant to the confinee's request for military counsel. Lieutenant I. O. Ewe, USN, Legal Officer, USS PUGET SOUND (AD 38) was present, acting in the capacity of command representative.

3. Having waived his right to remain silent, YN3 Typist was willing to discuss his absence with me. His reasons for going UA, as stated in reference (c), remain basically the same. Petty Officer Typist stands firm on his story concerning his involvement with the Naval Investigative Service. However, upon advisement of his counsel, YN3 Typist terminated the questioning. Lieutenant Ewe, command representative, had nothing further to offer except to reconfirm the command's position that continued confinement is warranted.

4. I find there is probable cause to believe the confinee committed the offense, and that court-martial jurisdiction does exist over the confinee and the offense charged. I find no cause to extend the time limit for completion of this review.

5. Subject to the foregoing, I find continued pretrial confinement appropriate in this case. The confinee should be brought to trial as soon hereafter as practicable, barring any unforeseen delays.

6. Pursuant to paragraphs (i)(7) and (j) of reference (a), reconsideration of this decision may be appropriate at a later date.

//S//
I. C. LIGHT
CDR, USN

Appendix III-b

MILITARY JUSTICE STUDY GUIDE

CHAPTER XIII

PRETRIAL ASPECTS OF GENERAL COURTS-MARTIAL

A. **Introduction**. The general court-martial is the highest level of court-martial in the military justice system. Such a court-martial may impose the greatest penalties provided by law for any offense. The general court-martial is composed of a minimum of five members, a military judge, and lawyer counsel for the government and the accused. In some cases, the court is composed of a military judge and counsel. The general court-martial is created by the order of a flag or general officer in command in much the same manner as the special court-martial is created by subordinate commanders. Before trial by general court-martial may lawfully occur, a formal investigation of the alleged offenses must be conducted and a report forwarded to the general court-martial convening authority. This pretrial investigation (often referred to as an article 32 investigation) is normally convened by a summary court-martial convening authority. This chapter will discuss the legal requisites of the pretrial investigation.

B. **Nature of the pretrial investigation**

1. **Scope**. The formal pretrial investigation (Art. 32, UCMJ) is the military equivalent of the grand jury proceeding in civilian criminal procedure. The purpose of this investigation is to inquire formally into the truth of allegations contained in a charge sheet, to secure information pertinent to the decision on how to dispose of the case, and to aid the accused in discovering the evidence against which he must defend himself. Basically, this investigation is protection for the accused. It is a shield which protects him from trial on baseless but infamous charges, the very existence of which are detrimental to the accused's reputation and respectability. The investigation is also a sword for the prosecutor who may test his case for its strength in such a proceeding and seek its dismissal if too frail or if groundless. Such an investigation can be a proving ground for witnesses who, for the first time, are subject to cross-examination. By affording the accused and the prosecutor the opportunity to protect their own interests, the government usually can be certain that only the truly serious and meritorious cases are referred to trial by general court-martial.

2. **Authority to direct**. An Article 32, UCMJ, investigation may be directed by one authorized by law to convene summary courts-martial or some higher level of court-martial. Article 24, UCMJ, and JAGMAN, § 0120, indicate that commanding officers of naval vessels, bases, stations, units, or activities and commanding officers of Marine Corps battalions, regiments, aircraft squadrons, and similar-sized or higher-level commands have summary court-martial convening authority and, by virtue of R.C.M. 405(c), the authority to direct an Article 32, UCMJ, investigation. As is true of all other forms of convening authority, the power to order the Article 32, UCMJ, investigation [hereinafter pretrial investigation] vests in the office of the commander. *See* Chapter X, Section B.1., **Authority to convene**.

3. **Mechanics of directing**. When the summary court-martial or higher convening authority receives charges against an accused which are serious enough to warrant trial by general court-martial, the convening authority directs a pretrial investigation. This is done by written orders of the convening authority which assign personnel to participate in the proceedings. At the time the investigation is ordered, the charge sheet will have been completed up to, but not including, the referral block on page 2. Unlike courts-martial, pretrial investigations are directed as required, and standing orders for such proceedings are inappropriate. Also unlike courts-martial, there is no separate referral of a case to a pretrial investigation since the order creating the investigation also amounts to a referral of the case to the pretrial investigation. The original appointing order is forwarded to the assigned investigating officer along with the charge sheet, allied papers, and a blank investigating officer's report form (DD Form 457; *see also* MCM, 1984, app. 5).

4. **Investigating officer**. The pretrial investigation is a formal one-officer investigation into alleged criminal misconduct. The investigating officer must be a commissioned officer who should be a major/lieutenant commander or above or an officer with legal training. R.C.M. 405(d)(1). The advantages of appointing a judge advocate (when available) to act as the investigating officer are substantial, especially in view of the increasingly complex nature of the military judicial process. Neither an accuser, prospective military judge, nor prospective trial or defense counsel for the same case may act as investigating officer. Further, the investigating officer must be impartial and cannot previously have had a role in inquiring into the offenses involved (e.g., as provost marshal, public affairs officer, etc.). Mere prior knowledge of the facts of the case will not, alone, disqualify a prospective investigating officer. If such knowledge imparts a bias to the investigating officer, then he obviously is not the impartial investigator required by law. The law contemplates an investigating officer who is fair, impartial, mature, and with a judicial temperament. It is the responsibility of the convening authority to see that such an officer is appointed to pretrial investigations.

Case law has reemphasized that the duty of the investigator is to perform a judicial function. This means that he must be neutral, detached, and

independent in conducting the investigation. The C.M.A. has specifically condemned the practice of the pretrial investigating officer engaging in private conversations about the case with the military lawyer whom the investigator knew would ultimately prosecute the case. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977). This case demonstrates the importance of selecting an individual who is capable of conducting the investigation without excessive, and perhaps impermissible, assistance from other advisors.

If it is necessary for a nonlawyer investigating officer to obtain advice regarding the investigation, that advice should not be sought from one who is likely to prosecute the case.

5. **Counsel for the government.** While the pretrial investigation need not be an adversarial proceeding, current practice favors having the convening authority detail a lawyer to represent the interests of the government, especially where the investigating officer is not a lawyer. The assignment of a counsel for the government does not lessen the obligation of the investigating officer to investigate the alleged offenses thoroughly and impartially. As a practical matter, however, the presence of lawyers representing the government and the accused make the pretrial investigation an adversarial proceeding. Counsel for the government functions much as a prosecutor does at trial and presents evidence supporting the allegations contained on the charge sheet.

6. **Defense counsel.** The accused's rights to counsel are as extensive at the pretrial investigation as at the general court-martial. More specifically, an accused is entitled to be represented by civilian counsel, if provided by the accused at no expense to the government, and by a detailed military lawyer, certified in accordance with Article 27(b), UCMJ, or by a military lawyer of his own choice at no cost to the accused if such counsel is reasonably available. *See* Chapter XI, regarding an accused's right to defense counsel. Detailed defense counsel at a pretrial investigation must be a certified (Art. 27(b), UCMJ) lawyer and should be designated by the appointing order. Individual counsel, military or civilian, is normally not detailed on the appointing order. An accused is not entitled to more than one military counsel in the same case.

7. **Reporter.** There is no requirement that a record of the pretrial investigation proceedings be made other than the completion of the investigating officer's report. Accordingly, a reporter need not be detailed. It is common practice, however, to assign a reporter to prepare a verbatim record of all proceedings. The purposes of such a record are to preserve the testimony of prospective trial witnesses in the event they should not be available to testify at trial and to accurately record conflicting factual testimony for use in determining the truth of the allegations in a

complex case. When such a record is desired, the convening authority (or a subordinate) may detail a reporter, but such assignment is usually made orally and is not part of the appointing order.

8. **Appointing order.** The order directing a pretrial investigation may be drafted in any acceptable form so long as an investigation is ordered and an investigating officer and counsel are detailed. A suggested format appears at the end of this chapter.

C. The hearing procedure

1. **Prehearing preparation.** When the pretrial investigation officer (PTIO) receives his order of appointment, he should first study the charge sheet and allied papers to become thoroughly familiar with the case. The charge sheet should be reviewed for errors and any needed corrections should be noted. If counsel for the government has been appointed, the investigating officer should contact him to determine what additional information, if any, is available. The PTIO should then deliver a copy of the charge sheet to the accused and his counsel. No attempt should be made to interrogate the accused at this time. Prospective witnesses should then be interviewed and items of physical or documentary evidence located and either obtained by the PTIO or properly preserved in order to protect the chain of custody or unique identifying features. Once the PTIO is satisfied that he has obtained all available relevant evidence, he should consult with accused, counsel, witnesses, and the legal officer of the convening authority to set up a specific hearing date. It is <u>not</u> the duty of the PTIO to "build a case" against the accused, but rather to impartially investigate the alleged offense with a view toward discovering the truth.

2. **Witnesses.** All reasonably available witnesses who appear necessary for a thorough and impartial investigation are required to be called before the article 32 investigation. Transportation and per diem expenses are provided for both military and civilian witnesses. *See* R.C.M. 405(g). Witnesses are "reasonably available," and therefore subject to production, when the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay and effect on military operations of obtaining the witness' appearance. R.C.M. 405(g)(1)(A). This balancing test means that the more important the expected testimony of the witness, the greater the difficulty, expense, delay, and effect on military operations must be to permit nonproduction. Similar considerations apply to the production of documentary and real evidence.

For both military and civilian witnesses, the PTIO makes the initial determination concerning availability. For military witnesses, the immediate commanding officer of the witness may overrule the PTIO's determination. The decision not to make a witness available is subject to review by the military judge at trial.

A civilian witness whose testimony is material must be invited to testify, although he or she cannot be subpoenaed or otherwise compelled to appear at the investigation. Thus, the PTIO should make a bona fide effort to have such civilian witnesses appear voluntarily, offering transportation expenses and a per diem allowance if necessary. R.C.M.405(g)(3).

3. **Statements**. The PTIO has a number of alternatives to live testimony. When a witness is not reasonably available, even if the defense objects, the PTIO may consider that witness' sworn statements. Unless the defense objects, a PTIO may also consider, regardless of the availability of the witness, sworn and unsworn statements, prior testimony, and offers of proof of expected testimony of that witness.

Upon objection, only sworn statements may be considered. Since objections to unsworn statements are generally made, every effort should be made to get sworn statements. All statements considered by the PTIO should be shown to the accused and counsel. The same procedure should be followed with respect to documentary and real evidence.

4. **Testimony**. All testimony given at the pretrial investigation must be given under oath and is subject to cross-examination by the accused and counsel for the government. The accused has the right to offer either sworn or unsworn testimony. If undue delay will not result, the statements of the witnesses who testified at the hearing should be obtained under oath. In this connection, the PTIO is authorized to administer oaths in connection with the performance of his duties. JAGMAN, § 0902a(2)(d).

5. **Rules of evidence**. The rules of evidence applicable to trial by court-martial do not strictly apply at the pretrial investigation, and the PTIO need not rule on objections raised by counsel except where the procedural requisites of the investigation itself are concerned. This normally means that counsels' objections are merely noted on the record. Care should be taken to insure that evidence relating to any search and seizure authorizations, article 31 warnings, or similar legal issues is fully developed at the investigation. Since the rules of evidence do not strictly apply, cross-examination of witnesses may be very broad and searching and should not be unduly restricted.

6. **Hearing date**. Once the prehearing preparation has been completed, the PTIO should convene the hearing. The pretrial investigation is a public hearing and should be held in a place suitable for a quasi-judicial proceeding. Accused, counsel, reporter (if one is used), and witnesses should be present. Witnesses must be examined one-by-one, and no witness should be permitted to hear another testify.

D. **Posthearing procedures**. After the hearing is completed, the investigating officer prepares his report pursuant to R.C.M. 405(j) and submits it to the commanding officer who directed the investigation. The commanding officer should consider the investigating officer's recommendation as to disposition, but he need not follow it. The commanding officer may dispose of the charges as he sees fit pursuant to R.C.M. 401. In Navy commands, if he deems a general court-martial appropriate, but lacks the authority to convene such a court-martial, he must forward the report to the area coordinator, absent direction to the contrary from the general court-martial convening authority in his chain of command, pursuant to JAGMAN, § 0128a(1). In Marine commands, the charges are forwarded to the general court-martial convening authority in the chain of command, pursuant to JAGMAN, § 0128b.

This is accomplished by means of an endorsement which includes the recommendations of the officer directing the pretrial investigation, the recommendations of the investigating officer, a detailed and explanatory chronology of events in the case, and any comments deemed appropriate. A sample endorsement follows at the end of this chapter.

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

Before a case is referred to a general court-martial, the convening authority's SJA must review the case and prepare a written legal opinion on the sufficiency of the evidence and advisability of trial. This written legal opinion is referred to as the pretrial advice.

The advice of the staff judge advocate shall include a written and signed statement which sets forth that person's:

1. Conclusion whether each specification on the charge sheet alleges an offense under the UCMJ;

2. conclusion whether each allegation is substantiated by the evidence indicated in the article 32 report of investigation;

3. conclusion whether a court-martial would have jurisdiction over the accused and the offense(s); and

4. recommendation of the action to be taken by the convening authority.

The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice, but the staff judge advocate is responsible for it and must sign it personally.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter and endorsements, and report of investigation are forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations, by commanders or others who have forwarded the charges, for disposition of the case. There is no legal requirement to include such information, however, and failure to do so is not error.

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

22 Aug CY

In accordance with R.C.M. 405, MCM, 1984, Lieutenant Commander Pretrial I. Officer, JAGC, U.S. Navy, is hereby appointed to investigate the attached charges preferred against Seaman Watt A. Accused, U.S. Navy. The charge sheet and allied papers are appended hereto. The investigating officer will be guided by the provisions of R.C.M. 405, MCM, 1984, and current case law relating to the conduct of pretrial investigations. In addition to the investigating officer hereby appointed, the following personnel are detailed to the investigation for the purposes indicated:

COUNSEL FOR THE GOVERNMENT

Lieutenant I. Will Convictim, JAGC, U.S. Navy, certified in accordance with Article 27(b), Uniform Code of Military Justice;

DEFENSE COUNSEL

Lieutenant I. Gettum Off, JAGC, U.S. Naval Reserve, certified in accordance with Article 27(b), Uniform Code of Military Justice.

//S//
CONVENING T. AUTHORITY
Captain, JAGC, U.S. Navy
Commanding Officer
Naval Justice School
Newport, Rhode Island

SAMPLE APPOINTING ORDER FOR (ART. 32) PRETRIAL INVESTIGATION

Appendix I

INVESTIGATING OFFICER'S REPORT

(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)

1a. FROM: *(Name of Investigating Officer — Last, First, MI)* OFFICER, Pretrial I.	b. GRADE LCDR/ JAGC/USN	c. ORGANIZATION Naval Justice School Newport, Rhode Island	d. DATE OF REPORT 30 Aug CY
2a. TO: *(Name of Officer who directed the investigation — Last, First, MI)* AUTHORITY, Convening T.	b. TITLE Commanding Officer	c. ORGANIZATION Naval Justice School Newport, Rhode Island	
3a. NAME OF ACCUSED *(Last, First, MI)* ACCUSED, Watt A.	b. GRADE SN/USN	c. SSN 123-45-6789	d. ORGANIZATION Naval Justice School Newport, Rhode Island
			e. DATE OF CHARGES 20 Aug CY

(Check appropriate answer)	YES	NO
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)	X	
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)	X	
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d)(2), 502(d)	X	

7a. NAME OF DEFENSE COUNSEL *(Last, First, MI)* OFF, I. Gettum	b. GRADE LT/JAGC/USNR	8a. NAME OF ASSISTANT DEFENSE COUNSEL *(If any)* N/A	b. GRADE N/A
c. ORGANIZATION *(If appropriate)* Naval Legal Service Office Newport, Rhode Island		c. ORGANIZATION *(If appropriate)* N/A	
d. ADDRESS *(If appropriate)* N/A		d. ADDRESS *(If appropriate)* N/A	

9. *(To be signed by accused if accused waives counsel. If accused does not sign, investigating officer will explain in detail in Item 21.)*

a. PLACE N/A	b. DATE N/A

I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.

c. SIGNATURE OF ACCUSED
N/A

10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: *(Check appropriate answer)*	YES	NO
a. THE CHARGE(S) UNDER INVESTIGATION	X	
b. THE IDENTITY OF THE ACCUSER	X	
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31	X	
d. THE PURPOSE OF THE INVESTIGATION	X	
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE	X	
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT	X	
g. THE RIGHT TO CROSS-EXAMINE WITNESSES	X	
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED	X	
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION	X	
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING	X	
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE *(If the accused or counsel were absent during any part of the presentation of evidence, complete b below.)*	X	

b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL

None.

[INCLUDE IN STATEMENT REASON(S) - FOR ABSENCE OF ACCUSED OR HIS COUNSEL.]

NOTE: If additional space is required for any item, enter the additional material in Item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading (*Example: "7c".*) Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."

DD FORM 457 84 AUG — EDITION OF OCT 69 IS OBSOLETE.

Appendix II-a(1)

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: (Check appropriate answer)				
NAME (Last, First, MI)	GRADE (If any)	ORGANIZATION/ADDRESS (Whichever is appropriate)	YES	NO
ITALL, You C.	BM3/USN	USS NEVERSAIL (AS 00)	X	
BLIND, Totally E.	DK2/USN	USS NEVERSAIL (AS 00)	X	
b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES HAS BEEN REDUCED TO WRITING AND IS ATTACHED.			X	
13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED; THE ACCUSED WAS PERMITTED TO EXAMINE EACH.				
DESCRIPTION OF ITEM	LOCATION OF ORIGINAL (If not attached)			
NAVPERS 1070/606 (Page 6)/IO(2) Record of Unauthorized Absence	Accused's Service Record PERSUPPDET, Newport, Rhode Island		X	
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED			X	
14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOT COMPETENT TO PARTICIPATE IN THE DEFENSE. (See R.C.M. 909, 916(b).)				X
15. THE DEFENSE DID REQUEST OBJECTIONS TO BE NOTED IN THIS REPORT (If Yes, specify in Item 21 below.)				X
16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL			X	
17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM			X	
18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED			X	
19. I AM NOT AWARE OF ANY GROUNDS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. (See R.C.M. 405(d)(1).)			X	

20. I RECOMMEND:

a. TRIAL BY ☐ SUMMARY ☐ SPECIAL ☒ GENERAL COURT-MARTIAL

b. ☐ OTHER (Specify in Item 21 below)

21. REMARKS (Include, as necessary, explanation for any delays in the investigation, and explanation for any "no" answers above.)

[EXAMPLES OF MATTERS TO BE COVERED HERE.]

1. Discussion of evidence, credibility of witnesses, and sufficiency of proof.
2. Explanation of delays in completing investigation.
3. Recommendations to dismiss, reduce, or otherwise change any specification/charge.
4. Statement of any anticipated defense and any expected difficulties in proving any specification/charge on which trial is recommended.
5. Any other recommendations.
6. Any other matters which should be known to the convening authority and subsequent reviewing authorities.

22a. TYPED NAME OF INVESTIGATING OFFICER	b. GRADE	c. ORGANIZATION
Pretrial I. Officer	LCDR JAGC/USN	Naval Justice School Newport, Rhode Island
d. SIGNATURE OF INVESTIGATING OFFICER: Pretrial I. Officer		e. DATE: 30 Aug CY

DD Form 457 Reverse, 84 AUG

Appendix II-a(2)

NOTE: After the hearing has been completed, the investigating officer should complete block 14 of DD Form 457 regarding the mental condition of the accused (*see* R.C.M. 908 and 915(k) for a discussion of mental responsibility or capacity and how to deal with this issue). It is important to note, however, that a mere assertion of insanity by accused or his counsel is not necessarily a basis for referring the accused to a psychiatric board and thereby delaying the investigation. There should exist some tangible evidence of a lack of mental responsibility or capacity. If such grounds do exist, then the matter should be referred to the convening authority. If a medical report is thereafter received on the issue, it should be attached as an exhibit to the report (DD Form 457).

Although the investigating officer is not required to rule on defense objections during the proceedings, the defense may properly request that such objections be noted in the investigative report. *See* block 15 of DD Form 457.

Next, the investigating officer completes block 16 of DD Form 457, indicating whether essential witnesses -- prosecution or defense -- will be available. Matters such as impending transfer, separation from service, death, etc. should be noted as appropriate opposite the name of the witness involved.

In block 17, the investigating officer indicates whether the charges and specifications are in proper form. If not, the investigating officer should specify any deficiencies. In addition, based on the evidence disclosed at the hearing, the investigating officer may believe that other charges should be preferred, either against the accused or against other persons.

In block 18, the investigating officer finally has an opportunity to indicate his overall assessment of the charges. If "reasonable grounds" do not exist to show that the accused committed the offense(s) alleged, the investigating officer should explain his/her conclusions.

In block 19, the investigating officer should affirm that he is not aware of any grounds which would disqualify him/her from acting as investigating officer.

Finally, in block 20, the investigating officer should indicate at what level of court-martial, if any, the case should be tried.

Block 21 is a general remarks section for explaining any "no" answers on the rest of the form. In addition, the investigating officer should account for any delays in the investigation. As a matter of routine practice, most investigating officers keep a detailed chronology of the investigation in the event that a speedy trial issue is litigated later.

Appendix II-b

DEPARTMENT OF THE NAVY
Naval Justice School
Newport, Rhode Island 02441-5030

2 Sep CY

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

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

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

1. Forwarded.

2. Recommend trial by general court-martial

//S//
CONVENING T. AUTHORITY

Appendix III

MILITARY JUSTICE STUDY GUIDE

CHAPTER XIV

REVIEW OF COURTS-MARTIAL

A. **Introduction**. This chapter describes the review of trials by summary, special, and general courts-martial. A summary of the chapter follows.

Upon completion of every trial by court-martial, a written record is prepared. This record is forwarded to the convening authority with a copy to the accused. Within certain time constraints, depending upon the type of court-martial and sentence adjudged, the accused may submit written "matters" which could affect the convening authority's decision whether to approve or disapprove the trial results. In a general court-martial or a special court-martial case involving a bad-conduct discharge, the convening authority's decision must also await the written recommendation of the staff judge advocate (SJA) or legal officer (LO). With the benefit of these inputs, the convening authority determines, within his sole discretion, whether to approve or disapprove the sentence adjudged. This determination is in the form of a written legal document called the convening authority's action.

After the convening authority has taken his action, the record of trial will be forwarded for further review. Summary courts-martial, special courts-martial not involving a bad-conduct discharge, and all other noncapital courts-martial in which appellate review has been waived will be reviewed by a judge advocate assigned, in most cases, to the staff of an officer exercising general court-martial jurisdiction. This written review will generally terminate the mandatory review process although, in certain cases, the officer exercising general court-martial jurisdiction himself will have to take final action.

General courts-martial and those special courts-martial which include a bad-conduct discharge, after initial review by the convening authority, will normally be reviewed further by the Navy-Marine Corps Court of Military Review. Under certain circumstances, the case will thereafter be considered by the Court of Military Appeals and, possibly, the United States Supreme Court.

B. **Sequence of review**

1. **Report of results of trial.** Immediately following the final adjournment of a court-martial, the trial counsel (TC) has an obligation to notify the convening authority and the accused's commanding officer of the results of trial. JAGMAN, § 0149. Additionally, if the sentence includes confinement, the notification must be in writing -- with a copy forwarded to the commanding officer or officer in charge of the brig or confinement facility concerned. *See* JAGMAN A-1-j and the end of this chapter for a recommended form.

2. **The record of a trial by court-martial**

a. When proceedings at the trial court level have been completed, a record of trial must be prepared. If the accused has been acquitted by withdrawal or dismissal of the charges prior to findings, the record of trial consists only of the original charge sheet, a copy of the convening order, and sufficient information to establish jurisdiction over the person and the offense(s) -- if not shown on the charge sheet. R.C.M. 1103(e), MCM, 1984 [hereinafter R.C.M.____]. When the trial has resulted in conviction, the contents of the record of trial are dictated by the type of court-martial and the adjudged sentence. R.C.M. 1103; JAGMAN, § 0150. (*See* Chapter X, *supra*, for the contents of a record of trial by SCM). The record of trial by an SPCM which did not adjudge a bad-conduct discharge need contain only a summarized report of the proceedings and testimony. *See* MCM, 1984, app. 13. The record of trial for all other courts-martial must be verbatim if, in the case of a general courts-martial, the sentence exceeds that which could be adjudged at a special courts-martial or if, in the case of either a general or special court-martial, the sentence includes a bad-conduct discharge. *See* MCM, 1984, app. 14. Once prepared, the record of trial will be authenticated by the signature of a person who thereby declares that the record accurately reports the proceedings. Except in unusual circumstances, this person will be the military judge or summary court-martial officer. R.C.M. 1104(a).

b. R.C.M. 1104 requires that a copy of the record of trial be served on the accused as soon as the record has been authenticated. This is to provide him with the opportunity to submit any written "matters" which may reasonably tend to affect the convening authority's decision whether or not to approve the trial results. R.C.M. 1105. The content of such "matters" is not subject to the Military Rules of Evidence and could include:

(1) Allegations of error affecting the legality of the findings of sentence;

(2) matters in mitigation which were not available for consideration at the trial; and

(3) clemency recommendations. The defense may ask any person for such a recommendation (including the members, military judge, or trial counsel).

c. Except in a summary court-martial case, submission of matters by the accused in accordance with R.C.M. 1105 shall be made within 10 days after the accused has been served with an authenticated record of trial and, if applicable, the service on the accused of the recommendation of the SJA or LO under R.C.M. 1106. In a summary court-martial case, such submission shall be made within 7 days after the sentence is announced.

-- If the accused shows that additional time is required to submit such matters, the convening authority may, for good cause shown, extend the applicable period stated above for not more than an additional 20 days.

d. In addition to the input from the accused, the convening authority must receive a written recommendation from his SJA or LO before taking action on a general court-martial or a special court-martial case involving a bad-conduct discharge. R.C.M. 1106. Legal officer means a commissioned officer of the Navy, Marine Corps, or Coast Guard designated to perform legal duties for a command. Article 1(12), UCMJ; 10 U.S.C. § 801(12). Care must be taken, however, to ensure that this SJA or LO is not disqualified from submitting this recommendation. Disqualification will result when the SJA or LO acted as a member, military judge, trial counsel, assistant trial counsel, or, more commonly, the investigating officer in the same case. If the SJA or LO is disqualified or if the convening authority, in his discretion, would prefer an SJA recommendation rather than one from his staff LO, the convening authority may request that another SJA be designated to prepare the recommendation.

The purpose of the recommendation is simply to assist the convening authority in deciding what action to take on the case. The recommendation is intended to be a concise written communication summarizing:

(1) The findings and sentence adjudged;

(2) the accused's service record, including length and character of service, awards and decorations, and any records of NJP and previous convictions;

(3) the nature of pretrial restraint, if any;

(4) obligations imposed upon the convening authority because of a pretrial agreement; and

(5) a specific recommendation as to the action to be taken by the convening authority on the sentence.

Identifying legal error is not one of the required goals of this recommendation. The only time when possible legal error must be discussed is in response to an allegation of legal error by the accused under paragraph 2 above, and then, only if the recommendation is prepared by an SJA. The response may consist of a statement of agreement or disagreement and need not be accompanied by a written analysis or rationale. None of the above comments, however, should be interpreted so as to prohibit the SJA or LO from including any additional matters deemed appropriate under the circumstances.

To assist the SJA or LO in preparing the recommendation, JAGMAN A-1-k provides a sample form. A sample LO/SJA recommendation appears at the end of this chapter.

In cases of acquittal of all charges and specifications and cases where the proceedings were terminated prior to findings with no further action contemplated, the SJA or LO recommendation is not required. R.C.M. 1106(a).

e. Before forwarding the record of trial and recommendation to the convening authority for action under R.C.M. 1107, the SJA or LO shall cause a copy of the recommendation to be served on counsel for the accused. Such counsel shall have 10 days to submit written comments on the recommendation, pursuant to R.C.M. 1106(f), for consideration by the convening authority.

3. **Responsibility for convening authority's action**. The first official action to be taken with respect to the results of a trial is the convening authority's action (CA's action). All materials submitted by the accused, SJA/LO, and defense counsel are preparatory to this official review.

Article 60, UCMJ, and JAGMAN, § 0151a, place the responsibility for this initial review and action on the convening authority. This is true even when the accused is no longer assigned to the convening authority's command. Although responsibility for a CA's action is nondelegable, R.C.M. 1107 and JAGMAN, § 0151b, acknowledge the fact that circumstances may exist making it impracticable for the convening authority to act. Situations of impracticability would arise, for example, when the command has been decommissioned or inactivated before the convening authority could act; when the command has been alerted for immediate overseas movement; when the convening authority is disqualified because he has other than an official interest in the case; or because a member of the court-martial which tried

being given an opportunity to show, by his good conduct during the probationary period, that he is entitled to have the suspended portion of his sentence remitted. In this context:

-- **Suspend** means to withhold conditionally the execution.

-- **Remit** means to cancel the unexecuted sentence.

(b) Convening authorities and officers exercising general court-martial jurisdiction are encouraged to suspend all or any part of a sentence when such action would promote discipline and when the accused's prospects for rehabilitation would more likely be enhanced by probation than by the execution of all or any part of the sentence adjudged. JAGMAN, § 0151.

(2) **Automatic reduction to paygrade E-1**. In accordance with the power granted in Art. 58(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Art. 58(a), UCMJ, shall be effected in the Navy and Marine Corps in accordance with JAGMAN, § 0152. Under the provisions of JAGMAN, § 0152, a court-martial sentence of an enlisted member in a paygrade above E-1, as approved by the convening authority, that includes a punitive discharge, whether or not suspended, or confinement in excess of 90 days (if the sentence is stated in days) or 3 months (if stated in other than days), automatically reduces the member to the paygrade E-1 as of the date the sentence is approved. As a matter within his sole discretion, the convening authority may retain the accused in the paygrade held at the time of sentence or at an intermediate paygrade and suspend the automatic reduction to paygrade E-1 which would otherwise be in effect. Additionally, the convening authority may direct that the accused serve in paygrade E-1 while in confinement, but be returned to the paygrade held at the time of sentence or an intermediate paygrade upon release from confinement. Failure of the convening authority to address automatic reduction will result in the automatic reduction to paygrade E-1 on the date of the CA's action. The convening authority may, in a pretrial agreement, agree to suspend or disapprove automatic reduction to paygrade E-1.

(3) **Requirements for a valid suspension of a sentence**

(a) The conditions of the suspension must be in writing and served on the accused in accordance with R.C.M. 1108. Unless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the UCMJ.

Appendix 16, MCM, 1984, contains sample forms of actions for summary, special, and general courts-martial. One or more of these forms is appropriate to implement the decisions of the convening authority in virtually every case. Deviation from the forms is risky and usually leads to trouble unless the draftsman is experienced. If there is any question as to the form of action necessary to effectuate the convening authority's decisions, assistance should be obtained from the nearest law center.

After taking his action, the convening authority will publish the results of trial and the CA's action in a legal document called a promulgating order.

Specific guidance concerning the responsibilities of the convening authority in reviewing records of trial, drafting CA's actions in particular classes of cases, and publishing the results in the promulgating order is provided later in this chapter.

5. **Subsequent review**

a. **Mandatory review**

The CA's action for every trial by court-martial is reviewed by higher authority. Certain reviews are mandatory; once these mandatory reviews are completed, the case is "final." Other reviews are discretionary (for example, the accused and his counsel must decide whether to petition the Court of Military Appeals for review of the case, whether to petition for review by the Judge Advocate General, or whether to petition for a new trial).

The terms "mandatory" and "discretionary review" imply opposite concepts: in the former case, the review will happen regardless of the accused's wishes; in the latter case, further review will happen only if the accused or some other person takes some positive action. The mutually exclusive nature of these two concepts has been diluted somewhat by the Military Justice Act of 1983. By adding the concepts of waiver and withdrawal, the Act gives an accused the option, except in a case involving the death penalty, to avoid what was formerly mandatory appellate review in all general courts-martial and special courts-martial involving a bad-conduct discharge.

R.C.M. 1110 governs waiver and withdrawal: "After any general court-martial, except one in which the approved sentence includes death, and after any special court-martial in which the approved sentence includes a bad-conduct discharge the accused may waive or withdraw appellate review." According to the Rule, the waiver or withdrawal must be a written document establishing that the accused and defense counsel have discussed the accused's right to appellate review; that they have discussed the effect that waiver or withdrawal will have on that

review; that the accused understands these matters; and that the waiver or withdrawal is submitted voluntarily. An accused must file a waiver within 10 days after being served a copy of the CA's action unless an extension is granted. A withdrawal may be submitted any time before appellate review is completed. In either case, however, once appellate review is waived or withdrawn, it is irrevocable and the case will thereafter be reviewed locally in the same manner as a summary court-martial or a special court-martial not involving a bad-conduct discharge.

b. **Summary courts-martial, special courts-martial not involving a bad-conduct discharge, and all other noncapital courts-martial where appellate review has been waived**

(1) Article 64, UCMJ, and R.C.M. 1112 require that all summary courts-martial, non-BCD special courts-martial, and all other noncapital courts-martial where appellate review has been waived or withdrawn by the accused be reviewed by a judge advocate who has not been disqualified by acting in the same case as an accuser, investigating officer, member of the court-martial, military judge, or counsel, or has otherwise acted on behalf of the prosecution or defense. JAGMAN, § 0153a(1), further requires this officer to be the SJA of an officer who exercises general court-martial jurisdiction and who, at the time of trial, could have exercised such jurisdiction over the accused. For Navy commands, this would be the SJA of the area coordinator (or the area coordinator's qualified designee) unless otherwise directed by an officer exercising general court-martial jurisdiction superior in the convening authority's chain of command. For Marine Corps commands, this would be the SJA of the officer exercising general court-martial jurisdiction next in the chain of command. In all cases, the action of the convening authority will identify the officer to whom the record is forwarded by stating his official title. R.C.M. 1112 states, however, that no review under this section is required if the accused has not been found guilty of an offense or if the convening authority disapproved all findings of guilty.

(2) The judge advocate's review is a written document containing the following:

(a) A conclusion as to whether the court-martial had jurisdiction over the accused and over each offense for which there is a finding of guilty which has not been disapproved by the convening authority;

(b) a conclusion as to whether each specification, for which there is a finding of guilty which has not been disapproved by the convening authority, stated an offense;

(c) a conclusion as to whether the sentence was legal;

(d) a response to each allegation of error made in writing by the accused; and

(e) in cases requiring action by the officer exercising general court-martial jurisdiction, as noted below, a recommendation as to appropriate action and an opinion as to whether corrective action is required as a matter of law.

(3) After the judge advocate has completed his review, most cases will have reached the end of mandatory review and will be considered final within the meaning of Article 76, UCMJ. If this is the case, the judge advocate review will be attached to the original record of trial and a copy forwarded to the accused. The review is not final, however, and a further step is required in the following two situations:

(a) The judge advocate recommends corrective action; or

(b) the sentence as approved by the convening authority includes a dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.

The existence of either of these two situations will require the SJA to forward the record of trial to the officer exercising general court-martial jurisdiction.

With the SJA's review in hand, the officer exercising general court-martial jurisdiction will take action on the record of trial in a document similar to CA's action. He will promulgate it in a similar fashion as well. He may disapprove or approve the findings or sentence in whole or in part; remit, commute, or suspend the sentence in whole or in part; order a rehearing on the findings or sentence or both; or dismiss the charges.

If, in his review, the judge advocate stated that corrective action was required as a matter of law, and the officer exercising general court-martial jurisdiction (OEGCMJ) did not take action that was at least as favorable to the accused as that recommended by the judge advocate, the record of trial must be sent to the Judge Advocate General of the Navy (JAG) for resolution. In all other cases, however, the review is now final within the meaning of Article 76, UCMJ.

c. Special courts-martial involving a bad-conduct discharge

(1) Assuming that appellate review has not been waived or withdrawn by the accused, a special court-martial involving a bad-conduct discharge, whether or not suspended, will be sent directly to the Office of the Judge Advocate

General of the Navy. R.C.M. 1111. After detailing appellate defense and government counsel, the case will then be forwarded to the Navy-Marine Corps Court of Military Review (NMCMR). R.C.M. 1201, 1202. NMCMR has review authority similar to that of the convening authority, except that it may not suspend any part of the sentence. It is also limited to reviewing only those findings and sentence which have been approved by the convening authority. In other words, it may not increase the sentence approved by the convening authority, nor may it approve findings of guilty already disapproved by the convening authority. In considering the record of trial, NMCMR may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact -- giving due weight, of course, to the fact that the trial court saw and heard the witnesses. Finally, NMCMR may affirm only those findings of guilty and the sentence which it finds correct in law and fact, and which NMCMR concludes should be approved on the basis of the entire record. A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused. Article 59, UCMJ.

(2) After review by NMCMR, the case will go to the Court of Military Appeals (C.M.A.) for review in the following two instances:

(a) If certified to the C.M.A. by JAG; and

(b) if the C.M.A. grants the accused's petition for review. R.C.M. 1204.

In any case reviewed by it, the C.M.A. may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by NMCMR.

(3) Finally, review by the United States Supreme Court is possible under 28 U.S.C. § 1259 and Article 67(h), UCMJ.

d. **General court-martial**

All general court-martial cases in which the sentence, as approved, includes dismissal, punitive discharge, or confinement of at least one year will be reviewed in precisely the same way as a special court-martial involving a bad-conduct discharge. *See* paragraph c, above. Cases involving death are reviewed in a similar fashion, except that review by C.M.A. is mandatory. Other general court-martial cases -- those not involving death, dismissal, punitive discharge, or confinement of one year or more where appellate review has not been waived or withdrawn -- are reviewed in the Office of the Judge Advocate General under Article 69(a), UCMJ, and R.C.M. 1201(b). The JAG may modify or set aside the findings or sentence -- or both -- if he finds any part of the findings or sentence to be

unsupportable in law or if reassessment of the sentence is appropriate. As an alternative measure, the JAG may forward the case for review to NMCMR. In this latter case, however, no further review by C.M.A. is possible unless the JAG so directs.

e. Review in the Office of the Judge Advocate General

Article 69(b), UCMJ, provides that certain cases may be reviewed in the Office of the Judge Advocate General and that the findings or sentence -- or both -- may be vacated or modified by the JAG on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction, or error prejudicial to the substantial rights of the accused. Review under this article may only be granted in a case which has been "finally" reviewed but has not been reviewed by NMCMR. Even then, such review by the JAG is not automatic. The accused must petition JAG to review the case and JAG may or may not agree to review it. If the case is reviewed, the JAG may or may not grant relief.

f. New trial

(1) Article 73, UCMJ, provides that, under certain limited conditions, an accused can petition the JAG to have his case tried again even after his conviction has become final by completion of appellate review. The trial authorized by article 73 is not a rehearing such as is ordered where prejudicial error has occurred. It is not another trial such as that ordered to cure jurisdictional defects. It is a trial de novo -- a brand new trial -- as if the accused had never been tried at all.

(2) There are only two grounds for petition:

(a) Newly discovered evidence; and

(b) fraud on the court.

(3) Sufficient grounds will be found to exist only if it is established that an injustice has resulted from the findings or sentence and that a new trial would probably produce a substantially more favorable result. R.C.M. 1210.

C. Issues and options for the reviewing authority

The reviewing authority has many options available to him when he takes his action on review. As an example, the convening authority may approve, substantially reduce, or <u>outright</u> disapprove the sentence of a court-martial as a matter of command prerogative. Though no action on findings of guilty is required, the

convening authority may, as a matter within his discretion, disapprove such findings or approve a lesser included offense. These actions may be taken for many reasons (including considerations of command morale, clemency for the accused, or error in the record of trial). As far as error is concerned, it must be remembered that the convening authority is not required to search for legal error or factual sufficiency. He may, on the other hand, determine that time and money may be saved by correcting error at his level of review rather than waiting for some other authority to return the record.

What follows is a discussion of the various issues and options which face the reviewing authority when he takes his action on review. The primary emphasis will be upon the action of the convening authority.

1. **Findings**

a. **Generally**. It merits repeating that the convening authority is not required to take action with respect to findings of guilty. On the other hand, issues of legal error or factual sufficiency may have to be considered by subsequent reviewing authorities. For example, the Court of Military Review may affirm only such findings of guilty as it finds correct in law and fact and determines, on the basis of the entire record, warrant approval. R.C.M. 1203. Occasionally, the court may discover error and order corrective action or dismissal of the charges. In order to avoid this from happening after a lengthy passage of time, a convening authority may choose, in his discretion, to review the findings with the intention of correcting discovered errors at an early stage. R.C.M. 1107.

This section discusses some of the issues which are considered when reviewing findings of guilty.

b. **Reviewing findings of guilty**

(1) In acting upon findings of guilty, a convening/reviewing authority would consider a number of issues:

(a) Did the court have jurisdiction in all respects?

(b) Did the accused have:

-1- Mental responsibility (i.e., was sane at the time of the offense); and

-2- mental capacity (i.e., was sane at the time of trial)?

-3- **Note**: If the issue of insanity is not raised at the trial, the presumption of sanity satisfies both questions.

(c) Did the specifications of which the accused has been found guilty state offenses under the UCMJ?

(d) Is there competent evidence of record which is factually sufficient to support each element of the offense(s) of which the accused has been found guilty? In this regard, it should be noted that the convening authority has the same power to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact as the court. If the evidence is not sufficient to support a finding of guilty to a charged offense, but is sufficient to support a finding of guilty to a lesser included offense (LIO), the convening authority may approve a finding of the LIO.

(e) Are there any errors which materially prejudice the substantial rights of the accused as to offenses of which the accused was convicted?

(2) **Note**: The record of trial is reviewed for error in the order given above because, if found, an error may in turn preclude the necessity of further review. For example, if the evidence shows the accused lacked mental responsibility, it would be a futile effort to search the record for sufficient competent evidence to establish each element of the offense.

2. **Sentence**

a. **Generally**. As long as the sentence is within the jurisdiction of the court-martial and does not exceed the maximum limitations prescribed for each offense in Part IV (Punitive Articles), MCM, 1984, it is a legal sentence and may be approved by the convening authority. Considerable discretion is given to the convening authority in acting on the sentence. R.C.M. 1107 states that "[t]he convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused." It also states, however, that he "may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased." These issues are discussed below.

b. **Determining the appropriateness of the sentence**. In determining what sentence should be approved or disapproved, the convening authority should consider all relevant factors including the possibility of

rehabilitation, the deterrent effect of the sentence, matters relating to clemency, and requirements of a pretrial agreement. He may also, when certain findings of guilty have been disapproved, reassess the sentence to determine its appropriateness for the remaining offenses. In his reassessment, he may determine that all -- or any part -- of the sentence should be approved.

c. Reducing and changing the nature of the sentence

(1) **Mitigation**. When a sentence is reduced in quantity (e.g., 4 months' confinement to 2 months' confinement) or reduced in quality (e.g., 30 days' confinement to 30 days' restriction), the sentence is said to have been mitigated.

(2) **Commutation**. When a sentence is changed to a punishment of a different nature (e.g., bad-conduct discharge to confinement), the sentence is said to have been commuted.

(3) **General rules**. In taking action on the sentence, the convening authority must observe certain rules.

(a) When mitigating forfeitures, the duration and amounts of forfeiture may be changed as long as the total amount forfeited is not increased and neither the amount nor duration of the forfeitures exceeds the jurisdiction of the court-martial.

(b) When mitigating confinement on bread and water or diminished rations, confinement, or hard labor without confinement, the convening authority should use the equivalencies at R.C.M 1003(b)(6), (7), and (9) as appropriate. For example, confinement on bread and water may be changed to confinement at the rate of 1 day of confinement on bread and water's equaling 2 days of confinement.

(c) The sentence may not be increased in severity or duration.

(d) No part of the sentence may be changed to a punishment of a more severe type.

(e) The sentence as approved must be one which the court-martial could have adjudged.

(4) **Application**

(a) A punitive discharge cannot be commuted to an administrative discharge, as the latter could not have been adjudged by the court-martial.

(b) **Example**: A special court-martial adjudges a bad-conduct discharge, confinement for 6 months, forfeiture of $68/month for 6 months. The convening authority commutes the bad-conduct discharge to confinement for 5 months and forfeitures of $68/month for 5 months; then he approves confinement for 11 months and forfeiture of $68/month for 11 months. Result: convening authority's action is illegal; the approved confinement and forfeiture for 11 months is beyond the jurisdiction of SPCM. *United States v. Hodges*, 22 M.J. 260 (C.M.A. 1986).

(c) Confinement and forfeitures for 1 year cannot be commuted to a bad-conduct discharge, even with accused's consent. A bad-conduct discharge is a more severe punishment and can only be approved when included in the sentence of the court-martial.

(d) A bad-conduct discharge can be commuted to confinement and forfeitures for 6 months. The latter is a less severe penalty. Confinement begins to run on the date the original sentence was imposed by the court-martial, rather than the date of the commutation.

(e) An unsuspended reduction in rate can be commuted to a suspended reduction and an unsuspended forfeiture of pay.

(f) It is often difficult to compare two authorized punishments of different types and decide which is less severe. For example, is the loss of 500 lineal numbers more or less severe than forfeiture of $25 per month for 12 months? The C.M.A. has opted for ". . . affirmance of [the CA's] judgment on appeal, unless it can be said that, as a matter of law, he has increased the severity of the sentence."

d. **Suspending the sentence**

(1) **When used**

(a) R.C.M. 1108 states: "Suspension of a sentence grants the accused a probationary period during which the suspended part of an approved sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence shall be remitted." Simply stated, the accused is

being given an opportunity to show, by his good conduct during the probationary period, that he is entitled to have the suspended portion of his sentence remitted. In this context:

-- **Suspend** means to withhold conditionally the execution.

-- **Remit** means to cancel the unexecuted sentence.

(b) Convening authorities and officers exercising general court-martial jurisdiction are encouraged to suspend all or any part of a sentence when such action would promote discipline and when the accused's prospects for rehabilitation would more likely be enhanced by probation than by the execution of all or any part of the sentence adjudged. JAGMAN, § 0151.

(2) **Automatic reduction to paygrade E-1**. In accordance with the power granted in Art. 58(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Art. 58(a), UCMJ, shall be effected in the Navy and Marine Corps in accordance with JAGMAN, § 0152. Under the provisions of JAGMAN, § 0152, a court-martial sentence of an enlisted member in a paygrade above E-1, as approved by the convening authority, that includes a punitive discharge, whether or not suspended, or confinement in excess of 90 days (if the sentence is stated in days) or 3 months (if stated in other than days), automatically reduces the member to the paygrade E-1 as of the date the sentence is approved. As a matter within his sole discretion, the convening authority may retain the accused in the paygrade held at the time of sentence or at an intermediate paygrade and suspend the automatic reduction to paygrade E-1 which would otherwise be in effect. Additionally, the convening authority may direct that the accused serve in paygrade E-1 while in confinement, but be returned to the paygrade held at the time of sentence or an intermediate paygrade upon release from confinement. Failure of the convening authority to address automatic reduction will result in the automatic reduction to paygrade E-1 on the date of the CA's action. The convening authority may, in a pretrial agreement, agree to suspend or disapprove automatic reduction to paygrade E-1.

(3) **Requirements for a valid suspension of a sentence**

(a) The conditions of the suspension must be in writing and served on the accused in accordance with R.C.M. 1108. Unless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the UCMJ.

(b) The suspension period must be for a definite period of time which is not unreasonably long. This period shall be stated in the CA action.

(c) A provision must be made for it to be remitted at the end of the suspension period, without further action. This provision shall be included in the CA's action.

(d) A provision must be made for permitting it to be vacated prior to the end of the suspension period. This provision shall be included in the CA action.

Note: Vacating means to do away with the suspension. *See* **Proceedings to vacate suspension**, section d(5), *infra*.

(4) **Who has the power to suspend?** The convening authority, after approving the sentence, has the power to suspend any sentence except the death penalty. The military judge or members of a court-martial may recommend suspension of part or all of the sentence, but these recommendations are not binding on the convening authority or other higher authorities. The following additional authorities may suspend:

(a) The officer exercising general court-martial jurisdiction who takes action under R.C.M. 1112 (*see* **Subsequent review**, section B.5, *supra*);

(b) for unexecuted portions of the sentence, the Secretary of the Navy, the Assistant Secretaries of the Navy, the Judge Advocate General, and all officers exercising general court-martial jurisdiction over the command to which the accused is attached (Art. 74(a), UCMJ; JAGMAN, § 0158); and

(c) in the case of a summary court-martial or a special court-martial not involving a bad-conduct discharge, the commander of the accused who has immediate authority to convene a court of the kind that adjudged the sentence. As in subparagraph (b) above, this power only extends to unexecuted portions of the sentence. JAGMAN, § 0158.

(5) **Proceedings to vacate suspension**

(a) **General requirements**. An act of misconduct, to serve as the basis for vacation of the suspension of a sentence, must occur within the period of suspension. The order vacating the suspension must be issued prior to the expiration of the period of suspension. The running of the period of suspension is interrupted by the unauthorized absence of the probationer or by commencement of proceedings to vacate the suspension. R.C.M. 1109 indicates that vacation of a

suspended sentence may be based on a violation of the UCMJ (although it is unclear as to whether such misconduct must also be service connected). Furthermore, when all or part of the sentence has been suspended as a result of a pretrial agreement, case law indicates that the suspension may be vacated for violation of any of the lawful requirements of the probation -- including the duty to obey the local civilian law (as well as military law), to refrain from associating with known drug users/dealers, and to consent to searches of his person, quarters, and vehicle at any time.

(b) **Hearing requirements**. Procedural rules for hearing requirements depend on the type of suspended sentence being vacated.

-1- **Sentence of any GCM or an SPCM including approved BCD**. If the suspended sentence was adjudged by any GCM, or by an SPCM which included an approved BCD, the following rules apply. After giving notice to the accused in accordance with R.C.M. 1109(d), the officer having SPCM jurisdiction over the probationer holds a hearing to inquire into the alleged violation of probation. The procedure for the hearing is similar to that prescribed for a formal pretrial investigation (Art. 32, UCMJ), and the accused has the right to detailed and/or civilian counsel at the hearing. The record of the hearing and the recommendations of the SPCM authority are forwarded to the officer exercising GCM jurisdiction who may vacate the suspension. Art. 72, UCMJ; R.C.M. 1109.

-2- **Sentence of SPCM not including BCD or sentence of SCM**. If the suspended sentence was adjudged by an SPCM and does not include a BCD, or if the sentence was adjudged by an SCM, the following rules apply. The officer having SPCM jurisdiction over the probationer holds a hearing to inquire into the alleged violation of probation. The procedure for the hearing is similar to that prescribed for a formal pretrial investigation. The probationer must be accorded the same right to counsel at the hearing that he was entitled to at the court-martial which imposed the sentence, except there is no right to request individual military counsel. Such counsel need not be the same counsel who originally represented the probationer. If the officer having SPCM jurisdiction over the probationer decides to vacate all or a portion of the suspended sentence, he must record the evidence upon which he relied and the reasons for vacating the suspension in his action. Art. 72, UCMJ; R.C.M. 1109.

-3- **Who must hold the hearing**? When the accused is entitled to a formal hearing [see -1- and -2- above], R.C.M. 1109 clearly indicates that the officer exercising special court-martial jurisdiction over the accused must personally conduct the hearing. He may not appoint another officer to hold the hearing for him.

-4- The officer who actually vacates the suspension must execute a written statement of the evidence he is relying on and his reasons for vacating the suspension.

-5- If, based on an act of misconduct in violation of the terms of suspension, the accused is confined prior to the actual vacation of the suspended sentence, a preliminary hearing must be held before a neutral and detached officer to determine whether there is probable cause to believe the accused has violated the terms of his suspension. R.C.M. 1109. JAGMAN, § 0160, indicates that this officer should be one who is appointed to review pretrial confinement under R.C.M. 305.

3. **Post-trial restraint pending completion of appellate review**

a. **Status of the accused**. The accused's immediate commander must initially determine whether the accused will be placed in post-trial restraint pending review of the case. Specifically, he must decide whether he will confine, restrict, place in arrest, or set free the accused pending appellate review. This decision is necessary because an accused, who has been sentenced to confinement by court-martial, for example, is not automatically confined as a result of the sentence announcement. Even though the sentence of confinement runs from the date it is adjudged by the court, the sentence will not be executed until the convening authority takes his action. Thus, an accused cannot be confined on the basis of his court-martial sentence alone. An order from the commanding officer is required. As a post-trial confinee, he is referred to as an adjudged prisoner. Later, when his sentence is executed, his status will change to that of a sentenced prisoner. R.C.M. 1101.

b. **Criteria**. Since the sentence of confinement runs from the date adjudged, whether or not the accused is confined, a commanding officer will usually take prompt action with respect to restraint. R.C.M. 1101(b) indicates that post-trial confinement is authorized when the sentence includes confinement or death. The commanding officer may delegate the authority under this rule to the trial counsel.

c. **The nature of post-trial restraint**. The *Navy Corrections Manual* (SECNAVINST 1640.9 series) has been amended to eliminate the distinction between post-conviction prisoners whose sentences have not been ordered executed (adjudged prisoners) and those whose sentences to confinement have been ordered executed (sentenced prisoners). The result of these amendments is that, under the provisions of Article 404.30D of the *Navy Corrections Manual*, personnel sentenced to confinement by court-martial may be assigned to work (i.e., to perform hard labor) and to participate in other aspects of the corrections program on an unrestricted basis.

4. Deferment of the confinement portion of the sentence

a. **Definition.** As indicated in the previous section, the confinement portion of a sentence runs from the date the sentence is adjudged. Art. 57(b), UCMJ. Deferment of a sentence to confinement is a postponement of the running and service of the confinement portion of the sentence. It is not a form of clemency. R.C.M. 1101(c).

b. **Who may defer?** Only the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial authority over the command to which the accused is attached can defer the sentence. R.C.M. 1001(c).

c. **When deferment may be ordered.** Deferment may be considered only upon written application of the accused. If the accused has requested deferment, it may be granted anytime after the adjournment of the court-martial, as long as the sentence has not been executed. R.C.M. 1101(c).

d. **Action on the deferment request.** The decision to defer is a matter of command discretion. As stated in R.C.M. 1101(c)(3), "the accused shall have the burden to show that the interests of the accused and the community in release outweigh the community's interest in confinement." Some of the factors the convening authority may consider include:

(1) The probability of the accused's flight to avoid service of the sentence;

(2) the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice;

(3) the nature of the offenses (including the effect on the victim) of which the accused was convicted;

(4) the sentence adjudged;

(5) the effect of deferment on good order and discipline in the command; and

(6) the accused's character, mental condition, family situation, and service record.

Although the decision to grant or deny the deferment request falls within the convening authority's sole discretion, that decision can be tested on review for abuse of discretion. In a Court of Military Appeals case, the court held that the

CA abused his discretion by denying deferment where the accused (an Air Force captain who was a physician) showed that he had no prior record, that his conviction was not based on any act of violence, that he had made no previous attempt to flee, that he had custody of a minor child, and that he had substantial personal property in the area.

e. **Imposition of restraint during deferment**. No restrictions on the accused's liberty may be ordered as a substitute for the confinement deferred. An accused may, however, be restrained for an independent reason (e.g., pretrial restraint resulting from a different set of facts). R.C.M. 1101(c)(5).

f. **Termination of deferment**. Deferment is terminated when:

(1) The CA takes action, unless the CA specifies in the action that service of the confinement after the action is deferred (in this case, deferment terminates when the conviction is final);

(2) the sentence to confinement is suspended;

(3) the deferment expires by its own terms; or

(4) the deferment is rescinded by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial authority over the accused's command. R.C.M. 1101(c)(7). Deferment may be rescinded when additional information comes to the authority's attention which, in his discretion, presents grounds for denial of deferment under paragraph 4, above. The accused must be given notice of the intended rescission and of his right to submit written matters. He may, however, be required to serve the sentence to confinement pending this action. R.C.M. 1107(c)(7).

g. **Procedure**. Applications must be in writing and may be made by the accused at any time after adjournment of the court. The granting or denying of the application is likewise in writing. If the deferment request is used to effectuate the intent of a pretrial agreement term suspending all confinement, it may be submitted, along with the pretrial agreement by the defense counsel, and the convening authority may sign both documents at once -- well before trial.

h. **Record of proceedings**. Any document relating to deferment or rescission of deferment must be made a part of the record of trial. The dates of any periods of deferment and the date of any rescission are stated in the convening authority or supplementary actions.

5. **Execution of the sentence.** An order executing the sentence directs that the sentence be carried out. In the case of confinement, it directs that it be served; in the case of a punitive discharge, that it be delivered. The decision as to execution of the sentence is closely related to other post-trial decisions involving suspension, deferment of confinement, and imposition of post-trial restraint.

a. **Execution authorities**

(1) No sentence may be executed by the convening authority unless and until it is approved by him. R.C.M. 1113(a). Once approved, every part of the sentence, except for a punitive discharge, dismissal, or death, may be executed by the convening authority in his initial action. R.C.M. 1113(b). Of course, a suspended sentence is approved, but not executed.

(2) A punitive discharge may only be executed by:

(a) The officer exercising general court-martial jurisdiction who reviews a case when appellate review has been waived under R.C.M. 1112(f); or

(b) the officer then exercising general court-martial jurisdiction over the accused after appellate review is final under R.C.M. 1209. If more than 6 months has passed since the approval of the sentence by the convening authority, the officer exercising general court-martial jurisdiction over the accused shall consider the advice of that officer's SJA as to whether retention of the accused would be in the best interest of the service. The advice shall include:

-1- The findings and sentence as finally approved;

-2- an indication as to whether the servicemember has been on active duty since the trial and, if so, the nature of that duty; and

-3- a recommendation whether the discharge should be executed. R.C.M. 1113(c)(1).

(3) Dismissal may be ordered executed only by the Secretary of the Navy or by such Under Secretary or Assistant Secretary as the Secretary may designate. R.C.M. 1113(c)(2).

(4) Death may be ordered executed only by the President. R.C M. 1113(c)(3).

(5) Though a punitive discharge may have been ordered executed, it shall not in fact be executed until all provisions of SECNAVINST 5815.3 series, concerning Naval Clemency and Parole Board action, have been complied with. JAGMAN, § 0157.

b. **Appellate leave.** Under the provisions of Art. 76(a), UCMJ, the Secretary of the Navy may prescribe regulations which require that an accused take leave pending completion of the appellate review process if the sentence, as approved by the convening authority, includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct discharge. The secretarial regulations concerning appellate leave are contained in Article 3420280 of the MILPERSMAN for Navy personnel and paragraph 3025 of MCO P1050.3G, *Regulations for Leave, Liberty and Administrative Absence*, for Marine Corps personnel. Stated very simply, procedures applicable to Navy and Marine Corps personnel have been revised to provide authority to place a member on mandatory appellate leave.

c. **Automatic reduction to paygrade E-1.** In accordance with the power granted in Art. 58(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Art. 58(a), UCMJ, shall be effected in the Navy and Marine Corps in accordance with JAGMAN, § 0152d. Under the provisions of JAGMAN, § 0152d, a court-martial sentence of an enlisted member in a paygrade above E-1, as approved by the convening authority, that includes a punitive discharge or confinement in excess of 90 days (if the sentence is stated in days) or 3 months (if stated in other than days), automatically reduces the member to the paygrade E-1 as of the date the sentence is approved. As a matter within his sole discretion, the convening authority may retain the accused in the paygrade held at the time of sentence or at an intermediate paygrade and suspend the automatic reduction to paygrade E-1 which would otherwise be in effect. Additionally, the convening authority may direct that the accused serve in paygrade E-1 while in confinement, but be returned to the paygrade held at the time of sentence or an intermediate paygrade upon release from confinement. Failure of the convening authority to address automatic reduction will result in the automatic reduction to paygrade E-1 on the date of the CA's action.

d. **Execution of confinement**

(1) The convening authority designates the place of confinement in his CA's action. R.C.M. 1113.

(2) Though confinement begins to run from the date the sentence is adjudged by the court-martial, the following periods are excluded in computing the service of the term of confinement:

(a) Periods in which the confinement is suspended or deferred;

(b) periods during which the accused is in custody of civilian authorities under Art. 14, UCMJ, if the accused was convicted in the civilian court;

(c) periods of unauthorized absence, escape, or release through fraudulent misrepresentation;

(d) periods of absence under parole which is later revoked or a period of erroneous release from confinement through a writ of habeas corpus which is later reversed; and

(e) periods in which another sentence of confinement by court-martial is being served. This happens when a later court-martial adjudges confinement. The later sentence of confinement interrupts the running of the earlier sentence. (Only restraint-type punishments interrupt an earlier sentence.) Once the later sentence is served, the remaining portion of the earlier sentence begins again. R.C.M. 1113.

6. **Speedy review**

a. The accused has a right to have his case reviewed promptly and without unnecessary delay. The Court of Military Appeals has expressed great interest in protecting this right. As formerly applied, a presumption of prejudice to the accused arose whenever he was in 90 days of continuous confinement without the OEGCMJ taking action. The presumption placed a heavy burden on the government to show due diligence and, in the absence of such a showing, the charges were dismissed. *Dunlap v. Convening Authority*, 23 C.M.A. 135, 48 C.M.R. 751 (1974). Later, in *United States v. Banks*, 7 M.J. 92 (C.M.A. 1979), the court softened its stance, rejecting the rule of presumed prejudice in post-trial confinement cases. For cases after 18 June 1979, the court has required a showing of specific prejudice to the accused, a rule which now applies regardless of his post-trial confinement status. In the absence of any articulated prejudice to the accused caused by delay, no corrective action will be required.

b. The C.M.A. appears to be aware, however, of the need to be vigilant in finding prejudice whenever lengthy post-trial delay in review occurs. Consider, for example, the case of *United States v. Clevidence*, 14 M.J. 17 (C.M.A.

1982). In this case, the accused was sentenced to a bad-conduct discharge, confinement at hard labor, and forfeitures for 3 months for two specifications of failing to go to his appointed place of duty, one specification of disrespect, and four specifications of failure to obey lawful orders. The accused spent 77 days in post-trial confinement and thereafter was given appellate leave. The record of trial was not authenticated by the military judge, however, until 200 days after the sentence had been adjudged. Moreover, the supervisory authority's action was not accomplished for an additional 113 days. In reversing the accused's conviction, the C.M.A. held that:

> [w]e are reluctant to dismiss charges because of errors on the Government's part and we would especially hesitate to do so if the case involved more serious offenses. However, it seems clear that unless we register our emphatic disapproval of such "inordinate and unexplained" delay in a case like this, we would be faced in the near future with a situation that would induce a return to the draconian rule of *Dunlap*.
>
> Since it appears that under the circumstances of this case, the delay in post-trial review was prejudicial to Clevidence and since we are sure that, in the exercise of our supervisory authority over military justice, we must halt the erosion in prompt post-trial review of courts-martial, we reverse the decision, . . ., set aside the findings and sentence, and dismiss the charges against appellant.

In *United States v. Gentry*, 14 M.J. 209 (C.M.A. 1982), the court set aside findings of guilty and dismissed two charges involving the use of marijuana by a lieutenant junior grade when the convening authority did not take his post-trial action in the case until 490 days after sentence was announced. The court noted:

> That no reason appears in the record -- nor is any alleged -- explaining the inordinate delay in the post-trial processing of this routine case . . . .
>
> It further appearing that appellant -- a lieutenant (junior grade) -- was not confined after trial and remained on active duty; that he was shunned by his commander and ordered by him to stay off station and to maintain a low profile; that he was not promoted due to the pendency of the convening authority's action, notwithstanding that he was selected for promotion one and one-half years before that action and was selected each year thereafter; and

> That appellant, anticipating prompt action by the convening authority and early dismissal, nevertheless had to reject two civilian job offers only after withholding decision on each for as long as possible;
>
> [T]his case is another example of the "erosion of prompt post-trial review of courts-martial" which must be halted. *United States v. Clevidence*, 14 M.J. 17, 19 (C.M.A. 1982)
> . . . .

D. Composition of convening authority's action and promulgating order

1. Convening authority's action

a. **Overview.** In cases resulting in conviction, the document known as the convening authority's action (CA's action) is made up of various parts, a list of which follows. Those marked with an asterisk (*) are always included in cases of conviction; the others are used only when appropriate. The format of the CA's action is specified in Appendix 16 of the *Manual for Courts-Martial, 1984*.

(1) Statement of disapproval or modification of findings;

* (2) statement of approval, modification or disapproval of sentence;

(3) declaration of invalidity of proceedings;

(4) order of rehearing or dismissal of charges or order of another trial;

(5) statement of reasons for disapproval, if a rehearing or another trial is ordered;

(6) order of execution or suspension of sentence;

(7) statement concerning automatic administrative reduction to E-1;

(8) order of deferment of confinement or rescission of deferment;

(9) designation of place of confinement;

(10) credit for illegal pretrial confinement or confinement served at a former trial;

(11) reprimand;

(12) statement regarding companion case;

(13) synopsis of accused's conduct;

(14) statement of facts in aggravation, extenuation, and mitigation;

(15) statement as to accused's opportunity to rebut adverse matter;

(16) statement forwarding record of trial; and

* (17) signature and authority to act.

The following is a discussion of these individual parts of the CA action and some suggested language for each.

b. **Statement of disapproval or modification of findings**

(1) This statement is not required in the CA's action; however, as previously discussed, the convening authority may, in his discretion, act with respect to the findings. If so, they are addressed in the action only when findings of guilty are disapproved in whole or in part.

(2) **Examples**:

(a) **Some findings disapproved**: "In the case of _____, the finding of guilty to Specification 2, Charge II is disapproved . . . ." MCM, 1984, app. 16, form 15.

(b) **Approval of a lesser included offense**: "In the case of _____, the finding of guilty of Specification 1, Charge II is changed to a finding of guilty of (assault with a means likely to produce grievous bodily harm, to wit: a knife) (absence without authority from (unit) alleged from 1 January 19CY to 3 March 19CY, in violation of Article 86)." MCM, 1984, app. 16, form 16.

c. **Statement of approval, modification or disapproval of sentence**

(1) The CA's action must state whether the sentence adjudged is approved or disapproved. If only part of the sentence is approved, the action shall state which parts are approved. Though the action to be taken on the sentence is a matter of command discretion, a pretrial agreement may require the convening authority to take a particular action.

(2) **Examples**:

(a) "In the case of _____, the sentence is approved . . . ." MCM, 1984, app. 16, form 1.

(b) "In the case of _____, only so much of the sentence as provides for _____ is approved . . . ." MCM, 1984, app. 16, form 2.

(c) "In the case of _____, the sentence is approved but _____ months of the approved period of confinement is changed to forfeiture of $_____ pay per month for _____ months . . . ." MCM, 1984, app. 16, form 3.

(d) "In the case of _____, it appears that the following error was committed: (evidence of a previous conviction of the accused was erroneously admitted) ( ). This error was prejudicial as to the sentence. The sentence is disapproved . . . ." MCM, 1984, app. 16, form 10.

d. **Declaration of invalidity of proceedings**

(1) This action is used in any case in which the court lacked jurisdiction or where one or more specifications fail to state an offense. A statement of disapproval is not proper in these cases because such a statement implies validity of the proceedings.

(2) **Examples**:

(a) **Lack of jurisdiction**: "In the case of _____, it appears that the (members were not detailed to the court-martial by the convening authority) ( ). The proceedings, findings, and sentence are invalid . . . ." MCM, 1984, app. 16, form 19.

(b) **One charge fails to state an offense**: "The findings and proceedings as to Charge I and its specification are invalid . . . ." (No form)

e. **Order of rehearing or dismissal of charge or order of another trial**

(1) If the CA's action disapproves any findings of guilty, the action must state either:

(a) That the charge and the specification(s) thereunder are dismissed; or

(b) that a rehearing or other trial is ordered with respect to that charge and specification. R.C.M. 1107(f)(3).

In the first instance, the sentence may be modified if it is no longer appropriate in light of the dismissed specification. When a rehearing is ordered with respect to a disapproved specification, as in the second instance, the entire sentence must be disapproved. R.C.M. 1107(f)(4). The accused will be sentenced at the rehearing, if convicted.

(2) A rehearing on sentencing alone is possible only after the entire sentence has been disapproved. R.C.M. 1107(f)(4).

(3) "Another trial" may be ordered when the findings of guilty are declared invalid. Otherwise, the charges should be dismissed. *See* **Declaration of invalidity of proceedings**, para. d, above.

(4) **Examples**:

(a) **Charges dismissed**: "In the case of _____, the findings of guilty and the sentence are disapproved. The charges are dismissed." MCM, 1984, app. 16, form 20.

(b) **Some findings disapproved; sentence approved or reassessed**: "In the case of _____, the finding of guilty of Specification 2, Charge I is disapproved. Specification 2, Charge I is dismissed. (The sentence is approved . . . .) (Only so much of the sentence as provides for _____ is approved . . . .)" MCM, 1984, app. 15, forms 15 and 16.

(c) **Rehearing with respect to disapproved findings**: "The findings of guilty as to Specifications 1 and 2 of Charge II and the sentence are disapproved. A combined rehearing is ordered before a court-martial to be designated." MCM, 1984, app. 16, form 17.

(d) **Sentence disapproved**: "This error was prejudicial as to the sentence. The sentence is disapproved. A rehearing is ordered before a ( ) court-martial to be designated." MCM, 1984, app. 16, form 10.

(e) **Jurisdictional error**: "In the case of _____, it appears (that the members were not detailed to the court-martial by the convening authority) ( ). The proceedings, findings, and sentence are invalid. Another trial is ordered before a court-martial to be designated." MCM, 1984, app. 16, form 19.

f. **Statement of reason for disapproval if a rehearing or another trial is ordered**. In certain situations, the convening authority should state his reasons for disapproving the findings or sentence.

(1) **Rehearing**. If a rehearing of any type is ordered, the convening authority must state the reason for disapproval of findings or sentence. R.C.M. 1107(f)(3). In such a statement, if the entire case is not affected, the drafter must specify what parts of the case are affected by the error causing disapproval (e.g., entire sentence but only some findings, sentence only, etc.). The purpose of this statement is to guide the court's actions in the rehearing so that the same error does not occur again.

(2) **Examples**:

(a) **Disapproval of sentence**: "In the case of _____, it appears that the following error was committed: (evidence of a previous conviction of the accused was erroneously admitted) ( ). This error was prejudicial as to the sentence. The sentence is disapproved. A rehearing is ordered before a ( ) court-martial to be designated." MCM, 1984, app. 16, form 10.

(b) **Some findings disapproved**: "In the case of _____, it appears that the following error was committed: (Exhibit 1, a laboratory report, was not properly authenticated and was admitted over the objection of the defense) ( ). This error was prejudicial as to Specifications 1 and 2 of Charge II, and the sentence is disapproved. A combined rehearing is ordered before a court-martial to be designated." MCM, 1984, app. 16, form 17.

(c) **All findings disapproved**: "In the case of _____, it appears that the following error was committed: (evidence offered by the defense to establish duress was improperly excluded) ( ). This error was prejudicial to the rights of the accused as to all findings of guilty. The findings of guilty and the sentence are disapproved. A rehearing is ordered before a court-martial to be designated." MCM, 1984, app. 16, form 18.

(2) **Another trial.** Where the proceedings are declared invalid because of the failure of the specification to state an offense or because of a correctable jurisdictional defect (e.g., the court was not sworn), the convening authority must state the reason for the declaration of invalidity when he orders another trial. R.C.M. 1107(e)(2). For an example, see the previous section.

(3) **Subsequent administrative action.** Even if a rehearing is not ordered, the reason for disapproval might aid in determining the effect of the proceedings upon future administrative disposition of the accused. In those cases, the reasons for disapproval should be set forth in the action. R.C.M. 1107(f)(3), Discussion.

(4) **For information of higher reviewing authorities.** In the convening authority's review of the case, it is often desirable for him to state the reason for his action. For example, in a case where the convening authority finds prejudicial error in the admission of a previous conviction in the sentencing portion of the trial, he may choose to reassess the sentence to cure the effect of the error rather than ordering a rehearing. It would be advisable to state the reason for any reduction in the sentence (e.g., reassessment as opposed to clemency) for the information of higher reviewing authorities. If the reason for reduction of the sentence is not apparent from the record of trial, higher reviewing authorities might view the reduction as an exercise of clemency and further reduce the sentence to cure the effect of the erroneously admitted evidence.

g. **Order of execution or suspension of sentence**

(1) If the convening authority decides to suspend part or all of a sentence, he must state his decision in the CA's action. If he is authorized to execute any part of the sentence and he desires to do so, he should so state in the action. R.C.M. 1107(f)(4). No part of a sentence may be suspended unless it has been approved first. Language should be included in the CA action providing that, unless the suspension is sooner vacated, the suspended portion of the sentence shall be remitted at the end of the suspension period. R.C.M. 1108.

(2) **Examples**:

(a) **Entire sentence executed**: "In the case of _____, the sentence is approved and will be executed." MCM, 1984, app. 16, form 1.

(b) **Part of sentence executed**: "In the case of _____, only so much of the sentence as provides for _____ is approved and will be executed." MCM, 1984, app. 16, form 12.

(c) **Entire sentence suspended**: "In the case of _____, the sentence is approved. Execution of the sentence is suspended for ____ months, at which time, unless the sentence is sooner vacated, the sentence will be remitted without further action." MCM, 1984, app. 16, form 5.

(d) **Part of sentence suspended**: "In the case of ____, the sentence is approved and will be executed, but the execution of that part of the sentence extending to (confinement) ( ) is suspended for ____ months, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action." MCM, 1984, app. 16, form 6.

(e) **Cases of discharge, dismissal, or death**: "In the case of _____, the sentence is approved and, except for the (part of the sentence extending to death) (dismissal) (dishonorable discharge) (bad-conduct discharge), will be executed." MCM, 1984, app. 16, form 11.

h. **Statement concerning automatic administrative reduction to paygrade E-1**

(1) In his sole discretion, the convening authority may retain the accused at his present paygrade and suspend the automatic reduction. Additionally, the convening authority may direct that the accused serve in paygrade E-1 while in confinement but be returned to the paygrade held at the time of sentencing, or an intermediate paygrade, when released from confinement. Failure to address automatic reduction will result in the reduction taking place automatically on the date of the CA's action.

(2) **Examples**:

(a) "In the foregoing case of _____, the sentence is approved (and will be duly executed) but (the execution of so much thereof as provides for reduction to paygrade _____ and) automatic reduction to paygrade E-1 is suspended until _____, at which time, unless the suspension is sooner vacated, the suspended portions will be remitted without further action. The accused will (continue to) serve in paygrade _____ unless the suspension of the (reduction to paygrade _____ and) automatic reduction is vacated, in which event the accused at that time will be reduced to the paygrade of E-1." JAGMAN, § 0152d(3)(a).

(b) "In the foregoing case of _____, the sentence is approved (and will be duly executed). The accused will serve in paygrade E-1 from this date until released from confinement at which time he/she will be returned to paygrade _____." JAGMAN, § 0152d(3)(b).

i. Order of deferral of confinement or rescission of deferral

(1) In those cases in which the granting of an application for deferral of confinement takes place prior to, or concurrently with, the CA's action, the convening authority must state the date upon which the sentence was (or is) deferred in his action. If rescission takes place prior to, or concurrently with, the CA's action, the dates of deferment and rescission of deferment must be included in the action. In the event that deferment or rescission of deferment takes place after the CA's action, a supplementary order to that effect will be issued and forwarded for inclusion in the record of trial. R.C.M. 1101, 1107(f)(4)(E).

(2) **Examples:**

(a) **Confinement deferred pending final review**: "In the case of _____, the sentence is approved and, except for that portion extending to confinement, will be executed. Service of the sentence to confinement (is) (was) deferred effective _____ 19__, and will not begin until (the conviction is final) ( ), unless sooner rescinded by competent authority." MCM, 1984, app. 16, form 7.

(b) **Deferment of confinement terminated**: "In the case of _____, the sentence is approved and will be executed. The service of the sentence to confinement was deferred on _____ 19__." MCM, 1984, app. 16, form 8.

(c) **Deferment of confinement terminated previously**: "In the case of _____, the sentence is approved and will be executed. The service of the sentence to confinement was deferred on _____ 19__, and the deferment ended on _____ 19__." MCM, 1984, app. 16, form 9.

j. Designation of place of confinement

(1) In any case in which the convening authority orders confinement executed or imposes post-trial confinement pending final review, he must designate the place of such confinement in his action. R.C.M. 1107(f)(4)(D).

(2) **Examples:**

(a) "_____ is designated as the place of confinement." MCM, 1984, app. 16, form 1.

(b) "Pending completion of appellate review, the accused will be confined in _____"; or "The place of temporary confinement will be _____" (No form).

k. **Credit for illegal pretrial confinement or confinement served from a former trial**

(1) When there has been illegal pretrial confinement, or confinement served from a former trial in the case of action on a rehearing, the entire sentence to confinement may be approved. Credit is then applied as a separate statement in the CA's action.

(2) **Examples:**

(a) **Credit for illegal pretrial confinement**: "In the case of _____, the sentence is approved and will be executed. The accused will be credited with ____ days of confinement against the sentence to confinement." MCM, 1984, app. 16, form 4.

(b) **Credit for previously executed or served punishment**: "In the case of _____, the sentence is approved and will be executed. The accused will be credited with any portion of the punishment served from _____ 19__ to _____ 19__ under the sentence adjudged at the former trial of this case." MCM, 1984, app. 16, form 21.

l. **Reprimand**. Where the convening authority executes a sentence including a reprimand, he must include the reprimand in his action. R.C.M. 1107(f)(4)(G); JAGMAN, § 0152.

m. **Statement regarding companion case**

(1) In cases in which a separate trial was ordered for a companion case, the convening authority must so indicate in his action on each record of trial. JAGMAN, § 0151. This statement alerts reviewing authorities to look for the companion case and enables them to evaluate the relative appropriateness of the sentences.

(2) **Example**: "This is a companion case to that of BMSN Mark Fortenberry, USN, 999-99-9999, tried by special court-martial by this command on 5 March 19CY."

n. **Synopsis of accused's conduct**

(1) In any case in which the convening authority approves a punitive discharge, whether or not suspended, he must include a synopsis of the accused's conduct during the current enlistment and extension thereof. This synopsis

should include a chronological list of all NJP's and court-martial convictions (including dates, offenses, and sentences). The synopsis should also include information of a favorable nature (such as medals and awards). JAGMAN, § 0152.

(2) The convening authority may, in any case in which he deems it appropriate, include a synopsis of conduct in his action. JAGMAN, § 0152. The purpose of including a synopsis of conduct in the action is to afford higher reviewing authorities an additional basis for determining the appropriateness of the sentence approved by the convening authority.

(3) **Example**: "A synopsis of the accused's service record during his current enlistment, or extension thereof, considered by the convening authority in connection with his action on the sentence in this case is as follows:

12 Jan CY NJP for UA from 1 Jan CY to 5 Jan CY; awarded 14 days restriction.

5 Mar CY SCM for UA from 1 Feb CY to 20 Feb CY; sentenced to one month confinement; CA approved.

The accused is entitled to the following medals and awards: Sea Service Deployment Ribbon."

o. **Statement of facts in aggravation, extenuation, and mitigation not in record of trial**

(1) In his action, the convening authority must include a statement of any facts which tend to extenuate, mitigate, or aggravate the offense if:

(a) The convening authority approves a punitive discharge, whether or not he suspends it; and

(b) the case involves a conviction of larceny or other offense involving moral turpitude; and

(c) they do not otherwise appear in the record of trial.

(2) If the information set forth is not exclusively extenuating or mitigating, the convening authority shall refer a copy of the information to the accused before acting on the case and shall afford the accused an opportunity to rebut any portion of the information. JAGMAN, § 0151.

(3) **Example**: "A synopsis of the facts tending to extenuate, mitigate, or aggravate the offense of the accused, not otherwise appearing in the record of trial or in the papers accompanying same, is as follows: (State fully but concisely). Prior to taking my action on this case, the foregoing synopsis was referred to the accused for any rebuttal, explanation, or comment he might care to make. (The accused's statement, which is appended to the record of trial, was carefully considered by me before taking my action on this case.) or (The accused did not desire to make any statement.)"

p. **Statement as to accused's opportunity to rebut adverse matter**

(1) In any case where the convening authority considers matter adverse to the accused, which does not appear in the record of trial and is not properly included in the accused's service record, he should state in his action:

(a) The information which was considered; and

(b) that the accused was afforded an opportunity to rebut such matter; and

(c) that the accused did or did not make such a rebuttal statement.

(2) If the accused makes a statement in rebuttal, a copy of it should be appended to the CA's action. JAGMAN, § 0151.

(3) **Example**: "Prior to taking any action on this case, the foregoing information was referred to the accused for any rebuttal, explanation, or comment he might care to make. (The accused's statement, which was carefully considered by me before taking my action on this case, is appended to the record of trial.) or (The accused did not desire to make any statement.)"

q. **Statement forwarding the record of trial**

(1) When a record of trial is forwarded to a judge advocate for review under R.C.M. 1112, the convening authority should include a statement in his action indicating to whom he is forwarding the record of trial. JAGMAN, § 0153.

(2) **Example**: "The record of trial is forwarded to the Staff Judge Advocate, Commander, Naval Base, Norfolk, for review under Article 64(a), UCMJ."

r. **Signature and authority**. The CA's action must be signed personally by the convening authority. Below his signature he must indicate his grade and authority to take action (e.g., commanding officer). R.C.M. 1107(f).

s. **Censure**. No action may be taken by the convening authority in his action or otherwise that would amount to censure of the court or member, military judge, or counsel thereof. Art. 37, UCMJ.

t. **Action on rehearing**

(1) The action on a rehearing is the same as an action on an original court-martial in most respects. It differs first in that, as to any sentence approved following the hearing, the accused must be credited with those parts of the sentence previously executed or otherwise served. Second, in certain cases, the convening authority must provide for the restoration of certain rights, privileges, and property. *See* R.C.M. 1107(f)(5)(A).

(2) **Examples**

(a) **Credit for previously executed or served punishment**: "In the case of _____, the sentence is approved and will be executed. The accused will be credited with any portion of the punishment served from _____ 19__ to _____ 19__ under the sentence adjudged at the former trial of this case." MCM, 1984, app. 16, form 21.

(b) **Restoration of rights**: "In the case of _____, the findings of guilty and the sentence are disapproved and the charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the execution of the sentence adjudged at the former trial of this case on _____ 19__ will be restored." MCM, 1984, app. 16, form 22.

Restoration of rights would also be required when the accused is acquitted at the rehearing or if the proceedings are declared invalid because of jurisdictional error.

u. **Withdrawal of previous action**

(1) R.C.M. 1107(f)(2) authorizes the convening authority to withdraw a previous action and modify it under certain conditions.

(2) **Example**: "In the case of _____, this action taken by (me) (my predecessor in command) on _____ 19__ is withdrawn and the following substituted therefor: _____." MCM, 1984, app. 16, form 24.

2. **Promulgating orders (i.e., court-martial orders)**

a. **In general**. A promulgating order publishes the results of the court-martial, the CA's action, and any subsequent action with regard to the case. It is a method of recordkeeping and informing all those officially interested in the progress of the case. R.C.M. 1114; JAGMAN, § 0155.

b. **When used**

(1) A promulgating order is <u>not</u> issued for summary courts-martial.

(2) A promulgating order is issued for every special court-martial and general court-martial, including those resulting in acquittal.

c. **Who issues?** The convening authority normally issues a promulgating order to publish the results of trial and his action on the case. Any action taken on the case subsequent to the initial action, such as to execute a discharge, shall be promulgated in supplementary orders by the authority authorized to take such action. R.C.M. 1114; JAGMAN, § 0155. Where the findings and sentence set forth in the initial promulgating order are affirmed without modification upon subsequent review, no further order need be issued. JAGMAN, § 0155.

d. **Form and content of the order**. The form for promulgating orders is set out in Appendix 17 of the *Manual for Courts-Martial, 1984*.

Each promulgating order published by a command during the calendar year is numbered consecutively, with the year following the number of the order. For example, the 10th special court-martial published by a command during 19CY would be "Special Court-Martial Order No. 10-19CY." In the center of the page, the title of the command issuing the order is set forth along with the date of the order -- which is the date of the action of the authority issuing the order. For example, if the date of the CA's action is 15 March 19CY, the date of the court-martial order would also be 15 March 19CY.

The next section of the court-martial order is called the "authority" section. It indicates the place where the trial was held, the command and organization of the convening authority, and the serial number and date of the convening order. For example:

> Before a special court-martial which convened at Naval Justice School, Newport, Rhode Island, pursuant to Commanding Officer, Naval Justice School, Special Court-Martial Convening Order 3-CY of 1 March 19CY . . . .

The authority section is followed by the "arraignment and the accused" section of the order. The arraignment section simply contains a statement that the accused was arraigned and tried. The accused section contains the grade, name, social security number, branch of service, and unit of the accused. When added to the authority section, this section looks like this:

> Before a special court-martial which convened at Naval Justice School, Newport, Rhode Island, pursuant to Commanding Officer, Naval Justice School Special Court-Martial Convening Order 3-CY of 1 March 19CY, was arraigned and tried: BOATSWAIN'S MATE SEAMAN MARK FORTENBERRY, U.S. NAVY, 999-99-9999, NAVAL JUSTICE SCHOOL, NEWPORT, RHODE ISLAND.

The court-martial order next sets forth the charge(s) and specification(s) upon which the accused was arraigned. The specifications should be summarized indicating specific factors such as value, amount, duration, and other circumstances which affect the maximum punishment. The specification may be reproduced verbatim if necessary. Findings should be indicated in parentheses after each charge and specification. For example:

> The accused was arraigned on the following offenses and the following findings or other dispositions were reached:
>
> Charge I: Article 86 (guilty).
>
> Specification 1: Unauthorized absence from unit from 1 January 19CY to 15 February 19CY (guilty).
>
> Specification 2: Failure to repair 18 February 19CY (dismissed on motion of defense for failure to state an offense).
>
> Charge II: Article 121 (not guilty).
>
> Specification: Larceny of property of a value of $150.00 on 27 January 19CY (not guilty).

The plea(s) section follows the charge(s) and specification(s) section of the court-martial order. For example:

> The finding of guilty as to Charge I, Specification 1, was based on the accused's plea of guilty. The accused pleaded not guilty to the remaining charge and specification.

If the accused was acquitted of all charges and specifications, the date of the acquittal should be shown: "The findings were announced on _____ 19__."

If the accused was convicted of one or more specifications, it is necessary to include the sentence in the court-martial order.

> The (military judge) (members) adjudged the following sentence on _____ 19__:
>
> Forfeitures of $100.00 pay per month for six months, confinement for six months, and reduction to paygrade E-1.

The "action" section is next. It contains the CA's action verbatim (including the heading, date, and signature or evidence of signature).

ACTION

NAVAL JUSTICE SCHOOL
NEWPORT, RHODE ISLAND 02841-5030

15 Mar CY

In the case of Boatswain's Mate Seaman Mark Fortenberry, U.S. Navy, Naval Justice School, Newport, Rhode Island, the sentence is approved and will be executed. The Navy Brig, Newport, Rhode Island, is designated as the place of confinement. The record of trial is forwarded to the Staff Judge Advocate, Commander, Naval Education and Training Center, Newport, Rhode Island, for action under Article 64(a), UCMJ.

/s/ I. M. LAW
I. M. LAW
Captain, JAGC, U.S. Navy
Commanding Officer

At the end of the court-martial order is the "authentication" section. This section simply contains the signature of the authority issuing the court-martial order or the signature of a subordinate officer designated by him to sign "by direction." The name, grade, title, and organization of the officer actually signing the court-martial order must be shown. If signed "by direction," such fact must be shown -- together with the name, grade, title, and organization of the person issuing the order.

e. **Distribution of the order**

(1) The original goes in the record of trial.

(2) A duplicate original is placed in the accused's service record only if the accused has been convicted.

(3) Certified or plain copies go to many places. See JAGMAN § 0155.

f. **Supplemental orders**. Action on the case occurring after the initial promulgating order has been published will be published by issuing a supplementary promulgating order. *See* JAGMAN, § 0155. Appendix 17 of the *Manual for Courts-Martial, 1984*, provides the necessary forms.

REPORT OF RESULTS OF TRIAL

From:

Subj: REPORT OF RESULTS OF TRIAL

1. Pursuant to R.C.M. 1101(a) and 1304(b)(2)(f)(v), MCM, 1984, notification is hereby given in the case of United States v. _____.

2. Trial by _____ court-martial at _____, convened by _____.

3. Offenses, pleas, and findings:

Charges & Specifications (with description of offense(s))	Pleas	Findings

4. Sentence adjudged:

5. Date sentence adjudged: _____

6. Forum: _____ Judge Alone

_____ Members

_____ Enlisted Members

7. Credits to be applied to confinement, if any:

a. Pretrial Confinement: _____ days (see note)

b. Judicially-ordered credits: _____ days

Total credits: _____ days

8. Terms of pretrial agreement concerning sentence, if any:

_____

_____

_____

_____

_____
Trial Counsel/Summary Court-Martial

A-1-j(1)

Distribution:
Convening Authority
Commanding officer of accused
CO/OIC of brig (if confinement adjudged)
Record of trial
Officer exercising general court-martial jurisdiction

[Note: Each day of pretrial confinement shall be counted as a day of pretrial confinement, except that, if the sentence includes confinement, the day on which sentence is announced shall not be counted as a day of pretrial confinement. Notwithstanding the foregoing, authorities responsible for sentence computation will count the day of sentencing as a day of pretrial confinement, when the accused was in pretrial confinement on the day that a sentence including confinement was announced and, for any reason (e.g., immediate deferment), that day does not count towards service of the sentence to confinement.]

A-1-j(2)

7 Jul CY

From: Staff Judge Advocate, Naval Surface Group FOUR
To: Commander, Naval Surface Group FOUR

Subj: RECOMMENDATION IN THE SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

Ref: (a) R.C.M. 1106, MCM, 1984
(b) JAGMAN, § 0151c

Encl: (1) Record of trial ICO YNSN John Q. Public, USN

1. Pursuant to references (a) and (b), the following information is provided:

a. Offenses, pleas, and findings:

Charges and specifications	Pleas	Findings
Charge I: Violation of Article 86, UCMJ	Guilty	Guilty
Specification: Unauthorized absence from his unit, USS Edson, from 13 July 19CY(-1) to his surrender on 5 January 19CY.	Guilty	Guilty
Charge II: Violation of Article 121, UCMJ	Guilty	Guilty
Specification: Larceny of a radio of a value of about $125.00, the property of Fireman Stoke T. Coals, U.S. Navy.	Guilty	Guilty

b. Sentence adjudged: On 15 June 19CY, the accused was sentenced to reduction to the grade of paygrade E-2, confinement for a period of 120 days, forfeiture of $200.00 pay per month for 4 months, and to be discharged from the naval service with a bad-conduct discharge.

c. Clemency recommendation by court or military judge: None.

d. Summary of accused's service record:

(1) Length of service: 3 years 2 months.

(2) Character of service: 3.4 average of evaluation traits.

Appendix II-a(1)

Subj: RECOMMENDATION IN THE SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

(3) Awards and decorations: The accused is not entitled to any awards, medals, or commendations, except the Sea Service Deployment Ribbon.

(4) Records of prior nonjudicial punishment: CO's NJP on 1 September 19CY(-2) for a violation of Article 86, UCMJ, for missing morning muster. Awarded 15 days restriction to the limits.

(5) Previous convictions: Conviction by summary court-martial at which he was represented by lawyer counsel on 8 October 19CY(-2) for a violation of Article 121, UCMJ, wrongful appropriation of government property, for which a sentence of 1 month confinement and reduction to the grade of paygrade E-1 was finally approved. Conviction by special court-martial on 17 February 19CY(-1) for a violation of Article 86, UCMJ, unauthorized absence for a period of 27 days, for which a sentence of confinement for 1 month and forfeiture of $50.00 pay per month for 2 months was finally approved.

(6) Other matters of significance: None.

e. Nature and duration of pretrial restraint: The accused was in pretrial confinement from 29 May to 4 June 19CY, a period of 7 days. In accordance with the decision rendered in *United States v. Allen*, 17 M.J. 126, the accused will be credited with 7 days of confinement against the sentence to confinement adjudged.

f. Judicially ordered credit to be applied to confinement, if any: None.

g. Terms and conditions of pretrial agreement, if any, which the convening authority is obligated to honor or reasons why the convening authority is not obligated to take specific action under the agreement: A pretrial agreement was submitted in this case and approved on 12 June 19CY. In return for the accused's provident guilty plea to all charges and specifications, the terms of this agreement called for a limitation on the punishment as follows:

Confinement:	If adjudged, confinement in excess of 4 months will be disapproved.
Restriction:	As adjudged.
Forfeitures:	If adjudged, forfeitures in excess of $300.00 pay per month for a period of 4 months will be disapproved.
Fine:	As adjudged.

Subj: RECOMMENDATION IN THE SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

Reduction: As adjudged.

Punitive discharge: As adjudged.

Your obligations concerning the terms of the pretrial agreement in this case are as follows: Since the confinement and forfeitures awarded are less than that provided for in the agreement, you are not obligated to suspend or disapprove any portion. The confinement, forfeitures, and bad-conduct discharge may be approved as adjudged.

h. The record of trial was served on the accused on 5 July 19CY. On behalf of the accused, the detailed defense counsel, LCDR I. Freeum, JAGC, USNR, has submitted a request for clemency in the form of reduction in confinement to be approved. Additionally, letters from the accused's parents and other family members and friends are attached for your review and consideration.

2. In my opinion, the court was properly constituted and had jurisdiction over the accused and the offense. The accused was found guilty in accordance with his plea. The proceedings were conducted in substantial compliance with current regulation and policy. The offenses of which the accused was found guilty are described as offenses under the UCMJ. There is no error noted nor any issues of error raised by the accused or counsel. The sentence as adjudged is legal and appropriate.

3. I recommend that the sentence as adjudged be approved in accordance with the terms of the pretrial agreement. I further recommend that SN Public be reduced to the grade of paygrade E-1 as authorized by Article 58(a) of the Uniform Code of Military Justice.

//S//
R. U. GUILTY

9 Jul CY

From: Staff Judge Advocate, Commander Naval Surface Group FOUR
To: LT Dick E. Tracy, JAGC, USNR, Naval Legal Service Office, Newport

Subj: SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

Ref: (a) Art. 64, UCMJ
(b) R.C.M. 1106(f)(1)

Encl: (1) Copy of SJA post-trial review ICO YNSN John Q. Public, USN

1. Pursuant to reference (a), a review of the court-martial of YNSN Public has been conducted. Enclosure (1) is a copy of this review.

2. Pursuant to rules established by reference (b), you are hereby served with a copy of this review in order to afford you an opportunity to correct or challenge any matter therein which you may deem erroneous, inadequate or misleading, or upon which you may otherwise wish to comment. Proof of service of this review upon you, together with any such correction, challenge, or comment you may make, shall be made a part of the record of proceedings.

3. You are advised that your failure to take advantage of the aforementioned opportunity within 10 calendar days from the date of this service will normally be deemed a waiver of any error in the review.

4. You are requested to acknowledge receipt of this letter, with attached copy of review, by immediately completing the first endorsement.

//S//
MATT E. DILLON
CDR, JAGC, USN

Appendix II-b

11 Jul CY

FIRST ENDORSEMENT on COMNAVSURFGRU FOUR ltr of 9 Jul CY

From: LT Dick E. Tracy, JAGC, USNR, Naval Legal Service Office, Newport
To: Staff Judge Advocate, Commander Naval Surface Group FOUR

Subj: SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

1. I, the undersigned, counsel for the accused in the above-captioned proceedings, hereby acknowledge receipt of the aforementioned staff judge advocate review required by Article 64, UCMJ, for the subject case on this 11th day of July 19CY.

//S//
DICK E. TRACY

Appendix II-c

DEPARTMENT OF THE NAVY
Naval Legal Service Office
Newport, Rhode Island 02841-5032

13 Jul CY

From: LT Dick E. Tracy, JAGC, USNR, Naval Legal Service Office, Newport
To: Staff Judge Advocate, Commander Naval Surface Group FOUR

Subj: RECOMMENDATION IN THE SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

Ref: (a) SJA review ICO YNSN John Q. Public, USN
(b) R.C.M. 1106(f)(4)

1. Reference (a) was received by me on 11 July 19CY and has been reviewed pursuant to reference (b).

2. I do not desire to submit a correction, challenge, or comment to the attached review.

3. I have attached letters from the accused's parents and his wife, Mrs. Public, for the convening authority's consideration.

//S//
DICK E. TRACY

Appendix II-d

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

1 February 19CY

In the case of Boatswain's Mate Seaman Mickey E. Mouse, 123-45-6789, U.S. Navy, tried by special court-martial on 18 January 19CY, the court had jurisdiction over the accused and the offense(s) for which he was tried and the court was properly convened and constituted.

//S//
H. S. LAW
Captain, JAGC, U.S. Navy
Commanding Officer
Naval Justice School
Newport, Rhode Island

Convening Authority's Action - Acquittal Record of Trial

Appendix III-a

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

1 Feb CY

In the case of Personnelman Third Class Mickey E. Mantel, 444-44-9944, U.S. Navy, the sentence is approved and will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ, and JAGMAN, Section 0152, automatic reduction in rate to paygrade E-1 is effected as of the date of this action.

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

//S//
H. S. LAW
Captain, JAGC, U.S. Navy
Commanding Officer
Naval Justice School
Newport, Rhode Island

NOTE TO STUDENT: This is a Convening Authority's Action (sentence awarded at trial approved and ordered executed).

In this sample, **the sentence does not include a punitive discharge, death, or dismissal**, and the paragraph pertaining to automatic reduction should be included only if the sentence awarded and approved contains confinement in excess of 90 days/ 3 months.

Appendix III-b

Appendix III-c(2) shows the **approval of part of the sentence and partial order of execution** of the sentence awarded at trial. The convening authority only approved part of the sentence adjudged by the court. The court sentenced the accused to reduction to the grade of paygrade E-2, confinement for 120 days, forfeiture of $200.00 pay per month for 4 months, and a bad-conduct discharge. The convening authority approved the reduction to E-2 and the bad-conduct discharge, but approved only 90 days of confinement and forfeitures of only $150.00 pay per month for 3 months.

The provisions of article 58a(a), automatic reduction, are included in this case only because the reduction awarded by the court was from E-3 to E-2. Had the court reduced the accused to E-1, and that portion of the sentence been approved and ordered executed, article 58a(a) would no longer have been applicable.

Appendix III-c(1)

DEPARTMENT OF THE NAVY
Naval Surface Group FOUR
Newport, Rhode Island 02841-5030

26 July 19CY

In the case of Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, only so much of the sentence as provides for reduction to the paygrade of E-2, confinement for 90 days, forfeiture of $150.00 pay per month for 3 months, and a bad-conduct discharge is approved and, except for the part of the sentence extending to a bad-conduct discharge, will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ and JAGMAN, Section 0152d, automatic reduction in rate to paygrade E-1 is effected as of the date of this action.

Synopsis of the accused's prior conduct as required by JAGMAN, Section 0152b:

Conviction by summary court-martial at which he was represented by lawyer counsel on 8 October 19CY(-2) for a violation of Article 121, UCMJ, wrongful appropriation of government property, for which a sentence of 1 month confinement and reduction to the grade of paygrade E-1 was finally approved. Conviction by special court-martial on 17 February 19CY(-1) for a violation of Article 86, UCMJ, unauthorized absence for a period of 27 days, for which a sentence of confinement for 1 month and forfeiture of $50.00 pay per month for 2 months was finally approved.

In addition to the two previous convictions considered by the court in this case, the accused was awarded 15 days restriction as a result of commanding officer's nonjudicial punishment on 1 September 19CY(-2) for missing morning muster, in violation of Article 86, UCMJ.

The accused is not entitled to any awards, medals, or commendations, except the Sea Service Deployment Ribbon.

The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 04.12), Office of the Judge Advocate General, Washington Navy Yard, Washington, D.C. 20374-2002 for review under Article 66, UCMJ.

//S//
D. D. DUCK
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

Appendix III-c(2)

DEPARTMENT OF THE NAVY
Naval Surface Group FOUR
Newport, Rhode Island 02841-5030

26 July 19CY

In the case of Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, the sentence is approved and, except for the part of the sentence extending to a bad-conduct discharge, will be executed. The Navy Brig, Naval Station, Philadelphia, Pennsylvania, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ and JAGMAN, Section 0152d, automatic reduction in rate to paygrade E-1 is effected as of the date of this action.

Synopsis of the accused's prior conduct as required by JAGMAN, Section 0152b:

Conviction by summary court-martial on 17 February 19CY(-1) for a violation of Article 85, UCMJ, desertion for a period of 10 days, for which a sentence of confinement for 2 months and forfeiture of $200.00 pay per month for 2 months was finally approved.

In addition to the previous conviction considered by the court in this case, the accused was awarded 15 days restriction as a result of commanding officer's nonjudicial punishment on 5 August 19CY(-2) for missing morning muster, in violation of Article 86, UCMJ.

The accused is not entitled to any awards, medals, or commendations, except the Sea Service Deployment Ribbon.

The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 04.12), Office of the Judge Advocate General, Washington Navy Yard, Washington, D.C. 20374-2002 for review under Article 66, UCMJ.

//S//
D. D. DUCK
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

CA's action - Sentence adjudged by the court approved by the convening authority and all but the bad-conduct discharge ordered executed.

Appendix III-d

The following are completed samples of forms contained in Appendix 16, *Manual for Courts-Martial*:

The court adjudged a sentence of confinement for 6 months, forfeiture of $200.00 pay per month for 6 months, and reduction to the grade of paygrade E-1.

Form 1. Adjudged sentence approved and ordered into execution without modifications.

In the case of Yeoman Seaman John Q. Public, U.S. Navy, the sentence is approved and will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

Form 2. Adjudged sentence approved in part (modified) and ordered executed.

In the case of Yeoman Seaman John Q. Public, U.S. Navy, only so much of the sentence as provides for confinement for 3 months and reduction to the grade of paygrade E-1 is approved and will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

NOTE: Since there is no mention of the forfeiture, it was not approved and SN Public will not forfeit his money. Also, the period of confinement was reduced from 6 months to 3 months.

Form 5. Adjudged sentence approved and entire sentence suspended.

In the case of Yeoman Seaman John Q. Public, U.S. Navy, the sentence is approved. Execution of the sentence is suspended for 6 months, at which time, unless the suspension is sooner vacated, the sentence will be remitted without further action.

Form 6. Adjudged sentence approved with part of the sentence suspended.

In the case of Yeoman Seaman John Q. Public, U.S. Navy, the sentence is approved and will be executed, however, the execution of that part of the sentence extending to confinement is suspended for 6 months, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action.

DEPARTMENT OF THE NAVY
Naval Surface Group FOUR
Newport, Rhode Island 02841-5061

26 July 19CY

Special Court-Martial Order No. 2-CY

Before a Special Court-Martial which convened at Naval Legal Service Office, Newport, Rhode Island, pursuant to Commander, Naval Surface Group FOUR, Newport, Rhode Island, Convening Order No. 14-CY, dated 1 June 19CY, was arraigned and tried:

Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, Naval Surface Group FOUR, Newport, Rhode Island

The accused was arraigned on the following offenses and the following findings or other dispositions were reached:

CHARGE I: ARTICLE 86. Plea: G. Finding: G.

Specification: Unauthorized absence from his unit, USS Edson, from 4 April 19CY to his apprehension on 1 June 19CY. Plea: G. Finding: G.

CHARGE II: ARTICLE 121. Plea: G. Finding: G.

Specification: Larceny of a radio of a value of about $125.00, the property of Fireman Stoke T. Coals, U.S. Navy. Plea: G. Finding: G.

SENTENCE

Sentence adjudged on 15 June 19CY: To be reduced to the grade of paygrade E-2, to be confined for 120 days, to forfeit $200.00 pay per month for 4 months, and to be discharged from the naval service with a bad-conduct discharge.

ACTION

DEPARTMENT OF THE NAVY
Naval Surface Group FOUR
Newport, Rhode Island 02841-5061

26 July 19CY

In the case of Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, only so much of the sentence as provides for reduction to the paygrade of E-2, confinement for 90 days, forfeiture of $150.00 pay per month for 3 months, and a bad-conduct discharge is approved and, except for the part of the sentence extending to bad-conduct discharge, will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement. Appendix IV-a(1)

In accordance with Article 58a(a), UCMJ and JAGMAN, Section 0152d, automatic reduction in rate to paygrade E-1 is effected as of the date of this action.

Synopsis of the accused's prior conduct as required by JAGMAN, Section 0152b:

Conviction by summary court-martial at which he was represented by lawyer counsel on 8 October 19CY(-2) for a violation of Article 121, UCMJ, wrongful appropriation of government property, for which a sentence of 1 month confinement and reduction to the grade of paygrade E-1 was finally approved. Conviction by special court-martial on 17 February 19CY(-1) for a violation of Article 86, UCMJ, unauthorized absence for a period of 27 days, for which a sentence of confinement for 1 month and forfeiture of $50.00 pay per month for 2 months was finally approved.

In addition to the two previous convictions considered by the court in this case, the accused was awarded 15 days restriction as a result of commanding officer's nonjudicial punishment on 1 September 19CY(-2) for missing morning muster, in violation of Article 86, UCMJ.

The accused is not entitled to any awards, medals, or commendations, except the Sea Service Deployment Ribbon.

The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 04.12), Office of the Judge Advocate General, Washington Navy Yard, Washington, D.C. 20374-2002 for review under Article 66, UCMJ.

//S//
D. D. DUCK
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

//S//
T. H. JUDGE
Lieutenant Commander, JAGC, U.S. Navy
Staff Judge Advocate
Naval Surface Group FOUR
Newport, Rhode Island
By direction of D. D. Duck
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

Distribution:
Original- Original ROT
Duplicate Original - Accused's SRB
Certified Copies - 3 to original ROT
1 to each copy ROT
2 to COMNAVSURFGRU FOUR Newport, RI
1 to COMNAVMILPERSCOM (NMPC-8)
1 to COMNAVSURFGRU FOUR Newport, RI (OEGCMJ)
1 to COMNAVSURFLANT Norfolk, VA
1 to PRESNAVCLEMPARBD
Plain Copies - 1 to accused
1 to NAVLEGSVCOFF Newport, RI
1 to MJ
1 to TC
1 to DC
1 to COMNAVSURFGRU FOUR Newport, RI
1 to USS EDSON (DD 946)
1 to USS SAMUEL B. ROBERTS (FFG 58)
1 to USS SIMPSON (FFG 56)

DEPARTMENT OF THE NAVY
Naval Surface Group FOUR
Newport, Rhode Island 02841-5061

26 July 19CY

Supplemental Court-Martial Order No. 2A-CY

In the special court-martial case of Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, the sentence to bad-conduct discharge, as promulgated in Special Court-Martial Order No. 2-CY, Commander, Naval Surface Group FOUR, Newport, Rhode Island, dated 26 July 19CY, has been affirmed by the Navy-Marine Corps Court of Military Review, NMCM CY 5464, dated 23 April 19CY. Article 71(c) having been complied with, the bad-conduct discharge will be executed.

//S//
T. H. JUDGE
Lieutenant Commander, JAGC, U.S. Navy
Naval Surface Group FOUR
Newport, Rhode Island
By direction of D. D. Duck
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

Distribution:
Original- Original ROT
Duplicate Original - Accused's SRB
Certified Copies - 3 to original ROT
1 to each copy ROT
2 to COMNAVSURFGRU FOUR Newport, RI
1 to COMNAVMILPERSCOM (NMPC-8)
1 to COMNAVSURFGRU FOUR Newport, RI (OEGCMJ)
1 to COMNAVSURFLANT Norfolk, VA
1 to PRESNAVCLEMPARBD
Plain Copies - 1 to accused
1 to NAVLEGSVCOFF Newport, RI
1 to MJ
1 to TC
1 to DC
1 COMNAVSURFGRU FOUR Newport, RI
1 to USS EDSON (DD 946)
1 to USS SAMUEL B. ROBERTS (FFG 58)
1 to USS SIMPSON (FFG 56)

Appendix IV-b

PROCEDURES FOR VACATION OF SUSPENDED SENTENCES

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

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

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

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

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

REPORT OF PROCEEDINGS TO VACATE SUSPENSION OF A GENERAL COURT-MARTIAL SENTENCE OR OF A SPECIAL COURT-MARTIAL SENTENCE INCLUDING A BAD-CONDUCT DISCHARGE UNDER ARTICLE 72, UCMJ, and R.C.M. 1109

1a. TO: *(Name of Officer exercising general court-martial jurisdiction — Last, First, MI)*	2a. FROM: *(Name of Officer exercising special court martial jurisdiction. — Last, First, MI)*
b. TITLE	b. TITLE
c. ORGANIZATION	c. ORGANIZATION

3a. NAME OF PROBATIONER *(Last, First, MI)*	b. RANK	c. SSN	d. ORGANIZATION

4. DATA AS TO TRIAL BY COURT-MARTIAL. ATTACH A COPY OF THE COURT-MARTIAL ORDER AND ANY SUPPLEMENTARY ORDERS OR, IF NO COURT-MARTIAL ORDER HAS BEEN PROMULGATED OR IS AVAILABLE, ATTACH A SUMMARY OF THE CHARGES AND SPECIFICATIONS, FINDINGS, SENTENCE, INITIAL ACTION, AND ANY SUPPLEMENTARY ACTIONS. ATTACH A COPY OF THE WRITTEN NOTICE OF SUSPENSION [*see* R.C.M. 1108(c)].

5. ALLEGED VIOLATION(S) OF THE CONDITIONS OF SUSPENSION. (BRIEF STATEMENT AND DATE. *See* R.C.M. 1108(c) AND 1109(a) CONCERNING THE CONDITIONS OF SUSPENSION.)

(Check appropriate answer)	YES	NO
6. PURSUANT TO THE PROVISIONS OF ARTICLE 72, UCMJ, AND R.C.M. 1109, A HEARING WAS HELD ON THE ALLEGED VIOLATION(S) OF THE CONDITIONS OF SUSPENSION.		
7. BEFORE THE HEARING THE AUTHORITY CONDUCTING THE HEARING CAUSED THE PROBATIONER TO BE NOTIFIED OF [*see* R.C.M. 1109(d)(1)(B)]:		
a. THE TIME, PLACE, AND PURPOSE OF THE HEARING.		
b. THE RIGHT TO BE PRESENT AT THE HEARING.		
c. THE ALLEGED VIOLATION(S) OF THE CONDITIONS OF SUSPENSION AND THE EVIDENCE EXPECTED TO BE RELIED ON.		
d. THE RIGHT TO BE REPRESENTED AT THE HEARING BY CIVILIAN COUNSEL PROVIDED BY THE PROBATIONER OR, UPON REQUEST, BY MILITARY COUNSEL DETAILED FOR THIS PURPOSE.		
e. THE OPPORTUNITY TO BE HEARD, TO PRESENT WITNESSES AND OTHER EVIDENCE, AND THE RIGHT TO CONFRONT AND CROSS-EXAMINE ADVERSE WITNESSES UNLESS THE HEARING OFFICER DETERMINES THAT THERE IS GOOD CAUSE FOR NOT ALLOWING CONFRONTATION AND CROSS-EXAMINATION.		
8a. THE PROBATIONER REQUESTED DETAILED MILITARY COUNSEL.		

b. NAME OF DETAILED COUNSEL *(Last, First, MI)*	c. RANK	d. ORGANIZATION

e. DETAILED COUNSEL WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(b), UCMJ, and R.C.M. 502(d).		

NOTE: If this form is used and additional space is required for any item, enter the additional material in Block 18 or on a separate sheet. Identify such material with the proper heading *(Example: "3d")*. Securely attach any additional sheet(s) and add a note in the appropriate item: "See Block 18" or "See additional sheet." This form may be used to vacate a suspended special court-martial sentence not including a bad-conduct discharge or a suspended summary court-martial sentence under R.C.M. 1109(c) by lining through or altering the form, as appropriate.

DD FORM 455 84 AUG — EDITION OF OCT 69 IS OBSOLETE.

(Check appropriate answer)	YES	NO
9a. THE PROBATIONER INDICATED THAT HE/SHE WOULD BE REPRESENTED BY CIVILIAN COUNSEL PROVIDED BY HIM/~~HER~~		X
b. NAME OF CIVILIAN COUNSEL (Last, First, MI) / c. ADDRESS OF CIVILIAN COUNSEL		
d. ENTRY OF APPEARANCE BY PROBATIONER'S CIVILIAN COUNSEL. I HEREBY ENTER MY APPEARANCE FOR THE ABOVE NAMED PROBATIONER AND REPRESENT THAT I AM A MEMBER IN GOOD STANDING OF THE FOLLOWING BAR(S) (LIST) OR LICENSED OR OTHERWISE AUTHORIZED TO PRACTICE LAW (EXPLAIN) [see R.C.M. 502(d)(3) CONCERNING QUALIFICATIONS]:		
e. SIGNATURE OF COUNSEL / f. DATE		
10a. DETAILED COUNSEL OR CIVILIAN COUNSEL WAS PRESENT THROUGHOUT THE PROCEEDINGS. *(If probationer waives the right to have counsel present throughout part or all of the proceedings after requesting detailed counsel or employing civilian counsel, complete b below.)*	X	
b. STATE CIRCUMSTANCES AND SPECIFIC PROCEEDINGS CONDUCTED IN ABSENCE OF COUNSEL.		
11 *(To be signed by probationer if answer to items 8 or 9 was "No." If probationer fails to sign, the hearing officer shall explain in Item 18.)* I have been informed and understand my right under R.C.M. 1109(d) to representation at this hearing by civilian counsel provided by me or upon request, by detailed military counsel. I hereby knowingly waive my right to such: a. ☐ Detailed Counsel b. ☒ Civilian Counsel		
c. SIGNATURE OF PROBATIONER: Timothy L. Little / d. DATE: 4 August 19CY		
12a. THE PROBATIONER WAS AFFORDED THE RIGHT TO OBTAIN WITNESSES AND PRODUCE EVIDENCE [see R.C.M. 405(g)]	X	
b. IN THE PRESENCE OF PROBATIONER I QUESTIONED UNDER OATH ALL AVAILABLE WITNESSES AND EXAMINED DOCUMENTARY AND REAL EVIDENCE FOR BOTH SIDES. ANY DOCUMENTS AND REAL EVIDENCE WERE SHOWN TO THE PROBATIONER.	X	
c. THE PROBATIONER WAS AFFORDED THE RIGHT TO CROSS-EXAMINE ALL AVAILABLE WITNESSES.	X	
d. I HAVE SUMMARIZED THE EVIDENCE CONSIDERED IN EXHIBIT 1	X	
e. THE FOLLOWING WITNESSES REQUESTED BY THE ACCUSED WERE NOT AVAILABLE UNDER R.C.M. 405(g) FOR THE REASONS INDICATED. *(Explain why requested witnesses were unavailable and any alternatives to testimony under R.C.M. 405(g)(4) used.)*		

NAME (Last, First, MI)	REASON UNAVAILABLE	ALTERNATIVES

13. AFTER HAVING BEEN INFORMED OF THE RIGHT TO REMAIN SILENT OR MAKE A STATEMENT, THE PROBATIONER a. INDICATED THAT HE/~~SHE~~ DID NOT WISH TO MAKE A STATEMENT.	X	
b. MADE A STATEMENT SUMMARIZED IN EXHIBIT _____		X

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Appendix V-b(2)

(Check appropriate answer)	YES	NO
14a. THERE ARE REASONABLE GROUNDS TO BELIEVE THAT THE PROBATIONER NOW OR AT THE TIME OF THE ALLEGED VIOLATION WAS NOT MENTALLY RESPONSIBLE (see R.C.M. 916(k)) OR IS NOW INCOMPETENT TO PARTICIPATE IN THE VACATION PROCEEDING (see R.C.M. 909).		X
b. INDICATE THE GROUNDS FOR SUCH BELIEF AND THE ACTION TAKEN.		
c. A REPORT OF MEDICAL OFFICERS UNDER R.C.M. 706 IS ATTACHED IN EXHIBIT ____		X
15. IF PROBATIONER WAS CONFINED PENDING VACATION PROCEEDINGS UNDER R.C.M. 1109(c)		
a. I FIND THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THE PROBATIONER VIOLATED THE CONDITIONS OF SUSPENSION.	X	
b. I DO NOT FIND THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THE PROBATIONER VIOLATED THE CONDITIONS OF SUSPENSION AND ORDER HIS/HER RELEASE UNDER R.C.M. 1109(d)(1)(E).		
16. RECOMMENDATION OF THE OFFICER EXERCISING SPECIAL COURT-MARTIAL JURISDICTION OVER THE PROBATIONER.		
a. I RECOMMEND THAT THE SUSPENSION OF THE SENTENCE BE VACATED. (Indicate type and amount of punishment, if any, to be vacated.) Bad conduct discharge and confinement for 11 months.	X	
b. I RECOMMEND THAT THE PROCEEDINGS TO VACATE SUSPENSION BE DROPPED.		X
c. I RECOMMEND (state other recommendation):		

17a. NAME OF OFFICER EXERCISING SPECIAL COURT MARTIAL JURISDICTION OVER PROBATIONER	b. RANK	c. ORGANIZATION
James F. Harper	CAPT/USN	USS NEVERSAIL (AS 00)
d. SIGNATURE James F. Harper		e. DATE 6 August 19CY

18. REMARKS

The testimony of LT R. B. Snodgrass, SC, USN, Supply Officer, USS NEVERSAIL (AS 00), establishes that the probationer was an unauthorized absentee during the time alleged; [Exhibit 1]. Given the fact that this occurred during the period of suspension in this case, and therefore a violation of the conditions of suspension, it is my recommendation that the suspension of the bad conduct discharge and confinement for 11 months in this case be vacated and that the punishment be executed.

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Appendix V-b(3)

REMARKS (Continued)

(Check appropriate answer)	YES	NO
19. DECISION OF THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION OVER PROBATIONER.		
a. VACATE SUSPENSION OF THE SENTENCE TO (specify type/amount of punishment to be vacated): Bad conduct discharge and confinement for 11 months.	X	
b. NOT TO VACATE.		

c. OTHER (specify).

d. IF DECISION IS TO VACATE, INDICATE EVIDENCE RELIED ON:
The undisputed testimony of Lt R. B. Snodgrass, SC, USN, clearly establishes the fact that SHSR Little was, in fact, an unauthorized absentee during the period alleged. The probationer has not presented any evidence which would tend to disprove the alleged violation nor any matters in extenuation or mitigation.

e. IF DECISION IS TO VACATE, INDICATE REASONS FOR VACATING:
The conduct of the probationer, particularly in light of the opportunity given him to redeem himself by suspending the punishment awarded at court-martial, is of such a serious nature as to warrant vacation of the suspended bad conduct discharge and confinement.

20a. NAME OF OFFICER EXERCISING GENERAL COURT MARTIAL JURISDICTION OVER PROBATIONER	b. RANK	c. ORGANIZATION
James T. Lawson	VADM/USN	U.S. Sixth Fleet

d. SIGNATURE James T. Lawson

e. DATE 8 August 19CY

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Appendix V-b(4)

MILITARY JUSTICE STUDY GUIDE

SECTION THREE

FOREWORD

This section is provided for use by the commander and the legal officer as a basic reference to commonly encountered offenses under the Uniform Code of Military Justice [hereinafter UCMJ]. Although this section reflects general principles of military criminal law as of the revision date, its coverage is not exhaustive, and military law is always changing. Thus, it is always wise to consult a judge advocate before taking action on a criminal law problem.

This section reflects the provisions of the *Manual for Courts-Martial, 1984* [hereinafter MCM, 1984]. MCM, 1984, became effective 1 August 1984. Accordingly, the discussion herein may not necessarily apply to offenses committed prior to 1 August 1984 [which are governed by the *Manual for Courts-Martial, 1969 (Rev.)*].

CHAPTER XV

BASIC CONCEPTS OF CRIMINAL LIABILITY

A. **Introduction**. Although this section of the *Military Justice Study Guide* is intended to be a practical guide to military/criminal law, certain basic theoretical concepts are important to an understanding of the various military offenses. Criminal law defines criminal liability. The purpose of criminal law is to define under what circumstances an individual's actions result in a criminal penalty (such as a fine, imprisonment, or even death). To convict an accused of a crime, the prosecution, representing the government, must prove beyond a reasonable doubt that the accused committed certain specific acts which constitute an offense. Many offenses also require the prosecution prove that the accused had a specific intent or state of mind when committing the required acts. Therefore, underlying each offense are two specific concepts which together constitute criminal liability: (1) specific acts, and (2) the accused's state of mind. In every case, the question of whether the accused committed a crime will turn upon these two concepts.

B. **Elements of the offense**. Each specific offense (e.g., larceny, assault, or unauthorized absence) is defined in terms of specific facts that the prosecution must prove in order to convict the accused. Such specific facts are called the elements of the offense.

This text lists the elements of each offense discussed. Another generally reliable source of the elements of offenses is Part IV of MCM, 1984, which provides a discussion of most of the offenses under the UCMJ and contains a listing of elements for each offense discussed. Caution is required when using Part IV of the *Manual*. The *Manual* does not discuss all possible UCMJ offenses. Also, the *Manual* may not reflect recent judicial interpretations of certain offenses, which would take precedence over the *Manual*'s provisions. A third generally reliable reference on the elements of the various offenses is the *Military Judges' Benchbook* (DA Pam No. 27-9, 1982).

C. **State of mind**. In addition to the accused's acts, the concept of criminal liability also involves the accused's state of mind or intent. This mental element of criminal liability is often referred to as mens rea, or "mind at fault." Criminal offenses may be classified according to the type of intent or state of mind required for conviction. Among the states of mind or intents recognized by military law are: (1) general intent, (2) specific intent, (3) negligence, (4) knowledge, and (5) willfulness.

1. **General intent offenses**. In order to convict an accused of a general intent offense, the prosecution need not prove that the accused entertained any specific intent or state of mind. The fact that the accused committed a prohibited act will give rise to an inference that the accused intended to commit the offense. The law recognizes that people usually intend the natural and probable consequences of their actions. This inference, however, may be rejected by the court where the evidence suggests that the accused's actions were accidental. Thus, where the accused threw a ball and hit a child who suddenly walked out onto the playing field, the accused intended to throw the ball but did not intend to hit the victim. It was an accident that the victim was hit; therefore, the accused is not guilty of assault and battery.

2. **Specific intent offenses**. Specific intent offenses are those which require that the accused had a specific intent or state of mind. Specific intent involves a further purpose than mere commission of the act. For example, the intentional taking of property from another represents only a general intent. Such an act, however, could be accompanied by a further purpose, or specific intent, to deprive that person of the property permanently. Such a taking with that specific intent constitutes larceny, a specific intent offense.

3. **Negligence offenses**. Under certain circumstances, a person may be criminally liable for unintentional conduct. Negligence is unintentional conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It can also be defined as the failure of a person to exercise the care that a reasonably prudent person would exercise under similar circumstances. The UCMJ recognizes a number of negligence offenses. The degree of negligence required for conviction varies depending upon the offense. There are three degrees of negligence: simple negligence, culpable negligence, and wantonness.

a. **Simple negligence**. Simple negligence is the less severe form of negligence. All that is required to convict an accused of such an offense is proof beyond a reasonable doubt that the accused failed to recognize a substantial unreasonable risk which a reasonably prudent person in similar circumstances would have recognized. For example, a person who is involved in an accident while operating a military vehicle while drunk may be guilty of damaging government property through neglect. Negligent homicide and dereliction of duty are two other examples which require only simple negligence.

b. **Culpable negligence**. Culpable negligence is a degree of negligence greater than simple negligence. Another term used for culpable negligence is recklessness. This form of negligence exists where an accused recognizes a substantial unreasonable risk yet consciously disregards that foreseeable risk. Thus, a person who practices fast draws with a loaded .45 pistol and, as a result, unintentionally shoots a bystander, has acted in a culpably negligent manner. It is

reasonably foreseeable that the bystander would be hit by an accidental discharge of the weapon; therefore, the would-be fast-draw artist is guilty of aggravated assault.

c. **Wanton offenses**. Wantonness is an act or omission done with a heedless disregard or indifference for known, probable, serious consequences. For example, throwing a live grenade into a group as a joke to watch everyone scatter shows a wanton disregard for human life. It is highly probable that, when the grenade goes off, people might be injured or killed. Should death result, even though "unintended," the accused would be guilty of murder. It is disregard for the probable consequences.

4. **Knowledge offenses**. Closely related to the concept of specific intent is knowledge. Some offenses require that the accused possess certain knowledge when committing or omitting to do certain acts. For example, to be guilty of disrespect to a superior, the accused must have known that the victim was superior. Or, before an accused can be found guilty of failure to go to an appointed place of duty, the prosecution must prove that the accused knew where the appointed place of duty was and knew the time required to be there.

5. **Willfulness offenses**. Also closely related to the concept of specific intent is willfulness. In fact, willfulness has been recognized by the courts as being the equivalent of specific intent. Therefore, in offenses such as willful disobedience of orders of superiors or willful destruction of property, proof that the accused intended to disobey or destroy is sufficient to fulfill the required element of willfulness. In some instances, it may merely mean the mere willingness to do or not do an act. In other instances, it may mean to do or not to do an act voluntarily with a bad purpose.

D. **Motive**. A popular misconception is that, in order to convict an accused of a crime, the prosecution must establish that the accused had a motive for committing the offense. Motive is not intent, and it is not an element of an offense. The prosecution's failure to prove a motive will not, by itself, result in an acquittal. (Of course, proof of a motive can be helpful circumstantial evidence that it was the accused who committed the offense.) Nor will an evil motive be a substitute for a required specific intent in the prosecution of a specific intent offense. The concepts of motive and intent should not be confused. For instance, if an accused takes another's radio for the purpose of teaching the owner a lesson (not to leave gear unsecured), the motive may be noble, but the intent is still to at least temporarily deprive the owner of his/her property. This is sufficient for a finding of guilty to wrongful appropriation.

MILITARY JUSTICE STUDY GUIDE

CHAPTER XVI

PARTIES TO CRIME: PRINCIPALS AND ACCESSORIES AFTER THE FACT

A. **Introduction**. A party to a crime is one who, because of the involvement in a criminal act, is liable for punishment. The UCMJ classifies parties to crimes into two major groups: (1) principals, and (2) accessories after the fact. Principals include the perpetrator of the crime, any aiders and abettors, and any accessories before the fact. All principals are treated as if each had committed the crime and are subject to the same punishment. Accessories after the fact are subject to lesser punishment than the principals.

B. **Types of principals**. Under Article 77, UCMJ, the following three types of parties to a crime are considered principals:

1. **Perpetrator**: A perpetrator of a crime is one who actually commits the crime, either personally or by causing the crime to be done through an animate/ inanimate agency or innocent human agent.

2. **Aider and abettor**. An aider and abettor does not actually commit the crime but is present at the crime, participates in its commission, and shares in the criminal purpose. A person is present for purposes of being an aider and abettor when in a position to aid the perpetrator to complete the crime. Thus, the getaway car driver who waits outside the bank is present for purposes of being an aider and abettor. Likewise, a lookout who is stationed down the street to watch for police while the perpetrator breaks into a jewelry store is also "present." Participation for purposes of being an aider and abettor requires that the aider and abettor actively participate in the crime by assisting the perpetrator. A mere bystander who doesn't try to stop the perpetrator is not an aider and abettor. Generally, a private citizen has no legal duty to attempt to stop a crime from being committed. A person such as a guard or night watchman, however, who has a special legal duty to prevent or stop a crime, may become an aider and abettor by failing to take action. Finally, the aider and abettor must act with the specific purpose of assisting the perpetrator. A person who innocently assists a perpetrator, not knowing that the perpetrator is committing a crime, would not be an aider and abettor.

3. **Accessory before the fact.** An accessory before the fact is one who counsels, commands, procures, or causes another to commit an offense. The advice must be given with the intent to encourage and promote the crime. He need not be present at the crime, nor participate in the actual commission of the offense. Thus, the husband who hires a "hit man" to kill his wife would be an accessory before the fact. The woman who encourages her friend to solve his financial problems by robbing a bank would also be an accessory before the fact, even though she may not share the loot.

C. **Scope of criminal liability of principals.** A principal is criminally liable for all crimes committed by another principal if those crimes are the natural and probable consequences of the common design.

a. **Example.** Rollo, the mastermind, plans a burglary and remains in the hideout waiting to count the loot. Rollo is guilty of murder if Willy, the perpetrator, kills the homeowner while carrying out the burglary. A natural and probable consequence of burglary is violence, which may result in death. Burglary involves an invasion of another's "castle." Even though the conspirators had agreed not to resort to violence in any event, if violence incidentally results, all principals are responsible therefor because it can be reasonably expected to occur, in spite of the "agreement."

b. **Contra-example:** Rollo and Willy enter into a common purpose for a purse snatching, to be accomplished in the middle of Grand Central Station at midnight. Willy waits outside in a get-away car while Rollo enters to do the job. After snatching the purse, monetary greed gives way to a strong urge and Rollo attempts to rape the victim. Willy may be convicted of larceny, but not of attempted rape. The rape was not an incidental result of the commission of the crime of larceny, nor could it reasonably be expected to occur. In short, it was not a natural and probable consequence.

D. **Withdrawal by accessory before the fact and aider and abettor.** An accessory before the fact and an aider and abettor may escape criminal liability by unequivocally disassociating themselves from the crime before the perpetrator commits the offense. For the withdrawal to be effective, three requirements must be met. First, the accused must effectively countermand or negate any assistance, etc., previously given. Second, the accessory and aider and abettor must communicate their withdrawal in unequivocal terms to all the perpetrators or to appropriate law enforcement authorities in time for the perpetrators to abandon the plan or for the authorities to prevent the offense. Finally, the communication must be made before the perpetrator commits the offense. Once the offense is committed, it is too late to withdraw.

There is no requirement that the perpetrator be convicted, or even tried, before trying the other principals. In fact, if the perpetrator is tried and acquitted, both the aider and abettor or accessory before the fact can be convicted. What is required at the trial of the aider or accessory before the fact is proof that the crime was committed. This may be established by using the same proof the government presented at the perpetrator's trial. If the perpetrator is tried first, and convicted, the government may not introduce evidence of that conviction as proof of the crime.

Example: Withdrawal by accessory before the fact. A hires B to murder her husband. She then has a change of heart and calls B and informs B that the deal is off, that she doesn't want B to kill her husband, and that she will not pay any hit money. B then goes ahead and kills Mr. A for practice. A is not an accessory before the fact because she effectively withdrew her request. Suppose, however, that when A tells B that the deal's off, B informs A that it's too late because B has already killed Mr. A. A is guilty of murder as an accessory before the fact, even though she didn't know that the crime had already been committed.

Example: Withdrawal by aider and abettor. A and B agree to rob a liquor store. A will actually go into the store, while B waits outside as a lookout. Before A enters the store, B says, "A, I want no part of this. I'm not going to help you." B drives home, but A stays and robs the store. B is not guilty as an aider and abettor to the robbery. He communicated his unequivocal withdrawal before the robbery was committed and effectively countermanded his previous assistance.

E. Accessory after the fact

1. **Elements of the offense**. Article 78, UCMJ, provides that one who is an accessory after the fact to a crime has committed a separate and distinct offense. Therefore, in order to convict an accused of being an accessory after the fact, the prosecution must prove beyond reasonable doubt that:

a. An offense punishable by the UCMJ was committed by a certain principal at the designated time and place;

b. the accused (the alleged accessory after the fact) knew that the principal had committed the offense;

c. the accused thereafter received, comforted, or assisted the principal in some manner; and

d. the accused so acted in order to hinder or prevent the principal's apprehension, trial, or punishment.

2. **The principal's offense**. In reality, two crimes must be proven in every accessory after the fact prosecution: (1) the principal's crime, and (2) the accessory's crime of illegally assisting the principal to escape apprehension, trial, or punishment. The principal need not be a person subject to the UCMJ, but the crime must be one that is recognized by it. There is no requirement that the principal be prosecuted and convicted before the accessory after the fact is prosecuted. Although the principal is usually prosecuted first, in some cases the principal may be dead or still at large. The fact that the principal has been convicted of the crime cannot be used at the accessory's trial to prove that the principal committed an offense. Conversely, the fact that the principal has been tried and acquitted of the offense does not prevent prosecution and conviction of the accessory after the fact.

> **For example**: A shoots B. C knows A shot B and helps A conceal the weapon. B dies shortly thereafter. A is guilty of murder; C is guilty of accessory after the fact to assault with the intent to commit murder. C is not guilty of being an accessory after the fact to murder because B had not yet died at the time C rendered A assistance. *See United States v. Wilson*, 7 M.J. 997 (A.F.C.M.R.), *petition denied*, 8 M.J. 181 (1979).

3. **The accessory's knowledge**. The prosecution must prove beyond a reasonable doubt that the accessory knew that the principal had committed the offense. Knowledge, for purposes of article 78, must be actual knowledge that the principal had committed the offense. The accessory, however, need not have actually witnessed the commission of the crime, but may have learned about it from third parties. The accessory is liable only for those crimes that he has knowledge of.

4. **The accessory's assistance**. Article 78, UCMJ, defines an accessory after the fact as one who "receives, comforts, or assists" the principal. "Receives" refers to harboring, sheltering, or concealing the principal. "Comforts" includes providing food, clothing, transportation, and money to the principal. "Assists" includes any act which aids the principal's efforts to avoid detection, apprehension, prosecution, conviction, or punishment. Such assistance would include acts such as concealing the fact that the crime had been committed, destroying evidence, making false reports to the police, or helping the principal escape. Mere failure to report a known offense, by itself, does not make one an accessory after the fact. There must be some active assistance rendered to the perpetrator. (Failure to report an offense

may be a violation of Article 1137, *U.S. Navy Regulations, 1990*, chargeable under Article 92, UCMJ, or Misprision of a Felony under Article 134, UCMJ.)

5. **The accessory's intent**. Accessory after the fact is a specific intent offense. The prosecution must prove beyond reasonable doubt that the accused assisted the principal in order to help the principal avoid apprehension, trial, or punishment. The type of assistance given may be strong circumstantial evidence of the accused's criminal intent. It is almost impossible, for example, to infer any innocent intent on the part of a person who helps a principal dismember a corpse with a chainsaw. On the other hand, the principal's wife, who washes his shirt, thereby destroying traces of the victim's blood which would be important evidence, may have done so for perfectly innocent reasons.

6. **Reduced punishment**. Although a party to the crime, an accessory after the fact's involvement is considered less serious than that of the principal. Therefore, the maximum confinement for an accessory after the fact is one-half that authorized for the principle offense, but not more than ten years. The death penalty may not be imposed. The accessory is subject to the same maximum sentence with respect to punitive discharge, forfeitures, and reduction in pay grade as the principal.

F. Pleading offenses by principals and by accessories after the fact

1. **Principals**. An offense by any type of principal is pleaded as though done by the perpetrator. Thus, in a specification alleging an offense by an aider and abettor, it is unnecessary to indicate that the accused was an aider and abettor. The specification is worded as if the aider and abettor committed the offense himself. Article 77 itself is a nonpunitive descriptive article and is never charged as the basis of any substantive offense. Sample specifications for each offense are produced in Part IV, MCM, 1984.

a. **Example**: A and B get into an argument with V. A and B together produce knives and make jabbing motions at V, resulting in two wounds -- one of which proves fatal. Under these circumstances, A may be charged as if he were the perpetrator of the fatal blow. It will not be necessary to determine who actually delivered the fatal blow. If it were A, his guilt as a principal would be clear; and, if it were B, the evidence is sufficient to show A's guilt as an aider and abettor. *United States v. Crocker*, 35 C.M.R. 725 (A.B.R. 1964), *petition denied*, 15 C.M.A. 677, 37 C.M.R. 471 (1965).

b. **Sample pleading.** In the stabbing example discussed immediately above, both A and B would be charged as follows:

Charge: Violation of the Uniform Code of Military Justice, Article 118.

Specification: In that (A or B), did, at (place), on or about (date), murder V by stabbing him in the back with a knife.

c. **Example**: A and B get into an argument with V over V's relationship with A's wife. The argument becomes heated and develops into fist-a-cuffs between A and V. When V makes some unsavory remarks about A's wife, A becomes furious. B is standing at the sidelines, sees a metal pipe, picks it up and hands it to A, shouting, "Kill him! Kill him!" A strikes V with the pipe and kills him. A is guilty of manslaughter, while B is guilty of murder.

c. **Sample pleadings.** In the death example immediately above, A and B would be charged as follows:

(1) Charge: Violation of the Uniform Code of Military Justice, Article 119.

Specification: In that A did, at (place), on or about (date), unlawfully kill V by striking him on the head with a metal pipe.

(2) Charge: Violation of the Uniform Code of Military Justice, Article 118.

Specification: In that B did, at (place), on or about (date), murder V by striking him on the head with a metal pipe.

2. **Accessories after the fact**

a. **General guidelines.** Follow the format of the sample specification in Part IV, para. 3f, MCM, 1984. Note that the specification must state the specific offense committed by the principal as well as the specific acts by the accused that assisted the principal.

b. **Sample pleading**

Charge: **Violation of the Uniform Code of Military Justice, Article 78.**

Specification: In that Seaman John Doe, U.S. Navy, Naval Education and Training Center, Newport, Rhode Island, on active duty, knowing that, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 19CY, Fireman William K. Felonious, U.S. Navy, had committed an offense punishable by the Uniform Code of Military Justice, to wit: Larceny of a radio, of a value of about $52.00, the property of Jonas Panasonic, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 19CY, in order to prevent the apprehension of the said Fireman Felonious, assist the said Fireman Felonious by hiding him under a lifeboat cover.

MILITARY JUSTICE STUDY GUIDE

CHAPTER XVII

SOLICITATION, CONSPIRACY, AND ATTEMPTS

A. **Introduction**. The UCMJ prohibits a range of various types of criminal conduct. Not only is a completed crime punishable, but certain acts short of a completed crime, if done with criminal intent, are also prohibited. The concepts of principals to a completed crime and accessories after the fact were discussed in chapter XVI. This chapter will discuss the three distinct types of criminal acts which fall short of the completed crime, and which occur chronologically before the completed crime: solicitation, conspiracy, and attempts.

B. **Solicitation**

1. **Concept of criminal solicitation**. A criminal solicitation is any statement or conduct which constitutes a serious request or advice to another to commit an offense. The gravamen of the offense is the "corruption" caused by "planting the seed" or idea to commit a crime. This is a specific intent offense which requires that the accused actually intended that the act solicited be carried out. The offense of solicitation, however, is completed as soon as the advice or request is made. The fact that the solicited crime was not attempted or completed is no defense.

2. **Prosecution under articles 82 and 134**. Two separate articles of the UCMJ prohibit solicitation. Article 82 is limited to solicitations to commit one of four specific crimes: desertion, mutiny, misbehavior before the enemy, and sedition. Solicitation to commit <u>any other offense</u> against the Code is prosecuted under article 134.

3. **Elements of solicitation**. Although solicitation is prosecuted under both article 82 and article 134, the elements of solicitation under each article are substantially similar. In order to convict the accused of solicitation, the prosecution must prove beyond reasonable doubt that:

a. At the designated time and place, the accused made certain statements, did certain acts, or exhibited conduct that constituted a request, advice, or counsel to another person;

b. such statements, acts, or conduct constituted a solicitation or advice to commit:

(1) [article 82 solicitations] the offense of desertion, mutiny, misbehavior before the enemy, or sedition; or

(2) [article 134 solicitations] an offense against the UCMJ;

c. that the accused did so with the intent that the offense actually be committed; and

d. [article 134 solicitations only] under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces.

4. **Relationship to completed crime**. The fact that the person solicited did not act on the advice or request is not a defense. On the other hand, when the person solicited completes the crime that the solicitor requested or advised, the solicitor should be charged with the completed crime because he/she is now an accessory before the fact. The maximum punishment for solicitation is also related to the completed or intended offense. Solicitations under article 134 are subject to the same maximum punishment as the intended offense, except that neither the death penalty nor confinement in excess of five years may be imposed. (There is one exception to this rule: solicitation to commit espionage does carry a life sentence under Article 134.) For the various maximum punishments under article 82 (which may include the death penalty in certain cases), see Part IV, para. 6e, MCM, 1984.

5. **Pleading**. Pleading formats under articles 82 and 134 are essentially similar. See Part IV, para. 6f, MCM, 1984 for article 82 solicitations. *See* Part IV, para. 105f, MCM, 1984 for solicitations under article 134. In article 82 pleadings, the intended offense is merely referred to by name and Code article. In article 134 pleadings, the intended offense is described more specifically. The following sample pleading for an article 134 solicitation demonstrates the general format for pleading both article 134 and article 82 solicitations.

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Seaman Apprentice Roger Seeker, U.S. Navy, USS PLANKTON, on active duty, did, on board USS PLANKTON, located at San Diego, California, on or about 6 July 19CY, wrongfully solicit Seaman Innocent Dupe, U.S. Navy, to steal one 1971 Chevy sedan, of a value of about $200, the property of Ensign Andrew Teek, U.S. Navy, by saying to said Seaman Dupe, "If you'll steal Teek's old Chevy for me, I'll give you fifty bucks," or words to that effect.

C. Conspiracy

1. **Concept of conspiracy**. A conspiracy is an agreement by two or more persons to commit an offense against the UCMJ, accompanied by the performance of an act by at least one of the conspirators to accomplish the criminal object of the conspiracy. Conspiracy is a separate and distinct offense from the intended crime. Thus, the fact that the intended crime was never committed is no defense. On the other hand, if the intended crime is completed, the conspirators are criminally liable for both the intended crime and for the separate offense of conspiracy in violation of article 81 of the Code. The maximum authorized punishment for conspiracy is the same as for the intended crime, except that the death penalty may not be imposed for conspiracy.

2. **Elements of the offense**. In order to convict an accused of conspiracy, in violation of article 81, the prosecution must prove beyond reasonable doubt that:

a. At the designated time and place, the accused entered into an agreement with a certain named person or persons to commit an offense under the UCMJ; and

b. while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or a co-conspirator performed one or more overt acts, as alleged in the specification, with the purpose of effecting the criminal object of the agreement.

3. **Form of the agreement**. The required agreement need not be a detailed "master plan." No specific form of agreement is required. The agreement to commit a crime need not specify the means to be used nor the part each

conspirator is to play. All that is required to satisfy the agreement requirement is that the conspirators agree to commit an offense against the Code. Thus, if A says to B, "Let's rob the liquor store tonight," and B says "Okay," A and B have entered into an agreement within the meaning of article 81. However, mere idle talk about committing some indefinite crime in the future is not, under most circumstances, a sufficient agreement. Whether or not the alleged conspirators actually entered into an agreement to commit an offense is a factual question to be decided by the members of the court or, in a judge-alone trial, by the military judge.

4. **Parties to the agreement.** At least two persons are required for a conspiracy. None of the accused's fellow conspirators need be persons subject to the UCMJ. Thus, Seaman A can be convicted of conspiracy even though all his co-conspirators were civilians. (Of course, all the requirements for subject-matter jurisdiction over the conspiracy must be met.) If the only other member of a conspiracy is a government agent or informant, however, there can be no conspiracy.

5. **The overt act.** The second element of conspiracy requires that one of the conspirators must commit an overt act in furtherance of the conspiracy. The overt act must be something other than the mere act of agreeing to commit the crime. Any act in preparation for the crime is sufficient. Also, any attempt to commit the intended crime, or the commission of the crime itself, will likewise satisfy the requirement for an overt act. The overt act need not be one committed by the accused: an overt act by any of the alleged members of the conspiracy will suffice. The law considers the act of one conspirator in furtherance of the conspiracy to be the act of all the conspirators. Suppose, therefore, that A and B agree to burn down the Naval Justice School. B buys a gallon of gasoline to start the fire. Both A and B are guilty of conspiracy to commit arson. Even though A may have committed no overt act himself, B's act in furtherance of the conspiracy will be imputed to A.

6. **Relationship to intended crime**

a. **Criminal liability of conspirators.** Conspiracy is a separate offense from the intended crime. The fact that the intended crime was never attempted or completed is no defense to a conspiracy charge. If the intended crime is committed, however, all conspirators will be criminally liable not only for the conspiracy, but also as principals for the completed crime. Suppose, therefore, that A, B, and C conspire to murder D. A and B provide C with the pistol, a disguise, and a stolen getaway car. C goes off by herself and kills D. A, B, and C will all be guilty of both conspiracy to commit murder and murder itself, even though only C did the actual killing. Thus, all conspirators are accessories before the fact to the completed crime, and are considered principals. Moreover, all conspirators are liable as principals for any other crime committed by any conspirator acting in furtherance of the conspiracy.

b. **Intended offenses requiring concert of action.** Some offenses (such as adultery, consensual sodomy, bigamy, and dueling) require a concert of action by at least two guilty people. Suppose that A and B agree to commit adultery with each other. By legal (and physiological) definition, the offense of adultery requires a concert of action by at least two persons. Therefore, A and B cannot be prosecuted for conspiracy to commit adultery. These situations are uncommon, however, since most offenses can be completed by one person.

7. **Withdrawal.** A conspirator may withdraw from the conspiracy and escape criminal liability for the conspiracy and for the intended crime. An effective withdrawal must consist of affirmative conduct which is wholly inconsistent with adherence to the unlawful agreement and which shows that the withdrawer has severed all connection with the conspiracy. (This may be by unequivocally communicating one's desire to get out of the conspiracy to the other conspirators in time for them to abandon the plan. This requirement is also satisfied when a conspirator reveals the plan to the police and is instructed to carry out a part in order to assist the authorities.) The withdrawal must be made before any conspirator commits an overt act in furtherance of the conspiracy. If the withdrawing conspirator makes an unequivocal, communicated, timely withdrawal, he will escape criminal liability for the conspiracy and for the completed crime. As a practical matter, however, conspirators seldom withdraw in time to avoid liability for the conspiracy charge. Since the overt act required for conspiracy need only be a preliminary preparation, and since it may be committed by any conspirator, the withdrawing conspirator's communication of the withdrawal usually occurs after the overt act. Under such circumstances, the conspirator is guilty of conspiracy, but will not be criminally liable for the completed crime.

8. **Pleading.** *See* Part IV, para. 5f, MCM, 1984.

Charge: Violation of the UCMJ, Article 81.

Specification: In that Fireman Apprentice Slip Ree Finger, U.S. Navy, USS DANGER, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 5 November 19CY, conspire with Seaman Constantine Spirator, U.S. Navy, to commit an offense under the Uniform Code of Military Justice, to wit: larceny of one rubber duck, of a value of $3.00, the property of Commander Tyrus Phoon, U.S. Navy, and, in order to effect the object of the conspiracy, the said Seaman Spirator did make a wax impression of the key to said Commander Phoon's quarters.

D. Attempts

1. **Concept of criminal attempts**. Article 80, UCMJ, defines a criminal attempt as an act, done with the specific intent to commit an offense against the Code, which amounts to more than mere preparation and which would tend to result in the intended crime being completed. The maximum authorized punishment for an attempt is the same punishment authorized for the intended crime; however, confinement may not exceed twenty years and the death penalty may not be imposed.

2. **Elements of the offense**. In order to convict an accused of an attempt, the prosecution must prove beyond reasonable doubt that:

a. The accused did a certain overt act;

b. the act was done with the specific intent to commit a certain offense under the UCMJ;

c. the act amounted to more than mere preparation (i.e., it was a direct movement toward the commission of the intended offense); and

d. the act apparently tended to result in the commission of the intended offense (i.e., the act would have resulted in the actual commission of the intended offense except for a circumstance unknown to the accused or the unexpected intervention of a circumstance which prevented completion of the offense).

3. **Specific intent to commit an offense**. The accused must have intended to commit an offense against the Code. Proof of this specific intent poses several problems.

a. **Proof of intent**. Proof of the accused's intent to commit an offense may be accomplished by direct or circumstantial evidence. (*See* chapter I of this text for a detailed discussion of direct and circumstantial evidence.) Very seldom is direct evidence available. Therefore, attempt prosecutions usually rely on circumstantial evidence. The overt act that the accused performed may itself be strong circumstantial evidence of the necessary criminal intent. The law assumes that people normally intend the natural and probable consequences of their acts. When the accused engages in conduct which normally leads to the commission of an offense, the intent to commit a crime may be inferred from his actions. Such an inference is not absolute or mandatory, and can be accepted or rejected by the trier of fact.

b. **Factual impossibility**. Suppose that A intends to murder B. A enters B's room at night and shoots at what appears to be B's sleeping form. In fact, the "victim" turns out to be a dummy that B placed in his bed in order to fool

A. A has committed attempted murder. He intended to commit murder. His overt act, shooting the gun, was more than mere preparation and would normally result in the murder being completed. Even though one cannot murder a dummy, a crime has been committed because A reasonably believed he was shooting B. The law recognizes that one is guilty of a criminal attempt if he purposely engages in conduct which would constitute the intended crime if the attendant circumstances were as he mistakenly believed them to be. Another common example of factual impossibility is the attempted drug sale. Suppose A sells B a substance that she reasonably believes is heroin, but it turns out to be a mixture of sugar and talc. A is not guilty of an actual distribution of heroin, because the substance wasn't actually heroin. Because A reasonably believed it was heroin, however, she will be guilty of attempted distribution of heroin.

4. **The overt act**. The overt act required for an attempt must be more than mere preparation. Distinguish, therefore, the overt act required for a conspiracy, an act which can be merely preparatory, and that required for attempts. The overt act in an attempt must be one which would normally result in the completion of the crime. In other words, the act sets in motion a sequence of events which will result in the completion of the crime, unless someone or something unexpectedly intervenes. Whether the required overt act has been committed is often a close question. For example, suppose that B wants to blow up a commercial airliner on which A is to travel. B obtains plans for an altitude-triggered bomb. He purchases the necessary supplies and constructs the bomb. He places the bomb in a suitcase and takes it to the airport. When B arrives at the airport, he checks the suitcase aboard the flight A is going to take. At what point did B's acts rise to the level of an attempt? Certainly, obtaining the plans and supplies and constructing the bomb would be merely preparatory acts. Checking the suitcase aboard the flight would obviously be more than mere preparation. However, intelligent arguments can be made for either side about the act of taking the suitcase to the airport. The question will be decided by the members of the court or, in a judge-alone trial, by the military judge.

5. **Relationship to completed offense**. An attempt is usually a lesser included offense of a completed crime. (For a detailed discussion of lesser included offenses, see chapter XVIII of this section of this text.) Therefore, when charging an accused with a completed crime, there is no need to separately charge the attempt to commit that crime. Suppose, for example, that A is charged with larceny. At trial, the evidence shows that A never completed the intended larceny; but she did perform the necessary overt act with the requisite intent for an attempt. She could be found guilty of the lesser included offense of attempted larceny. Like solicitation, but distinct from conspiracy, attempt merges with the completed offense to which it relates.

6. **Pleading**

a. **Charge under the correct article**. Like solicitations, attempts may be charged under several articles of the Code. Article 80, UCMJ, covers all criminal attempts except those which are specifically prohibited by another article. These specific attempts include: attempted desertion (article 85), attempted mutiny or sedition (article 94), attempt by subordinate to compel surrender (article 100), attempt to aid the enemy (article 104), attempted espionage (article 106a), and attempt-type assault (article 128).

b. **Sample specification**

> Charge: Violation of the Uniform Code of Military Justice, Article 80.
>
> Specification: In that Hull Technician Third Class Jacob Want, U.S. Navy, USS WEAKFISH, on active duty, did, on board USS WEAKFISH, located at Norfolk, Virginia, on or about 1 August 19CY, attempt to steal a Little Giant vacuum sweeper, of a value of about $65.00, the property of Seaman Kirby Hoover, U.S. Navy.

E. **The spectrum of crime**. This chapter has discussed the legal principles that also make it a crime for a servicemember to solicit another to commit an offense under the Code, to conspire with another to commit an offense under the Code, and to attempt to commit an offense under the Code. One who solicits, conspires, or attempts is criminally liable even though the intended crime is never completed. Then, again, if the crime is completed, the accused will be guilty of the completed crime and, usually, the conspiracy. Finally, as discussed in chapter XVI, one may commit the crime of accessory after the fact after the object crime is completed. The spectrum of crime may be visualized as follows.

Solicitation	Conspiracy	Attempt	The Completed Crime	Accessory After the Fact

(**NOTE**: Not every crime may possess all of these attributes.)

F. **The spectrum of criminals.** The spectrum of crime outlined above can be applied to the parties of crime discussed in chapter XVI. The spectrum of criminals may be visualized as follows.

Accessory Before the Fact	: Conspirator :	Aider and Abettor	: Perpetrator	: Accessory After the Fact

Generally, a person who counsels, procures, commands, or causes another to commit an offense becomes an accessory before the fact and is guilty of the crime of solicitation if the crime is not completed. Upon completion of the crime, the accessory before the fact becomes liable as a principal for the completed crime, the crime of solicitation, absent a separate time-and-place factor, merging with the completed crime. An accessory before the fact who goes to the scene of the crime and participates in the commission of the crime also becomes an aider and abettor, and guilty of the crime completed. If the crime is not completed, but an act beyond mere preparation has been committed, the accessory before the fact/aider and abettor is guilty of solicitation and attempt. On the other hand, because conspiracy and the completed crime never merge, the conspirator is always guilty of conspiracy, and, depending upon whether the crime is completed or not, may also be guilty of solicitation, attempt, and the completed crime.

REVIEW QUESTION

Lieutenant Smith and Lieutenant Jones, two lawyer students, with nothing better to do for the evening, decide that they do not want to chance flunking the Criminal Law Exam, so they agree to break into Major Wilson's office during the night to obtain an advance copy. Pursuant to their plan, Smith (accompanied by Jones) drives his vehicle to the back of the Justice School at 0200 Friday morning. Upon arriving at the school, Smith has a change of heart and decides that a life of crime is not for him. Accordingly, he informs Jones that their deal is off and that, should he intend to pursue the criminal venture, he will immediately inform the authorities. Jones tells him to buzz off, and proceeds to break into the Justice School and steal the Criminal Law Exam. He is later apprehended and is given immunity from prosecution to testify against Smith. At Smith's trial, what would the appropriate result be?

A. Smith should be acquitted of all charges.

B. Smith should be found guilty of conspiracy to commit larceny as well as the resulting housebreaking and larceny.

C. Smith should be found guilty of conspiracy to commit larceny, but he must be acquitted of housebreaking and larceny.

D. Smith should be found guilty of conspiracy to commit larceny as well as attempted larceny, but he should be acquitted of the resulting housebreaking and larceny.

MILITARY JUSTICE STUDY GUIDE

CHAPTER XVIII

LESSER INCLUDED OFFENSES

A. **Basic concept**. If the evidence introduced at trial fails to prove the offense charged, but does prove beyond a reasonable doubt another offense that is included in the one charged, the accused may be convicted of that lesser included offense. For example, suppose that A is charged with robbery. Robbery is defined as the larceny of property from the person or presence of another person, through the use of force, violence, or threat of violence. At A's trial, the evidence shows that A stole B's property, but she didn't use any force, violence, or threat. In fact, she took the property from B's parked car while B was in the liquor store. A is not guilty of robbery, but she can be convicted of the included offense of larceny. The offense of larceny is included in the legal definition of robbery.

B. **Patterns of lesser included offenses**. Lesser included offenses fall into four general patterns.

1. **Missing element(s)**. All of the elements of the lesser offense are included and necessary parts of the greater offense, but the lesser included offense lacks at least one element contained in the greater offense. For example:

	DESERTION		UNAUTHORIZED ABSENCE
a.	Absence from unit, organization, place of duty	a.	Same
b.	Without proper authority	b.	Same
c.	With intent to remain away therefrom permanently		

2. **One element factually less serious**. All of the elements of the lesser offense are included and necessary parts of the greater offense, but at least one element of the lesser offense is factually less serious. For example:

	BURGLARY		HOUSEBREAKING
a.	Breaking and entering	a.	Unlawfully entering (no breaking, hence, factually less serious)
b.	Dwelling house in nighttime	b.	Building or structure (does not have to be a dwelling house and can be at any time, night or day)
c.	With intent to commit a serious offense (art. 118 through 128) therein	c.	With intent to commit any criminal offense (other than a (purely military offense)

3. **Mental element lesser in degree**. All of the elements of the lesser offense are included and necessary parts of the greater offense, but the mental element in the lesser offense is lesser in degree. For example:

	LARCENY		WRONGFULAPPROPRIATION
a.	Wrongfully taking, obtaining, or withholding personal property of another	a.	Same
b.	Of some value	b.	Same
c.	With intent to deprive the owner permanently thereof	c.	With intent to deprivc the owner temporarily thereof

4. **Fairly embraced**. Although the elements of two offenses are different, these different elements are so factually similar that they are fairly embraced in the allegations and they may stand in the relationship of greater and lesser offenses. For example:

BREAKING RESTRICTION	UNAUTHORIZED ABSENCE
Ordered into restriction	Appointed place of duty
Knowledge of limits	Without authority
Went beyond limits	Left unit, organization
C to P, SD	

C. **Attempts as lesser included offenses.** An attempt to commit an offense is usually a lesser included offense. Likewise, an attempt to commit a lesser included offense is itself a lesser included offense of the charged offense.

D. **Commonly included offenses.** In the discussion paragraphs of each offense listed in Part IV, MCM, 1984, there is a mention of commonly included offenses of the offense under discussion. The particular facts of a given case may raise lesser included offenses not listed in Part IV or may negate the existence of one or more of the listed lesser included offenses.

E. **Guilty findings to lesser included offenses.** The mechanics of finding an accused guilty of a lesser included offense can be complicated. The accused must be found guilty by "exceptions and substitutions." For example, suppose the accused is charged with the following larceny specification:

> Charge: Violation of the UCMJ, Article 121.
>
> Specification: In that Private John A. Smith, U.S. Marine Corps, A Company, Schools Battalion, Marine Corps Base, Camp Pendleton, California, on active duty, did, at Marine Corps Base, Camp Pendleton, California, on or about 18 January 19CY, steal a wristwatch of a value of $125.OO, the property of Private James S. Willis, U.S. Marine Corps.

The evidence at trial proved that the accused only wrongfully appropriated the watch, because he did not intend permanently to deprive Private Willis of the watch, but did intend to keep it temporarily. A guilty finding to the lesser included offense of wrongful appropriation would be announced as follows:

> . . . the court finds you, of the specification, guilty, except for the word "steal," substituting therefor the words "wrongfully appropriate," of the excepted word, not guilty, of the substituted words, guilty, and of the charge, guilty.

F. **Pleading**. As a general rule, lesser included offenses are not separately pleaded in addition to the greater offense. The specification alleging the greater offense automatically alleges all lesser included offenses. Occasionally, however, it may be wise to plead separate specifications alleging the lesser included offenses in order to facilitate announcing guilty findings. Such separate pleadings would be advisable only when there is a fair risk that the court members might become unduly confused despite the military judge's instructions on findings by exceptions and substitutions.

MILITARY JUSTICE STUDY GUIDE

CHAPTER XIX

PLEADING

A. **The purpose of pleading**. In its legal context, the term "pleading" refers to the drafting of formal written accusations against an accused. Such formal written accusations, or pleadings, are known in civilian criminal justice systems as "indictments" or "informations." Pleadings have a threefold purpose. First, they formally notify the accused of the nature of the accusations. Second, pleadings provide specific information about the alleged offense so that the accused and the accused's attorney may prepare a defense. Finally, because they specify a particular offense, pleadings protect the accused against double jeopardy (i.e., being tried twice for the same offense).

B. **The charge and specification**. Military pleadings are drafted in the format of a charge and a specification. Together, the charge and specification provide specific information about the alleged offense and also about the factual basis for court-martial jurisdiction over the accused and over the alleged offense.

1. **The charge**. The charge merely cites a specific article of the UCMJ which the accused allegedly violated.

Example:

Charge: Violation of the Uniform Code of Military Justice, Article 121.

With the exception of articles 106a, 112a, and 123a, the various subdivisions of a charge are not listed. Thus, "Article 86(1)" is improper; simply write "Article 86."

2. **The specification**. The specification contains two types of information. First, it contains the specific facts which constitute the alleged offense. As a general rule, the specification must allege all the elements of the offense. The specification also contains jurisdictional allegations (i.e., the facts which give rise to court-martial jurisdiction over the accused and over the offense). Sample pleadings are provided

throughout this section. Each specification relates to one separate offense. Therefore, if the accused committed five separate larcenies, the pleading would contain one charge ("Violation of the Uniform Code of Military Justice, Article 121.") and five specifications, numbered one through five, under the one charge.

3. **Numbering of charges and specifications**. If there is only one charge, or only one specification under a charge, that single charge or single specification is not numbered. When there are multiple charges, they are numbered with Roman numerals (Charge I, Charge II, etc.), and are usually listed in the order of articles of the Code violated. For example, a violation of article 86 would be listed before a violation of article 87, even though the latter may have occurred first. Specifications are numbered with Arabic numerals (Specification 1, Specification 2, etc.), and are also listed in the chronological order in which they occurred.

4. **Additional charges and specifications**. After the charges and specifications have been drafted and preferred, it may be necessary to add additional, newly discovered charges and specifications. Such additional pleadings are designated "Additional Charge ___." If there is more than one such additional charge, they are numbered as explained above; however, the sequence begins anew. (Additional Charge I, Additional Charge II). Specifications under additional charges are <u>not</u> identified as "Additional Specifications," but merely as "Specifications."

5. **Other matters of style and format**. Traditionally, abbreviations have been deemed improper in military pleadings. Change 3 to the MCM, however, allows for the use of commonly understood abbreviations, particularly for ranks, grades, units and organizations, components, and geographic or political entities. *See* R.C.M. 307(c)(3).

C. **Contents of specifications**. Specifications contain two types of information: (1) facts concerning the alleged offense; and (2) facts showing why a court-martial has jurisdiction over the accused and over the offense.

1. **Information about the offense**

a. **General considerations**. A specification must include a simple, concise statement of the facts constituting the offense. These facts must include, either expressly or by reasonable implication, all elements of the offense charged. In other words, when the specification is read, it must describe acts that are clearly and unequivocally an offense.

(1) **Use of Part IV form specifications**. Part IV, MCM, 1984, contains sample formats for specifications for the commonly encountered offenses under the UCMJ. These samples should be used as a basic guide for drafting specifications. The form specifications must be used with care, however.

Each specification must be tailored to fit the facts of each case. Thus, some of the language in a Part IV form may not be appropriate. Finally, it is possible that future appellate decisions will find some of the Part IV forms to be incomplete or insufficient. It is therefore important to seek periodic updates from a judge advocate.

(2) **Elements of the offense.** The specifications must include a simple, concise statement of the basic facts that are the elements of the offense. As a general rule, all of the elements must be pleaded, either expressly or by reasonable implication. Part IV form specifications are generally reliable guides. Where a specific intent or state of mind is an essential element of the offense, it must be included in the specification.

(3) **Words importing criminality.** Words such as "wrongfully," "unlawfully," "without authority," and "dishonorably" are words importing criminality because they describe the circumstances under which an otherwise innocent act is considered criminal. For example, see Part IV, para. 54f(2), MCM, 1984. This sample assault specification contains the language ". . . did . . . unlawfully strike." "Unlawfully" is a word importing criminality. If "unlawfully" were deleted, the remaining language would describe an act that might or might not be criminal: ". . . did . . . strike . . .". (Not all strikings of another person are criminal. The accused may have acted in lawful self-defense, or the alleged victim may have lawfully consented to the striking.) The importance of words importing criminality is self-evident. Without words importing criminality, the specification fails to state an offense and is fatally defective. Careful use of Part IV form specifications is the best way to ensure that all the necessary words importing criminality are included.

(4) **Aggravating facts and circumstances.** For many offenses, the maximum authorized punishment is determined by the circumstances under which the offense occurred. Such circumstances are known as matters in aggravation. For example, the maximum punishment for simple assault is forfeiture of two-thirds pay per month for three months and confinement for three months. If the assault is aggravated by the use of a dangerous weapon (other than a loaded firearm), the maximum punishment is increased to a dishonorable discharge, total forfeitures, and confinement for three years. For the increased punishment to be applicable, however, the aggravating facts or circumstances which trigger the increased punishment must be pleaded in the specification.

Example: Petty Officer Remington shoots her .45 pistol at another person. The specification, however, alleges only simple assault, and omits the fact that the assault was with a dangerous weapon. Because of this omission, the maximum punishment that can be imposed on Remington is only that authorized for the simple assault.

Remember, the aggravating circumstances must be pleaded in order to trigger the increased maximum punishment.

b. **Specific contents of the specification**

(1) **Description of the accused**. The accused should be clearly identified by grade/rank, name, armed force, and unit or organization. The social security number is not included. The specification should also indicate that the accused is on active duty.

Example:

Specification: In that Seaman Rue D. Toot, U.S. Naval Reserve, USS BAGNAROL, on active duty . . .

(2) **Description of time and place of offense**. The time and place of the offense should be stated with sufficient precision to clearly identify the specific offense charged and to enable the accused to prepare a defense.

(a) **Use of "on or about."** "On or about" is usually used before the date of the alleged offense. The exact date of the offense is seldom an important issue in a case; therefore, an approximate date is usually sufficient, so long as it is not so vague or inaccurate as to mislead the accused in preparing a defense. The facts and circumstances of each case will determine how much latitude is reasonable in pleading the date. Nonetheless, the allegation of the date of the offense should be as specific and accurate as possible. The exact hour of the offense is seldom pleaded, except in short absence offenses, failure to go offenses, or some dereliction of duty offenses, when the 24-hour clock is used.

(b) **Offenses over a period of time**. When the alleged acts extend over a prolonged period, or when the exact date of the offense is uncertain, it is proper to allege a period of time rather than a single date.

> **Example:** The accused embezzled, bit-by-bit, Navy Exchange funds from 26 December 19CY-1 to 5 May 19CY. This was essentially one continuing offense. Therefore, it is proper to allege the date as "during the period of 26 December 19CY-1 to 5 May 19CY."

Where there is simply a single act involved, and the precise date is uncertain, it may be necessary to allege the offense as having occurred during a period of time.

> **Example:** Sometime between 1 January 19CY and 30 June 19CY, the accused stole government property from a ship. There was only one act involved, and it must have occurred during this period. It would be proper to allege the date as "from about 1 January 19CY to about 30 June 19CY."

The better practice, however, is to use "on or about" pleading whenever it is possible to make a reasonable approximation of the date of the offense.

(c) Ordinarily, the place of the offense need only be pleaded as a general location, such as "on board USS WOONSOCKET, located at Newport, Rhode Island" or "at Naval Air Station, Jacksonville, Florida." Greater detail, such as a street number or building number, is seldom advisable. (There are rare instances where the accused's act is an offense only if committed in a particular place. In such a case, an attorney should be consulted for advice on how much more detail is necessary.) Two common exceptions are "failure to go" and "going from" offenses in violation of article 86, both of which require the accused's specific place of duty to be alleged.

(3) **Description of accused's role as a principal**. If the accused is a principal to the offense, the specification does not have to specify whether the accused was the perpetrator, an aider and abettor, or an accessory before the fact. The specification is written as if the accused committed the crime personally

> **Example**: Seaman Smith induced Seaman Jones to steal a car for him. The larceny specification against Smith would read: "In that Seaman Smith . . . did steal a 1957 Edsel . . . ."

(4) **Description of victim**. If the offense is a crime against the person or property of another, the victim should be clearly identified. The victim's full name and any aliases should be used. If the victim is a military person, rank and branch of service should be included. A full, complete identification of the victim will protect against possible unforeseen developments at trial.

(a) **Victim's rank and military status**. The victim's rank and status as a person subject to the UCMJ may be critical in some cases. For example, disrespect to and willful disobedience of commissioned officers require that the victim was a superior. The victim's rank is essential to establish this element. Other offenses, such as use of provoking words, require that the victim be a person subject to the UCMJ. Therefore, pleading the victim's rank and branch of service is necessary to allege the victim's status properly. If the victim of provoking words was a reservist, the specification should also allege that he/she was on active duty.

(b) **The unknown victim**. Occasionally, the exact identity of the victim may be uncertain. For example, an assault specification which identifies the accused's victim only as "a military policeman" is sufficient because of the other specific information in the specification about the time, date, place, and manner of commission of the offense. Nonetheless, vague descriptions of the victim are unwise. It becomes easier for the accused to assert that the pleading is defective because he/she has been misled in preparing a defense. When the exact identity of the victim is unknown, he/she should be described by alias, if any, or by a general physical description.

> **Example**: Private Slugworthy assaults an unidentified person. The assault specification may describe the victim as "a Caucasian adult male of unknown identity."

(5) **Description of property**. Usually, generic terms such as "a knife" or "a typewriter" are sufficient. Sometimes, however, greater detail is advisable. Common sense is the pleader's best guide.

> **Example**: Corporal "Hot" Carr steals five different automobiles on five different occasions. Each of the five larceny specifications should avoid confusion by describing the stolen car by year, make, and model: "a 1987 Ford Taurus sedan."
>
> **Example**: A general order prohibits possession of a pocket or sheath knife with a blade longer than four inches aboard naval vessels. Seaman MacNife is caught with a "South Philly slicer" with a six-inch blade. His orders violation specification should describe the knife as "a pocket knife with a six-inch blade."

(6) **Description of value**. In property offenses, such as larceny, the value of the property determines the maximum authorized punishment; therefore, whenever value determines the maximum punishment, value must be alleged. Exact values should be used whenever possible. However, if only an approximate value is known, it may be described as "of a value of about $500.00." For ease of proof, value may be alleged as "not less than" a certain amount. If several items of different kinds are the subject of the offense, the value of each item should be stated, followed by a statement of aggregate value.

> **Example**: Private Lightfinger goes on a shoplifting spree at the Navy Exchange. Her larceny specification should describe her booty as ". . . one shirt, value $3.50; one pair of shoes, value $14.00; one camera, value $220.00; one package of chewing gum, value $0.20; of a total value of $237.70 . . ."

(7) **Description of written instruments, orders, and oral expressions**

(a) **Written instrument**. When a written instrument (such as a check, or a part of it) forms the gist of the offense, the specification should set forth the writing, preferably verbatim.

> **Example**: Private Badpaper is charged with forgery of a check. A verbatim copy of the check (photocopy recommended) should be inserted in the specification after "to wit: . . . ."
>
> *See* Part IV, para. 48f(1), MCM, 1984.
>
> **Example**: Seaman Bogus is charged with wrongful possession of a pass. A photocopy of the pass should be inserted in the specification.
>
> *See* Part IV, para. 77f(3), MCM, 1984.

(b) **General orders**. When the offense alleged constitutes a violation of a general order or regulation (Article 92(1), UCMJ), the specification should clearly identify the particular directive and indicate clearly the part of it which the accused allegedly violated. This may be done by referring to it by its title, article, section or paragraph, and date of the directive. For example, ". . . Article 1165, *U.S. Navy Regulations*, dated 14 September 1990 . . . ." It is not necessary to quote the general order verbatim.

(c) **Other lawful orders** (Article 92(2), UCMJ). When the order violated is an "other lawful order" under article 92(2), that order, or the specific part of it the accused allegedly violated, should be stated in the specification. If there is more than one way to violate the order, the specific misconduct constituting the violation must be alleged. An example would read something like ". . . issued by the commanding officer, USS CAINE, to wit: Ship's Organization and Regulation Manual, Article 2222, dated 24 May 1985, an order. . ." If the order is an oral one, it should be quoted verbatim, but the phrase "or words to that effect" should be added at the end of the quotation. This provides for the possibility that the evidence at trial might establish minor variances in the oral order's exact wording.

(d) **Oral statements**. Some offenses, such as disrespect and use of provoking words, involve unlawful oral statements by the accused. The

statement that constitutes the offense should be quoted verbatim in the specification with the phrase "or words to that effect" added at the end of the quotation.

2. **Information about jurisdiction**

a. **General considerations**. In its 1987 decision in *Solorio v. United States*, the Supreme Court stated that the only prerequisite for military jurisdiction is that the accused be subject to trial by court-martial. Whether or not an offense occurred off-base or had significant "service connection" are no longer important factors in determining the issue of court-martial jurisdiction.

b. **Jurisdiction over the accused**. Generally speaking, a court-martial has jurisdiction to try only military members on active duty. Therefore, each specification must clearly indicate that the accused is on active duty. In addition to reciting the accused's rank and branch of service, the words "on active duty" should be added.

> **Example**: "In that Seaman Bertha D. Blooze, U.S. Navy, USS MARSHGAS, on active duty, did . . . ."

Sometimes more than "on active duty" may be necessary. When, for example, the offense resulted from the failure of a reservist to report for active duty for training, the specification should indicate his activation.

> **Example**:
>
> Specification: In that Seaman Jake D. Snake, U.S. Naval Reserve, Naval Station, Philadelphia, Pennsylvania, on active duty, who was lawfully ordered on 11 January 19CY to a period of forty-five days active duty for training to commence on 2 February 19CY, did . . . .

D. **Demonstration: Drafting a charge and specification**

1. **The facts**. You cannot begin to draft the charges and specifications until you know the facts. Review all of the available evidence, including reports of investigation, report chits, etc. Then, and only then, begin to draft. In this example, the facts are as follows: Seaman Ben Z. Drine, USN, attached to USS ANGELDUST, meets with his shipmate, Seaman Ben Gay, USN, on 6 November 19CY aboard their ship during duty hours. Drine and Gay conspire to rob a military supply van which

is supposed to be carrying the civilian payroll. They agree to "hit" the van in Middletown, Rhode Island, near the intersection at "Chicken City," the next day at 1300. The van is military property and is driven by a civilian military employee with a military police escort. In order to hide the loot until "the heat is off," they agree to bring their spoils back to the ship. The robbery takes place as planned.

2. **Step One: Draft the information about the offense.** This offense will be prosecuted as a violation of Article 122, UCMJ (robbery). The form found in Part IV, para. 47f, MCM, 1984, will be used for the basic format. At this point, the charge and specification should look like this:

> Charge: Violation of the Uniform Code of Military Justice, Article 122
>
> Specification: In that Seaman Ben Z. Drine, U.S. Navy, USS ANGELDUST, did at Middletown, Rhode Island, on or about 7 November 19CY, by means of force and violence, steal from the persons of Mr. James E. Sandcrab and Yeoman Second Class I. Am Victimized, U.S. Navy, against their will, $10,000.00 in U.S. currency, the property of the U.S. Navy.

3. **Step Two: Add information about jurisdiction over the persons**

As noted earlier, adding the words "on active duty" is usually sufficient to allege jurisdiction over an accused. The pleading would look like the following, once this is accomplished:

> Charge: Violation of the Uniform Code of Military Justice, Article 122
>
> Specification: In that Seaman Ben Z. Drine, U.S. Navy, USS ANGELDUST, on active duty, did at Middletown, Rhode Island, on or about 7 November 19CY, by means of force and violence, steal from the persons of Mr. James E. Sandcrab and Yeoman Second Class I. Am Victimized, U.S. Navy, against their will, $10,000.00 in U.S. currency, the property of the U.S. Navy.

4. **A word about style**. The examples in this text are drafted using the accepted style and language generally used in military pleadings. Never be intimidated by "saids" and "to wits." The purpose of pleading is to draft a legally sufficient, understandable accusation that will inform the accused of the charges, allow for preparation of the defense, and protect against double jeopardy. It is the substance of the pleading, not its literary style, that determines its quality.

E. **Amendments to pleadings**. Once a charge and specification have been preferred, relatively minor amendments may be made. Pen-and-ink changes to specifications, even at the last minute before trial, are not uncommon. There are, however, several limitations placed on amendments to pleadings.

1. The amendment must not change a specification that fails to allege an offense into one that does.

> **Example**: An unauthorized absence specification fails to allege that the absence was "without authority." "Without authority" cannot be added to the specification; a new specification must be preferred, referred for trial, and served on the accused.

2. The amendment must not change the offense alleged into a different offense other than a lesser included offense.

> **Example**: An assault specification cannot be changed into a murder specification by deleting the word "assault" and substituting "murder." A new specification must be preferred, referred, and served on the accused. Murder is a greater offense.
>
> **Example**: A larceny specification can be amended to become a specification alleging the lesser included offense of wrongful appropriation. The word "steal" can be deleted and "wrongfully appropriate" can be substituted. Wrongful appropriation is a lesser offense.

3. The amendment cannot change the date of the offense in order to correct a problem with the statute of limitations.

4. The amendment must not mislead the accused to the extent that he/she is unable to prepare a defense.

> **Example**: A larceny specification alleges that the accused stole "a wristwatch of a value of $75.00, the property of Harry Smith." If the specification were amended to allege the theft of "$75.00 in currency, the property of Sidney Jones," such a change would be so substantial that the accused would probably be misled. A new specification should be preferred, referred, and served on the accused. The test is whether the accused has actually been misled.

F. Common defects in pleading

1. **Fatal and nonfatal defects**. Pleading defects fall into two general categories: fatal and nonfatal defects. A fatally defective pleading cannot be used at trial. If the accused is convicted on a fatally defective pleading, the conviction will usually be overturned. A nonfatal defect in a pleading will not result in such a drastic result. Most nonfatal defects are cured by amendment or by exceptions and substitutions, and the trial continues. For a more technical discussion of the remedies for fatal and nonfatal defects in pleading, see R.C.M. 907.

2. **Misdesignation**. Misdesignation occurs when the article number cited in the charge does not conform to the specification. For example, a larceny specification is incorrectly charged under article 122 instead of article 121. This is a nonfatal defect, which can be remedied by merely making the appropriate correction to the charge.

3. **Failure to allege an offense**. When a specification omits a necessary element of the offense or omits necessary words importing criminality, it fails to allege any offense at all. Failure to state an offense is a fatal defect. The specification will usually be dismissed at trial. If the defect is not detected and the accused is convicted, the conviction will often be overturned on appeal.

4. **Lack of specificity**. If a specification properly alleges an offense, but is vague or ambiguous in its factual allegations, it lacks specificity. Lack of specificity is fatal only when the specification is so vague that the accused is unable to prepare a defense, and the lack of specificity cannot reasonably be corrected by amendment. In most cases, however, the military judge will merely order the specification be amended to make it more definite and the trial will continue. Even though it is seldom a fatal defect, lack of specificity is serious. It can result in

substantial delay because the defense will be entitled to a continuance if additional time is needed to prepare in light of the changes in the specification.

5. **Duplicity**. Each specification should allege only one offense. Duplicity occurs when two or more separate offenses are combined in one specification. For example, Smith assaults Jones and Baker on separate days. If there is only one assault specification alleging an assault against both victims together, it is duplicitous. Two separate crimes have been committed: an assault against Jones and an assault against Baker. Two assault specifications should be pleaded. Duplicity is not fatal, unless the specification is so convoluted and confusing that the accused is unable to prepare a defense.

6. **Unreasonable multiplication**. One transaction or event, or what is substantially one transaction, should not be made the basis for an unreasonable number of charges. What is reasonable or unreasonable depends on the particular facts of each case and is largely a matter of judgment. Unreasonable multiplication is pleading run rampant: alleging so many charges and specifications, both serious and trivial, that the accused is unable to prepare a proper defense against the serious ones. The accused in such a case may be entitled to some form of relief, such as severance (referral of some of the charges to a different court) or even outright dismissal of some of the charges. This problem can be avoided by charging the accused with the most serious offenses only. On the other hand, if the minor charges serve to explain the major offenses, they should be added to the charge sheet.

> **Example**: Seaman Grabb goes on a shoplifting spree at the Navy Exchange one Saturday afternoon. In the course of an hour he steals six watches, seven cameras, and three shirts. To charge Grabb with sixteen separate specifications of larceny (one for each item) would be unreasonable multiplication, because what is involved is essentially one transaction, one criminal impulse. He should be charged with only one specification.

Example: One Saturday afternoon, Seaman Grabb goes on a shoplifting spree at the Navy Exchange, the Commissary, the MiniMart, and the Automobile Accessories Store of the Navy Exchange, all located at various points on the base. In the course of the afternoon, he steals six watches, seven cameras, and three shirts, two quarts of milk, five steaks, a case of beer, and two tires. To charge Grabb with twenty-six separate specifications of larceny (one for each item) would be unreasonable multiplication, but to charge him with four specifications of larceny (one for larceny of the six watches, seven cameras, and three shirts; one for the two quarts of milk and five steaks; one for the case of beer; and another for the two tires) may not be unnecessary multiplication because, though occurring during the same afternoon, there are sufficient time and place differences to constitute four different transactions. He should be charged with four specifications of larceny.

Sometimes the line between unreasonable multiplication and duplicity is hard to distinguish. Once again, common sense and professional legal advice will be the pleader's best guide in avoiding unreasonable multiplication.

G. **Conclusion**. Military pleading has traditionally been the task of the nonlawyer. The pleader's goal should be to draft a legally sufficient charge and specification that adequately informs the accused of the accusation, enables the accused to prepare a defense, and offers double jeopardy protection. Common sense, attention to detail, and an appreciation of clear, concise language will help the pleader achieve this goal and avoid the occasional legal pitfalls in pleading.

MILITARY JUSTICE STUDY GUIDE

CHAPTER XX

ORDERS OFFENSES AND DERELICTION OF DUTY

A. **Overview**. Three types of orders offenses are proscribed under the UCMJ:

1. Violations of general orders and regulations [article 92(1)];

2. violations of other lawful orders [article 92(2)]; and

3. willful disobedience of the lawful orders of superiors and/or of petty officers, noncommissioned officers, and warrant officers [articles 90(2)) and 91(2)].

Closely related to orders offenses is the offense of dereliction of duty [article 92(3)]. Both orders offenses and dereliction of duty involve the accused's failure to perform a military duty. In an orders violation, the duty is imposed by a lawful order. In dereliction of duty, the duty is imposed by a lawful order or regulation or by the custom of the service.

B. **The lawful order**. Before an accused can be convicted of an orders offense, that particular order must be proven to be lawful. General orders and regulations, other orders requiring the performance of a military duty, and orders from superiors may be inferred to be lawful. This inference of lawfulness merely means that the prosecution need not introduce specific evidence to prove that the order is lawful. If the defense contests the lawfulness of the order, however, the prosecution must prove beyond reasonable doubt that the order was lawful. The concept of lawfulness involves several issues, which are discussed below.

1. **Punitive orders and regulations**. Before violation of an order or regulation can be a basis for prosecution (other than for dereliction of duty), the order or regulation must be punitive; that is, it must subject the violator to the criminal penalties of the UCMJ. Therefore, the order or regulation must be more than a mere policy statement or administrative guideline. It must impose a specific duty on the accused to perform or refrain from certain acts. The order may be oral or written, or a combination of both. It cannot require further implementation by subordinates.

a. **Nonpunitive orders and regulations**. The armed forces have published millions of pages of technical and administrative instructions, regulations, directives, and manuals. Their purpose is to standardize operations, especially in administrative areas. Some of these regulations are merely policy statements; others detail rather complicated, specific procedures. Nonpunitive regulations are not intended to define individual conduct which will be considered criminal and which will result in prosecution under the UCMJ.

b. **Punitive or nonpunitive?** A frequent issue -- especially in cases involving written orders -- is whether the alleged order was a specific mandate or merely a nonpunitive regulation. The issue is always decided on a case-by-case basis. The court will examine the purported order and the context in which it was issued. No single factor is decisive, but the issue will be determined by considering the following factors:

(1) **Purpose**. If the stated purpose of the directive uses language such as "provide guidance," "establish policy," or "promulgate guidelines and procedures," the directive is most likely nonpunitive. If the stated purpose uses language such as "establish individual duties and responsibilities," the directive is most likely punitive.

(2) **Specificity**. If the directive expressly commands or forbids specific acts, it is probably punitive. If it promulgates only general procedures or guidelines, it is probably nonpunitive. If the directive expressly or impliedly allows individual discretion in its implementation, it is probably nonpunitive. Specificity of language is an extremely important factor.

(3) **Sanctions**. A nonpunitive directive will seldom provide sanctions for violations. If the directive indicates that violators will be subject to disciplinary action, the directive is probably punitive.

(4) **Implementation**. If the directive provides that its provisions shall be implemented by subordinates, it is probably not punitive. Language such as "subordinate commanders will ensure compliance" or "as implemented by subordinate commanders" indicates that the directive is probably nonpunitive.

(5) **Intent**. Sometimes it will be necessary to produce evidence of the intentions of the authority promulgating the directive. For example, if the directive in question is a ship's instruction, the commanding officer who promulgated the instruction may have to testify about whether the directive was intended to be a punitive order. Any notes or memoranda that were written while the directive was being drafted may also be helpful. Intent is not a decisive factor by itself; but it permits the court to look behind the sometimes ambiguous language of a directive.

Evidence of the original intent of the directive allows the court to make a more accurate determination of whether it is punitive.

2. **Was the order issued by a proper authority?** The person issuing the order must have legal authority to do so. The authority to issue orders may arise by law, regulation, or custom of the service. Generally, a superior has authority to issue orders to a subordinate. A commanding officer has authority to issue orders to all persons subordinate in the chain of command, even those who may hold a higher military rank. Therefore, a rear admiral (O-8), temporarily attached to Naval Justice School while attending a Senior Officer Course, is subordinate in the chain of command to the Justice School's commanding officer, a captain (O-6). The captain would have authority to issue orders (very politely!) to the rear admiral. A person in the execution of military police or shore patrol duties may issue orders related to law enforcement duties to all personnel, regardless of rank. Circumstances may control whether or not the person has the authority to give an order. In the case of an emergency, such as the loss of engine power, the pilot of a plane may order all baggage jettisoned. He would not have the authority to order the discarding of baggage just to get home faster.

3. **Did the order relate to a military duty?** In order to be a lawful order under the Code, the order must relate to a military duty. Military duties include all activities reasonably necessary to safeguard or promote the morale, discipline, readiness, and mission of a command. For example, the commanding officer, desiring to raise the morale of his troops, may set aside a building to be turned into an auto-hobby shop. He may order servicemembers to build racks and tables, see that an officer procures automotive tools, and get someone to maintain the place. All these orders relate to a military need. The commanding officer may not order work to be done on his personal automobile.

4. **Is the order contrary to superior law?** An order is unlawful if it is contrary to the Constitution or to the UCMJ. For example, an officer orders a subordinate to discuss an offense with which the subordinate is charged. The officer's order is unlawful because it violates an accused's right to silence under Article 31, UCMJ. In combat, an order to commit a violation of the law of armed conflict is unlawful. An order is also unlawful when it conflicts with the lawful order of an authority superior to the person issuing it.

5. **Is the order an arbitrary infringement on individual rights?** Military orders frequently limit the free exercise of the servicemember's individual rights and liberties. Such an order will be unlawful, however, only if it arbitrarily or unreasonably interferes with individual rights. An infringement on individual rights is arbitrary when it bears no reasonable relationship to a legitimate military mission or interest. It will also be unlawful if it imposes a greater interference with individual rights than is reasonably necessary. For example, an order forbidding any

member of a command to read comic books is unlawful because it unreasonably interferes with the individual's right to select one's own reading material. However, an order forbidding the reading of any book or magazine other than official publications while acting as a sentinel would be entirely reasonable. The order promotes the very important military interest in ensuring that all sentinels are alert.

Conscience, ethical standards, religion, or personal philosophy must not be confused with the concept of arbitrary infringement of individual rights. The fact that an order may be contrary to an individual's morals is not, by itself, a defense. "Immorality" alone does not make an order unlawful.

6. **Does the order unlawfully impose punishment?** Punishment in the military may be lawfully imposed only as a result of nonjudicial punishment or a court-martial sentence. Any other order that either expressly or impliedly imposes punishment is unlawful. The critical issue, however, is the definition of punishment. Whether an order is punishment or is merely designed to correct a performance deficiency depends on the facts of each case. An order to perform extra work as a result of a deficiency must be reasonably related to correcting the deficiency. It would be unreasonable, for example, to order a Marine who fails a locker inspection to run ten miles. Running ten miles will not correct slovenly habits. Such an order would be unlawful. It would be reasonable, however, to require an additional inspection after working hours, provided the inspection is conducted at a reasonable time. Remedial orders, often styled as "extra military instruction" (EMI), are common in the military. To be lawful, however, they must order the servicemember to perform duties reasonably related to correcting deficient performance. Moreover, the remedial duties must not be performed at unreasonable times or under clearly unreasonable conditions. For a more detailed discussion of extra military instruction and other nonpunitive measures, see chapter I of this Handbook.

7. **Is the order unreasonably redundant?** An order cannot merely restate a preexisting duty nor repeat another order already in effect. For example, if a servicemember is already in a restricted status and fails to muster as the restriction orders require, the ultimate offense is failure to go in violation of article 86 and not violation of the written orders in violation of article 92.

8. **Is the order specific?** The exact language of an order is insignificant, so long as it amounts to a positive mandate and is so understood by the subordinate. Expressing an order in courteous language, rather than in a peremptory form, does not alter the order's legal effect. Thus, "Jones, please file these before you go" is just as much an order as "Jones, file these before you go." Moreover, the order must direct the accused to perform a specific act whether it is to do or refrain from doing something. Vague orders, such as "go train," would be hard to successfully prosecute.

C. Violation of general orders or regulations [article 92(1)]

1. **General order.** Part IV, para. 16c(1)(a), MCM, 1984, defines general orders or general regulations as those orders or regulations generally applicable to an armed force. General orders or regulations may be promulgated by the following authorities:

a. President of the United States;

b. Secretary of Defense (Secretary of Transportation for the U.S. Coast Guard);

c. Secretary of a military department (e.g., Secretary of the Navy);

d. flag or general officers in command, and their superior commanders; and

e. officers possessing general court-martial convening powers and their superior commanders. (Not every such commander has such authority. For example, the UCMJ gives commanders of overseas naval bases GCM authority; however, some cases have held that this grant alone is insufficient authority to issue general orders. Other factors, such as the rank of the commander and the position of the base in the echelon of command, must also be considered.)

2. **Elements of the offense.** The prosecution must prove beyond reasonable doubt that:

a. A certain lawful general order or regulation was in effect; and

b. the accused had a duty to obey the order; and

c. at the time and place alleged, the accused failed to obey the order.

3. **Discussion**

a. **The order was in effect.** Normally, an order is effective when published. Sometimes, however, an order may provide that its provisions will not go into effect until a certain date after publication. Also, an order may be later superseded, amended, or canceled. The specification should, therefore, clearly allege that the general order was in effect at the time of the offense. Usually, merely indicating the effective date of the order will be sufficient. At trial, the prosecution will be required to prove beyond reasonable doubt that the order was in effect and properly published to the command.

b. **The accused had a duty to obey**. Not only must the general order be lawful (as discussed in part B of this chapter), but the accused must also have had a duty to obey the order. Thus, the order must have been applicable to the accused. Although many general orders, such as many of the provisions of *U.S. Navy Regulations*, apply to all members within a branch of service, some may apply only to commanding officers or commissioned officers. A general order which commands certain conduct from a commissioned officer would not be applicable to an enlisted person. An enlisted accused would have no duty to obey such an order. Careful analysis of the language of the order will determine whether it was applicable to the accused.

c. **The accused failed to obey or violated the order**. If the order commands certain specific acts, the accused disobeys the order by failing to perform those acts. If the order forbids acts, the accused's commission of those acts will constitute a violation. Sometimes, however, an order or regulation may prohibit certain acts, but will provide for specific exceptions under specified conditions. If the facts of the case raise any issue of whether the accused's conduct was covered by one of the exceptions, the burden will be on the prosecution to prove beyond reasonable doubt that the accused's acts did not fall within an exception. The prosecution need not prove that the accused knew about the general order that was violated. The accused's ignorance of the general order's provisions -- or even of its existence -- is no defense. Nor must the prosecution prove that the accused intended to violate the order; a negligent violation is sufficient to convict the accused.

4. **Pleading**

a. **General considerations**. *See* Part IV, para. 16f(1), MCM, 1984. A written general order or regulation should not be quoted, but must be clearly identified by citations such as serial number, article number, paragraph, or subject. The effective date must be included. The order must be described as a "general order" or "general regulation." The accused's conduct which violated the order should be described clearly and concisely. If the order provides for exceptions under specified conditions, it is unnecessary to allege that the accused's conduct did not come within the terms of one of the exceptions.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 92.
>
> Specification: In that Seaman Eye W. Harper, U.S. Navy, USS SEAGRAM, on active duty, did, on board USS SEAGRAM, at sea, on or about 15 July 19CY, violate a lawful general regulation, to wit: Article 1162, *U.S. Navy Regulations*, dated 14 September 1990, by wrongfully possessing alcoholic liquors for beverage purposes aboard a United States Navy ship, to wit: USS SEAGRAM.

D. **Violation of other lawful orders** [article (92(2)]

1. **Other lawful orders**. Violations of lawful orders other than general orders (and other than willful violations of orders of superiors and/or noncommissioned officers, petty officers, and warrant officers) are prosecuted under Article 92(2), UCMJ. The fundamental legal principles applicable to general orders violations also apply to article 92(2) cases, with a few exceptions which will be noted below.

2. **Elements of the offense**. The prosecution must prove beyond reasonable doubt that:

a. A member of the armed forces issued a certain lawful order; and

b. the accused had knowledge of the order; and

c. the accused had a duty to obey the order; and

d. at the time and place alleged, the accused failed to obey the order.

3. **Discussion**

a. **The accused had knowledge of the order**. Unlike general orders offenses, the prosecution in an article 92(2) case must prove beyond a reasonable doubt that the accused had actual knowledge of the order. Merely establishing that the accused should have known of the order is not enough. Actual knowledge may be proven by either direct or circumstantial evidence. A statement by the accused admitting knowledge of the order would be direct evidence of the

accused's knowledge. Circumstantial evidence would include facts such as the order being announced. The accused's lack of knowledge of the order is a complete defense to prosecution under article 92(2).

b. **The accused failed to obey**. The accused's failure to obey the order may be willful or the result of forgetfulness or negligence. If the order requires instant compliance, any delay results in a violation. If no specific time for compliance is given (either expressly or implicitly), then the order must be complied with within a time reasonable under the circumstances. If the order calls for performance of an act at a later time, or no later than a specified time, the order is not violated until that time has passed. If the order does not state exactly how the duty is to be performed, the accused will not be guilty of an orders violation if the acts are performed in a reasonable manner, even though the accused's performance may not be exactly what was intended by the person giving the order. Whether the accused reasonably complied with the order is determined by examining all the facts and circumstances of the case.

4. **Pleading**

a. **General considerations**. *See* Part IV, para. 16f(2) and (3), MCM, 1984. A written order must be clearly identified, but need not be quoted. If the order was oral, the exact language of the order should be quoted and the phrase "or words to that effect" should be added at the end of the quotation. The specification must allege that the accused knew of the order and that the accused had a duty to obey. If the exact language of the order is quoted, then usually it is unnecessary to describe the specific acts which constituted a violation of the order. The phrase "fail to obey the same" will usually suffice because the verbatim quotation of the order should indicate exactly what the accused was required to do. On the other hand, if the order could have been violated in more than one way, the specification should describe exactly how the accused violated it. The first sample pleading involves an order which could be violated in more than one way. The accused's specific mode of violating the order is described.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 92.
>
> Specification 1: In that Seaman Eaton E. Ternally, U.S. Navy, USS TUBB, on active duty, having knowledge of a lawful order issued by the Commanding Officer, USS TUBB, to wit: Paragraph 3d(3), USS TUBB Instruction 1020.3E, dated 5 June 1981, an order it was her duty to obey, did, on board USS TUBB, at sea, on or about 8 August 19CY, fail to obey the same by wrongfully possessing food in her berthing space.
>
> Specification 2: In that Seaman Eaton E. Ternally, U.S. Navy, USS TUBB, on active duty, having knowledge of a lawful order issued by Lieutenant Commander Bugs Bunny, MC, U.S. Navy, to submit to medical treatment for weight reduction, an order which it was her duty to obey, did, on board USS TUBB, on or about 8 August 19CY, fail to obey the same.

E. **Willful disobedience of certain lawful orders** [articles 90(2) and 91(2)]

1. **Willful disobedience**. Willful disobedience is more than just an orders violation. The willful disobedience offenses involve an intentional defiance of authority. Other orders offenses may be the result of either a willful or merely negligent failure to obey. Thus, willful disobedience is the most serious of the orders offenses. (Willful disobedience of a superior commissioned officer in time of declared war is a capital offense.) Article 90(2), UCMJ, prohibits willful disobedience of a superior commissioned officer. Article 91(2), UCMJ, forbids willful disobedience of a warrant (W-1), noncommissioned, or petty officer.

2. **Elements of the offenses**. Although willful disobedience of a superior commissioned officer and willful disobedience of a warrant, noncommissioned, or petty officer are prosecuted under different articles of the Code, the elements are similar. The key difference is that, while article 90 requires that the victim be a superior commissioned officer, orders violations under article 91 involve no requirement of superiority (although in most cases, of course, a superior will have no

"duty to obey" orders from juniors). Another difference is that article 91 cannot be violated by a commissioned officer. To establish these offenses, the prosecution must prove beyond reasonable doubt that:

a. (For article 91 offenses only) the accused was an enlisted person or a warrant officer (W-1); and

b. the accused received a lawful order; and

c. the order was issued by (for article 90(2)) a superior commissioned officer, or (for article 91(2)) a warrant (W-1) officer, noncommissioned officer, or petty officer; and

d. the accused knew that the order was issued by his/her superior commissioned officer, or by a warrant (W-1) officer, noncommissioned officer, or petty officer; and

e. (for article 91(2) only) the accused had a duty to obey the order; and

f. the accused willfully disobeyed the order.

3. **Discussion**

a. **The accused received a lawful order** (*see* part B of this chapter for a discussion of the lawfulness of orders). The order must be directed to the accused personally. For example, "Seaman Jones, report to the OOD at once" is directed to Jones personally. "Jones, Smith, and Brown will report to the executive officer immediately" is also directed to Jones personally (as well as to Smith and Brown). "All nonrated personnel will muster at 0900" is not directed personally to any specific individual.

The order may be passed through an intermediary and still be directed personally to the recipient. Suppose the commanding officer tells Seaman Smith to inform Seaman Jones that Jones must report to the commanding officer's stateroom immediately. The order is considered to have been directed personally to Jones. If Jones intentionally fails to report, she may be guilty of willful disobedience of the commanding officer.

b. **The "ultimate offense."** This doctrine specifies that an accused should not be punished for violating an order which merely restated an existing order or commanded the accused to perform an existing duty. In such cases, the accused should be punished for the ultimate offense (the preexisting duty). For example, a Marine returns from leave sporting a beard, which is forbidden by Marine Corps

grooming regulations. His superior commissioned officer reminds him of the regulation, to which he refuses to conform. The Marine should not be punished for willful disobedience if the officer's efforts merely constituted counseling to obey the existing grooming regulations. If so, the ultimate offense was violation of the grooming regulation, not the officer's command. Thus, the ultimate offense was an article 92(1) general order violation, and, while the accused may be convicted of willful disobedience of a superior commissioned officer, he will only be punished for violating the regulation. If, however, the officer had clearly invoked his own authority as a commissioned officer to direct the Marine to get a haircut (independent of the grooming regulation), the ultimate offense would then be the affront to the officer's authority in violation of article 90(2).

c. **Superiority**. For article 90(2) violations, the order must be issued by the accused's superior commissioned officer. In its legal context, "superior" has a special, limited meaning. A superior is one who is superior to the accused either in rank or in the chain of command.

(1) **Superior in rank**. A superior in rank is at least one paygrade senior to the accused and is a member of accused's branch of service. The Navy and Marine Corps are considered the same branch of service, since both are part of the Department of the Navy. Therefore, a Navy ensign is superior in rank to a Marine corporal. But, an Air Force general is not superior in rank to a Navy seaman recruit (for the purposes of offenses involving superiority as an element), because they belong to different branches of the armed forces.

(2) **Superior in chain of command**. Regardless of rank, one who is superior to the accused in the chain of command is the accused's superior. Thus, a Navy lieutenant commander who is commanding officer of a ship is superior to a Navy commander (or Army colonel) who is temporarily assigned to the ship as medical officer. Superiority in chain of command takes precedence over superiority in rank.

d. **Knowledge**. The prosecution must prove beyond a reasonable doubt that the accused actually knew that the person issuing the order was a superior commissioned officer or a petty officer, noncommissioned officer, or warrant officer. Knowledge may be proven by direct evidence. For example, when Seaman Jones refused Ensign Smith's order, Jones stated "Ensign Smith, I won't do it." Circumstantial evidence, such as the fact that the superior was in uniform, may also be used.

e. **The accused willfully disobeyed**. The accused's failure to comply with the order must show an intentional defiance of the victim's authority. Failure to comply with an order because of forgetfulness or carelessness is not willful disobedience, although it may constitute an article 92(2) other-lawful-orders

violation. Willful disobedience connotes an intentional flouting of the authority to issue an order to the accused. Thus, there is necessarily a close relationship between the issuing of the order and the accused's refusal. More is required, however, than the accused merely stating, no matter how emphatically, that the order will not be obeyed. Willful disobedience occurs only when the accused actually fails to obey.

4. **Pleading**

a. **General considerations.** *See* Part IV, paras. 14f(4) and 15f(2), MCM, 1984.

b. **Sample pleadings**

(1) **Willful disobedience of superior commissioned officer**

> Charge: Violation of the Uniform Code of Military Justice, Article 90.
>
> Specification: In that First Lieutenant Real E. Tough, U.S. Marine Corps, Naval Justice School, Newport, Rhode Island, on active duty, having received a lawful command from Captain Kill R. Instinct, U.S. Marine Corps, his superior commissioned officer, then known by the said Tough to be his superior commissioned officer, to "get into the truck," or words to that effect, did, at the Naval Education and Training Center, Newport, Rhode Island, on or about 3 April 19CY, willfully disobey the same.

(2) **Willful disobedience of warrant, noncommissioned, or petty officer**

> Charge: Violation of the Uniform Code of Military Justice, Article 91.
>
> Specification: In that Seaman Simone N. Sezz, U.S. Navy, USS TUBB, on active duty, having received a lawful order from Yeoman First Class Roger Dodger, U.S. Navy, a petty officer, then known by the said Seaman Jones to be a petty officer, to "empty the wastebasket" or words to that effect, an order which it was her duty to obey, did, on board the USS TUBB, at sea, on or about 13 May 19CY, willfully disobey the same.

F. **Dereliction of duty** [article 92(3)]

1. **Dereliction distinguished from orders offenses**. Dereliction of duty, under Article 92(3), UCMJ, is closely related to the three types of orders offenses discussed previously in this chapter. It is also distinguishable, however, from orders violations. The term "dereliction" covers a much wider spectrum of infractions in the performance of duties. Not only is failure to perform a duty prohibited, but also performing one's duty in a culpably inefficient manner. The accused's duty may be one imposed by statute, regulation, order, or merely by the custom of the service. *See* Part IV, para. 16c(3), MCM, 1984, for a more detailed discussion.

2. **Elements of the offense**. The prosecution must prove beyond reasonable doubt that:

a. The accused had a certain prescribed duty; and

b. the accused knew, or reasonably should have known, of the duty; and

c. the accused was derelict in the performance of that duty (either willfully, through neglect, or culpable inefficiency).

3. **Discussion**

a. **The accused's duty**. The duty contemplated by article 92(3) is any military duty either specifically assigned to the accused or incidental to the

accused's military assignment. The duty may be imposed by statute, regulation, order, or custom of the service.

b. **Knowledge**. The 1 August 1984 *Manual* listed actual knowledge as an element of the offense. Previous manuals did not have this specific element. On 15 May 1986, Change 2 to the MCM, 1984, added the constructive knowledge standard to the manual. The explanation states that actual knowledge does not have to be proven if the accused "should have known" of the duties. The knowledge can be established by custom, manuals, regulations, literature, past behavior, testimony of witnesses, or other ways.

c. **The accused was derelict**. Dereliction of duty encompasses three specific types of failure to perform: willful, negligent, and culpably inefficient.

(1) **Willful dereliction**. The accused has full knowledge of the duty and deliberately fails to perform it.

(2) **Negligent dereliction**. The accused has full knowledge of the duty, but fails to exercise ordinary care, skill, or diligence in performing it. As a result of the accused's negligence, the duty is not performed or is performed incorrectly. Ordinary care, skill, and diligence is that which a reasonably prudent person would exercise in similar circumstances. Whether the accused failed to meet this standard is a factual issue for the court-martial members, or military judge in a judge-alone trial, to determine.

(3) **Dereliction through culpable inefficiency**. Culpable inefficiency is inefficient or inadequate performance for which there is no reasonable excuse. If the accused has the ability and opportunity to perform the required duty efficiently, but performs it in a sloppy or substandard manner, the accused is culpably inefficient. However, if the accused's failure is due to ineptitude, the poor performance is not the result of culpable inefficiency. Ineptitude is a genuine lack of ability to perform properly despite diligent efforts. Whether the accused's poor performance was the result of culpable inefficiency or merely ineptitude is a factual issue to be resolved at trial. The prosecution must prove beyond a reasonable doubt that the accused was culpably inefficient, not just inept.

4. **Pleading**

a. **General considerations**. Dereliction of duty specifications are often difficult to draft. Moreover, no single sample or form can adequately provide for all the factual variations that arise in dereliction cases. A dereliction specification should include specific details describing the conduct which constituted the dereliction, the accused's knowledge of the duty (or that he should have known), and whether the accused's dereliction was willful, negligent, or culpably inefficient.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 92.
>
> Specification: In that Private First Class Lute N. Pillage, U.S. Marine Corps, Company A, 1st Battalion, 9th Marines, 3d Marine Division, Fleet Marine Force Pacific, on active duty, who knew of his duties at Camp Fuji, Japan, on or about 20 November 19CY, was derelict in the performance of those duties, in that he negligently failed to perform routine inspection and cleaning on the M-16 rifle in his custody, as it was his duty to do.

G. **Common defenses to orders offenses and dereliction of duty**. Three defenses which are especially applicable to orders violations and dereliction are illegality, impossibility, and conflicting orders. Other defenses, discussed elsewhere in this text, may also be relevant in certain factual situations, but these three defenses are among the most common.

1. **Illegality**. The accused contends that the order violated was unlawful. The defense may be based on any of the specific issues discussed in part B of this chapter. The most common attacks on the alleged lawfulness of an order will be in the areas of the order not relating to a military duty, the order being contrary to superior law, and the order unlawfully infringing on individual rights. Whenever the defense raises any issue about the order's lawfulness, the prosecution must prove beyond reasonable doubt that the order was lawful. The accused's erroneous belief that the order was unlawful will not be a defense (i.e., an accused disobeys at his/her own risk).

2. **Impossibility**. Impossibility may be a defense to orders violations and dereliction of duty when a physical or financial inability prevented the accused from complying with an order or properly performing a duty. For example, suppose that Jones is ordered to drive the command vehicle to the airport to meet a visiting dignitary. The car breaks down on the way, making it impossible for Jones to comply with the order. Jones is not guilty of an orders violation nor of dereliction of duty because of the impossibility.

Impossibility is not a defense to article 92(1) and 92(2) orders violations or to dereliction of duty if the impossibility was the accused's own fault. Thus, in the example above, if it was impossible to comply with the order to drive to the airport because Jones carelessly lost the key, Jones will be unable to defend on the grounds of impossibility. In willful disobedience cases, however, impossibility will be a defense regardless of whether the accused was at fault. Willful disobedience requires a willful noncompliance. Nothing less, not even gross negligence, will suffice. Of course, if the "impossibility" is deliberately created by the accused for the specific purpose of avoiding compliance with an order, this contrived impossibility will not be a defense.

3. **Subsequent conflicting orders.** When a subordinate receives an order from a superior, and that order is subsequently countermanded or modified by an order from another superior, the accused is not guilty of a violation of the original order. This is so whether or not the officer who issued the second order is superior to the officer who issued the first order or was authorized to countermand the first order. *See* Article 0124, *U.S. Navy Regulations, 1990*, for specific guidance.

REVIEW QUESTIONS

A local instruction issued by Commanding Officer, Naval Air Station, Key West, Florida, outlined the command's smoking restrictions. The instruction designated certain spaces within each building at the command as "no-smoking" areas. The instruction similarly designated certain spaces as "smoking" areas. The instruction further stated violations of the instruction would be punishable as an orders violation under article 92(2) of the UCMJ. The legal office was both designated as a "no-smoking" area and under the supervision of the SJA. LN2 Susan Rink worked for the SJA. LN2 Rink, who also smoked 2 packs of cigarettes a day, was unaware of the local instruction. The SJA, a smoker herself, was so impressed with the quality of LN2 Rink's work that she had no problem with LN2 Rink occasionally "sneaking" a cigarette within the office. The SJA had never given LN2 Rink her express permission to smoke in the legal office. One day, while "sneaking" a cigarette, the XO -- an anti-smoking fanatic -- walked in on LN2 Rink and was outraged to find her smoking in a designated "no-smoking" area. LN2 Rink was subsequently charged with a single violation of article 92(2). What would be LN2 Rink's best defense at her court-martial?

A. The skipper lacked the authority to issue the instruction.

B. She had the implied permission of the SJA to smoke in the legal office.

C. The instruction constituted an unreasonable intrusion on her individual rights.

D. She lacked actual knowledge of the instruction.

Based on this same set of facts, the legally correct result at LN2 Rink's court-martial should be:

A. Guilty of article 92(2).

B. Guilty of article 92(3) (willful dereliction of duty).

C. Not guilty.

D. Guilty of article 92(3) (negligent dereliction of duty).

MILITARY JUSTICE STUDY GUIDE

CHAPTER XXI

DISRESPECT

A. **Overview**. The Uniform Code of Military Justice prohibits two distinct disrespect offenses. Article 89 prohibits disrespect toward a superior commissioned officer. Article 91(3) prohibits disrespect toward a warrant (W-1), noncommissioned, or petty officer -- whether or not the victim is the superior -- who is in the execution of office. (Note also that only warrant officers (W-1) and enlisted persons can violate article 91.) The concept of superiority is identical to that in willful disobedience, as discussed in chapter XX of this text: superior in rank or superior in chain of command.

B. **What is disrespect**? A common element of the two disrespect offenses is that the accused's language or conduct was, under the circumstances, disrespectful to the victim. Whether the accused's behavior was disrespectful is a factual question to be determined by evaluating all the facts and circumstances of each case.

1. **The accused's behavior**. Disrespect may consist of words, acts, failures to act respectfully, or any combination of the three. Disrespect connotes contempt. The accused's disrespectful behavior detracts from the respect and authority rightfully due the position and person of a victim. The accused's disrespectful language may attack the victim's military performance (e.g., "Colonel, you're a nice woman, but you couldn't lead a regiment out of a paper bag."). It may also be a personal insult, unrelated to military matters (e.g., "Commander, you're an outstanding officer, but a mindless buffoon at poker."). The fact that the accused's statement is true is no defense. Disrespect may also consist of contemptuous behavior, such as deliberately refusing to perform military courtesies, or turning and walking away from a superior who's talking to you.

2. **The circumstances**. Although the accused's language or conduct is the most important factor in determining whether the accused's behavior was disrespectful, the circumstances of the alleged disrespect are also important. Social engagements may allow greater familiarity than would be permitted during the regular performance of military duties. On the other hand, a social function is not a license for disrespect. The prior relationship between the victim and the

subordinate may be considered. Greater liberty may be allowed a close personal friend or relative of the victim, especially if the alleged disrespect occurred when no other military members were present. The accused's intent and the victim's understanding of the behavior is important. If the accused meant no disrespect, and if the victim took no offense, the accused's behavior may not have been disrespectful under the circumstances. On the other hand, if other military members witnessed the encounter, the fact that the accused meant no disrespect may be outweighed by the potential impact on military discipline.

a. **Abandonment of rank**. Sometimes a victim may provoke the disrespectful behavior by his or her own outrageous conduct. When a victim's conduct is so demeaning as to be undeserving of respect, the victim is considered to have abandoned his or her rank. Such a person no longer deserves the respect which the UCMJ protects. An accused who is provoked to disrespectful behavior by the victim's abandonment of rank will not be guilty of disrespect.

b. **Private conversations**. Part IV, para. 13c(4), MCM, 1984, counsels that ". . . ordinarily one should not be held accountable under this article for what was said or done in a purely private conversation." A private conversation is one conducted outside the course of government business and not in public. The victim concerned must not be party to the conversation. If the conversation is loud enough that others can overhear, the conversation is usually not a private one. For example, two sailors on liberty are conducting a gripe session in a bar. They are talking in a very low voice. One sailor says, "Ensign Smeen is such a turkey that he has to hide every Thanksgiving." This would be a purely private conversation. If, however, the sailor shouts her statement, the conversation would not be a purely private one.

c. **Directed toward the victim**? The disrespectful language or conduct must be directed towards the victim. Contemptible language or gestures which are not directed towards the "victim" may not be disrespectful, even if said or done in the victim's presence. However, a superior commissioned officer need not be present for disrespectful language to be "directed toward" him or her.

C. **Disrespect toward a superior commissioned officer** (article 89)

1. **Elements of the offense**. The prosecution must prove beyond reasonable doubt that:

a. At the alleged time and place, the accused did, or failed to do, certain acts, or used certain language; and

b. the accused's behavior was directed toward a superior commissioned officer of the accused; and

c. the accused knew that the superior commissioned officer was his or her superior commissioned officer; and

d. the accused's behavior, under the circumstances, was disrespectful to the superior commissioned officer.

2. **Discussion**. There are three significant distinctions between disrespect to a superior commissioned officer and disrespect to a warrant, noncommissioned, or petty officer. First, the commissioned officer must be the accused's superior. Second, the alleged disrespect to the superior commissioned officer need not occur in the presence of the commissioned officer. Third, the superior commissioned officer need not be in the performance of official duties when the disrespect occurs. Thus, if Seaman Smith makes a disrespectful remark about Commander Jones, Smith will be guilty of disrespect even though the remark was made out of the presence of Jones and while the two were both on liberty.

3. **Pleading**

a. **General considerations**. *See* Part IV, para. 13f, MCM, 1984. The specification should include a clear, concise description of the accused's behavior. If the disrespect consisted of a statement, the statement should be quoted verbatim. If the statement was oral, the phrase "or words to that effect" should be added at the end of the quotation. If the disrespect included conduct, the accused's actions should be described with enough specificity to indicate that they were disrespectful.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 89.
>
> Specification: In that Private Mel Content, U.S. Marine Corps, Marine Barracks, Charleston, South Carolina, on active duty, did, at Naval Base, Charleston, South Carolina, on or about 10 December 19CY, behave himself with disrespect toward Rear Admiral I. M. Comsix, U.S. Navy, his superior commissioned officer, then known by said Private Content to be his superior commissioned officer, by saying to her, "Hey, stupid, can't you read? I don't care if you are some big-shot admiral. That stop sign at the gate applies to you, too, dummy," or words to that effect.

D. **Disrespect toward warrant (W-1), noncommissioned, or petty officer** [article 91(3)]

1. **Elements of the offense.** The prosecution must prove beyond a reasonable doubt that:

a. The accused was a warrant officer (W-1) or enlisted person; and

b. at the alleged time and place, the accused did, or failed to do, certain acts, or used certain language; and

c. the accused's behavior was directed toward a warrant (W-1), noncommissioned, or petty officer of the accused; and

d. the accused's behavior was within the sight or hearing of the warrant, noncommissioned, or petty officer to whom it was directed; and

e. the accused then knew that the victim was a warrant, noncommissioned, or petty officer; and

f. the warrant, noncommissioned, or petty officer was in the execution of his or her office at the time; and

g. the accused's behavior, under the circumstances, was disrespectful to the superior warrant, noncommissioned, or petty officer.

(**Note**: If the victim was the superior of the accused, add the following elements):

h. That the victim was the superior noncommissioned or petty officer of the accused; and

i. that the accused then knew that the victim was the accused's superior noncommissioned or petty officer.

2. **Discussion**. Unlike disrespect to a superior commissioned officer, disrespect to a warrant, noncommissioned, or petty officer must occur within the sight or hearing of the victim of the disrespect. The warrant, noncommissioned, or petty officer must also be in the execution of office at the time. "Execution of office" means that the person is on duty or is performing some military function. Most examples of execution of office are obvious, but some require careful analysis. For example, a petty officer who is drinking at a bar after working hours is certainly not in the execution of office. Such a petty officer cannot be the subject of an unlawful disrespect. However, if the petty officer acts to quell a disturbance in the bar that

involves military members, he or she would assume a status of being in the execution of office. (**Note**: Article 7, UCMJ, authorizes a warrant, noncommissioned, or petty officer to quell such disturbances.) The victim need not be the accused's superior. If it is alleged and proved that the victim was the accused's superior noncommissioned or petty officer, however (superiority being irrelevant when the victim is a warrant officer (W-1)), the maximum punishment is increased.

3. **Commissioned warrant officers**. Disrespect to superior commissioned warrant officers (W-2 through W-4) must be charged under article 89.

4. **Pleading**

a. **General considerations**. *See* Part IV, para. 15f(3), MCM, 1984. The guidelines applicable to article 89 disrespects also apply to disrespect to a warrant, noncommissioned, or petty officer. Differences between the terms "behave himself/herself with disrespect," "treat with contempt," and "disrespectful in language and deportment," have no legal significance.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 91.
>
> Specification: In that Yeoman Third Class Brigrat Striker, U.S. Navy, USS LITTLE COMPTON, on active duty, on board USS LITTLE COMPTON, at sea, on or about 15 November 19CY, was disrespectful in language and deportment toward Chief Yeoman Dirk T. Oldman, U.S. Navy, a superior chief petty officer, then known by said Striker to be a superior chief petty officer, who was then in the execution of his office, by saying to him, "Chief, you're an overbearing, obnoxious, stupid Nazi" or words to that effect, and by contemptuously turning away from and leaving said Chief Yeoman Oldman's presence without his consent.

OFFENSES AGAINST AUTHORITY

	Article	Offense	Perpetrator	Victim	Knowledge
DISRESPECT	89	Disrespect to superior comm'd off'r	Anyone junior to the victim	Need not be present nor in execution of office	Of superior status
	91(3) (superior = aggravation)	Disrespect to WO, NCO, PO	Enlisted or WO	Must be present and in execution of office	Of status
ORDERS VIOLATIONS	92(1)	General order	Anyone		Need not be pleaded nor proved
	92(2)	Other lawful order	Anyone		Must be pleaded and proved
	92(3)	Dereliction of duty	Anyone		Must plead and prove that accused knew of duty
WILLFUL DISOBEDIENCE	90(2)	Willful disobedience of superior comm'd off'r	Anyone junior to the victim	comm'd off'r	Of superior status of victim and of order
	91(2)	Willful disobedience of WO, NCO, PO	Enlisted or WO	WO, NCO, PO	Of status of victim and of order
ASSAULT	90(1)	Assault on superior comm'd off'r	Anyone junior to the victim	Must be in execution of office	Of superior status
	91(1) (superior = aggravation)	Assault on WO, NCO, PO	Enlisted or WO	Must be in execution of office	Of status
	128	Assault on comm'd, WO, PO	Anyone	Need not be in execution of office or superior	Of comm'd, WO, NCO, PO status

(*See* discussion in chapter XXV, part F)

REVIEW QUESTIONS

Lieutenant Junior Grade Jones and Lieutenant Junior Grade Wilson are spending their lunch hour, as usual, slugging down Margaritas at Dos Yanquis. The topic of Lieutenant Commander Smith comes up, and the conversation turns to his questionable heterosexuality. Unfortunately, a remark by Lieutenant Junior Grade Jones, to the effect that "Smith is as queer as a three-dollar bill," is overheard. The incident is reported, and Lieutenant Junior Grade Jones is taken to a court-martial. During cross-examination, Lieutenant Commander Smith admits that he is in love with Tom Selleck.

A. Lieutenant Junior Grade Jones is not guilty of disrespect because truth is a defense.

B. Lieutenant Junior Grade Jones is guilty of disrespect to a superior commissioned officer.

C. Lieutenant Junior Grade Jones is not guilty of disrespect because Lieutenant Commander Smith did not hear the offensive statement.

D. Lieutenant Junior Grade Jones is no guilty because of the defense of purely private conversation.

Lieutenant Jones fell madly in love with the waitress at Mama Leone's Pizza Parlor and he married her immediately. Unfortunately, her three previous husbands are often tardy in their child support payments, and most of Lieutenant Jones' paycheck now goes to supporting her six kids. Noticing that his uniforms are becoming quite frayed (apparently because of the parade of little bodies jumping into Lieutenant Jones' lap), Major Smith orders Lieutenant Jones to purchase presentable uniforms in order to meet the dress code promulgated by NAVJUSTSCOLINST 5510.2A. But, pressing family expenses prevent Lieutenant Jones' compliance. He is charged with failing to obey the order in violation of article 92(2).

A. Lieutenant Jones is guilty because his family life is his problem, not Major Smith's.

B. Lieutenant Jones is not guilty because it was financially impossible for him to comply with the order.

C. Lieutenant Jones is not guilty because the order was an unlawful order.

D. Lieutenant Jones is not guilty because the failure of the other fathers to make their child support payments was an unforeseeable circumstance.

Lieutenant Junior Grade Blockhead, tired of Lieutenant Commander Jones' off-color case illustrations, approaches him during a break and requests that he tone down his presentation. Lieutenant Commander Jones, taking this comment as a personal affront, retorts, "You Communist dog, I decide what is proper for this class." After a tirade of approximately ten minutes, spiced with a multitude of equally witty and profane comments by Lieutenant Commander Jones, Lieutenant Junior Grade Blockhead replies with words to the effect, "Commander, you're not fit to wear the uniform of an officer." Lieutenant Commander Jones writes Lieutenant Junior Grade Blockhead up for disrespect.

A. Lieutenant Junior Grade Blockhead is guilty as charged.

B. Lieutenant Junior Grade Blockhead has a defense of purely private conversation.

C. Lieutenant Junior Grade Blockhead has a defense of abandonment of rank.

D. Lieutenant Junior Grade Blockhead has a defense of provocation.

MILITARY JUSTICE STUDY GUIDE

CHAPTER XXII

ABSENCE OFFENSES

A. **Overview**. The UCMJ prohibits four major types of absence offenses. Despite the factual variations among the offenses, all absence offenses are based on one common fact: The accused, without proper authority from anyone competent to grant leave or liberty, was absent from a place where the accused was required to be in the course of his/her military duty. The four basic types of absence offenses are:

1. Failure to go to, or going from, an appointed place of duty [articles 86(1) and 86(2)];

2. unauthorized absence from unit or organization [article 86(3)];

3. missing movement (article 87); and

4. desertion (article 85).

B. **Failure to go to, or going from, an appointed place of duty** [articles 86(1) and 86(2)]

1. **General concept**. The two least serious absence offenses are failure to go to an appointed place of duty [article 86(1)] and going from an appointed place of duty [article 86(2)]. Both offenses involve the accused's unauthorized failure to be at a specific location. Although each offense is separate and distinct from the other, the two offenses share common legal principles.

2. **Elements of the offenses**. The prosecution must prove beyond a reasonable doubt that:

a. Lawful authority appointed a certain time and place of duty for the accused; and

b. the accused knew that he or she was required to be present at the appointed time and place of duty; and

c. that, at the alleged time and place, the accused, without proper authority:

(1) [Article 86(1)] failed to go to the appointed place of duty; or

(2) [article 86(2)] left the appointed place of duty after having reported to it.

3. **Discussion**

a. **Lawful authority**. The accused must have been lawfully ordered to be at the appointed place of duty at the prescribed time. An order by a military superior may be inferred to be lawful, absent evidence to the contrary. The order may be directed to the accused individually or as a member of a group. See chapter XX of this text for a detailed discussion of the concept of lawfulness of orders.

b. **Appointed place of duty**. The appointed place of duty must be a specific location to which the accused must report at a specific time. A location such as "USS Cambria County" or "Naval Station, Norfolk, Virginia" is too general to be an appointed place of duty. Articles 86(1) and 86(2) contemplate a specific location such as "the mess decks" or "Building 17" [therefore, when the accused fails to report to a command or leaves his/her unit, the absence should be prosecuted as unauthorized absence from the unit or organization, in violation of article 86(3)]. The specific location must be alleged.

c. **A precise time**. A precise time must be appointed for the accused to report. Thus, an order to "report to Building M-6 when your duties are finished" is too general as to time. "Report to Building M-6 at 1400" is specific. The precise time must also be alleged.

d. **Knowledge**. The prosecution must prove beyond a reasonable doubt that the accused actually knew that he or she was required to be at the appointed place of duty at the time prescribed. Actual knowledge may be proven by either direct or circumstantial evidence.

e. **Without authority**. The common element of all absence offenses is that the accused had no authority to be absent. In the offenses of failure to go to, or going from, appointed place of duty, the absence of authority is usually proven by the testimony of the accused's supervisor or of the superior who ordered the accused to report to the place of duty. The burden is always on the prosecution to prove beyond a reasonable doubt that the accused had no permission to be absent.

f. **Failure to go**. Failure to go to an appointed place of duty may be either intentional or the result of negligence. Thus, one who is ordered to report

to the wardroom at 1500, but forgets to do so, is guilty of failure to go. Failure to go to an appointed place of duty is an instantaneous offense. If the accused does not report to the appointed place of duty at the prescribed time, the offense is completed. Reporting late is no defense unless the tardiness was caused by unforeseeable factors beyond the accused's control. The accused's failure to report is usually proven by the testimony of a witness or by an official logbook entry.

g. **Going from appointed place of duty**. The offense of going from an appointed place of duty involves two distinct acts. First, the accused must have reported to the place of duty. The accused's arrival may be proven by the testimony of witnesses or by official log entries. Second, the accused must leave the appointed place of duty without authority. The accused's departure also may be proven by the testimony of witnesses or by official logbook entries. Like failure to go, going from appointed place of duty is an instantaneous offense. Once the accused leaves without authority, the offense is completed. The accused's subsequent return is no defense. In some cases, there may be an issue of whether the accused actually went beyond the limits of the appointed place of duty. Usually, if the accused goes too far from the appointed place to be reasonably able to perform the assigned duty, the accused has left the place of duty. For example, a person standing a phone watch in an office probably has not left the appointed place of duty while visiting a nearby head, while a watchstander has certainly left the appointed place of duty while visiting a nearby tavern. Whether the accused went beyond the reasonable limits of the place of duty is an issue that must be decided after evaluating the facts and circumstances of each case.

4. **Aggravated forms of absence from appointed place of duty**. Part IV, para. 10e(3)-(5), MCM, 1984, authorizes substantially increased maximum punishments when the failure to go to, or going from, an appointed place of duty occurs under certain aggravating circumstances. These additional aggravating circumstances must be pleaded and proven beyond a reasonable doubt in order to trigger the greater maximum punishment.

a. **Absence from watch or guard**. If the accused's appointed place of duty is a watch, guard, or duty section, the maximum sentence to confinement and two-thirds forfeitures is increased from one month to three months. The fact that the accused's appointed place of duty was a watch, guard, or duty section must be clearly alleged in the specification.

b. **Intentionally abandoning watch or guard or avoiding maneuvers or field exercises**. If the accused fails to go to, or goes from, a watch, guard, or duty section with any such intent, the maximum punishment is increased to total forfeitures, six months' confinement, and a bad-conduct discharge. In addition to the elements of the offense, the prosecution must also prove beyond a reasonable doubt that the accused knew the absence would occur during the

aggravating event, and that the accused intended to abandon or avoid the event. The accused's intent may be proven by either direct or circumstantial evidence.

5. **Pleading**

a. **General considerations**. *See* Part IV, para. 10f(1), MCM, 1984. Note that the MCM form does not expressly allege that the accused had actual knowledge of the appointed place of duty. The military appellate courts have never ruled that the knowledge element must be expressly pleaded. This apparent exception to the rule that all elements must be pleaded may be explained by interpreting the language "his [her] appointed place of duty" as fairly implying that the accused had actual knowledge. The prescribed time at which the accused was to go to the appointed place of duty must be alleged in failure to go specifications, and the precise place of duty must be alleged in either case.

b. **Sample pleadings**

(1) **Failure to go to appointed place of duty** [article 86(1)]

> Charge: Violation of the Uniform Code of Military Justice, Article 86.
>
> Specification: In that Seaman James J. Jones, U.S. Navy, USS POTTSYLVANIA, on active duty, did, on board USS POTTSYLVANIA, at sea, on or about 3 September 19CY, without authority, fail to go at the time precribed to his appointed place of duty, to wit: the 0600 restricted muster on the fantail.

(2) **Going from appointed place of duty** [article 86(2)]

> Charge: Violation of the Uniform Code of Military Justice, Article 86.
>
> Specification: In that Seaman James J. Jones, U.S. Navy, USS MORDOR, on active duty, did, on board USS MORDOR, located at sea, on or about 3 September 19CY, without authority, go from her appointed place of duty, to wit: the 0800 to 1200 signal bridge watch.

Note that, for article 86(2) offenses, it is not common practice to include the time the accused went from his duty since, usually, the exact time he/she left will be unknown.

C. **Unauthorized absence from unit or organization** [article 86(3)]

1. **General concept**. Article 86(3) prohibits the most commonly prosecuted absence offense, unauthorized absence from the servicemember's unit or organization. UA, as this offense is commonly called, is an instantaneous offense, complete the moment the accused becomes absent without authority. It is also an offense of duration because the length of an absence is an important aggravating circumstance. If the unauthorized absence is (1) three days or less, (2) more than three days but no more than thirty days, or (3) more than thirty days, the maximum authorized punishment differs. While the maximum authorized punishment does not change where the unauthorized absence is in excess of thirty days, the length of the absence will serve, practically speaking, as an important factor in determining the amount of confinement to be imposed upon the accused. In addition, if an absence of over thirty days is terminated by apprehension, the maximum punishment is increased even further. Thus, the most important aspects of any unauthorized absence are its inception, termination, and how the absence ended.

2. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. At the alleged time and place, the accused was absent from his or her unit, organization, or place of duty; and

b. this absence was without proper authority from anyone competent to grant the accused leave or liberty; and

c. the accused remained an unauthorized absentee until the alleged termination date;

(Note: If the absence was terminated by apprehension, add as an additional element)

d. that the absence was terminated by apprehension.

3. **Discussion**

a. **Absence from unit or organization**. "Unit" refers to a smaller command, such as a ship, air squadron, or company. "Organization" refers to a larger command, such as a large shore installation, base, or battalion. The terms may be used interchangeably. For purposes of article 86(3) offenses, the accused's unit is usually the military activity that holds the accused's service record. It is the

command having summary court-martial jurisdiction over the accused. When an accused is on temporary duty away from the permanent command, the accused is technically a member of both the permanent and the temporary unit. The accused's unauthorized absence from the temporary command could also be charged as an unauthorized absence from the permanent unit. When a servicemember, pursuant to permanent change-of-station orders, detaches from the old command, that person immediately becomes a member of the new command. Thus, should a person traveling under PCS orders fail to report to the new command, the unauthorized absence would be from the new unit or organization even though the accused was never actually there.

b. **"Place of duty" under article 86(3).** The language of article 86(3) also provides for an unauthorized absence from a "place of duty." "Place of duty" under article 86(3) must not be confused with the "appointed place of duty" under articles 86(1) and 86(2). The article 86(3) "place of duty" refers to a general location to which the accused is assigned. For example, a sub-unit of a command located in a place other than the command headquarters would be a "place of duty" under article 86(3). If the accused is regularly assigned to the detached sub-unit and becomes an unauthorized absentee, the offense may be charged as an unauthorized absence from either the accused's command or from the detached sub-unit. Because of the possible confusion that can arise from prosecuting an unauthorized absence from a "place of duty," an article 86(3) offense should usually be charged as an absence from the unit or organization rather than the article 86(3) "place of duty." The specification should allege the accused's unit or organization in terms of both the command and the detached sub-unit, e.g., "absent himself from his unit, to wit: Naval Legal Service Office, Newport, Rhode Island (Naval Air Station, Brunswick, Maine Detachment) . . . ."

c. **Commencement of the unauthorized absence.** An unauthorized absence begins in one of three ways: The accused may leave the command without authority; the accused may fail to return to the command upon the expiration of leave or liberty; or the accused may fail to report to a permanent or temporary command pursuant to military orders. The inception of the accused's absence is usually proven through official military records such as muster reports or entries in the accused's service record.

d. **Without authority.** The accused's absence must be without authority from anyone competent to grant leave or liberty. Service record entries are routinely used to prove the absence of proper authority. The person preparing the service record entry should consult the accused's supervisor or commanding officer before preparing the entry to ensure that the absence was without authority.

e. **Intent.** The accused's unauthorized absence may be intentional or the result of negligence. If unforeseen factors beyond the accused's control made

it impossible to return from leave or liberty or to report on time, the accused will have a defense to unauthorized absence. Also, if the accused honestly and reasonably believed that the absence was authorized, the accused will not be guilty of unauthorized absence. The defenses of impossibility and mistake of fact are discussed in greater detail later in this chapter.

f. **Termination of the unauthorized absence.** An unauthorized absence terminates when there is a bona fide return to military control. The absence may be terminated either by the accused's surrender to military authorities or by the accused's apprehension.

(1) **Surrender.** When the accused surrenders to military authorities, the unauthorized absence terminates. A surrender requires three things: First, the accused must appear in person before any military authority; second, the accused must disclose his or her status as an unauthorized absentee; and third, the accused must actually submit (or demonstrate a willingness to submit) to military control. If these requirements are met, the absence is terminated even if the accused surrenders to a unit or armed force other than his/her own. For example, if Seaman Jones is UA from NETC Newport, she may surrender to Fort Ord, California, to terminate her UA status.

(a) **Physical presence.** Merely writing or telephoning military authorities is not sufficient.

(b) **Disclosure of status.** In order to end the unauthorized absence, the absentee must disclose his or her status of unauthorized absence. Suppose that Seaman Jones is an unauthorized absentee. Jones visits his recruiter to ask about what will happen to "a friend" who is an absentee. Jones' visit will not be a surrender because Jones did not disclose his status, nor did he disclose enough facts to alert the recruiter to the fact that Jones might be an unauthorized absentee.

(c) **Actual submission to military control.** The absentee must actually submit (or demonstrate a willingness to submit) to military control. The surrender must constitute a present, physical submission to military control. "Casual presence" aboard a military installation will not end an unauthorized absence. Suppose that Corporal Smith is an unauthorized absentee. Smith returns to the base to patronize the liquor store, visit the enlisted club, and purchase cigarettes at the PX. This "casual presence" will not constitute a surrender: the unauthorized absence continues.

(2) **Apprehension by military authorities.** If military authorities apprehend someone they know to be an unauthorized absentee, the absence terminates. Even if the military authorities are unaware of the person's

status, the absence will terminate if the authorities could have determined the person's unauthorized absence status by reasonable diligence. Usually, when military authorities apprehend a military member, they will be able to determine through reasonable inquiries and efforts if the person is an unauthorized absentee. If, however, the apprehended absentee deliberately conceals or misrepresents his or her status to the military authorities, and they reasonably rely on the absentee's statements and release the absentee, the absence will not usually be considered terminated.

(3) **Apprehension by civilian authorities.** An unauthorized absence often ends in an arrest by civilian police and subsequent delivery to military authorities. The point at which the unauthorized absence terminates depends upon the circumstances of the civilian arrest.

(a) **General rule: Termination upon notification.** As a general rule, the unauthorized absence terminates when the civilian authorities notify the military that the absentee is in custody and is available to be returned to military control. Suppose, therefore, that the civilian police arrest Private Smith on a civilian charge. Smith informs the police that he is an unauthorized absentee from the Marine Corps. Rather than prosecute Smith for the civilian charge, the police decide to return Smith to the Marines. The unauthorized absence terminates when the police notify military authorities that Smith is in custody and is available for return to the military. Even if the Marines wait three weeks before taking custody of Smith, the unauthorized absence ends when they were notified that Smith was available to them.

(b) **Exception: Civilian arrest pursuant to military request.** When military authorities request civilian authorities to apprehend an unauthorized absentee, the unauthorized absence will terminate when the person is apprehended pursuant to the request. After a servicemember has been an unauthorized absentee for a certain period of time, his or her command will issue a Form DD-553 -- "Absentee Wanted by Armed Forces" -- to the Federal Bureau of Investigation and to state and local authorities near the absentee's home of record. This flyer requests (and authorizes) civilian authorities to apprehend the absentee. Whenever a military member is taken into civilian custody because of a Form DD-553, his or her unauthorized absence terminates immediately upon apprehension. By arresting the absentee, the civilian police have merely acted as agents of the military.

Whether the civilian arrest was pursuant to military request depends on the reason why the civilian police took the absentee into custody. Suppose, for example, that Seaman Jones is stopped by local police for a traffic offense. When the police officer checks Jones' license and registration with headquarters, a Form DD-553 is discovered. The officer takes Jones into custody.

Seaman Jones' unauthorized absence has terminated because the arrest was the result of the DD-553 request. Had the police officer not discovered the DD-553 against Jones, Jones would not have been taken into custody for a traffic offense. On the other hand, suppose that Jones is arrested for armed robbery and the Form DD-553 against him is discovered. Seaman Jones' unauthorized absence is not terminated because the arrest was not pursuant to the DD-553. Jones was suspected of a serious crime. The arresting officer would have taken Jones into custody regardless of his absentee status.

(4) **Apprehension or surrender?** Sometimes it is difficult to determine whether an absence ended by apprehension or surrender. An unidentified military accused who is arrested for minor civilian offenses has nonetheless surrendered for military purposes if the accused freely and voluntarily discloses his/her military status. On the other hand, if the accused discloses military status only begrudgingly, or for an ulterior motive, or when faced with serious civilian charges, the absence is considered terminated by apprehension for military purposes as well.

> **Example**: Suppose that Sergeant Johnson is an unauthorized absentee from the Marine Corps. Johnson is arrested by civilian police for burglary. The police do not know that Johnson is an unauthorized absentee. Johnson calculates that one year in the brig is better than five-to-ten in the state penitentiary. Hoping that the civilians will merely turn her over to the Marine Corps, Johnson informs the police of her status and of her earnest desire to surrender. Johnson's actions do not constitute a surrender. Should Johnson ever be tried by the military, the maximum punishment will be higher because this absence was terminated by apprehension.

g. **Delivery of military personnel to civilian authorities**. When military authorities deliver a military member to civilian authorities for prosecution of a civilian offense, the member is not in a status of unauthorized absence. The member's absence has been ordered by military authority. Even if the person is convicted of the civilian offense and sentenced to imprisonment, the entire period is not an authorized absence. (It may, however, still be "dead time" for which the member would not receive pay nor credit toward his/her service obligation.)

4. **Variance**. Determination of unauthorized absence inception and termination dates is very important because "UA" is not a continuing offense. Remember, the length of the absence is only a matter in aggravation. Consequently,

if the proof at trial varies from the inception and termination dates charged, the accused under some circumstances may not be convicted of anything other than a "one-day" absence. Suppose, for example, the accused is charged with being UA from 1 January 19CY until 1 December 19CY. If the proof adduced at trial only shows that the absence ended 1 December 19CY, the accused can be convicted only of a one-day UA on 1 December 19CY. Or, suppose the proof shows that the absence began when charged (1 January 19CY) but the proof fails to establish when the UA ended. The accused can be convicted for a one-day (1 January 19CY) UA only. If, however, there is proof that the accused went UA initially on 2 January 19CY, returned on 1 February 19CY, again went UA on 1 March 19CY, and remained absent until 1 December 19CY, the accused may properly be convicted of the two separate UA's, since the times in question were included within the one longer UA charged (1 January - 1 December 19CY).

5. **Aggravating factors**. In addition to the length of absence and manner of termination, article 86(3) cases may be aggravated by the same factors which aggravate article 86(1) and (2) offenses. *See* discussion *supra*.

6. **Pleading**

a. **General considerations**. *See* Part IV, para. 10f(2), MCM, 1984. Extra care must be taken to allege the accused's correct unit or organization at the time of absence and the exact inception and termination dates. Hours of the day should not be alleged unless it is necessary to establish that the absence is more than three days (72 hours) or thirty days. *See* Part IV, para. 10e for a discussion of the duration of the absence and its effect on permissible punishment.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 86.
>
> Specification: In that Seaman Ovur D. Hill, U.S. Naval Reserve, Naval Education and Training Center, Newport, Rhode Island, on active duty, did, on or about 6 May 19CY, without authority, absent himself from his unit, to wit: USS DONORA, located at San Diego, California, and did remain so absent until he was apprehended on or about 6 August 19CY.

D. **Missing movement** (article 87)

1. **General concept**. Missing movement is an aggravated form of unauthorized absence from a unit or organization. The accused, while an unauthorized absentee, misses a significant movement of a ship, aircraft, or unit. The accused may have intended to miss the movement, or did so through carelessness or neglect.

2. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. The accused was required in the course of duty to move with a certain ship, aircraft, or unit; and

b. the accused actually knew of the movement; and

c. at the alleged time and place, the accused missed the movement; and

d. the accused missed the movement by design or through neglect.

3. **Discussion**

a. **What is a movement?** A movement under article 87 is a significant move of a ship, aircraft, or unit. Whether a particular operation is a significant movement is a factual issue, to be decided by evaluating all the facts and circumstances of each case. A movement usually involves an operation over a substantial period of time. Under some circumstances, however, an important operation or mission of less than a day may be a movement under article 87. Distance is also an important factor. Merely changing berthing space in a shipyard is not a movement. Under certain circumstances, however, local operations may be important enough to constitute a movement. The nature of the mission and the existence of a combat environment must also be considered. Even personnel shortages and budgetary restraints may be relevant if these problems were such that the movement would not be made unless it was significant. All of the circumstances must be considered.

b. **Individual or group travel**. If the accused misses a significant movement of his or her command, article 87 applies. Article 87 also applies, under certain circumstances, to other instances where the military member is required to perform individual or group travel. The term "unit" not only includes a permanent military component, such as a company, platoon, or squadron, but also a group organized solely for purposes of group travel. For example, 200 Marines, commanded by an officer, organized into a replacement company for transportation to Okinawa,

constitute a unit under article 87, even though the unit will be disbanded upon arrival in Okinawa and its members distributed among several commands. On the other hand, several enlisted members listed on a standard transfer order assigning them to a new permanent command do not constitute a unit because there is no organizational structure and the mode of travel for each individual may vary.

c. **Military or commercial transportation**? If the accused misses a movement, the mode of transportation used, military or commercial, is irrelevant. The mode of transportation may be important, however, when the accused is ordered to perform individual travel. If the individual travel was to be by military transportation (including civilian transportation leased by the military), the accused will usually be guilty of missing movement regardless of whether he or she was a crew member or merely a passenger. If the accused misses commercial transportation, however, the accused will not usually be guilty of missing movement.

d. **Knowledge of the movement**. The prosecution must prove beyond reasonable doubt that the accused actually knew the approximate time and date of the upcoming movement. This knowledge is usually proven by circumstantial evidence, such as the planned movement being announced at quarters or a formation at which the accused was present. Simply placing notice of the movement in the plan of the day (POD) is <u>not</u> enough to show actual knowledge, even if all hands are charged with reading the POD.

e. **Missing movement by design**. Missing movement by design is a specific intent offense: the accused missed movement because he or she specifically intended to do so. The accused's intent may be proven by direct evidence, such as the accused's statement to a shipmate that he or she won't make the movement. It can also be proven by circumstantial evidence, such as the accused having had severe family problems and the fact that the ship was about to deploy for eleven months. As a practical matter, unless there is direct evidence of the accused's intent, it is difficult to prove missing movement by design at trial.

f. **Missing movement through neglect**. Missing movement through neglect is the lesser included offense of missing movement by design. Neglect connotes a failure to make reasonable efforts to make the movement. It also includes careless actions undertaken without considering the reasonable possibility that they might prevent the accused from making the movement. In the typical missing movement case, proof beyond reasonable doubt that the accused knew about the scheduled movement, but was an unauthorized absentee when the movement occurred, will prove missing movement through neglect. Even if the prosecution is unable to prove the accused's knowledge beyond a reasonable doubt, the accused may be convicted of missing movement's lesser included offense of unauthorized absence from unit or organization.

4. **Pleading**

a. **General considerations**. *See* Part IV, para. 11f, MCM, 1984. The word "neglect" may be substituted for "design" where appropriate. Note that the sample form in the MCM does not expressly allege knowledge of the movement. The specification reasonably implies knowledge, however. "Through design" implies that the accused knew of the movement and intended to miss it. (If only "through neglect" were to be alleged, however, it would be prudent to also allege that the accused had knowledge of the movement.)

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 87.
>
> Specification: In that Fireman Stokes D. Blaze, U.S. Navy, USS PUDDLESTOPPED, on active duty, did, at Mayport, Florida, on or about 12 November 19CY, through design, miss the movement of USS PUDDLESTOPPED with which he was required in the course of duty to move.

E. **Desertion** (article 85)

1. **General concept**. Desertion is the most serious type of absence offense. Like missing movement, desertion is an aggravated form of unauthorized absence from the unit or organization. Article 85 provides for two types of desertion. Article 85a(a) prohibits unauthorized absence with the intent to remain away permanently from the unit or organization. Article 85a(2) prohibits unauthorized absence with the intent to avoid hazardous duty or to shirk important service. Of the two forms, article 85a(1) desertion is the more commonly encountered.

2. **Elements of article 85a(1) desertion**. In order to convict the accused of desertion with the intent to remain away permanently in violation of Article 85a(1), UCMJ, the prosecution must prove beyond reasonable doubt that:

a. At the alleged time and place, the accused was absent from his or her unit, organization, or place of duty; and

b. this absence was without proper authority from anyone competent to grant the accused leave or liberty; and

c. the accused intended at the time the absence began, or at some time during the absence, to remain away permanently from his or her unit, organization, or place of duty; and

d. the accused remained an unauthorized absentee until the alleged termination date.

(**Note**: When the desertion was terminated by the accused's apprehension, add as a fifth element)

e. the accused's absence was terminated by apprehension.

3. **Discussion of article 85a(1) desertion**

a. **Relationship to unauthorized absence**. Desertion with the intent to remain away permanently is merely an aggravated form of unauthorized absence from the unit or organization. The additional element in article 85a(1) desertion is the intent to remain away permanently from the unit or organization. Thus, article 85a(1) desertion is merely unauthorized absence plus specific intent.

b. **Intent to remain away permanently**. The accused must specifically intend to remain away permanently from his or her unit or organization. This intent may exist when the unauthorized absence begins, or it may be formed at a later time. Once the intent is formed, the offense of desertion is complete. A change of heart is no defense. The fact that the accused always intended to return to military control is no defense if the accused nonetheless never intended to return to the unit or organization the accused left. An intent to return to the unit at some indefinite time in the future is a defense to article 85a(1) desertion, as is an intent to return when a certain event occurs. Thus, the unauthorized absentee who always intends to return to his or her unit "someday" or "when things get better financially" is not guilty of desertion with the intent to remain away permanently.

Intent is sometimes proven by direct evidence, such as the accused's statement that "I'm glad they caught me because I never would have come back on my own." More frequently, however, the intent to remain away permanently is proven by circumstantial evidence. Length of absence is the most important fact, but, by itself, will not be sufficient to convict an accused of desertion. Other important facts include: The fact that the accused destroyed his or her uniforms, ID card, or military gear; the fact that the accused's absence was terminated by apprehension; the fact that the accused left the country; the accused's use of an alias while an absentee; and the fact that, while an absentee, the accused stayed far away from any military installation. All the facts and circumstances surrounding the reasons for the accused's absence, as well as the accused's life while an absentee, must be considered.

c. **Termination by apprehension**. If the accused's absence is terminated by apprehension, the authorized maximum sentence to confinement is increased from two years to three years. The apprehension must be pleaded and proven beyond reasonable doubt. "Apprehension," as used in article 85 cases, means that the accused's return to military control was involuntary, caused by events beyond the accused's control; that is, neither the accused nor persons acting at the accused's request voluntarily initiated the accused's return. Where an accused deserter is arrested by civil authorities for a civilian offense and makes his military status known when required to fully identify himself by the civilian police or to escape punishment at the hands of the civilian authorities, his absence is not terminated by surrender, but by apprehension. On the other hand, if the accused's disclosure of status was completely free and voluntary, the accused's absence was not terminated by apprehension. Whether the unauthorized absence was terminated by apprehension is a factual issue decided by the court-martial members or, in a judge-alone trial, by the military judge.

4. **Desertion with intent to avoid hazardous duty or to shirk important service** [article 85a(2)]

a. **General concept**. Article 85a(2) desertion is merely unauthorized absence plus one of two specific intents: the intent to avoid hazardous duty or the intent to shirk important service. Article 85a(2) desertion also contains elements of knowledge *not* present in desertion with intent to remain away permanently.

b. **Elements of the offense**. In addition to the elements of the offense of unauthorized absence [article 86(3)], the prosecution must also prove beyond reasonable doubt that the accused knew that he or she would be required to perform a hazardous duty or important service, and that the accused's unauthorized absence was with the specific intent to avoid such hazardous duty or important service.

c. **"Hazardous duty" and "important service."** "Hazardous duty" involves danger, risk, or peril to the individual performing the duty. Hazardous duty need not involve combat. Even some training exercises would qualify as hazardous duty. "Important service" denotes service that is of substantially greater consequence than ordinary everyday military service. Whether a given service is "important" depends upon all the facts and circumstances of each case.

5. **Article 85a(3)**. Article 85a(3), UCMJ, provides that any member of the armed forces who:

> without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or

> another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States . . . is guilty of desertion.

The U.S. Court of Military Appeals has held that article 85a(3) does not create a third type of desertion offense. Article 85a(3) merely describes a specific factual situation which constitutes desertion with intent to remain away permanently.

6. **Pleading**

a. **General considerations.** *See* Part IV, para. 9f, MCM, 1984. The specific intent to remain away permanently and, if applicable, termination by apprehension must be pleaded.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 85.
>
> Specification: In that Yeoman Second Class Runyon A. Way, U.S. Navy, Naval Station, Philadelphia, Pennsylvania, on active duty, did, on or about 1 January 19CY, without authority and with intent to remain away therefrom permanently, absent himself from his unit, to wit: USS HOBOKEN, located at Bayonne, New Jersey, and did remain so absent in desertion until he was apprehended on or about 9 October 19CY.

Note: In cases of desertion not terminated by apprehension, omit the words "he(she) was apprehended."

F. **Common defenses to absence offenses**

1. **Ignorance or mistake of fact.** Ignorance or mistake of fact is a complete defense to the various absence offenses. The conditions under which ignorance or mistake of fact is available as a defense vary from one absence offense to another. To be a defense to a general intent offense, such as an article 86(3) unauthorized absence, the ignorance or mistake of fact must be both honest and reasonable. An honest ignorance or mistake of fact is one occurring in good faith. It is not feigned ignorance, nor is it a mistaken belief which the accused knows is

erroneous. A reasonable ignorance or mistake of fact is one which a reasonable person would make under similar circumstances. Thus, in an unauthorized absence case, if the accused claims that he or she believed that someone in military authority had authorized or excused the absence, the prosecution need prove beyond reasonable doubt only either that the accused's mistake of fact was not honest or was not reasonable. Some other absence offenses are specific intent offenses. For example, in a "missing movement through design" case, the ignorance or mistake of fact need only be honest. It need not be reasonable. However, the fact that the accused's mistake of fact was wildly unreasonable may be relevant to show that there was no good faith, honest ignorance, or mistake.

To illustrate the operation of the defense of ignorance or mistake of fact, suppose that the accused is charged with desertion with intent to remain away permanently. The accused testifies that, at the beginning and all throughout the absence, the accused honestly believed that she had been discharged from the service. The evidence establishes, however, that this mistake of fact was unreasonable under the circumstances. The accused was informed of the "discharge" by a junior enlisted member, made no effort to verify the "discharge" before leaving the command, and never received a discharge certificate. Nonetheless, if the accused's testimony is believed, the accused is not guilty of the specific intent offense of desertion. The accused is, however, guilty of the lesser included offense of unauthorized absence because the mistake was not reasonable.

Mistake of fact must never be confused with ignorance or mistake of law. Ignorance of the law is no excuse. If the accused knew that the absence was without proper authority, but didn't know that unauthorized absence was an offense, the accused is nonetheless guilty.

2. **Impossibility**. When unforeseen circumstances beyond the accused's control prevent the accused from being at the appointed place of duty, unit, or organization when required, the accused has a defense of impossibility. The accused must not be at fault, nor can the accused contribute to the creation of the circumstances which make it impossible to be at the appointed place of duty, unit, or organization.

a. **Three requirements for impossibility**. In order to constitute a defense of impossibility, the circumstances must satisfy three requirements. These are factual issues to be decided by the court-martial members or, in a judge-alone case, by the military judge.

(1) **Unforeseen circumstances**. The impossibility must result from circumstances or events that were not reasonably foreseeable. For example, if an accused leaves home to return from liberty at the last minute when a severe snowstorm has been predicted, it is not unforeseeable that the weather will

make it impossible for the accused to return on time. Whether the circumstances were not reasonably foreseeable is decided by evaluating all the facts in each case.

(2) **Beyond the accused's control.** The accused cannot contribute to the creation of the circumstances which caused the impossibility to arise. For example, if an automobile breakdown occurs because the accused has been negligent in properly maintaining the car, the defense of impossibility will not be available. The ultimate issue is whether the accused was at fault.

(3) **The circumstances must cause actual impossibility.** In order to be a defense, it must be actually impossible for the accused to be at the appointed place of duty, unit, or organization -- not just inconvenient. An accused whose car breaks down, and who fails to take other reasonably available forms of transportation, usually will not have a defense of impossibility. The inability must be the accused's own inability. Thus, the fact that the accused's absence was occasioned by a spouse's heart attack does not create impossibility, although it is a strong extenuating circumstance. Finally, the circumstances must have actually made it impossible for the accused to avoid unauthorized absence. Thus, if the accused is already an unauthorized absentee when the impossibility arises, impossibility will not be a defense. Impossibility is a defense only when the only reason why the accused was absent was the unforeseen circumstance or event.

b. **Types of impossibility.** Impossibility may be an unforeseen act of God, the accused's physical or financial inability, or the unforeseen acts of third persons. "Acts of God" include sudden, unexpected, unforeseen occurrences such as floods, blizzards, hurricanes, and other natural disasters. If the accused is injured, ill, or destitute, and such condition was not reasonably foreseeable and was not the accused's fault, the accused's condition will be a defense if it makes it impossible for the accused to avoid being an unauthorized absentee. Unforeseen acts of third persons which make it impossible for the accused to avoid unauthorized absence will also give rise to a defense if the acts were not caused or provoked by the accused's acts.

c. **Impossibility caused by civilian arrest.** A very common type of impossibility by acts of third persons arises when the accused is unable to return when required to the unit or organization because the accused has been arrested and is in the custody of civilian authorities. Such circumstances may be a defense, depending upon the time of the arrest and the reason for the arrest.

(1) **Accused in status of unauthorized absence.** If the civilian arrest occurs while the accused is already an unauthorized absentee, there is no defense. The arrest did not make it impossible for the accused to avoid unauthorized absence. The rule of "Once UA, always UA" governs. The accused's unauthorized absence will continue until the accused is made available to military

authorities. This is the rule whether the arrest subsequently results in a conviction or the accused is acquitted.

(2) **Accused on duty, leave, or liberty**. An accused who is turned over to civilian authorities by the military is not UA while held by the civilians under that delivery. If a military turnover is not involved, and if the accused is on duty, leave, or liberty when the arrest occurs, the key issue is whether the accused was at fault.

(a) **Accused convicted of civilian charge**. If the accused is convicted of the civilian charge, the time in civilian custody is an unauthorized absence. If the arrest prevented the accused from returning from leave or liberty, the accused's unauthorized absence begins only at the time and date the leave or liberty was to expire. Impossibility is not a defense because the accused's arrest was his or her own fault, as evidenced by the conviction.

(b) **Accused acquitted of civilian charges**. If the accused is acquitted of all the civilian charges, the period in civilian custody is an excused absence. It was impossible for the accused to avoid the absence because of the civilian arrest. The fact that the accused was acquitted of all civilian charges is conclusive proof that the accused was not at fault. An acquittal is a not guilty verdict after a civilian trial, or judicial action which is tantamount to a not guilty verdict. Remember, this rule does not apply where the accused is an unauthorized absentee at the time of the civilian arrest.

(c) **Accused returned to military without disposition of civilian charges**. If the accused is returned to the military without having been tried for the civilian charges, the accused can be found guilty of the absence only if the prosecution, at the accused's court-martial, can prove beyond a reasonable doubt that the accused actually committed the civilian crimes. In other words, the prosecution must prove a crime within a crime. Because litigating the issue of the accused's guilt of the civilian crime can be expensive and complicated, such prosecutions are often impractical.

3. **Duress**. Duress may be raised when the accused, a family member, or an innocent third party is threatened with immediate bodily harm and there is no opportunity to prevent the danger. Duress is controlled by the actual facts and may be unavailable when the accused has a chance, but fails to seek assistance through the chain of command.

4. **Condonation of desertion**. Condonation applies to desertion cases only. Condonation occurs where the accused's commander, knowing about the accused's alleged desertion, unconditionally restores the accused to normal duty without taking any steps toward disciplinary action. Thus, whenever a desertion suspect is unconditionally restored to normal duties by a commander who knows of the alleged desertion, and is allowed to perform those duties over an extended period of time, condonation may arise. If a commander desires to restore a desertion suspect to normal duties, condonation can be avoided by ensuring that the suspect is placed in a legal hold status pending disposition of the alleged offense and that the accused realizes that, although he or she may be under no pretrial restraint, disciplinary action is pending.

WHEN UA TERMINATES

SITUATION	UA TERMINATES
Apprehension by the military	at the apprehension
Surrender to the military	at the surrender
Civilian apprehension for UA pursuant to DD 553	at the apprehension
Civilian apprehension for civilian crime, detained longer due to DD 553	when the accused is being held for the military
Civilian apprehension for civilian crime, NO DD 553	when military informed that accused is available to it

RELATIONSHIP BETWEEN UA STATUS AND CIVILIAN CRIMINAL CHARGE

SITUATION	UA	NOT UA		DURATION
UA, civ. arrest; acquit	X			for the entire period
UA, civ. arrest; no trial	X			for the entire period
UA, civ. arrest; convict	X			for the entire period
On Leave; arrest; acquit		X		no "unauthorized" absence
On Leave; arrest; no trial	X *		*	if trial counsel proves accused "at fault" (for all the time over leave)
Leave; arrest; convicted	X **		**	all the time over leave
Military turnover to civilians		X		always "authorized"

THE USUAL RULE: ONCE UA, ALWAYS UA

REVIEW QUESTIONS

Learning that his command initiated random urinalysis testing, Lieutenant Junior Grade Jones immediately calculated that during his last day at the Naval Justice School he could "toke up" without being nanogrammed into early retirement. On the evening before graduation, Lieutenant Junior Grade Jones chose to consume the remaining portion of his dope rather than see good weed go to waste. The following morning, his mellow mood occasioned an extra hour of slumber and, when he realized that he was going to be late for graduation, he decided to remain at the BOQ all day. Which of the following is the most appropriate charge?

A. UA from unit.

B. Failure to go to appointed place of duty.

C. Desertion (intent to shirk important service).

D. Both A and C, above.

Seaman Skip Towne, USN, is on trial for desertion. Which of the following assertions would be a defense to this charge?

A. That he had not formed an intent to remain away permanently until long after he had left the ship.

B. That he had remained onboard a naval base for the entire period of his absence.

C. That he intended to return to his unit after his mother was over her illness.

D. That, although he never intended to report back to his parent command (USS NEVERSAIL), he did not intend to remain away permanently from the Navy.

Seaman B. C. Dee, USN, went on weekend liberty to expire at 0730 Monday. On Friday night he got drunk in town and assaulted another sailor. Thus, at 0130 Saturday, he was apprehended by civilian police. Unable to post bail, he was held by civilian police until 0900 Tuesday, when the district attorney declined prosecution and instructed the police to release Dee to military authorities. The police immediately called Dee's command and told them that Dee was available and could be picked up at any time. At 1000 Wednesday, a master-at-arms from Dee's command picked up Dee at the town jail and returned him to his ship. Assuming the assault could be proved, which of the following is the most correct finding at Dee's summary court-martial for unauthorized absence?

A. Guilty of UA from 0130 Saturday until 1000 Wednesday.

B. Guilty of UA from 0130 Saturday until 0900 Tuesday.

C. Guilty of UA from 0730 Monday until 0900 Tuesday.

D. Guilty of UA from 0730 Monday until 1000 Wednesday.

Seaman Hale, USN, absented himself without authority from USS BERTRAND RUSSELL (SSBN 190) on 1 November. He was arrested by the Hohokus, New Jersey Police Department on 23 December, pursuant to the Navy's request on DD Form 553. On 24 December, the Hohokus police chief called the legal officer of the RUSSELL, then in Charleston, South Carolina, and told him of Hale's arrest. The legal officer promptly forgot about the matter until 27 December, when he remembered that Hale was languishing in the Hohokus lockup. He immediately dispatched a master-at-arms to escort Hale back to the RUSSELL. The MAA arrived in Hohokus on 28 December and immediately took custody of Hale. At trial, the evidence establishes that, had the legal officer acted promptly on this matter, Hale could have been picked up on 25 December. When did Hale's unauthorized absence end?

A. 23 December

B. 24 December

C. 25 December

D. 28 December

Seaman Dodge, USN, is charged with one charge and specification alleging violation of Article 87, UCMJ: missing movement through design on 10 November 19CY. At trial, the prosecution presented the following evidence: (1) Dodge was an unauthorized absentee from 0730, 10 November 19CY until 0730, 30 November 19CY; (2) Dodge's ship sailed from Boston at 0810, 10 November 19CY for Tierra del Fuego; (3) the POD each day, from 7 November 19CY until 9 November 19CY, announced that the ship would deploy at an unspecified hour on 10 November 19CY; and (4) the POD said, in accordance with long-standing tradition, "All hands are charged with knowledge of the contents of the POD." The defense presented no evidence. Based on the above evidence alone, what is the most correct finding?

A. Guilty of missing movement through design.

B. Not guilty of missing movement through design, but guilty of missing movement through neglect.

C. Not guilty of missing movement through design, but guilty of a short duration unauthorized absence in violation of article 86.

D. Not guilty.

Seaman Neve R. Show is charged with violation of article 86(1), failure to go to his appointed place of duty, to wit: fire watch, room 207, building 551, at 0200, 26 March 19CY. At trial, the government presents the following evidence: (1) Duty roster published in the POD appointing Seaman Show to the watch; (2) log book entry indicating accused was UA at the specified time, place, and date; (3) testimony that no one in authority had given Seaman Show permission not to be at his appointed place of duty. The defense presents no evidence. Which of the following would be the most correct finding?

A. Guilty of violation of article 86(1), failure to go to his appointed place of duty.

B. Guilty of violation of article 86(3), unauthorized absence from his place of duty.

C. Guilty of article 92(3), dereliction of duty.

D. Not guilty.

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CHAPTER XXIII

THE GENERAL ARTICLE: ARTICLE 134

A. **Overview**. Unlike most of the other punitive articles of the UCMJ, article 134 does not identify or define specific acts. Instead, its language is general and somewhat vague:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital . . . shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of that offense, and shall be punished at the discretion of that court.

This language has already resulted in more than sixty separate, specific offenses, each with its own elements of proof, substantive legal principles, and authorized maximum punishment. Article 134 offenses fall within three general categories of offenses: (1) conduct prejudicial to good order and discipline; (2) service-discrediting conduct; and (3) federal noncapital crimes. The concept of a general article such as article 134 is an ancient one in military law. General articles appeared in military codes as early as the fourteenth century. Much of article 134's language is substantially unchanged from the time of the American Revolution.

B. **Limited scope of article 134**. Article 134 is not a legal "catch-all." Instead, it is limited to recognized offenses not specifically mentioned elsewhere in the UCMJ. Moreover, to be an offense under article 134, the conduct must have been traditionally recognized in the military as criminal. As a general rule, the appellate courts are extremely reluctant to recognize specific offenses under article 134 unless they are specifically mentioned in the MCM, or have been recognized by earlier case law. Prosecution under article 134 for violation of a federal criminal statute is limited to noncapital crimes not specifically covered by the UCMJ.

C. **Conduct prejudicial to good order and discipline**. The first clause of article 134 prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces." The accused's conduct must directly prejudice or tend to prejudice good order and discipline. The act must have a substantial relationship to military activity. Although every act of misconduct by a military member arguably affects military activity at least remotely, article 134 requires direct, palpable impact.

D. **Service-discrediting conduct**. The second clause of article 134 prohibits "all conduct of a nature to bring discredit upon the armed forces." "Discredit" means an injury to the reputation of the armed forces. Actual discredit need not be proven. It is sufficient if the accused's conduct reasonably tends to injure the reputation of the armed forces.

E. **Proof that conduct is prejudicial to good order and discipline or service-discrediting**. Whether the accused's conduct was service-discrediting or prejudicial to good order and discipline is a factual issue. The prosecution seldom offers any special evidence on this issue. Expert witnesses, such as generals or admirals, are not called to testify about the effect o. the accused's conduct on military discipline or reputation. Instead, the court considers all the facts of the case and decides whether the conduct was, under the circumstances, prejudicial or discrediting. The facts of the offense speak for themselves.

F. **Conduct that is both prejudicial and discrediting**. Many of the article 134 offenses, such as graft, are both prejudicial to good order and discipline and service-discrediting. For this reason, article 134 pleadings need not specifically state that the accused's conduct was prejudicial or of a service-discrediting nature. The prosecution does not have to elect which theory it will argue at trial. In a members trial, the members will be instructed that the accused is guilty of the article 134 offense if they are satisfied beyond reasonable doubt that the accused's conduct was either prejudicial to good order and discipline or that it was service-discrediting.

G. **Federal noncapital crimes**. The third clause of article 134 prohibits "crimes and offenses not capital." This phrase refers to federal, noncapital crimes, not specifically mentioned elsewhere in the UCMJ. Federal noncapital offenses may be prosecuted under one of two types of statutes: federal statutes with unlimited application or federal statutes of limited application or jurisdiction. One of these federal statutes of limited jurisdiction is the Federal Assimilative Crimes Act found at 18 U.S.C. § 13. Prosecution under the third clause of article 134 is usually rather complicated, and an attorney should always be consulted.

H. **Federal Assimilative Crimes Act**. If conduct is not prohibited by a specific article of the UCMJ or by a federal statute, it still may be prosecuted under article 134 if the state in which the "offense" occurred prohibits it. A court-martial cannot enforce state law; however, the state statute can be assimilated into the federal law

by use of the Federal Assimilative Crimes Act. This act assimilates state law whenever there is no federal statute governing the accused's specific acts, provided that the acts occur in an area subject to either exclusive or concurrent federal jurisdiction. For example, suppose that neither the UCMJ nor any other federal statute requires drivers of motor vehicles to stop at stop signs. Seaman Driver is driving his car aboard a military base over which the federal government has exclusive jurisdiction. Driver drives his car through a stop sign without stopping. Although neither federal law nor the UCMJ cover this type of misconduct, the law of the state in which the base is located does prohibit such acts. The Federal Assimilative Crimes Act would therefore adopt the state law and make it federal law also. Driver could therefore be prosecuted under article 134(3) for violation of a noncapital federal crime.

I. **Pleading**. *See* Part IV, paras. 60-113, MCM, 1984. Note that none of the forms involve federal noncapital crimes. Pleading a violation of a federal noncapital crime, under the third clause of article 134, is extremely technical. It usually requires research of civilian federal case law materials not normally available to the command without a lawyer. Specifications alleging a federal noncapital crime should be drafted only by an attorney. The following example illustrates how the state statute and the Federal Assimilative Crimes Act are referenced in the pleading:

-- **Sample Specification**

> Charge: Violation of Uniform Code of Military Justice, Article 134
>
> Specification: In that Staff Sergeant James T. Holman, U.S. Marine Corps, 1st Battalion, 8th Marines, 2d Marine Division, Fleet Marine Force, Atlantic, on active duty, did, at Camp Lejeune, North Carolina, a place under the exclusive jurisdiction of the United States, on or about 12 March 19CY, wrongfully and knowingly possess an unauthorized machine pistol, in violation of 18 North Carolina General Statutes, Section 195a, as assimilated into federal law by the provisions of the Federal Assimilative Crimes Act, 18 U.S.C. § 13.

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CHAPTER XXIV

CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN

A. **Overview**. The offense of conduct unbecoming an officer and gentleman, under article 133, is closely related to theories of prosecution under article 134. Both articles 133 and 134 prohibit general types of conduct rather than specifically defined acts. Like article 134, article 133 is the product of ancient traditions in military discipline. Unlike article 134, however, article 133 includes offenses specifically mentioned elsewhere in the UCMJ, as well as those unmentioned offenses which are nonetheless established in military tradition. Offenses listed elsewhere in the Code may be charged under article 133, as long as the terminal element of conduct unbecoming an officer can also be proven beyond a reasonable doubt.

B. **Elements of the offense**. The prosecution must prove beyond reasonable doubt that:

1. The accused is a commissioned officer, cadet, or midshipman, and did, or failed to do, certain alleged acts; and

2. under the circumstances, the accused's acts or omissions constituted conduct unbecoming an officer and gentleman (or gentlewoman).

C. **Discussion**

1. **Status of the accused**. Article 133 applies only to commissioned officers, cadets, and midshipmen.

2. **Accused's conduct**. To constitute an offense under article 133, the accused's conduct must have a double significance. First, it must unbecome the accused as an officer by compromising his/her standing in the military profession. Second, it must also unbecome the accused as a gentleman/gentlewoman by impugning his/her honor or integrity or otherwise subjecting the accused to social disgrace. While the conduct in question need not be criminal, article 133 does not address every departure from the moral attributes common to the ideal officer and perfect gentleman: only serious departures are covered. For example, A, an officer,

desiring time off from work for personal reasons, falsely tells his supervisor that he needs to go to the clinic. The resulting brief unauthorized absence, while clearly diminishing his standing as an officer, does not (in peacetime, at least) seriously affect A socially, and does not, therefore, constitute a violation of article 133. Lying, however, epitomizes dishonor both in the military and in society. Accordingly, A's intentional deception of his superior does constitute a violation of article 133. Similarly, conduct such as public association with known prostitutes or failure to support one's dependents -- which might not otherwise be criminal -- could nonetheless violate article 133 under circumstances evidencing substantial personal and professional discredit.

3. **Relationship to other offenses**. Article 133 covers a wide range of acts and omissions, including acts that are themselves offenses under other articles of the Code. An accused should not, however, be charged with a violation of article 133 as well as with a violation of the underlying offense. It is usually simpler to charge such offenses as violations of their respective articles, and not as article 133 offenses. For example, if the unbecoming conduct was a theft, it should usually be charged as a violation of article 121, not under article 133. Little is gained, practically speaking, by charging the theft as unbecoming conduct, and the prosecution under article 133 is somewhat complicated by the requirement to prove as an additional element the fact that the conduct was unbecoming. If both the underlying offense and conduct unbecoming are charged, they will be considered multiplicious for findings. The two specifications will be merged, requiring dismissal of the non-133 specification.

4. **Punishment**. *See* Part IV, para. 59e, MCM, 1984. An officer tried by general court-martial for an article 133 violation may be dismissed, forfeit all pay and allowances, and be confined for the amount of time authorized for the offense listed in the MCM, 1984, which is most analogous to the crime committed. If there is no listed analogous offense, confinement can be no more than one year, but dismissal is always authorized.

5. **Pleading**. *See* Part IV, para. 59f, MCM, 1984. The MCM provides only two sample specifications for unbecoming conduct. Most article 133 specifications must be custom-drafted to fit the facts and circumstances of each case. The specification need not expressly allege that the accused's conduct was unbecoming, unless the acts would also constitute a separate offense under another article of the Code. Then the specification should expressly state that the conduct was "unbecoming an officer and a gentleman" or "unbecoming an officer and a gentlewoman" in order to prevent confusion. If the alleged unbecoming conduct was noncriminal in nature, such as publicly insulting another officer, the conduct should be described as dishonorable and wrongful.

MILITARY JUSTICE STUDY GUIDE

CHAPTER XXV

ASSAULTS

A. **Overview**. Although the UCMJ provides for more than a dozen specific types of assault, the structure of the law of assaults is rather simple. All assaults are based on the simple assault, which is merely an unlawful offer or attempt to do bodily harm. All the other varieties of assaults are merely simple assaults plus additional aggravating facts.

B. **Simple assault** (article 128)

1. **General concept**. The simple assault occurs when an accused unlawfully attempts or offers to do bodily harm to another person. No actual harm or striking occurs. Simple assault is a relatively minor offense, but it is significant because it is the foundation upon which all the various types of assault offenses are constructed.

2. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. At the alleged time and place, the accused offered or attempted to do bodily harm to the alleged victim;

b. the accused did so by committing certain alleged acts; and

c. the attempt or offer was done with unlawful force or violence.

3. **Discussion**

a. **Attempt-type assault**. The attempt-type simple assault occurs when the accused attempts to strike or do bodily harm to another person. Hence, there is no such crime as "attempted assault"; as soon as an attempt is made, an assault has been committed. The accused must specifically intend to strike or do bodily harm to the other person. The intended victim need not be aware of the attempt. Like any other attempt, the accused's act must be more than mere

preparation. For example, if Smith picks up a railroad tie, intending to bash it over Jones' head, an attempt-type assault has not yet occurred. If Smith swings at Jones' head and misses, the attempt-type assault has been committed because Smith's act is now more than mere preparation. The accused must also have the apparent present ability to strike or harm the intended victim. If Johnson fires a pistol with maximum range of 100 yards, intending to hit Baker who is standing on the next mountain six miles away, an attempt-type assault has not occurred. Johnson's act would not have normally resulted in a crime being completed because Baker was too far away.

b. **Offer-type assault**. An offer-type simple assault involves an unlawful demonstration of violence which causes another person to reasonably apprehend imminent bodily harm. The accused need not intend to actually harm anyone. The offer may merely be a culpably negligent act that appears menacing or threatening. A culpably negligent act is the result of more than ordinary carelessness or neglect; it involves a wrongful disregard for the foreseeable consequences of one's actions. Thus, waving a loaded pistol around in a crowded room would constitute culpable negligence. In the offer-type assault, it is the victim's state of mind that is important. The victim must reasonably anticipate that bodily harm is imminent. The victim need not actually be afraid. The test is whether a reasonable person, in the same circumstances, would believe that unlawful force or violence was about to be applied to his or her person. Thus, waving around an unloaded pistol could constitute an offer-type assault if the victim reasonably apprehends imminent bodily harm. The victim probably wouldn't know that the gun was empty. On the other hand, if the victim knows that the accused is waving only a toy pistol, there is no reasonable apprehension of harm. Menacing or threatening words, by themselves, do not constitute an offer-type assault.

c. **Conditional offers of violence**. Sometimes the accused's apparently threatening gestures may be accompanied by statements which seem to negate any intent by the accused to actually carry out the threat. For example, suppose the accused raises his clenched fist towards another person and says, "Smith, if you weren't my brother-in-law, I'd slug you." This is a conditional offer of violence. Despite the accused's menacing gestures, the accused's language indicates that no harm is intended. Under such circumstances, a reasonable person will not usually expect to be struck or harmed. Therefore, no offer-type assault has occurred.

d. **Unlawful force or violence**. In the context of simple assaults, "force or violence" refers to actions that are of a violent nature or that threaten imminent violence. An act of force or violence is unlawful if it is done without legal justification or excuse. Examples of legal justification or excuse include situations such as the proper performance of a lawful military duty or self-defense.

4. **Pleading**

a. **General considerations**. *See* Part IV, para. 54f(1), MCM, 1984. The specification need not indicate whether the simple assault was an offer-type or an attempt-type. The specific act that constituted the battery must be clearly and concisely alleged. The accused's actions must be expressly described as "unlawful."

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 128.
>
> Specification: In that Lance Corporal George D. Barwrecker, U.S. Marine Corps, Marine Barracks, New London, Connecticut, on active duty, did, on board Naval Education and Training Center, Newport, Rhode Island, on or about 10 July 19CY, assault Seaman Wimpy Squid, U.S. Navy, by throwing a beer bottle at him.

C. **Assault consummated by a battery** (article 128)

1. **General concept**. An assault consummated by a battery is merely a simple assault which results in bodily harm or a striking of the victim.

2. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. At the alleged time and place, the accused did bodily harm to the alleged victim;

b. the accused did so by committing the alleged acts; and

c. the bodily harm was done with unlawful force or violence.

3. **Discussion**

a. **Bodily harm**. A battery is the unlawful application of force or violence to another person. "Bodily harm" includes any physical injury to, or offensive touching of, another person -- however slight. There is no requirement for bloodshed or pain.

b. **Accused's state of mind.** A battery may be committed by the accused's intentional act or through culpable negligence. The accused need not intend to inflict any particular kind of bodily harm, nor does the accused's intent have to be directed toward any specific victim. The battery itself proves the assault, so no attempt-offer analysis is necessary. For example, if Smith intends to strike Jones, but misses and strikes Johnson instead, Smith is nonetheless guilty of an assault consummated by a battery. A battery may also be a result of culpable negligence. Culpable negligence is significantly more serious than simple negligence. Simple negligence, which is merely the failure to exercise ordinary care, is insufficient to result in an assault. Suppose the accused is practicing fast draws with a loaded pistol. The pistol accidentally discharges, injuring a bystander. The accused is guilty of an aggravated assault consummated by a battery. Even though the accused didn't intend to injure anyone, the accused's actions were at least culpably negligent. It was reasonably foreseeable that the pistol might accidentally fire and injure someone.

4. **Pleading**

a. **General considerations.** *See* Part IV, para. 54f(2), MCM, 1984. The specific act that constituted the battery must be clearly and concisely alleged. The accused's actions must be expressly described as "unlawful."

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 128
>
> Specification: In that Airman Recruit Boyle R. Maker, U.S. Navy, Naval Air Technical Training Center, Lakehurst, New Jersey, on active duty, did, on board USS RELIC, located at Bayonne, New Jersey, on or about 22 February 19CY, unlawfully strike Seaman E. Z. Targette, U.S. Navy, on the shoulders and arms with his fists.

D. **Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm** (article 128)

1. **General concept.** One of the most common aggravated forms of assault is assault with a dangerous weapon or means likely to produce death or grievous bodily harm. Like all other aggravated forms of assault, this offense is merely a simple assault plus the aggravating circumstance of the nature of the weapon, means, or force used in the assault. The assault need <u>not</u> be consummated by a battery, although many such assaults often do result in bodily harm.

2. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused attempted, offered to do, or actually did bodily harm to the alleged victim;

b. the accused did so by committing certain alleged acts;

c. the accused did so with a certain alleged weapon, means, or force;

d. the attempt, offer, or bodily harm was done with unlawful force or violence; and

e. the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

(**Note**: When a loaded firearm was used, add as an additional element)

f. the weapon was a loaded firearm.

3. **Discussion**

a. **Bodily harm not required**. Assault with a dangerous weapon or means likely to produce grievous bodily harm may arise from a simple offer-type or attempt-type assault, or it may involve an assault consummated by a battery. Bodily harm is <u>not</u> required. If an offer or attempt to do bodily harm is with a weapon, means, or force likely to produce grievous bodily harm, the offense is complete.

b. **Weapon, means, or force**. This aggravated form of assault involves the use of a deadly or dangerous weapon. It also includes the use of other instruments, devices, means, or forces that are dangerous when used in the way the accused used them. The weapon, means, or force must actually be dangerous. Thus, an unloaded rifle pointed at a victim is not a dangerous weapon. Even if both the accused and the victim believe that the rifle is loaded, assault with a dangerous weapon has not occurred. If, however, the unloaded rifle is used as a club, it could be considered a dangerous weapon because of the way it is used. A means or force is likely to produce grievous bodily harm when the natural and probable result of the accused's use of the means or force would be serious physical injury. The key is the way in which the accused used the means or force. Although each is relatively harmless in itself, a bottle, rock, boiling water, drug, can opener, fist, or foot could all be used in a way likely to produce grievous bodily harm. Whether the particular

means used by the accused was likely to produce grievous bodily harm is a factual issue to be decided by the court-martial members or, in a judge-alone trial, by the military judge.

c. **Grievous bodily harm**. "Bodily harm" includes any physical injury to, or offensive touching of, another person. "Grievous" bodily harm is more than minor injuries, bruises, or cuts. It requires fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other grave physical injuries.

4. **Pleading**

a. **General considerations**. *See* Part IV, para. 54f(8), MCM, 1984. The specification should expressly allege that the means used was a dangerous weapon or means likely to produce bodily harm. The weapon or means should be described with enough detail to identify it as dangerous. If the instrument or means used by the accused was not in itself dangerous (e.g., a rock or bottle), the accused's actions should be described with enough detail to show that the way in which the means was used made it dangerous. If the dangerous weapon was a loaded firearm, this should be expressly alleged since it increases the maximum confinement by five years.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 128.
>
> Specification: In that Airman Recruit Boyle R. Maker, U.S. Navy, Naval Air Technical Training Center, Lakehurst, New Jersey, on active duty, did, on board Naval Air Station, Lakehurst, New Jersey, on or about 1 March 19CY, commit an assault upon Airman Apprentice Baer L. Alive, U.S. Navy, by striking him on the head with a means likely to produce death or grievous bodily harm, to wit: a baseball bat.

E. **Intentional infliction of grievous bodily harm** (article 128)

1. **General concept**. The offense of intentional infliction of grievous bodily harm is one of the three aggravated forms of assault that require that bodily harm actually be inflicted. (Assault consummated by a battery was the first.)

2. **Elements of the offense.** The prosecution must prove beyond reasonable doubt that:

a. At the alleged time and place, the accused assaulted the alleged victim;

b. grievous bodily harm was thereby inflicted upon such person;

c. the grievous bodily harm was done with unlawful force or violence; and

d. the accused, at the time, had the specific intent to inflict grievous bodily harm.

(**Note**: When a loaded firearm was used, add as an additional element)

e. that the injury was inflicted with a loaded firearm.

3. **Discussion**

a. **Grievous bodily harm inflicted.** The offense of intentional infliction of grievous bodily harm requires that grievous bodily harm, as defined earlier in this chapter, actually be inflicted.

b. **The accused's intent.** The accused must specifically intend to inflict harm. No degree of negligence, no matter how wanton or reckless, will suffice. Moreover, the accused must intend to inflict grievous harm, not just ordinary bodily harm. The accused's intent is usually proven by circumstantial evidence. If, for example, the accused uses a weapon that would normally cause grievous bodily harm, it may be inferred that the accused used the weapon with that intent. The law recognizes that persons normally intend the natural and probable consequences of their acts. If the accused repeatedly bludgeons the victim, this may also indicate that the accused intended grievous bodily harm. The accused's statements while committing the crime may also provide evidence of intent. If, for example, the accused screams, "Die, you bastard, die!" while repeatedly striking the accused, there is strong evidence that the accused intended grievous bodily harm.

4. **Pleading**

a. **General considerations.** *See* Part IV, para. 54f(9), MCM, 1984. The specification must allege that the accused's acts were intentional and should describe the victim's injuries. If the grievous bodily harm is inflicted with a loaded firearm, this should be expressly alleged, since it increases the maximum confinement by five years.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 128.
>
> Specification: In that Lance Corporal Mame N. Dismember, U.S. Marine Corps, Marine Barracks, Charleston, South Carolina, on active duty, did, on board Air Force Base, Charleston, South Carolina, on or about 20 December 19CY, commit an assault upon Airman First Class Benton Broken, U.S. Air Force, by repeatedly striking him on the head and shoulders with a pinball machine, and thereby did intentionally inflict grievous bodily harm upon him, to wit: a fractured skull, six smashed vertebrae, a fractured clavicle, and two dislocated shoulders.

F. **Assault upon certain officers** [articles 90(1) and 91(1)]

1. **General concept**. Assault upon certain military authorities is one of several aggravated forms of assault where the principal aggravating circumstance is the status of the victim. Article 90(1) prohibits assaults upon superior commissioned officers in the execution of their office. Article 91(1) prohibits assaults upon warrant or noncommissioned and petty officers in the execution of office. Violation of article 90(1) during time of declared war is a capital offense. (*See* chart "Offenses Against Authority," chapter XXI).

2. **Elements of the offenses**. The elements of the two types of assaults are similar. Note, however, that only enlisted persons and warrant officers (W-1) can violate article 91(1). The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused attempted, offered to do, or actually did, bodily harm to the alleged victim;

b. the accused did so by committing certain alleged acts;

c. the offer, attempt, or bodily harm, was done with unlawful force or violence;

d. at the time, the alleged victim was the accused's warrant, superior commissioned, or (superior) noncommissioned or petty officer;

e. at the time, the accused knew that the alleged victim was his or her warrant, superior commissioned, or (superior) noncommissioned or petty officer; and

f. at the time, the alleged victim was in the execution of his or her office.

3. **Discussion**

a. **Basic assault**. The assault may be either a simple assault, either offer-type or attempt-type, or an assault consummated by a battery.

b. **Superiority**. The superiority concept is the same as is discussed with respect to willful disobedience in chapter XX and disrespect in chapter XXI of this section. Under article 90(1), the victim must be the accused's superior commissioned officer, which includes commissioned warrant officers (W-2 and above). Under article 91(1), however, superiority is irrelevant for warrant officer (W-1) victims, and is merely an optional, aggravating element for victims who are noncommissioned or petty officers.

c. **Accused's knowledge**. The accused must have had actual knowledge that the victim was his or her warrant, superior commissioned, or (superior) noncommissioned or petty officer.

d. **Execution of office**. The victim must be in the execution of his or her office. One is in the execution of office when engaged in any act or service required or authorized by statute, regulation, superior orders, or military custom. The victim must be performing a lawful duty in a lawful manner in order to be in the execution of office. Thus, one who is committing an illegal act is not in the execution of his or her office. Likewise, one who performs a lawful duty in an illegal manner is also not in the execution of office. In order to remove one from the status of being in the execution of office, his or her actions must be definitely criminal or illegal, and not just deviations from prescribed procedures.

4. **Pleading**

a. **General considerations**. *See* Part IV, paras. 15f(1), (2), (3) and 16f(1), MCM, 1984. Note the different language used in the various specifications. Assaults on superior commissioned officers are styled as "strike," "draw or lift up a weapon," or "offer violence against." Assaults on warrant, noncommissioned, and petty officers simply use the terms either "strike" or "assault." These differences merely reflect traditional language used in pleading these offenses, but have no legal significance. Be careful, however, in the use of the word "strike." If the words describing the assault do not import unlawful conduct on their face, it would be

advisable to include a word importing criminality, such as "unlawfully strike." If the victim was the superior NCO or PO of the accused, that element must be plead and proved to increase the maximum punishment.

b. **Sample pleadings**

> Charge I: Violation of the Uniform Code of Military Justice, Article 90.
>
> Specification: In that Seaman Runyon Amuck, U.S. Navy, USS FALL RIVER, on active duty, did, on board USS FALL RIVER, located at Newport, Rhode Island, on or about 13 August 19CY, unlawfully strike Ensign Noah Count, U.S. Navy, his superior commissioned officer, then known by said Seaman Amuck to be his superior commissioned officer, who was then in the execution of his office, on the arm with a broom.
>
> Charge II: Violation of the Uniform Code of Military Justice, Article 91.
>
> Specification: In that Seaman Runyon Amuck, U.S. Navy, USS FALL RIVER, on active duty, did, on board USS FALL RIVER, located at Newport, Rhode Island, on or about 13 August 19CY, assault Yeoman Second Class Penn N. Inque, U.S. Navy, a petty officer, then known to the said Seaman Amuck to be a superior petty officer, who was then in the execution of his office, by throwing a knife at him.

G. **Assault consummated by a battery upon a child** (article 128)

1. **General concept**. A very serious aggravating circumstance arises when the victim is a child under age sixteen. This offense is the last of the three types of assaults under article 128 that require that the assault be consummated by a battery. It should be noted that this is not a type of sex offense, and the fact that the assailant and the victim are of the same or different sexes is irrelevant to this charge.

2. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. At the alleged time and place, the accused did bodily harm to the alleged victim by certain alleged acts;

b. the bodily harm was done with unlawful force or violence; and

c. the alleged victim was then a child under the age of sixteen years.

3. **Discussion**

a. **Bodily harm**. This offense requires that bodily harm actually occur. Remember, however, that bodily harm includes any physical injury to or offensive touching of the victim -- however slight.

b. **Unlawful force or violence**. This offense is commonly used to prosecute child-abuse cases. The bodily harm must be unlawful (i.e., without legal justification or excuse). A parent is authorized by law to administer corporal punishment to his or her child. The privilege to administer corporal punishment is limited, however, and does not include unreasonable physical abuse. Thus, a routine spanking, producing no injury, would not be an offense; however, if the corporal punishment unreasonably results in physical injuries requiring medical attention or is unreasonably repeated, the parent may be guilty of assault.

c. **Child under sixteen**. At the time of the assault, the victim must be under age sixteen. The accused's knowledge or belief about the child's age is immaterial. Even if the accused reasonably believed that the victim was older than sixteen, the accused can be found guilty.

4. **Pleading**

a. **General considerations**. *See* Part IV, para. 54f(7), MCM, 1984. The specification must allege an assault consummated by a battery. It must also specifically allege that the victim was under the age of sixteen years.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 128.
>
> Specification: In that Chief Boatswain's Mate Steven A. Dore, U.S. Navy, USS RELUCTANT, on active duty, did, on board Naval Base, Charleston, South Carolina, on or about 14 December 19CY, unlawfully strike Payne N. DeNeck, a child under the age of sixteen years, in the face with his hand.

H. **Other assaults aggravated by the victim's status** (article 128)

1. **General concept**. Part IV, para. 54e, MCM, 1984, provides for increased maximum punishments when the victim of the assault falls within one of several other classes. These other classes of victims are:

a. Commissioned officers (not in the execution of office);

b. warrant, noncommissioned, and petty officers (not in the execution of office);

c. persons in the execution of police duties; and

d. sentinels and lookouts.

Bodily harm need not be inflicted on any of the above individuals. A simple offer-type or attempt-type assault will suffice.

2. **Elements of the offenses**. The elements of the assault offenses involving the above four categories of victims are the same. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused attempted, offered to do, or did bodily harm to the alleged victim;

b. the accused did so by committing certain alleged acts;

c. the attempt, offer, or bodily harm, was done with unlawful force or violence;

d. the victim was a person who was:

(1) A commissioned officer;

(2) a warrant, noncommissioned, or petty officer;

(3) a person in the execution of police duties;

(4) a sentinel or lookout; and

e. the accused knew of the victim's status as one of the above.

3. **Discussion**

a. **Commissioned, warrant, noncommissioned, or petty officer.** Unlike the assaults prosecuted under articles 90(1) and 91(1), assaults on commissioned, warrant, noncommissioned, or petty officers under article 128 do not require that the victim be in the execution of office, and superiority is never an element. Thus, an admiral who assaults an ensign is guilty of an assault upon a commissioned officer. An ensign who assaults a chief petty officer is guilty of assault upon a petty officer. The article 128 assault upon a commissioned, warrant, noncommissioned, or petty officer is a lesser included offense of assault upon a superior under articles 90(1) or 91(1).

b. **Person in the execution of police duties.** A person is in the execution of police duties whenever engaging in any law enforcement act or service authorized by statute, regulation, superior order, or military custom. The victim must perform the police duties in a lawful manner. Thus, a law enforcement officer who uses unreasonable, excessive force while apprehending an unresisting suspect is not in the execution of police duties.

c. **Sentinel or lookout.** A sentinel or lookout is one who is assigned to a duty requiring extra alertness to constantly watch for the approach of an enemy, to look for danger, to maintain security of the perimeter of an area, or to guard stores.

d. **Accused's knowledge.** The accused must actually know of the victim's status. Constructive knowledge (i.e., that the accused should have known) will not suffice.

4. **Pleading**

a. **General considerations.** *See* Part IV, paras. 54f(3), (4), (5) and (6), MCM, 1984.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 128.
>
> Specification: In that Lieutenant Gene N. Tonic, U.S. Navy, USS PLANKTON, on active duty, did, on board USS PLANKTON, at sea, on or about 1 December 19CY, assault Ensign Drew A. Blank, U.S. Navy, who then was and was then known by the accused to be a commissioned officer of the U.S. Navy, by throwing a clipboard at him.

I. **Assault with intent to commit certain serious offenses** (article 134)

1. **General concept**. Article 134 prohibits assaults committed with the intent to commit one of several serious crimes. Such assaults can also sometimes be charged as attempts to commit the intended crime. The article 134 assault is charged to provide for the possibility that the alleged overt act in the assault charge might not be sufficient to constitute a criminal attempt (an act beyond mere preparation). Thus, if the court should find that the accused's actions didn't rise to the level of a criminal attempt, but did constitute an assault, the accused can still be held criminally liable for the acts.

2. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. At the alleged time and place, the accused assaulted the alleged victim;

b. the accused did so by committing certain alleged acts;

c. the accused's acts were with unlawful force or violence;

d. at the time of the assault, the accused intended to commit one of the following crimes: murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking; and

e. under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces.

3. **Discussion**. The accused must specifically intend to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking. The accused's intent is usually proven through circumstantial evidence involving all the accused's actions before, during, and after the assault. Thus, if an accused commits an assault immediately prior to or during the course of committing arson, it is usually reasonable to infer that the accused committed the assault with an intent to commit arson.

4. **Pleading**

a. **General considerations**. *See* Part IV, para. 64(f), MCM, 1984. Notice that the terminal element of prejudicial or service-discrediting conduct need not be alleged. The specification must state the exact crime the accused intended. Do not allege the intended crime in the alternative (e.g., as "with intent to commit murder or sodomy"). If it is uncertain which of several crimes were intended by the accused, or if the evidence suggests that the accused intended to commit several crimes, separate specifications should be alleged for each intended crime.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 134.
>
> Specification: In that Seaman Brigrat Striker, U.S. Navy, Naval Justice School, Newport, Rhode Island, on active duty, did, on board Naval Justice School, Newport, Rhode Island, on or about 1 July 19CY, with intent to commit rape, commit an assault upon Ensign Olivia O. Day, U.S. Navy, by striking her on the head with a telephone receiver.

J. **Relationships among assault offenses**. Since the more complicated forms of assaults are based on a simple assault or an assault consummated by a battery, there will frequently be several possible lesser included offenses for any aggravated form of assault alleged. Part IV, MCM, 1984, discusses each of the assault offenses. In the discussion for each offense, there is a list of commonly included offenses. These lists are merely general guides; however, under certain circumstances, some of the listed included offenses may not be appropriate. In other situations, offenses other than those listed may be lesser included offenses. Whether or not a certain lesser included offense is raised by the evidence is a matter that the military judge must decide after reviewing all the evidence in the case.

K. Common defenses to assault offenses

1. **Legal justification**. An act of force or violence committed during the proper performance of a lawful duty is legally justified. This defense of legal justification has two requirements. First, the accused must be performing a lawful duty, which may be imposed by a statute, regulation, superior order, or custom of the service. Thus, a marine who shoots an enemy during combat is not usually guilty of assault. The marine was merely performing a lawful military duty. Even when an order to commit an act of force or violence is not lawful, the accused has a defense if the accused honestly believed the order to be lawful, and if a person of ordinary understanding would not have known that the order was unlawful. Second, the duty must be performed in a proper manner. The accused may use only enough force reasonably necessary to carry out the duty. Thus, the marine who shoots an unresisting, unarmed prisoner of war is guilty of assault. The marine did not perform the lawful duty in a lawful manner.

2. **Self-defense**. One who is free from fault may use reasonable force, even deadly force if necessary, to defend against unlawful bodily harm. Self-defense will excuse an accused's acts only when both of the following questions are answered in the affirmative.

a. **Was the accused free from fault**? Self-defense will not excuse the accused's acts when the accused intentionally started the altercation. However, suppose that the accused provoked the other party's hostile actions and then withdrew, intending to avoid any further hostility. If the other party continues the attack, even after the accused's withdrawal, the accused may then act in self-defense. The other party has become the aggressor. Likewise, an accused who willingly engages in mutual combat, such as a barroom free-for-all, may not successfully claim self-defense. If the opponent should unexpectedly resort to deadly force (e.g., pulls a knife), thereby escalating the affray, the accused may be permitted to defend against the excessive force.

b. **Did the accused use a reasonable degree of force**?

(1) **In homicide or assault involving deadly force, or battery involving deadly force**

(a) **The accused reasonably believed that death was about to be inflicted**. Taking into account all the circumstances, the accused's apprehension of death or grievous bodily harm must have been one which a reasonable, prudent person would have held under the circumstances. Because this test is objective, such factors as intoxication or emotional instability of the accused

are irrelevant. Relative height, weight, build, and the possibility of safe retreat are circumstances to be considered in determining the reasonableness of the apprehension.

(b) **The accused honestly believed that the force used was necessary for protection against death or grievous bodily harm.** This element is entirely subjective. The accused is not objectively limited to the use of reasonable force. Accordingly, such matters as the accused's emotional control, education, and intelligence are relevant in determining the accused's actual belief as to the force necessary to repel the attack.

(2) **In other assault cases**

(a) **The accused reasonably believed that bodily harm was imminent.** Taking into account all the circumstances, the accused's apprehension of imminent bodily harm must have been reasonable. In other words, a reasonable person, under similar circumstances, would have concluded that he or she was about to suffer unlawful bodily harm. This is an objective test.

(b) **The accused honestly believed that force used was necessary, providing it was less than force reasonably likely to result in death or grievous bodily harm.** A person who perceives imminent bodily harm does not have an unlimited right to resort to force. The accused must have had an honest, good-faith belief that force was actually necessary to defend against imminent bodily harm. The accused's belief need not be the belief that the so-called "reasonable person" would have held. Thus, factors such as the accused's intelligence, emotional state, and sobriety are relevant. There is no duty imposed on the accused to retreat in the face of attack. This is a subjective test. The type and amount of force used is limited to that reasonably necessary to protect oneself. The degree of force reasonably necessary to protect the accused is a factual issue, to be determined by the fact-finder after analyzing all the circumstances of each case. There is no requirement that the accused meet force with exactly the same kind of force. For example, if the accused is kicked, (s)he may protect him or herself with his or her fists, but not with deadly force.

3. **Threatened use of deadly force.** In order to deter an assailant, the accused may offer, but not actually apply or attempt, such means or force which might likely cause death or grievous bodily harm. Such deadly force may be threatened even though the accused only reasonably anticipated only minor bodily harm.

4. **Defense of another.** One may lawfully use force in defense of another person under the same conditions that self-defense could be invoked. The person aided must not be the aggressor nor a willing mutual combatant. The accused is

limited to the use of that degree of force reasonably necessary to protect the victim. Mistake of fact as to who was really the aggressor is not a defense.

5. **Consent**. An accused is not guilty of an alleged assault consummated by a battery if the alleged victim lawfully consented to the battery. The victim's consent must be freely given before the striking or offensive touching. Consent obtained by threats, duress, or fraud is not lawful consent. Some individuals, such as infants and mental incompetents, are categorically unable to give lawful consent. No one can lawfully consent to a battery that is likely to produce death or serious physical injury, except where the act is necessary to save the victim's life. Thus, a person who is choking to death may lawfully consent to having an opening cut into his or her windpipe. No one can lawfully consent to any act that constitutes an unlawful breach of the peace. Finally, the victim's consent may be limited. If the battery goes beyond the extent to which the victim consented, the battery will be unlawful. For example, a football player, by entering the game, consents to such physical contact as is customary in a football game. A football player doesn't consent, however, to being bashed over the head with a crowbar.

6. **Duress**. Duress is available as a defense to any crime less serious than murder when the accused's acts were not voluntary, but the result of a reasonable, well-grounded fear that if he or she didn't commit the assault, the accused, a member of the accused's family, or any innocent person would be immediately killed or seriously injured.

7. **Accident**. In an assault case, the accused will not be guilty if his or her acts were unintentional and not due to culpable negligence. An accident is an unintentional act which occurs while the accused is otherwise acting lawfully. It is not the unexpected consequence of a deliberate act. Suppose that Seaman Jones is roaring drunk, driving 80 mph in a 35 mph zone, and runs a red light, when a child suddenly darts out in front of him and is thereby run down by Seaman Jones. Seaman Jones' actions are at least culpably negligent and accident will not be a defense. But, if Seaman Jones is carefully driving within the speed limit, and a child suddenly darts in front of him and is hit, Seaman Jones is not guilty of assault. He was doing a lawful act in a lawful manner.

8. **Special privilege**. The law recognizes certain other limited situations where one may rightfully use force against another, even without the other person's consent. A parent is privileged to use reasonable amounts and types of corporal punishment to discipline a minor child. A custodian or guardian of children or mentally incompetent persons may use limited, reasonable force to care for or control the persons in the custodian's charge. The rightful occupant of any premises, whether home or place of business, is privileged to use reasonable force to expel persons unlawfully on the premises.

REVIEW QUESTIONS

Disdaining the night life of Newport, First Lieutenant Rambo was content to remain in his BOQ room watching reruns of Bonanza while he practiced twirling his lariat and drawing his Colt .45 pistol. His behavior was in marked contrast to that of his neighbor, Lieutenant Junior Grade Impervious, who had sworn off breakfast, lunch, and dinner so that he would have more funds to distribute among the various Newport taverns. One evening, upon returning from one of his forays into the Combat Zone of downtown, Lieutenant Junior Grade Impervious mistook First Lieutenant Rambo's room for his own and burst through the unlocked door just in time to see First Lieutenant Rambo execute a fast draw that would have brought tears to the eyes of both "Hoss" and "Little Joe." Scared to death, Lieutenant Junior Grade Impervious' face-to-face encounter with this unholstered and unloaded .45 is a classic example of:

A. An assault with a dangerous weapon.

B. An offer-type simple assault.

C. An attempt-type simple assault.

D. "No harm, no foul."

Lieutenant Junior Grade Norris' arrival at NJS was preceded by rumors which soon became known to the entire class -- that he was a real bad dude. Apparently, while at the reformatory, he was diagnosed as having a schizoid personality with alternating delusions that he was either "Conan the Barbarian" or "Bruce Lee." It was during this period that he earned a 10th degree black belt in karate, while achieving a remarkable proficiency in the use of the double-edged sword. Tired of Lieutenant Junior Grade Wimps' incessant chatter during enthralling criminal law lectures, Lieutenant Junior Grade Norris turned around in his seat one day and informed Lieutenant Junior Grade Wimps that he was "dead meat." At that point, Lieutenant Junior Grade Wimps threw up all over Lieutenant Junior Grade Norris, and both individuals had to be excused from the class. While in the nearby men's room cleaning up, Lieutenant Junior Grade Wimps happened to glance up just in time to see Lieutenant Junior Grade Norris assume the "striking cobra" karate position. In a fear-inspired burst of adrenalin, Lieutenant Junior Grade Wimps ripped the seat from the nearest toilet and clubbed Lieutenant Junior Grade Norris over the head, thereby inflicting serious injury.

A. Lieutenant Junior Grade Wimps cannot claim self-defense because he struck the first blow.

B. Lieutenant Junior Grade Wimps has a valid claim of self-defense.

C. Lieutenant Junior Grade Wimps cannot claim self-defense because he used excessive force.

D. Lieutenant Junior Grade Wimps is guilty of assault on the toilet seat.

MILITARY JUSTICE STUDY GUIDE

CHAPTER XXVI

DISTURBANCE OFFENSES

A. **Overview**. The UCMJ prohibits five major offenses involving public disturbance or threats against the peace:

1. Riot (article 116);

2. breach of peace (article 116);

3. disorderly conduct (article 134);

4. communicating a threat (article 134); and

5. provoking words or gestures (article 117).

B. **Riot** (article 116)

1. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. The accused was a member of a group of three or more persons;

b. the accused and at least two others mutually intended to assist one another in carrying out a certain undertaking, plan, or enterprise against anyone who might oppose them; and

c. the group, or some of its members, in furtherance of the group's common purpose, committed certain violent or turbulent acts which constituted an unlawful tumultuous disturbance of the peace; and

d. these acts terrorized the public in general by causing, or intending to cause, public alarm or terror.

2. **Discussion**. A riot must consist of at least three persons. If fewer than three are involved, only breach of peace or disorderly conduct is committed. The "common purpose" is an intention, object, plan, or project shared by the group, and it is immaterial whether the act intended is unlawful. This common purpose need not exist before the violence begins. It can be formed even after the group begins the tumultuous acts. Thus, what started as merely disorderly conduct can escalate into a riot. Although "public alarm or terror" appears vague, it refers to a disturbance so violent or potentially disruptive that members of the community would have cause to be concerned for the safety of themselves or their property. The community may include a military community -- such as a vessel or shore installation.

3. **Pleading**

a. **General considerations**. *See* Part IV, para. 41f(1), MCM, 1984. When in doubt about whether the accused's acts constituted a riot or merely a breach of peace, charge the offense as riot. Breach of the peace and disorderly conduct are lesser included offenses of riot.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 116.
>
> Specification: In that Seaman Hugh N. Cry, U.S. Navy, USS WOONSOCKET, on active duty, did, at the Naval Correctional Center, Naval Education and Training Center, Newport, Rhode Island, on or about 15 June 19CY, participate in a riot by unlawfully assembling with Fireman Will N. Follower, U.S. Navy, and Yeoman Third Class Rab L. Rowser, U.S. Navy, for the purpose of resisting all military authority at said Correctional Center, and, in furtherance of said purpose, did wrongfully break and remain out of his own area of confinement in the said Correctional Center, tear down the inner fence to said Correctional Center, damage and destroy military property of the United States, and unlawfully brandish a weapon, to wit: a lead pipe, to the terror and disturbance of the staff and other inmates of said Correctional Center.

C. **Breach of the peace** (article 116)

1. **Elements of the offense.** The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused caused or participated in a certain violent or turbulent act; and

b. the peace of the community was thereby unlawfully disturbed.

2. **Discussion**

a. **Violent or turbulent act.** Examples include destroying or damaging property, discharging firearms, or public fighting, loud speech, or language which tends to induce or incite violence or unrest and a breach of the peace results.

b. **The peace of the community.** A breach of the peace disturbs public tranquility or impinges upon the peace and order to which the community is entitled. Thus, the acts must disturb the public peace, not just the peace of the persons who witness the acts. For example, a fight in a bar would merely be disorderly conduct. Only the other patrons are disturbed. However, if the fight spills out into the parking lot, it may become a breach of peace if it is noisy enough to disturb the surrounding neighborhood.

c. **Community.** Although "community" usually refers to the general public in the area, it also includes military communities such as a base, post, vessel, or confinement facility.

d. **Unlawful disturbance.** A breach of peace is unlawful when committed without legal justification or excuse. Legal justification refers to the proper performance of a legal duty. Legal excuse includes defenses such as self-defense. Thus, if the shore patrol is required to use force to apprehend a group of drunken sailors roaming the streets of the naval base, and violence ensues disturbing the peace of the military community, the shore patrol officers have not committed a breach of peace.

3. **Pleading**

a. **General considerations.** *See* Part IV, para. 41f(2), MCM, 1984. Note that some of the examples of violent acts used in the sample specification may not be breaches of the peace under all circumstances. For example, "wrongfully engaging in a fistfight in the dayroom" would be a breach of the peace only under

some circumstances. However, when in doubt about whether an accused's acts constituted breach of the peace or only disorderly conduct, plead the offense as breach of the peace.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 116.
>
> Specification: In that Fireman Wake D. Towne, U.S. Navy, USS JOHN L. SULLIVAN, on active duty, did, on board Naval Education and Training Center, Newport, Rhode Island, on or about 15 June 19CY, participate in a breach of the peace by wrongfully engaging in a fistfight outside Bachelor Officers' Quarters, Room #442, with Airman Hire N. Kyte, U.S. Navy, Seaman Michael Maul, U.S. Navy, and Private Waldo D. Cokesnorter, U.S. Marine Corps.

D. **Disorderly conduct** (article 134)

1. **Elements of the offense**. The prosecution must prove beyond reasonable doubt that:

a. At the time and place alleged, the accused was disorderly; and

b. under the circumstances, the accused's conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. **Discussion**. Disorderly conduct affects the peace and quiet of persons witnessing it. It need not be violent conduct, however. An act which outrages generally held standards of public decency, such as indecent exposure or window peeping, would also constitute disorderly conduct. Whether the accused's acts constituted disorderly conduct is a factual issue to be decided at trial by the court-martial members or, in a judge-alone trial, by the military judge.

3. **Pleading**

a. **General considerations**. Part IV, para. 73f, MCM, 1984, provides the general format for disorderly conduct specifications, but is insufficient in several respects. The form specification does not allege the specific acts which constituted the disorderly conduct. As a matter of good practice, these acts should

be briefly described. If the accused was disorderly under circumstances that would bring discredit upon the military, this is an aggravating fact which significantly increases the maximum authorized punishment providing it is alleged. The sample specification below illustrates a preferable method. The place where the accused was disorderly ("in quarters," "on station," "in camp," or "on board ship") is traditionally used in disorderly conduct pleadings.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 134.
>
> Specification: In that Staff Sergeant Gene N. Tonic, U.S. Marine Corps, Marine Corps Recruiting Station, Norfolk, Virginia, on active duty, was, at Marine Corps Recruiting Substation, Virginia Beach, Virginia, on or about 1 December 19CY, disorderly on station by urinating in public while in uniform, which conduct was of a nature to bring discredit upon the armed forces.

E. **Communicating a threat** (article 134)

1. **Elements of the offense.** The prosecution must prove beyond a reasonable doubt that:

a. At the alleged time and place, the accused communicated certain language;

b. the communication was made to a certain other person;

c. the language used by the accused, under the circumstances, constituted a threat to injure the person, property, or reputation of another person; and

d. the communication was wrongful, without justification or excuse; and

e. under the circumstances, the accused's conduct was prejudicial to good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces.

2. **Discussion**

a. **Threat**. The threat may be to the person, property, or reputation of another. It must involve an avowed present intent to injure, either now or in the future. A conditional threat may not always be an offense. Thus, "If you weren't so old, I'd beat you to a pulp," is not a threat. The condition ("If you weren't so old . . .") negates any present intent to injure. On the other hand, "If you don't cooperate, we'll kill you," does constitute a threat. The condition ("If you don't cooperate . . .") is one the accused is not entitled to impose and doesn't negate the intent to injure, but merely explains the circumstances under which the threat will be carried out. A malicious bomb threat increases the maximum punishment by two years. Whether the accused's words constituted a threat is a factual issue, to be decided by analyzing all the facts and circumstances of each case. Thus, words which all parties understand to have been said in jest would not constitute a threat.

b. **Communication**. The threat must be communicated to another person. The threat does not have to be communicated to the intended victim, however. Thus, if A tells B, "I'm going to beat up C," a threat has been communicated for purposes of this offense.

c. **Intent**. The accused need not specifically intend to carry out the threat. The gist of the offense is communication of the threatening words, not the actual intent of the speaker. The fact that the accused said the words in jest is no defense if the person to whom they were communicated believed or understood the words to be an actual threat.

d. **Wrongful**. The threat must be wrongful, without legal justification or excuse. Not all threats are wrongful. For example, if a witness to a crime threatens to report the perpetrator to the authorities, the threat is not wrongful, even though it will certainly injure the perpetrator's reputation if carried out. On the other hand, if the accused threatens to falsely report another person, the threat is wrongful. There is no legal justification for false accusations of crime. If a person mistakenly believes that another person has committed a crime, the threat to report the supposed criminal is not wrongful, provided the mistaken belief was both honest and reasonable.

3. **Pleading**

a. **General considerations**. *See* Part IV, para. 110f, MCM, 1984. Note that the exact language constituting the threat need not be alleged. Under many circumstances, the threat will consist of more than just a sentence or two. It may involve the manifestation of the accused's intent during the course of a lengthy conversation. Therefore, only the nature of the threat need be alleged.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 134.
>
> Specification: In that Seaman Ratlin Sabres, U.S. Navy, USS MANAYUNK, on active duty, did, on board USS MANAYUNK, located at Newport, Rhode Island, on or about 7 September 19CY, wrongfully communicate to Yeoman Third Class Albert L. Ears, U.S. Navy, a threat to injure Ensign Strutt N. Martinet, U.S. Navy, by throwing said Ensign Martinet overboard.

F. **Provoking speeches or gestures** (article 117)

1. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused wrongfully used certain words or gestures toward a certain person;

b. the words or gestures were provoking or reproachful; and

c. the person to whom the words or gestures were used was a person subject to the UCMJ.

2. **Discussion**

a. **Provoking**. Provoking words or gestures tend to induce breaches of the peace. They are "fighting words" or challenging gestures. It is not necessary, however, that a breach of the peace actually result. The person to whom the words or gestures were used need not have been actually provoked to violence. On the other hand, the victim's reaction to the words or gestures is a factor to be considered in determining whether, under the circumstances, the accused's conduct was provoking. Conditional threats may be provoking words. For instance, "If you weren't so ugly, I'd smack you," is not a threat -- but is chargeable as provoking words.

b. **Reproachful**. Reproachful words or gestures are ones that censure, blame, discredit, or otherwise disgrace another person's life or character. They also must tend to induce breaches of the peace.

c. **Accused's intent.** The accused need not actually intend to provoke violence or a breach of the peace. The gist of the offense is the consequences of the provoking conduct, not the intent behind it. The accused's intent can be considered, however, along with all the other circumstances, to determine whether the conduct was provoking or reproachful.

d. **Victim's status.** The person to whom the provoking or reproachful words or gestures were used must be a person subject to the UCMJ. It is not necessary, however, that the accused be aware of the victim's status. Lack of knowledge of the victim's status is not a defense.

e. **Wrongful use.** Provoking or reproachful words or gestures do not include reprimands, censures, reproofs, and other admonitions which may be properly administered in the furtherance of military training, efficiency, or discipline.

f. **The person to whom directed.** Unlike communicating a threat, provoking words must be communicated directly to the victim, not a third party.

3. **Pleading**

a. **General considerations.** *See* Part IV, para. 42f, MCM, 1984. The words or gestures used should be clearly described in the specification.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 117.
>
> Specification: In that Ensign Rude N. Boorish, U.S. Navy, USS MOOSEBURGER, on active duty, did, on board USS MOOSEBURGER, at sea, on or about 31 October 19CY, wrongfully use provoking words, to wit: "If you're so tough, come on and try to prove it, you coward," or words to that effect, towards Chief Boatswain's Mate Decker Ape, U.S. Navy.

Provoking words is a lesser included offense of indecent language. *See* Change 3 to MCM, 1984.

REVIEW QUESTIONS

In a fit of anger, LCPL Turk yelled to his civilian girlfriend, "Sally Smith, if you were a man I'd beat the living hell out of you right now. Why don't you loose some weight you fat, ugly cow?" The government charged LCPL Turk with a single violation of Article 134, communicating a threat. Based upon this charge, what, if anything, is LCPL Turk guilty of?

A. Communicating a threat (article 134).

B. Provoking/reproachful words (article 117).

C. Nothing.

D. Both A and B, above.

In a similar fit of anger, fueled in part by a hastily-consumed quart of "Mad/Dog 20/20," YNSN Jones yelled to his girlfriend PFC Polly Smith, USA, "If you were a civilian I'd kick you in your flat rear end. Why don't you put some meat on your bones you skinny, anorexic broomstick?" The government also charged YNSN Jones with a single violation of Article 134, communicating a threat. Based upon this charge, what, if anything, is YNSN Jones guilty of?

A. Communicating a threat (article 134).

B. Provoking/reproachful words (article 117).

C. Nothing.

D. Both A and B, above.

MILITARY JUSTICE STUDY GUIDE

CHAPTER XXVII

CRIMES AGAINST PROPERTY

A. **Overview**. The UCMJ prohibits a broad range of crimes against property. This chapter will discuss the more common property offenses:

1. Larceny and wrongful appropriation (article 121);

2. receiving stolen property (article 134);

3. robbery (article 122);

4. burglary, housebreaking, and unlawful entry (articles 129, 130, 134);

5. arson (article 126);

6. offenses against military property (article 108);

7. damage or destruction of nonmilitary property (article 109); and

8. bad check offenses (articles 123a and 134).

B. **Larceny and wrongful appropriation** (article 121)

1. **General concept**. Article 121 prohibits larceny and its lesser included offense of wrongful appropriation. The only difference between the two crimes is the required intent. Both crimes are specific intent offenses. In larceny, the accused specifically intends to deprive the owner permanently of the property stolen. In wrongful appropriation, the accused intends to deprive the owner of the property only temporarily.

2. **Elements of the offenses**. The elements of larceny and wrongful appropriation are identical, except for the required intent. The prosecution must prove beyond reasonable doubt that:

a. At the time and place alleged, the accused wrongfully took, obtained, or withheld certain property;

b. the property belonged to, or was in the lawful possession of, another person;

c. the property was of a certain value; and

d. the taking, obtaining, or withholding by the accused was with the intent to permanently (or temporarily, in the case of wrongful appropriation) deprive the other person of the use and benefit of the property.

3. **Discussion**

a. **Wrongfulness**. Article 121 does not prohibit all takings, obtainings, or withholdings of another's property -- only wrongful ones. The accused's act is wrongful if it is without the lawful consent of the owner, or without legal justification or excuse. A police seizure of evidence is an example of legal justification. Legal excuse would include situations such as the accused's taking property he/she honestly believes to be his/her own.

b. **Taking**. Article 121 describes three types of larceny: wrongful taking, wrongful obtaining, and wrongful withholding. A "taking" requires two acts by the thief. First, the thief must exercise physical dominion so as to impair the owner's control over the property. This usually occurs when the thief picks up the property. Second, the thief must remove the property. Any movement, however slight, will usually suffice. Both dominion and removal are necessary.

Suppose a thief wants to steal a radio from the Navy Exchange. The thief picks up the radio from the shelf. The thief has moved the property but, as she starts for the door, she is stopped by the chain securing the radio to the shelf. The thief has been unable to gain dominion over the property so as to impair the Exchange's control of the radio. Therefore, no larceny has been committed, only attempted larceny. Suppose, however, that the radio isn't chained and the thief starts for the door with it. If, before she leaves the Exchange, the thief conceals the radio under her coat, the crime of larceny will be complete. The act of concealment will be dominion sufficient to impair the owner's right to control the radio.

c. **Obtaining**. Wrongful obtaining is larceny by fraud. The thief makes a deliberate misrepresentation which induces the owner to give the property voluntarily to the thief. The misrepresentation must have all of the following characteristics.

(1) **It must be a material misrepresentation.** The thief's misrepresentation must concern an important matter in the relationship or dealings between the thief and the victim. It must relate directly to the transaction and not involve some incidental or tangential matter. The misrepresentation is material if a reasonable person would rely upon it, at least in part, in deciding whether to give the property to the thief.

(2) **It must be a misrepresentation of present or past fact.** A statement such as "This watch lists for $500," or "This bridge coat was worn by Admiral Nimitz" could form the basis for a wrongful obtaining. On the other hand, a statement such as "This coin isn't worth much now, but will be worth a fortune someday" is not a statement of present or past fact. The statement that "This is the most beautiful picture in the world" is merely a statement of opinion. If, however, the thief says, "The art critic for the New York Times says that this is the most beautiful painting in the world," the thief has made a representation of fact (i.e., the fact that the art critic has expressed that opinion). A present fact includes the thief's present intentions. Thus, if the thief states, "I will gladly pay you Tuesday for a hamburger today," the thief has stated the fact of his or her present intention to pay for the hamburger in the future.

(3) **The representation must be false**

(4) **The accused must not believe that the misrepresentation is true.** Any one of three possible states of mind will satisfy this requirement. First, the accused may know that the representation is untrue. Second, the accused may believe that it is untrue, without actually knowing whether it is untrue. Third, the accused may have no actual knowledge or belief about whether the statement is true or false.

Under certain circumstances, silence can constitute a misrepresentation. Suppose that the accused makes a misrepresentation of fact to the victim, but believes that the statement is true. Later, before the victim gives the property to the accused, the accused learns that the statement is actually false. The accused will be under a legal obligation to retract or correct his or her prior statement. The accused's silence, once it is known that the representation is untrue, will be considered as a misrepresentation.

(5) **The misrepresentation must induce the victim's transfer of the property to the thief.** The victim must actually rely on the thief's misrepresentation as a basis for giving the property to the thief or to the thief's agent. The misrepresentation usually must be made before, or simultaneously with, the transfer. Although the misrepresentation must induce the transfer, it need not be the only reason why the victim parted with the property.

(6) **Monetary loss irrelevant**. There is no requirement that the victim suffer a monetary loss as a result of the transaction. Suppose, for example, that a person uses a forged prescription to buy drugs. By presenting the prescription, the accused represents that the drugs have been lawfully prescribed. Relying on this representation, the pharmacist transfers the drugs to the accused. Without the prescription, the pharmacist would not have parted with the drugs. Therefore, the accused has committed a wrongful obtaining-type larceny. The fact that the accused paid full value for the drugs is immaterial.

d. **Withholding**. In taking and obtaining types of larceny, the thief unlawfully comes into possession of the property. In wrongful withholding, however, the thief's initial possession of the property is usually lawful. Acts which constitute the offense of unlawfully receiving, buying, or concealing stolen property, or being an accessory after the fact, however, are not included within the meaning of "withholds." For example, the thief may be a renter, borrower, or custodian of the property. The larceny occurs when the thief wrongfully withholds the property from its rightful owner. The act of withholding may take several forms. The thief may fail to return borrowed or rented property when lawfully required to do so. The thief may be a custodian, who fails to account for, or deliver, the property to its owner when legally required to do so. Still another example of wrongful withholding would be the custodian of property who converts the property to his or her own use or benefit, or who uses it in an unauthorized manner to the detriment of the owner's rights. Acts which constitute the offense of unlawfully receiving, buying, or concealing stolen property or of being an accessory after the fact, however, are not included within the meaning of "withhold." Because what is a withholding can often be a very complicated legal question, it will often be wise to consult an attorney before prosecuting a wrongful withholding form of larceny.

e. **Property**. The law divides property into two general classes: real property and personal property. Real property includes land, buildings, and permanent fixtures attached to the land. Real property cannot be the subject of a larceny. Personal property may be defined as any property that is not real property. Personal property includes tangible property, which has a physical existence, and intangible property, such as contract rights, patents, and rights to services.

"Property" for purposes of article 121 is limited to tangible personal property, money, and negotiable instruments such as checks. Services, such as telephone services or labor, cannot be the subject of larceny. Theft of services may be prosecuted under article 134 when the accused wrongfully obtained the services. [*See also* Part IV, para. 93, MCM, 1984 (theft of mail).]

Under Change 3 to the MCM, 1984, a new aggravated offense of larceny of military property was added. Larceny of military property of a value of $100 or less carries a BCD, total forfeitures, and one year confinement, while property in excess of $100 carries a DD, total forfeitures, and ten years confinement. It should be noted that this change did not create a comparable offense under wrongful appropriation.

f. **Ownership**. "Ownership" merely describes a person's right to possess, use, and dispose of property. The law identifies two types of owners of property: general owners and special owners. Owners include not only people, but also corporations, associations, governmental agencies, and partnerships.

(1) **General owners**. The general owner has the greatest right to possess, use, and dispose of property. The general owner's rights are generally superior to those of anyone else. The general owner is often said to have "title" to the property, or to be its "legal owner" or "true owner."

(2) **Special owners**. The special owner has ownership rights that are superior to the rights of anyone else except the general owner. Thus, a renter, borrower, or custodian of property would be a special owner. Even a thief may be a special owner. The thief's rights in the stolen property are greater than those of anyone else, except the general owner or another special owner. Thus, if one thief steals stolen property from another thief, a larceny has been committed. On the other hand, there is no larceny when the general owner retrieves the property from a thief.

(3) **Relationship to larceny**. A larceny may be either from a general owner or from a special owner. If the larceny is from a special owner, there is usually no need to plead or prove the general owner's identity or interest. Larcenies may occur between general and special owners. A special owner commits larceny against the general owner when the special owner wrongfully withholds the general owner's property. Under certain circumstances, a general owner may commit a larceny against the special owner, if the special owner has the right to exclusive possession of the property.

g. **Value**. Value has a twofold importance in larceny cases. First, one of the elements of the offense is that the property had at least some value. This is seldom an issue because most property has at least nominal value. Second, the property's value determines the authorized maximum punishment. (Note, however, that the maximum punishment is increased regardless of value in the case of motor vehicles, aircraft, vessels, firearms, or explosives.) A property's value for purposes of article 121 is its fair market value at the time and place of the theft. Fair market value usually equals the replacement cost of the property, less deductions for condition and depreciation. The concept of value may present several problems.

(1) **Proof of value**. Value may be proven in several ways. First, the larceny victim may testify to the property's value, specifically in terms of what he or she paid for it or what it costs to replace the property. Second, evidence of the prevailing retail price in the community for the same or similar items may be introduced through testimony or authenticated advertisements. Third, if the property was government property, official price lists are admissible to prove value. However, if the official price list conflicts with other evidence of fair market value, the fair market value governs. Finally, when as a matter of common knowledge the property is obviously of some value or of a value substantially in excess of $100.00, its value may be inferred by the fact-finder.

(2) **Unique property**. Rare or one-of-a-kind items such as antiques or paintings usually have no prevailing retail price in the community. Their value may be established by the expert testimony of an appraiser or other authority on that kind of property, who may give his or her opinion about the price the item would command if offered for sale at the time and place of the theft. Note, however, that value need not be monetary. It is sufficient if the property has value to someone. For example, body fluids generally do not have a fair market value, yet the courts have held that the theft of a urine sample is properly charged under article 121 because the sample has value to the military even though it may be subjective and extrinsic. The specification would simply state ". . . did steal one urine sample, of some value . . ."

(3) **Value of negotiable instruments**. Negotiable instruments are writings which represent money value and which can be converted to cash. Examples of negotiable instruments include checks, bank drafts, and money orders. The value of a negotiable instrument depends upon whether the document is in a negotiable form (i.e., whether it can be cashed). Thus, the thief who steals a currently dated, properly signed check for one million dollars has committed a million-dollar larceny. However, if the check is unsigned or has some other defect that renders it nonnegotiable, the accused has stolen only a piece of paper of nominal value.

(4) **Deductions for condition and depreciation**. Fair market value reflects the property's condition and any appropriate depreciation. Deteriorated or damaged property would, of course, have a lower fair market value than if in perfect condition. Some types of property may be subject to commonly recognized depreciation. There is no need for depreciation or deteriorated condition to be considered when drafting a larceny pleading; nor does the prosecution have to introduce any evidence about the property's condition or any applicable depreciation. If they become issues, such matters are usually presented by the defense and decided by the fact-finder.

h. **Intent**. Larceny and wrongful appropriation are specific intent offenses. In larceny, the accused must specifically intend to deprive the owner of the property permanently. Wrongful appropriation requires the specific intent to deprive temporarily. Like all other matters of intent in criminal law, the requisite intents in larceny and wrongful appropriation may be proven by direct or circumstantial evidence.

i. **Unexplained possession of recently stolen property**. Thefts are seldom committed in public. In most trials, there will be no witness who can testify to seeing the accused steal the property; therefore, the law recognizes a permissive inference arising from the accused's unexplained possession of recently stolen property. If, shortly after the property was stolen, the accused was found in unexplained, knowing, exclusive possession of the stolen property, one may infer that the accused was the thief. This is only a permissive inference which may be completely rejected by the fact-finder. For the inference to operate, not only must the accused's possession be unexplained, but it must also satisfy three other conditions.

(1) **Conscious possession**. The evidence must show that the accused knew that he or she possessed the property. It is not necessary to prove that the accused knew the property was stolen. For example, if the prosecution can merely prove that the accused held the property in his or her hand, the requirement of conscious possession will usually be satisfied.

(2) **Exclusive possession**. The evidence must show that the accused exercised exclusive control or dominion over the property.

(3) **Recently stolen property**. "Recent" is a relative concept. A practical test for determining if the property was "recently" stolen is as follows: Was it reasonably possible for the accused to have innocently acquired the property in the time between its theft and its discovery? If it is unlikely that the accused could have acquired the property in that time without being the thief, the condition will be satisfied.

j. **Found property**. Found property is property which has been inadvertently lost or mislaid by its owner and which is found by the accused. The old maxim of "finders keepers, losers weepers" has little legal authority. The law imposes certain duties on a finder of property. If the finder fails to make reasonable efforts to locate the property's owner, the finder may be criminally liable for larceny of the found property.

(1) **Clues to ownership**. The extent to which the finder will be legally required to try to locate the property's owner will be determined by the clues to ownership. Clues to ownership include identifying marks, the nature of the

property, where it was found, when it was found, its apparent value, and how long it had apparently been located where it was found. Sometimes there may be no clues to ownership. For example, there will be almost no clues to ownership when a dollar bill is found on a busy street corner, and it would be nearly impossible to find the rightful owner. On the other hand, a roll of $100 bills found on the floor of a bank will present many clues to ownership. Given the nature of the property and where it was found, it is reasonable to surmise that the owner's identity could be determined. Likewise, an unmarked suitcase found in an alley will have virtually no clues to ownership. An unmarked suitcase packed with clothing and personal items and found on a bench in a railroad station will present many clues to ownership. It is reasonable to surmise that a passenger mislaid the suitcase and still may be in the station or may be located through the railroad's lost-and-found department. Whether the property presented clues to ownership must be determined by analyzing all the facts and circumstances surrounding the finding of the property.

(2) **Finder's duty to make reasonable efforts**. The finder has a legal duty to make reasonable efforts to find the property's owner. What constitutes reasonable efforts is determined by the kind and quality of the clues to ownership. If the finder takes the found property and makes no reasonable efforts to return it to its owner, the finder commits a taking-type larceny. Whether the finder made reasonable efforts is a factual question to be decided by the court-martial members or, in a judge-alone trial, by the military judge. Suppose that, when the property is found, there were no clues to ownership. The finder therefore lawfully takes the property. Later, however, the finder learns of clues to ownership, such as an advertisement in the lost-and-found column of a newspaper. The finder then has a duty to make reasonable efforts to return the property to its owner. If the finder learns of subsequent clues to ownership, but makes no reasonable efforts to return the property, the finder commits a withholding-type larceny. The finder's initial possession was lawful, but the finder failed to return the property when legally required to do so.

k. **Abandoned property**. Abandoned property is property in which the owner has relinquished all title, rights, and possession. Anyone may lawfully take possession of abandoned property. Whether certain property was abandoned will be determined by the type of property, its condition, its location, and whether the prior owner actually abandoned the property. Moreover, even if the property was not in fact abandoned, the accused will not be guilty of larceny or wrongful appropriation if the accused honestly believed that the property was abandoned.

4. **Common defenses to larceny**. The following are the most frequently encountered defenses in larceny cases. Many are also applicable to other types of property crimes.

a. **Lack of criminal intent**. The accused claims that the alleged taking, obtaining, or withholding was not wrongful. Suppose, for instance, that the accused and victim are friends who often borrow from each other. They may even borrow from each other without obtaining the other person's express consent. At trial, the accused claims that the property was merely "borrowed" and that the accused believed that the victim would not object. The accused's claim of "borrowing," if believed, will constitute a defense to both larceny and wrongful appropriation. The accused's state of mind was such that the taking of the victim's property was not wrongful.

b. **Intoxication**. Although voluntary intoxication is not usually a complete defense, it may become a defense to larceny or wrongful appropriation when the accused was so intoxicated as to be unable to form the required intent. As a practical matter, such intoxication would have to be extremely severe, to the extent that the accused did not really know what he or she was doing.

c. **Honest mistake of fact**. If the accused honestly believed that the property was his or her own, such a mistake of fact will constitute a complete defense to larceny and wrongful appropriation. The accused's mistake need not be reasonable, only honest. Thus, the key issue is the accused's worthiness of belief. The accused's character and reputation for truthfulness and the extent to which the accused's claim is corroborated or contradicted by other evidence will be important.

d. **Return of similar property**. After wrongfully taking/obtaining/withholding property, the accused's intent to return similar property is not a defense. For example, if Seaman Smith steals $100 worth of food from the commissary and consumes it, but later leaves $100 in cash in the register, it is still larceny. The rightful owner has still been deprived permanently of the original property. The exception is when cash or a check is taken and an equivalent amount of currency is later returned. Because of the fungible nature of money, this return is usually a defense to larceny, but not wrongful appropriation.

5. **Pleading**

a. **General considerations**. *See* Part IV, para. 46f, MCM, 1984. For suggestions on pleading value and describing property, see chapter XIX of this text.

b. **Pleading multiple larcenies**. One of the most puzzling pleading problems in larceny cases is whether the theft of several items should be pleaded in one or several specifications. Unreasonable multiplication must be avoided. What is essentially one continuing theft, arising from one single criminal impulse, must not be broken down into an unreasonable number of specifications. On the other hand, several different larcenies should not be aggregated into a single specification.

Common sense, not abstract legal rules, is the pleader's best guide. If the evidence suggests that the accused committed several distinct thefts, each motivated by its own criminal impulse, separate specifications should be pleaded. Separate specifications should also be pleaded when the stolen items belonged to different persons. However, if the evidence suggests that the accused's acts were really part of one continuing criminal enterprise, a single specification will be appropriate. Common-sense analysis of the facts of each case is necessary before drafting the pleadings because, at trial, the sufficiency of the pleadings will be decided by the same analysis.

c. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 121.
>
> Specification: In that Seaman Clarence C. Stickyfingers, U.S. Navy, USS VALENTINE, on active duty, did, on board USS VALENTINE, at sea, on or about 25 September 19CY, steal a toy rubber duck, of a value of $5.00, the property of Commander Bertram N. Erny, U.S. Navy.

C. **Receiving, buying, or concealing stolen property** (article 134)

1. **General concept**. Although closely related to larceny, receiving stolen property is not a lesser included offense of larceny. Thus, whenever there is doubt about whether the accused was the thief, or merely a receiver of stolen property, a receiving stolen property charge must be preferred in addition to the larceny charge.

2. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. The accused unlawfully received, bought, or concealed certain property;

b. the property belonged to another person;

c. the property had been stolen by someone other than the accused;

d. the accused knew the property was stolen at the time he/she received, bought, or concealed the property;

e. the property had a certain value; and

f. under the circumstances, the conduct was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces.

3. **Discussion**

a. **Unlawfully received, bought, or concealed.** The accused must have received, bought, or concealed the goods without the rightful owner's consent and without legal justification or excuse. One who buys stolen goods in order to return them to their rightful owner has not unlawfully bought stolen property. Any control over the property is sufficient to constitute receipt of the property. Property is therefore "received" if it is delivered personally to the accused, the accused's agent, or the accused's residence. An accused who steals from a thief is not guilty of receiving stolen property, but is guilty of larceny.

b. **Stolen property.** The property must actually be stolen property. Thus, a person who receives property, erroneously believing that it is stolen, is not guilty of receiving stolen property. He or she may be guilty of an attempt to receive stolen property, however. The property must have been stolen by someone other than the receiver. A thief cannot receive stolen property he or she has stolen.

c. **Knowledge.** At the time the accused receives the property, the accused must actually know that the property is stolen.

4. **Relationship to larceny.** Although closely related to larceny and wrongful appropriation, receiving stolen property is not a lesser included offense of either crime. Nor does receiving stolen property merge into a wrongful withholding type of larceny when the receiver fails to return the property to its owner. For example, suppose that Seaman A gives Seaman B a radio that B knows is stolen. Several days later, Petty Officer C sees the radio, identifies it as the one stolen from her, and demands that B return it. B refuses. Although B is guilty of receiving stolen property, he cannot be guilty of larceny. Seaman B did not wrongfully take or obtain the radio from Petty Officer C. Seaman B's refusal to return the radio cannot constitute a wrongful withholding type larceny, because Seaman B's initial possession of the radio was not lawful, and a wrongful withholding type larceny always requires that the accused's initial possession be lawful.

5. **Pleading**

a. **General considerations.** *See* Part IV, para. 106f, MCM, 1984.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 134.
>
> Specification: In that Seaman Recruit Aloysius F. Fagin, U.S. Navy, USS FENCEHAVEN, on active duty, did, at Naval Justice School, Newport, Rhode Island, on or about 25 December 19CY, wrongfully receive a wristwatch, of a value of $150.00, the property of Ensign I. Ben Robbed, U.S. Navy, which property, as he, the said Seaman Fagin, then knew, had been stolen.

D. **Robbery** (article 122)

1. **General concept**. Robbery is essentially a larceny committed by means of an assault upon the victim. Both larceny and assault are lesser included offenses of robbery.

2. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused wrongfully took certain property from the victim's person or presence;

b. the taking was against the victim's will;

c. the taking was accomplished by force, violence, or threat of force or violence;

d. the property belonged to the victim;

e. the property was of a certain value; and

f. the accused took the property with the intent to deprive the victim permanently of its use and benefit.

(**Note**: If the robbery was committed with a firearm, add as an additional element)

g. that the means of force or violence, or of putting the person in fear, was a firearm.

3. **Discussion**. Many of the concepts of larceny law also apply to robbery. Robbery has several other distinct principles which are discussed below.

a. **From the victim's person or presence**. The robber must take the property from the victim's person or must take property in the victim's presence. Property is in the victim's presence when the victim has immediate control over it. Suppose, for example, the robber ties up the victim in the kitchen and then steals property from the victim's bedroom. The stolen property would be in the victim's presence for purposes of the offense of robbery.

b. **Against the victim's will**. The taking must be without the victim's freely given consent. Acquiescence at gunpoint is not consent.

c. **Force and violence**. The wrongful taking must be accomplished by force, violence, or threat of force or violence. This is the assault component of robbery. The accused's force or violence need only be enough to overcome the victim's resistance. The force or violence may precede or accompany the taking. Thus, a robber, who hits the victim with a club and then takes the victim's wallet, has committed robbery. Likewise, the purse snatcher who suddenly grabs the victim's purse, pushes the victim to the ground and runs away, also commits robbery. There is no requirement that the victim offer resistance.

d. **Threats of force or violence**. Robbery may also be accomplished by putting the victim in fear of force or violence. The threat may be to the victim's person or property. The threat may also be one which places the victim in fear of force or violence to the person or property of a relative or of another person in the victim's company. For purposes of robbery, "fear" means a reasonably well-founded apprehension of immediate or future injury. While there need not be any actual force or violence, the threat must include demonstrations of force or menacing acts which reasonably raise an apprehension of impending harm.

4. **Lesser included offenses**. Both larceny and assault are lesser included offenses of robbery. Suppose, for example, that the accused is charged with robbery. The evidence clearly establishes that the accused stole the victim's property, but it fails to prove that the accused did so through force, violence, or threats. The accused should be found not guilty of robbery, but guilty of the lesser included offense of larceny under article 121. In another robbery prosecution, suppose that there is no evidence that the accused intended to steal property. The accused should be found not guilty of robbery, but guilty of the lesser included offense of assault under article 128.

5. **Pleading**

a. **General considerations**. *See* Part IV, para. 47*f*, MCM, 1984. Be sure to allege that the taking was by force, violence, or threats. Also, be sure to include that the theft was from the victim's person or presence and against the victim's will. These allegations are necessary to state the offenses of robbery. Note that pleading (and proving) use of a firearm increases the maximum authorized punishment by five years.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 122.
>
> Specification: In that Seaman Apprentice Muggs D. Victim, U.S. Navy, USS SKULLSMASHER, on active duty, did, at Naval Air Station, Fly, Ohio, on or about 30 September 19CY, by means of force and violence, with a firearm, steal from the person of Airman Walker N. Darkalleys, U.S. Navy, against his will, a watch, of a value of $200.00, the property of the said Airman Darkalleys.

E. **Burglary** (article 129), **housebreaking** (article 130) **and unlawful entry** (article 134)

1. **Introduction**. Burglary, housebreaking, and unlawful entry are closely related offenses, all involving illegal entries into buildings or structures. Burglary is the most serious of the three offenses, and unlawful entry the least serious. Since the three offenses are similar, it would be unnecessarily repetitive to recite the elements for each. Therefore, each of these three offenses will be discussed generally and will be distinguished from the other two related offenses.

2. **Burglary** (article 129)

a. **General concept**. Burglary is the unlawful breaking and entering of another person's dwelling, at night, with the specific intent to commit any of certain specified serious offenses. It is immaterial whether the intended serious offense is actually committed. The offense is complete when the burglar breaks and enters the dwelling at night with the requisite intent.

b. **Unlawful breaking and entering**. The burglar must break into the victim's dwelling. This may be done by an actual breaking such as forcing a lock, breaking a window, or even opening a closed door. There may also be a constructive breaking, which occurs when the burglar gains entry to the dwelling by trick (e.g., hiding in a box), by fraud (e.g., claiming to be from the telephone company), or by threats. The slightest entry into the dwelling, even if by only part of the body, will suffice. A breaking and entry is unlawful when done without lawful consent or legal justification.

c. **Dwelling**. The burglar must break into and enter the victim's dwelling. This ancient term refers to any building occupied as a place of residence. It also usually includes apartments. The dwelling must be occupied, but there is no requirement that the occupant actually be on the premises.

d. **At night**. The burglary must occur at night (i.e., between sunset and sunrise). The offense of burglary has remained substantially unchanged since the Middle Ages. Medieval law viewed nocturnal crimes as especially heinous. The UCMJ preserves this remnant of medieval society.

e. **Intent to commit certain specified serious offenses**. The burglar must enter the dwelling with the intent to commit a serious crime. These include: murder, manslaughter, rape and carnal knowledge, larceny and wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, and assault. It is immaterial that the intended crime was not actually committed.

f. **Lesser included offenses**. Housebreaking (article 130) and unlawful entry (article 134) are lesser included offenses of burglary.

g. **Pleading**

(1) **General considerations**. *See* Part IV, para. 55f, MCM, 1984. The elements of (a) unlawfully breaking and entering, (b) the dwelling house, (c) at night, and (d) the intended offense, must be expressly pleaded.

(2) **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 129.
>
> Specification: In that Seaman Morris D. Katz, U.S. Navy, USS HOHOKUS, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 December 19CY, in the nighttime, unlawfully break and enter the dwelling house of Captain Hugh N. Crigh, U.S. Navy, with intent to commit larceny therein.

3. **Housebreaking** (article 130)

a. **General concept**. Housebreaking is the unlawful entry of another person's building or structure with the intent to commit a criminal offense inside. Housebreaking is less serious than burglary. The premises need not be a dwelling, but can be any building, room, shop, store, office, structure, houseboat, house trailer, railroad car, or tent. Automobiles, airplanes, footlockers, or wall lockers, however, cannot be the subject of housebreaking. For a breaking into one of those areas, consider charging under article 134 using the Federal Assimilative Crimes Act. The premises need not be occupied or in use at the time of the housebreaking. The unlawful entry can occur at any time, not just at night. Finally, the accused may intend to commit any crime except strictly military offenses.

b. **Lesser included offense**. Housebreaking's principal lesser included offense is unlawful entry under article 134.

c. **Pleading**

(1) **General considerations**. *See* Part IV, para. 56f, MCM, 1984. The intended crime must be alleged in the specification.

(2) **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 130.
>
> Specification: In that Corporal Wiley N. Slighe, U.S. Marine Corps, Marine Barracks, Norfolk, Virginia, on active duty, did, on board USS EASYPICKENS, located at Norfolk, Virginia, on or about 15 December 19CY, unlawfully enter the Ship's Post Office, the property of the United States Government, with intent to commit a criminal offense, to wit: larceny therein.

4. **Unlawful entry** (article 134)

a. **General concept**. Unlawful entry occurs when the accused, without lawful consent or legal justification, enters a building or structure of another person. All those types of structures previously discussed with respect to burglary and housebreaking may be the subject of an unlawful entry. Since unlawful entry is an article 134 offense, the accused's actions must also be prejudicial to good order and discipline or service-discrediting. Note that the offense of unlawful entry does not require proof of an intent to commit any other offense once inside.

b. **Pleading**

(1) **General considerations**. *See* Part IV, para. 111f, MCM, 1984. Orchards and vegetable gardens, two examples in the form, may be the subject of an unlawful entry. Take special care in pleading when dealing with unfenced orchards, vegetable gardens, and similar types of real property. Under such circumstances, such unfenced property might not be the subject of an unlawful entry.

(2) **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 134.
>
> Specification: In that Yeoman Third Class Lester Baggadonutz, U.S. Navy, USS CHARLEROI, on active duty, did, on board USS CHARLEROI, at sea, on or about 7 May 19CY, unlawfully enter the stateroom of Commander Phillip R. Delphia, U.S. Navy.

F. **Offenses against military property** (article 108)

1. **General concept**. Article 108 prohibits the unauthorized sale, disposition, damage, destruction, or loss of military property of the United States. Not only does article 108 prohibit these specific acts, it also prohibits allowing someone else to commit the unauthorized sale, disposition, damage, destruction, or loss of military property. Article 108 can be distinguished from larceny in that larceny is concerned with how the accused came into possession of the property. Article 108 deals with how the accused handled or disposed of the property.

2. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused either:

(1) Sold, disposed of, damaged, destroyed, or lost certain property; or

(2) allowed someone else to sell, dispose of, damage, destroy, or lose certain property;

b. the accused's act was done without proper authority;

c. the property was military property of the United States; and

d. the property was of a certain value.

3. **Discussion**

a. **Military property of the United States**. Military property is all property, real or personal, that is owned, held, leased, or used by one of the armed forces of the U.S. Government. Thus, all property owned or used by the Department of the Navy, from paper clips to aircraft carriers, is covered by article 108. The appellate military courts have also held that retail exchange merchandise owned or used by a nonappropriated fund activity, such as the Navy Exchange, is not military property of the United States; however, merchandise in a ship's store is military property.

b. **Wrongful sale or disposition**. "Sale" of military property means a sale in the usual commercial sense. "Disposition" may include abandonment, loan, lease, or surrender of military property. Sale of military property is usually permanent. Disposition, however, need only be temporary. The prosecution need not prove that the accused actually knew that the sale or disposition was unauthorized. If the accused honestly and reasonably believed that the sale or disposition was authorized, however, the accused will not be guilty of an article 108 violation.

c. **Damage, destruction, or loss**. The accused's damaging, destruction, or loss of the military property may be intentional or negligent. Thus, whether the military property was damaged, destroyed, or lost because the accused failed to exercise reasonable care for the property or because he intentionally damaged, destroyed, or lost it, the accused would be guilty of an article 108 violation.

d. **Allowing another to sell, dispose of, damage, destroy, or lose**. The accused may be guilty of an article 108 violation even if he or she merely allowed another person to wrongfully sell, dispose of, damage, destroy, or lose military property if the prosecution can prove that the accused had a duty to protect the property and that the accused either intentionally or negligently failed to perform that duty, thereby permitting another person to commit the offense against military property.

e. **Value**. Because the property's value determines the authorized maximum punishment, the value should be pleaded and proven. Value is also one of the elements of the offense. (Note, however, that value is immaterial in determining maximum punishment if the property sold or disposed of was a firearm or explosive.)

4. **Pleading**

a. **General considerations**. *See* Part IV, para. 32f, MCM, 1984. Note that the three types of article 108 pleadings vary. Each type of pleading will require careful tailoring to the facts of each case. Because of the differences among the various types of article 108 offenses, four sample pleadings are provided below. They illustrate the major patterns in article 108 pleading.

b. **Sample pleadings**

Charge: Violation of the Uniform Code of Military Justice, Article 108.

(1) **Wrongful sale or disposition**

Specification 1: In that Seaman Roland R. Redeye, U.S. Navy, USS FOGBOUND, on active duty, did, on board USS FOGBOUND, at sea, on or about 20 November 19CY, without proper authority, sell to Seaman Wilbur R. Weakeyes, U.S. Navy, one pair of binoculars, of a value of $135.00, military property of the United States.

(2) **Damage**

Specification 2: In that Seaman Roland R. Redeye, U.S. Navy, USS FOGBOUND, on active duty, did, on board USS FOGBOUND, at sea, on or about 2 December 19CY, without proper authority, through neglect, damage, by dropping on the deck, one electric typewriter, of a value of about $2,000.00, military property of the United States, the amount of said damage being in the sum of $108.16.

(3) **Destruction (similar pattern for loss)**

Specification 3: In that Seaman Roland R. Redeye, U.S. Navy, USS FOGBOUND, on active duty, did, on board USS FOGBOUND, at sea, on or about 4 December 19CY, without proper authority, willfully destroy, by burning, one mattress, of a value of $63.00, military property of the United States.

(4) **Allowing another to commit an offense against property**

Specification 4: In that Seaman Roland R. Redeye, U.S. Navy, USS FOGBOUND, on active duty, did, on board USS FOGBOUND, at sea, on or about 10 December 19CY, without proper authority, through neglect, suffer a sextant, of a value of $145.00, military property of the United States, to be damaged by Seaman Recruit Clum Z. Goof, U.S. Navy, the amount of said damage being in the sum of $45.00.

G. **Damage or destruction of nonmilitary property** (article 109)

1. **General concept**. Article 109 prohibits certain types of damage or destruction to property other than military property of the United States. Wrongful sale or disposition of nonmilitary property is not covered by article 109.

2. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused either:

(1) Willfully or recklessly wasted or spoiled real property by committing certain acts; or

(2) willfully damaged or destroyed personal property by committing certain acts;

b. the property belonged to another person; and

c. the amount of damage was of a certain value.

3. **Discussion**

a. **Nonmilitary property**. Article 109 covers any property, whether real property or personal property, that is owned by someone other than a military department of the U.S. Government. Article 109 property would therefore include nonmilitary government property, private property, and property owned by corporations and associations, and military exchange inventory.

b. **Wasting or spoiling real property**. Damage to real property may be either intentional or the result of the accused's recklessness. More than simple negligence is required, however.

c. **Damaging or destroying personal property**. Damage or destruction of personal property must be intentional. No form of negligence will suffice.

d. **Value**. As in article 108 offenses, one of the elements of an article 109 offense is that the property had a certain value. Value is also an aggravating factor for purposes of increasing the authorized maximum punishment.

4. **Relationship of article 109 to article 108**. The offenses in articles 108 and 109 are often confused. Actually, the distinctions between the two types of offenses are rather simple. The following checklist will be helpful.

a. **Is the property military property of the United States?**

(1) **If yes**, the accused may be convicted for either intentional or negligent sale, disposition, damage, destruction, or loss. The accused may also be prosecuted for allowing someone else to commit an offense against the military property. The property may be either real or personal property.

(2) **If no**, the type of the nonmilitary property must be determined.

b. **Is the nonmilitary property real property or personal property?**

(1) **If real property**, the wasting or spoiling may be caused either intentionally or through recklessness.

(2) **If personal property**, the damage or destruction must be intentional.

5. **Pleading**

a. **General considerations**. *See* Part IV, para. 33f, MCM, 1984. "Waste" and "spoil" refer to damage to real property. "Destroy" and "damage" describe injury to personal property.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 109.
>
> Specification: In that Seaman Runyona Muck, U.S. Navy, USS RELUCTANT, on active duty, did, on board USS RELUCTANT, at sea, on or about 22 August 19CY, willfully and wrongfully destroy, by smashing with a sledgehammer, one wristwatch, of a value of $75.00, the property of Lieutenant Hubert C. Slowwrist, U.S. Navy.

6. *See* chart on following page "*Article 108 vs. Article 109.*"

If an accused damages or destroys		and the damage or destruction was done	then the accused is
Military Property		Willfully	Guilty of Violating Art. 108
		Recklessly	
		Negligently	
Non-Military Property	and the Property is Realty	Willfully	Guilty of Violating Art. 109
		Recklessly	
		Negligently	Not Guilty
	and the Property is Personalty	Willfully	Guilty of Violating Art. 109
		Recklessly	Not Guilty
		Negligently	

PERTINENT DEFINITIONS

1. "Military property" is all property owned, held, or used by one of the armed forces of the United States.

2. "Nonmilitary property" means any property not embraced in definition 1 above.

3. "Realty" means land, buildings, and any fixtures attached thereto such as piers, fences, trees.

4. "Personalty" means any property not embraced in definition 3 above.

5. "Willfully" means intentionally, i.e., the accused actually intended to cause the damage or destruction which resulted.

6. "Recklessly" means that the accused damaged or destroyed the property through a culpable disregard for the foreseeable consequences of his acts.

7. "Negligently" means that the accused failed to exercise the due care which a reasonably prudent man would have exercised under the circumstances.

H. **Bad check law** (articles 123a and 134)

1. **Overview**. The UCMJ prohibits three types of bad check offenses. Article 123a prohibits using a bad check to procure something of value with the intent to defraud, and using a bad check to pay a past-due obligation with the intent to deceive. Article 134 is used to prosecute dishonorable failure to maintain sufficient funds in an account. [Note that certain situations involving bad checks might also constitute violations of article 121 (larceny), but article 123a should be used when bad checks are involved.] Although bad check offenses are common in military society, enforcement is often difficult. Civilian authorities are often reluctant to prosecute such offenses unless large sums of money or a significant number of bad checks are involved.

2. **Using a bad check with intent to defraud** [article 123a(1)]

a. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

(1) The accused made, drew, uttered, or delivered a check, draft, or money order;

(2) at the time, the accused knew that there was not or would not be sufficient funds in the account to pay in full the check, draft, or money order when it was presented for payment;

(3) the accused made, drew, uttered, or delivered the check, draft, or money order to procure an article of value; and

(4) the making, drawing, uttering, or delivery was with the intent to defraud.

b. **Discussion**

(1) **Make, draw, utter, deliver**. "Make" and "draw" are synonymous and constitute the acts of writing and signing the instrument. "Deliver" means to transfer the instrument to another person. Delivery also includes endorsing an instrument over to another person or depositing it in one's own account. "Utter" has a somewhat broader meaning than "deliver." "Utter" also includes an offer to transfer the instrument, with a representation that it will be paid when presented. The person who writes and signs the instrument usually also utters and delivers it.

(2) **Procurement of an article of value**. The instrument must be used to procure an article or thing of value. An article or thing of value includes every kind of right or interest in property, or derived from contract,

including interests and rights which are intangible or contingent or which mature in the future. Payment of a past-due debt is not a thing of value. It is not necessary that the article actually be procured, only that the accused used the instrument in an attempt to procure the item.

(3) **Knowledge**. The accused must actually know that there is not or will not be sufficient funds to pay the instrument in full upon presentment at the time the instrument was made, drawn, uttered, or delivered. Presentment is the act of delivering the instrument and demanding payment.

(4) **Intent to defraud**. The accused must intend to defraud. One must be very careful not to confuse the intent to defraud, under article 123a(1), with the intent to deceive, under article 123a(2). They are separate, noninterchangeable intents. Intent to defraud denotes an intent to obtain an article or thing of value through a misrepresentation. For example, when one gives another person a check, there is an implied representation that the check will be paid upon presentment.

(5) **Five-day rule**. Actual knowledge and intent are often difficult to prove. Thus, if the maker or drawer of the instrument is notified that it has been dishonored, but fails to redeem it in full within five days of the notification, the court may infer both that the accused knew that there would be insufficient funds upon presentment and that the accused had an intent to defraud. The five-day rule does not apply to persons other than the maker or drawer of the instrument. Notification of dishonor can be oral or written, and can be given by a bank or any other person.

(6) **Value**. Although the value of the instrument is not an element of the offense, it is the principal factor aggravating the authorized maximum punishment.

c. **Pleading**

(1) **General considerations**. *See* Part IV, para. 49f(1), MCM, 1984. The specification should contain a photocopy of the check, draft, or money order. Be certain to allege that the instrument was used to procure an article of value and that it was with the intent to defraud. The two article 123a check offenses are not lesser included offenses of each other.

(2) **Sample pleading**

Charge: Violation of the Uniform Code of Military Justice, Article 123a.

Specification: In that Seaman Claude D. Paperhanger, U.S. Navy, USS TRENTON, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 16 October 19CY, with intent to defraud and for the procurement of lawful currency, wrongfully and unlawfully make a certain check upon the Bank of America, in words and figures as follows, to wit:

Claude D. Paperhanger **No. 667**
Irma A. Paperhanger
123 Fonebone Street *16 October* **19** *CY*
Oakland, CA 98901

Pay to
the order of *Navy Exchange* **$** *100.00*

One hundred and 00/100 **Dollars**
Bank of America
San Francisco, CA Claude D Paperhanger

Claude D Paperhanger

[BACK OF CHECK]

then knowing that he, the maker thereof, did not or would not have sufficient funds in or credit with such bank for the payment of the said check in full upon its presentment.

3. **Using a bad check with intent to deceive** [article 123a(2)]

a. **Elements of the offense.** The elements of this offense are similar to those of using a worthless instrument with intent to defraud under article 123a(1). The differences deal with the purpose of the instrument and the accused's intent. Under article 123a(2), the instrument is used to pay a past-due obligation or for any other purpose, other than one covered by article 123a(1). The accused's intent is an intent to deceive, not defraud.

b. **Discussion**

(1) **Past-due obligation.** Under article 123a(2), the instrument is used to pay a past-due obligation [or for any other purpose not covered under article 123a(1)]. A past-due obligation is a legal obligation to pay a debt which has matured prior to the use of the instrument.

(2) **Intent to deceive.** An intent to deceive is an intent to cheat, trick, or mislead. It involves a desire to gain an advantage for oneself, or to cause disadvantage to another person, through a misrepresentation. Every check, draft, or money order carries with it an implied representation that it will be paid on presentment. Article 123a(2) requires an intent to deceive, not defraud. The two intents are separate, noninterchangeable states of mind.

(3) **Five-day rule.** The five-day rule, discussed above, also applies to this offense for makers and drawers.

(4) **Value.** The value of the instrument is not an element of the offense, but is an aggravating factor which must be pleaded and proven.

c. **Pleading**

(1) **General considerations.** *See* Part IV, para. 49f(2), MCM, 1984. As with article 123a(1) pleadings, a photocopy of the instrument should be incorporated into the specification.

(2) Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 123a.

Specification: In that Commander Ruth Badcheck, U.S. Navy, USS SCUTTLEFAST, on active duty, did, at Naval Air Station, Jacksonville, Florida, on or about 1 December 19CY, with intent to deceive and for the payment of a past-due obligation, to wit: an overdue balance on a uniform charge account, wrongfully and unlawfully utter to the Navy Exchange, Naval Air Station, Jacksonville, Florida, a certain check for the payment of money upon Oil City Farmers National Bank, Oil City, Pennsylvania, in words and figures as follows, to wit:

Ruth Badcheck **No. 1988**
P.O. Box 6169
Titusville, PA 15088 *1 December* **19** *CY*

Pay to
the order of *Navy Exchange* **$** *39.50*

Thirty-nine dollars and 50/100 **Dollars**
Oil City Farmers'
National Bank
Oil City, PA Ruth Badcheck

Ruth Badcheck

[BACK OF CHECK]

then knowing that she, the maker thereof, did not, or would not, have sufficient funds in, or credit with, such bank for the payment of the said check in full upon its presentment.

4. **Dishonorable failure to maintain funds** (article 134)

a. **General concept**. Dishonorable failure to maintain sufficient funds for the payment of checks differs from article 123a offenses in that there need be no intent to defraud or deceive at the time of making and uttering, and that the accused need not know at that time that he/she did not or would not have sufficient funds for payment. The gist of the offense is the accused's conduct after uttering the instrument. Dishonorable failure to maintain sufficient funds is a lesser included offense of both article 123a check offenses.

b. **Elements of the offense**. The elements of this offense are substantially similar to those under article 123(a). The accused must both make and utter the instrument. The elements of knowledge and intent are not required. The check may be used for any purpose. The actions of the accused must be dishonorable. Because this is an article 134 offense, the prosecution must also prove beyond a reasonable doubt that the accused's conduct was prejudicial to good order and discipline or was service-discrediting.

c. **Dishonorable failure**. A dishonorable state of mind is one characterized by fraud, deceit, deliberate misrepresentation, evasion, bad faith, or a grossly indifferent attitude toward one's obligations. Simple mistakes in bookkeeping or oversights are insufficient. However, if the accused overdraws the account because he or she is grossly indifferent to the account's balance, such indifference is sufficiently dishonorable. Dishonorable failure to maintain funds also occurs when the accused innocently overdraws the account, but thereafter wrongfully fails to deposit enough money to cover the overdraft.

d. **Pleading**

(1) **General considerations**. *See* Part IV, paras. 68f or 71f, MCM, 1984. A copy of the check should be incorporated into the specification for para. 68f.

(2) **Sample pleading**

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Ensign Larsen E. Pettifogger, U.S. Navy, USS MINNOW, on active duty, did, at Naval Base, Charleston, South Carolina, on or about 1 May 19CY, make and utter to the Navy Exchange, Charleston, South Carolina, a certain check, in words and figures as follows, to wit:

Larsem E. Pettifogger **No. 98**
404 Swampsmell Street
Charleston, SC *1 May* **19** *CY*

Pay to
the order of *Navy Exchange* **$** *329.00*

Three hundred twenty-nine and 00/100 **Dollars**

South Carolina National Bank
Charleston, SC *Larsem E. Pettifogger*

[BACK OF CHECK]

Larsem E. Pettifogger

for the purchase of a wristwatch, and did thereafter dishonorably fail to maintain sufficient funds in the South Carolina National Bank, Charleston, South Carolina, for payment of such check in full upon its presentment for payment.

REVIEW QUESTIONS

At 2200, 22 December 19CY, Mess Management Specialist Third Class Harry H. Cahill approached the Navy Exchange complex at Pearl Harbor. He broke into a delivery van belonging to the Exchange. Once inside the van, Petty Officer Cahill stole 3 brass-framed mirrors, 4 plant stands, 2 cabinet doors, 1 bookcase, and 1 box of automobile floor mats. Regarding the taking of property, Petty Officer Cahill is:

A. Guilty of housebreaking under article 130.

B. Guilty of burglary under article 129.

C. Guilty of robbery under article 122.

D. Guilty of larceny under article 121.

At 2330, 24 December 19CY, Petty Officer Cahill returned to the Exchange complex. He spied a boxcar located next to the Exchange furniture mart. The boxcar was resting on blocks and was owned by the Exchange service. The boxcar's door was secured by a rusty latch and combination lock. Petty Officer Cahill suspected that there was valuable furniture in the boxcar. Using a tire iron, Petty Officer Cahill broke the lock and latch -- ripping the door off its hinges. He then entered the boxcar, examined its contents, and left without taking anything. In a subsequent statement to NIS, Petty Officer Cahill said, "I found nothing in the boxcar worth stealing." You appropriately recommend:

A. Charge burglary under article 129 and damaging nonmilitary property under article 109.

B. Charge housebreaking under article 130 and damaging nonmilitary property under article 109.

C. Charge attempted larceny under article 80 and damaging military property under article 108.

D. Charge housebreaking under 130 and damaging military property under article 108.

At 1400, 25 December 19CY, believing that Commander Long and his family would be away from their residence in base housing until 2200 that same evening, Petty Officer Cahill, disguised as a maintenance worker, removed the door to the Long's house. He entered to find three pieces of personal luggage in the otherwise vacant house. What Cahill did not know was that the Longs were in the process of moving out for a permanent change of station and did not intent to spend another night in the house. Using a 12-inch hunting knife, Petty Officer Cahill slashed open the luggage in an unsuccessful attempt to find money. Outraged at his bad luck, he punched the refrigerator (a base housing inventory item), leaving a half-inch deep dent in the surface. Based upon Cahill's actions regarding his entry into the Long's house, you appropriately recommend a charge of:

A. Burglary under article 129.

B. Housebreaking under article 130.

C. Attempted larceny under article 80.

D. Unlawful entry under article 134.

Based on these same facts, regarding Cahill's "assault" on the personal luggage and refrigerator, you recommend the following charges:

A. Article 108 for the refrigerator and the luggage.

B. Article 109 for the refrigerator and the luggage.

C. Article 108 for the refrigerator and article 109 for the luggage.

D. Article 109 for the refrigerator and article 108 for the luggage.

Ensign Linda Cook, elated over her TAD orders to Naval Justice School, decided to take her own car and make the trip from Mayport, Florida in one shot. Tanked up on NoDoz and Nutrasweet-laden soft drinks, her last vivid memory was the gate guard at NETC yelling at her to dim her car's lights. She is awakened approximately one hour later by base police who inform her that the CO of the Naval Justice School is unlikely to appreciate her having "parked" her car in the passenger side of the school's command vehicle. You recommend the following charge(s):

A. Article 108, damaging military property.

B. Article 109, damaging nonmilitary property.

C. Both of the above.

D. None of the above.

Ensign Smith invited Lieutenant Junior Grade Jones out for his birthday. Deciding to make the most of their evening, they immediately head to the O'Club. Unfortunately, Smith grossly underestimated Jones' capacity to drink wine coolers, as the total bill for the evening exceeded Smith's cash reserves by a considerable amount. Jones agreed to pay with his credit card in exchange for a personal check from Smith. Smith advised Jones he would gladly give him a post-dated check for the full amount, as his account was presently "empty." Smith further advised that he only needed to deposit his income tax refund which had arrived early that same day to cover the check. Based upon this explanation, Jones accepted Smith's post-dated check. Smith had, in fact, closed his checking account over a month ago and owed money to the IRS. Ensign Smith should be charged with what?

A. Article 123a, delivering a bad check with intent to deceive.

B. Article 123a, delivering a bad check with intent to defraud.

C. Article 134, dishonorable failure to maintain sufficient funds.

D. Both A and C, above.

Assuming the same facts as above, what, if anything, would Lieutenant Junior Grade Jones be guilty of if, on the next morning, he endorsed Ensign Smith's check over to Lieutenant Davis to satisfy an outstanding loan?

A. Article 123a, delivering a bad check with intent to deceive.

B. Article 123a, delivering a bad check with intent to defraud.

C. Article 92, dereliction of duty.

D. Nothing.

MILITARY JUSTICE STUDY GUIDE

CHAPTER XXVIII

DRUG OFFENSES

A. Overview

1. **Background**. By Executive Order No. 12,383 of 23 September 1982, the President provided for a single, comprehensive treatment of drug offenses to be followed by all services beginning 1 October 1982. The Executive Order amended the MCM, 1969 (Rev.) by adding a new paragraph, 213g, which established under article 134 the offenses of "possession, use, introduction into a military unit, base, station, post, ship, or aircraft, manufacture, distribution, and possession, manufacture or introduction with intent to distribute, of a controlled substance." The Table of Maximum Punishments was substantially modified to provide for a wider range of standardized punishments based upon the relative severity of each offense. A corresponding change to Article 1151, *U.S. Navy Regulations, 1973*, confirmed that the Navy Department would rely exclusively on article 134 to prosecute drug offenses addressed therein.

2. **From 1 August 1984**. In the Military Justice Act of 1983, Congress enacted a new punitive article of the UCMJ, Article 112a, effective 1 August 1984, which superseded article 134 as the sole vehicle for prosecuting applicable drug offenses. Article 112a did little more than provide a statutory basi for the offenses previously identified by Executive Order No. 12,383. (Although article 112a did eliminate the need to prove in each case that drug abuse is either prejudicial to good order and discipline or service-discrediting. This was a necessary element under article 134; though, in practice, this additional element was virtually self-proving.) Thus, article 112a has not significantly altered the military law of drugs which immediately preceded it.

B. **Article 112a**. Article 112a, as implemented in Part IV, para. 37, MCM, 1984, prohibits the wrongful use, possession, manufacture, distribution, importing, exporting, introduction into a military installation, vessel, vehicle, or aircraft, or possession, manufacture, or introduction with intent to distribute, of any controlled substance. Punishment is increased if these acts occur on a ship, aircraft, or missile launch facility, or are done by persons performing certain duties.

1. Definitions

a. **Wrongfulness**. To be punishable under article 112a, acts involving drugs must be wrongful. Such acts are wrongful if done without legal justification or excuse. Such acts would not be wrongful if done pursuant to legitimate law enforcement activities, or pursuant to authorized medical duties, or without knowledge of the contraband nature of the substance. Possession, use, distribution, introduction, or manufacture of a substance may be inferred to be wrongful in the absence of evidence to the contrary.

b. **Marijuana**. Marijuana is defined as all parts of the plant *cannabis sativa L.* (except mature stalks). It would also include derivatives such as hashish and any other species of the plant.

c. **Controlled substance**. A "controlled substance" is any substance listed in Schedules I through V as established by the Controlled Substances Act of 1970 [21 U.S.C. § 812 (1982)] as updated and republished under the provisions of that Act (or by the President for purposes of article 112a). These five schedules are periodically updated by the Attorney General. These schedules classify drugs according to their recognized medical use, potential for abuse, and potential danger:

(1) Schedule I substances are drugs that have no recognized medical use in the United States, are dangerous even if used under medical supervision, and have the highest potential for physical or psychological dependence. Marijuana, heroin, and lysergic acid diethylamide (LSD), are examples of substances currently on Schedule I. The status of heroin and marijuana as Schedule I substances may change in the future due to growing medical acceptability of those substances in treating terminal cancer patients and glaucoma cases, respectively.

(2) Schedule II substances also have a high abuse potential, and are highly likely to result in physical or psychological dependence, but they do have a recognized medical use in the United States. Opium, amphetamine, cocaine, and opiate derivatives are examples of Schedule II substances.

(3) Schedules III, IV, and V are characterized by decreasing abuse potentials, medical acceptability, and relatively limited potential for dependence.

d. **Possession**. "Possession" is the knowing exercise of control. Possession of a drug can be either direct physical custody, such as holding a drug in one's hand, or constructive, as in storing the drug in a locker in a bus terminal while keeping the key. Possession must be "exclusive" in the sense of having the authority to preclude control by others, but more than one person may possess a drug simultaneously. Possession does not require ownership (title).

e. **Use**. "Use" includes smoking, ingesting, injecting, swallowing, or any other act with the drug which provides a chemical effect in the body.

f. **Distribution**. "Distribution" is the delivery of possession to another. Distribution replaces the previously defined drug offenses of sale and transfer. As such, the agency principle (in which an accused charged with sale might establish a defense by showing he acted only as the buyer's agent) has, for all practical purposes, been eliminated.

g. **Manufacture**. "Manufacture" is the production, preparation, and processing of a drug. Manufacture can be accomplished either directly or indirectly. It can be effected by extraction from a substance of natural origin or independently by chemical synthesis. "Manufacture" also includes the packaging or repackaging of a substance and the labeling or relabeling of a container. "Production" includes planting, cultivating, growing, or harvesting.

h. **Introduction**. "Introduction" is the act of bringing a drug or causing a drug to be brought into or onto a military unit, base, station, post, ship, or aircraft. Introduction is more serious than simple possession.

i. **Intent to distribute**. The presence of an intent to distribute increases the severity of possession, manufacture, or introduction. An intent to distribute is generally inferred from circumstantial evidence. Indicia supporting such an intent would be the possession of a quantity of drugs in excess of a normal quantity for personal use; the market value of a substance; the manner in which a substance was packaged; and the fact that an accused was not normally a user. The fact that an accused was addicted to or was a heavy user of a substance <u>may</u> negate an inference of an intent to distribute.

j. **Certain amount**. When a specific amount of a controlled substance is believed to have been possessed, distributed, introduced, or manufactured by an accused, the specific amount should ordinarily be alleged in the specification. This ensures that the accused's record will reflect the relative seriousness of the offense, and is a mandatory prerequisite to invoking any increased punishments for marijuana offenses based on quantity (e.g., possession of 30 grams or more of marijuana). For negligible amounts, however, it is not necessary to allege the specific amount, and a specification is sufficient if it alleges "some," "traces of," or "an unknown quantity of" a controlled substance.

2. **Relationships among the prohibited acts**

a. Under the previous drug law, transfer and possession were <u>not</u> lesser included offenses of sale. In addition, possession was not a lesser included offense of transfer because one could transfer custody of drugs without having

possession; that is, exclusive control of the drugs. Under article 112a, possession is a lesser included offense of use, distribution, possession with intent to distribute, and introduction. Therefore, it is normally not necessary to plead use and possession in separate specifications. They would be multiplicious for findings, and one specification would be dismissed before findings. Some very recent case law suggests, however, that, if the accused possesses a separate "stash" of drugs which is kept hidden and remote from the drugs which are distributed, separate specifications alleging possession and distribution are appropriate.

b. The courts have indicated that introduction and distribution offenses are separate and are not multiplicious with each other or use.

3. **Proof of the substance's identity**. At trial, the prosecution must prove beyond a reasonable doubt that the substance the accused distributed, used, possessed, manufactured, imported, exported, or introduced was marijuana or a controlled substance. Of course, the most reliable evidence of the substance's identity and composition will be the results of chemical analysis. Nonexpert testimony may also be admissible sometimes to prove the substance's identity. A person who has used the same substance on previous occasions and is familiar with its appearance and effects may give his or her opinion about the substance's identity. Such testimony is rather common in marijuana cases. Where the substance is less common, it may be less likely that a nonexpert witness could accurately identify the substance merely by its appearance and effects. Many drugs look and act alike. In such a case, nonexpert identification will usually be inadmissible, and expert testimony or scientific evidence will be required.

4. **Punishments**. The maximum punishments prescribed by Part IV, para. 37e, MCM, 1984, are as follows:

a. Wrongful use, possession, manufacture, or introduction of amphetamine, cocaine, heroin, LSD, marijuana (except possession of less than 30 grams or use of marijuana), methamphetamines, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: Dishonorable discharge; forfeiture of all pay and allowances; and confinement not to exceed five years.

b. Wrongful possession of less than 30 grams or use of marijuana and wrongful use, possession, manufacture, or introduction of phenobarbital and Schedule IV and V controlled substances: Dishonorable discharge; forfeiture of all pay and allowances; and confinement not to exceed two years.

c. Wrongful distribution of, or with intent to distribute, wrongful possession, manufacture, or introduction of amphetamine, cocaine, heroin, LSD, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I,

II, and III controlled substances: Dishonorable discharge; forfeiture of all pay and allowances; and confinement not to exceed fifteen years.

d. Wrongful distribution of, or with intent to distribute, wrongful possession, manufacture, or introduction of phenobarbital and Schedule IV and V controlled substances: Dishonorable discharge; forfeiture of all pay and allowances; and confinement not to exceed ten years.

e. When any of the above offenses is committed while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; in a hostile fire pay zone; or in time of war, the maximum period of confinement and forfeiture of pay and allowances authorized for such offense shall be increased by five years.

5. **Elements**

a. That the accused possessed, used, distributed, imported, exported, introduced, or manufactured a controlled substance; or wrongfully possessed, manufactured, or introduced a controlled substance, with intent to distribute; and

b. that such conduct was wrongful.

In addition to the listed elements, the Court of Military Appeals has stated that two types of knowledge are necessary to establish the offenses of use and possession: knowledge of the presence of the substance and knowledge of its contraband nature.

6. **Pleading**

a. **General considerations**. *See* Part IV, para. 37f, MCM, 1984. If possible, the quantity of drugs should be alleged. If the quantity is not known, such terms as "some," "traces of," or "an unknown quantity of" may be utilized. If the offense involves distribution, the specification should identify the person who received or purchased the drugs. The identity of the receiver/purchaser is particularly useful in cases involving more than one distribution because it will make it easier for the fact-finder to relate a witness' testimony to a specific alleged distribution. The amount of money paid for the drugs need not be pleaded. The accused's acts must be alleged to be "wrongful." The schedule to which a controlled substance belongs should be alleged, if possible, because of the above-mentioned punishment distinctions. However, if the drug is one of the nine actually named in article 112a, the schedule does not have to be charged. If the aggravating circumstances of sentinel/lookout, in time of war, etc., are applicable, then so allege the circumstances.

b. **Sample pleadings**

Charge: Violation of the Uniform Code of Military Justice, Article 112a

(1) **Possession**

Specification 1: In that Seaman Pushin D. Snow, U.S. Navy, USS ANGELDUST, on active duty, did, on board USS ANGELDUST, at sea, on or about 15 December 19CY, wrongfully possess 50 grams, more or less, of marijuana.

(2) **Use**

Specification 2: In that Seaman Pushin D. Snow, U.S. Navy, USS ANGELDUST, on active duty, did, on board USS ANGELDUST, at sea, on or about 15 December 19CY, wrongfully use cocaine.

(3) **Distribution**

Specification 3: In that Seaman Pushin D. Snow, U.S. Navy, USS ANGELDUST, on active duty, did, on board USS ANGELDUST, at sea, on or about 15 December 19CY, wrongfully distribute 50 grams, more or less, of morphine, a Schedule II controlled substance, to Seaman Ida Snort, U.S. Navy.

(4) **Manufacture**

Specification 4: In that Seaman Pushin D. Snow, U.S. Navy, USS ANGELDUST, on active duty, did, on board USS ANGELDUST, at sea, on or about 15 December 19CY, wrongfully manufacture 50 grams, more or less, of marijuana.

(5) **Introduction**

Specification 5: In that Seaman Pushin D. Snow, U.S. Navy, USS ANGELDUST, on active duty, did, on or about 15 December 19CY, on board USS ANGELDUST, at sea, wrongfully introduce 50 grams, more or less, of marijuana onto a vessel used by the armed forces, to wit: USS ANGELDUST.

(6) **Introduction with the intent to distribute**

Specification 6: In that Seaman Pushin D. Snow, U.S. Navy, USS ANGELDUST, on active duty, did, on or about 15 December 19CY, on board USS ANGELDUST, at sea, wrongfully introduce 450 grams, more or less, of marijuana, onto a vessel used by the armed forces, to wit: USS ANGELDUST, with the intent to distribute the said controlled substance.

C. **Drug paraphernalia**. Article 112a does not address drug paraphernalia, and resort must therefore be made to any applicable orders or regulations (or to article 134). For the Navy and Marine Corps, a service-wide drug paraphernalia regulation is promulgated in SECNAVINST 5300.28 Series.

1. **Text**. Paragraph 6b of SECNAVINST 5300.28A states:

> Except for authorized medicinal purposes, the use for the purpose of injecting, ingesting, inhaling, or otherwise introducing into the human body marijuana, narcotic substances, or other controlled substances, the possession with the intent to so use, or the distribution with the intent that it be so used, of drug abuse paraphernalia by persons in the naval service is prohibited. . . .

Paragraph 4f of the instruction defines drug abuse paraphernalia as:

> All equipment, products, and materials of any kind that are used, intended for use, or designed for use in injecting, ingesting, inhaling, or otherwise introducing into the human body marijuana, narcotic substances, or other controlled substances in violation of law. . . .

2. **Analysis**. Although the instruction uses somewhat broad language to define drug abuse paraphernalia, it is clear that nothing can be considered paraphernalia unless it is used, possessed, sold, or transferred with the intent that it be used as a medium through which illegal drugs are to be introduced into the body. Hence, the intent of an accused determines whether any given form of property is drug abuse paraphernalia. Factors tending to prove the intent of the accused might include statements concerning the use of the objects by a person in possession of drugs; proximity of the paraphernalia, in time and space, to the unlawful use of drugs; instructions provided with an object concerning its use; descriptive materials with the object explaining its use; and the existence or scope of legitimate uses for the object. Consequently, an item as innocuous as a government issue ballpoint pen may be paraphernalia if an accused uses it to smoke marijuana. On the other hand, possession of an item commonly associated with drug abuse, such as a water pipe, may not be banned if it is possessed for an innocent purpose. The regulation also contains an exception for "authorized medicinal purposes." Hence, if an accused possesses a syringe with the purpose of injecting a controlled substance into his body, he is not guilty of an offense if his possession was incident to an authorized medicinal purpose. Violations of this SECNAV instruction are meant to be enforced by "disciplinary or punitive action as may be . . . appropriate . . ." under article 92 (violation of a lawful general order).

D. **Failure to report drug offenses**

1. **Bases for prosecution**

A. Article 1137, *U.S. Navy Regulations, 1990*, states:

> Persons in the naval service shall report as soon as possible to superior authority all offenses under the UCMJ which come under their observation, except when such persons are themselves already criminally involved in such offenses at the time such offenses first come under their observation.

Navy and Marine Corps personnel who fail to report drug offenses committed by fellow servicemembers could be charged under Article 92(1), UCMJ, with failure to obey a lawful general regulation. (Note that whether or not the accused was aware of the existence of article 1137 would be irrelevant in any such prosecution. Part IV, para. 16c(1)(d), MCM, 1984.)

E. **Article 134**. Drug violations which are not addressed by article 112a nor by applicable regulations might potentially be prosecuted under clause 3 of article 134, "crimes or offenses not capital." A clause 3 prosecution could be accomplished under two theories. First, another federal criminal statute could be the basis for

prosecution. Second, state criminal statutes might be assimilated into federal law through the use of the Federal Assimilative Crimes Act (provided the offense occurs in an area subject to exclusive or concurrent federal jurisdiction).

F. **Designer drugs**. Designer drugs such as "Ecstacy" and "China White" are synthetic substitutes for existing drugs. The concept has been called "diabolically simple." Illegal drugs are defined and classified in the United States by their precise molecular structure. By making simple molecular alterations an underground chemist can create a new chemical cousin, or analog, that produces the same effects as a "controlled substance" yet is completely legal. As soon as one version is discovered and added to the controlled substances list, the chemist goes back to the lab, makes a few changes, and stays one step ahead of the law.

To combat this problem, Congress passed the Controlled Substance Analogue Enforcement Act of 1986, 21 U.S.C. § 813, which prohibits all permutations of existing illegal drugs, whether known or unknown. Thus, the approach to take when faced with offenses involving designer drugs is to check if the substance appears on Schedules I through V. If so, charge it under article 112a. If the substance is not listed in any of the five schedules, charge it under article 134, clause 3.

G. **Common defenses in drug cases**. Three defenses commonly arise in drug cases: lack of knowledge, entrapment, and lack of wrongfulness.

1. **Lack of knowledge**. Three types of lack of knowledge on the part of the accused may be pertinent in drug possession cases. First, the accused may claim a lack of knowledge that he or she possessed the substance. Second, the accused may claim lack of knowledge regarding the substance's true identity. Third, the accused may claim a lack of knowledge that possession of the substance was illegal.

The accused's possession must be knowing and conscious. Therefore, if the accused didn't know he or she possessed the substance, the accused has a complete defense. Likewise, if the accused knew he or she possessed the substance, but honestly didn't know the substance's true identity, the accused also has a complete defense. Ignorance of the fact that possession of the substance is illegal is no defense.

2. **Entrapment**. Entrapment may be a defense to any crime, but it often arises in prosecutions for distribution of drugs. Entrapment exists when the police or an undercover agent deliberately coerce the accused to commit a crime, even though the accused had no predisposition to do so. Entrapment involves overcoming the accused's desire to be a law-abiding person. It is not merely affording the accused an opportunity to commit a crime that the accused already was predisposed

to commit; instead, the accused must have had no predisposition to commit the crime. For entrapment to lie, therefore, the accused must have committed the crime only because of overbearing, insistent coercion by the police or an undercover agent.

3. **Lack of wrongfulness**. Another defense that may be raised on drug use is the "authorized medicinal purposes" exception. Article 1138, *U.S. Navy Regulations, 1990*, permits handling of an otherwise illegal drug or controlled substance if such handling is for authorized medicinal purposes. Because the general rule prohibits the handling of illegal drugs, however, the burden is placed on the accused to produce some evidence to show that he/she falls within the exception to that rule. Once the evidence produced by the defense indicates that the accused's acts were for authorized medicinal purposes, the burden then shifts to the prosecution to prove beyond a reasonable doubt that there was no such medicinal authorization.

REVIEW QUESTIONS

MS3 Matthew Spice, a mess crank attached to USS FLINT, was dating a dancer at a local club. MS3 Spice soon became aware of his girlfriend's fondness for cocaine. MS3 Spice had never tried cocaine in his life. His girlfriend would repeatedly tell him how much fun "snorting" cocaine could be. MS3 Spice eventually gave into temptation and agreed to do "a couple of lines" with her. To MS3 Spice's horror, the next morning he was required to produce a urine sample as part of a valid unit sweep of his department. The results came back positive -- to MS3 Spice's surprise -- indicating the use of methamphetamine. MS3 Spice was charged with a single violation of article 112a, wrongful use of methamphetamine. At his contested court-martial, MS3 Spice testified that he honestly believed that he was using cocaine and that he had never knowingly used methamphetamine. Assuming that his testimony is believed, the proper results at MS3 Spice's court-martial should be:

A. Not guilty (honest lack of knowledge).

B. Guilty of article 112a (wrongful use of cocaine by exceptions and substitutions).

C. Guilty of article 80 (the LIO of attempted wrongful use of cocaine).

D. Guilty of article 112a (wrongful use of methamphetamine).

BT3 Robert Flair moonlighted at the base commissary because he was in serious financial trouble. The local bank was threatening to repossess his beloved 1988 "Camaro." Despite his part-time job, he was 3 months behind in his car payments and currently had no money. In a moment of desperation, he concocted a scheme to "save" his car. By surreptitiously taking a large unopened box of "Old Empire" brand spices from the commissary, BT3 Flair obtained 36 .5-ounce jars of oregano. He then filled 18 plastic bags with the oregano. Based on his representations that it was marijuana, he was able to sell over the course of a single weekend the 18 bags of oregano to 8 local teenagers. Regarding only the sale of oregano, what, if any, crime has BT3 Flair committed?

A. Eight violations of article 112a (wrongful distribution of marijuana).

B. Eight violations of article 80 (attempted wrongful distribution of marijuana).

C. Eight violations of article 121 (larceny).

D. Nothing.

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CHAPTER XXIX

DRUNKENNESS

A. **Overview**. The UCMJ prohibits four major types of drunkenness offenses:

1. Drunk on ship, on station, in camp, or in quarters (article 134);

2. drunk on duty (article 112);

3. incapacitation for duty (article 134); and

4. drunken or reckless driving (article 111).

B. **"Drunk" defined**. Part IV, para. 35c(3), MCM, 1984, defines "drunkenness" as "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties." Drunkenness is therefore measured in terms of the impairment of physical abilities, such as vision, speech, balance, coordination, and reaction time. Drunkenness is also determined by the impairment of the accused's judgment. Drunkenness may be caused by alcoholic beverages or by drugs. There is no specific point at which a person becomes drunk. There is, for example, no specific blood-alcohol level which, by itself, will result in the accused being declared drunk as a matter of law. (In many states, by contrast, the law provides that, when a certain blood-alcohol level is reached, the accused may legally be presumed to be drunk.) The accused's intoxication must be voluntary. Therefore, if ruffians pin the accused to the floor and force the accused to drink, the accused's resulting intoxication will not be voluntary.

C. **Proof of drunkenness**. Intoxication can be proven in several ways. The results of scientific tests, such as blood-alcohol or breathalyzer tests, are the most reliable proof of intoxication when they are properly performed. Such tests may not always be sufficient by themselves, however. Tests of physical coordination, such as walking a straight line or balancing on one leg, are frequently administered when the accused is apprehended. These tests do <u>not</u> require article 31 warnings. Nonexpert opinion is also admissible to prove intoxication. Any witness who observed the accused can testify regarding his or her observations of the accused's behavior. The

witness will describe the condition of the accused's eyes, the smell of the accused's breath, the extent to which the accused's speech was slurred, and any apparent difficulty the accused had with balance or coordination. After testifying about these basic facts, the witness may then state an opinion about the state of the accused's sobriety. The court may give the witness' opinion as much weight as the court believes it deserves under the circumstances.

D. **Drunk on ship, on station, in camp, or in quarters** (article 134)

1. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused was drunk on station, on ship, in camp, or in quarters; and

b. under the circumstances, the accused's conduct was prejudicial to good order and discipline in the armed forces or was service-discrediting.

2. **Discussion**. The accused must have been drunk while voluntarily present on a military installation or in military quarters. If the accused was brought aboard the installation against his or her will, the accused is not guilty of this offense. Not all instances of drunkenness on a military installation or in quarters are offenses against the Code. Drunkenness will be criminal only if the accused's behavior was directly prejudicial to good order and discipline or was service-discrediting. This is a factual issue for the court to decide after considering all the evidence in the case.

3. **Drunk and disorderly**. The offense of drunk and disorderly is an aggravated form of drunk on ship, on station, in camp, or in quarters. This offense is also prosecuted under article 134. To be found guilty of drunk and disorderly, the accused must be drunk aboard a military installation or in quarters and must be engaged in disorderly conduct. *See* chapter XXVI of this text for a discussion of disorderly conduct.

4. **Pleading**

a. **General considerations**. *See* Part IV, para. 73f, MCM, 1984. If the accused was drunk and disorderly, the specification should allege "drunk and disorderly" rather than just "drunk." Higher punishment is authorized if the conduct is plead and proved to be "conduct of a nature to bring discredit upon the armed forces."

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 134.
>
> Specification: In that Chief Boatswain's Mate John E. Walker, U.S. Navy, USS BEERKEG, on active duty, was, on board USS BEERKEG, located at New London, Connecticut, on or about 14 December 19CY, drunk and disorderly on board ship.

E. **Drunk on duty** (article 112)

1. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused was on duty in a certain capacity; and

b. the accused was found drunk while on that duty.

2. **Discussion**. The term "duty" includes all types of military duties, except for those of a sentinel or lookout. Drunkenness by a sentinel or lookout is prosecuted under article 113. "Duty" includes standby duty, such as for flight crews, but it does not include liberty or leave. In order to be drunk on duty, the accused must first assume the duty and then be found drunk while still on duty. In many cases, this requirement will be satisfied by the accused's coming to work drunk. Where formal posting or assumption of duty is required, however, the accused will not be on duty until he or she properly assumes the duty. The duty status is terminated by relief, dismissal, end of the working day, or abandonment of the duty. Thus, a person who leaves his or her appointed place of duty without proper authority and goes to a tavern and gets drunk during working hours will not be drunk on duty, although he or she may be guilty of a violation of article 86, or incapacitation for duty under Article 134. Merely being hung-over is not sufficient for this offense.

3. **Pleading**

a. **General considerations**. *See* Part IV, para. 36f, MCM, 1984. The specification should allege the accused's duty.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 112.
>
> Specification: In that Yeoman Third Class Susan S. Barandgrill, U.S. Navy, USS RUMRUN, on active duty, was, on board USS RUMRUN, located at Perth Amboy, New Jersey, on or about 1 December 19CY, found drunk while on duty as a master-at-arms.

F. **Incapacitation for duty through prior wrongful indulgence in intoxicating liquor or any drug** (article 134)

1. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. The accused was assigned certain duties;

b. the accused was incapacitated for the proper performance of those duties;

c. the accused's incapacitation was caused by his or her prior wrongful indulgence in intoxicating liquor or any drug; and

d. under the circumstances, the accused's conduct was prejudicial to good order and discipline in the armed forces or was service-discrediting.

2. **Discussion**. "Incapacitation" occurs when the accused is unable to perform assigned duties in a proper manner. Drunkenness is not required, and incapacitation can result from a bad hangover. As a practical matter, if the accused is drunk when he or she is to assume the duties, the accused will usually be considered to be incapacitated. This is not a lesser included offense of drunk on duty. What if he assumes the duty while incapacitated? Although the law is unclear on this area, it is believed that assumption of the duty does not create a defense. To be safe, the accused should also be charged with dereliction of duty in violation of article 92.

3. **Pleading**

a. **General considerations**. *See* Part IV, para. 76f, MCM, 1984. The accused's duty should be alleged.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 134.
>
> Specification: In that Chief Yeoman Gus L. Turpentine, U.S. Navy, Service School Command, Naval Training Center, San Diego, California, on active duty, was, at Service School Command, Naval Training Center, San Diego, California, on or about 10 December 19CY, as a result of wrongful previous overindulgence in intoxicating liquor or drugs, incapacitated for the proper performance of his duties as an instructor at Yeoman "A" School.

G. **Drunken or reckless driving** (article 111)

1. **Elements of the offense**. The prosecution must prove beyond reasonable doubt that:

a. At the time and place alleged, the accused operated a vehicle; and

b. the accused was either:

(1) drunk; or

(2) operating the vehicle in a reckless or wanton manner.

(**Note**: If injury resulted, add as an element)

c. that the accused thereby caused the vehicle to injure a person.

2. **Discussion**

a. **Vehicle**. "Vehicle" includes any mechanical conveyance for land transportation, whether or not motor-driven or passenger-carrying. One operates a vehicle when one guides the vehicle while in motion, sets the vehicle in motion, or manipulates the vehicle's controls so as to cause the vehicle to move. Water or air transportation is not included.

b. **Drunk or reckless**. The accused must either be drunk while driving or driving in a reckless manner. "Drunk" has the same meaning as discussed in part B of this chapter. "Reckless" involves a culpable disregard of the foreseeable

consequences of one's actions. It is a significantly greater degree of carelessness than simple negligence. "Wanton" involves an even greater degree of negligence than recklessness. Wantonness involves an utter disregard of the probable consequences of one's actions. A person who acts wantonly behaves as if he or she doesn't care about what happens as a result of his or her actions.

Drunken driving is not always reckless driving. Drunkenness is a factor which, along with all the other evidence, may prove recklessness or wantonness. Thus, a drunk driver, who nonetheless obeys the speed limit and is careful of the safety of others, is not guilty of reckless driving -- only drunken driving. A drunk driver who drives 20 mph over the speed limit, weaving from one lane to another, may also be reckless. A drunk driver who drives down a narrow, crooked residential street at 90 mph, driving up over the sidewalk, running all stop lights, and hitting parked cars is acting wantonly. There is no such offense as drunk and reckless driving.

3. **Drunken or reckless driving resulting in personal injury**. If the accused's drunken or reckless driving results in personal injury to a person, including the accused, this fact increases the maximum authorized punishment. The fact that a personal injury resulted must be pleaded and proven beyond reasonable doubt at trial. A personal injury is any injury serious enough to warrant medical attention.

4. **Pleading**

a. **General considerations**. *See* Part IV, para. 35f, MCM, 1984. If the accused's driving results in personal injury, that fact must be alleged, but the nature of the injury need not be pleaded.

b. **Sample pleadings**

Charge: Violation of the Uniform Code of Military Justice, Article 111.

(1) **Drunken driving**

Specification 1: In that Seaman Recruit Desmond C. Crazydriver, U.S. Navy, USS CRUNCH, on active duty, did, at Naval Air Station, Jacksonville, Florida, on or about 5 August 19CY, on Yorktown Avenue, between Saratoga and Allegheny Avenues, operate a vehicle, to wit: a passenger car, while drunk.

(2) **Reckless driving**

Specification 2: In that Seaman Recruit Desmond C. Crazydriver, U.S. Navy, USS CRUNCH, on active duty, did, at Naval Station, Philadelphia, Pennsylvania, on or about 3 September 19CY, on Broad Street, between Porter Avenue and the Delaware River, operate a vehicle, to wit: a passenger car, in a reckless manner by driving on the sidewalk at a speed in excess of 50 miles per hour.

(3) **Drunken driving resulting in personal injury**

Specification 3: In that Seaman Recruit Desmond C. Crazydriver, U.S. Navy, USS CRUNCH on active duty, did, at Naval Air Station, Fly, Ohio, on or about 6 October 19CY, on Second Street, between the Main Gate and Exhaustfume Road, operate a vehicle, to wit: a passenger car, while drunk, and did thereby cause said vehicle to strike and injure Airman Apprentice Flattern A. Pancake, U.S. Navy.

REVIEW QUESTIONS

SR Hardy and SR Laurel were on liberty for the entire weekend. This was the first full weekend that they each had free since reporting to their ship. They were both required to report back to duty at 0730 the following Monday. They decided to make the most of their time off and spent the entire weekend drinking beer. They stopped drinking beer at 0400 Monday morning when they remembered that they had to report back to the ship by 0730. Arriving together at 0725, still drunk, they reported to their respective divisions. SR Hardy's LPO immediately noticed his condition and refused to let SR Hardy assume his duties. SR Laurel, however, quietly assumed his duties without anybody noticing. He promptly fell asleep and his LPO awakened him 2 hours later. A subsequent BAC revealed that SR Laurel had a blood alchol level of .15.

1. What, if anything, is SR Laurel guilty of?

   A. Incapacitated for duty.

   B. Disorderly conduct.

   C. Drunk on duty.

   D. Nothing, because he assumed his duties.

2. What, if anything is SR Hardy guilty of?

   A. Incapacitated for duty.

   B. Disorderly conduct.

   C. Drunk on duty.

   D. Nothing, because he wasn't allowed to assume his duties.

MILITARY JUSTICE STUDY GUIDE

CHAPTER XXX

MISCONDUCT BY A SENTINEL OR LOOKOUT

A. **Overview**. Article 113 makes it a criminal offense for a sentinel or lookout to be drunk on post, to sleep on post, or to leave the post before being properly relieved. Article 134 prohibits sitting or loitering on post. Sentinel and lookout offenses involve the accused's failure to remain vigilant and alert. They constitute a distinct group of serious military offenses, some of which are punishable by death if committed during time of declared war.

B. **Elements of the offenses**. The five major sentinel and lookout offenses have similar elements. The prosecution must prove beyond a reasonable doubt that:

1. The accused was posted as a sentinel or lookout; and

2. at the time and place alleged, the accused:

   a. Was found drunk on post (article 113); or

   b. was found asleep on post (article 113); or

   c. left his or her post before being properly relieved (article 113); or

   d. wrongfully sat down on post (article 134); or

   e. loitered on post (article 134); and

   f. (for sitting down or loitering on post only -- article 134) under the circumstances, the accused's conduct was prejudicial to good order and discipline in the armed forces or was service-discrediting.

(**Note**: If the offense was committed in time of war or while the accused was receiving hostile fire pay, add as an element)

   g. that the offense was committed (in time of war) (while the accused was receiving special pay under 37 U.S.C. § 310).

C. **Who is a sentinel or lookout?** A sentinel or lookout is one whose military duty requires constant vigilance and alertness. Part IV, para. 38c(4), MCM, 1984, describes a sentinel or lookout as one whose duties include the requirement to "maintain constant alertness, be vigilant, and remain awake, in order to observe for the possible approach of an enemy, or to guard persons, property, or a place, and to sound the alert, if necessary." The terms include one who is detailed to use any equipment designed to locate friend, foe, or possible danger, or at a designated place to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work. Whether the accused was a sentinel or lookout, within the meaning of articles 113 and 134, is a factual issue to be decided at trial. The most important factor will be whether the accused's duties required constant vigilance. Therefore, the instruction or orders that describe the accused's duties will be very important evidence, especially if those orders mandate an extraordinary degree of alertness. Misbehavior by watchstanders who do not fit the definitions of "sentinel" or "lookout" may fall under articles 86, 92, 112, 133, and 134 depending on the facts.

D. **Drunk on post**. "Drunk" has the same meaning under article 113 as it does for other drunkenness offenses under the Code. *See* chapter XXIX of this text for a detailed discussion of drunkenness.

E. **Sleeping on post**. Sleeping on post is perhaps the most common sentinel or lookout offense. Although sleeping on post may sometimes appear to be a minor infraction, it is nonetheless a capital offense if committed during time of declared war. Sleep is a condition of insentience sufficient to impair the full exercise of mental and physical faculties. It is more than a dulling of the senses or drowsiness, but it is not necessary that the accused be wholly comatose. Proof that the accused was asleep always involves circumstantial evidence, such as the fact that the accused was snoring, was in a reclining position, did not respond to questions, or did not respond to shaking. The accused is guilty of sleeping on post if he or she either intentionally went to sleep or accidentally fell asleep. If the accused falls asleep due to factors beyond his or her control -- such as illness or unexpected effects of prescribed medication -- the accused will not be criminally liable. If the accused could have prevented falling asleep by getting proper rest before assuming his or her post, however, the accused may be found guilty of this offense.

F. **Leaving post before relief**. The accused has left the post when he or she goes far enough away to impair the maintenance of constant alertness. Thus, a sentinel at the gate to a military installation may walk several yards from the guard box and not leave the post. On the other hand, a radar observer may leave the post by going only a few inches away.

G. **Loitering on post**. Loitering connotes idle behavior and inattention by the sentinel or lookout. It includes sauntering, idling, lingering, reading unauthorized material, or other acts that detract from the maintenance of vigilance.

H. **Wrongful sitting**. Sitting on post must be unauthorized sitting which detracts from the proper maintenance of vigilance. Therefore, not all sitting on post is wrongful.

I. Pleading

1. **General considerations**. *See* Part IV, paras. 38f and 104f, MCM, 1984. The format for specifications under article 113 and article 134 are substantially similar. Under article 113, if the drunkenness on post, sleeping on post, leaving the post occurred in an area designated as authorizing combat pay, this is an aggravating fact which significantly increases the authorized maximum punishment. Since the article 113 sentinel offenses are capital offenses in time of declared war, the phrase "during time of declared war" should be added after the date of the offense when appropriate.

2. **Sample pleadings**

a. **Sleeping on post** (for drunk on post, substitute "drunk" for "sleeping")

Charge: Violation of the Uniform Code of Military Justice, Article 113.

Specification: In that Private First Class Ima Z. Rack, U.S. Marine Corps, Marine Barracks, Charleston, South Carolina, on active duty, on or about 18 July 19CY, at Naval Base, Charleston, South Carolina, being on post as a sentinel at Gate No. 1, was found sleeping upon her post.

b. **Leaving post before proper relief**

Charge: Violation of the Uniform Code of Military Justice, Article 113.

Specification: In that Private First Class Harry N. Van Ish, U.S. Marine Corps, Marine Barracks, Charleston, South Carolina, on active duty, on or about 20 August 19CY, at Naval Base, Charleston, South Carolina, being posted as a sentinel at Gate No. 1, did leave his post before he was regularly relieved.

c. **Loitering on post** (for sitting down, substitute "wrongfully sit down" for "loiter")

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Seaman Apprentice Ida Gold Brick, U.S. Navy, Naval Education and Training Center, Newport, Rhode Island, on active duty, while posted as a sentinel, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 16 June 19CY, loiter on her post.

MILITARY JUSTICE STUDY GUIDE

CHAPTER XXXI

BREACHES OF RESTRAINT

A. **Overview.** Articles 95 and 134 prohibit five major offenses involving breaches of lawful restraint. Article 95 prohibits resisting apprehension, escape from confinement, escape from custody, and breaking arrest. Breaking restriction is prosecuted under article 134.

B. **Resisting apprehension** (article 95)

1. **Elements of the offense.** The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, a certain person attempted to apprehend the accused;

b. the person attempting to apprehend the accused was a person lawfully authorized to apprehend the accused; and

c. the accused actively resisted the apprehension by committing certain acts.

2. **Discussion**

a. **Apprehension.** Article 7(a), UCMJ, defines apprehension as the act of taking a person into custody. Apprehension equates to a civilian arrest. In the military justice system, the terms "apprehension" and "arrest" must not be confused. They are not synonymous.

b. **The attempt to apprehend.** Someone must have made an overt effort to apprehend the accused. This attempt must include clear notice to the accused that he or she was being placed in custody. While words such as "You are under apprehension" are the clearest notification to the accused, the accused may be

notified by other words importing the same meaning. Notification may also occur through acts, or a combination of words and acts, which clearly communicate to the accused the fact that he or she is being apprehended.

c. **Authority to apprehend**. Article 7 of the Code and R.C.M. 302(b), MCM, 1984, authorize the following persons to conduct military apprehensions:

(1) Commissioned officers;

(2) warrant officers;

(3) noncommissioned officers and petty officers; and

(4) other persons in the execution of law enforcement duties.

R.C.M. 302(b) also states a policy that an enlisted member should apprehend a warrant or commissioned officer only when ordered to do so by another commissioned officer, when necessary to prevent disgrace to the service, or to prevent the escape of one who has committed a serious crime.

d. **Resistance**. Words, by themselves, are insufficient to constitute resisting apprehension. Some degree of physical resistance is also required, such as flight or assaulting the apprehending officer. The resistance must occur before the accused has submitted to the apprehending officer's control. If the accused submits to the apprehension and then attempts to resist, the offense committed is not resisting apprehension. Instead, the accused may be guilty of escape from custody or attempted escape from custody.

e. **Knowledge**. The "clear notification" requirement for the attempt to apprehend implies that the accused must have knowledge that an apprehension is being attempted. There is apparently no requirement that the accused actually know that the person attempting the apprehension is lawfully empowered to apprehend. Part IV, para. 19c(1)(d), MCM, 1984, however, provides: "It is a defense that the accused held a reasonable belief that the person attempting to apprehend him did not have authority to do so." Therefore, a reasonable belief that the apprehending person was acting without authority to apprehend is a complete defense. This same analysis applies to the probable cause to apprehend. The *Manual* discussion indicates that the existence of probable cause is presumed. Lack of probable cause would be an affirmative defense to be raised by the accused. Part IV, para. 19c(1), MCM, 1984, and analysis.

f. **Alternate offenses.** An accused, who forcibly resists apprehension, may be convicted of assault even if the apprehending officers lacked probable cause, provided the officers were acting in good faith and do not use extreme force themselves. Part IV, para. 19c(1)(e), MCM, 1984.

3. **Attempt not lesser included offense.** Resisting apprehension is one of the few offenses for which attempt is not a lesser included offense. If the accused attempts to resist apprehension, the accused has, in fact, resisted apprehension. If it is uncertain whether the resistance occurred before or after the accused submitted to the apprehension, a specification alleging escape from custody should also be pleaded in order to provide for the contingencies of proof at trial.

4. **Pleading**

a. **General considerations.** *See* Part IV, para. 19f(1), MCM, 1984. While not included in the *Manual* sample specification, the specific acts which constituted the resistance should be pleaded. The identity of the person attempting the apprehension should be pleaded.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 95.
>
> Specification: In that Fireman Neville B. Kaught, U.S. Navy, USS ELUSIVE, on active duty, did, on board USS ELUSIVE, located at Mayport, Florida, on or about 19 May 19CY, resist being apprehended by Lieutenant Will I. Ketchum, U.S. Navy, a person authorized to apprehend the accused, by running away from the said Lieutenant Ketchum.

C. **Escape from confinement and escape from custody** (article 95)

1. **General concept.** Although escape from confinement and escape from custody are two separate, distinct offenses, they share many common legal principles which permit them to be discussed together in this text. Both offenses involve an escape from restraint. Confinement implies physical restraint, while custody need only be moral restraint (but may be physical restraint).

2. **Elements of the offenses.** The prosecution must prove beyond a reasonable doubt that:

a. The accused was lawfully placed in confinement or in custody;

b. that the person who placed the accused in custody or confinement was authorized to do so; and

c. at the time and place alleged, the accused freed himself or herself from the restraint of the confinement or custody before being released therefrom by proper authority.

3. **Discussion**

a. **Confinement.** Confinement is the physical restraint of the person. One is in confinement if his or her freedom of movement is restrained by physical devices, such as leg irons, handcuffs, or a jail cell. A person, however, must first be delivered to and placed in a confinement facility prior to confinement status occurring. Thus, one who is in handcuffs is still only in custody if he or she has not yet been placed in a confinement facility or delivered to brig personnel.

A person may pass in and out of a status of confinement depending upon the existence or absence of physical restraint at a given moment. Thus, a prisoner at a brig is in a status of confinement while inside the brig. Suppose, however, that the prisoner is permitted to leave the brig on a work-release program. The prisoner is accompanied by an unarmed escort, who is instructed not to attempt to stop a fleeing prisoner. When the prisoner leaves the brig with the escort, the prisoner passes from a status of confinement to one of custody. At the end of the day, the prisoner will return to confinement. If, however, the prisoner is accompanied by a guard who has the duty and the means to exercise physical restraint, confinement continues outside the brig. Dereliction in the execution of the brig guard's duty to exercise physical restraint does not terminate the confinement status.

b. **Custody.** Custody may only involve moral, rather than physical, restraint of freedom of movement. As noted above, it can also involve physical restraint. Custody is usually imposed by lawful apprehension. Custody also may be imposed by lawful orders restricting the individual's freedom of movement to extremely limited confines. For example, an accused, who has just been sentenced to confinement by a court-martial, is ordered by the trial counsel to remain in an office and await transportation to the brig. There is no restraint other than the legal and moral force of the trial counsel's order. If the accused runs away, the accused

has escaped from custody. Another example of custody not imposed by apprehension would be the status of the work-release prisoner who is accompanied by a guard with no duty to personally restrain or stop escape.

c. **Lawfully placed in restraint**. The accused must have been lawfully placed in confinement or custody. This merely means that the legal procedures for placing the accused in confinement or in custody must be substantially followed.

d. **Freed before being properly released**. The accused's escape from the restraint need only be temporary or momentary. If the accused is stopped before completely throwing off the physical or moral restraint, the accused may be found guilty of attempted escape from confinement or custody.

4. **Separate offenses**. Escape from confinement and escape from custody are entirely separate, distinct offenses. Custody and confinement are separate statuses. Therefore, escape from custody is not a lesser included offense of escape from confinement, even though custody would appear to be a factually less serious status. Likewise, escape from confinement is not a lesser included offense of escape from custody. If it is uncertain whether the accused escaped from confinement or from custody, both offenses should be charged in separate specifications. After considering all the evidence and applicable law, the court can decide which offense the accused committed. (Note, however, that attempted escape is a lesser included offense of each escape offense.)

5. **Pleading**

a. **General considerations**. *See* Part IV, para. 19f(3) and (4), MCM, 1984. The sample pleading below alleges escape from confinement. An escape from custody pleading would follow the same format, but would substitute "custody of [person's name] a person authorized to apprehend the accused" for "confinement in [place]."

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 95.
>
> Specification: In that Private Duck N. Runn, U.S. Marine Corps, Headquarters and Service Squadron, Marine Corps Air Station, Cherry Point, North Carolina, on active duty, having been placed in confinement in the Marine Corps Air Station Brig, Cherry Point, North Carolina, by a person authorized to order the accused into confinement, did, at Marine Corps Air Station, Cherry Point, North Carolina, on or about 17 May 19CY, escape from confinement.

D. **Breaking arrest** (article 95) **and breaking restriction** (article 134)

1. **General concept**. Breaking arrest, under article 95, and breaking restriction, under article 134, are closely related offenses. Both involve the accused going beyond certain geographical limits imposed by superior authority.

2. **Elements of the offenses**. The prosecution must prove beyond a reasonable doubt that:

a. The accused was lawfully placed in arrest, or was lawfully restricted to certain limits, by proper authority;

b. the accused knew of the limits of the arrest or restriction;

c. at the time and place alleged, the accused, without proper authority, went beyond the limits of the arrest or restriction; (and)

d. (for breaking restriction only) under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was service-discrediting.

3. **Discussion**

a. **Arrest and restriction**. Arrest and restriction are closely related forms of restraint. Both are imposed by superior authority and prescribe certain geographical limits, such as a ship or base, beyond which the accused may not go. As a practical matter, arrest often involves closer geographical limits than restriction. A person in arrest cannot be required to perform military duties. "Arrest" under

article 95 also includes arrest in quarters, which is a status of restraint which may be imposed as nonjudicial punishment only on an officer.

b. **Proper authority**. The person who placed the accused in arrest or restriction must have been legally authorized to do so.

c. **Breaking arrest or restriction**. The breach occurs when the accused goes beyond the limits of the arrest or restriction. Merely failing to comply with some other condition of the arrest or restriction, such as wearing a certain uniform, refraining from use of alcoholic beverages, or failing to muster at a specified time is not breaking arrest or restriction, although other violations of the Code may have been committed (e.g., articles 92 or 86, respectively). (One decision from the Navy-Marine Corps Court of Military Review, that drinking alcohol while in a restricted status is properly charged as breaking restriction, appears to be a clear departure from the traditional law. It is recommended that the safe course to pursue would be to continue charging violation of the terms of a restriction order under article 92 and to disregard this case.) Once the accused goes beyond the limits of the arrest or restriction, the offense is complete. The accused's return is no defense.

4. **Lesser included offenses**. Breaking restriction is a lesser included offense of breaking arrest. Attempts are lesser included offenses of both breaking arrest and breaking restriction.

5. **Pleading**

a. **General considerations**. *See* Part IV, para. 19f(2) and 102f, MCM, 1984. The formats for pleading each offense are similar. Note that the accused's knowledge of the limits of the restriction or arrest are not expressly pleaded.

b. **Sample pleadings**

(1) **Breaking arrest**

Charge: Violation of the Uniform Code of Military Justice, Article 95.

Specification: In that Ensign Busta Out, U.S. Navy, USS CAMDEN, on active duty, having been placed in arrest in the Bachelor Officers' Quarters, Naval Station, Philadelphia, Pennsylvania, by a person authorized to order the accused into arrest, did, at Naval Station, Philadelphia, Pennsylvania, on or about 24 October 19CY, break said arrest.

(2) **Breaking restriction**

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Radioman Third Class Atwater Kent, U.S. Navy, USS ASHTABULA, on active duty, having been restricted to the limits of the USS ASHTABULA, by a person authorized to do so, did, on board USS ASHTABULA, located at Norfolk, Virginia, on or about 22 September 19CY, break said restriction.

REVIEW QUESTIONS

LCPL Thomas B. Allen, USMC, was lawfully ordered into pretrial confinement for the commission of numerous unauthorized absences and bad check offenses. As a pretrial detainee, LCPL Allen was required to perform mess deck duties. These duties required LCPL Allen to retrieve the food for each meal from the naval station galley that was adjacent to the brig. LCPL Allen was always escorted by a brig guard during this retrieval process. Two days before his pending general court-martial, LCPL Allen decided that he had had enough. While performing his food retrieval duties before lunch, he ran away from his escort. Even though the guard was authorized to use force to prevent any such escape, all he did was chase LCPL Allen while yelling, "Stop! Stop! Stop!" LCPL Allen ignored the guard and left the base. He was later arrested by civilian police. Based on his most recent actions, what, if anything, is LCPL Allen guilty of?

A. Resisting apprehension.

B. Escape from custody.

C. Breaking restriction.

D. Escape from confinement.

Assume the same facts as above, <u>except</u> now note that there exists a local brig instruction which prohibits anyone from using force to stop any escape. Under these changed circumstances, what, if anything, is LCPL Allen guilty of?

A. Nothing.

B. Escape from confinement.

C. Escape from custody.

D. Resisting apprehension.

MILITARY JUSTICE STUDY GUIDE

CHAPTER XXXII

FALSIFICATION OFFENSES

A. **Overview**. The UCMJ prohibits five types of falsification offenses:

1. False official statements (article 107);

2. forgery (article 123);

3. perjury (article 131);

4. frauds against the United States (article 132); and

5. false swearing (article 134).

Although serious offenses, forgery, perjury, and frauds against the United States are not frequently encountered by most commands. Therefore, this chapter will only briefly discuss these offenses. The major emphasis of this chapter will be on false official statements and false swearing, which are more common.

B. **False official statement** (article 107)

1. **Elements of the offense**. The prosecution must prove beyond reasonable doubt that:

a. At the time and place alleged, the accused signed a certain document or made a certain statement;

b. the statement or document was an official statement or document;

c. the statement or document was false;

d. the accused knew the statement or document was false when it was made or signed; and

e. the accused made the statement or signed the document with the intent to deceive.

2. **Discussion**

a. **Official statement**

(1) The statement may be oral or written. An official statement is one made in the line of duty. This coverage is meant to be extremely broad.

(2) **Suspect's statement**

(a) A suspect who is being interrogated normally has no duty to make a statement. However, if warnings under article 31, UCMJ, are given to a criminal suspect, the suspect's duty to respond truthfully to criminal investigators, if he responds at all, is sufficient to impute officiality to his statements for purposes of article 107. Therefore, if a suspect elects to waive his/her rights under article 31, UCMJ, the suspect must tell the truth or be submitted to prosecution under article 107, UCMJ.

(b) On the other hand, if the suspect has an independent duty to make a statement or report, such statement is inherently official for the purposes of article 107. This is true regardless of whether the suspect has been warned under article 31, UCMJ. For example, an enlisted club manager has an independent duty to account for club funds. The manager's duty to account is separate from the right to remain silent under article 31.

(c) When determining whether a suspect's statement is official, the "exculpatory no" doctrine may apply. This doctrine provides that when a suspect merely states a negative response to a law enforcement agent's question the suspect should not be prosecuted under article 107, UCMJ, even if the suspect knows that such a response is false. This doctrine does <u>not</u> apply to the offense of false swearing discussed below.

(d) Proceed cautiously when drafting charges in cases where the false statement was made by a suspect to a criminal investigator. Careful consideration should be given to possible alternative charges such as false swearing.

b. **Accused's knowledge**. The accused must have actually known, at the time the official statement was made, that the statement was false. This element is established if the accused had no belief that the statement was true.

c. **Intent**. The accused must make the false statement with an intent to deceive. This denotes an intent to mislead, trick, cheat, or induce someone to believe as true something that is false. No one actually need be deceived, nor any material benefit be obtained. If the accused knew that the official statement was false, the law will permit the court to infer that the accused intended to deceive. This

3. Pleading

a. **General considerations.** *See* Part IV, para. 31f, MCM, 1984. Note that the false statement must be summarized or quoted verbatim. If the statement was entirely untrue, an allegation that it was wholly false will suffice. If the statement was only partially untrue, the specification must explain the way in which it was partially false.

b. **Sample pleading**

> Charge: Violation of the Uniform Code of Military Justice, Article 107.
>
> Specification: In that Chief Yeoman Wylie Slighe, U.S. Navy, USS DUBIOUS, on active duty, did, on board USS DUBIOUS, located at San Diego, California, on or about 15 May 19CY, with intent to deceive, make to Lieutenant Sherlock Holmes, U.S. Navy, an official statement, to wit: "Sir, I counted the money in the ship's post office cash drawer, and all $250.00 of it is there," or words to that effect, which statement was false in that said ship's post office cash drawer contained at that time only $106.00, more or less, in cash, and was then known by the said Chief Yeoman Slighe to be so false.

C. **Forgery** (article 123). Forgery is the false making or alteration of a signature or writing. The accused's acts must affect the document in such a way that, if genuine, it would impose a legal liability on another person or would adversely change another person's legal rights or liabilities. Forgery requires the specific intent to defraud. There is no requirement, however, that anyone actually suffer financial loss or legal detriment from the accused's acts. Forgery most frequently involves unlawfully signing another's signature, or unlawfully altering a check or document. *See* Part IV, para. 48c, MCM, 1984, for an extensive discussion of forgery.

D. **Perjury** (article 131). Perjury occurs when a witness gives sworn testimony in a judicial proceeding, and the witness knows at the time that the testimony is false. The perjured testimony must concern a material fact or issue in the trial. Judicial proceedings include courts-martial and article 32 pretrial investigations. False sworn statements in other hearings, proceedings, or situations are prosecuted as false swearing in violation of article 134. Closely related to perjury is the article

134 offense of subornation of perjury, which occurs when the accused induces a witness in a judicial proceeding to give sworn testimony that the accused knows is untrue. *See* Part IV, para. 57c, MCM, 1984, for an extensive discussion of perjury.

E. **Frauds against the United States** (article 132). Article 132 prohibits seven offenses which constitute, or relate to, frauds against the U.S. Government. These fraudulent offenses include:

1. Making a false or fraudulent claim against the United States;

2. presenting a false or fraudulent claim against the United States for approval or payment;

3. making or using a false writing or other paper in connection with a claim against the United States;

4. false oath in connection with claims against the United States;

5. forgery of a signature in connection with claims against the United States;

6. delivering less than the amount called for on a receipt; and

7. making or delivering a receipt without having full knowledge that it is true.

See Part IV, para. 58c, MCM, 1984, for an extensive discussion of the various types of frauds against the United States.

F. **False swearing** (article 134)

1. **Elements of the offense**. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused took an oath or made an affirmation;

b. the oath or affirmation was lawfully administered to the accused by a person having authority to do so;

c. upon the oath or affirmation, the accused made a statement;

d. the statement was false;

e. the accused did not then believe that the statement was true; and

f. under the circumstances, the accused's conduct was prejudicial to good order and discipline in the armed forces, or was service-discrediting.

2. **Discussion**

a. **Lawfully administered oath or affirmation.** The accused must make a statement under a lawfully administered oath or affirmation. Article 136, UCMJ, and section 0902 of the *Manual of the Judge Advocate General* list the persons authorized to administer oaths and affirmations in the Department of the Navy. The oath or affirmation must actually be administered. Asking the accused questions such as "Is all of this true?" does not constitute the administration of an oath or affirmation.

b. **False statement.** The accused's statement under oath or affirmation must be false in fact. Moreover, the accused must not have believed that the statement was true when it was made. False swearing covers both official and unofficial statements. Thus, a suspect who knowingly makes a false statement during an interrogation is not guilty of making a false official statement. But, if the statement is made under oath, the suspect may be found guilty of false swearing. Article 31, UCMJ, merely protects the suspect's right to remain silent. Once the suspect takes an oath or makes an affirmation, the suspect is under a legal duty to tell the truth.

3. **Pleading**

a. **General considerations.** *See* Part IV, para. 79f, MCM, 1984. The statement must be summarized or quoted verbatim.

b. **Sample pleading**

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Airman Apprentice Lyon Thrue Histeeth, U.S. Navy, Naval Station, Long Beach, California, on active duty, did, at Naval Station, Long Beach, California, on or about 1 July 19CY, in an affidavit, wrongfully and unlawfully made under lawful oath a false statement in substance as follows: "Mad Dog Kowalski couldn't have killed Sheldon the Fink, because he was with me all afternoon," which statement he did not then believe to be true.

REVIEW QUESTION

LT Jim Jones was responsible for documenting the destruction of classified material on board the USS SECRET. The CO was then required to sign each destruction report after LT Jones had compiled the necessary information. LT Jones accurately and truthfully filled out each destruction report; however, he forgot to have the CO sign 6 reports. During preparation for an upcoming inspection, LT Jones noticed his error. Rather than risk the CO's fury, LT Jones signed the CO's signature on each of the 6 reports. What, if anything, is LT Jones guilty of?

A. False swearing (article 134).

B. Forgery (article 122).

C. False official statement (article 107).

D. Nothing.

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CHAPTER XXXIII

DEFENSES

A. **Overview**. Previous chapters of this section have discussed the common defenses to the crimes described in each chapter. This chapter will briefly outline the various defenses recognized in military criminal law which typically confront the legal officer in the drafting of charges. This chapter will also discuss the defense of insanity, which is not presented elsewhere in this text.

Defenses may be grouped into two categories: defenses in bar of trial and defenses on the merits. Defenses on the merits can be subdivided into general defenses and affirmative defenses. Insanity can be both a defense in bar of trial and a defense on the merits.

B. **Defenses in bar of trial**. Defenses in bar of trial are matters which do not directly relate to the accused's guilt or innocence. They present legal grounds for preventing the trial from proceeding. Defenses in bar of trial are decided by the military judge alone. A successful defense in bar of trial will usually result in a dismissal of the charges without any determination of the accused's guilt or innocence of those charges.

1. **Lack of jurisdiction**. *See* R.C.M. 201-203, MCM, 1984, and section two (Procedure) of this text for a discussion of jurisdictional matters.

2. **Statute of Limitations**. The Statute of Limitations under the UCMJ is article 43. As to all offenses committed on or after 14 November 1986, the accused may not be tried unless sworn charges are received by the officer exercising summary court-martial jurisdiction over the accused within five years after the commission of the offense. No time limit exists, however, for capital offenses, UA in time of war, or missing movement in time of war. Any period during which the accused is in a status of unauthorized absence is excluded from the computation of the five-year period. Contact a judge advocate regarding offenses committed before 14 November 1986.

3. **Former jeopardy**. *See* R.C.M. 907(b)(2)(C), MCM, 1984. Article 44(a) of the Code provides that no person may be tried, without his or her consent, a second time for the same offense. Former jeopardy does not apply to a rehearing which has been ordered to correct errors in a previous trial of the same charges, nor does former jeopardy preclude a trial by court-martial when the previous trial was by a state court or foreign court. *But see* JAGMAN, § 0124 (prior approval of the Judge Advocate General required in order to court-martial one convicted by civilian court for same offense). Neither does former jeopardy apply when the former adjudication of the offense was at office hours or captain's mast.

4. **Former punishment**. *See* R.C.M. 907(b)(2)(D)(iv), MCM, 1984. When punishment has been imposed under article 15 for a minor offense, that offense cannot be tried at a subsequent court-martial. An offense is minor if its maximum authorized punishment -- as set forth in Part IV, MCM, 1984 -- does not provide for confinement in excess of 1 year and/or a dishonorable discharge. Former punishment also applies to article 13 punishments for minor disciplinary infractions by a person in pretrial restriant.

5. **Denial of speedy trial**. *See* R.C.M. 707, MCM, 1984, and section two (Procedure) of this text.

6. **Constructive condonation of desertion**. *See* chapter XXII ("Absence Offenses") of this section and R.C.M. 907(b)(2)(D)(iii), MCM, 1984.

7. **Grant or promise of immunity**. *See* R.C.M. 704 and R.C.M. 907(b)(2)(D)(ii), MCM, 1984. If the accused has been previously promised or granted immunity from prosecution in return for his or her testimony at another proceeding, the accused may not be prosecuted for any offenses covered by the grant or promise of immunity. *See* JAGMAN, § 0138 for procedures for granting immunity.

8. **Insanity**. The accused's lack of mental capacity to stand trial may be interposed as a defense preventing trial. If the prosecution fails to prove that the accused is mentally competent to stand trial, the trial will adjourn until such time as the accused is capable of standing trial, if ever. *See* part D of this chapter for a more complete analysis of the insanity defense.

C. **Defenses on the merits**. Defenses on the merits directly relate to the issue of guilt or innocence. They are presented during the trial on guilt or innocence and are decided by the triers of fact (i.e. the members or, in a judge-alone trial, the military judge). A successful defense on the merits will usually result in a finding of not guilty to the charges and specifications to which the defense relates. Defenses on the merits may be subdivided into two categories: general defenses and affirmative -- or special -- defenses.

1. **General defenses**. A general defense denies that the accused committed any or all of the acts that constitute elements of the offense charged. A general defense may arise merely by the inability of the prosecution, by its own evidence alone, to prove the accused's guilt beyond a reasonable doubt. A general defense may also negate one specific element of the offense. The following are the most common general defenses:

a. **Lack of requisite criminal intent**. The defense offers evidence that the accused committed some of the alleged acts, but that these acts were done without the required criminal intent. For example, an accused admits that he absented himself without authority, but the accused denies that he ever formed any intent to remain away permanently from his unit. Mistake of fact, discussed as an affirmative defense below, may also act as a general defense when the mistake prevented the accused from forming a required intent or state of mind. Diminished mental responsibility, discussed in part D of this chapter, also functions as a general defense when, because of mental disease or defect, or because of intoxication, the accused was unable to form a required specific intent.

b. **Alibi**. Under the alibi defense, the defense contends that the accused could not have committed the alleged offense because the accused was elsewhere when it occurred. It is the accused's responsibility to present evidence that he or she was elsewhere. Once such evidence is presented, the prosecution must prove beyond reasonable doubt that the accused was not elsewhere, but in fact committed the crime.

c. **Illegality of orders**. *See* chapter XX ("Orders Offenses and Dereliction of Duty") of this text.

d. **Good character**. Under the Military Rules of Evidence, general good character evidence is not admissible to show that a person acted in conformity therewith. This general rule is a significant change from prior military practice and has several exceptions. One exception is that evidence of a pertinent character trait of the accused offered by the accused may be admissible. Good military character is admissible in a drug prosecution to show the accused was not involved. Evidence of the character trait of honesty is admissible in a larceny trial. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders to show that the accused was less likely to have committed the offense. When admissible, it is the responsibility of the trier of fact to evaluate character evidence and to give it only so much weight as they deem appropriate under the circumstances. *See* Mil.R.Evid. 404 and 405 for further discussion.

2. **Affirmative defenses**. Affirmative defenses are also known as special defenses. The accused contends that his or her conduct was not criminal. In essence, the accused says, "I did it, but . . . ." It is the accused's responsibility to present

evidence that raises the affirmative defense. Once such evidence is presented, the prosecution must prove beyond a reasonable doubt that the asserted affirmative defense does not apply. The following are the common affirmative defenses, most of which have been discussed elsewhere in this text.

a. **Legal justification**. *See* R.C.M. 916(c), MCM, 1984. Legal justification is the lawful performance of a lawful duty which results in the accused committing acts that otherwise would constitute a crime. The accused must be performing a lawful duty which may be imposed by statute, regulation, orders, or custom of the service. Furthermore, the accused must be performing the duty in a lawful manner, although not necessarily in exact compliance with precise procedural regulations.

b. **Obedience to apparently lawful orders**. *See* R.C.M. 916(d), MCM, 1984. If the accused commits acts that would otherwise constitute a crime because he or she was ordered by competent authority to perform those acts, the accused will not be guilty of a crime if the orders were apparently lawful. An order is apparently lawful if a person of ordinary sense and understanding would know or believe it to be legal.

c. **Accident or misadventure**. *See* chapter XXV ("Assaults") of this text, and R.C.M. 916(f), MCM, 1984.

d. **Self-defense or defense of another**. *See* chapter XXV ("Assaults") of this text, and R.C.M. 916(e), MCM, 1984.

e. **Duress**. *See* chapter XXV ("Assaults") of this text, and R.C.M. 916(h), MCM, 1094.

f. **Entrapment**. *See* chapter XXVIII ("Drug Offenses") of this text, and R.C.M. 916(g), MCM, 1984.

g. **Physical or financial inability**. *See* chapters XX ("Orders Offenses") and XXII ("Absence Offenses") of this text, and R.C.M. 916(i), MCM, 1984.

h. **Lawful consent**. *See* chapter XXV ("Assaults") of this text. A person cannot usually give lawful consent to an act likely to result in grievous bodily harm or death.

i. **Special privilege**. *See* chapter XXV ("Assaults") of this text.

j. **Mistake of fact**. *See* chapters XXII ("Absence Offenses") and XXVIII ("Drug Offenses") of this text, and R.C.M. 916(j), MCM, 1984. When the accused's mistake of fact negates a required specific intent, mistake of fact is a general defense.

k. **Insanity**. The accused's lack of mental responsibility at the time of the offense is a complete defense. Insanity is discussed in part D of this chapter and in R.C.M. 916(k), MCM, 1984.

D. **Insanity**. In 1986, Congress enacted a new insanity standard under military law which applies to all offenses committed on or after 14 November 1986.

1. **General concepts**. Insanity is a legal concept, not a medical or psychological one. Insanity involves two distinct phenomena:

a. Lack of mental responsibility at the time of the offense; and

b. lack of mental capacity to stand trial.

These two concepts focus more on the effects of the accused's mental condition on his or her actions, rather than on the precise psychological nature of the accused's mental disorder. Thus, the law is more concerned with "How did this mental condition affect the accused?" than with "What type of mental disorder did the accused suffer?" Although medical and psychological concepts are an important part of resolving issues of insanity, the ultimate decision is reserved for the trier of fact at trial (i.e. the court-martial members or, in a judge-alone trial, the military judge).

2. **Lack of mental responsibility**

a. **Statement of the rule**. A person is not responsible for criminal conduct if, at the time of such conduct, as a result of a severe mental disease or defect, the person was unable to appreciate the nature and quality or the wrongfulness of the acts.

b. "**Mental disease or defect.**" A mental disease or defect, although not clearly defined in case law, appears to be an irrational state of mind which may be caused by physical or psychological factors. These may include brain damage, pathological deterioration of the brain, mental retardation, or psychiatric disorders. Personality disorders not rising to the level of mental illness do not constitute mental diseases or defects. An irrational state of mind caused by voluntary intoxication by liquor or drugs also is not a mental disease or defect. Voluntary intoxication may, however, be a general defense if the accused is unable to possess certain required knowledge or to form a required specific intent that is an

element of the offense. *See* paragraph C.1 of this chapter. Repeated criminal or antisocial behavior would not meet the required state of mind.

c. **Working of the rule**. In sum, therefore, in order for the insanity defense to be available to an accused, the accused must demonstrate the presence of a severe mental disease or defect and a lack of cognition. The burden of proving this defense is on the accused. The standard is clear and convincing evidence.

3. **Lack of mental capacity to stand trial**. An accused may not be tried if lacking sufficient mental capacity either:

a. To understand the nature of the proceedings; or

b. to cooperate intelligently in his or her own defense.

The lack of mental capacity may result from mental illness, mental retardation, brain damage, or any other neurological disorder which results in the lack of either of the mental capacities set forth above. If the accused lacks mental capacity to stand trial, court-martial proceedings will be held in abeyance until such time, if ever, that the accused is mentally capable of standing trial. The focus is on the accused's mental status on the day of trial rather than on the day the crime was committed.

4. **Deciding insanity issues**. The accused's insanity may be raised either before trial or during trial. It may even be raised after trial, but only under limited conditions.

a. **Inquiry**. R.C.M. 706, MCM, 1984, outlines procedures for inquiry into the accused's sanity. The issue of insanity may be raised by the accused's commanding officer, the defense counsel, the trial counsel, or the article 32 investigating officer. If the accused's commanding officer has reason to believe that the accused is insane, or was insane at the time of the offense, the commanding officer will refer the accused to a sanity board. It is wise to refer the accused to the sanity board whenever the issue is raised in order to avoid later delays in disciplinary proceedings. The sanity board consists of one or more physicians. At least one member of the board should be a psychiatrist. Although sanity boards without a psychiatrist are permissible when a psychiatrist is not reasonably available, they are definitely unwise, as the findings of such a board would be subject to a strong attack at trial. The sanity board will evaluate, examine, and observe the accused. The sanity board is required to report findings about whether the accused was free enough from mental disease or defect to:

(1) Appreciate the criminality of his or her conduct;

(2) understand the nature of the proceedings; and

(3) cooperate intelligently in his or her own defense.

b. **Commanding officer's options**

After receiving the board's report, the accused's commanding officer may take one or four actions:

(1) Dismiss the charges (if the commanding officer is competent to convene "a court-martial appropriate to try the offense charged");

(2) suspend disciplinary proceedings if the accused lacks mental capacity to stand trial;

(3) institute an administrative separation proceeding; or

(4) refer the charges for trial by court-martial.

5. **Litigation at trial**. R.C.M. 916(k)(3)(C), MCM, 1984, provides a detailed, extensive discussion of litigation of insanity at trial. Before the accused may raise an insanity defense at trial, he or she must submit to a sanity board evaluation if one has not been previously conducted. The military judge may enter any orders necessary to protect the accused's article 31 or other substantive rights. The issue of mental capacity is an interlocutory question for a judge. The issue of mental responsibility has special voting procedures in a trial with members. The members must first vote (2/3 majority) on whether the government proved the elements of the offense beyond a reasonable doubt. If so, then the members vote on whether the accused has proven lack of mental responsibility by clear and convincing evidence. If a majority believe the burden was met, the accused is not guilty by reason of lack of mental responsibility. Otherwise, the finding of guilty stands.

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CHAPTER XXXIV

PART A - FRATERNIZATION

A. **General**. Fraternization is very much a viable offense under the UCMJ. There is an increasing number of fraternization cases being published by the courts of review and the Court of Military Appeals. Though each service appears to be handling the offense slightly differently, cases have been successfully prosecuted under articles 92 (when there is a lawful order in effect which precludes the conduct), 133, and 134. Cases prosecuted as violations of article 134 may have as their essence conduct which is prejudicial to good order and discipline or which is service discrediting.

1. Historically, the prohibition against fraternization applied only to relations between officers and enlisted and was based on social distinctions. Presently, it is the negative effect wrongful fraternization has on discipline and morale that has allowed the proscription to withstand all manner of legal attacks. The courts have held that wrongful fraternization compromises the chain of command, undermines a leader's integrity, and, at the very least, creates the appearance of partiality and favoritism.

2. In the past, fraternization was pled either under article 133 or as an unlisted offense under article 134. The maximum punishment was determined by the underlying offense. Fraternization is now a listed offense at paragraph 83 in the MCM, 1984. Fraternization may also be charged under article 92 as a violation of Art. 1165, *U.S. Navy Regulations, 1990*. The maximum punishment is two years' confinement and a dismissal.

B. **Definition**. Because fraternization has traditionally been a breach of custom, it is more describable than definable. Frequently it is not the acts alone which are wrongful per se, but rather the circumstances under which they are performed. In *United States v. Free*, 14 C.M.R. 466, 470 (N.B.R. 1953), the Navy Board first enunciated the difficulty in defining fraternization:

> Because of the many situations which might arise, it would be a practical impossibility to lay down a measuring rod of

> particularities to determine in advance what acts are prejudicial to good order and discipline and what are not. As we have said, the surrounding circumstances have more to do with making the act prejudicial than the act itself in many cases. Suffice it to say, then, that each case must be determined on its own merits. Where it is shown that the acts and circumstances are such as to lead a reasonably prudent person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by the compromising of an enlisted person's respect for the integrity and gentlemanly obligations of an officer, there has been an offense under Article 134.

Therefore, it is not every interaction between officers and enlisted that is wrongful.

1. Part IV, para. 83c, MCM, 1984, makes no specific attempt to define fraternization. It expressly adopts the "acts and circumstances" language of *United States v. Free, supra*, and describes the offensive acts as those which are in "violation of the custom of the armed forces against fraternization."

2. The Navy-Marine Corps Court of Military Review has described fraternization as: ". . . untoward association that demeans the officer, detracts from the respect and regard for authority in the military relationship between officers and enlisted and seriously compromises the officer's standing as such."

3. In discussing whether an officer's sharing of marijuana with enlisted personnel and having sexual relations with female members of his staff constituted wrongful fraternization, the Navy court said, "Fraternization . . . in civilian usage means associating in a brotherly manner; being on friendly terms. The military usage of the term is very similar ... fraternization refers to a military superior-subordinate relationship in which mutual respect of grade is ignored."

4. The Court of Military Appeals stated, "fraternization is any, nonprofessional, social relationship of a personal nature between two or more persons." This means fraternization is a gender-neutral concept. Included in this definition are relationships between permanent personnel and trainees, NCO's (E-5 and above) and junior enlisted personnel, or officer and enlisted personnel of all grades. Suggestive (but not exhaustive) of the types of conduct addressed by the term fraternization are: drinking alcoholic beverages together, playing cards or gambling together, going to private homes or clubs together, and dating or engaging in sexual activities.

5. OPNAVINST 5370.2 defines fraternization as: ". . . personal relationships which contravene the customary bounds of acceptable senior-subordinate relationships. Although it has most commonly been applied to officer-enlisted relationships, fraternization also includes improper relationships between officer members and between enlisted personnel."

6. Article 1165, *U.S. Navy Regulations, 1990*, defines fraternization as: "Personal relationships . . . which are unduly familiar and do not respect differences in rank . . . ." Such relationships are inappropriate and violate long-standing traditions of the naval service. When prejudicial to good order and discipline, or of a nature to bring discredit on the naval service, personal relationships which are unduly familiar and do not respect differences in rank and grade are prohibited: (1) between an officer and an enlisted member; or, (2) between officer members or between enlisted members where a direct senior-subordinate supervisory relationship exists.

C. **Elements under Art. 134, UCMJ**. Part IV, para. 83b, MCM, 1984, lists five elements under fraternization. Though this listed offense is quite new, the paragraph appears to be largely a codification of existing case law.

1. The accused was a commissioned or warrant officer.

-- There are no enlisted accused's under this paragraph, though there are other theories for prosecuting the enlisted personnel involved (*see* paragraph E under Part A of this chapter. According to the analysis to paragraph 83, this article 134 offense does not preempt the creation of a novel 134 specification or an article 92 orders violation to punish the enlisted participant. Novel charges under article 134 to punish the enlisted participant(s), however, should no longer be required with the new prohibition set out in Art. 1165, *U.S. Navy Regulations, 1990* (discussed paragraph E, *infra*). Warrant officers (WO-1) are included as accused despite the fact that elsewhere in the UCMJ they are treated as enlisted. Part IV, para. 15a, MCM, 1984. A midshipman would have to be charged under article 133, since this first element would seem to exclude them. Part IV, para. 59c(1), MCM, 1984.

2. The accused fraternized on terms of military equality with one or more enlisted members in a certain manner.

a. This element suggests that not every meeting between officers and enlisted is wrongful. The Navy-Marine Corps Court of Military Review said that the damage done by fraternization does not depend on the chain of command: ". . . today's lovers of different commands are tomorrow's senior and subordinate." Article

134, however, does not require that a command or supervisory relationship exist between the officer and enlisted person. The Army and Air Force have interpreted this more strictly.

b. The conduct prohibited need not be sexual in nature, although it often is.

3. The accused then knew the person(s) to be (an) enlisted member(s).

-- It would appear to be a general defense that the accused honestly did not know the person's enlisted status. The government must show actual knowledge beyond a reasonable doubt.

4. Such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality.

a. The existence of a custom proscribing the alleged conduct also provides the notice of criminal sanction required by due process. Recent N.M.C.M.R. cases have uniformly held that any reasonable officer of even minimal intelligence is deemed to be on notice that officers cannot associate with enlisted personnel on terms of military equality in the naval service. For example, the court has described a "judicially recognizable custom" against sexual relations with enlisted personnel.

b. However, the prosecution must prove the existence of a service custom which makes the alleged conduct wrongful. "Custom" is defined at Part IV, para. 60c(2)(b), MCM, 1984. It is the existence of a custom that makes conduct such as fornication between officers and enlisted wrongful. Absent the existence of the service-wide custom, it is not unlawful. The government may rely on written documents such as *U.S. Navy Regulations, 1990* (art. 1165) and OPNAVINST 5370.2 (Feb 89) (fraternization); the *Marine Corps Manual*, para. 1100.4; or NAVMC 2767 of 12 March 1984, "User's Guide to Marine Corps Leadership Training," to prove a custom.

c. The existence of a punitive order or regulation would eliminate the need to prove custom was violated and allow the offense to be charged under article 92. Such codifications of custom in the form of regulations is also encouraged by the MCM. Part IV, para. 83c(2), MCM, 1984 specifically suggests that officer-enlisted relations may be governed by orders. The analysis at Appendix 21, para. 83, states that there would be no preemption issue raised with a fraternization prosecution under article 92. Multiplicity would still have to be considered. Navy custom is now codified in Art. 1165, *U.S. Navy Regulations, 1990*, and OPNAVINST 5370.2.

5. Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

-- The harm must be direct and palpable. There is no conduct known as "simple fraternization" which does not prejudice good order and discipline.

D. **Constitutionality**. All manner of constitutional challenges have been leveled against the concept of fraternization. Since the United States Supreme Court decided *Parker v. Levy*, 417 U.S. 733 (1974), all such attacks have largely failed. In *Parker*, the High Court recognized the military's special need for discipline, against which certain personal liberties may pale.

1. **Freedom of association**. This right is accorded less weight because of the negative impact fraternization has on discipline. The prohibition is "valid and necessary."

2. **Vagueness**. The existence of a long-acknowledged custom, and the circumstances surrounding the misconduct, make the prohibition against fraternization specific.

3. **Equal protection**. Officers have always been held to a higher standard of conduct, so it is reasonable to single them out. Some regulations governing fraternization apply to instructor-student relationships, even when the instructors are also enlisted. Singling out this group of enlisted personnel has also been held to be reasonable because of their temporary special status as teachers.

4. **Privacy**. There is no right to privacy when it compromises discipline. The need for discipline has been called a compelling state interest when weighed against an individual servicemember's need for sexual privacy.

E. **Alternative theories of prosecution**. For cases of overfamiliarity between ranks which do not fit the elements described in Part IV, para. 83, MCM, 1984, there may be other means of prosecution.

1. Fraternization may now also be charged under article 92(1) as a violation of Art. 1165, *U.S. Navy Regulations, 1990*, regardless of whether the accused is an officer or enlisted member. A description of the prohibited conduct under article 1165 is discussed, *infra*.

2. The conduct may also violate "an other lawful order" or regulation and be punishable under Article 92, UCMJ. Notice that officer-officer and enlisted-enlisted overfamiliarity may have the same detrimental effect on morale and discipline in the appropriate circumstances as officer-enlisted fraternization. As

such, the participants may be subject to a lawful written or verbal order to cease and desist. Failure to terminate the relationship may constitute willful disobedience under Articles 90 or 91, UCMJ.

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

4. The conduct may be such that it would constitute conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ. *See* chapter XXIV, *supra*.

F. **Pleading**. The sample specification for the listed fraternization offense appears at Part IV, para. 83f, MCM, 1984.

1. Where fraternization is alleged under Article 134, UCMJ, and the same conduct is alleged under article 133, the offenses will merge for findings with the conduct unbecoming. Where fraternization and the underlying misconduct such as adultery or sodomy are both alleged, the offenses may merge for punishment purposes. Where there is conduct amounting to fraternization which is different from the underlying offense which is also alleged, the offenses may also be separate for sentencing.

2. Pleading the same conduct as fraternization and violation of a local order or regulation is multiplicious charging.

3. **Sample specification for violation of Article 1165, *U.S. Navy Regulations, 1990***

Charge: Violation of the Uniform Code of Military Justice, Article 92.

Specification: In that Senior Chief Disbursing Clerk Walter W. Whitman, U.S. Navy, Naval Air Station, Barbers Point, Hawaii, on active duty, did, at Naval Air Station, Barbers Point, Hawaii, on the island of Oahu, Hawaii, and at Anaheim, California, from about 1 September 19CY to 20 November 19CY, on diverse occasions, violate a lawful general regulation, to wit: Article 1165, U.S. Navy Regulations, dated 14 September 1990, by wrongfully engaging in an unduly familiar personal relationship not respecting differences in rank and grade with a subordinate enlisted member under the direct supervision of said Senior Chief Disbursing Clerk Whitman, to wit: flirting with and spending an inappropriate amount of time with Disbursing Clerk Third Class Judy Junior, U.S. Navy, Naval Air Station, Barbers Point, Hawaii, during normal working hours at Naval Air Station, Barbers Point, Hawaii; dating said Disbursing Clerk Third Class Junior at Naval Air Station, Barbers Point, Hawaii, and on the island of Oahu, Hawaii; and inappropriately vacationing with said Disbursing Clerk Third Class Junior at Anaheim, California, which relationship was prejudicial to good order and discipline and in violation of long-standing traditions of the naval service.

PART B - SEXUAL HARASSMENT

Article 93, UCMJ; Part IV, para. 17, MCM, 1984.

Though sexual harassment, when charged under article 93, is not an offense that requires a sexual assault, the conduct proscribed usually involves comments or gestures of a sexual nature. It is a form of abuse of subordinates, and was first recognized as an offense by the MCM, 1984.

A. Text of Article 93, UCMJ, cruelty and maltreatment

> Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

B. Discussion and definitions

1. "Any person subject to his orders" means not only those military personnel under the direct or immediate command of the accused, but extends to all persons whether subject to the code or not, who by reason of some duty or employment are required to obey the lawful orders of the accused. The accused need not be in the direct chain of command over the victim. Part IV, para. 17c, MCM, 1984.

This element, that the victim was subject to the orders of the accused, creates an obvious loophole in the prosecution of sexual harassment cases under this article. It does not cover harassment between personnel of the same rank unless position or duties create a senior-subordinate relationship.

2. Assault, improper punishment, and sexual harassment may all constitute the cruelty, maltreatment, or oppression for article 93 purposes. Sexual harassment includes influencing, offering to influence, or threatening the career, pay or job of another person in exchange for sexual favors and deliberate or repeated offensive comments or gestures of a sexual nature. (Emphasis added.) Part IV, para. 17c(2), MCM, 1984.

a. The emphasized language in the discussion portion of paragraph 17 of MCM, 1984, is the only language in the *Manual* that expressly deals with sexual harassment. The elements, punishment, and sample specification for article 93, cruelty and maltreatment, remain identical to those first published in the 1951 *Manual for Courts-Martial, United States*.

b. "Deliberate or repeated offensive comments." This language suggests that the offense may be committed willfully or through culpable negligence. The "or repeated" terminology, standing alone, may seem to imply strict liability if it is found to be cruel or oppressive on an objective standard. Part IV, para. 17c(2), MCM, 1984. However, the same language appears in SECNAVINST 5300.26 (series) and MCO 5300.10, as well as the policy statements of other services on sexual harassment. Within these documents, the phrase "or repeated" is explained as referring to those comments or gestures of a sexual nature which are initially made innocently but become wrongful by repetition, particularly after the victim has complained.

C. **Difficulties with article 93**

1. **Specification**. The sample specification at paragraph 17f clearly contemplates the more traditional forms of cruelty towards subordinates, such as a drill instructor abusing a recruit. Hence, the sample specification must be extensively tailored. The specification should reflect sexual harassment as the specific type of abuse; whether it was deliberate or repeated; and should include an exact description of the acts of misconduct.

2. **Lesser included offense**. Paragraph 17d lists "attempts" as an LIO of article 93. While attempt is certainly an LIO of the more traditional form of cruelty to subordinates, it is difficult to imagine a situation that would qualify as attempted sexual harassment since the *Manual* definition includes threatening or offering to influence . . . in exchange for sexual favors. (Emphasis added.)

3. **Necessity of complaint**. There is no requirement under article 93 that the victim complain though, certainly, if an innocent comment is made and the victim complains about the remark or gesture, such notice to the accused may go a long way in proving culpable negligence if the situation is repeated. Both SECNAVINST 5300.26 and MCO 5300.10 say the victim should complain and make the situation known to his or her superior. The commander is required to investigate under these orders.

4. **Maximum punishment**. The maximum punishment listed in paragraph 17e is a dishonorable discharge and one year confinement. This could create "ultimate offense" problems if the same misconduct is prosecuted under article 92 as an orders offense. Part IV, para. 16e, *Note*, MCM, 1984.

D. **Defenses**. It would appear that an honest and reasonable belief (mistake) that the questioned behavior is appropriate is a defense. It is not a defense that the comments or gestures were enjoyed, appreciated, or that the victim, by appearance or dress, somehow invited the comments except as it may affect the determination of cruelty or oppression.

E. **Related orders**. SECNAVINST 5300.26 (series) and MCO 5300.10 were generated in response to Office of Personnel Management and the Secretary of Defense requests that each of the service secretaries generate policy statements emphasizing the inappropriateness of sexual harassment. Though the definition of sexual harassment is the same as that in the *Manual*, because of their origin as policy statements, it is unlikely they will be found to be punitive orders for article 92 prosecutions. The regulations require commanders to train personnel about sexual harassment and require victims of such misconduct to use their chain of command to report such offensive conduct. *See also* OPNAVINST 5300.9, which requires initial orientation and periodic training for all Navy personnel on the identification and prevention of sexual harassment.

1. Recently, sexual harassment has been addressed for the first time in *U.S. Navy Regulations, 1990* (article 1166). Article 1166, however, appears to be nonpunitive.

2. SECNAVINST 5370.2 (series), Subj: Standards of Conduct and Government Ethics, is a punitive order. It prohibits naval personnel from misusing their official position for personal gain. This could be the basis of a sexual harassment prosecution. It applies to officers, enlisted, and civilians without reference to chain of command.

3. Section 703 of Title VII of the United States Code (Civil Rights Act) has been the basis of federal prosecutions for sexual harassment. Federal courts treat sexual harassment as a form of sex discrimination. The Department of the Navy has been successfully sued under Title VII for sex discrimination.

4. There are numerous other military orders and directives that deal with sexual harassment, including: OPNAV 12720.3, NAVAIR 5350.1, NAVSEA 5350.1, OPNAV 5350.5, NCPC 12410.1, and CMC White Letter Number 18-80 of 2 December 1980.

F. **Alternatives to article 93 for sexual harassment**. Prosecution of comments and acts alleged to be sexual harassment is an area as yet untested by the appellate courts. However, there are many other articles and theories under which the same misconduct could be prosecuted.

1. Comments may amount to disrespect under articles 89 or 91, provoking speech under article 117, communicating a threat under article 134, extortion under article 127, bribery under article 134, or indecent language under article 134.

2. Where contact or acts are involved, articles such as 128 assaults, 134 indecent acts, 120 rape, 125 sodomy, or 134 adultery may also be alternatives -- depending upon the circumstances surrounding the alleged harassment.

3. Finally, dereliction of duty under article 92 and conduct unbecoming an officer under article 133 may also be charged when sexual harassment is alleged.

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MILITARY JUSTICE STUDY GUIDE

SECTION FOUR

SUPPLEMENTARY CHECKLISTS AND OUTLINES

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USN CHECKLIST FOR REPORT CHIT PROCESSING

The following process assumes that the command has a local report chit or system for reporting offenses and conducting the preliminary inquiry prior to the preparation of a NAVPERS 1626/7 for use at XOI or CO's mast.

A. BEFORE CO's MAST

1. Log local report into the logbook. (A log should be used for tracking the report through your command.)

2. Send local report and request for preliminary inquiry and recommendation as to disposition to SNM's department head.

3. If returned recommending XOI or mast, check service record out from personnel or PSD.

4. Review service record to ensure all pages are there and to determine if SNM is on any suspended sentence, is in a frocked paygrade, or has been given an administrative separation warning.

5. Prepare NAVPERS 1626/7 and appropriate acknowledgement of rights forms from *JAG Manual*. If a UA case, be sure to have a page 601-6R or page 13.

6. Attach preliminary inquiry report, including statements and other evidence, to report chit.

7. Contact and inform the accused of all rights and let him/her inspect the evidence. (If shore based, set up appointment with defense counsel if accused wants to consult with counsel.)

8. Inform accused, his supervisors, and witnesses of time and place of XOI/CO's mast.

B. AFTER CO's MAST

1. Ensure CO has completed section of NAVPERS 1626/7 entitled "Action of the Commanding Officer."

2. Inform accused of his right to appeal his NJP. Be sure he signs the appropriate forms (*see* JAGMAN, app. A-1-f). Ensure NAVPERS 1626/7 is modified to reflect the 5-day time limit vice 15 days which is preprinted on NAVPERS 1626/7.

3. Prepare necessary service record entries.

   a. Service record entries required when the commanding officer EXCUSES or DISMISSES the offense(s):

      (1) When the service record contains an entry concerning UA, an entry must be made to show what action was taken. If the UA is less than 24 hours, a page 13 entry is required.

      (2) If UA more than 24 hours, completion of a page P601-6R is required.

      (3) For all other offenses EXCUSED or DISMISSED, no service record entry is required. If UA offense excused or dismissed, page 13 required to reflect disposition.

   b. When mast results in a decision to refer charges to trial by summary or special court-martial, prepare a charge sheet (DD-458). No service record entry is required.

   c. When mast results in a decision to refer charges to a pretrial investigation under article 32, no service record is required.

   d. Required service record entries if punishment imposed:

      (1) Punishments NOT including reduction or forfeiture of pay:

         (a) NAVPERS 1070/613 (Page 13)

         (b) NAVPERS 1070/609 (Page 9)

(c) NAVPERS 1070/606 (Page 6) - Must be completed in UA cases in excess of 24 hours. Since UA of 24 hours or more is lost time, completion of the page 6 (blocks 1 and 2, 38 through 42, and block 50) must be timely and accurate. Strict adherence to the PAYPERSMAN, § 90435 is mandatory.

(2) Punishments including reduction or forfeiture of pay:

(a) NAVPERS 1070/607 (Page 7)

(b) NAVPERS 1070/609 (Page 9)

(c) NAVPERS 1070/604 (Page 4) if reduction is awarded.

(d) NAVPERS 1070/606 (Page 6) to be completed in UA cases in excess of 24 hours as outlined above.

(e) If reduction and forfeitures, ensure forfeitures are based on reduced paygrade (even if reduction suspended).

Note: Manual of Advancement states that all lost time as a result of UA, sick, misconduct, confinement, etc., is not creditable as time in rate (TIR) for advancement and, accordingly, the TIR shall be adjusted (Page 4), ONLY if there has been NO REDUCTION IN RATE!

(3) Punishments involving reduction or forfeiture of pay which are suspended:

(a) NAVPERS 1070/613 (Page 13) if punishment awarded pertains to RIR or FF and was suspended.

(b) NAVPERS 1070/607 (Page 7) if one or more types of punishment awarded is suspended, but still includes at least one punishment not suspended that pertains to pay.

(c) NAVPERS 1070/609 (Page 9) if reduction is awarded.

(d) NAVPERS 1070/604 (Page 4) if reduction is awarded.

(4) Punishments involving restraint:

(a) Correctional custody. If CC is awarded at mast, prepare the confinement order (NAVPERS 1640/4). You will need an original and two copies.

Note: The accused will be escorted to the local medical facility for a preconfinement physical. This is a function of your master-at-arms. They are trained to do this . . . DO NOT ASSIGN THE JOB TO ONE OF YOUR YN's.

(b) Restriction to limits. If restriction is imposed, restriction papers need to be typed. Usually this is on a local preprinted form, necessitating only the completion of the accused's name, rate, and social security number. It will show the boundaries of restriction, times, dates and places for muster, and is signed by someone authorized to do so.

(c) Extra duty. If extra duty is imposed, virtually the same procedures as in b. above will be used. Again, notification is by preprinted locally prepared form which defines the extra duty, the time it will be accomplished, to whom the accused reports, and any extra instructions necessary.

(d) Confinement on bread and water. Prepare confinement orders for bread and water. The SNM must be given a confinement physical and found to be fit for confinement on bread and water. *See* section on preparation of confinement order.

(e) File documents in UPB and, after all action (including any appeal), ensure it is complete.

[A "Unit Punishment Book" is nothing more than a binder containing completed NAVPERS 1626/7's of ALL cases appearing before the CO at MAST, whether dismissed or excused. The unit punishment book is required as a permanent command record of all cases involving ENLISTED persons handled at mast and will be maintained on board for 2 years (MILPERSMAN 5030500 and JAGMAN, § 0119 refers).]

(5) Remission, mitigation, or setting aside of NJP

(a) The PAYPERSMAN (Part 9, section 90436) contains block-by-block instructions for preparation of NAVPERS 1070/607 for these actions.

(b) Refer to table 9-4-39h for instructions to mitigate, reinstate, or set aside the punishment for members who have previously been reduced in rate.

C. MISCELLANEOUS MATTERS

1. If the CO's NJP results in a restraint-type punishment, the details must be furnished to the OOD for inclusion in the deck log.

2. Prepare notice for POD. If it is the policy of commands to publish the results of CO's NJP in the command POD, strict compliance with JAGMAN, § 0115 is mandatory. (It is suggested that names of the offenders be omitted if the information may be disseminated to civilians.) In no instance will the social security number of an individual be used in the publication of NJP results. (*See* SECNAVINST 5211.5 series.)

3. If appropriate, prepare page 13 -- warning member of consequences of future misconduct.

4. If a basis for administrative discharge applies, determine if command wants to process member for discharge.

D. NJP APPEALS

1. After receipt of accused's appeal, prepare written endorsement for the CO's signature. Include a copy of NAVPERS 1626/7, copies of all statements or evidence used at mast, and copy of page 9 from accused's service record (with all endorsements). *See* JAGMAN, § 0116 for requirements.

2. Indicate appeal on NAVPERS 1626/7.

3. If no response to appeal is received from appeal authority within 5 days of accused's appeal, then restraint punishments must be stayed if accused has requested this.

E. OFFICER'S NJP

1. Before taking an officer to NJP, check with regulations promulgated by the type commander regarding any additional requirements or procedures required by them. (Many want notification prior to the NJP hearing. CINCPACFLT commands must have a prompt verbal report of all incidents of officer misconduct to CINCPACFLT.)

2. If an officer is awarded NJP, then a disciplinary report must be sent to NMPC-8. (MILPERSMAN 3410100.2b contains the applicable provisions.)

3. If the officer is also being detached for cause, consult paragraph 5 of MILPERSMAN 3410100 for the provisions for this procedure.

USMC REPORT CHIT PROCESSING

The following process assumes that the command has a locally prepared form which is used to institute a report of offenses that may lead to NJP.

A. PRIOR TO OFFICE HOURS

1. The form referred to above should be used at the lowest possible level (i.e., the actual accuser).

2. The form should contain the basic complaint of wrong, not the specific article and specification. The precise article and properly worded specification or charge should be prepared by a qualified legal clerk.

3. The form should reflect the full chain of command, from fire team leader or section head -- depending on the organizational structure involved -- all the way up to the level that disposes of offense(s).

4. The form should contain sufficient space to allow for recommendations from each and every level or link in the chain of command. This allows leadership to be reinforced down to the lowest level and provides an excellent tool to measure the level of understanding of the UCMJ within a unit.

5. Once the decision has been made that NJP is appropriate, the command legal section should ensure that all witnesses are available, the Unit Punishment Book (UPB) is filled out completely as required by the Legal Admin Manual (LEGADMINMAN), and that the required appendixes from the JAGMAN are attached.

6. This package of documents should be submitted to the first sergeant or sergeant major, as appropriate, for review.

7. The first sergeant or sergeant major will coordinate with the CO and legal officer to set a time and place to conduct the NJP and then notify the accused and any necessary witnesses.

8. Generally, the first sergeant or sergeant major will read and advise the accused of the charges and explain the appropriate rights to the accused prior to the conduct of the NJP.

B. AFTER OFFICE HOURS

1. Ensure blocks 7 to 19 of the UPB are completed as appropriate, in accordance with LEGADMINMAN, chapter 2.

2. Enter appropriate Unit Diary entries.

3. Prepare necessary page 12 entries in accordance with IRAM 4015.

4. Prepare confinement orders, if applicable.

5. Prepare CCU documents, if applicable.

6. Complete restriction orders as required.

7. Prepare summary of proceedings.

8. If appealed, prepare a written endorsement for CO's signature. Forward to higher authority for decision with SRB (if applicable), original UPB, summary of proceedings, and all allied papers.

   a. Make sure to indicate appeal rights and appeal on UPB blocks 13, 14, and 15.

   b. If no response to appeal is received from appeal authority within 5 days of accused's appeal, the restraint punishments must be stayed if accused has requested this. Entry reflecting stay of punishment must be made in block 18.

9. Maintain UPB which will consist of UPB pages (include attached pages -- i.e., witnesses' statements), original appeal, summary transcript of proceedings, and reduction order (if applicable), filed alphabetically in a loose-leaf binder.

[A "UPB" shall be opened at the beginning of each calendar year, retained on board for two years, and will reflect all cases appearing at office hours except those reflecting dismissal, referral to trial by court-martial, administrative corrective action other than NJP, or those forwarded to higher authority for disposition.]

[Those organizations using consolidated administration may maintain a single UPB (e.g., a battalion), but each article 15 jurisdiction should be maintained separately by dividers.]

UNAUTHORIZED ABSENCES / DESERTIONS CHECKLIST

I. NAVY

A. POLICY

The policies and procedures regarding unauthorized absences and desertion of enlisted members are found in MILPERSMAN 3020220, 3430100, 3430150, 3430200, 3430250, 3430300, 3430350, 3640450. Consult these sections for further amplification of the checklist given below.

B. PROCEDURES

The procedures for completing the service record entries can be found in MILPERSMAN sections above and PAYPERSMAN 10381, 90419, 90435.

C. CHECKLIST

1. When a member is reported UA, immediately prepare a page 13 to document inception of UA.

2. When a member has been UA over 24 hours, ensure that the NAVPERS 601-6R is prepared. This will stop the servicemember's pay.

3. If member is absent less than 24 hours, prepare a page 13 to document the termination of absence.

4. If the member is gone 10 days, prepare a letter to the next of kin notifying them of the member's absence; his personal effects should be collected, inventoried, and placed in safekeeping; prepare NAVCOMPT 3060.

5. Upon return of a member gone less than 30 days, complete the NAVPERS 601-6R and decide what type, if any, disciplinary action will be taken.

6. If the member is gone 30 days, he/she is declared a deserter. This may be done earlier if there is an indication the member has no intention to return. The following documents should be prepared and actions taken:

   a. Deserter message

   b. DD Form 553 (Absentee Wanted by the Armed Forces)

   c. Any evidence of desertion should be gathered, such as: witness statements, pending incident complaint reports, restriction orders, any relevant message traffic, and any documentation of other pending disciplinary action

   d. Obtain health, dental and pay records.

   e. Notwithstanding any other provision in the MILPERSMAN is the contrary, DO NOT prefer charges against the accused.

7. If member is gone 180 days, send the following to NMPC:

   a. Service record (including the page 601-6R and restriction orders)

   b. Health record

   c. Dental record

   d. Pay record

8. After 180 days, send the personal effects to Naval Supply Center, Oakland, CA, or Supply Annex, Williamsburg, VA.

9. A deserter file should be retained by command. It should include the following:

   a. Certified copy of the restriction order

   b. Right side of the service record

   c. Copy of Page 601-6R

   d. Performance evaluations

e. Last LES

f. Copy of DD 553

g. Copy of deserter message

h. Any other relevant messages

10. Upon return of a member from UA, prepare page 13 documenting return.

11. Upon return of a member from UA over 24 hours, but less than 10 days, complete page 601-6R -- sending fourth copy to disbursing. This starts member's pay.

12. Upon return of a member from UA over 10 days, but less than 30 days, complete page 601-6R; prepare letter to the next of kin, notifying them of member's return.

13. Upon return of a member from UA over 30 days, complete page 601-6R; prepare letter to the next of kin notifying them of member's return; and prepare return deserter message if not done by an intermediate command.

II. MARINE CORPS

A. REFERENCES

1. MCO P5800.8B, Marine Corps Manual for Legal Administration (LEGADMINMAN), Chapter 5

2. *MCO P1080.35H (PRIM)*

3. MCO P4050.38B, Marine Corps Personal Effects and Baggage Manual

4. MCO P1070.12G, Marine Corps Individual Records and Administration Manual (IRAM)

5. MCO P5512.11A, Uniformed Service Identification and Privilege Card, *DD Form 1173*

6. MCO P11000.17, Real Property Facilities Manual, Vol. X

B. CHECKLIST

1. _____ UA entry (in excess of 24 hours) run on unit diary (b).

2. _____ Page 12 SRB "to UA" entry made (4015 of (d)).

3. _____ Inventory within 24 hours government and personal property of absentee accomplished (c).

4. _____ After 48th hour of absence, CO telephoned NOK (if not in CONUS, only if dependents reside locally (a)).

5. _____ Prior to 10th day of UA, letter mailed to NOK and copy filed on document side of SRB (fig. 5-1, ref(a)).

6. _____ Unit diary entry run declaring a deserter and dropping from roles to desertion on 31st day (b).

7. _____ SRB pages 3, 12, and 23 - completed IAW ref (d).

   a. _____ Chronological record (page 3).

   b. _____ Offenses and punishments (page 12) administratively declaring a deserter and dropping from roles.

   c. _____ Markings page (page 23).

8. _____ DD 553 prepared and distributed IAW para. 5002 of ref (a).

   a. _____ Date published matches that of page 12 entry date (normally 31st day of UA).

   b. _____ If insufficient information, priority message sent MMRB-10.

   c. _____ If incomplete information, permission requested MHL-30.

   d. _____ Original sent to CMC (MHL-30) (Report Symbol MC-5800-01) within seven days of administrative declaration of desertion on page 12.

9. _____ DD 553 distributed properly (para. 5002.2e(4) of ref (a)).

   a. _____ Copy on document side of SRB.

   b. _____ Copy to NOK.

   c. _____ Copy to all known associates.

   d. _____ Copy to each chief of police and county sheriff in area of civilian addressees of DD 553.

   e. _____ Copy to units assigned admin responsibility and appropriate area police (see MCO 5800.10).

10. _____ If deserter has dependents, see para. 5004 of ref (a).

   a. _____ Retrieved dependent ID cards.

   b. _____ If <u>not</u> surrendered, notify local medical facilities and military activities.

   c. _____ A <u>terminated</u> DD 1172 submitted to DEERS (*see* ref (e)).

   d. _____ Dependents directed to vacate quarters (*see* ref (f)).

11. _____ Return of deserter within 91 days.

   a. _____ "From UA" entry made in diary.

   b. _____ Page 12 entry recording date, hour, and circumstances of return to military control (*see* 4015 of ref (d)).

   c. _____ Page 12 SRB entry made removing mark of desertion (not removed if apprehended and/or convicted by civil authorities except as provided in ref (a)).

   d. _____ If mark of desertion removed, notify disbursing office in writing of removal IAW ref (a).

12. _____ If no return by 91st day of absence (*see* ref (a), Chapter 5).

    a. _____ Audit of SRB, pages 3, 12, and 23 completed and entries correct.

OUTLINE FOR PREPARATION OF THE CHARGE SHEET

I. PROCEDURAL ASPECTS

A. General information. The preparation of the charge sheet is a matter for the regulations of the Secretary of a Department; however, certain rules and considerations have been adopted to ensure consistency in the preparation of the charge sheet.

1. Prepared on DD Form 458 AUG 84

2. Copies - Optimum number

-- One accused - prepare at least an original and six copies, to be ultimately distributed as follows:

(1) Original - will be inserted in the original ROT

(2) Copy: Trial counsel

(3) Copy: Defense counsel

(4) Copy: Military judge

(5) Copy: Accused

(6) Copy: File

(7) Copy: Court reporter

NOTE: This is a recommended distribution. Numbers may vary depending upon local practices.

B. Preparation instructions

1. Typing: In typing the charge sheet, you may use either initial CAPS or ALL CAPS. The rule is BE CONSISTENT. Don't use a different type style in one section and another for a different section.

-- EXCEPTION: In the typing of charges and specifications in block 10, use lower case and "Initial" capitalization ONLY.

2. Accused - Show last name, first name, and middle initial

3. Social security number - Verify from enlistment contract

4. Grade or rank - Grade or rank is abbreviated

-- EXAMPLE: GRADE OR RANK = SN, YN3, BM2, PFC, ENS, LT

5. Pay grade - Indicate pay grade by O or E level

-- EXAMPLE: PAY GRADE = E-3, E-4, E-7, O-2, O-4

6. Unit or organization - List organization to which individual is assigned for strength accountability

a. EXAMPLE: Ships = Name of ship and hull number

USS NEVERSAIL (DD 828) - exception to rule

b. EXAMPLE: Shore activities = Name of activity and geographical location

Fleet Training Center
San Diego, California

Fighter Squadron ONE ZERO ONE
Naval Air Station, Oceana
Virginia Beach, Virginia

7. Current service - Verify from enlistment contract(s)

a. Initial date: 1 April 19 ____

b. Term: 3 years, 6 years

8. Pay per month - Verify with disbursing or finance office

a. Basic: Dollar amount = $492.60

b. Sea/foreign duty: Dollar amount = $100.00
(If no sea or foreign duty pay = None)

c. Total: Add it all up and enter dollar amount = $592.60

9. Nature of restraint of accused - Use one of the following terms

a. Restriction

b. Confinement

c. None

10. Date(s) imposed - Show inclusive dates of restraint, including commencement and termination

-- EXAMPLE: 1-2 August 19 ___, 1 May - 7 June 19 ___

If the accused is still in restraint on the date you are preparing the charge sheet, show only date restraint began. If accused is released from restraint status after the charge sheet is typed and before the date of trial, trial counsel will amend the entry or entries as appropriate and initial the same.

NOTE: In regards to 9 and 10, above, if there are changes in the type of restraint or dates imposed, each are shown as separate and distinct periods of time

In accordance with the decision rendered in *United States v. Allen*, 17 M.J. 126 (1984), periods of legal pretrial confinement are given a day-for-day credit against any confinement awarded at trial. Additionally, periods of illegal pretrial confinement or restriction which is considered by the judge to be equal to confinement, then an additional day-for-day credit will be given. (R.C.M. 305k, MCM, 1984.) Confinement by civilian authorities may also be listed, but must be related to, or as a result of, current charges listed on the DD 458.

11. Charges and specifications - Block 10 is utilized for setting forth charges and specifications alleged against the accused

-- Prepared in accordance with Part IV, MCM, 1984

12. Accuser

a. Name of accuser - Last name, first name, middle initial

b. Grade - List grade or rate

-- EXAMPLE: CAPT, ENS, LTJG, Maj, YN2, 1stLt, PN1 (appropriate abbreviation) - May be spelled out if room allows

c. Organization of accuser - Activity of accuser

-- EXAMPLE: Naval Education and Training Center, Newport, RI

VF-101, Naval Air Station, Oceana Virginia Beach, VA

d. Signature of accuser / date - Accuser signs and dates after swearing to charges and specifications

(1) Accuser must sign all copies of the charge sheet in presence of officer who administers oath

(2) Accuser, by signing charge sheet, "prefers" charges

(3) Any person subject to the Code may prefer charges

NOTE: Accuser cannot later be detailed as court reporter for trial of that same accused. *United States v. Moeller*, 8 C.M.A. 270, 24 C.M.R. 85 (1957).

13. Affidavit (Line out information where appropriate)

a. Day, month and year - This entry can be typed or left blank until affidavit is signed, at which time information can be penned in by officer signing affidavit

b. Typed name of officer - Type as person will sign

c. Grade - Include armed force and staff corps designation

-- EXAMPLE: LCDR, JAGC, USN
MAJ, JAGC, USA

d. Organization of officer

-- *See* typing instructions given for the "accuser"

e. Official capacity to administer oath

(1) Only certain officers are authorized to administer oaths in cases of this character - These officers are set forth in:

(a) Article 136(a), UCMJ, which extends this authorization to:

-1- All judge advocates

-2- All summary courts-martial

-3- All adjutants, assistant adjutants, acting and personal adjutants

-4- All CO's of the Navy, Marine Corps, and Coast Guard

-5- All staff judge advocates and legal officers and acting or assistant SJA's and legal officers

-6- All other persons designated by regulations of the armed forces or by statute

(b) Section (b) of article 136 lists other persons who may administer oaths in the performance of their duties

(c) JAGMAN, § 0902 - Navy
AR 27-10 - Army

-- Additional departmental guidance

(2) This officer must not only witness the accuser's signature on the charge sheet, but must also actually administer to the accuser the "oath to charges" set forth in R.C.M. 307, MCM, 1984

-- If the oath is not given, the accused may object to being tried on unsworn charges

C. PAGE 2

1. Informing accused of charges (Line out information where appropriate)

a. Date - Will be the date the accused is formally informed of the charges

b. Typed name of immediate commander

-- Type name of person actually informing accused of charges

c. Grade - *See* example for affidavit

d. Organization of immediate commander

-- Name of unit or organization

-- EXAMPLE: USS NEVERSAIL (DD 828)

Naval Justice School
Newport, Rhode Island

Naval Education and Training Center
Newport, RI

e. Signature

(1) Signature of person actually informing the accused of charges will personally sign original and all copies

(2) R.C.M. 308, MCM, 1984, states that the accused's immediate commander shall cause the accused to be informed of the charges against him/her and the name of the accuser. This is accomplished by the immediate commander personally informing the accused and signing or certifying he has caused this to be done with his signature.

2. Receipt for sworn charges

a. Designation of command or officer exercising SCM jurisdiction

-- Type name of activity or name of officer holding that designation - R.C.M. 403

b. Typed name of officer - Individual who will sign

c. Grade - *See* example for affidavit

d. Official capacity of officer signing - What position does the individual who is signing hold within the command

(1) Adjutant

(2) Judge advocate (just some examples)

(3) Personnel officer

(a) May be the commander (CO) or a subordinate authorized to sign for him/her

(b) When the commander (CO) signs personally, strike out the inapplicable words, "FOR THE," appearing above the signature line. *See* FOOTNOTE 1.

EXAMPLES: FOR THE COMMANDER

FOR THE _____

e. Date / hour

(1) Date of receipt is extremely important. If this date occurs during the running of the two- or three-year statute of limitations, the accused is liable to be tried by court-martial.

(2) If this date occurs after the running of the statute of limitations, the accused is not liable to be tried by court-martial.

(3) Hours normally left blank until receipt of sworn charges has been signed, at which time the "hours" entry is penned in by the officer signing

3. Referral of charges

a. Designation of command of convening authority

-- Type name of activity. For ships, type in UPPER CASE -INCLUDE HULL NUMBER

b. Place

-- Give geographical location of all activities other than ships. For ships, LEAVE BLANK.

c. Date

-- This will be the date that the convening authority refers the charges for court-martial

d. Convened by

-- Type the convening order number and date

-- EXAMPLE: my Special Court-Martial Convening Order 1-CY of 1 January 19CY

e. Subject to the following instructions - The convening authority may have any number of instructions relative to a case being referred to court-martial. In this event, the convening authority would state in this section what instructions or conditions would be applied.

(1) Instructions that the charges against the accused be tried with certain other charges

(2) Capital offenses may be referred as noncapital if the death penalty is not mandatory. When a convening authority has this discretion to refer a capital case as noncapital, the convening authority should be guided by the criteria found at R.C.M. 1004.

(3) Instructions that no bad-conduct discharge be adjudged

(4) Instructions concerning amending orders to the court-martial

NOTE: ANY SPECIAL INSTRUCTIONS MUST BE STATED IN THE REFERRAL

f. By command or order of - Referral shall be by the personal order of the convening authority. In some instances, the convening authority may not be signing the charge sheet. If this should occur (example being that of a person signing as the subordinate to the convening authority), this would be reflected by indicating the signer's authority. R.C.M. 601.

-- If convening authority is signing (WHICH IS USUALLY THE CASE), then this section would be lined out by the means of ////////////

SPECIAL NOTE: If the only officer present in command refers the charges to a summary court-martial and serves as summary court-martial officer under R.C.M. 1302, the referral will be completed with an additional comment:

"ONLY OFFICER PRESENT IN THE COMMAND"

4. Service of charges

a. Date - Date service upon accused(s) is made

b. Typed name of trial counsel - Who is the TC?**

c. Grade or rank of trial counsel

-- EXAMPLE: CPT, JAGC, USA
LT, JAGC, USN
(spell out if room allows)

d. Signature - TC signs name as typed in this block

** If charges are for trial by summary court-martial, this section would reflect that the summary court served the accused. This process would be accomplished by //////// through the words "Trial Counsel" and replacing them with "Summary Court."

-- Trial counsel responsible for serving the accused

(a) Actually give copy of charges to accused

(b) Substitute service upon defense counsel insufficient

(c) Service made immediately after receipt by TC

(d) TC promptly informs DC that service made

(e) Any questions by accused when served should be referred to respective DC

(f) Changes or amendments to charge sheet brought to attention of DC

(g) Any charge sheet amended or substantially changed must be served anew

e. Service on accused "By direction" of the trial counsel. Although the TC is tasked by R.C.M. 602 with service of charges upon the accused, trial counsel may not be able to accomplish this on all occasions. When and if this situation should occur, the steps set forth below are followed.

(1) Service section will reflect all personal information of the trial counsel

(2) Service "By direction of the Trial Counsel" is shown by leaving the section (caused to be) unmarked

f. Rights of the accused relating to service of charges. Article 35, UCMJ, states that, in time of peace, no person may, over objection, be brought to trial - including an Article 39(a) session - before a general court-martial within a period of 5 days after service of charges, or before a special court-martial within a period of 3 days after service of charges.

-- Computing dates

(a) Date of service excluded

(b) Date of trial excluded

(c) Holidays and Sundays included

-- EXAMPLE: Accused is served on Wednesday, awaiting trial by SPCM - must wait Thursday, Friday, and Saturday before compelling trial. Trial could not be compelled before Sunday - as practical matter, not before Monday.

(d) Can be waived by accused

-1- Voluntary

-2- Agrees to proceed with trial earlier

II. CHARGES AND SPECIFICATIONS FORMAT
(Ref: R.C.M. 307, MCM, 1984)

A. How to allege offenses - The formats of charges and specifications contained in Part IV, MCM, 1984, are used to allege violations of the Code. Utilizing this format guide, charges and specifications are typed on the charge sheet (DD Form 458) in block 10.

1. Purpose of pleading - The term "pleading" refers to the drafting of a formal written accusation against an accused

-- Purpose

(1) Formally notify accused of accusations

(2) Provide specific information about alleged offense

(3) Allow preparation of defense

2. The charge - The charge merely cites an article of the Code, which the accused allegedly violated

3. The specification - States specifically what the individual did or caused to violate the Code. As a general rule, the specification must allege all the elements of the offense. The specification also contains jurisdictional allegations, i.e., the facts which show that the court would have jurisdiction over the accused and the offense.

4. Numbering charges - If there is only one charge, it is not numbered. Where there is more than one charge, each charge is numbered in order by Roman numerals.

-- EXAMPLE: Charge I: Violation of the UCMJ, Article 86

Charge II: .....

5. Additional charges - Charges that are preferred after other charges have been preferred are called "Additional Charges," and are also numbered by Roman numerals

-- EXAMPLE: Additional Charge: Violation of the UCMJ, ...

Additional Charge I: .....

Additional Charge II: .....

NOTE: If there is only one charge or additional charge -- not assigned a number

-- EXAMPLE: Charge: Violation of the UCMJ, ...

EXAMPLE: Additional Charge: Violation of the UCMJ, ...

6. Numbering specifications - Same rule applies here as for numbering of charges, with exception of the numbers used. In numbering of specifications, they are numbered in order using Arabic numerals.

-- EXAMPLE: Specification 1: In that .....

Specification 2: In that .....

When used in conjunction with an Additional Charge, the same format applies. NEVER!!!

Additional Specification

NOTE: If there is only one specification under a charge, it is not assigned a number

-- EXAMPLE: Specification: In that .....

7. Formatting - The specification is typed using the block form in what is called "margin-to-margin" fashion. After typing your charge line, drop down two spaces and begin typing directly under the word "Charge":

-- EXAMPLE: Charge: Violation of the UCMJ, Article .....

Specification: In that .....
.....
.....

NOTE: Before attempting to draft a specification, always refer to the pertinent provisions of Part IV, MCM, concerning elements of proof for various offenses, and follow the sample specification set out for each offense in Part IV, MCM

8. Other matters of style and format

a. No hull numbers for ships - type using initial CAPS

b. No zip codes

c. No social security number

d. Commonly used and understood abbreviations may be used, particularly abbreviations for ranks, grades, units and organizations, components, and geographic or political entities -- such as names of states or countries

9. Name and description of the accused

a. Name - State the accused's full name, middle initial, last name. If the accused is known by more than one name, the acknowledged name of accused in the service record will be used. The true name of the accused will be listed first, followed by known aliases.

-- EXAMPLE: Seaman John P. Smith, U.S. Navy, alias Lieutenant Robert R. Brown, U.S. Navy

b. Military association - State the accused's rank or grade, armed force, and unit or organization

-- EXAMPLE: In that Seaman John P. Jones, U.S. Navy, USS NEVERSAIL ....

-- If the rank or grade of the accused has changed since the date of alleged offense, and this is pertinent to the offense charged, identify accused by present rank or grade held followed by the former rank or grade

-- EXAMPLE: In that Seaman John P. Jones, U.S. Navy, then Seaman Apprentice John P. Jones ....

c. Personal jurisdiction

-- Military member on active duty - The words "on active duty" added immediately after the description of the accused

-- EXAMPLE: In that Seaman John P. Jones, U.S. Navy, USS NEVERSAIL, on active duty, ...

NOTE: "on active duty" or other term such as "on active duty for training" indicates the basis for jurisdiction of persons who are subject to the Code under Articles 2(a) and (3) of the UCMJ

d. Date and time of offense - In general, the date of the commission of the offense should be stated in the specification with sufficient precision to identify the offense and allow accused to understand act or omission to defend against

(1) Use of "on or about" - In alleging the date of an offense, it is proper to allege it as "on or about" a specified date

(2) Hour - Exact hour not normally alleged except in certain absence offenses. When the exact time is alleged, the 24-hour clock is used. When using the hour "at or about" is proper.

-- EXAMPLE: In that Seaman John P. Jones, U.S. Navy, USS NEVERSAIL, on active duty, did, on or about 15 June 19CY .....

In that Seaman John P. Jones, U.S. Navy, USS NEVERSAIL, on active duty, did, at or about 0800 hours, ...

e. Extended periods - When the act specified extend(s) over a period of time, it is proper to allege the specification in that fashion

-- EXAMPLE: In that Seaman John P. Jones, U.S. Navy, USS NEVERSAIL, on active duty, did, from about 15 June 19CY to about 4 November 19CY .....

In that Seaman John P. Jones, U.S. Navy, USS NEVERSAIL, on active duty, did, between 15 June 19CY and 4 November 19CY .....

f. Place of offense - Place of the commission of the charge is stated in the specification with sufficient precision to identify the offense and allow accused to understand particular act or omission alleged. Unless required to state as offense it is not necessary to identify exactly where the offense took place, a general description will suffice.

-- EXAMPLE: In that Seaman John P. Jones, U.S. Navy, USS NEVERSAIL, on active duty, did, on or about _____, on board Naval Education and Training Center, Newport, RI, ...

EXAMPLE WITH MORE SPECIFICITY:

In that Seaman John P. Jones, U.S. Navy, USS NEVERSAIL, on active duty, did, on or about _____, at Jerry's Pub, Middletown, RI, ...

g. Elements of the offense - The specification must include a simple, concise statement of the basic facts. Elements must be expressed either expressly or by necessary implication. If a specific intent, knowledge or state of mind is an element of the offense, it must be alleged.

-- EXAMPLE: "and then known by the said"

"with intent to deceive"

"Having knowledge of a lawful order"

10. Words indicating criminality - ("Words of Art") If an alleged act is not itself an offense, but is made an offense by statute, regulation or custom having the effect of law, then words indicating criminality such as "wrongfully," "unlawfully," or "without authority" (depending on the nature of the offense) are used to describe the accused's actions

a. That the wearing of a uniform was not only improper, but it was unlawful

That the accused carrying a concealed weapon was unlawful

That the accused's failure to pay a just debt was dishonorable

That the accused wrongfully and dishonorably copied the exam of another

That the absence was without authority from anyone competent to give him leave or liberty

b. On the other hand, just by adding these words does not make an offense

That the accused did wrongfully and unlawfully breathe in the presence of Captain Crunch .....

c. Some crimes have no need for words of art

Steal - Automatically implies that stealing is WRONGFUL, UNLAWFUL, DISHONORABLE, OR WITHOUT AUTHORITY

d. Some offenses have to show specific intent

Desertion - Must show intent to remain away permanently

Articles 89, 90, and 91 - Must show knowledge

e. Orders

(1) General orders

-- Must clearly identify specific order or regulation violated, by paragraph or Article

(2) Other orders

-- If alleging other lawful written order, the same rule as for general order applies. If alleging other lawful oral order, verbatim followed by: "or words to that effect."

(3) Oral statements

-- Verbatim followed by: "or words to that effect"

-- EXAMPLE: by saying to him, "If brains were *gunpowder, you couldn't blow your* nose" or words to that effect

11. Value - When the value of property or other amount determines the maximum punishment which may be adjudged for an offense, the value or amount should be alleged. See Table of Maximum Punishments, Appendix 12, MCM, 1984. You must allege at least "some value."

-- EXAMPLE: Of a value not less than

Of a value of about

Of some value

12. Property - In describing property, generic terms should be used -- such as "a watch" or "a knife" -- unless more specificity is necessary to state an offense

13. Documents - When documents other than general orders are alleged (e.g., bad checks), the document may be copied or reproduced for inclusion in the specification

14. Aggravating factors - Facts which are not essential elements, but which indicate the offense to be more serious than usual, enabling the court to increase the maximum punishment

-- EXAMPLE: Desertion: Termination by apprehension

Discharging a firearm in public

Endangering human life

15. A final word about style - Never be intimidated by "saids" and "to wits." The purpose of pleading is to draft a legally sufficient and understandable accusation that will inform the accused of the charges and specifications against him/her, enable the accused to prepare a defense, and protect the accused against double jeopardy. It is the substance of the pleading, not its literary style, that determines its quality.

ATTENTION TO DETAIL

PROPER PLANNING AND COORDINATION

COMMON SENSE

LEGAL / DISCIPLINE OFFICER
SUMMARY COURT-MARTIAL CHECKLIST

A. PRETRIAL PROCEDURES

1. Check the service record out from personnel or PSD.

2. Prepare the DD Form 458 and the convening order for the CO's signature.

3. You will need 3 copies of the charge sheet and 4 copies of the convening order. Distribute as follows: one of each for the defendant, one of each for the SCM officer, one of each for command files. The fourth convening order should be certified as a true copy and attached to the original charge sheet. Note the original convening order is retained in the command files for use in future courts-martial.

4. Inform the defendant of his rights at the SCM, his right to refuse SCM, and his right to consult with counsel.

5. If defendant consults with an attorney, be sure he/she has made an election to accept a SCM. If defendant has elected a SCM and desires to waive counsel at the court, have defendant sign a Waiver of Rights to Counsel form. This allows the results to be admissible as a conviction at a later court-martial for purposes of the escalator clause.

6. Obtain a list of witnesses desired by defendant and arrange for their attendance at the trial.

7. Inform the member's division officer that the defendant could receive confinement and that a full sea bag is required. This will save time after trial if he does in fact go to the brig.

8. Contact SCM officer and inform him generally of duties.

B. POST-TRIAL PROCEDURES

1. If confinement has been awarded, prepare the confinement orders and alert personnel that TEMADD orders will be needed.

2. If member is to be confined, copy pages 2, 4, 5, 9, 10, and any pages 6, 7, and 13 relating to prior NJP's. Also copy any evaluations or commendations. This information may be needed to prepare the convening authority's action and the service record is sent to the brig with the prisoner.

3. Ensure that the SCM officer had completed blocks 1-11 of the Record of Trial by Summary Court-Martial (DD Form 2329) and signed block 12.

4. Notify the defendant that he/she has seven days to submit matters to the convening authority for his/her consideration in taking the action on the record. The defendant may waive his right to submit matters to the convening authority. If this is done, the waiver must be in writing and should be attached to the record of trial.

5. After the seven days have elapsed, consult with your commanding officer to determine what action is to be taken on the record of trial; then prepare the CA's action accordingly. This is done by completing block 13 of the Record of Trial by Summary Court-Martial. If the accused has waived the right to submit matters, the convening authority need not wait seven days prior to taking the action on the record. Although not statutorily required, it is recommended that this waiver be noted in the convening authority's action.

6. Assemble the record of trial. It should include a certified copy of the convening order, the original charge sheet, copies of any documentary evidence used, any summarizations of witness testimony (if any -- this is no longer required by the MCM, 1984, but may be desired or required by the SCM procedures established by the OEGCMJ in your chain of command), and the Record of Trial by Summary Court-Martial (DD Form 2329). (Check also chain of command directives for local requirements for content of the record of trial.)

7. Complete the processing times report and attach it to the record of trial. [See OPNAVINST 5810.4 and JAGINST 5810.1, encl (6).]

8. Make three copies of this package and distribute as follows: one to the accused; one to the accused's service record; and one for the command's files.

9. Forward the original to the appropriate judge advocate for review (this is probably either your area coordinator or the GCM authority).

10. Ensure that appropriate service record page entries are prepared to record the CA's action. This should include a page 7 (if there is confinement, a reduction, or a forfeiture) and other entries on page 4 and 9 as needed.

11. Upon completion of any adjudged confinement, ensure that a page 7 is prepared to indicate the release and appropriate lost time.

SPECIAL COURT-MARTIAL CHECKLIST

I. NAVY

A. PRETRIAL PROCEDURES

1. Check the service record out from personnel or PSD.

2. Copy the enlistment contract; pages 1, 2, 4, 5, 7, 9; all page 13's relating to NJP or disciplinary matters; and enlisted evaluations. These will be needed for preparation of CA's action if accused is convicted.

3. Establish liaison with the local NLSO regarding the pending charges. Follow their desired procedure regarding the forwarding of the charge sheet to their office.

4. Prepare the charge sheet, DD Form 458.

5. Prepare list of possible members from which commanding officer may choose the panel. If possible, avoid using members you know should be disqualified, such as accused's division officer or others from his same department. Have the commanding officer select the panel and prepare the convening order.

6. After the charges have been preferred by the legal clerk, have the commanding officer sign both the charge sheet and convening order.

7. Make sufficient copies of the charges and convening order. Check with the NLSO, but you will normally need the original and five copies of the charge sheet and six copies of the convening order. They will be distributed as follows: original charge sheet plus one copy to the trial counsel; one to defense counsel; one to military judge; one to the command files; and one to be served on the accused. Note, the original convening order remains in the command files; therefore, the copy for the record of trial should be a certified copy.

8. Serve the accused with the charges and note the service on the original charge sheet prior to forwarding the others to the NLSO.

9. Forward appropriate copies of the charge sheet and convening order to the NLSO. Include the service record and copies of the investigation.

10. Make all arrangements necessary for the accused to see his lawyer and for the witnesses to be interviewed by counsel.

11. After being notified of the time and date of the trial, inform all witnesses and members, if necessary.

12. Arrange for a bailiff to escort the accused to the trial and to take custody after trial. Bailiff should be indoctrinated by NLSO staff for courtroom duties and by brig staff for any confinement, etc.

13. If confinement is expected, ensure the accused has a full sea bag by the date of the trial. His division officer should do this.

14. If confinement is expected, prepare a confinement order and assemble the pay record, health record, and dental record. Have TEMADD orders prepared prior to trial. If the accused receives more than 30 days confinement, or a BCD and any confinement, these must be changed to TEMDU orders later.

B. POST-TRIAL MATTERS

1. If accused received more than 30 days confinement, or a BCD and any confinement, prepare TEMDU orders and deliver to the brig. These will cancel the previously issued TEMADD.

2. After receipt of a copy of the record of trial, ensure that one copy is served on the accused. Note: This may be done by the NLSO, so check their normal procedure.

* 3. Prepare the legal officer's recommendation in accordance with R.C.M. 1106.

* 4. Serve a copy of the recommendation on the defense counsel.

* 5. Prior to preparing the convening authority's action, ensure that the time limits for the accused's response [R.C.M. 1105(c)] and the defense counsel's response have elapsed [R.C.M. 1106(f)(5)].

* 6. After receiving all responses in accordance with R.C.M. 1105 and 1106, forward the record of trial, your recommendation, and the responses to the commanding office for review.

* 7. Ascertain what action the commanding officer wants to take on the record of trial and prepare the convening au'hority's action accordingly.

* 8. After the action is signed by the commanding officer, attach it along with all deferment requests, requests for clemency, or other matters submitted by the accused or counsel to the record of trial. (*See* JAGMAN, § 0153.)

* 9. Prepare the promulgating order and make appropriate copies for distribution, including copies for the record. (*See* JAGMAN, § 0155 regarding distribution of the promulgating order.) Advocate NOTE: In some chains of command, a staff judge advocate may be available to perform steps 5–9 in whole or in part.

* 10. Complete the necessary times sheet from OPNAVINST 5510.4 and the back of the cover of the original record of trial. Forward the record per JAGMAN, § 0153.

11. If the service record is held by the command, prepare the appropriate service record entries. These will normally be pages 4, 7, 9, and 13.

12. Ensure that the command has retained a complete copy of the record of trial, convening authority's action, and the promulgating order.

13. Upon completion of any adjudged confinement, prepare a page 7 to indicate lost time.

14. In non-BCD cases, upon receipt of the judge advocate review, make an appropriate page 13 entry.

* NOTE: These matters may be completed by SJA assigned to OEGCMJ in your chain of command or NLSO command services office. Check Organization Legal Affairs Guide/Manual.

II. MARINE CORPS

A. PRETRIAL PROCEDURES

1. Assemble service record book, preliminary inquiry (or NIS investigation).

2. Audit service record book to assure it is up-to-date and contains no errors.

3. Complete request for legal services. Be sure to list witnesses and any who are pending transfer, discharge, or who will be unavailable within the near future. Also list five (5) approved court-martial officer members by full name, rank, unit, and phone number. Also request telephone notification to the LO when a specific trial counsel is assigned.

4. Make copies of request for legal services and allied papers and forward to Law Center/LSSC. (Be certain to have legal clerk who receives it sign your log as receiving the service record book.)

5. Upon receipt of the convening order and charge sheet upon which charges have been preferred, check to see that first page is completed and signed.

6. Have adjutant/personnel officer receipt for sworn charges and cause unit commander or his designee to personally notify the accused of charges and complete the notification block.

7. Have convening authority sign convening order first; then complete referral block.

8. Return charge sheet and convening order to Law Center/LSSC for service by trial counsel.

9. After reasonable period of time, call trial counsel for a trial date and notify prospective members that, if utilized, they will be needed during a specified time frame.

10. Assign a bailiff (senior to accused) and have him/her read the bailiff's handbook to learn his/her duties. Advise trial counsel who has been selected.

11. Prepare applicable parts of page 13, SRB.

12. If confinement is expected, prepare confinement orders, assemble health and dental records, and secure physical immediately before trial (or notify medical people of need).

B. POST-TRIAL MATTERS

1. Ensure confinement order is completed, any deferral request is acted on, accused has proper uniforms, and escort to brig.

2. Upon receipt of copy of record of trial, assure accused is served a copy.

3. Ensure convening authority does not act on the record until all responses under R.C.M. 1105 and 1106 are received for the CA's action.

4. After the convening authority has acted, attach action to the record of trial and return to Law Center/LSSC for review. Ensure command has a complete copy.

5. Complete appropriate section of page 13, SRB, and appropriate SRB pages.

6. Upon receipt of promulgating order, insert in the record of trial.

7. Upon completion of confinement, enter time lost on page 5, SRB.

PREPARATION OF CONFINEMENT ORDERS

Most brigs have their own instructions regarding any local requirements such as minimum sea bag needs, visiting hours, and release times. Obtain a copy of the local instruction for further guidance. See also the Navy Corrections Manual, SECNAVINST 1640.9 (series) and OPNAVINST 1640.6 (series) for all brig procedures.

A. PRETRIAL CONFINEES

1. Prepare a confinement order, NAVPERS 1640/4. You will normally need an original and three copies.

2. Check local requirements to determine whether to send dental, medical, and pay records to brig.

3. Have the accused's division officer assist the accused in obtaining the sea bag requirements for the brig.

4. Check local requirements to determine whether brig requires TEMADD orders. Do not use TEMDU orders for pretrial confinees.

5. Have member escorted to the medical department or emergency room for the confinement physical. Note: The doctor must sign the confinement order.

6. Upon confinement, the accused must be informed of the nature of the offenses for which he/she is being held. This should be acknowledged by the accused on the confinement order. The accused must also be informed of: (1) The right to remain silent; (2) any statement made may be used against him/her; (3) the right to retain civilian counsel at no expense to the United States and the right to request assignment of military counsel; and (4) the procedures by which pretrial confinement will be reviewed. This may be done by brig personnel or the person escorting the member to the brig. Check with the brig to see which method is preferred.

7. After the member is confined, the commanding officer must forward a pretrial confinement memo to the initial review officer. This must be done within 72 hours. (See R.C.M. 305.)

8. The command should be prepared to send a knowledgeable representative to the hearing held by the initial review officer. This representative should be cognizant of: (1) The circumstances regarding the charges; (2) the accused's past history for reliability; and (3) unauthorized absences.

9. After the hearing by the initial review officer, the command will receive a memo either allowing the confinement to continue or ordering the accused's release. If the member is ordered released, the command must comply. A lesser form of restraint may be imposed, but reconfinement may not occur without further misconduct or new evidence which would impact on the accused's reliability. (*See* R.C.M. 305.)

10. If pretrial confinement is to exceed 30 days, permission for continued confinement must be obtained from the cognizant GCM authority. Ensure that permission is received prior to the expiration of the 30th day, and request must be reviewed every 30 days.

B. POST-TRIAL CONFINEES

1. A confinement order (with three copies) should be completed prior to trial. The charges of which convicted and the sentence adjudged should be left for the trial counsel to complete. The order should be presigned at the command, or permission should be given to the trial counsel to sign "by direction." (Note: Some NLSO's do not want a trial counsel to sign the orders on their own authority as commissioned officers and, therefore, prefer the "by direction" authority be granted.)

2. The medical, dental, pay, and service records must be sent to the brig. The NLSO will have the service record, but the command should collect the others and hold them until the end of the trial. If confinement is less than 30 days, the pay record will not be needed; but you should obtain it just in case more lengthy confinement is adjudged.

3. Prepare 30-day TEMADD orders for the accused. Give these to the bailiff also. If confinement is greater than 30 days, or BCD/DD and any confinement, TEMDU orders will be needed. To save time after trial, however, the TEMADD orders will suffice initially and they can be canceled by the TEMDU orders the next day after trial.

4. A NAVPERS 3067 will be needed to obtain the member's pay record. If confinement is less than 30 days, the pay record may not be needed.

5. Note: If your command is a deploying unit and the member receives more than 30 days, you may not have to take the member back after confinement. Check with your personnel/administrative officer.

C. CONFINEMENT ON BREAD AND WATER / DIMINISHED RATIONS

1. Prepare an original and three copies of the confinement order.

2. The service record, medical, and dental records should accompany the accused (check local requirements).

3. Have division officer assist member in obtaining sea bag requirements.

4. Have MAA's take confinement orders, records, sea bag, and member to medical facility for confinement physical.

5. The doctor must find the accused fit for confinement on bread and water, not just confinement. OPNAVINST 1640.6A requires the following language to be used on the medical certificate: "I certify that from an examination of _____, and the place where he/she is to be confined, I am of the opinion that the execution of the foregoing sentence to confinement on (bread and water) (diminished rations) will (not) produce serious injury to his/her health."

ARTICLE 32 INVESTIGATION CHECKLIST

POLICIES AND GUIDANCE. *See* R.C.M. 405, 406; Arts. 32-34, UCMJ.

A. Obtain service record from personnel or PSD.

B. Establish liaison with local NLSO regarding pending charges and obtain name of article 32 investigating officer.

C. Draft charges on DD Form 458. Complete charge sheet through block IV only; do not refer charges.

D. Prepare the appointing order for the article 32 investigating officer.

E. Make sufficient copies of charge sheet and appointing order for distribution to all necessary parties and one copy for the command files. The original appointing order will be attached to the investigation; it is not kept in the command files.

F. Forward the charge sheet, appointing order (and the copies of each), plus the service record and any investigative reports to the NLSO.

G. After receipt of the completed article 32 investigation and the investigating officer's report, forward to your commanding officer for a determination as to disposition.

H. If a general court-martial is desired, forward service record, the investigation, and investigating officer's report to the GCM authority requesting the appropriate action.

I. If a lesser forum is desired, handle according to procedures set out elsewhere in this book.

LEGAL OFFICER RELIEVING CHECKLIST

A. GENERALLY. One of the best sources for a checklist covering your particular office is the administrative inspection checklist. Your GCM SJA should have a copy. It will be the checklist that he uses when inspecting your office during a regularly scheduled admin inspection. It can be quite helpful in determining how "healthy" the office is.

The following checklist is designed to be used in conjunction with your admin inspection checklist and not as a substitute.

____ 1. Who is in the command's administrative chain of command? Is the operational chain of command the same? Who is the general court-martial convening authority (GCMCA) for the command?

____ 2. Is there a force legal affairs manual?

____ 3. Are there local supplements to the MCM, *JAG Manual*, or Navy Regs?

____ 4. Where does the legal officer fit into the staff organizational chart? Through whom do you report to the XO and CO on military justice matters? Have you reviewed chapter 3 of the SORM (OPNAVINST 3120.32A)?

____ 5. What are the position descriptions (PD's) for the civilian employees?

____ 6. What is the military manpower authcrization for the office?

____ 7. When is the next set of civilian personnel evaluations done?

____ 8. When are military personnel evaluations done?

____ 9. Is there a written SOP for the legal office? When was the last revision?

____ 10. Does the legal officer have "by direction" signature authority and to what kind of correspondence is that authority limited?

____ 11. Who is responsible for the legal office library? Do you have all of the current and updated materials (e.g., Manual for Courts-Martial, Manual of the Judge Advocate General, MILPERSMAN, PAYPERSMAN, and all other relevant command directives, instructions, general orders, etc.)?

____ 12. Is there a "tickler" system for recurring reports (e.g., FOIA, Privacy Act, court-martial reports, financial disclosure DD-1555, local and type commander reports, etc.)?

____ 13. Does your office provide powers of attorney and notary services?

____ 14. What Reserve units train at your command?

____ 15. Who is assigned responsibility for claims processed through your office?

____ 16. Who maintains the UPB? How is the UPB maintained?

____ 17. When was the last training conducted for summary court-martial officers? Is there an SCM trial guide? Standards of Conduct?

____ 18. Are CNO court-martial processing goals being met?

____ 19. Are enlisted administrative separations being processed within COMNAVMILPERSCOM time limits?

____ 20. What is the procedure for delivery of personnel to civilian authorities and service of process on the command?

____ 21. What procedures exist for processing indebtedness, nonsupport, paternity complaints?

____ 22. What procedures exist to ensure that incidents involving potential claims, LOD/Misconduct determinations or otherwise requiring JAGMAN investigations are brought to your attention?

____ 23. How are NJP and JAGMAN investigating officers and admin board and court-martial members selected? Are there handbooks/guides for each?

____ 24. What procedures exist to ensure that IO's complete JAGMAN investigations in a timely manner? How are errors in the reports corrected?

____ 25. Who maintains service records for the command? Who prepares service record entries (UA, post-NJP, post-trial, post-confinement, civilian conviction, time lost due to injury not in the line of duty, etc.)?

____ 26. Who is responsible for preparing declarations of desertion and related paperwork (10-day letters, inventorying personal effects, etc.)?

____ 27. What procedures exist for obtaining medical services (psychiatric evals, discharge physicals, drug and alcohol evals, etc.)?

____ 28. Are required/useful forms available and current (NJP rights, Privacy Act statements, delivery agreements, restriction/extra-duty orders, confinement orders, injury report forms, etc.)?

____ 29. Is an SJA available to provide SJA recommendations or other post-trial processing in BCD cases?

____ 30. Are command instructions in the legal area current and accurate?

____ 31. Has authority to award EMI been delegated by the commanding officer?

____ 32. What procedures exist to track pending NJP, JAGMAN investigations, courts-martial, admin discharges, NIS investigations?

____ 33. How often is NJP conducted? Who notifies the accused and witnesses? Is formal XOI conducted?

____ 34. What procedures exist to ensure that command visits are made to personnel in confinement or correctional custody?

____ 35. What local requirements/procedures exist for confinement at the brig? Confinement of females?

____ 36. What procedures are in effect at the local NLSO for screening courts-martial? For obtaining other legal services -- for the command or individuals?

____ 37. Who administers the command urinalysis program? Are random sample urinalyses conducted, and how are the participants chosen?

____ 38. Has information on Standards of Conduct and Navy hotline been disseminated?

____ 39. Who is the command Freedom of Information Act/Privacy Act coordinator? Have personnel who may handle FOIA requests received training?

B. LEGAL ADMINISTRATION. Incorporate those matters noted in the Legal Administration Outline (which follows) into the relieving process. In this way, you will better familiarize yourself with the actual operation of the legal office.

LEGAL ADMINISTRATION OUTLINE

I. GENERAL MANAGEMENT

A. It is essential to maintain cooperative relationships with CO/XO, division officers, personnel office, disbursing office, and MAA's. This is not so much camaraderie as a working cooperation for keeping each other informed and ensuring service record entries are made, pay stops and starts as appropriate, division officers have input to the discipline process, witnesses are available as necessary, performance evaluations are prepared on time, an accused has necessary uniforms, and evidence is handled properly.

B. Must keep well organized, pay attention to details, maintain good files, and stay current

C. Need good subordinates (may seek assistance from NLSO/Law Center for training subordinates)

D. Military justice should be firm but fair

E. Communicate with lawyers

1. Find out time and documentation preferred for *Booker* and ADSEP advice

2. Consult frequently with TC

3. Maintain contacts with legal assistance office

F. Library must be current

1. *Manual for Courts-Martial, 1984*, *JAG Manual*, PAYPERSMAN MILPERSMAN, applicable instructions, notices, messages

2. Applicable force regulations/instructions (e.g., Sixth Fleet Legal Manual - get it before you deploy to Mediterranean)

3. Applicable local instructions (e.g., evidence handling, search authorization, urinalysis, desertion)

4. Make sure admin office has you on routing for all charges and updates

G. Keep adequate supply of blank forms (e.g., charge sheets, confinement orders, report chits, page 6's, page 7's, consent forms, rights warnings, claims forms) – especially before deployment

H. CCU/brig list must be current at all times

1. This can also be used as your reminder for letters to IRO and requests to retain prisoners in PTC for more than thirty days

2. Send a weekly list to department heads for CCU/brig visits

I. Status lists (pending courts-martial, discharges, *JAG Manual* investigations, and claims)

J. Tickler system for periodic reports (e.g., monthly post-trial review status, annual Privacy Act report, triennial FOIA report, disciplinary statistics report)

K. Admiralty matters (*JAG Manual*, chap. XII). Shipboard (non-Government employee) civilian injuries must be investigated and reported to OJAG.

L. Overseas

1. Foreign criminal jurisdiction

2. Foreign claims (*JAG Manual*, chap. VIII)

3. Liberty ports

4. Liberty risk program

5. Custom declarations

M. Indebtedness complaints - MILPERSMAN 6210140, Ch. 7 of LEGADMINMAN

N. Nonsupport complaints - MILPERSMAN 6210120, Ch. 8 of LEGADMINMAN

II. DESERTION (example of shipboard procedure)

A. 24 hours

1. Obtain service record

2. Start page 6

B. Ten days

1. Memo reminding division to inventory personal effects and send you copy of inventory receipted by supply department or memo from division officer specifically stating that the deserter left no personal effects aboard

2. Letter to next-of-kin

C. Thirty days

1. Deserter message

2. Mail DD Form 553

3. Obtain health, dental, and pay records

4. Collect evidence (e.g., witness statements, pending ICR's and other documentation of pending disciplinary matters, restriction order, relevant message traffic)

5. Prepare charge sheet. Charge absence as a violation of Art. 85, UCMJ. Prefer and receive charges.

6. Copy anything important (e.g., charge sheet (certify true), right side of service record, page 6, performance evaluations, last LES, restriction order (certify true), relevant messages)

D. 180 days

1. Service, health, dental, and pay records to NMPC

2. Original page 6 OCR, original charge sheet, original restriction order are sent with service record

3. Retain deserter file onboard

E. Return of deserter

1. Returner deserter message. Include Finance Center as addressee, with specific request for outstanding pay and leave balances.

2. Keep personnel office, disbursing office, and department head informed

3. Convert deserter file to court-martial case file

F. Cross-reference outstanding deserter list and alpha roster with EDVR

III. MAST / OFFICE HOURS

A. Maintain log book tracking each report chit (i.e., report initiated, sent to division (for investigation and completion of rights form, have someone in division initial receipt in log book), return to legal (dismissed, EMI, or XO screening), sent to XO (dismissed, XOI, to CO), return to legal (Booker if shore command), mast/office hours (dismissed, NJP))

B. Coordinate with division and with MAA's to ensure witnesses and division representative will be present

C. Have CO record NJP and sign

D. Post mast/office hours

1. Post-mast yeoman standing by with appellate rights form
2. Know in advance who may need page 13 warning/counseling
3. Service record entries should be made without delay
4. Be prepared for confinement at CCU

E. Maintain UPB

1. Original report chit with NJP signed by CO
2. Record of mast/office hours proceeding
3. All documents considered by CO
4. Original, signed and dated, rights warning statements
5. Copies of service record entries
6. Copies of appeals, endorsements, and responses (originals in NJP appeal correspondence file)

IV. COURTS-MARTIAL

A. Convening orders, drafting charges, service record review

B. Status list

C. Case file

1. Copy right side of service record and performance evaluations

2. ICR's, NIS reports, miscellaneous writings (such as letter from Mom or from accused while UA), relevant messages, memo to division officer, etc.

3. Chronology recording when events occurred, such as delivery to NLSO, DC called about sanity issue, you called finance center, NMPC, or civilian police (with whom you spoke and what was said)

D. Work closely with TC

1. Serve accused when he is aboard

2. Supply sufficient copies of charge sheet, etc.

3. Ensure that service record entries are accurate

4. Make DC work through TC

E. Accused works for command, not for DC

1. Use check-in/check-out chits for visits to DC, and retain them in case file

2. Conversely, work with division officer and disbursing office to ensure that command fulfills its responsibilities (e.g., accused is paid if so entitled, personal effects returned, brig visits, accused's family has POC)

F. Work with division officer

1. Form memo that accused is in brig, or may be going to brig, or may be transferred after trial; that have to get sea bag in order (onboard, not off-base); that will need transfer performance evaluation reflecting SPCM conviction (to be completed after trial, of course)

2. Keep division informed of changes in trial date and results of trial

3. Keep witnesses informed of when needed (work with TC)

G. If accused still attached to command when CA action taken, ensure service record entries are made (including page 13 warning/ counseling, if appropriate). If not, ensure promulgating order forwarded to accused's new command.

H. Trial team at sea

1. Message NLSO to get trial teams. Follow format in applicable legal manual, especially noting companion cases and prior attorney-client relationships.

2. Make special efforts to accommodate attorneys

a. For each case, prepare case file folders marked TC, DC, or MJ, which include the charge sheet and convening order. For counsel, include lists of witnesses, LPO, LCPO, division officer, and their phone numbers. TC's folder should include all applicable reports with copies he may provide to DC.

b. Provide temporary work space, a private space (stateroom) where DC may interview clients, and a space for courts-martial (wardroom)

3. Coordinate trial team visit with battle group JA, if possible

4. Ask attorneys to give legal assistance, ADSEP advice, Booker advice for SCM's (if they have time)

I. Notes on SCM's

1. Use good officers and do the legwork yourself, so that busy officers will be more cooperative

2. Provide a copy of the trial guide with plastic covers and a grease pen

3. Maintain separate case files as with other courts-martial

4. Ensure that service record entries are made, including page 13 *Booker* waivers and page 13 counseling/warnings, if appropriate

5. Inform division officer of trial results

V. SERVICE RECORD ACCOUNTABILITY

A. There should be a single service record monitor in your office who should be kept informed of all service records entering or leaving the office. He can prepare an update list daily and should inventory the service records in the office regularly.

B. No service record should leave your office without a record transmittal sheet dated and receipted by the transmittee (disbursing, admin, personnel, division, NLSO, registered mail clerk, etc.) and retained by your service record monitor

MILITARY JUSTICE STUDY GUIDE

SECTION FIVE

GLOSSARY OF WORDS AND PHRASES

The following words and phrases are those most frequently encountered in Military Justice which have special connotations in Military Law. This list is by no means complete and is designed solely as a ready reference for the meaning of certain words and phrases. Where it has been necessary to explain a word or phrase in the language of or in relation to a rule of law, no attempt has been made to set forth a definitive or comprehensive statement of such rule of law.

ABANDONED PROPERTY - property to which the owner has relinquished all right, title, claim, and possession with intention of not reclaiming it or resuming ownership, possession, or enjoyment.

ABET - to intentionally encourage or assist another in the commission of a crime.

ACCESSORY AFTER THE FACT - one who, knowing that an offense punishable by the UCMJ has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment.

ACCESSORY BEFORE THE FACT - one who counsels, commands, procures, or causes another to commit an offense -- whether present or absent at the commission of the offense.

ACCUSED - one who is charged with an offense under the UCMJ.

ACCUSER - any person who signs and swears to charges; any person who directs that charges nominally be signed and sworn to by another; and any person who has an interest other than an official interest in the prosecution of the accused.

ACTIVE DUTY - the status of being in the active Federal service of any of the Armed Forces under a competent appointment or enlistment or pursuant to a competent muster, order, call, or induction.

ACTUAL KNOWLEDGE - a state wherein a person in fact knows of the existence of an order, regulation, fact, etc. in question.

ADDITIONAL CHARGES - new and separate charges preferred after others have been preferred against the same accused.

ADMISSION - a statement made by an accused which may admit part of an element, an element, or more than one element of an offense charged, but which falls short of a complete confession to every element of an offense charged.

AFFIDAVIT - a statement or declaration reduced to writing and confirmed by the party making it by an oath taken before a person who had authority to administer the oath.

AFFIRMATION - a solemn and formal external pledge, binding upon one's conscience, that the truth will be stated.

AIDER AND ABETTOR - one who shares the criminal intent or purpose of the perpetrator, and seeks to help him carry out his scheme, and, hence, is liable as a principal.

ALIBI - a defense that the accused could not have committed the offense alleged because he was somewhere else when the crime was committed.

ALLEGE - to assert or state in a pleading; to plead in a specification.

ALLEGATION - the assertion, declaration, or statement of a party to an action made in a pleading -- setting out what he expects to prove.

ALL WRITS ACT - a Federal statute, 28 U.S.C. 1651(a) (1982), which empowers all courts established by Act of Congress, including the Court of Military Appeals, to issue such extraordinary writs as are necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

APPEAL - a complaint to a superior court of an injustice done or error committed by an inferior court whose judgment or decision the court above is called upon to correct or reverse.

APPELLATE REVIEW - the examination of the records of cases tried by courts-martial by proper reviewing authorities, including, in appropriate cases, the convening authority, the Court of Military Review, the Court of Military Appeals, the U.S. Supreme Court, and the Judge Advocate General.

APPREHENSION - the taking into custody of a person.

ARRAIGNMENT - the reading of the charges and specifications to the accused, or the waiver of their reading, coupled with the request that the accused plead thereto.

ARREST - a moral restraint, not intended as punishment, imposed upon a person by oral or written orders of competent authority limiting the person's liberty pending disposition of charges.

ARREST IN QUARTERS - a moral restraint limiting an officer's liberty, imposed as a nonjudicial punishment by a flag or general officer in command.

ARTICLE 39a SESSION - a session of a court-martial called by the military judge, either before or after assembly of the court, without the members of the court being present, to dispose of matters not amounting to a trial of the accused's guilt or innocence.

ASPORTATION - a carrying away; felonious removal of goods.

ASSAULT - an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated.

ATTEMPT - an act, or acts, done with a specific intent to commit an offense under the UCMJ, amounting to more than mere preparation, and tending to effect the commission of such offense.

AUTHENTICITY - the quality of being genuine in character, which in the law of evidence refers to a piece of evidence actually being what it purports to be.

BAD-CONDUCT DISCHARGE - one of two types of punitive discharges that may be awarded an enlisted member; designed as a punishment for bad conduct; a separation under conditions other than honorable; may be awarded by a GCM or SPCM.

BATTERY - an unlawful, and intentional or culpably negligent, application of bodily harm to the person of another by a material agency used directly or indirectly.

BEYOND A REASONABLE DOUBT - the degree of persuasion based upon proof such as to exclude not every hypothesis or possibility of innocence, but any fair and rational hypothesis except that of guilt; not an absolute or mathematical certainty but a moral certainty.

BODILY HARM - any physical injury to or offensive touching of the person of another, however slight.

BONA FIDE - in good faith.

BREACH OF THE PEACE - an unlawful disturbance of the public tranquility by an outward demonstration of a violent or turbulent nature.

BREAKING ARREST - going beyond the limits of arrest before being released by proper authority.

BURGLARY - the breaking and entering in the nighttime of the dwelling house of another with intent to commit murder, manslaughter, rape, carnal knowledge, larceny, wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, or assault.

BUSINESS ENTRY - any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, made in the regular course of any business, profession, occupation, or calling of any kind.

CAPTAIN'S MAST - the term applied, through tradition and usage in the Navy and Coast Guard, to nonjudicial punishment proceedings.

CAPITAL OFFENSE - an offense for which the maximum punishment includes the death penalty.

CARNAL KNOWLEDGE - an act of sexual intercourse with a female not the accused's wife and who has not attained the age of 16 years.

CHALLENGE - a formal objection to a member of a court or the military judge continuing as such in subsequent proceedings; either for cause, based on a fact or circumstance which has the effect of disqualifying the person challenged from further participation in the proceedings, or peremptorily, without grounds or basis.

CHARGE - a formal statement of the article of the UCMJ which the accused is alleged to have violated.

CHARGE AND SPECIFICATION - a formal description in writing of the offense which the accused is alleged to have committed; each specification, together with the charge under which it is placed, constitutes a separate accusation.

CHIEF WARRANT OFFICER - a warrant officer of the Armed Forces who holds a commission or warrant in warrant officer grades W-2 through W-4.

CIRCUMSTANTIAL EVIDENCE - evidence which tends directly to prove or disprove not a fact in issue, but a fact or circumstance from which, either alone or in connection with other facts, a court may, according to the common experience of mankind, reasonably infer the existence or nonexistence of another fact which is in issue; sometimes called indirect evidence.

CLEMENCY - discretionary action by proper authority to reduce the severity of a punishment.

COLLATERAL ATTACK - an attempt to impeach or challenge the integrity of a court judgment in a proceeding other than that in which the judgment was rendered and outside the normal chain of appellate review.

COMMAND - (1) the authority which a commander in the military service lawfully exercises over his subordinates by virtue of rank or assignment; (2) a unit or units, an organization, or an area under the authority of one individual; (3) an order given by one person to another who, because of the relationship of the parties, is under an obligation or sense of duty to obey the order.

COMMANDING OFFICER - a commissioned officer in command of a unit or units, an organization, or an area of the Armed Forces.

COMMISSIONED OFFICER - an officer of the Naval Service or Coast Guard who holds a commission in an officer grade, *Chief Warrant Officer (W-2) and above.*

COMMON TRIAL - a trial in which two or more persons are charged with the commission of an offense which, although not jointly committed, was committed at the same time and place and is provable by the same evidence.

COMPETENCY - the presence of those characteristics, or the absence of those disabilities (i.e., exclusionary rules), which renders a particular item of evidence fit and qualified to be presented in court.

CONCURRENT JURISDICTION - jurisdiction which is possessed over the same parties or subject matter at the same time by two or more separate tribunals.

CONCURRENT SERVICE OF PUNISHMENTS - two or more punishments being served at the same time.

CONFESSION - a statement made by an accused which admits each and every element of an offense charged.

CONFINEMENT - physical restraint, imposed by either oral or written orders of competent authority, depriving a person of his freedom.

CONSECUTIVE SERVICE OF PUNISHMENTS - two or more punishments being served in series, one after the other.

CONSPIRACY - a combination of two or more persons who have agreed to accomplish, by concerted action, an unlawful purpose or some purpose not in itself unlawful by unlawful means, and the doing of some act by one or more of the conspirators to effect the object of that agreement.

CONSTRUCTIVE ENLISTMENT - a valid enlistment arising where the initial enlistment was void but the enlistee submits voluntarily to military authority, is mentally competent and at least 17 years old, receives pay, and performs duties.

CONSTRUCTIVE KNOWLEDGE - a state wherein a person is inferred to have knowledge of an order, regulation, fact, etc. as a result of having a reasonable opportunity to gain such knowledge (e.g., presence in an area where the relevant information was commonly available).

CONTEMPT - in Military Law, the use of any menacing word, sign, or gesture in the presence of the court, or the disturbance of its proceedings by any riot or disorder.

CONTRABAND - items, the possession of which is in and of itself illegal.

CONVENING AUTHORITY - the officer having authority to create a court-martial and who created the court-martial in question, or his successor in command.

CONVENING ORDER - the document by which a court-martial is created, which specifies the type of court, details the members, and, when appropriate, the specific authority by which the court is created.

CORPUS DELICTI - the body of a crime; facts or circumstances showing that the crime alleged has been committed by someone.

COUNSELING - directly or indirectly recommending or advising another to commit an offense.

COURT-MARTIAL - a military court, convened under authority of government and the UCMJ for trying and punishing offenses committed by members of the Armed Forces and other persons subject to Military Law.

COURT OF INQUIRY - a formal administrative fact-finding body convened under the authority of Article 135, UCMJ, whose function it is to search out, develop, analyze, and record all available information relative to the matter under investigation.

COURT OF MILITARY APPEALS - the highest appellate court established under the UCMJ to review the records of certain trials by court-martial, consisting of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years.

COURT OF MILITARY REVIEW - an intermediate appellate court established by each Judge Advocate General to review the record of certain trials by court-martial -- formerly known as Board of Review.

CREDIBILITY OF A WITNESS - his worthiness of belief.

CULPABLE - deserving blame; involving the breach of a legal duty or the commission of a fault.

CULPABLE NEGLIGENCE - Culpable negligence is a degree of negligence greater than simple negligence. This form of negligence is also referred to as recklessness and arises whenever an accused recognizes a substantial unreasonable risk yet consciously disregards that risk.

CUSTODIAL INTERROGATION - questioning initiated by law enforcement officers or others in authority after a suspect has been taken into custody or otherwise deprived of his freedom of action in any significant way.

CUSTODY - that restraint of free movement which is imposed by lawful apprehension.

CUSTOM - a practice which fulfills the following conditions: (a) it must be long continued; (b) it must be certain or uniform; (c) it must be compulsory; (d) it must be consistent; (e) it must be general; (f) it must be known; (g) it must not be in opposition to the terms and provisions of a statute or lawful regulation or order.

DAMAGE - any physical injury to property.

DANGEROUS WEAPON - a weapon used in such a manner that it is likely to produce death or grievous bodily harm.

DECEIVE - to mislead, trick, cheat, or to cause one to believe as true that which is false.

DEFERRAL - discretionary action by proper authority, postponing the running of the confinement portion of a sentence, together with a lack of any post-trial restraint.

DEFRAUD - to obtain, through a misrepresentation, an article or thing of value and to apply it to one's own benefit or to the use and benefit of another -- either permanently or temporarily.

DEMONSTRATIVE EVIDENCE - anything (such as charts, maps, photographs, models, drawings, etc.) used to help construct a mental picture of a location or object which is not readily available for introduction into evidence.

DEPOSITION - the testimony of a witness taken out of court, reduced to writing, under oath or affirmation, before a person empowered to administer oaths, in answer to interrogatories (questions) and cross-interrogatories submitted by the parties desiring the deposition and the opposite party, or based on oral examination by counsel for accused and the prosecution.

DERELICTION IN THE PERFORMANCE OF DUTY - willfully or negligently failing to perform assigned duties or performing them in a culpably inefficient manner.

DESIGN - on purpose, intentionally, or according to plan and not merely through carelessness or by accident; specifically intended.

DESTROY - sufficient injury to render property useless for the purpose for which it was intended, not necessarily amounting to complete demolition or annihilation.

DIRECT EVIDENCE - evidence which tends directly to prove or disprove a fact in issue.

DISCOVERY - the right to examine information possessed by the opposing side before or during trial.

DISHONORABLE DISCHARGE - the most severe punitive discharge; reserved for those warrant officers (W-1) and enlisted members who should be separated under conditions of dishonor, after having been convicted of serious offenses of a civil or military nature warranting severe punishment; it may be awarded only by a GCM.

DISORDERLY CONDUCT - behavior of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby.

DISRESPECT - words, acts, or omissions that are synonymous with contempt and amount to behavior or language which detracts from the respect due the authority and person of a superior.

DOCUMENTARY EVIDENCE - evidence supplied by writings and documents.

DOMINION - control of property; possession of property with the ability to exercise control over it.

DRUNKENNESS - (1) as an offense under the UCMJ, intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties; (2) as a defense in rebuttal of the existence of a criminal element involving premeditation, specific intent, or knowledge, intoxication which amounts to a loss of reason preventing the accused from harboring the requisite premeditation, specific intent, or knowledge; (3) as a defense to general intent offenses, involuntary intoxication which amounts to a loss of reason preventing the accused from knowing the nature of his act or the natural and probable consequences thereof.

DUE PROCESS - a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights; such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe.

DURESS - unlawful constraint on a person whereby he is forced to do some act that he otherwise would not have done.

DYING DECLARATION - a statement by a victim, concerning the circumstances surrounding his death, made while in extremis and while under a sense of impending death and without hope of recovery.

ELEMENTS - the essential ingredients of an offense which are to be proved at the trial; the acts or omissions which form the basis of any particular offense.

ENTRAPMENT - a defense available when actions of an agent of the government intentionally instill in the mind of the accused a disposition to commit a criminal offense, when the accused has no notion, predisposition, or intent to commit the offense.

ERROR - a failure to comply with the law in some way at some stage of the proceedings.

EVIDENCE - any species of proof, or probative matter, legally presented at trial, through the medium of witnesses, records, documents, concrete objects, demonstrations, etc., for the purpose of inducing belief in the minds of the triers of fact.

EXCULPATORY - anything that would exonerate a person of wrongdoing.

EXECUTION OF HIS OFFICE - engaging in any act or service required or authorized to be done by statute, regulation, the order of a superior, or military usage.

EX POST FACTO LAW - a law passed after the occurrence of a fact or commission of an act which makes the act punishable, imposes additional punishment, or changes the rules of evidence to the disadvantage of a party.

EXTRA MILITARY INSTRUCTION - extra tasks assigned to one exhibiting behavioral or performance deficiencies for the purpose of correcting those deficiencies through the performance of the assigned tasks; also known as Additional Military Duty or Additional Military Instruction.

FEIGN - to misrepresent by a false appearance or statement, to pretend, to simulate or to falsify.

FINE - a type of court-martial punishment in the nature of a pecuniary judgment against an accused, which, when ordered executed, makes him immediately liable to the United States for the entire amount of money specified.

FORMER JEOPARDY - a defense in bar of trial that no person shall be tried for the same offense by the same sovereign a second time without his consent; also known as Double Jeopardy.

FORMER PUNISHMENT - a defense in bar of trial that no person may be tried by court-martial for a minor offense for which punishment under Articles 13 or 15, UCMJ, has been imposed.

FORMER TESTIMONY - testimony of a witness given in a civil or military court at a former trial of the accused, or given at a formal pretrial investigation of an allegation against the accused, in which the issues were substantially the same.

FORFEITURE OF PAY - a type of punishment depriving the accused of all or part of his pay as it accrues.

GRIEVOUS BODILY HARM - a serious bodily injury; does not include minor injuries (such as a black eye or a bloody nose) but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs and other serious bodily injuries.

HABEAS CORPUS - "You have the body"; an order from a court of competent jurisdiction which requires the custodian of a prisoner to appear before the court to show cause why the prisoner is confined or detained.

HARMLESS ERROR - an error of law which does not materially prejudice the substantial rights of the accused.

HAZARD A VESSEL - to put a vessel in danger of damage or loss.

HEARSAY - an assertive statement, or conduct, which is offered in evidence to prove the truth of the assertion, but which was not made by the declarant while a witness before the court in the hearing in which it is offered.

IN CONCERT WITH - together with, in accordance with a design or plan, whether or not such design or plan was preconceived.

INCAPACITATION - the physical state of being unfit or unable to perform properly.

INCULPATORY - anything that implicates a person in a wrongdoing.

INDECENT - an offense to common propriety; offending against modesty or delicacy; grossly vulgar, or obscene.

INFERENCE - a fact deduced from another fact or facts shown by the state of the evidence.

INSANITY - *see* MENTAL CAPACITY and MENTAL RESPONSIBILITY, *infra*.

INSPECTION - an official examination of persons or property to determine the fitness or readiness of a person, organization, or equipment, not made with a view to any criminal action.

INTENTIONALLY - deliberately and on purpose; through design, or according to plan, and not merely through carelessness or by accident.

IPSO FACTO - by the very fact itself.

JOINT OFFENSE - an offense committed by two or more persons acting together in pursuance of a common intent.

JOINT TRIAL - the trial of two or more persons charged with committing a joint offense.

JURISDICTION - the power of a court to hear and decide a case and to award an appropriate punishment.

KNOWINGLY - having actual knowledge; consciously, intelligently.

LASCIVIOUS - tending to excite lust; obscene; relating to sexual impurity; tending to deprave the morals with respect to sexual relations.

LESSER INCLUDED OFFENSE - an offense necessarily included in the offense charged; an offense containing some but not all of the elements of the offense charged, so that if one or more of the elements of the offense charged is not proved, the evidence may still support a finding of guilty of the included offense.

LEWD - lustful or lecherous; incontinence carried on in a wanton manner.

LOST PROPERTY - property which the owner has involuntarily parted with by accident, neglect, or forgetfulness and does not know where to find or recover.

MATTER IN AGGRAVATION - any circumstances attending the commission of a crime which increases the enormity of the crime.

MATTER IN EXTENUATION - any circumstances serving to explain the commission of the offense, including the reasons that actuated the accused, but not extending to a legal justification.

MATTER IN MITIGATION - any circumstance having for its purpose the lessening of the punishment to be awarded by the court and the furnishing of grounds for a recommendation of clemency.

MENTAL CAPACITY - the ability of the accused at the time of trial to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense.

MENTAL RESPONSIBILITY - the ability of the accused at the time of commission of an offense to appreciate the nature and quality or the wrongfulness of his or her acts.

MILITARY DUE PROCESS - due process under protections and rights granted military personnel by the Constitution or laws enacted by Congress.

MILITARY JUDGE - a commissioned officer, certified as such by the respective Judge Advocates General, who presides over all open sessions of the court-martial to which he is detailed.

MISLAID PROPERTY - property which the owner has voluntarily put, for temporary purposes, in a place afterwards forgotten or not easily found.

MISTRIAL - discretionary action of the military judge, or the president of a special court-martial without a military judge, in withdrawing the charges from the court where such action appears manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the trial.

MITIGATION - action by proper authority reducing punishment awarded at NJP or by court-martial.

MORAL TURPITUDE - an act of baseness, vileness, or depravity in private or social duties, which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

MOTION TO DISMISS - a motion raising any defense or objection in bar of trial.

MOTION FOR APPROPRIATE RELIEF - a motion to cure a defect of form or substance which impedes the accused in properly preparing for trial or conducting his defense.

MOTION TO SEVER - a motion by one or more of several co-accused that he be tried separately from the other or others.

NEGLIGENCE - unintentional conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. The failure of a person to exercise the care that a reasonably prudent person would exercise under similar circumstances; something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would, or would not, do.

NONJUDICIAL PUNISHMENT - punishment imposed under Article 15, UCMJ, for minor offenses, without the intervention of a court-martial.

NONPUNITIVE MEASURES - those leadership techniques, not a form of informal punishment, which may be used to further the efficiency of a command.

OATH - a formal external pledge, coupled with an appeal to the Supreme Being, that the truth will be stated.

OBJECTION - a declaration to the effect that the particular matter or thing under consideration is not done or admitted with the consent of the opposing party, but is by him considered improper or illegal, and referring the question of its propriety or legality to the court.

OFFICE HOURS - the term applied, through tradition and usage in the Marine Corps, to nonjudicial punishment proceedings.

OFFICER - any commissioned or warrant officer of the Armed Forces, Warrant Officer (W-1) and above.

OFFICER IN CHARGE - a member of the Armed Forces designated as such by appropriate authority.

OFFICIAL RECORD - a writing made as a record of a fact or event, whether the writing is in a regular series of records or consists of a report, finding, or certificate and made by any person within the scope of his official duties provided those duties included a duty to know, or to ascertain through appropriate and trustworthy channels of information, the truth of the fact or event, and to record such fact or event.

ON DUTY - in the exercise of duties of routine or detail, in garrison, at a station, or in the field: does not relate to those periods when, no duty being required of them by order or regulations, military personnel occupy the status of leisure known as "off duty" or "on liberty."

OPERATING A VEHICLE - driving or guiding a vehicle while in motion, either in person or through the agency of another, or setting its motive power in action or the manipulation of the controls so as to cause the particular vehicle to move.

OPINION OF THE COURT - a statement by a court of the decision reached in a particular case, expounding the law as applied to the case, and detailing the reasons upon which the decision is based.

ORAL EVIDENCE - the sworn testimony of a witness received at trial.

OWNER - a person who has a right to possession of property which is superior to that of the accused, in the light of all conflicting interests therein.

PAST RECOLLECTION RECORDED - memoranda prepared by a witness, or read by him and found to be correct, reciting facts or events which represent his past knowledge possessed at a time when his recollection was reasonably fresh as to the facts or events recorded.

PER CURIAM - "by the court"; a phrase used in the report of the opinion of a court to distinguish an opinion of the whole court from an opinion written by any one judge.

PER SE - taken alone; in and of itself; inherently.

PERPETRATOR - one who actually commits the crime, either by his own hand, by an animate or inanimate agency, or by an innocent agent.

PLEADING - the written formal indictment by which an accused is charged with an offense; in Military Law, the charges and specifications.

POSSESSION - actual physical control and custody over an item of property.

PREFERRAL OF CHARGES - the formal accusation against an accused by an accuser signing and swearing to the charges and specifications.

PREJUDICIAL ERROR - an error of law which materially affects the substantial rights of the accused and requires corrective action.

PRESUMPTION - a fact which the law requires the court to deduce from another fact or facts shown by the state of the evidence unless that fact is overcome by other evidence before the court.

PRETRIAL INVESTIGATION - an investigation pursuant to Article 32, UCMJ, that is required before convening a GCM, unless waived by the accused.

PRIMA FACIE CASE - introduction of substantial evidence which, together with all proper inferences to be drawn therefrom and all applicable presumptions, reasonably tends to establish every essential element of an offense charged or included in any specification.

PRINCIPAL - (1) one who aids, abets, counsels, commands, or procures another to commit an offense which is subsequently perpetrated in consequence of such counsel, command or procuring, whether he is present or absent at the commission of the offense; (2) the perpetrator.

PROBABLE CAUSE - (1) for apprehension, a reasonable grounds for believing that an offense has been committed and that the person apprehended committed it; (2) for pretrial restraint, reasonable grounds for believing that an offense was committed by the person being restrained; and (3) for search, a reasonable grounds for believing that items connected with criminal activity are located in the place or on the person to be searched.

PROVOKING - tending to incite, irritate, or enrage another.

PROXIMATE CAUSE - that which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces a result, and without which the result would not have occurred.

PROXIMATE RESULT - a reasonably foreseeable result ordinarily following from the lack of care complained of, unbroken by any independent cause.

PUNITIVE ARTICLES - Articles 78 and 80 through 134, UCMJ, which generally describe various crimes and offenses and state how they may be punished.

PUNITIVE DISCHARGE - a discharge imposed as punishment by a court-martial, either a bad-conduct discharge or a dishonorable discharge.

RAPE - an act of sexual intercourse with a female, not the accused's wife, done by force and without her consent.

REAL EVIDENCE - any physical object offered into evidence at trial.

RECKLESSNESS - an act or omission exhibiting a culpable disregard for the foreseeable consequences of that act or omission; a degree of carelessness greater than simple negligence.

RECONSIDERATION - the action of the convening authority in returning the record of trial to the court for renewed consideration of a ruling of the court dismissing a specification on motion, where the ruling of the court does not amount to a finding of not guilty.

REFERRAL OF CHARGES - the action of a convening authority in directing that a particular case be tried by a particular court-martial previously created.

RELEVANCY - that quality of evidence which renders it properly applicable in proving or disproving any matter in issue; a tendency in logic to prove or disprove a fact which is in issue in the case.

REMEDIAL ACTION - action taken by proper reviewing authorities to correct an error or errors in the proceedings or to offset the adverse impact of an error.

REMISSION - action by proper authority interrupting the execution of a punishment and canceling out the punishment remaining to be served, while not restoring any right, privilege, or property already affected by the executed portion of the punishment.

REPROACHFUL - censuring, blaming, discrediting, or disgracing of another's life or character.

RESISTING APPREHENSION - an active resistance to the restraint attempted to be imposed by the person apprehending.

RESTRICTION - moral restraint imposed as punishment, or pretrial restraint upon a person by oral or written orders limiting him to specified areas of a military command, with the further provision that he will participate in all military duties and activities of his organization while under such restriction.

REVISION - a procedure to correct an apparent error or omission or improper or inconsistent action of a court-martial with respect to a finding or a sentence.

SALE - an actual or constructive delivery of possession of property in return for a valuable consideration and the passing of such title as the seller may possess, whatever that title may be.

SEARCH - a quest for incriminating evidence.

SEIZURE - to take possession of forcibly, to grasp, to snatch, or to put into possession.

SELF-DEFENSE - the use of reasonable force to defend oneself against immediate bodily harm threatened by the unlawful act of another.

SELF-INCRIMINATION - the giving of evidence against oneself which tends to establish guilt of an offense.

SET ASIDE - action by proper authority voiding the proceedings and the punishment awarded and restoring all rights, privileges, and property lost by virtue of the punishment imposed.

SIMPLE NEGLIGENCE - the absence of due care (i.e., an act or omission by a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances).

SOLICITATION - any statement, oral or written, or any other act or conduct, either directly or through others, which may reasonably be construed as a serious request or advice to commit a criminal offense.

SPECIFICATION - a formal statement of specific acts and circumstances relied upon as constituting the offense charged.

SPONTANEOUS EXCLAMATION - an utterance concerning the circumstances of a startling event made by a person while he was in such a condition of excitement, shock, or surprise, caused by his participation in or observation of the event, as to warrant a reasonable inference that he made the utterance as an impulsive and instinctive outcome of the event, and not as a result of deliberation or design.

STATUTE OF LIMITATIONS - the rule of law which, unless waived, establishes the time within which an accused must be charged with an offense to be tried successfully.

STRAGGLE - to wander away, to rove, to stray, to become separated from, or to lag or linger behind.

STRIKE - to deliver a blow with anything by which a blow can be given.

SUBPOENA - a formal written instrument or legal process that serves to summon a witness to appear before a certain tribunal and to give testimony.

SUBPOENA DUCES TECUM - a formal written instrument or legal process which commands a witness who has in his possession or control some document or evidentiary object that is pertinent to the issues of a pending controversy to produce it before a certain tribunal.

SUBSCRIBE - to write one's signature on a written instrument as an indication of consent, approval, or attestation.

SUPERIOR COMMISSIONED OFFICER - a commissioned officer who is superior in rank or command.

SUPERVISORY AUTHORITY - an officer exercising general court-martial jurisdiction who acts as reviewing authority for SCM and SPCM records after the convening authority has acted.

SUSPENSION - action by proper authority to withhold the execution of a punishment for a probationary period pending good behavior on the part of the accused.

THREAT - an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future.

TOLL - to suspend or interrupt the running of.

USAGE - a general habit, mode or course of procedure.

UTTER - to make any use of, or attempt to make any use of, an instrument known to be false by representing, by words or actions, that it is genuine.

VERBATIM - in the exact words; word-for-word.

WANTON - behavior of such a highly dangerous and inexcusable character as to exhibit a callous indifference or total disregard for the probable consequences to the personal safety or property of other persons; heedlessness.

WARRANT OFFICER - an officer of the Armed Forces who holds a commission or warrant in a warrant officer grade, paygrades W-1 through W-4.

WILLFUL - deliberate, voluntary, and intentional, as distinguished from acts committed through inadvertence, accident, or ordinary negligence.

WRONGFUL - contrary to law, regulation, lawful order or custom.

MILITARY JUSTICE STUDY GUIDE

SECTION SIX

COMMON ABBREVIATIONS USED IN MILITARY JUSTICE

AAF	Accessory after the fact
ABA CPR	American Bar Association Code of Professional Responsibility
ABA Model Rules	American Bar Association Model Rules of Professional Conduct
ABF	Accessory before the fact
ACC	Accused
ADC	Assistant Defense Counsel
ALMAR	General message from the Commandant of the Marine Corps to all Marine Corps activities
ALNAV	General message from the Secretary of the Navy to all naval activities
ART.	Article, Uniform Code of Military Justice
ATC	Assistant Trial Counsel
BCD	Bad-Conduct Discharge
BOR	Board of Review
BW	Confinement on Bread and Water
CA	Convening Authority
CC	Correctional Custody
CDO	Command Duty Officer
CG	Commanding General; Coast Guard

CH	Charge
CHNAVPERS	Chief of Naval Personnel
CID	Criminal Investigations Division
C.M.A.	United States Court of Military Appeals
CMC	Commandant of the Marine Corps
CMO	Court-Martial Order
C.M.R.	Court of Military Review; Court-Martial Reports
CNO	Chief of Naval Operations
CO	Commanding Officer
CONF	Confinement
CPO	Chief Petty Officer
CWO	Chief Warrant Officer
DA PAM	Department of the Army Pamphlet
DC	Defense Counsel
DD	Dishonorable Discharge
DIG. OPS.	Digest of Opinions of the Judge Advocates General of the Armed Forces
DIMRATS	Diminished Rations
DoD	Department of Defense
ED	Extra Duty
EMI	Extra Military Instruction
E & M	Extenuation and Mitigation
FACA	Federal Assimilative Crimes Act

FOIA	Freedom of Information Act
FORF; FF	Forfeiture
Fed.R.Crim.P.	Federal Rules of Criminal Procedure
GCM	General Court-Martial
HL w/o C	Hard Labor without Confinement
IC	Individual Counsel
IMC	Individual Military Counsel
INST	Instruction
IO	Investigation Officer
IRO	Initial Review Officer
JA	Judge Advocate
JAG	Judge Advocate General
JAGC	Judge Advocate General's Corps
JAG Manual; JAGMAN	Manual of the Judge Advocate General of the Navy
LIO	Lesser Included Offenses
LO	Legal Officer
LOAC	Law of Armed Conflict
LOD	Line of Duty
LSSO	Legal Services Support Office (Marine Corps)
MCM	Manual for Courts-Martial, United States, 1984
MFNG	Motion for a finding of not guilty
MILPERSMAN	Military Personnel Manual

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MJ	Military Judge; Military Justice Reporter
MP	Military Police
MRE Mil.R.Evid.	Military Rules of Evidence
NAVY REGS	U.S. Naval Regulations, 1973
N/A	Not Applicable
NMPC	Naval Military Personnel Command
NCO	Noncommissioned Officer
NG	Not Guilty
NPLOC	Nonpunitive Letter of Censure
NIS	Naval Investigative Service
NJP	Nonjudicial Punishment
NLSO	Naval Legal Service Office
NPM	Nonpunitive Measures
OEGCMJ	Officer Exercising General Court-Martial Jurisdiction
OESPCMJ	Officer Exercising Special Court-Martial Jurisdiction
OINC; OIC	Officer in Charge
OJAG	Office of the Judge Advocate General
OOD	Officer of the Deck/Day
OPNAV	Office of the Chief of Naval Operations
OTH	Discharge Under Other Than Honorable Conditions
PCS	Permanent Change of Station
PIO	Preliminary Inquiry Officer

PO	Petty Officer
PTA	Pretrial Agreement
PTI	Pretrial Investigation
PTIO	Pretrial Investigating Officer
R.C.M.	Rules for Court-Martial
RED	Reduction
REST	Restriction
SCM	Summary Court-Martial
SECNAV	Secretary of the Navy
SJA	Staff Judge Advocate
S/L	Statute of Limitations
SLO	Staff Legal Officer
SOFA	Status of Forces Agreement
SNCO	Staff Noncommissioned Officer
SP	Shore Patrol
SPCM	Special Court-Martial
SPEC.	Specification
SRB	Service Record Book
TAD	Temporary Additional Duty
TC	Trial Counsel
UA	Unauthorized Absence
UCMJ	Uniform Code of Military Justice

UPB	Unit Punishment Book
USC	United States Code
USCA	United States Code Annotated
U.S.C.M.A.	United States Court of Military Appeals
VA	Veterans Administration
WO	Warrant Officer
XO	Executive Officer