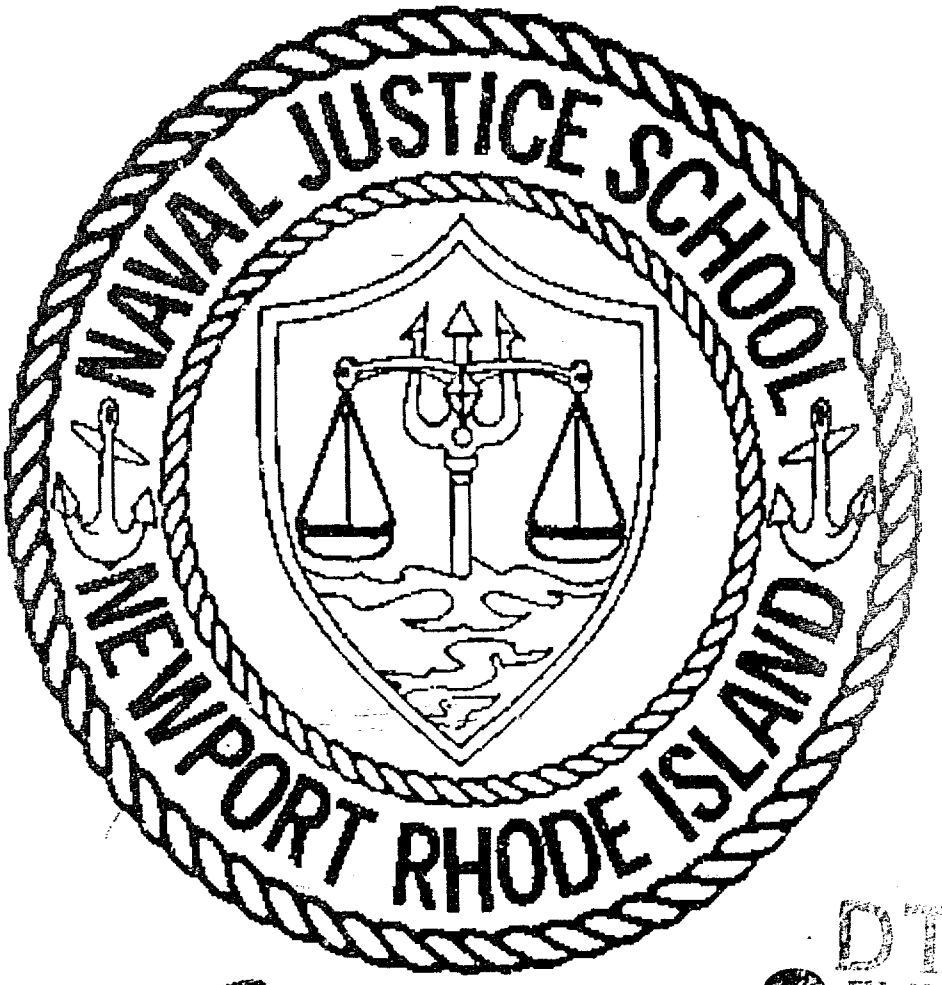
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Rev. 7/92

EVIDENCE STUDY GUIDE

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Rev. 7/92

PREFACE

This study guide is a primary resource in the Naval Justice School course in military evidence. The purpose of the course is to enable military attorneys to provide professionally competent legal services in matters involving substantive and procedural evidentiary matters. Specifically, at the end of the course, the military attorney will be able to develop correct legal analyses and solutions to evidence problems. This process involves two basic legal skills which will be developed in the course: (1) accurate identification of the issues in a given factual situation; and (2) correct application of principles of military rules of evidence.

This study guide is also intended to be a convenient reference for use by Navy and Marine Corps judge advocates and Coast Guard law specialists. While this study guide does not discuss all possible evidentiary issues, it provides detailed discussion of the fundamental concepts of military evidentiary law and projects probable developments of evidentiary law in currently unresolved areas. As such, the guide should be only a starting point for legal research and not a substitute for the comprehensive legal research required for the effective practice of law in the military.

Acknowledgement

The evidence portion of the Criminal Law Text utilized at the Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, was used as a basis for portions of this text.

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CHAPTER I

INTRODUCTION TO THE LAW OF EVIDENCE

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EVIDENCE STUDY GUIDE

CHAPTER I

INTRODUCTION TO THE LAW OF EVIDENCE

0101 GENERAL

Our discussion of the "law of evidence" centers primarily upon one concept. That concept is whether or not certain information may be presented to the trier of fact in a legal proceeding. The proceeding with which we are concerned is a criminal trial by court-martial, and the individual initially responsible for making the decision is the military judge detailed to the particular case. In a case in which the accused requests trial by military judge alone, the judge determines whether or not he or she will consider each item of information presented by counsel. In a trial by court members, the judge determines whether the members may hear the information, or, if the members have heard the information prior to an objection, whether the members will be instructed to disregard the information in their deliberations.

It is incumbent upon every trial advocate to be well versed in the rules of evidence which the military judge enforces at trial. The key to effective trial advocacy is the ability to anticipate developments at trial and to cite authority to support legal theories concerning the admissibility or inadmissibility of each item of evidence that may be offered.

Of course, it is no easy task to develop expertise in this often complex area of the law. Some of the difficulty experienced in mastering the military law of evidence is due to the diversity of its sources. Despite the effort to codify the law of evidence into Part III of the *Manual for Courts-Martial, 1984* [hereinafter MCM, 1984], there is still no single authoritative source that treats all evidentiary questions which may arise during preparation for and trial of courts-martial. A more detailed discussion of the scope of Part III of the MCM, known as the Military Rules of Evidence [hereinafter Mil.R.Evid.], may be found in chapter III of this study guide; but, it is obvious to even the casual reader that the Mil.R.Evid. are not intended to cover such topics as discovery, compulsory process, immunity, argument, and the special rules for conducting presentencing hearings. Accordingly, it is necessary for the effective trial advocate to be aware of all of the sources of the military law of evidence listed in the next section.

0102 SOURCES OF THE MILITARY LAW OF EVIDENCE

A. The United States Constitution

-- The Constitution, as the supreme law of the land, governs many evidentiary and quasi-evidentiary concerns that arise during courts-martial. The Constitution determines both the admissibility of certain evidence (fourth and fifth amendments) and also affects such matters as discovery, compulsory process of witnesses, and immunity (fifth and sixth amendments). Many of the so-called "courtroom" rules of evidence (such as form of questions, relevancy, and hearsay) are not constitutionally based and reference must be made to other sources of evidentiary law to resolve such issues.

B. The Uniform Code of Military Justice [hereinafter UCMJ]. 10 U.S.C. §§ 801-934 (1982). The Constitution, in article I, section 8, provides that Congress shall have the power to make rules for the government of the land and naval forces. Congress provided such rules by enacting the UCMJ in 1950. Congress was primarily concerned with establishing a military justice system, complete with a series of punitive articles defining criminal activity, and did not greatly concern itself with the law of evidence in enacting the UCMJ. The following are the relatively few articles of the UCMJ that deal with evidentiary matters.

1. Article 31: Prohibits compulsory self-incrimination. *See* chapter XIII, *infra*.

2. Article 42: Requires that the court members, the military judge, trial counsel, defense counsel, and the witnesses be sworn. *See* chapter VII, *infra*.

3. Article 46: Provides that trial counsel and defense counsel will have an equal opportunity to obtain evidence and to secure the attendance of witnesses. *See* chapter XV, *infra*.

4. Article 47: Makes it an offense for a civilian to refuse to appear as a witness in a court-martial after fees have been tendered and the witness has been properly subpoenaed. *See* chapter XV, *infra*.

5. Article 49: Provides for the use of depositions in courts-martial. *See* chapter VIII, *infra*.

6. Article 50: Provides that records made at courts of inquiry may, under certain conditions, be admitted under the "former testimony" exception to the hearsay rule. *See* chapter VIII, *infra*.

Note that, of these articles, only articles 31, 49, and 50 actually deal with the admissibility of evidence.

Probably the most significant article of the UCMJ with regard to the rules governing the admissibility of evidence is the rarely cited article 36(a), which provides:

> Pretrial, trial and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. [Emphasis added.]

The President has prescribed procedures for the trial of courts-martial in the *Manual for Courts-Martial.*

C. The *Manual for Courts-Martial.* Pursuant to the authority vested in the President by Article 36, UCMJ, the MCM (an Executive order) was promulgated in 1951 and significantly revised in 1969 and 1984. The revised MCM became effective 1 August 1984. The Mil.R.Evid., patterned after the Federal Rules of Evidence, were promulgated in September 1980 as a change to the 1969 MCM. They replaced the old rules of evidence which were listed in paragraph format. The Mil.R.Evid. are listed in the numerical rule format of the Federal Rules of Evidence.

D. Departmental regulations. The Department of the Navy directs the activities of the U.S. Naval Service, which includes the U.S. Marine Corps, and promulgates regulations that can affect the admissibility of evidence at trials by court-martial. These regulations often provide rules governing the admissibility of documentary evidence, particularly the service record entries so important during presentencing hearings, and sometimes establish additional restrictive rules of evidence not found in the Constitution, the UCMJ, or the Mil.R.Evid. *See, e. g.*, the discussion of the limited immunity available to a servicemember under the Navy's Alcohol and Drug Abuse Program in Secretary of the Navy Instruction (SECNAVINST) 5300.28B of 11 July 1990.

The following regulations, instructions, and publications are often cited as sources of evidentiary law in trials by court-martial:

1. *U.S. Navy Regulations, 1990*;

2. Secretary of the Navy Instructions (SECNAVINST);

3. *Manual of the Judge Advocate General* (JAGMAN);

4. *Navy Military Personnel Manual* (MILPERSMAN);

5. *Navy Pay and Personnel Procedures Manual* (PAYPERSMAN);

6. Office of the Chief of Naval Operations Instructions (OPNAVINST);

7. *Marine Corps Individual Records Administration Manual* (IRAM); and

8. Marine Corps Orders (MCO).

It is common for the lawyer first entering military practice to underestimate (often to the extent of ignoring) the importance of the rules and procedures set forth in the various departmental regulations. The proper execution of the rules and procedures set forth in these departmental regulations will often control the admissibility of evidence. For example, the PAYPERSMAN and the IRAM set forth the rules for the preparation of service record entries for the Navy and Marine Corps, thus controlling the admissibility of these public records under Mil.R.Evid 803(6). Additionally, OPNAVINST 5350.4B and MCO P5300.12 set forth the procedures used in the Department of the Navy's urinalysis program. Both of these instructions create personal rights for the servicemember which must be followed for the test results to be admissible. Counsel must be careful not to overlook these important sources of evidentiary law.

E. The military appellate court system

1. The appellate courts in the military justice system include the Courts of Military Review -- the intermediate level courts (one for each service), consisting of several panels of senior military lawyers; the Court of Military Appeals -- the court of last resort within the military justice system, consisting of three civilians appointed by the President for fifteen-year terms; and the U.S. Supreme Court. The Court of Military Appeals reviews cases from all of the services, and its decisions are considered binding precedential authority on all trials by court-martial. The decisions of the Courts of Military Review are binding for their own service and are considered persuasive authority by the other services.

2. Both the Court of Military Appeals and the Courts of Military Review often have the opportunity to interpret the sources of law listed above. On occasion, the Court of Military Appeals will find that a particular provision does not comply with constitutional or statutory requirements. Accordingly, the appellate case law must always be researched before a given section of any of the sources listed above is relied upon in court. Appeal to the U.S. Supreme Court only became possible in August 1984, and it remains to be seen to what extent that Court will directly address military law issues.

F. Other sources

1. The Federal Rules of Evidence [hereinafter Fed.R.Evid.]. These rules are not directly applicable to trials by court-martial. The Fed.R. Evid., however, may become applicable if the Mil.R.Evid. are silent on a particular point. Mil.R.Evid. 101(b) provides:

> Secondary Sources: If not otherwise prescribed ... and not inconsistent with or contrary to the Uniform Code of Military Justice or this Manual, courts-martial shall apply:
>
> (1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and
>
> (2) Second, when not inconsistent with [Mil.R.Evid. 101 (b)(1)], the rules of evidence at common law.

It should prove relatively rare that the Fed.R.Evid. themselves address a point upon which the Mil.R.Evid. are silent, as the Military Rules are patterned so closely after the Federal Rules. However, Mil.R.Evid. 101(b), in its language "the rules of evidence generally recognized in . . . the [U.S.] district courts . . ." clearly contemplates the use of Federal appellate case law in military practice.

2. Federal precedent. A significant reason for the adoption of the Mil.R.Evid. was to allow for the utilization of the substantial body of Federal case law interpreting the Fed.R.Evid. Obviously, counsel must take care to ensure the Federal rule is substantially similar to the military rule and attempt to determine that the Federal case cited represents the rule "generally recognized" in the U.S. district courts.

3. State court decisions. These precedents may be of persuasive authority, particularly if they interpret the U.S. Constitution and are well reasoned.

4. Evidence handbooks:

a. S. Saltzburg, L. Schinasi, and D. Schlueter, Military Rules of Evidence Manual (3d ed. 1991);

b. Weinstein's Evidence (7 vols.);

c. S. Saltzburg and K. Redden, Federal Rules of Evidence Manual (4th ed. 1986);

d. Federal Rules of Evidence News (loose-leaf service);

e. Moore's Federal Practice, vols. 10-11;

f. Federal Practice and Procedure, vols. 21-22;

g. Am. Jur. 2d, Federal Rules of Evidence, vol. 32B;

h. Wigmore on Evidence (10 vols.);

i. Jones on Evidence (6th ed.) (4 vols.); and

j. Wharton's Criminal Evidence (14th ed.) (4 vols.).

0103 FORMS AND TYPES OF EVIDENCE

A. Forms of evidence. The information with which counsel attempt to persuade the trier of fact takes roughly four different forms: oral, documentary, physical, and "demonstrative" evidence.

1. Oral evidence. Oral evidence is the sworn testimony received at trial. The fact that an oath is administered is considered some assurance that the information related by the witness will be trustworthy. If the witness makes statements under oath that are not true, the witness may be prosecuted for 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 be able to relate only what they actually saw, heard, smelled, felt, or tasted, and state certain conclusions they reached based upon these sensory perceptions. *See* chapter VII of this study guide for a more detailed discussion of the various aspects of the testimony of witnesses.

2. Documentary evidence. (Key Number 1040) 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, may attempt to introduce the report in evidence. Another example involves unauthorized absences. A servicemember is absent from his or her command. In order to prove the absence, the government may introduce an entry from the accused's service record. *See* chapter IX for a more detailed discussion of documentary evidence.

3. Physical evidence. (Key Number 1037) Physical evidence (often referred to as "real" evidence) usually consists of tangible objects that are relevant to the offense charged. The murder weapon or the baggie of marijuana are examples of physical evidence. Chapter X contains a discussion of the procedures for handling physical evidence at trial.

4. Demonstrative evidence. (Key Number 1037) Strictly speaking, here are only three forms evidence may take: oral, documentary, and physical. There is a fourth form which is sometimes considered a separate category. This form of evidence, called "demonstrative" evidence, has no inherent relevance to the case. Its relevance is derived from the item or location that it represents or demonstrates for the trier of fact. Demonstrative evidence (in the form of charts, diagrams, maps, models, or photographs) assists the trier of fact in visualizing places or objects that cannot be introduced into evidence in the courtroom. Demonstrative evidence is the preferred method for familiarizing the trier of fact with such locations or objects rather than transporting the trier of fact to the location for a personal view. R.C.M. 913(c)(3) discussion, MCM, 1984. Demonstrative evidence is discussed further in Chapters IX and X.

B. The two types of evidence: direct and circumstantial. All of the forms in which evidence appears in a trial are introduced either directly to prove a fact in issue, or to prove some other fact which may not be in issue, but from which a fact in issue may be inferred.

Examples: Saab is accused of murdering Datsun.

Witness 1: "I saw Saab shoot Datsun." -- Direct evidence that Saab is the culprit.

Witness 2: "I saw Saab running away from the scene of the shooting with a gun in his hand." -- Circumstantial evidence that Saab is the perpetrator.

1. Direct evidence

a. Defined: "[E]vidence that tends directly to prove or disprove a fact in issue." R.C.M. 918(c) discussion, MCM, 1984.

b. Effect

(1) No inference need be drawn by the court members in order to make direct evidence relevant.

(2) It is not necessary for the court to undergo any reasoning process in order to arrive at the conclusion desired. The conclusion is apparent from the fact itself.

2. Circumstantial evidence

a. Defined: "[E]vidence that tends directly to prove or disprove not a fact in issue but some other fact or circumstance from which, either alone or together with other facts and circumstances, one may reasonably infer the existence or nonexistence of a fact in issue." R.C.M. 918(c) discussion, MCM, 1984.

(1) It may be necessary for the court to draw several inferences in order to arrive at the conclusion desired by counsel.

(2) Example: *United States v. Wilson*, 13 C.M.A. 670, 33 C.M.R. 202 (1963) (a larceny case).

(a) Evidence was admitted that showed the following:

-1- A record player was taken from a barracks;

-2- accused was seen in barracks from which taken at the approximate time of theft;

-3- accused didn't live in that barracks;

-4- accused was seen leaving that barracks by a fire escape, carrying a box with a handle that resembled a record player; and

-5- stolen record player was pawned by a person giving a similar name and identical address to that used by accused in pawning another record player.

(b) Held: The evidence was sufficient to support a guilty finding.

b. Rule: Military law permits a conviction to rest solely upon circumstantial evidence. *See* R.C.M. 918(c), MCM, 1984.

(1) Circumstantial evidence is not resorted to as secondary or inferior evidence, or only where there is an absence of direct evidence. It is admissible even when there is direct evidence on the same issue, and the decision as to weight rests with the trier of fact. "There is no general rule for determining or comparing the weight to be given to circumstantial or direct evidence." R.C.M. 918(c) discussion, MCM, 1984; Mil.R. Evid. 401, 402.

(2) In many situations, no direct evidence may be available on the point in question (e.g., the accused's intent, his identity, his knowledge of a particular fact, and his state of mind are often proved by circumstantial evidence).

Example: (desertion case)

Where there have been no admissions made by the accused and it is necessary for trial counsel to prove the intent to remain away

permanently, trial counsel may introduce: The fact that the accused changed his name; bought a one-way ticket to Hong Kong; burned his uniforms; and accepted civilian employment. From all these facts, the court may properly infer the necessary intent to remain away permanently.

0104 ADMISSIBILITY OF EVIDENCE

A. Admissibility distinguished from credibility

1. Admissibility is satisfied if the offered evidence meets the three requirements of authenticity, relevancy, and competency.

2. Just because evidence has been admitted for the trier of fact's consideration, however, does not mean that it must necessarily be believed. For example:

a. The witness may be lying;

b. the document may contain false information; or

c. the object may have been planted at the scene of the crime.

3. Credibility. Credibility relates to the "believability" of the evidence admitted; that is, the "weight" it is accorded by the court. The trier of fact is the final judge as to how much weight a particular item of evidence will be given.

B. The "admissibility formula": authenticity (A) + relevancy (R) + competency (C) = admissible evidence (AE). All three factors must be present before the evidence is admissible over an objection.

1. Authenticity. The term authenticity refers to the genuine character of the evidence. Authenticity simply means that a piece of evidence is what it purports to be. To illustrate, remember the three primary forms of evidence. 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 oath he has taken to tell the truth. He identifies himself as John Jones. This is John Jones' testimony. 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 that entry or page. Again, it is established that the service record entry is what it purports to be. With regard to physical evidence, take, for example, a pistol that 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 about 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 individual signing the certificate or statement is the official custodian of the record. Once it is admitted in evidence, the certificate takes the place of the authenticating witness. In effect, the certificate speaks for itself. Some examples of this include documents or records of the United States, or any state, district, Commonwealth, territory, or possession of the United States. The concept of "self-authentication" is discussed further in chapter IX.

2. Relevancy. (Key Number 1024) Relevant evidence means evidence having a 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, "Does the evidence aid the court in answering the question before it?"

To demonstrate the meaning of relevancy, 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. Chapter V covers the various concepts of relevancy in greater detail.

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. The various exclusionary rules recognize that in certain instances there are public policies which require the exclusion of certain evidence because of a need to encourage or prevent certain other activity or types of conduct. The exclusionary rules will be discussed at length in subsequent chapters of this study guide with regard to evidence obtained in violation of Article 31, UCMJ (chapter XIII), and evidence obtained in violation of the law of search and seizure (chapter XIV). Additionally, public policy sometimes acts to further certain relationships at the cost of foregoing certain relevant evidence (e.g.,

the husband-wife privilege which 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. Chapter VI discusses these privileges in more detail.

b. Reliability. A second fact that relates to competence is reliability. Evidence which is hearsay, for example, is considered unreliable and is inadmissible. Exceptions to the hearsay rule are allowed only where the circumstances independently establish the reliability of the evidence. These rules exist with one purpose in mind: evidence that is offered must be reliable. *See* chapter VIII for more discussion of the hearsay rule.

c. Undue prejudice. The third consideration with regard to competence is 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 they might unfairly prejudice the accused by emotionally affecting the court members. *See* chapter V and Mil.R.Evid. 403.

4. Admissible evidence. (A+R+C=AE) It is obviously impossible to reduce the admissibility of evidence to a formula of mathematical precision. The chart on the following page is designed as an aid in conceptualizing the three broad categories under which all of the various objections to evidence lie. The proponent of an item of evidence must anticipate such objections and be prepared to offer sound legal theories to demonstrate that the proffered evidence is authentic, relevant, and competent.

ADMISSIBILITY FORMULA CHART

Formula: 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 issues of fact.

CHAPTER II

DISCOVERY

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CHAPTER II

DISCOVERY

0201 GENERAL (Key Numbers 931 - 934)

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

A. It helps to put the defense on an equal footing with the prosecution in terms of investigative resources. Art. 46, UCMJ; *United States v. Simmons*, 44 C.M.R. 804 (A.C.M.R. 1971).

B. 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 served with a copy of them.

C. It provides the basis for cross-examination and impeachment of witnesses at trial. *See United States v. Cunningham*, 12 C.M.A. 402, 30 C.M.R. 402 (1961).

D. It works to make a court-martial a "truth-finding" process by giving both government and defense access to the evidence to be presented in both government and defense cases, and prevents trial by ambush. *See* R.C.M. 701.

The accused's and the government's right to discovery under the UCMJ is implemented by various provisions of the *Manual for Courts-Martial* [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 analogous civilian discovery provisions. Although the materials to which counsel have access are specifically delineated, any errors in denying requests for discovery are measured on appeal by the reasonableness of counsel's requests. Discovery is not a substitute for counsel's case preparation; it is an essential part of it. Therefore, any request for discovery should be (1) as specific as possible under the circumstances, (2) timely, (3) directed to the appropriate official, and (4) supported by the specific authority pursuant to which the request is made. In general, in order to preserve any error in denying a request for discovery for appellate review, it is necessary to renew

the request at trial and to delineate the reason why the request was made (i.e., how the accused's defense is prejudiced by denial of access to the information in issue). For example, defense counsel may show that he has been deprived of the right to prepare cross-examination of the witness because the witness refused to talk to him, or that the government and pretrial investigating officer refused to call the witness at a pretrial investigation. *See United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976) (error to deny accused's request for presence of witness at article 32 investigation).

0202 METHODS OF DISCOVERY (Key Numbers 921, 924, 931-934, 1040)

A. 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 ...." Rule of Court-Martial 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. Trial counsel's dealings with the accused must be through the defense counsel. R.C.M. 502(d)(5)(C). *See United States v. Irwin*, 30 M.J. 87 (C.M.A. 1990) (order requiring third party present during defense interview of victim held invalid); *United States v. Aycock*, 15 C.M.A. 158, 35 C.M.R. 130 (1964) (order for accused not to contact witnesses against him unlawful); *United States v. Enloe*, 15 C.M.A. 256, 35 C.M.R. 228 (1965) (Air Force regulation requiring presence of a third party during defense counsel interview of Air Force investigative agents held unlawful); *United States v. Meyer*, 15 C.M.A. 268, 35 C.M.R. 240 (1965); *United States v. Beck*, 15 C.M.A. 269, 35 C.M.R. 241 (1965); *United States v. Williams*, 15 C.M.A. 270, 35 C.M.R. 242 (1965). *See also United States v. Strong*, 16 C.M.A. 43, 36 C.M.R. 199 (1966) (error to prohibit accused or his counsel from interviewing prosecution witnesses after they had testified); *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980) (where government transferred informant to distant duty station to protect informant against retaliation, government had duty to arrange required interview; even though extraordinary measures might be required to protect informant, such measures to include telephone interviews or written communication if appropriate).

Although both sides have an equal right to interview witnesses, it should be noted that a witness has no obligation to submit to a pretrial interview. *United States v. Morris*, 24 M.J. 93 (C.M.A. 1987). Also, the denial of access to a witness will not automatically get the defense appellate-level relief. *See United States v. Irwin, supra*. The Court of Military Appeals (Cook, J. concurring in the result) has held that, absent an averment of "materiality" by the defense, a denial

of requests for interviews would not be an abuse of discretion. *United States v. Lucas*, 5 M.J. 167 (C.M.A. 1978). The defense counsel should ensure the record fully reflects the prejudice to the accused. If the record does not indicate prejudice to the accused, then the appellate court may simply remand the case for a hearing to determine if the witness had information material to the defense, rather than letting a conviction stand or fall solely on the basis of whether or not the interview was allowed. *United States v. Killebrew, supra. But see United States v. Ford*, 29 M.J. 597 (A.C.M.R. 1989) (Abuse of discretion found where military judge denied defense request for continuance to obtain witness, even though request was untimely. Testimony was noncumulative, important, relevant, requested on the merits, and delay would only have been one of a few days.) *See also United States v. Jones*, 20 M.J. 919 (N.M.C.M.R. 1985) on issue of abuse of discretion.

Note, that a remedy for the witness who refuses to be interviewed exists under R.C.M. 702's provisions for depositions. Of significance is the subpoena power under this rule, which would permit compelling attendance and response to questions. For more information, see para. H, *infra*.

B. 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 not limited by the rules of evidence and may consider the sworn statements of unavailable witnesses. Additionally, unsworn statements of witnesses may be considered if the defense does not object. R.C.M. 405(g)(4). All reasonably available witnesses who appear relevant and not cumulative to a thorough and impartial investigation are required to be called at the article 32 investigation. Military orders may be issued to pay the travel and per diem expense of military witnesses to attend an article 32 investigation. R.C.M. 405(g)(3) and *United States v. Stoecker*, 17 M.J. 158 (C.M.A. 1984) There is no subpoena power at these investigations; therefore, civilian witnesses may not be compelled to attend. However, civilian witnesses who desire to attend can be provided money for their travel and per diem expenses by the issuance of invitational travel orders. R.C.M. 405(g)(3) and JAGMAN, § 0137.

As indicated above, not every witness will be made to attend the pretrial investigation. In pertinent part, Article 32(b), UCMJ provides: "At that investigation, full opportunity shall be given the accused to cross-examine witnesses against him if they are available." (Emphasis added.) R.C.M. 405(g)(1)(A) defines a witness as being "reasonably available" if the witness is located within 100 miles from the situs of the investigation and 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. This provision, amended in change 5 of the *Manual for Courts-*

Martial (MCM) dated 15 November 1991 and adding the 100-mile limitation, is designed to simplify the determination of "reasonably available" by creating a bright-line rule. If the witness is within 100 miles, then the investigating officer must consider the other factors in the rule. The production of witnesses outside the 100-mile radius is within the discretion of the witness' commander for military witnesses or the commander ordering the investigation for civilian witnesses. Note that this amendment to the R.C.M. has not yet been scrutinized by the courts in light of the cases cited below.

In *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976), the Court of Military Appeals considered the meaning of the word "available" as it bears upon the right of the accused to confront and cross-examine witnesses at the pretrial investigation. The accused requested the presence of the key government witness to cross-examine him at the article 32 investigation. The defense objected to the denial of this request and the use of the witness' statements. At trial, the defense moved to reopen the article 32 investigation. The trial judge denied the motion without comment.

In deciding the issue, the Court of Military Appeals utilized a balancing test by weighing the significance of the witness' testimony against the relative difficulty and expense of providing the witness for the investigation. The witness in *Ledbetter* was the key prosecution witness, transferred by the government less than two weeks prior to the investigation. The government made no showing that military exigencies or extraordinary circumstances existed to support its decision not to produce the witness subject to military orders. The court concluded that the trial judge's failure to reopen the investigation and order the production of the witness was prejudicial error. In *United States v. Jones*, 20 M.J. 919 (N.M.C.M.R. 1985), the appellate court, using evidence presented at the investigation and on the motion at trial, found the investigating officer and the trial judge had correctly applied the balancing test set forth in *Ledbetter* when the defense request for two NIS agents to attend the investigation and the request to reopen the article 32 to get their testimony on the record were denied. The facts indicated the agents were located 8,000 miles from the original investigation, they had heavy caseloads which precluded their attendance, and the cost of their attendance would have been very high. The court found them "unavailable" for the original article 32 and also found the defense had subsequently had an opportunity to interview the agents; therefore, there was no need to reopen the article 32.

Because the availability of a witness is a matter of law to be resolved by the trial judge [*United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976)], the importance of raising the issue again at trial and getting all the facts on the record cannot be overemphasized. As was seen in both *Ledbetter* and *Jones*, the appellate courts indicated this evidence must be obtained in order for the trial

judge to make a ruling. The trial judge cannot make assumptions as to the facts. In *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976), the court held that a trial judge's assumption that a key civilian witness was unavailable was improper. When a motion to reopen an article 32 investigation is made, the trial judge must make an independent determination concerning the availability of the requested witness. *United States v. Quan*, 4 M.J. 244 (C.M.A. 1978) (summary disposition). Additionally, the failure to object to the deprivation of substantial pretrial rights at the article 32 investigation through a motion for continuance or a motion for appropriate relief at trial will, absent adverse effects at trial, preclude appellate relief from the article 32 investigation's deficiencies. *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978).

R.C.M. 405(f) states that the accused and his counsel are entitled to be present at all sessions of the pretrial investigation and to confront all witnesses who testify. *But see United States v. Bramel*, 29 M.J. 958 (A.C.M.R. 1990), where the court found the right of face-to-face confrontation at trial, as announced in *Coy v. Iowa*, 487 U.S. 1012 (1988), did not apply to a pretrial investigation provided for by Article 32, UCMJ, which was neither a trial nor part of the trial proceedings. The defense is also entitled to a copy of the report of investigation, with all enclosures, which is forwarded to the officer who ordered the investigation. R.C.M. 405(j)(3). In addition to a copy of the report itself, counsel is also entitled to the tape recording of the witness' testimony at the article 32 investigation. *United States v. Strand*, 17 M.J. 839 (N.M.C.M.R. 1984); *United States v. Derrick*, 21 M.J. 903 (N.M.C.M.R. 1986); *Jencks Act*, 18 U.S.C. § 3500 (1976).

C. Documents and other information possessed by the prosecution. R.C.M. 701.

1. 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 and will be in the possession of trial counsel:

a. The report of the preliminary inquiry officer and statements of witnesses;

b. the report of Naval Investigative Service (NIS) or the Criminal Investigation Division (CID) and statements of witnesses;

c. the recommendations as to disposition by officers subordinate to the convening authority;

d. the report of the pretrial investigating officer, either formal or informal, and a transcript of the pretrial investigation;

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

f. papers relating to any previous withdrawal or referral of charges; and

g. the service record of the accused.

2. 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.

3. Before the 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 or lack of mental responsibility.

4. 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 examinations, 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.

5. 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.

6. When the defense gives timely notice of a defense of alibi, innocent ingestion, or lack of mental responsibility, R.C.M. 701(a)(3)(b) requires the government to disclose the names of witnesses to be called to rebut these defenses.

7. R.C.M. 701(a)(6) requires the trial counsel to affirmatively disclose to the defense the existence of evidence which tends to negate or reduce

the guilt of the accused of the offense charged or which would reduce the punishment. In addition, R.C.M. 703(f) entitles both parties to evidence which is relevant and necessary and, if that evidence is unavailable, then a party may get relief. R.C.M. 703(f) allows this when the "evidence is of such central importance to be an issue that is essential to a fair trial," and will allow relief if there is no "adequate substitute" for such evidence. In examining what type of evidence is essential to a fair trial, what the duties of the trial counsel are, and when the defense is entitled to relief, a look at appellate case law is essential.

a. In a line of cases beginning with *Brady v. Maryland*, 373 U.S. 83 (1963), the Federal courts began with the doctrine that due process required the prosecution, upon request, to disclose to defense any evidence favorable to the accused. The Supreme Court later strengthened this doctrine to require the prosecutor to affirmatively disclose any evidence favorable to the accused if that evidence is reasonably likely to raise a reasonable doubt as to the accused's guilt. *United States v. Agurs*, 427 U.S. 97 (1976). This doctrine has caused reversal of convictions, even in instances where the prosecutor himself was not aware of the evidence. *See, e.g., Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976) (detective's promise to aid government witness unknown to the prosecutor); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964) (ballistics report, unknown to prosecutor, in possession of police showing accused's pistol not wanted for any known crime). This concept has also been extended to impose a duty on the government to preserve and protect exculpatory evidence for the use of the accused. In *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986), this was applied to the military when the court stated, "The Government has a duty to use good faith and due diligence to preserve and protect evidence and make it available to an accused." These principles apparently do not apply to inculpatory evidence, only that which is obviously exculpatory. Additionally, the military courts, following the principles set forth by the Supreme Court in *United States v. Trombetta*, 467 U.S. 479 (1984), have placed the burden of showing the exculpatory nature of the evidence on the defense. The Court of Military Appeals stated "...where the evidence is not 'apparently' exculpatory, the burden is upon the accused to show that the evidence possessed an exculpatory value that <u>was or should have been</u> apparent to the Government before it was lost or destroyed and that he is <u>unable to obtain comparable evidence</u> by other reasonable means." (Emphasis added.) *United States v. Kern*, 22 M.J. 49 at 51-52 (C.M.A. 1986). *See also United States v. Garries*, 22 M.J. 288 (C.M.A. 1986).

The language used by the Court of Military Appeals is similar enough in intent to the language of R.C.M. 703(f) to assume that the court will interpret that provision using the same guidelines set forth in *Trombetta*, *Kern*, and *Garries*. It is therefore incumbent on the trial counsel to ascertain what evidence is available and preserve that which is apparently exculpatory. Whether the prosecution intentionally suppresses exculpatory evidence or is

negligent in doing so, the likelihood of reversal is great. *See, e.g., United States v. Poole*, 379 F.2d 645 (7th Cir. 1967) (failure to disclose report of doctor who had examined kidnap-rape victim and found no evidence of intercourse was error, even though defense relied upon theory of consent at trial). Reversal has also been required for nondisclosure of exculpatory evidence, even where due diligence by defense counsel would have revealed its existence. *See, e.g., Levin v. Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966).

b. The courts have viewed the disclosure requirements as pertaining not only to direct evidence of innocence but to matters which might have helped the defense on the merits or sentencing had the defense known about them. *See, e.g., Levin v. Katzenbach, supra* (eyewitness' inability to recall whether certain transactions had taken place); *United States v. Poole, supra* (report of a doctor who examined the alleged kidnap-rape victim and stated there was no evidence of intercourse was viewed as exculpatory on appeal, even though trial defense counsel cross-examined and argued as though the defense theory was consent); *Giglio v. United States*, 405 U.S. 150 (1972) and *United States v. Reece*, 25 M.J. 93 (C.M.A. 1987) (disclosure of matters affecting credibility of a witness). *See Moore v. Illinois*, 408 U.S. 786 (1972) *reh'g. denied*, 409 U.S. 897 (1972) (unrevealed evidence must be material); *United States v. Agurs*, 427 U.S. 97 (1976) (a prosecutor doesn't violate the constitutional duty of disclosure unless the omission results in the denial of the defendant's right to a fair trial; but, if evidence favorable to the accused is reasonably likely to raise a reasonable doubt as to accused's guilt, government must disclose the evidence even in the absence of a defense request). It should be noted that neither *Brady* nor *Agurs* created a constitutional right to general discovery in criminal cases, only a right to disclosure of exculpatory evidence. In *Arizona v. Youngblood*, 109 S.Ct. 333 (1988), the Court held that, unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process law. *See United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989). R.C.M. 701(a)(2)(B) was found to require disclosure of nonexculpatory rebuttal evidence; even though trial counsel did not intend to use the evidence in question in the government's case-in-chief, the materiality of the evidence required disclosure.

c. In *United States v. Webster*, 1 M.J. 216 (C.M.A. 1975), the Court of Military Appeals held that a grant of immunity or promise of leniency must be reduced to writing and served on the accused within a reasonable time before the witness' testimony. Mil.R.Evid. 301(c)(2) codifies the results in the *Webster* case. Failure to serve the promise upon the defense may preclude the testimony, but a failure to object by the defense may amount to a waiver of the defect. *United States v. Carroll*, 4 M.J. 674 (N.C.M.R. 1977), *aff'd*, 4 M.J. 89 (C.M.A. 1977).

8. The Court of Military Appeals addressed the right of discovery required by military due process in *United States v. Toledo*, 15 M.J. 255 (C.M.A. 1983). In that case, the court reversed the trial judge's denial of a defense request for the government to produce testimony given in a prior trial in Federal court by the informant, the government's key witness. The defense counsel had based his request solely on the Jencks Act, and it had been properly denied on those grounds. The Court of Military Appeals, though, after saying that the request was reasonable and the material relevant, held that military due process required that it be disclosed. The court cited the "liberal" provisions of Article 46, UCMJ. To preserve the issue, counsel should take care to discuss the military due process aspects of a discovery request in addition to the other specific provisions which apply to any particular request.

9. In *United States v. Garries*, 19 M.J. 845 (A.F.C.M.R. 1982), *aff'd*, 22 M.J. 288 (C.M.A. 1986), the defense counsel sought to compel the government to pay for an independent investigator to assist the accused. Noting that the extensive discovery rights enjoyed by the defense in military practice accomplish the same purpose as the Federal statute cited as authority for such funding, the Court of Military Appeals affirmed that the trial judge's denial of this request did not violate the accused's due process right to a fair trial. Additionally, it has become well settled that, in order for the defense to obtain such expert assistance, an accused must show that expert assistance is both material and necessary to his case. *United States v. True*, 28 M.J. 1057 (N.M.C.M.R. 1989); *United States v. Mann*, 30 M.J. 639 (N.M.C.M.R. 1990). Upon proper showing of necessity, the entitlement to expert assistance vests; however, this right to expert services does not mean the accused is entitled to an expert of his own choosing. Rather, all that is required is that competent assistance be made available. *United States v. Burnette*, 29 M.J. 473 (C.M.A. 1990).

D. Documents and evidence in possession of defense. R.C.M. 701(b), as amended in 1991, places broad discovery obligations on the part of the defense. The purpose of this widening of the information is to foster the open discovery process traditionally found in military courts. The information required to be disclosed includes:

1. Names of witnesses and statements. R.C.M. 701(b)(1) requires the defense to notify the government, before trial, of the names and addresses of witnesses, other than the accused, intended to be called in its case-in-chief, and to provide all signed or sworn statements made by these witnesses that the defense is aware of. This new rule constitutes a major departure from the former practice which allowed the defense to wait until conclusion of the government case to reveal their witnesses. The rule is further expanded to require, upon request, disclosing the names and addresses of witnesses the defense intends to call on

sentencing, and to allow the trial counsel to inspect written material the defense intends to present on sentencing.

2. Notice of certain defenses. R.C.M. 702(b)(2), requires notice before beginning of trial of the defense alibi, innocent ingestion and lact of mental responsibility or use of an expert to discuss the accused's mental condition. With respect of the alibi and innocent ingestion, the defense must describe with particularity the circumstances behind the defense and the witnesses who will testify.

E. Privileged information. The MCM refers to information which is not subject to disclosure under the Military Rules of Evidence, such as classified information (Mil.R.Evid. 505), "government information" (Mil.R.Evid. 506), and an informant's identity (Mil.R.Evid. 507). Where the substantial rights of the accused are prejudiced by a refusal to disclose information, the charges may have to be dismissed. Mil.R.Evid. 505-7. *See Jencks v. United States*, 353 U.S. 657 (1957); R.C.M. 701(f); and G. below.

F. Reasonable request. Discovery for some items must be preceded by a request. A broad request amounting to a "fishing expedition" is regarded as unreasonable. *United States v. Franchia*, 13 C.M.A. 315, 32 C.M.R. 315 (1962) (relevance and reasonableness of request depend upon facts of each case). Discovery under R.C.M. 701 may be limited by order of the convening authority pursuant to the Military Rules of Evidence. R.C.M. 701(f). R.C.M. 701 is not intended to entitle defense counsel to matter which is the "work product" of trial counsel. *See Hickman v. Taylor*, 329 U.S. 495 (1947) (written statements of witnesses given to counsel subject to discovery under the Federal Rules of Civil Procedure upon showing of good cause; oral statements given to counsel, whether in form of memoranda or mental impressions, are "work product" and not subject to discovery); R.C.M. 701(f). *See also United States v. Nobles*, 422 U.S. 225 (1975) (Supreme Court applied the attorney work product doctrine to criminal cases and held that, when an investigator who was part of the defense team takes the stand to contrast his recollection of an interview with that of an opposing witness, the work product privilege is waived with respect to matters covered in the investigator's testimony) and *United States v. Vanderwier*, 25 M.J. 263 (C.M.A. 1987) (reflecting that interview notes prepared by attorney or his representative are not automatically excluded from discovery by defense on basis that notes are work produce).

G. *Jencks Act*, 18 U.S.C. § 3500 (1976).

In *Jencks v. United States*, 353 U.S. 657 (1957), the U.S. Supreme Court held that a Federal criminal defendant was entitled to inspect pretrial statements of government witnesses without a showing that such statements were

inconsistent with the witness' trial testimony. The *Jencks* decision was interpreted by some Federal courts to allow discovery before trial of statements of prospective government witnesses. In some instances, the government was required to allow discovery of its investigative files. Congress regarded these lower court interpretations of the *Jencks* decision as unwarranted, and passed legislation known as the Jencks Act, 18 U.S.C. § 3500.

The effect of the Jencks Act was to limit the defendant's right of discovery established by *Jencks v. United States, supra.* In pertinent part, the statute provides:

> a. After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement related to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
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> b. The term "statement," as used in subsection (b) in relation to any witness called by the United States, means --
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> -1- a written statement made by said witness and signed or otherwise adopted or approved by him;
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> -2- a stenographic, mechanical, electrical, or other recording or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement. . . .

18 U.S.C. § 3500(e) (1976).

1. The Court of Military Appeals has held that the Jencks Act applies to courts-martial. *United States v. Albo*, 22 C.M.A. 30, 46 C.M.R. 30 (1972); United States v. Jones, 20 M.J. 919 (N.M.C.M.R. 1985). This application of the Jencks Act to courts-martial, however, does not restrict discovery provisions contained in the MCM, 1984. Rather, it furnishes an alternative to the defense when discovery is not available under existing interpretations of MCM, 1984

provisions. *United States v. Enloe*, 15 C.M.A. 256, 35 C.M.R. 228 (1965) has a discussion of the broad nature of discovery in military law.

Additionally, the Jencks Act allows discovery of witness statements possessed by the United States, as distinguished from statements in the hands of trial counsel or military authorities. R.C.M. 701. It also allows discovery of nonevidentiary statements of testifying government witnesses. *See also* Mil.R.Evid. 612 and R.C.M. 914.

2. The definition of "statement" in the Jencks Act includes a wide variety of matter. It includes not only the written statements signed by a witness, but also the typed signed reports of reports and case activity notes of CID agents. *See United States v. Albo, supra*, and *United States v. Pena*, 22 M.J. 281 (C.M.A. 1986). Photographs can be included if they constitute part of the statement by the witness. *Simmons v. United States*, 390 U.S. 377 (1968); however, a composite drawing made from a witness' statement has been held not to be a statement within the meaning of the Jencks Act. *United States v. Zurita*, 369 F.2d 474 (7th Cir. 1966), *cert. denied*, 386 U.S. 1023 (1967). In *United States v. Jarrie*, 5 M.J. 193 (C.M.A. 1978), the court held that secondhand statements adopted by the witness fall within the scope of the act. The "statement" in that case was the notes taken by the military investigator during a conversation with an informant that were seen and verified by the informant two weeks later. *Accord United States v. Dixon*, 8 M.J. 149 (C.M.A. 1979) and *United States v. Holmes*, 25 M.J. 674 (A.F.C.M.R. 1987). In *United States v. Gomez*, 15 M.J. 954 (A.C.M.R. 1983), *petition denied*, 17 M.J. 22 (C.M.A. 1983), rough notes taken by a military police dispatcher of a telephone request for assistance from a witness were held not to constitute a "statement" within the purview of the Jencks Act, but instead were merely a part of the administrative and general recordkeeping practice. The tape recordings of witness' testimony at article 32 investigations is the proper subject of Jencks Act motions. *See United States v. Strand*, 17 M.J. 839 (N.M.C.M.R. 1984), *aff'd after returned for additional review and new CA action*, 21 M.J. 912 (N.M.C.M.R. 1986). However, the Coast Guard Court of Military Review has indicated there is no duty to make a recording at the article 32 investigation, only to provide it to the defense if one was made. *See United States v. Giusti*, 22 M.J. 733 (C.G.C.M.R. 1986).

The definition of "statement" in subsection (e) of the Jencks Act includes matter that might properly be objected to as "work product" under discovery provisions of R.C.M. 701. There is no work product exception under the Jencks Act and, if a statement taken or recorded by government counsel falls within the definition of the Act, it must be produced. *United States v. Hilbrich*, 341 F.2d 555 (7th Cir.), *cert. denied*, 381 U.S. 941, *reh'g denied*, 382 U.S. 874 (1965), *reh'g denied*, 382 U.S. 1028 (1966); *Saunders v. United States*, 316 F.2d 346, *aff'd on rehearing*, 323 F.2d 628 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 935

(1964); *United States v. Smaldone*, 484 F.2d 311 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974). *See also United States v. White*, 37 C.M.R. 791 (A.F.C.M.R. 1966). Additionally, in *Goldberg v. United States*, 425 U.S. 93 (1976), a writing prepared by a government lawyer relating to the subject matter of testimony of a government witness that had been signed or otherwise adopted or approved by the government witness was held to be producible under the Jencks Act. The court noted that such a writing was not rendered nonproducible merely because a government lawyer interviewed the witness and wrote the statement.

3. If the government, in response to the defendant's demand, maintains that there are portions of the statement which do not relate to the testimony of the witness, the judge must require that the statement in question be submitted to him for an *in camera* examination. If the judge determines that any portion of the statement does not relate to the testimony, he shall excise that portion and deliver the remainder to the defense. Excised portions of the statement must be preserved for appeal. *See* 18 U.S.C. § 3500(c) (1976) *and United States v Dixon*, 8 M.J. 149 (C.M.A. 1979).

It should be noted that the judge determines only if the evidence is a "statement" within the meaning of the statute and whether it relates to the testimony of the witness. He does not attempt to determine whether it can be used by the defense to impeach the witness. *See Palermo v. United States*, 360 U.S. 343 (1959).

4. Classified material. In *Campbell v. United States*, 365 U.S. 85 (1961), the Court placed the duty on the trial judge to administer the Jencks Act "in such a way as can best secure relevant evidence necessary to decide between the directly opposed interests protected by the statute." *Id.* at 95. The Court found erroneous the trial judge's ruling that placed the burden upon the defendant to produce evidence to support his position. If the military judge orders production of a statement under the Jencks Act, and the government refuses on the basis that the material is classified and not producible under Mil.R.Evid. 505, the military judge may recess the trial and require the government to choose among (1) foregoing prosecution; (2) not using the testimony to which the classified material relates; or (3) devising a system under which the statement may be seen by the defense. *See United States v. Gagnon*, 21 C.M.A. 158, 44 C.M.R. 212 (1972); *DeChamplain v. McLucas*, 367 F. Supp. 1291 (1973); Mil.R.Evid. 505.

5. When a request is made for production of material under the Act, what remedy is available when the material is unavailable? Normally, the military judge can grant a continuance in an attempt to produce the evidence or, as an acceptable alternative, he can exclude the witness' testimony or grant a dismissal. Notwithstanding these remedies, relief need not be granted absent an

intentional withholding or destruction of the evidence in an effort to frustrate the defense. *See United States v. Marsh*, 21 M.J. 445 (C.M.A.), *cert. denied*, 479 U.S. 1016 (1986). This "good faith" exception excuses the inadvertent destruction of material. A major problem often arises in determining whether or not there is a good faith exception. The Court of Military Appeals, in *United States v. Jarrie, supra*, recognized such an exception but construed it narrowly, holding that it was inapplicable where there was no showing by the government that the discoverable material was destroyed prior to contemplation of prosecution. It should be noted that, as a practical matter, usually the last thing the defense actually wants is production of the discoverable statement. Failure to produce, it is hoped, will lead to exclusion of the witness' in-court testimony and subsequent failure of the charge. It is critical, then, for the government to bring itself within a good faith exception when discoverable material has been destroyed. The current trend has been for the Courts of Military Review to expand upon the *Jarrie* "good faith" exception. In *United States v. Bosier*, 12 M.J. 1010 (A.C.M.R.), *petition denied*, 13 M.J. 480 (C.M.A. 1982), the Army court applied no sanction to the loss of discoverable Jencks Act material, holding that the appropriate test for prejudice was to "weigh the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial." *Id.* at 1014, *quoting United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971). The court went on to cite *Jarrie, supra*, and hold that harmless error cannot be presumed where the contents of the missing statements cannot be reconstructed; but, in the case at hand, that was possible. Compare the approach of the Navy Court of Military Review, which initially at least was much more reluctant to apply the good faith exception, as reflected in *United States v. Kilmon*, 10 M.J. 543 (N.M.C.M.R. 1980). The Navy court originally held that failure to produce Jencks Act material was error and dismissed the charge saying that, since the statement had been destroyed, there was no means of determining what its contents actually were and, consequently, there was no way to hold that the error was not prejudicial. *United States v. Boyd*, 14 M.J. 703 (N.M.C.M.R. 1982), *petition denied*, 15 M.J. 279 (C.M.A. 1983). However, their view appears to have changed in recent years. In *United States v. Strand*, 21 M.J. 912 (N.M.C.M.R. 1986), the court found that, even though the good faith exception did not excuse the government's failure to produce evidence, the exclusion of a witness' testimony was not mandatory. In this case, the court found only harmless error in the failure to produce the material and, therefore, no relief was necessary. *See also United States v. Price*, 15 M.J. 628 (N.M.C.M.R. 1983); *United States v. Jones*, 20 M.J. 919 (N.M.C.M.R. 1985); *United States v. Marsh*, 21 M.J. 445 (C.M.A. 1986); *United States v. Derrick*, 21 M.J. 903 (N.M.C.M.R. 1986); and *United States v. Pena*, 22 M.J. 281 (C.M.A. 1986). Consequently, merely because material discoverable under the Jencks Act has been lost or destroyed does not mean that the prosecution has no recourse. The government should attempt to show lack of any bad faith in the loss and produce testimony as to the contents of the statements lost.

H. Depositions. *See generally* Art. 49, UCMJ; R.C.M. 702; and chapter XIV, *infra*. 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. But, 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. It may be that, 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 by the legal compulsion afforded by a deposition (*see* R.C.M. 702) can defense counsel have ample opportunity to contact this witness. This use of depositions for discovery purposes is discussed by the court in *United States v. Chestnut, supra* note 2, at 85, wherein the Court of Military Appeals considered the trial judge's failure to grant the defense a continuance for a deposition to be 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. *But see* Fed. R. Crim. P. 15 Advisory Committee notes, which provide that the principal reason for depositions under the Federal Rules of Criminal Procedure is to preserve evidence for use at trial and not to provide a basis for discovery.

Article 49, UCMJ, and R.C.M. 702 authorize both oral and written depositions. R.C.M. 702(g)(2)(B) indicates that no party has the right to be present at written interrogatories. This does not reflect the holding of the Court of Military Appeals in *United States v. Jacoby*, 11 C.M.A. 428, 29 C.M.R. 244 (1960), wherein the court ruled that the sixth amendment requires that the accused be afforded the opportunity to be present with his counsel at the taking of written depositions.

R.C.M. 702(g)(1)(A)(i)(c) allows oral depositions to be taken without the presence of the accused if the deposition is to be used under R.C.M. 1001 for sentencing and the ordering authority determines the circumstances are appropriate.

CHAPTER III

THE MILITARY RULES OF EVIDENCE

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CHAPTER III

THE MILITARY RULES OF EVIDENCE

0301 INTRODUCTION

On 12 March 1980, President Carter signed Executive Order No. 12,198, promulgating the Military Rules of Evidence. Executive Order No. 12,233, of 1 September 1980, made some clarifying and technical amendments to the rules and they became effective on that date. With minor changes, the rules were incorporated into the *Manual for Courts-Martial* which became effective 1 August 1984. The rules alter the nature of trial practice and substantially change the rules of criminal procedure, as well as the rules limiting the nature and quantity of evidence admissible before a court-martial. Perhaps equally important is the significant change in approach symbolized by the Military Rules of Evidence. Following Article 36, UCMJ, the rules not only adopt civilian Federal practice unless it would not be practicable or would be "contrary to or inconsistent with" the Uniform Code of Military Justice, but they also automatically adopt any amendments to the Federal Rules of Evidence 180 days after their effective date, unless the President takes action to the contrary. Mil.R.Evid. 1102. (Accordingly, Mil.R.Evid. 704 was modified on 10 April 1985, but the original rule was restored subsequently and remains different from Fed.R.Evid. 704.) Thus, the rules are designed to ensure conformity with civilian Federal practice -- a conformity that should keep military practice current.

This chapter takes a brief look at the history of the Military Rules of Evidence [hereinafter Mil.R.Evid.] and provides an overview of these rules and their impact upon military practice. It also discusses the general and miscellaneous rules under Sections I and XI, Mil.R.Evid.

0302 HISTORY

A. Drafting the rules. The Military Rules of Evidence were initially drafted by a special committee of the Joint Service Committee on Military Justice Working Group, and subsequently reviewed and modified by the Joint Service Committee on Military Justice. The Joint Service Committee is an interservice body composed of the chiefs of the criminal law divisions of the Army, Air Force, Coast Guard, Navy, and Marine Corps, and a representative of the Court of Military Appeals. The working group that drafted the Military Rules of Evidence was composed of two

representatives from the staff of the Court of Military Appeals, and one representative each from the Army, Navy, Air Force, Coast Guard, and the Office of the General Counsel of the Department of Defense, respectively. The Code Committee, Uniform Code of Military Justice, Article 67(g), reviewed those matters under the proposed rules which involved interservice conflicts, except with regard to Section III of the rules which the judges of the Court of Military Appeals chose not to review. The final draft of the rules was forwarded through the General Counsel of the Department of Defense to the Office of Management and Budget, which circulated the rules to the Department of Justice and other agencies, and finally forwarded them to the President via the White House Counsel's Office.

B. Drafters' analysis

1. In order to assist counsel in the field, the drafters of the rules provided a detailed analysis of the new rules. This analysis was promulgated as *Manual for Courts-Martial, 1969 (Rev.)*, app. 18, and is included as appendix 22 of the *Manual for Courts-Martial, 1984*. The analysis presents the intent of the drafting committee, seeks to indicate the source of the various changes, and generally notes when substantial changes to military law result from the amendments. It clarifies a number of the rules with examples and occasionally suggests possible trial practice considerations. It has been a great help to the trial practitioner and should be consulted as a persuasive source for interpretation of the Military Rules of Evidence.

2. There are several limitations to the analysis, however.

a. The analysis is not binding, as it is not part of the Executive Order promulgating the Mil.R.Evid., nor does it constitute or represent any official view of the Court of Military Appeals or any of the executive departments concerned with the drafting of the Mil.R.Evid.

b. The analysis makes frequent reference to "the present *Manual*," meaning the *Manual for Courts-Martial, 1969 (Rev.)* [hereinafter MCM, 1969 (Rev.)], as it existed prior to 1 September 1980. Most trial advocates in the field will not have access to copies of the now-superseded provisions of the MCM, 1969 (Rev.). The comparisons to and analysis of, the changes from these MCM, 1969 (Rev.) paragraphs will be of limited usefulness to a majority of the judge advocate community for this reason.

c. In a number of situations, there is little detailed information concerning known uncertainties in a rule. In other cases, there are apparent conflicts between the analysis and the rules. These selections will be pointed out at the respective portions of this text.

C. Later revisions. There have been modifications to the Mil.R.Evid. Additional analysis accompanies all modifications and is added to appendix 22 of MCM, 1984 (Rev.).

0303 OVERVIEW

A. General. Until the adoption of the Military Rules of Evidence, the evidentiary rules for courts-martial were primarily "cook-book" type discussions similar to the remainder of the MCM, 1969 (Rev.). In place of this, the Mil.R.Evid. is a body of black-letter rules which the drafters believe to be clearer than the pre-Mil.R.Evid. MCM, 1969 (Rev.) provisions and more susceptible to use by laymen. At the same time, the rules modernize military law and will hopefully make practice before courts-martial simpler and more efficient. Lederer, The *Military Rules of Evidence: An Overview*, 12 The Advocate 113 (1980).

B. Similarity to the Federal Rules of Evidence. Sections I-II, IV, and VI-XI of the Mil.R.Evid. adopt the Federal Rules of Evidence [hereinafter Fed.R.Evid.] with little change, except when modification of the Federal rule was required to ensure compliance with the UCMJ or to ensure practicality within the military setting. (The term "section" was used rather than "article," as in the Fed.R.Evid., because the drafters were concerned that confusion with articles of the UCMJ might result.) For a general, tabular comparison of the Federal and Military Rules of Evidence, see appendix III-1, *infra*.

C. New sections under the Mil.R.Evid. Sections III and V represent significant departures from the corresponding articles of the Federal Rules of Evidence.

1. Section III replaces those Federal evidentiary rules dealing with presumptions in civil matters with a partial codification of the law relating to self-incrimination, confessions and admissions, search and seizure, and eyewitness identification. (For a discussion of specific rules in these areas, see chapters XII, XIII, and XIV, respectively, *infra*.)

a. Section III represents a balance between complete codification -- the approach best suited for situations principally involving laymen -- and flexibility, which is generally permitted only when dealing with matters primarily within the province of lawyers. Section III was expressly intended to serve the needs of the numerous laymen, commanders, nonlawyer legal officers, and law enforcement personnel who play important roles in the administration of military justice.

b. The Section III rules provide a combination of both procedural and evidentiary prescriptions. Since they affect conduct outside of the traditional trial arena, some might argue (and have argued) that there is a question whether these rules are properly within the confines of the President's Article 36 powers. *See United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977) (it is outside the President's authority to promulgate matters affecting substantive law such as the standard for mental responsibility). The drafters' analysis is silent on this point. Although there has been no litigation in this area, it is likely that the rules would be upheld for, although the Mil.R.Evid. are plainly designed in part to affect out-of-court behavior, they are written so as to focus on evidence, trials, and the creation of evidence.

c. There is no treatment of presumptions (found in Article III of the Fed.R.Evid.) in the Military Rules of Evidence.

2. Section V prescribes a body of law of privileges derived primarily from the MCM, 1969 (Rev.) and the Federal Rules of Evidence dealing with privileges. This section of the Mil.R.Evid. follows Federal Rule 501 to the extent that it recognizes Federal common law, but it also provides for eight specific privileges in Section V -- with additional self-incrimination privileges in Section III.

D. Intent to follow the Fed.R.Evid. As previously mentioned, it is the explicit intent of the President and all concerned with the drafting of the Military Rules of Evidence that the court-martial evidentiary rules will never again be allowed to proceed independently of civilian Federal law. This intent is evidenced in several ways.

1. The title itself, according to the drafters, is intended to make it clear that "military evidentiary law should echo the civilian federal law to the extent practicable," but should reflect the "unique and critical reasons" behind a separate military justice system. *See* Mil.R.Evid. 1103 drafters' analysis, *Manual for Courts-Martial, 1984*, app. 22-56 [hereinafter MCM, 1984, app. ____].

2. Under pre-Mil.R.Evid. procedures, in order to change an evidentiary rule, it was necessary for the President to authorize the change and then promulgate it by Executive Order. Military Rule of Evidence 1102 removes the practical inhibitions of this earlier procedure and allows the military rules to continue to track the Federal Rules where practicable.

a. Amendments to the Federal Rules of Evidence automatically apply to the Military Rules on the 180th day after the effective date of the Fed.R.Evid. amendment, unless:

(1) The President directs earlier or later application; or

(2) the President affirmatively directs that any such amendment not apply, in whole or part, to the military. Mil.R.Evid. 1102.

b. The automatic adoption date of amendments to the Federal Rules is 180 days after the effective date of the Federal rule amendment's implementation, not the date that the amendment is proposed by the Supreme Court.

c. In the first case of amendment of the Mil.R.Evid., the President chose to take affirmative action and not utilize the automatic provisions of Mil.R.Evid. 1102. Executive Order No. 12,306, of 1 June 1981, amending Mil.R.Evid. 410.

d. Mil.R.Evid. 704 was modified as of 10 April 1985, pursuant to the automatic provision of Mil.R.Evid. 1102, but the original rule was restored subsequently and remains different than Fed.R.Evid. 704.

E. Challenge of the Mil.R.Evid.

1. The change to the military rules, though sweeping, has not been as disruptive of court-martial practice as had first been expected. This is because the Fed.R.Evid. and the Mil.R.Evid. are very much like the former substantive portions of Chapter XXVII, MCM, 1969 (Rev.). While the format was changed, approximately 75% of the most common evidentiary issues raised at trial are still resolved as they were under prior law. Similarly, a great deal of military judicial precedent will still be viable and controlling on most issues.

2. The Military Rules of Evidence provide counsel with numerous additional opportunities and responsibilities. The new Mil.R.Evid depart from prior law by placing primary responsibility in a number of critical instructional areas on the defense counsel rather than the military judge. Far more evidence is admissible under the new Mil.R.Evid. than under the previous evidentiary provisions of the MCM, 1969 (Rev.). This change results in a notable opportunity for defense counsel, but it is one that will more often inure to the benefit of the prosecution because of the government's burden of proof. Consequently, it is imperative that counsel completely familiarize themselves with the rules and learn not only to employ them affirmatively on the part of their respective clients, but also to object to improper use of the rules by opposing counsel. In this latter respect, it is important to note that a failure to object under the new rules will almost always result in a waiver of the objection; the issue will also be waived if the objection or motion lacks sufficient specificity. Mil.R.Evid. 103.

0304 PURPOSE AND CONSTRUCTION. Mil.R.Evid. 102.

A. General. In case there was ever any doubt as to what a court-martial proceeding should be about, or how it should be conducted, Mil.R.Evid. 102 appears to settle the matter. Without mincing words, this provision mandates that courts-martial are tools of justice, not merely disciplinary proceedings -- that they should foster the growth and development of the law and insure a maximum facility for ascertaining the truth of the issues at bar.

B. Statement of philosophy. Mil.R.Evid. 102 is a statement of philosophy taken verbatim from Fed.R.Evid. 102 and, as an "aspirational rule," is without precedent in military practice. It provides six guidelines which should be considered in construing the Military Rules of Evidence:

1. Securing fairness in the administration of justice;

2. eliminating unjustifiable expense;

3. eliminating unjustifiable delay;

4. promoting the growth and development of the law;

5. enhancing the ascertainment of truth; and

6. justly determining the guilt or innocence of an accused.

C. Balancing requirements. It can be seen that use of these guidelines in argument by counsel will provide the usual countervailing considerations and balancing requirements in determining evidentiary issues at trial. When is the time and expense of obtaining and admitting evidence "unjustifiable," and when is it necessary for "ascertainment of the truth"? When will the admission of additional evidence on an issue interfere with the "just determination" of guilt or innocence, or when is it advisable to depart from the well-trod path of precedent in order to "promote the growth and development" of the law? Essentially, this rule provides a wealthy source of material for argument by any counsel.

D. Aid in application. Mil.R.Evid. 102 is not an independent source of authority nor a license for counsel and military judge to ignore the remaining rules and fashion their own concepts of law. The language of the rule is clear -- that it is intended only to aid in the legitimate application of specific rules under the Mil.R.Evid. The case validly can be made that Mil.R.Evid. 102 must also be considered in construing secondary sources under Mil.R.Evid. 101(b) and in applying the traditional concept of "military due process."

0305 SCOPE AND APPLICABILITY OF THE RULES. Mil.R.Evid. 101, 1101, and 104(a).

A. Applicability. Mil.R.Evid. 101(a) is a deceptively simple statement of the extent of application of the Military Rules of Evidence. It is taken generally from Federal Rule of Evidence 101. Essentially, it states that the military rules apply in all courts-martial, including summary courts-martial. This should not be taken at full face value, however, since Mil.R.Evid. 101 must be read together with Mil.R.Evid. 1101 (as explicitly stated in Mil.R.Evid. 101) and (implicitly) with Mil.R.Evid. 104(a). For example, Mil.R.Evid. 1101(c) recognizes the relaxation of the rules during the sentencing proceedings of courts-martial, while Mil.R.Evid. 104(a) qualifies Mil.R.Evid. 101(a) s broad application by indicating that most preliminary questions heard at article 39(a) sessions and many evidentiary rulings will not be governed by the Mil.R.Evid. In this regard, it is interesting to note the reason given by the Fed.R.Evid. advisory committee for leaving questions of detail out of the initial statement of the scope of the rules is "a simple one: not to discourage the reader of the rules by confronting him at the outset with a rule filled with minute detail." J. Weinstein and M. Berger, Weinstein's Evidence 101-2 (1981).

1. The applicability of the rules to summary courts-martial is emphasized by the inclusion of subsection (c) in Mil.R.Evid. 101. This "rule of construction" makes it clear that when the rules use the term "military judge," the term is intended to include a summary court-martial officer and the president of a special court-martial sitting without a military judge. Where the application of the rules in a summary court-martial or a special court-martial without military judge is different from their application in the traditional court-martial with military judge, specific reference and explanation is given in the individual rule.

2. The application of the rules to summary courts-martial is not a change in military practice, as the previous evidentiary provisions of the MCM, 1969 (Rev.) were similarly applicable to all courts-martial. However, some concern has been expressed that the change from the "cookbook approach" to the tersely worded rule approach of the Mil.R.Evid. might cause difficulties for the nonattorney summary court officer. *See, e.g.*, S. Saltzburg, L. Schinasi & D. Schlueter, *Military Rules of Evidence Manual*, 6 (3d ed. 1991) [hereinafter *Military Rules of Evidence Manual*]. In light of the limited litigation of evidentiary issues at summary courts-martial, this is not seen as a significant problem.

B. Proceedings at which applicable. Mil.R.Evid. 1101 (a) makes a further statement about the applicability of the rules to all courts-martial, except as otherwise provided in the *Manual for Courts-Martial*. *E.g.*, Mil.R. Evid. 104(a).

Mil.R.Evid. 1101(a) repeats the statement that the rules are specifically applicable to summary courts-martial and further emphasizes that the rules are generally applicable at all issue-determinant portions of court-martial practice by enumerating an inclusive list of proceedings at which the rules are applicable:

1. Article 39(a) sessions;

2. limited fact-finding proceedings ordered on review (*Dubay* hearings);

3. proceedings in revision; and

4. contempt proceedings, except where the military judge may act summarily.

C. Proceedings at which not applicable. Mil.R.Evid. 1101(d) is the corollary to Mil.R.Evid. 1101(a) in enumerating proceedings at which the rules are not applicable. These include:

1. Pretrial investigations under Article 32, UCMJ;

2. vacation of suspended sentence hearings under Article 72, UCMJ;

3. requests for search authorizations (chapter XIII, *infra* has a detailed discussion of the applicable procedures for search authorizations);

4. proceedings involving pretrial restraint (review officer's hearings); and

5. any other proceedings authorized under the UCMJ or MCM and not included in Mil.R.Evid. 1101(a) (e.g., courts of inquiry and nonjudicial punishment).

It must be remembered, however, that although the rules in general are not applicable to these proceedings, those rules with respect to privileges are applicable, as emphasized by the parenthetical note in Mil.R.Evid. 1101(d). *See also* the discussion of Mil.R.Evid. 1101(b), *infra*.

Although Mil.R.Evid. limitations, except with respect to privileges, are not applicable to the proceedings listed above, it is anticipated that presiding officials at those proceedings will still consider the rules as persuasive authority in making rulings and decisions, based upon a fairness argument and the similar experience of Federal administrative law judges.

D. Applicability of the rules of privilege. Mil.R.Evid. 1101(b) makes it clear that the privileges provided for in Sections III and V of the Military Rules of Evidence "apply at all stages of all actions, cases, and proceedings." (Emphasis added.) This is particularly important, since the benefits of a privilege are substantially lost once the privilege is violated and cannot be significantly recovered by application of an exclusionary rule or limiting instruction. Accordingly, notwithstanding the comment in the drafters' analysis to Mil.R.Evid. 101 that the rules are "inapplicable to proceedings conducted pursuant to Article 15 of the Uniform Code of Military Justice," it seems appropriate to read Mil.R.Evid. 1101(b) and (d) as providing that privileges recognized under the Mil.R.Evid. must be honored at captain's mast or office hours. *Cf.* Mil.R.Evid. 101 drafters' analysis, MCM, 1984, app. 22-1. Furthermore, Part V, paragraph 4c(3), MCM, 1984, specifically requires application of priviledge rules at NJP.

E. Relaxation of the rules. During the sentencing portion of a court-martial, it has been traditional military practice to allow a relaxation of evidentiary rules. Mil.R.Evid. 1101(c) continues this practice by allowing that the rules, although still applicable, may be relaxed in sentencing proceedings and cites R.C.M. 1001, MCM, 1984 [hereinafter R.C.M. ___].

1. R.C.M. 1001(b)(4) - evidence in aggravation. Relaxation of the rules with regard to aggravation may be limited to that portion dealing with depositions.

2. R.C.M. 1001(c)(3) - extenuation and mitigation (E&M). This is the area where the rules have traditionally been relaxed with regard to letters, affidavits, certificates of civil or military officers, and other writings of similar authenticity and reliability. This is discussed in detail in chapter XI, *infra*.

3. R.C.M. 1001(d) - rebuttal and surrebuttal.

It should be noted that the extent of relaxation of the rules is within the sound discretion of the military judge and not mandatory, but judges are traditionally fairly liberal in allowing any reliable evidence to be used since they do not have the benefit of a presentencing report as do their Federal court brethren. The intent of Mil.R.Evid. 102 is also significant in this area, especially when it is remembered that the rules are merely relaxed, not "abandoned."

Mil.R.Evid. 1101(c) also allows for the possible relaxation of the rules in additional areas and recognizes that the remainder of the *Manual for Courts-Martial* may impact on the Mil.R.Evid.

One of these additional relaxations of the rules is hidden in Mil.R.Evid. 405(c). This rule relaxes the normal rules by allowing the defense counsel to use

affidavits or other written statements of persons other than the accused to prove the accused's character. If the defense uses any of these types of statements, the prosecution is also allowed a relaxation of the rules to use similar types of statements. Since the use of this rule can only be initiated by the accused, there appears to be no sixth amendment confrontation problem with it. This is a limited relaxation since the written statements are admissible "only if, aside from being contained in an affidavit or other written statement, [they] would otherwise be admissible under the rules." (Emphasis added.) Mil.R.Evid. 405(c).

F. Determination of preliminary questions. As noted above, Mil.R.Evid. 104(a) qualifies the broad statements of Mil.R.Evid. 101(a) and 1101(a) as to the applicability of the rules. During hearings before the military judge on "preliminary questions," the judge is not bound to apply the exclusionary law of evidence, except with respect to privileges. [This latter provision is a reiteration of Mil.R.Evid. 1101(b).] Therefore, the judge may hear any relevant evidence, including affidavits or other reliable hearsay.

1. The rule lists five particular issues which are strictly within the military judge's function to decide:

a. Whether a person is competent to be a witness (*see* Mil.R.Evid. 601-602);

b. whether a privilege exists (*see* Sections III and V, Mil.R.Evid.);

c. whether an evidentiary or procedural rule or a constitutional doctrine prevents the admission of evidence (*see* Sections III,IV, VI, VIII-X, Mil.R.Evid.);

d. whether a continuance should be granted; and

e. whether a request for a witness should be granted (these latter two situations have been traditionally recognized as requiring some waiver of the rules, particularly with regard to hearsay, due to military exigencies).

2. The drafters' analysis states that there is a significant and unresolved issue concerning whether the rules of evidence shall be applicable to the determination of evidentiary issues involving constitutional or statutory issues. The drafters suggest that Mil.R.Evid. 104(a) is constitutional in providing that the rules of evidence need not apply in determining constitutional issues. MCM, 1984, app.

22-3. This appears to be the prevailing practice in Federal courts and should be held to be permissible in courts-martial. *See, e.g., United States v. Matlock*, 415 U.S. 164 (1974); *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (hearsay evidence admissible at suppression hearing).

3. In some situations it may even be necessary for the military judge to breach a privilege in order to see if that privilege exists. *See, e.g., Lutwak v. United States*, 344 U.S. 604 (1953) (determination of whether spousal privilege existed).

4. Although the military judge "is not bound by the rules" except with respect to privileges, there is nothing wrong with requesting the judge to apply the rules in appropriate situations, and the competent counsel would be well advised to keep this in mind.

0306 LITIGATION OF PRELIMINARY QUESTIONS. Mil.R.Evid. 104.

A. General. Under Mil.R.Evid. 104(a), the role of the military judge and the applicability of the Mil.R.Evid. in the determination of preliminary questions has been discussed in section 0305 F., *supra*. The remaining subsections of Mil.R.Evid. 104 provide guidance on the procedural aspects of litigating preliminary questions.

B. Relevancy conditioned on fact. Mil.R.Evid. 104(b). In determining the preliminary question of the admissibility of evidence, the "admissibility formula" (AE = ARC) must be kept in mind (i.e., only relevant evidence is admissible). *See* Mil.R.Evid. 402. In some situations, the relevancy of an item of evidence may depend upon the existence of a particular preliminary fact. Relevance in this sense is conditional relevance and should be distinguished from logical relevance, treated by rule 401. *See* chapter V, *infra*.

1. Under the Fed.R.Evid., if the judge believes the proponent has established or will establish the condition of fact to the satisfaction of a reasonable juror, the matter is submitted to the jury subject to instructions to disregard the evidence if they find against the existence of the conditional fact. J. Weinstein and M. Berger, *Weinstein's Evidence*, footnote 104-54 (1988). Under the Mil.R.Evid., language has been added to Fed.R.Evid. 104(b) to make it clear that in military practice the judge alone determines whether evidence is relevant and whether there is sufficient factual basis to allow evidence to come before the court members. The rule allows for an exception to the judge's sole responsibility where the rules or the *Manual for Courts-Martial* provide expressly to the contrary, and Mil.R.Evid. 1008 is the only apparent exception at present.

a. In making this relevancy determination, the military judge might admit one piece of evidence contingent upon other evidence being admitted and strike the initially admitted evidence if a link is not made (with appropriate instructions to the members to disregard); or the judge might require counsel to demonstrate at an article 39(a) session that the link could be made before admitting any of the evidence. The order of proof is strictly within the discretion of the military judge. *See* Mil.R.Evid. 611(a).

b. The *Military Rules of Evidence Manual, supra,* at 57, offers an insightful analysis of the questions a military judge should consider in ruling under Mil.R.Evid. 104(b):

> In the usual case, Rule 104(b) requires the trial judge to ask himself at least one, and possibly two, questions when evidence is offered and an objection on relevance grounds is made. Always, the judge must ask the following questions: If they believe this evidence, will court-members find it helpful in deciding the case accurately? If the answer is "no," the judge excludes the evidence as irrelevant under Rule 402. If the answer is "yes," the judge asks another question: Is there sufficient evidence to warrant a reasonable court-member in believing the evidence? If the answer is "no," the evidence is excluded. If the answer is "yes," the evidence is admitted. It is very important that the judge not decide whether *he* believes the evidence under Rule 104(b); the judge only decides whether a reasonable court-member could believe it. If one piece of evidence must be connected with another to be useful, the judge asks the questions stated here with respect to the two pieces of evidence together.
>
> When Rules 104(a) and 104(b) are put together, it seems that the judge protects the court-members under (b) by assuring that evidence is relevant if believed, and that there is enough evidence for the jury to believe it. Under Rule 104(a) the judge himself must be satisfied that the principle of evidence, procedure or constitutional law has been satisfied. For instance, the judge decides whether a communication was made in confidence to a lawyer, or whether it was part of plea bargaining. Once he decides, he knows whether to admit or to exclude the evidence.

2. Like many of the other Military Rules of Evidence, Mil.R.Evid. 104(b) cannot be considered in a vacuum. Some of the rules which specifically relate

to the concept of Mil.R.Evid. 104(b) are Mil.R.Evid. 602, 901(a), and 1008 (dealing with personal knowledge of a witness, authentication, and the admissibility of other evidence of contents of writings, respectively).

3. Mil.R.Evid. 104(e) should also be considered, as it provides an alternative for counsel who have lost a conditional relevancy issue -- or any other preliminary issue, for that matter. This provision states that nothing in Mil.R.Evid. 104 prevents counsel from introducing evidence before members that would challenge the weight to be given admitted evidence and the credibility of witnesses. This is a reminder that the military judge's decision to admit evidence does not mean that the evidence must be believed by the members.

C. Hearing of members. Mil.R.Evid. 104(c). This subsection discusses the circumstances under which members are excluded from hearings in preliminary matters.

-- In a trial with members, Mil.R.Evid. 104(c) requires that the members be excluded under two situations:

a. During litigation under Mil.R.Evid. 301-306 on the admissibility of statements of the accused; and

b. when the accused is a witness on any preliminary question, but only if the accused so requests.

In any other situation, exclusion of the members is permissive and within the sound discretion of the military judge "when the interests of justice require." Mil.R.Evid. 104(c). In light of traditional military practice, Article 39(a), UCMJ and the R.C.M. 803 discussion, and considering that the judge has sole responsibility for preliminary question determination, it is hard to envision a situation where the members will not be excluded. If the military judge should fail to call for article 39(a) sessions sua sponte, defense counsel should be prepared to explicitly request them.

D. Testimony by the accused. Mil.R.Evid. 104(d). This section of Rule 104 is designed to encourage the accused's participation in the litigation of preliminary matters and thus improve the fact-finding process. If the accused decides to testify on a preliminary matter, he or she is not subject to cross-examination concerning any other issue in the case.

1. There is nothing in the rule which deals with subsequent use of testimony given by an accused at a hearing on a preliminary question. For example, can the accused's limited purpose testimony be used to impeach?

2. Mil.R.Evid. 304(f), 311(f), and 321(e) deal with the testimony of the accused in specific circumstances and should be consulted and cited by counsel when applicable (motions to suppress accused's statements, results of search and seizure, and eyewitness identification, respectively). These rules strictly forbid any use of the accused's limited purpose testimony except for prosecution for perjury, false swearing, and making of a false official statement.

0307 RULINGS ON EVIDENCE. Mil.R.Evid. 103.

A. General. Perhaps more than any other evidentiary provision contained in the Military Rules of Evidence, Mil.R.Evid. 103 provides for a new approach and philosophy towards courts-martial practice. Prior to the Mil.R.Evid., the Court of Military Appeals had adopted paternalistic tendencies towards defense counsel and had been prone to allow appellate defense counsel to raise allegations having no foundation in the record of trial. *See, e.g., United States v. Reagan*, 7 M.J. 490 (C.M.A. 1979), *petition for reconsideration denied*, 9 M.J. 263 (C.M.A. 1980). Under Mil.R.Evid. 103, counsel have greater responsibility for raising and preserving issues and can no longer afford to sit back and count on the courts to save them, except possibly to save their clients from the truly incompetent counsel.

B. Materially prejudicial error. Rule 103(a) requires that no error may be found to exist on appeal unless that error "materially prejudices a substantial right of a party." (Translated, the accused.) No one should be surprised that such language found its way into the rules; but what should be surprising is that it has existed for as long as Article 59(a), UCMJ and, for a few years prior to implementation of the Mil.R.Evid., had been rather routinely ignored by the Court of Military Appeals. Rule 103 changes this, requiring that error alone will not justify relief on appeal, and that the accused in some very specific manner must first have suffered material prejudice to a substantial right.

C. Historical background. First, we should look at the ways in which the Court of Military Appeals has dealt with the effects of errors in the past.

1. In some situations, this court has adopted prophylactic rules which must be rigidly followed if a conviction is to be sustained. Violation of these rules can result in reversal, even without any showing of prejudice in the individual case. *See, e.g., United States v. Green*, 1 M.J. 453 (C.M.A. 1976); *United States v. King*, 3 M.J. 458 (C.M.A. 1977) (pretrial agreement inquiries). The creation of such prophylactic rules is increasingly rare, however. In fact, the Green-key Rule was later recanted in *United States v. Passini*, 10 M.J. 108 (C.M.A. 1980). When a constitutional error is committed, the Court of Military Appeals has followed the decision of the United States Supreme Court in *Chapman v. California*, 386 U.S. 18, *reh'g denied*, 386 U.S. 987 (1967). *See United States v. Ward*, 1 M.J. 176 (C.M.A. 1975). *Chapman* requires reversal unless constitutional error is harmless beyond a

reasonable doubt, which, the court has indicated, means there is no reasonable possibility that the error affected the decision of the trial court. The second paragraph of Mil.R.Evid. 103(a) and the drafters' analysis make it clear that the "harmless error" test prevails over the general rule of 103(a) when applicable. *See* MCM, 1984, app. 22-2. The Army Court of Military Review addressed the standard for finding prejudicial error for constitutional issues in *United States v. Thornton*, 16 M.J. 1011 (A.C.M.R. 1983). It offered three tests for determining whether constitutional error equates to prejudice requiring relief: (1) Focusing on the erroneously admitted evidence or other constitutional infraction to determine whether it might have contributed to the conviction; (2) disregarding the erroneously admitted evidence where overwhelming evidence supports conviction; and (3) determining whether the erroneously admitted evidence is merely cumulative, duplicating properly admitted evidence. *See also United States v. Owens*, 21 M.J. 117 (C.M.A. 1985) and *United States v. Jones*, 33 M.J. 1040 (N.M.C.M.R. 1991) for a harmless, beyond-a-reasonable-doubt analysis.

2. In the case of nonconstitutional error, the Court of Military Appeals, in *United States v. Barnes*, 8 M.J. 115 (C.M.A. 1979), specifically adopted the Supreme Court's approach in *Kotteakos v. United States*, 328 U.S. 750 (1946) as its standard. In *Kotteakos*, the Supreme Court held that nonconstitutional error produces harm when it has a substantial influence on the findings. The majority in *Barnes* specified that nonconstitutional errors would be harmless if the government could establish "that the finder of fact had not been influenced by it . . . [or] . . . that the error had but a slight effect on the resolution of the issues in the instant case." *Id.* at 116. The standard expressed in Mil.R.Evid. 103(a) and the similar Fed.R.Evid. provision considerably strengthens this test in favor of the government. *See, e.g.*, *United States v. Wirth*, 18 M.J. 214 (C.M.A. 1984) (government's rebuttal, even if improper, did not dictate the outcome of the trial and therefore there was no fair risk that the accused was substantially prejudiced by that evidence). *See also United States v. (Karen) Davis* (previously known as Charles W. Marks), 26 M.J. 445 (C.M.A. 1988) (members being advised that the accused had pleaded guilty to two offenses prior to considering the offenses to which accused had pleaded was error, but not reversible.)

D. Objection. Mil.R.Evid. 103(a). The seriousness with which Congress intended Mil.R.Evid. 103 to be applied in the Federal courts, and the philosophy with which it is hoped it will be received in the military, is displayed by Mil.R.Evid. 103(a)(1). This provision requires that, not only must a substantial error have occurred at trial before relief can be obtained, but also that counsel have done everything possible to protect the record and rectify the error while still in the courtroom. Mil.R.Evid. 103(a) provides that, if an erroneous evidentiary ruling is made at trial, counsel must object or move to strike with respect to the issue. The objection or motion to strike must be specific, identifying the evidence objected to and the grounds upon which counsel contends the objection or motion to strike should be

sustained. The rule provides an exception to the requirement for stating the grounds for an objection when the specific ground for the objection is obvious in the content of the case.

1. Timeliness. A "timely" objection normally means one made at the earliest possible opportunity, traditionally before a witness has had a chance to answer an objectionable question or at the time that objectionable physical evidence is offered to the military judge for admission into evidence. Some cases may be illustrative of the need for timeliness in objecting to evidence.

a. In *United States v. Lockhart*, 11 M.J. 603 (A.F.C.M.R.), *petition denied*, 11 M.J. 466 (C.M.A. 1981), defense counsel failed to make a timely objection when the government admitted his client's admissions. Instead, after the government rested, defense counsel moved for a finding of not guilty, contending that the government failed to establish a satisfactory basis for the admission's voluntariness. The court found the claim to be untimely, holding that "[f]ailure to object at the time the admission was offered in evidence constituted a waiver." *Id.* at 604. *See generally* Mil.R.Evid. 304(d) on objection to confessions and admissions.

b. In *United States v. Thomas*, 11 M.J. 388 (C.M.A. 1981) (pre-Mil.R.Evid.), defense counsel sought to exclude certain evidence by a motion *in limine*. The military judge refused to hear the matter at that time, but informed counsel that he could raise the issue at trial. However, defense counsel failed to object when the evidence was later offered and admitted. As a result, the Court of Military Appeals held that counsel waived any objection and prohibited appellate defense counsel from litigating the issue. *But see United States v. Gamble*, 27 M.J. 298 (C.M.A. 1988). In that case, the military judge made a final ruling on a motion *in limine* obviating a second defense objection at the time the evidence was eventually introduced.

c. Contrast *Thomas* with *United States v. Burrell*, 15 M.J. 259 (C.M.A. 1983), where error was not waived even absent a specific defense objection. In *Burrell*, the military judge gave a constitutionally deficient instruction on reasonable doubt (using the words "unwilling to act" vice "hesitate to act"). Defense counsel failed to object to the improper instruction, but did submit a constitutionally sufficient instruction to the military judge. The military judge did not give the instruction submitted by the defense counsel. The court held that the act of submitting the proposed instruction preserved the error on appeal, even though no specific objection was made to the constitutionally deficient instruction given by the military judge.

d. But, in *United States v. Robinson*, 544 F.2d 110 (2d Cir. 1976), *cert. denied*, 434 U.S. 1050 (1978) counsel's offer of proof -- made one day after his witness' testimony was excluded -- was timely, where the delay was due

to the fact that counsel wished to make an offer with the jury absent and did not wish to delay the proceedings. (There does seem to be a legitimate rationale for requiring a more timely objection when evidence is admitted than when it is excluded.)

e. In *United States v. Cofield*, 11 M.J. 422 (C.M.A. 1983), the court urged the use of *in limine* motions to resolve issues where appropriate. While recognizing that *in limine* resolutions are discretionary with the military judge, the court stated that they minimized the possibility of mistrials, reduced the amount of time members need to spend waiting for evidentiary issues to be resolved, help clarify issues for review, and reduce or avoid the "trial-by-ambush" tactics employed by some counsel.

f. In the case of *United States v. Hilton*, 27 M.J. 323 (C.M.A. 1989), the court held that a failure to raise at trial constitutional and statutory challenges to a regulation which was disobeyed did not preclude appellate consideration where apposite precedent from appellate courts militated against objecting or if C.M.A. decided sua sponte to order review. Accused had plead not guilty, and the objections challenged the very power of the United States to try the accused on these charges.

2. Specificity of objection grounds. Mil.R.Evid. 103(a)(1). In their analysis of Mil.R.Evid. 103(a)(1), the drafters of the rules note that the "party has a right to state the specific grounds of the objection to the evidence." (Emphasis added.) More than a "right," this is a responsibility of counsel, and the Federal courts have held the defense to high levels of specificity. *See, e.g., United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978) (objection to evidence as irrelevant does not preserve hearsay objection on appeal); *United States v. Sims*, 617 F.2d 1371 (9th Cir. 1980) (court would not consider Mil.R.Evid. 803(8) on appeal when only 803(6) was raised at trial); *United States v. O'Brien*, 601 F.2d 1067 (9th Cir. 1979) (objection that witness was testifying from material not in evidence held inadequate to preserve objection under Fed.R.Evid. 1006). It is suggested that counsel cite specific rules of evidence in their objections and make an adequate demonstration of the potential error if the evidence is admitted. *See, e.g., United States v. Hutcher*, 622 F.2d 1083 (2d Cir. 1980), *cert. denied, Hutcher v. United States*, 449 U.S. 875, 101 S.Ct. 218 (1980) (defense counsel's statement "I will object to that" without any citation of authority was found to lack sufficient specificity to preserve the claim for appeal); *United States v. Taylor*, 12 M.J. 561, 562 (A.C.M.R. 1981) (court requires objecting counsel to demonstrate potential errors so that moving party could cure "evidentiary foundational defects" at trial, rather than on appeal); *United States v. Foust*, 14 M.J. 830, 832 (A.C.M.R. 1982) (general hearsay objection to admissibility of lab reports and related documents lacked "sufficient specificity to warrant . . . cognizance of this matter on appeal"), *aff'd on other grounds*, 17 M.J. 85 (C.M.A. 1983). *See also United States v. Corraine*, 31 M.J. 102 (C.M.A. 1990).

E. Offer of proof. Mil.R.Evid. 103(a)(2). When an objection to evidence has been successful and the evidence excluded, the proponent of the evidence must make an offer of proof under Mil.R.Evid. 103(a)(2) in order to retain the question for appeal. *See, e.g., United States v. Heatherly*, 21 M.J. 113 (C.M.A. 1985) (court declined to speculate about counsel's purpose in seeking admission of demonstrative evidence); *United States v. Elvine*, 16 M.J. 14 (C.M.A. 1983) (defense counsel's offer of proof demonstrated probative value of excluded evidence). As noted in Mil.R.Evid. 103(a)(1), there is an exception to this requirement when the substance of the excluded evidence is "apparent from the context within which questions were asked," but counsel are again cautioned never to count on the obvious and to make the offer of proof in these situations.

1. The drafters' analysis to Mil.R.Evid. 103(a) defines offer of proof as a "concise statement by counsel setting forth the substance of the expected testimony or other evidence." MCM, 1984, app. 22-3. In *United States v. Young*, 49 C.M.R. 133 (A.F.C.M.R. 1974), the court held that counsel's offer of proof must be more than his mere hope of what the expected testimony would be. It was considered necessary for the offer of proof to portray, in fact, what the witness in question would ultimately have added to the proceedings. Since counsel in *Young* failed to do this, the offer of proof was rejected on appeal. Similarly, in *United States v. Winkle*, 587 F.2d 705 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979), the court warned that it would not accept mere conclusions by counsel as sufficient offer of proof and provided a suggestion on what a proper offer should contain:

a. Statement concerning the nature of the testimony in question;

b. indication of the issue the testimony would affect; and

c. a showing of how the issue would be affected.

Counsel following this suggestion will be on firm footing in preserving an issue for appeal.

2. The statement of the offer of proof by counsel is not the only permissible form of an offer of proof. The offer may take several other forms.

a. Counsel may obtain permission to question the witness as if the objection had been overruled. The second sentence of Mil.R.Evid. 103(b) explicitly recognizes this form of an offer. Conducted at an article 39(a) session, this form allows the courts to determine more accurately the effect of the exclusion of the testimony, but it does result in increased delay in the proceedings.

b. Counsel could submit a written summarization of the offer of proof. This particularly would be advisable when the excluded testimony is lengthy or technical and counsel's oral offer might omit certain portions.

c. Courts have found other forms of offers of proof when they deem it appropriate. In *United States v. Reed*, 11 M.J. 649 (A.F.C.M.R. 1981), an important defense witness was excluded on the basis of trial counsel's hearsay objections. The court found the exclusion of the witness to be error, but noted that trial defense counsel had failed to make a timely offer of proof demonstrating what the excluded testimony would have been. Adopting a broad, if not creative, intepretation of Mil.R.Evid. 103(a)(2), the court found that the defense counsel's opening statements (demonstrating how the witness would have testified) was the functional equivalent of an "offer of proof." The court did note that it would probably not be so generous again and noted that counsel would be well advised to make an explicit offer of proof following the exclusion of proffered evidence.

3. Counsel should remember that the term "offer of proof" includes not only offers following the exclusion of evidence, but also representations of fact that are actually used in lieu of evidence by the court to resolve a disputed matter. In neither case is the offer of proof considered evidence. In the latter case, the offer of proof is akin to a stipulation, discussed in chapter IV, *infra*. An interesting discussion of the uses of offers of proof by defense counsel can be found in Carroll, *Effectively Using Offers of Proof*, 10 The Advocate 87 (1978).

F. Waiver. In general, the Court of Military Appeals has strictly applied the waiver provision of Mil.R.Evid. 103(a).

1. *United States v. McLemore*, 10 M.J. 238 (C.M.A. 1981). At appellant's trial, defense counsel failed to object to certain potentially inadmissible article 15's. Although the Court of Military Appeals noted that their admission may have been erroneous, the court failed to grant relief stating: "Under these circumstances, the responsibility rests on defense counsel to interpose an objection -- or else be subject to waiver." *Id.* at 240. Importantly, the court went on to state that Mil.R.Evid. 103(a)(1) has taken a "very expansive view of waiver," indicating that defense counsel must pose specific and timely objections to inadmissible evidence or face waiver on appeal. *Id. See also United States v. Gordon*, 10 M.J. 278 (C.M.A. 1981), where the court, citing *McLemore* and *United States v. Negrone*, 9 M.J. 171 (C.M.A. 1980), again alluded to Mil.R.Evid. 103(a)(1)'s broad waiver provisions.

2. *United States v. Cofield*, 11 M.J. 422 (C.M.A. 1981). Appellant's motion *in limine* to suppress a summary court-martial conviction was denied before trial. As a result, appellant did not testify on the merits. Although the court ultimately reversed the conviction, it expressed concern that, because Cofield did not testify, it was difficult to determine whether the judge's erroneous ruling prejudiced

the defense. Today, the accused's failure to testify would constitute waiver. *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984). *United States v. Sutton*, 31 M.J. 11 (C.M.A. 1990).

3. *United States v. Jessen*, 12 M.J. 122 (C.M.A. 1981), *aff'd, United States v. Lucas*, 25 M.J. (C.M.A. 871, *cert. denied* 484 U.S. 1027, 108 S.Ct. 752 (1988) also recognizes that Mil.R.Evid. 103 changes pre-existing practice and provides that hearsay may be considered when it is admitted without objection. *Accord United States v. Gordon*, 18 M.J. 463 (C.M.A. 1984) (the failure of the defense counsel to raise a hearsay objection to testimony regarding a prior identification of the accused waived this issue for appeal).

4. In *United States v. Lucas*, 19 M.J. 773 (A.F.C.M.R. 1984), the failure of the trial defense counsel to object to the improper use of immunized testimony was determined to be a waiver of this issue for appeal.

G. Record of offer and ruling. Mil.R.Evid. 103(b) places some responsibility on the military judge to ensure that counsel's offers of proof are accurately preserved by giving the judge discretion to enhance any offering. The military judge may add a comment that explains the character or form of the evidence or offer, the nature of the objection, or the court's ruling on the objection. The purpose here again is to send a complete and accurate view of the proceedings to the appellate courts.

H. Hearing of members. Mil.R.Evid. 103(c) is self-explanatory and consistent with the military practice of article 39(a) sessions in preventing members from hearing potentially inadmissible evidence. It states that, in a court-martial composed of a military judge and members, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the members by any means (such as making statements or offers of proof or asking questions in the hearing of the members). Additionally, rules 15 and 16 of the Uniform Rules of Practice before Navy and Marine Corps Courts-Martial, NAVMARTRIJUDIC 5810.5A (17 Dec 90), provide that, when stating their objections, making motions to strike, or submitting offers of proof, counsel should inquire whether the military judge will entertain argument outside the presence of the members. Rule 15: When counsel initially enters an objection, he shall state only the objection and the basis for it. Before proceeding to argue an objection, counsel will request permission of the trial judge and ascertain whether argument will be entertained in open session or in an out-of-court session. Although argument identifying legal issues and presenting authorities is ordinarily appropriate, an objection or argument for the purpose of making a speech, recapitulating testimony, or attempting to guide a witness is prohibited. Rule 16: After the trial judge has announced his decision upon an objection, counsel shall not make further comment or argument except with the express permission of the trial judge.

I. Plain error. Mil.R.Evid. 103(d)'s "plain error" provision provides an escape route from the strict requirements of Mil.R.Evid. 103(a) should there be truly egregious error. This subsection should normally be limited to errors that are indeed "plain," which can be translated to mean "without excuse for their occurrence." *See, e.g, United States v. Watson*, 11 M.J. 483, 486 (C.M.A. 1981), where the court, in reversing a case where defense counsel failed to object to hearsay statements, noted that it was "unable to discern any trial tactic which would imply a conscious choice by defense counsel to have hearsay evidence in the record." Such errors can be minimized if the military judge inquires of counsel whether counsel is acting inadvertently or whether counsel is pursuing a course of action for strategic reasons.

-- Counsel should not count on the invocation of Mil.R.Evid. 103(d) on a frequent basis. Errors of constitutional magnitude are not necessarily plain error. *United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983). The philosophy of one Court of Military Review may show the thinking on "plain error." In *United States v. Beaudion*, 11 M.J. 838 (A.C.M.R.), *petition denied*, 12 M.J. 181 (C.M.A. 1981), the court found waiver under Mil.R.Evid. 103(a) in defense counsel's failure to object to an inadmissible record of NJP. The court refused to apply Mil.R.Evid. 103(d)'s "plain error" standard because "invoking the waiver doctrine will not cause a miscarriage of justice nor will it impugn the reputation and integrity of the court or amount to a denial of a fundamental right of the accused." *Id.* at 840. In *United States v. Robinson*, 12 M.J. 872 (N.M.C.M.R. 1982), admission of an unauthenticated document was not plain error. Lack of finality of a prior conviction was not considered to be plain error in *United States v. Hancock*, 12 M.J. 685 (A.C.M.R. 1981). In *United States v. Willett*, 11 M.J. 723 (A.F.C.M.R.), *petition denied*, 12 M.J. 177 (C.M.A. 1981), however, admission of a prior conviction not properly recorded on a service record page was considered to be plain error since it was "plainly inadmissible." Failure of the record to establish that a government witness called in presentencing had personal knowledge of an NJP of the accused, about which the witness testified, was plain error. *United States v. McGill*, 15 M.J. 242 (C.M.A. 1983). Plain error was also found in the military judge's admission of an unobjected to article 15 record that was largely unreadable and incomplete [*United States v. Dyke*, 16 M.J. 426 (C.M.A. 1983)] and when the charges were multiplicious [*United States v. Waits*, 32 M.J. 274 (C.M.A. 1991)]. "Although the Military Rules of Evidence were intended to place additional responsibility upon trial and defense counsel, we do not believe that they were meant to provide a license for slipshod performance by military judges." *Dyke* at 427. *See also United States v. May*, 18 M.J. 839 (N.M.C.M.R. 1984) (plain error committed in admitting civilian conviction with patent deficiencies). Even when plain error does not exist, courts of military review can still take corrective action in the interest of justice. *United States v. Claxton*, 32 M.J. 159 (C.M.A. 1991).

J. Deferring ruling. Nothing requires the judge to make a ruling on objections when they are raised. He may defer ruling, even if doing so will have a chilling effect on counsel. *United States v. Cannon*, 33 M.J. 376 (C.M.A. 1991).

0308 LIMITED ADMISSIBILITY. Mil.R.Evid. 105.

A. During the course of a court-martial, evidence may be admitted as helpful to the trier of fact on one aspect of the case (Mil.R.Evid. 401 & 402), yet be inadmissible as to another aspect of the case [*see, e.g.*, Mil.R.Evid. 404(b)]. Court members often find it difficult to use evidence offered for a limited purpose solely for that limited purpose and may tend to misapply the evidence, especially when it is evidence of an accused's prior conviction (Mil.R.Evid. 609). Mil.R.Evid. 105 addresses the problem of limited admissibility.

B. Rule 105 embodies the traditional military theory that, as a general rule, evidence should be received if it is admissible for any purpose, notwithstanding the fact that it is inadmissible for another purpose. This rule categorizes the two general situations in which limited admissibility arises.

1. Evidence may be admissible for one purpose, but not another. For example, evidence of other crimes may be admissible to show an accused's intent, but not that he acted in conformity with the character shown by these crimes [Mil.R.Evid. 404(b)]; or, in situations not covered by Mil.R. Evid. 801 (d)(1), inconsistent statements may not be used on the merits of a case, but may be used solely for impeachment purposes (Mil.R.Evid. 613).

2. Evidence may be admissible for one accused even though it is inadmissible against a co-accused. *See Bruton v. United States*, 391 U.S. 123 (1968); *United States v. Pringle*, 3 M.J. 308 (C.M.A. 1977). Note that Mil.R. Evid. 306, dealing with statements of co-accused, is more restrictive and protective than Mil.R.Evid. 105.

C. Mil.R.Evid. 105 places primary responsibility for limiting instructions upon counsel, rather than the military judge, by specifying that the judge need give a limiting instruction only "upon request." This is a significant change in military law, since substantial appellate litigation over the three years prior to the effective date of the Mil.R.Evid. had stripped counsel of their responsibilities in this area. The drafters' analysis to Mil.R.Evid. 105 indicates the explicit intent to overrule *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977). MCM, 1984, app. 22-3. *Grunden* reflected a more paternalistic approach by the court, substituting the court's judgment over that of counsel. The case included the oft-quoted language that "no

evidence can so fester in the minds of court members as to the guilt or innocence of the accused as to the crime charged as evidence of uncharged misconduct. Its use must be given the weight of judicial comment, i.e. an instruction as to its limited use." *Id.* at 119.

Even before the adoption of the Mil.R.Evid., the Court of Military Appeals was backtracking from the *Grunden* position. In the case of *United States v. Montgomery*, 5 M.J. 832 (A.C.M.R.), *petition denied*, 6 M.J. 89 (C.M.A. 1978), the accused met a companion with whom he became intimate. After the companion performed oral sex on him, he disrobed the companion and found out that "she" was a "he." Becoming quite upset, the accused beat up the companion and took his money as compensation for the emotional trauma. Montgomery was charged with robbery only and not sodomy; but, at trial, the evidence of the sodomy was introduced. Finding the uncharged misconduct to be part and parcel of the charged misconduct, the court did not find error in the trial judge's refusal to give a limiting instruction. *See also United States v. Thomas*, 11 M.J. 388 (C.M.A 1981) (evidence inextricably related in time and offense to those offenses charged need not be the subject of a sua sponte limiting instruction).

D. Although an instruction need not be given unless requested by counsel (and note that this can be either trial or defense counsel), once a request is made, the instruction must be given. *See, e.g., United States v. Eckmann*, 656 F.2d 308 (8th Cir. 1981) (where damaging evidence was adduced against only one of several defendants, the court found that the failure to give requested limiting instructions was reversible error.) The rule is silent, however, on what constitutes a sufficient "request" or when the instruction should be given.

1. Sufficient request. It would seem that a defense counsel's request for instructions couched in terms of the military judge doing "whatever is legal and correct" is not a request for an instruction under this rule. *See United States v. Vitale*, 596 F.2d 588 (5th Cir. 1979); *United States v. Bridwell*, 583 F.2d 1135 (10th Cir. 1978).

a. Counsel should, at a minimum, specifically state the grounds for limiting the evidence. Mil.R.Evid. 103(a). It is possible that reviewing courts may find an issue to be so potentially prejudicial, notwithstanding counsel's failure to state specifically the error or even ask for any instruction, that the judge's failure to give a sua sponte instruction may be plain error under Mil.R.Evid. 103 (d), but counsel would be foolhardy to count on this. Military judges may help reduce plain error problems by asking counsel whether there are tactical reasons for their decision not to request an instruction or to object in only general terms, or whether it is inadvertence or laziness.

b. In addition to making the specific request for instruction and citing to the grounds for the request, counsel are well advised to offer the court specific language for the instruction, usually based on the *Military Judge's Benchbook* [DA Pam 27-9, 1982 (Rev.)] or other competent authority or case law. Military judges will frequently require counsel to provide such an instruction. If an adequate instruction cannot be fashioned, that may be an indication that the evidence should be excluded completely under an Mil.R.Evid. 403 rationale. This relationship between Mil.R.Evid. 105 and 403 is sometimes overlooked by counsel. It should be remembered that the effectiveness of Mil.R.Evid. 105 is a consideration in reaching a decision under Mil.R.Evid. 403, discussed in chapter V, *infra*.

2. Timing of the instruction. The limiting instruction may be given either when the evidence is received or as part of the general instructions at the conclusion of the case. It seems that counsel should have input as to the timing of the instructions as part of their responsibility in this area. In most cases, if counsel desire any instruction, they will want instructions at both possible times and should get two instructions. Of course, two instructions could unduly emphasize the evidence -- another tactical decision for counsel.

E. There is nothing in Mil.R.Evid. 105 to prevent the military judge from giving limiting instructions sua sponte in appropriate situations, even in the presence of objection by counsel. The military judge "is more than a mere referee, and as such he is required to assure that the accused receives a fair trial." *United States v. Graves*, 1 M.J. 50, 53 (C.M.A. 1975). The Court of Military Appeals has noted with pleasure the practice of sua sponte instructions. *See, e.g., United States v. Robinson*, 11 M.J. 218, 221 n.1 (C.M.A. 1981). If a judge determines that an instruction is necessary, it seems good practice to consult counsel on the form of instruction they would recommend.

F. Limiting instructions under Mil.R.Evid. 105 should be distinguished from curative instructions given when evidence has been erroneously admitted and is not admissible for any purpose. The requirements for giving a curative instruction, or the adequacy of such an instruction, should be judged by Mil.R.Evid. 103 standards and not under Mil.R.Evid. 105, which assumes by its very language that the evidence must be admissible for some purpose.

0309 REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS. Mil.R.Evid. 106.

A. At first glance, Mil.R.Evid. 106 appears to be a rule dealing with the admissibility of documentary evidence and should have been included under Section X of the rules. In actuality, it concerns the timing of the introduction of otherwise admissible evidence and does not create an additional rule of admissibility. In order

for an adverse party to "require" the remainder of a writing or any other writing to be introduced, that additional writing must be admissible under some other portion of the Mil.R.Evid. Two examples from the *Military Rules of Evidence Manual* demonstrate this point.

> [I]f a written confession is offered by the government, but a portion has been deleted, the offered portions are surely going to be admissible as admissions under Rule 801(d). But the other portions might not be admissions. They might, however, be part of the admissions and thus admissible, going to the weight to be given the admissions. The government surely will not be able to offer portions of a confession taken out of context, because the probative value of the statements could be exaggerated. If a court traditionally would have allowed the remaining statements to be admitted, Rule 106 indicates that they can be admitted sooner rather than later.
>
> If, however, a defendant confesses on one day, gets a lawyer the next day, and repudiates his confession on the third day, the repudiation of the confession probably is classic, self-serving hearsay and inadmissible under Rule 802. If it is not admissible, it will never come in, and a request to have it admitted in connection with the initial confession should be rejected by a trial court.

Military Rules of Evidence Manual, supra, at 72, 73.

B. The phrase "at that time" should be considered in context with the military judge's control of the order of presentation of evidence under Mil.R.Evid. 611(a). It is anticipated that military judges will exercise their normal discretion in this matter and avoid the potential problem of unnecessary interruption of one counsel's case and confusion for the members, by resolving as many issues as possible during preliminary article 39(a) sessions.

C. Mil.R.Evid. 106 is based upon two primary considerations:

1. Avoidance of misleading impressions created by taking matters out of context; and

2. the inadequacy of the remedy when remedial work is delayed to a later portion of the trial.

The rule suggests that "fairness" is the controlling consideration in determining issues under this rule, but this is not particularly helpful since fairness is a general consideration in all discretionary rulings. *See* Mil.R.Evid. 102. Since this rule is taken without change from Fed.R.Evid. 106, Federal case law must be considered, at least until military courts have the opportunity to address the issue. *See, e.g., United States v. Walker*, 652 F.2d 708 (7th Cir. 1981) (where portions of appellant's previous testimony were read to the jury, reversible error to exclude other relevant portions that explained the admitted evidence).

D. When the confession or admission of an accused is involved, Mil.R.Evid. 106 must be read in conjunction with Mil.R.Evid. 304(h)(2). The latter rule deals with oral as well as written statements.

1310 **SUMMARY.** The general and miscellaneous rules of sections I and XI, Mil.R.Evid., discussed above, are frequently given a quick and cursory glance by counsel in their haste to get to the "meaty" and "fun" part of the Mil.R.Evid. (i.e., substantive evidentiary rules of the later sections of the Rules). It is hoped that the new trial advocate will realize the error of a cursory reading of the general rules and appreciate the basic themes which permeate this section and make a basic knowledge of Section I mandatory for effective use of the Military Rules of Evidence.

A. First, it should be obvious that counsel need to know when and to what extent the rules apply to the proceedings in which the counsel are involved. The need to know if the rules are inapplicable, or if their application may be relaxed, is self-evident.

B. Secondly, it should be realized that proper use of procedural rules is necessary to the effective use of the substantive rules, such as those in sections VI and VIII.

C. Thirdly, counsel must appreciate that, although it is necessary to consider the rules individually in order to learn their content, in using the Mil.R.Evid. it is equally necessary to consider their interrelationships with each other.

D. Lastly, if for no other reason, the general rules should be considered for their statements of the responsibility placed on counsel by the rules. Counsel practicing under the Military Rules of Evidence, if they are to be even minimally competent, must know both the substantive rules of evidence (discussed later in this study guide) and the procedural rules for using them, but also must be able to use these rules in the courtroom. The use of the rules is considered in the trial advocacy portion of the lawyer course and the Naval Justice School publication, *Evidentiary Foundations*.

Fed.R.Evid. vs. Mil.R.Evid.
Comparison Table

The following table is designed to give the reader a general idea of the relationship between individual rules under the Federal Rules of Evidence and the corresponding rules under the Military Rules of Evidence.

Although not a substitute for a side-by-side comparison of the rules, this table should be useful in an initial analysis and determination of persuasive value of Federal court cases interpreting the Federal Rules of Evidence.

The term "identical" denotes that the respective Fed.R.Evid. was adopted into the Mil.R.Evid. without change; "similar" denotes that the language of the Federal rule was changed to some extent (frequently to conform to military terminology), but the intent of the rule was retained; and "standard" refers to provisions of the Federal Rules proposed by the Supreme Court but not accepted by Congress.

FEDERAL RULE	MILITARY RULE
101 Scope.	101 Similar to Fed.R.Evid. 101; adds subd. (b) as to permissible secondary sources, subd. (c) definition of "military judge."
102 Purpose and Construction.	102 Identical to Fed.R.Evid. 102.
103 Rulings on Evidence.	103 Substantially similar to Fed.R. Evid. 103; adds sec. on constitutional error and makes minor modifications.
104 Preliminary Questions.	104 Similar to Fed.R.Evid. 104.
105 Limited Admissibility.	105 Identical to Fed.R.Evid. 105.
106 Remainder of or Related Writings or Recorded Statements.	106 Identical to Fed.R.Evid. 106.

FEDERAL RULE	MILITARY RULE
201 Judicial Notice of Adjudicative Facts.	201 Substantially similar to Fed.R. Evid. 201, subd. (b), modified to reflect worldwide nature of armed forces; subd. (c) adds new sentence.
No comparable rule.	201A Judicial Notice of Law subd. (b) substantially similar to Fed. R. Crim. P. 26.1.
301 Presumptions in General Civil Actions and Proceedings.	No comparable rule 301-306, 311-317, 321 exclusionary rules governing self-incrimination, search, seizure, eyewitness identification.
302 Applicability of State Law in Civil Actions and Proceedings.	No comparable rule.
401 Definition of "Relevant Evidence."	401 Identical to Fed.R.Evid. 401.
402 Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.	402 Substantially similar to Fed.R. Evid. 402; adds reference to Uniform Code of Military Justice, Military Rules and Manual; reflects different application of Constitution to armed forces.
403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.	403 Identical to Fed.R.Evid. 403.

Appendix III(2)

FEDERAL RULE	MILITARY RULE
404 Character Evidence Not Admissible to Prove Conduct: Exceptions; Other Crimes.	404 Similar to Fed.R.Evid. 404: subd. (a)(2) adds "or assault" and deletes "first."
405 Methods of Proving Character.	405 Identical to Fed.R.Evid. 405.
406 Habit; Routine Practice.	406 Identical to Fed.R.Evid. 406.
407 Subsequent Remedial Measures.	407 Identical to Fed.R.Evid. 407.
408 Compromise and Offers to Compromise.	408 Identical to Fed.R.Evid. 408.
409 Payment of Medical and Similar Expenses.	409 Identical to Fed.R.Evid. 409.
410 Inadmissibility of Pleas Orders of Pleas and Related Statements.	410 Substantially similar to Fed.R. Evid. 410, except for minor minor changes to adapt rule to use in military court.
411 Liability Insurance.	411 Identical to Fed.R.Evid. 411.
412 Rape Cases, Relevance of Victim's Past Behavior.	412 Similar to Fed.R.Evid. 412; refers to "nonconsensual sexual offenses"; subd. (c) modified for military use; adds subd. (e).

Appendix III(3)

FEDERAL RULE	MILITARY RULE
501 General Rule.	501 Adopts those privileges recognized in common law pursuant to Fed.R.Evid. 501 with some limitations. Special privileges are generally taken from proposed Fed.R.Evid.'s which were not controversial, or from those previously recognized in MCM.
Standard 502 Required Reports Privileged by Statute.	No comparable rule.
Standard 503 Lawyer-Client Privilege.	502 Combined standard Fed.R.Evid. 503, modified for military use, and former MCM, 1969 (Rev.) provisions.
Standard 504 Psychotherapist-Patient Privilege.	No comparable rule.
Standard 505 Husband-Wife Privilege.	504 Based on MCM, 1969 (Rev.) and standard Fed.R.Evid. 505.
Standard 506 Communications to Clergyman.	503 Similar to standard 506, modified for military use.
Standard 507 Political Vote.	508 Similar to proposed Fed.R.Evid. 507.
Standard 508 Trade Secrets.	No comparable rule.
Standard 509 Secrets of State and Other Official Information.	No comparable rule 505, classified information; 506, other governmental information. Appendix III(4)

FEDERAL RULE	MILITARY RULE
No comparable rule.	509 Deliberations of Courts and Juries; similar to former MCM, 1969 (Rev.) provision modified to conform to Mil.R.Evid. 606(b).
Standard 510 Identity of Informer.	507 Subd. (a) similar to former MCM, 1969 (Rev.) provisions; subd. (b) similar to standard Fed.R.Evid. 510(b); minor language changes; subd. (c)(1) and (2) based on MCM, 1969 (Rev.); adds subd. (c)(3) and (d).
Standard 511 Waiver of Privilege by Voluntary Disclosure.	510 Subd. (a) similar to standard Fed.R.Evid. 511; adds "under such circumstances that it would be inappropriate to allow the claim of privilege"; subd. (b) based on MCM, 1969 (Rev.).
Standard 512 Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege.	511 Similar to standard Fed.R.Evid. 512; adds subd. (b) concerning telephone transmission of information.
Standard 513 Comment Upon or Inference from Claim of Privilege: Instruction.	512 Similar to standard Fed.R.Evid. subd. (a) (1) refers to "accused"; subd. (a)(2) authorizes inference in interests of justice when privilege asserted by person not the accused; subds. (b) and (c) modified for military use.
601 General Rule of Competency.	601 Identical to first sentence of Fed.R.Evid. 601.

FEDERAL RULE	MILITARY RULE
602 Lack of Personal Knowledge.	602 Substantially similar to Fed.R. Evid. 602 and similar to para. 138(d), MCM, 1969 (Rev.).
603 Oath or Affirmation.	603 Identical to Fed.R.Evid. 603.
604 Interpreters.	604 Identical to Fed.R.Evid. 604.
605 Competency of Judge as Witness.	605 Similar to Fed.R.Evid. 605; modified for military practice.
606 Competency of Juror as Witness.	606 Similar to Fed.R.Evid. 606; modified for military practice.
607 Who May Impeach?	607 Identical to Fed.R.Evid. 607, except changes "him" to "the witness."
608 Evidence of Character and Conduct of Witness.	608 Substantially similar to Fed.R. Evid. 608; subd. (b) modified for military use; adds subdivision (c), and impeachment by bias.
609 Impeachment by Evidence of Conviction of Crime.	609 Similar to Fed.R.Evid. 609, modified for military practice.
610 Religious Beliefs or Opinions.	610 Identical to Fed.R.Evid. 610, except for minor change.
611 Mode and Order of Interrogation and Presentation.	611 Substantially similar to Fed.R. Evid., modified for military practice.

Appendix III(6)

FEDERAL RULE	MILITARY RULE
612 Writing Used to Refresh Memory.	612 Substantially similar to Fed.R. Evid. 612, modified for military practice.
613 Prior Statement of Witnesses.	613 Identical to Fed.R.Evid. 613. (Inadvertant change when incorporated into MCM, 1984, has been corrected.)
614 Calling and Interrogation of Witnesses by Court.	614 Substantially similar to 614, modified for military practice.
615 Exclusion of Witnesses.	615 Substantially similar to 615, modified for military practice.
701 Opinion Testimony by Lay Witnesses.	701 Identical to Fed.R.Evid. 701.
702 Testimony by Experts.	702 Identical to Fed.R.Evid. 702.
703 Bases of Opinion Testimony by Experts.	703 Identical to Fed.R.Evid. 703.
704 Opinion on Ultimate Issue.	704 Fed.R.Evid. 704(b), excluding ultimate issue evidence in connection with criminal defendant's sanity has been deleted from Mil.R.Evid.
705 Disclosure of Facts or Data Underlying Expert Opinion.	705 Similar to Fed.R.Evid. 705; changes "court" to "military judge."

Appendix III(7)

FEDERAL RULE	MILITARY RULE
706 Court Appointed Experts.	706 Based on Article 46, UCMJ; MCM, 1969 (Rev.), and Fed.R. Evid. 706(b)(c).
801 Definitions.	801 Identical to Fed.R.Evid. 801.
802 Hearsay Rule.	802 Similar to Fed.R.Evid. 802, refers to applicable "Acts of Congress."
803 Hearsay Exceptions; Availability of Declarant Immaterial.	803 See below.
803 Subd. (1) Present Sense Impression.	(1) Identical to Fed.R.Evid. 803(1).
803 Subd. (2) Excited Utterance.	(2) Identical to Fed.R.Evid. 803(2).
803 Subd. (3) Then Existing Mental, Emotional or Physical Condition.	(3) Identical to Fed.R.Evid. 803(3).
803 Subd. (4) Statement for Purposes of Medical Diagnosis or Treatment.	(4) Identical to Fed.R.Evid. 803(4).
803 Subd. (5) Recorded Recollections.	(5) Similar to Fed.R.Evid. 803(5); changes "him" to "the witness."
803 Subd. (6) Records of Regularly Conducted Activity.	(6) Similar to Fed.R.Evid. 803(6), modified to military use.

FEDERAL RULE	MILITARY RULE
803 Subd. (7) Absence of Entry in Records Kept in Accordance with the Provisions of Paragraph (6).	(7) Identical to Fed.R.Evid. 803(7).
803 Subd. (8) Public Records and Reports.	(8) Similar to Fed.R.Evid. 803(8), modified for military use.
803 Subd. (9) Records of Vital Statistics.	(9) Identical to Fed.R.Evid. 803(9).
803 Subd. (10) Absence of Public Record or Entry.	(10) Identical to Fed.R.Evid. 803(10).
803 Subd. (11) Records of Religious Organizations.	(11) Identical to Fed.R.Evid. 803(11).
803 Subd. (12) Marriage, Baptismal and Similar Certificates.	(12) Identical to Fed.R.Evid. 803(12).
803 Subd. (13) Family Records.	(13) Identical to Fed.R.Evid. 803(13).
803 Subd. (14) Records of Documents Affecting an Interest in Property.	(14) Identical to Fed.R.Evid. 803(14).
803 Subd. (15) Statements in Documents Affecting an Interest in Property.	(15) Identical to Fed.R.Evid. 803(15).
803 Subd. (16) Statements in Ancient Documents.	(16) Identical to Fed.R.Evid. 803(16).
803 Subd. (17) Market Reports, Commercial Publications.	(17) Similar to Fed.R.Evid. 803(17); adds government price lists.

FEDERAL RULE	MILITARY RULE
803 Subd. (18) Learned Treatises.	(18) Identical to Fed.R.Evid. 803(18).
803 Subd. (19) Reputation Concerning Personal or Family History.	(19) Identical to Fed.R.Evid. 803(19).
803 Subd. (20) Reputation Concerning Boundaries or General History.	(20) Identical to Fed.R.Evid. 803(20).
803 Subd. (21) Reputation as to Character.	(21) Identical to Fed.R.Evid. 803(21).
803 Subd. (22) Judgment of Previous Conviction.	(22) Similar to Fed.R.Evid. 803(22), modified to recognize conviction of crimes punishable by DD.
803 Subd. (23) Judgment as to Personal, Family or General History, or Boundaries.	(23) Identical to Fed.R.Evid. 803(23).
803 Subd. (24) Other Exceptions.	(24) Identical to Fed.R.Evid. 803(24).
804 Hearsay Exceptions; Declarant Unavailable.	804 See below.
804 Subd. (a) Definition of Unavailability.	(a) Subd. (a) similar to Fed.R.Evid. 804(a); language adapted to military use, adds subd. (6).
804(b)(1)	(b)(1) Similar to Fed.R.Evid. 804(b)(1); adapted to military use.

FEDERAL RULE	MILITARY RULE
804(b)(2) Statement Under Belief of Impending Death.	(b)(2) Similar to Fed.R.Evid. 804(b)(2); deletes "in a civil action or proceeding," adds "on any offense resulting in the death of the alleged victim."
804(b)(3) Statement Against Interest.	(b)(3) Identical to Fed.R.Evid. 8 0 4 (b)(3).
804(b)(4) Statement of Personal or Family History.	(b)(4) Identical to Fed.R.Evid. 804 (b)(4).
804(b)(5) Other Exceptions.	(b)(5) Identical to Fed.R.Evid. 8 0 4 (b)(5).
805 Hearsay within Hearsay.	805 Identical to Fed.R.Evid. 805.
806 Attacking and Supporting Credibility of Declarant.	806 Identical to Fed.R.Evid. 806.
901 Requirement of Authentication or Identification.	901 Identical to Fed.R.Evid. 901.
902 Self-Authentication.	902 Similar to Fed.R.Evid. 902; subds. (4), (10) refer to "applicable regulations"; adds subd. (4a).
903 Subscribing Witness' Testimony Unnecessary.	903 Identical to Fed.R.Evid. 903.

FEDERAL RULE	MILITARY RULE
1001 Definitions P1001[01].	1001 Identical to Fed.R.Evid. 1001.
1002 Requirement of Original P1002[65].	1002 Similar to Fed.R.Evid. 1002; refers to the Manual for Courts-Martial.
1003 Admissibility of Duplicates.	1003 Identical to Fed.R.Evid. 1003.
1004 Admissibility of Other Evidence of Contents.	1004 Identical to Fed.R.Evid. 1004.
1005 Public Records.	1005 Similar to Fed.R.Evid. 1005, adds "or attested to."
1006 Summaries.	1006 Identical to Fed.R.Evid. 1006; "court" changed to "military judge."
1007 Testimony of Written Admission of Party.	1007 Identical to Fed.R.Evid. 1007.
1008 Functions of Court and Jury.	1008 Identical to Fed.R.Evid. 1008; changes "court" and "jury" to "military judge" and "members."
1101 Applicability of Rules.	1101 Similar to Fed.R.Evid. 1101; reflects military practice and rules.

CHAPTER IV

SUBSTITUTES FOR EVIDENCE

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CHAPTER IV

SUBSTITUTES FOR EVIDENCE:

JUDICIAL NOTICE, PRESUMPTIONS AND INFERENCES, AND STIPULATIONS

0401 INTRODUCTION (Key Numbers 1020, 1021)

In the court-martial process, most of the "proof" of a case is presented by, and most of the effort of counsel is directed toward, the use of testimonial, documentary, and real evidence. The Military Rules of Evidence primarily deal with these "regular" aspects of the law of evidence. But, traditionally, the law has recognized the need for and the existence of substitutes for the formal process of evidentiary presentation. These substitutes relieve a proponent from formally proving certain facts and are recognized as practical necessities for the purposes of economy of judicial effort and the efficient resolution of litigation.

This chapter deals with the three most commonly accepted substitutes for evidence. Part One considers judicial notice under Mil.R.Evid. 201 and 201A. Part Two addresses the interrelated concepts of presumption and inference. This part deals with general application of these concepts to evidentiary issues at trial, primarily as they have been developed under military common law. This common law approach is necessary since the drafters of the Mil.R.Evid. purposely decided not to codify the concepts into specific rules, but to allow for their continued development by the courts. Presumptions and inferences related to specific procedural rules or substantive criminal offenses are dealt with in detail in NJS Procedure Study Guide, and Criminal Law Study Guide, respectively. Part Three discusses stipulations of both fact and testimony as provided for in Rule of Courts-Martial 811, MCM, 1984 [hereinafter R.C.M. ____].

PART ONE: JUDICIAL NOTICE

0402 DEFINITION

A. Traditional. Prior to the Mil.R.Evid., "judicial notice" in the military was defined to be "the recognition by a court of the existence of certain kinds of matters without formal proof." MCM, 1969 (Rev.), para. 147a. This paragraph enumerated

a number of matters of which judicial notice could be taken, the common attribute of these judicially noticeable "facts" being that they "could not reasonably be the subject of dispute" or were "capable of immediate and accurate determination by resort to easily accessible sources of reasonably indisputable accuracy." *Id.* This essential prerequisite of "a high degree of indisputability" is carried over in Mil.R.Evid. 201. *See* Fed.R.Evid. 201 advisory committee note.

B. Under the rules. Mil.R.Evid. 201 is taken substantially from Fed.R.Evid. 201. The drafters of Fed.R.Evid. 201 considered judicial notice to be a court's acceptance of particular facts "outside the area of reasonable controversy" without formal introduction of evidence. *Id.* In their consideration of what matters are properly subject to judicial notice, they limited notice to only "adjudicative" facts, as opposed to "legislative" facts.

1. Adjudicative facts are defined as simply the facts of the particular case ("i.e., those facts that are normally resolved by the fact-finder. *Id.*"). Legislative facts, on the other hand, are "those that have relevance to legal reasoning and the lawmaking process whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." *Id.* They tend to be general in application, rather than situation specific, and their noninclusion under judicial notice can be considered a vote against judicial lawmaking. Two well-known cases of judicial notice of legislative fact are *Brown v. Board of Education*, 347 U.S. 483 (1954) (segregated schools could never be equal) and *Baker v. Carr*, 396 U.S. 186 (1962) (contemporary notions of justice require voting reapportionment).

The "adjudicative" and "legislative" fact terminology was coined by Professor Kenneth Davis in his article, *An Approach to Problems in Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 404-07 (1942). *See* Annot., 35 A.L.R. Fed. 440 (1977). Other works by Professor Davis provide some amplification on the distinction in terminology.

Adjudicative facts are defined by Professor Davis as follows:

> When a court or an agency finds facts concerning the immediate parties--who did what, where, when, how, and with what motive or intent--the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts . . . .
>
> Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.

K. Davis, 2 *Administrative Law Treatise* 353 (1958).

Legislative facts are quite different. As Professor Davis says in his article, *A System of Judicial Notice Based on Fairness and Convenience*, published in Perspectives of Law (1964):

> My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are "clearly . . . within the domain of the indisputable." Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.

The drafters' analysis to Mil.R.Evid. 201 is not particularly helpful in resolving the distinction between adjudicative and legislative facts as it notes that the distinction "can on occasion be highly confusing in practice and resort to any of the usual treatises may be helpful." *See* MCM, 1984, app. 22-4. *See also* Note, *Judicial Notice: Rule 201 of the Federal Rules of Evidence*, 28 U. Fla. L. Rev. 723 (1976). The Mil.R.Evid. resolve part of the problem by the specific recognition in rule 201A of judicial notice of law (a form of legislative fact).

2. The debate on what facts are judicially noticeable can be further complicated when the philosophical theory that all judicial deliberations are in essence "judicial notice" is considered. This theory implies that all thought processes require the acceptance of certain assumptions, that judicial thought is no different and, hence, must involve certain assumptions, and that these assumptions are judicial notice of facts. Thayer stated:

> In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit.

Thayer, *Preliminary Treatise on Evidence* 279-80 (1898).

Fortunately, most of the day-to-day problems of the practitioner, as discussed *infra*, are fairly clear-cut and only occasionally will counsel have to enter the "mire" of commentator distinctions. It also may be worth noting that Professor Davis' distinction originally arose in the area of administrative law.

0403 KINDS OF FACTS NOTICEABLE. Mil.R.Evid. 201(b).

A. Not subject to reasonable dispute. In addition to being adjudicative, "a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Mil.R.Evid. 201(b).

This subdivision is based on the theory that traditional methods of proof should be dispensed with only in clear cases. Mil.R.Evid. 201(b) differs from the Federal rule in that subsection (b)(1) has been modified to reflect the widely dispersed military community rather than to limit judicial recognition of known facts to an area "within the territorial jurisdiction of the trial court," a concept foreign to military practice.

B. Otherwise admissible. A concept that is implicit in this subsection is that the judicially noticeable facts must be otherwise admissible under the Mil.R.Evid. The rule allows substitutes for proof, not exemption from the usual rules of evidence.

C. Examples. The drafters' analysis lists examples of types of matters which are judicially noticeable under Mil.R.Evid. 201, provided that they qualify as adjudicative facts.

1. The ordinary divisions of time into years, months, weeks, and other periods;

2. general facts and laws of nature, including their ordinary operations and effects;

3. general facts of history;

4. generally known geographical facts;

5. such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute;

6. such facts as are so generally known, or are of such common notoriety, in the area in which the trial is held that they cannot reasonably be the subject of dispute [*see, e.g., United States v. Porter*, 12 M.J. 129, 131 (C.M.A. 1981) (in a drug case, judicial notice could be taken that "a 'crime laboratory' is a place in which scientific methods and principles are applied in the testing and analysis of various items in connection with the detection and prosecution of crimes"); *United*

States v. Evans, 16 M.J. 951 (A.F.C.M.R. 1983), *petition denied*, 17 M.J. 348 (C.M.A. 1984) (judicial notice could be taken that burning marijuana has a distinctive odor)]; and

7. specific facts and propositions of generalized knowledge that are capable of immediate and accurate determination by resort to easily accessible sources of reasonably indisputable accuracy. *Compare United States v. Jones*, 14 M.J. 740 (A.F.C.M.R. 1982), *petition denied*, 15 M.J. 298 (C.M.A. 1983) (judicial notice could be taken that, on a certain date, a certain person was the acting General Counsel for the Air Force) *with United States v. Williams*, 17 M.J. 207 (C.M.A. 1984) (judicial notice of jurisdictional issue was inappropriate due to the complexity of the issue). Mil.R.Evid. 201 drafters' analysis, MCM, 1984, app. 22-4.

§404 THE "MAY" AND "MUST" OF JUDICIAL NOTICE

A. Discretionary notice. Mil.R.Evid. 201(c) states:

> When discretionary. The military judge may take judicial notice, whether requested or not. The parties shall be informed in open court when, without being requested, the military judge takes judicial notice of an adjudicative fact essential to establishing an element of the case.

1. Subdivision (c) permits the military judge to take judicial notice on his own motion. The first sentence is identical to the Federal rule, but the second sentence is new and requires the military judge to announce when he has taken judicial notice on his own motion if the fact noticed is essential to establishing an element of the case. This notice requirement was included by the drafters to meet the "clear implication" of subdivision (e), which offers counsel an opportunity to be heard, and to satisfy the requirement of *Garner v. Louisiana*, 368 U.S. 157 (1961). In *Garner*, under a Louisiana statute, black defendants were convicted for disturbing the peace when they sat in a restaurant section reserved for whites. The Supreme Court resisted state arguments that the trial court must have *sub silentio* taken judicial notice of the racial unrest in Louisiana. Finding no evidence in the record to support the state's position, the Court noted that it would not turn the doctrine of judicial notice into a pretext for dispensing with a trial. The Court stated:

> Furthermore, unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such

> notice or to dispute the notoriety or truth of the facts allegedly relied upon. Moreover, there is no way by which an appellate court may review the facts and law of a case and intelligently decide whether the findings of the lower court are supported by the evidence where the evidence is unknown. Such an assumption would be a denial of due process.

368 U.S. at 173.

2. If the trial judge does not properly exercise the judicial notice provisions, appellate relief may be forthcoming. In *United States v. Williams*, 17 M.J. 207 (C.M.A. 1984), the Court of Military Appeals expounded on its ability to take judicial notice of indisputable facts. *See also United States v. Irvin*, 21 M.J. 184 (C.M.A. 1986) (court declined to take judicial notice for the first time on appeal, citing sixth amendment issues).

B. Mandatory judicial notice. Mil.R.Evid. 201(d) states:

> When mandatory. The military judge shall take judicial notice if requested by a party and supplied with the necessary information.

The drafters' analysis provides only that the military judge must take judicial notice when the evidence is properly within Rule 201, is relevant under Rule 401, and is not inadmissible under other provisions of the Mil.R. Evid., MCM, 1984, App. 22-4. S. Saltzburg, L. Schinasi, and D. Schleuter, *Military Rules of Evidence Manual* (2d ed. 1986) adds:

> . . . supporting evidence . . . need not itself be admissible. If the supporting evidence is admissible, the military judge, instead of judicially noticing the fact, may admit the evidence . . . . But if notice is appropriate, it shall be taken. This is important, even though the proponent of the noticed fact may have some evidence to support it; the taking of notice effectively tells the members of the court that the proponent need not offer additional evidence of the fact, and places the imprimatur of the judge on the fact.

0405 OPPORTUNITY TO BE HEARD

Mil.R.Evid. 201(e) states:

> Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

A. General. Subdivision (e) is identical to the Federal rule and provides that counsel must be provided an opportunity to address the propriety of taking judicial notice.

B. Procedure

1. The rule gives no specific procedures for effecting notice. It is anticipated that fair dealings and common sense will provide for a continuation of traditional practice.

2. Counsel will still give advance notice to the opposing parties, and a copy of any materials should also be furnished to the military judge. Generally, these materials need not be admissible in evidence, but must be included in the record of trial. *See United States v. Atkins*, 46 C.M.R. 572 (A.C.M.R. 1972).

3. The military judge will generally permit opposing counsel to present controverting evidence and make argument on the propriety and tenor of the notice before he makes a ruling. If notice is to be taken, the judge will appropriately instruct the court members by explaining the nature and effect of judicial notice upon the proceedings. *See* Mil.R.Evid. 201(g) and *Military Judges' Benchbook*, DA Pam 27-9, at 7-8 (1982).

4. In some situations, the request for an opportunity to be heard may be made after the court takes judicial notice if prior notification is not given. *See In re King Resources*, 651 F.2d 1326 (10th Cir. 1981).

0406 TIME OF TAKING NOTICE

Mil.R.Evid. 201(f) states:

> Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

Subdivision (f) provides that judicial notice may be taken either at the trial or appellate level. It is identical to the Federal rule and is subject to the second sentence of rule 201(c), which would apparently prevent an appellate court from filling evidentiary gaps by noticing an essential adjudicative fact for the first time on appeal. *See United States v. Williams, supra. But see United States v. Berrojo*, 628 F.2d 368 (1980) (trial judge could properly take judicial notice even after close of government's case). This subdivision should not restrict appellate courts from continuing to judicially notice, for example, a counsel's qualifications, *United States v. Craft*, 44 C.M.R. 664 (A.C.M.R. 1971); a military judge's certification, *United States v. Gray*, 47 C.M.R. 693 (A.C.M.R. 1973); or matters in other cases pending before or previously decided by the courts, *United States v. Surry*, 6 M.J. 800 (A.C.M.R. 1978), *petition denied*, 17 M.J. 62 (C.M.A. 1979); *United States v. Kildare-Marcano*, 21 M.J. 683 (A.C.M.R. 1985); *United States v. Peterson*, 15 M.J. 530 (A.F.C.M.R.), *petition denied*, 15 M.J. 475 (C.M.A. 1982). Nor should it restrict an appellate court from drawing inferences from the evidence actually admitted or judicially noticed. *See generally* Adamkewicz, *Appellate Consideration of Matters Outside the Record of Trial*, 32 Mil. L. Rev. 1, 27-31 (1966); Field, *What is the Appellate Record? Appellate Inferences and Judicial Notice*, 20 JAG J. 51 (1965).

0407 INSTRUCTIONS TO MEMBERS. Mil.R.Evid. 201(g).

A. In a members case, the military judge is required to instruct the court members ". . . they may, but are not required to," consider as conclusive those facts that have been judicially noticed. Mil.R.Evid. 201(g) (emphasis added). An instruction to accept mandatorily as conclusive any judicially noticed fact would be inappropriate as contrary to the sixth amendment right to trial by jury. *See Military Judges' Benchbook*, DA Pam 27-9, at 7-8 (1982).

B. Since the members may reject the noticed fact, it would seem that the other party should be able to offer evidence to rebut the fact. However, admissible rebuttable evidence would seem somewhat difficult to find since the fact must be beyond reasonable dispute in order to be judicially noticeable.

0408 EXAMPLE OF TAKING JUDICIAL NOTICE

A request by the trial counsel or the defense counsel that the court take judicial notice of a fact may be made substantially as follows:

TC: The prosecution requests that the court take judicial notice that the motor vehicle speed limit on NETC, Newport, on 23 January 19CY, was 20 miles per hour. To assist the court and reviewing authorities, the prosecution offers to the court a true copy of paragraph 3a, Center Traffic Regulations, NETC, Newport RI, dated 4 July 1986, supporting the fact to be judicially noticed.

(TC shows document to DC for inspection and then gives it to MJ. The document will normally be marked as an appellate exhibit.)

DC: No objection.

MJ: The court will take judicial notice that, on 23 January 19CY, the motor vehicle speed limit on NETC, Newport, was 20 miles per hour.

0409 JUDICIAL NOTICE OF DOMESTIC LAW

Mil.R.Evid. 201A(a) states:

> The military judge may take judicial notice of domestic law. Insofar as a domestic law is a fact that is of consequence to the determination of the action, the procedural requirements of Mil.R.Evid. 201 -- except Mil R.Evid. 201(g) -- apply.

A. General. The subject matter of rule 201A is generally treated as a procedural matter in article III courts. *See, e.g.*, Fed. R. Crim. P. 26.1. Accordingly, a new rule was adopted to allow judicial notice of law.

B. Domestic law. According to the drafters' analysis, the term "domestic law" is intended to include the following:

1. Treaties of the United States;

2. executive agreements between the United States and any State thereof, foreign country, or international organization or agency;

3. laws and regulations pursuant thereto of the United States, of the District of Columbia, and of a state, Commonwealth, or possession (regulations of the United States include those of the armed forces);

4. international law, including the laws of war [*see, e.g., The Paquete Habana*, 175 U.S. 677 (1900) (international law assumed to be part of domestic law)];

5. general maritime law and the law of air and space; and

6. common law.

Mil.R.Evid. 201A drafters' analysis, MCM, 1984, app. 22-4.

C. Procedure

1. The rule recognizes that, where the domestic law is a "fact that is of consequence to the determination of the action," the procedural requirements of rule 201 must be applied. This is a recognition that law may constitute an adjudicative fact, discussed *supra*, as would almost always be the case where violation of a regulation is the gravamen of the offense charged or a matter in defense. If the law is a legislative fact instead, the procedural requirements of Mil.R.Evid. 201 still could be used as matters within the judge's discretion.

2. The "procedural requirements of Rule 201" include the notice to parties requirement of rule 201(c) and the opportunity to be heard provision of Mil.R.Evid. 201(e). *See, e.g., United States v. Mead*, 16 M.J. 270 (C.M.A. 1983) (on appeal of a military judge taking judicial notice of a Navy regulation as domestic law, the court ruled that the accused had received all the procedural benefits he was due under Mil.R.Evid. 201).

Some question exists as to whether the term "procedural requirements" includes the instructions subdivision, rule 201(g). S. Saltzburg, L. Schinasi, and D. Schleuter, *Military Rules of Evidence Manual*, 75 (2d ed. 1986), indicates that "[the procedural sections of rule 201] do not include subdivision (g) since it would be improper to tell the court members they need not follow the law." *See, e.g., United States v. Gould*, 536 F.2d 216 (8th Cir. 1976), in which the court stated that judicial notice that "cocaine hydrochloride is a Schedule II controlled substance under the laws of the United States" was a legislative fact that does not traditionally go to the jury. "The District Court was not obligated to inform the jury that it could disregard the judicially noticed fact. In fact, to do so would be preposterous, thus permitting juries to make conflicting findings on what constitutes controlled substances under federal law." *Id.* at 221.

3. Although the rule contains no requirement for a copy of the noticed law to be attached to the record of trial, the drafters' analysis suggests this practice be adopted unless the law in question can reasonably be anticipated to be easily available to any possible reviewing authority. MCM, 1984, app. 22-5.

0410 JUDICIAL NOTICE OF FOREIGN LAW

Mil.R.Evid. 201A(b) states:

> A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The military judge, in determining foreign law, may consider any relevant material or source including testimony whether or not submitted by a party or admissible under these rules. Such a determination shall be treated as a ruling on a question of law.

A. General. This subdivision is derived from Federal Rule of Criminal Procedure 26.1 and is little changed from pre-Mil.R.Evid. military practice. It reflects the drafters' realization that the determination of questions of foreign law can be difficult and requires extra time and recourse to additional evidence, including witnesses. Accordingly, the requirement for reasonable written notice has been added, and the consideration of inadmissible evidence is allowed.

B. Foreign law. The drafters' analysis states an intention to have the term "foreign law" include:

1. Laws and regulations of foreign countries and their political subdivisions; and

2. laws and regulations of international organizations and agencies. MCM, 1984, app. 22-5.

This should be distinguished from international law and international agreements of which the United States is a party. These both are considered domestic law under Mil.R.Evid. 201A(a).

C. Procedure

1. Although the rule allows the military judge to consider matter not submitted by a party, the military judge will normally want the parties to submit their relevant sources so that they may be examined by all, and each party may then address the other's sources. If the military judge does consider matters not submitted

by a party, the better procedure would be for the military judge not only to notify counsel of the sources used but to provide copies to the parties. Any material used for determining foreign law, or pertinent extracts therefrom, should be included in the record of trial as an exhibit. This should include any translations used by the court.

2. Although foreign law could be an adjudicative fact (at least in theory), there is no need for an adjudicative fact versus legislative fact analysis. The court members may be instructed to accept as conclusive the existence and content of the foreign law that is noticed.

PART TWO: PRESUMPTIONS AND INFERENCES

0411 INTRODUCTION (Key Numbers 1022, 1132)

A. General concepts. Presumptions and inferences are ways of dealing with evidence; they are substitutes for evidence; they are not evidence. They have been created because it is generally or frequently recognized that certain facts or circumstances exist in relation to, or as the result of, certain other facts or circumstances. These recognized relationships between facts are referred to as either presumptions or inferences. These relationships are a product of what the military judge defines in instructions to court members as the trier of fact's "common sense and knowledge of human nature and the ways of the world." *Military Judges' Benchbook*, DA Pam 27-9, Inst. 2-29.1 (Cl.2 1986).

> Traditionally, a "presumption" was defined as a conclusion that the law directed the jury to find from other established facts, and an "inference" was defined as a conclusion that the law permits the jury to find from other established facts. *United States v. Burns*, 597 F.2d 939, 943 n.7 (5th Cir. 1979). In recent cases, however, the Supreme Court has spoken not of presumption versus inference but of differing degrees of presumptions. *Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

U.S. Dept. of Justice, *Proving Federal Crimes*, 11-2 (1980).

Application of the presumption-inference evidentiary concept in the military justice system has followed the traditional development of presumptions and inferences as separate terms. Since both are rational conclusions drawn from facts, however, the terms frequently are used interchangeably (e.g., a presumption being called a "mandatory inference" or an inference being a "permissible presumption"). The key difference, as discussed *infra*, is the use to which the concept is put, not the terminology used to describe it. Along with these traditional evidentiary definitions, or as a result of the application of those definitions, the concepts of presumption and inference have also been accepted as imposing upon the various parties to litigation certain burdens, most particularly that burden generally labeled "burden of proof."

B. Military application. Prior to the adoption of the Military Rules of Evidence, paragraph 138a of the *Manual for Courts-Martial*, 1969 (Rev.) [hereinafter MCM, 1969 (Rev.)], provided definitions and guidelines for the use of presumptions and inferences. The drafters of the Mil.R.Evid., like their Fed.R.Evid. counterparts,

apparently felt this area could not be properly codified and abandoned it to what could be called the "military common law."

The Mil.R.Evid. have no corollary to Article III of the Fed.R. Evid., since that article deals only with presumptions in civil cases. While the general provisions of paragraph 138a were deleted, there is no indication of an intent to change the status of the law of presumptions and inferences as it existed prior to the Mil.R.Evid., and it should be noted that numerous specific presumptions and inferences were retained in the post-Mil.R.Evid. provisions of the MCM, 1969 (Rev.). Both military and Federal judicial authority will play a vital role in the development of this evidentiary substitute. Mil.R.Evid. 101(b). The material in this part of the chapter catalogs the generally understood status of the current "military common law" of presumptions and inferences and addresses the specifically retained MCM provisions. It should be noted that, although this concept within the law of evidence is used in every case, it is a very slowly developing concept with few germane cases.

0412 PRESUMPTIONS

A. General. If the rule of law is that the court members must infer fact B if they find fact A, the rule of law is a mandatory inference or presumption. Presumptions are primarily procedural rules governing the production of evidence and do not themselves constitute evidence. *See generally United States v. Biesak*, 3 C.M.A. 714, 14 C.M.R. 132 (1954); 9 Wigmore's Evidence, sec. 2490 et seq. (1940).

B. Rebuttable presumptions. In the military, the term presumption is applied to facts that a court is bound to find in the absence of adequate evidence to the contrary. Although the definition is generally applied to a rebuttable presumption in the common law of evidence, it should be noted that the military recognizes only the rebuttable type and not the conclusive presumption. That is, the fact-finder is bound to find fact B once it finds fact A only if the opponent fails to produce evidence of non-B. The opponent is not precluded by law from producing evidence of non-B.

1. Thus, once the proponent establishes A, fact B is also established, and the burden of going forward on the issue of establishing non-B shifts to the opponent; if the opponent produces no evidence of non-B, then the opponent loses on that issue.

2. When the opponent does present evidence tending to establish non-B, then the presumption of B is rebutted and the fact-finder is no longer bound to find, but may find, B even if it finds A. Thus, once the presumption has been rebutted, normally an inference of the originally presumed fact remains, and the court members will be so instructed.

C. Conclusive presumptions. So-called irrebuttable or conclusive presumptions are really rules of substantive law. Under a conclusive presumption, the fact-finder is told, "if the fact-finder finds fact A, he must find fact B, even if the opponent has demonstrated that B did not exist." Such a rule has the effect of removing B as an issue in the case altogether; the focus of the controversy is A, and whether B actually exists or not is irrelevant. There are no conclusive presumptions in the military, since conclusive presumptions are not constitutional in criminal cases as they invade the province of the trier of fact and conflict with the presumption of innocence. *See Morissette v. United States*, 342 U.S. 246 (1952); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

D. Effect. Rebuttable presumptions as "members control devices" in the military are purely procedural, designed to allocate the burden of going forward. *See, e.g., United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), *petition granted*, 20 M.J. 131 (C.M.A. 1985) (presumption of unlawful command influence on potential character witness raised by defense).

E. Examples of "presumptions"

Several of the so-called "presumptions" in military law are not in fact true presumptions, since they do not require any initial fact A from which fact B must be presumed. They are once again merely procedural devices, several of which are discussed here for the reader's reference and comparison.

1. An accused person is presumed to be innocent until his guilt is proved beyond a reasonable doubt. R.C.M. 920(e)(5).

a. This is not a true presumption, in that no preliminary fact has been found (unless it could be said that being charged with a crime is a preliminary fact). The presumption of innocence is a traditional method of restating and emphasizing that the government has the heavy burden of proving the accused's guilt beyond a reasonable doubt.

b. The innocence presumption is treated differently than rebuttable presumptions. The military judge must always instruct on the innocence presumption and must use mandatory language.

2. An accused is presumed to have been sane at the time of the offense charged and to be sane at the time of trial, until some evidence to the contrary is admitted. R.C.M. 916(k)(3)(A) and 909(b).

a. Sanity is also not a true rebuttable presumption because the government need prove no foundational fact to rely upon it. But, this presumption operates like a presumption in other respects because it shifts the burden of going

forward with evidence of insanity to the defense and because the inference of sanity remains even though the defense meets this burden.

b. To what extent may the government rely upon the inference of sanity once the presumption has been rebutted?

(1) In *United States v. Covert*, 6 C.M.A. 48, 19 C.M.R. 174 (1955), the Court of Military Appeals upheld a finding of guilty where the government relied solely on the inference of sanity.

(2) But, in *United States v. Morris*, 20 C.M.A. 446, 43 C.M.R. 286 (1971), the Court of Military Appeals reversed the accused's conviction where a psychiatrist's testimony that the accused was insane was unrebutted and the testimony of the government's own witnesses (the victims of the charged robbery/assault) that tended to indicate that the accused was not fully rational at the time of the offense was not challenged by the government. Here, the Court of Military Appeals said that there was no basis in the record for an inference of sanity.

3. Every person is presumed to be competent as a witness until the contrary is shown. Mil.R.Evid. 601. This presumption merely serves to relieve the party presenting the witness from having to establish competency in the absence of a contest from the other party.

4. Regularity of official documents may be presumed in the absence of any evidence to the contrary. *United States v. Leahy*, 20 M.J. 564 (N.M.C.M.R. 1985).

0413 INFERENCES

A. Distinguished from presumptions. The 1951 *Manual for Courts-Martial*, paragraph 158a, made no distinction between presumptions and inferences, regarding the presumption as a special form of inference. The lumping together of these two related but dissimilar terms created confusion and has been the subject of criticism. *See United States v. Troutt*, 8 C.M.A. 436, 24 C.M.R. 246 (1957) and Hug, *Presumptions and Inferences in Criminal Law*, 56 Mil. L. Rev. 81, 91-92 (1972). The presumption is a procedural tool, while the inference is an evidentiary medium. If the rule of law is that the court members may infer fact B if they find fact A, the rule of law is a permissible or justifiable inference. As discussed below, such concepts as intent, knowledge, or state of mind are seldom susceptible of direct proof except in the rare instance of an accused making a concurrent admission and, even there, the accused's actions may belie his or her words. These concepts are normally established by proof of actions from which the concept may be inferred. Inferences may help in meeting a burden of going forward with evidence or a burden of

persuasion. They are especially important during argument and on instructing members (i.e., they are useful in applying evidence that has been received at trial).

B. Three possible definitions

1. A truth or proposition drawn from another which is supposed or admitted to be true.

2. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted. This is essentially the manner in which circumstantial evidence may be used by the trier of fact.

3. Well-recognized examples of the application of logic and experience to circumstantial evidence.

Thus, the drawing of inferences is not mandatory, and their weight or effect is to be measured only in terms of their logical value. The weight that should be given to any inference will depend upon all the circumstances attending the proven facts that give rise to the inference. If the inference is thought of as a "rational conclusion" to be "built" by logic, the inference's total strength will depend on the strength of the individual "bricks" of factual proof. Mandatory inferences would also be unconstitutional. *See Morissette v. United States, supra.*

C. Weighing the logic of inferences. The fact that evidence is introduced to show the nonexistence of a fact which might be inferred from proof of other facts does not, if the evidence can reasonably be disbelieved, necessarily destroy the logical value of the inference, but the rebutting evidence must be weighed against the inference. The same is true if the evidence is introduced to show the nonexistence of the facts upon which the inference is based.

1. In drawing and weighing inferences, and in considering evidence introduced in rebuttal thereof, common sense and a general knowledge of human nature and the ordinary affairs of life should be applied.

2. Example

The prosecution proves:

a. A wallet is missing from X's locker; plus

b. the wallet is found in the accused's locker; plus

c. X didn't authorize anyone to take it;

d. equals an inference that A stole the wallet.

The defense proves:

a. X left his locker unlocked;

b. A was on liberty at the time of the taking; and

c. A denies the taking and says he never saw the wallet until the chief master-at-arms searched his locker and found it.

The court may choose to believe or disbelieve the government's evidence, defense evidence, or both; in fact, it is the function of the fact-finder to determine the witness' credibility and weight to be given to the evidence. Consider in this regard the instruction in the *Military Judges' Benchbook*, DA Pam 27-9, Inst. 7-3 (1982):

> In this case, evidence has been introduced that [foundational fact, e.g.,] (a letter correctly addressed and properly stamped was placed in the mail) . . . . Based upon this evidence you may justifiably infer that [inferred fact e.g.,] (the letter was delivered to the addressee) . . . . The drawing of this inference is not required and the weight or effect, if any, will depend upon the facts and circumstances as well as other evidence in the case.

D. Examples

1. Since most persons are sane, it may be inferred that a certain person is sane and that he was sane at any given time. Thus, it may be inferred that an accused was sane at the time of the offense and is sane at the time of trial. The inference of sanity permits consideration of all the evidence in the light of the general human experience that most persons are sane. Query: Is there a difference between the presumption and inference of sanity? Is the presumption of sanity turned into an inference once contradicting evidence appears?

2. It may be inferred that a sane person intended the natural and probable consequences of acts shown to have been intentionally committed by him. R.C.M. 916(k)(3)(A) discussion.

3. It may be inferred that a condition shown to have existed at one time continues to exist. This inference was applied in *United States v. Hatchett*, 46 C.M.R. 1239 (N.C.M.R. 1973), to uphold the appellant's conviction for robbery based on an identity inference. In this case, the victim of the robbery reported having been

beaten and robbed by four black Marines who had given him a ride in a car. The victim gave three letters of the car's license to the police. Within an hour of the reported robbery and within a few miles of the robbery location, the accused, along with three other black Marines, was apprehended in a car whose license plate contained the three letters noticed by the victim and which contained the victim's field jacket. The victim was not able to identify the accused, Hatchett, but did identify one of the other Marines apprehended in the car as one of the assailants. On these facts, it was permissible for the trial court to infer that the accused was one of the Marines in the car at the time of the robbery and, hence, one of the robbers.

4. Proof that a letter correctly addressed and properly stamped or franked was deposited in the mail will support an inference that it was delivered to the addressee, and a similar inference is permissible in regard to telegrams regularly filed with a telegraph company for transmission. *United States v. Albright*, 14 C.M.R. 883 (A.F.B.R. 1954).

5. Identity of name ordinarily will support an inference of identity of person. Whether or not this inference may be drawn in a particular case, and the weight to be given to the inference if it is drawn, will depend upon how common the name is and upon any other existing circumstances.

6. When it is shown that a person was in possession of recently stolen property or part thereof, it may be inferred that the person stole the property and, if it is shown that the property was stolen from a certain place at a certain time and under certain circumstances, that the person stole it from that place at that time and under those circumstances. *See United States v. Pasha*, 24 M.J. 87 (C.M.A. 1987). Instructions on the possession of recently stolen property are set forth in *Military Judges' Benchbook*, DA Pam 27-9, Inst. 3-90, note 3 (1989).

7. It may be inferred that one who has assumed the custody of another's property has stolen the property if he refuses or fails to account for or deliver it when an accounting or delivery is due. *See United States v. Lyons*, 14 C.M.A. 67, 33 C.M.R. 279 (1963); *United States v. Crowell*, 9 C.M.A. 43, 25 C.M.R. 305 (1958).

E. Contradicting or inconsistent inferences. The fact that one or more inferences contradict or are inconsistent with one or more other inferences does not necessarily neutralize or destroy the inferences on either side of the question. The relative weights of conflicting inferences should be assessed in accordance with the logical value of each in the light of all attendant circumstances. *See United States v. Patrick*, 2 C.M.A. 189, 7 C.M.R. 65 (1953).

F. Circumstantial evidence and inferences

1. Circumstantial evidence is defined as evidence of an indirect nature; evidence of facts or circumstances from which the existence or nonexistence of a fact in issue may be inferred. *See generally Military Judges' Benchbook*, DA Pam 27-9, Inst. 7-3 (1982).

2. All inferences are the result of circumstantial evidence. The weight to be given an inference, and thus circumstantial evidence, will depend upon all the circumstances attending the proved facts that give rise to it. For an extensive collection of examples of inferences arising from circumstantial evidence, see J. Munster and M. Larkin, *Military Evidence* 88-120 (2d ed. 1978).

0414 COMMON INFERENCES IN MILITARY LAW

The following list of common inferences is offered for the reader's consideration. It must be remembered that the inferences are permissive and their usefulness is dependent upon the strength of the underlying circumstantial evidence, the situation of the particular case, and the use to which counsel desires to put the inference. This list is not inclusive; the number of permissible inferences is limited only by logic, facts, and the persuasiveness of counsel.

A. Intent. If the court members find the accused intentionally committed an act, they may infer that he intended the natural and probable consequences of the act. *See, e.g.*, Part IV, para. 54c(4)(b)(ii), MCM, 1984. [hereinafter Part IV, para. ___] (intentional infliction of grievous bodily harm).

B. Mails. If the court members find that an individual deposited a correctly addressed and properly stamped letter in the mails, they may infer that the letter was delivered to the addressee. *United States v. Albright, supra.*

C. Possession of stolen property. If the court members find that the accused was in personal, conscious, and exclusive possession of recently stolen goods, they may infer that he stole the property. *United States v. Hairston*, 9 C.M.A. 554, 26 C.M.R. 334 (1958).

D. Larceny. An intent to steal may be proved by circumstantial evidence. Thus, if a person secretly takes property, hides it, and denies knowing anything about it, an intent to steal may be inferred; if the property was taken openly and returned, this would tend to negate such an intent. Part IV, para. 46c(1)(F)(ii).

E. Forgery. If the court members find that the accused possessed and uttered a forged instrument, they may infer that he was the forger. *United States v. Cook*, 15 C.M.R. 876 (A.F.B.R. 1954).

F. Witnesses not called. If the court members find that a party failed to call as a witness an individual likely to possess information about the case, under the party's control, and available as a witness, they may infer that the individual's testimony would have been unfavorable to the party. *See, e.g., United States v. Vigneault*, 3 C.M.A. 247, 12 C.M.R. 3 (1953). This inference should be used with caution, however, and certainly cannot be used when the accused fails to testify. *Cf. United States v. Ray*, 15 M.J. 808 (N.M.C.M.R.), *petition denied*, 16 M.J. 177 (C.M.A. 1983).

G. Evidence not produced. If the court members find that a party failed to produce relevant documentary evidence within his control, they may infer that the documentary evidence would have been unfavorable to the party. *United States v. Vigneault, supra.*

H. Stolen property. If the court members find that the accused stole a part of a body of stolen property, they may infer that he stole the remainder. *United States v. Sparks*, 21 C.M.A. 134, 44 C.M.R. 188 (1971).

I. Drug possession. If the court members find that the accused had knowing, personal possession of narcotics or marijuana, they may infer the possession was wrongful. Part IV, para. 37c(5).

J. Bad checks. If the court members find that the accused drawer or maker did not pay a check within five days after notice that the drawee bank refused to pay on presentment because of insufficient funds, they may infer both an intent to defraud and knowledge of the account's insufficiency. UCMJ, art. 123a; Part IV, para. 49c(17).

K. General references

1. 9 Wigmore's Evidence 2499-2540 (Chadbourn Rev. 1981)

2. 1 Wharton's Criminal Evidence 89-150 (13th ed. 1972)

3. 29 Am.Jur.2d Evidence 168-245 (1967).

4. C. McCormick, Law of Evidence 336-347 (2d ed. 1972).

5. 1 Jones on Evidence, Chapter 3 (1972).

0415 A USE FOR PRESUMPTIONS/INFERENCES: BURDENS OF PROOF

As noted above, presumptions frequently impose or allocate the "burdens of proof" at trial and are therefore solely not evidentiary concepts, but are also procedural devices for determining the order of proof in a case or for litigation of an issue within a case. These presumptions are based on experience, probability, public policy, and convenience.

A. Burden of proof. The term "burden of proof" is really a misnomer, and its use should normally be avoided at trial (although the drafters of the Mil.R.Evid. continue to use this term). *See* Mil.R.Evid. 304(e) and 311(e). It is actually a broad general term incorporating two separate burdens: the burden of persuasion and the burden of going forward with the evidence.

1. Burden of persuasion

a. The party with the burden of persuasion as to a given issue bears the risk of losing on that issue if he does not affirmatively persuade the trier of fact to accept his position.

b. In courts-martial, the burden of persuasion is allocated as follows:

(1) The government has the ultimate burden of persuasion as to the accused's guilt, applying the beyond a reasonable doubt standard, as to:

(a) The elements of offenses charged, and

(b) once a defense is placed in issue, proving beyond a reasonable doubt that the defense did not exist. R.C.M. 916(b).

(2) Except where the Rules for Courts-Martial and/or the Military Rules of Evidence otherwise provide, the burden of persuasion on any factual issue which is necessary to decide a motion is on the moving party. R.C.M. 905c(2)(A).

(a) Rule for Courts-Martial 905c(2)(B) specifically places the burden of persuasion on the prosecution with regard to a motion to dismiss for lack of jurisdiction, denial of the right to speedy trial, or the running of the statute of limitations. *See also* Mil.R.Evid. 304(e) (the burden of proof is on the prosecution with regard to the admissibility of a confession); Mil.R.Evid. 311(e) (following a motion to suppress evidence on the grounds of unlawful search and

seizure, the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search and seizure); Mil.R.Evid. 321(d) (following a motion to suppress the eyewitness identification of the accused, the burden of proof is upon the prosecution to rebut the defense complaint).

(b) The burden of proof on any factual issue which is necessary to decide a motion is generally by a preponderance of the evidence. R.C.M. 905c(1).

c. The amount of proof required. After determining who has the burden of persuasion, the next question is: What degree of persuasion will be sufficient to find that the burden has been satisfied?

(1) The law recognizes three commonly used degrees of persuasion, depending upon the type of issue involved.

(a) A preponderance of the evidence. This test, used mostly for interlocutory issues, is met by showing that the existence of a particular fact is more probable than not (i.e., more than 50 percent of the evidence supports existence of the fact). (Numbers and percentages are used here merely for ease of explanation. The reader must be careful to note that this has nothing to do with the number of witnesses nor the length and quantity of evidence. It is a way of describing the quality of evidence or the degree of persuasion developed by the evidence. One believable witness may overcome one hundred unbelievable witnesses.)

(b) Clear and convincing evidence: This test requires a somewhat higher degree of proof than preponderance of the evidence and is used in consent search litigation. *See* Mil.R.Evid. 314(e)(5).

(c) Proof beyond a reasonable doubt. The trier of fact must be convinced to a moral certainty of the truth of the charge. If there remains a possibility that the accused is not guilty, even though it is not a likelihood, he must be found not guilty. The quantity of evidence is not the real test. The real question is whether the force of the evidence leaves the military judge or court members convinced of an accused's guilt beyond a reasonable doubt and to a moral certainty. *See* R.C.M. 920(e) and *Military Judges' Benchbook*, DA Pam 27-9, Inst. 2-29.1 (Cl. 1985).

(2) In comparing the three types of tests, the trier of fact must either find that the fact is (1) probably true (preponderance), (2) highly probably true (clear and convincing), or (3) almost certainly true (reasonable doubt test).

2. Burden of going forward

a. The party with the burden of going forward bears the risk of losing on an issue if insufficient evidence is presented to submit the issue to the trier of fact for decision.

b. Allocating the burden. Allocation of the burden of going forward is made for reasons of legal logic, plus consideration of such things as ease of proof, accessibility to sources of evidence, and public policies favoring a particular result. Accessibility to sources of evidence plays a major role in placing the burden of going forward on one party or the other.

(1) The general rule is that the party having the burden of persuasion on an issue also has the burden of going forward (e.g., the government must both go forward with evidence as to every element of the offense and persuade the trier of fact that each element exists beyond a reasonable doubt).

(2) There are numerous exceptions to this rule, however.

(a) The accused generally has the burden of going forward on most defenses (e.g., insanity, self-defense, entrapment).

(b) The accused may also bear this burden as to some interlocutory matters (e.g., an attack on a search warrant valid on its face).

(3) **Example**: In an assault and battery charge, the prosecution calls witness A who testifies that he saw D strike V with a club and that V was rendered unconscious and bleeding. Without more, the prosecution has established a prima facie case of assault and battery (i.e., a case that would be legally sufficient to convict the accused). The law generally places upon the accused the burden of going forward with the defense of self-defense. D then testifies that, on two prior occasions within the last several days, V has threatened to kill him. D relates how V ran toward him with an object that looked like a knife, that D feared for his life and struck V with a baseball bat. The fact-finder must now decide whether D has adequately established self-defense. It should be noted that D bears the burden of going forward with the issue of self-defense because only he can know of the prior threats on his life; only he can know that, in his own mind, he feared for his life.

(4) An interesting article on the allocation of burdens from the defense standpoint can be found in Trant and Harders, *Burdens of Proof, Persuasion and Production: A Thumb on the Scales of Justice?*, 13 The Advocate 24 (1981).

B. Meeting the burden. These burdens can often be met by relying on an inference (e.g., accused presents evidence that, at the time of the offense, he was incoherent and acting bizarrely; this might meet the burden of going forward and gain him an insanity instruction, although no one testified that he was insane).

0416 ATTACKING PRESUMPTIONS AND INFERENCES. Since there are no mandatory or conclusive presumptions and inferences in the military, all are subject to attack. The opposing party can attack either the foundational fact or the presumed/inferred fact, or both.

A. Opposition to foundational fact. The opponent may attempt to prevent a finding of the foundational fact (fact A below) in the presumption or the inference; in which case, the fact-finder is precluded from reaching the presumption or inference. This can be done by:

1. Rebutting the existence of A (e.g., accused is sane):

a. Directly [e.g., opposition witness testifies that non-A existed (e.g., psychiatrist testifies the accused is paranoid)]; or

b. circumstantially [e.g., opposition witness testifies that circumstances were such that A could not, or at least probably did not, exist (accused's mother testifies that he was an escapee from a mental institution)].

2. Attacking evidence from which A is to be found (e.g., by impeaching proponent's witnesses who testified that A exists).

3. Note that the opponent is never bound to rebut A. He can do nothing and hope that the fact-finder does not find A. In some cases he may get a ruling by the judge that, as a matter of law, insufficient evidence has been presented from which A might be found.

B. Attacks on the presumed or inferred fact. On the other hand, the opponent may not dispute the foundational fact (facts) but may attack the fact (fact B) inferred from A.

1. Attack the inferred fact. With either a presumption or an inference, the opponent can attempt to prove non-B. This can also be done by rebutting the existence of B in either or both of two ways:

a. Directly (e.g., opposition witness testifies that non-B existed); or

b. circumstantially (e.g., opposition witness testifies that circumstances were such that B could not or probably did not exist).

2. Note that, in cases where a true presumption is recognized, failure of the opponent to rebut the inferences of B as shown above means that B is no longer in issue, only A is.

3. Attack the inference itself as a factual question. In the case of an inference, the opponent can, even if he presents no rebuttal to B, still argue to the fact-finder that the logical weight of the inference is insufficient for it to be drawn in this case. It is possible that the fact-finder will not draw the inference, even if there is no rebutting evidence. This luxury is not available to one faced by a presumption, although a similar argument can be made in the face of a rebutted presumption.

4. Attack the presumption or inference as a legal question. The opponent can argue that, as a matter of law, the presumption or inference should not be permitted to work against him in this case (e.g., no instruction given to court members by the military judges) because the logical connection between A and B is insufficient to permit a finding of B merely upon proof of A. (In the case of the accused as opponent, this argument will be based on constitutional due process standards. *See* section 0417, *infra*).

a. This argument might be based on the specific facts in the case (e.g., the way in which A arose here makes B inherently unlikely).

b. The argument might also be based on general or special broad-based knowledge [e.g., the sort relied upon by the Supreme Court in *Leary v. United States*, 395 U.S. 6 (1969)].

0417 CONSTITUTIONAL CONSIDERATIONS: DUE PROCESS LIMITATIONS ON THE USE OF PRESUMPTIONS AND INFERENCES

Despite the fact that the law of evidence recognizes presumptions and inferences, questions have arisen as to the propriety of their use and certain circumstances, particularly as they relate to constitutional considerations.

A. Proof of elements. Due process requires that the government establish guilt by proving "every fact necessary to constitute the crime" beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

1. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Supreme Court held that the prosecution must prove not only criminality, but the degree of criminality, by proof beyond a reasonable doubt, and that the government cannot shift this burden to the accused by recharacterizing an essential element as something else (e.g., as a mitigating factor).

2. The Court of Military Appeals discussed the government's burden of proof as defined by *Winship*, *Mullaney*, and other Supreme Court cases, in *United States v. Verdi*, 5 M.J. 330 (C.M.A. 1978) (burden of proof never shifts to the accused to establish his innocence or to disprove the facts necessary to establish the crime charged).

B. When may a permissible inference operate against the accused?

1. At one time, either a rational connection between a foundational and an inferred fact or just comparative "convenience of proof" was enough for a presumption to operate against the accused. *Morrison v. California*, 291 U.S. 82 (1934).

2. In *Tot v. United States*, 319 U.S. 463 (1943), the comparative convenience test of *Morrison*, *supra*, was discarded, and rational connection between foundational fact and inferred fact was found to be a necessary and sufficient condition.

3. Subsequently, in *Leary v. United States*, 395 U.S. 6, 36 (1969), rational connection was construed to mean probative sufficiency rather than mere logical relevance:

> [A] criminal statutory presumption must be regarded as irrational or arbitrary and hence unconstitutional, unless it can at least be said with substantial assurance that the

> presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

(Note: The Supreme Court uses the word "presumption" here to describe a permissible inference). In *Leary*, *supra*, a statute provided that possession of marijuana, unless satisfactorily explained, was sufficient to prove that the defendant knew that the marijuana had been illegally imported into the United States. The Court concluded that, in view of the significant possibility that any given marijuana was domestically grown and the improbability that a marijuana user would know whether his marijuana was of domestic or imported origin, the inference permitted by the statute was "irrational or arbitrary." Hence, the presumption was unconstitutional because it could not be said with substantial assurance that the presumed fact (the marijuana was imported) was more likely than not to flow from the proved fact (accused possessed marijuana) on which it was made to depend.

4. An issue to be considered is whether, in order for an inference to operate so as to establish an essential element against the accused, the inferred fact must be said to follow from the foundational fact beyond a reasonable doubt?

a. In two cases, the Supreme Court has expressly avoided deciding this issue. In both, the Court upheld inferences on grounds that they satisfied the beyond-a-reasonable-doubt standard, without actually holding that that is the necessary standard.

(1) *Turner v. United States*, 396 U.S. 398 (1970), *reh'g denied*, 397 U.S. 958 (1970) (statutory inference).

(2) *Barnes v. United States*, 412 U.S. 837, 846 (1973) (in reference to a common law inference, the court noted "[s]ince this inference . . . satisfies the reasonable doubt standard, the most stringent standard the Court has applied in judging permissive criminal law inferences, we conclude that it satisfied the requirement of due process.").

b. The military rule appears to be the beyond-a-reasonable-doubt standard. *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987). A permissible inference must meet the beyond-a-reasonable-doubt standard in order to operate against an accused, at least where the inference supplies an essential element of the offense.

C. Instructions

1. Instructions regarding an inference should be carefully worded so as not to mislead the court members as to the nature and effect of the inference. Counsel should carefully scrutinize the military judge's instructions. *See, e.g., Military Judge's Benchbook*, DA Pam 27-9, Inst. 3-90 (1989).

2. *United States v. Lake*, 482 F.2d 146 (9th Cir. 1973), specifies four considerations in evaluating an instruction concerning an inference:

a. No mention is made of the word "presumption";

b. although the defendant might produce evidence to disprove the inference, he is under no burden to do so;

c. it is explained to the court member that they are not in any way compelled to accept the inference; and

d. the instruction unequivocally places and maintains the burden of proof on the government.

PART THREE: STIPULATIONS

0418 INTRODUCTION. Stipulations are substitutes for evidence which is not otherwise in dispute. The proper use of stipulations allows counsel to save valuable time and effort and to focus litigation (and the attention of the trier of fact) on the important issues in a case; essentially, to produce a better trial and, hopefully, more justice. This section addresses the types, admissibility, and procedures for the use of stipulations at courts-martial.

0419 DEFINITION. A stipulation is an oral or written agreement between the trial counsel and the defense counsel with the express consent of the accused as to:

A. The existence or nonexistence of any fact (a stipulation as to fact);

B. the contents of a writing (a stipulation as to the contents of a writing); or

C. the sworn testimony of a certain person if he/she were present in court to testify as a witness (a stipulation as to expected testimony). R.C.M. 811(a).

Examples

Stipulations as to fact: The accused is tried for hazarding a vessel. The facts of collision, date, location, and damage are not in dispute and, therefore, can be the subject for stipulation between the parties with the express consent of the accused; counsel would not be able to challenge the accuracy or existence of the fact.

Stipulations as to contents of a writing: The ship's deck log for the vessel contains entries indicating the weather conditions at the time of the collision, the heading and ordered speed of the vessel, and distances and bearings to navigational aids. The trial and defense counsel, with the express consent of the accused, could stipulate that the deck log did actually contain such entries, yet counsel would be able to challenge the accuracy of the entries (i.e., by offering evidence that the weather conditions were other than as indicated).

Stipulation as to expected testimony: In the same trial for hazarding a vessel, if the commanding officer were present at trial, he would testify that the accused was the assigned OOD at the time of the collision and that he was in uniform and properly posted. The trial and defense counsel could, with the express consent of the accused, stipulate that the commanding officer would so testify, yet counsel could challenge the accuracy or credibility of the testimony.

Inasmuch as a stipulation is a bilateral agreement between the parties, it must be distinguished from "consent" to dispense with the introduction of certain evidence or a conscious, silent waiver concerning the introduction of evidence. Both of these are unilateral and generally may not operate to relieve a party from the necessity of offering evidence on an issue material to the case.

0420 TYPES OF STIPULATIONS (Key Numbers 1249-1252)

A. Stipulation of fact. A stipulation of fact admits the existence or nonexistence of certain facts; that is, the truth of the facts stated in the stipulation. Once the stipulation of fact is properly received by the court, the parties are bound in the sense that they may not introduce evidence to contradict the stipulated fact. An example of a stipulation of fact is set forth in *United States v. Long*, 3 M.J. 400 (C.M.A. 1977) (stipulation that substance seized from the accused's automobile was marijuana).

B. Stipulation as to the contents of a writing. This type of stipulation is really a hybrid type of stipulation. This is a stipulation to the fact that the writing contains entries, yet the trier of fact will consider the entries themselves as an equivalent of testimony, giving no greater weight or evidentiary value to the substance of the entries merely because the parties agree that the entries exist. The parties are bound in the sense that they may not deny that the document contains the stipulated statements. However, they may raise independent evidentiary objections to the statements and introduce evidence to contradict the statements contained in the document.

C. Stipulation of expected testimony. A stipulation of expected testimony admits that, if a certain person were present in court as a witness, he or she would give certain testimony under oath. Such a stipulation does not admit the truth of the indicated testimony, nor does it add anything to the weight or evidentiary nature of the testimony. The parties are bound in the sense that they may not deny that, if called as a witness, the individual would give the stipulated testimony. However, they may raise independent evidentiary objections to the statements in the testimony and may introduce evidence to contradict the statements in the testimony.

0421 ADMISSIBILITY

A. General

1. A stipulation may not be properly accepted into evidence where any doubt exists as to the accused's understanding of the stipulation procedure and its significance. R.C.M. 811(c). The military judge normally ensures such understanding by asking the accused if he has read the stipulation (if written) or heard counsel's statement of the stipulation (if oral), understands its contents, understands that he is not bound to stipulate, understands the effect of the stipulation, and determines that he (the accused) has not been pressured or coerced into entering the stipulation. If it is a stipulation of fact, the military judge will ask the accused if he admits the facts as stipulated are true and that such facts cannot be later controverted by him. Although there is some authority from the Court of Military Appeals that the accused need not necessarily be asked if he understands these stipulated matters [*United States v. Cambridge*, 3 C.M.A. 377, 12 C.M.R. 133 (1953)], the current practice is for the military judge to assure himself via a direct colloquy with the accused, on the record.

2. Joint or common trials. One accused may not, without the co-accused's express consent, stipulate to facts incriminating the latter. *See United States v. Thompson*, 11 C.M.A. 252, 29 C.M.R. 68 (1960). When, in a joint or common trial, a stipulation is received which was made by only one or some of the accused, the members of the court should be instructed that the stipulation may be considered

only with respect to the accused person or persons who joined in it. R.C.M. 812 discussion, MCM, 1984.

3. A stipulation that, if true, would operate as a complete defense to an offense charged should not be received in evidence. R.C.M. 811(b) discussion, MCM, 1984.

B. Confessional stipulations

1. In *United States v. Bertelson*, 3 M.J. 314, 315 n.2 (C.M.A. 1977), the court defined a "confessional stipulation" to be "a stipulation which practically amounts to a confession. We believe that a stipulation can be said to amount 'practically' to a judicial confession when, for all facts and purposes, it constitutes a de facto plea of guilty, i.e., it is equivalent of entering a guilty plea to the charge."

2. The Court of Military Appeals has held that such a stipulation is permissible in certain situations (i.e., where there is a detailed inquiry made to ensure that the consent of the accused to it is knowing, voluntary, and intelligent). *See also United States v. Honeycutt*, 29 M.J. 416 (C.M.A. 1990). The court equated such a stipulation to a plea of guilty and, therefore, it imposed the same judicial scrutiny as mandated by *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969), in the extraordinary situation where this type of fact stipulation might be desired by the accused. The court emphasized, however, that the government cannot be allowed to circumvent the prohibition of Art. 45, UCMJ, and thus the accused may not be forced to forego litigation of any motion or defense as a condition of this type of stipulation. *United States v. Bertelson, supra.*

a. In *United States v. Aiello*, 7 M.J. 99 (C.M.A. 1979), the court summarized the requirements *Bertelson* placed upon the military judge:

(1) That the military judge must personally apprise the accused;

(2) that the stipulation may not be accepted without the accused's consent;

(3) that the government has the burden of proving beyond a reasonable doubt every element of the offense(s) charged;

(4) that, by stipulating to the material elements of the offense, the accused alleviates that burden; and

(5) the military judge must conduct an inquiry similar to that required by *United States v. Care, supra.*

b. The discussion to Rule for Courts-Martial 811(c) delineates a more detailed inquiry by the military judge, noting that:

> If the stipulation practically amounts to a confession to an offense to which a not guilty plea is outstanding, it may not be accepted unless the military judge ascertains: (A) from the accused that the accused understands the right not to stipulate and that the stipulation will not be accepted without the accused's consent; that the accused understands the contents and effect of the stipulation; that a factual basis exists for the stipulation; and that the accused, after consulting with counsel, consents to the stipulation; and (B) from the accused and counsel for each party whether there are any agreements between the parties in connection with the stipulation, and, if so, what the terms of such agreements are.

R.C.M. 811(c) discussion, MCM, 1984.

3. The use of confessional stipulations in appropriate cases (e.g., when a conviction is assured if a motion or objection is denied or overruled) may have certain advantages for the accused. First, since the government enters into pretrial agreements primarily to save time and money, the accused may be able to negotiate a favorable pretrial agreement as to the maximum punishment that the convening authority will approve. The accused then would be able to obtain the favorable sentence limitation provisions of the pretrial agreement while being able to plead not guilty and preserve any denied suppression motions for appellate review. For a detailed discussion of the waiver effect of a guilty plea in a case involving suppression motions under Mil.R.Evid. 304 or 311, see chapters XII and XIII, *infra*. A confessional stipulation may also limit the volume of evidence presented at trial and, therefore, the facts favorable to the government may be limited to the minimum necessary. In cases where the defense makes a motion to suppress, any errors committed if the motion is denied will be waived if the accused enters a guilty plea.

If the motion is denied and the accused enters into a confessional stipulation instead of pleading guilty, the issue raised by the motion is preserved for appeal. *See, e.g., United States v. Barden*, 9 M.J. 621 (A.C.M.R. 1980) (defense presentation of search issue). R.C.M. 910(a)(2) allows, subject to the approval of the military judge, the entry of a plea of guilty conditioned upon the right to appeal certain motions. Accordingly, the need to enter confessional stipulation in order to preserve appellate issues may be obviated by R.C.M. 910 (a)(2).

Additionally, if the confessional stipulation procedure is pursued, defense counsel should consider requesting an instruction that the appellant's

confessional stipulation is a matter to be considered in mitigation, the same as if he had pleaded guilty. While the defendant is not entitled as a matter of law to such an instruction in not guilty plea cases, a strong argument can be made that such an instruction should be given since the effect of the defendant's stipulation is the same as if he pleaded guilty.

4. Although the confessional stipulation may be beneficial to both parties, trial counsel has an added burden to ensure that the military judge conducts proper *Bertelson* inquiries. The dangers are pointed out in two cases: *United States v. Bray*, 12 M.J. 553 (A.F.C.M.R. 1981) (proceedings in revision necessary to inform accused of rights, with possible setting aside of findings of guilty) and *United States v. Hagy*, 12 M.J. 739 (A.F.C.M.R. 1981), *petition denied*, 13 M.J. 204 (C.M.A. 1982) (military judge failed to conduct inquiry when stipulation accepted, but defense presented evidence prior to findings that was consistent with factual stipulation but inconsistent with prima facie admission of guilt. The court held the factual stipulation ceased to be a confessional stipulation prior to findings and, hence, no warnings required. The court noted, however, that a prudent military judge should conduct an inquiry prior to accepting any factual stipulation admitting inculpatory facts necessary for a conviction.).

-- Where the facts to be stipulated do <u>not</u> reasonably amount to a confession which negates the requirement that the government prove <u>all</u> elements of the offense, pre-*Bertleson* case law is supportive of its admissibility. *See United States v. Wilson*, 20 C.M.A. 71, 42 C.M.R. 263 (1970); *United States v. Long*, 3 M.J. 400 (C.M.A. 1977); and *United States v. Hale*, 4 M.J. 693 (N.C.M.R. 1977).

C. <u>Stipulations of expected testimony</u>

1. Stipulations of expected testimony can be used in any situation where a live witness could be called to testify (e.g., to give direct or circumstantial evidence on the merits of the case or on presentencing, or evidence relevant to witness credibility or character evidence). An area of particular importance in the use of stipulations of expected testimony is during the presentencing phase of the court-martial; for, under Rule for Courts-Martial 1001e(2), the willingness of a party to stipulate to the expected testimony of a witness during presentencing is a factor in determining the availability of the witness for live testimony. *See* chapter XI, *infra*, for a discussion of witness availability during presentencing.

2. Stipulations of expected testimony are subject to the rules of evidence in the same manner as the live testimony of a witness. *See, e.g.*, Mil.R.Evid. 608a (credibility of a witness may be attacked by opinion or reputation evidence).

0422 EFFECT OF STIPULATING

A. General

1. A party may withdraw from an agreement to stipulate or from a stipulation at any time before the stipulation is received in evidence. R.C.M. 811(d). The fact that a written stipulation was signed is not controlling.

2. Also, the military judge may, as a matter of discretion, permit a party to withdraw from a stipulation that has been received in evidence, and the stipulation must be disregarded by the court. R.C.M. 811(d).

3. Absent special circumstances, it will usually be inferred that parties to a stipulation intended it to remain effective in all subsequent phases of the same litigation (including a rehearing, new trial, or "other trial"). This inference of continuing intent will permit the acceptance of the stipulation in the later phase even over objection by the party against whom it is to be used. *See, e.g., United States v. Mills*, 12 M.J. 1 (C.M.A. 1981) (condition in pretrial agreement allowing for stipulation of expected testimony in sentencing upon rehearing held enforceable).

-- The inference of continuing intent to stipulate will not apply where the stipulation of fact was made pursuant to a guilty plea at the first trial and where the accused pleads not guilty at the later proceeding involving the same matter (e.g., at a rehearing, it will not be admitted over the accused's objection to prove his guilt, impeach his credibility, or to aid the government in any other manner). *See United States v. Daniels*, 11 C.M.A. 52, 28 C.M.R. 276 (1959).

> Note: In light of the above, counsel desiring to enter into a stipulation for limited use (for example, at an article 32 investigation only) should ensure that this intent for limited use is made a clear part of the record of proceedings to prevent later contrary use by the government.

B. Stipulation as to fact

1. Attack or withdrawal. Unless it is properly ordered stricken from the record or withdrawn, a stipulation of fact that has been received into evidence may not be contradicted by the parties thereto. R.C.M. 811(c).

2. Stipulated authenticity. The stipulation as to the authenticity of a document is a stipulation of fact that the document is what it purports to be. Such stipulations are commonly entered into concerning pages from the service records of the accused.

Note: Such a stipulation is not a stipulation as to the admissibility of the document, and thus the admissibility may still be attacked on other grounds, such as relevancy or competency. *See United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988). This stipulation of authenticity should be distinguished from a mere waiver to authenticity by failure to object.

3. Effect of acceptance of stipulation on court members. Once a stipulation of fact is properly accepted at a trial with members, it is placed then before them and they are authorized to accept the stipulation, but they are not bound to find the stipulated fact.

C. Stipulation as to expected testimony

1. A stipulation as to expected testimony does not admit the truth of the indicated testimony, nor does it add anything to the weight or the evidentiary nature of the testimony. R.C.M. 811(e).

2. Stipulated testimony may be attacked, contradicted, or explained in the same way as though the witness had actually so testified in person. R.C.M. 811(e).

3. With court members, a stipulation of expected testimony is merely read into evidence. R.C.M. 811(f). Unlike a stipulation of fact, a written stipulation of testimony is never examined by the members, with the single exception of the president of a special court-martial without military judge examining it to determine admissibility.

0423 PROCEDURES

A. Preparation. To avoid any misunderstanding, stipulations of fact or expected testimony should be prepared in writing and verbatim in advance of trial, and any disagreements as to content should be resolved at that time. While it is advisable to prepare the stipulation in writing, oral stipulations as well as written stipulations may be presented and received at trial. Defense counsel should fully advise the accused as to the nature and content of any stipulation and obtain his or her concurrence. A stipulation may contain matter favorable to both the prosecution and the accused.

B. Use during trial

1. Oral stipulations. The following language is considered appropriate for counsel presenting an oral stipulation:

a. Oral stipulation of fact

TC: With the express consent of the accused, it is hereby stipulated by and between the prosecution and the defense that the following facts are true: the accused surrendered himself to military authorities at the station guardhouse, NETC, Newport, RI, on 1 August 19CY. At the time of his surrender, he was dressed in a Navy service dress blue uniform.

b. Oral stipulation of expected testimony

TC: With the express consent of the accused, it is hereby stipulated by and between the prosecution and the defense that, if John Jones were present in court and sworn as a witness, he would testify substantially as follows: "My name is John Jones. I am a member of the Toyson, Missouri, Police Department. On 1 August 19CY, Seaman Joe James came to me at the Bryant Avenue Police Station and told me that he was UA from his ship and wanted to turn himself in. At that time, Seaman Joe James was dressed in a Navy uniform."

> Note: Oral stipulations -- although permitted -- should be avoided unless the matter is a simple one and can be concisely stated. Where the oral stipulation is detailed, and is to be recited by one party in open court, it will often contain some objectionable statement or misstatement. The best solution is usually to recess for a time sufficient to prepare a written stipulation. At the very least, an article 39(a) session should be asked for in a members case so that objectionable matter could be deleted if necessary.

2. Written stipulations

a. A written stipulation of fact should be placed before the court in the form of a prosecution or defense exhibit or an appellate exhibit, as appropriate. R.C.M. 811(F). For example:

TC: (Offering Prosecution Exhibit 8 for identification to defense counsel.) Does the defense care to examine Prosecution Exhibit 8 for identification?

DC: Yes, thank you. (DC inspects the exhibit.)

TC: (After showing the exhibit to defense counsel and the military judge) Prosecution Exhibit 8 for identification, which is a stipulation of fact entered into between the trial counsel and the defense counsel with the express consent of the accused, is offered in evidence as Prosecution Exhibit 8.

Form for written stipulation of fact:

CAMP BLANK, NORTH CAROLINA

United States	)	STIPULATION	15 August 19CY
	)		
v.	)	of	
	)		
Pete Smith	)	FACT	
Pvt USMC	)		
123 45 6789	)		

It is hereby stipulated and agreed by and between the prosecution and the defense, with the express consent of the accused, that the following facts are true:

The accused surrendered himself to military authorities at Camp Blank, North Carolina, on 1 August 19CY.

JOHN J. ARTHUR
Captain, USMC, Trial Counsel

GEORGE R. JOHNSON
Captain, USMC, Defense Counsel

PETE SMITH
Accused

b. A written stipulation of expected testimony is read into evidence. The writing itself is not shown to the members of the court, but should be marked and appended to the record as an appellate exhibit. R.C.M. 811(F).

Form for written stipulation of expected testimony:

NAVAL EDUCATION AND TRAINING CENTER
NEWPORT, RI

United States	STIPULATION	15 August 19CY
	of	
v.		
	EXPECTED	
	TESTIMONY	
Joe James Seaman, USN 987-65-4321		

It is hereby stipulated and agreed by and between the prosecution and the defense, with the express consent of the accused, that if John Jones, 545 Lyndale Avenue, South Toyson, Missouri, were present in court and sworn as a witness, he would testify substantially as follows:

On 1 August 19CY, I was a member of the Toyson, Missouri Police Department. On that date, Joe James came to me at the Bryant Avenue Police Station and told me that he was UA from his ship and wanted to turn himself in. At that time, Joe James was dressed in a Navy uniform.

JOHN J. ARTHUR
Lieutenant, JAGC, USN, Trial Counsel

GEORGE R. JOHNSON
Lieutenant, JAGC, USN, Defense Counsel

JOE JAMES
Accused

Note: Before accepting a stipulation of fact or a stipulation of testimony, the military judge should assure himself that the accused understands the stipulation and its consequences and consents to its use. An inquiry of the accused should be conducted by the military judge.

It should be also noted that stipulations to the authenticity of service record book pages, common in court-martial practice, are usually entered into without the benefit of a writing.

C. Objections. Under some unusual circumstances, counsel may desire to pose evidentiary objections to stipulations. This is permitted with stipulations of expected testimony, but not stipulations of fact. The procedure is very unusual, however, as it would be unclear why counsel desired to stipulate, negotiated the stipulation, and then objected to it at trial. One example may be in a situation where the government knows what a witness would testify if present and the trial counsel is not able to dispute the content of the testimony, but claims the testimony is not admissible because it is irrelevant or hearsay not falling within an appropriate exception. The trial counsel could stipulate to the content of the expected testimony in order to save the government the expense of bringing the witness to the trial situs, yet still object to the admissibility of the expected testimony.

0424 CONCLUSION. In preparing a case for trial, counsel logically expend most of their time and effort on documentary or testimonial evidence. This is where counsel will "dazzle the members with their footwork." However, by early consideration of the "substitutes for evidence" considered in this chapter and the proper use of such substitutes, counsel will be able to economize expenditures of their time and efforts (and the government's money) and improve the litigation of cases -- to say nothing of being able to focus in on the "real" issues of a case with the attendant "spotlight" this will provide for their "footwork" in the traditional evidentiary areas.

CHAPTER V

RELEVANCY

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CHAPTER V

RELEVANCY

0501 INTRODUCTION (Key Numbers 1024–1035)

The concept of relevancy is basic to the law of evidence. Irrespective of any other rules or considerations, an item of evidence cannot be admitted unless it meets the test of relevancy. Military Rule of Evidence 402 [hereinafter Mil.R.Evid. ____]. This is a reflection of the fact that our system of law is a rational one built on the application of logic. As the Federal Rules of Evidence Advisory Committee noted in its note to Federal Rule of Evidence 402 [hereinafter Fed.R.Evid. ____]:

> The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are "a presupposition involved in the very conception of a rational system of evidence." Thayer, *Preliminary Treatise on Evidence* 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests.

The requirement for relevancy of evidence has been mentioned previously in chapter I in regard to the "admissibility formula" (AE=A+R+C). Of the three concepts in the formula, authenticity, relevancy, and competency, relevancy is perhaps the most important and pervasive concept. For example, authenticity and competency of witnesses is normally met fairly easily by an oath (Mil.R.Evid. 603) and showing of personal knowledge (Mil.R.Evid. 601 and 602). Frequently, the relevancy of the witness' testimony is the only point of dispute between the parties.

0502 SCOPE OF THE CHAPTER

This chapter will examine sec. IV of the Mil.R.Evid., "Relevancy and Its Limits." This section deals with a potpourri of aspects of relevancy, ranging from the definition of relevancy (Mil.R.Evid. 401) to the admissibility of the payment of a victim's medical expenses (Mil.R.Evid. 409), to a "shield law" to protect the victims of nonconsensual sexual offenses (Mil.R.Evid. 412). It must be remembered that the concept of relevancy is not limited solely to sec. IV of the rules. It is subsumed into other Military Rules of Evidence (e.g., the "helpfulness" or "assistance" tests of opinion evidence under rules 701 and 702 and the "balancing test" for the general

hearsay exception under rule 803(24) all assume some degree of relevance analysis). These and other rules with some relation to relevancy are considered in their respective sections of the text, but cross-references are made as appropriate.

As expressed by the Advisory Committee in the note to Fed.R.Evid. 401, "the variety of relevancy problems is co-extensive with the ingenuity of counsel in using circumstantial evidence as a means of proof. An enormous number of cases fall in no set pattern, and this rule [401] is designed as a guide for handling them." Part one of this chapter will examine the definitions of relevancy (Mil.R.Evid. 401), the general rule on the admissibility of relevant evidence (Mil.R.Evid. 402), and the "exclusionary rule" which may keep even relevant evidence from the fact-finder in a case (Mil.R.Evid. 403). The reader is cautioned at this point that these three rules must be read together; each has its own importance, yet none can stand completely alone. This point will be reiterated on occasion throughout the chapter, but the reader should bear it in mind as an implicit consideration, even if not explicitly stated in the text.

Some relevancy situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Mil.R.Evid. 404-412 are of this variety. For ease of analysis, these rules can be divided into three groups, each of which will be examined separately. Mil.R.Evid. 404-406, dealing with the admissibility of character and habit evidence, are considered in part two of this chapter. As we will see, these rules are stated in terms of positive admissibility of appropriate evidence.

Mil.R.Evid. 407-412 are primarily rules of exclusion. They reflect policy determinations that certain types of evidence, although logically relevant under the general rule, should be made inadmissible for certain reasons. These serve as illustrations of the application of the exclusionary principles of Mil.R.Evid. 403 applied to recurring situations. Part three of this chapter examines Mil.R.Evid. 407-411 on miscellaneous situations. Mil.R.Evid. 412, because of its unique and extremely important nature, is considered in part four of this chapter.

> NOTE: The rules in sec. IV talk in terms of the "admissibility" of evidence rather than strictly "relevancy." Section IV use of the term "admissibility" relates to the language of rule 402 that "all relevant evidence is admissible" (emphasis added) and does not presume to be a conclusionary or mandatory pronouncement. Mil.R.Evid. 402. Authenticity and competency remain part of an overall admissibility determination.

PART ONE: GENERAL RELEVANCY

0503 GENERAL (Key Numbers 1024 - 1026)

Despite the fact that admissibility subsumes relevancy, the nature of the concept of relevancy is such as to evade definition. "Relevancy," as the Advisory Committee notes, "is not an inherent characteristic of any item of evidence but exists only as a relationship between an item of evidence and a matter properly provable in the case." Fed.R.Evid. 401 Advisory Committee note. Relevancy involves a relationship between X and Y, where X and Y are particular propositions about facts in a particular case. "'[R]elevant' [is a term] of relation. . . . Terms of relation must always relate. They are like prepositions in grammar. (A preposition has incomplete meaning by itself; its meaning must be completed by the substantive which is its object.)" Michael & Adler, *The Nature of Judicial Proof* 84 (1931).

The overall goal of the general rules on relevancy might be summed up in the Fed.R.Evid. Advisory Committee's note to rule 401: "Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence."

0504 DEFINITION OF RELEVANCY. Mil.R.Evid. 401 indicates: "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."

A. Language of the rule

1. Mil.R.Evid. 401 is taken verbatim from the Fed.R.Evid. Under this rule, evidence is relevant if it has "any tendency" (emphasis added) to make the existence of a fact in the case "more probable or less probable." Mil.R.Evid. 401. The evidence does not by itself have to prove the ultimate proposition for which it is offered. Anything that can help rationally decide a case is relevant. *See, e.g., United States v. Ives*, 609 F.2d 930 (9th Cir. 1979), *cert. denied*, 445 U.S. 919 (1980), where the court held that weak, even remote, defense evidence of mental responsibility was erroneously rejected by the judge. As noted by the Fed.R.Evid. Advisory Committee:

> The standard of probability under the rule is "more ... probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As McCormick 152, p. 317, says, "[a] brick is not a wall", or, as Falknor, Extrinsic Policies Affecting Admissibility, 10

> Rutgers L. Rev. 574, 576 (1956), quotes Professor McBaine, "[i]t is not to be supposed that every witness can make a home run." Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

Fed.R.Evid. 401 Advisory Committee note.

The language of the rule somewhat broadens the military definition of relevancy developed under pre-Mil.R.Evid. practice, as it abandons the former MCM, 1969 (Rev.), para. 137, language that defined as "not relevant" evidence "too remote to have any appreciable probative value. . . ." Remoteness is now considered under rule 403, discussed *infra*, rather than as a limitation on the relevancy definition.

2. It should be noted that rule 401 does not use the word "materiality." The drafters of the Federal Rule, from which the Military Rule is taken, felt that the term "material" was loosely used and ambiguous. In pre-Mil.R.Evid. practice, the term "materiality" meant the same as relevancy, so this deletion of the term "materiality" should not affect military practice.

3. Some part of the common law terminology on the concept of materiality may survive, however, in the condition that relevant evidence must involve a fact "which is of consequence to the determination of the action." *See* Mil.R.Evid. 401 drafters' analysis, MCM, 1984, app. 22-31. The ambiguous language "of consequence" has yet to be judicially determined to mean either an important issue or any issue actually in the case. Judging from the philosophy favoring admissibility under the rules, the conclusion probably will be a determination that "consequence" does not mean "important." In this regard, the Fed.R.Evid. Advisory Committee notes that the "fact to be proved may be ultimate, intermediate, or evidentiary; it matters not. . . ." Fed.R.Evid. 401 Advisory Committee note.

4. A related issue is whether this "fact of consequence" need be disputed. The Fed.R.Evid. Advisory Committee states that:

> The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in

> nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission.

Fed.R.Evid. 401 Advisory Committee note.

Yet Saltzburg and Redden criticize this approach:

> The first sentence of the final paragraph of the Advisory Committee's Note, *infra*, states that "[t]he fact to which the evidence is directed need not be in dispute".... In our view the wording "fact that is of consequence to the determination of the action" requires that all proof be directed to the issues in dispute. Contrary to the suggestion of the Committee, illustrative evidence would not be barred under such a reading, as long as the illustrative evidence was reasonably related to a disputed issue. We believe the Advisory Committee's Note places undue reliance on Rule 403. Although we would probably reach the same result as the Committee in most cases, we think that it is important to emphasize the first step in a relevance analysis is to decide whether the trier of fact conceivably could be helped by evidence. If the answer is "no," the evidence should be excluded without reference to a balancing test which requires a specific demonstration of an extant evil before evidence is excluded.

S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual* 154 (5th ed. 1990).

It remains to be seen which approach the Court of Military Appeals will adopt. Defense counsel, however, must be careful to establish his position on the record by either objection or an offer of proof in order to preserve the review of parties position on appeal. *See* Mil.R.Evid. 103. Certainly a proper objection or offer of proof will help resolve the issues more correctly at the trial level before the case ever goes to appeal.

5. The reader should also consider the language "less probable" in the rule. Too frequently counsel think in terms of establishing the proposition that "X was the case." Evidence tending to establish that "X was <u>not</u> the case" is just as

relevant under the rule. Either aspect increases our knowledge and enhances the likelihood of ascertaining the truth about the fact in issue.

B. Logical versus legal relevancy

The standard of relevancy adopted by rule 401 is usually termed "logical relevancy" as opposed to a theory of "legal relevancy." Logical relevance refers solely to the evidence's probative value, but ignores related dangers touching upon prejudice, collateral issues, time consumption, and unfair surprise. *See generally* McCormick, *Evidence* 184 (2d ed. 1972) and Trautman, *Logical or Legal Relevancy -- A Conflict in Theory*, 5 Vand. L. Rev. 385 (1951). Legal relevancy generally requires that evidence submitted to the members have "something more than a minimum of probative value. Each single piece of evidence must have a plus value." 1 Wigmore, *Evidence* 28 (3d ed. 1940). *Cf. United States v. Ravich*, 421 F.2d 1196, 1203 (2d Cir.), *cert. denied,* 400 U.S. 834 (1970) (after quoting Wigmore's definition, the court noted that "others have taken an even more generous view," and cited the proposed Fed.R.Evid. 401). Pre-Mil.R.Evid. military practice tended to follow this higher "legal relevancy" standard. *See* former MCM, 1969 (Rev.), para. 137, discussed *infra*.

> To the extent that the *Manual's* definition includes consideration of "legal relevance," those considerations are adequately addressed by such other Rules as Rules 403 and 609. *See, e.g.*, E. Imwinkelried, P. Giannelli, F. Gilligan & F. Lederer, *Criminal Evidence* 62-65 (1979) (which, after defining "logical relevance" as involving only probative value, states at 63 that "under the rubric of 'legal relevance,' the courts have imposed an additional requirement that the item's probative value outweighs any attendant probative dangers.")

Mil.R.Evid. 401 drafters' analysis, MCM, 1984, app. 22-31.

It may seem to the reader that there really is little difference in result between the two approaches to relevancy. The distinction is one of burdens: Under "legal relevancy" the proponent has the entire burden of showing how the probative value outweighs the prejudicial value, while under the "logical relevancy" theory the proponent has a smaller threshold to cross and the burden of trying the balancing test is essentially on the opponent.

C. Determination of relevancy

1. General. Rule 401 furnishes no standards for the determination of relevancy, but it implicitly recognizes that questions of relevancy cannot be resolved by mechanical resort to legal formulas. Logic and experience are the main guides for determination of the relevancy issue by the military judge. *See* Thayer, *A Preliminary Treatise on Evidence* 265 (1898) ("The law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience, assuming that the principles of reasoning are known to judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known to them.") *See, e.g., United States v. Allison*, 474 F.2d 286, 289 (5th Cir. 1973), *cert. denied*, 419 U.S. 851, 9 S.Ct. 95 (1974) (court reversed conviction because entire transcript of defendant's grand jury testimony had been admitted even though large portion was not relevant; noting that "The determination of relevancy is not automatic or mechanical. Courts cannot employ a precise, technical, legalistic test for relevancy; instead, they must apply logical standards applicable to every day life. The relevancy or irrelevancy of particular evidence, therefore, turns on the facts of the individual case." *See generally* J. Weinstein and M. Berger, *Weinstein's Evidence* 401[01] (1988).

2. Military judge's discretion. In view of the vagueness of the standards set forth in rule 401, it appears that the military judge is afforded broad discretion in ruling on issues of relevancy. *See* Mil.R.Evid. 403 drafters' analysis, MCM, 1984, app. 22-32. *See also* Rosenberg, Judicial Discretion, 38 *The Ohio Bar* 819 (1965); *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977) (*en banc*), *cert. denied*, 435 U.S. 905 (1978). The judge should consider not only whether the admission of evidence is likely to advance the cause, but also whether its absence might produce negative inferences that would unfairly hurt a party (i.e., the absence of evidence might be probative to a jury). *See generally* Saltzburg, *A Special Aspect of Relevance, Countering Negative Inferences Associated with the Absence of Evidence*, 66 Calif. L. Rev. 1011 (1978).

As an example of what the judge may be called upon to do, McCormick considers whether evidence of an attempt at suicide by the defendant may be introduced at his murder trial as relevant to show consciousness of guilt. McCormick concluded:

> There are no statistics for attempts at suicides by those conscious of guilt and those not so conscious which will shed light on the probability of the inference. The answer must filter through the judge's experience, his judgment, and his knowledge of human conduct and motivation. He must ask himself, could a reasonable jury believe that the attempt makes it more probable that he was conscious of guilt, and if the answer is yes, the evidence is relevant.

C. McCormick, *Evidence Handbook on the Law* 438 (2nd ed. 1972).

3. Nexus required

a. Determinations of relevancy, therefore, are based on the presence of a nexus; that is, a relationship between the evidence offered for admission and a fact or issue of consequence to the case. In many instances it will be obvious why evidence is relevant, and no purpose would be served by spending valuable judicial resources rehearing what is clear to everyone participating at trial. But, in some cases, the relation of evidence to an issue in the case is obscure. The military judge may be unclear as to the relationship of the evidence to the facts and issues of the case and may require counsel to explain the purpose in offering the evidence. In order for the military judge to give proper limiting instructions under rule 105, and to strike a proper balance between probative value and prejudicial effect under rules 105 and 403, the judge must be sure that there is no doubt as to why the evidence is being offered. When a doubt arises, the military judge can ask counsel offering the evidence, and counsel should be prepared to explain *in detail*, the rationale for the offer of evidence. If counsel fails to explain satisfactorily the significance of the evidence, the military judge may exclude it without error. *Compare Harris v. United States*, 371 F.2d 365, 366 (9th Cir. 1967) (counsel said only "it is essential for the defense of this client") *and United States v. Sanchez*, 361 F.2d 824, 825 (2d Cir. 1966) (attorney did not make clear to trial judge that inquiry as to pre-arrest delay was designed to indicate deprivation of constitutional right) *with United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983) (defense counsel's offer of proof displayed that the excluded evidence was relevant, material, and vital to the defense). For evidence produced by the government in rebuttal, the nexus of relevance must be determined in light of evidence first introduced and issues initially raised by the defense at trial. *United States v. Wirth*, 18 M.J. 214 (C.M.A. 1984).

b. Determination of nexus -- three-part analysis. Where relevancy is not immediately apparent, the military judge and counsel should clearly identify the terms of the relevancy relationship in the particular case. This relationship can be identified by a three-part analysis; that is, the military judge and counsel should:

(1) Describe the item of evidence being offered;

(2) identify the fact of consequence to which it is directed; and

(3) state the hypothesis required to infer the consequential fact from the evidence.

Without this analysis, it is impossible to decide how the evidence may alter the probability of the existence of the consequential fact. If it cannot be demonstrated that an item of evidence may affect the trier's evaluation of the probability of a consequential fact, it should be excluded. Of course, information on credibility, or on the probability of an evidential hypothesis, will help a trier evaluate a line of proof. So will some charts, diagrams, and the like used by the experts. *See* chapter VII, *infra*.

c. Although the primary responsibility for meeting these requirements rests with counsel (Mil.R.Evid. 103), it may be in the military judge's best interest to assist in this demonstration, particularly when difficult instructional issues are likely to result.

d. Often, a determination of relevancy will depend upon the theory urged by counsel. Careful planning of counsel's argument is therefore essential when considering the relevancy of certain matters. Counsel should be aware of all issues in the case and how particular items of evidence may or may not be relevant to those issues.

> **Example:** A desertion case where there exists an issue as to whether the accused intended to remain away permanently. The accused, on the merits, testifies that the reason he absented himself was to care for his ill wife. At first glance, it may appear that this testimony brings out merely an extenuating circumstance for the absence and is therefore irrelevant on the issue of guilt or innocence. The accused's testimony, however, if offered to show that the accused's actions conflict with the intent to remain permanently away, would be relevant to the issue of intent.

4. Potential rulings

a. The military judge has four basic choices with respect to how he should rule on relevancy issues:

(1) Exclude the evidence;

(2) admit all the evidence;

(3) admit all the evidence subject to a limiting instruction; or

(4) admit part of the evidence and exclude part.

Once again, it must be remembered that the judge is not considering the relevance of the evidence and the possible options in regard to Mil.R.Evid. 401 alone. There is a continuous interplay among rules 401, 402, 403, and other appropriate rules in the process of judicial reasoning. *See United States v. McRary*, 616 F.2d 181 (5th Cir. 1980), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2306 (1982) for a discussion of the interrelation of rules 401, 402, and 403.

D. Conditional relevance

In some situations, the relevancy of an item of evidence depends upon the existence of a particular preliminary fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged with notice heard the statement. The problem is one of fact, and the applicable rules are those relating to the respective functions of the military judge and court members. *See* rules 104(b) and 901. *See also Kolod v. United States*, 371 F.2d 983, 987-89 (10th Cir. 1967), *cert. denied*, 389 U.S. 834 (1967). Mil.R.Evid. 401 does not deal with relevance in this sense.

E. Illustrative example

As noted previously, after an objection on relevancy grounds, an attorney arguing on relevancy should be able to explain exactly how the evidence may tend to prove or disprove the consequential fact in issue. Counsel should be able to analyze the evidentiary hypothesis in each step of proof. An example from Maguire, Weinstein, Chadbourn and Mansfield, *Cases and Materials on Evidence* 545-47 (5th ed. 1965) demonstrates such an in-depth analysis.

> Whenever an item of evidence is offered as tending circumstantially--that is, inferentially--to establish a proposition the truth of which is at issue in a case, it is essential to articulate honestly and fully the inference or series of inferences invited. Each specific step of reasoning must invariably match a premise usually unarticulated, which the judge judicially notices. Thus, where the contested proposition is whether D is the person who killed H, and the evidence is a love letter from D to W, H's wife, the inferential series runs from (1) the expression in the letter to (2) D's love of W to (3) D's desire for exclusive possession of W to (4) D's wish to get rid of H to (5) D's plan to get rid of H to (6) D's execution of the plan by killing H. The unarticulated premise conjoined with and supposed to justify the inferential steps are:

(1-2) A man who writes a love letter to a woman probably does love her. (The term "probably" as used here means that the proposition of fact is more probable or likely true as to this man than an identical proposition as to a person of whom nothing is known.)

(2-3) A man who loves a woman probably desires her for himself alone.

(3-4) A man who loves a married woman probably wishes to get rid of her husband.

(4-5) A man who wishes to get rid of the husband of the woman he loves probably plans to do so.

(5-6) A man who plans to get rid of the husband of the woman he loves probably kills him.

Obviously the value of item (1) as probative of conclusion (6) varies inversely with the number and dubiousness of the intervening inferences. Application of premise (1-2) to item (1) cannot produce more than fractional certitude of intermediate conclusion (2) -- the qualifying term "probably" which had to be inserted in (1-2) shows that. And so on down the line. This type of reasoning is progressively attenuative. Here it fractionalizes at five successive points.

Despite such fractionalizing the judge often concludes that the initial item of evidence should be admitted. Relevance is present and there is enough weight or materiality to justify consideration by the trier. At the same time, though, he may also be forced to conclude, if he conscientiously follows through the attenuation, that the item of evidence standing alone would not sustain a finding of the ultimate conclusion desired. When this is so, and the burden of persuasion is upon the party offering the evidence, that party must undertake an accumulative process by collecting and presenting other items of evidence tending toward the conclusion. In the case imagined such other items might be (a) threats by D against H's life; (b) purchase of a pistol and ammunition by D; (c) procurement

by D of a key to the front door of H's house; (d) D's presence in the neighborhood of the house shortly before and after the killing; and (e) the finding of D's hat in the house immediately after the killing. . . . The greater the number of independent items pointing toward a common conclusion, the greater the confidence in that conclusion, but no matter how many the circumstantial items may be, they can never produce absolute certainty. Nor will they, under the assumption above as to placement of burden of persuasion, even make the ultimate proposition or conclusion a question for the trier of fact in an ordinary civil case unless the judge believes that their total effect would justify reasonable men in deciding that the conclusion is more likely true than not.

Plainly enough it is the presence of more or less incalculable human factors which makes particularly substantial the lack of certitude in the hypothetical situations mentioned above. Human beings may resist temptation instead of yielding to it, may speak or write jocosely although with the appearance of seriousness, may have interests, intentions, or motives not readily perceptible to others. Higher degrees of certitude are readily and properly obtainable when the variability of human impulse and action is removed. Thus, if reliable observers of the commission of a crime agree that the guilty person was baldheaded, one-eyed, lacking two fingers on his right hand, swarthy of complexion, club-footed, and afflicted with a nervous tic and impediment of speech, the police may feel just confidence of having the right man if they pick up near the time and place of the crime a person with this entirely distinctive collection of characteristics. And, to prove presence at some time of a particular person in a room, the finding on walls and furniture of fingerprints exactly agreeing with his may be even more convincing.

0505 ADMISSIBILITY OF RELEVANT EVIDENCE. Mil.R.Evid. 402.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as

> otherwise provided by the Constitution of the United States as applied to members of the armed forces, the Uniform Code of Military Justice, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

A. General rule

As discussed in the previous section, relevancy is defined by Mil.R.Evid. 401 in a broad manner. Rule 402 continues the statement of the general relevancy rules favoring the admissibility of all relevant evidence. This rule is taken without significant change from the Federal rule, the language being changed only to reflect military practice. It also reflects the traditional common law approach encouraging consideration of relevant or probative evidence. The effect of the rule is not significantly different from former MCM, 1969 (Rev.), para. 137, which the rule replaces. *See* drafters' analysis to Mil.R.Evid. 402, MCM, 1984, app. 22-31.

B. Exceptions

Mil.R.Evid. 402 provides only a general standard of admissibility in that it provides that evidence falling into any one of five categories, although relevant, still may not be admissible because the evidence violates the:

1. Constitution of the United States, as applied to the military (e.g., fourth amendment protections against unreasonable searches). The last part of this subsection reflects the fact that the Constitution may apply differently to members of the military (e.g., Mil.R.Evid. 313 on military inspections).

2. Uniform Code of Military Justice (e.g., article 31(d) excluding even relevant confessions obtained by coercion).

3. Manual for Courts-Martial (e.g., R.C.M. 1001(c)(3), MCM, 1984 [hereinafter R.C.M. ___], relaxation of the Mil.R.Evid. with regard to matters in sentencing).

4. Military Rules of Evidence (e.g., a privilege under Section V of the rules may keep out relevant evidence; rules such as Mil.R.Evid. 403 and 609 with their balancing tests may also fall under this subsection).

5. Any congressional limitation which might specifically concern courts-martial. Although without a present example, this subsection can be read as a disclaimer of intention to affect congressional enactments that exclude evidence.

C. Irrelevant evidence

The rule states an absolute prohibition against the admission of evidence which is not relevant. A problem may arise with this prohibition should one party not object when the opposing party offers irrelevant evidence. Saltzburg and Redden offer a lucid analysis of the potentially troublesome area:

> As a general proposition, it is correct to assert that irrelevant evidence is not admissible in litigation (assuming that a proper objection is made). There is one class of cases in which this general statement must be further refined--i.e., when one party offers evidence that is properly classified as irrelevant and the other party, after failing to object, offers to meet the irrelevant evidence with additional irrelevancies. The notion of "fighting fire with fire" is an old one and the decision whether to admit irrelevant evidence in order to counter other irrelevant evidence is likely to be the same under the Federal Rules of Evidence as at common law. The Trial Judge must decide whether the interests of justice are better served by penalizing the party who failed to object or by treating the party that began the parade of irrelevant evidence as being in no position to complain. Among the factors that the Trial Judge is likely to take into account in making a ruling are: the damage that can fairly be attributable to the initial offer by irrelevant evidence; whether the party who failed to object intentionally sat on his rights; whether a limiting instruction to disregard all of the irrelevant evidence is likely to work in the particular case; the amount of time that it would take to hear further irrelevant evidence; and the extent to which a failure of one party to respond to irrelevant evidence might mislead a jury untrained in evidence law to think that the irrelevant evidence was beyond challenge and therefore somewhat probative.

S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual* 156 (5th ed. 1990).

The best solution to the problem, however, is for the military judge to insist that counsel provide a relevancy analysis, as discussed in sec. C, *supra*, whenever there is any doubt as to relevancy. *See* sec. D.1., *infra*.

D. Application of the Rule. Essentially, the rule requires that three questions may have to be addressed before evidence is admitted.

1. First, does the evidence qualify under Mil.R.Evid. 401's definition?

2. Second, will the evidence violate any of the five prohibitions listed in Mil.R.Evid. 402?

3. Third, will the evidence satisfy any rule that requires a judicial assessment of the probative value of the evidence and the possible reliability or prejudice problems presented by the evidence? *See, e.g.*, Mil.R.Evid. 403, 611, 803(6), 803(24), 804(b)(5) and 1003.

E. Procedures

1. The drafters' analysis encourages the use of offers of proof when evidence of doubtful relevance is offered. Mil.R.Evid. 402 drafters' analysis, MCM, 1984, app. 22-32. These are certainly appropriate in response to any relevancy objection.

2. Also, as discussed previously, it is possible, subject to the military judge's discretion, to offer evidence "subject to later connection." Mil.R.Evid. 104(b) (conditional relevancy). In members' cases, the conditional relevancy should be handled with great care to avoid the possibility of bringing inadmissible evidence before the members of the court. Even a cautionary instruction may be insufficient to correct the taint resulting from the members' exposure to otherwise irrelevant evidence that was admitted contingent upon establishing a condition that was never established at trial.

F. Broad potential impact

As the drafters' analysis notes:

> Rule 402 is potentially the most important of the new rules. Neither the Federal Rules of Evidence nor the Military Rules of Evidence resolve all evidentiary matters; *see, e.g.*, Rule 101(b). When specific authority to resolve an evidentiary issue is absent, Rule 402's clear result is to make relevant evidence admissible.

Mil.R.Evid. 402 drafters' analysis, MCM, 1984, app. 22-31.

0506 EXCLUSION OF RELEVANT EVIDENCE

Mil.R.Evid. 403 indicates: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

A. General. The rules defining relevant evidence and declaring generally its admissibility, Mil.R.Evid. 401 and 402 respectively, strongly encourage the admission of as much evidence as possible. Rule 403 is the first of the rules in sec. IV of the Mil.R.Evid. that restrict this policy of encouraging admissibility of relevant evidence. The rules that follow rule 403 "are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule [rule 403], which is designed as a guide for the handling of situations for which no specific rules have been formulated." Fed.R.Evid. 403 Advisory Committee note. Thus, rule 403 is the general rule which may exclude from the court's consideration evidence of unquestioned relevancy. It may be used as a "catchall" objection to the admission of evidence if counsel cannot point to any other specific ground or if the military judge has ruled against counsel on another objection. As such, it may be considered the most important of the rules and, judging from Federal cases, the most cited.

The rule recognizes six grounds which may lead to the exclusion of relevant evidence. These grounds may be grouped into two categories. The first category is the "danger category" consisting of unfair prejudice, confusion of the issues, or misleading the members. The second, or "considerations," category contains the issues of undue delay, waste of time, or needless presentation of cumulative evidence. In the initial drafts of the Federal rules, the "danger category" was designated for mandatory exclusion, but as finally adopted into the Fed.R.Evid. and subsequently into the Mil.R.Evid., the application of the rule to both categories of grounds is discretionary with the judge. J. Weinstein and M. Berger, *Weinstein's Evidence* 403-4 (1981).

Exclusion of relevant evidence is warranted only where the "probative value" of the evidence "is substantially outweighed" by one or more of the grounds enumerated in the rule and the above paragraph. In order to appreciate the rule and its application, we must examine the grant of judicial discretion implicit in the rule, the balancing test used to determine whether there is "substantial" outweighing, and the significance of the grounds for exclusion -- "unfair prejudice" in particular.

B. Discretion of military judge

1. General. The analysis accompanying rule 403 stresses the breadth of discretion which the rules vest in the military judge. S. Saltzburg, L. Schinasi, and

D. Schlueter, *Military Rules of Evidence Manual* 434 (3d ed. 1991). In *United States v. Teeter*, 16 M.J. 68 (C.M.A. 1983), appellant was convicted of a brutal rape and murder. Part of the government's evidence included the accused's one-year-old statements about how such crimes could be committed. The appellant alleged that these statements should not have been admitted because their prejudicial effect outweighed their probative value. Affirming the conviction, the court stated that striking a balance between probative value and prejudicial effect is left to the trial judge. *See also United States v. Thomas*, 11 M.J. 388 (C.M.A. 1981) (the only limitation on the admissibility of evidence under Mil.R.Evid. 404(b) is the proper exercise of the military judge's discretion to exclude evidence in accordance with Mil.R.Evid. 403); *United States v. Gonzalez*, 16 M.J. 58 (C.M.A. 1983) (neither Mil.R.Evid. 403, nor its Federal counterpart, permits a trial judge to "weed out" evidence on the basis of his or her own view of its credibility).

2. Special findings. Because of the extensive judicial discretion vested by rule 403, counsel should ensure that objections under its provisions are as specific as possible in order to narrow the military judge's discretion. One method of doing this is to request that the military judge state on the record his reasons for admitting or excluding the evidence. Other methods for counsel to use in limiting the military judge's discretion are: (1) Requests for, and submission of, proposed limiting instructions, or (2) offers to stipulate to the relevant portion of objectionable evidence. These two methods will be discussed in connection with our consideration of the "balancing test," *infra.*

C. Balancing test

To apply rule 403, the military judge must balance the probative value of the subject evidence against the "danger of unfair prejudice" or one of the other five grounds for exclusion listed in the rule. Most of the cases deal with the unfair prejudice ground, so, for the sake of clarity, we will refer to prejudice in the following discussion. The reader should remember that the other five grounds (i.e., confusing the issue, misleading the members, undue delay, waste of time, and needless presentation of cumulative evidence) could be substituted in the test. This is a highly subjective process requiring the judge to evaluate the proponent's need for the evidence as well as any possible prejudice to the opponent. The factors on each side of the "scale" for this "balancing test" are subject to the different policy considerations and are difficult to quantify; it is something akin to the proverbial apples-and-oranges comparison. Complicating the test is the fact that the "probative value" side starts with a thumb on the scales (i.e., the "substantially outweighed" language of the rule). Counsel must remember this language while arguing rule 403 objections.

While the weighing, or balancing process, must necessarily deal with the particular facts of the case, courts have developed certain guidelines.

1. The military judge should examine the probative value of the proffered evidence. Certainly the evidence must have some probative value, or relevancy, or it would not be admissible at all. Mil.R.Evid. 402. If the relevancy of the evidence is only slight (remotely relevant to an issue of consequence or directly relevant to an issue of little import), but it would likely be prejudicial, then any justification for its admission is only slight or virtually nonexistent. Counsel should remember that the appearance of probative value in the balancing test is dependent upon the theory of relevancy they espouse and the logical connections they can detail in argument. A quote from Judge Friendly in *United States v. Ravitch*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970), summarizes the logic of this consideration:

> The length of the chain of inferences necessary to connect the evidence with the ultimate fact to be proved necessarily lessens the probative value of the evidence, and may therefore render it more suspectible to exclusion as unduly confusing, prejudicial, or time-consuming, but it does not render the evidence irrelevant.

Id. at 1240 n.10.

2. Secondly, the military judge should consider whether the same fact sought to be proven by the proffered evidence can be proven by alternative means. *See* Fed.R.Evid. 403 advisory committee note. Illustrative of this point is *United States v. 88 Cases, Birely's Orange Beverage*, 187 F.2d 967 (3d Cir.), *cert. denied*, 342 U.S. 861 (1951). Pursuant to a libel charging adulteration of certain food, the United States seized for condemnation 88 cases of an orange beverage. At trial, the United States presented evidence that showed that the beverage did not contain vitamin C and introduced gruesome photographs of test animals who had died in apparent agony due to an experimental diet which lacked this vitamin. In explaining why the gruesome evidence could not be admitted, the court stated that the same fact could have been proved "simply and impressively yet without sensationalism . . . ." *Id.* at 975. The court then set forth a test that can be applied by others engaged in a balancing process: "[A]lthough sensational and shocking evidence may be relevant, it has an objectionable tendency to prejudice the jury. It is, therefore, incompetent unless the exigencies of proof make it necessary or important that the case be proved that way . . . ." *Id.*

Counsel should not read *88 Cases, supra*, as standing for the proposition that gruesomeness alone is a sufficient basis for excluding evidence. In *Rivers v. United States*, 270 F.2d 435 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960), defendant's conviction for murdering her husband by smothering him was upheld despite the admission of the parts or photographs of the dismembered parts of the victim's body. (Defendant had dismembered the body after the murder.) This evidence was deemed relevant to proving the commission of the smothering and the

intent and purpose with which it was done. In rejecting its revolting quality as an insufficient ground for exclusion, the court stated: "If the mere gruesomeness of the evidence were ground for its exclusion, then it would have to be said that the more gruesome the crime, the greater the difficulty of the prosecution in proving its case . . . ." *Id.* at 438.

a. Stipulation. One alternative to the seeking of admission of prejudicial portions of the proffered evidence which counsel should consider is the use of a stipulation. Thus, when the government seeks to introduce evidence of a prior conviction, defense counsel should consider stipulating to the fact of conviction. In one case, a reviewing court held that the trial judge abused his discretion by admitting a record of a conviction after such an offer. See *United States v. Spletzer*, 535 F.2d 950 (5th Cir. 1976). Likewise, when a defendant charged with armed robbery fled the jurisdiction and was picked up while armed, a stipulation as to his flight would have avoided the prejudice arising from revelation of the circumstances of his arrest. *United States v. Jackson*, 405 F. Supp. 938 (E.D.N.Y. 1975). *See also* Mil.R.Evid. 403 drafters' analysis, MCM, 1984, app. 22-34. The offer to stipulate may not always be sufficient, however, as there are two sides of the scale to consider.

In *United States v. Bowers*, 660 F.2d 527 (5th Cir. 1981), although color photographs of a battered child's lacerated heart had the potential to inflame passions, the court found the photos were necessary and could be admitted, even though the accused offered to stipulate.

3. Thirdly, the military judge must consider the "probable effectiveness or lack of effectiveness of a limiting instruction. . . ." Fed.R. Evid. Advisory Committee note. Where the adverse effect of relevant evidence may be cured by a cautionary instruction to the members, the need for exclusion may be outweighed. *See, e.g., United States v. Catalano*, 491 F.2d 268 (2d Cir. 1974), *cert. denied*, 419 U.S. 825 (1974).

D. Unfair prejudice

The Federal Rules of Evidence Advisory Committee defined unfair prejudice as evidence that has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed.R. Evid. 403 Advisory Committee note. However, by restricting the rule to evidence which will cause "unfair prejudice," the draftsmen meant to caution courts that mere prejudicial effect is not a sufficient reason to refuse admission. *Id.* Mil.R.Evid. 403 is similarly concerned only with "unfair prejudice."

A very common error for novice counsel is to object to evidence as "prejudicial to my client." A party is always prejudiced by relevant, damaging evidence admitted by the opponent, and the law will not exclude evidence on the

basis of "prejudice." Counsel must use "unfair prejudice," cite Mil.R.Evid. 403, and apply the balancing test.

Despite the breadth of judicial discretion under Mil.R.Evid. 403, and the availability of curative instructions, appellate courts have recognized unfair prejudice in a wide variety of cases. In *United States v. Williams*, 561 F.2d 859 (D.C. Cir. 1977), for example, the defense in a bank robbery case objected when the prosecution attempted to introduce evidence that stolen money was found in the apartment of the defendant's sister. Because the co-tenant of that apartment had already pled guilty to the robbery, the court found that the evidence, while slightly relevant, was extremely prejudicial. In *United States v. Green*, 548 F.2d 1261 (6th Cir. 1977), the government sought to introduce expert testimony comparing the illegal drug the defendant allegedly manufactured with LSD. The court found that the evidence was irrelevant and unfairly prejudicial, and excluded it. *See also United States v. McManaman*, 606 F.2d 919 (10th Cir. 1979); *United States v. Anderson*, 584 F.2d 849 (6th Cir. 1978); *United States v. Harris*, 18 M.J. 809 (A.F.C.M.R. 1984) (admission of extracts from Department of Justice pamphlet on drug enforcement error where much of the information was irrelevant and unfairly prejudicial). The Fifth Circuit reviewed a similar situation in *United States v. Hall*, 653 F.2d 1002 (5th Cir. 1981), a conspiracy trial of an alleged drug distributor. A drug agent testified that, due to the difficulties in arranging controlled purchases from large-scale dealers, no physical evidence existed. The court reversed because the inference was unfairly prejudicial. In *United States v. Koger*, 646 F.2d 1194 (7th Cir. 1981), the court held that evidence of a co-accused's conviction was unfairly prejudicial. The court reviewed a bizarre factual scenario in *United States v. Richardson*, 651 F.2d 1251 (8th Cir. 1981), where jurors learned that a key government witness had been threatened and shot just before the trial. The appellate court found unfair prejudice and reversed on the grounds that a mistrial should have been declared when the witness testified from a wheelchair. In *United States v. Tomlinson*, 20 M.J. 897 (A.C.M.R. 1985), the court held that the trial judge erred in permitting a social worker to testify that the victim suffered from a post-traumatic stress disorder consistent with rape-trauma syndrome in a case where the credibility of the victim and of the accused was the central issue. *But see United States v. Carter*, 26 M.J. 428 (C.M.A. 1988).

Evidence of "bad acts" occurring prior to or subsequent to the charged offense may often be excluded as unfairly prejudicial. Although the admission of evidence of "bad acts" is governed by Mil.R.Evid. 404(b), an objection under Mil.R.Evid. 403 can often be successful even if the evidence of bad acts is relevant. *See United States v. Jones*, 570 F.2d 765 (8th Cir. 1978); *United States v. Cook*, 557 F.2d 1148 (5th Cir. 1977); *United States v. Czarnecki*, 552 F.2d 698 (6th Cir. 1977), *cert. denied*, 431 U.S. 939 (1977); *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978); *United States v. Hall*, 588 F.2d 613 (8th Cir. 1978). Some illustrative examples include *United States v. Foskey*, 636 F.2d 517

(D.C. Cir. 1980), a prosecution for drug possession, where there was evidence of the defendant's prior arrest for an identical offense while in the company of his present co-defendant. Both rules 404(b) and 403 barred this evidence. *See also United States v. Thomas*, 11 M.J. 388 (C.M.A. 1981). Additionally, where the accused was being prosecuted for indecent acts against his nine-year-old daughter, it was error (though harmless in light of the evidence) for the military judge to admit testimony from the accused's eleven-year-old son that the accused had committed several sex acts against the son some four or five years before the charged offense. *United States v. Mann*, 26 M.J. 1 (C.M.A.), *cert. denied*, 488 U.S. 824, 109 S.Ct. 72 (1988). Similarly, the prosecution may not introduce evidence of a defendant's possession of marked bills from an earlier robbery during the trial of an unrelated robbery. *United States v. Calhoun*, 604 F.2d 1216 (9th Cir. 1979). In *United States v. Shavers*, 615 F.2d 266 (5th Cir. 1980), the Fifth Circuit held that it was error to introduce evidence of a prior threat with a knife in a prosecution for assault on a different victim with a different weapon.

Cumulative or confusing evidence may also be unfairly prejudicial. For example, in *United States v. Civella*, 493 F. Supp. 786 (W.D. Mo. 1980), complex statistical evidence introduced by the government was deemed unfairly prejudicial because it was beyond the jury's expertise. In *United States v. Stark*, 24 M.J. 381 (C.M.A. 1987), *cert. denied*, *Stark v. United States*, 484 U.S. 1026, 108 S.Ct. 56 (1988), the court held that the military judge did not abuse his discretion in denying admission of videotapes, offered by the defense, of interviews of the accused by his civilian psychiatrist. The defense asserted that the probative value of this evidence, in that it would permit the court to view the research which formed the basis for the psychiatrist's opinion, outweighed any possible prejudice. The court found a danger of confusion and a potential inability for court members to consider the tapes for purposes other than the truth of the statements contained therein. *See also United States v. Butcher*, 557 F.2d 666 (9th Cir. 1977); *United States v. King*, 560 F.2d 122 (2d Cir. 1977), *cert denied*, 434 U.S. 925 (1977). *But see United States v. Moreno*, 649 F.2d 309 (5th Cir. 1981) (where the cumulative nature of the testimony rendered it nonprejudicial). Mil.R.Evid. 403 must be used equitably; if government evidence is admitted over the objection, the provision cannot be used to reject similar evidence offered by the defense. *See United States v. Sellers*, 566 F.2d 884 (4th Cir. 1977).

There is some support for the proposition that the standard of rule 403 regarding weighing unfair prejudice against probative value is inapplicable in trials by military judge alone. In *Gulf States Utilities Co. v. Ecodyne Corp.*, 635 F.2d 517 (5th Cir. 1981), a civil case, the court found that the trial judge's exclusion of evidence was not harmless error. The trial judge had reasoned that, since he would not have let a jury hear the evidence, he would not hear it in a bench trial. The Court of

Appeals rejected this reasoning, finding that a judge is trained to recognize improper inferences and exclude them from his reasoning when he makes a decision. Thus, the court suggested that the portion of Mil.R.Evid. 403 dealing with weighing probative value against prejudicial effect had no logical application to bench trials.

E. Other grounds for exclusion

Although the unfair prejudice ground for exclusion of relevant evidence is the most commonly cited ground under Mil.R.Evid. 403, as previously noted, counsel must not forget to consider the other five grounds. For example, in *United States v. Helton*, 10 M.J. 820 (A.F.C.M.R. 1981), the Air Force Court of Military Review, citing rule 403, found that considerations of expenditure of time, digression from the issues in the case, and placement of undue weight on scientific evidence, among other reasons, justified exclusion of the results of polygraph testing. *See also United States v. Luce*, 17 M.J. 754 (A.C.M.R. 1984), *petition denied*, 18 M.J. 402 (C.M.A. 1984) (trial judge did not abuse his discretion in excluding evidence offered by the defense to rebut prosecution evidence attacking character of defense witness for truthfulness where the proposed testimony was of minimal probative value and related to motive for telling the truth rather than character for truthfulness).

Surprise is not one of the other allowable grounds for exclusion under Mil.R.Evid. 403. The Fed.R.Evid. Advisory Committee rejected surprise from the Federal rule, noting that "the granting of a continuance is a more appropriate remedy" and "the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate." Fed.R.Evid. 403 Advisory Committee note. The subjective belief of the trial judge that evidence is not believable is also an invalid basis for exclusion under rule 403. *See, e.g., United States v. Thompson*, 615 F.2d 329 (5th Cir. 1980) (rule 403 does not permit exclusion of evidence because the judge does not find it credible).

Consideration of such grounds as confusion of the members and waste of time points out the frequently forgotten fact that rule 403 is not just a defense tool. The trial counsel can invoke the rule to exclude marginally relevant defense evidence. *See, e.g., United States v. Steffen*, 641 F.2d 591 (8th Cir. 1981), *cert. denied*, 452 U.S. 943 (1981) (defense evidence too confusing); *United States v. Clifford*, 640 F.2d 150 (8th Cir. 1981) (defense evidence irrelevant and confusing); *United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980) (defense impeachment evidence as to drug use too tenuous and possibly inflammatory); *United States v. Williams*, 626 F.2d 697 (9th Cir. 1980), *cert. denied*, 449 U.S. 1020 (1980) (defense evidence held cumulative); *cf. United States v. Johnson*, 20 M.J. 610 (A.F.C.M.R. 1985) (trial judge erred in sustaining government's Mil.R.Evid. 403 objection to the admissibility of evidence of a negative urinalysis offered by the defense as misleading and confusing the issues).

F. Relationship with other rules

Although Mil.R.Evid. 403 cuts across the Mil.R.Evid. and can be applicable in almost every evidentiary situation or any stage of the trial, there are a few special interrelationships between rule 403 and other rules which deserve special mention.

Rules 403 and 404(b) are frequently cited together in decisions in the Federal court system. Although evidence of prior bad acts by the accused may qualify for admission under Mil.R.Evid. 404(b), rule 403 may constitute a "second line of defense" to keep the bad acts from being admitted by considering their prejudicial effect along with the probative value considered under 404(b). *See United States v. Thomas*, 11 M.J. 388 (C.M.A. 1981) *and United States v. Dawkins* 2 M.J. 898 (A.C.M.R. 1976) (pre-Mil.R.Evid. cases applying Federal rules).

Rule 609, as amended in May 1991, applies the 403 balancing test to evidence of a prior felony conviction not involving dishonesty offered to impeach a witness' credibility. If the witness' prior conviction has a prejudicial effect on the accused which substantially outweighs the convictions probative value, the evidence of this prior conviction should be excluded. If a prior conviction of the accused is offered, a different balancing standard is applied. Here, the probative value must affirmatively outweigh prejudicial effect. S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual*, 669 5th ed. 1991. Finally, evidence of a conviction over ten years old is admissible if the military judge determines that its probative value substantially outweighs any prejudicial effect. Note the scales here are tipped heavily in favor of exclusion. *See* section 0713, *infra*.

Rule 608, character evidence, also interacts with rule 403. *See, e.g., United States v. Pierce*, 14 M.J. 738 (A.F.C.M.R. 1982); *United States v. Leake*, 642 F.2d 715 (4th Cir. 1981); *United States v. Medical Therapy Sciences, Inc.*, 583 F.2d 36 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979); *United States v. Bocra*, 623 F.2d 281 (3d Cir. 1980), *cert. denied*, 449 U.S. 875, 101 S.Ct. 217 (1980). In *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981), the court held that it was error to exclude two defense witnesses who would have impeached the chief prosecution witness. They had been excluded since they were not included on a pretrial witness list. The court's decision was based on rule 403 and the sixth amendment. It is especially important to examine character evidence carefully, because limiting instructions may not suffice.

G. Summary

The importance of the proper application of rule 403 cannot be overemphasized. This can be seen to some extent by the references to rule 403 in the

discussion of rules 401 and 402, *supra*. Counsel must focus on the language of the rule, be it "substantially outweighed" or "unfair prejudice," and apply it to the facts of their cases.

It must be remembered, however, that Mil.R.Evid. 403 is only a general check on evidence admissibility, not a license to ignore the specific limitations of other rules or rule 402's prohibition concerning irrelevancy. Mil.R.Evid. 403 can keep relevant evidence out of court, but it cannot get irrelevant or inadmissible evidence into court.

PART TWO: CHARACTER EVIDENCE

0507 INTRODUCTION (Key Numbers 1027, 1028)

A. Scope. The first part of this chapter dealt with the general rules of relevancy. As discussed therein, rules 401 and 402 define the concept of relevancy and generally allow for the admission of relevant evidence; rule 403 gives the policy considerations for excluding relevant evidence in general situations. The rules (Mil.R.Evid. 404-406) examined in this part of the chapter apply the principles of these general rules to the specific area of character evidence. This is an area of substantial litigation in criminal cases as discussed *infra*. Mil.R.Evid. 404 addresses the use which can be made of character evidence in general, and extrinsic evidence in particular. Mil.R. Evid. 405 delineates the types of character evidence that can be used at trial if any character evidence is allowed under rule 404. Mil.R.Evid. 406, dealing with habit and routine practices, although not denominated by title as a rule of character evidence, is a related rule. Evidence of a habit or routine practice is evidence of previous conduct the use of which is generally barred by rule 404 and 405. Mil.R.Evid. 406 permits the admission of this type of evidence under limited circumstances. Accordingly, it is considered in this part of the chapter.

Evidence of the character of the accused is relevant at two distinct stages of a court-martial. First, it can be relevant during the merits of the case on the ultimate issue of the guilt or innocence of the accused. Second, it can be relevant after findings as a matter in consideration of punishment. Only the first use will be discussed in this chapter. Character evidence after findings will be covered in chapter XI on presentencing.

B. Character evidence in general

Character evidence is information relating to a person's distinctive traits, behavior, or qualities. Counsel often wish to use such information at trial without deciding exactly what it is or how they can use it.

1. What is character evidence? In trying to define "character," the reader may note that this is one of those words in the English language that is more difficult to define than to use. It is possible to list related concepts (i.e., specific character traits such as truthfulness, peacefulness, sobriety, and honesty). Mil.R.Evid. 404 is concerned with "traits" such as these. There is also the general character which we associate with people -- "she is a good girl" or "he is a bad man." This is essentially the "actual moral nature of a person." Under prior military law, an accused's general good character was admissible to prove he was innocent of any alleged offense. *See* former MCM, 1969 (Rev.), para. 138f(2). The extent to which the

prior *Manual* provision has been modified by Mil.R.Evid. 404 is the subject of continuing debate. Pertinent cases will be discussed later in this chapter.

a. Character must be distinguished from reputation. Reputation is the repute in which a person generally is held in the community in which he lives or pursues his business or profession. Mil.R.Evid. 405(d). A person's reputation can be said to "reflect" his character. Reputation evidence, together with opinion testimony, forms two methods of proving character. Mil.R.Evid. 405(a).

b. Character also must be distinguished from habit.

> Character and habit are closely akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance or peacefulness. "Habit," in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two steps at a time . . . . Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition.

C. McCormick, *Evidence* 462-3 (1954).

2. Why use character evidence? Character evidence may be used for one of two fundamentally different reasons. First, it may be offered to disprove an element of a crime or to establish a defense when character itself is in issue. This situation is commonly referred to as "character in issue." Second, it may be offered for the purpose of suggesting that a person who has a certain character acted in conformity with his usual character at the time, or in the situation presently in issue. This is sometimes referred to as "circumstantial use" of character.

a. Character in issue. Character evidence offered to prove character when it is a consequential, material proposition, rather than to prove an act, does not fall within the prohibition of rule 404 and, consequently, is admissible. So is character evidence offered to prove an act, if it can be utilized without resort to

the inference that a person of certain character is more likely than men generally to have committed the act in question. Such character evidence is controlled by general relevancy considerations under rules 401 and 402. The language of the rule does not explicitly state this, but the Fed.R.Evid. Advisory Committee in its note to Fed.R.Evid. 404(a) notes:

> Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense . . . . Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following.

Although most of the cases in which character is an issue appear to be civil cases, there are several situations in which it could appear in a criminal trial. By far the most common situation is the entrapment defense. The courts tend to treat the predisposition of the accused as an element of the defense of entrapment, and thus the character of the accused for lawfulness would be in issue. *See United States v. Burkley*, 591 F.2d 903 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979) and *Sorrells v. United States*, 287 U.S. 435 (1932). Weinstein and Berger note two other situations where character may be in issue in criminal cases.

> Character evidence is customarily received in Hobbs Act prosecutions. Since the government must prove that property was extorted from the victim by threats, the defendant's reputation for violence--when known to the victim--is relevant in ascertaining the victim's fear and its reasonableness. A similar use of character evidence occurs in connection with the Extortionate Credit Transactions Act.

J. Weinstein and M. Berger, *Weinstein's Evidence* 404-21 (1988).

Although Mil.R.Evid. 404(a) does not deal with the admissibility of "character in issue," but deals only with the "circumstantial use" of character discussed below, it should be remembered that rule 405(b), discussed *infra*, is still applicable.

b. "Circumstantial use" of character evidence as inference. The use of character evidence circumstantially to create an inference that a person acted in conformity with his character on a particular occasion, normally at the time of the offense with which he is charged, is an exercise in logic. Common sense would indicate to most people that "dishonest" people are more prone to larceny than "honest" people and, more generally, that "good" people are less likely to commit crimes than "bad" people.

Because evidence of bad character of the accused may logically lead to an inference that the accused committed the offense charged, courts have consistently held that, if the prosecution is allowed initially to introduce such evidence, the trier of fact might improperly base its findings on the character of the accused and not on his actual guilt of the offense charged. As the Supreme Court explained in *Michelson v. United States*, 335 U.S. 469, 476 (1948):

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The over-riding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Consequently, the rules governing the admission of character evidence on the ultimate issue reflect a compromise between the desire to make all relevant evidence available and the protection of the court against undue confusion of the issues.

Character evidence may be used logically to create an inference in two possible situations:

(1) As circumstantial evidence of the guilt or innocence of the accused (substantive character evidence); or

(2) as circumstantial evidence as to whether a witness, including the accused, is telling the truth at trial (impeachment character evidence).

The twin concepts of substantive and impeachment character evidence are related in that the goal of each is to demonstrate that a person is acting in conformity with his established character.

If offered only to show that a witness is or is not telling the truth at trial, the military judge, upon appropriate request by counsel, will consider it only for that purpose and in a members case will instruct the court members that they must not consider the evidence for any other purpose. *See* Mil.R.Evid. 105. This limiting instruction is the key difference between substantive and impeachment character evidence.

Substantive character evidence is governed by the concept of relevance found in Mil.R.Evid. 404(a) and 405. Impeachment character evidence is covered by the concept of credibility found in section VI of the Mil.R.Evid., most particularly rule 608.

0508 ADMISSIBILITY OF CHARACTER EVIDENCE. Mil.R.Evid. 404.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) Character of the accused. Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim

offered by the prosecution in a homicide or assault case to rebut evidence that the victim was an aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

A. General

Mil.R.Evid. 404 is basically a codification of the common law. *See* Fed.R.Evid. 404 Advisory Committee's note. This rule replaces former MCM, 1969 (Rev.), paras. 138f and g, and is taken without substantial change from the Federal rule. Mil.R.Evid. 404 expands upon the Federal rule by including, in subsection (a)(2), the character trait of peacefulness of the victim of an assault; whereas the Federal rule limits the use of similar evidence to homicide cases. Two major sections make up the rule: subdivision (a) concerns general character evidence; subdivision (b) deals with proof of other crimes, wrongs or similar acts (called "extrinsic offense evidence" in the Federal courts, and previously known as "uncharged misconduct," or "misconduct not charged," in the military). These sections will be discussed separately *infra*: Rule 404(a) is covered in sections B-E, and rule 404(b) is discussed in section F.

B. Character evidence generally

Mil.R.Evid. 404(a) generally excludes the circumstantial use of a person's character or a trait of a person's character. The rule, however, does list three significant exceptions. These exceptions are predicated upon the status of the person (i.e., accused, victim, witness) whose character counsel wishes to establish. Within these three exceptions there is also a further division by types of admissible character evidence (i.e., pertinent traits of character or character evidence "to impeach or support the credibility of a witness. . . ."). Mil.R.Evid. 404(a) drafters' analysis, MCM, 1984, app. 22-32.

1. Accused. An accused may offer evidence of a "pertinent trait" of his character. If he does offer such a pertinent character trait, the prosecution may rebut. Mil.R.Evid. 404(a)(1).

2. Victim

a. Evidence of a "pertinent trait" of character of the victim of a crime may be admissible when offered by an accused. The prosecution, however, may rebut the same. Mil.R.Evid. 404(a)(2).

b. Additionally, the prosecution may offer evidence of a character trait of peacefulness of the victim in a homicide or assault case, provided the accused has presented evidence that the victim was the aggressor. Evidence of the victim's character for peacefulness, therefore, is only admissible in rebuttal. Mil.R.Evid. 404(a)(2). *See, e.g., United States v. Pearson*, 13 M.J. 922 (N.M.C.M.R. 1982) (evidence of victim's character for peacefulness relevant to rebut accused's contention that victim struck him first, *rev'd on other grounds*, 17 M.J. 149 (C.M.A. 1984).

3. Witness. Evidence of the character of a witness may be admitted, as provided in rules 607, 608, and 609 (i.e., the credibility of the witness). Mil.R.Evid. 404(a)(3).

It should be noted that initial use of the first two exceptions is solely within the control of the defense. The prosecution cannot present character evidence under subsection (a)(1) or (2) until the defense "opens the door" by "putting the accused's character in issue" or by raising the issue of a victim's pertinent character or the allegation of the victim's aggression in an assault or homicide case. The terminology of "putting the accused's character in issue" can be misleading. It is not the same as having "character in issue," to which Mil.R.Evid. 404(a) is not applicable. Once the defense offers any evidence of pertinent character traits, however, the prosecution is free to rebut in kind. Thus, the defense controls the substantive use of character evidence, at least initially. An accused does not "open the door" merely by taking the stand. *See United States v. Tomaiolo*, 249 F.2d 683 (2d Cir. 1957); *United States v. Masino*, 275 F.2d 129 (2d Cir. 1960). By taking the stand as a witness, however, certain evidence of bad character may be admissible to attack the accused's credibility. Character evidence for impeachment use is available to either party at any time. *See* Mil.R.Evid. 607 and 404(a)(3). While neither party controls use of impeachment character evidence, the parties do have the ability to request limiting instructions under rule 105 when character evidence is used for this limited purpose.

The term "pertinent" in the rule means that the trait or traits are relevant to the offense charged or any other issue of consequence to the case. For example, in a trial for murder, defense evidence as to the good character of the accused for honesty is not admissible, for honest men may be as likely to commit murder as dishonest men. A relevancy analysis under Mil.R.Evid. 402 may be necessary to determine if a trait is pertinent under rule 404.

C. Character of the accused

1. Pertinent character traits. As discussed above, the defense is limited to substantive character evidence involving a "pertinent trait" of the accused. *United States v. Elliott*, 23 M.J. 1 (C.M.A. 1986) (prejudicial error in larceny case not to admit evidence of accused's "trusting" nature as a pertinent trait where accused asserts he did not steal the two government TV's, but merely "innocently accepted" them as gifts from a new friend).

Other examples of admissible evidence of specific traits are:

Offense	Character Traits
Theft	Honesty
Drunkenness	Sobriety
Homicide	Peacefulness
Assault	Peacefulness
Negligence	Carefulness

It must be emphasized that offering substantive character evidence is an important tactical decision for the defense. Once such evidence is offered, it may be "tested" on cross-examination by the trial counsel and rebutted during the government's case in rebuttal. Such "testing" and rebuttal by the prosecution may well outweigh the impact of the original character evidence presented by the defense.

2. Evidence of general good military character. The rule 404(a)(1) provision allowing only pertinent traits of character appears to be a significant change from, and limitation upon, the old military rule which allowed the use of general good military character to demonstrate that the accused was less likely to have committed a criminal act. The drafters' analysis, however, provides that "[i]t is the intention of the Committee, however, to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders." Mil.R.Evid. 404 drafters' analysis, MCM, 1984, app. 22-32.

a. In the first military case to address this issue, *United States v. Cooper*, 11 M.J. 815 (A.F.C.M.R. 1981), the accused was convicted of possession of marijuana in violation of Article 134, UCMJ. In an attempt to prove innocent possession, defense counsel sought to demonstrate the accused's good military character under Mil.R.Evid. 404(a)(1). However, the military judge sustained trial counsel's objection, holding such evidence was not relevant to the offense charged and did not concern a "pertinent" trait of character. In affirming the conviction, the Air Force Court of Military Review initially determined that general good military

character is not admissible unless the accused is charged with a unique military offense. It then sought to define that concept. Looking to the drafters' analysis, the court reasoned that crimes which are "exclusively military in nature," such as desertion or absence without leave, are covered by the rule. *Id.* at 816. The court refused to find that offenses charged under the general article (article 134) are uniquely military merely because they require proof of conduct to the prejudice of good order and discipline, or are of a nature to bring discredit upon the armed forces. Instead, the court mandated that trial judges "look to the military nature of the charged misconduct before determining if the accused's good military character is pertinent to the determination of guilt or innocence."

b. The Federal courts have tended to admit evidence that an accused has a character trait of being a "law-abiding citizen." Although such a trait reflects upon an accused's general character for being a "good" person, the Federal courts have accepted the trait as a "pertinent" trait of character under rule 404. *See, e.g., United States v. Angelini*, 678 F.2d 380 (1st Cir. 1982); *United States v. Hewitt*, 634 F.2d 277 (5th Cir.1981). Federal courts will accept character evidence if it can be shown that the trait in question would make any fact of consequence to the determination of the case more or less probable than it could be without evidence of the trait. The courts use the criteria of relevancy under rule 401 in determining the issue (*see United States v. Angelini, supra*).

c. More recent decisions demonstrate that some military courts are taking a more flexible position with respect to admitting evidence of good military character. In *United States v. Clemons*, 16 M.J. 44 (C.M.A. 1983), the accused was charged with theft. His defense was that he took the item while acting as charge of quarters in order to teach the owners a lesson because they left their gear adrift. The accused wanted to introduce evidence of good general military character and evidence that he had a character trait for lawfulness. The trial judge ruled that such evidence was not reflective of "pertinent" traits of character in that the evidence reflected upon general character. The Court of Military Appeals held that the trial judge committed error; that "pertinent" under Mil.R.Evid. 404 was equivalent to "relevant," and that good military character and character for lawfulness were traits relevant to the defense of taking the items to teach the owners a lesson. Chief Judge Everett concurred, but also hinted that evidence of character for being a law-abiding citizen and good general character might always be relevant in courts-martial. *See also United States v. Fitzgerald*, 19 M.J. 695 (A.C.M.R. 1984) (evidence of good military character properly excluded in larceny prosecution because offense did not have sufficient nexus to performance of military duties, distinguishing *Clemons*); *United States v. McConnell*, 20 M.J. 577 (N.M.C.M.R. 1985) (same result as *Fitzgerald, supra*); *United States v. Piatt*, 17 M.J. 442 (C.M.A. 1984) (accused should have been allowed to present evidence of his good character as a drill instructor in a court-martial where he was charged with assault upon a recruit); *United States v. McNeill*, 17 M.J. 451 (C.M.A. 1984) (evidence of accused's good

general military character was admissible in prosecution for sodomy where he denied the offense and asserted his proper professional conduct on the day in question); *United States v. Kahakauwila*, 19 M.J. 60 (C.M.A. 1984) (because offense of possessing, selling, and transferring marijuana was charged as violation of naval regulations, evidence of accused's performance of military duties and overall military character was admissible to show that he conformed to demands of military laws and was not a person who would have committed such an act in violation of regulations); *United States v. Pershing*, 28 M.J. 668 (A.F.C.M.R. 1989) (failure of military judge to admit evidence of accused's good military character in prosecution for larceny constituted error); *United States v. Lutz*, 18 M.J. 763 (C.G.C.M.R. 1984) (although evidence of good military character is admissible as a trait of character when pertinent to the charges, it is necessary to look at the defense theory and offenses charged; in prosecution for sexual child abuse, evidence of accused's good military character held to be not pertinent and inadmissible). *But see United States v. Wilson*, 28 M.J. 48 (C.M.A. 1989) (military judge should have admitted evidence of accused's good military character with respect to sodomy, adultery, and indecent language charges involving wives of accused's military subordinates).

3. A helpful analysis for both counsel and the military judge in determining whether exclusion of evidence of the accused's good military character is prejudicial was provided by the Court of Military Appeals in *United States v. Weeks*, 20 M.J. 22 (C.M.A. 1985). The court held that evidence of good military character of an accused charged with selling marijuana in violation of naval regulations was admissible as substantive evidence, and suggested the following questions in order to test for prejudice from exclusion of such evidence: (1) Is the government's case strong and conclusive; (2) is the defense's theory of the case feeble or implausible; (3) is the proffered evidence material, and is the question of whether the accused is the type of person who would engage in the alleged criminal conduct fairly raised by the government's theory of the case or by the defense; and (4) what is the quality of the proffered defense evidence, and is there any substitute for it in the record of trial. This analysis was applied in *United States v. Klein*, 20 M.J. 26 (C.M.A.), *cert. denied*, *Klein v. United States*, 474 U.S. 1009, 106 S.Ct. 534 (1985) (false official statements); *United States v. Wilson*, 20 M.J. 31 (C.M.A. 1985) (drug offenses); *United States v. Belz*, 20 M.J. 33 (C.M.A. 1985) (charges of conduct unbecoming an officer due to drug offenses); *United States v. Traveler*, 20 M.J. 35 (C.M.A. 1985) (drug offenses); *United States v. Vandelinder*, 20 M.J. 41 (C.M.A. 1985) (drug offenses); and *United States v. Hurtt*, 22 M.J. 134 (C.M.A. 1986) (drug offenses).

4. Instructions. For an instruction on the use of a pertinent trait of the accused, see *Military Judges' Benchbook*, DA Pam 27-9, inst. 7-8(I) (1982).

D. Character of the victim

1. Under Mil.R.Evid. 404(a)(2), the defense may choose to offer evidence concerning any "pertinent" trait of character of the victim of a crime. This pertinent trait of character of the victim must be relevant to an issue in the case. *See United States v. Agee*, 23 M.J. 506 (A.F.C.M.R. 1986) (in an unprovoked assault, victim's "propensity" for engaging other persons in altercation irrelevant where defense failed to show accused had knowledge of the propensity). *See also* Mil.R.Evid. 401 and 402. For example, to help establish an abandonment of rank defense to a disrespect charge, the defense may offer evidence that the "victim" of the disrespect has a reputation for using profanity and taunting subordinates. Once the defense presents such evidence, the government may use opinion or reputation evidence to rebut the assertion. One pertinent trait of a victim's character that is not admissible under rule 404(a)(2), because of its specific exclusion, is evidence relating to the past sexual behavior of the victim of a nonconsensual sexual offense. Rule 412 preempts this area with its "notwithstanding any other provision of these rules" language. This rule is discussed in part four of this chapter.

2. Additionally, in any assault or homicide case, the government may offer evidence of the pertinent character trait of peacefulness of the victim to rebut evidence that the victim was the aggressor. Note that, in this instance, any claim of self-defense will be sufficient to allow the admission of this pertinent character trait evidence by the government; and the trial counsel may offer such evidence without waiting until the defense offers character evidence -- the claim of self-defense automatically puts the victim's character for peacefulness in issue. *See United States v. Iturralde-Aponte*, 1 M.J. 196 (C.M.A. 1975).

3. For an instruction on the use of evidence of a victim's character, see *Military Judges' Benchbook*, DA Pam 27-9, inst. 7-8(II) (1982).

E. Character of the witness

Mil.R.Evid. 404(a)(3) allows the use of character evidence for impeachment purposes, as provided in rules 607, 608 and 609. Stated in summary fashion, Mil.R.Evid. 607 permits the credibility of a witness to be attacked by any party; Mil.R.Evid. 608 permits use of character evidence to attack or support the truthfulness or untruthfulness of a witness under certain situations; and Mil.R.Evid. 609 permits the impeachment of a witness by evidence of conviction of crime. These rules are discussed in Chapter VII, part two, *infra*.

Unlike the situation where the defense controls the use of substantive character evidence under rules 404(a)(1) and (2), under 404(a)(3) either party may initiate the use of character evidence of a witness for the purpose of impeachment. *See* Mil.R.Evid. 607. Once a witness takes the stand to testify, his or her character for truthfulness is in issue and subject to attack.

When character evidence is used under 404(a)(3) for impeachment, a limiting instruction may be requested under rule 105. For a sample instruction, see *Military Judges' Benchbook*, DA Pam 27-9, inst. 7-8(III) (1982). Whether counsel requests that the military judge give a limiting instruction is a question of trial tactics. Will the limiting instruction help or hinder the case? For instance, the granting of the limiting instruction may only serve to remind the members of damaging evidence.

F. Distinction between rules 404(a)(1) and (2) and rule 404(a)(3)

1. The key distinction between rules 404(a)(1) and (2), and rule 404(a)(3), is the ultimate use to which the evidence may be applied by the trier of fact. Evidence of "pertinent character traits" of the accused or a victim may be used in the determination of the accused's guilt or innocence (i.e., substantively). The character of a witness, as limited by Mil.R.Evid. 608 to the trait for truthfulness or untruthfulness, may be used only in a determination of the witness' credibility. Difficulties may arise when the accused or victim testifies as a witness. In this situation, the accused's or victim's pertinent character trait for truthfulness or untruthfulness goes to their credibility, while any "pertinent character trait" under rule 404(a)(1) and (2) may be used substantively.

2. As an illustration, consider the case where an accused is charged with the offense of assault. The defense counsel presents evidence of the accused's character trait for peacefulness and the accused testifies as a witness. The prosecution can rebut with evidence of the accused's reputation for violence and also present opinion or reputation evidence of the accused's character for untruthfulness. The defense can then counter with evidence of the accused's character for truthfulness. The military judge would instruct the members that they could consider the accused's character traits for peacefulness or violence in determining his guilt or innocence of the charge of assault, but they could consider his traits for truthfulness or untruthfulness only in determining his credibility as a witness, not in determining his guilt of the charge. The members may find it difficult to apply the concept that part of a person's character goes to his potential guilt of the charge while another part does not.

3. For an extensive discussion of this issue by the Court of Military Appeals, see *United States v. Everage*, 19 M.J. 189 (C.M.A. 1985) (although truthfulness of the accused would have been a "pertinent trait" if, for example, the

accused had been prosecuted for making a false official statement, it did not bear directly upon his guilt or innocence of charged drug offenses).

G. Evidence of other crimes, wrongs or acts. Mil.R.Evid. 404(b).

Traditionally, this area of the law in military justice has been called "uncharged misconduct." The Federal courts label it "extrinsic offense evidence." For our purposes, we will use the terms "uncharged misconduct" and "extrinsic evidence" interchangeably. The present rule 404(b) is substantially similar to former MCM, 1969 (Rev.), para. 138g, in its effect. *See United States v. Stokes*, 12 M.J. 229 (C.M.A. 1982); *United States v. Thomas*, 11 M.J. 388 (C.M.A. 1981). It must be recognized that Mil.R.Evid. 404(b) specifically prohibits the use of past crimes, wrongs, or acts for the purpose of proving the character of an individual to show that the person acted in conformity therewith. Therefore, Mil.R.Evid. 404(b) is not really a rule of character evidence at all, since both substantive and impeachment character evidence is inadmissible to prove a person acted in conformity with his or her character. Rather, it is a means to alert the reader to the many avenues available for admitting evidence of other criminal acts. Only one evidentiary hypothesis for the use of uncharged misconduct (extrinsic offense evidence) is precluded: use of extrinsic offenses solely to establish the accused's character.

1. Prohibition against demonstrating character. The easiest way to understand subsection (b) of rule 404 is to separate its two sentences. The first sentence establishes that evidence of uncharged misconduct cannot be used to demonstrate the character of a person, usually the accused, in order to show that he has acted in conformity with his past acts. The principle at work is that specific acts may not be used to prove the kind of person someone is in order to show how he probably acted on a particular occasion. This is consistent with the general philosophy and language of Mil.R.Evid. 404(a) and the limitation on proof of character in Mil.R.Evid. 405. The sentence applies whether or not the extrinsic offense ever resulted in apprehension, referral, preferral, or conviction.

2. Admissible for other purposes. The second line of Mil.R.Evid. 404(b) indicates that such evidence of past crimes, wrongs, or acts may be admissible if offered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. This is only a partial list of exceptions, thus providing the trial judge with discretion to adopt additional provisions. *See United States v. Castillo*, 29 M.J. 145 (C.M.A. 1989). This reading of the list of "other purposes" as examples of consequential facts is confirmed by the drafters' analysis to rule 404(b): "Rule 404(b) provides examples rather than a list of justifications for admission of evidence of other misconduct." Mil.R.Evid 404 drafters' analysis, MCM, 1984, app. 22-32.

a. Use of uncharged misconduct on the merits. The most important aspect of subsection (b) is that it may be used to introduce evidence of the acts of an accused, even though he does not testify in his own behalf. This means Mil.R.Evid. 404(b) can be used as part of the government's case-in-chief as substantive evidence to be considered by the finder of fact in determining guilt or innocence, not just as a matter affecting credibility. It is no wonder that subdivision (b) is so heavily litigated. Any time that the prosecution attempts to offer other acts of the accused as part of its substantive proof, there is a very real problem of prejudice. *See United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (*en banc*), *cert. denied*, 440 U.S. 920 (1979). These other acts ordinarily involve some kind of wrongdoing or misbehavior. No matter how carefully the court members are instructed that the evidence is not to be used in determining whether the accused is a good or bad person, there is a possibility of misuse. The worse the act, the greater the chance that court members may lose sympathy for the accused and decide against him because he is a bad person -- something that the law does not allow.

b. Use of uncharged misconduct for impeachment purposes. This rule does not deal with the use of extrinsic offense evidence for purposes of impeachment. *See* Mil.R.Evid. 608 and 609; *United States v. Owens*, 21 M.J. 117 (C.M.A. 1985) (Mil.R.Evid. 608(b) permitted trial counsel to impeach accused by extracting on cross-examination his admission to a prior act of intentional falsehood under oath concerning prior convictions and arrests).

c. Relevancy analysis. Rule 404(b) is simply a specialized rule under the relevancy section of the Mil.R.Evid. Accordingly, as with any relevancy determination under rule 401, counsel offering extrinsic offense evidence must be prepared to (1) identify the consequential fact to which the proffered extrinsic evidence is directed (e.g., identity, motive, etc.); (2) establish the extrinsic offense and the accused's connection with it; and (3) articulate the evidentiary hypothesis by which the consequential fact may be inferred from the proffered evidence. *See Huddleston v. United States*, 108 S.Ct. 1496 (1988).

Once the proffered evidence is shown to be relevant and that it is not offered to demonstrate the prohibited area of character, Mil.R.Evid. 403 must still be considered. The drafters' analysis explicitly states that "Rule 404(b) is subject to Rule 403." Mil.R.Evid. 404(b) drafters' analysis. These two rules are frequently cited in tandem in Federal cases. It has been held, for example, in a prosecution for possession of drugs with intent to distribute, that the military judge erred in permitting a government witness to testify that the accused had been selling drugs for years and had, on one occasion, distributed drugs to the witness' child. Whatever the admissibility of the evidence under Mil.R.Evid. 404(b) may have been, the danger of unfair prejudice substantially outweighed any probative value which such evidence may have possessed. *United States v. Brooks*, 26 M.J. 28 (C.M.A. 1988).

To protect the interest of the accused, the defense counsel should ensure that the military judge realizes his responsibility to measure all tentatively admitted evidence against the criteria expounded in rule 403. Thus, the military judge must conduct a balancing test in which the probative value of the evidence is weighed against its potential for prejudice after determining that the evidence meets the requirements of rule 404(b). This two-step approach was followed in *United States v. Conley*, 523 F.2d 650 (8th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976). The defense counsel can further protect the accused by proposing ways in which probative evidence in a particular case may be admitted without exposing the accused to undue prejudice. *See, e.g., United States v. Dansker*, 537 F.2d 40 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977) (selective exclusion of evidence of defendant's prior acts, coupled with tailored limiting instruction, sufficiently reduced prejudicial impact). The military judge possesses a great deal of discretion in this area, and he is arguably authorized "to interpret the rules creatively so as to promote growth and development in the law of evidence in the interests of justice and reliable fact-finding." *United States v. Jackson*, 405 F. Supp. 938, 943 (E.D.N.Y. 1975). *See* Mil.R.Evid. 102. As Judge Friendly observed in *United States v. Kahaner*, 317 F.2d 459, 471-72 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963): "True, the trial judge should, in an exercise of sound discretion, exclude evidence tending to show the commission of other crimes 'where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.'"

d. Examples of "other purposes." The following examples of legitimate "other purposes" for the use of extrinsic offense evidence and some citations to military case law on uncharged misconduct are offered for the reader's consideration. The Federal cases on rule 404(b) are too numerous to detail and are easily researched for particular points.

(1) When it tends to prove a plan or design of the accused.

> **Example:** The accused is being tried for having obtained money from Z by going through a marriage ceremony with her, securing the funds on a false representation that he would invest them for her, and then absconding. Evidence that he pursued the same course with W, X, and Y is admissible.

Note, however, that in order for uncharged offenses to be relevant to show a common scheme, plan, or design, they must be shown to be more than similar to the charged offenses; they must be almost identical to the charged acts and to each other so as to naturally suggest that all those acts were results of the same plan. *Compare*

United States v. Rappaport, 22 M.J. 445 (C.M.A. 1986) (evidence tending to establish only a propensity, rather than a plan, not admissible under 404(b)) *and United States v. Brannan*, 18 M.J. 181 (C.M.A. 1984) (uncharged drug offenses not sufficiently similar to charged offenses to justify admission to show scheme or plan) *with United States v. Brooks*, 22 M.J. 441 (C.M.A. 1986) (evidence that accused participated in uncharged drug sales and purchases permitted to show he aided and abetted a charged sale). *See also United States v. Munoz*, 32 M.J. 359 (C.M.A.), *cert. denied*, 112 S.Ct. 437 (1991) (testimony about the accused sexual abuse of another daughter 11 years before trial was admissible to show plan; the court also relied on defense counsel's failure to object).

(2) When it tends to prove knowledge or guilty intent in a case in which such matters are in issue.

> **Example:** The accused is charged with receiving stolen goods knowing them to have been stolen. Evidence that, before the occasion charged, he had received stolen goods under similar circumstances is admissible as tending to prove that, on the occasion charged, he knew that the goods which were then received by him had been stolen.
>
> **Example:** The accused is charged with larceny of property belonging to X. Evidence that the accused sold the property is admissible -- even if the sale is itself an offense -- since this evidence would tend to prove that he intended to deprive X of the property permanently.

The seminal case in this area prior to the Military Rules of Evidence was *United States v. Janis*, 1 M.J. 395 (C.M.A. 1976), where the accused was charged with unpremeditated murder of his infant son and the court found no error in admitting evidence that another son had died under similar circumstances three years earlier. In this case, the court established that three criteria must be satisfied before extrinsic offense evidence could be admitted. First, there must be a "nexus in time, place, and circumstances between the offense charged and the uncharged misconduct." *Id.* at 397. The court was very liberal in applying the test, finding that a three-year interval was not too remote. Second, the extrinsic offense would have to be established by "plain, clear and conclusive" evidence to be admissible. *Id.* Finally, the court adopted a rule 403 balance indicating that the extrinsic offense evidence would be excluded if it threatened the "fairness of the trial process," and its prejudicial impact outweighed its probative value. *Id.* Again the court was liberal, striking the balance in favor of excluding the evidence only if it was

inflammatory. Cases applying *Janis* include *United States v. White*, 23 M.J. 84 (C.M.A. 1986) (evidence of prior injuries to child admissible using *Janis* analysis); *United States v. Barus*, 16 M.J. 624 (A.F.C.M.R. 1983) (similar incidents of drug abuse admissible under *Janis* test); *United States v. Woodyard*, 16 M.J. 715 (A.F.C.M.R. 1983) (proof the accused possessed homosexual literature was properly admitted to prove intent to commit sodomy); *United States v. King*, 16 M.J. 990 (A.C.M.R. 1983) (similar past acts of sexual improprieties met *Janis* criteria in sodomy case); *United States v. Vilches*, 17 M.J. 851 (N.M.C.M.R. 1984) (admission of prior uncharged acts of sodomy in court-martial or charges of nonconsensual sodomy, indecent assault, and wrongful fraternization); *United States v. Cox*, 18 M.J. 72 (C.M.A. 1984) (in prosecution of indecent liberties, pattern of lustful intent established in several specifications may be used as circumstantial evidence of intent in another specification); *United States v. Brannan*, 18 M.J. 181 (C.M.A. 1984) (although uncharged drug offenses were not sufficiently similar to charged offenses to justify admission to show a common scheme or plan, the evidence was admissible to rebut the defense of lack of criminal intent using *Janis* criteria); *United States v. Garries*, 19 M.J. 845 (A.F.C.M.R. 1985), *aff'd*, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 107 S.Ct. 575 (1986) (statement of accused that "if you don't come and get me, I'll kill her" admissible on issues of intent and motive in murder prosecution); *United States v. Martin*, 20 M.J. 227 (C.M.A. 1985), *cert. denied*, 479 U.S. 917, 107 S.Ct. 323 (1986) (evidence of uncharged misconduct, normally admissible in contested case under Mil.R.Evid. 404(b), not rendered inadmissible when accused pleaded guilty; analysis of government evidence on sentencing is first to determine if evidence tends to prove or disprove existence of facts permitted by sentencing rules, and if so, whether evidence is admissible under Mil.R.Evid.); *United States v. Peterson*, 20 M.J. 806 (N.M.C.M.R. 1985) (military judge incorrectly applied "signature" and similarity tests to evidence of uncharged misconduct offered by government to prove intent, when they should be applied only to evidence of uncharged misconduct offered to prove modus operandi and common plan or design, respectively).

It should be noted, however, that the continuing viability of the standards set forth in *Janis* is questionable. C.M.A. has stated, on at least two occasions, that *Janis* was a pre-Rules case and that Mil.R.Evid. 404(b) has simply superseded *Janis*. *United States v. Brooks*, 22 M.J. 441 (C.M.A. 1986); *United States v. Mirandes-Gonzalez*, 26 M.J. 411 (C.M.A. 1988). In *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989) the court allowed testimony that the accused had committed similar acts of sexual misconduct on occasions previous to the charged offense. Although modus operandi evidence normally only enjoys logical relevancy to prove identity, the court allowed the evidence as a means to prove the accused's intent with respect to whether sexual intercourse was consensual. Without commenting upon the *Janis* test described above, the court established a new test for the admissibility of uncharged misconduct: (1) Does the evidence reasonably support a finding by the court members that the accused committed prior crimes, wrongs or acts?; (2) What fact of consequence is made more or less probable by the existence of

this evidence?; and (3) Is the probative value substantially outweighed by the danger of unfair prejudice? Absent the explicit overruling of *Janis*, it would appear that *Reynolds* is a refinement of the *Janis* test.

In prosecutions for desertion based upon an unauthorized absence with the intent to remain away permanently, the Court of Military Appeals has sustained the admission into evidence of convictions for previous unauthorized absences as relevant to the question of whether the accused entertained the intent to remain away permanently. *United States v. Renshaw*, 9 C.M.A. 52, 25 C.M.R. 314 (1958); *United States v. Graham*, 5 C.M.A. 265, 17 C.M.R. 265 (1954); *United States v. Deller*, 3 C.M.A. 409, 12 C.M.R. 165 (1953); *United States v. Powell*, 3 C.M.A. 64, 11 C.M.R. 64 (1953).

However, not every record of previous unauthorized absence is indicative of the intent to remain away permanently during a later absence and, standing alone, unauthorized absence does not necessarily support an inference of an intent to remain away permanently. *United States v. Wallace*, 19 C.M.A. 146, 41 C.M.R. 146 (1969). If the record of previous absences does not shed light clearly on the accused's mental attitude with respect to the offense charged, it must be excluded from evidence. *Id.* at 148.

United States v. Wallace, supra, approved the admissibility of three prior unauthorized absences and provided some guidelines for determining whether or not such absences should be received into evidence:

(a) The duration of the previous unauthorized absences;

(b) the method of termination;

(c) whether previous unauthorized absences are separate in time and circumstances from the second or succeeding unauthorized absences;

(d) whether the prior unauthorized absence can fairly be considered a part of the course of conduct evidenced by the subsequent absences; and

(e) whether the entire record of unauthorized absences can fairly be viewed as portraying a person who refuses to remain with the service except when in confinement or some other form of restraint, thus indicating a defiant attitude of "I will not serve voluntarily."

Some question exists as to whether the defense must actually dispute intent before the government can offer evidence of uncharged misconduct which shows intent. In *United States v. Orsburn*, 31 M.J. 182 (C.M.A. 1990), *cert. denied*, 111 S.Ct. 1074 (1991), the government was allowed to admit dirty books found in the accused's house to prove his intent to rape his daughter. The defense insisted on a ruling on the books before disclosing its theory of the case.

(3) When it tends to identify the accused as the perpetrator of the offense charged.

> **Example:** Two adjoining buildings are burglarized on the same night and in a similar manner. It is permissible to show upon the trial of an accused for burglarizing one of the buildings that he participated in the burglary of the other, for this evidence has a reasonable tendency to establish that he participated in the burglary charged.
>
> **Example:** The accused is charged with burglary. Evidence is admissible that the burglar left a pistol at the scene of the burglary and that the pistol had recently been stolen from X by the accused.
>
> **Example:** The accused is being tried for inducing X to turn over a large sum of money by a peculiarly ingenious fraudulent scheme. Evidence that the accused obtained money from Y by the same scheme is admissible.

A carefully worded limiting instruction would be especially appropriate in these situations. *See, e.g., United States v. Williams*, 17 M.J. 548 (A.C.M.R. 1983), *petition denied*, 18 M.J. 432 (C.M.A. 1984) (evidence of uncharged robbery committed 20 months before charged robbery admitted to show identity of perpetrator, after application of *Janis* criteria); *United States v. Rappaport*, 22 M.J. 445 (C.M.A. 1986) (where identity of accused was not in issue, it was error to admit evidence purporting to show modus operandi; additionally, uncharged acts purporting to show modus operandi must be so unusual and distinctive as to be like a signature). *See also Reynolds, supra. But see United States v. Jones*, 32 M.J. 155 (C.M.A. 1991). (accused put identity in issue by raising alibi defense, opening the door to proof of prior drug sales at the same location).

(4) When it tends to prove motive. *See United States v. Sellers*, 12 C.M.A. 262, 30 C.M.R. 262 (1961), where evidence that the accused frequently gambled, that his checking account was overdrawn, and that he had written bad checks was admissible as tending to establish a motive for the offense of stealing from funds of which he was custodian.

(5) When it tends to show lack of accident or mistake or to negate a defense of entrapment.

> **Example:** The accused is charged with an offense involving an accusation that he administered poison to X. The accused, expressly or by implication, defends on the ground that he administered the poison to X as a result of accident or mistake. Evidence that the accused had poisoned other persons is admissible if the circumstances of the other acts are so similar to the circumstances of the act charged that the other acts tend to show that the act charged was not the result of accident or mistake.
>
> **Example:** The accused is charged with selling military property without proper authority. He defends on the grounds of entrapment, claiming that the sale was solicited by a government agent. Evidence that on previous relatively recent occasions the accused had sold military property without proper authority is admissible to show that on the occasion charged the accused was not an unwilling participant.

See United States v. Conrad, 15 C.M.A. 439, 35 C.M.R. 411 (1965), where the court held that testimony that the accused had admitted committing other similar offenses and having a sexual problem was admissible to rebut a defense of accident to a charge of indecent exposure. *See also United States v. Bryant*, 3 M.J. 9 (C.M.A. 1977), where the court held that, when evidence of prior sales is offered to rebut the defense allegation of entrapment, the members must be specifically instructed that they may consider such evidence only for the purpose of determining the accused's general predisposition, and not for any inference that it might otherwise create concerning the specific predisposition to make this particular sale [citing *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977)].

e. Instructions. As has been noted previously, if evidence of extrinsic offenses of the accused is admitted under rule 404(b), a limiting instruction may be appropriate under Mil.R.Evid. 105 to ensure the members do not draw the conclusion from the 404(b) evidence that the accused is a bad person.

3. Conviction or acquittal. The language of Mil.R.Evid. 404(b) and the explicit statement of the drafters' analysis make it clear that the extrinsic offense need not have led to a conviction. But, what of the case where the offense has led to an acquittal at trial? There are really two separate aspects to this question. The first is simply whether Mil.R.Evid. 404(b) prohibits the use of such evidence, and the second is really the constitutional question of whether the double jeopardy clause of the fifth amendment prohibits any use of such evidence.

As to the Mil.R.Evid. 404(b) issue, the two leading military cases on this point are *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987), *cert. denied*, 484 U.S. 827, 108 S.Ct. 95 (1987) and *United States v. Cuellar*, 27 M.J. 50 (C.M.A. 1988), *cert. denied*, 493 U.S. 811, 110 S.Ct. 54 (1989). In *Hicks*, the accused stood charged with rape and the government called as witnesses against the accused two young ladies who testified that the accused had on previous occasions forced them to have sex with him by using the same modus operandi which he allegedly used in the case of the charged offense. The accused had actually been prosecuted at a court-martial for each of these two prior rapes and had been acquitted. He was, however, convicted of the charged rape and, on appeal, he contended that the evidence was inadmissible under Mil.R.Evid. 404(b) because of the acquittal at the previous court-martial. In separate opinions, Chief Judge Everett and Judge Cox affirmed, finding the evidence to be admissible under Mil.R.Evid. 404(b). Judge Sullivan did not participate. Subsequently, in *Cuellar*, C.M.A. reaffirmed its earlier decision in *Hicks*. In *Cuellar*, the accused was charged with committing an indecent act upon a 10-year-old girl who was an overnight guest at his house. In order to show the accused's modus operandi, the government called two other young girls who testified that he had committed similar acts under similar circumstances against them several years earlier while they had been staying at his house overnight. The allegations of these other two young girls had resulted in criminal prosecutions against the accused in state courts, both of which resulted in acquittals. C.M.A. held that the testimony of the young girls was properly admitted under Mil.R.Evid. 404(b) to show the accused's modus operandi. It should be noted, however, that C.M.A. went on to say that, under such circumstances, it is error for the military judge to deny the accused the opportunity to put on evidence that he was acquitted.

As to the constitutional issue, once again *Hicks* and *Cuellar* are the two leading military cases. The issue was complicated, however, by the U.S. Supreme Court's decision in *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), but then clarified in *Dowling v. United States*, 493 U.S. 342, 110 S.Ct 668 (1990). In *Ashe v. Swenson*, the accused was prosecuted by state authorities for his role in allegedly robbing six individuals who had been engaged in a poker game. At the first prosecution, he was charged with robbing one of the six individuals and was acquitted. Six weeks later, he was charged with robbing another of the six players in connection with the same incident. In fact, most of the witnesses against the accused at the second trial were the same witnesses who had testified against him

at the first trial. The U.S. Supreme Court held that the second prosecution was barred by the collateral estoppel doctrine of the double jeopardy clause of the fifth amendment. The Court noted that the single rationally conceivable issue in the first prosecution was whether the accused had been the man who robbed the six players and his acquittal therefore operated to bar any subsequent relitigation of this issue in a subsequent prosecution by the same sovereign. In *Dowling,* the defendant faced charges in Federal court for armed robbery. The government offered testimony about an earlier, yet similar, offense that had resulted in an acquittal in an earlier Federal trial. Since the testimony about the earlier trial did not go to the ultimate issue, it was admissible over defense objection.

Regarding the standards of proof, some Federal courts purport to require clear and convincing evidence [*see, e.g., United States v. Calvert*, 523 F.2d 895 (8th Cir. 1975), *cert. denied*, 424 U.S. 911, 96 S.Ct. 1106 (1976)]. This is not in accord with prior military practice or a fair reading of rules 401 and 402. Interpreting Fed.R.Evid. 404(b), the U.S. Supreme Court has held that, in order to put on evidence of some prior bad act of the accused, the government need only put on enough evidence to satisfy the conditional relevance standard of Fed.R.Evid. 104(b) ("evidence sufficient to support a finding of the fulfillment of the condition"). *Huddleston v. United States*, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). C.M.A. has adopted the same interpretation of Mil.R. Evid. 404(b). *United States v. Mirandes-Gonzalez*, 26 M.J. 411 (C.M.A. 1988).

4. Defense use of bad acts. S. Saltzburg, L. Schinasi, and D. Schlueter raise an interesting point as to the possible use of rule 404(b) by the defense.

> Most judicial attention has focused on the typical case in which the prosecution is offering evidence against an accused. It should be remembered, however, that an accused might be able to offer evidence of a government's witness' bad acts for the defense's own purposes. For example, in order to demonstrate that the accused was not a co-actor in the charged offense, he might present extrinsic offense evidence demonstrating that the government's witness committed a past similar act without him [fn omitted]. In a drug prosecution, defense counsel may want to show that the same government informant who allegedly coerced the accused into dealing with him, has coerced other individuals into the same type of misconduct [fn omitted]. In other cases the accused might

> want to offer evidence of his own other acts...to explain why certain conduct charged by the government actually was part of a legal pattern of events. *See, e.g., United States v. Garvin*, 565 F.2d 519 (8th Cir. 1977).

S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 464 (3rd ed. 1991).

5. Defense waiver. According to *United States v. Munoz*, 32 M.J. 359 (C.M.A. 1991), the limits of rule 404(b) may be further relaxed when the defense fails to object.

6. Trial counsel notice requirement. Effective 29 May 1992, M.R.E. 404(b) is amended to require that trial counsel give notice of intended use of extrinsic character evidence if requested by Defense counsel.

H. Summary

Under Mil.R.Evid. 404(a) "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion" subject to certain limited exceptions. Rule 404 does not, however, govern the admissibility of character evidence when character is at issue. General principles of relevancy govern admissibility in the latter cases.

Mil.R.Evid. 404(a) must be distinguished from rule 405. While rule 404(a) addresses itself to the basic question of the circumstantial use of character evidence, rule 405 deals with allowable methods of proof of character. Rule 405, unlike rule 404(a), is applicable both when character evidence is used circumstantially and when character is at issue. Rule 404 must also be distinguished from rule 406 dealing with habit.

0509 METHODS OF PROVING CHARACTER. Mil.R.Evid. 405.

Rule 405. Methods of Proving Character

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of an offense or defense, proof may also be made of specific instances of the person's conduct.

(c) Affidavits. The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this subdivision, the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under these rules.

(d) Definitions. "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. "Community" in the armed forces includes a post, camp, ship, station, or other military organization regardless of size.

A. General

1. Mil.R.Evid. 405 governs methods of proving character. It does not determine whether such evidence is admissible. Admissibility of character evidence is within the domain of rule 404. Nevertheless, the two rules are related in that the applicability of rule 405 is dependent on the purpose for which character evidence is offered. Once it is determined that character evidence is admissible, either because character is in issue or because the circumstantial use thereof is permissible under the exceptions enumerated in Mil.R.Evid. 404(a), rule 405(a) governs the methods of proving character.

2. The rule provides three methods for proving a witness' character: (1) By reputation testimony; (2) by opinion testimony, and (3) by evidence of specific conduct. The first two methods, reputation or opinion testimony, are available to prove character in any situation where it is admissible. The third method, proof by specific instances of conduct, is allowable only in the situation where the character of a person is an "essential element" of an offense or defense (i.e., not when character is used circumstantially, but when character is "in issue"). The only situation in military practice where character is an essential element is the predisposition of the accused in rebuttal to a posed entrapment defense.

Reputation and opinion testimony are discussed together in section 0509.B, *infra*, while proof by specific acts is covered in section 0509.C, *infra*.

3. Mil.R.Evid. 405 does not determine methods of proof when "evidence is being introduced not to prove that a person acted in conformity with his character, but to prove something else such as motive or intent under rule 404(b). In such a case, even though character is proved incidentally, any method of proof including extrinsic proof of other crimes, wrongs or acts is acceptable." J. Weinstein and M. Berger, *Weinstein's Evidence* 405-16 (1988). Nor does rule 405 limit the methods of proof enumerated therein when character evidence is used to attack a witness' credibility. Mil.R.Evid. 608 and 609 govern modes of proof in such a case. *Id.*

B. Reputation and opinion evidence

1. Subdivision (a) mandates that the proponent of character evidence will generally be limited to reputation or opinion testimony. The proponent here means the proponent of a particular piece of character evidence. The reader will remember that the initial proponent of character evidence of a "pertinent trait" of the accused or the victim will be the defense, except in assault and homicide cases where the defense can "open the door" merely by raising the issue of self-defense.

2. *Reputation and opinion are closely related, but different, concepts.*

a. Reputation is defined in Mil.R.Evid. 405(d) and is essentially that information that the witness knows about an individual from having heard community discussion about him. Rule 405(d) broadly defines "community" to encompass virtually any duty station to which a servicemember could be assigned, thus increasing the chance that an accused will have a pertinent reputation of some form. The key to reputation evidence is that it is not the witness' personal belief, but what the witness knows of the collective belief of the community (or communities, since the accused and witness can be members of more than one "community"). Reputation evidence is really hearsay testimony, but it falls under the exception of Mil.R.Evid. 803(19).

b. Opinion evidence relates to the personal belief of the witness. It is likely that most witnesses who are able to testify to the reputation of a person will also have a personal opinion. In fact, much reputation testimony is probably just camouflaged opinion testimony. It is possible for a witness to testify differently as to opinion and reputation on a pertinent trait. Opinion testimony is allowed by Mil.R.Evid. 701.

3. Foundation. Before either reputation or opinion testimony is offered, counsel must ensure that an adequate foundation has been laid for its admission. This, too, is essentially a showing of relevancy. To establish proper foundation for the admission of opinion testimony, it must be shown that the witness has such an acquaintance or relationship with the accused that the witness is qualified to form a reliable opinion on the trait to which he will testify. *See, e.g., United States v. McClure*, 11 C.M.A. 552, 29 C.M.R. 368 (1960), where it was held that an article 32 investigating officer who has had no previous contact with the accused and whose only knowledge of the accused was obtained from his activities as an investigating officer was not qualified by either time, opportunity, or relationship to form any opinion as to the accused's combat capability or performance of military duties. Consequently, it was error to permit the officer to testify for the prosecution as a rebuttal character witness and state his opinion that he would not want the accused in his command or in combat. The same rule would seem to apply concerning reputation testimony. *United States v. Tomchek*, 4 M.J. 66 (C.M.A. 1977). For reputation testimony, the basic foundational requirement is an adequate relationship of the witness to a community. Saltzburg, Schinasi, and Schlueter suggest that four questions are appropriate for laying a proper foundation: (1) Is the character witness familiar with the individual's reputation in some relevant community? (2) Is the witness competent to speak for the community with respect to the individual's reputation? In other words, is the witness sufficiently linked to the community to really know of the individual's reputation? (3) Is the witness' reputation knowledge timely with respect to the issue it addresses? (4) Does the reputation relate to the character trait that can be proven under Rule 404? Affirmative answers to all four questions are necessary for admissibility. S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 485 (5th ed. 1991). *See* NJS *Evidentiary Foundations* (1/89) for sample foundation questions.

4. Testing the opinion or reputation testimony. The most effective way of testing a witness' opinion or reputation knowledge is by cross-examining that witness with respect to specific instances of conduct. Mil.R.Evid. 405(a) authorizes this approach, which usually involves asking a witness "have you heard" type questions. "Have you heard" questions may not be appropriate when examining opinion witnesses. Here counsel may ask "do you know" questions, since it is the witness' own belief, not the community's, which is important. For example, if the defense decides to open the door and put the accused's character in issue, Mil.R.Evid. 405(a) permits the defense to do so by calling witnesses to testify as to their opinion(s) of the appropriate pertinent trait(s) of the accused or to testify as to the accused's reputation with regard to the appropriate pertinent trait(s). The trial counsel may "test" the validity of an opinion or reputation witness' testimony by asking if the witness knows or has heard of incidents in which the accused has acted inconsistently with the trait about which the witness has testified. For example, suppose a defense witness testifies that the accused enjoys a reputation for honesty in his command. The trial counsel may ask the witness if he has heard that the

accused has stolen items from members of his unit. Obviously, no matter how the witness responds, the impact of his or her testimony is diminished.

a. The inquiry into relevant specific instances of conduct allowed on cross-examination by Mil.R.Evid. 405(a) must be distinguished from the proof of character by specific instances of a person's conduct under Mil.R.Evid. 405(b). In the former, it is the witness' credibility that is being tested by the inquiry; the trait of character is not being proved substantively. In the latter, the specific acts are being used as substantive proof of character.

b. Caveat. Concerning this "testing," the trial counsel must have "reasonable basis" to ask such a question of the witness, and the military judge will, upon request, instruct that such questions are not evidence and that, if the witness has heard of such an incident, that information must be considered only for its effect on the original reputation evidence offered by the defense and not for any other purpose. The limited use of this evidence avoids the problem of considering counsel's hearsay in asking the question.

c. In *United States v. Webster*, 23 C.M.R. 492 (A.B.R. 1957), *petition denied*, 8 C.M.A. 768, 23 C.M.R. 421 (1957), a defense witness stated his opinion as to the accused's honesty in a trial for larceny and also testified as to the accused's reputation for honesty. On cross-examination, the trial counsel inquired of the witness' knowledge of a previous conviction of the accused for using a false pass with intent to deceive. The court held that, although specific acts of misconduct may not be used to establish bad character, when a witness gives opinion testimony as to the accused's character, the basis for his opinion may be tested in the same manner as any other opinion testimony, including cross-examination as to knowledge of the arrest or accusation of the accused for a crime, or as to whether he has heard of a previous conviction of the accused. *See also* 3A Wigmore, *Evidence* 988 (Chadbourn rev. 1970).

With respect to the inquiry on cross-examination concerning rumors or reports of specific acts of the accused's misconduct, Wigmore states:

> This method of inquiry on cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation. The value of the inquiry for testing purposes is often so small and the opportunities of its abuse by underhand ways are so great that the practice may amount to little more than a mere subterfuge,

> and should be strictly supervised by forbidding it to counsel who do not use it in good faith.

3A Wigmore, *supra*.

The leading case approving such a cross-examination technique is *Michelson v. United States*, 335 U.S. 469 (1948), where the court indicated that a heavy responsibility is placed on the trial courts to protect the practice from misuse, and praised the trial judge for assuring himself that there was a reasonable factual basis for the prosecutor's questions. In *Michelson*, the prosecutor asked several defense character and reputation witnesses during cross-examination if they had heard that the accused had been convicted some 20 years prior to trial. He also asked them if they had heard that the accused had been arrested some 27 years prior to trial. In each case, the witnesses said no. The U.S. Supreme Court held that the judge's action was proper in permitting these questions, in view of the fact that he (1) instructed the jury on the limited use they could make of this testimony and (2) satisfied himself that the prosecutor had a good-faith belief that the events had actually occurred. A similar result was obtained in *United States v. Pearce*, 27 M.J. 121 (C.M.A. 1988), where the trial counsel called a government witness to testify against the accused in a prosecution for larceny and housebreaking. During the defense counsel's cross-examination of the witness, the witness rendered a favorable opinion of the accused's character for honesty. The trial counsel thereupon sought to test the witness' opinion on redirect examination by asking him if he had been "aware of the fact that Sergeant Pearce, the accused today, was a suspect and was under investigation by the CID for the larceny of four tires and other items from a Buick Regal, the replacement value of which was approximately $950.00"? C.M.A. held that it was proper for the trial counsel to ask this question under Mil.R.Evid. 405. This result is especially interesting because Mil.R.Evid. 405 on its face limits such a tactic to cross-examination. Yet, in *Pearce*, the trial counsel was conducting redirect examination of his own witness.

5. Rebuttal opinion and reputation. In addition to being able to "test" the opinion of the witnesses of the proponent of the character evidence, the opponent is also permitted to rebut the opinion or reputation evidence offered by the proponent with contrary opinion or reputation evidence during the opponent's own case. The opponent is not limited to the mode of proof selected by the defense, but may rebut reputation with opinion and vice versa. This rebuttal evidence is not limited in its use to lessening the impact of the original character evidence, but may be offered to prove the opposite character trait and that the accused acted in conformity therewith on this occasion. Mil.R.Evid. 404(a)(1).

6. Timeliness of opinion or reputation

a. Often overlooked are the time limitations placed upon the admissibility of reputation or opinion testimony. This limitation of timeliness embodies the aspects of relevancy and fairness. The testimony as to a pertinent trait of character should relate to the person's character at the controlling time (i.e., at the time of the alleged offense). *See, e.g., United States v. Lewis*, 482 F.2d 632 (D.C. Cir. 1973). Testimony offered in regard to character evidence on the credibility of a testifying witness should refer to the time of trial.

b. Provided that the opinion or reputation evidence meets the time test for relevancy, cross-examination inquiry into specific acts should be limited to acts occurring before the controlling time (i.e., that point in time the court wishes to test the character trait, usually the time of the offense). *See United States v. Polsinelli*, 649 F.2d 793 (10th Cir. 1981), where defense character witnesses should not be asked if their opinion of the accused would change if he is actually guilty of the charged offenses. There is no early time limit on acts which may be inquired about. *See, e.g., United States v. Edwards*, 549 F.2d 362 (5th Cir.), *cert. denied sub nom. United States v. Matassini*, 434 U.S. 828 (1977). But rules 403 and 611(a) can be used to prevent unfairly prejudicial or wasteful questioning.

C. Specific instances of conduct

The drafters of Fed.R.Evid. 405(b), from which Mil.R.Evid. 405(b) was taken, were aware that proving character by specific acts of a person was potentially dangerous:

> Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine.

Fed.R.Evid. 405 Advisory Committee note.

To put it another way, under subdivision (b), specific conduct evidence is not admissible to demonstrate that an individual had a certain character trait and acted in conformity with it. Rather, specific instances of conduct can be used only to establish an essential element of an offense or defense (i.e., when character is "in issue" as discussed in section 0507.B, *supra*). Thus, even an accused who is permitted to prove a pertinent trait under rule 404(a) may not do so with specific act evidence. According to this rule then, the defense, for example, would not be able to prove the accused's character for honesty in a theft case by showing that, on a former occasion, the accused found a watch and turned it in to the chief-master-at-arms. By contrast, if the accused raises the defense of entrapment in a drug sale case, the prosecution should be able to show specific instances when the accused has solicited to sell drugs. Such incidents directly prove predisposition, a fact which negates the innocent state of mind which is an element of the defense of entrapment.

The Federal criminal cases which address the issue of whether an accused's character is an "essential element" or "in issue" are all in the area of the entrapment defense. *See, e.g., United States v. Mack*, 643 F.2d 1119 (5th Cir. 1981). Relatively few military cases arise in this limited area, and it seems likely that military appellate courts applying rule 405(b) will adopt the conservative position taken by the court in *United States v. Giles*, 13 M.J. 669 (A.F.C.M.R. 1982). In *Giles*, the court held that the trait of peacefulness was not an element of self-defense. Thus, the trial judge properly precluded the defense from offering specific instances of the accused's peaceful behavior and correctly limited the defense to opinion and reputation evidence.

The holding in *Giles* is in accord with pre-Mil.R.Evid. precedent on the issue of specific acts. *See, e.g., United States v. Baldwin*, 17 C.M.A. 72, 37 C.M.R. 336 (1967); *United States v. Harrison*, 5 C.M.A. 208, 17 C.M.R. 208 (1954). In the military, it is anticipated that, except for entrapment cases, Mil.R.Evid. 405(b) will not be utilized.

The reader must distinguish proof by specific instances under rule 405(b) and inquiry on cross-examination into relevant specific instances of conduct under rule 405(a), as discussed in section 0509.B.4, *supra*. The former, as substantive evidence, is a very narrow exception, but if it is admissible under rule 405(b), extrinsic evidence may be used.

Proof of specific instances of conduct may be permitted to rebut the direct testimony of the accused that he has never, or has not within a certain period of time, committed an offense of any kind or of a certain kind. This would be for the limited purpose of impeachment by contradiction.

D. Affidavits

Rule 405(c) is unique to military practice. It was taken verbatim from former MCM, 1969 (Rev.), para. 146b. In effect, it allows defense counsel to initiate character litigation by using affidavits or other written statements in place of in-court testimony. The rule goes on to provide that, if the defense is permitted to use such documentary evidence, the government may then respond in kind.

Note that Mil.R.Evid. 405(c) evidence applies only to the accused and not other witnesses. Also, in order for such documentary evidence to be admissible, it must not violate other Mil.R.Evid.'s (e.g., the evidence of character contained in the affidavits would have to be admissible if offered by testimony).

As the drafters' analysis notes, subdivision (c) is a necessary device in a worldwide judicial system. Because the rule can be initiated only by the accused, there should be no sixth amendment confrontation problems with it. While the provision does permit the government to make use of similar evidence in rebuttal, the accused can avoid any unfavorable results here by merely foregoing its use himself. Mil.R.Evid. 405 drafters' analysis, MCM, 1984, app. 22-33.

0510 HABIT OR ROUTINE PRACTICE. (Key Number 1029)

Rule 406. Habit; Routine Practice

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

A. General

Mil.R.Evid. 406 is taken without change from the Federal rule and is similar, in effect, to former MCM, 1969 (Rev.), para. 138.

As noted previously, habit must be distinguished from character; habit is not a trait. Instead, it has been defined as a course of behavior of a person regularly reported in like circumstances. *A.L.I. Model Code of Evidence* 189 (1942). The two concepts of habit and character are related in the Mil.R.Evid. and Fed.R.Evid. because both can involve a person's conduct on a particular occasion being inferred from past conduct by that person. Behavior on the part of a group, which is equivalent to individual habit, is designated "routine practice of an

organization." Unfortunately, rule 406 defines neither "habit" nor "routine practice."

The drafters' analysis to rule 406 states an intent to have "organization" include every military organization, regardless of size. MCM, 1984, app. 22-33.

B. Scope of rule

Mil.R.Evid. 404 and 405 generally bar evidence of previous conduct when offered to establish that an individual or organization has acted in conformity with its past. However, rule 406 specifically permits its use under two circumstances.

1. First, with respect to individuals, evidence of a person's habit is admissible to show that the individual's conduct on a specific occasion was consistent with his conduct on past occasions. An example of this would be an accused who uses as an alibi defense the fact that, at the time of the alleged robbery, he was at store A in another location purchasing his daily paper. He could introduce evidence that he has the habit of buying his paper at the same time every day at store A, and has done so for over two years. This could be used to show that, at the time of the alleged robbery of store B, the accused was acting in accordance with his habit of buying the paper at store A.

2. Second, evidence of an organization's past routine practices is admissible to demonstrate that the organization acted consistently with those practices. An example of this would be the traditional "presumption of regularity" recognized in military practice with regard to certain governmental activities (e.g., the preparation of service record documents). *See* Mil.R.Evid. 803(6) and (8) (business entry and official document exceptions to the hearsay rule). *See also United States v. Weaver*, 1 M.J. 111 (C.M.A. 1975) (presumption of regularity inherent in court proceedings).

C. Proof

Mil.R.Evid. 406 does not provide standards for determining when repeated instances rise to the level of habit. (This discussion will use habit to mean routine practice also.) The Fed.R.Evid. Advisory Committee opines that "[w]hile adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated." Fed.R.Evid. 406 Advisory Committee note. Thus, it is for the military judge to exercise sound discretion in characterizing a person's behavior as habit.

A common sense examination of "habit" would indicate that: (1) specificity, (2) consistency, and (3) regularity are required for actions to rise to the level of habit. Saltzburg, Schinasi, and Schlueter suggest that answers to the following five questions may satisfy the rule.

> (1) How often has the individual been observed performing the same conduct? (2) How similar is the past conduct with the conduct sought to be proved? (3) How unique is the conduct? (4) How uniformly or consistently has the conduct been performed? And (5), does the conduct appear to be virtually automatic rather than discretionary in nature?

S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 502 (3rd ed. 1991).

Similarly, the rule does not specify how habit can be proven. The original Federal rule, as promulgated by the Supreme Court, provided for proof by opinion testimony or proof by specific instances, but this section was deleted by Congress. J. Weinstein and M. Berger, *Weinstein's Evidence* 406-22 (1988). So, the choice of how habit may be proved is also for the judge's discretion. Proof by evidence of a series of past acts would seem logically more probative than proof by testimony of a witness' opinion of another person's habits. A truly valid opinion would be based upon observation or other knowledge of repeated specific acts. Evidence is most likely to be admitted when its proponent is able to demonstrate that the individual performed the past acts without planning. The more counsel can offer detail to demonstrate this, the more likely a military judge will be to view it as habitual. *See, e.g., United States v. Krejce*, 5 M.J. 701 (N.C.M.R. 1978) (government able to rely on a recruiting sergeant's past habits to establish a proper enlistment; conviction reversed on other grounds). Similarly, when applying this logic to routine business or organization practices, counsel should be concerned with the frequency of the conduct more than uniqueness. An event which continually occurs is more likely to be viewed as a routine practice than one which rarely and unpredictably happens. It should be remembered that a foundation must be laid as to how the witness obtained knowledge of the specific facts or otherwise formed an opinion. The better the foundation, the more likely the admission of the evidence. There is no requirement for corroboration of the habit for it to be admissible, nor for the presence of eyewitnesses to specific acts. *See, e.g., Cereste v. New York, New Haven & Hartford R. Co.*, 231 F.2d 50 (2d Cir. 1956), *cert. denied*, 351 U.S. 951 (1957).

The reader is reminded that general relevancy under rules 401 and 402 is still a major factor in determining the final admission of evidence such as habit and that counsel should never forget the possible effect rule 403 has on the military judge's decision.

D. Summary of specific acts use

The general rule is that evidence of specific acts may not be used to prove character or any pertinent character trait. *See* Mil.R.Evid. 404(b). However, there are generally five uses to which evidence of specific acts may be put.

1. Inquiry into specific acts is allowed to test the credibility of a witness giving character opinion or reputation testimony. Mil.R.Evid. 405(a).

2. Proof of specific acts is allowed when character or a pertinent character trait is an essential element of an offense or defense. Mil.R.Evid. 405(b).

3. Proof of specific acts is allowed to demonstrate other purposes than character (e.g., motive, plan, identity). Mil.R.Evid. 404(b).

4. As a preliminary matter, specific acts may be used to demonstrate the existence of a habit or routine practice. If the military judge accepts the fact that certain actions demonstrated by the acts are habit, the habit may then be used to prove conduct in conformity therewith. *See* Mil.R.Evid. 104 and 406.

5. Inquiry as to specific acts is allowed to attack or support the credibility of a witness. These acts must relate to truthfulness or untruthfulness, no extrinsic evidence of the acts is allowed, and limiting instructions may be given if requested. *See* Mil.R.Evid. 608(b), discussed in chapter VII, part two, *infra*.

PART THREE: RULES ON RELEVANCY OF SPECIFIC INSTANCES

0511 INTRODUCTION

As noted in the introduction to this chapter, a series of rules in the second half of Section IV of the Mil.R.Evid. deals with the relevancy of frequently recurring factual patterns. These are primarily exclusionary in nature. *See* Mil.R.Evid. 407-411. They reflect policy decisions that for some reason otherwise logically relevant evidence is declared inadmissible, at least for specific purposes. With the exception of the plea bargaining scenario of rule 410, the factual patterns set forth in rules 407-411 are predominantly directed to civil, not criminal, litigation. For the most part, these rules are taken from the Federal rules without change and, while offering little comment in their analysis of these rules, even the drafters of the Mil.R.Evid. speculate as to the applicability of some of these rules to court-martial practice. *See, e.g.*, Mil.R.Evid. 409 and 411 drafters' analysis, MCM, 1984, app. 22-33. Thus, the dearth of prior military and civilian criminal case law in this area would seem to bear them out.

0512 SUBSEQUENT REMEDIAL MEASURES (Key Number 1030)

Rule 407, Subsequent Remedial Measures

> When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to pr · :gligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

A. Rationale. Rule 407 addresses incidents of negligent or culpable conduct and codifies for military criminal cases the standard practice of American courts in civil cases of excluding evidence of subsequent remedial measures as proof of an admission of fault. As noted by the Fed.R.Evid. Advisory Committee in its commentary to Fed.R.Evid. 407:

> The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects

> the notion that "because the world gets wiser as it gets older, therefore it was foolish before." *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L.T.R. N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rule is broad enough to encompass all of them.

See also Falknor, *Extrinsic Policies Affecting Admissibility*, 10 Rutgers L. Rev. 574, 590 (1956).

The drafters' analysis notes that rule 407 has no foundation in previous *Manual for Courts-Martial* editions. Mil.R.Evid. 407 drafters' analysis, MCM, 1984, app. 22-33.

B. Scope. The use of the phrase "remedial measures" apparently includes within the scope of the rule any post-accident change, repair, or precaution taken to avoid further problems. The drafters' analysis fails to indicate situations where these "remedial measures" might arise in military practice, but the most probable would be in prosecution for negligent homicide or for involuntary manslaughter resulting from a culpably negligent act under Articles 134 and 119(b)(1), UCMJ, respectively. Although negligent conduct is generally not sufficient to invoke criminal sanctions, military necessity has caused Congress to control and punish areas of conduct beyond those in the civilian community. In *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979), the court affirmed a conviction despite appellant's contention that his negligent act should not have resulted in criminal liabilities. As in *Kick, supra*, most of these cases will involve vehicular accidents. As an example of a possible application of this rule, assume that A is in an automobile accident in which B, a passenger, is killed by being thrown from the car. Subsequent to the accident, A has seat belts installed in the car where he had previously removed them. A, charged with involuntary manslaughter, cannot have evidence of the seat belt reinstallation used as evidence against him as proof of culpability. However, his original act of removing the first set of seat belts would be admissible.

C. Other purposes

Mil.R.Evid. 407 does provide that under some circumstances -- whenever the evidence is offered for a purpose other than to show negligence or

culpable conduct -- proof of an individual's subsequent actions may be admissible just as in civil cases. The rule lists some examples (e.g., to establish control of or ownership of an automobile that might have been used to commit an offense). For instance, in the example above, the fact of A's installation of the seat belts could be used to show his ownership of the car. Subsequent conduct might also be used to establish that the instrument of criminality was in the accused's possession when an offense occurred. This may have the effect of a party being able to do indirectly what it could not accomplish directly under the rule. For example, A is charged with involuntary manslaughter, having hit a pedestrian with his car's front bumper. It would be impermissible to use evidence of A's repair of the bumper to show that he was guilty of the manslaughter. However, it would be permissible to use the evidence of bumper repair to show A's ownership of the car involved in the incident. Coupled with a permissible inference that the owner of a car is its normal operator, this proof would go a long way toward convicting A of the offense.

If evidence of subsequent remedial measures is used for a purpose other than to show negligence or culpability, a limiting instruction under Mil.R.Evid. 105 would be appropriate. Care must be taken in drafting this instruction so as not to overly emphasize the evidence in the minds of the members. In some cases, the danger of emphasizing the evidence may lead counsel not to request any limiting instruction. It is simply a question for ad hoc determination.

It should be remembered that nothing in the rule requires the admission of evidence of subsequent measures, and the balancing test of rule 403, discussed in part one of this chapter, must be considered. In the seat belt example, even with limiting instructions under rule 105, the prejudicial value of the evidence of the new seat belt installation would likely outweigh its probative value as to ownership of the vehicle, especially since other methods of proving ownership would be possible.

A current annotation on this rule is [*Annotation, Admissibility of Subsequent Remedial Measures Under Rule 407 of Federal Rules of Evidence*], 50 A.L.R. Fed. 935 (1980).

0513 COMPROMISE AND OFFER TO COMPROMISE
(Key Number 1031)

Rule 408. Compromise and Offer to Compromise

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for

> or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

A. General. Mil.R.Evid. 408, taken from the Federal rules without alteration, discusses the admissibility of evidence originating in offers to compromise or to settle civil suits. It protects these discussions in much the same way that rule 410 protects plea negotiations. It reflects a policy judgment that free and frank discussions in negotiations leading toward settlement should be encouraged in order to avoid needless litigation. Because the rule concerns noncriminal proceedings, it has no foundation in previous *Manual for Courts-Martial* editions.

B. Scope

1. The drafters' analysis fails to indicate how Mil.R.Evid. 408 will apply to court-martial practice; however, circumstances may arise where the accused might be civilly liable for damages inflicted as a result of his criminal misconduct. Here, rule 408 would generally prohibit the admission of evidence concerning any offer to settle or statement made in connection therewith from being admitted during the court-martial itself. For example, if the United States brings a civil suit against a person, settlement negotiations in that suit should not generally be admissible in a related criminal proceeding. This might be applicable where the government is seeking to recover money obtained in an embezzlement scheme.

a. In this regard, it should be remembered that the rule only protects against the use of compromise offers relating to claims that are disputed as to either validity or amount. The Advisory Committee note to Fed.R.Evid. 408 states that "the effort . . . to induce a creditor to settle an admittedly due amount for a lesser sum" would not further the underlying policy of the rule and is therefore not protected. Yet, a careful distinction must be made between a frank disclosure during the course of negotiations -- such as "All right, I was negligent. Let's talk about damages" (inadmissible) --and the less frequent situation where both the validity of the claim and the amount of damages are admitted -- "Of course, I owe you the money, but unless you're willing to settle for less, you'll have to sue me for it" (admissible). Likewise, an admission of liability made during negotiations concerning the time of payment and involving neither the validity nor amount of the claim is not within the rule's exclusionary protection. For example, in an embezzlement scheme,

if there was a dispute as to the amount taken, the compromise discussions would be protected by the rule; but, if the discussion dealt only with a payment plan for an agreed-upon amount of embezzled money, the rule would not apply.

b. Similarly, the rule only protects offers involving a valuable consideration. What this means is that something of legitimate value must be offered. A threat to kill someone unless a settlement is reached would not be an offer of anything of value that the law regards as legitimate. Thus, it would be outside the coverage of the rule.

2. The leading case so far dealing with Mil.R.Evid. 408 is the case of *United States v. Jensen*, 25 M.J. 284 (C.M.A. 1987), in which a soldier was prosecuted at a general court-martial for allegedly raping a foreign national near his Army base in South Korea. During the government case-in-chief, the trial counsel offered evidence that the accused had made an offer to the victim to settle all her claims against him "under civil or criminal law" for a specified price. Citing Mil.R.Evid. 408, C.M.A. held that all evidence of the accused's offer to pay the victim money in settlement of her claim against him was inadmissible.

3. It may be that the most important function of this rule will be to assure someone facing both civil and criminal liability that simultaneous bargaining concerning both forms of liability will result in protection under both this rule and rule 410. There is, however, one problem with simultaneous bargaining. The legislative history of Fed.R.Evid. 410, which will be important in interpreting Mil.R.Evid. 410, indicates that statements made in the course of legitimate plea bargaining may not be used to impeach an accused at trial if bargaining breaks down. Rule 408 is less clear on the impeachment question. As noted in S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 507-508 (3d ed. 1991):

> Some commentators have suggested that the last sentence of the Rule would permit impeachment use of statements made in settlement negotiations. Others have argued that this approach would inhibit free and open bargaining in which the parties do not have to fear a mistake or a slip of the tongue. Our own position is that impeachment use should not be permitted since simultaneous bargaining would be impaired were Rules 408 and 410 read differently on the impeachment issue.

This seems to be the proper reading on this issue and comports with the intention of the drafters. Counsel would be well-advised, however, to avoid any potential problem in the use of statements made during negotiations by doing all negotiations for his or her client and by putting everything in hypothetical form.

C. No immunity. There is no immunity against the use of evidence that one party is entitled to obtain from the other just because the evidence was revealed for the first time during settlement. Under the rule, the settlement negotiations themselves are not to be used as evidence, but no part of the rule is intended to permit one party to immunize against use of evidence at trial that might otherwise be available. In essence, counsel can use proper discovery methods, as discussed in chapter II, to obtain this evidence, but cannot use statements of the parties or matters produced solely for negotiations to create evidence. For example, if, in the negotiations for repayment of monies obtained by a disbursing clerk in an embezzlement scheme, the government negotiator referenced certain pay documents, the defense could obtain copies of the pay documents with a request for matters within the control of military authorities. R.C.M. 701. However, the defense could not use statements relating to the pay documents made by government agents during the negotiations.

D. Other purposes. Just as in rule 407, it should be noted that the last sentence of the rule, read in conjunction with the opening sentence, makes it clear that the limitation on the use of evidence in this rule applies only when the evidence is offered to prove liability for, or invalidity of, a claim or the amount of a claim. It does not apply when the evidence is offered for another purpose, "such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." But, if there is sufficient danger that the members would misuse evidence, rule 403 could be used to bar evidence otherwise admissible under the last sentence.

0514 PAYMENT OF MEDICAL AND SIMILAR EXPENSES
(Key Number 1032)

Rule 409. Payment of medical and similar expenses.

> Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

A. Applicability. The drafters' analysis to rule 409 raises the question of whether this rule really has any cause to be within the Mil.R.Evid.

> Unlike Rule 407 and 408 which although primarily applicable to civil cases are clearly applicable to criminal cases, it is arguable that Rule 409 may not apply to criminal cases as it deals only with questions of "liability"-

> -normally only a civil matter. The Rule has been included in the Military Rules to ensure its availability should it, in fact, apply to criminal cases.

Mil.R.Evid. 409 drafters' analysis, MCM, 1984, app. 22-33.

This reading of "liability" as a strictly civil matter seems overly restrictive and not fully in accord with their implicit readings of rules 407 and 408. If liability is interpreted to mean responsibility, then the rule would seem applicable in any case involving injuries and/or hospitalization, such as in assault and battery cases.

> **Example.** In Okinawa, it is common practice that, if a Marine injures or kills an Okinawan, the Marine is encouraged to comply with Okinawan custom and make a call on the victim or the victim's family and make a "condolence" payment. This "condolence" payment was utilized as a tangible means of expressing sympathy. Under such circumstances, the restrictions of rule 409 would appear to become applicable were the Marine to be tried subsequently at court-martial proceedings for an offense arising out of the incident that resulted in the injury or death. Thus, evidence of any payment made, promised, or offered by the Marine to the victim or the victim's family would be inadmissible; but, any statements he made to the victim or the victim's family inculpating himself could be admitted.

B. Scope

1. This rule bars admission only of payments or promises to pay, not factual statements or admissions made in connection therewith. Hence, in not protecting against the admission of such statements, this rule is less protective than rule 408. This was the Fed.R.Evid. drafters' intent. *See* Fed.R.Evid. 409 Advisory Committee note.

2. Saltzburg, Schinasi, and Schlueter raise an interesting issue as to the scope of "liability" under the rule:

> Assuming that the Rule is applicable in courts-martial, there may arise a question whether a payment or promise to pay can be used to prove the identity of an assailant. Is identity different from liability? Arguments can be made both ways. One argument would be that identity is being used to establish criminal liability and should not be

> allowed. The countervailing argument is that liability is otherwise proved, and that the Rule only protects against using the evidence to show negligence or failure to meet a standard of care on the theory that the evidence is of only slight value; if used to prove identity, arguably the evidence has greater probative force. At the moment, there is little law supporting either argument.

S. Saltzburg, S. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 510 (3rd ed. 1991).

0515 PLEAS AND PLEA BARGAINING (Key Number 1033)

A. History. This discussion deals with Mil.R.Evid. 410 as it presently exists; however, comparison to the original rule is encouraged.

1. Rule 410 was the first Mil.R.Evid. to be modified pursuant to Mil.R.Evid. 1102 when the corresponding Fed.R.Evid. was changed. In fact, the present military rule reflects the second amendment to the Federal rule. An equivalent to the present Fed.R.Evid. 410 may also be found at Federal Rule of Criminal Procedure 11(e)(6). For a complete history of the evolution of the Federal Rule, see S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual* 370-371 (5th ed. 1990). For our purposes, it is sufficient to note the text of the original and the amended Mil.R.Evid. 410 and to summarize the changes made by the amendment, the rationale for the rule and the significance of the rule, as amended, all of which will be discussed *infra*.

> Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements
>
> (a) In general. Except as otherwise provided in this rule, evidence of the following is not admissible in any court-martial proceeding against the accused who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of nolo contendere;
>
> (3) any statement made in the course of any judicial inquiry regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the Government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a court-martial proceeding for perjury or false statement if the statement was made by the accused under oath, on the record and in the presence of counsel.

(b) Definitions. A "statement made in the course of plea discussions" includes a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial; "on the record" includes the written statement submitted by the accused in furtherance of such request.

2. The present rule was effective on 1 August 1981, pursuant to Executive Order No. 12,306 (1981). It is modeled after its Federal counterpart, as noted above, but some language changes were made to conform the rule to military situations and practice. For example, language in the Federal rule referring to an "attorney for the prosecution authority" was changed to refer to the convening authority, staff judge advocate, trial counsel, and other government counsel.

3. Changes. The present rule has three significant modifications to the original rule.

a. The rule now includes a "completeness" approach akin to rule 106's approach (concept of completeness).

b. The rule now expressly addresses statements made during in-court providency or judicial inquiries (in-court statements).

c. The scope of plea discussions protected by the rule is now limited to those involving the convening authority or appropriate government counsel (appropriate negotiators).

B. Rationale

In adopting a principle that plea bargaining and related statements are inadmissible, rule 410 follows a rationale similar to that of rule 408 dealing with offers of compromise -- that is to say, a recognition that the criminal justice system depends on guilty pleas to dispose of the bulk of cases and frank discussions of such pleas should be encouraged. *See, e.g., United States v. Arroyo-Angulo*, 580 F.2d 1137, 1148 (2d Cir. 1978), *cert. denied*, 439 U.S. 913 (1978) ("The purpose of [Fed.R.Evid. 410] is to encourage frank discussions in plea bargaining negotiations . . . ").

If a withdrawn guilty plea were allowed to be used against the accused as proof of his guilt, limiting instructions, at the very least, would have to be given to the court members. Even if a proper instruction could be drafted, it is recognized that the court members would have a great deal of trouble following them. Consider, for example, the following anecdote of a British barrister:

> I had been briefed to defend a man on a charge of horsestealing; and, as briefs were scarce, I had no idea of letting the case go without a fight. As chance would have it, the prisoner was arraigned during the luncheon hour when I had left the court, and I was disgusted to find on return that he had actually pleaded "Guilty." I at once sought the judge, and asked him privately to let the plea be withdrawn, explaining to him my position, and assuring him that had I been in court, I should have advised the prisoner differently. The learned Baron demurred at first, but seeing my earnestness he gave way, and the prisoner was permitted to withdraw his plea. The trial came on; and after I had addressed the jury with much fervor, the learned Baron proceeded to sum up as follows: "Gentlemen of the jury, the prisoner at the bar is indicted for stealing a horse. To this charge he has pleaded guilty; but the learned counsel is convinced this was a mistake. The question, therefore, is one for you, gentlemen, which of them you will believe. If you have any doubt, pray bear in mind that the prisoner was there and the learned counsel wasn't."

A. C. Plowden, *Grain or Chaff; The Autobiography of a Police Magistrate* 156 (1903), *quoted in* 4 Wigmore, *Evidence* 1067 (3rd ed. 1940).

C. Pleas

Rule 410 considers two subjects: pleas and statements that are related, but present slightly different problems. First, the rule deals with pleas, either a plea of guilty that is later withdrawn or a plea of nolo contendere. Second, the rule deals with statements, either made in the course of a judicial inquiry regarding pleas or made in the course of plea bargaining. For clarity, they will be considered separately; this section on pleas, and section D on statements.

1. It has long been settled practice that Federal courts would not admit evidence of a withdrawn plea to a criminal charge in the trial of that charge against the party making the plea. *See, e.g., Kercheval v. United States*, 274 U.S. 220, S.Ct. 582 (1927). In the military, this practice has applied only to withdrawn guilty pleas, since pleas of nolo contendere, although included in the language of rule 410, are considered "irregular" pleas under R.C.M. 910, and thus the equivalent of a plea of not guilty. Thus, this provision of the rule does not change traditional practice.

2. Under the rule, evidence of a withdrawn plea of guilty or a plea of nolo contendere may never be used in any court-martial against the accused who entered the plea. For example, if the accused should plead guilty, then change his mind, plead not guilty and testify as to his innocence, the trial counsel could not impeach the accused with his original plea nor with any statement made in the course of any judicial inquiries made concerning the plea. There are two aspects of the rule, however, that do not protect an individual who has entered pleas of guilty or nolo contendere.

a. The fact that the accused changed his pleas can be used to impeach the accused who later testifies as a witness at the trial of any other person.

b. A plea of guilty that is not withdrawn, and any statement made in the course of negotiations resulting in the guilty plea, would not be rendered inadmissible under this rule. The reader should remember the distinction between being not inadmissible and being admissible. There is nothing in the rule which says that statements in negotiations leading to an unchanged guilty plea will be admissible at trial. The reader should also note, however, that C.M.A. has specifically held that it does not amount to a denial of the accused's right to remain silent for the government to use in aggravation statements made by an accused during a providency inquiry. *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988).

D. Statements

The rule controls the admissibility of "statements" made under two conditions: (1) Statements rendered by the accused during a judicial inquiry

535, 40 C.M.R. 247 (1969) (requiring the military judge to personally question an accused regarding the facts and circumstances of an offense before accepting his plea of guilty)]; and (2) statements made in the course of plea discussions with appropriate government authorities that do not result in a plea of guilty or result in a plea later withdrawn.

1. Statements during judicial inquiry

a. Basic rule. Military courts have generally excluded from evidence any admissions made by an accused during the providency inquiry, or stipulations of fact used during the providency hearing, if the plea of guilty is withdrawn. *See United States v. Barber*, 14 C.M.A. 198, 33 C.M.R. 410 (1963), and discussion in Imwinkelried, [*The New Federal Rules of Evidence - Part IV*], Army Lawyer 12 (July 1973). An interesting application of this provision of rule 410 is contained in *United States v. Shackelford*, 2 M.J. 17 (C.M.A. 1977). There, the accused impeached his guilty plea during the providency inquiry. Subsequently, the case was tried before a court composed of members. After the accused testified on direct examination, the military judge asked him more than 50 questions aimed at displaying the untruthful nature of his testimony. In reversing the conviction, the court found that the military judge had unfairly disparaged the defense by improperly using information obtained during the providency inquiry. The court further held that such conduct has long been prohibited by the Uniform Code of Military Justice (see article 45), military precedent (*see United States v. Barber, supra*), and Supreme Court guidance (*see Kercheval v. United States, supra*). Judge Cook's concurring opinion particularly highlighted the impropriety of using the accused's guilty plea statements against him in such fashion. *United States v. Heirs*, 29 M.J. 68 (C.M.A. 1989) also involved an accused whose guilty plea was not accepted by the military judge. The court found that it was error for the SJA's response to the accused's post-trial submission to contain references to damaging statements made by the accused during providency.

b. Exceptions

(1) Although the rule precludes use for substantive or impeachment purposes of statements made by an accused during a judicial inquiry into the providency of his plea, it does indicate that, if the accused makes a false statement during the colloquy with the military judge, the false statement could be used as the basis for his prosecution for perjury or other false statement offenses. For this exception to apply, three conditions must be satisfied: (1) The false statement must be given by the accused under oath [*see e.g., United States v. Abrahams*, 604 F.2d. 386 (5th Cir. 1979) (defendant not placed under oath before magistrate; statement to magistrate not usable in perjury proceeding)]; (2) it must be made on the record [which might include a written statement by the accused asking for disposition by administrative action; rule 410(b)]; and (3) it must be

rendered in counsel's presence. R.C.M. 910(c)5 parallels this decision in providing that the military judge, before accepting a plea of guilty, must advise the accused that: "if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement."

(2) Rule 410 also provides an exception to the use of statements made during judicial inquiry where part of a statement has been introduced and a portion or all of the remainder of the statement should "in fairness" to all parties be considered contemporaneously. This is similar to rule 106's "rule of completeness," and is intended to prevent distortion of the truth by one party. The normal situation in which this would arise is where the accused (who may waive the rule) introduces a statement originally. *Cf. United States v. Doran*, 564 F.2d 1176 (5th Cir. 1977), *cert. denied*, 435 U.S. 928 (1978) (accused testified on direct that he refused plea offer because he was innocent; on cross-examination, prosecutor was permitted to ask him about counteroffers made to government).

2. Statements during plea discussions

In order to gain the protection of the rule with regard to statements made during appropriate plea discussions, the accused and counsel must ensure that two requirements are met. First, there must be a plea discussion and, second, the discussion must be with appropriate persons.

a. Plea discussion. Not every legitimate discussion of a case with governmental agents may amount to a plea discussion. *Compare United States v. Ross*, 493 F.2d 771 (5th Cir. 1974) (government narcotics agent could not testify as to his discussion with the accused when the accused stated "If I take the bla[illegible]e is there a chance you will let my wife go?" The court excluded the statement, citing *Santobello v. New York*, 404 U.S. 257 (1971), because it concluded that few defendants would engage in plea bargaining if remarks uttered during the course of unsuccessful bargaining were admissible in a later trial as evidence of guilt; *United States v. Herman*, 544 F.2d 791 (5th Cir. 1977) (noting that rule 410 codified *Ross, supra*, the court found: "[s]tatements are inadmissible if made at any point during a discussion in which the defendant seeks to obtain concessions from the government in return for a plea.") *with United States v. Robertson*, 560 F.2d. 647 (5th Cir. 1977) (*en banc*) (inculpatory statements of a defendant pursuant to an agreement made with the government to be lenient with his wife were excluded. The court held that rule 410 did not bar this evidence because it did not involve a negotiation concerning

the accused's own plea.); *United States v. Cross*, 638 F.2d 1375 (5th Cir. 1981) (because the accused's statements to the government were made in contemplation of leniency, but not in contemplation of pleading guilty, they were outside of rule 410's protections).

In determining whether there has been a plea discussion, many courts have adopted something close to the two-step approach in *United States v. Robertson*, 582 F.2d 1356 (5th Cir. 1978). The court will first look to the accused's subjective intent to bargain for a plea, then balance it against the objective circumstances that surround and define the intent, ultimately seeking to determine whether it was reasonable for the accused to believe an agreement was possible. *See e.g., United States v. Castillo*, 615 F.2d 878 (9th Cir. 1980) (both the objective and subjective criteria were missing). *United States v. Barunas*, 23 M.J. 71 (C.M.A. 1986). The Court of Military Appeals has taken an expansive view of rule 410, finding that it excludes a letter to a commanding officer admitting guilt and pleading for leniency [*United States v. Barunas*, 23 M.J. 71 (C.M.A. 1986)], a spontaneous statement by an accused to his commanding officer requesting administrative action in lieu of court-martial [*United States v. Brabant*, 29 M.J. 259 (C.M.A. 1989)], and at a Christmas party, civilian defense counsel telling an assistant SJA that his client asked the urinalysis unit coordinator to substitute his positive sample with a "clean sample." *United States v. Ankeny*, 30 M.J. 10 (C.M.A. 1990).

b. Appropriate government negotiators. Under the rule, only plea discussions with the convening authority, staff judge advocate, trial counsel, or other government counsel amount to the kind of bargaining that permits an accused to prevent the use of his bargaining statements against him. Thus, a line is drawn between designated government representatives on the one hand, and military policemen and lower level commanders on the other. It is an effort to clarify what caused problems under the old rule for many courts. *See, e.g., United States v. Robertson*, 582 F.2d 1356 (5th Cir. 1978) (*en banc*) (statements to DEA agents); *United States v. Herman*, 544 F.2d 791 (5th Cir. 1977) (statements to postal officers).

In view of the fact that the rule includes statements made solely for the purpose of requesting administrative separation in lieu of trial by court-martial, a fair reading of this section would indicate that "convening authority" should include not only the convening authority of the court-martial but any commander acting officially on the case (e.g., the OEGCM authority acting on the discharge request even if not the convening authority).

c. The exceptions applicable to statements made during judicial inquiry are also applicable to statements made in the course of plea discussions.

E. Use of pleas and statements by accused

Rule 410 creates, in effect, a privilege for the accused. His failure to object constitutes a waiver of the use of the evidence against himself. *See* Mil.R.Evid. 103.

Generally, the court should give a defendant in a criminal case considerable leeway in introducing evidence of offers to plead or evidence of pleas that might be excluded were a prosecutor to offer them. There are two clear exceptions to this rule of leniency in applying rule 410.

First, the defendant should not be permitted to prove a withdrawn plea or an offer to plead in order to show that a government attorney had doubts about his guilt. *See United States v. Verdoorn*, 528 F.2d 103 (8th Cir. 1976). Affirming convictions for conspiracy and various substantive offenses arising out of a theft of an interstate shipment of beef, the *Verdoorn* court cited rule 408 and Federal Rule of Criminal Procedure 11(e)(6) (the counterpart to rule 410) for the proposition that criminal defendants cannot introduce evidence of plea bargaining by the government to show consciousness of a weak case. The case also serves as a reminder that a witness who pleads guilty and then cooperates with the government in another case can be impeached with evidence of the plea bargain (rule 609 notwithstanding) because the evidence tends to show bias or interest on the part of the witness. In essence, the prosecutor's view of the defendant's guilt or innocence is irrelevant. Second, where there are joint trials, the introduction of such evidence by one defendant may prejudice a co-defendant. *Cf. Bruton v. United States*, 391 U.S. 123 (1968) (limitations on admissibility of co-actor's confession in a joint trial).

0516 LIABILITY INSURANCE (Key Number 1034)

Rule 411. Liability Insurance

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

The provisions of Mil.R.Evid. 411 are taken without alteration from the Federal rule and have no previous military foundation. Although this rule is primarily a rule of civil, not criminal, applicability, it may affect a military accused who is charged with negligent homicide or involuntary manslaughter.

PART FOUR: RELEVANCY OF SEXUAL CONDUCT: THE "RAPE SHIELD" LAW IN THE MILITARY

0517 GENERAL (Key Numbers 1024-1026, 1035)

A. Introduction. In recent years, state legislatures have followed a growing trend of protecting rape victims from the humiliation of having the details of their past sexual behavior publicly disclosed in court. Approximately forty-six states have evidentiary rules that restrict an accused's ability to use the past sexual conduct of the rape victim as a matter in his defense. *See generally* [Tanford and Bocchino] Rape Shield Laws and the Sixth Amendment, 128 U. Pa. L. Rev. 544 (1980). *See generally* J. Weinstein's and M. Berger, *Weinstein's Evidence*, 412 (02) 1988. In 1978, Congress followed the trend and enacted rule 412 of the Federal Rules of Evidence. The military followed suit, in September of 1980, by adopting Military Rule of Evidence 412 which is patterned with some modification after the Federal rule.

B. History. Prior to the adoption of the "rape shield" laws, criminal trials involving rape and other nonconsensual sex offenses most often placed the alleged victim, as well as the accused, on trial. As the prosecution attempted to prove the elements of the offense, especially the lack of consent, the defense would counter by exposing the past unchaste reputation and history of sexual behavior of the victim. Courts would permit evidence of the past sexual behavior in the form of reputation or opinion evidence and specific acts not only for the purpose of showing consent, but for the purpose of impeaching the credibility of the victim. These rules were premised upon the concept that most women were virtuous by nature, and that an unchaste woman must therefore have an unusual character flaw which caused her to consent to sexual advances. Also, an archaic perception prevailed that an unchaste woman was inherently suspect and not, therefore, worthy of belief (*see* Tanford and Bocchino, *supra* at 548). Traditionally, in military courts, prior to the adoption of Mil.R.Evid. 412, the defense was able to introduce evidence of a victim's lack of chastity. Under former MCM, 1969 (Rev.), para. 153b(2)(b), the defense counsel could impeach a sex offense victim, or try to show consent of the victim, by introducing evidence of the victim's past sexual behavior. This former provision permitted the defense counsel to introduce evidence "including the victim's lewd repute, habits, associations, or way of life . . ." which would tend to establish the unchaste character of the victim.

Mil.R.Evid. 412, however, generally precludes the introduction of evidence relevant to the past sexual behavior of the victim. The succeeding paragraphs set forth a discussion of the Rule and its procedural aspects.

0518 COMPARISON TO FED.R.EVID. 412 -- GENERALLY

Although Mil.R.Evid. 412 is taken from the Federal rule, the applicability of the military rule is substantially broader in order to meet the needs of the military society -- individuals confronted with close, isolated living conditions -- and to correct what the drafters considered defects in the Federal rule.

The greatest distinction between the military and Federal rule is the expanded number of crimes to which the military rule applies. Mil.R.Evid. 412 applies to a variety of nonconsensual sexual offenses, such as rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses, as well as any other sexual offense where lack of consent is an element of the offense charged or the existence of consent would constitute a defense. Mil.R.Evid. 412(e). By contrast, Fed.R.Evid. 412 is applicable only to cases of rape and assault with intent to commit rape. Additionally, the procedural aspects of the Federal rule have been modified to adapt it to military practice. *See* Mil.R. Evid. 412 drafters' analysis, MCM, 1984, app. 22-34. The Federal rule places a 15-day notice requirement upon the defense if the defense desires to utilize one of the exceptions found in Fed.R.Evid. 412(b). *See* Fed.R.Evid. 412(c)(1). Mil.R.Evid. 412(c)(1), which will be discussed later, provides for a notice requirement but mentions no specific time within which notice by the defense must be made. Also, Fed.R.Evid. 412(c)(1) requires that a "brief" accompany the notice, while Mil.R.Evid. 412(c)(1) requires only that notice be accompanied by an "offer of proof."

0519 MIL.R.EVID. 412's PROHIBITIONS

A. Mil.R.Evid. 412(a) places prohibitions on the use of:

1. Reputation evidence of past sexual behavior of the alleged victim of nonconsensual sex offenses generally; and

2. opinion evidence of past sexual behavior of the alleged victim of nonconsensual sex offenses.

B. It should be noted that, in this respect, Mil.R.Evid. 412 marks a radical departure from the spirit which permeates most of the other rules concerning character evidence. For example, it can be said that the Military Rules of Evidence in general express a clear preference for evidence in the form of opinion or reputation over that of evidence of specific acts. *See, e.g.*, Mil.R.Evid. 404 and 405. Under Mil.R.Evid. 412, however, evidence of the character of the victim in the form of opinion or reputation testimony is never admissible. If any evidence at all is admissible, it will only be evidence of prior specific acts offered for the limited purposes discussed below.

0520 MIL.R.EVID. 412's QUALIFIED EXCEPTIONS

-- Mil.R.Evid. 412(b) states that evidence of the alleged victim's past sexual behavior is admissible if:

1. The accused intends to offer specific instances of the alleged victim's past sexual behavior and certain procedural requirements are met.

2. The specific instances are:

a. Acts of past sexual behavior with persons other than the accused;

b. offered by the accused on the issue of whether the accused was or was not the source of the semen or injury to the alleged victim;

or

3. the specific instances are acts of past sexual behavior with the accused and offered by the accused on the issue of whether the alleged victim consented to the sexual behavior with respect to which the nonconsensual sex offense is alleged.

These qualified prohibitions of Mil.R.Evid. 412(b)(2)(A)(B) may provide the basis for a constitutional attack by the defense on the grounds that the prohibition denies the accused his rights of confrontation. (The qualified prohibitions are discussed in section VI *infra*.)

0521 REPUTATION AND OPINION EVIDENCE OF PAST SEXUAL BEHAVIOR

A. Mil.R.Evid. 412(a) apparently precludes the admission of any reputation or opinion evidence related to the past sexual behavior of the alleged victim. No exceptions are listed in this section of the rule. The basis for this prohibition is relevance. When Fed.R.Evid. 412 was adopted in 1978, it was a codification of the growing consensus among Federal and State courts that the virtually unrestricted attack on a rape victim's sexual reputation often resulted in evidence of doubtful probative value, high potential for prejudice, injection of irrelevant collateral issues, and unwarranted embarrassment for victims. *See Privacy for Rape Victims: Hearings on H.R. 14666 and Other Bills Before the Subcommittee on Criminal Justice of the Committee on the Judiciary*, 94th Cong., 2d Sess. (1966).

B. Even prior to Fed.R.Evid. 412, ample judicial authority existed for the view that a rape victim's reputation for unchastity is ordinarily insufficiently probative either of her general credibility as a witness or of her consent to sexual intercourse with the accused, and that the minimally probative value of such evidence is outweighed by its highly prejudicial effect. *United States v. Kasto, supra. See also United States v. Merrival*, 600 F.2d 717 (8th Cir. 1979); *McLean v. United States*, 377 A.2d 74 (D.C. App. 1977). "The sixth amendment right of confrontation and the fifth amendment right of due process of law require only that the accused be permitted to introduce all relevant and admissible evidence." *United States v. Kasto, supra* at 272.

C. The only military court to rule on the constitutionality of Mil.R.Evid. 412(a) held that this section, on its face, does not violate either the fifth or sixth amendments of the Constitution since its language is directed at excluding only irrelevant evidence. Unchaste character per se has little relevance to the victim's truthfulness or the issue of consent. *United States v. Hollimon*, 16 M.J. 164 (C.M.A. 1983). In the *Hollimon* case, the defense attempted to show that the victim of the rape consented to the act of sexual intercourse with the accused. The defense requested that four witnesses be permitted to testify that the victim had a reputation for being a flirt, "loose," sexually "easy," and that she was regarded as "sort of a whore." *Id.* at 165. None of the proffered evidence of past sexual behavior, however, related to sexual activity between the victim and the accused. The *Hollimon* court not only ruled that the language of Mil.R.Evid. 412(a) was constitutional, but also held that, under the facts of the case, the rule was applied in a constitutional manner. *Accord United States v. Pickens*, 17 M.J. 391 (C.M.A. 1984) (evidence of specific instances of rape victim's past sexual behavior, which did not involve accused and were not similar in circumstances to any version of the events in this case, were not relevant to prove consent; evidence that rape victim appeared to one witness to be "generally a teasing type" was not admissible to establish her sexual reputation, which was not material in the case).

D. The language of Mil.R.Evid. 412(a) appears to have established an absolute prohibition against the use of opinion or reputation evidence reflecting upon the sexual behavior of the victim. The rationale for the prohibition is based upon the premise that reputation and opinion evidence concerning a victim's sexual behavior is not relevant to a determination of the victim's credibility. This issue was discussed in the Federal case of *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981), where the appellate court stated that, although opinion and reputation evidence of sexual behavior of the victim was not relevant to the issues of the victim's consent or veracity, such evidence might be relevant when offered to show the accused's state of mind. If the defense can establish the relevance of such evidence within the meaning of Mil.R.Evid. 401 and 403, refusal of the military judge to admit such evidence may cause this otherwise constitutional rule to be applied in an unconstitutional fashion. It must be remembered that rule 412 is no more than a

specific application of the general principles of relevance in Rules 401 and 403. *United States v. Hollimon*, *supra* at 165.

0522 SPECIFIC INSTANCES OF PAST SEXUAL BEHAVIOR

A. Types of instances. Specific instances of past sexual behavior of the victim are also generally not admissible for any purpose. Mil.R.Evid. 412(b). Three qualified exceptions to this general principle, however, are stated in the rule:

1. Instances of past sexual behavior of the victim are admissible if they are "constitutionally required to be admitted." In this connection, there are at least four cases which merit discussion.

a. In the first, *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983), the accused was charged with rape. The government evidence at trial showed that, shortly after the rape allegedly occurred in the accused's room in the barracks, the victim fled the scene and shortly thereafter, in an emotional and tearful state, reported the rape to several of her friends and subsequently to appropriate authorities. The accused testified that the victim had not only consented to the intercourse; in fact, the entire matter was her idea. By way of explaining why the victim would have been in such an emotional state so soon after an act of intercourse which she had supposedly suggested herself, the accused testified that she had just had sex with a friend of his earlier that same night and, when she then proposed to have sex with the accused, he had called her a whore. At this, she had burst into tears and fled the room. The accused proffered the testimony of his friend who, it was asserted, would have confirmed that the victim had indeed had intercourse with him consensually that same night. The military judge excluded this evidence, citing Mil.R.Evid. 412, and C.M.A. reversed, holding such evidence was constitutionally required to be admitted. C.M.A. noted that this evidence was not really being offered to show that the victim had in fact consented, but was rather being offered to corroborate the accused's explanation of one of the most damaging elements of the government's evidence against him -- namely, the evidence of the emotional state of the victim shortly after the alleged rape.

b. In the second case, *United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983), the accused was charged with rape. The military judge excluded evidence proffered by one of the victim's coworkers that the victim told her prior to the date of the alleged rape that her husband had been unfaithful and she was upset and angry about this. The military judge also excluded evidence from the same coworker that the victim had told her that she had sex with two other men after the date of the alleged rape. C.M.A. held that this evidence was constitutionally required to be admitted (though the error was found to be harmless in view of the overpowering government evidence on the issue of lack of consent in this case).

c. In *United States v. Elvine*, 16 M.J. 14 (C.M.A. 1983), the ːcused was charged with rape. At trial, the accused sought to cross-examine the ctim regarding numerous acts of sexual intercourse with various different men since ıe date of the alleged rape. He also sought to offer evidence of the victim's ːputation in the unit. Finally, the defense counsel also sought to cross-examine the ctim at the sentencing hearing about various acts of sexual intercourse with her ɔyfriend since the alleged rape, in order to establish that the victim had resumed normal sex life and had not suffered any permanent emotional trauma as a result 'the intercourse with the accused. The military judge excluded all this evidence and .M.A. affirmed, holding that such evidence was barred by Mil.R.Evid. 412 and was ɔt constitutionally required to be admitted. Of particular interest here is C.M.A.'s ɔlding that Mil.R.Evid. 412 applied as much at the sentencing hearing as at the trial ı the merits.

d. Finally, in *United States v. Jensen*, 25 M.J. 284 (C.M.A.)87), the accused was charged with raping a foreign national near the Army base here he was stationed in South Korea. The evidence showed the accused had been ıt drinking with several of his friends when they met the victim on the street. One 'the accused's friends then took the victim into an alley where they had intercourse. he accused subsequently went into the alley with the victim and also had ıtercourse. At trial, the accused testified that his intercourse with the victim was ɔnsensual and he offered the testimony of his friend, who was prepared to testify ıat his own intercourse with the victim was consensual. The military judge ɛcluded the testimony of the friend about the victim's intercourse with him, citing [il.R.Evid. 412, and C.M.A. reversed, holding such evidence was constitutionally ːquired to be admitted and that the military judge's failure to admit it denied the ːcused his sixth amendment right to confront his accuser.

e. The theme running through these four cases appears to be ıat evidence of other acts of sexual intercourse will be deemed to be constitutionally ːquired to be admitted if (1) the evidence has some significance for the case other ıan simply to show that the victim consented or (2) the other act of sexual ıtercourse was so closely related in time to the accused's sexual intercourse with the ictim that, in effect, the two acts are part of the same transaction or occurrence.

2. Past sexual behavior <u>with persons other than the accused</u> is ɪdmissible if offered by the accused upon the issue of whether the accused was or was ɔt, with respect to the alleged victim, the source of semen or injury. Mil.R.Evid. 12(b)(2)(A).

3. Instances of past sexual behavior <u>with the accused</u> are admissible offered by the accused upon the issue of whether or not the alleged victim

consented to the allegedly nonconsensual sexual behavior. Mil.R.Evid. 412(b)(2)(B). Such evidence may also support a claim of mistake of fact. *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984).

4. Although the relevancy of character evidence of unchastity is normally tenuous at best, and not admissible under 412(a), specific instances of past sexual behavior may be very relevant in a nonconsensual sexual offense case to show that the source of the semen or injury was not the accused or to establish that the sexual act alleged in the specification was entered into consensually.

B. Timeliness. The exceptions do not on their face require a showing that the instances of past sexual behavior took place within a certain time period prior to the alleged offense. The lack of a time period, however, will not grant carte blanche authority to the defense to have admitted all prior acts of sexual misconduct regardless of the length of time that had transpired. A ten-year gap, for example, between a prior act of sexual intercourse between the accused and the victim and the alleged offense might be so far removed as to be considered irrelevant or more confusing than helpful. *See* Mil.R.Evid. 401 and 412(c)(3).

0523 PROCEDURAL REQUIREMENTS FOR THE USE OF SPECIFIC INSTANCES OF PAST SEXUAL BEHAVIOR

The exceptions found in Mil.R.Evid. 412(b) are not self-executing. The defense must comply with certain procedural requirements prior to offering evidence of specific instances of past sexual behavior of the victim.

A. Timely notice. The defense must give notice to both the trial counsel and the military judge that it intends to offer specific instances of past sexual behavior. Mil.R.Evid. 412(c)(1). As previously mentioned, no specific time period for the notice is stated in this military rule, unlike its Federal rule counterpart -- which requires 15 days notice. The military rule deleted the requirement of 15 days prior notice because of the military's stringent speedy trial requirements. *See* Mil.R.Evid. 412(c)(1) drafters' analysis. Although no specific time period is set out in the military rule, the defense counsel should provide the government and the military judge with reasonable notice which would permit the government to sufficiently prepare to litigate the motion. Since no sanctions against the defense are mentioned in the military rule for failure to give proper notice, the remedy to be fashioned is within the sound discretion of the military judge. *Cf.* Mil.R.Evid. 304(d) and 311(d). The appropriate remedy in most instances for failure to give notice or failure to give timely notice would seem to be a continuance.

B. Offer of proof. The notice required by this rule must be accompanied by an offer of proof. Mil.R.Evid. 412(c)(2). (The Federal rule requires notice to be accompanied by a brief.) Failure to provide notice and make an offer of proof concerning the proposed evidence may result in defense waiver of any claim of error if the evidence is excluded at trial. *Compare United States v. Mahone*, 14 M.J. 521 (A.F.C.M.R.), *petition denied*, 14 M.J. 454 (C.M.A. 1982) (record established that each accused chose to forego any confrontation with the witness concerning her sexual history) *with United States v. Brown*, 17 M.J. 544 (A.C.M.R. 1983) (defense counsel's negligence, lack of experience, or whatever reason for noncompliance with procedural requirements of Mil.R.Evid. 412 could not justify exclusion of relevant evidence).

C. Judge's determination. The military judge must determine whether or not the offer of proof contains evidence relevant to the exceptions found in Mil.R.Evid. 412(b). If he so determines, the military judge must hold a hearing outside the presence of the members (in a members trial), which may be closed, to determine if such evidence is, in fact, admissible. During this hearing, both parties may call witnesses including the victim and may introduce other relevant evidence. Mil.R.Evid. 412(c)(2). The military judge need not be bound by the Military Rules of Evidence, except for Section III and Section V, during the hearing. Mil.R.Evid. 104(a).

D. Balancing test. The military judge, based upon the evidence admitted at the hearing, must engage in a balancing test. The judge must determine that the evidence that the accused seeks to offer is relevant, and that the probative value of the evidence outweighs the danger of unfair prejudice before such evidence is legally admissible. It is noted that the balancing test found within Mil.R.Evid. 412(c)(3) is not towards admissibility as it is in Mil.R.Evid. 403. Under Mil.R.Evid. 412(c)(3), the proffered evidence will be excluded unless deemed to be more probative than prejudicial. *See* S. Saltzburg, S. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 524 (3rd ed. 1991).

E. Extent of admissibility. If, upon conducting the balancing test, the military judge determines that the evidence is admissible, he may fashion a ruling as to the extent that the evidence will be admitted and as to the areas about which the victim may be examined. Mil.R.Evid. 412(c)(3). *See also United States v. Hollimon*, 16 M.J. 164 (C.M.A. 1983) (a judge who conducts a hearing as called for by this rule should indicate on the record, in detail, the basis for his reception or exclusion of the proffered testimony).

0524 SPECIAL CONSIDERATIONS

A. Applicability to both sexes. As previously stated, unlike Fed.R.Evid. 412, Mil.R.Evid. 412 is applicable not only to the crime of rape but also to all nonconsensual sex offenses involving victims of either sex (e.g., indecent assault).

Therefore, the prohibitions upon the use of opinion/reputation evidence or specific acts concerning past sexual activity of the victim will apply equally to male or female victims of the nonconsensual sex offense charged. Conversely, the rule will be applied in nonconsensual sex offense trials regardless of the sex of the accused. No equal protection problems, therefore, arise either in the language of the rule or in reasonably foreseeable applications of the rule.

B. Applicability at sentencing hearings. It should be noted that C.M.A. has specifically held that Mil.R.Evid. 412 is fully as applicable at the sentencing hearing as it is during the trial on the merits. Thus, for example, a defense counsel who wishes to show the victim's prior sexual history as "extenuation and mitigation" of his client's rape of the victim is likely to be disappointed. *United States v. Elvine*, 16 M.J. 14 (C.M.A. 1983); *United States v. Fox*, 24 M.J. 110 (C.M.A. 1987).

0525 FINAL COMMENTS

Since Mil.R.Evid. 412 reflects a very recent trend in the law, a multitude of issues will not be resolved until litigated in the future. Counsel will therefore be in a position to argue creatively to the trial court about the interpretation to be given the specific language, policy, the intent of the rule. To be effective, however, counsel must fully comply with the procedural requirements of the rule.

CHAPTER VI

PRIVILEGES

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CHAPTER VI

PRIVILEGES (Key Numbers 1126 - 1132)

0601 INTRODUCTION. Section V of the Military Rules of Evidence [hereinafter Mil.R.Evid.] contains an extensive codification of applicable privileges. No counterpart exists in the Federal Rules of Evidence [hereinafter Fed.R.Evid.]. Congress deleted all privileges which might apply to criminal trials, believing they were "pregnant with litigious mischief" and should be left to the Federal common law and individual state practice. The military cannot endure such a luxury. As a worldwide criminal justice system, we are forced to have an evidentiary code applicable in overseas areas just as it is in CONUS. For that reason, the Mil.R.Evid. framers went about establishing a thorough list of privileges and the mechanics for implementing them. Not only are the traditional areas treated (lawyer-client and clergy privileges, for example), but the more sophisticated ones dealing with government and classified information are also included. The new rules also adopt the Supreme Court's decision with respect to the husband-wife privilege. *See Trammel v. United States*, 445 U.S. 40 (1980).

There is no evidentiary physician-patient privilege in the military. Mil.R.Evid. 501(d). This is true even where the physician is a civilian. *See, e.g., United States v. Johnson*, 22 C.M.A. 424, 47 C.M.R. 402 (1973) (since no physician-patient privilege exists in trials by courts-martial, a civilian psychiatrist may be compelled to testify concerning disclosures made to him by the accused). *But see United States v. Miller*, 32 M.J. 843 (N.M.C.M.R. 1991) regarding possible privilege claimed by a social worker under California law. Protection against involuntary disclosure does exist, however, in the area of HTLV-III (AIDS) virus screening. While not a rule of evidence, the Defense Authorization Act for FY '87 (§ 705(c) of Pub. L. No. 99-661, approved 14 Nov 86) and SECNAVINST 5300.30C of 14 March 1990, provide that no information obtained by the DoD during, or as a result of, an epidemiologic assessment interview with a serum-positive member of the armed forces may be used to support any adverse personnel action (e.g., courts-martial, NJP, involuntary separation (other than for medical reasons), unfavorable personnel record entry, etc.) against the member.

There are very few recently published military cases addressing the law of privileges. An excellent discussion of the history of the law of privileges in the military, as well as a comparison of the new Military Rules of Evidence with former law, can be found in Woodruff, *Privileges under the Military Rules of*

Evidence, 92 Mil. L. Rev. 5 (1981). The following discussion concerns those privileges which will most frequently arise in the courts-martial arena.

0602 LAWYER-CLIENT PRIVILEGE (Key Numbers 1127, 1131)

A. The attorney-client relationship. An attorney-client relationship is created when an individual seeks and receives professional legal service from an attorney. In addition, there must be an acceptance of the attorney by the client and an acceptance of the client by the attorney before the relationship is established. *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978). A close examination of Mil.R.Evid. 505(a) discloses the need to have certain requirements fulfilled before the privilege applies. For example, the privilege applies only to "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. . . ." Accordingly, if the communication between the attorney and his client is one deemed to be of a nonconfidential character [*see* Mil.R.Evid. 502(b)(4)], a lawyer-client privilege will not exist even though an attorney-client relationship has been established. Similarly, if a conversation between a client and his attorney has been held for a purpose which does not include obtaining professional legal services, then the privilege will not exist even though an attorney-client relationship clearly exists.

B. Problems with ambiguous terminology. The general rule found within Mil.R.Evid. 502(a) at first glance appears to be rather clear in meaning, yet close examination reveals a number of problems.

1. Although "client" is defined by Mil.R.Evid. 502(b)(1) to include a public entity, the standard used to contrast an individual relationship with an attorney, as distinguished from one in an organizational context, has been elusive. The following represent suggested approaches.

a. Control-group test. The key question of the control-group test is to ascertain "if the employee making the communication . . . is in a position to control ... or take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney . . ." *Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962). This test has been squarely rejected by the Supreme Court. *Upjohn Company v. United States*, 449 U.S. 383 (1981). After Upjohn's general counsel was informed of certain questionable payments made by one of its subsidiaries to foreign government officials, he began an internal investigation which included the sending of questionnaires to managers and employees seeking detailed information concerning the payments. Interviews were also conducted. IRS, during the course of their investigation into this same matter, demanded production of these questionnaires and interview notes. Upjohn refused on the grounds that to do so

would violate the attorney-client privilege. In upholding Upjohn's actions, the Supreme Court held that this information was privileged because it was made by employees to the general counsel who was investigating the matter so that he could provide legal advice to corporate superiors. Future court decisions may provide guidance as to whether the court will apply this approach with government agencies relying on the privilege.

b. Unlimited approach. All communications by any employee of an entity are protected. *See United States v. United Shoe Machinery Corporation*, 89 F. Supp. 357 (D.Mass. 1950).

c. Modified control-group test. This approach permits the privilege if: (1) though not a decisionmaker, the employee makes the communication at the bequest of a superior; and (2) the subject matter concerns the employee's responsibilities within the organization. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd*, *Decker v. Harper & Row Publishers, Inc.*, 400 U.S. 348 (1971).

d. An interesting, but unresolved, question concerns the relationship between the staff judge advocate and his convening authority. To what extent will information presented by the convening authority to his staff judge advocate be protected by the attorney-client privilege? May the convening authority claim an attorney-client privilege in an action against him personally? Although there are no military cases addressing these issue, there is one decision that sheds some light on the issue in a corporation setting. *In re Grand Jury Proceedings*, 434 F. Supp. 648 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978) stated:

> If the communicating officer seeks legal advice himself and consults a lawyer about his problems, he may have a privilege. If he makes it clear when he is consulting the company lawyer that he personally is consulting the lawyer and the lawyer sees fit to accept and give communication knowing the possible conflicts that could arise, he may have a privilege. But in the absence of any indication to the company's lawyer that the lawyer is to act in any other capacity than as lawyer for the company in giving and receiving communications from control group personnel, the privilege is and should remain that of the company and not that of the communicating officer.

434 F. Supp. at 650.

To avoid forming an attorney-client relationship, staff judge advocates should make clear to their convening authorities that "The Department of the Navy . . . is the client served by each judge advocate . . . unless assigned another client by competent authority." JAGINST 5803.1 of 26 Oct 87, para. 4a.

2. Who qualifies as a "lawyer"? Although the answer to this question might seem obvious, the issue is more subtle than it may appear at first glance. C.M.A. has strongly implied, for example, that, under the right circumstances, a doctor who becomes part of the defense team in connection with assisting the accused and his counsel in the preparation of an insanity defense would qualify as a "lawyer" for purposes of the attorney-client privilege. *United States v. Toledo*, 25 M.J. 270 (C.M.A. 1987), *on reh'g*, 26 M.J. 104 (C.M.A. 1988) *cert. denied*, 488 U.S. 889 (1988). Under such circumstances, of course, any statements by the accused to the physician would be within the attorney-client privilege. Defense counsel should notice, however, that (in *Toledo*) C.M.A. makes clear that such an "attorney-client" privilege will not exist between the doctor and the accused in the case of a government physician unless the accused first submits a formal request to an appropriate government authority for the appointment of the government physician.

In *United States v. Turner*, 28 M.J. 487 (C.M.A. 1989), a forensic toxicologist was assigned to consult with the defense in preparation for a cocaine-use trial. This expert, who was present with counsel at trial, was determined to be a "lawyer representative" and, thus, it was error, though not reversible, for the prosecution to interview him prior to trial.

3. The term "communications" is not explicitly defined within the rule. Nevertheless, a number of ideas have been incorporated within the term through decisional law and academic comments.

a. Clearly, oral remarks made by a client to his attorney would fall within the term "communications" under the concept of attorney-client privileges. Although documents and physical items of evidence may be additionally included in this term "communications," restrictions have been placed on the extent to which they will be "privileged" communications. For example, the Seventh Circuit has held that a lawyer who allegedly was given stolen money by clients suspected of bank robbery had to obey a subpoena ordering him both to turn over the money and to testify about its source. Under the facts of this case, it was unclear whether the money was given to the attorney as a bailment for purposes of safekeeping or whether it represented a retainer or prepayment of fees. From the court's point of view, however, it made no difference. The court commented that the attorney "cannot assert the attorney-client privilege as a justification for taking possession of what may be the fruits of a violent crime."

Furthermore, the court concluded that they "are not persuaded that the transfer of such money represents a communication for which the clients could legitimately anticipate confidentiality." *In re January 1976 Grand Jury*, 534 F.2d 719, 729 (7th Cir. 1976).

In *United States v. Rhea*, 33 M.J. 413 (C.M.A. 1991), a calendar on which accused's stepdaughter had made a notation indicating incidents of sexual intercourse with the accused was not a privileged attorney-client communication and was properly admitted into evidence; since the calendar and its writings were not privileged and could have been seized, storing calendar with accused's attorney did not make it privileged. (The two defense counsel were commended by the Air Force court [29 M.J. 991 A.F.C.M.R. 1990] for contacting their state bars for guidance. In accordance with that guidance, the counsel requested ex parte hearing with the trial judge who ordered counsel to provide the evidence to the government.)

b. With regard to documents in the possession of the attorney, the Supreme Court has considered the applicability of the attorney-client privilege in connection with the fifth amendment rights of the client. In this case, the Court held that it was not a violation of the attorney-client privilege to compel an attorney to produce tax work papers prepared for his client by a third-party accountant. *Fisher v. United States*, 425 U.S. 391 (1976). Although the attorney-client privilege applies to documents in an attorney's hands that would have been privileged in his client's hands, by reason of self-incrimination rights, the privilege does not apply here because enforcement of a summons addressed to the taxpayer, while the documents were in his possession, would have involved no incriminating testimony and thus would not have been barred by the fifth amendment. In other words, if the client could not prevent production of documents in his possession, the lawyer could not claim the attorney-client privilege as a bar to production of the documents.

c. Query: When an attorney has physical evidence in his possession which incriminates his client, can he rely on the attorney-client privilege to negate any potential affirmative duty to turn over the evidence to the authorities? Although there are no military cases dealing with physical evidence, the weight of state and federal cases favors disclosure without revealing the source of, the evidence. *See In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967), *aff'd*, 361 F.2d 713 (4th Cir. 1967); *People v. Nash*, 313 N.W.2d 307 (Mich. App. 1981), *rev'd on other grounds, aff'd in part*, 341 N.W.2d 439 (Mich. 1983); *Morrell v. State*, 575 P.2d 1200 (Alaska 1978). *See generally Note, Ethics, Law, and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence*, 32 Stan. L. Rev. 977 (1980); [Note, Legal Ethics and the Destruction of Evidence], 88(2) Yale L.J. 1665 (1979); [Note, The Right of Criminal Defense Attorney to Withhold Physical Evidence Received From His Client], 38 U. Chi. L. Rev. 211 (1970).

4. What is a confidential communication? It should be noted that a statement must be made in order to facilitate the rendition of professional legal services in order to qualify as a confidential communication under Mil.R. Evid. 502. Thus, for example, where the accused was an enlisted clerk assigned to an Army legal office, was apprehended for drug distribution, was then released to the custody of his OIC (who was a judge advocate), and he told the OIC that he wanted him to know that he was not a "big-time drug dealer," the statement did not fall within the scope of the attorney-client privilege. *United States v. Wallace*, 14 M.J. 1019 (A.C.M.R. 1982). Also, where the accused filled out an inventory form and gave it to his defense counsel with the understanding that it would be passed on to others, the communication was not privileged. *United States v. Smith*, 33 M.J. 527 (A.F.C.M.R. 1991).

5. When does the privilege attach? At a social function, the accused's civilian defense counsel, in *United States v. Ankeny*, 28 M.J. 780 (N.M.C.M.R. 1989), related to the accused's squadron staff judge advocate certain incriminating information that was told to him by his client. The accused at that time was under investigation for drug use. The information disclosed related to an incident of soliciting the urinalysis officer to be derelict in his duties, a charge about which the government was previously unaware. The accused's conviction was based on evidence so obtained.

The Navy-Marine Corps Court of Military Review set aside the conviction, holding that the unauthorized disclosure to the government violated the accused's attorney-client privilege and, thus, constituted ineffective assistance of counsel.

The Court of Military Appeals affirmed the decision of the N.M.C.M.R. on nonconstitutional grounds, holding that the attorney-client relationship formed even before preferral of charges; thus, the disclosures were subject to the attorney-client privilege and the counsel's preliminary overtures to the staff judge advocate were part of "plea discussions" within the meaning of Mil.R.Evid. 410 and, as such, were inadmissible. *United States v. Ankeny*, 30 M.J. 10 (C.M.A. 1990).

C. Exerciser of the privilege. Essential to a full understanding of this privilege, as with any other confidential communication, is a grasp of who the privilege runs to and who may exercise or invoke the privilege.

1. Although early in its development the rule was deemed to be held by the lawyer, Mil.R.Evid. 502(c) changes this application and gives it directly to the client. No confusion exists with regard to this notion.

2. The privilege may be exercised not only by the client, but by any number of representatives on his or her behalf. This is so, even though the client may not be alive or the organization to which it runs is no longer in existence.

D. Exceptions. There are a number of exceptions to the rule. If one of several situations comes into existence, the privilege no longer remains in force. The following exemplify, among others, some of these circumstances.

1. Mil.R.Evid. 502(d)(1) removes coverage of the privilege when the client's communications concern involvement in future crimes. In a Ninth Circuit case, the defendant was tried for fraud dealing in real estate ventures. During the course of this criminal activity, the defendant had conversations with his attorney concerning these real estate transactions. Because these conversations included references to future actions (perpetuating the frauds), the attorney-client privilege was lifted, and the attorney testified about the "game plan" of the defendant. The court stated that the government had to first establish a prima facie case of fraud, independent of these communications, before the attorney could be required to testify. *United States v. Shewfelt*, 455 F.2d 836 (9th Cir. 1972). *Accord United States v. Rosenstein*, 474 F.2d 705 (2d Cir. 1973) (wherein the privilege was lifted to allow into evidence a letter written by the defendants during the commission and in furtherance of a felony).

2. Mil.R.Evid. 502(d)(3) removes coverage of the privilege when an attorney and client become embroiled in a subsequent disagreement. Matters which were communicated during the privileged relationship may be used, to the extent necessary, by either side to protect their respective interests. This idea is important to consider when a counsel is attacked on appeal as having provided inadequate representation. In a 1957 Court of Military Appeals decision, the accused, on appeal, claimed that his trial defense counsel inadequately represented him because he failed to present extenuating evidence during the sentencing portion of the court-martial. In sending the case back for a rehearing, the court stated: "Since a charge of incompetency of the kind alleged in this case constitutes a waiver of the attorney-client privilege, the accused's former counsel can testify at the hearing to conversations with the accused." *United States v. Allen*, 8 C.M.A. 504, 508; 25 C.M.R. 8, 12 (1957). *See also United States v. Johnson*, 21 M.J. 211 (C.M.A. 1986); *United States v. Dupas*, 14 M.J. 28 (C.M.A. 1982); *cf. United States v. Devitt*, 20 M.J. 240 (C.M.A. 1985) (once a former client seeks reversal, claiming improper conduct on the part of counsel, there has been a waiver of the attorney-client privilege and counsel may not rely on the privilege to refuse to answer interrogatories concerning possible conflicts).

E. What is the effect on the results of a trial when a privileged communication is improperly used against an accused? This question was

addressed by the Court of Military Appeals in *United States v. Brooks*, 2 M.J. 102 (C.M.A. 1977). The court stated: "When a confidential communication is improperly used against an accused in a criminal case and the accused is convicted, the conviction can nonetheless be affirmed, if the record demonstrates that the use made of the communication was harmless to the accused and that the conviction is otherwise valid." *Id.* at 105.

0603 HUSBAND-WIFE PRIVILEGE (Key Numbers 1128, 1131)

A. Introduction. The husband-wife privilege is one of the oldest legal concepts in American jurisprudence. Its roots date back to medieval times and originally disqualified the spouse as being an incompetent witness for all purposes. It wasn't until *Funk v. United States*, 290 U.S. 371 (1933) that the Supreme Court abolished this testimonial disqualification for the Federal courts. *Funk* left the area in a state of uncertainty by indicating that either spouse could prevent the other from testifying, but by failing to provide any further guidance on how the privilege would be used. The rule, as a result, became rather broad. It has endured these many years as the beneficiary of society's desire to protect the marital relationship and the family concept in general.

1. Modern legal practice has held the privilege in low esteem. Professor Wigmore's characterization of it as being "the merest anachronism in legal theory and an indefensible obstruction to truth in practice" has had a great deal to do with our new rule. 8 Wigmore, *Evidence* 2228 (McNaughton rev. 1961).

2. Military practice in this area has historically followed the Federal model. Yet, military appellate courts were not satisfied with the broad exclusionary rule and took every opportunity to limit it. In *United States v. Gibbs*, 4 M.J. 922 (A.F.C.M.R. 1978), the appellant had been convicted of UA. During the sentencing portion of trial, while the accused was on the stand, government counsel cross-examined him with respect to a conversation the accused had with his wife while he was still UA. Appellate defense counsel asserted it was improper for the trial counsel to use such evidence against the accused due to the husband-wife privilege. Affirming the conviction, the court passingly recognized the privilege's existence, then opined that, because the appellant failed specifically to assert its protection at trial, the privilege was waived.

3. This uncertainty and dissatisfaction with the husband-wife privilege has set the stage for complete revamping of the law, and the creation of Mil.R.Evid. 504. Interestingly, the Mil.R.Evid. drafters were just finishing their work when the Supreme Court announced its opinion in *Trammel v. United States*, 445 U.S. 40 (1980), a decision substantially altering the Federal husband-

wife privilege. As a result, Mil.R.Evid. 504 is an adoption of the Supreme Court's holding.

B. Spousal incapacity to testify. Prior to the adoption of Mil.R.Evid. 504, military law allowed each spouse the opportunity to prevent the other one from testifying. Under Mil.R.Evid. 504(a), however, the testifying spouse generally makes the decision as to whether or not he or she should testify [contingent, of course, upon whether any exceptions apply under Mil.R.Evid. 504(c)]. Mil.R.Evid. 504(a) is in accord with the *Trammel* decision, *supra*. In *Trammel*, the defendant, Otis Trammel, was indicted for importing heroin into the United States from Thailand and the Philippine Islands. His wife, Elizabeth, on her way from Thailand to the United States, was arrested in Hawaii for possession of heroin. In exchange for lenient treatment, she agreed to cooperate with DEA agents in giving the details of the heroin distribution conspiracy. At trial, anticipating that Elizabeth would testify against him, Otis Trammel made a motion which asserted his claim to a privilege to prevent her from testifying against him. In support of this motion, the defense cited *Hawkins v. United States*, 358 U.S. 74 (1958), which barred the testimony of one spouse against the other unless both consented. The district court ruled that the wife could testify in support of the government's case to any act she observed during the marriage and to any communication "made in the presence of a third person." However, the court ruled that confidential communications between the defendant and his wife were privileged and inadmissible. The Supreme Court affirmed the action of the district court and modified the *Hawkins* case by holding that the witness spouse alone has a privilege to refuse to testify adversely. The defendant spouse cannot prevent his wife from testifying unless confidential communications are involved. The Supreme Court balanced the interests of the privilege against adverse spousal testimony with the need for production of probative evidence in the administration of criminal justice, and favored the latter consideration. Furthermore, the Supreme Court reasoned that the purpose for allowing the husband to prevent the wife from testifying against him was to foster marital harmony. But, when a wife is willing to testify against her husband in a criminal proceeding, there is little marital harmony to preserve.

-- Exceptions. There are four primary situations in which the witness spouse must testify against the accused spouse even though the witness spouse does not want to testify.

a. A spouse may not refuse to testify against the accused spouse when, at the time the testimony is to be given, the marriage has been terminated by divorce or civil annulment. Mil.R.Evid. 504(c)(1).

b. A spouse may not refuse to testify against the accused spouse when the latter is charged with a crime against the person or property of

the other spouse or a child of either. Mil.R.Evid. 504(c)(2)(A). *See, e.g., United States v. Allery*, 526 F.2d 1362 (8th Cir. 1975) (spouse was properly allowed to testify concerning activities of her husband on the night he allegedly attempted to rape one of their children); *United States v. Smith*, 533 F.2d 1077 (8th Cir. 1976) (the court concluded that a wife could testify against her husband, and that the husband committed an offense against her when he planted heroin on her person, subjecting her to a criminal prosecution); *United States v. Menchaca*, 23 C.M.A. 67, 48 C.M.R. 538 (1974) (wife could testify against her accused husband when the latter was charged with various sexual offenses upon his minor adopted daughter, the wife's natural daughter).

c. A spouse may not refuse to testify against the accused spouse when the marital relationship was entered into as a sham, and remained a sham at the time the testimony was to be introduced against the other. Mil.R.Evid. 504(c)(2)(B). *See also Lutwak v. United States*, 344 U.S. 604 (1953) (describes factual situation which depicts a marital sham).

d. A spouse may not refuse to testify against the accused spouse when the latter has been charged with importing the other spouse for prostitution, or other immoral purposes, or with transporting the other spouse in interstate commerce for immoral purposes. Mil.R.Evid. 504(c)(2)(C). Additionally, if an out-of-court statement has been made by the spouse of the accused, the statement could be admissible at trial, despite the exercise of spousal incapacity by the witness spouse, under an exception to the hearsay rule. *United States v. Hughes*, 28 M.J. 391 (C.M.A. 1989).

C. Confidential communications. Mil.R.Evid. 504(b) discusses how confidential communications made between the spouses and during the marriage are to be treated. Generally, this rule provides that the privilege will protect those confidential communications made during the marriage even after the marriage has been terminated. The rule states that the accused spouse may evoke the privilege to prevent the testifying spouse from giving any evidence. It also allows the accused's spouse to similarly claim the privilege, but it retains the accused's ability to force disclosure of a privileged communication.

1. The term "communications" generally refers to utterances or expressions intended to convey a message; however, courts have recognized that there are instances where conduct, intended to convey a private message to the spouse, may also qualify as "communicative." *See, e.g., United States v. Lewis*, 433 F.2d 1146, 1150-51 (D.C. Cir. 1970) ("Some acts conceivably may so convey a message, and may so bespeak a trust, as to necessitate nothing more to demonstrate entitlement to the privilege."). *Compare United States v. Martel*, 19 M.J. 917 (A.C.M.R. 1985) (under facts of this case, accused's act of summoning his wife to the bedroom and pulling back the bed sheets to reveal piles of stolen

currency and coins was communicative) *with United States v. Smith, supra* (accused husband placing package of heroin in wife's underclothing was not a communication, but a gesture intended to force her to be an unwilling participant in a crime); *United States v. Lustig*, 555 F.2d 737 (9th Cir.), *cert. denied*, 434 U.S. 926 (1977) (wife properly testified as to her observations of the defendant husband engaging in drug transaction with third party); *United States v. Bolzer*, 556 F.2d 948 (9th Cir. 1977) (ex-wife could testify that the style and size of pants found with the stolen money matched those of the type defendant wore, as she was merely relating her knowledge and observations of the defendant's pants and not testifying about any communications covered by the marital privilege).

2. The communications must be intended to be confidential. "In order for the privilege to obtain there must be a confidential disclosure or communication, the publication of which would betray conjugal confidence and trust or tend to produce family discord." *United States v. McDonald*, 32 C.M.R. 689, 692 (N.C.M.R. 1962). Since the communications must be intended to be confidential, conversations made with third or fourth parties present will not be deemed confidential communications. *United States v. Pensinger*, 549 F.2d 1150 (8th Cir. 1977); *United States v. Lustig, supra; United States v. Martel, supra.* The terms "confidential communications" may also include written documents, such as letters. The circumstances surrounding the writing of the letters will be closely scrutinized to determine whether they fit within the confidential communication privilege. In a Court of Military Appeals decision dealing with this issue, the court concluded that the letters written by the accused were improperly received in evidence because they were confidential communications. In this case, the accused was charged with carnal knowledge of his adopted daughter. Once these incidents came to light, the accused's wife left her husband, and she announced her intention to obtain a divorce through a letter to him. The accused responded by sending letters to her. She then turned these letters over to Air Force authorities, and their admissibility at trial became an issue in light of the marital privilege. The court concluded that, based upon the information contained in the letters as well as the circumstances surrounding their transmittal, they were intended to be confidential. *United States v. Nees*, 18 C.M.A. 29, 39 C.M.R. 29 (1968).

3. An interesting evidentiary issue could arise in a situation where a spouse reveals the contents of a confidential communication to law enforcement officials, who in turn seek independent nonprivileged evidence against the accused. Once discovered, can they use this nonprivileged evidence against the accused at trial, or is it inadmissible because it is derived from the disclosures made by the spouse? Although it does not directly answer this question, the Court of Military Appeals has given some guidance in this area. In *United States v. Seiber*, 12 C.M.A. 520, 31 C.M.R. 106 (1961), the accused's ex-wife disclosed information to criminal investigators about how her ex-husband

had obtained his commission by fraud. Apparently, no evidence was introduced at trial to show that this information was based upon a confidential communication between spouses, although the Board of Review inferred it had been. As a result of these disclosures, the investigators obtained documents from official sources, not from the ex-wife, relating to the fraud. The court concluded that these documents were properly admitted at trial. They relied principally on the facts that the ex-wife did not testify at trial, that privileged communications were not introduced, and that there was no misconduct on the part of the investigators. The Air Force Court of Military Review, in a pre-Mil.R.Evid. case, squarely addressed this issue in *United States v. Lovell*, 8 M.J. 613 (A.F.C.M.R. 1979), *petition denied*, 9 M.J. 17 (1980). There appellant was convicted of robbery, but not before he strenuously litigated the propriety of the search of his quarters. Part of that litigation dealt with the government's using statements obtained from the accused's wife to provide the requisite probable cause to search. The search led to the production of highly incriminating evidence. Affirming the conviction, the Court stated:

> We hold that the testimonial privilege . . . does not extend to preventing a spouse from furnishing evidence which provides probable cause for authorizing a search. *See generally United States v. Seiber*, 12 U.S.C.M.A. 520, 31 C.M.R. 106 (1961), and cases cited therein. Accordingly, we find no error in the use of the wife's statements since they were considered solely by the military judge and only on the question of probable cause to issue the authority to search.

Id. at 616.

4. Exceptions. As with the spousal capacity prong of the marital privilege, there are situations in which a spouse would have to testify despite the privilege and, therefore, the accused spouse could not claim the protections of the privilege.

a. A spouse may not refuse to testify against the accused spouse when the latter is charged with a crime against the person or property of the other spouse or a child of either. Mil.R.Evid. 504(c)(2)(A).

b. A spouse may not refuse to testify against the accused spouse when the marital relationship was entered into as a sham and was a sham at the time of the communication. Mil.R.Evid. 504(c)(2)(B).

c. A spouse may not refuse to testify against the accused spouse when the latter has been charged with importing the other spouse for

rostitution, or other immoral purposes, or with transporting the other spouse in ıterstate commerce for immoral purposes. Mil.R.Evid. 504(c)(2)(C).

d. Several Federal courts also recognize a "joint articipant" or "co-conspirator" exception to the husband-wife privilege. This xception rests on the proposition that the public interest in preserving the family s not great enough to justify protecting conversations in furtherance of crime. *Inited States v. Kahn*, 471 F.2d 191 (7th Cir. 1972) *rev'd on other grounds*, 471 J.S. 143, 94 S.Ct. 977 (1974). In *United States v. Mendoza*, 574 F.2d 1373 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978), the court explained that: ". . . onversations between husband and wife about crimes in which they are jointly ıarticipating when the conversations occur are not marital communications for ıurposes of the marital privilege, and thus do not fall within the privilege's ırotection . . . . [Emphasis added.] *Id.* at 1381. *See also United States v. Keck*, 73 F.2d 759 (7th Cir. 1985) (neither marital privilege applies if spouses are joint ıarticipants in crime); *United States v. Sims*, 755 F.2d 1239 (6th Cir. 1985) limited the "joint participants" exception to only those conversations pertaining to ıatently illegal activity); *United States v. Harrelson*, 754 F.2d 1153 (5th Cir. 1985) in a prosecution charging defendants with conspiring and killing a Federal judge, he court found that marital communications were in furtherance of a conspiracy ınd expressed doubts that conversations concerning past crimes would fall within he privilege).

The application of this exception in the military has so ar been limited to the Army Court of Military Review decision in *United States v. Martel*, 19 M.J. 917 (A.C.M.R. 1985). (In *United States v. Smith*, 33 M.J. 114 C.M.A. 1991), the court considered the exception but decided the case on a waiver heory.) In *Martel*, the spouse of the accused actively participated in the oncealment of the accused's larceny from the NCO Club by accompanying him to he dumpster to dispose of the tools, toolbag, and clothing used in the crime. The ourt determined that all communications during this venture were not entitled to he protection of the marital privilege, since both spouses were engaged in ıatently illegal activity. Whether N.M.C.M.R. or C.M.A. will adopt this view emains unclear. Unlike the Federal Rules, which simply prescribe the common aw privileges (and exceptions), the Mil.R.Evid. deal specifically with various ırivileges. The drafters' analysis to Mil.R.Evid. provides:

> The Committee deemed the approach taken by Congress in the Federal Rules impracticable within the armed forces. Unlike the Article III court system, which is conducted almost entirely by attorneys functioning in conjunction with permanent courts in fixed locations, the military criminal system is characterized by its dependence upon large numbers of laymen, temporary

> courts, and inherent geographical and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more stability than civilian law. This is particularly true because of the significant number of non-lawyers involved in the military law system. Commanders, convening authorities, non-lawyer investigating officers, summary court-martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not.

Id. at app. 22-35. *See United States v. Tipton*, 23 M.J. 338 (C.M.A. 1987) (dealing with a different aspect of the marital confidential communication privilege, the court simply employed a literal reading of Mil.R.Evid. 504 in determining whether a privilege existed).

e. Waiver under Mil.R.Evid. 510. "An accused who testifies about matters discussed in a privileged communication waives the privilege even if the actual communication is not disclosed." *United States v. Smith*, 33 M.J. 114 (C.M.A. 1991).

0604 CLERGY-PENITENT PRIVILEGE (Key Numbers 1126, 1131)

A. Introduction. There are very few published military and civilian cases dealing with the clergy-penitent privilege. This situation is probably due to the fact that clergymen, although not always understanding the legal aspects of the privilege, are extremely hesitant to go to trial and testify about communications made to them. It is important, when discussing priest-penitent confidentiality, to distinguish the application of Mil.R.Evid. 503 and restraints placed on the clergyman by church edicts. For the privilege to attach: (1) The communication must be made either as a formal act of religion or as a matter of conscience; (2) it must be made to a clergyman in his capacity as a spiritual adviser or to his assistant in his official capacity; and (3) the communication must be intended to be confidential. *United States v. Moreno*, 20 M.J. 623, 626 (A.C.M.R. 1985). Denominational rules governing divulging confidences are varied and beyond the scope of this guide.

The cases discussed below simply illustrate the applicability of the privilege to specific factual situations. Mil.R.Evid. 503.

B. Case illustrations

1. *United States v. Kidd*, 20 C.M.R. 713 (A.B.R. 1955). In this case, a chaplain had a post-trial interview with the accused. Subsequent to this

interview, he gave his opinion to the SJA concerning the lack of rehabilitation potential of the accused. The accused claimed that the privilege was thereby violated. The court disagreed, on the basis that there was no indication that the chaplain had revealed any confidences relating to matters of faith or conscience or that he revealed any facts or communications originating from the accused at all.

2. *United States v. Garries*, 19 M.J. 845 (A.F.C.M.R. 1985). Prior to the murder of his wife, the accused consulted a neighbor because he was upset that his wife was about to leave him. The neighbor was neither licensed nor ordained as a minister, but served as a deacon in the same off-base church attended by the accused. The court held that, at the time of the conversation with the accused, the neighbor was not a person who could act as a clergyman, and the accused could not reasonably believe him to be a clergyman; hence, their conversation, in which the accused indicated an inclination to harm his wife, was not a privileged communication.

3. *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1958). The defendant was charged with violating a statute dealing with mistreating children. This court concluded that the clergy-penitent privilege was clearly violated when a minister testified concerning a conversation he had with her. Prior to communion, the minister urged her to confess her sins. As a result, she told him how she had chained her children. The minister then testified in court about this information.

4. *United States v. Wells*, 446 F.2d 2 (2d Cir. 1971). The defendant wrote a letter to a priest requesting that the latter contact a certain FBI agent. This letter was subsequently introduced in evidence against the defendant. Although the defendant claimed that the admission of this letter violated the clergy-penitent privilege, the court disagreed. The court concluded that the privilege was not violated because the letter contained no hint that its contents were to be kept secret or that its purpose was to obtain religious or other counsel, advice, solace, or absolution.

5. *United States v. Moreno*, 20 M.J. 623 (A.C.M.R. 1985). After killing his girlfriend, the accused went to a post chapel and told the chaplain what he has done. The chaplain ultimately called the military police and reported what he learned. At trial, the chaplain, over defense objections, related this information to the court. On appeal, the government argued no privilege since the chaplain believed that the accused came to the chapel to turn himself in -- not for spiritual guidance. In ordering a rehearing, the court noted it was not what the chaplain thought concerning intended confidentiality that controls, but rather what appellant thought. The court found adequate evidence in the record that the appellant intended the communication be confidential.

C. Confidential communication. It should be noted that not every statement made by an individual to a clergyman or chaplain is necessarily within the scope of the privilege. The statement must be made as a formal act of religion or a matter of conscience in order to qualify for such a status. An interesting case in this regard is *United States v. Coleman*, 26 M.J. 407 (C.M.A. 1988), where the accused was charged with committing indecent acts upon his nine-year-old daughter. After the incident came to light, his wife took the child and left him. The accused subsequently called his father-in-law, who also happened to be a minister, for help in putting his marriage back together. The accused asked for help because his marriage was falling apart and, when the father-in-law asked if it was true that he had taken liberties with his daughter, the accused admitted that it was and asked his father-in-law to pray for him. C.M.A. held that the military judge properly admitted the testimony of the father-in-law regarding the accused's statement to him since it did not appear to have been made as a formal act of religion.

D. JAG opinion

Reflecting an apparent concern for a lack of understanding about this privilege in the field, a 1979 opinion of the Judge Advocate General of the Navy has addressed the issue of when the privilege attaches to a communication. The chaplain must consider the totality of the circumstances surrounding the communication before a decision can be made as to whether or not it falls within the privilege. "[T]he chaplain must determine the purpose for which the consultation took place, the capacity in which the chaplain was consulted, whether the disclosure was of the character likely to be regarded by the servicemember as confidential, and whether the consultation is rooted in essentially religious, spiritual, or moral considerations." JAG ltr JAG:13.1:RLS:cmt Ser 13/6071 of 10 Oct 1979. This opinion contains the following example:

> If the unauthorized absentee approaches a naval chaplain because he is a superior naval officer in order to terminate an unauthorized absence, the relationship would appear to be secular, involving no confidential communications, and would require the chaplain to exercise authority no differently than would any other naval officer. This responsibility, depending upon current regulations, orders and directives, may include taking the member into custody and effecting the member's delivery to cognizant military authorities. On the other hand, if the chaplain is consulted by the absentee for the purposes, and in the relationship, discussed herein as giving rise to a clergyman-penitent privilege, any resultant confidential communication

> made by the member would be privileged from disclosure. In that connection, if the fact of the member's status as an unauthorized absentee is unknown to the authorities and is made known to the chaplain as a privileged confidential communication, the fact of such status may not be revealed absent the member's waiver of the privilege.

Id. at 7. *See also United States v. Moreno, supra.*

0605 GOVERNMENT INFORMATION

A. Classified information

1. Mil.R.Evid. 505 is not a novel approach to the protection of information which, if disclosed, "would be detrimental to the national security." It merely embodies principles that have been previously judicially exercised but not formally memorialized. *See generally United States v. Reynolds*, 345 U.S. 1 (1953).

2. In order for a litigant to have a proper basis from which to challenge the propriety of the privilege, certain preconditions must exist:

a. The material sought must be relevant and material to an element of the offense or a legally cognizable defense; and

b. the material must be admissible as evidence in its own right. Mil.R.Evid. 505(f).

3. The privilege itself may only be invoked formally "by the head of the department which has control over that matter." *United States v. Reynolds, supra*; Mil.R.Evid. 505(c). Rule 505(c) permits an agent for this official, such as the trial counsel, to articulate the claim in court [This differs from many civilian courts, where the claimant must first show that the agency head wishes to invoke the privilege. *See, e.g., Coastal Corp. v. Duncan*, 86 F.R.D. 514 (D.Del. 1980)]. As a predicate to a proper governmental claim, the government must show, pursuant to Mil.R.Evid. 505(c), that:

a. The information was properly classified; and

b. the disclosure would be harmful to national security.

4. The philosophy which underpins the qualified ability of the government to withhold information is the notion that it would be morally

reprehensible to have the sovereign bring an action in the first instance and thereafter block the accused's right to acquire evidence from which he or she may viably defend. The military judge is tasked with the responsibility of balancing competing interests, to wit: the government's need to protect the defense of the nation against society's right to have a full consideration of all those facets pertinent to the judicial truth-seeking process.

5. Mil.R.Evid. 505(i) provides the military judge with a full array of procedural powers by which the merits of the government and defense positions can be intelligently evaluated.

a. Procedure

(1) When it appears to any party that the court-martial may deal with an issue related to classified information, an initial article 39(a) session will be held in order to establish the ground rules by which the problem will be resolved. Mil.R.Evid. 505(e).

(2) In accordance with Mil.R.Evid. 505(i)(3), if the government demonstrates preliminarily by affidavit that the national security interests of the country could be compromised in the degree attendant to the classification level of the information, the military judge shall conduct an article 39(a) session.

(a) The above session is characterized as being "in camera."

(b) The damage shown above must be proven by a level of proof expressed as follows: "[t]he information reasonably could be expected to cause damage to the national security . . . ." Mil.R.Evid. 505(i)(3).

(3) During an in camera proceeding, the government may submit matters to the military judge solely for a determination that the defense is entitled to limited access to the information being detailed to the military judge. Mil.R.Evid. 505(i)(4)(A). It may be supplied with additional material couched with conditions. Mil.R.Evid. 505(g)(1).

b. The demand for the information in question is made by way of a motion for appropriate relief. Mil.R.Evid. 505(d).

(1) The burden of proof on the matter seems to rest with the party (the government) claiming that the privileged information should not be disclosed. *See Mead Data Cent. Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242 (D.C. Cir. 1977).

(2) The logic supporting the allocation of the burden is reasonable since all information relating to the motion is within the control of the government.

6. The convening authority may entertain requests for information prior to the referral of charges. Further litigation on the request may be precluded if action that is taken by this official satisfies the needs of the defense. Mil.R.Evid. 505(d).

B. Nonclassified information

1. Mil.R.Evid. 506 is structured in a manner analogous to Mil.R. Evid. 505. The respective parties' actions and their legal bases are virtually identical.

2. Information that is required to be disclosed by acts of Congress is not within the contemplation of the rule. Thus, the following legislative enactments will have substantial impact on questions of release:

a. Freedom of Information Act, 5 U.S.C. § 552 (1982); and

b. Jencks Act, 18 U.S.C. § 3500 (1982).

3. The theory which supports the privilege is that governmental employees should be encouraged to be candid in their official communications. This, it is believed, is fostered by cloaking their conduct by a privilege. Thus, adverse effects which might impact on governmental operations are limited. *See United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090 (1974).

4. Although the privilege is claimed generally by high level officials, one exception to the rule is found within Mil.R.Evid. 506(c). An Inspector General report may be protected by the person who ordered the investigation or a superior to that official.

5. The rule presents one significant problem. It does not specifically describe the nature of information exempt from disclosure. It merely indicates that the privilege attaches to governmental information which "would be detrimental to the public interest." Mil.R.Evid. 506(a). *See also* Mil.R.Evid. 506(i)(3), where the same proposition is stated as being information which "reasonably could be expected to cause identifiable damage to the public interest."

6. The analysis to Mil.R.Evid. 506(i)(4)(B) explicitly explains that the burden of proof of nondisclosure is on the party seeking to withhold information.

0606 IDENTITY OF INFORMANT PRIVILEGE (Key Number 1130)

A. Introduction. Mil.R.Evid. 507 establishes the nature and extent of the government informant privilege. Generally, it provides that the privilege must give way if disclosure of the informant's identity is necessary on the issue of guilt or innocence or if disclosure is necessary in litigating the validity of a search or seizure. Unless otherwise privileged under the Military Rules of Evidence, the communications of an informant are not privileged except to the extent necessary to prevent the disclosure of the informant's identity.

B. The privilege. Although Mil.R.Evid. 507 was only enacted in 1980 in the military, the concept of an informant privilege existed prior to the adoption of the Military Rules of Evidence. *See, e.g., United States v. Hawkins*, 6 C.M.A. 135, 19 C.M.R. 261 (1955) (wherein the court concluded that disclosure of the informant's identity was required because it would tend to "shed light" on the merits of the case); *United States v. Ness*, 13 C.M.A. 18, 32 C.M.R. 18 (1962) (wherein the court concluded that the accused was not entitled to disclosure of the informant's identity to help establish an entrapment defense because no evidence compellingly established such a defense). The United States Supreme Court commented upon the privilege in 1957, when it stated that the identity of the informant must be disclosed when it "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Roviaro v. United States*, 353 U.S. 53, 60 (1957).

1. The term "informant" refers both to the good citizen reporter and to the traditional "confidential informant." In order for the privilege to be applicable, the information must be communicated "to a person whose official duties include the discovery, investigation or prosecution of crime." Mil.R. Evid. 507(a). Accordingly, an informant's identity would not be privileged when the communication was made to officials not involved in law enforcement.

2. The privilege may be claimed by an "appropriate representative" of the United States, regardless of whether the information was received by Federal, state, or state subdivision officers. Additionally, the privilege may be claimed by state or state subdivision officers if the information was furnished to an officer thereof, but the privilege will not be allowed if the prosecution objects.

C. Exceptions

1. The identity of an informant is not privileged if this identity has already been disclosed to the opposing party. Mil.R.Evid. 507(c)(1).

2. The identity of an informant is not privileged if the military judge determines that disclosure "is necessary to the accused's defense on the issue of guilt or innocence." Mil.R.Evid. 507(c)(2). This rule provides no guidance as to when disclosure will be required. Each case will be decided on an individual basis.

a. In *United States v. Silva*, 580 F.2d 144 (5th Cir. 1978), the court concluded that the trial judge should have ordered disclosure of the informant's identity for the following reasons:

(1) The informant allegedly introduced an undercover agent to the defendant, and the latter claimed mistaken identity as a defense;

(2) the informant was the only witness in a position to support or contradict testimony of the lone agent; and

(3) the informant allegedly had a revenge motive.

b. In *United States v. Marshall*, 532 F.2d 1279 (9th Cir. 1976), the court concluded that the request for disclosure of the identity of the informant was properly denied by the trial judge because the defendant merely speculated that disclosure would be beneficial to his defense. The defendant had failed to show the need for disclosure. *See also United States v. Watkins*, 32 M.J. 1054 (A.C.M.R. 1991).

c. In *United States v. Skeens*, 449 F.2d 1066 (D.C. Cir. 1971), the informant contacted the police three weeks after the crime had been committed and advised them of the location of a shotgun. He further advised the police of facts indicating the existence of a conspiracy. The court concluded that disclosure of the informant's identity was not required because nothing in the record established that the informant was a participant, an eyewitness, or a person who was otherwise in a position to give direct testimony concerning the crime.

3. The identity of an informant is not privileged if the military judge, in a motion considering the legality of a search or seizure under Mil.R.Evid. 311, determines that disclosure is required by the Constitution as applied to the armed forces. Mil.R.Evid. 507(c)(3). *See also McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056 (1967) and *Franks v. Delaware*, 438 U.S. 154 (1978).

D. Procedure. To raise the issue of the existence of the privilege, the defense counsel should make a motion requesting disclosure of the informant's identity. The rule is silent as to whether an in camera proceeding can be employed in making this determination, but there is some military case law

suggesting the appropriateness of such a hearing. *See United States v. Bennett*, 3 M.J. 903, 906 n.2 (A.C.M.R. 1977); *United States v. Miller*, 43 C.M.R. 671, 674 (A.C.M.R. 1971). If the military judge rules that disclosure is required, and the prosecution elects not to disclose, the matter is referred to the convening authority. The convening authority could then order disclosure, terminate the proceedings, or take other appropriate action. If disclosure is not made after a reasonable period of time, the military judge may sua sponte, or upon motion, and after a hearing if requested, dismiss the charges or specifications which involve the informant.

CHAPTER VII

WITNESSES

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CHAPTER VII

WITNESSES

0701 INTRODUCTION

Witnesses! The very word conjures up images of stirring courtroom dramatics. There are the film classics such as Charles Laughton's brilliant barrister conducting examination of Tyrone Power and Marlene Dietrich in "Witness for the Prosecution" or Jose Ferrer's incisive cross-examination of Humphrey Bogart in "The Caine Mutiny." There are the television courtroom dramas with their unrealistic pat one-hour solutions, perhaps best depicted by "Perry Mason" and his near-perfect record. There are the epic novels such as Leon Uris' "QB VII."

Yet, as counsel soon discover, the trial of an actual case is not so simple as it may appear in fiction. Witnesses are not as well scripted and predictable to deal with. As in fiction, though, a good part of the trial advocate's work is spent working with witnesses. They are the primary source of evidence at most courts-martial. Accordingly, a working relationship with the rules of evidence applicable to witnesses is important to the successful trial advocate.

0702 SCOPE OF THE CHAPTER

This chapter will examine those rules in Sections VI and VII of the Military Rules of Evidence [hereinafter Mil.R.Evid.], the "witnesses" sections, which deal with the substantive and procedural aspects of using witnesses at courts-martial. It will also examine provisions of the *Manual for Courts-Martial*, United States, 1984 [hereinafter MCM, 1984], that relate to witnesses and their testimony at trial. This chapter will <u>not</u> consider trial tactics and the strategies for using witnesses to advantage; nor will it deal with how to actually interrogate a witness. These topics are best considered by specialized commercial treatises and various trial advocacy publications of the Naval Justice School.

The chapter is divided into four parts, each reflecting a conceptual subdivision of the substantive and procedural rules of Sections VI and VII, Mil.R.Evid. Part one discusses the concept of competency and considers Mil.R.Evid. 601-606. The area of witness credibility under Mil.R.Evid. 607-610 and 613 is considered in part two. Section VII, Mil.R.Evid. rules on opinion testimony and expert witnesses testimony, is discussed in part three. Part four discusses the miscellaneous procedural rules such as Mil.R.Evid. 611, 612, 614 and 615, and related MCM, 1984 provisions. It also contains a general discussion of the stages of a court-martial and the technical procedures by which witness examination is conducted.

PART ONE: COMPETENCY

0703 INTRODUCTION (Key Numbers 1123, 1125)

The admissibility of any evidence depends upon its possessing three characteristics: authenticity, relevancy, and competency. *See* Mil.R.Evid., Sections IV and IX. This is commonly referred to as the "admissibility formula" (AE=ARC). Evidence submitted to the court through the testimony of witnesses must comply with these characteristics. The competency and authenticity aspects of testimonial evidence will be discussed in this part of the chapter. Relevancy has been addressed in chapter V, *supra*.

Section VI of the Military Rules of Evidence sets forth the various rules dealing with testimonial evidence. Rules 601-606 specifically address the third characteristic of the admissibility formula; that is, competency. Before proceeding to examine the content and impact of Mil.R.Evid. 601-606 on the admissibility of testimony of witnesses, some terminology and the procedures dealing with competency issues need be discussed.

A. Definitions. Witness competency is "the presence of those characteristics, or the absence of those disabilities, which render a witness legally fit and qualified to give testimony in a court of justice." *Black's Law Dictionary* 257 (rev. 5th ed. 1979). It includes the general qualities that every witness must possess in order to be allowed to testify. In this regard, "general competency" and "specific competency" should be distinguished.

1. General competency refers to whether a witness possesses certain qualities that would preclude the witness from taking the stand and presenting any evidence at a trial. If a witness lacks general competency, he is not legally qualified to testify at the court-martial on any issue. *See* Mil.R.Evid. 601.

2. Specific competency refers to a witness' legal ability to testify on a specific issue. It is the physical opportunity of the witness to observe, hear, or otherwise experience the particular facts to which he testifies. A witness may possess general competency to testify as a witness, yet lack specific competency to testify on a certain issue, either through lack of personal knowledge of facts relating to the issue (*see* Mil.R.Evid. 602) or because of the application of a privilege under Section V, Mil.R.Evid. (discussed in chapter VI, *supra*).

B. Distinguish competency and credibility

Competency differs from credibility. The former is a question that arises before considering the evidence given by the witness; the latter concerns the degree

of credit to be given to his testimony. The former denotes the personal qualification of the witness; the latter his veracity. A witness may be competent, and yet give incredible testimony; he may be incompetent, and yet his evidence, if received, may be perfectly credible. Competency is for the military judge to decide; credibility for the trier of fact, be it members or judge. The courts may confuse the distinction at times, however, by defining competency as the minimum standard of credibility necessary to permit any reasonable man to put any credence in a witness' testimony. Therefore, competency includes a minimal standard of credibility. *See, e.g., United States v. Banks*, 520 F.2d 627 (7th Cir. 1975).

Counsel should be careful in their use of terminology. Credibility of witnesses is considered in part two of this chapter.

C. Raising the competency issue

The competency of a witness to take the stand and testify is in issue as soon as the witness is called to testify. Witnesses who lack general competency should not be permitted to testify at all. Accordingly, counsel should raise an objection after the witness has been called and before he is sworn. In a members case, the objection, any resultant *voir dire* of the witness, and any argument by counsel on the objection should be heard at an article 39(a) session.

The determination of general competency of a witness is a preliminary matter within the military judge's discretion. *See* Mil.R.Evid. 104(a) and the discussion of this rule in chapter III, *supra*. Specific competency is also a matter for the military judge's determination, but special aspects of raising this issue will be reserved for discussion in section III, *infra*.

0704 GENERAL COMPETENCY. Mil.R.Evid. 601. (Key Number 1125)

A. Pre-Mil.R.Evid. rules on competency

In order for the reader to appreciate fully the present rule on general witness competency, and the significant change that it has made to military law, it is necessary to consider the military rules on competency as they existed prior to the adoption of the Mil.R.Evid. Consideration of the old rules will also aid counsel in determining the applicability of pre-Mil.R.Evid. case law to the present rules.

1. MCM, 1969 (Rev.), para. 148, provided that a competent witness was one who:

a. Had sufficient mental capacity to receive, remember and relate with reasonable accuracy the facts in question;

b. understood the difference between truth and falsehood; and

c. understood the moral importance of telling the truth.

2. There existed a certain presumption of competency for witnesses. MCM, 1969 (Rev.), para. 148. The presumption determined who had the burden of proving or disproving the general competency of the witness.

a. Witness 14 years or older:

(1) If the witness was 14 years of age or older, there was a presumption of competency;

(2) if the opponent objected to a witness testifying who was 14 or over, he had to come forward with evidence showing that the witness lacked mental or moral competency; and

(3) the opponent had to overcome the presumption by clear and convincing evidence.

b. Witness under 14:

(1) If the witness was less than 14 years of age, no presumption existed;

(2) the side calling the child witness had to show the child's competency by such preliminary questioning of the child as the military judge deemed necessary or from the appearance of the child and the testimony that the child gave in the case; and

(3) there was no precise age that determined testimonial competency. *United States v. Slozes*, 1 C.M.A. 47, 1 C.M.R. 47 (1951). *See also United States v. Hunter*, 2 C.M.A. 37, 6 C.M.R. 37 (1952); *United States v. Nelson*, 39 C.M.R. 947 (A.B.R. 1968); *United States v. Storms*, 4 M.J. 624 (A.F.C.M.R. 1977).

B. General rule

Rule 601. General Rule of Competency

> Every person is competent to be a witness except as otherwise provided in these rules.

As noted by the Fed.R.Evid. Advisory Committee which drafted the Federal rule from which Mil.R.Evid. 601 is taken verbatim, this rule represents a

"general ground-clearing." Fed.R.Evid. 601 Advisory Committee note. This rule eliminates the categorized disabilities which existed at common law and under prior military law as noted previously. *See, e.g., United States v. Allen*, 13 M.J. 597, 600 (A.F.C.M.R. 1982), *petition denied*, 14 M.J. 174 (C.M.A. 1983) (several very young victims of sexual abuse held competent to testify despite their ages; court finds Mil.R.Evid. 601 "actually redefines the term 'competent witness' so as to include person" not acting as military judge or court member). At various times, these disabilities were: mental infirmities, infamy, extreme youth, senility, bias or interest in the proceedings, spousal incapacity, co-accused or conspiratorial affiliations, religious beliefs, or official connections with the tribunal.

The drafters' analysis to Mil.R.Evid. 601 clearly indicates the intent of the rule and the significance of the rule's reference to the exceptions "otherwise provided in these rules."

> In declaring that subject to any other rule, all persons are competent to be witnesses, Rule 601 supersedes para. 148 of the present Manual which requires, among other factors, that an individual know the difference between truth and falsehood and understand the moral importance of telling the truth in order to testify.
>
> Under Rule 601 such matters will go only to the weight of the testimony and not to its competency. The Rule's reference to other rules includes Rules 603 (Oath or Affirmation), 605 (Competency of Military Judge as Witness), 606 (Competency of Court Member as Witness), and the rules of privilege.

Mil.R.Evid. 601 drafters' analysis, MCM, 1984, app. 22-41.

The Section VI, Mil.R.Evid. exceptions will be discussed in subsequent sections of this part; chapter VI of this study guide discusses privileges.

The clear objective of the rule is to provide court members with the greatest possible amount of arguably reliable evidence by reviewing the previous barriers to testimony by competent witnesses. The previous issue of general competency is now significantly one of credibility. Two cases under the Federal rule indicate a trend to follow the literal language of the rule and to allow all witnesses to testify. In *United States v. McRary*, 616 F.2d 181 (5th Cir. 1980), the accused was charged with kidnapping. Defense counsel attempted to call the accused's wife as a witness. Even though she had previously been found mentally incompetent to stand trial with respect to her participation in the charged criminal venture, the court said, in the process of reversing the conviction on other grounds, that mental incompetence

rarely, if ever, could be a ground for disqualification. *See also United States v. Lightly*, 677 F.2d 1027 (4th Cir. 1982). In *United States v. Harris*, 542 F.2d 1283 (7th Cir. 1976), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2306 (1982), the defendants were convicted of conspiracy. Their case was part of an intensive government effort to break up a drug ring. One government witness testified that he had used heroin for years, that two days before the trial he had a "fix," and that the day before trial he had received Demerol and Phenergon. Apparently, on several occasions during his testimony, the witness was observed to be bouncing or nodding. A defense expert testified that a person who received the dosages that the witness had received would, at the time he was testifying, experience some clouding of consciousness and difficulty in pinpointing accurate thoughts. The court emphasized that the witness' condition was a matter of credibility for evaluation by the jury.

C. Limitations

Are there now any limitations at all in the area of general competency? May anyone at all testify? It seems clear from the plain language of Mil.R.Evid. 601 that this is precisely what the drafters intended. It would appear, therefore, that the only limitation on any witness' ability to testify is found in Mil.R.Evid. 602 and 603, discussed *infra*. In general, those rules require that every witness must testify from personal knowledge and must do so under oath "administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to [testify truthfully]." Mil.R.Evid. 603. No other requirement of competency exists.

0705 SPECIFIC COMPETENCY. Mil.R.Evid. 602. (Key Number 1125)

A. General

As noted in the preliminaries to this part, specific competency refers to a witness' physical opportunity to observe, hear, or otherwise experience the particular facts to which he testifies; essentially, whether the witness has personal knowledge of the matter about which he testifies. Mil.R.Evid. 602 is the Mil.R.Evid. dealing with specific competency and is similar in content to its predecessor, MCM, 1969 (Rev.), para. 138d.

Rule 602. Lack of Personal Knowledge.

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to

> prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Mil.R.Evid. 703, relating to opinion testimony by expert witnesses.

B. Rationale

Restated, Mil.R.Evid. 602 provides that a witness may testify only about matters of which he has firsthand knowledge. The testimony must be based upon events perceived by the witness through one of the physical senses. The rule -- an extension of the law's preference that decisions be based on the best evidence available -- is grounded in the realization that the possibility of distortion increases with transfers of testimony, and that consequently the most reliable testimony is that which is obtained from the witness who himself perceived the event.

C. Incredible testimony

Mil.R.Evid. 602 provides that "a witness may not testify . . . unless evidence is introduced sufficient to support a finding" of personal knowledge. (Emphasis added.) The "sufficient to support a finding" formula is also employed in Mil.R.Evid. 104(b) and 901. As in these other rules, the effect of the language is to compel admission if the proponent of the evidence makes a prima facie showing of the pertinent qualifying characteristic.

Nevertheless, the military judge retains the power to reject the evidence if it could not reasonably be believed (i.e., if, as a matter of law, no trier of fact could find that the witness actually perceived the matter about which he is testifying). *See, e.g., United States v. Borelli*, 336 F.2d 376, 392 (2d Cir. 1964), *cert. denied sub nom., Mogavero v. United States*, 379 U.S. 960 (1965) (witness for prosecution in conspiracy to violate narcotic laws action testified that narcotics "must have been" in certain suitcases). The appellate court held that "objection should have been sustained in the absence of a showing that [witness] was giving 'an impression derived from the exercise of his own senses, not from the reports of others,' or from speculation based on the high price paid." *See* 2 *Wigmore Evidence* § 657(a) (1940 ed.); *see also United States v. Fernandez*, 480 F.2d 726, 739 (2d Cir. 1973) (error for trial judge to have permitted witness to attach names to surveillance photographs being shown to jurors when agent had no personal knowledge and had not been qualified as expert to compare surveillance photographs with known photographs of defendant). Professor Morgan explains the test as one of "impossibility":

> The court may not refuse to permit a witness to testify that he perceived a material matter merely because the court believes the witness to be obviously mistaken or obviously falsifying. It is only when no reasonable trier of fact could

> believe that the witness perceived what he claims to have perceived that the court may reject the testimony. Not improbability but impossibility is the test. Thus, the trial judge was affirmed in refusing to allow a plaintiff to testify that to his own knowledge, during an operation for amoebic ulcer a portion of his intestine above the rectum was removed. Obviously, he must have been giving the result of hearsay. In like manner whenever a witness testifies to matter that is contrary to undisputed physical facts, his testimony is to be disregarded. But where he swears that he has personal knowledge of a matter of which it is merely very unlikely that he was a percipient witness, his testimony will stand and may be credited by the trier, unless the opponent on cross-examination secures disclosure of facts demonstrating that his knowledge was second-hand or inferred knowledge.

J. Morgan, *Basic Problems of Evidence* 59-60 (1962).

According to J. Weinstein and M. Berger, *Weinstein's Evidence* 602-5 (1981):

> "Impossibility" is too strong a word. "Near impossibility" or "so improbable that no reasonable person could believe" better states the judge's role--to determine whether the witness has enough to add to warrant the time and possible confusion in hearing his testimony. In a criminal case where the proponent is the defense, the court should hesitate even more than in other instances in excluding testimony on Mil.R.Evid. 602 grounds.

As long as the judge determines that the jury could find that the witness perceived the event to which he is testifying, the testimony should be admitted with the fact-finder then determining what weight, if any, to give to the testimony. This is the case even though the witness is not positive about what he perceived, as long as he had an opportunity to observe and did obtain some impressions. Uncertainty or hesitation only affects the weight of the evidence. *See, e.g., Ross v. Firestone Tire and Rubber Co.*, 242 F.2d 914 (5th Cir. 1957).

In summary, there is a difference between improbable evidence, which the trial judge should admit, and completely unbelievable evidence which should be excluded.

D. Relationship to hearsay rules

Mil.R.Evid. 602 is subject to the hearsay rule. If a witness is testifying to what he heard, he may do so unless what he heard is excluded under the hearsay rules of Section VIII, Mil.R.Evid. For example, a witness who testifies, "I only know what LtCol A told me. She said. . . ," has personal knowledge of what he heard, but the testimony will not be admissible unless it qualifies under Section VIII of the Mil.R.Evid.

E. Establishing a foundation

1. The basis for the witness' personal knowledge is referred to as the "foundation." Mil.R.Evid. 602 provides that a witness may not testify unless a foundation has been established. Mil.R.Evid. 602 goes on to state that such a foundation may, but need not, be established through the witness himself.

2. It is to be expected that traditional military practice should continue under this rule, and counsel will be able to initiate testimony without qualifying the witness in any formal sense. Only if it becomes apparent during the witness' testimony that a factual foundation is absent must an inquiry be conducted. Of course, if opposing counsel has interviewed the witness prior to trial, and has a good faith belief that the witness has no personal knowledge to support all or part of his testimony, he may seek an article 39(a) session before the witness takes the stand in order to avoid having the court members hear testimony that does not satisfy the rule. Note, however, that the witness need not be certain to have personal knowledge. *M.B.A.F.B. Fed. Credit Union v. Cumis Ins. Soc'y*, 681 F.2d 930 (4th Cir. 1982).

3. The preferred method is for counsel to lay a foundation on direct examination by asking questions that show that the witness was within such distance of the occurrence he relates that he was able to see, hear, smell, touch, or taste the matters described.

a. Laying the foundation:

(1) The questioning should place the witness at the scene at the time of the event;

(2) indicate what other persons were present; and

(3) describe any other pertinent circumstances necessary to convince the court that this witness could make the observation.

b. This initial foundation laying is especially important when counsel consider that one of the most common forms of witness impeachment is to attack the foundation of their testimony, or to do nothing during witness examination and then use the lack of a sufficient foundation to argue lack of credibility.

4. Objections on the basis of a lack of personal knowledge should be made at the earliest possible time. Once a witness has given testimony, a motion to strike is the only available remedy. Such a motion is never a perfect remedy, and rarely is it as desirable as barring inadmissible evidence before it is offered.

5. The foundation may be established by extrinsic evidence. For example, individuals A and B were standing at a street corner facing each other when the accused, C, drove his car into another car killing that car's driver. At C's trial, A, who was facing the collision, could testify where he was, whom he was with, and what he saw and heard. B, who was facing away from the collision, would be able to testify to the sounds of the collision which he heard. B could not, however, necessarily relate the sounds, and hence his personal knowledge, to the accused's collision, but A would be able to fill the gap in the connection of A's personal knowledge.

6. Opposing counsel should always consider testing a witness' basis of knowledge when testifying about uncharged misconduct. Such an examination can prevent inadmissible and prejudicial evidence from reaching the fact-finders and preclude the need of relying on the imperfect remedy of striking inadmissible testimony. *United States v. Brooks*, 22 M.J. 44 (C.M.A. 1986).

F. Expert opinions

The final sentence of Mil.R.Evid. 602 concerns the provision's interaction with expert or opinion testimony under Mil.R.Evid. 703. This sentence was inserted to underscore the drafter's intent that the requirement of personal knowledge would not limit an expert's testimony. Expert witnesses will be permitted to offer their opinions, even though they may be based on information provided by others, and even though the information itself might not be independently admissible as evidence.

0706 OATH OR AFFIRMATION. Mil.R.Evid. 603, R.C.M. 807. (Key Number 1125)

Rule 603. Oath or Affirmation.

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or

> affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.

This rule is taken without change from Fed.R.Evid. 603 and represents no change from prior military practice. Although fairly self-explanatory, some comments are appropriate.

A. Rationale

Along with cross-examination, the requirement of an oath is designed to ensure that every witness gives accurate and honest testimony. It supplies the "authenticity" element of the admissibility formula for witnesses. Although some critics have suggested that the oath is not really a substantial deterrent to false testimony, common law courts have traditionally imposed the requirement on the ground that it is some guarantee that the truth will be told. *See, e.g.*, Note, *A Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century*, 75 Mich. L. Rev. 1681 (1977).

B. Oath or affirmation

The rule follows traditional military practice in allowing the use of either an oath or an affirmation. "The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special formula is required." Fed.R.Evid. 603 Advisory Committee note. Any process that is sufficient to awaken the witness' conscience is satisfactory. Mil.R.Evid. 602. The idea is to find some procedure that will establish the witness' willingness to tell the truth and the concomitant acceptance of responsibility for false statements.

1. Form of the Oath. *See* R.C.M. 807(b)(2).

2. Trial counsel leg work. As a procedural matter, before a witness actually appears in court to take an oath, trial counsel should determine whether an oath or affirmation is appropriate and whether the witness desires the reference to God contained in the oath form. This will avoid embarrassment and possible confusion among court members.

3. Judicial inquiry. In order to ensure that the witness' conscience is "awakened," it may be necessary for the military judge to voir dire the witness pursuant to Mil.R.Evid. 104. *See, e.g., United States v. Hardin*, 443 F.2d 735, 737 n.3 (D.C. Cir. 1970) (key witness was an 11-year-old boy; court noted that he understood the meaning of the oath he took to tell the truth. "[He] testified that he understood that he would be punished if he told a lie and that, in this case, he might go to jail.

It was also brought out that he attended Sunday School. . . ."); *United States v. Allen*, 13 M.J. 597 (A.F.C.M.R. 1982) (4-year-old witness' statement that "mommy puts hot sauce on my tongue if I lie" sufficient to establish she knew importance of telling the truth). Any such judicial inquiry, of course, should be conducted at an article 39(a) session in order to avoid any possibility of prejudicing the members. It was held to be proper for a three-year-old girl to testify about the accused's alleged sodomy against her after the trial counsel elicited from the girl her promise to tell the truth and her statement that she knew she would be spanked if she lied. *United States v. LeMere*, 16 M.J. 682 (A.C.M.R. 1983), *aff'd*, 22 M.J. 61 (C.M.A. 1986).

C. Moral qualifications

The question remains as to whether Mil.R.Evid. 603 operates as a rule of competency authorizing a military judge to reject testimony because he regards the witness as being inherently untruthful (having no conscience or not being capable of having any conscience awakened). The Advisory Committee, in its note to Fed.R.Evid. 601, rejected a standard of moral qualification as unenforceable and argued that the main function of such a standard would be to impress witnesses with their duty to tell the truth, a function that could be accomplished more directly when administering the oath or affirmation required by rule.

D. Refusal to take oath

A witness who refuses to promise to testify truthfully cannot testify. *See United States v. Fowler*, 605 F.2d 181 (5th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980), where the court affirmed the judge's refusal to allow a defendant to testify after he refused either to swear or affirm that he would tell the truth or submit to cross-examination. This would be an extremely rare event in a court-martial, absent a valid claim of privilege, due to the possible imposition of criminal penalties under Article 92, UCMJ, for military witnesses and Article 47, UCMJ, for all witnesses.

E. The recalled witness

If a witness is administered an oath or affirmation during a court-martial and is later recalled in the same court-martial, Mil.R.Evid. 603 does not require that the witness be resworn. It is sufficient if the military judge advises the witness, in a manner appropriate, to recall the significance of the oath or affirmation.

But, if a witness who was originally sworn at an article 39(a) session is recalled to testify on the merits before court members, it is appropriate to comply again with this rule. Thus, court members would not draw inferences from an apparent unequal treatment of the witnesses nor give the witness' testimony less weight because they did not hear an oath from the witness to be truthful.

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2. Taken without significant change from the Federal rule, Mil.R.Evid. 605(a) is related to Article 26(d), UCMJ, and continues prior military practice. As related in the drafters' analysis:

> Although Article 26(d) of the Uniform Code of Military Justice states in relevant part that "no person is eligible to act as a military judge if he is a witness for the prosecution . . . " and is silent on whether a witness for the defense is eligible to sit, the Committee believes that the specific reference in the Code was not intended to create a right and was the result only of an attempt to highlight the more grievous case. In any event, Rule 605, unlike Article 26(d), does not deal with the question of eligibility to sit as a military judge, but deals solely with the military judge's competency as a witness. The rule does not affect voir dire.

Mil.R.Evid. 605(a) drafters' analysis, MCM, 1984, app. 22-41.

3. Automatic application. The rule provides an "automatic" objection. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector. Thus, this is an exception to Mil.R.Evid. 103's general requirement of a timely and specific objection in order to preserve a claim.

B. Rationale

After noting that the likelihood of a judge testifying as a witness in a case over which he is presiding is slight, the Fed.R.Evid. Advisory Committee offers the following rationale for the categorical prohibition in the rule.

> The solution here presented is a broad rule of incompetency, rather than such alternatives as incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his

> seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality? The rule of general incompetency has substantial support. *See* Report of the Special Committee on the Propriety of Judges Appearing as Witnesses, 36 A.B.A.J. 630 (1950); cases collected in Annot., 157 A.L.R. 311.

Fed.R.Evid. 605 Advisory Committee note.

It could be argued that Mil.R.Evid. 605 is not needed, as general due process considerations should prohibit the trial judge from testifying, and thus aligning himself with one party or the other. But the rule avoids any constitutional problem and any need for constitutional decisionmaking.

C. Exceptions to the general prohibition

There are two situations which may arise in the court-martial process where the military judge is a witness or effectively a witness.

1. First, there is no incapacity with respect to a military judge testifying during subsequent proceedings which concern a trial over which he presided. This could occur with respect to limited rehearings ordered pursuant to *United States v. Dubay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967) or *United States v. Ray*, 20 C.M.A. 331, 43 C.M.R. 171 (1971).

2. Second, a military judge could effectively become a witness by taking judicial notice of facts under Mil.R.Evid. 201. Counsel would not be able to cross-examine the bench with respect to the facts noticed as if he were a witness, but the notice and opportunity to be heard provisions of Mil.R.Evid. 201 and its applicability to only well-known or reasonably unquestioned facts would appear to prevent the use of Mil.R.Evid. 201 to circumvent Mil.R.Evid. 605(a).

D. Docketing matters

Mil.R.Evid. 605(b) is not found within the Federal Rules of Evidence. It was added because of the unique nature of the military judiciary in which military judges often control their own dockets without clerical assistance. In view of the military's stringent speedy trial rules, it was necessary to preclude expressly any interpretation of Mil.R.Evid. 605 that would prohibit the military judge from placing on the record details relating to docketing in order to avoid prejudice to a party. *See also United States v. Burris*, 21 M.J. 140 (C.M.A. 1985) (chief trial judge of the circuit, who was originally scheduled to be the military judge in this case, should not have testified at the trial concerning defense allegations of delay).

0709 COMPETENCY OF COURT MEMBER AS WITNESS.

Mil.R.Evid. 606. (Key Numbers 882, 1125, 1275)

Rule 606. Competency of Court Members as Witnesses

(a) At the court-martial. A member of the court-martial may not testify as a witness before the other members in the trial of the case in which the member is sitting. If the member is called to testify, the opposing party, except in a special court-martial without a military judge, shall be afforded an opportunity to object out of the presence of the members.

(b) Inquiry into validity of findings or sentence. Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.

A. Rationale

The considerations that bear upon the permissibility of testimony by a military judge of the court-martial in which he is sitting have an obvious similarity to the problems evoked when the court member is called as a witness. By prohibiting all triers of fact from testifying, the drafters recognized that it is not possible for court members to sit as neutral arbiters and to evaluate, without bias, their own testimony. Other pragmatic considerations also support the rule. Counsel will

generally desire to talk with a witness just prior to direct examination. This could not be accomplished if the witness is also a court member. More importantly, how aggressive could opposing counsel be in cross-examining or impeaching a witness if that same witness must later sit in judgment of counsel's case?

When it comes to the rationale for the more limited exclusions under subsection (b) of the rules, the Fed.R.Evid. Advisory Committee offers the following reasoning:

> The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 785, 59 L.Ed. 1300 (1915). On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

Fed.R.Evid. 606(b) Advisory Committee vote.

B. Competency of members at trial

1. Mil.R.Evid. 606(a) is taken from the Fed.R.Evid. without substantive change. This rule deals only with the competency of court members as witnesses and does not affect other *Manual for Courts-Martial* provisions governing the eligibility of individuals to sit as members due to their potential status as witnesses. The rule does not affect voir dire.

2. Unlike Mil.R.Evid. 605(a), Mil.R.Evid. 606(a) is not one of strict incompetence, as its second sentence indicates that opposing counsel must object to such conduct in order to preserve any possible error for appeal.

3. Mil.R.Evid. 606(a) should rarely come into operation if counsel thoroughly prepare their cases and conduct a thorough voir dire of the prospective court members, inquiring into their personal knowledge of the case and their association with any potential witnesses.

4. Saltzburg, Schinasi, and Schlueter raise the problem of what happens when the member becomes a potential witness during the trial.

> While 606(a) mandates that counsel not plan on using court members during their case-in-chief, it does not address what should be done when it is determined during trial that a court member may have relevant testimony to offer. This event is more likely to occur in military than in federal practice, because many military communities are small and closely knit. The problem envisioned here could easily arise as follows: During trial the government learns that an unanticipated witness must be called. In response, defense counsel discovers that a court member is the sole source of valuable impeachment evidence concerning that witness. However, Rule 606(a) will not permit the court member to testify over a timely government objection. This result raises problems of constitutional magnitude, as the accused's ability to present his defense is severely limited.
>
> In this situation, it is doubtful that the trial judge could allow the court member to testify for the very reasons that give rise to Rule 606(a). Hence, trial counsel will insist upon a mistrial as the only appropriate remedy. It is unlikely that the judge can save the case by excusing the testifying court member, even if sufficient members are left to constitute a quorum. Government counsel still would feel that any attempt to impeach the court member or to vigorously cross-examine him would prejudice his case in the remaining members' eyes.

Military Rules of Evidence Manual, supra, at 505.

C. Inquiry into validity of findings or sentence

1. The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. The authorities are virtually in complete accord in excluding evidence of courtroom deliberations. W. Fryer, Note on Disqualification of Witnesses, *Selected Writings on Evidence and Trial* 345, 347 (Fryer ed. 1957); 8 Wigmore Evidence § 2349 (McNaughton Rev. 1961).

2. Prohibited matters. Subdivision (b) initially prohibits a member from testifying about his or any other member's: (1) actual deliberations, (2)

impressions, (3) emotional feelings, or (4) mental processes used to resolve an issue at bar. *See United States v. Boland*, 22 M.J. 886 (A.C.M.R. 1986) (military judge should not have ordered post-trial voir dire of members because of their alleged failure to follow sentence instruction). Distinguish *United States v. Washington*, 23 M.J. 679 (A.C.M.R. 1986) from *Boland*, where the guidance of R.C.M. 1102 and *United States v. Brickey*, 16 M.J. 258 (C.M.A. 1983) was relied upon by the military judge in convening a "post-trial session" to dispose of a claim of error. *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989) follows. The rule also states that, if the court members cannot testify, then their affidavits or similar documentary statements will not be admissible. *See United States v. Higdon*, 2 M.J. 445 (A.C.M.R. 1975), where Fed.R.Evid. 606(b) was used to reject a court member's affidavit alleging improper balloting techniques. *See* Mil.R.Evid. 509 for the related privilege as to court's deliberations.

3. Permitted inquiry. Mil.R.Evid. 606(b) allows court members to testify if the possibility exists of: (1) extra-record prejudicial information being brought to their attention, (2) outside influence being exerted upon them, or (3) command control being used to guide the proceedings' outcome. This aspect of subdivision (b) is virtually identical with its Federal counterpart, except that the drafters added a specific provision addressing command influence. The addition is required by the need to keep proceedings free from any taint of unlawful command influence and further implements Article 37(a) of the Uniform Code of Military Justice. Use of superior rank or grade by one member of a court to sway other members would constitute unlawful command influence for purposes of this rule. *United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985). Mil.R.Evid. 606 does not itself prevent otherwise lawful polling of members of the court [*United States v. Hendon*, 6 M.J. 171 (C.M.A. 1979)], and does not prohibit attempted lawful clarification of an ambiguous or inconsistent verdict. The following military cases indicate the permissible application of the rule.

a. In *United States v. Bishop*, 11 M.J. 7 (C.M.A. 1981), the Court of Military Appeals relied specifically upon Mil.R.Evid. 606(b) in discussing when post-trial affidavits should be considered in determining whether the court members were improperly affected by "extraneous prejudicial information." In this case, the initial defense affidavit contended that certain court members had deliberately viewed the crime scene in order to determine which witnesses were testifying truthfully. In response, the government submitted additional affidavits stating that the members in question had not deliberately viewed the area, but were familiar with it "because their homes were nearby and they passed through the neighborhood." In affirming conviction, the court found that "a fair reading of the affidavits before us does not show that the personal familiarity of the members had any effect whatsoever on their deliberations or decision in this case." *Id.* at 10. *See also United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983); *United States v. Johnson*, 22 M.J. 327 (C.M.A. 1987); *United States v. Ezell*, 24 M.J. 690 (A.C.M.R.

1987); *United States v. Hargrove*, 25 M.J. 68 (C.M.A. 1987); *United States v. Stone*, 26 M.J. 401 (C.M.A. 1988).

b. *See also United States v. Martinez*, 17 M.J. 916 (N.M.C.M.R. 1984) (the scope of the permitted inquiry into the possibility that superior rank improperly influenced court-martial deliberations is strictly limited to a member's testimony as to objective facts bearing upon the issue, and testimony as to a member's subjective thoughts, impressions, motivations or emotions is prohibited); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984) (in view of extrinsic evidence of misconduct during deliberations and receipt of unsigned typewritten letter from member indicating that other members had been subjected to undue pressure from president to reach guilty verdict, military judge should have held post-trial article 39(a) session to investigate allegations).

D. Summary

The balance between the prohibition rule of subsection (a) and the permitted inquiry rule of subsection (b) is informatively summed up by Saltzburg, Schinasi, and Schlueter.

> By allowing court members to testify under some circumstances, and not others, subdivision (b) represents the military drafters' adoption of a congressional compromise. The balance is struck between the necessity for accurately resolving criminal trials in accordance with rules of law on the one hand, and the desirability of promoting finality in litigation and of protecting members from harassment and second-guessing on the other hand. The result permits court members to testify with respect to objective manifestations of impropriety--*e.g.*, that inadmissible evidence was placed in their deliberation room, *see United States v. Pinto*, 486 F. Supp. 578 (E.D. Pa. 1980)--but prohibits their testimony if the alleged transgression is subjective in nature--*e.g.*, allegations that the court members ignored the trial judge's instructions and convicted the accused because he failed to take the stand in his own defense, *see United States v. Edwards*, 486 F. Supp. 673 (S.D.N.Y.), *aff'd*, 631 F.2d 1049 (2d Cir. 1980). Recent federal litigation demonstrates that 606(b) will prevent counsel from examining court members to determine whether they followed the bench's instructions, violated their juror oaths, or were emotionally influenced by some event at trial. *See United States v. Greer*, 620 F.2d 1382 (10th Cir. 1980). *See also* Weinstein and

Bergen, *Weinstein's Evidence*, 606-631 to 606-634 (1978), for other examples of subjective and objective criteria.

Military Rules of Evidence Manual, supra, at 506.

0710 FINAL COMMENTS

Relevancy, as discussed in chapter V, *supra*, is the factor of greatest importance to determining the admissibility of a witness' testimony in the usual court-martial. However, the question of whether a witness is competent, both generally and specifically, remains a vital consideration in determining the admissibility of the witness' testimony. The Military Rules of Evidence dealing with witness competency are simply stated, perhaps deceptively so, as we have discussed them in this part of the chapter. Yet counsel should never be lulled into forgetting their importance. Counsel must also remember that many of the common law competency considerations are now treated as questions of witness credibility. Credibility is discussed in the next part of this chapter.

PART TWO: CREDIBILITY OF WITNESSES

0711 INTRODUCTION (Key Numbers 1141 1150)

The concepts of competency and authenticity as they apply to witnesses were discussed in part one of this chapter, and the concept of relevancy was considered in chapter V, *supra*. Thus, the admissibility formula (AE=ARC) has been discussed. It will now be assumed that a witness is about to testify. Now, the question for counsel is whether the military judge or court members will believe the witness' testimony. This aspect of witness believability, or credibility, is probably the most frequent question to be resolved at the trial level, although the reported cases may seem to indicate otherwise. To put it simply, the outcome of a trial very often depends solely upon the fact-finder's evaluation of the credibility of the witnesses testifying for either side.

A. Credibility

Credibility may be defined as a witness' "worthiness of belief." Determining a witness' credibility is a subjective judgment on the part of the military judge or court members and any number of factors may influence the determination.

Although the credibility of a witness is subject to an ad hoc determination, there are well-recognized rules to be applied by counsel in presenting evidence on witness credibility to a court-martial. This part of the chapter will examine these rules, but first it is helpful to consider the general concepts of how credibility is placed in issue and the three stages into which the credibility discussion may be broken.

B. Placing credibility in issue

The credibility of a witness, whether an ordinary witness or the accused, is immediately in issue once he is sworn and testifies. *See* Mil.R.Evid. 611(b) and 608(a). A witness' credibility, including that of the accused, is always a proper subject of inquiry on cross-examination. *See* Mil.R.Evid. 611(b); *Alford v. United States*, 282 U.S. 687 (1931). There may be limits placed on an examination into a witness' credibility, however. *See, e.g.*, Mil.R.Evid. 608(b), which provides that "the giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility."

C. Stages in credibility determination

Three basic stages may be examined when discussing the credibility of competent witnesses. Each of these stages will be examined in a separate section, *infra*.

1. First, bolstering a witness' credibility before it has been attacked is normally impermissible. Mil.R.Evid. 608(a)(2). In some instances, however, the party calling a witness will be permitted to present evidence to enhance a witness' credibility before the opponent attacked it or even before the opponent had an opportunity to attack. *See, e.g.*, Mil.R.Evid. 321(a)(1) (prior eyewitness identification). In *United States v. Maniego*, 710 F.2d 24 (2d Cir. 1983), it was held that the prosecutor could enhance the credibility of his witnesses, even absent an attack on their credibility, during the presentation of evidence since the defense in their opening statement opined that the prosecution witnesses were all liars. In *United States v. Henderson*, 717 F.2d 135 (4th Cir. 1983), *cert. denied*, 465 U.S. 1001, 104 S.Ct. 1006 (1984), the Court of Appeals held that it was permissible to elicit on direct examination of a witness that he was promised a plea bargain if he testified truthfully and that such testimony was not impermissible bolstering because the government was not implying or admitting that they had specialized knowledge of the witness' veracity. *But see United States v. Brown*, 720 F.2d 1059 (9th Cir. 1983), where, in addition to testifying that he would receive a plea bargain if he testified truthfully, the witness further testified that he would submit to a polygraph as part of the deal. The Court of Appeals indicated that it disliked the practice of reinforcing the credibility of a witness (bolstering) and held that the government may not strengthen its "courtroom hand" by communicating to a jury that it has ways and means by which it can know its case is true.

2. Second, a witness may be impeached. Impeachment is the generic term for the process of attempting to diminish a witness' credibility in the eyes of the trier of fact. The process involves adducing proof that a witness is unworthy of belief. When a witness is impeached, the witness is not removed from the witness stand nor is counsel allowed to move to strike the witness' testimony on grounds that the witness has been impeached (although novice counsel may try this). The result of impeachment is that the trier of fact may consider the impeachment when weighing the credibility of the witness. Counsel may argue the effect of impeachment in closing argument. Impeachment can be divided into two general classes, intrinsic impeachment and extrinsic impeachment, although there is no difference in their uses.

a. Intrinsic impeachment is impeachment demonstrated during the testimony of the witness being impeached, whether by contradictory or self-effacing answers or otherwise in reply to proper questioning.

b. Extrinsic impeachment involves calling a witness other than the witness being impeached or otherwise presenting evidence to diminish the prior witness' credibility.

3. Third, a witness may be rehabilitated. During this stage, a party seeks to increase the witness' credibility in the eyes of the trier of fact after the other party has attempted impeachment.

D. Limited purpose

Military practice prior to the Mil.R.Evid. provided that evidence introduced to impeach a witness could not be considered as substantive evidence unless otherwise admissible. *See* MCM, 1969 (Rev.), para. 153a. The Mil.R.Evid. do not contain a similar broad restriction, but Federal practice and the language of the rules themselves indicate that evidence presented on the credibility issue must be considered upon request by counsel for the limited purpose for which it is offered, with an accompanying limiting instruction under Mil.R.Evid. 105. *See, e.g.*, Mil.R.Evid. 608(b) ("for the purpose of attacking or supporting the credibility of the witness"); 609(a) ("for the purpose of attacking the credibility of a witness"); and 610 ("for the purpose of showing that . . . the credibility of the witness is impaired or enhanced").

It is possible, however, for evidence to be used not only for impeachment, but also as substantive evidence. The most common situation deals with inconsistent statements. These may be used for the purpose of impeachment under Mil.R.Evid. 613, as discussed *infra*, but they may also be used substantively under Mil.R.Evid. 801(d)(1)(A) provided that certain conditions are met. Mil.R.Evid. 801 is discussed in chapter VIII, *infra*. *See also United States v. Jackson*, 12 M.J. 163 (C.M.A. 1981). The lesson to be learned is for counsel to be aware of the purpose for which the evidence is being offered -- does it affect credibility only, or is it substantive evidence?

E. Scope of part two

Unlike the other parts of this chapter, this part will not follow a rule-by-rule approach in analyzing the area of witness credibility. Although Mil.R.Evid. 607-610 and 613 are the primary Military Rules of Evidence on witness credibility, it is more beneficial to adopt a functional approach to this issue since the Federal Rules of Evidence, from which the Military Rules of Evidence were taken, are not exhaustive and a number of different types of techniques of impeachment are not explicitly codified.

> The failure to so codify them does not mean that they are no longer permissible. *See, e.g., United States v. Alvarez-*

> *Lopez*, 559 F.2d 1155 (9th Cir. 1977); Rule 412. Thus, impeachment by contradiction, *see also* Rules 304 (a)(2)[sic]; 311(j)[sic], and impeachment via prior inconsistent statements, Rule 613, remain appropriate. To the extent that the military rules do not acknowledge a particular form of impeachment, it is the intent of the Committee to allow that method to the same extent it is permissible in the Article III courts. *See, e.g.*, Rule 402; 403.

Mil.R.Evid. 608 drafters' analysis, MCM, 1984, app. 22-42.

0712 BOLSTERING THE WITNESS BEFORE IMPEACHMENT
(Key Numbers 1141, 1143, 1145)

A. General

The provisions of the Mil.R.Evid. do not specifically set forth the statement of the principle that generally precludes counsel from bolstering the credibility of his witness before the witness is impeached. Mil.R.Evid. 608(a), however, does address the specialized situation of the use of evidence of truthful character to bolster a witness' credibility by providing that such evidence is "admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Mil.R.Evid. 101 does state, however, that the "rules of evidence generally recognized in the trial of criminal cases in the United States district courts" and the common law rules of evidence will be applicable in courts-martial "insofar as practicable" and provided they are not "inconsistent with or contrary to" the Uniform Code of Military Justice or *Manual for Courts-Martial*. Thus, the standard Federal practice and the prior military practice of not generally allowing bolstering will still be followed. *See, e.g., United States v. Mack*, 643 F.2d 1119 (5th Cir. 1981). Likewise, the three common exceptions to this general rule are still applicable.

1. Corroboration. The witness' testimony still may be corroborated before his overall credibility is impeached. *See generally* E. Imwinkelried, P. Giannelli, F. Gilligan, and F. Lederer, *Criminal Evidence* 43-44 (1979). This is done by presenting evidence consistent with the testimony of the original witness.

2. Fresh complaint. Although the new rules do not specifically recognize the "fresh complaint" exception, three rules should enable the admission of extrajudicial statements from victims of nonconsensual sex crimes. Thus, a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible as an

exception to the proscription of hearsay under Mil.R.Evid. 803(2). No extrinsic evidence of the startling event or condition need be proffered; this prerequisite may be established by the declarant. If the defense alleges recent fabrication of, or improper motivation by, the victim, evidence of the circumstances surrounding the alleged crime are admissible under Mil.R.Evid. 801(d)(1)(B). Finally, Mil.R.Evid. 803(3) recognizes the admissibility of a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition [such as . . . mental feeling, pain and bodily health]" even though the declarant is available. Mil.R.Evid. 803(3).

3. Pretrial identification. The pretrial identification exception is preserved in Mil.R.Evid. 321(a)(1) and 801(d)(1)(C). Mil.R.Evid. 321(a)(1) codifies the decision in *United States v. Burger*, 1 M.J. 408 (C.M.A. 1976), and is especially important if the identifying witness is senile, has been intimidated, or is unavailable for trial as it provides that any person who observed the original identification may testify concerning it.

B. Additional consideration. A witness may testify before his credibility is attacked that he must testify truthfully to preserve a plea bargain or grant of immunity. *See, e.g., United States v. Maniego, supra*, and *United States v. Henderson, supra*. If, however, the testimony goes beyond this, and the party calling the witness attempts to show that it possesses special knowledge of the witness' veracity, impermissible bolstering has occurred. *See, e.g., United States v. Brown, supra*.

0713 IMPEACHMENT (Key Number 1143)

A. Who may impeach. Mil.R.Evid. 607.

The common law and prior military practice proceeded from the assumption that a proponent may not impeach his own witness. The party calling the witness was said to "vouch" for his credibility. Thus, the opponent could ordinarily attack only the credibility of witnesses called by opposing counsel, the judge, or the jury. *See* MCM, 1969 (Rev.), para. 153b. Mil.R. Evid. 607 changes the "voucher rule" and allows a party to impeach his own witness. Mil.R.Evid. 607 broadly states that "the credibility of a witness may be attacked by any party, including the party calling the witness." Mil.R.Evid. 607 responds to the reality that "in modern criminal trials, defendants are rarely able to select their witnesses: they must take them where they find them." *See Chambers v. Mississippi*, 410 U.S. 284 (1973). *See also United States v. Johnson*, 3 M.J. 143 (C.M.A. 1977). Without mentioning Mil.R.Evid. 607, the Court of Military Appeals has specifically rejected the voucher rule, calling it "a vestigial 'remnant of primitive English trial practice.'" *United States v. Perner*, 14 M.J. 181, 183 n.2 (C.M.A. 1982).

The remaining paragraphs under this "impeachment" topic will deal with the various methods of impeachment normally allowed and used in court-martial practice.

B. Attacking specific competency. Mil.R.Evid. 601 and 602.

1. General. With the liberalization of the rules on witness competency, there will be greater opportunity to testify at trial for witnesses who would have been precluded from testifying under pre-Mil.R.Evid. rules. Less emphasis on competency of witnesses to testify means a concomitant increase in emphasis which must be given to determine the weight which their testimony is to receive from the trier of fact. *See* Mil.R.Evid. 104(e); Mil.R.Evid. 601 drafters' analysis, MCM, 1984, app. 22-41. Thus, the first method of impeachment is not to keep the witness off the witness stand, but to attack the basis of his competency and thus diminish the weight to be given to his testimony. This is normally done on cross-examination, but it may be done by extrinsic evidence. Although counsel often forget this method of impeachment since it is not specifically stated in the Mil.R.Evid., it is a permissible method and one generally recognized in Article III courts and as part of the military common law. *See* MCM, 1969 (Rev.), para. 149(b)(1). *See also* E. Imwinkelried, P. Giannelli, F. Gilligan, and F. Lederer, *Criminal Evidence* 50-51 (1979).

2. Common sense factors. In considering how to diminish a witness' credibility by attacking the basis for the witness' competency or by pointing out deficiencies in that basis, counsel must remember that there are no hard and fast standards. This is an area of broad judicial discretion controlled by general relevancy considerations under rules 401-403 and by the hard language of Mil.R.Evid. 104(e) on "evidence relevant to weight or credibility." To be considered, however, are the common law competency factors (e.g., sincerity, perception, memory and narrative). Part one of this chapter has a discussion of pre-Mil.R.Evid. competency factors. Although use of these common law competency factors is subject to the application of common sense and good trial tactics, it may be helpful to point out some of the more common areas of inquiry.

3. Perception. Any number of factors can bear on a witness' perception, such as how the information was obtained; sensory defects as to sight, hearing, and smell; physical and emotional conditions such as darkness, fright, and excitement, under which information was obtained; and the witness' ability to comprehend and remember the facts accurately.

4. Religious beliefs or opinions. An area of potential inquiry, especially as to the ability to understand or abide by an oath or under Mil.R.Evid. 603, would be a witness' religious beliefs. Mil.R.Evid. 610 expressly addresses this area by precluding any evidence of the beliefs or opinions of a witness for the purpose

of showing that the witness' credibility is enhanced or diminished thereby. *Contemporary Mission, Inc. v. Bondal Mailing*, 671 F.2d 81 (2d Cir. 1982) (trial judge properly excluded extensive cross-examination of witness on his affiliation with Catholic church). Such beliefs, however, may be relevant (and hence admissible) on some other grounds (e.g., to show that the witness has an interest in the case). *United States v. Abel*, 707 F.2d 1013 (9th Cir. 1983), *cert. granted*, 105 S.Ct. 69 (1984) (defense witness may be impeached by showing membership in secret prison gang along with defendant).

C. Evidence of character for truthfulness. Mil.R.Evid. 608(a).

As has previously been noted, once a witness (including the accused) testifies, his or her credibility becomes an issue in the case. One aspect of having a witness' credibility in issue is that evidence of their character is then relevant. *See* Mil.R.Evid. 404(a) and the discussion of character evidence in chapter V, part two, of this study guide. Mil.R.Evid. 608(a) limits the relevance of a witness' character to only one trait: truthfulness, and its converse, untruthfulness. (For our discussion, the term truthfulness is considered to include its converse.) Evidence of neither general character (good or bad) nor of some other specific character trait of the witness is permissible proof of credibility. *See, e.g., United States v. Blanchard*, 11 M.J. 268 (C.M.A. 1981) (evidence of poor performance is "not proper rebuttal of credibility evidence). *See also* Mil.R.Evid. 404(a); Mil.R.Evid. 608(a) drafters' analysis, MCM, 1984, app. 22-42; chapter V, part two of this study guide.

1. Initiating the attack. Under Mil.R.Evid. 608(a), a witness' character for truthfulness must be attacked as being bad before it may be rehabilitated. Thus, the rule does not allow bolstering. The initial attack need not be in the form of character evidence because Mil.R.Evid. 608(a) provides for a witness' character for truthfulness to be attacked "otherwise." Thus, the initial attack on a witness' character for truthfulness may be made by cross-examination. *See United States v. Harvey*, 12 M.J. 501 (A.F.C.M.R. 1981), *aff'd*, 14 M.J. 129 (C.M.A. 1983) (defense counsel's exhaustive cross-examination of a key government witness, characterized by trial defense counsel as total and complete destruction, was held sufficient to justify trial counsel calling a witness to testify on character for purposes of rehabilitating the original government witness); *United States v. Everage*, 19 M.J. 189 (C.M.A 1985) (when the tenor of cross-examination can be characterized as an attack on the witness' veracity, evidence of his truthful character may be offered to rehabilitate the witness). *See also United States v. Allard*, 19 M.J. 346 (C.M.A. 1985) and *United States v. Woods*, 19 M.J. 349 (C.M.A. 1985).

It may be argued that *United States v. Allard, supra*, and *United States v. Woods, supra*, effectively support the proposition that the defense may always introduce evidence of the accused's good character for truthfulness if he testifies on the merits, since the trier of fact must decide whether to believe the

government's evidence which shows that the accused's denial of guilt is untruthful. Further support for this proposition may be found in *United States v. Varela*, 25 M.J. 29 (C.M.A. 1987), where it was held that, in a prosecution for cocaine use, the accused was entitled to present evidence of his character for truthfulness after the trial counsel conducted a "somewhat limited" cross-examination of the accused implying that he would have to return his $16,000 reenlistment bonus if convicted.

2. Relevancy of character. The admissibility of testimony on this character trait for truthfulness still depends upon its relevancy. *See* Mil.R.Evid. 401 and 403. Therefore, when it comes to the character for truthfulness of a witness, we are interested in the witness' credibility at the time of trial. Generally, evidence of a witness' truthful character at some remote point in time should be excluded under Mil.R.Evid. 401 or 403; but this is another question that falls within the broad discretionary authority given military judges by the Military Rules of Evidence.

3. Proof of character. Mil.R.Evid. 608 speaks in terms of "evidence of opinion or reputation." It does not specifically refer to Mil.R.Evid. 405 which sets forth a complete treatment of the permissible methods of proving character. A fair reading of the rules would indicate that the definitions of Mil.R.Evid. 405(d) as to "reputation" and "community" should be read into Mil.R.Evid. 608. Less clear is whether the Mil.R.Evid. 405(c) provision for affidavits is applicable under Mil.R.Evid. 608. Saltzburg, Schinasi, and Schlueter argue for such a reading, but the courts have yet to resolve the issue. *See Military Rules of Evidence Manual, supra*, at 517. Until the issue of the use of affidavits is resolved, actually calling witnesses to testify as to another witness' character for truthfulness will continue to be the norm.

In any event, for such testimony to be admissible, the proponent must demonstrate that the witness has such acquaintance or relationship with the person so as to qualify him to form a reliable opinion. *See, e.g., United States v. Perner*, 14 M.J. 181 (C.M.A. 1982) (holding that a psychiatric technician's three encounters with the witness did not provide a sufficient basis for him to form a reliable opinion as to her character for truth and veracity). And, in *United States v. Williams*, 26 M.J. 487 (C.M.A. 1988), it was held to be reversible error for a government witness to testify as to the accused's allegedly poor character for truthfulness where the witness' only contact with the accused consisted of observing him for some 90 minutes during an interview. Similarly, it was held to be proper for the military judge to exclude testimony from a defense witness as to the accused's allegedly good character for truthfulness where the defense witness had only met with the accused four of five times for marital counseling sessions and had only spoken to him a couple of times on the telephone. *United States v. Jenkins*, 27 M.J. 209 (C.M.A. 1988).

a. Laying the foundation for reputation evidence

-- It must be shown that the witness who testifies about the first witness' reputation:

(a) Is a member of the same community as the witness to be impeached or rehabilitated; and

(b) is acquainted with the witness' reputation for truthfulness in that community.

"Community" in the military includes ship, station, unit, camp, organization. Mil.R.Evid. 405(d). Remember that a witness may have a reputation in both civilian and military communities. *See United States v. Johnson*, 3 C.M.A. 709, 14 C.M.R. 127 (1954).

b. Laying the foundation for opinion evidence

(1) It must be shown that the witness who testifies to his opinion of the first witness' truthfulness:

(a) Is personally acquainted with the witness to be impeached or rehabilitated; and

(b) is acquainted with him well enough to have had an opportunity to form a reliable opinion of his trait for truthfulness.

(2) Although the Mil.R.Evid. do not specifically address the issue, it would seem to be permissible to continue the traditional military practice of asking the character witness giving opinion, "Would you believe him under oath?" This was specifically allowed by MCM, 1969 (Rev.), para. 153(b)(1), and is a relevant method for "testing" the opinion of the testifying witness. *United States v. Fields*, 3 M.J. 27 (C.M.A. 1977).

4. Limitation with the accused. When the defendant makes an unsworn statement, the prosecution is not allowed to introduce evidence as to the defendant's character trait for untruthfulness. *United States v. Cleveland*, 29 M.J. 361 (C.M.A. 1990). Opinion and reputation evidence attacking an accused's credibility following an unsworn statement in which no claim of truth and veracity is asserted is impermissible. *United States v. Williams*, 23 M.J. 582 (N.M.C.M.R. 1986). The rationale of this premise is predicated upon the balance struck between

the accused's right to make an unsworn statement and the government's weapon of impeachment. The only mechanism possessed by the government to protect the court-martial from a lying accused is the power to rebut the factual content of the accused's statement.

5. Testing the character witness. Mil.R.Evid. 608(b)(2) provides that a character witness can be asked questions about specific acts of the person whose credibility has been attacked or rehabilitated as a means of "testing" the character witness. This is parallel to the inquiry into specific acts of conduct permitted under Mil.R.Evid. 405(c) and discussed in chapter V, part two, *supra*. It should be noted that the cross-examination must relate to the specific character trait of truthfulness, and the examiner must have a good faith basis for any questions that are asked. Also, as with inquiry or cross-examination under Mil.R.Evid. 405(a), the examiner is not allowed to offer extrinsic evidence to prove the acts, unless the acts are otherwise admissible (e.g., under Mil.R.Evid. 404(b), as reflecting upon motive, intent, plan, etc.). *See* rule 405 discussion in chapter V, *supra*. Mil.R.Evid. 608(b) will be discussed further in subsection E of this part, *infra*.

D. Prior convictions. Mil.R.Evid. 609. (Key Number 1146)

1. General. The third method of impeachment is to introduce evidence that a witness, including the accused, has been convicted of a crime by either a military or civilian court. The rationale for admitting this evidence is that convictions are relevant to credibility because they demonstrate that the witness has violated the law; and witnesses who have violated the law are more likely to lie than witnesses who have not violated the law.

An obvious problem occurs with this rationale when an accused testifies as a witness and is impeached with a prior conviction. Court members might use the evidence of a prior conviction not only as evidence that the accused may be less credible, but also as evidence that he is a bad person who is more likely to have committed the offense for which he is charged. *See, e.g., United States v. Rodriguez-Hernandez*, 493 F.2d 168 (5th Cir. 1974), *cert. denied*, 422 U.S. 1056 (1975). Although Mil.R.Evid. 609, as discussed below, provides some protection for this problem by including several applications of the use of judicial discretion, counsel should consider a limiting instruction under Mil.R.Evid. 105 whenever impeachment is had under Mil.R.Evid. 609.

In order to better understand Mil.R.Evid. 609 and its use for impeaching a witness, the topic of impeachment by conviction of crime has been divided into the following four subtopics: (1) for what types of crimes is the rule applicable; (2) what constitutes a conviction of such a crime; (3) how recent must the conviction be; and (4) how can the conviction be proved.

2. Types of crime

a. Non crimen falsi convictions. Subdivision (a)(1) of the rule makes convictions for offenses punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law of the prosecuting jurisdiction eligible for admission. With respect to previous military convictions, the rule specifically provides that the maximum punishment is to be determined by reference to the maximum punishments presented under Article 56, UCMJ. As a result, the level of court-martial adjudging a conviction is not relevant in determining whether the crime for which the witness was convicted falls under this rule. Only the maximum possible punishment listed for the offense in the MCM, 1984, will affect admissibility under subsection (a)(1).

(1) Not automatic. Subdivision (a)(1) was amended in Change 6 to the MCM to reflect two distinct balancing tests. As the greatest risk of unfair prejudice to the defense arises when the accused is impeached with a prior conviction, a military judge must determine that the probative value of admitting a prior conviction outweighs its prejudicial effect to the accused. Ruling on the impeachment of all other witnesses will be governed by the general balancing test of Rule 403. Under Mil.R.Evid. 403 relevant evidence will be excluded if the probative value is substantially outweighed by the danger of unfair prejudice.

(2) The balance to be drawn. In determining probative value and prejudice, Federal courts have considered the following factors: (1) impeachment value of the prior conviction; (2) proximity in time and the witness' subsequent history; (3) similarity between the past crime and the charged crime; (4) importance of the testimony of the witness; and (5) centrality of the credibility issue. *See, e.g., Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). Clearly, however, the military judge has enormous discretion in balancing the scales. In a prosecution for sale of marijuana, for example, the military judge did not abuse his discretion in permitting the trial counsel to impeach the accused's credibility be offering a 4-year-old special court-martial conviction for a 3-month unauthorized absence. *United States v. Brenizer*, 20 M.J. 78 (C.M.A. 1985).

(3) Judge's determination. Mil.R.Evid. 609(a)(1) does not require the military judge to make any special findings when applying the balancing test, nor does it require the military judge to rule on the admissibility of an accused's prior conviction before the accused takes the stand. In *United States v. Cofield*, 11 M.J. 422 (C.M.A. 1981), the court recognized that, when an accused desires to testify in his own defense, resolution of the question whether the probative value of the prior conviction will outweigh its prejudicial effect is extremely important and that defense counsel may seek a pretrial resolution by using a motion in limine. The court generally encouraged in limine resolutions, but recognized the problems of drawing

a proper balance without knowing all of the facts in a case. *See also United States v. Gamble*, 27 M.J. 298 (C.M.A. 1988). It should also be noted, however, that the U.S. Supreme Court has held that, if the trial judge declines to rule in limine on the issue of the admissibility of a prior conviction of the accused, and the accused thereupon elects not to testify, the accused has waived any error in the judge's ruling for appellate purposes. *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984). As a result, defense counsel who seek in limine rulings on this issue may find themselves confronted by a cagey judge who simply wants to postpone ruling until after the accused has testified (thereby placing on the defense counsel the burden of making the first move).

b. Crimen falsi convictions. Subdivision (a)(2) of Mil.R.Evid. 609 makes admissible convictions involving "dishonesty or false statement, regardless of punishment." The exact meaning of "dishonesty" is unclear and has been the subject of substantial litigation. It has been held, for example, that shoplifting is not a crime of falsehood for purposes of this rule. *United States v. Huettenrauch*, 16 M.J. 638 (A.F.C.M.R. 1983). *See also United States v. Jefferson*, 23 M.J. 517 (A.F.C.M.R. 1986) (shoplifting not crimen falsi); *United States v. Frazier, supra* (drug offense and grand larceny not crimen falsi); *United States v. Hayes*, 553 F.2d 824 (2d Cir.), *cert. denied*, 434 U.S. 867, 98 S.Ct. 204, 54 L.Ed.2d 143 (1977) (smuggling could be crimen falsi if involving, for example, false statement on customs form, but not if merely involving stealth and secrecy). The drafters' analysis noted this lack of clarity and added that "pending further case development in the Article III courts, caution would suggest close adherence to [a] highly limited definition." Mil.R.Evid. 609 drafters' analysis. That "highly limited definition" to be considered until further case development in military courts is succinctly stated in the Congressional Conference Committee Report regarding the Federal Rules of Evidence:

> By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

H.R. Rep. 1597, 93d Cong., 2d Sess. 9, reprinted in 20 Sup. Ct. Dig. at 231.

For these crimen falsi convictions, under subdivision (a)(2), the balancing test of probative value versus prejudice to the accused is not applicable. Without (a)(1)'s balancing, all crimen falsi convictions may be admissible against any witness, absent constitutional problems of military due process and fundamental fairness or timeliness problems under Mil.R.Evid. 609(b). Most courts perceive such evidence as being automatically admissible, leaving no discretion to the military judge

to conduct a balancing. *See, e.g., United States v. Coates*, 652 F.2d 1002 (D.C. Cir. 1981); *United States v. Wong*, 703 F.2d 65 (3rd Cir.), *cert. denied*, 464 U.S. 842, 104 S.Ct. 140 (1983). Whether the different balancing test of Mil.R.Evid. 403 may be applied to exclude crimen falsi convictions is an open question. *See* 3 Weinstein and Berger, *Weinstein's Evidence* 609-61 (1981). The Congressional Conference Committee Report on Fed.R.Evid. 609 states:

> The admission of prior convictions involving dishonesty and false statements is not within the discretion of the court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

H. Rep. 1597, 93d Cong., 2d Sess., *reprinted in* 20 Sup. Ct. Dig. at 231. *See also United States v. Toney*, 615 F.2d 277 (5th Cir. 1980).

If a conviction qualifies under (a)(2) as well as under (a)(1), then the limitation of the latter should be ignored. A substantial gray area exists with respect to offenses which are not crimen falsi per se, but which may actually have involved dishonesty or a false statement. Counsel relying on a conviction not plainly within (a)(2) should be permitted to demonstrate the conviction's crimen falsi characteristics by proving that the offense was committed through false statements or dishonesty. *See United States v. Hayes, supra.* A crime of larceny may not be a crimen falsi offense if the thief committed the crime by shoplifting, but a crime of larceny committed through trick or deception would be crimen falsi in nature.

3. Conviction

a. A court-martial conviction occurs when the sentence is adjudged. Mil.R.Evid. 609(f). *United States v. Stafford*, 15 M.J. 866 (A.C.M.R.), *petition denied*, 17 M.J. 22 (C.M.A. 1983) held that a civilian conviction occurs when findings are announced. (An arrest, indictment, information, or record of nonjudicial punishment may not be used as a prior conviction, but evidence of these actions may be important in considering the specific incidents of misconduct method of impeachment. *See* section E, *infra.*)

b. Finality. There is no requirement that a conviction be final, except for convictions from a summary courts-martial or a special courts-martial conducted without a military judge. Mil.R.Evid. 609(e) provides that a conviction by either of these two forums is inadmissible until review has been completed pursuant to Article 64 or Article 66, UCMJ. It should be noted that the rules reference to article 66 appears clearly to be a drafting error. Presumably it was the intent of the

drafters to refer to appeals under article 69, not article 66. For general courts-martial and special courts-martial with a military judge, a court-martial is a "conviction" as soon as sentence is adjudged. *See* Mil.R.Evid. 609(f). The fact that an appeal is pending is admissible as bearing upon the weight to be given to the impeachment. *See* Mil.R.Evid. 609(e). There is even the possibility of a judicially created exception to Mil.R.Evid. 609(e) which would render a conviction inadmissible if the prior conviction is being appealed on sixth amendment grounds. *See Spiegel v. Sanstrom*, 637 F.2d 405 (5th Cir. 1981).

c. Summary courts-martial. Under what circumstances may a previous conviction by summary court-martial be used to impeach a witness' credibility under Mil.R.Evid. 609? A complete understanding of this issue requires some historical background. Under the 1969, MCM, there was a provision known as para. 127c, which specified the maximum authorized punishment for each offense under the UCMJ. Section B of para. 127c contained a provision known as the so-called "escalator clause." This provided that, if a servicemember was convicted by a special or general court-martial, and no punitive discharge was authorized for the offense of which the accused stood convicted, then proof of two or more convictions during the previous three years would "escalate" the maximum authorized punishment to include a punitive discharge. (A similar provision, incidentally, may be found in the 1984, MCM at R.C.M. 1003(d)). In *United States v. Booker*, 5 M.J. 238 (C.M.A. 1977), C.M.A. addressed the issue of whether a prior summary court-martial conviction could qualify as a "conviction" for purposes of the escalator clause. The court held that a prior summary court-martial could not qualify as a prior conviction unless the accused was actually represented by counsel at the summary court-martial itself or executed a voluntary, knowing, and intelligent waiver of the presence of counsel. Not content to limit itself to the issue before it in *Booker*, C.M.A. went on (in fn. 23 of the opinion) to declare that a "counselless" summary court-martial would also not qualify as a conviction for purposes of impeachment by a prior conviction. It should be emphasized that the issue in this area is not whether the witness being impeached (usually but not necessarily the accused) was afforded the opportunity to consult with counsel prior to deciding whether to accept or refuse a summary court-martial. Such a consideration merely goes to the question of whether the prior summary court-martial may be used at a sentencing hearing as evidence of the character of the accused's prior service. In order for the prior summary court-martial to qualify as a prior "conviction" to impeach the witness' credibility under Mil.R.Evid. 609, however, the summary court-martial must have been one at which the witness being impeached was actually represented by counsel or else it must have been one at which he waived presence of counsel.

d. Pardon, annulment, or certificate of rehabilitation

Mil.R.Evid. 609(c) contains two limitations upon the use of prior convictions. These are based on the theory that, if a person is truly

rehabilitated, the rationale for impeachment by evidence of prior conviction is no longer applicable. Both subdivisions under Mil.R.Evid. 609(c) initially require the exclusion of an otherwise admissible conviction when that conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other similar process. Completion of Army or Air Force rehabilitation programs does not qualify under the rule. *See, e.g., United States v. Rogers*, 17 M.J. 990 (A.C.M.R. 1984); *United States v. Clarke*, 27 M.J. 361 (C.M.A. 1989).

(1) If the pardon or other similar process is predicated upon a finding that the witness has rehabilitated himself, the conviction is inadmissible provided that the witness has not been convicted of a subsequent crime which might be subject to the punishment of death, dishonorable discharge, or confinement for over one year. If there has been such a subsequent conviction, the effect of the pardon is canceled, and both convictions potentially are admissible for impeachment purposes -- if the other requirements of this rule are met.

(2) If the pardon or similar process was based on a finding of not guilty, it does not matter whether the witness has been subsequently convicted. The prior conviction may never be used for later impeachment. It might still be used for some other purpose under the rules. *See, e.g.*, Mil.R.Evid. 404(b).

e. Juvenile adjudication

Mil.R.Evid. 609(d) provides that evidence of juvenile adjudications generally is not admissible, and in no event may it be used against an accused. The rule permits impeachment of witnesses other than the accused if the military judge believes it is necessary to a fair resolution of the case, and the impeachment evidence would have been admissible had the witness previously been tried as an adult. This balance is in accord with *Davis v. Alaska*, 415 U.S. 308 (1974). In *Davis*, a witness, who was on probation for burglary as the result of a juvenile proceeding, allegedly observed the defendant near the location of the disposition of the fruits of the burglary close to the witness' home and 26 miles from the place of the burglary. The court held that the defendant's right of confrontation was paramount to a state policy of not revealing juvenile adjudications through impeachment of this key prosecution witness. Mil.R.Evid. 609(d) is also in accord with prior military practice. *See, e.g., United States v. Butler*, 13 C.M.A. 260, 32 C.M.R. 260 (1962).

Evidence of juvenile proceedings, however, may be used against the accused in rebuttal when he testifies that he has never, or has not within a certain period of time, committed or been convicted of an offense. Mil.R.Evid. 609(d); *see also United States v. Kindler*, 14 C.M.A. 394, 34 C.M.R. 174

(1964), where the Court of Military Appeals permitted trial counsel to introduce evidence of juvenile sexual misconduct through cross-examination where the accused contended he was sexually normal.

4. Timeliness of the convictions

a. General rule. Under Mil.R.Evid. 609(b), evidence of a conviction generally will not be admissible if it is more than ten years' old.

b. Exception. Although there is a strong presumption against using dated convictions, it is possible to use an older conviction provided that three requirements are met. *See, e.g., United States v. Spero*, 625 F.2d 779 (8th Cir. 1980) (22-year-old conviction admitted); *United States v. Johnson*, 542 F.2d 230 (5th Cir. 1976) (17-year-old conviction admitted). Those requirements found in Mil.R.Evid. 609(b) are:

(1) The interests of justice must require admission of the old conviction; and

(2) its probative value, supported by "specific facts and circumstances," must substantially outweigh its prejudicial effect; and

(3) the proponent of such a conviction must provide the other party with sufficient advance notice. The rule does not define the prior notice that is required. In the absence of a judicial definition, Saltzburg, Schinasi, and Schlueter suggest the following criteria be used:

> (1) Opposing counsel should be given written notice, or an oral representation should be made on the record of the proponent's intentions to use such evidence; (2) where possible, the notice should be served at least 24 hours before the date of trial to permit in limine motions and rulings; (3) the notice should include a copy of any official, public, or other documentary evidence which will be used to establish the conviction; or (4) if such documentary evidence is not available, opposing counsel should be provided with a statement specifying where the witness was convicted, upon what charges, and based on what plea. The statement should also specify what appellate review has taken place. The proponent should be asked on the record why the interests of justice require the admission of the evidence. The opponent should be given a chance to be heard. And the trial judge should state his ruling and the reasons therefor on the record.

Military Rules of Evidence Manual, supra, at 538.

Counsel should note the specific language of the rule with regard to the second factor of the exception. This is not a simple Mil.R.Evid. 609(a)(1) or 403 balancing test. It is heavily weighted against admission of the evidence of conviction.

5. How proved. Mil.R.Evid. 609(a) states that convictions that qualify for admission may be proved in two ways: (1) Counsel may ask a witness if the witness has ever been convicted of a crime; or (2) counsel may introduce a public record demonstrating the conviction. With regard to inquiry of the witness, Change 6 to the MCM removes the limitation that the conviction may only be elicited on cross-examination. The rule now permits the tactical decision to "remove the sting" from potential impeachment on cross-examination.

a. Counsel may ask a witness nonaccusatory questions on direct or cross-examination even if the questioner has no information that the witness has been convicted of any such offense. For example:

(1) Have you ever been convicted of a felony?

(2) Have you ever been convicted of a crime involving dishonesty or false statement?

b. If the witness answers "yes," other proof of the conviction is unnecessary to complete the impeachment. Counsel may point out the fact in his argument.

c. If the witness answers "no," counsel may introduce evidence of the conviction during his case in reply or rebuttal.

d. It is not essential that counsel show the witness' conviction on direct or cross-examination (i.e., intrinsically). *United States v. Weeks*, 15 C.M.A. 583, 36 C.M.R. 81 (1966). Proof of the conviction may be made by introducing in evidence an admissible record or other competent evidence of the conviction. *See* Mil.R.Evid. 609(a) and 803(22). Mil.R.Evid. 803(22) specifically provides a hearsay exception for proof of prior conviction.

e. In examining a witness on his prior conviction, questions should not be framed in an accusatory form unless there is clearly admissible documentary proof of the specific conviction.

(1) In *United States v. Russell*, 3 C.M.A. 696, 14 C.M.R. 114 (1954), the accused had taken the stand on his own behalf and trial counsel had no documentary evidence of his previous convictions. The following dialogue occurred:

TC: "Isn't it a fact that you were convicted of highway robbery as a civilian?"

W: "No, sir."

Held: Improper: It is permissible to ask a witness if he has ever been convicted of a felony, but here the question was an accusation unsupported by proper evidence of a conviction.

(2) In *United States v. Berthiaume*, 5 C.M.A. 669, 18 C.M.R. 293 (1955), a prosecution witness had given damaging testimony against the accused.

Defense counsel asked: "Isn't it a fact that in civilian life you were convicted of a crime involving moral turpitude?"

The military judge ruled the question improper, on the grounds that counsel must have available admissible proof of such a civilian conviction before he could inquire about it of the witness. The Court of Military Appeals held:

> With an eye to the latitude intended for the cross-examiner...we hold that in military law the former may inquire by questions which do not mask an allegation into the possible prior conviction of a witness of an offense involving moral turpitude, or otherwise affecting credibility, regardless of a want of definite information concerning the witness' past record. Of course, a denial of such a conviction is binding on the examiner - unless the latter is able to produce admissible evidence of a judicial determination of guilt.

Id. at 305.

f. If evidence of a prior conviction against the accused is used for impeachment purposes, defense counsel should consider requesting that a limiting instruction be given. *See* Mil.R.Evid. 105.

E. Specific instances of conduct. Mil.R.Evid. 608(b).

1. General rule. Mil.R.Evid. 608(b) provides that generally a party may not offer extrinsic evidence of specific instances of past conduct of a witness to either attack or support the witness' credibility. This is taken without significant change from the Fed.R.Evid. and is in accord with prior military practice as to the exclusion of extrinsic evidence of specific acts to demonstrate credibility.

a. Mil.R.Evid. 608(b) provides for an explicit exception to the general rule (i.e., the admission of extrinsic evidence of prior convictions). *See* Mil.R.Evid. 609.

b. There are also implicit exceptions allowing the use of extrinsic evidence of specific acts of conduct to show bias [Mil.R.Evid. 608(c)] or prior inconsistent statements (Mil.R.Evid. 613). *See* Mil.R.Evid. 609(b) drafters' analysis. Extrinsic evidence of specific acts is also permissible as it relates to impeachment by contradiction, discussed in subsection H, *infra*. *See United States v. Kindler*, 14 C.M.A. 394, 34 C.M.R. 17 (1964).

2. Inquiry on cross-examination. Mil.R.Evid. 608(b) permits the cross-examiner to inquire about specific instances of conduct for the purpose of supporting or attacking credibility provided that the specific instances are (1) probative of truthfulness or untruthfulness; (2) explicitly subject to the military judge's discretion concerning admissibility; and (3) related to the character trait for truthfulness or untruthfulness of either the witness being cross-examined or another witness as to whose character the present witness has testified. The acts that qualify to impeach a witness under Mil.R.Evid. 608(b) are those that involve crimen falsi (such as false swearing, perjury, fraud, etc.). Not all "bad acts," however, fall within Mil.R.Evid. 608(b). *Compare United States v. Fortes*, 619 F.2d 108 (1st Cir. 1980), where prior acts of drug trafficking were held not to be relevant as acts bearing upon truthfulness under Fed.R.Evid. 608(b), *with United States v. Hunter*, 21 M.J. 240 (C.M.A. 1986), where accused's prior involvement with marijuana was admissible to show accused's intent and motive to rebut defenses of entrapment and agency. Such inquiry can be especially important when such specific acts have not led to a conviction under Mil.R.Evid. 609 as discussed in the previous subsection of this chapter.

a. Extrinsic evidence. While the rule does allow impeachment by inquiry into specific instances, the questioner is precluded from introducing extrinsic evidence in support of his inquiry. *Cf.* Mil.R.Evid. 405(a). This is done to avoid a "trial within a trial" which may cause confusion and may tend to distract the court members from the main issues in the case. Thus, the questioner may inquire about a specific instance of conduct and, if the witness acknowledges the act, the impeachment or rehabilitation is complete and no further evidence is needed. If the

witness denies the act, it is generally said that the questioner is "bound by the answer," in that the answer may not be contradicted by extrinsic evidence. *See, e.g., United States v. Bosley*, 615 F.2d 1274 (9th Cir. 1980); *United States v. Robertson*, 14 C.M.A. 328, 34 C.M.R. 108 (1963). Being "bound by the answer" does not necessarily mean that the questioner must take the witness' answer and abandon any further inquiry once a denial of the act is given. *See United States v. Owens*, 21 M.J. 117 (C.M.A. 1985). Counsel may continue to pursue the inquiry until limited by the military judge under Mil.R.Evid. 611(a) and 403.

On the other hand, if the extrinsic evidence would be admissible without regard to the witness' answer -- for example, if admissible under Mil.R.Evid. 404(b) -- counsel could introduce the evidence, both for impeachment and for substantive use. *See, e.g., United States v. Dorsey*, 15 M.J. 1 (C.M.A. 1983). *Cf. United States v. Barnes*, 8 M.J. 115 (C.M.A. 1979).

b. Cross-examination. Some question exists with respect to whether specific instances of conduct may be inquired into on direct as well as cross-examination. Recognizing that the text of Mil.R.Evid. 608(b) would seem to restrict the use of evidence of specific acts for cross-examination, the drafters of the Mil.R.Evid. have suggested that the better approach is to permit similar inquiry on direct-examination as well. Mil.R.Evid. 608 drafters' analysis. "It is the intent of the Committee to allow use of this form of evidence on direct-examination to the same extent, if any, it is so permitted in the Article III courts." *Id.* There is yet no clear authority on this issue.

c. Good faith inquiry. Although a good faith belief in the accuracy of the specific instances of conduct inquired about is not explicitly required by Mil.R.Evid. 608(b), the drafters' analysis recognizes that, as a matter of ethics, counsel should not attempt to elicit evidence of such conduct unless there is a reasonable basis for the question. *See United States v. Britt*, 10 C.M.A. 557, 28 C.M.R. 123 (1959); *United States v. Shepherd*, 9 C.M.A. 90, 25 C.M.R. 352 (1958); Mil.R.Evid. 608 drafters' analysis, MCM, 1984, app. 22-42.

3. Waiver of self-incrimination. The last sentence of Mil.R.Evid. 608(b) provides that testimony relating only to credibility does not waive the privilege against self-incrimination. *See* Mil.R.Evid. 301(f) (claiming the privilege). *See also* Mil.R.Evid. 301. This provision applies to all witnesses, including the accused, and recognizes that fifth amendment interests may predominate over impeachment needs. It should be noted that this provision does not prohibit questions on specific acts relating to issues other than credibility. *See, e.g.*, Mil.R.Evid. 609 (prior convictions); Mil.R.Evid. 404(b) (other crimes, wrongs or acts). Chapter XII, *infra*, discusses the effects of claiming the privilege against self-incrimination in response to such questions.

4. Although a witness may be asked about specific acts he committed that reflect upon his lack of truthfulness, an unresolved issue arises as to whether or not a witness can be asked about adjudications concerning those acts. In *United States v. Wilson*, 12 M.J. 652 (A.C.M.R. 1981), the Army Court of Military Review took the position that it was improper to ask the accused if he was awarded an NJP for making a false statement. *But see United States v. Whitehead*, 618 F.2d 523 (4th Cir. 1980), where the court of appeals held it permissible to inquire of an accused if he had been formally suspended from the practice of law based upon allegations of fraud. The issue is not yet resolved by the Navy and Marine Corps Court of Military Review or by the Court of Military Appeals.

5. Limited use. Inquiry into specific instances of conduct under Mil.R.Evid. 608(b) is for the limited purpose of impeaching or rehabilitating a witness' credibility. Remember this important distinction between 608(b) (specific instances of conduct which may be used only for their impact on credibility) and 404(b) (crimes, wrongs, or acts (which technically are not used to establish character at all but rather motive, plan, intent, etc.) which may be considered on the issue of the accused's guilt or innocence).

F. Evidence of bias. Mil.R.Evid. 608(c).

This method of impeachment is taken from prior military practice and has no direct corollary in the Fed.R.Evid. *See* MCM, 1969 (Rev.), para. 153d. Evidence of bias is a generally accepted form of impeachment in the Article III courts and is explicitly codified in Mil.R.Evid. 608(c). *See, e.g., United States v. Rubier*, 651 F.2d 628 (9th Cir.), *cert. denied*, 454 U.S. 874, 102 S.Ct. 351 (1981); *United States v. Leja*, 568 F.2d 493 (6th Cir. 1977).

This rule does not change prior military law as to the admissibility of extrinsic evidence to prove bias. A witness may be impeached by a showing of "bias, prejudice, or any other motive to misrepresent," because these qualities have a bearing on the credibility of his testimony. Mil.R.Evid. 608(c). The three factors under Mil.R.Evid. 608(c) are only a representative, and not exhaustive, list of specific factors which might be considered as evidence of bias or motive to misrepresent. The bias may be either in favor of or against one of the parties to the trial or it may be an interest in the outcome of the case. In a prosecution for drug distribution where the accused presented an entrapment defense, for example, it was reversible error for the military judge to preclude cross-examination and extrinsic evidence of the informant's sexual relationship with her controlling agent and other evidence that the informant was "manipulative" and "would do whatever is necessary for personal gain." *United States v. Tippy*, 25 M.J. 121 (C.M.A. 1987).

G. Prior inconsistent statements of witnesses. Mil.R.Evid. 613. (Key Number 1149)

Although it may not appear so from its title ("Prior Statements of Witnesses") or from its position in the Mil.R.Evid. (between "Writings Used to Refresh Memory" and "Calling and Interrogation of Witnesses by the Court-Martial"), Mil.R.Evid. 613 is the primary Military Rule of Evidence dealing with impeachment by prior inconsistent statements. *See* Mil.R.Evid. 613 drafters' analysis, MCM, 1984, app. 22-44. The Mil.R.Evid. drafters even speculate that the word "inconsistent" may have been "inadvertently omitted" from Fed.R.Evid. 613 from which Mil.R.Evid. 613 is taken. This seems to be in error since this rule can be used, to a limited extent, in conjunction with Mil.R.Evid. 801(d)(1)'s substantive use of prior statements, discussed in chapter VIII of this study guide.

1. General rule. Since Mil.R.Evid. 613 addresses only the procedural aspects of prior inconsistent statements, the common law and pre-Mil.R.Evid. case law rule on impeachment by prior inconsistent statement is applicable to present military practice. *See* Mil.R.Evid. 101(b). Accordingly, a witness may be impeached by a showing with any competent evidence that he made a previous statement, oral or written, or engaged in other conduct, inconsistent with his in-court testimony. This competent evidence may be in the form of either intrinsic or extrinsic evidence. Intrinsic evidence involves the witness who made the prior statement being interrogated as to the existence and content of the statement. This form of impeachment by prior inconsistent statement is controlled by Mil.R.Evid. 613(a). Extrinsic evidence entails either calling a third party to testify to the existence and content of the prior inconsistent statement or presenting some documentary form of the statement. Mil.R.Evid. 613(b) provides the requirements for extrinsic proof of a prior inconsistent statement.

Although Mil.R.Evid. 613 speaks of "statements," prior inconsistent conduct (acts) is generally recognized as being admissible for impeachment purposes to the same extent as statements. For example, if, in an embezzlement prosecution, the government offers testimony that the defendant is an untrustworthy person, the defense could elicit testimony that the witness made an unsecured signature loan to the defendant. A person who truly believed the defendant to be untrustworthy would probably not make such a loan.

2. Foundation requirement abolished

a. Under former MCM, 1969 (Rev.), para. 153b(2)(c), certain foundational requirements had to be met before any evidence of a prior inconsistent statement could be considered for the purpose of impeachment, either intrinsically or extrinsically. These requirements were called the rule of the *Queen's Case*, 2 Br & B. 284, 129 Eng. Rep. 976 (1820). Their primary purpose was to acquaint the

witness with the prior statement and to give the witness an opportunity to either change his testimony or reaffirm it.

b. Mil.R.Evid. 613(a) abandons these foundational requirements for the use of prior inconsistent statements and imposes only a limited procedural requirement in their stead. It provides that, when counsel is examining a witness based on an inconsistent oral or written pretrial statement: (1) that statement need not be shown to the witness, nor (2) must its contents be disclosed to the witness during cross-examination. It is only necessary to ask the witness whether he made a certain statement.

(1) The only procedural requirement that counsel must meet before examining a witness about a prior inconsistent statement is to show or disclose the statement to opposing counsel (not the witness) when specifically requested.

(2) Counsel should be alert to make such a specific request. But, the language of the rule indicates that, even upon request, the statement need not be disclosed to opposing counsel until the witness is actually examined concerning the statement. Granting continuances and the judicious use of Mil.R.Evid. 611(a) should control any injustice in this regard. Counsel should also be aware of the use of discovery devices as discussed in chapter II of this study guide.

(3) The fact that the prior inconsistent statement need not be offered or mentioned during examination of the witness, but may be withheld until other witnesses are called, is particularly useful when there is possible collusion among witnesses. While the requirements of Mil.R.Evid. 613(b) must be met before the statement is admitted extrinsically, they need not be accomplished until a number of witnesses have been examined and impeached.

c. Proper foundation. Although Mil.R.Evid. 613(a) abolishes the old requirement for laying a proper foundation, the drafters' analysis to the rule states that "such a procedure may be appropriate as a matter of trial tactics" MCM, 1984, app. 22-44. For example, laying a foundation in a trial with members may emphasize the inconsistent statement and thus act as a "highlighting" tactic. For counsel who choose to lay such a foundation, the following traditional steps are offered.

(1) Direct the attention of the witness to the time and place when the prior inconsistent statement was made, naming the person to whom the statement was made.

(2) Ask the witness if he made the statement. Counsel can read or repeat the statement to the witness at this point. The writing need not be shown to the witness.

(3) If the witness denies making the inconsistent statement, or states he does not remember whether he made it, or refuses to testify as to whether he made it, competent evidence of the text or substance of the statement may be introduced.

(4) Even if the witness admits making the inconsistent statement, other competent extrinsic evidence of the text or substance of the statement may be introduced in addition to the admission.

3. Extrinsic evidence of prior inconsistent statement (Key Number 1150)

a. Requirement. Although the general foundational requirements of the common law and past military practice have been removed for the extrinsic use of prior inconsistent statements, Mil.R.Evid. 613(b) imposes its own procedural requirements. If extrinsic evidence of the prior statement is to be admissible, the witness who made the prior statement must be given the opportunity to explain or deny it. The rule sets forth no particular timing for this explanation, so it would be possible initially to utilize the witness' own responses under Mil.R.Evid. 613(a) for intrinsic impeachment and later have the witness recalled to explain or deny extrinsic evidence of the same prior inconsistent statement. In addition to this opportunity for the witness to explain or deny, the opposing counsel has the opportunity to examine the witness concerning the extrinsic evidence of the statement. Thus, counsel may be able to help the witness explain the inconsistencies by showing misunderstandings, misstatements, or evidence taken out of context. In order to allow for such eventualities as the witness becoming unavailable by the time the prior statement is discovered, a measure of discretion is conferred upon the military judge to allow extrinsic evidence without an opportunity to explain or deny or for counsel to examine when "the interests of justice otherwise require." Mil.R.Evid. 613(b).

b. Methods. Provided that the requirements of Mil.R.Evid. 613(b) are met, counsel still need to follow some basic steps of authentication before the extrinsic evidence is admitted.

(1) Written statement

(a) Counsel shows the writing to the witness, asking him to identify his signature or the authorship of the written statement.

(b) If the witness admits that the signature is his, or that he was the author of the statement, the writing becomes admissible in evidence.

(c) If there is no such admission, but either of these facts (authorship or signature) is otherwise proved, the writing becomes admissible in evidence.

(2) Oral statements

(a) Counsel calls another witness, who heard the person testifying make the prior statement.

(b) This method may also be used where the written statement is not accounted for. But note the peculiar problems implicit where the statement was an unwitnessed oral statement to counsel. Short of taking the stand, counsel has no method of proving the contents of the contested statement; this, in turn, raises several ethical considerations. *See United States v. Maxwell*, 2 M.J. 1155 (N.C.M.R. 1975). The suggested procedure is, therefore, to obtain such statements in writing or in the presence of witnesses.

(c) A question had existed as to whether extrinsic evidence may be admitted under the rule after a witness has admitted the prior inconsistent statement. In *United States v. Button*, 34 M.J. 139 (C.M.A. 1992), the court adopted the federal position "that extrinsic evidence of a prior inconsistent statement should not be admitted for impeachment when (1) the declarant is available and testifies; (2) the declarant admits making the prior statement; and (3) the declarant acknowledges the specific inconsistencies between the prior statement and his or her in-court testimony." *See also United States v. Greer*, 806 F.2d 556 (5th Cir. 1986).

4. Uses of prior inconsistent statements. The general rule is that a prior inconsistent statement is admissible only for the purposes of impeachment and not for the truth of the matters asserted in the statement.

a. When the statement is offered for impeachment, upon request, the military judge should instruct the members of the court in open session, at the time the inconsistent statement is introduced, that the evidence is to be considered only for the purpose of credibility and not for the purpose of establishing the truth of its contents. Mil.R.Evid. 105. *Military Judges' Benchbook*, DA Pam 27-9, Inst. 7-11 (1982).

b. Exception to the general rule. The statement is admissible for its truth:

(1) When the statement may properly be received as evidence of a voluntary confession or admission of the witness when the witness is the accused. Mil.R.Evid. 801(d)(2).

(2) When the statement of the witness is otherwise admissible as not hearsay. Mil.R.Evid. 801(d)(1)(A).

(3) When the witness testifies that his inconsistent statement is true, not merely that he made it, and thus adopts the statement as part of his testimony.

Mil.R.Evid. 613(b) is not applicable in the two situations under Mil.R.Evid. 801 noted above. Counsel must be aware of the need to distinguish the purpose for which evidence is to be offered. *See United States v. Jackson*, 12 M.J. 163 (C.M.A. 1981), on the need to use prior inconsistent statements only for proper purposes. *See also United States v. Mendoza*, 18 M.J. 576 (A.F.C.M.R. 1984) (error to consider prior inconsistent statement on merits rather than simply for impeachment purposes).

5. Prior inconsistent statements of a hearsay declarant. Although not the subject of this chapter, impeachment of a hearsay declarant may involve the use of prior inconsistent statements also. *See* Mil.R.Evid. 806 and the discussions in chapter VIII of this text. The basic impeachment methods and procedures just discussed are also applicable in attacking the credibility of a hearsay declarant with the explicit exclusion of the "explain or deny" provision of Mil.R.Evid. 613(b).

H. Impeachment by contradiction (Key Number 1143)

The drafters' analysis to Mil.R.Evid. 608(c) recognizes that the rules do not codify every permissible technique of impeachment. One of the noncodified techniques specifically mentioned by the Mil.R.Evid. drafters is impeachment by contradiction. This technique is essentially the converse of the corroboration technique of bolstering which was previously discussed. With corroboration, the evidence presented is consistent with previous testimony, thus increasing the credibility of the witness who gave the testimony. With contradiction, the evidence presented is inconsistent or conflicting with previous testimony, thus diminishing the credibility of the witness who gave the initial testimony. The most common situation is where the accused takes the stand and testifies to the effect that he has never, or has not within a certain period of time, committed an offense of any kind or of a certain kind. Trial counsel may now introduce, through cross-examination of the accused or by extrinsic sources, evidence which contradicts the accused's testimony.

This evidence may be used for the purpose of impeaching the accused's credibility and for the purpose of rebuttal. *See, e.g., United States v. Rodgers*, 18 M.J. 565 (A.C.M.R. 1984) (accused's pretrial admission of prior drug sales, which rebutted his in-court assertion that the charged offense was his only drug sale and which contradicted his in-court assertion that he had not regularly used drugs in the past, was relevant rebuttal evidence).

Impeachment by contradiction is mentioned explicitly in Mil.R.Evid. 304(b) and 311(b). Under Mil.R.Evid. 304(b), a statement of the accused that is involuntary only in terms of noncompliance with counsel rights under Mil.R.Evid. 305, and thus inadmissible on the merits of the case, could be used to impeach the accused should he testify in court and deny having made the statement or deny the contents of the statement. This is in accord with *Harris v. New York*, 401 U.S. 222 (1981). Likewise, Mil.R.Evid. 311(b) allows the result of an illegal search or seizure to be used to impeach the accused should he testify in court and deny the existence of the search or seizure result or otherwise contradict a known fact. This is in accord with *United States v. Havens*, 446 U.S. 620 (1980). In both of these situations, it must be remembered that the otherwise inadmissible evidence is being offered only for the limited purpose of impeachment. A limiting instruction may again be appropriate. *See* Mil.R.Evid. 105.

Impeachment by contradiction was recently recognized by the Court of Military Appeals as an authorized method of impeachment. *United States v. Banker*, 15 M.J. 207 (C.M.A. 1983). The court cited Mil.R.Evid. 607 as the authority for this method of impeachment. The court in *Banker* defined impeachment by contradiction as a "line of attack showing the tribunal the contrary of a witness' asserted fact, so as to raise an inference of a general defective trustworthiness." *Id.* at 210. One noteworthy issue addressed in *Banker* is whether a party can impeach a witness by contradiction on a collateral matter. The *Banker* court held that extrinsic evidence could be used to impeach a witness by contradiction on a collateral matter if the matter was raised on direct examination. The court opined, however, that it is not permissible for a party to raise collateral matters on cross-examination and then use extrinsic evidence to impeach the witness by contradicting the witness on the collateral matter. In *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989) the court concurred with *Banker*, indicating that, if a witness makes a broad collateral assertion on direct examination that he has never engaged in a certain type of misconduct, he may be impeached by extrinsic evidence of the misconduct. However, *Trimper* went further than *Banker* and held that, if a witness volunteers broad information in responding to appropriately narrow cross-examination, the prosecution is entitled to offer extrinsic evidence to show that the witness' testimony is false. This latter portion of the *Trimper* opinion supported the finding in the Navy and Marine Corps Court case of *United States v. Bowling*, 16 M.J. 848 (N.M.C.M.R. 1983), where it had been held that it was permissible to impeach through the use of extrinsic evidence collateral matters raised on cross-examination when the witness

sua sponte raised the issue during cross-examination. *See United States v. Garcia-Garcia*, 25 M.J. 652 (C.M.A. 1987); *United States v. McSwain*, 24 M.J. 754 (A.C.M.R. 1987); *United States v. Joyner*, 25 M.J. 730 (A.F.C.M.R. 1987).

0714 REHABILITATION OF THE WITNESS

The third stage in the analysis of credibility is rehabilitation. After the witness' testimony has been attacked, it is possible for counsel to present evidence to support or enhance a witness' credibility. This is known as "rehabilitation of the witness." Except for the methods allowed under bolstering, such support for a witness' credibility requires some form of attack. *See* Mil.R.Evid. 608(a). The mere fact that a witness, even the accused, is contradicted by other witnesses does not necessarily constitute an attack on his credibility. *Kauz v. United States*, 188 F.2d 9 (5th Cir. 1951). *See United States v. Kauth*, 11 C.M.A. 261, 29 C.M.R. 77 (1960); *United States v. Halsing*, 11 M.J. 920 (A.F.C.M.R. 1981). *But see United States v. Varela*, 25 M.J. 29 (C.M.A. 1987); *United States v. Everage*, 19 M.J. 189 (C.M.A. 1985).

A. Methods. The Military Rules of Evidence do not go into detail about methods for rehabilitation. For the most part, the common law principle that rehabilitation must respond in kind to impeachment is followed. *See, e.g.*, Mil.R.Evid. 608.

1. On redirect examination, the witness may be allowed to explain apparent inconsistencies or otherwise clarify his testimony.

2. The testimony of the impeached witness may be corroborated in the same manner as it could if it were to be initially bolstered.

3. The impeaching evidence may be discredited itself.

a. Opinion or reputation evidence of the impeaching witness' character for untruthfulness may be shown. Mil.R.Evid. 608(a).

b. Bias or other motive to misrepresent on the part of the impeaching witness may be shown. Mil.R.Evid. 608(c).

c. Proof that the impeaching witness has been convicted of a crime can be used. Mil.R.Evid. 609.

Note, however, there may be balancing difficulties with the remoteness and probative value of a collateral issue. *See* Mil.R.Evid. 401, 403.

4. If the impeachment is by a showing of bias or prejudice, there may be evidence to contradict the assertion or prior consistent statements under Mil.R.Evid. 801(d)(1)(B) predating the event and confirming the testimony of the witness in court. Prior consistent statements are discussed, *infra*.

5. If the witness' character for truthfulness has been attacked, there may be a showing of good opinion or reputation in rebuttal or an inquiry into specific good acts. Mil.R.Evid. 608(a) and (b).

6. Prior statements consistent with in-court testimony may be introduced in accordance with Mil.R.Evid. 801(d)(1)(B) to rebut impeachment by prior inconsistent statements.

B. Prior consistent statements. Mil.R.Evid. 801(d)(1)(B).

1. The general rule is that counsel may not bolster the credibility of his own witness by showing that the witness has made prior consistent statements.

2. Mil.R.Evid. 801(d)(1)(B), however, allows the use of such statements if they are offered to rebut an express or implied charge against the declarant of the statement of: (1) recent fabrication; (2) improper influence; or (3) bad motive. There is no requirement that the prior consistent statement have been given under oath or at any type of proceedings as is required of a prior inconsistent statement under Mil.R.Evid. 801(d)(1)(A). Additionally, on its face, the rule does not require that the consistent statement offered have been made prior to the time the improper influence occurred or the motive arose or prior to the alleged recent fabrication. The Federal courts, on the other hand, seem to have read such a common law requirement into the rule. *See United States v. Dominguez*, 604 F.2d 304 (4th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); *United States v. Quinto*, 582 F.2d 224 (2d Cir. 1978); *United States v. Scholle*, 553 F.2d 1109 (8th Cir.), *cert. denied*, 434 U.S. 940 (1977). The drafters' analysis to Mil.R.Evid. 801 opines that "the propriety of this limitation is clearly open to question." This remains to be seen. Meanwhile, timeliness of prior consistent statements will involve a standard relevancy analysis. For example, the rehabilitative effect of a consistent statement in dispelling a charge of fabrication depends significantly on whether the statement was made prior to the time the witness had a reason to lie. Recent cases have left the question unresolved. *See United States v. Meyers*, 18 M.J. 347 (C.M.A. 1984); *United States v. Cottriel*, 21 M.J. 535 (N.M.C.M.R. 1985). *See United States v. Kauth*, 11 C.M.A. 261, 29 C.M.R. 77 (1960), for a discussion of the admissibility of prior consistent statements. For a more recent treatment of this issue, see *United States v. Hurst*, 29 M.J. 477 (C.M.A. 1990).

0715 FINAL COMMENTS

With the policy of the Mil.R.Evid. encouraging the admission of relevant testimony, it is incumbent upon counsel to ensure that the triers of fact give the testimony its proper weight. Thus, credibility will be an area of frequent litigation at trial. Counsel should remember that the methods of bolstering, impeaching, and rehabilitating witnesses discussed in this chapter are not exhaustive. As has been noted, it is the intent of the drafters to allow any form of attack on or support of credibility accepted by article III courts to be allowable under the Mil.R.Evid. Thus, counsel should follow developments in both Federal and military courts and should remember the common law. *See* Mil.R.Evid. 101. In addition to knowing the methods of attacking or supporting credibility, counsel must be able to use these methods. While reading articles and treatises on techniques is useful, actual trial practice will be the final test of the extent of counsel's knowledge of witness credibility. Finally, it must be remembered that, in impeaching a witness, as in any other area of trial work, there is no substitute for preparation.

PART THREE: OPINIONS AND EXPERT TESTIMONY (Key Number 1120)

0716 INTRODUCTION. Section VII of the Military Rules of Evidence deals with the manner in which witnesses may testify. Traditionally, opinions, as opposed to facts, have not been preferred by the law. Evidentiary rules have developed which discourage witnesses from expressing inferences, opinions, or conclusions and encourage them to "keep to the facts." These rules were based on the premise that allowing witnesses to offer conclusions or opinions would lead to the acceptance of the witnesses' inferences at face value without consideration of the underlying facts and would deprive the fact-finders of opportunities to draw their own inferences, thus abrogating their duties. It has even been suggested that "[l]ike the hearsay and original documents rules [the opinion rule] is a 'best evidence' rule." McCormick, Opinion Evidence in Iowa, 19 Drake L. Rev. 245, 246 (1970).

Section VII of the Mil.R.Evid. presents an integrated approach to opinion testimony. Mil.R.Evid. 701-705 are essentially identical with the corresponding Federal rules, the only changes being deletions of references to the masculine gender. Mil.R.Evid. 701 governs the testimony of ordinary or "lay" witnesses while the testimony of "experts" is governed by Mil.R.Evid. 702, 703, and 705. Mil.R.Evid. 704 deals with testimony by any witness on an "ultimate issue." All of these rules should be read in conjunction with each other, as they reflect a total and coherent philosophy involving both relevancy and competency. The final rule in this section, Mil.R.Evid. 706, applies special military considerations to the subject of court-appointed experts.

0717 OPINION TESTIMONY BY LAY WITNESSES. Mil.R.Evid. 701.

> Rule 701. Opinion Testimony by Lay Witnesses
>
> If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

A. Requirements for application of the rule

In order for a lay witness' testimony in the form of opinions or inferences to be admissible, the opinion or inference: (1) must be rationally based on the witness' own perception; and (2) must be helpful to the trier of fact.

1. This first requirement implicitly incorporates the specific competency requirement of Mil.R.Evid. 602. The perception, whether it be something seen, heard, felt, or otherwise perceived, must be the witness' own [*e.g., United States v. Jackson*, 569 F.2d 1003, 1011 (7th Cir.), *cert. denied*, 437 U.S. 907 (1978) (trial judge properly refused to allow wife to testify why her husband was depressed as she could not so perceive)]. Additionally, these perceptions must be rationally based. This means only that the opinion or inference is one which a normal person would form on the basis of the observed facts. For example, it is doubtful that a person claiming to be possessed of extrasensory perception would be able to meet the rational perception test (from either the perception or rationality aspects).

2. The second, and more important, requirement is that the opinion or inference be helpful to the determination of a fact in issue or to a clear understanding of the testimony of the witness. It is not clear what the distinction is between understanding the testimony of the witness and determining a fact in issue, since it appears that any improvement in understanding testimony would also improve the determination of a fact in issue. This is not significant, however, as long as the opinion is an aid to the fact-finder.

a. The opinion may be helpful when the exclusion of an opinion would not allow the witness to be able adequately or accurately to describe the event perceived. *E.g., United States v. Arrasmith*, 557 F.2d 1093, 1094 (5th Cir. 1977) (border patrol agent allowed to testify as to the smell of marijuana since "describing odors is a task that can severely test the abilities of even the most accomplished wordsmith."); *New York Life Insurance Co. v. Harrington*, 299 F.2d 803, 807 (5th Cir. 1962) (witness who claimed deceased shot himself accidently was permitted to testify that the deceased looked surprised when the gun fired: "a witness is allowed some latitude in giving a shorthand description of events involving manifestations of familiar but complex emotions").

b. Helpful opinions also include situations where the witness is able to avoid artificial circumlocutions that might cause the factfinder to miss the point or at least be unnecessarily distracted. *E.g., Bohannon v. Pegelow*, 652 F.2d 729 (7th Cir. 1981) (witness permitted to testify that arrest was racially motivated); *United States v. Lawson*, 653 F.2d 299 (7th Cir. 1981) (lay testimony that accused was sane at time of offenses was permitted). On the other hand, it was not "helpful to the trier of fact" for a CID agent to express the opinion in a rape prosecution that the victim displayed symptoms similar to those of typical rape victims when he interviewed her. *United States v. Carter*, 26 M.J. 428 (C.M.A. 1988).

c. Any time a lay witness states an opinion, it is appropriate that the witness be required to state the basis for the opinion. This should normally

be done by the counsel requesting the opinion of the witness, but may also be done by the military judge pursuant to Mil.R.Evid. 611(a) and 104(a) in determining the admissibility of an opinion.

B. Discretion of the military judge

It should be remembered that Mil.R.Evid. 701 is a rule of discretion to be applied by the military judge. The emphasis should be on what the witness knows and not on the manner in which this knowledge is expressed. The fact-finders are normally astute enough to pick up signals as to when a witness is testifying about what he perceived and when it is merely what the witness thinks.

Mil.R.Evid. 701 must be read in conjunction with Mil.R.Evid. 704. Although Mil.R.Evid. 704 allows opinions on an ultimate issue in a case, opinions that simply serve to tell the fact-finder how to decide a case are not helpful to the trier of fact. For example, no witness should offer an opinion that the accused is guilty; nor should an investigator be permitted to testify that, in his opinion, an accused lied when making an exculpatory pretrial statement. *See United States v. Clark*, 12 M.J. 978 (A.F.C.M.R. 1982), *petition denied*, 13 M.J. 480 (C.M.A. 1983); *United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985). Of course, this axe cuts both ways. It is equally improper for a defense witness to express the opinion that the accused was being truthful when making an exculpatory pretrial statement. Thus, for example, in a prosecution for use of cocaine, it was not an abuse of the military judge's discretion to exclude testimony from a drug counselor called by the defense that the accused was telling the truth when he told her in the course of a pretrial drug counseling session that he had not used cocaine. *United States v. Farrar*, 25 M.J. 856 (A.F.C.M.R. 1988).

C. Commonly used opinions

1. Observable physical phenomena:

a. Speed of an automobile;

b. whether a voice heard was that of a man, woman, or child;

c. matters of color, weight, size; and

d. matters involving sight, sound, taste, smell, touch (the senses).

2. Physical, emotional, or mental condition of a person (includes drunkenness, illness)

3. Proof of character. When proof of the character of a person is admissible, the opinion of a witness as to that person's character may be received in evidence if it is known that the witness has such an acquaintance or relationship with the person as to qualify him to form a reliable opinion in this respect. Mil.R.Evid. 405(a).

4. General mental condition. A lay witness, who is acquainted with the accused and who has observed his behavior, may also testify as to his observations and give such an opinion as to the general mental condition of the accused as may be within the bounds of common experience and means of observation of men. *See United States v. Carey*, 11 C.M.A. 443, 29 C.M.R. 259 (1960). *See also United States v. Lawson*, 653 F.2d 299 (7th Cir. 1981); *United States v. Pickett*, 470 F.2d 1255 (D.C. Cir. 1972).

5. Habit or usage. Mil.R.Evid. 406.

6. Handwriting. Mil.R.Evid. 901(b)(2).

7. Drugs. A witness, who is familiar with the drug in issue and its physical or chemical properties, is permitted to give an opinion of the identity of the drug, whether the familiarity arises from formal or informal training and experience. *See United States v. Weinstein*, 19 C.M.A. 29, 41 C.M.R. 29 (1969) (contemporaneous declaration as to the nature of the substance by a person using the substance and who may be presumed to know its nature is evidence of the identity); *United States v. Smith*, 3 C.M.A. 803, 14 C.M.R. 221 (1954) (user of morphine may express opinion on identity of substance); *United States v. Ayers*, 14 C.M.A. 336, 34 C.M.R. 116 (1964). *See also United States v. King*, 36 C.M.R. 929 (A.F.B.R. 1966), *petition denied*, 16 C.M.A. 653, 36 C.M.R. 541 (1966) (nonexpert's opinion as to marijuana goes to weight and not admissibility); *United States v. Jackson*, 49 C.M.R. 881 (A.F.C.M.R. 1975); *United States v. Quindana*, 12 C.M.R. 790 (A.F.B.R. 1953); *United States v. Tyler*, 17 M.J. 381 (C.M.A. 1984) (identification of cocaine); *United States v. Day*, 20 M.J. 213 (C.M.A. 1985) (identification of heroin and hashish).

For other examples of the use of lay witness opinion, see Annot. Lay Witnesses: construction and application of Rule 701 of Federal Rules of Evidence, providing for opinion testimony by lay witnesses under certain conditions, 44 A.L.R. Fed. 919 (1979).

0718 TESTIMONY BY EXPERTS. Mil.R.Evid. 702.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge

> will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

A. General. This rule sets forth the generally permissive standard for the use of expert witnesses. Like Mil.R.Evid. 701 dealing with lay witnesses, the key question here is whether the testimony will "assist the trier of fact." *See, e.g., United States v. Kyles*, 20 M.J. 571 (N.M.C.M.R. 1985).

1. There is no requirement under this rule that an expert be necessary or that the subject matter of the expert's testimony be beyond the ken of the fact-finder. These were common requirements under traditional rules on expert testimony.

2. The rule is intentionally broadly phrased. Contrary to a commonly accepted belief, appropriate areas of expertise under this rule are not limited to scientific or technical fields of knowledge, but include all "specialized" knowledge. Similarly, the expert is not viewed in the strictly professional sense, but includes any person qualified by "knowledge, skill, experience, training, or education," so that even a lobsterman or quahogger could give expert testimony in the appropriate case.

3. The witness need not be an outstanding practitioner, but merely someone who can assist the trier of fact because of his specialized knowledge. *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986) (CID agent, who took five-day course on blood spatter, could testify). *See also United States v. Peel*, 29 M.J. 235 (C.M.A. 1989).

4. Although much of the expert testimony in court will be opinions, the drafters allowed for other types of testimony ("opinion or otherwise"). The drafters of the rule envisioned a situation where an expert might "give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts." Fed.R.Evid. 702 Advisory Committee note.

5. The impact of the permissiveness of Mil.R.Evid. 702 cannot be fully appreciated without consideration of related rules considered later in this part of the chapter (Mil.R.Evid. 703 with its expansion of the data on which the expert may rely, Mil.R.Evid. 704 with its abolition of the ultimate issue rule, and Mil.R.Evid. 705 with the loosening of foundational requirements).

B. Assistance to the trier of fact. It should be noted that the standard referred to in Mil.R.Evid. 702 is simply whether the evidence which the expert will provide is going to assist the trier of fact in any manner. C.M.A. has rejected the

holding of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). As a result, the extent to which a particular type of expert testimony is generally accepted in the scientific community is merely one factor to consider in determining whether it is sufficiently probative to be admissible in a military proceeding. *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987). It is perhaps most useful to examine how this standard will apply in some of the more common types of cases and issues which military justice practitioners are likely to experience.

1. Polygraphs. Newly created Mil.R.Evid 707 establishes a bright-line rule that polygraph evidence is not admissible by any party to a court-martial, even if stipulated to by the parties. This amendment is not intended to accept or reject *United States v. Gipson*, 24 M.J. 343 (C.M.A. 1987), concerning the standard for admissibility of other scientific evidence under Mil.R.Evid 702. Section (b) of the rule ensures that any statements which are otherwise admissible are not rendered inadmissible solely because the statements were made during a polygraph examination."

2. Child sexual abuse. Any number of cases have addressed the use of expert testimony in child sexual abuse cases. One of the leading cases in this area is *United States v. Snipes*, 18 M.J. 172 (C.M.A. 1984), holding that the military judge did not err in permitting the trial counsel to call a social worker, a state counselor, and a clinical and forensic psychologist, all of whom expressed the opinion that the child's mental and emotional state during their pretrial interviews with her was consistent with that of a child who had been sexually abused. It has been held proper for a government expert in clinical psychology to express opinions as to why a child might not quickly report an incident of sexual abuse; whether a child might be prompted to fabricate an allegation of sexual abuse after viewing a pornographic videocassette; and what effect, if any, an adult's sexual orientation might have on the probability of his committing sexual offenses against a child. *United States v. Nelson*, 25 M.J. 110 (C.M.A. 1987). In another child molestation case, it was held proper for a government expert to express an opinion as to various patterns of consistency in the stories of child sexual abuse victims and compare those patterns with patterns in the immediate victim's story. *United States v. Harrison*, 31 M.J. 330 (C.M.A. 1990). *See also United States v. Rhea*, 33 M.J. 413 (C.M.A. 1991).

3. Drug cases. In a urinalysis prosecution for use of marijuana, it was held proper for a military judge to exclude defense proffered expert testimony regarding the possibility of "melanin interference" (the theory that melanin pigmentation in black skin can cause a false positive for THC in a gas chromatography and mass spectrometry test) where the defense expert had received no education or training in the area of forensic chemistry; he had never personally tested whether melanin interferes with the reliability of the gas chromatography and mass spectrometry procedure; and he was unaware of any scientist besides himself who subscribed to the melanin interference theory. *United States v. Mance*, 26 M.J.

who subscribed to the melanin interference theory. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988).

4. Truthfulness of another witness. Trial advocates should be alert to the serious potential for abuse of expert testimony when it begins to approach a commentary by the expert witness on the truthfulness of another witness' testimony. For example, while it is perfectly proper for experts to express opinions on matters such as whether a child would be likely to fabricate an allegation of sexual abuse or whether during a pretrial interview the child was demonstrating symptoms commonly seen in sexually abused children, it would be highly improper for the expert to go just one step further and begin to express opinions regarding the truthfulness of the victim's allegation against the accused. Thus, for example, in *Rhea, supra*, C.M.A. noted that it would have been improper for the court to ask the government expert if the victim in that case was fabricating her allegation or telling the truth. Similarly, in another child molestation case, it was held to be error (though harmless, in light of the overpowering evidence against the accused) for a government psychiatrist on the basis of his pretrial interviews with the victim to express his opinion that she had actually had a sexual encounter with the accused. *United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988). And, in *United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985), it was held to be reversible error for a social worker to express the opinion that the twelve-year-old victim was being truthful when she reported the sexual abuse to her. On the other hand, it was held to be error, though harmless under the circumstances, in a prosecution for making a false official statement for the military judge to prevent a defense psychiatrist from expressing the opinion that the accused was engaging in a "coping mechanism" and actually believed she was still married at the time she made the false representation (the accused allegedly lied in claiming she was still married at the time she applied for married BAQ when in fact she had recently been divorced). *United States v. Hill - Dunning*, 26 M.J. 260 (C.M.A. 1988); *United States v. Peterson*, 24 M.J. 283 (C.M.A. 1987); *United States v. Toledo*, 25 M.J. 270 (C.M.A. 1987).

0719 BASES OF OPINION TESTIMONY BY EXPERTS. Mil.R.Evid. 703.

Rule 703. Bases of Opinion Testimony by Experts

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The traditional common law approach to expert testimony was to restrict it to opinions or inferences based upon facts actually presented in evidence. This usually involved asking the expert a hypothetical question wherein the expert was asked to give an opinion assuming that the facts stated in the question were correct. The assumed facts had to be proven by other evidence and witnesses in court. MCM, 1969 (Rev.), para. 138e, was more permissive by allowing an expert's opinion to be based on personal observation, personal examination or study, or examination or study "of reports of others of a kind customarily considered in the practice of the expert's specialty." Mil.R.Evid. 703, although similar in scope to MCM, 1969 (Rev.), para. 138e, is broader still. As the drafters' analysis notes, hypothetical questions of the expert are not required under the rules. Mil.R.Evid. 703 drafters' analysis, MCM, 1984, app. 22-45.

A. General

While Mil.R.Evid. 702 establishes the general requirement that the testimony of a qualified expert witness assist the trier of fact to understand an issue, Mil.R.Evid. 703 prescribes the permissible factual bases for the expert's opinion. It begins with the implicit assumption that an expert's opinion has a factual basis. This assumption is made explicit by Mil.R.Evid. 705, discussed in subsection 0720 *infra*. Mil.R.Evid. 703 then sets forth three possible sources of facts or data upon which the expert could rely in forming his opinion. This is an expansion on the single basis allowable for a lay witness' opinion (i.e., "the perception of the witness"). *See* Mil.R.Evid. 701(a).

B. Three bases

1. Personal perception. The first and most obvious way for an expert to learn the pertinent facts needed for forming an opinion is for him to perceive them himself. A doctor who has treated a patient is a common example. This basis is identical with that allowed for lay witnesses under Mil.R.Evid. 701.

2. Facts made known at the hearing. The second method of informing an expert of facts on which to base his opinion is to acquaint him with the facts at trial. This method may be done by either of two techniques. The first technique would be to present the pertinent facts in the form of the traditional hypothetical question which solicits the expert's opinion on the basis of the facts set forth in the question. Under the Mil.R.Evid., hypothetical questions need not assume facts in evidence or facts to be proven later, but the underlying assumptions must be within the range of issues and cannot assume facts utterly extrinsic to the evidence. *See United States v. Breuer*, 14 M.J. 723 (A.F.C.M.R. 1982). The second technique is to have the expert attend the trial, hear the evidence, and then offer an opinion based on the evidence heard in court. *See, e.g., Sears, Roebuck Co. v. Penn Central Co.*, 420 F.2d 560 (1st Cir. 1970). This provision may be particularly useful with

psychiatrists. *See, e.g., United States v. Hammond*, 17 M.J. 218 (C.M.A. 1984) (expert's discussion of victim's impairment due to rape trauma syndrome based on in-court observation of victim's testimony). *See also United States v. Eastman*, 20 M.J. 948 (A.F.C.M.R. 1985). If this latter method is used, counsel should remember the sequestration of witness provisions of Mil.R.Evid. 615 (discussed in part four *infra*). Mil.R.Evid. 705, discussed *infra*, may also be useful in determining which of the facts heard in court by the expert were actually used in forming his opinion.

3. Facts made known outside of court. The third permissible method of making facts known to an expert is to supply him data outside of the trial and of which he has no personal knowledge. Even if such data might itself be inadmissible as evidence, it may still form the basis for an expert's opinion provided it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Mil.R.Evid. 703. As the Fed.R.Evid. Advisory Committee noted in its analysis to Fed.R.Evid. 703, medical diagnoses frequently are based on "statements by the patient and his relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and x-rays." It is in a context such as this that the rule permits the use of "facts and data" (commonly hearsay) which would not be admissible themselves. The use of data from outside court raises several problems.

a. How does the military judge determine whether the facts used by the expert at trial are what experts in a particular field rely upon? The military judge can inquire of the expert witness, or call other expert witnesses and ask what they and their colleagues rely on, or the military judge could consult appropriate literature of the particular field. Mil.R.Evid. 703 contains no guidelines on this question, but C.M.A. has held that the appropriate standard for the military judge to employ is that found in Mil.R. Evid. 403; namely, whether the danger of unfair prejudice substantially outweighs the probative value or not. *United States v. Neeley*, 25 M.J. 105 (C.M.A. 1987). In that case, the accused was being prosecuted for premeditated murder and he presented an insanity defense. In rebuttal, the government called a clinical psychologist who testified that, in her opinion, the accused had deliberately inflated the results of his Minnesota Multiphasic Personality Inventory (a psychiatric test which she had administered to the accused prior to trial). She further testified that she had shown the results to three other psychologists and they had agreed with her assessment. C.M.A. held that Mil.R.Evid. 703 permits an expert to rely on the opinions of others and that the military judge did not abuse his discretion in admitting this testimony since it related primarily to her own opinion.

b. Another problem with the use of inadmissible facts is this: How does the expert testify as to his opinion without reporting some of the underlying facts? If he is required to state only the opinion without any of the facts upon which it is based, the trier of fact may not be able to properly evaluate the

weight to be given the opinion. However, if the expert is given a free hand to state any facts upon which the opinion is based, Mil.R.Evid. 703 could become a tool to bypass many of the other rules and get inadmissible evidence before the members improperly. The drafters' analysis refers to the possible need for a limiting instruction under Mil.R.Evid. 105 in this situation. Mil.R.Evid. 403 considerations are also applicable. The party opposing the expert witness may find it appropriate to make a motion in limine.

C. Confrontation

A constitutional challenge to Mil.R.Evid. 703 has been raised by some who argue that an accused's sixth amendment rights are violated when an expert gives opinion testimony based on data obtained from others who are not themselves presented as witnesses, since the accused is denied the opportunity to confront them. *See United States v. Lawsen*, 653 F.2d 299 (7th Cir. 1981), which stated in dictum that an expert's testimony based entirely on hearsay would violate the confrontation clause. Decisions supporting the Mil.R.Evid. 703 approach are based on the theory that the only evidence that the expert is presenting is his own opinion and not the factual basis for the opinion. Since the expert is subject under this rule to cross-examination about the basis for his opinion, the trier of fact can adjust the weight to be given to the witness' opinion where the facts upon which it is based emanate from an unknown or unreliable source. *See United States v. Williams*, 447 F.2d 1285 (5th Cir. 1971) (*en banc), cert. denied*, 405 U.S. 954 (1972). This theory, and its acceptance, is dependent upon proper limitation of the expert's testimony as to inadmissible facts or data upon which his opinion is based. Although such confrontation clause problems were not discussed by C.M.A. in its decision in *Neeley, supra*, it seems fairly unlikely in view of its decision there that C.M.A. would be very moved by a confrontation clause challenge to Mil.R.Evid. 703 on its face.

0720 DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION. Mil.R.Evid. 705

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

> The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the military judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

A. General

Mil.R.Evid. 705 authorizes the admission of the opinion testimony of an expert without prior disclosure of the facts or data which underlie his opinion, unless the military judge requires otherwise. In that event, the rule leaves to cross-examination an inquiry into the factual basis for the witness' opinion. This rule is taken verbatim from the Federal rule. A basic thrust of the rule is that it allows the military judge to control whether or not the opinion may precede any statement of a basis for the opinion. *See* Mil.R.Evid. 611(a).

B. Interplay with Mil.R.Evid. 703

Mil.R.Evid. 703 and 705 are closely related, since they both deal with the facts upon which an expert may base an opinion. As discussed in the last section of this part of the chapter, Mil.R.Evid. 703 sets forth the means by which an expert can obtain the factual basis for his opinion. Mil.R.Evid. 705 only obviates the need either for the expert to enumerate this factual basis or to have the facts repeated to the expert in a hypothetical question prior to having the expert state his opinion. The rules are most related when dealing with hypothetical questions and with testimony based on out-of-court facts or data.

1. Hypothetical questions. As we noted in the discussion of Mil.R.Evid. 703, the traditional hypothetical question asks the expert to assume as true certain enumerated facts which are in evidence and could be found true by the trier. The basic concept is that the expert is to give his opinion based on the facts set forth in the question, and that the trier may then accept the opinion if the trier finds as true the facts which formed the basis of the expert's opinion. As the Fed.R.Evid. Advisory Committee points out in its note to Fed.R.Evid. 705:

> The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, "Expert Testimony", 5 Vand. L. Rev. 414, 426-427 (1952). While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand.

In the article cited by the Committee, Dean Ladd stated:

> A hypothetical question will always be difficult for the attorneys to frame, for the court to rule on, and for the jury to understand. Perhaps the one who suffers the most is the witness who is required to answer. Hypothetical questions have been the subject of justified criticism and even their abolishment has been urged. Partisan bias, length of questions, awkwardness and complexity of expression have placed a stigma upon them as an obstruction to the administration of justice.

Id. at 425, 427 (footnotes omitted). Mil.R.Evid. 705 offers a means to avoid these problems. There is nothing in the rule which forbids their use, however. It leaves the choice to counsel.

2. Inadmissible facts considered. In our prior discussion of Mil.R.Evid. 703, the problem of the use of inadmissible facts being revealed to members was addressed. During cross-examination under Mil.R.Evid. 705 into the factual basis for an opinion, the standards of Mil.R.Evid. 105 and 403 still apply. It may be possible for the inadmissible factual basis to be so prejudicial that counsel could argue that effective cross-examination would not be reasonably possible and ask the military judge to go so far as to preclude the admission of the expert's opinion on a Mil.R.Evid. 403 theory. More likely, the court would fashion an appropriate limiting instruction.

C. Responsibilities of counsel

1. Discovery. Mil.R.Evid. 705 relies upon effective cross-examination to reveal the factual basis for an expert's opinion which can then permit the trier of fact to determine the weight to give the testimony. The effectiveness of the cross-examination will depend, in part, upon whether counsel have effectively used the discovery devices discussed in chapter II of this study guide.

2. Trial tactics. As the Fed.R.Evid. Advisory Committee notes: "[i]f the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion." Fed.R.Evid. 705 Advisory Committee note. Counsel should remember that it usually is to the advantage of the direct examiner to bring out the facts or data upon which an opinion is based, since an opinion will be worth only as much as the factual basis upon which it is founded. It is dangerous for a direct examiner to refrain from asking questions about the facts or data because the cross-examiner also may choose not to ask them and the answers may never find their way into evidence.

0721 OPINION ON ULTIMATE ISSUE. Mil.R.Evid. 704

Rule 704. Opinion on Ultimate Issue

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

A. General

Opinion testimony is not objectionable on the grounds that it relates to an "ultimate issue" to be decided by the trier of fact. In the common law this was a proper objection and, under prior military practice, the common law approach was generally followed, although the MCM, 1969 (Rev.) did not specifically address the topic. *See, e.g., United States v. Hunter*, 2 C.M.A. 37, 6 C.M.R. 37 (1952). *But see United States v. Lowe*, 4 C.M.A. 654, 16 C.M.R. 228 (1954). The rationale for explicitly abolishing the common law approach is in keeping with the basic approach of section VII of the rules (i.e., opinions that are helpful to the trier of fact should be admitted). *See* Fed.R.Evid. 704 Advisory Committee note. The Advisory Committee stated that the old rule "was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information." *Id.* It resulted in witnesses having to "couch their opinions in cautious phrases of 'might or could' rather than 'did.'" The common law rule was further complicated by the many exceptions which developed and instances where the rule was simply disregarded. Mil.R.Evid. 704 simplifies matters substantially.

Notwithstanding its physical location between two rules dealing with the factual basis for expert opinion, Mil.R.Evid. 704 applies to both lay and expert witnesses. Any opinion that is "otherwise admissible" can be admitted despite the fact that it relates to an ultimate issue.

As the Fed.R.Evid. Advisory Committee states in its note to Fed.R.Evid. 704, "the abolition of the ultimate issue rule does not lower the bars so as to admit all opinions." Litigation must now focus on whether an opinion is "otherwise admissible," not on whether an opinion goes to an ultimate issue. Thus, any debate on what constitutes an "ultimate issue" is moot. *See, e.g., United States v. Snipes*, 18 M.J. 172 (C.M.A. 1984) (experts testifying about the typical behavior of sexually abused children permitted to answer questions relating to the "believability" of the victim, and, by implication, the guilt of the accused). On the other hand, C.M.A. has made it clear that it does not construe Mil.R.Evid. 704 as permitting one witness to comment or express an opinion on the truthfulness of another witness' testimony. Such issues have been particularly prevalent in child molestation cases. For example,

in one such case, it was held to be error (though harmless in light of the overpowering evidence against the accused) for a government psychiatrist, on the basis of his pretrial interviews with the victim, to express his opinion that the victim had actually had a sexual encounter with the accused. *United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988). And, in *United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985), it was held to be reversible error for a social worker to express the opinion that the twelve year-old-victim was being truthful when she reported the sexual abuse to her.

B. Otherwise admissible

Mil.R.Evid. 701 and 705 require that the opinion have a factual basis. Mil.R.Evid. 701 and 702 require that the opinions of lay and expert witnesses assist the trier of fact. Mil.R.Evid. 403 provides for the exclusion of evidence that wastes time. Thus, if a witness' opinion will do little more than tell the court members what result to reach, it will be inadmissible. For example, a witness cannot testify that "the accused is guilty." This adds nothing to assist the trier of fact. The drafters' analysis to Mil.R.Evid. 704 plainly states that "the rule does not permit the witness to testify as to his or her opinion as to the guilt or innocence of the accused or to state legal opinions. Rather it simply allows testimony involving an issue which must be decided by the trier of fact. Although the two may be closely related, they are distinct as a matter of law."

The military judge is the "sole source of the law" and witnesses should not be allowed to testify on the status of the law, just as counsel are forbidden to argue law to the members. Hearing statements of "the law" from several sources would not be helpful to the members. *See* Mil.R.Evid. 403, 701, and 702. The limited Federal litigation of Fed.R.Evid. 704 in criminal cases has been primarily on whether the witness' opinion involved "inadequately explored legal criteria." For example, in *United States v. Baskes*, 649 F.2d 471, 478 (7th Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981), the defendant wished to cross-examine a co-conspirator as to whether the witness did "unlawfully, knowingly, and willfully conspire to defraud the United States" along with the defendant. The Court of Appeals found that such an opinion of the scope of criminal law would not be helpful under Rule 701 and thus not "otherwise admissible." *See also United States v. Ness*, 665 F.2d 248 (8th Cir. 1981). *But see United States v. Kelly*, 679 F.2d 135 (8th Cir. 1982). A similar problem arises when a psychiatrist is asked whether an accused is "legally insane." Asking if the accused is "insane" is permissible, provided, of course, that the witness is properly qualified to render that opinion. To avoid problems in this area, counsel should assure himself that a question posed to the witness does not assume that the witness understands legal terms or definitions and does not ask the witness to answer in legal terms unless the witness is qualified as an expert in legal matters. Permission of the military judge for any questioning on legalities should be sought as a preliminary matter. *See* Mil.R.Evid. 611(a).

0722 COURT APPOINTED EXPERTS. Mil.R.Evid. 706.

Rule 706. Court Appointed Experts

(a) Appointment and compensation. The trial counsel, the defense counsel, and the court-martial have equal opportunity to obtain expert witnesses under Article 46. The employment and compensation of expert witnesses is governed by R.C.M. 703.

(b) Disclosure of employment. In the exercise of discretion, the military judge may authorize disclosure to the members of the fact that the military judge called an expert witness.

(c) Accused's experts of own selection. Nothing in this rule limits the accused in calling expert witnesses of the accused's own selection and at the accused's own expense.

Mil.R.Evid. 706 represents a substantial redraft of Fed.R.Evid. 706 in order to conform it to the needs of the military.

A. Appointment and compensation

Mil.R.Evid. 706(a) simply restates the law that all parties to the trial, including the military judge and members, have a right to obtain expert witnesses. *See* Article 46, UCMJ and Mil.R.Evid. 614. The procedural means by which an expert witness may be obtained at government expense differ from those procedures used to obtain lay witnesses. R.C.M. 703(d).

Mil.R.Evid. 706(c) is similar to Fed.R.Evid. 706(d) in making it clear that the accused may call his own expert witnesses if he pays their expenses. The calling of the accused's own witnesses would be subject to the relevancy provision of Mil.R.Evid. 402 and 403.

B. Experts called by the military judge

Mil.R.Evid. 614 provides that the military judge may call witnesses, and this may include calling expert witnesses. Mil.R.Evid. 706(b), taken from Fed.R.Evid. 706(c), authorizes the military judge to inform the members that he has called an expert witness. This presents the problem that the court members will associate the witness with the military judge and accord the testimony greater weight. If the military judge does decide to use subsection (b), care must be taken to give a fair instruction that the witness' testimony is not to be accorded any extra weight.

0723 FINAL COMMENTS

The rules on opinion testimony and the use of expert witnesses are simple and fairly straightforward. Their philosophy of encouraging assistance to the trier of fact is clear. In most cases, there will be no serious question that an expert can testify provided that counsel properly qualify the witness as an expert. The real questions in this area are those of trial tactics and strategy. These are beyond the scope of the text and the reader is referred to the many trial advocacy materials available to the practitioner. *See, e.g.*, Tigar, *Handling the Expert Like an Expert: Back to Basics*, 14 The Advocate 13 (1982).

PART FOUR: TRIAL PRACTICE RULES OF EVIDENCE

'724 INTRODUCTION

Some of the rules of Section VI of the Mil.R.Evid. may be thought of as trial practice rules of evidence." These are often distinguished from the "substantive ules of evidence" found in Sections III-V, VII-X, and the first part of Section VI. 'he trial practice rules should not be thought of as lesser cousins, however. Unlike nany of the more substantive rules that are rarely used, counsel will deal with the rial practice rules in every court-martial and, without them, a trial would have no ırder.

Foremost in the trial practice group is Mil.R.Evid. 611 since it deals with the nilitary judge's control over the mode and order of interrogation and presentation of estimony, the scope of cross-examination, and the use of leading questions. Closely elated in subject matter, but not in importance or frequency of use, is Mil.R.Evid. 514 which provides for the calling and interrogation of witnesses by the military udge and members. Mil.R.Evid. 615 on the exclusion, or sequestration, of witnesses ıas become so automatic in its application that counsel tend to forget that the rule ;ven exists. The specific testimonial situation of "refreshing memory" is examined ɔy rule 612. Although based on a common law rule, the codification in Mil.R.Evid. 512 has been judicially expanded to become a discovery tool. There are other trial ɔractice or procedural rules in the Mil.R.Evid. (such as Mil.R.Evid. 608 and 613), but ;hey are examined elsewhere in this study guide.

This part of the chapter will look briefly at each of the rules mentioned in the ɔrevious paragraph and then analyze the use of various testimonial evidence at the ;tages of the court-martial. This discussion will reveal the interrelationship of the ·ules and the procedural provisions of the MCM, 1984. Although these latter sections will make some mention of strategies in the use of testimonial evidence and give ;everal examples, it is not the intent of this section to be a discussion of trial ıdvocacy. The reader is referred to appropriate NJS trial advocacy materials for such liscussions. *See, e.g.*, NJS, *Aids to Practice*; NJS, *Evidentiary Foundations*; and NJS, *Trial Advocacy Practical Exercises*.

0725 MODE AND ORDER OF INTERROGATION AND PRESENTATION. Mil.R.Evid. 611. (Key Number 220)

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by the military judge. The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness or a witness identified with an adverse party, interrogation may be by leading questions.

A. Control by the military judge

Mil.R.Evid. 611(a) is a basic source of the military judge's power to control proceedings at court-martial. Although taken without change from Fed.R.Evid. 611(a), it is a reflection of the military judge's traditional powers and broad discretion. According to the Fed.R.Evid. Advisory Committee, in its note to Fed.R.Evid. 611(a): "Spelling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain." The three objectives the military judge should try to attain will now be discussed.

1. The first objective is to ensure that the evidence is presented in an efficient manner so as to maximize the ascertainment of truth. This is a broad restatement of the power and obligation of the judge as developed under common law. *See* Mil.R.Evid. 102 and Fed.R.Evid. 611 Advisory Committee note. Mil.R.Evid.

611(a) allows the judge to control the use of real or demonstrative evidence, to determine whether counsel may ask narrative questions or must ask questions requiring specific answers, and to control the order in which witnesses may testify and the internal ordering of a particular witness' testimony. It also covers "the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances." Fed.R.Evid. 611(a) Advisory Committee note. The Court of Military Appeals has recognized for some time the obligation of the military judge to ensure that the accused receives a fair trial. *See, e.g., United States v. Graves*, 1 M.J. 50 (C.M.A. 1975). This obligation on the part of the judge is demonstrated in the rules' use of "shall exercise reasonable control" [Mil.R.Evid. 611(a), emphasis supplied] rather than the discretionary "may" of the 1971 draft of the Fed.R.Evid.

2. The second objective addressed is the avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. *See generally United States v. Wright*, 13 M.J. 824, 827 (A.C.M.R. 1982), *petition denied*, 13 M.J. 480 (C.M.A. 1983). A companion objective is found in the discretion vested in the judge to exclude evidence as a waste of time in Mil.R.Evid. 403(b). Cumulative or redundant evidence can be controlled under this provision. *See United States v. Clark*, 617 F.2d 180 (9th Cir. 1980), where at trial the trial judge properly exercised his discretion by refusing to allow defense counsel to recall an expert witness where defense made no offer concerning how the witness would aid the jury in determining the issue.

3. The third objective calls for the judge to protect witnesses from harassment or undue embarrassment. The Fed.R.Evid. Advisory Committee notes that this objective

> calls for a judgment under the particular circumstances whether interrogation tactics entail harassment or undue embarrassment. Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion. McCormick 42. In *Alford v. United States*, 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624 (1931), the Court pointed out that, while the trial judge should protect the witness from questions which "go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate," this protection by no means forecloses efforts to discredit the witness.

Fed.R.Evid. 611(a) Advisory Committee note.

Not all embarrassing questions are prohibited under the rule. Only unduly embarrassing questions are prohibited. Questions asked merely to belittle the witness or subject the witness to public ridicule are unduly embarrassing. It should be emphasized, however, that "undue embarrassment" is not to be confused with the normal degree of embarrassment which is nearly always attendant upon an impeachment of the witness' credibility, especially when such impeachment results from some showing of bias or a motive to fabricate. Thus, for example, in a prosecution for larceny, where it was alleged that the accused had conspired to commit the larceny with another servicemember and one of the key witnesses against the accused was the wife of the co-conspirator, it did not constitute "undue embarrassment" of the witness to cross-examine her about whether she had committed adultery with the accused, especially in view of the defense offer to prove that the co-conspirator had found out about her adultery and had beaten his wife as a result. Such evidence constituted a motive on the part of the witness to fabricate testimony against the accused and the military judge therefore erred in precluding cross-examination of the witness on this point. *United States v. Hayes*, 15 M.J. 650 (N.M.C.M.R. 1983).

4. Although the military judge has the discretion to alter the sequence of proof to the extent that the burden of proof is not affected, the usual sequence for examination of witnesses is: prosecution witnesses, defense witnesses, prosecution rebuttal witnesses, defense rebuttal witnesses, and witnesses for the court. The usual order of examination of a witness is: direct examination, cross-examination, redirect examination, recross-examination, and examination by the court. R.C.M. 913(c). This order will be outlined specifically in subsection 0729, *infra*.

B. Scope of cross-examination

A party's cross-examination is limited to the subject matter of direct testimony plus examination into the witness' credibility. As a result, if a party intends to exceed the bounds of direct examination, that inquiry usually should occur during the party's own case and not as part of the opponent's. But the discretion afforded the military judge permits more liberal cross-examination when it will assist in understanding evidence or is necessary to avoid burdening witnesses with several court appearances. If the cross-examiner exceeds the scope of direct examination, the new material must be elicited as if on direct examination. This means no leading questions under subdivision (c) of the rule, unless special circumstances permit leading questions had the witness actually been called to testify by the cross-examiner.

Mil.R.Evid. 611(b) does not address specifically when and to what extent an accused may be cross-examined; the Fed.R.Evid. Advisory Committee note to 611(b) does:

> The rule does not purport to determine the extent to which an accused who elects to testify thereby waives his privilege against self-incrimination. The question is a constitutional one, rather than a mere matter of administering the trial. Under *United States v. Simmons*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 247 (1968), no general waiver occurs when the accused testifies on such preliminary matters as the validity of a search and seizure or the admissibility of a confession. Rule 104(d), *supra*. When he testifies on the merits, however, can he foreclose inquiry into an aspect or element of the crime by avoiding it on direct? The affirmative answer given in *Tucker v. United States*, 5 F.2d 818 (8th Cir. 1925), is inconsistent with the description of the waiver as extending to "all other relevant facts" in *Johnson v. United States*, 318 U.S. 189, 195 63 S.Ct. 549, 87 L.Ed. 704 (1943). *See also Brown v. United States*, 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958).

The drafters of the Mil.R.Evid. have attempted to answer this problem with Mil.R.Evid. 301(e), which states that, when an accused voluntarily testifies, he waives his fifth amendment privilege only with respect to those matters contained in his direct examination. The scope of the waiver is controlled by the accused's answers, not his counsel's questions. Chapter VII, *infra*, has a complete discussion of this area.

The drafters' analysis, MCM, 1984, app. 22-44, notes several other sections of the Mil.R.Evid. that are related to Mil.R.Evid. 611(b). *See* Mil.R.Evid. 301(b)(2) (judicial advice as to the privilege against self-incrimination for an apparently uninformed witness); Mil.R.Evid. 301(f)(2) (effect of claiming the privilege against self-incrimination on cross-examination); Mil.R.Evid. 303 (degrading questions); and Mil.R.Evid. 608(b) (evidence of character, conduct, and bias of witness). To these should be added Mil.R.Evid. 104(d) (testimony by the accused). Cross-examination will be examined further in outline form in the latter part of the chapter.

C. Leading questions

The drafters' analysis to Fed.R.Evid. 611 defines a leading question as "one which suggests the answer it is desired that the witness give." Generally, a

question that is susceptible to being answered by "yes" or "no" is a leading question. The "forms of questions" section of this part of the chapter will give examples of how to ask nonleading questions.

> The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore 774-778. An almost total unwillingness to reverse for infractions has been manifested by appellate courts. *See* cases cited in 3 Wigmore 770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command.

Fed.R.Evid. 611(c) Advisory Committee note.

The specific uses of leading questions normally allowable under the exceptions to the general rule will be examined in the section on forms of questions, *infra*.

Mil.R.Evid. 611(c) also conforms to tradition in making the use of leading questions on cross-examination a matter of right (i.e., "Ordinarily leading questions should be permitted . . . ."). The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only, and not in fact; as, for example, the "cross-examination" by a party of a witness who is friendly to it and considered adverse to the direct examination (such as a chief-master-at-arms called by defense counsel might be).

The third sentence of 611(c) allows leading questions to be asked on direct examination when a party calls a hostile witness or a witness identified with an adverse party. The drafters leave the term "hostile witness" undefined. Under previous military practice, counsel had to demonstrate a witness' hostility before he could ask leading questions. This meant something more than showing the witness was unfavorable. Counsel had to establish that the witness would not adequately respond to his questions and had been unwilling to cooperate during pretrial discussions. This situation is particularly likely to occur in the military where defense counsel will often have to call witnesses aligned with the command in order to establish a defense. Such witnesses may be unwilling to assist defense counsel. As a result, normal direct examination will prove troublesome and may, in fact,

produce harmful testimony due to counsel's inability to limit effectively the witness' responses. Even if a witness cannot be shown to be "actually" hostile, it may be that most officers and senior enlisted personnel will be "identified with" the government. The "identified with" language of the rule should make it less necessary in many cases to make a finding about actual hostility. *Military Rules of Evidence Manual, supra*, at 554.

0726 CALLING AND INTERROGATION OF WITNESSES BY THE COURT-MARTIAL. Mil.R.Evid. 614

Rule 614. Calling and Interrogation of Witnesses by the Court-Martial

(a) Calling by the court-martial. The military judge may, sua sponte or at the request of the members or the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. When the members wish to call or recall a witness, the military judge shall determine whether it is appropriate to do so under these rules or this Manual.

(b) Interrogation by the court-martial. The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions or the course of questioning and so that questions may be asked on behalf of the court by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.

(c) Objections. Objections to the calling of witnesses by the military judge or the members or to the interrogation by the military judge or the members may be made at the time or at the next available opportunity when the members are not present.

Mil.R.Evid. 614 is taken from Fed.R.Evid. 614, but has been modified to recognize the power of the court members and military judge to call and examine witnesses.

A. Calling of witnesses

Subsection (a) recognizes that, even though the adversary nature of the judicial process requires that the trial of a court-martial normally be left to the trial and defense counsel, the military judge or court members may desire to call witnesses in the search for justice. For example, this might be necessary to avoid collusion of counsel in carefully scripting a case. This rule is another example of judicial discretion. In determining whether a witness should be called, the military judge should balance the need to clarify or supplement the evidence presented by the parties against the possibility of interfering with the parties' control of their case. The judge will normally exercise this discretion with restraint, however, and, in close cases, tip the scale in favor of calling all the witnesses in the case. As noted in the case of *United States v. Liddy*, 509 F.2d 428 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 911, 95 S.Ct. 4 (1975):

> The precepts of fair trial and judicial objectivity do not require a judge to be inert. The trial judge is properly governed by the interest of justice and truth, and is not compelled to act as if he were merely presiding at a sporting match. . . . A federal trial judge has inherent authority not only to comment on the evidence adduced by counsel, but also--in appropriate instances--to call or recall and question witnesses. He may do this when he believes the additional testimony will be helpful to the jurors in ascertaining the truth and discharging their fact-finding function. What is required, however, are reins of restraint, that he not comport himself in such a way as to "tilt" or oversteer the jury or control their deliberations.

Id. at 438.

Any witness called by the military judge or court members may be examined by both sides as if on cross-examination; thus, leading questions can be used. This is one reason for counsel to note the provision of the rule that provides that the judge may call a witness at "the suggestion of a party." Mil.R.Evid. 614(a).

The case law suggests that the military judge has broad discretion in determining the nature and number of questions he will ask. Additionally, the degree of flexibility which the military judge possesses in this area depends to some extent on the forum election made by the accused. Clearly, if the military judge is the trier of fact, then concerns about his questioning shaping the perceptions of the members do not come into play. On the other hand, where the trial is by members, the military judge must be much more careful about maintaining a scrupulously impartial demeanor and posture in terms of his questioning.

Thus, for example, in *United States v. Bouie*, 18 M.J. 529 (A.F.C.M.R. 1984), a special court-martial by military judge alone involving complicated evidence relating to allegations of false claims allegedly made by the accused, the military judge did not abandon his impartial role, despite asking some 370 questions of the accused during his testimony in the trial on the merits. On the other hand, in *United States v. Thomas*, 18 M.J. 545 (A.C.M.R. 1984), a special court-martial by members, it was held that the military judge abandoned his impartial role by repeatedly berating the defense counsel in front of the members; by restricting his voir dire, cross-examination, and closing argument; by suggesting to the trial counsel ways of getting evidence admitted; and by posing some 375 questions of various witnesses during trial on the merits (some 35 to the accused), questions which were evidently intended to elicit evidence favorable to the prosecution.

The rule makes it clear that the calling of a witness by the judge is contingent upon compliance with the Mil.R.Evid. and MCM, 1984. The testimony must be relevant and not prohibited by any provision of the Mil.R.Evid. or MCM, 1984. This may require the judge to instruct the members that a requested witness cannot be called.

B. Interrogation by the court-martial

Mil.R.Evid. 614(b) allows the military judge or court members to interrogate any witness, whether called by the parties or the court.

1. Procedure. The rule has formalized and made mandatory a procedure for handling questions submitted by the court members. It requires that the members' questions be in writing and submitted to the military judge for approval. The judge would then ask the question if approved. Although the rule does not specify how the written questions by members should be handled procedurally, it is recommended that the member asking the question sign the paper on which the question is written and that all such papers be attached to the record of trial as an appellate exhibit.

2. Form of question. The rule allows the military judge to rephrase a member's question in a "form acceptable to the military judge." Mil.R.Evid. 614(b). The drafters' analysis to Mil.R.Evid. 614(b) notes, however, that "[i]t is the Committee's intent that the military judge alter the questions only to the extent necessary to ensure compliance with these Rules and *Manual*." MCM, 1984, app. 22-44.

3. Witnesses not having testified previously. The rule provides that, when a witness who has not testified previously is called by the military judge, either sua sponte or at the members' request, the judge may conduct the direct examination or may assign the responsibility to any counsel. In order to retain the appearance

of propriety, it would normally be preferable for the military judge not to conduct the initial questioning. If the military judge designates a party to conduct the evidence examination, past practice indicates that this usually will be the party standing to benefit the most from such evidence. In any event, both parties may proceed as if on cross-examination and may use leading questions. Therefore, the term "direct examination," used in Mil.R.Evid. 614(b) to define the scope of cross-examination, probably means an initial questioning rather than the restrictive direct examination imposed when a party calls a witness as its own. This seems to be a fair reading of the subsection in light of Mil.R.Evid. 614(a).

4. Impartiality. In questioning witnesses, including the accused who has become a witness, the military judge and the court members must be careful not to depart from an impartial role. *United States v. Shackelford*, 2 M.J. 17 (C.M.A. 1976); *United States v. White*, 14 C.M.A. 610, 34 C.M.R. 390 (1964); *United States v. Bishop*, 11 C.M.A. 117, 28 C.M.R. 341 (1960); *United States v. Smith*, 6 C.M.A. 521, 20 C.M.R. 237 (1955); *United States v. Jackson*, 3 C.M.A. 646, 14 C.M.R. 64 (1954). Court members should generally limit their questions to those that clarify the witness' testimony. When questioning the accused, the court members must confine themselves to questions which would be permissible on cross-examination of the accused by trial counsel. *United States v. Sellars*, 17 C.M.A. 116, 37 C.M.R. 380 (1967). Members may not question an accused concerning information presented in an unsworn statement. *United States v. Whitt*, 9 M.J. 953 (N.M.C.M.R. 1980).

United States v. Brandt, 196 F.2d 653 (2d Cir. 1952), gives an example of a judge exceeding the bounds of propriety. In *Brandt, supra*, the trial judge asked over 800 questions, cross-examined witnesses at length, underlined inconsistencies in the defense, and elicited admissions bearing upon the credibility of defense witnesses. Reversing, the appellate court outlined the judge's duty:

> [H]e enjoys the prerogative, rising often to the standard of a duty, of eliciting those facts he deems necessary to the clear presentation of the issues.... To this end he may call witnesses on his own motion, adduce evidence, and himself examine those who testify ....But he nonetheless must remain the judge, impartial, judicious and, above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested.

Id. at 655-56.

One way to limit any appearance of impropriety would be for the military judge to suggest to counsel that inquiry into an area might be appropriate rather than having the judge elicit the testimony himself.

C. Objections

Mil.R.Evid. 614(c) provides that, if counsel has an objection to any examination conducted by the court members or the military judge, or the military judge's decision to call or recall a witness, the objection need not be made in the members' presence, but may be raised "at the next available opportunity when the members are not present." While this appears to be in conflict with Mil.R.Evid. 103's requirement for timely objections, the drafters recognized that a timely objection here may either alienate the court members or demonstrate a conflict with the military judge. Counsel's appropriate response, if they desire to object to a question or the calling of a witness in a members case, is to request an article 39(a) session. Some military judges use side-bar conferences, but these probably are even more confusing to members and potentially more prejudicial than article 39(a) sessions.

As a practical matter, most military judges eliminate this problem by the simple expedient of requiring the bailiff to pass the member's written question to each counsel so that each counsel may indicate in writing on the face of the question that he either does or does not object to the question. In order to ensure that a counsel may lodge an objection without the members knowing who originated the objection, the military judge will normally require that the members' questions be written on preprinted questionnaires which are drafted in such a manner that, even if one counsel has no objection, he is still required to so indicate on the face of the questionnaire.

0727 EXCLUSION OF WITNESSES. Mil.R.Evid. 615.

Rule 615. Exclusion of Witnesses

> At the request of the prosecution or defense the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the order *sua sponte*. This rule does not authorize exclusion of (1) the accused, or (2) a member of an armed service or an employee of the United States designated as representative of the United States by the trial counsel, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's case.

A. General

Mil.R.Evid. 615 requires the military judge to exclude witnesses at the request of a party or upon his own motion. The rule is justified on the theory that,

by preventing a witness from hearing the testimony of another witness, the risk of fabrication, collusion, and inaccuracy is minimized.

This rule is one of the few in the rules where the military judge generally lacks discretion. It is the duty of the judge to exclude witnesses upon request, except when they fall within one of the three exceptions to the rule. When they do fall within an exception, the rule does not authorize exclusion -- meaning exclusion is not to be permitted.

The rule provides no explicit provision should a witness fail to comply with the exclusion rule. Some courts have gone so far as to exclude or strike the witness' testimony, but this is rather harsh and rarely used. *See, e.g., United States v. Tolbert*, 496 F.2d 154 (9th Cir.), *cert. denied*, 419 U.S. 857 (1974). A more likely remedy would be for the judge to permit counsel to comment on the violation as a matter relating to witness credibility. The military judge might also give an appropriate instruction concerning the matter.

In order for sequestration to be effective, the military judge should instruct each witness not to discuss his testimony with anyone other than counsel for either side or the accused.

B. Exceptions

1. Accused. The first exception is merely a recognition of the accused's rights to confrontation and due process under the sixth amendment. *See Geders v. United States*, 425 U.S. 80 (1976). As the drafters' analysis to 615 notes: "Rule 615 does not prohibit exclusion of either accused or counsel due to misbehavior when such exclusion is not prohibited by the Constitution of the United States, the Uniform Code of Military Justice, this *Manual* or these Rules." Mil.R.Evid. 615 drafters' analysis, MCM, 1984, app. 22-45.

2. Designated representatives of the United States. The second exception allows the trial counsel to designate a member of the military, or an employee of the United States (e.g., a Navy officer psychiatrist, agent of the Naval Investigative Service), as a representative of the government. That individual, even though called to testify, need not be sequestered. Congress specifically intended that investigative agents be included in the potential designees.

> The practice is permitted as an exception to the rule of exclusion and compares with the situation defense counsel finds himself in--he always has the client with him to consult during the trial. The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some

> specialized subject matter. The agent, too, having lived with the case for a long time, may be able to assist in meeting trial surprises where the best-prepared counsel would otherwise have difficulty.

S. Rep. No. 1277, 93d Cong., 2d Sess. 26, *reprinted in* 20 Sup. Ct. Dig. at 216.

This is a continuation of previous Federal practice. *See, e.g., In re United States*, 584 F.2d 666 (5th Cir. 1978), where the court held that a government agent could be the prosecution's representative under Fed.R.Evid. 615(2). The court opined, however, that the trial judge, via Fed.R.Evid. 611(a), can require the government to present such a designated agent witness at the beginning of its case, thus limiting the possibility of collusion or undue influence upon his testimony by other witnesses. The judge can require this, but need not. If the government can establish that presenting the witness' testimony out of sequence would substantially harm its case, then the judge may permit the witness to testify after remaining in the courtroom. In either event, the government should be able to use the witness during rebuttal should it be necessary. *See United States v. Alvarado*, 647 F.2d 537 (5th Cir. 1981), where it was held to be within the judge's discretion to allow more than one government witness to remain in the courtroom, even though one was to testify late in the government's case. *See also United States v. Scott*, 13 M.J. 874 (N.M.C.M.R. 1982) (Mil.R.Evid. 615(2) specifically permits criminal investigators who are potential witnesses to be designated representatives of the United States and to remain in courtroom despite sequestration order; no abuse of discretion where military judge allows representative to hear testimony of other government witnesses prior to taking the stand).

3. Person whose presence shown to be essential to a party's case. The third exception places discretion in the military judge by requiring a determination as to whether a party has shown that the presence of a witness is essential to its case. The normal situation for invoking the subsection would be where "an expert [is] needed to advise counsel." Fed.R.Evid. 615 Advisory Committee note. In the military context this will most likely be a psychiatrist, although other experts might be used in appropriate cases. *See* Mil.R.Evid. 703. *See also Government of the Virgin Islands v. Edinborough*, 625 F.2d 472 (3d Cir. 1980), where the presence of the mother of a 13-year-old rape victim was considered essential during her daughter's testimony.

0728 **WRITING USED TO REFRESH MEMORY.** Mil.R.Evid. 612. (Key Number 1147)

Rule 612. Writing Used to Refresh Memory

If a witness uses a writing to refresh his or her memory for the purpose of testifying, either

(1) while testifying, or

(2) before testifying, if the military judge determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military judge shall examine the writing in camera, excise any privileged information or any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be attached to the record of trial as an appellate exhibit. If a writing is not produced or delivered pursuant to order under this rule, the military judge shall make any order justice requires, except that when the prosecution elects not to comply, the order shall be one striking the testimony, or, if in discretion of the military judge it is determined that the interests of justice so require, declaring a mistrial. This rule does not preclude disclosure of information required to be disclosed under other provisions of these rules or this Manual.

A. General

1. Comparison to Fed.R.Evid. 612. Mil.R.Evid. 612 codifies the doctrine of "present recollection refreshed or reviewed" or "refreshed memory," and is taken generally from the Federal rule; but discards the language of Fed.R.Evid. 612 that expressly subjected it to the disclosure shield provisions of the Jencks Act, 18 U.S.C. § 3500 (1982). The drafters of the Mil.R.Evid. deleted the Jencks Act reference since "such shielding was considered to be inappropriate in view of the general military practice and policy which utilizes and encourages broad discovery on behalf of the defense." Mil.R.Evid. 612 drafters' analysis, MCM, 1984, app. 22-44.

2. As a result, the rule unqualifiedly broadens the opponent's right under prior military law to inspect writings examined by a witness to refresh his memory. Previously, the examination right extended only to writings used while testifying. As expressed in Mil.R.Evid. 612, the right to examine writings also includes those used before testifying if the interests of justice will thereby be served. This inspection again involves judicial discretion. As can be seen, the Fed.R.Evid. Advisory Committee and Congress anticipated that the discretionary nature of the provision would guard against fishing expeditions directed at attorney work-product or other privileged information:

a. "The purpose of the phrase 'for the purpose of testifying' is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness." Fed.R.Evid. 612 Advisory Committee note.

b. "The Committee considered that permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial." H.R. Rep. No. 650, 93d Cong., 1st Sess. 13, *reprinted in* 20 Sup. Ct. Dig. at 171.

3. Mil.R.Evid. 612 does not affect in any way information required to be disclosed under any other rule or portion of the *Manual for Courts-Martial. See, e.g.*, Mil.R.Evid. 304(c)(1).

B. Expansion of meanings

1. Writings. Mil.R.Evid. 612 does not state what qualifies as a "writing" to refresh memory. Additionally, there is no requirement that the writing be prepared by the witness. *See Johnson v. Earle*, 313 F.2d 686 (9th Cir. 1962). Mil.R.Evid. 1001 contains a liberal definition of writings in the context of section X: "'Writings' and 'recordings' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation." But Federal practice has given it an even broader meaning. To quote Judge Learned Hand: "[a]nything may in fact revive a memory: a song, a scent, a photograph, an allusion, even a past statement known to be false." *United States v. Razpy*, 157 F.2d 964, 967 (2d Cir.), *cert. denied*, 329 U.S. 806 (1947). It is anticipated that the military courts will follow this liberal Federal practice.

2. Although the rule is limited by its language to writings that refresh memory, there is a decided trend in Federal courts to treat any use of documents to prepare a witness as falling under the rule. *See, e.g., Beckey Photo, Inc.*

v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977), *rev'd on other grounds*, 603 F.2d 263 (2d Cir. 1979). Accordingly, the rule, as noted previously, can be used as a discovery tool.

C. Traditional approach: refreshing memory while testifying

Mil.R.Evid. 612 does not state the method by which counsel are to use writings to refresh the witness' memory. It is recommended that the traditional approach to refreshing recollection continue to be used.

1. Requirements

a. A proper foundation, showing both that the memory of the witness has failed and that there is some means whereby his memory can be refreshed, must first be laid.

b. Where an object, such as a previously signed statement, is used to refresh recollection, it need not meet the requirements of admissibility since it is not an exhibit for the proponent.

c. Opposing counsel has the right to inspect the object used to refresh recollection, use it in cross-examination of the witness, and to introduce those portions that relate to the testimony of the witness.

d. Where a writing or memorandum is used to refresh recollection, the witness may not read to the court matter contained therein. He must read it to himself, and testify from his own independent recollection; he may not merely recite what he just read.

e. The source of the evidence is the witness' refreshed memory and not the document used to do the refreshing.

2. Laying the foundation

-- Two requirements:

(1) Examining counsel must show that the memory of the witness has failed; and

(2) examining counsel must show there is some means in existence by which the witness can refresh his recollection.

3. It is recommended that the item used to refresh recollection be offered as an appellate exhibit and appended to the record of trial. Of course, under

Mil.R.Evid. 612, the opponent may offer the document, or relevant parts of it, into evidence as his exhibit.

D. Privileged information or matters

1. Discussion. Under either the so-called "absolute" right of disclosure of items used while testifying or the discretionary provision for items used before testifying, items may be protected if they contain privileged information or matters not related to the content of the witness' testimony. *See* Section V, Mil.R.Evid. If a party makes such claims, the military judge shall order the document produced and shall examine it in camera. If he determines the document does not fall within the exception, he will overrule the objection; if he determines that only a portion of the document's contents falls within the exception, he will excise the protected matter and order the remainder of the item, if any, turned over to opposing counsel.

2. Attachment to record. The rule provides that, if any material is withheld, it must be appended to the record of trial. Yet the rule and the drafters' analysis to the rule are silent as to how this should be done. In order to protect the privileged or otherwise protected matter, some form of sealing would seem appropriate. *Compare* Mil.R.Evid. 612 *with* Mil.R.Evid. 505 *and* Mil.R.Evid. 506 as to protective measures.

3. Corrective action. If the military judge's order is rejected, the judge may order corrective action. Any order that justice requires may be entered against the accused or, if the government withholds evidence, either the striking of the direct testimony or a mistrial will ensue.

E. Items used before trial

Mil.R.Evid. 612 expands the scope of potential discovery to include items examined before trial. Yet it fails to suggest any time restraints as to the length of time before trial that a writing be used by the witness can be said to be "refreshing" memory. No definitive answer is possible, but counsel's attention is invited to the language "for the purpose of testifying" in the rule. Mil.R.Evid. 612.

In any event, one standard question to a witness on cross-examination, especially a law enforcement agent, is "Did you at any time prior to trial consult any document, file, or other writing in preparation for today?" If the witness responds in the affirmative, counsel should ask for the document before conducting any further cross-examination, inspect it, and, if necessary, move for its admission to establish any inconsistencies or inaccuracies.

F. Distinguished from past recollection recorded

1. Refreshing memory should not be confused with the past recollection recorded exception to the hearsay rule.

> The primary difference between the two classifications is the ability of the witness to testify from present knowledge: where the witness' memory is revived, and he presently recollects the facts and swears to them, he is obviously in a different position from the witness who cannot directly state the facts from present memory and who must ask the court to accept a writing for the truth of its contents because he is willing to swear, for one reason or another, that its contents are true.

United States v. Riccardi, 174 F.2d 883, 886 (3d Cir.), *cert. denied*, 337 U.S. 941 (1949).

2. This distinction is significant in that, when a writing is used to refresh a witness' memory, the writing itself is not the primary evidence. Rather, the oral testimony of the witness whose memory has been refreshed constitutes the evidence. The witness may be cross-examined as to his capacity for memory and perception, his determination to tell the truth, and so on. Mil.R.Evid. 612 governs the use of writings so offered to refresh present recollection. On the other hand, past recollection recorded is not open to the same scrutiny by opposing counsel because the writing, and not the witness' oral testimony, is offered as evidence. *See* Mil.R.Evid. 803(5) and chapter VIII of this study guide.

> NOTE: The following sections of this part of the chapter offer brief notes and outlines on trial procedures and evolutions involving witnesses. The Mil.R.Evid. offer little guidance in this area and resort is had to the common law. *See* Mil.R.Evid. 101(b).

0729 STAGES IN THE PRESENTATION OF EVIDENCE ON THE MERITS. R.C.M. 903.

A. Presenting the case to the court:

1. Witnesses for the prosecution

-- The prosecution introduces all admissible evidence to establish the elements of the offense such as:

(1) All evidence on the corpus delicti; and

(2) all evidence on the identity of accused, and the pleading, as well as matters in aggravation.

2. Witnesses for the defense. The defense introduces all admissible evidence to establish either:

a. Any general or affirmative defense;

b. the denial or explanation of facts adduced by the prosecution; or

c. the impeachment of prosecution witnesses by means other than cross-examination.

3. Witnesses for the prosecution in rebuttal

a. The prosecution introduces evidence to deny, explain, or discredit facts and witnesses adduced by the defense during its case-in-reply.

b. Testimony is usually limited to issues raised by the defense case-in-reply, but the court in its discretion may allow new material. Mil.R.Evid. 611(a).

4. Witnesses for the defense in rebuttal. The accused introduces evidence to deny, explain, or discredit facts and witnesses adduced by the prosecution during its case-in-rebuttal.

5. Witnesses for the court. Mil.R.Evid. 614. If the court desires to have a witness called that neither side has called, or a witness recalled for further questioning, this is the stage in the trial in which it is done. Where the witness is requested by the court members, the grant or denial of the request is in the sound discretion of the military judge.

B. The order of examining each witness

1. General

a. Witnesses other than the accused may be excluded from the courtroom except when testifying. Mil.R.Evid. 615.

b. Oath or affirmation. R.C.M. 807(b)(1)(B); Mil.R.Evid. 603.

(1) The trial counsel administers the oath, whether the witness is called by the trial counsel, defense counsel, or the court.

(2) Trial counsel usually asks the witness: "State your name, grade, armed force, and present duty station." (If a civilian, "State your name, address, and occupation.")

(3) Witnesses that are recalled to the witness stand do not need to be resworn. They should, however, be reminded that they are still under oath. A failure to remind the witness, however, does not affect the validity of the trial and will not be a ground for rejecting his testimony.

2. Order of examining. Mil.R.Evid. 614.

a. Direct examination -- is conducted by the side calling the witness.

b. Cross-examination -- is conducted by opposing counsel.

c. Redirect examination -- is conducted by the side initially calling the witness.

d. Recross-examination -- is conducted by opposing counsel at the discretion of the military judge.

e. Examination by the court.

C. Discretion of the military judge to vary order of introducing evidence. Mil.R.Evid. 611(a).

1. The order of presentation of evidence is not inflexible.

2. At his discretion, the military judge may:

a. Permit the recall of witnesses at any stage of the proceedings;

b. permit testimony to be introduced by either party out of its regular order; and

c. permit a case once closed by either or both sides to be reopened for the introduction of evidence at any time before findings are announced.

0730 DIRECT EXAMINATION

A. Introduction

-- Direct examination through the testimony of witnesses is the usual manner of presenting evidence to a court.

a. Even where exhibits are used, counsel will use witnesses to authenticate and demonstrate relevancy and competency.

b. Often counsel will encounter more difficulty in conducting direct examination than cross-examination since, on direct examination, counsel is restrained by the rule limiting leading questions. *See* Mil.R.Evid.d 611(c). Leading questions are generally poor trial practice for two reasons.

(1) They are properly objectionable by the opposing counsel and his objections, when made and sustained by the military judge, will break up the flow of the questioning being conducted by the examining counsel. This, in turn, will make it harder for the trier of fact to follow the evidence being elicited by the examining counsel and may also cause him to lose sight of his goals in questioning the witness.

(2) Additionally, the testimony being offered by the witness is much less effective if it appears to be not really the witness' own testimony, but rather the lawyer's testimony to which the witness is meekly and passively agreeing.

c. Success in proving a case often depends upon the skill counsel displays in presenting the witness' knowledge to the court.

B. General principles of direct examination

1. Counsel should attempt to put the witness at ease with a few uncontroverted preliminary questions. It gives the witness a chance to become accustomed to the surroundings and sets the time for the direct examination. It also gives the trier of fact time to focus on the ultimate issues of the case. Leading questions may be allowed at this stage. *See* Mil.R.Evid. 611(c).

Examples: "What division are you in, Seaman O'Toole"; "How long have you been aboard the ALEGASH?"

2. Counsel should next direct the witness' attention to the time and place where the events occurred.

Example: "Directing your attention to the evening of 21 June 19__, at about 2400, where were you?"

3. A foundation showing the witness' specific competency should then be laid. *See* Mil.R.Evid. 602.

Illustrations: "Who else was present?"; "Did you have an occasion to see the accused?"; "Where were you in relation to the accused?"; "Will you please describe for the court what occurred at that time?"

4. Counsel should develop the witness' story in chronological order, if practicable.

5. Connectives should be used, such as:

a. "What happened next?"

b. "Then what happened?"

c. "What did you do then?"

6. As a general rule, counsel should begin questions with who, what, when, where, how, describe, explain, etc. This will help avoid leading questions in direct examination. For example:

a. "Who was present?"

b. "What happened then?"

c. "Where was the accused?"

7. Counsel should remember that the scope of direct examination (testimony) generally controls the scope of cross-examination of the witness. *See* Mil.R.Evid. 611(b). Counsel may limit or expand the subject matter into which opposing counsel may inquire on cross-examination, but it is the scope of the testimony, not the scope of the questions, that controls.

8. Counsel should know what the witness' answer will be to each question asked on direct. Counsel will usually not be embarrassed by answers elicited during questioning if a careful pretrial interview of the witness was conducted.

9. Counsel should phrase questions in simple, direct form.

a. Plain language should be used so the witness will understand the question and the court will understand the answer.

b. Legal terms should be avoided.

c. Ambiguous questions should not be asked. The witness and the court may misinterpret them.

d. Only one question at a time should be asked; avoid double questions.

10. Allow the witness to tell his story in his own words.

a. With an intelligent witness who has been carefully interviewed, narrative testimony may be feasible. Permission to elicit narrative testimony should be obtained from the military judge, however, under Mil.R.Evid.d 611(a).

b. Advantages:

(1) The witness' testimony has more continuity and more spontaneity; and

(2) his credibility will probably be enhanced.

c. Disadvantages:

(1) Counsel is unable to direct testimony to matters that he wishes brought out, with the result that much irrelevant and inadmissible matter may be thrust into the record, while more critical matters are omitted or deemphasized;

(2) there is a possibility of numerous objections and ensuing arguments which will interrupt the chain of testimony; and

(3) this technique sometimes results in prejudicial matters getting into the record, which may require a reversal. *See United States v. Ledlow*, 11 C.M.A. 659, 29 C.M.R. 475 (1960) (where a witness through narrative testimony brought out matters relating to a lie detector test given to the accused, the Court of Military Appeals reversed).

0731 CROSS-EXAMINATION. Mil.R.Evid. 611(b).

A. Introduction

1. The right to cross-examine is absolute. Where a key witness refuses to answer proper questions on cross-examination, his entire testimony can be stricken. *See* Mil.R.Evid. 301(f)(2) (unless the matters to which the witness refuses to testify are purely collateral). Failure to so move may subject defense counsel to a finding of inadequacy of counsel. *See United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977).

2. Its basis is found in the sixth amendment, which gives an accused the right to be confronted by the witness against him.

B. Two purposes of cross-examination

1. First purpose. To develop the truth regarding the issues which the witness testified about on direct examination.

a. Although the witness may have told the truth on direct, he may not have told the whole truth.

b. The cross-examiner may wish to bring out facts known by the witness which are helpful to his side of the case, but which were not brought out on direct.

c. The cross-examiner may wish to underscore the weakness of the opponent's case.

2. Second purpose. To test the credibility of the witness.

C. General principles of cross-examination

1. If the cross-examiner does not think that he can accomplish one or both of the above goals, he should consider asking no questions at all.

2. Do not cross-examine unless the testimony of the witness has actually been harmful or the witness has helpful information not mentioned on direct. Just because the right exists does not mean that it must be exercised. Often, if testimony of a witness has not been harmful, cross-examination may strengthen the direct testimony.

3. As far as possible, never cross-examine without knowing what the answer will be. Interviewing opposing witnesses prior to trial is essential.

4. Avoid over cross-examination. Too much persistence in emphasizing a point may result in the witness explaining away inconsistencies.

5. The witness should not be allowed to explain away his inconsistencies.

a. This is an opponent's responsibility on redirect.

b. A witness should be required to limit his answers to the question asked. He cannot, however, be required to answer categorically by a simple "yes" or "no" unless it is clear that such an answer will be a complete response to the question. A witness may always be permitted to explain any of his testimony at some time before completing his testimony. *See* Mil.R.Evid. 611(a) drafters' analysis, MCM, 1984, app. 22-43.

6. Avoid asking the witness "why?" (Allowing the witness to respond to such a broad question may bring out unfavorable testimony.)

7. Do not try to get the witness to draw the inference desired from the circumstances. Instead, establish the basic facts on cross-examination and argue the inference later to the court.

8. Stop on the high point. There is a tendency, once a point has been made with the witness, to drive it home to the court. This often results in an anti-climax.

D. The scope of cross-examination of witnesses other than the accused

1. Cross-examination of a witness other than the accused is generally limited to the issues testified to on direct examination and to the issue of his credibility. *See* Mil.R.Evid. 611(b).

2. The scope of cross-examination is a matter resting in the sound discretion of the military judge. Mil.R.Evid. 611. *See also United States v. Heims*, 3 C.M.A. 418, 12 C.M.R. 174 (1953).

3. If the cross-examiner wishes to pursue an issue not covered on direct examination, or which does not go to the credibility of the witness, he may call the witness as his own during his case or request that the military judge allow examination as if on direct. Mil.R.Evid. 611(b).

4. What is meant by the "issues" to which the witness testified on direct examination? It does not mean the precise facts developed on direct. It does mean the subject matter opened up. It may be the period of time. It may be the

relationship between two parties. It may be an element of the offense (e.g., knowledge in an Article 92(2), UCMJ offense, or intent in an Article 85, UCMJ offense). It is always permissible to inquire into the details of the events testified to on direct.

E. Scope of cross-examination of the accused

1. An accused who voluntarily testifies as a witness becomes subject to proper cross-examination upon the issues about which he testified and upon the question of his credibility. Mil.R.Evid. 301(e). With respect to the issues about which he testified on direct examination, he is said to have waived his privilege against self-incrimination.

2. A greater latitude may be allowed in the cross-examination of the accused than in the case of other witnesses. An accused who has elected to testify has "opened the door" for trial counsel to matters relevant to the issue of his guilt or innocence of the offense or offenses to which he has testified.

> **Example:** The accused is charged with desertion. On direct, defense counsel asks one question, "Did you intend to remain away permanently?" Answer: "No, Sir." Trial counsel can cross-examine the accused on all of the elements of desertion. He can inquire into his aliases while he was gone; that he had spent two years in Mexico; that he had grown a beard, etc.

3. As is true with any other witness, the credibility of the accused is in issue when he takes the stand. The accused can be cross-examined on matters relating to his credibility.

F. Limitations on the scope of cross-examination of the accused

1. Preliminary issues

-- When the accused takes the stand during a motion and testifies only about preliminary matters not bearing on the guilt or innocence, he may not be cross-examined on the issue of his guilt or innocence at all. *See* Mil.R.Evid. 104(d). *See also* Mil.R.Evid. 304(f), 311(f), which establish that the accused can testify to the involuntary nature of a confession or admission or to the illegality of a search without subjecting himself to cross-examination upon other issues in the case. Under all three rules (104, 304, and 311), counsel should alert the military judge of the intended limitation of his client's testimony by citing the specific rule applicable.

2. Trial on the merits

-- When an accused purports to limit the scope of the testimony to a collateral issue, it is the content of his testimony on direct examination and not the announcement of his intention to limit his testimony that controls. If he touches on the general issue of his guilt or innocence, he opens the door to cross-examination on all matters testified to on direct. *United States v. Miller*, 14 C.M.A. 412, 34 C.M.R. 192 (1964). *See also United States v. Wannenwetsch*, 12 C.M.A. 64, 30 C.M.R. 64 (1960); *United States v. Vandermark*, 14 M.J. 690 (N.M.C.M.R. 1982) (military judge's granting of motion to strike was appropriate where accused testified that indebtedness prompted his unauthorized absence, but declined to reveal on cross the reasons for his indebtedness).

3. Accused limiting his testimony to certain of the offenses charged

a. The accused has the right to limit his testimony on direct examination to one or some of the offenses charged. Mil.R.Evid. 301(e).

b. He does not waive his privilege against self-incrimination as to the offense or offenses to which he did not testify. Hence, trial counsel may not cross-examine him on these offenses. Where the cross-examiner goes beyond the legitimate scope, reversible error is likely to occur. *See United States v. Trotter*, 23 C.M.A. 239, 49 C.M.R. 372 (1974); *United States v. Sellars*, 17 C.M.A. 116, 37 C.M.R. 380 (1967); *United States v. Marymont*, 11 C.M.A. 745, 29 C.M.R. 561 (1960); *United States v. Johnson*, 11 C.M.A. 113, 28 C.M.R. 337 (1960).

c. The accused must in fact limit his testimony; the content of the testimony upon direct examination and not the announcement of his limiting his testimony will control. *United States v. Lovig*, 15 C.M.A. 69, 35 C.M.R. 41 (1964); *United States v. Kauffman*, 14 C.M.A. 283, 34 C.M.R. 63 (1963).

d. Defense counsel may face a particularly difficult problem where the offenses charged have closely related elements even though they are not identical (i.e., larceny and burglary). In *United States v. Lovig, supra*, at 45, the Court of Military Appeals stated, "it is apparent from the allegations that the defense should have been on notice that broaching the issue of larcenous intent as to the burglary would involve the accused's larcenous intent with regard to the theft." *See also United States v. Kelly*, 7 C.M.A. 218, 22 C.M.R. 8 (1976); *United States v. Castillo*, 29 M.J. 145 (C.M.A. 1989).

4. Acts of uncharged misconduct. Mil.R.Evid. 608(b) discusses the limitations on the cross-examination of the accused concerning acts of misconduct uncharged. *See* chapter VII, part two, *infra*, for discussion of this limitation.

0732 FORMS OF QUESTIONS AND ANSWERS

A. Introduction

1. Scope. This section is concerned with the form of the questions to be asked on direct and cross-examination as distinguished from their subject matter or content.

2. Limitations. Although the examining counsel will ordinarily be allowed to ask a witness questions in the form that seems best to him, certain limitations have traditionally been imposed by the courts. *See* Mil.R.Evid. 611 drafters' analysis.

3. Discretion. Rulings as to form are largely within the sound discretion of the military judge. Mil.R.Evid. 611.

B. Leading questions. *See* Mil.R.Evid. 611(c).

1. Definition of leading question:

a. A question that suggests the desired answer; or

b. a question that embodies a material fact not yet testified to by the witness and is susceptible of being answered by a simple yes or no.

2. Recognition

a. It is not necessarily the wording of the question that makes it leading, but its probable result.

b. If it appears that the examiner is attempting to put words into the witness' mouth (i.e., suggest the answer desired), it is probably a leading question.

c. If it sounds as though counsel is testifying instead of the witness, it is probably a leading question.

3. Tests

a. Can the question be answered by YES or NO? (note that this fact alone is not determinative).

b. Is the question in the form of an assertion?

c. Does the question assume facts not yet testified to?

d. Who appears to be doing the testifying, the witness or counsel?

e. Illustrations:

"You saw Tanglefoot loading the gun then, didn't you?" (Assertion)

"Isn't it true that you saw Tanglefoot shooting craps with the duty officer?" (Previously untestified fact)

"Tell the court what Tanglefoot said . . . about going over the hill and never coming back." (Counsel testifying)

4. Direct examination

a. General rule -- leading questions are generally prohibited on direction examination. Mil.R.Evid. 611(c).

b. Exceptions

(1) Preliminary matters

-- Preliminary questions designed to put the witness at ease, as long as they deal with uncontroverted facts.

(2) Slip of the tongue. When it appears that the witness has inadvertently made an erroneous statement due to a slip of the tongue, or because he misunderstood the question or was inattentive, the examiner may use a leading question to direct attention to the error and afford the witness an opportunity for correction.

(3) Witness of low intelligence. When a witness (because of age, low I.Q., or mental infirmity) is laboring under obvious difficulties in directing his mind to the subject matter, or when the exact meaning of words used by the witness is obscured by language difficulties, the court may in its discretion allow counsel to lead the witness.

(4) Hostile witness. When a witness appears hostile, is manifestly evasive, or is reluctant to give evidence, the court may permit counsel calling him to use leading questions.

(5) Adverse witness. When a witness is identified with the other party, the party calling the witness may be allowed to use leading questions. Mil.R.Evid.d 611(c).

(6) Refreshing recollection. Leading questions may be used in directing the witness' attention to the memoranda or other item used in refreshing his recollection, but the expected answer may not be suggested by a leading question.

(7) Laying the foundation for the introduction of a confession. The witness who took the accused's confession may be asked leading questions by the trial counsel in order to establish that it was voluntarily given, since the government bears the burden of proving a negative proposition (i.e., that certain things did not happen). *See* Mil.R.Evid. 304(e).

> **Example:** "Were any threats of bodily harm used in obtaining this statement from the accused?"

5. Cross-examination. Leading questions are generally permissible on cross-examination; but the military judge may rule otherwise in the exercise of his discretion. Mil.R.Evid. 611(c).

C. Ambiguous questions and misleading questions. Both are improper on direct and cross-examination. 3 *Wigmore Evidence* 780 (Chadbourn rev. 1970).

-- Reason. They are unfair to the witness, since they may cause him to unintentionally misstate his testimony.

D. Double questions are improper on both direct and cross-examination

-- Reason. Unfair to the witness, since the court might apply the answer given to the wrong question.

E. Misstating the evidence. Is improper on both direct and cross-examination. *See* 3 *Wigmore Evidence* 780 (Chadbourn rev. 1970).

F. Incorporation of evidence. It is permissible for counsel to incorporate the facts which the witness has already testified to in subsequent questions, as long as counsel does not misstate the evidence.

G. Assuming a fact not in evidence. It is improper on direct or cross-examination to put a fact into the mouth of a witness without first giving him an opportunity to deny it. 3 *Wigmore Evidence* 771 (Chadbourne rev. 1970).

H. Harassing or improper insinuating questions. *See* Art. 31c, UCMJ; Mil.R.Evid. 303; 3 *Wigmore Evidence* 781 (Chadbourne rev. 1970). *See also* Mil.R.Evid.d 611(a).

1. Questions asked only for the purpose of harassing the witness or causing him to become emotionally upset are improper on both direct and cross-examination.

2. The use of certain insinuating questions under the guise of impeachment is improper.

I. Questions constituting argument. Arguing with the witness is improper on both direct and cross-examination. *See* Mil.R.Evid. 611(a).

J. Questions already asked and answered. *See* 3 *Wigmore Evidence*, 782 (Chadbourne rev. 1970).

1. Rule on direct examination. Repeating a question which has already been asked and answered is improper on direct examination.

2. Rule on cross-examination

a. Questions may be repeated on cross-examination.

b. Counsel may go over the same ground several times, as this is a proper technique on cross-examination.

(1) The cross-examiner has the right to test the witness' memory and ascertain whether the witness is consistent in his story.

(2) Going over the same matter might bring out that the story has been memorized.

(3) A tactical disadvantage may develop if counsel fails to show either inconsistency or memorization; such cross-examination will then serve only to highlight the witness' testimony.

c. If the repetition becomes intimidating, harassing, or a waste of the court's time, the court should limit the questioning even on cross-examination. Mil.R.Evid. 611(a).

K. Hypothetical questions. 2 *Wigmore Evidence* 672f (1940).

1. Defined. Hypothetical questions are based upon assumed facts not within the personal knowledge of the witness.

2. General rule. Improper.

Reason. A witness is ordinarily limited in testimony to facts within his or her personal knowledge.

3. Two exceptions

a. An expert witness may be asked a hypothetical question. Mil.R.Evid. 703.

b. An impeaching witness may give his opinion of another witness' character for truth and veracity [Mil.R.Evid. 608(b)] by using the following hypothetical question: "Would you believe him if you were to hear him testify under oath?"

L. Nonresponsive answers. *See also* 3 *Wigmore Evidence* 785 (Chadbourn rev. 1970).

1. Defined. An answer is nonresponsive if the witness volunteers matter not asked about in the question.

2. Only counsel who asks the question may promptly move that the answer, or a designated part of the answer, be stricken and the court instructed to disregard it. *See United States v. Sellers*, 12 C.M.A. 262, 30 C.M.R. 262 (1961). Opposing counsel may not object. Asking counsel should keep in mind that it is the answer, not the question, which controls the scope of cross-examination. Consequently, an objection to unasked for responses is important if cross-examination is to be kept within anticipated limits.

M. Comments on answers. Counsel should not repeat the witness' answers, or make comments upon them, during examination of the witness.

N. PROPER AND IMPROPER FORMS OF QUESTIONS

Types of Question	When Objectionable
(1) Leading	
(a) On cross-examination	NOT OBJECTIONABLE UNLESS JUDGE HAS LIMITED IAW MIL.R.EVID. 611(C)
(b) On direct examination	OBJECTIONABLE Except: 1. Preliminary matters; 2. Leading witness to specific matters about which he is to testify; 3. Slip of the tongue by the witness; 4. Low intelligence, age, or language difficulties; 5. Hostile witness; 6. Refreshing recollection; and 7. Laying foundation for confession.
(2) Ambiguous	ALWAYS OBJECTIONABLE
(3) Double	" "
(4) Misstating the evidence	" "
(5) Assuming a fact not in evidence	" "
(6) Harassing	" "
(7) Question constituting argument	" "
(8) Asked and answered	OBJECTIONABLE ON DIRECT OBJECTIONABLE
(9) Hypothetical	Except: 1. Expert witness; and 2. Credibility (e.g., Would you believe X if he were under oath?)

CHAPTER VIII

HEARSAY

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CHAPTER VIII

HEARSAY

0801 INTRODUCTION. This chapter examines the hearsay rule as defined by the Military Rules of Evidence and analyzes the evidentiary rules which set forth the permissible and impermissible uses of hearsay evidence at courts-martial.

The distinction between out-of-court statements which are hearsay and those out-of-court statements which are not considered hearsay under the Military Rules of Evidence is discussed at the onset. Following this discussion, exceptions to the hearsay rule are addressed. Although the Military Rules of Evidence list twenty-nine exceptions to the hearsay rule, only the more common exceptions which arise in court are treated in this chapter. Subsequently, problems associated with the multiple levels of hearsay and problems concerning attacking or supporting a declarant of an out-of-court statement are discussed. Additionally, a brief survey of the philosophies concerning the application of the Military Rules of Evidence [hereinafter Mil.R.Evid.] which control the use of hearsay evidence at trial is presented in the final notes located at the end of this chapter.

0802 GENERAL PRINCIPLE. Hearsay is a statement, oral or written, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Mil.R.Evid. 801(c). "Hearsay is not admissible except as provided by the [Military Rules of Evidence] or by any act of Congress applicable in trials by court-martial." Mil.R.Evid. 802.

-- Basis of the rule. Hearsay is generally considered to be incompetent evidence in that it lacks trustworthiness because:

1. The statement is normally that of a third person (although it could be an out-of-court statement of the witness on the stand);

2. the party against whom it is offered is deprived of the opportunity to cross-examine the declarant; and

3. the court is deprived of an opportunity to observe the demeanor of the declarant.

See, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973) (hearsay rule is grounded in the notion that untrustworthy evidence should not be presented to the triers of fact; however, hearsay rules cannot be mechanically applied to exclude probative evidence tending to show an accused's innocence).

0803 NONHEARSAY STATEMENTS AND EXEMPTIONS FROM THE HEARSAY RULE (Key Numbers 1086, 1087)

A. Not to prove truth of statement. In determining whether an out-of-court statement is hearsay, counsel should ask themselves for what purpose the out-of-court statement is being introduced.

1. Except for the exemptions set forth in Mil.R.Evid. 801(d), if the out-of-court statement is introduced for the truth of the contents of the statement, the statement is hearsay.

> **Example**: Special Agent Marx testifies that the owner of the pawnshop told him the accused purchased the pistol used to commit the murder from him. The out-of-court statement of the pawnshop owner is hearsay if it is introduced for the purpose of proving that the accused was the owner of the murder weapon.

2. If the out-of-court statement is introduced for some purpose other than to prove the truth of the matter asserted, the statement is not hearsay.

> **Example:** Special Agent Marx testifies that the owner of the pawnshop told him the accused purchased the pistol used to commit the murder from him. The out-of-court statement of the pawnshop owner is not hearsay if it is offered for a purpose other than proving ownership, such as laying the foundation for Marx's subsequent act of asking the accused for consent to search his wall locker for the pistol.

B. Exemptions from hearsay. Mil.R.Evid. 801(d), which was adopted verbatim from Federal Rules of Evidence 801(d) [hereinafter Fed.R.Evid.], removes certain categories of evidence from the definition of hearsay, notwithstanding the fact that in each instance the category of evidence fits within the language of the hearsay definition found in Mil.R.Evid. 801(c). The legislative history of Fed.R.Evid. 801(d) reveals that Congress believed that traditional hearsay limitations inhibited the trier of fact from discerning the truth. It was determined that the inherent trustworthiness of these categories of evidence permitted their exemption from the hearsay rule. These evidentiary categories are now classified as "statements which are not hearsay" in both the Federal rule and Mil.R.Evid. 801(d).

1. Prior statements by witness. Mil.R.Evid. 801(d)(1).

a. Prior inconsistent statements. If a declarant who has made a prior statement testifies and is subject to cross-examination at a trial or hearing; and the prior statement is inconsistent with the in-court testimony; and the prior inconsistent statement was made while under oath and subject to the penalties of perjury at a trial, hearing or deposition, the prior inconsistent statement is not hearsay. *See United States v. Luke*, 13 M.J. 958 (A.F.C.M.R.), *petition denied*, 14 M.J. 297 (C.M.A. 1982) (statements given by victim to security policeman did not qualify under this exemption); *United States v. Powell*, 17 M.J. 975 (A.C.M.R. 1984), *aff'd on other grounds*, 22 M.J. 141 (C.M.A. 1986) (Mil.R Evid. 801(d)(1)(A) does not extend to a statement made in policeman's office even though given under oath). The statement is admissible as substantive evidence for consideration of the trier of fact on the merits. Note that a prior inconsistent statement which does not meet these requirements may still be used to impeach the witness as permitted by Mil.R.Evid. 613, although these statements are admissible only for purpose of impeachment.

b. Prior consistent statements. If a declarant who has made a prior statement testifies at a trial or hearing (e.g., article 32 investigation) and is subject to cross-examination, and the prior statement is consistent with the declarant's in-court testimony and is offered to rebut an expressed or implied charge against the declarant of recent fabrication, improper influence, or improper motive, the prior consistent statement is not hearsay. Unlike the prior inconsistent statement previously discussed, there is no requirement for prior consistent statements to have been made under oath. *See, e.g., United States v. Allen*, 13 M.J. 597 (A.F.C.M.R.), *petition denied*, 14 M.J. 174 (C.M.A. 1982) (complaints by two young girls to their mothers concerning the charged offenses of indecent liberties were admissible as prior consistent statements to refute defense charges that the children's in-court testimony had been recently fabricated). If admitted, these statements may be used as substantive evidence. There must be at least an implied charge of recent fabrication or improper influence or motive. *United States v. Browder*, 19 M.J. 988 (A.F.C.M.R. 1985), set aside findings where the drug informant's prior consistent statement was admitted simply because the accused's

testimony was contrary ' 'hat of the informant. *But see United States v. Jones*, 26 M.J. 197 (C.M.A. 1988), wherein the defense counsel's intense cross-examination of the victim amounted to a charge of recent fabrication and, thus, made a prior consistent statement admissible. Under the common law rule, prior consistent statements were never admissible if made after a motive to fabricate would have arisen. Although the common law rule for admissibility of prior consistent statements is not found in the language of the military rule or the Federal rule, some Federal cases have read the requirement of the common law rule into the Federal rule. *See United States v. Shulman*, 624 F.2d 384 (2d Cir. 1980); *United States v. Quinto*, 582 F.2d 224 (2d Cir. 1978). Other Federal cases follow the literal reading of the rule and permit a party to introduce into evidence a prior consistent statement notwithstanding the fact that the statement was made after a reason to fabricate had arisen. *See United States v. Parodi*, 703 F.2d 768 (4th Cir. 1983); *United States v. Parry*, 649 F.2d 292 (5th Cir. 1981); *United States v. Williams*, 573 F.2d 284 (5th Cir. 1978). *United States v. McCaskey*, 30 M.J. 188 (C.M.A. 1990) generally adopts the common law rule for the military. In *McCaskey*, the court decides the issue on relevancy. The court stated, "... to be logically relevant to rebut such a charge, the prior statement typically must have been made before the point at which the story was fabricated or the improper influence or motive arose. Otherwise, the prior statement normally is mere repetition which, if made while still under the improper influence or after the urge to lie has reared its ugly head, does nothing to 'rebut' the charge." In dicta the court notes that it would be hard to imagine an instance where a prior consistent statement made after the point of the alleged fabrication would be probative but, acknowledging the possibility might present itself, declined to state their holding in absolute terms. *See also United States v. Morgan*, 31 M.J. 43 (C.M.A. 1990).

c. The Military Rules of Evidence also provide that, if a witness has previously identified a person after having had the opportunity to observe that person, then the original observation is admissible as substantive evidence of guilt. Mil.R.Evid. 801(d)(1)(C). This new rule does no more than recognize reality. An individual's identification is more likely to be accurate if made shortly after the incident in question than if made weeks or months later in court. For a detailed discussion, see part IV of chapter 14.

2. Admission by party-opponent. Mil.R.Evid. 801(d)(2). A statement offered against a party is also exempted from the hearsay rule under the following circumstances.

a. A party's own statement may be used against the party. Even though such confessions or admissions are not hearsay, however, the statements must not be obtained in violation of fifth amendment rights. *See* Mil.R.Evid. 304. Remember that all statements of the accused in the possession of the government must be provided to the defense prior to an arraignment. *See* Mil R.Evid. 304(d)(1).

b. A statement of which the party has manifested the party's adoption or belief in its truth is admissible against the party. *See, e.g., United States v. Potter*, 14 M.J. 978 (N.M.C.M.R. 1982) (accused adopted unsworn statement of co-conspirator by introducing it at his own magistrate's hearing); *United States v. Garrett*, 16 M.J. 941 (N.M.C.M.R. 1983) (accused's words and actions did not demonstrate adoption of statement by co-accused while in pretrial confinement); *United States v. Stanley*, 21 M.J. 249 (C.M.A. 1986) (One of several persons apprehended in connection with a drug sale stated, "We have to get our stories straight." The accused's silence was not an adoption.); *United States v. Wynn*, 22 M.J. 726 (A.F.C.M.R. 1986) (silence of shoplifter when confronted by store detective was considered admission by silence); *United States v. Antonitis*, 26 M.J. 856 (A.C.M.R. 1988) (accused who refused to sign a CID-typed results of interview document did not "adopt" the statement).

c. A statement by a person authorized by the party to make a statement on the subject is admissible against the party.

d. A statement by a party's agent or servant concerning a matter within the scope of the duties of the agent or servant is admissible against the party. Defense counsel is such an agent, but plea negotiations are protected by Mil.R.Evid. 410.

e. A statement made by a co-conspirator of a party during the course of and in furtherance of the conspiracy is admissible against the party.

(1) Requirements:

(a) A conspiracy must be in existence at the time of the statement;

(b) the declarant must be part of the conspiracy at the time the statement is made;

(c) the accused must be part of the conspiracy either at the time the statement is made or thereafter, although the accused need not be charged with conspiracy; and

(d) the statement must be made in furtherance of that conspiracy. If, for example, a co-conspirator gives a confession to law enforcement officials after surrendering or being apprehended, the statement given would not be for the purpose of furthering the conspiracy. Therefore, the confession per se could not be introduced against other co-conspirators under Mil.R.Evid. 801(d)(2). The confession, however, would not be hearsay if introduced against the co-conspirator who gave the confession.

(2) Laying a foundation

(a) Evidence of acts or declarations of co-conspirators are admissible as exemptions to the hearsay rule only after a proper foundation has been laid. The foundation consists of:

-1- Proof of a conspiracy in existence; and

-2- proof that the act or declaration was made in pursuance of the conspiracy.

(b) The military judge may have discretion under the Military Rules of Evidence to admit evidence of such acts or declarations without the foundation, upon the condition that the statement must ultimately be excluded and disregarded if the foundation is not subsequently shown. Mil.R.Evid. 104(b). Most civilian courts, however, take the view that the trial judge, under Fed.R.Evid. 104(a), must make a preliminary finding that a conspiracy exists before admitting conspirator's statement. *See* S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 618 (2d ed. 1986) [hereinafter *Military Rules of Evidence Manual*].

(c) A proper foundation may be laid by direct or circumstantial evidence. In *Bourjaily v. United States*, 483 U.S. 171 (1987), the Supreme Court held that a judge may consider any evidence, including the proffered hearsay statements themselves, in determining the existence of a conspiracy and the defendant's participation in it. Prior to *Bourjaily*, the Court of Military Appeals had consistently held that independent proof of the conspiracy is a prerequisite for the admissibility of such statements. *See United States v. LaBossiere*, 13 C.M.A. 337, 32 C.M.R. 339 (1969); *United States v. Ward*, 16 M.J. 341 (C.M.A. 1983). It is unclear if the Court of Military Appeals will change its position in light of *Bourjaily*; however, in *United States v. Scott*, 24 M.J. 578 (N.M.C.M.R. 1987), the Navy-Marine Corps Court stated its preference for using proffered statements viewed in conjunction with independent evidence for proving the underlying conspiracy.

(d) The conspiracy agreement may have been formal or informal, express or tacit.

(3) Termination of the joint enterprise

(a) Time of termination: Upon completion of enterprise or upon effective withdrawal of co-conspirator against whom the statement is made.

(b) Effect of termination: Once the enterprise or combination has ended, subsequent acts and declarations are admissible only against the actor or declarant. *See, e.g., Lutwak v. United States*, 344 U.S. 604 (1953); *United States v. Beverly*, 14 C.M.A. 468, 34 C.M.R. 248 (1964); *United States v. Garrett*, 16 M.J. 941 (N.M.C.M.R. 1983) (statement by co-conspirator during pretrial confinement not admissible against accused where the conspiracy terminated upon apprehension of the co-actors); *United States v. Stroup*, 29 M.J. 224 (C.M.A. 1989) (statement made by conspirator more than a year after discovery of conspiracy to acquire blank government checks was not admissible as hearsay exception for statements of co-conspirators made during course of, and in furtherance of, conspiracy).

0804 EXCEPTIONS TO THE HEARSAY RULE

Over a period of time, certain classifications of evidence which are hearsay in nature have nonetheless been admitted into evidence as exceptions [as distinguished from exemptions under Mil.R.Evid. 801(d)] to the hearsay rule. Under the Federal Rules of Evidence and the Military Rules of Evidence, such exceptions are found in rules 803 and 804. An easy reference to hearsay exceptions has been compiled. The compilations are separated into two groups: (1) Mil.R.Evid. 803 lists items which are exceptions even if the declarant is available to testify; and (2) Mil.R.Evid. 804 lists the exceptions applicable only if the declarant is unavailable.

A. Exceptions applicable even if declarant is available. Mil.R.Evid. 803. (Key Numbers 1088 et seq.) Mil.R.Evid. 803 contains 24 exceptions to the hearsay rule admissible as evidence whether the declarant is available or not. Many are consistent with prior military authority, the Federal Rules of Evidence, and traditional jurisprudence. Some are not, particularly those which are unique to the military's interpretation of the rules. A description of the most important of these exceptions follows.

1. Present sense impression. Mil.R.Evid. 803(1).

a. Mil.R.Evid. 803(1) was adopted from Fed.R.Evid. 803(1) without change. Under this rule, a statement describing or explaining an event made while the declarant was perceiving the event or condition or immediately thereafter may be admitted as an exception to the hearsay rule.

b. This rule, unlike Mil.R.Evid. 803(2), does not require that the event or condition perceived be a startling event or condition.

c. The rule, however, applies only to statements made at the time the condition or event is "perceived" or "immediately thereafter." The salient issue in this rule is to determine what lapse of time may be considered as

"immediately thereafter." The commentary on the Federal rule contained in the Advisory Committee notes states that Fed.R.Evid 803(1), "recognizes that in many, if not most instances, precise contemporaneity is impossible, and hence a slight lapse is allowable." 56 F.R.D. 187, 304 (1973). A lapse of between fifteen and forty-five minutes in one case was not considered to be a slight lapse and, therefore, the statement was not "immediately thereafter" the event. *Hilyer v. Howat Concrete Co., Inc.*, 578 F.2d 442 (D.C. Cir. 1978). *But see United States v. Blakey*, 607 F.2d 779 (7th Cir. 1979), where a lapse of time of about twenty-three minutes from the time of the event (an act of extortion) until the time of the statement was considered by the court to have been made "immediately thereafter" under Fed.R.Evid. 803(1). For a further discussion of this issue, see *United States v. Cain*, 587 F.2d 678 (5th Cir. 1979), *cert. denied*, 440 U.S. 975 (1979). Although there is no hard-and-fast rule which determines what lapse of time is acceptable, commentators have indicated that the purpose and intent of the rule are met if the statement is made as soon as the declarant has the opportunity to speak after the event or condition takes place. *See Military Rules of Evidence Manual, supra*, at 641.

> **Example:** The secretary for a grand jury proceeding made rough notes during the proceeding which indicated that the accused, now being tried for perjury for false testimony before the grand jury, was sworn at the grand jury proceedings. These notes were made immediately after the accused took the oath at the grand jury proceeding. Even if the official transcript failed to indicate that an oath was administered, the notes would be admissible under the present sense impression exception to the hearsay rule as proof of the oath having been administered to the accused. *See United States v. Kehoe*, 562 F.2d 65 (1st Cir. 1977).

2. Excited utterance. Mil.R.Evid. 803(2).

a. This exception to the hearsay rule is identical to Fed.R.Evid. 803(2). Under the rule, a statement relating to a startling event or condition made while under the stress of excitement caused by the event or condition may be admitted into evidence. This rule is premised on the presumption that statements made while a declarant is under the stress of excitement due to a startling event are inherently trustworthy. It is presumed that the excitement, coupled with the relative spontaneity of the statement, precludes the opportunity for reflection and thus limits the opportunity for fabrication and falsehood. Of course, it can be argued that the

same excitement and stress which precludes reflection may also act to cause distortions or inaccuracies of perception. The drafter of the Federal rule noted this criticism of the rationale for the rule but dismissed it and opted for its inclusion as an exception to the hearsay rule.

b. In breaking down this rule to its component parts, the military judge must determine:

(1) Whether the event or condition occurred;

(2) whether the event or condition was startling; and

(3) whether the declarant was acting under the stress of excitement caused by the event or condition.

This rule does not appear to require independent evidence that the event occurred. In most instances, by the very nature of the case, evidence will be elicited to show, at least circumstantially, that the event occurred. In those cases where there is no other evidence to prove the event, however, the modern trend is to consider the declaration itself as proof that the event occurred. In deciding whether the event or condition is "startling," the judge must assess the shock effect that the event had upon the declarant. The presence of blood as a result of accident or assault is generally presumed to result in the event being deemed as startling. *See* Weinstein, *Weinstein's Evidence*, § 803(2)(1). It is noted, however, that even if the event is not startling, the statement might otherwise be admissible under the present sense impression exception [Mil.R.Evid. 803(1)].

Whether the declarant was acting under the stress of excitement will be determined in large measure by the time element involved and the relationship of the declarant to the startling event. The standard is the duration of the excitement. "How long can the excitement prevail? Obviously, there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, *Spontaneous Statements and State of Mind*, 46 Iowa L. Rev. 224, 243 (1961). Participation by the declarant in the startling event (e.g., as a victim of assault) is not required under the rule. A nonparticipant may likewise be moved to describe what he perceives as a result of the startling event. *Id.*

Example: A mother and her 4-year old daughter are standing at an intersection waiting to cross the street. The young child begins to run across the street. At the same time, the accused drives his car at a high rate of speed, "runs" the stop sign, and hits the child, killing her. The mother is severely upset. A policeman arrives at the scene and asks the mother what happened. The mother responds, "He went right through the stop sign and hit my daughter." At the accused's trial for negligent homicide, the policeman testifies and relates the statement the mother gave him concerning the accident. The mother's out-of-court statement as related in court by the policeman would, under the excited utterance exception, be admissible for the truth of the matter asserted (i.e. the accused failed to obey the stop sign and hit the child).

c. The Mil.R.Evid. excited utterance provision was addressed in detail in *United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987), wherein the victim reported sexual abuse by her father to a trusted counsellor at school the morning after the incident. The court held that the degree of agitation of the victim, the spontaneity of her statement, and the fact that this was her first opportunity to report the statement brought the case under the excited utterance exception. *See also United States v. Jones*, 30 M.J. 127 (C.M.A. 1990), which distinguished *Arnold* based on the length of time, the age of the declarant, the lact of spontaneity, and the absence of a threat. *United States v. Hill*, 13 M.J. 882 (A.C.M.R. 1982) (mother's statement to physician some time after the event that father had abused her son, made at physician's urging, not an excited utterance); *United States v. Smith*, 14 M.J. 845 (A.C.M.R. 1982) (former "fresh complaint" evidence qualified as an excited utterance); *United States v. LeMere*, 22 M.J. 61 (C.M.A. 1986) (statements of three-and-a-half-year-old victim of sexual abuse made 16 hours after the assault did not qualify as excited utterance); *United States v. Dunlap*, 25 M.J. 89 (C.M.A. 1987) (statement made by child molestation victim to her babysitter while in tears, some 30 to 45 minutes after the incident, was an excited utterance); *United States v. Whitney*, 18 M.J. 700 (A.F.C.M.R. 1984) (in cases involving sexual abuse of a young child, the excited utterance exception to the hearsay rule should be liberally applied; however, a statement made four days after the event was inadmissible). *See also United States v. Urbina*, 14 M.J. 962 (A.C.M.R. 1982)

3. Existing, mental, emotional, or physical condition. Mil.R. Evid. 803(3).

-- This exception to the hearsay rule permits the introduction into evidence of statements of the declarant's then existing state of mind, sensation, or physical condition. Included under the rule are statements of intent, plan, motive, design, mental feeling, pain, and bodily health. *See, e.g., United States v. Elliott*, 23 M.J. 1 (C.M.A. 1986) (accused's innocent state of mind); *United States v. Dodson*, 16 M.J. 921 (N.M.C.M.R. 1983) (statement of murder victim regarding intended confrontation admissible as evidence of victim's state of mind), *rev'd in part on other grounds*, 21 M.J. 237 (C.M.A. 1986). Except for situations involving a declarant's will or other testamentary documents, this rule does not include a statement of memory or belief to prove the fact remembered or believed.

> **Example:** Assume the declarant made an out-of-court statement, as follows: "I'm scared. I think my wife has been poisoning me." Assuming the statements are otherwise relevant, the statement "I'm scared" would be admissible under the rule to prove the state of mind of the declarant. However, the statement, "I think my wife has been poisoning me," would not be admissible to prove the truth of that statement under the rule in that the statement is one of belief and may not be used to prove the fact believed. For an excellent treatment of the distinction between "state of mind" and "belief," see *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980), *reh'g* and *reh'g en banc denied*, 636 F.2d 315 (5th Cir. 1981).

4. Statements for the purpose of medical diagnosis or treatment. Mil.R.Evid. 803(4).

a. This exception permits statements made for the purpose of medical diagnosis or treatment to be admitted into evidence. Such statements are admissible when they describe "medical history, or past or present symptoms, pains, or sensations, or the inception or general character of the cause or external source thereof insofar as they are reasonably pertinent to diagnosis or treatment." Mil.R.Evid. 803(4). This exception is related to, and is often considered simultaneously with, the excited utterance exception [Mil.R.Evid. 803(2)] and the mental, emotional, or physical condition exception [Mil.R.Evid. 803(3)].

b. Statements, to qualify under the rule, need not be made specifically to a physician. The statement may be directed to such personnel as nurses, technicians, or even family members as long as the purpose of the statement is for diagnosis or treatment. It is the motive to promote diagnosis and treatment, and not the fact as to whom the statements were made, that gives such statements their indicia of trustworthiness. C.M.A. firmly stated its position in *United States v. Edens*, 31 M.J. 267 (C.M.A. 1990), that the declarant must make the statement for purpose of the medical diagnosis or treatment and that the declarant made the statement with some expectation of receiving medical benefit. Thus, for example, statements made by two young children to a child psychologist, who was treating them as a result of sexual abuse they had suffered at the hands of the accused, were admissible under Mil.R.Evid. 803(4), since the statements were clearly made by the children with a view toward obtaining treatment for lingering psychological trauma resulting from the offenses. *United States v. White*, 25 M.J. 50 (C.M.A. 1987). Such out-of-control statements will even be admissible where the psychologist to whom the statements were made is part of a "Child Protection Case Management Team," so long as the purpose of the child in making the statements was to obtain treatment. *United States v. Welch*, 25 M.J. 23 (C.M.A. 1987). But, in a similar type of case, where the record of trial made clear that the four-year-old victim did not realize she was being treated by a psychologist and where the psychologist had introduced herself to the victim during the treatment sessions as "Kathy" and encouraged her to think of the psychologist as "just another Mommy," the statements made by the victim to the psychologist were not admissible under Mil.R.Evid. 803(4). *United States v. Avila*, 27 M.J. 62 (C.M.A. 1988). It should also be noted that persons other than medical personnel may fall within the scope of this exception. For example, statements made to a social worker by a four-year-old sex abuse victim for treatment of her nightmares were admissible under this exception. *United States v. Cottriel*, 21 M.J. 535 (N.M.C.M.R. 1985). It is also suggested in *Military Rules of Evidence Manual* that the declarant need not be the patient. In *United States v. Hill*, 13 M.J. 882 (A.C.M.R. 1982), statements made by the victim's mother to the attending physician that the child's father had struck her son and dropped him were held not admissible under this exception because they were not made to promote treatment, but rather were encouraged by the physician to identify the assailant. On the other hand, it seems clear that, while the patient's statements to the physician fall within the scope of this rule, the physician's statements to the patient do not qualify as being within the scope of the medical diagnosis exception. Thus, for example, where a military judge precluded a defense witness from testifying that she had type A blood (something which she plainly knew only because her physician had told her so), it was clear that the witness was trying to introduce the physician's statement and this statement was not admissible under Mil.R.Evid. 803(4). *United States v. Williams*, 26 M.J. 487 (C.M.A. 1988).

c. Even if a patient is seen by a physician solely for diagnostic vice treatment purposes, this rule would be applicable and the statements of the

declarant to the physician regarding his medical history, present or past symptoms, would be admissible. The analysis of the Mil.R. Evid., however, indicates that the drafters of Mil.R.Evid. 803(4) felt that statements made to a physician merely to enable the physicians to testify do not appear to come within the rule. The language of the rule, however, sets forth no such limitation. It appears that the proper test to apply in determining whether the rule is applicable is two-pronged:

(1) Is the declarant's motive consistent with the purpose of the rule; and

(2) is the information in the statement such that it could reasonably be relied upon for either diagnosis or treatment? *See United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981) (statement of nine-year-old victim to physician, that she had been raped, held pertinent to medical treatment).

d. The medical diagnosis exception is one which is employed frequently in child abuse cases. For example, in *United States v. Deland*, 22 M.J. 70 (C.M.A. 1986), the accused was charged with sexually molesting his seven-year-old daughter. The evidence showed that, after the child had first reported these incidents to her mother, the mother had arranged for the child to begin visiting a psychiatrist, who later testified at trial to many of the statements made to him by the child in the course of his treatment and diagnosis of her. These statements included statements identifying the accused as the person who had molested her. C.M.A. held that the statements were admissible under Mil.R.Evid. 803(4). *See also United States v. Lingle*, 27 M.J. 704 (A.F.C.M.R. 1988) (treating physician could testify not only to statements child made that injury was intentionally inflicted, but to child's identification of assailant).

5. Recorded recollection. Mil.R.Evid. 803(5).

a. This rule is identical to the Federal rule. It provides for the admissibility of a memorandum or record concerning a matter about which a witness once had knowledge if:

(1) It is established that the witness' memory is impaired; and

(2) the memorandum or record was made or adapted by the witness when the matter was fresh in the witness' memory; and

(3) the memorandum or record accurately reflects the witness' knowledge.

b. The guarantee of trustworthiness lies in the reliability inherent in both the accuracy of a record made while the event perceived was still fresh in the declarant's mind and the opportunity of the opposing party to examine the declarant about the circumstances in which the statement was made. *See Military Rules of Evidence Manual, supra*, at 644.

c. If the recorded recollection is admitted into evidence, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. This part of the rule attempts to preclude the members from giving the statement, as opposed to the testimony of other witnesses, undue weight in the deliberation room. The adverse party may offer the memorandum itself into evidence as an exhibit. An adverse party may desire to do so in order to establish inconsistencies or inaccuracies found in the memorandum.

6. Records of regularly conducted activity (business records). Mil.R.Evid. 803(6).

a. Development of the rule

(1) This exception to the hearsay rule can be traced to 17th century England, when it was created to foster business trade. Known then as the "shop book" doctrine, it served as an alternative means of proof for tradesmen involved in a lawsuit. The doctrine was limited by statute in 1609 to prevent abuse by prohibiting entries older than one year. Adoption of the rule by the American legal system, however, placed other restrictions on it: The party using the book must not have been a clerk; the records must have an honest appearance; and each transaction must have exceeded a limited value. *See* McCormick, *Evidence* 718 (1954).

(2) As finally developed by the common law, the record had to be the first permanent record of the transaction -- a routine entry made in the regular course of business, made at or near the time of the event or fact, recorded by an entrant who had personal knowledge of the transaction (or whose informant had personal knowledge). Either the entrant or informant had to testify or the proponent of the records had to show that the witnesses were unavailable.

b. Treatment in the Mil.R.Evid. 803(6)

(1) A record of regularly conducted business activity may be defined as:

(a) Any memorandum, report, or data compilation;

(b) concerning acts, events, opinion, or diagnosis;

(c) made at or near the time of the event;

(d) from information transmitted by a person with knowledge of the information;

(e) if the information was transmitted and recorded in the regular course of business; and

(f) if it was the regular practice of that business activity to make such a record.

(2) Under the rule, the proponent of a record must lay the foundation for its admissibility by establishing the above-cited criteria, through the custodian or other qualified witness who must also be able to withstand a cross-examination designed to display that the source of the information or the method of its preparation lacked trustworthiness. The rule expressly provides for the exclusion of a record if "the source of the information or the method of preparation indicate a lack of trustworthiness." In *United States v. McKinley*, 15 M.J. 731 (N.M.C.M.R.), *petition denied*, 15 M.J. 405 (C.M.A. 1983), verification slips used in the course of business by a communication company to record results of inquiries made for long-distance telephone calls disputed by the subscriber to have been made were held admissible under Mil.R.Evid. 803(6). *See also United States v. Williams*, 12 M.J. 894 (A.C.M.R. 1982) (Army records which did not qualify as public record did meet criteria for "business" record hearsay exception); *United States v. Dean*, 13 M.J. 676 (A.F.C.M.R. 1982) (checks admissible as records of regularly conducted activity); *United States v. Benedict*, 27 M.J. 253 (C.M.A. 1988) (report of sanity board is not a "regularly conducted business activity" for purposes of the hearsay exception). Note that in the case of a theft from an automatic teller machine where the documents at issue were computer generated and the key strokes themselves were the only issue, these documents fell outside of the hearsay rule. *See United States v. Duncan*, 30 M.J. 1284 (N.M.C.M.R. 1990).

(3) The information found in the record must have been transmitted by a "person with knowledge." The rule does not require the one who makes a recording of the information to have had personal knowledge of the information so long as the content of the information is transmitted to the maker by someone with knowledge. Although not clear on the face of Mil.R.Evid. 803(6) or the present Fed.R.Evid. 803(6), the Federal courts generally require that all participants who are either transmitting or recording information, including the observer furnishing the information, must be acting in the regular course of business. The Federal cases stand for the proposition that, even if a record is kept by an activity in their regular course of business, if the information was transmitted by one who was not doing so in the regular course of business, then that information on the record is not admissible under the rule. *See, e.g., United States v. Plum*, 558 F.2d 568 (10th

Cir. 1977); *United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975); *United States v. Burruss*, 418 F.2d 677 (4th Cir. 1969).

(4) Police records

-- Prior to the adoption of the Military Rules of Evidence, MCM, 1969 (Rev.), para. 144(d) prevented a record "made principally with a view towards prosecution, or other disciplinary or legal action. . ." from being admissible as a business record. This limitation is not found in the language of Mil.R.Evid. 803(6). An exclusion, however, does exist in Mil.R.Evid. 803(8)(B) (public records exception) for "matters observed by police officers and other personnel acting in a law enforcement capacity." Such records are not admissible as public records under Mil.R.Evid. 803(8)(B). This exclusion would also appear to be applicable to Mil.R.Evid. 803(6), and would therefore appear to prevent such records from being admitted as a record of regularly conducted business activity. Almost all public records made at or near the event recorded also qualify as records of regularly conducted business activity under Mil.R.Evid. 803(6). If the exclusion in 803(8) were not equally applicable to 803(6), the exclusion would serve no useful purpose. It would always be circumvented by seeking admission of such a record under 803(6) vice 803(8). *See, e.g., United States v. Gudel*, 17 M.J. 1075 (A.F.C.M.R.), *petition denied*, 19 M.J. 93 (C.M.A. 1984) [OSI report inadmissible at presentencing proceedings notwithstanding relaxation of the rules in accordance with Mil.R.Evid. 1101(c)].

(5) Lab reports and chain of custody documents

(a) The most unusual aspect of Mil.R.Evid. 803(6) is that it contains an additional sentence not found within Fed.R.Evid. 803(6). This sentence specifically indicates that certain types of evidence are admissible which would probably not be admissible under the Fed.R.Evid. Among the evidence which Mil.R.Evid. 803(6) makes admissible are forensic laboratory reports and chain of custody documents. The inclusion of forensic laboratory reports and chain of custody documents in this Mil.R.Evid. is in conflict with the legislative history of Fed.R.Evid. concerning records of regularly conducted business activities and the Federal courts. The Federal courts generally agree that such documentary evidence is simply not admissible. *See, e.g., United States v. Oates*, 560 F.2d 45 (2d Cir. 1977).

(b) It should be noted that the second sentence in Mil.R.Evid. 803(6) is not intended to mandate admissibility for all such documents listed in that portion of the rule. In other words, the list of documents is intended merely to be illustrative of various types of documents which frequently qualify for admissibility under the rule. In the case of each individual forensic laboratory report, however, it will be necessary for the counsel offering the exhibit to establish the predicate elements of the business records foundation. He may not simply rely on the

second sentence of Mil.R.Evid. 803(6) as making all such lab reports admissible. Thus, for example, a military judge erred where he admitted over the defense counsel's objection a forensic laboratory report offered by the trial counsel and where no evidence was adduced to establish the foundational elements of the business records exception. *United States v. Wooten*, 25 M.J. 917 (N.M.C.M.R. 1988).

(c) The Court of Military Appeals has consistently held that forensic laboratory reports fall within the business record exception to the hearsay rule. *See United States v. Vietor*, 10 M.J. 69 (C.M.A. 1980); *United States v. Strangstalien*, 7 M.J. 225 (C.M.A. 1979); *United States v. Miller*, 23 C.M.A. 579, 45 C.M.R. 353 (1972); *United States v. Evans*, 21 C.M.A. 579, 45 C.M.R. 353 (1972). Prior to the present rules, the court did not sanction the admissibility of chain of custody documents as business record exceptions to the hearsay rule. *See United States v. Nault*, 4 M.J. 318 (C.M.A. 1978); *United States v. Porter*, 7 M.J. 32 (C.M.A. 1979); *United States v. Neutz*, 7 M.J. 30 (C.M.A. 1979); however, *United States v. Jessen*, 12 M.J. 122 (C.M.A. 1981) recognized in dicta that Mil.R.Evid. 803(6) overturned prior case law on this point. *United States v. Robinson*, 14 M.J. 903 (N.M.C.M.R. 1982) also held that a chain of custody document can be admissible under Mil.R.Evid. 803(6).

(6) Absence of specific entries on records of regularly conducted business activities. Mil.R.Evid. 803(7) provides that, if a matter is not noted in a record which qualifies under the provisions of Mil.R.Evid. 803(6), and if that matter is of a kind which regularly would be so recorded, then that fact may be admitted into evidence to show that the matter is nonexistent or that the event concerned did not occur.

> **Example:** SN Jones is charged with UA from his unit. Assume that a muster report qualifies as a record of regularly conducted business activity. Assume further that notation will be made on the report if an individual is UA. If no such notation appears in the report with respect to SN Jones, an absence of such a notation would be admissible as evidence to prove that SN Jones was not UA.

7. Public records and reports. Mil.R.Evid. 803(8).

a. Under the exception to the hearsay rule, records, reports, statements, or data compilation in any form are admissible if:

(1) They are of public offices or agencies; and

(2) they set forth any of the following:

(a) The activities of the office or agency;

(b) matters observed pursuant to a duty imposed by law;

(c) factual findings resulting from an investigation made pursuant to authority granted by law (only if such findings are to be used against the government); and

(3) the source of information or other circumstances are indicative of trustworthiness.

-- Is a record inadmissible for lack of conformity with the regulation under which it was prepared? There is normally a presumption of regularity, and substantial compliance with the regulation is sufficient. However, irregularities or omissions which are material to the execution of the record (such as absence of a required signature) will preclude its admissibility under Mil.R.Evid. 803(8). *See, e.g., United States v. Anderson*, 12 M.J. 527 (N.M.C.M.R. 1981).

b. Public records commonly utilized at courts-martial include service record pages, military medical records, and military pay records.

c. This rule, as mentioned previously, excludes matters observed by police officers and other personnel acting in a law enforcement capacity. [Factual findings of such reports should be admissible by the defense under Mil.R.Evid. 803(8)(C).] Although not apparent from the face of the language in the rule, the exclusion was intended only to exclude those law enforcement records which are essentially evaluative in nature. Thus, for example, some cases have held that a record of some very simple, objective fact which was created by a person who was acting in a law enforcement capacity but who was performing a purely ministerial act would not fall within the scope of this exclusion. In other words, it would still be admissible as a public record. *United States v. Quezada*, 754 F.2d 1190 (5th Cir. 1985); *United States v. Hernandez-Rojas*, 617 F.2d 533 (9th Cir. 1980), *cert. denied*, 449 U.S. 864, 101 S.Ct. 170, 66 L.Ed.2d 81 (1980); *United States v. Union Nacional de Trabajadores*, 576 F.2d 388 (1st Cir. 1978); and *United States v. Grady*, 544 F.2d 598 (2nd Cir. 1976). The only military case so far addressing this issue seems to be *United States v. Yeoman*, 22 M.J. 762 (N.M.C.M.R. 1986), a larceny case where it was held that the military judge did not err in admitting a military police incident report to show that the victim's property had been stolen. The court noted that this incident report was ultimately based on information mechanically registered by the PMO desk sergeant as a result of a telephone complaint and was recorded in the routine process of starting an investigation.

d. Notwithstanding this exclusion, records such as forensic laboratory reports and chain of custody documents are specifically mentioned in the last sentence of the rule as being admissible. Under this rule, forensic laboratory reports and chain of custody documents are admissible as public records if the documents were made by a person within the scope of his official duties, and those duties included a duty to know or ascertain through appropriate and trustworthy channels the truth of the fact, and to record the fact. Note, however, that areas of expertise which apply "subjective" interpretation of data (such as handwriting analysis) instead of "clinical" interpretation require the presence of a live witness to testify. *See United States v. Broadnax*, 23 M.J. 389 (C.M.A. 1987).

e. As is true for records of a regularly conducted business activity, the absence in a public record of an entry which regularly would be made and preserved may be considered as proof that the document does not exist or that the event not recorded did not occur. Proof of the absence may be made by evidence in the form of a certification in accordance with Mil.R.Evid. 902, or by testimony that diligent search failed to disclose the record, report, statement, or data compilation or entry. *See* Mil.R.Evid. 803(10).

8. Learned treatises. Mil.R.Evid. 803(18).

a. Under this rule, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art may be admitted as substantive evidence of the facts contained therein to the extent the statements are called to the attention of an expert witness upon cross-examination, or, to the extent relied upon by the expert in direct examination.

b. The treatise, periodical, or pamphlet must be established as a reliable authority either:

(1) Through the testimony or admission of the witness himself; or

(2) by other expert testimony; or

(3) by judicial notice.

c. If the statements are admitted, they may be read into evidence but the treatise, periodical, or pamphlet may not be received as an exhibit.

Example: Dr. Shrink, a forensic psychiatrist, testifies that the accused suffers from a psychomotor epilepsy. Dr. Shrink, upon cross-examination, admits that the *Diagnostic and Statistical Manual III* (DSM III) published by the World Health Organization is recognized in the psychiatric community as a reliable, authoritative work. The definition of psychomotor epilepsy found in the DSM III may be read into evidence and considered as evidence just as the live testimony of Dr. Shrink may be considered.

9. Mil.R.Evid. 803(21) allows admission of one's reputation in a relevant community.

10. Mil.R.Evid. 803(22) allows admission of hearsay evidence of most prior convictions.

11. "Other exceptions" -- the "catchall" exception. Mil.R.Evid. 803(24).

a. This new provision, known as the "catchall" in Federal practice, permits a trial court to admit hearsay evidence even if it does not fit within one of the other 23 exceptions or any other provision of the rules. Its legislative history mandates that the "catchall" was not designed to be a forum for creating new exceptions or, for that matter, precedent in this area. Rather, the new rule is to be used in an ad hoc fashion, based on the individual considerations of the case at bar and counsel's ability to demonstrate the evidence's "circumstantial guarantees of trustworthiness." The requirement that any out-of-court statement offered under Mil.R.Evid. 803(24) possess such equivalent circumstantial guarantees of trustworthiness was clearly intended to satisfy the requirements of the sixth amendment confrontation clause. Therefore, any statement which is sufficiently reliable to be admissible under Mil.R.Evid. 803(24) should also be sufficiently reliable to satisfy the sixth amendment and vice versa.

b. Once counsel have addressed this requirement, they must establish that the evidence is offered:

(1) To prove a material fact in issue;

(2) is more probative of the point than any other evidence reasonably available; and

(3) that the admission of the evidence generally fosters fairness in the administration of justice.

In using the rule, counsel must be sensitive to its procedural requirements. Opposing counsel must be provided with the fair opportunity to prepare adequately in order to challenge the evidence. Notice must include, prior to trial, the intention to offer the statements and the particulars of the statements including the name and address of the declarant.

c. Some courts which have evaluated the "catchall" provisions have constructed a rule 403-type balance to determine how the trial judge should evaluate admissibility, while providing a structure for counsel's arguments on the issue. *See United States v. Oates, supra*. These decisions indicate that, placed on one side of the balance should be the proponent's legitimate needs for the evidence and, on the other, any unfair prejudice to the opponent's case.

d. It should be apparent that the residual hearsay provisions of Mil.R.Evid. 803(24) constitute one area where the law of evidence relating to hearsay verges on the limitations imposed by the sixth amendment right to confront one's accuser. Any analysis of the admissibility of some proffered item of residual hearsay, therefore, will often necessarily embrace a review of the case law interpreting the confrontation clause.

(1) One of the critical Supreme Court cases in this area is *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), holding that the confrontation clause is not violated where an out-of-court statement is introduced against the accused as long as the declarant is available in court to be cross-examined. In *Green*, the state's key witness against the accused testified at the trial in a manner which essentially recanted his earlier testimony against the accused which had been given at a preliminary hearing. The state thereupon offered as substantive evidence against the accused the witness' testimony from the preliminary hearing. The evidence was admitted and the accused was convicted. The U.S. Supreme Court noted that the accused's sixth amendment right to confront his accuser was not violated since his accuser was present in court and subject to cross-examination.

(2) Another critical Supreme Court case in this area is *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), which addressed more broadly the interrelationship of the hearsay rule and the accused's sixth amendment right to confront his accuser. *Roberts*, like *Green*, dealt with the use by the state against the accused of a transcript of testimony given by a key state witness

at a preliminary hearing. Unlike *Green*, however, the state's witness in *Roberts* was not present at the trial to be cross-examined by the accused. The Supreme Court found no violation of the accused's sixth amendment right to confront his accuser, since the witness could not be located despite a good faith effort by the state to produce her for testimony at trial; she was therefore unavailable; and the statement was given under oath at a preliminary hearing at which the accused through his counsel had the opportunity to question the witness. More significant, perhaps, is the language in *Roberts* indicating that, when the declarant does not testify at trial and the government seeks to use against the accused an out-of-court statement of the declarant, the government must show (1) that the government made a good faith effort to locate the declarant and (2) that the statement offered possesses sufficient indicia of reliability to be admissible under the confrontation clause. The court further noted that any statement which fit one of the traditional hearsay exceptions is presumptively reliable enough to satisfy the confrontation clause.

(3) It is clear from the military case law in this area that a substantial showing of unavailability is required. At a minimum, the government must be able to show that it made an effort at personal service of a subpoena along with a tender of witness fees and mileage (as is required by article 46 in order for the subpoena to have any binding effect on the witness). *United States v. Burns*, 27 M.J. 92 (C.M.A. 1988). Furthermore, in the context of depositions, counsel should not be misled by certain language in article 49, which purports to make any deposition admissible if the deponent is located more than 100 miles away from the site of the trial. C.M.A. has made it clear that, whatever article 49 may say, whether a witness is unavailable for confrontation clause purposes has nothing at all to do with the 100-mile limit contained therein. *United States v. Vanderwier*, 25 M.J. 263 (C.M.A. 1987).

e. The military cases which have ruled upon the admissibility of certain extrajudicial statements as substantive evidence under Mil.R. Evid. 803(24) have been guided by whether such evidence has the equivalent circumstantial guarantees of trustworthiness found in the other exceptions to the hearsay rule. In *United States v. Powell*, 22 M.J. 141 (C.M.A. 1986), Hernandez overdosed on heroin and ultimately made a statement implicating Powell for distribution. Hernandez misled the trial counsel as to her expected testimony up to the moment of trial, when she recanted. Her earlier statement was admitted under Mil.R.Evid. 803(24). C.M.A. affirmed, noting that Hernandez was available for cross-examination, she admitted making the statement, its substance was corroborated independently, Powell had admitted to another prosecution witness that he had provided heroin to Hernandez, her trial testimony was internally inconsistent, and her reasons for recanting were improbable. *See also United States v. Whalen*, 15 M.J. 872 (A.C.M.R. 1983) (proper to admit self-incriminating statement which witness recanted at trial, where statement was written, sworn, made shortly after incident and after rights warning and waiver); *United States v. King*, 16 M.J. 990 (A.C.M.R. 1983) (error to admit

earlier statement where witness' testimony demonstrated her strong motive to have fabricated the earlier statement); *United States v. Harris*, 18 M.J. 809 (A.F.C.M.R. 1984) (guilty plea stipulation of available declarant was admissible not as substantive evidence against accused, but for the limited purpose of impeaching declarant's testimony).

f. In assessing the admissibility of an out-of-court statement under Mil.R.Evid. 803(24) and 804(b)(5), the Supreme Court has recently radically changed the method for determining admissiblity of this type of evidence. In the case of *Idaho v. Wright*, 110 S.Ct. 3144 (1990), the Court rejected the prior approach of permitting an out-of-court statement to be corroborated by extrinsic evidence of its reliability, to include other statements of the declarant, physical evidence, the statements of other witnesses, and the confession of the accused. The new approach is to determine the reliability of the statement based solely on the "totality of the circumstances" surrounding the making of the statement to determine whether there are the "particularized guarantees of trustworthiness" found in other firmly rooted hearsay exceptions. Factors the Court noted for consideration were (1) spontaneity and consistent repetition of the statement, (2) the mental state of the declarant, (3) use of terminology unexpected of a child of similar age, and (4) lack of motive to fabricate.

(1) Applying *Wright*, N.M.C.M.R. in the case of *United States v. Harjack*, 33 M.J. 577 (N.M.C.M.R. 1991), held the statement of a victim taken by NIS to be inadmissible, and furthermore held that the inadmissible hearsay could not be used under Mil.R.Evid. 104(a) to corroborate the confession of the accused. The court held that corroboration of a confession was a dual issue of law for the military judge and fact for the trier of fact to determine.

(2) The *Wright* "totality of the circumstances" test is currently enjoying success before the courts in cases where the government has crafted their arguments to conform with its requirements. *See United States v. Pollard*, 1992 CMR Lexis 421 (April 1, 1992) (court admits statement of child victim, focusing on the dynamics of the interview and the *Wright* factors); *United States v. Ortiz*, 34 M.J. 831 (A.F.C.M.R. 1992) (court admits statement of spousal abuse victim applying *Wright* test).

g. Military courts have been somewhat slower than civilian courts to notice the significance of *California v. Green, supra*. Thus, one can find several military cases which have held that the accused was denied his sixth amendment right to confront his accuser despite the fact that the declarant who made the out-of-court statement against him actually testified against the accused at trial. In *United States v. Quarles*, 25 M.J. 761 (N.M.C.M.R. 1987), for example, the key government witnesses in this prosecution for child molestation were the accused's three young children, all of whom had reported his alleged sexual abuse of them to

their babysitters and also, in the course of their subsequent psychological treatment, to their psychologist. When the children recanted their testimony at trial, the government introduced their earlier statements to the babysitters and the psychologist. Without addressing the applicability of *Green*, N.M.C.M.R. held that the accused was denied his sixth amendment right to confront his accuser. Similarly, in *United States v. Williamson*, 26 M.J. 115 (C.M.A. 1988), another child molestation prosecution, the victim testified against the accused in court but denied ever being abused by him. The government thereupon introduced certain statements made by the victim to a social worker and to her grandfather which tended to suggest that sexual abuse had occurred. The accused was convicted but C.M.A. reversed, holding that the accused was denied his sixth amendment right to confront his accuser by the use of the out-of-court statements against him. Again there was no discussion of the applicability of *Green*, which would suggest that no sixth amendment violation occurred since the declarant testified in court and was available for cross-examination.

h. Finally, in *United States v. Guaglione*, 27 M.J. 268 (C.M.A. 1988), C.M.A. indicated some awareness of the full scope of *Green*. This was a prosecution for wrongful use of hashish by an officer in the company of enlisted men. The three key witnesses against the accused were enlisted men in the same battalion to which the accused (an Army lieutenant) was attached. In the course of the investigation, all three soldiers gave sworn statements to CID alleging that they and the accused had smoked hashish together on one occasion. At trial, two of the three witnesses recanted their earlier statements but the third witness stuck by his story. The government thereupon introduced the previous sworn statements made by the other two soldiers as substantive evidence that the offense alleged had indeed occurred. The accused was convicted and C.M.A. found that no violation of the accused's sixth amendment right to confront his accuser had occurred, citing (with evident reluctance) *Green*. C.M.A. then went on to hold, however, that the out-of-court statements were inadmissible under the residual hearsay exception since they were not, in the mind of C.M.A., sufficiently reliable to be admissible as they were made to criminal investigators pressing hard to obtain statements. *Guaglione* makes clear that C.M.A. is willing to hold statements inadmissible as residual hearsay even though admission of the out-of-court statements may not violate the confrontation clause. Thus, even when the declarant takes the stand to testify, any out-of-court statement offered by that witness must still meet the test for reliability under the residual hearsay exception and counsel should be prepared to specify those aspects of a particular statement which give it circumstantial guarantees of trustworthiness such that it qualifies for admission under either Mil.R.Evid. 803(24) or Mil.R. Evid. 804(b)(5).

B. Exceptions to the hearsay rule requiring declarant unavailability. Mil.R.Evid. 804. (Key Numbers 1096 et seq.)

1. Under this Mil.R.Evid., certain exceptions to the hearsay rule are predicated upon a showing that the out-of-court declarant "is unavailable as a witness." *See, e.g., United States v. Bruce*, 14 M.J. 254 (C.M.A. 1982) (Mil.R.Evid. 804(b)(3) not applicable since government made no showing declarant was unavailable).

a. The same definition of "unavailability" is to be used on all hearsay exceptions.

b. Unavailability is satisfied by:

(1) Exercise of claim of privilege [*see, e.g., United States v. Koistinen*, 27 M.J. 279 (C.M.A. 1988) (civilian witness' assertion of his right against self-incrimination rendered him unavailable as a witness); *but see United States v. Vaiente*, 17 M.J. 1087 (A.F.C.M.R. 1984) (prosecution witness asserting his privilege against self-incrimination is not "unavailable" if he can be made available with a grant of testimonial immunity); *United States v. Dill*, 24 M.J. 386 (C.M.A. 1987)];

(2) persistent refusal to testify despite judicial order [*see United States v. Hogan*, 16 M.J. 549 (A.F.C.M.R. 1983) (military judge must explain the impact of refusal and attempt to persuade reluctant witness), remaining findings of guilty set aside on other grounds, 20 M.J. 71 (C.M.A. 1985); *United States v. Ferdinand*, 29 M.J. 164 (C.M.A. 1989) (military judge is hardly exercising contempt powers and, thus, witness is not unavailable simply because mother threatens to disobey order to produce child to testify];

(3) testimony by declarant as to "lack of memory" [*see, e.g., United States v. Garrett*, 17 M.J. 907 (A.F.C.M.R. 1984) (witness' testimony that he did not remember anything about the offenses and that he wished to blot them out of his mind)];

(4) death "or then existing physical or mental illness or infirmity";

(5) inability of proponent to procure declarant's attendance (or testimony) by process or other reasonable means [*see United States v. Crockett*, 21 M.J. 423 (C.M.A. 1986) (civilian witness in Florida who refused invitational travel orders to Germany was "unavailable" despite fact that trial could have been moved to Florida); *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989) (witness was "unavailable" where witness had left his unit without authority, law enforcement agencies had searched diligently for him without success, and there was

no indication when, if ever, he would return). Note, however, that C.M.A. has required courts and the government to exhaust all means available before finding a witness unavailable. In *United States v. Ferdinand*, 29 M.J. 164 (C.M.A. 1989), the court held that issuing a subpoena which was not responded to, the refusal of the witness' mother to allow victim to testify, the entering of a family court order prohibiting testimony, and the appearance of a state social worker to testify about the state action and potential trauma to the victim was not sufficient to satisfy this rule];

(6) declarant's unavailability under UCMJ, Art. 49(d)(2) (i.e. military necessity).

-- It should be noted that certain language in article 49 suggests that, where depositions are concerned, the declarant is automatically unavailable if he is more than 100 miles from the site of the trial. Practitioners of military justice should not be misled by this language. It is clear from the case law that whether a witness is unavailable for confrontation clause purposes has nothing to do with the 100-mile provision of article 49. *United States v. Vanderwier*, 25 M.J. 263 (C.M.A. 1987).

c. Unavailability of the declarant due to the "procurement or wrongdoing" of the proponent of the declarant's statement is not "unavailability" within the meaning of Mil.R.Evid. 804(a).

2. Five hearsay exceptions are discussed under Mil.R.Evid. 804, four of which are discussed below. The underlying assumption of the drafters of the Mil.R.Evid. 803 exceptions is that the hearsay statement should not be excluded even if the declarant is available because the statement possesses "circumstantial guarantees of trustworthiness." Mil.R.Evid. 804 exceptions are admissible under a different theory. Here, the theory is that hearsay, which admittedly is not equal in quality to testimony of the declarant on the stand, may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard.

a. Former testimony. Mil.R.Evid. 804(b)(1).

(1) The military rule is taken from Fed.R.Evid. 804(b)(1), with the omission of the language relating to civil cases. Also, the military rule adds a section concerning the requirement of verbatim records of the former testimony.

(2) Former testimony is defined as testimony given at another hearing of the same or different proceeding, or in a deposition taken in compliance with the law in the course of the same or different proceeding.

(3) Former testimony qualifies for admission as evidence in the instant proceeding if:

(a) The party against whom the former testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; and

(b) the record of former testimony is verbatim.

(c) In addition to the above, if the former testimony is in the nature of a deposition or a record of a court of inquiry, the limitations set forth in UCMJ, Arts. 49 and 50 apply; *see United States v. Amerine,* 17 M.J. 947 (A.F.C.M.R. 1984) (deposition given in U.S. admissible at court-martial in Japan).

(4) The application of this rule to transcripts from article 32 investigations raises interesting legal issues. The rule states that former testimony may be admitted if the party against whom the testimony is now offered had an opportunity and motive to develop the testimony. The question may therefore arise whether testimony from an article 32 investigation is admissible where the party cross-examined the witness at the investigation solely for purposes of discovery. Can the party against whom the testimony is offered prevent the admission of the transcript by claiming that his motive in cross-examining the witness at the article 32 investigation was solely to obtain discovery? Although earlier case law was ambiguous on this point, the answer now seems clearly to be that he may not. *United States v. Arruza,* 26 M.J. 234 (C.M.A. 1988); *United States v. Connor,* 27 M.J. 378 (C.M.A. 1989) (it is enough that defense counsel had unrestricted opportunity to cross-examine witness).

b. Statement under belief of impending death. Mil.R.Evid. 804(b)(2).

(1) Under this rule, an out-of-court statement is admissible if:

(a) The case involves a prosecution for homicide or for any offense resulting in the death of an alleged victim (perhaps a drug distribution case where the transferee died from an overdose or perhaps when a lesser offense is charged, e.g., aggravated assault, but the victim dies as a result of the assault); and

(b) the declarant believed that his or her death was imminent at the time the statement was made; and

(c) the statement concerned the cause or circumstances of what the declarant believed to be the declarant's impending death.

(2) It should be noted, however, that there is no requirement that the declarant actually die, though some victim must die (otherwise you would not have a homicide prosecution), and the declarant must be unavailable. The declarant need only believe that his or her death is imminent at the time the statement is made.

(3) The rationale for the rule is that an individual would not use his last breath of life to lie.

> **Example:** SN Jones and SN Smith are walking back to the barracks from the base theater. They are confronted by two knife-wielding sailors, whom Smith knows from the barracks, who demand money from them. They refuse. Both Jones and Smith are stabbed and robbed. Jones dies almost immediately. Smith is bleeding profusely and is losing consciousness. The police arrive at the scene. Smith feels his life "slipping away" and tells the police that "SN Hammer and SN Daggar robbed and stabbed Jones and me." Smith does not die, due to the excellent efforts of the police and medical personnel. Smith lapses into a coma, however, and is not available to testify at Hammer and Daggar's trial for murder, robbery, and aggravated assault. In this case, Smith's statement identifying Hammer and Daggar as the assailants qualifies as a dying declaration and is admissible notwithstanding the fact that Smith survived.

c. Statement against interest. Mil.R.Evid. 804(b)(3).

(1) This rule was adopted from the Federal Rules of Evidence without change. Statements against interest are admissible if:

(a) At the time of its making, the statement was contrary to the pecuniary, proprietary, or penal interest of the declarant (see *United States v. Dillon*, 18 M.J. 340 (C.M.A. 1984) (statement as to source of cocaine possessed by declarant held inadmissible where declarant perceived the statement as entirely innocuous based upon the command intent to enroll him in a drug

rehabilitation program) and C. J. Everett's opinion in *United States v. Baran*, 22 M.J. 265 (C.M.A. 1986) questioning whether declarant perceived statement to be against his penal interest); and

(b) under the circumstances, a reasonable person in the position of the declarant would not have made the statement unless he or she believed it to be true.

(2) Under this rule, however, a statement that tends to expose the declarant to criminal liability and at the same time is offered by the defense to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. The rationale for the requirement of corroboration is that one, who is already convicted or exposed as being involved in criminal activity, may be likely to take the whole blame to protect his friends out of a feeling of loyalty or in exchange for favors. *See United States v. Perner*, 14 M.J. 181 (C.M.A. 1982) (discussion of the trustworthiness requirement); *United States v. Williams*, 23 M.J. 724 (A.F.C.M.R. 1986) (exclusion of brother-in-law's out-of-court admission exculpating accused because of insufficient corroboration). This rule of corroboration has been imposed upon statements offered to inculpate the accused as well. *Compare United States v. Robinson*, 16 M.J. 766 (A.C.M.R. 1983) (declarant's out-of-court statement implicating the accused was inadmissible in absence of independent evidence showing the trustworthiness of the declarant's accusation that the accused was his accomplice) *with United States v. Vasquez*, 18 M.J. 668 (A.C.M.R. 1984) (unavailable declarant's statement against interest inculpating the accused was admissible where its reliability and trustworthiness was guaranteed by independent corroboration).

(3) The scope of this hearsay exception is broader than the common law exception, which extended only to statements against pecuniary (not penal) interest. The difference is more than academic.

-- Suppose, for example, that two individuals are suspected of a crime. One of them confesses, but the other does not. When the two of them are referred to trial, the accused who confessed does not testify -- invoking his right to remain silent. May the confession of the one be used as substantive evidence against the other? Mil.R.Evid. 804(b)(3) would suggest that it may now qualify for admission as a statement against interest or as an exemption for the statement of a co-conspirator under Mil.R.Evid. 801(d)(2). In *United States v. Inadi*, 475 U.S. 387 (1986), the Supreme Court held that the general requirement of unavailability did not apply to incriminating out-of-court statements made by a nontestifying co-conspirator. Additionally, in *Bourjaily v. United States*, 483 U.S. 171 (1987), the court held that such statements also carried with them sufficient "indicia of reliability" because the hearsay exception for co-conspirator statements was a firmly rooted one.

d. "Catchall exception." Mil.R.Evid. 804(b)(5).

(1) Just as Mil.R.Evid. 803(24) represents a "catchall" exception to the hearsay rule for the admissibility of statements whether or not a declarant is available, Mil.R.Evid. 804(b)(5) provides for a "catchall" exception in cases where the declarant is deemed to be unavailable. This exception is identical in its language to Mil.R.Evid. 803(24), and the student should refer to the discussion of the legal issues found in section 0804 A.11.

(2) The most typical application of Mil.R.Evid. 804(b)(5) has been in connection with prior statements of child abuse victims who refuse to testify or who recant their earlier statements. In evaluating the reliability of the earlier statement, courts consider factors such as the child's age and maturity, the nature of the statements and the circumstances surrounding them, the presence of corroborative physical evidence, and the child's motives to distort the truth. In *United States v. Hines*, 23 M.J. 125 (C.M.A. 1986), several family members did not recant their earlier sworn statements, but refused to testify for family reasons. Their statements, which corroborated each other, were admissible to the extent they were corroborated by Hines' confession. In *United States v. Barror*, 23 M.J. 370 (C.M.A. 1987), though, the statement of Barror's fourteen-year-old stepson did not measure up to the *Hines* yardstick in terms of ability to understand the circumstances surrounding the statement or its corroboration. However, the *Hines* holding, with respect to using corroboration as a justifying factor for admissibility of a statement under Mil.R.Evid. 804(b)(5), is now questionable in light of the Supreme Court's recent decision in *Idaho v. Wright*, ___ U.S. ___, 110 S.Ct. 3139 (1990) concerning sixth amendment confrontation requirements. In *Idaho v. Wright*, the court found, in order not to run afoul of the sixth amendment confrontation right, the statement must have particular guarantees of trustworthiness. This indicia of reliability must be by virtue of the statement's inherent trustworthiness as reflected by the circumstances surrounding the making of the statement. Using corroboration to prove the truth of the statement in order to satisfy the hearsay exception violates the sixth amendment.

0805 HEARSAY WITHIN HEARSAY. Mil.R.Evid. 805.

-- This rule states that "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Therefore, multiple hearsay may be admissible if each segment of the hearsay satisfies an exception under Mil.R.Evid. 803 or 804.

Example: A victim of rape is taken to an NRMC for diagnosis and treatment. She describes the manner of attack. The physician records the victim's description of the attack on a physical examination record required to be made and kept in accordance with applicable regulations. The physical examination record, including the victim's statement contained therein, is admissible under the medical diagnosis as treatment exception found in Mil.R.Evid. 803(4). Also, the record of the physical examination is hearsay but is admissible under the public records exception to the hearsay rule found in Mil.R.Evid. 803(8). Both the statement of the victim and the physical examination record are out-of-court statements which fall under exceptions to the hearsay rule and, as such, notwithstanding the double hearsay nature of the physical examination record, upon proper authentication and showing of relevance, the document including the statements of the victim contained therein is admissible in light of Mil.R.Evid. 805.

0806 ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT. Mil.R.Evid. 806

A. The purpose of Mil.R.Evid 806 is to allow both the opponent and the proponent of a hearsay declaration, which has been admitted into evidence, to impeach or support the out-of-court declarant in basically the same fashion as if the declarant had been a witness who had testified. This opportunity to impeach or support extends not only to hearsay declarations of an out-of-court declarant, but also to "admissions" of an out-of-court declarant that would traditionally have been admissible under the admissions of a party opponent exception (such admissions are now by definition not hearsay).

B. It is unnecessary to afford the declarant of a hearsay statement, which has been admitted into evidence, any opportunity to "deny or explain" prior to use by the opponent of an inconsistent statement or conduct to impeach the declarant.

C. If the opponent of a hearsay statement, which has been admitted into evidence, calls the declarant of the statement as a witness, then the opponent can cross-examine the declarant. The opponent is not limited by the rules that would otherwise apply on direct examination.

0807 FINAL NOTES

-- It must be emphasized that the mere fact that a statement qualifies as an exception to the hearsay rule does not automatically guarantee its admission into evidence. The sixth amendment confrontation requirements must be satisfied; the probative value of the evidence must not be substantitally outweighed by confusion, undue delay, or unfair prejudice under Mil.R.Evid. 403; and, of course, authenticity, relevancy, and other competency requirements must be satisfied.

CHAPTER IX

DOCUMENTARY EVIDENCE

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CHAPTER IX

DOCUMENTARY EVIDENCE

0901 INTRODUCTION (Key Number 1040)

Documentary evidence, including private writings, records of regularly conducted business activity, and public records, is often the most frequently utilized form of evidence at courts-martial. In courts-martial for offenses such as unauthorized absence or forgery, documentary evidence normally constitutes most of the evidence submitted on the merits. Similarly, the primary evidence usually considered during the presentencing stage of a court-martial consists of documents such as service record entries and character letters.

This chapter will not address the hearsay issues attendant to the admissibility of documentary evidence. The student should refer to chapter VIII of this text for a discussion of such hearsay implications. This present chapter is intended to familiarize the student with the rules of evidence applicable to the issues of authenticity of documentary evidence and the "best evidence rule" as it applies to the military.

0902 AUTHENTICATING DOCUMENTS (Key Numbers 1041, 1042)

A. General. Authentication of a document is one of the conditions precedent to the admissibility of the document. A document is authenticated by evidence sufficient to support a finding that the document in question is what it purports to be. Military Rule of Evidence 901 [hereinafter Mil.R.Evid.]. Sufficient proof that a document is what it purports to be may be presented by a variety of methods which will be discussed in the succeeding paragraphs.

The student must not confuse the matter of the authenticity of a document with such matters as its relevancy or competency. For instance, any hearsay issues concerning a document are properly raised by the opponent as an objection under the hearsay rule. Such hearsay objections relate to the issue of the legal competency of the document and do not relate to the issue of the authenticity of the document. *See generally* chapter VIII, *supra*. Any objection based upon grounds questioning the authenticity of a document is proper only if opposing counsel is contesting the fact that the document is what it purports to be. For example, the fact that entries upon a service record page in the accused's

service record book were not prepared in accordance with appropriate regulations does not, in itself, give rise to an objection challenging the authenticity of the service record page. Although failure to comply with appropriate regulations in preparing the document raises issues as to the legal competency of the document, based upon the hearsay rule, such a failure is not sufficient to establish that the service record page is other than what it purports to be. If, however, evidence exists that would tend to prove that the service record page in question is a forgery or otherwise did not come from the accused's service record book, opposing counsel would have a valid objection challenging its authenticity.

In determining admissibility, the military judge must view the credibility, authenticity, and identification of introduced evidence in the light most favorable to the proponent. The ultimate decision as to whether a person, document, or item of real or demonstrative evidence is as purported is for the trier of fact. *United States v. Hudson*, 20 M.J. 607 (A.F.C.M.R. 1985); *United States v. Lewis*, 19 M.J. 869 (A.F.C.M.R. 1985).

B. Methods of authentication

Documentary evidence may be authenticated by the proponent of the document in a variety of ways. The student should take note, however, that although the burden of establishing the authenticity of a document lies with the proponent of the document, neglecting to object to the proponent's failure to establish authenticity will, absent plain error, constitute a waiver on appeal of the issue of authenticity. Mil.R.Evid. 103. *See United States v. Woodworth*, 24 M.J. 544 (A.C.M.R. 1987) concerning sufficiency of objection necessary to preserve appeal of authenticity issues. In fact, this is normally the case, since authenticity is rarely a real issue and is usually not mentioned by either counsel.

The methods of authentication presented below are not exhaustive. They do, however, represent the more commonly used techniques for authenticating documents at court.

1. Stipulations. Written or oral stipulations may be used by the parties to establish the authenticity of a document. R.C.M. 811, MCM, 1984 [hereinafter R.C.M.] contains a general discussion of the use of stipulations at courts-martial.

2. Witness testimony. The testimony of a witness may be used, either directly or circumstantially, to establish the authenticity of a document. *See generally United States v. Shears*, 27 M.J. 509 (A.C.M.R. 1988).

a. Direct evidence. If direct evidence is offered, it may consist of the document's author testifying that he or she wrote and/or signed the

document in question. The proponent of the document may also call a witness, other than the author, who has sufficient personal knowledge of the document to testify as to the authenticity of the document. Mil.R.Evid. 901(b)(1).

> **Example:** The trial counsel desires to submit a morning muster report into evidence at the accused's court-martial for UA. The trial counsel may, in order to authenticate the report, use the testimony of the mustering petty officer who recorded the accused's UA on the muster report. The trial counsel could, in lieu of the mustering petty officer's testimony, use as direct evidence the testimony of anyone sufficiently familiar with the muster report to authenticate the report.

b. Circumstantial evidence

(1) A lay witness, though unfamiliar with the nature or content of a document, may give testimony that serves to authenticate the document if the witness can, on the basis of sufficient familiarization with or sufficient observation of the signature or handwriting of the author of the document, testify that the signature on the document is the genuine signature of the author. Mil.R.Evid. 701 and 901(b)(2). *See, e.g., United States v. Mauchlin*, 670 F.2d 746 (7th Cir. 1982) (prison official who knew defendant for 16 months and had seen him write six times properly authenticated signature).

> **Example:** An incriminating letter, purportedly written by the accused, is seized pursuant to a lawful search and seizure. The trial counsel can authenticate the letter by calling a friend of the accused who is sufficiently familiar with the accused's handwriting and/or signature to establish that the accused was the author of the letter and hence establish the letter's authenticity. A proper foundation must be laid to demonstrate that the friend had sufficient familiarization with the handwriting/signature of the accused prior to the admission into evidence of the friend's opinion.

(2) The proponent may use expert testimony to establish the authenticity of a document. The witness must first be qualified as an expert by stipulation or proper foundation. Next, the expert, in court, will be given previously authenticated documents containing the signature and/or handwriting of the author of the questioned document now in issue. The expert

will then compare the previously authenticated documents with the document in issue. The expert opinion that the document in issue was authored by the person who authored the previously authenticated documents may be sufficient evidence to authenticate the document at issue at court. Mil.R.Evid. 702, 703, and 901(b)(3).

> **Example:** A handwriting expert is qualified as such at court. He is shown a duly authenticated enlistment contract containing the accused's signature. The expert is then shown a letter that is incriminating and purportedly signed by the accused. The expert may compare the signature on the enlistment contract and the signature on the letter and render an opinion based upon the comparison as to whether or not the accused was the author of the letter. The expert opinion that the accused authored the letter may be sufficient to authenticate the letter.

(3) In addition to the use of nonexpert and expert opinion as to the authorship of a document, the proponent of a document may submit the document at issue together with previously authenticated documents to the trier of fact for comparison. If the trier of fact is convinced that the signatures on the specimen were authored by the person who signed the document at issue, the document is considered to be authentic. Mil.R.Evid. 701 and 901(b)(3).

> **Example:** The trial counsel can submit for comparison the previously authenticated enlistment contract of the accused which bears his signature together with an incriminating letter purportedly bearing the accused's signature. If the trier of fact is convinced as a result of the comparison that the signature on the letter is that of the accused, the letter is properly authenticated.

(4) "Reply letter" theory. Another technique for authenticating a document by circumstantial evidence is by using the "reply letter" theory. Here, counsel will establish that the correspondent mailed a letter that was properly addressed to the alleged author. Thereafter, in the due course of mail, the correspondent received a letter that is purportedly signed by the author and expressly refers or responds to the first letter. When using the "reply letter" theory to demonstrate authenticity, counsel should carefully check the following:

(a) With respect to the first letter, that it was:

-1- Properly stamped;

-2- properly addressed; and

-3- properly mailed.

(b) With respect to the reply letter, that it:

-1- Bears the purported author's signature;

-2- was received in the due course of mail; and

-3- either referred to the first letter, or was specifically responsive to its terms.

See United States v. McDonald, 32 C.M.R. 689 (N.B.R. 1962). *See also* 20 Am. Jur. 2d *Evidence*, 989 (1964).

3. Self-authentication

In light of the numerous documents relevant to the merits and presentencing stages of courts-martial, if witness testimony or other extrinsic evidence establishing the authenticity of a document were the only legally permissible method of authenticating the document, the court-martial process would be an unduly burdensome and tedious process. The burden of authenticating certain categories of documentary evidence by extrinsic evidence has been considerably lightened by Mil.R.Evid. 902. This rule recognizes certain types of documents as being self-authenticating if the criteria set forth in the rule are met. Mil.R.Evid. 902 takes the view that some evidence is so likely to be genuine that its proponent should not be compelled to lay a formal foundation by using extrinsic evidence. The underlying philosophy of the rule is that extrinsic evidence should only be required when reasonable people might question the genuineness of the document. *See* S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* (3d ed. 1991) [hereinafter *Military Rules of Evidence Manual*].

Mil.R.Evid. 902 sets forth ten situations whereby a record is considered to be self-authenticating. Several of the more common methods of self-authentication are discussed below.

a. Domestic public records. Such records may be self authenticated in several manners. For the definition and discussion of public records, see chapter VIII, *supra*.

(1) Under seal. A document bearing the seal of the United States, its territories, possessions, a state or political subdivision, department, office or agency thereof, is self-authenticating if the document bears a signature purporting to be an attestation or execution. Mil.R.Evid. 902(1). A seal on a domestic public document is self-authenticating and, in the absence of evidence to the contrary, is presumed to be genuine. Judicial notice is not required. Mil.R.Evid. 902(1).

A certificate of the United States Postal Service, under seal, bearing a signature purporting to be an execution, constitutes a self-authenticated document needing no extrinsic evidence for its authentication. *United States v. Moore*, 555 F.2d 658 (8th Cir. 1977). It is important to note, however, especially for counsel trying cases overseas, that this method of authentication does not apply to documents under the seal of a foreign country or international organization. *United States v. M'Biye*, 655 F.2d 1240 (D.C. Cir. 1981). The self-authentication technique applicable to foreign documents can become somewhat involved and is beyond the scope of the intent of this study guide. The student interested in the self-authentication of foreign documents should read Military Rule of Evidence 902(3). Reference to the *Military Rules of Evidence Manual*, *supra*, at 893-902, would also be helpful.

(2) Not under seal. Domestic public documents not under seal are self-authenticating under Mil.R.Evid. 902(2) if the public document:

(a) Purports to bear the signature in the official capacity;

(b) of an officer or employee of an entity listed in Mil.R.Evid. 902(1) having no seal; provided that

(c) a public officer having a seal and having official duties in the district or political subdivision of such offices or employer;

(d) certified under seal that the document's signer has the official capacity and that the signature on the document is genuine.

The rule is silent regarding the location of the certification required. There appears, however, to be no prohibition to setting forth the requisite certification either on the document itself or on an attached sheet.

Example: The trial counsel desires to introduce into evidence a U.S. custom's receipt signed by J_____ S _____, Chief, _____ Division. No seal is affixed to the receipt. The receipt may be self-authenticated by a certification under seal by an officer of the division having a seal. The certification must state that the signature on the document belongs to J_____ S_____ and that J_____ S_____ has the official capacity to issue customs receipts.

(3) Certified copies. Under Mil.R.Evid. 902(4), a copy of a domestic public record, report, or entry therein, or a copy of a document authorized to be recorded or filed in a public office and actually so recorded or filed, including data compilations, can be self-authenticating. Such documents must be certified as correct by the custodian or other person authorized to make certifications with a certificate made in the manner set forth under Mil.R.Evid. 902(1) and 902(2) (public documents under seal and not under seal respectively). The certificate should contain the purported signature of the custodian or other authorized persons under a statement that the copy is correct. Any reasonable statement implying custody and correctness should suffice. One certificate may certify several documents, but it is best to list individual documents on the certificate. *United States v. Pent-R-Books, Inc.*, 538 F.2d 519 (2d Cir. 1976), *cert. denied*, 430 U.S. 906 (1977).

Example: The trial counsel desires to introduce state criminal convictions against the accused on presentencing. If copies of the conviction summaries are certified correct by the clerk of court (the custodian), the summaries would be self-authenticating. Each summary could be individually certified, or one certificate made in the manner set forth under Mil.R.Evid. 902(1) or 902(2) could be used stating that it is certifying as correct a list of conviction summaries attached.

(4) Public records of the United States. Under Mil.R.Evid. 902(4a), documents or records kept in accordance with the applicable laws or regulations of the United States by any department, bureau, agency, office, or court thereof are self-authenticating if accompanied by an attesting certificate of the custodian without further authentication. There is a rebuttable presumption that the custodian's signature is genuine if legible. *United States v. Lawson*, 42 C.M.R. 847 (A.C.M.R. 1970). No seal is required upon the attesting certificate. According to the drafters' analysis of this rule, an attesting certificate is a certificate or statement signed by the custodian or the deputy or assistant of

the custodian. *See Woodworth*, 24 M.J. at 546 concerning need to show duty position and relationship of signer to the document proffered. It may be in any form that indicates that the writing to which the certificate or statement refers is either a true copy of the record or an accurate translation of a machine, electronic, or coded record, and which further indicates that the signer of the certificate or statement is acting in an official capacity as the person having custody of the record or as the deputy or assistant thereof. The drafters' analysis differs from the plain language of the rule in that the analysis provides that the deputy or assistant custodian may, in lieu of the actual custodian, sign the attesting certificate, while the language of the rule provides for the execution of the attesting certificate by the "custodian." *See* Mil.R.Evid. 902 drafters' analysis, MCM, 1984, app. 22-54. No mention is made of the assistant or deputy custodian. However, the spirit and purpose of the rule would not appear to be abrogated if the assistant or deputy custodian signed the attesting certificate in lieu of the actual custodian. In *United States v. Jaramillio*, 13 M.J. 782 (A.C.M.R. 1982), a record was inadmissible because the attesting certificate was signed by an individual who was not the custodian and whose position and relationship to the document was not shown. Implied in the ruling is the idea that, had the individual been properly identified as an assistant or deputy, the document would have been admissible. Finally, in *United States v. Thomas*, 33 M.J. 1067 (A.C.M.R. 1991), the court upheld the use of blanket authenticity certificates. For an example of an attesting certificate, refer to the sample attesting certificate appended to the end of this chapter.

b. Official publications. Books, pamphlets, or other publications purporting to be newspapers or periodicals issued by public authority may be self-authenticating. Mil.R.Evid. 902(5). United States publications fall within the purview of the rule. General lawful regulations, and even local command regulations, would appear to be covered. *See Military Rules of Evidence Manual*, *supra*, at 898. No specific guidance is found within the rule, however, and case law interpretation is presently nonexistent. It should be noted that judicial notice of a particular regulation would probably obviate the need to introduce and hence authenticate the written regulation.

c. Newspapers and periodicals. Mil.R.Evid. 902(6) states that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to "printed materials purporting to be newspapers or periodicals." This brief rule could be subject to a variety of interpretations. A liberal interpretation would include all newspapers, periodicals, or any portions thereof which are identified on their face as being a newspaper, periodical, or clipping therefrom. One commentator, however, suggests that this rule does not apply to newspaper clippings or periodical excerpts which could be authenticated under the provisions of Mil.R.Evid. 901. *See Military Rules of Evidence Manual*, *supra*, at 719. There is a paucity of case law on this issue, and that case law

which is presently relevant is not dispositive of the issue. *See, e.g.*, in *Oaks v. City of Fairhope, Alabama*, 515 F. Supp. 1004 (S.D. Ala. 1981); *Shell Oil Co. v. Kleppe*, 426 F. Supp. 894 (D. Colo. 1977), *aff'd*, 591 F.2d 597 (10th Cir. 1979), *aff'd sub nom. Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980).

d. Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments are self-authenticating. Mil.R.Evid. 902(8). A certificate of acknowledgment should state that the person executing or acknowledging the document has:

(1) Come before a notary public or other officer authorized to take on acknowledgement;

(2) that his/her identity was known to said person or notary public; and

(3) that the person acknowledging the document swore under oath that he executed the document of his/her own free will.

This rule does not absolutely require that a notary public affix a seal to the document acknowledged before him/her. The rule merely requires that the document be executed in the manner prescribed by law.

The words "other officer authorized by law to take acknowledgements" found in Mil.R.Evid. 902(8) are pertinent to those military personnel, including judge advocates, upon which the authority to take acknowledgements has been conferred under Article 136, UCMJ, and applicable service regulations.

0903 THE BEST EVIDENCE RULE (Key Number 1043)

A. Introduction. Section X of the Mil.R.Evid. contains the "best evidence rule" as it applies to courts-martial. The traditional best evidence rule required a party desiring to introduce the contents of a writing, recording, or photograph to produce the original or satisfactorily account for its absence, or otherwise establish the basis for an exception to the rule. *See generally Military Rules of Evidence Manual, supra*, at editorial comments, Section X. Section X of the Mil.R.Evid. adds greater flexibility to the traditional best evidence rule. The salient aspects of the Section X rules are set forth in the succeeding paragraphs.

B. "Writings"

Mil.R.Evid. 1001(1) offers a very broad definition of a "writing." A writing may be virtually anything consisting of letters, words, numbers, or their equivalents. It does not matter whether the means of recordation is handwriting, typewriting, photostating, or any other form of recording; the rule still applies. The same can be said of photographs, including X-rays, films, and videotapes. Mil.R.Evid. 1001(2). *See, e.g., United States v. Kelsey*, 14 M.J. 545 (A.C.M.R. 1982) (a videotape is a photograph under Mil.R.Evid. 1001(2) and its qualities as real evidence require treatment as a marked exhibit).

C. "Originals"

Mil.R.Evid. 1001(3) discusses what constitutes an "original" document. It is, first of all, the logical meaning of the word. The document first touched by ink, pen, or photo equipment. But, an original now can also be any counterpart intended to have the same legal effect by the person executing or creating it. Therefore, an original includes, for instance, the data stored in a computer, or a similar device, when displayed in a printout. A print made from a negative is also considered an original photograph.

If the actual original is not available, then Mil.R.Evid. 1001(4) indicates what copies of the original may be admissible as the original. The rule permits the admission of a duplicate made from the same impression as the original, whether by photograph, mechanical, or electronic reproduction.

D. Admissibility of duplicates

Mil.R.Evid. 1003 addresses the greatest change to the traditional best evidence rule. Under this provision, duplicates will be admissible to the same extent as would the original document unless the following occurs:

1. A genuine question of authenticity is raised concerning the original; or

2. based on the individual circumstances at bar, it would be unfair to admit the duplicate. The pragmatic result of this provision places the burden upon the party attempting to exclude the duplicate instead of upon the proponent, where the burden had traditionally been placed.

E. Use of "secondary" evidence of contents of a document

1. Mil.R.Evid. 1004 addresses the alternatives available to counsel when the original or its duplicates are not available. The rule provides four

situations where "secondary" evidence can then be admitted. There are no degrees of "secondary" evidence. The proponent may rely upon any form, including live testimony or duplicate copy, where:

a. The original and all duplicates have been lost or destroyed (a showing of bad faith by the proponent will negate the exception). *See, e.g., United States v. Gerhart*, 538 F.2d 807 (8th Cir. 1976) (photocopy of photocopy of bank check admissible where defendant raised no genuine issue as to authenticity and no unfairness would result);

b. the original and all duplicates are beyond judicial process or procedures;

c. the original and all duplicates are in possession of the opponent and, after notice is served on the opponent, the originals are not produced; or

d. the original writing, recording, or photograph deals with a collateral matter.

2. Furthermore, the contents of an official record or document authorized to be recorded or filed (and actually recorded or filed) may be proven by "secondary" evidence, if, the original or a copy, certified as correct in accordance with Mil.R.Evid. 902, or authenticated under Mil.R.Evid. 901, cannot be obtained by reasonable diligence. Mil.R.Evid. 1005. The special treatment for public documents represents a judgment that it should never be necessary to disrupt public offices by requiring an original and that, if a properly authenticated copy cannot be obtained after exercising due diligence, other evidence of the contents of the document may be offered. *Military Rules of Evidence Manual, supra*, at 919.

3. Mil.R.Evid. 1008 addresses the respective functions of the military judge and members with respect to the admissibility of writings. Under this rule, the military judge determines whether the conditions precedent to the admissibility of secondary evidence to prove the contents are met. The military judge, therefore, determines the issues of the legal competency of the secondary evidence. The members, however, are tasked under this rule with making the following determinations:

a. Whether the original ever existed;

b. whether another writing produced is the original; or

c. whether the evidence presented correctly reflects the original's contents.

F. Summaries

Mil.R.Evid. 1006 recognizes that voluminous or bulky originals are inconvenient for counsel to use in court or for the trier of fact to peruse. This rule, therefore, permits admission of evidence in the form of charts, summaries, or calculations when the original cannot be conveniently examined in court. The originals or duplicates, however, are required to be made available for examination and/or copying by the opposing party at a convenient time. Also, the military judge may order that the originals or copies thereof be made available in court.

Before a chart, summary, or calculation is admissible, the underlying originals or copies thereof must be admissible. Failure of the proponent of such summaries to establish that the underlying original or copies are made were themselves admissible will render the summaries also inadmissible. *See, e.g., United States v. Johnson*, 594 F.2d 1253 (9th Cir. 1979), *cert. denied sub nom*; *Richey v. United States*, 444 U.S. 964 (1979) (trial court committed reversible error when it permitted prosecution to use summary of voluminous evidence without requiring it to first establish a foundation showing the reliability of the underlying documents).

0904 CONCLUDING REMARKS

Counsel should survey all the applicable rules for authenticating documents at the time he/she is preparing for a court-martial where documents will be introduced on the merits and/or presentencing stage. Counsel should choose the method of authentication that most efficiently and clearly establishes that the document is what it purports to be. Similarly, an effective trial advocate will employ the most advantageous aspects of the best evidence rule as it applies to the military.

Proper utilization of the rules mentioned in this chapter promotes judicial economy. Saving courtroom time and expense are indeed valid considerations for the trial attorney. Proper utilization of the authentication and best evidence rules through effective trial advocacy skills will promote these considerations.

PROOF OF OFFICIAL RECORD

ATTESTATION OF COPY OF OFFICIAL RECORD

BY OFFICER HAVING LEGAL CUSTODY

GENERAL FORM *

I, R_____ S_____, _____ [title of officer having custody], do hereby certify that I have compared the [paper] [papers] in writing to which this certificate is attached with the original _____ [name paper or papers] as the same appear of record and on file in my office, at the _____ and that the same [is a] [are] true and correct [copy] [copies] of said [original] [originals] and the whole thereof.

** In testimony whereof, I have hereunto set my hand and affixed the seal of my office, at _____ this _____ day of _____, 19___.

[SEAL]

_____
[Title of Officer]

* N.B. Fed.R.Civ.P. 44(a)

** N.B. The seal is not required for documents or records of the United States under Mil.R.Evid. 902(4a).

Appendix IX

CHAPTER X

PHYSICAL EVIDENCE

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CHAPTER X

PHYSICAL EVIDENCE

1001 INTRODUCTION

"Seeing is believing" is a time-honored theorem of trial advocacy. The trier of fact expects that each party to the trial will explain the legal concepts and develop the evidence in concrete terms. Evidence which is physical in nature, therefore, may most readily transform esoteric theories and complicated testimony into concrete mental images. The mental pictures created by physical evidence greatly assist the trier of fact in understanding the case. Conversely, such evidence, because of its powerful impact, may in some instances be given too much weight by the trier of fact or be unduly prejudicial. Thus, competent trial advocates must understand the permissible uses of physical evidence available in a case in order to present his or her theory of the case more effectively and, at the same time, avoid committing prejudicial error.

1002 TYPES OF PHYSICAL EVIDENCE

There are two types of physical evidence: demonstrative evidence and real evidence. Demonstrative evidence is admitted solely for illustrative purposes, (e.g., a model of a pistol used in an assault). Real evidence has an historical connection with the incident in question (the actual pistol involved in an assault). It is often difficult to distinguish between those items which are real evidence and those merely offered as illustrative tools. For example, a drawing, while normally considered demonstrative evidence, may in some cases be real evidence (a map drawn in furtherance of a conspiracy to rob a bank). Demonstrative evidence is generally that which illustrates or clarifies the testimony of a witness, such as by the use of models or not-to-scale diagrams. Substantive or real evidence, however, is introduced to prove or disprove a fact in issue (a firearm, the photograph of a footprint, or a photograph of a latent fingerprint -- vis-a-vis the accused's fingerprint). The decision to permit or deny the use of demonstrative evidence generally has been held to be within the discretion of the trial judge. *United States v. Heatherly*, 21 M.J. 113, 115 n.2 (C.M.A. 1985).

1003 DEMONSTRATIVE EVIDENCE (Key Numbers 1037 - 1039)

A. Tangible demonstrative evidence. Military courts will allow the use of tangible demonstrative evidence such as photos, mock-ups, or charts. There is a variety of methods of dealing with the actual evidentiary status of this item. The preferred practice is for counsel to have the item verified by a competent witness as a substantially correct representation and then to formally introduce the item as a part of the witness' testimony. It may then be incorporated by reference in the testimony.

Example: The accused is charged with arson of a barracks. The defense, in attempting to prove that the fire was caused by a faulty electrical connection vice the accused's actions, calls the NIS agent who investigated the fire. The NIS agent identifies photographs of the scene of the fire by testifying that he took the photos, developed them, and wrote his initials and date on the back. He states that the photos were taken at the scene of the fire immediately after the fire was extinguished. The photos reveal that a cone-shaped char mark extended upward from a point under the windowsill where an electrical connection had separated. The NIS agent may thus refer to the photos to illustrate his testimony.

Example: The accused is charged with hazarding a vessel by placing nuts and bolts into the reduction gear box of the ship. Damage occurred. The ship's engineering officer is called to testify as to the effects of the accused's acts. During his testimony, the ship's engineer would be permitted to explain the causation of the damage by referring to a model of the reduction gear assembly. The model is demonstrative evidence and serves to illustrate the testimony.

In the examples stated above, the photos and model act as visual aids which assist the trier of fact in understanding the testimony of the witnesses. The photo and model would be authenticated by the witness concerned as accurate representations of the events discussed. Any witness who is familiar with the

object or area portrayed can authenticate demonstrative evidence by testifying that the exhibit is a true and accurate representation of the object or area.

Tangible items used as demonstrative evidence should be marked for identification before they are introduced into evidence and should accompany the record either as prosecution or defense exhibits admitted into evidence or as appellate exhibits, depending upon whether the military judge permits these exhibits to be taken into the deliberation room by the members. If this was not permitted, the exhibit will be marked as an appellate exhibit. In either case, if the tangible exhibit (photos, chart, model, etc.) is too cumbersome or impractical to attach to the record of trial, a photograph of the exhibit will be taken and attached to the record in lieu of the actual exhibit.

B. Nonverbal testimony of the witness. To clarify the verbal testimony of a witness, the witness may be requested to demonstrate with his body the manner in which a certain event occurred. For example, he may be asked to demonstrate with his arm the motion that the accused used in plunging a knife into the heart of the victim. The witness might also be requested to place marks on a map or chart to demonstrate the escape route that the accused took after stabbing the victim.

If such nonverbal testimony is given, a description of the actions of the witness must be reflected on the record. The party questioning the witness at the time should ensure that the record adequately reflects the witness' actions.

C. Courtroom demonstration. There is a growing trend in trial advocacy to show to the triers of fact evidence that is not historically connected to the crime or the accused, but is, instead, illustrative of a fact or concept. The trial counsel, for example, may desire to have a witness demonstrate a particular scientific test in court, or to have the witness use objects not in evidence to replicate in court the manner in which the accused handled similar objects at the time of the offense.

> **Example:** An NIS agent who performed a test on suspected marijuana seized from the person of the accused might be asked to replicate in court the procedures he used in conducting the out-of-court test on the suspected marijuana.

If the items used in the demonstration are offered merely to illustrate testimony, their specific identity is generally of no significance. Military appellate courts, however, have shown great reluctance to accept such evidence at face value and have required a substantial demonstration of relevance and helpfulness to the

fact-finder. If the probative value is outweighed by the prejudicial effect or is outweighed by a tendency to mislead the court, the evidence will not be admitted. *See, e.g., United States v. Pjecha*, 7 M.J. 455 (C.M.A. 1979) (in-court demonstration of drug analysis using substance in no way connected with accused was inflammatory); *United States v. Penn*, 4 M.J. 879 (N.C.M.R. 1978) (judge's instruction purged error in allowing in-court demonstration of how accused was packaging marijuana). *See also* Mil.R.Evid. 403 (codifies authority of the trial judge to exclude relevant evidence where probative value is outweighed by the danger of unfair prejudice, confusion of the issues, etc.). *See also United States v. Redmond*, 21 M.J. 319 (C.M.A.), *cert. denied*, 106 S.Ct. 1950 (1986) (judge did not abuse his discretion in admitting disembodied skull of the murder victim into evidence since the exhibit would be used to show the ferocious nature of attack and thereby, indirectly, to establish premeditation).

1004 REAL EVIDENCE (Key Number 1037)

A. Definition. Real evidence is physical evidence which is linked directly with the crime or the accused. It consists of items of substantive evidence and not items used to illustrate a point.

Examples:

1. A murder weapon
2. fruits of the crime (e.g., stolen merchandise);
3. instrumentalities of the crime (e.g., the burglar tools); and
4. seized contraband.

B. Marking exhibits. Real evidence is normally marked with a tag. The exhibit is labeled as either a prosecution or defense exhibit if the exhibit is introduced for consideration by the trier of fact on the merits or presentencing.

C. Record of trial. A photograph of the real evidence may be substituted in the record of trial in lieu of the exhibit itself.

1005 AUTHENTICITY OF REAL EVIDENCE (Key Number 1041)

As noted previously, real evidence is physical evidence which is directly connected with the crime in question. The proponent of the evidence must not only show that such evidence would be relevant to an issue in the case, but it

must also be demonstrated that the item is what it purports to be; that is, the item is authentic. The manner of establishing the authenticity of real evidence is referred to as "identification." There are several means of identifying real evidence:

Method 1: Proof that the item is readily identifiable;

Method 2: Proof of a chain of custody; or

Method 3: A combination of methods 1 and 2.

A. Method no. 1: proof that the item is readily identifiable. If the item possesses unique, identifying physical characteristics, and the witness recognizes the characteristics, the item is sufficiently identified.

1. Analytic approaches. The courts are becoming increasingly realistic and sophisticated in their analysis of these problems.

a. At first, the courts simply accepted the witness' identification at face value. "[W]here a party positively identifies an article as the one involved in the case, such identification is prima facie sufficient. . . ." 32 C.J.S. *Evidence* 607(a) (1964).

b. Generally, courts today treat the problem as one of probability. Do the physical characteristics make the item unique? How unusual is the item? *United States v. Reed*, 392 F.2d 865 (7th Cir. 1968) (unusual looking hat identified by bank manager and wife). The proponent should elicit both the witness' identification of the item and the list of the physical characteristics the witness relies upon in making the identification. The incidence or frequency of occurrence of that combination of characteristics determines whether the item is unusual enough to qualify as a readily identifiable item.

(1) What kinds of articles qualify as readily identifiable articles?

(a) Articles with serial numbers.

(b) Articles with distinctive physical markings.

-1- *United States v. Briddle*, 443 F.2d 443 (8th Cir. 1971) (a split, leather, dark-brown button with the picture of a whale on the front and a sticky substance smeared on the back).

-2- Even relatively common articles have been identified under this theory. *See, e.g., Burris v. American Chicle Co.*, 120 F.2d 218 (2d Cir. 1941) (a piece of rope); *United States v. Pagerie*, 15 C.M.R. 864 (A.F.B.R. 1954) (a tire).

(c) Courts have permitted witnesses to identify articles on the basis of marks they scratched onto the articles when they seized the article. *See, e.g., United States v. Madril*, 445 F.2d 827 (9th Cir. 1971) (markings the officer places on a pistol grip); *O'Quinn v. United States*, 411 F.2d 78 (10th Cir. 1969) (markings on jars); *United States v. Bourassa*, 411 F.2d 69 (10th Cir.), *cert. denied*, 396 U.S. 915 (1969); *Rosemund v. United States*, 386 F.2d 412 (10th Cir. 1967). Military courts have permitted witnesses to identify even highly fungible items, such as marijuana, if the container holding the substance can be identified by markings and there is no evidence of tampering or alteration of the substance. *See, e.g., United States v. Madela*, 12 M.J. 118 (C.M.A. 1981) (undercover agent allowed to identify a clear plastic bag of marijuana by noting that he had entered the time, date, and his initials on the bag after he had purchased it from the accused); *United States v. Lewis*, 11 M.J. 188 (C.M.A. 1981) ("readily identifiable" packet of heroin admissible despite gaps in the chain of custody); *United States v. Courts*, 9 M.J. 285 (C.M.A. 1980) (chemical analysis of cocaine admissible absent proof of tampering).

B. Method no. 2: proof of a chain of custody (Key Number 1039)

1. When must the proponent show a chain of custody?

a. The item is not readily identifiable.

b. The item is readily identifiable, but the witness failed to note the item's unique physical characteristics. *See, e.g., United States v. Hooks*, 23 C.M.R. 750 (A.F.B.R. 1956) (proof of the chain of custody is a more than adequate substitute for the witness' positive identification of the item).

c. The item is readily identifiable, but its condition is a critical issue in the case and the condition is susceptible to change. Here, the judge should have the discretion to require the proponent to prove a chain of custody.

Example: A pistol is seized from the accused and sent to a crime lab for ballistic tests. Assume that a key issue in the case is the defense's contention that the pistol was incapable of firing due to a faulty firing pin. Assume further that the pistol was successfully fired at the lab. The judge may require proof of a chain of custody from the time of its seizure to the time of its testing at the lab. The prosecution, therefore, must then demonstrate that there was no tampering with the firing pin prior to the testing of the pistol at the lab.

2. What is the length of a proper chain of custody?

a. If the article's relevance depends upon a witness' in-court identification, generally, the chain of custody must run from the time of seizure until the time the article is offered in evidence.

b. There is a split of authority in the civilian jurisdictions as to whether the chain must run until the time of trial if the prosecution is relying upon the results of a test or chemical analysis of the substance.

(1) *Novak v. District of Columbia*, 160 F.2d 588 (D.C. Cir. 1947) and *State v. Weltha*, 288 Iowa 519, 292 N.W. 148 (1940) indicate that, even here, the chain must run from the time of seizure to the time of trial.

(2) The majority rule, however, is that the chain need run only from the time of seizure to the time of the test analysis for the test result to be admissible. *See, e.g., State v. Romo*, 66 Ariz. 174, 185 P.2d 757 (1947). The military has adopted the majority view. *United States v. Barr*, 1 M.J. 1015 (N.C.M.R. 1976); *United States v. Hughes*, 16 C.M.R. 559 (A.F.B.R.), *rev'd on other grounds*, 5 C.M.A. 374, 17 C.M.R. 374 (1954). *See United States v. Morris*, 30 M.J. 1221 (A.C.M.R. 1990) (HIV testing); *United States v. Berry*, 30 M.J. 134 (C.M.A. 1990) (chain of custody for urine specimen was not established where chemists who prepared report could not have known circumstances of collection and transmission of urine sample). This rule implies that the item itself (drugs) need not actually be presented at trial as long as a good chain of custody from the time of seizure to the time of chemical analysis is established. *Barr*, 1 M.J. at 1015. However, if the item itself is to be admitted into evidence, the chain of custody must run from time of seizure to time of trial.

3. Who are the links in the chain?

a. Persons who merely had access to the item--NO.

b. Persons who handled the item--generally, YES.

Perhaps the proponent need not account for a person's handling of the item if the person had the item only momentarily and performed purely mechanical functions with the item. *Commonwealth v. Thomas*, 448 Pa. 352, 292 A.2d 352 (1972). Also, in *United States v. Nault*, 4 M.J. 318 (C.M.A. 1978), the chain of custody had a gap because the acting custodian who had possessed the LSD pill for four days was not called to testify. The court noted that the record was devoid of any indication of distinctive seals or unusual identifying marks associated with the item. The court further noted in a footnote that it would be willing to presume regularity of systematic handling on part of "neutral chemical analysis." It was, however, unwilling to apply that presumption to a prosecutorial custodian of real evidence in the absence of a proper demonstration. *But see* Mil.R.Evid. 803(6) and 803(8) (chain of custody document is now admissible as an official record or a business entry).

c. The accused. When evidence is seized from an accused, the chain of custody must normally start with the accused. However, the signature of an accused on the chain of custody form constitutes an admission and requires that the suspect be warned of his rights to refuse to sign the form. *United States v. Dozier*, No. 11179 (A.C.M.R. 11 Dec. 1975) (unreported). If the accused refuses to sign, the beginning of the chain of custody can be shown by the testimony of the individual seizing the evidence.

4. How does the proponent establish the chain of custody? Negatively, he must establish a reasonable probability that neither substitution nor tampering has occurred. Affirmatively, he must establish that the item offered is the same item in substantially the same condition. Three factors must be considered: the nature of the article, the circumstances surrounding its preservation and custody, and the likelihood of tampering. With respect to each link, the proponent should prove: (1) receipt of the item; (2) ultimate disposition of the item, i.e., destruction, transfer, or retention; and (3) safekeeping and handling of the item in the period between receipt and ultimate disposition. The most difficult problem of proof is element (3).

a. The proponent may establish element (3) if he proves:

(1) That the article was placed in a marked, sealed container in the interim and that the next link received the article with the seal

unbroken [*United States v. Bass*, 8 C.M.A. 299, 24 C.M.R. 109 (1957); *United States v. Santiago*, 534 F.2d 768 (7th Cir. 1976) (sealed bags)];

(2) that the article was deposited in a secure container and that the times when the article was removed from the container are accounted for [*Sorge v. State*, 487 P.2d 902 (Nev. 1972) (the officer did not place marijuana in a licked, sealed envelope, but he deposited it in an evidence locker)]; and

(3) that it is unlikely that any intermeddler had access to the article [*United States v. Yarborough*, 50 C.M.R. 149 (A.F.C.M.R. 1975) (although the vial of LSD was unguarded for a short period of time, it had been placed in a hospital office where tampering was unlikely)].

b. The standard of proof is rather slight.

(1) The article need not be kept under lock and key. *See, e.g., United States v. Martinez*, 43 C.M.R. 434 (A.C.M.R. 1970) (unlocked refrigerator).

(2) In showing continuous custody that preserves fungible evidence in an unaltered state, the government cannot rely solely on the presumption that a law enforcement officer has maintained the evidence properly. The government, however, need not exclude all possibilities of tampering. Rather, it must satisfy the trier of fact that, in reasonable probability, the article has not been altered in any important respect. *See, e.g., United States v. Gardi*, 6 M.J. 703 (N.C.M.R. 1978) (containers of marijuana left for 3 days in unlocked temporary evidence locker; chain upheld), *petition denied*, 7 M.J. 56 (C.M.A. 1979); *Courts*, 9 M.J. at 285 (although prosecution did not exclude every possibility of tampering, sufficient chain of custody was established so as to allow testimony with respect to chemical analysis of cocaine).

(3) In *United States v. Ettleson*, 13 M.J. 348 (C.M.A. 1982), to complete the chain of custody, the court used a "strong, uncontroverted inference" that the evidence custodian had received drugs from an OSI agent, even though the trial counsel had failed to establish the transfer directly on the record.

c. The courts may apply a stricter standard of proof where:

(1) There is a strong possibility that the article has been confused with other similar articles [*see, e.g., Nichols v. McCoy*, 235 P.2d 412 (Cal. Dist. Ct. App. 1951), *aff'd*, 240 P.2d 569, 38 Cal.2d 447 (1952) and *United States v. Carrott*, 25 M.J. 823 (A.F.C.M.R. 1988)]; or

(2) the article is a delicate one whose condition can be easily changed. *See, e.g., Walker v. Firestone Tire Rubber Co.*, 412 F.2d 60 (2d Cir. 1969) (the standard of proof is higher if the item is subject to "easy alteration"); *Erickson v. North Dakota Workmen's Compensation Bureau*, 123 N.W.2d 292 (N.D. 1963) (the court in effect imposed a higher standard where the blood sample was kept in an ordinary unsealed glass container).

5. Methods of proof of chain of custody

a. Live testimony

(1) Trial counsel testimony as to chain of custody:

(a) *United States v. Whitacre*, 12 C.M.A. 345, 349, 30 C.M.R. 345, 349 (1961), though limiting its holding, held that it was not error per se for the trial counsel to testify where:

> [t]he prosecutor did not pit his credibility against that of any other witness. He merely stated he had taken custody of the items of Government property which were turned over to him. It was other evidence which indicated that the items were the same articles seized at accused's apartment. . . . Furthermore, in arguing on the merits, the trial counsel did not attempt to capitalize on his own testimony.

(b) It is recommended, however, that trial counsel not take receipt of evidence from law enforcement officials where chain of custody issues will arise until the law enforcement officer hands the items to the trial counsel during the officer's testimony in court.

(2) Testimony of those in the chain who handled the evidence:

(a) The government may call each person in the chain to testify as to their involvement in handling the evidence. The witnesses may also testify as to the identification of their signatures on a chain of custody form to establish the authenticity of the form and also confirm their link in the chain.

(b) Missing links in chain. Military law will permit the authentication by chain of custody where there is some "missing link" in the chain, but such admission will depend on the careful sealing and/or labeling of the item, the absence of any suggestion of tampering, and a complete showing of

a possession on each side of the missing link. This rule was originally set forth in the decision in *United States v. Bass*, 8 C.M.A. 299, 24 C.M.R. 109 (1957). Failure of one or more persons in the chain of custody to testify concerning their handling of the evidence will not render the chain fatally broken if the gaps caused by their failure to testify are, in fact, bridged by the testimony of others. *United States v. Chong*, 8 M.J. 592 (A.C.M.R. 1979). *See also United States v. Fowler*, 9 M.J. 149 (C.M.A. 1980); *Courts*, 9 M.J. at 285; *United States v. Wallace*, 14 M.J. 1019 (A.C.M.R. 1982) (failure of agent to list one exhibit on the chain of custody document did not destroy the chain of custody, in absence of any evidence that the evidence was altered or commingled with evidence from other cases).

b. Stipulations (Key Numbers 1249 - 1252)

(1) Counsel and the accused can stipulate to the chain of custody as a stipulation of fact, or

(2) in a stipulation of expected testimony.

c. Documentary evidence (Key Number 1040)

(1) The admissibility of the chain of custody receipt as a record of a regularly conducted activity or public records is addressed by Mil.R.Evid. 803(6) and 803(8), respectively. *See* Chapter VIII, *supra*. These provisions specifically provide for the document's admission, rejecting the Court of Military Appeals holding in *United States v. Porter*, 7 M.J. 32 (C.M.A. 1979) and *United States v. Nault*, 4 M.J. 318 (C.M.A. 1978).

-- The pivotal issue in the pre-Mil.R.Evid. cases had been whether the record was prepared principally for purposes of prosecution and, hence, was inadmissible. In *United States v. Bowser*, 33 C.M.R. 844 (A.F.B.R. 1963), the board admitted the receipt and held that it had not been prepared principally for purposes of prosecution. In *Nault*, 4 M.J. at 318, however, Fletcher, C.J., writing for the majority, noted in a footnote:

> It is true that this Court is on record in *United States v. Burge*, 1 M.J. 408 (C.M.A. 1976) upholding the admissibility of a police blotter containing entries establishing a chain of personal custody. We are unable, however, to analogize that rationale to the instant case. The proposition that a report showing the chain of custody of an alleged drug qualifies for the business records exception in a prosecution for possession of a substance in violation of a regulation simply flies in the face of paragraph 144d of the Manual for Courts-

> Martial, United States, 1969 (Revised edition). That evidentiary proscription excludes records made "principally with a view to prosecution." Our Brother [Cook, J., dissenting] correctly points out administrative reasons for allowing inventory of personal property of persons taken into custody. He goes on to reason, for example, that, as we have indicated, corrected morning reports serve valid administrative purposes; they do not therefore, as a matter of law, constitute records made with a view toward prosecution. The same result, he argues, should follow for chain of custody records. However, we are unwilling to so dissipate the plain meaning of the "view to prosecution" proscription in paragraph 144d as applied to the facts of this case.

Id. at n.7. In *Porter*, 7 M.J. at 32, the court, in a *per curiam* opinion (Cook, J., dissenting), addressed the issue head on and adopted Judge Fletcher's footnote in *Nault*. The chain of custody form, DA Form 4137, was declared to be inadmissible hearsay under MCM, 1969 (Rev.), para. 144d. Failure of defense counsel to object prior to the Military Rules of Evidence had not rendered the form admissible.

(2) Mil.R.Evid. 803(6) and 803(8) specifically allow the admissibility of chain-of-custody documents and lab reports, inter alia, provided the proper foundation is laid for qualifying them under the appropriate rule. *United States v. Cordero*, 21 M.J. 714 (A.F.C.M.R. 1985); *United States v. Wootton*, 25 M.J. 917 (N.M.C.M.R. 1988).

C. Method no. 3: Combination of methods 1 and 2

1. If the proponent relies on strict chain of custody reasoning, the links in the chain who testify need not inspect the item and attempt to identify it. *United States v. Lauer*, 287 F.2d 633 (7th Cir. 1961). However, if the proponent submits the item to these witnesses and, although it is not readily identifiable, they testify that the item is the same item and in substantially the same condition, this testimony is additional probative evidence above and beyond the strict chain of custody evidence. In *United States v. Martinez*, 43 C.M.R. 434, 437 (A.C.M.R. 1970), the court stated: "[a]uthentication of the evidence and establishing that it has remained substantially unchanged may be accomplished (1) by establishing a chain of custody from the significant point of time to its examination, or (2) by the testimony of a witness from personal knowledge, or (3) by a combination of these methods."

If the chain-of-custody evidence leaves any doubt in the judge's mind about the items' identity or condition, the witness' additional

testimony might be sufficient to remove the doubt. It is a good technique of trial advocacy to have each person in the chain called as a witness to testify about article's custody, to inspect the article, and to attempt to identify the item.

2. An accused's admissible confession may also be used to bolster an otherwise weak chain of custody. *United States v. White*, 9 M.J. 168 (C.M.A. 1980).

3. If the package containing a fungible substance is itself readily identifiable, even if there are breaks in the chain of custody, the substance may still be admissible under current military case law, absent evidence of tampering or alteration of the substance. *Madela*, 12 M.J. at 118; *Lewis*, 11 M.J. at 188; *Courts*, 9 M.J. at 285.

> **Example:** The NIS agent seizes a "baggie" of marijuana from the accused. The agent marks his initials and the date of the seizure on the "baggie." Assume there are breaks in the chain of custody. The agent, if able to identify the baggie by identifying his initials and date thereon, will also establish the identity of the marijuana itself as the same marijuana that was seized from the accused provided there is no evidence of alteration or tampering with the substance.

4. Presumptions: The Court of Military Appeals has recognized a rebuttable presumption of regularity in the handling of evidence by personnel of forensic laboratories. *United States v. Porter*, 12 M.J. 129 (C.M.A. 1981); *United States v. Strangstalien*, 7 M.J. 225 (C.M.A. 1979). Therefore, it normally is not legally mandated that those who handled the evidence at a crime lab be called by the government to establish a proper handling of the evidence at the lab in order to establish a proper chain of custody.

1006 RELEVANCE (Key Numbers 1024 - 1026)

A. General. Regardless of whether the physical evidence once authenticated is demonstrative or real, a key issue to be addressed is its relevance. Does the item tend to establish a fact that is a part of an issue in the case? *See* Mil.R.Evid. 401-02.

B. Methods of establishing relevance

1. Direct connection. If the item in question is linked directly with the crime or the accused, then relevancy is normally not a problem.

> **Example:** PVT Jones, an eyewitness to a murder, picks up the smoking pistol. At trial, he identifies the pistol as the same pistol he found at the murder scene. The pistol is relevant to the issue. It has an historical connection with the crime. It tends to establish a fact that is a part of an issue in the case, i.e., the weapon used in the murder. The proponent, however, must distinguish the concepts of "identification" and "relevancy." Simply identifying the object (same items as witness found) may not necessarily establish relevancy (found weapon at murder scene). As a practical matter, both identification and relevancy may be shown by the same witness, as was done in this example.

2. Similarity

a. Some courts hold that proof of similarity is an insufficient foundation. The proponent must prove that the item found in the accused's possession was the very item the guilty party had. *See, e.g., People v. Miller*, 22 A.D.2d 958, 256 N.Y.S.2d 110 (1964).

b. Some courts take an intermediate view that the evidence is admissible if the proponent makes a strong showing of similarity. In *State v. Thompson*, 364 P.2d 783 (Ore. 1961), the court stated that the evidence's admissibility turns on "the time and place where the accused is apprehended and the weapons found in respect to [the] time and place of the crime committed . . . ."

c. The majority view, however, is that the evidence is admissible because it is logically relevant. The fact that the accused was found in possession of a weapon or clothing similar to that of the perpetrator increases the probability that the accused is the perpetrator. The courts will also ensure that such evidence is not more prejudicial or misleading than probative. *See United States v. Abraham*, 617 F.2d 187 (9th Cir.), *cert. denied*, 447 U.S. 929 (1980); *United States v. Chibbaro*, 361 F.2d 365 (3rd Cir. 1966). *See also* Mil.R.Evid. 403.

Example: The accused is charged with assault with a deadly weapon. A .25 caliber automatic pistol with a shocking-pink handgrip on one side of the handle is found 100 yards from the scene of a shooting and is marked as an exhibit in the court. The accused's roommate testifies that he has seen the accused in possession of a .25 caliber automatic pistol with a shocking-pink handgrip on one side of the handle. But, the roommate cannot positively identify the weapon shown him in court. He does, however, testify that it "looks like the pistol" he had seen in the accused's possession. The unique similarities render the in-court exhibit relevant to the case.

d. Types of items to which the similarity doctrine has been applied.

(1) Clothing similar to that which the perpetrator wore at the time of the offense. *Abraham*, 617 F.2d at 187; *Chibbaro*, 361 F.2d at 365; *Caldwell v. United States*, 338 F.2d 385 (8th Cir. 1964).

(2) Weapons similar to that which the perpetrator had or used at the time of the offense. *United States v. Cunningham*, 423 F.2d 1269 (4th Cir. 1970).

(3) Property similar to that which the perpetrator stole. *Chibbaro*, 361 F.2d at 365.

(4) Drugs; form and amount of chunks of hashish were similar to hashish seized from accused's yellow knapsack. *United States v. Parker*, 10 M.J. 415 (C.M.A. 1981).

(5) Blood stains which could be identified as the same type as the victim, but not positively the blood of the victim. *United States v. Garries*, 19 M.J. 845 (A.F.C.M.R. 1985), *aff'd on other grounds*, 22 M.J. 288 (C.M.A.), *cert. denied*, 107 S.Ct. 575 (1987).

3. Other relevant evidence. If the item is relevant it may be admitted, even though there is no showing that the item was indeed directly connected with the accused or that the offered item is similar. In *United States v. Noreen*, 48 C.M.R. 228 (A.C.M.R. 1973), the accused was charged with murder.

The victim's body bore several cuts and puncture wounds. A knife was found in the victim's house, but was never directly connected to the accused nor was it offered as a murder weapon. It was shown, however, to be the type of weapon which could have been used. The Army Court of Military Review held that the knife was relevant because "[t]o some degree it would show that a weapon was available which may have been used by the assailant." *Id.* at 233.

4. Establishing nature of a substance purported to be an illicit drug. A number of cases allow a lay person's opinion testimony to serve to establish a substance as an illicit drug. *See, e.g., United States v. Accordino*, 15 M.J. 825 (A.F.C.M.R. 1983); *United States v. Morris*, 13 M.J. 666 (A.F.C.M.R. 1982); *United States v. Mackey*, 7 M.J. 649 (A.C.M.R.), *petition denied*, 7 M.J. 391 (C.M.A. 1979); *United States v. Watkins*, 5 M.J. 612 (A.C.M.R.), *petition denied*, 5 M.J. 326 (C.M.A. 1978). In drug cases, failure to establish the substance as the drug set forth in the specification renders the physical evidence irrelevant to the case.

> **Example:** An NIS agent, who has handled marijuana in over one hundred cases, may, upon establishing a proper foundation, render an opinion as to the nature of the "green-brown vegetable matter" he seized from the person of the accused. He may testify that, in his opinion, based upon his experience, the "baggie" of vegetable matter is in fact marijuana.

1007 LAYING A FOUNDATION AT TRIAL FOR REAL EVIDENCE

A. General. Prior to litigating the issue of admissibility of real evidence at trial, counsel should decide on the specific theory or theories justifying admission, then select the most efficient method of identification for use to gain admission. Counsel should then insure that all valuable evidence is admitted. When proving the chain of custody, for example, the witnesses called should, if possible, testify to the condition of the evidence when received and transferred even though such evidence may not be strictly necessary as a matter of theory. Furthermore, even if one method of identifying real evidence would be sufficient to gain the admission of evidence, alternative methods should also be employed if the additional steps required will not confuse the trier of fact or cause undue delay in the trial. The alternative method may add to the weight the fact-finder will give the evidence.

B. Display of evidence. It is generally considered unprofessional conduct, and possibly reversible error, for counsel to have unadmitted real evidence visible to the court members or witnesses prior to the time admission is sought. When a witness who has been called to identify a piece of evidence is, without any testimony relating to that evidence, shown the evidence and asked about it, the opposition may properly object on the grounds of a leading question. In view of the significant prejudice such an action may cause if the evidence is critical, a motion for a mistrial might be appropriate. *See United States v. McDowell*, 13 C.M.A. 129, 32 C.M.R. 129 (1962).

1008 SPECIAL CONSIDERATIONS (Key Numbers 1042 - 1043)

A. Verification of photographs, maps, charts, etc. The use of photographs, maps, charts, etc. as a form of physical evidence can be highly effective. It will help paint a picture of the oral testimony, highlighting for the trier of fact and appellate authorities those points considered most important by counsel. Such exhibits also help clarify complicated factual or technical testimony for the fact-finder. Notwithstanding the obvious value such testimony may have, it presents difficult issues of proof for the proponent. Exhibits in this category must be adequately verified before they can be used. For example, if a map or photograph is going to be used, a witness must first verify that the area depicted in the exhibit is what it purports to be. The witness need not have made the photo or map, but must be familiar with the area and further be able to verify that the exhibit actually looks like the area represented by the exhibit. Counsel must elicit sufficient testimony to demonstrate that the witness' personal knowledge and observation of the area is sufficient. Failure to do so will prohibit the exhibit's admission. *See, e.g., United States v. Howell*, 16 M.J. 1003 (A.C.M.R. 1983) (photographic evidence from automated teller machine admissible using testimony of roommate as to accused's appearance); *United States v. Richendollar*, 22 M.J. 231 (C.M.A. 1986).

B. Use at trial. Using the exhibit presents additional problems for counsel and witness alike. The mechanical process of identifying each aspect of the exhibit and properly marking it with a number or letter is very time-consuming and, from the finder of fact's view, possibly extremely boring. Nonetheless, if the exhibit's proponent is going to use the map, photo, or chart effectively, each witness must be thoroughly prepared concerning the appropriate techniques involved. If a chart or map is to be used, it must be large enough for it to be easily read by the trier of fact, and it must be large enough to remain uncluttered and legible if marked upon by the witnesses. If a photograph is used at court, attempts should be made to have the picture taken under the same circumstances and time of day that the alleged offense occurred. Finally, a blackboard drawing should not be used unless it can be photographed or

reproduced in some manner for inclusion in the record of trial. *See* R.C.M. 808, MCM, 1984. *See also United States v. White*, 23 M.J. 84 (C.M.A. 1986) concerning Mil.R.Evid. 403 considerations; *United States v. Anderson*, 21 M.J. 751 (N.M.C.M.R. 1985); *United States v. Stroup*, 24 M.J. 760 (A.F.C.M.R. 1987).

1009 FINAL COMMENTS

Physical evidence can have a significant impact upon the decision of the trier of fact. It should be recognized, however, that the significance of such evidence will be perceived by the trier of fact only if the evidence is properly submitted in a manner which will ensure its admissibility, i.e., establish proper identity, relevancy, and proper foundation. The opposing party, conversely, must be diligent in making appropriate objections to the admissibility of physical evidence if the identity or relevancy of the physical evidence is not properly established or if other requisite foundations for admissibility are not established. Additionally, opposing counsel should always consider making a Mil.R.Evid. 403 objection to any physical evidence the probative value of which is outweighed by its prejudicial effect. Opposing counsel, for example, should object under Mil.R.Evid. 403 to the introduction of gory photographs of the victim of an assault. *See, e.g., United States v. Schuring*, 16 M.J. 664 (A.C.M.R. 1983) (two color photographs of the murder victim were admissible because they were limited in number, clinical in nature, and relevant to corroborate the accused's confession and the pathologist's testimony). *See also United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990) (admission of gruesome photographs of murder victims' bodies was not an abuse of discretion); *United States v. Nixon*, 30 M.J. 501 (A.F.C.M.R. 1989) (judge did not abuse his discretion in admitting color photographs of murder victim showing injuries to victim's head, kidney, back, and buttocks where nature and extent of injuries tended to negate accused's claim of accident). It should be argued that such photographs are so inflammatory that they will be given undue and misapplied consideration by the trier of fact and, therefore, the probative value of the photographs is far outweighed by their prejudicial effect. Failure to raise such an objection will generally constitute a waiver of the issue on appeal. Mil.R.Evid. 103(a)(1). Furthermore, it would also be advisable for opposing counsel to request a limiting instruction in a member's trial with respect to any demonstrative evidence that is introduced to help ensure that the trier of fact realizes that the demonstrative evidence is for illustrative purposes only and that such evidence is not to be confused with other substantive evidence admitted at trial.

CHAPTER XI

PRESENTENCING

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CHAPTER XI

PRESENTENCING

1101 INTRODUCTION (Key Numbers 1300 - 1304)

In civilian trials, the sentencing authority is often a different person than the trier of fact who considered the case on the merits. In state and Federal courts, for example, if an accused has a jury trial on the merits, the jury completes its task by rendering a verdict as to guilt or innocence. The jury will not be involved in the sentencing of the accused except in rare instances (e.g., capital cases). Instead, the trial judge will sentence the accused after consideration of a presentencing report and other information provided by the parties. Courts-martial, however, are not bifurcated in this manner. The accused at a special or general court-martial has a right to be tried by a court composed of members, or, if desired, an accused may elect to be tried by military judge alone. In either case, the trier of fact on the merits will also serve to impose the sentence. Additionally, at summary courts-martial, the summary court-martial officer will act as the trier of fact on the merits and will also act to impose the sentence upon the accused.

The stage of the trial which follows a finding of guilty, whether by military judge alone, by a court composed of members, or by a summary court-martial officer, is called the "presentencing" stage. Unlike civilian trials, which utilize neutral presentencing reports as the major basis for determining an appropriate sentence (*see* Fed. R. Crim. Proc. 32), court-martial procedure during the presentencing stage continues to be an adversary proceeding. No presentence report by a neutral party is prepared. *See United States v. Hill*, 4 M.J. 33 (C.M.A. 1977). *See also* R.C.M. 1001 analysis, MCM, 1984, app. 21-61. Therefore, counsel for both sides must be intimately familiar with proper presentencing procedure, and counsel must be as vigilant in presenting a case at the presentencing stage of the trial as they were in the presentation of their cases on the merits.

In guilty plea cases, the presentencing stage of the trial is of paramount concern to all parties since the total focus is upon a single issue -- the appropriate sentence to be adjudged. All parties, therefore, are naturally motivated to conduct themselves in a tenacious, adversarial manner.

In cases contested on the merits, however, the focus is first upon resolving the issue of guilt or innocence. In a contested case, the trial on the

merits may be very time-consuming and exhausting. Consequently, the presentencing portion of the trial is often viewed as anticlimactic by the counsel involved. The accused, however, views this stage of the trial to be as important, if not more so, as the trial on the merits. At this stage of the proceedings, the rank or rate, liberty, financial condition, and possibly the life of the accused are at stake. Imposition of a punitive discharge, for example, may have a substantially prejudicial effect upon the accused's ability to secure meaningful employment or to obtain government benefits. Furthermore, it is not only the accused who is punished; his family may also be adversely affected by the punishment imposed. Conversely, the presentencing stage of the trial is important from the government's perspective. An appropriate sentence serves to rehabilitate the accused and acts as a specific deterrent to the accused and a general deterrent to others. Consequently, both trial counsel and defense counsel, acting in their adversarial roles, must be thoroughly familiar with presentencing procedures and must remain ever vigilant in the representation of their respective clients during this important stage of the court-martial.

1102 ORDER OF PRESENTATION OF MATTERS ON SENTENCING

R.C.M. 1001(b) sets forth the following order of presentation of matters on sentencing:

A. Trial counsel presents service data on the accused on the charge sheet;

B. trial counsel presents the personal data and characterization of the accused's prior service from the accused's personnel records;

C. trial counsel presents records of prior military and/or civilian convictions, if any;

D. trial counsel presents evidence of aggravation relating to offenses to which the accused has plead guilty or was found guilty;

E. defense presents matters in extenuation and/or mitigation;

F. rebuttal, as appropriate and in the discretion of the military judge;

G. argument by trial counsel;

H. argument by defense counsel; and

I. rebuttal arguments in the discretion of the military judge.

Each step of the presentencing stage listed above will be discussed in the subsequent paragraphs.

1103 PRESENTATION OF MATTERS BY TRIAL COUNSEL
(Key Number 1305)

What can the prosecution introduce to meet the objectives of sentencing? After findings, the prosecution may introduce prior convictions, personnel records, or matters in aggravation.

A. Service data of the accused. R.C.M. 100 (b)(1). Initially, the trial counsel has the duty to inform the court of the data on the first page of the charge sheet. The data must include the age, pay, service of the accused, and the duration of any pretrial restraint imposed upon the accused which relates to the charges presently before the court concerned. The data may be read from the charge sheet, or, in the discretion of the court, the data may be supplied to the court in the form of a written statement or a copy of the first page. Any objection to the data must be made at trial or waiver will result. The nature and duration of pretrial confinement will ultimately affect the amount of adjudged confinement that may be served. The military judge must instruct the members to consider the nature and extent of pretrial restraint. *United States v. Davidson*, 14 M.J. 81 (C.M.A. 1982). An accused is entitled to day-for-day administrative credit for any pretrial confinement. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). This credit is often referred to as *Allen* credit. Additionally, R.C.M. 305(k) provides that the military judge shall order administrative credit on a day-for-day basis for periods of pretrial confinement that are considered illegal because of noncompliance with subsections (f), (h), or (i) of R.C.M. 305. Although the R.C.M. do not specifically address the issue of the possible combination of *Allen* credit and R.C.M. 305(k) credit, the analysis to R.C.M. 305 states that the day-for-day credit for illegal pretrial confinement under R.C.M. 305(k) is to be awarded in addition to *Allen* credit. *See* MCM, 1984, app. 21-17; *see also United States v. Larner*, 1 M.J. 371 (C.M.A. 1976). Additionally, present case law permits the military judge to award more than the day-for-day credit offered under R.C.M. 305(k) if the conditions of pretrial confinement are particularly harsh or if the military judge considers that the circumstances require a more appropriate remedy than day-for-day credit for the period of illegal pretrial confinement. *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983).

> Example: SN Smith served 30 days of pretrial confinement, all of which was illegal due to an abuse of discretion on the part of the reviewing officer. While in the brig, SN Smith is subjected to gross maltreatment. The credit that the military judge may award could be as follows:
>
> 30 days *Allen* credit + 30 days R.C.M. 305(k) credit + any other credit the military judge deems appropriate.

It is important to note that the convening authority is bound by the military judge's order directing administrative credit. R.C.M. 1107 (f)(4)(F).

B. Personal data and character of prior service. R.C.M. 1001(b)(2). (Key Numbers 1305, 1306)

1. General. The trial counsel may introduce from the personnel records of the accused evidence of the marital status of the accused and the number of dependents, if any. Also, the trial counsel may introduce from such personnel records evidence of the character of the prior service of the accused. "Personnel records include all those records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused." Normally, such information will be obtained from the service record book of the accused. Under this specific rule [R.C.M. 1001(b)(2)], live witnesses are not permitted. *United States v. Helliker*, 49 C.M.R. 869 (N.C.M.R. 1974); *but see* R.C.M. 1001(b)(5) (which permits the testimony of live witnesses regarding the accused's previous performance as a servicemember and potential for rehabilitation).

The case of *United States v. Morgan*, 15 M.J. 128 (C.M.A. 1983) added a new twist to the presentation of evidence concerning the accused's prior service. In *Morgan*, the defense sought to have the trial counsel introduce favorable evidence from the accused's service record -- along with some unfavorable evidence -- to preclude the trial counsel from calling live witnesses to testify in rebuttal of the defense material. The court, relying on the underlying Federal Rules of Evidence (Fed.R.Evid.) and the Military Rule of Evidence (Mil.R.Evid.) 106 (the Mil.R.Evid. were not in effect at the time of the accused's court-martial) policy favoring "completeness," held that, if the trial counsel offers in evidence personnel records that reflect the past conduct and performance of the accused, the defense may successfully object if favorable portions that would provide a more complete and accurate picture of the accused's conduct and performance are omitted from the offered record. In other words, the accused's

entire service record was considered as a single "writing" for purposes of Mil.R. Evid. 106 completeness. The court held, however, that the rule applies to both sides; trial counsel may successfully object if the defense offers only documents from accused's service record that are favorable to the accused, and thus present an incomplete picture of accused's conduct and behavior. Unfortunately, the result in some cases may be that nothing is presented to the sentencing authority. Since *Morgan*, however, the *Manual for Courts-Martial* has undergone two revisions. Although *Morgan* addressed generally the issue of the doctrine of completeness and analogized to Mil.R.Evid. 106, the holding appeared to be based more specifically upon an interpretation of former paragraph 75(b). *See* Executive Order No. 12,315 dated 29 July 1981; *United States v. Morgan*, 15 M.J. at 128, n.8 at 134-35. The Army Court of Military Review addressed this issue upon the first MCM change after *Morgan* and held that the service record book of an accused is not a unitary record and that the prosecution was free to rebut evidence presented by the defense. *United States v. Abner*, 17 M.J. 747 (A.C.M.R. 1984). Similarly, under the 1984 revision, R.C.M. 1001(b)(2) does not treat the service record book as a unitary record. Instead, any objections that a service record document is incomplete or inaccurate must state in what specific regard the particular document is inaccurate or incomplete. *See* R.C.M. 1001 analysis, MCM, 1984, app. 21-61. In spite of these efforts to overrule *Morgan*, the Court of Military Appeals has apparently decided to breathe new life into the *Morgan* decision. In *United States v. Salgado-Agosto*, 20 M.J. 238 (C.M.A. 1985), the court reaffirmed the *Morgan* case with only passing reference to the post-*Morgan* changes to the MCM. *See United States v. Merrill*, 25 M.J. 501 (A.F.C.M.R. 1987) (where the government is not required, during sentencing, to produce material which it does not, and is not, required to maintain).

2. Prior record of service. There are a number of exhibits that may be introduced to reflect the character of the accused's service.

a. Documents reflecting the history of the accused's assignments, advancements or reductions in grade, awards and decorations, and mental capacity may be considered in the presentencing stage. Additionally, evidence that the accused had been given fair warning of deficiencies and was warned of the consequences of future infractions is admissible. For example, the "frequent involvement" warning placed in the accused's service record (page 13, USN; page 11, USMC) may be admissible under R.C.M. 1001(b)(2) as relevant to the issue of sentencing. Such entries reflect that the accused's prior history of service was not exemplary and, notwithstanding the fact that the accused was duly counseled about the deficiencies and was duly warned about the consequences, the accused chose to ignore the warning and again flout military authority. Even if the disciplinary actions that precipitated the frequent involvement warning are not themselves admissible, the frequent involvement warning may still be admissible. *United States v. Collazo*, No. 78-0322 (N.C.M.R.

13 July 1978) (unpublished). When the trial counsel desires to introduce personnel records of the accused under this provision, only those records that relate to the past conduct and performance of the accused since entering the military service are admissible. Notations on personnel records referring to such things as preservice use of drugs and preservice juvenile conviction would not be admissible. *United States v. Martin*, 5 M.J. 888 (N.C.M.R. 1978); *United States v. Galloway*, No. 76-1677 (N.C.M.R. 14 September 1976). Documents reflecting preservice misconduct, however, may be admissible for purposes of impeachment. *United States v. Honeycutt*, 6 M.J. 751 (N.C.M.R. 1978). *See United States v. Delaney*, 27 M.J. 501 (A.C.M.R. 1981) (arrest record inadmissible as "personal data").

There is an additional issue which must be addressed before "adverse matter" reflecting the character of accused's prior service may be admitted into evidence, and it is discussed in *United States v. Shelwood*, 15 M.J. 222 (C.M.A. 1983). In that case, the trial counsel introduced two "administrative remarks" counseling warnings from the page 11 of the Marine accused's service record book. One was merely signed by the accused and the other was accompanied by an illegible signature. The *Shelwood* court cited Article 1110 of *U.S. Navy Regulations, 1973*, which, at the time of Shelwood's trial, stated:

> "Adverse matter shall not be placed in the record of a person in the Naval service without his knowledge . . . . [S]uch matters shall be first referred to the person reported upon for such statements as he may choose to make. If the person reported upon does not desire to make a statement, he shall so state in writing."

The court then held that the entries constituted adverse matter and, since there was no indication that the accused was afforded an opportunity to make a statement with respect to the entries, they were excluded from admission. Since the *Shelwood* case, an amendment to Article 1110 of *U.S. Navy Regulations* has occurred and a clarification of the issue through case law has emerged. In *United States v. West*, 17 M.J. 627 (N.M.C.M.R. 1983), *petition denied*, 18 M.J. 22 (C.M.A. 1984), the Navy Court of Military Review held that the *Shelwood* doctrine does not extend to records of unauthorized absence or NJP. Additionally, Article 1110 was amended on 1 March 1984. The article now states, in effect, that, except for medical records, the right of the member to have an opportunity to peruse the matter and rebut the same applies only to officer fitness reports and correspondence relating thereto; and to enlisted performance evaluations and correspondence relating thereto of E-5's and above. *See* ALNAV 036/84. Therefore, *Shelwood* will be inapplicable to all adverse service record entries of E-4's and below made after the amendment and further will be inapplicable to adverse matters placed after the date of the amendment in the service records of

officers and E-5's and above if such adverse matter does not relate to fitness reports or enlisted performance evaluations. The trial advocate must take note, however, that the *Shelwood* rules are applicable to service record entries made prior to 1 March 1984.

b. Nonjudicial punishment. (Key Numbers 1312, 1313, 1314) Assuming the personnel record was made in accordance with appropriate regulations [e.g., MILPERSMAN, art. 5030320 (USN); IRAM, para. 4015 (USMC)], evidence that nonjudicial punishment (NJP) was imposed upon the accused is admissible subject to certain limitations.

(1) NJP's must relate to offenses committed prior to trial, during the current enlistment, and must not be more than two years old. The two-year period is measured from the date of the last offense to which the NJP related to the date of the first offense for which the accused was found guilty at court. Periods of unauthorized absence are excluded from calculating the two-year period. JAGMAN, § 0141.

(2) For persons not attached to or embarked upon a vessel at the time the NJP was conducted, such NJP must have complied with the requirements of *United States v. Booker*, 5 M.J. 238 (C.M.A. 1977), unless the NJP was conducted prior to 11 October 1977. *United States v. Syro*, 7 M.J. 431 (C.M.A. 1979). *Booker* does not apply to NJP proceedings involving an accused who is attached to or embarked on a vessel at the time the NJP was conducted since such an accused has no right to refuse NJP. It is necessary, therefore, for the trial counsel to demonstrate in cases where *Booker* is applicable that the accused was given an opportunity to consult with counsel and either that he consulted with counsel or affirmatively waived that right prior to electing NJP.

(3) May the military judge question the accused to determine if the *Booker* requirements were met? In 1980, the Court of Military Appeals answered this question in the affirmative, but then reversed itself two years later in light of a new Supreme Court decision. *United States v. Spivey*, 10 M.J. 7 (C.M.A. 1980) originally held that, in a guilty plea trial, the accused waives his right against self-incrimination. The court also held that the military judge's inquiry is not involved with the commission of an offense and thus, Article 31, UCMJ, and the fifth amendment are inapplicable at the presentencing stage. Furthermore, *Spivey* dicta indicated that the right against self-incrimination was inapplicable during presentencing even if the accused pled not guilty. However, the Navy and Marine Corps Court of Military Review has rejected the principle stated in *Spivey* and held that it was not constitutionally permissible for the military judge to conduct such an inquiry. This court held that any effort to counsel an accused to speak against his will at the sentencing stage of the trial clearly contravenes the fifth amendment. *United States v. Sauer*, 11 M.J. 872

(N.M.C.M.R. 1981), *aff'd*, 15 M.J. 113 (C.M.A. 1983). The court, in *Sauer*, relied upon the holding in *Estelle v. Smith*, 451 U.S. 454 (1981), wherein the Supreme Court of the United States held that the fifth amendment applied to the sentencing stage of a trial, and that the fifth amendment protects an accused from being a "deluded instrument" of his own execution. The Court of Military Appeals resolved the conflict when it affirmed the N.M.C.M.R. opinion in *United States v. Sauer*, 15 M.J. 113 (C.M.A. 1983), and overruled the *Spivey* decision. The court approved the reasoning in the N.M.C.M.R. decision, relied on the *Estelle* decision as controlling, and distinguished Federal decisions that had limited *Estelle* to capital cases. Consequently, if an NJP or, by analogy, a summary court-martial conviction, does not comply with the *Booker* requirements on its face, the military judge may not question the accused to "fill in the blanks." *See also United States v. Cowles*, 16 M.J. 467 (C.M.A. 1983) (the military judge may not question an accused with regard to compliance with *Booker* despite his waiver of self-incrimination during the plea stage).

(4) What service record entries satisfy *Booker*? In *United States v. Wheaton*, 18 M.J. 159 (C.M.A. 1984), the trial counsel introduced several mast records with *Booker* warnings which demonstrated that the accused was informed of his rights, but did not show which rights he elected. In upholding the admission of such evidence in aggravation, the Court of Military Appeals ruled that military judges may rely upon a presumption of regularity that a nonjudicial punishment following documentation that the accused was advised of his rights is indicative of the accused's decision not to request trial by court-martial.

(a) C.M.A. noted, however, that an incomplete or illegible record of punishment is inadmissible, except where the omission has been accounted for elsewhere in the form or by independent evidence. *United States v. Mack*, 9 M.J. 300, 324 (C.M.A. 1980). *See also United States v. Negrone*, 9 M.J. 171 (C.M.A. 1980). Even if a document establishing prior punishment under article 15 is sufficient on its face, but the accused establishes by independent credible evidence that there is an essential omission or irregularity in the procedure for imposing punishment, the record of NJP will not be admissible. *Mack*, 9 M.J. at 300.

(b) Failure to object to a fatal or essential defect on an NJP which was obvious waives the objection. *United States v. McLenore*, 10 M.J. 238 (C.M.A. 1981). The majority noted that "[t]he Military Rules of Evidence now have taken a very expansive view of waiver by failure to object. *See* Rule 103(a)(1)." *Id.* at 240 n.1. Failure to object does not waive the issue, however, if there has been "plain error" which materially prejudices the substantial rights of the accused. *United States v. Dyke*, 16 M.J. 426 (C.M.A. 1983) (plain error to admit a record of nonjudicial punishment which contained no signature, legible or otherwise). In *United States v. Yarbough*, 33 M.J. 122

(C.M.A. 1991), the court held that to admission of NJP still pending appeal was not "plain error," and failure to object waived the issue.

(5) Vacations of punishment under article 15 are admissible in evidence. The "normal inference" that the sentencing authority may make is that the vacation was the result of misconduct by the accused. *United States v. Covington*, 10 M.J. 64 (C.M.A. 1980). *See United States v. Stewart*, 12 M.J. 143, 144 n.2 (C.M.A. 1981): "[S]ince the appellant appeared in court in the uniform of [an E-4] and testified concerning his unawareness of the reduction in grade, the military judge arguably was on notice to inquire further into compliance with the required procedures." In essence, the presumption had been rebutted. Unless contrary evidence is offered, there is a presumption that the vacation was proceeded by "an opportunity to appear" and "to rebut any derogatory or adverse information." The burden is on the defense to make a specific objection that the vacation of suspension was not preceded by notice and opportunity to reply demanded. *Covington*, 10 M.J. at 68. At the "vacation proceeding," the accused does not have the right to counsel. *Id.* at 66.

(6) In addition to rejecting right to counsel at NJP hearings or vacation proceedings under article 15, the courts have rejected arguments that records of punishment under article 15 imposed upon persons attached to or embarked upon a vessel should be inadmissible because the procedure violates due process. *See United States v. Lecolst*, 4 M.J. 800 (N.C.M.R. 1978); *United States v. Penn*, 4 M.J. 879 (N.C.M.R. 1978).

C. Evidence of prior conviction. R.C.M. 1001(b)(3). (Key Numbers 1310, 1311).

1. Under R.C.M. 1001(b)(3), the trial counsel may introduce evidence of prior military and civilian convictions even if the convictions are not similar to the offense or offenses of which the accused has been found guilty at his present court-martial. There are, however, certain conditions set forth below that affect the admissibility of convictions.

a. A vacation of a suspended sentence is not itself a conviction and is not admissible under this Manual provision. It may be admissible under R.C.M. 1001(b)(2), however, as reflecting the character of prior service of the accused.

b. A summary court-martial conviction, otherwise admissible, may be inadmissible due to failure to comply with the mandates emanating from the Court of Military Appeals' decision in *Booker*, 5 M.J. at 238.

c. For a civilian conviction to be admissible under R.C.M. 1001(b)(3), it must be a "conviction" under the law of the civilian jurisdiction. *See United States v. Hughes*, 26 M.J. 119 (C.M.A. 1988) for a decision where an "Order Deferring Adjudication" entered in a Texas court was not a conviction under Texas law, regardless of the "order's" admissibility for sentencing in a Texas courtroom. *See also United States v. Smith*, 25 M.J. 222 (C.M.A. 1987) and *United States v. Evans*, 26 M.J. 961 (A.C.M.R. 1988). Further, a "juvenile adjudication" is no longer a "conviction" for purposes of this rule after the holding of *United States v. Slovacek*, 24 M.J. 140 (C.M.A. 1987).

d. There are no automatic rules of exclusion based on the age of a conviction. However, Mil.R.Evid. 403 may be useful when trying to exclude a very old conviction. *See also United States v. Allen*, 21 M.J. 507 (A.F.C.M.R.), *petition denied*, 21 M.J. 307 (C.M.A. 1985) [civilian conviction, for offenses committed more recently than those for which accused convicted at instant trial, admissible under R.C.M. 1001(b)(3)]; *United States v. Caniete*, 28 M.J. 426 (C.M.A. 1989) (convictions which were obtained between date of offense for which accused was on trial and date of trial were "prior convictions" admissible as aggravation evidence under R.C.M. 1001(b)(3)(A)].

2. Pendency of an appeal does not render evidence of a conviction inadmissible, except that a conviction by summary court-martial or by special court-martial without a military judge may not be used during presentencing until review is final under either Art. 65(c) or 66, UCMJ. Pendency of appeals from general courts-martial and special courts-martial with a military judge does not render such courts-martial convictions inadmissible. Evidence of the pendency of appeal from such courts-martial, however, is admissible as relevant to the weight to be given such convictions.

3. Prior convictions are usually proved by introducing the record of previous convictions or the pertinent personnel records of the accused (e.g., Navy service record page 7, Marine service record page 13). Records of summary courts-martial should clearly reflect the presence or waiver of counsel as required by *Booker*, 5 M.J. at 238. Authentication of these records of conviction will normally be in accordance with the provisions of Mil.R.Evid. 902(2), 902(4), or 902(4)(a).

D. Evidence aggravating the offense. R.C.M. 1001(b)(4) (Key Number 1306).

1. General. Circumstances surrounding the commission of the offense which have not been previously introduced before the findings may be introduced at the presentencing stage regardless of whether the accused pled guilty or not guilty. *See United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982).

Such evidence may include testimony from witnesses to the incident, the victim of the crime, stipulations of fact agreed upon by and between counsel with the express consent of the accused, as well as stipulations of expected testimony between the parties concerning the circumstances of the offense. Oral and written depositions are automatically admissible, except in capital cases. *See, e.g., United States v. Marshall*, 14 M.J. 157 (C.M.A. 1982) (victim's testimony regarding the effects on her lifestyle resulting from a rape was properly admitted in presentencing); *United States v. Pearson*, 17 M.J. 149 (C.M.A. 1984) (testimony from prosecution witnesses concerning the homicide victim's character and magnitude of loss felt by his family and military community was admissible; however, certain responses so invaded the province of the fact-finder that curative instructions were required); *United States v. Needham*, 23 M.J. 383 (C.M.A. 1987) (Department of Justice periodical tracing the history, use, and effects of hallucinogens was relevant and admissible during accused's sentencing for distributing LSD); *United States v. Hammond*, 17 M.J. 218 (C.M.A. 1984) (expert testimony on rape trauma); *United States v. Corl*, 6 M.J. 914 (N.C.M.R.), *aff'd*, 8 M.J. 47 (C.M.A. 1979) (effects of drugs in drug sale case); *United States v. Snodgrass*, 22 M.J. 866 (A.C.M.R. 1986), *petition denied*, 24 M.J. 234 (C.M.A. 1987) (expert testimony on likelihood of psychological damage to child-abuse victim); *United States v. Hood*, 12 M.J. 890 (A.C.M.R. 1982) (value of property accused stole including black market value); *United States v. Schwarz*, 24 M.J. 823 (A.C.M.R. 1987) (government, victim of accused's negligent destruction of an ambulance, allowed to use victim impact statement); *United States v. Fontenot*, 29 M.J. 244 (C.M.A. 1989) (testimony of victim's parents about effect of rape on victim and her family was admissible during presentencing as evidence about aggravating circumstances). *United States v. Rosato*, 32 M.J. 93 (C.M.A. 1991) (commander's sentencing testimony about time and effort expended to train accused and effect of loss of security clearance admissible to show impact of offense on unit mission); *but see United States v. Bartoletti*, 32 M.J. 419 (C.M.A. 1991) (government offered record of command crimes to show extent of car theft problem on post found to be error); *United States v. Sherman*, 32 M.J. 449 (C.M.A. 1991) (government argues that sentence should send message that United States is concerned with lives and property of German people, held to be in error -- opinion suggests that community impact evidence would be admissible).

In *Roberts v. United States*, 445 U.S. 552 (1980), refusals of accused to cooperate with government were held admissible. This would apply in the military where the accused is asked to cooperate prior to trial, but refuses. It would be permissible to cross-examine an accused after a sworn statement by asking if he would be willing to cooperate with the government in the future. Conversely, evidence that the accused cooperated is admissible during sentencing. *See, e.g., United States v. Thomas*, 11 M.J. 388 (C.M.A. 1981). *Cf. United States v. Wright*, 20 M.J. 518 (A.C.M.R. 1985), where it was held proper during sentencing for the military judge to consider the appellant's sworn testimony during

sentencing in a prior trial acknowledging he had made a mistake and deserved another chance, as well as the judge's admonition to the accused to avoid committing further drug offenses (the accused was convicted of two specifications of distribution of cocaine and one of attempted wrongful distribution of cocaine).

2. Use of providence inquiry. C.M.A. has approved the use during presentencing of information obtained during the providence inquiry. *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988). The Mil.R.Evid. do not prohibit such use. (Mil.R.Evid. 410 applies to guilty pleas which are later withdrawn, but not those which are accepted.) The issue typically has arisen when the military judge revealed his reliance on such information or when the trial counsel used it in argument. If information from the providence inquiry may now be used during presentencing, though, then it should be presented to members as well when relevant under R.C.M. 1001(b)(4) (or possibly R.C.M. 1001(b)(3) in rare instances). It should be easy to establish a foundation in accordance with the Mil.R.Evid. Of course, Mil.R.Evid. 403 also applies.

3. Although aggravating circumstances surrounding the offense are generally admissible, defense counsel may properly object under Mil.R. Evid. 403 if the probative value of the evidence is outweighed by its unfair prejudice to the accused. *See, e.g., United States v. Pooler*, 18 M.J. 832 (A.C.M.R. 1984) (evidence of willingness to engage in future drug transactions expressed contemporaneously with charged offense admissible under Mil.R.Evid. 403 balancing). Failure to object, unless plain error exists, will waive the issue on appeal.

4. Evidence of uncharged misconduct generally is admissible aggravation only if such evidence is directly related to the offense and necessary that the circumstances surrounding that offense or its repercussions might be understood by the trier of fact. The application of this rule is found most expansively in the area of child abuse cases. In *United States v. Mullens*, 29 M.J. 398 (C.M.A. 1990), the court held that evidence of prior sexual liberties with members of the accused's family was admissible in sentencing for committing sodomy on the accused's son on the basis that this evidence shows the depth of the accused's sexual problems and the true impact of the offenses on the accused's family. *See also United States v. Ciulla*, 32 M.J. 186 (C.M.A. 1991) (court allowed testimony of the accused's fantasies about other children to be admitted on sentencing for sexually abusing his own daughter on the basis of state of mind/depth of problem evidence); *United States v. Silva*, 21 M.J. 336 (C.M.A. 1986) (court allowed testimony of accused's statements about prior acts given to victim of sexual abuse during commission of acts). A rather expansive view has been taken by the Army Court of Military Review which has generously approved the admission of uncharged misconduct under R.C.M. 1001(b)(4). *United States v. Green*, 21 M.J. 633 (A.C.M.R. 1985); *United States v. Arceneaux*, 21 M.J. 571

(A.C.M.R. 1985); *United States v. Harrod*, 20 M.J. 777 (A.C.M.R. 1985); *United States v. Wright*, 20 M.J. 518 (A.C.M.R.), *petition denied*, 21 M.J. 309 (C.M.A. 1985). The admissibility of uncharged misconduct ultimately depends upon a balancing of the prejudicial danger versus probative value in sentencing. Rule 403 serves as a guide to the military judge in determining admissibility. The fact that the accused has pled guilty is not, by itself, a r· ason to prohibit the prosecution from admitting such evidence. If it were otherwise, the defense could plead guilty by way of strategy in order to present a sterile picture to the sentencing authority. From a policy point of view, the court should be presented with evidence to allow it to make an enlightened decision as to sentence. The 1984 Manual contains the following rule:

> (f) Additional matters to be considered. In addition to matters introduced under this rule, the court-martial may consider -
>
> . . .
>
> (2) Any evidence properly introduced on the merits before findings, including:
>
> (A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose;. . . (R.C.M. 1001(f)).

In *Green*, 21 M.J. at 632, the Army court held that rule 403 applies to the admissibility of evidence and aggravation under rule 1001. In *United States v. Martin*, 20 M.J. 227 (C.M.A. 1985), both Judge Cox and Chief Judge Everett agreed that the evidence of uncharged misconduct which would have been admissible in a contested case is not automatically excluded from evidence for sentencing purposes. If evidence of uncharged misconduct is going to be admissible against the accused in sentencing, there must be evidence that the accused was the individual involved in the misconduct. Then it must be tied in some way to the offenses for which the accused was found guilty. Lastly, the misconduct cannot be remote in time and circumstances. *Id.* at 232-33.

> Evidence of the accused's motive or other state of mind often serves a proper and useful function during the sentencing phase of the trial, for it may show aggravating or mitigating circumstances of the charged offense.... To illustrate, in a drug-distribution case, it will help the sentencing authority to learn whether the accused distributed the drug to a friend as a favor or

> whether he did so as part of a large business that he operated.

Id. at 232.

In *Silva, supra*, the Court of Military Appeals reversed the Air Force Court of Military Review, which had held that evidence of uncharged misconduct normally admissible in a contested case is inadmissible when the accused pleads guilty. *See also United States v. Carfang*, 19 M.J. 739 (A.F.C.M.R. 1984), *petition denied*, 21 M.J. 112 (C.M.A. 1985), where reference by the accused to uncharged drug usage expressed during a dialogue with an informant was properly admitted during sentencing. *See United States v. Bono*, 26 M.J. 240 (C.M.A. 1988), where evidence of uncharged misconduct in an accused's confession had no bearing on the offenses charged and was inadmissible.

5. Capital case. When a case has been referred as a capital case under R.C.M. 1004, the prosecution must seek to introduce matters in aggravation. It may seek to prove that the offense was outrageously or wantonly vile, or both; or inhuman -- in that it involved torture, depravity of mind, or an aggravated battery of the victim. The prosecution may also seek to introduce evidence that there is a probability that the accused committed criminal acts of violence that would constitute a threat to society. R.C.M. 1004(c). It may be that part of the accused's confession related to a plan to kill others or a desire to have tortured the victim more. This evidence would not normally be introduced in the case-in-chief, but would be relevant to the imposition of the death penalty.

E. Evidence of rehabilitative potential. R.C.M. 1001(b)(5) (Key Number 1306).

A major change to prior presentencing practice is found in R.C.M. 1001(b)(5). Under this rule, trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(a)(1), evidence, in the form of opinion, concerning the accused's previous performance as a servicemember and potential for rehabilitation. Obviously, trial counsel should be careful to lay the appropriate foundation required for such opinion evidence in order to avoid defense objections. Defense counsel also has a valid objection if the witness testifies on direct examination about specific instances of conduct reflecting upon the accused's rehabilitative potential or past service. R.C.M. 1001(b)(5) allows evidence of specific instances to be admitted only upon cross-examination and on redirect if the defense has "opened the door." The clear language of the rule and the drafters' intent preclude the introduction of such specific instances on direct examination given under this rule during the prosecution's case-in-chief on presentencing. *See also* R.C.M. 1001(b)(5) analysis, MCM, 1984, app. 21-62. This

rule does not preclude, however, the admission of specific instances of conduct elicited upon the direct examination of a rebuttal witness.

The purpose of this provision is to allow a more informed decision to be made by the sentencing authority. The "introduction of evidence of this nature should not be contingent solely upon the election of the defense." R.C.M. 1001(b)(5). *See United States v. Lawrence*, 22 M.J. 846 (A.C.M.R. 1986), which held that it was error to consider the accused's prior sworn statement under R.C.M. 1001(b)(5) to show his limited rehabilitative potential. *Lawrence* illustrates two aspects of the rule. One is that other forms of evidence (other than testimony or oral deposition) are not permitted. The other is that only opinion evidence is permitted. It is noted that specific acts may be explored during cross-examination which might then justify inquiry about specific acts during redirect examination.

In *United States v. Horner*, 22 M.J. 294 (C.M.A. 1986), a battery commander's opinion should have been stricken after the defense showed that the opinion was based solely on the witness' view of the offense and not on an assessment of the accused's character or potential. Counsel must pay close attention to the manner in which opinion testimony of rehabilitative potential is given. In *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989), the court held that a witness should not be allowed to express an opinion on whether an accused should be punitively discharged. The use of euphemisms such as "[N]o potential for continued service"; "[H]e should be separated"; or the like are just other ways of saying "[G]ive the accused a punitive discharge." This type of testimony is inappropriate as an invasion of the province of the sentencing authority. The focus of rehabilitative potential testimony, therefore, is to determine whether the accused has the potential to be integrated as a productive member of society, and not whether he should remain in the armed services. This type of evidence must be based on the entire history of service of the accused and not merely on the offenses for which the accused has been found guilty. In laying a foundation for this testimony, counsel must show that the witness has sufficient contact with the accused over a sufficient period of time and under circumstances which will allow the formation of an opinion concerning rehabilitative potential. The ultimate question must be: "based on your contact with the accused, in your opinion, does the accused have rehabilitative potential?" Defense counsel must be aware that, if they seek to cross-examine the witness on this foundation, they open the door to specific instances of conduct which act as the basis for the opinion.

F. Access of the defense to information to be presented by the trial counsel. R.C.M. 701(a)(5) (Key Numbers 931, 933).

1. General. Prior to arraignment, the defense has the right, upon request, to inspect written material that will be presented by the prosecution on sentencing. Additionally, the trial counsel must provide, upon request, a list of prosecution witnesses, if any. Failure to comply with this provision will cause the defense to be granted a continuance to inspect and reply to the material. Recent amendment to R.C.M. 701 grants to the government the same rights to discovery of witnesses and written materials that the defense intends to present on sentencing.

2. This provision does not distinguish between written material and witnesses on the prosecution's initial case in presentencing and its case in rebuttal. Until the issue is resolved by the courts, it would be good trial practice for the defense to make an "automatic" request, in every case, for all written material and witnesses that the prosecution intends to introduce in its initial case in sentencing and in anticipated rebuttal.

1104 PRESENTATION OF MATTERS BY THE DEFENSE.

R.C.M. 1001(c). (Key Number 1307)

A. General. The defense may present matters in rebuttal to any material presented by the prosecution and may present matters in extenuation and mitigation regardless of whether the defense offered evidence before findings. R.C.M. 1001(c)(1).

1. Matters in extenuation include circumstances surrounding the commission of an offense that do not amount to a legal defense but might cause the court to impose a lighter sentence.

Examples:

a. Defense counsel might show that the reason the accused went UA was because his father deserted his mother and left her penniless, and the accused remained UA in order to work at a better-paying job in order to support his mother.

b. Defense might show that the accused returned late from liberty because there was a two-hour power failure overnight and, consequently, his trusty electric alarm clock was two hours late.

2. Matters in mitigation consist of facts concerning the particular accused which, although unrelated to the offense of which the accused stands convicted, might warrant a lesser punishment. Such evidence may, among other things, include evidence of good conduct or bravery.

Examples:

a. A showing that the accused has an elderly parent for whom he provides the sole support;

b. a showing that the accused has a low or high GCT; and

c. a showing of the accused's value to the service:

(1) Testimony from a division officer, petty officer, noncommissioned officer that the accused is a good worker;

(2) previous honorable discharges;

(3) awards, citations, letters of commendation, good conduct ribbons, combat record, etc.; and

(4) accused's desire to make the service a career.

3. Rights of the accused to present matters during presentencing. R.C.M. 1001(c)(2).

a. Testimony under oath may be presented by the accused for the court to consider. This rule does not, however, permit the filing of an

affidavit of the accused. As to such testimony in extenuation and/or mitigation, the accused is subject to cross-examination as to matters brought out on direct examination and on his credibility just as any other witness. In this regard, two cases are of interest. In *United States v. Grayson*, 438 U.S. 41 (1978), the Supreme Court upheld the sentence in a case where the trial judge indicated on the record that the sentence was based, in part, on his belief that the accused had perjured himself, and that the defense evidence was a "complete fabrication." The holding declined to adopt the defense position that this was sentencing for a crime not charged. Judge Granger, writing for the Navy court in *United States v. Young*, 5 M.J. 797 (N.C.M.R.), *petition denied*, 6 M.J. 100 (C.M.A. 1978), and citing *Grayson*, adopted this position in a military situation.

b. An unsworn statement (Key Number 1309) by the accused, by counsel, or by both, may also be made part of the record. It may be oral, written, or both. An oral unsworn statement may be in the narrative form or may be made in a question-and-answer format. *United States v. Michael*, 4 M.J. 905 (N.C.M.R. 1978). The accused's unsworn statement may not be subjected to cross-examination by the government. Any factual assertions may, however, be rebutted by the government. *United States v. Konarski*, 8 M.J. 146 (C.M.A. 1979). It must be emphasized that only factual matter raised in an unsworn statement is subject to rebuttal. Opinion evidence, for instance, impeaching the accused's credibility (e.g., he is a liar) is not admissible. *United States v. Harris*, 13 M.J. 653 (N.M.C.M.R. 1982); *see also United States v. Shewmake*, 6 M.J. 710 (N.C.M.R. 1978), *criticized at* 13 M.J. 654 (N.C.M.R. 1982).

c. The accused may, as always, remain silent during this phase of the trial. Such silence cannot be commented upon, or considered in an adverse manner, by the sentencing body.

d. The three options available to the accused with regard to any statement he may desire to make are not contingent upon events occurring during the trial on the merits. Thus, the fact that the accused did or did not testify on the merits is irrelevant with respect to the type of statement, if any, he makes during presentencing.

e. The military judge is required personally to remind the accused of his or her rights to make a sworn or unsworn statement to the court in mitigation or extenuation of the offenses of which he stands convicted, or to remain silent. *See United States v. Hawkins*, 2 M.J. 23 (C.M.A. 1976). The military judge should advise the accused of these alternatives out of the presence of the court members. *United States v. Richardson*, 21 C.M.A. 383, 45 C.M.R. 157 (1972).

f. An unsworn statement might be accorded less weight than testimony, but it is still evidence, and the Mil.R.Evid. apply though usually they are relaxed. In *United States v. Oxford*, 23 M.J. 548 (A.C.M.R. 1986), *review denied*, 24 M.J. 346 (C.M.A. 1987) (sodomy compelled at knife point), it was error to exclude an unsworn statement regarding prior sexual activity between the accused and his wife-victim. While Mil.R.Evid. 412 applied and consent was not an issue, evidence that the wife regularly sought sodomy and forcible sexual acts was extenuating and admissible under Mil.R. Evid. 412(b)(1) as constitutionally required. (Some of the evidence was properly excluded as simply embarrassing and not extenuating.)

g. An unsworn statement does not allow the prosecution to attack the accused's character for truthfulness as would the accused's testimony. *Harris*, 13 M.J. at 653. In *United States v. Williams*, 23 M.J. 582 (N.M.C.M.R. 1986), a prior inconsistent statement of the accused was improperly admitted to rebut his unsworn statement. The prior exculpatory statement had not been introduced to contradict the unsworn statement (a permissible use), but to attack the accused's truthfulness which was not legitimately subject to attack because the accused had not testified.

B. Relaxation of the rules of evidence for defense. R.C.M. 1001(c)(3).

The formal rules of evidence may be relaxed for the defense to the extent of receiving affidavits, certificates of military and civil officers, and other writings of similar apparent authenticity and reliability as part of the defense case in extenuation and mitigation. *See also* Mil.R.Evid. 1101c; *United States v. Franchia*, 13 C.M.A. 315, 32 C.M.R. 315 (1962); *United States v. Ault*, 15 C.M.A. 540, 36 C.M.R. 38 (1965). Note, however, that if the military judge relaxes the rules for the defense, they may also be relaxed for prosecution in rebuttal. R.C.M. 1001(d).

C. Use of all available evidence in extenuation and mitigation

Defense counsel must be especially careful to present all available information that would be helpful to an accused in extenuation and mitigation. If counsel does not do an adequate job, there is the risk of reversal because of denial of effective assistance of counsel. In *United States v. Rowe*, 18 C.M.A. 54, 39 C.M.R. 54 (1968), the Court of Military Appeals reversed the case because the defense counsel failed to introduce evidence that the accused had been awarded the Vietnam Service Medal and the Republic of Vietnam Campaign Medal. *See also United States v. Brogan*, 50 C.M.R. 807 (N.C.M.R. 1976).

Some evidence which was inadmissible prior to findings becomes admissible during the sentencing stage: specific good acts, R.C.M. 1001(c)(1)(B);

general good character, *compare* R.C.M. 1001(c)(1)(B) *with* Mil.R.Evid. 404(a); potential as to retention, R.C.M. 1001(a)(1)(A)(v); and letters, affidavits, and other writings that could not be admissible prior to findings can be introduced during this stage. ("The military judge. . . may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.") *See United States v. Maracle*, 26 M.J. 431 (C.M.A. 1988) for an interesting fact situation where C.M.A. held the defense should have been allowed to present evidence of a prior court-martial and sentence as having bearing on accused's circumstances at time of trial.

While the prosecution may present evidence of the accused's lack of cooperation with law enforcement officials, the defense may want to show such cooperation and the extent to which the accused is still willing to assist government law enforcement officials. If the accused is reluctant to state this in open court, the defense may request the courtroom be closed while the accused testifies about future cooperation. In *United States v. Martinez*, 3 M.J. 600, 602-04 (N.C.M.R. 1977), *rev'd on other grounds*, 5 M.J. 122 (C.M.A. 1978), the court held that, under the circumstances of the case, the trial judge abused his discretion in not closing the courtroom so that the accused could respond to questions concerning his willingness to cooperate with law enforcement officials.

An opinion as to an appropriate sentence (for example, whether the accused should receive a punitive discharge or how much confinement would be appropriate) is not helpful to the sentencing authority. However, a witness may express an opinion regarding whether confinement would be beneficial in a given case or whether the witness desires to serve in the same unit with the accused. *United States v. Taylor*, 21 M.J. 840 (A.C.M.R. 1986). *See also United States v. Pearson*, 17 M.J. 149 (C.M.A. 1984). On the other hand, it is error for a superior to testify that the accused should receive the maximum imposable sentence. *United States v. Jenkins*, 7 M.J. 504 (A.F.C.M.R. 1979).

The sentence of another accused at another trial is not normally proper evidence during the presentencing portion of a trial. *United States v. Hutchinson*, 15 M.J. 1056 (N.M.C.M.R. 1983), *death sentence rev'd on other grounds*, 18 M.J. 281 (C.M.A.), *cert. denied*, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984) (sentence of co-conspirator was not proper consideration during presentencing in capital case). *See also United States v. Ballard*, 20 M.J. 282 (C.M.A. 1985) (trial and appellate courts are not required to consider sentences of similar but unrelated cases). (It is noted that highly disparate sentences in closely related cases are considered by appellate courts.)

D. Representing the "BCD striker"

1. One perplexing problem is representing a client who desires to obtain a bad-conduct discharge. This is commonly known in the field as a "BCD striker" case. Counsel should make a good faith effort to make his client understand the hardships that can result from being discharged in that manner. If the client is insistent on pursuing such a course, counsel must be very careful for at least two reasons. First, there is the question of determining how counsel may ethically and professionally proceed in such a case. Secondly, an accused who gets such a discharge may later attempt to have it overturned by claiming ineffective assistance of counsel.

2. If the DC cannot dissuade the accused from such intended action, counsel must still do everything within reason to see that the accused's best case is presented at trial consistent with the accused's instructions. *United States v. Blunk*, 17 C.M.A. 158, 37 C.M.R. 422 (1967); *United States v. Freeland*, 19 C.M.A. 455, 42 C.M.R. 57 (1970). These cases indicate that the defense counsel is duty bound to present information to the court in extenuation and mitigation, and failure to do so will give rise to the claim of inadequate counsel. The Court of Military Appeals recommended that the defense counsel have the accused sign an affidavit, often referred to as the *Blunk* letter, indicating that the accused requests that the defense counsel present nothing in extenuation and mitigation inconsistent with the accused's desire for a BCD. The court further recommended that counsel retain this letter in his file in the event his representation is later challenged by the accused as inadequate. The court also indicated in *Freeland* that it is appropriate for the defense counsel to allow the accused to express a desire for a punitive discharge and question the accused concerning it during the trial proceeding. In *United States v. Drake*, 21 C.M.A. 227, 44 C.M.R. 281 (1972), the court indicated that in appropriate cases it is not improper for the defense counsel to argue for a BCD for the accused who has expressed a desire for one, so long as the record clearly shows that the argument by counsel is in essence a plea for leniency. Even if conceding the appropriateness of a BCD at the request of the accused, and even though the imposition of a BCD may in effect be a plea for leniency, the defense counsel should still argue for the minimum of other punishments (i.e., confinement, forfeitures, reduction, etc.). *See United States v. Weatherford*, 19 C.M.A. 424, 42 C.M.R. 26 (1970), where counsel conceded the BCD, but argued for no confinement or minimum confinement. N.M.C.M.R. has recently given very explicit instructions on the proper handling of BCD striker cases. In *United States v. Sharrock*, NMCM No 90-3841, 1991 CMR LEXIS 867 (June 19, 1991), the court was confronted with a situation where the defense counsel queried the accused on his desires for a discharge as part of an unsworn statement; counsel also brought out the fact that he had advised the accused that this was against his interest, had tried to talk him out of it, had been directed to offer no evidence in extenuation and mitigation, and then attached the *Blunk*

letter to the record of trial. The military judge further questioned the accused about his desires for a discharge. In ordering a rehearing on sentence, the court found that the conduct of counsel in trying to dissuade the accused and the accused's advice concerning presenting no evidence in extenuation and mitigation was simply irrelevant. The court went on to hold that questioning the accused about his desire for a discharge and an explanation of his understanding of the consequences would be sufficient, without going into the underlying dynamics of the process of attorney-client discussion of this decision. The military judge is permitted to ask questions to further clarify whether the accused truly desires a discharge and understands the lasting consequences of this decision. The *Blunk* letter should not be attached to the record of trial as an appellant exhibit or otherwise. In *United States v. Hunter*, NMCM No 91-1289, 91 CMR LEXIS 1466 (December 5, 1991), the court reemphasized this fact, seeking to halt what has until present been Navy-Marine Corps practice.

E. Tactical considerations of defense counsel

1. Even in a case in which there has been a pretrial agreement, the defense counsel has a duty to present extenuation, mitigation, and argument. Counsel may be able to secure a sentence lower than that contained in the agreement, and it is his or her duty to attempt to do so.

2. The accused's service record should be checked closely for favorable information (such as letters of commendation or appreciation, performance evaluations, and records of courses taken and schools attended).

3. One difficult task is to argue in regard to the quantum of punishment after the accused's guilt has been contested at length, and he has been found guilty in spite of his not guilty plea. Counsel must be resolved at this stage of the trial that the court has found the accused guilty, and that there is no longer any use in contesting his guilt at the trial level. Do not argue guilt or innocence at this stage of the trial. Such argument may militate against the accused.

4. Testimony of the accused: Sworn, unsworn, or silence? This basic decision as to which method to use will inevitably turn on the desire of the accused and the following three criteria: the demeanor of the accused, how well counsel can control him on the stand (or how well the accused can control himself), and what, if anything, the accused has to hide. The impact of an unsworn statement of an accused varies tremendously among individual judges and court members. However, there are three possible (and common) attitudes of the judiciary toward such statements:

a. It will be given the same weight as sworn testimony;

b. it will be given some weight, though very little; or

c. it will be given no weight and, in fact, offends the judge.

Counsel must remember that, regardless of the inclinations of a particular judge, what the judge is most apt to notice are these factors: (a) is the statement consistent with other evidence, and (b) what has the accused left out? Counsel would be foolish to think that the military judge will not notice, for instance, that the accused in his unsworn statement expressed no desire to return to duty or to go to sea if ordered.

Certain other considerations pertain in the selection of the proper use of statements or silence:

a. Total silence by the accused can be dangerous -- even a statement by counsel is better than such silence;

b. an unsworn statement before members can be dangerous, since they may wish to cross-examine; when told that they cannot do so, they are also reminded that an unsworn statement is "not evidence"; and

c. a sworn statement may be equally dangerous if the accused has something to hide or can be easily impeached.

5. Presenting the accused. Whenever possible, the accused should be "fleshed out" as much as possible, assuming that "control" considerations described above in section (4) do not dictate otherwise. A very cursory presentation of the accused, with no background information, is of little value in making him appear to be a real person. Members are often reluctant to give harsh sentences to "real people." In this same vein, counsel must remember his or her duty to make the accused comfortable in court. This includes the obligation of counsel to position himself or herself when questioning the accused so that the accused can comfortably speak to the military judge or members, and not just to counsel. On the other hand, defense counsel should remember that the more information he draws out of an accused, the more information an astute trial counsel has available upon which to cross-examine.

6. Assuming that the accused is going to testify under oath, and therefore be subject to cross-examination, counsel must decide whether to present this testimony before or after other extenuation and mitigation evidence. If the accused testifies first, the court cannot cross-examine him about matters later presented in his behalf. Counsel should remember that such evidence, if presented before the testimony of the accused, may provide considerable material,

and in fact the only material, from which the trial counsel may cross-examine the accused.

7. Counsel should be wary of the "professional" extenuation and mitigation witnesses who will always speak well of personnel they supervise. Such witnesses are easily impeached -- often by the use of evaluations which they themselves have completed and which are inconsistent with their own testimony.

1105 REBUTTAL AND SURREBUTTAL. R.C.M. 1001(d).

A. Trial counsel may offer evidence to rebut any matter presented by the defense counsel in extenuation or mitigation, even if it has arisen through an unsworn statement by the accused. *See, e.g., United States v. Hamilton*, 20 C.M.A. 91, 42 C.M.R. 283 (1970). In a case of potentially far-reaching implications for both trial and defense counsel, the Court of Military Appeals has further stated that the defense "must accept responsibility not only for specific evidence it offers in mitigation, but also for reasonable inferences which must be drawn from it." *United States v. Strong*, 17 M.J. 263, 266-267 (C.M.A. 1984). In this case, where the defense testimony implied that the accused had an outstanding military character, the trial counsel was properly allowed to correct this impression through inquiry into an inadmissible NJP. *But see United States v. Cleveland*, 29 M.J. 361 (C.M.A. 1990) (accused's unsworn statement that he felt he had served well was not a statement of fact, and evidence of prior uncharged misconduct was not admissible to rebut the claim). *See also United States v. Hamilton*, 20 C.M.A. 91, 42 C.M.R. 283 (1970) (prior convictions); *United States v. Oakes*, 3 M.J. 1053 (A.F.C.M.R. 1977) (performance ratings); *United States v. Blau*, 5 C.M.A. 232, 17 C.M.R. 232 (1954) (specific acts of misconduct); *United States v. Ledezma*, 4 M.J. 838 (A.F.C.M.R. 1978) (evidence that accused told supervisor that, if he found who had reported him, he would "get a contract on him"); *United States v. Pinkney*, 22 C.M.A. 595, 48 C.M.R. 219 (1974) [requests for administrative discharge (implicit in dictum)].

In an unsworn statement in *United States v. Britt*, 16 M.J. 971 (A.F.C.M.R. 1983), the accused portrayed his drug involvement as passive and reluctant, and the prosecution could rebut with extrinsic evidence of Britt's active drug involvement including uncharged misconduct. In *United States v. Oenning*, 20 M.J. 935 (N.M.C.M.R. 1985), it was permissible to introduce extrinsic evidence of nonjudicial punishment (not admissible under R.C.M. 1001(b)(2) because of the two-year limitation of JAGMAN, § 0133) to rebut a performance evaluation submitted by the defense. *Oenning* demonstrates the continuing significance of *Morgan*, whose impact has been diminished by R.C.M. 1001(b)(5).

JAGMAN, § 0141 explicitly limits its applicability to R.C.M. 1001 (b)(2). May evidence of nonjudicial punishment be introduced under R.C.M. 1001(d) when compliance with *Booker* cannot be established? *United States v. Irvin*, NMCM 84-3149 (N.M.C.M.R. 30 Oct 84), *petition denied*, 19 M.J. 258 (C.M.A. 1984), held that admission of such evidence was not abuse of discretion, relying on *Strong*. (It is noted that even evidence which has been suppressed due to constitutional violations may be admissible sometimes for impeachment. Mil.R.Evid. 304(b)(1) and 311(b)(1).)

B. Presenting evidence of the accused's character during presentencing is not normally constrained by Mil.R.Evid. 404(a) and 405(a) in the first instance (opinion or reputation testimony introduced by the defense first). R.C.M. 1001(b) explicitly permits the prosecution to introduce the accused's character first, to use documentary evidence in some categories, and to use specific instances in some categories. R.C.M. 1001(c) allows the defense very wide latitude for presenting evidence of the accused's character. Nevertheless, it may be argued that rebutting a defense character witness, who merely offers opinion or reputation testimony, is limited by Mil.R.Evid. 405(a) (contrary specific instances may only be explored intrinsically, and extrinsic rebuttal is limited to contrary opinion or reputation testimony). However, defense evidence of the accused's character is seldom presented so narrowly during presentencing, and recent case law has not highlighted distinctions between rebutting opinion or reputation testimony, rebutting other character evidence (for which Mil.R.Evid. 405(a) has been relaxed), and merely contradicting facts presented by an opponent. Indeed, the tendency has been to permit the prosecution a wide scope in rebutting impressions or inferences which may be drawn fairly from the defense evidence. The Air Force Court of Military Review, however, found plain error to exist where the trial counsel cross-examined a defense character witness with three instances of uncharged misconduct on the part of the accused in "rebuttal" to the witness' opinion of the manner in which the accused performed in a job-related environment. *United States v. Kitching*, 23 M.J. 601 (A.F.C.M.R. 1986).

C. In addition, where the defense has introduced affidavits, certifications, writings, etc., the formal rules of evidence are similarly relaxed for the prosecution. R.C.M. 1001(d). Indeed, there are several Court of Military Review decisions which suggest that the rules of evidence with regard to live testimony are also relaxed during this stage. *See, e.g., United States v. Boughton*, 16 M.J. 649 (A.F.C.M.R. 1983) (testimony of commander admissible in rebuttal during sentencing stage even though testimony was based on hearsay); *United States v. Stark*, 17 M.J. 778 (A.F.C.M.R. 1983) (evidence of on-duty marijuana usage was admissible to rebut mitigation evidence of good military character).

D. The defense in surrebuttal may rebut any rebuttal evidence offered by the prosecution.

E. Rebuttal and surrebuttal is subject to the discretion of the military judge.

1106 ARGUMENT AND INSTRUCTIONS

Following rebuttal and surrebuttal, counsel will be given an opportunity for argument. The law applicable to argument on sentence is fully explained in chapter XV of this text.

In a case with court members, an article 39a session is held to discuss instructions with regard to sentencing matters. *See United States v. Wheeler*, 17 C.M.A. 274, 38 C.M.R. 72 (1967); *Military Judges' Benchbook*, DA Pam. 27-9, 1982. When the instructions are decided upon and the court members return to the courtroom, argument on sentence is made by counsel for both sides. Following the presentation of arguments, the instructions are given to the court members. Upon receipt of instructions, the court closes for deliberation.

CHAPTER XII

ADMISSIONS, CONFESSIONS, AND THE RIGHT AGAINST SELF-INCRIMINATION

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CHAPTER XII

ADMISSIONS, CONFESSIONS, AND THE RIGHT AGAINST SELF-INCRIMINATION

1201 INTRODUCTION (Key Numbers 534, 1134 - 1139)

A. Requirements. Before a confession or admission of an accused may be admitted into evidence over defense objection, the following legal considerations must be addressed:

1. The substantive rights against self-incrimination as found in the fifth amendment and Uniform Code of Military Justice, Article 31;

2. the Article 31(b), UCMJ warning requirements;

3. the warning requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), as applied to the military by *United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (1967), and Mil.R.Evid. 305(d);

4. the voluntariness doctrine [*see* Mil.R.Evid. 304(e)(1)];

5. the rights to counsel as found in case law interpretations of the sixth amendment and the Uniform Code of Military Justice; and

6. the notice to counsel requirement set forth in Mil.R.Evid. 305(e).

B. Corroboration (Key Number 1115). A confession or admission will also require corroboration by independent evidence before it may be considered against the accused on the question of guilt or innocence. *See* Mil.R.Evid. 304(g).

1202 THE RIGHT AGAINST SELF-INCRIMINATION (Key Number 534)

A. The substantive rights

1. The fifth amendment to the U.S. Constitution provides:

"nor shall [any person] be compelled in any criminal case to be a witness against himself."

2. Article 31, UCMJ provides:

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) 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.

The statutory right against self-incrimination in the armed services stems from both article 31(a) and article 31(b). Article 31(b) requires that an interrogator warn a suspect or an accused of the nature of the accusation, of his right to remain silent, and of the consequences of speaking before the interrogator requests a statement.

B. The development of the right against self-incrimination

1. The constitutional right began as an outgrowth of religious persecution in England and found secular justifications later. The actual development was complex and resulted from numerous political and social conflicts. *See generally* L. Levy, The Origins of the Fifth Amendment (1968).

2. Article 31 was originally intended to restate the fifth amendment and common law, as well as to compensate for the presumed coerciveness of military interrogations due to the rank differential between the interrogator and suspect. The Court of Military Appeals has occasionally held article 31 to be broader in scope than the fifth amendment.

C. Scope of the right

1. Generally. Both the fifth amendment and article 31 protect an individual against "self-incrimination." When considering the question of self-incrimination, an attorney must determine both whether the consequence involved approximates a criminal penalty and whether the type of act involved is protected by the right against self-incrimination. *See* chapter XI for a discussion of self-incrimination issues at the presentencing phase of a court-martial.

a. Consequences

-- Fifth amendment. Under the Constitution, a criminal penalty must be involved. *United States v. Ward*, 448 U.S. 242 (1980) ("civil penalty," fine against an oil lessee levied upon filing required oil spill report with Coast Guard held not sufficient to trigger right). Thus, deportation, prison discipline proceedings, and other administrative proceedings are generally not consequences that trigger the fifth amendment. Generally speaking, neither is loss of employment or livelihood, although this may not be true for disbarment proceedings. The right against self-incrimination does apply at administrative proceedings where testimony could lead to criminal sanction. *E.g., Malloy v. Hogan*, 378 U.S. 1 (1964) (right upheld at state statutory hearing into gambling that could conceivably lead to criminal gambling charges). Further, waiver of an existing right against self-incrimination cannot be compelled by a threat of loss of livelihood. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (New York statute that divested political officials of their offices and forbade holding of office for five years upon refusal to testify or waive immunity before grand jury or other authorized tribune is violative of fifth amendment). "[T]he touchstone of the fifth amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the amendment forbids." *See generally* 8 J. Wigmore, *Evidence* 2256-57 (McNaughton Rev. 1961). Because of the unique nature of the armed services, most of the civilian problems in this area are rare or unknown.

b. The nature of the act. Both the fifth amendment and article 31 protect only a limited range of actions generally related to verbal expression. Putting on clothes or taking them off is, for example, unprotected. Nonetheless, the scope of coverage of the two rights differs significantly and is discussed below.

2. Fifth amendment (Key Numbers 1106, 1111)

a. The fifth amendment prohibits compulsory taking of incriminating verbal statements or soliciting unwarned incriminating statements when the warnings are required.

b. It may also prohibit compulsory production of incriminating papers held by an accused or requesting such evidence of an accused without proper warnings when warnings would be required for a verbal admission.

(1) The traditional rule was that papers were as privileged as oral admissions. *See, e.g., United States v. White*, 322 U.S. 694 (1944); *Boyd v. United States*, 116 U.S. 616 (1886). The Supreme Court has sharply curtailed the application of the privilege to documents by holding, in 1976, that it does not extend to personal "business" papers. *Andresen v. Maryland*, 427 U.S. 463 (1976) (where probable cause existed, seizure of business papers did not violate fifth amendment); *Fisher v. United States*, 425 U.S. 391 (1976) (tax records given to lawyer not protected).

(2) The fifth amendment privilege adheres to the person and not to the information that may incriminate him; a party is privileged from producing the evidence, but not from its production. Because this concept is difficult to apply, the extent to which the constitutional privilege now extends to personal papers, including diaries and letters, is unclear. It can be asserted that, if documents of this kind can be protected, they must be in the hands of the accused rather than his attorney or accountant. *In re Grand Jury Proceedings*, 632 F.2d 1033 (3d Cir. 1980) (attorney need not comply with subpoena to produce client's records because of right against self-incrimination). *Contra United States v. Couch*, 409 U.S. 322 (1973) (no fifth amendment violation in the summons of tax records regularly delivered to an independent accountant). The difference involves the application of the attorney-client privilege. If documents are protected in the hands of the client, they may be protected by the attorney-client privilege in the hands of the client's attorney. The attorney-client privilege section of this study guide discusses this subject in further detail.

c. Generally, the fifth amendment does not prevent the compulsory taking of handwriting and voice exemplars. *See, e.g., United States v. Dionisio*, 410 U.S. 1 (1973) (grand jury may compel creation of voice exemplars); *United States v. Mara*, 410 U.S. 19 (1973) (grand jury may order witness to furnish handwriting exemplars); *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting exemplar is an identifying physical characteristic, outside constitutional protection); *United States v. Wade*, 388 U.S. 218 (1967) (compelling accused to submit to fingerprinting, photography, measurements, to write or speak for identification, to assume a stance, or make a particular gesture does not become testimonial within the scope of the privilege against self-incrimination because required in a pretrial lineup).

d. The fifth amendment will not prohibit a suspect's being compelled to put clothes on for identification purposes. *United States v. Wade*, 388 U.S. 218 (1967); *United States v. Holt*, 218 U.S. 245 (1910).

e. The fifth amendment allows the compulsory taking of blood and urine samples unless the *Rochin* "shock the conscience" test is violated. *Rochin v. California*, 342 U.S. 165 (1952); *see also Schmerber v. California*, 384 U.S. 757 (1966). Such evidence is not considered a testimonial act, which is protected. Remember, though, that fourth amendment protections still must be considered when dealing with body fluids.

f. The fifth amendment allows some regulatory reporting schemes that have socially accepted purposes that are not principally prosecutorial [*e.g., California v. Byers*, 402 U.S. 424 (1971) (upholding state statute that required motorists involved in accidents to stop and give name and address)]; but prohibits others that are primarily for prosecution purposes [*e.g., United States v. Leary*, 395 U.S. 6 (1969) (prohibiting requirement to pay tax on drugs when the report renders the individual criminally liable)].

3. Article 31, UCMJ (Key Numbers 1106, 1107, 1109)

a. Article 31(a) prohibits compulsory self-incrimination.

b. Article 31(b) prohibits questioning of a suspect or an accused without first providing warnings as to the nature of the accusation, the right to remain silent, and the consequences of speaking.

c. Article 31 is potentially broader than the fifth amendment right against self-incrimination, partially due to the wording of article 31(a) ("may compel any person to incriminate himself" vs. "nor shall [any person] be compelled ... to be a witness against himself") and partially due to the requirement of article 31(b) that warnings be given before a statement can be taken. In the past, the word "statement" has been interpreted expansively by the Court of Military Appeals. Some examples are considered below.

(1) Historically, the Court of Military Appeals held that article 31 prohibited compulsory production of voice and handwriting exemplars or a request for their production made of a suspect without proper article 31(b) warnings. In *United States v. Lloyd*, 10 M.J. 172 (C.M.A. 1981), however, the court indicated that article 31 did not protect handwriting or voice samples. The accused had been asked to produce his military ID card so that his signature could be compared with possible forgeries. The court drew no distinction between presenting an already existing sample and making one on the scene. It seems safe to conclude that, because the court is leaning generally towards restricting the scope of article 31, there is no distinction to be made. *See also United States v. Akgun*, 19 M.J. 770 (A.C.M.R. 1984), *aff'd*, 24 M.J. 434 (C.M.A. 1987) (production of a voice exemplar does not violate the privilege against self-incrimination provided by the fifth amendment and Article 31, UCMJ); *United States v. Chandler*, 17 M.J. 678 (A.C.M.R. 1983),

petition denied, 18 M.J. 132 (C.M.A. 1984); *United States v. Harden*, 18 M.J. 81 (C.M.A. 1984) [a handwriting sample is not a "statement" triggering article 31(b) nor is it within the purview of article 31(a)].

(2) Article 31 may prohibit an unwarned vocal utterance made by a suspect in response to official questioning. The key word is "suspect." The article 31 right applies to anyone suspected of an offense, not merely to those guilty of an offense. *See, e.g., United States v. Williams*, 2 C.M.A. 430, 9 C.M.R. 60 (1953) (examiner's article 31 rights advisement was improper where he advised the accused that he had a right to remain silent only if his answers to questions asked would tend to incriminate or degrade him and that otherwise he was required to answer). *See also United States v. Hundley*, 24 C.M.A. 538, 45 C.M.R. 94 (1972) (article 31 warning improperly modified where interrogating agent advised suspect that, if he was not involved in the offense but was aware of information, he could be held responsible for withholding information). The question need not be incriminating to be barred. The key is that what is either being sought or what is a reasonable consequence of the interrogation would be incriminating. *See* Mil.R.Evid. 305(b)(2). *See also United States v. Pruitt*, 48 C.M.R. 495 (A.F.C.M.R. 1974) (officer conducting article 32 investigation of charges of wrongful sale of marijuana admittedly suspected witness at that investigation of being involved as a purchaser; witness should have been warned of his rights under article 31; therefore, his testimony was not admissible at the subsequent perjury court-martial of the witness). The original intent of the drafters of the UCMJ was to allow nonincriminating administrative questioning. Lederer, *Rights Warnings in the Military*, 72 Mil. L. Rev. 1, 33 (1976). The cases, however, hold otherwise.

(3) Article 31 allows display of external body characteristics. *See, e.g., United States v. Cain*, 5 M.J. 844 (A.C.M.R. 1978) (gold tooth); *United States v. Martin*, 9 M.J. 731 (N.C.M.R. 1979), *aff'd*, 13 M.J. 66 (C.M.A. 1982) (tooth impressions).

(4) Article 31 will not prohibit the involuntary furnishing of body fluid samples for use at criminal proceedings. *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983) (urine); *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980) (blood).

(a) In *Armstrong*, 9 M.J. at 374, C.M.A. held that the taking of blood samples is not the creation of evidence that is testimonial in nature and, hence, a compulsory taking of such samples is not protected by article 31. The accused in *Armstrong* was suspected of driving while intoxicated, thus causing an accident in which his passenger was killed. He was taken to an American military hospital where he was advised that he was suspected of driving under the influence of alcohol, that he had the right to remain silent, that he had the right to refuse to take a blood-alcohol test, but that, if he did refuse, his military driving

permit would be revoked. He was also told that he could be taken to a German hospital where a blood sample could be taken forcibly and later used against him in a German court. The court stated:

> [W]e conclude that, in enacting the compulsory self-incrimination provision of Article 31, Congress did not plan for blood samples to be covered by the privilege. Instead, the clearly manifested intent of Congress . . . was merely to afford to servicepersons a privilege against self-incrimination which paralleled the constitutional privilege. Accordingly, Article 31 did not apply to the taking of blood specimens from Armstrong since body fluids are not within the purview of the Fifth Amendment.

Id. at 382-83 [emphasis added].

(b) In *Armstrong*, Chief Judge Everett also expressed the view that article 31 was never meant to give any broader protections than the fifth amendment provides. He wrote: "Nothing in the wording of Article 31(a) reveals any intent to extend a serviceperson's protection against self-incrimination to include types of evidence that would not fall within the Fifth Amendment's purview." *Id.* at 380.

Judge Cook, joined by Judge Fletcher in his concurring opinion, would not associate himself with this holding. He did, however, agree that the taking of blood specimens is not protected by article 31.

(c) In *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983), the court extended the *Armstrong* rationale to urine samples, with Judge Cook concurring in Chief Judge Everett's opinion.

(d) The drafters of the Military Rules of Evidence intended that the taking of body fluid samples be treated as nontestimonial in nature and thus not protected by article 31. Although article 31 does not apply to the taking of body fluid samples, the search and seizure considerations found in Mil.R.Evid. 312(d) must be applied, although the production of a urine sample through normal elimination is not an "extraction." *See Murray v. Haldeman*, 16 M.J. at 74.

d. Article 31 does not apply to requests or orders to produce business and government records, for use as evidence or otherwise, when the record or writing is under an individual's control in a representative rather than a personal capacity, as when the writing is in the individual's control as a records custodian.

(1) The accused, in *United States v. Haskins*, 11 C.M.A. 365, 29 C.M.R. 181 (1960), ran the base Air Force Aid office. He was confined after he was discovered embezzling funds from the base theater where he worked part-time. Of necessity he was replaced in the aid office, and 34 loan ledger cards were found to be missing. He was asked to locate the cards, and did. The cards supplied evidence of embezzlement from the aid office. The Court of Military Appeals found that, at the time the accused was asked for the cards, he was not a suspect and that, in any event, he had a duty to return the government records to his replacement. Thus, article 31 did not apply.

(2) In *United States v. Sellers*, 12 C.M.A. 262, 30 C.M.R. 262 (1961), the accused, a captain who was the company unit fund officer, was reassigned within the battalion. He failed to turn over his records to his replacement and then went UA, disobeying orders to turn over the books to the executive officer. Knowing that the records were in the accused's car, the battalion commanding officer sent men to get the books. They told the accused's wife to open the car. The Court of Military Appeals held that, since the government has a right to its own records, no fifth amendment or article 31 privileges existed.

(3) The means of obtaining the records, of course, must be reasonable. Further, in the absence of case law to the contrary, it may be presumed that article 31 protects private papers. When government property is not held in a representative capacity, the rule relating to lawful custodians does not apply; a demand for production must be preceded by a complete article 31 warning or a search authorization. *See United States v. Jones*, 31 M.J. 189 (C.M.A. 1990).

e. Article 31 does not affect otherwise lawful searches although, in some cases, the "verbal acts" doctrine may be implicated. *See, e.g., United States v. Coakley*, 18 C.M.A. 511 40 C.M.R. 223 (1969) (request for identification from deserter who had just been apprehended not a violation of article 31); *United States v. Insani*, 10 C.M.A. 519, 28 C.M.R. 85 (1959) (suspect's consent to search not incriminating); *United States v. Dutcher*, 7 C.M.A. 439, 21 C.M.R. 747 (1956). If the search is accompanied by questions, article 31 and *Miranda* may apply.

f. Article 31 does apply to "verbal acts."

(1) A verbal act may be loosely defined as a physical act, the result of which is similar to a testimonial utterance. Verbal acts are sometimes referred to as "testimonial acts"; they are considered speech analogs and thus are "statements" within the meaning of article 31(b).

(2) A synthesis of the decisions

(a) Where a lawful search is being conducted and the suspect is merely required to cooperate and therefore lacks any discretion, article 31 does not apply. For example, in a search incident to a lawful apprehension, an order to the suspect to empty his pockets will not require the giving of article 31 warnings.

(b) Where a search is unlawful and the accused, without being warned under article 31, is asked to perform an act that incriminates him, the requirements of article 31 will have been violated. For example, if a search is a result of an illegal apprehension, an order to the suspect to empty his pockets will be illegal due to the mandates of both the fourth amendment and article 31, and the resulting evidence will be suppressed. *See, e.g, United States v. Kinane*, 1 M.J. 309, 311 n.1 (C.M.A. 1976); *United States v. Hay*, 3 M.J. 654, 656 (A.C.M.R. 1977) (emptying pockets violated article 31).

(c) Where a search occurs and the suspect is required to perform a discretionary act that will be incriminating, article 31 will apply. In a search of an individual suspected of drug possession, for example, an order to "take the drugs out of your pocket" may be barred by article 31. On the other hand, an act that is not incriminating or renders only preliminary assistance will not violate article 31. For example, after securing authorization to search a suspect's locker, CID agents tell the suspect to point out which locker is assigned to him. Article 31 is not violated if the identity of the locker assigned to the suspect is not the issue in question.

(3) The cases

(a) *United States v. Nowling*, 9 C.M.A. 100, 25 C.M.R. 362 (1958). The accused was suspected by an MP of being off base without a pass. The MP demanded Nowling's pass; he received from Nowling a pass which had another man's name on it. Charged with possession of an unauthorized pass, Nowling claimed that his article 31(b) rights had been violated by the request for the pass. The Court of Military Appeals held that producing the pass was equivalent to a verbal statement and was covered by article 31(b), because Nowling was a suspect at the time the MP demanded and received the pass.

(b) *United States v. Corson*, 18 C.M.A. 34, 39 C.M.R. 34 (1968). Believing that the accused possessed marijuana, a chief petty officer found the accused and said, "[Y]ou know what I want, give them to me. . . ." The accused turned the marijuana over to the chief petty officer. Article 31 warnings were held to be necessary because the chief petty officer suspected the accused at the time he asked for the marijuana.

(c) *United States v. Kinane*, 1 M.J. 309 n.1 (C.M.A. 1976). An order to a person suspected of having stolen blank ID cards to empty his pockets was held to be a fourth amendment and article 31 violation.

(d) *United States v. Taylor*, 5 C.M.A. 178, 17 C.M.R. 178 (1954). Having been told that the accused possessed marijuana, military police asked him to point out his clothes. He did so, and marijuana was found. The court held that article 31 applies to "any statement." Here, the accused was suspected of an offense and the "chase was too hot." Article 31 warnings were required. The court indicated that asking a person's name will not normally be incriminating. This may not be true, of course, in desertion cases. *But cf. United States v. Davenport*, 9 M.J. 364 (C.M.A. 1980) (statement as to suspect's identity not covered by article 31).

(e) *United States v. Morris*, 1 M.J. 352 (C.M.A. 1976). The accused was apprehended after an investigation of a break-in and theft at a hobby store. He and a friend had been seen pushing a car in the vicinity of the crime. When the investigating agent approached them and asked who owned the car, the appellant stated that he was the owner and subsequently orally consented to a search of the car. The court held that this acknowledgement of ownership or dominion and control over property does not constitute a "statement." The results in *Morris* may have been different if the accused had requested counsel. *In United States v. Burns*, 33 M.J. 316 (C.M.A. 1991), the accused consented to the search of various areas, but requested counsel and refused to make a statement. Investigator's subsequent questions asking for the identification of certain property were held to be violations of the accused's fifth amendment rights. A distinction must be made between granting consent to search and having property identified. Requesting consent to search property in which a suspect has an interest is <u>not</u> prohibited by a prior request for counsel, but asking a suspect to communicate information as to the location of the property is prohibited. *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981).

(f) *United States v. Whipple*, 4 M.J. 773 (C.G.C.M.R. 1978). The act of handing over a bag of cocaine and admitting being its possessor after a lecture to the entire crew urging crew members to "come clean" and join the drug exemption program, was a verbal act requiring article 31 warnings.

(4) <u>Regulatory reporting schemes</u>. The regulatory reporting requirements of the various military departments can be a troublesome area, as article 31 issues seem to abound.

(a) In *United States v. Heyward*, 22 M.J. 35 (C.M.A.), *cert. denied*, 479 U.S. 1011 (1986), the court held that an Air Force regulation that required airmen to report the drug abuse of other airmen was valid,

but the privilege against self-incrimination protected against a conviction for dereliction of duty for failure to make the required report where "at the time the duty to report arises, the witness to drug abuse is already an accessory or principal to the illegal activity." *Id.* at 37. *See also United States v. Hoff*, 27 M.J. 70 (C.M.A. 1988), where C.M.A. held that an accused's privilege against self-incrimination did not excuse him from reporting his shipmates' larceny of government property in which he was allegedly involved only as an accessory after the fact so that a specification alleging a failure to make appropriate disclosure under Navy Regulations should not have been struck; *and United States v. Kelleher*, 31 M.J. 701 (N.M.C.M.R. 1990), where a regulation requiring naval personnel to obtain a commander's approval before visiting or contacting a Communist country or establishment did not violate the fifth amendment. Compliance was necessarily required before the commission of any illegal act.

(b) In *United States v. Medley*, 33 M.J. 75 (C.M.A. 1991), the court refused to modify and extend the protection stemming from the *Heyward* decision. In *Medley*, the accused unsuccessfully argued that the ongoing drug activities of her social circles were so interrelated that it would have been impossible for her to report one incident without potentially incriminating herself with respect to the other incidents. The court stated:

> However, the possibility of touching off a chain reaction that might come back to bite her is not the litmus test for self-incrimination . . . (fact that "the information disclosed may focus attention on the reporting servicemember and may eventually lead to criminal charges being brought against him . . . alone does not invalidate the reporting requirement") . . . This classic duty not to tolerate malfeasance cuts to the very core of military leadership and responsibility. It is a duty with respect to others that clearly exceeds the duty of ordinary citizens.

(c) Another form of regulatory reporting is reflected in the regulations requiring a servicemember to show possession of a tax-exempt item or the authorized disposition of same. In *United States v. Lee*, 25 M.J. 457 (C.M.A. 1988), the court held that the regulations requiring servicemenbers to produce documentation showing continued possession or lawful disposition of duty-free goods could not be used by military police to have the accused's commander conduct a "show-and-tell" inquiry when the accused is a suspect at the time of the inquiry, and rights warnings were required prior to inquiry and questioning. *See also United States v. Williams*, 29 M.J. 112 (C.M.A. 1989); *United States v. Jones*, 31 M.J. 189 (C.M.A. 1990); *United States v. Hilton*, 32 M.J. 393 (C.M.A. 1991).

(5) Waiver. In *United States v. Smith*, 4 M.J. 210 (C.M.A. 1978), the accused was given an order to perform physical fitness training. He refused, feigning an ankle injury. He argued on appeal that the order was illegal because, if he had performed the training, he would have incriminated himself. The court stated that, on its face, the order was legal and not intended to obtain evidence. Therefore, by not asserting any right to refuse compliance, he had waived any rights he might have had. The holding in *Smith*, however, is a limited one. The court implies that preliminary article 31(b) warnings were not required because, at the time of the order to perform physical training, the accused was not suspected of an offense. Thus, the accused's failure to assert his right to remain silent was critical. Had he been a suspect, failure to assert his right to remain silent would not have mattered because the order would have had to be preceded by article 31(b) warnings.

4. Verbal acts and the problem of requiring identification

a. Few procedures are as common to military life as the requirement to identify oneself. Yet, the identification requirement in the case of a criminal suspect is a difficult question not yet resolved. Whether the request is for a verbal statement or for an ID card, the usual MP request could constitute a request for a statement within the usual meaning of article 31(b). Since an individual's identity does not usually involve an element of any offense, it is generally not within the ambit of article 31(b). *See United States v. Davenport*, 9 M.J. 364 (C.M.A. 1980) (asking for the name of an individual is not interrogation requiring article 31(b) warnings, even when the charge is making a false official statement by giving a false name). *See also United States v. Lloyd*, 10 M.J. 172 (C.M.A. 1981) (asking for ID card not interrogation); *United States v. Anderson*, 1 M.J. 246 (C.M.A. 1976); *United States v. Ziegler*, 20 C.M.A. 523, 43 C.M.R. 363 (1971); *United States v. Taylor*, 5 C.M.A. 178, 17 C.M.R. 178 (1954); *United States v. Jackson*, 1 C.M.R. 764, 767 (A.F.C.M.R. 1951).

b. In *United States v. Nowling*, 9 C.M.A. 100, 25 C.M.R. 362 (1958), the court stated that not every routine or administrative check of a servicemember's pass or identification card must be preceded by article 31(b) warnings. But, where the member is suspected of possessing a false pass or identification card, the request for production of the card must be preceded by appropriate warnings. *See also United States v. Meyers*, 15 C.M.R. 745 (A.F.B.R. 1984). The holding in *Nowling* has been criticized. *See, e.g., United States v. Earle*, 12 M.J. 795, 797 n.1 (N.M.C.M.R. 1981); *Whipple*, 4 M.J. at 773 (accused's turning of cocaine over to drug exemption officer in response to executive officer's speech was verbal act).

D. Immunity -- overcoming the proper exercise of the right against self-incrimination. *See* chapter XIV.

E. Self-incrimination before trial

1. Interrogations generally. Under the fifth amendment and article 31, every servicemember has a right to refuse to incriminate himself. The privilege is implemented through the rights warnings and the voluntariness doctrine.

2. Polygraph examinations. Examination by a "lie detector" is no different from any other form of interrogation. A suspect may not be compelled to participate. Defense counsel should note that polygraph activities often yield incriminating statements from suspects who are convinced they can "beat" the polygraph.

3. Nonjudicial punishment. While the right against self-incrimination applies to all military personnel regardless of forum, the exclusionary rule found in article 31(d) refers to "trial by court-martial." In *Dobzynski v. Green*, 16 M.J. 84 (C.M.A. 1983), the Court of Military Appeals recognized that nonjudicial punishment does not require use of rules of evidence or exclusionary rules. At least one Federal case suggests that the exclusionary rule does not apply at the article 15 hearing. *See Dumas v. United States*, 620 F.2d 247 (Ct.Cl. 1980) (fifth and sixth amendment rights applicable at a criminal trial do not apply at nonjudicial punishment hearing).

F. Self-incrimination at trial

1. Exercising the right against self-incrimination

a. The accused's right against self-incrimination can properly be exercised only if there is some chance for incrimination. Traditionally, incrimination under the fifth amendment has meant only a possibility of criminal penalty. *See, e.g., Chavez-Raya v. Immigration & Naturalization Service*, 519 F.2d 397 (7th Cir. 1975) (the right does not apply when only deportation can take place). *But see Gardner v. Broderick*, 392 U.S. 273 (1968) (a city charter provision that permitted discharge of police officers who refused to waive immunity from prosecution violated their privilege against self-incrimination).

b. Article 31(b) may apply at trial. A witness who begins to incriminate himself on the stand should be warned of his right to remain silent. *United States v. Milburn*, 8 M.J. 110 (C.M.A. 1979). *See, e.g., United States v. Howard*, 5 C.M.A. 186, 17 C.M.R. 186 (1954); Mil.R.Evid. 301(b)(2). With regard to article 31 warnings at article 32 hearings, *United States v. Pruitt*, 48 C.M.R. 495 (A.F.C.M.R. 1974) should be examined. In *Pruitt*, the court held that article 31 rights were required where the article 32 investigating officer suspected a witness (the accused) of being involved in drug sales as a purchaser. Additionally, in *United States v. Williams*, 9 M.J. 831 (A.C.M.R. 1980), the court held that a witness at an

article 32 investigation who is suspected of an offense must be advised by the investigating officer of his article 31 rights.

c. The right against self-incrimination may be raised by the witness. If a witness indicates that the answer to a question may tend to incriminate him, the military judge should carefully inquire into the basis of the assertion. *See* Mil.R.Evid. 301(c).

d. By taking the stand, an accused normally waives his privilege against self-incrimination with respect to the matters on which he testifies. Mil.R.Evid. 301(e). If a witness incriminates himself, he may be compelled to continue to testify so long as he is not in danger of further incrimination; that is, he may be cross-examined as to those offenses about which he has testified, and may be questioned about other relevant matters. *See United States v. Rogers*, 340 U.S. 367 (1951) (a witness who testified about her connections with the Communist Party could not properly invoke the privilege against self-incrimination as grounds for refusing to disclose the identity of the person to whom she delivered party records, when the disclosure would not present a reasonable danger of further incrimination); Mil.R.Evid. 301(d). In *United States v. Varcoe*, 46 C.M.R. 1282 (A.C.M.R. 1973), the court upheld denial of a defense motion to strike the testimony of the witness/drug purchaser because he invoked the right against self-incrimination when he refused to name persons to whom he passed some of the purchased drugs. The court held that the witness' exercise of the privilege concerned collateral matters affecting only his credibility. If an accused chooses to testify and, having done so, leaves the stand, does the right against self-incrimination prevent his recall to the witness stand without express consent? In *United States v. Newton*, 1 M.J. 654 (N.C.M.R. 1975), the court held that an accused could not be recalled without his express consent. In *United States v. Ray*, 15 M.J. 808 (N.M.C.M.R.), *petition denied*, 16 M.J. 177 (C.M.A. 1983), however, another panel of the court indicated that the *Newton* decision was overly broad and that the fifth amendment does not prevent the recall of the accused without his consent. The court reasoned that an accused's election to testify carries the possibility of thorough cross-examination which, however, should be circumscribed by the military judge's discretionary authority to control trial proceedings. Thus, the accused should not be subjected to overly repetitive questioning, harassment, or other abuses.

e. The right against self-incrimination is ultimately waived as to any particular offense by a guilty plea to that offense. Failure by the defense counsel to so advise an accused might invalidate a plea or result in a finding of inadequacy of counsel. *See generally United States v. Dunsenberry*, 23 C.M.A. 287, 49 C.M.R. 536 (1975).

2. Effects of the refusal of a witness to testify

a. If a witness exercises the right against self-incrimination, the witness is held to be unavailable for purposes of former testimony and certain hearsay exceptions. *See United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) (an article 32 case).

b. Striking direct testimony. If a witness has testified on direct examination, but refuses to testify on cross-examination, relying on the right against self-incrimination, the trial judge may have to strike the direct testimony. *See, e.g. United States v. Hill*, 18 M.J. 459 (C.M.A. 1984) (military judge properly struck testimony of defense witness who claimed fifth amendment privilege); *United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977) (failure of defense counsel to move that witness' testimony be stricken, after witness invoked privilege against self-incrimination, constituted ineffective assistance of counsel); *United States v. Colon-Atienza*, 26 C.M.A. 674, 47 C.M.R. 336 (1973) (failure of military judge to strike direct examination of a witness who invoked the privilege against self-incrimination on cross-examination concerning a relevant matter was error). If the matters to which the witness refused to testify are merely "collateral," however, the direct examination need not be stricken. *United States v. Varcoe, supra; United States v. Anderson*, 4 M.J. 664 (A.C.M.R. 1977) (witness' use of heroin was an issue collateral to the accused's defense of entrapment); *United States v. White*, 4 M.J. 628 (A.F.C.M.R. 1977) (no ineffective assistance of counsel where defense counsel failed to move to strike testimony related only to general credibility matters), *aff'd*, 6 M.J. 12 (C.M.A. 1978). *See United States v. Richardson*, 15 M.J. 41 (C.M.A. 1983) (questions asked of defense witness about unrelated drug dealings in order to attack credibility relating to a collateral matter). *Accord United States v. Williams*, 16 M.J. 333 (C.M.A. 1983); *United States v. Hunter*, 17 M.J. 738 (A.C.M.R. 1983); *United States v. Lawless*, 18 M.J. 255 (C.M.A. 1984). *See also* Mil.R.Evid. 301(f)(2).

3. Does the right against self-incrimination exist at the sentencing stage? Yes. A brief historical summary of the cases follows. In *United States v. Mathews*, 6 M.J. 357 (C.M.A. 1979), the court addressed the question of whether a military judge could question the accused concerning the admissibility, under *United States v. Booker*, 5 M.J. 238 (C.M.A. 1987), of an article 15 punishment. The court said:

> When there has been a plea of guilty, the segment of a trial designated as the extenuation and mitigation hearing obviously is subsequent to entry of the plea. Extenuation and mitigation hearings are not part of the procedure that give rise to a finding of guilty. A sentence does not go to prove that a crime has been committed but results from conviction of a crime. Self-incrimination therefore, stops

> as to the crime charged at the time the plea of guilty is accepted. We specifically find that Article 31, 10 U.S.C. § 831 is not applicable to extenuation and mitigation hearings except where evidence could be produced that would give rise to a charge being laid to a different crime.

6 M.J. at 358. The *Mathews* rationale was reaffirmed in *United States v. Spivey*, 10 M.J. 7 (C.M.A. 1980). A short while later, however, the Supreme Court apparently rejected that rationale in *Estelle v. Smith*, 451 U.S. 454 (1981) (there is no basis to distinguish between the merits and penalty phases of a capital murder trial so far as protection of the fifth amendment privilege is concerned). In *United States v. Sauer*, 11 M.J. 872 (N.M.C.M.R. 1981), the Navy-Marine Corps Court of Military Review held that the *Mathews/Spivey* holding had been overtaken by *Estelle*, and forbade military judges from questioning an accused concerning prior NJP's sought to be admitted in aggravation. In *United States v. Sauer*, 15 M.J. 113 (C.M.A. 1983), the Court of Military Appeals affirmed the Navy-Marine Corps Court's decision by holding that the fifth amendment affirmatively forbids a situation wherein an accused is forced to provide information that will increase his sentence. *See also United States v. Cowles*, 16 M.J. 467 (C.M.A. 1983) (waiver of privilege against self-incrimination by guilty plea does not extend to sentencing phase; extension of *Sauer*, but rendered unimportant by requirement to place accused under oath before providency inquiry).

G. Self-incrimination after trial

-- The general need for finality. An accused's conviction is not final until all appeals have been completed and the action executed. The right of an accused to assert the privilege against self-incrimination as to the offenses of which he has been convicted is retained until the conclusion of the final direct appeal. Article 69 appeals and collateral attacks normally are not treated as appeals for this purpose. *See, e.g., Mills v. United States*, 281 F.2d. 736 (4th Cir. 1960). A discussion of this principle as it relates to military prosecutions can be found in Lederer, *Reappraising the Legality of Post-Trial Interviews*, The Army Lawyer 12 (July 1977).

H. Article 31(c) -- degrading statements

1. Article 31(c) prohibits coercing a 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" that person. Article 31(c) is a survival of the common law privilege against self-infamy, tempered by the need for probative evidence.

2. In current practice, article 31(c) appears to be rarely employed. Reviewing the legislative history, there is reason to believe that issues of credibility

were viewed as "non-material." Thus, article 31(c) might be available but, at most, to prevent unnecessarily embarrassing impeachment of a witness. *See* Mil.R.Evid. 303. There appear to be no cases construing article 31(c).

3. One possible application of article 31(c), as restated in Mil.R.Evid. 303, is in the area of sex offenses. Congress found the information safeguarded by the "rape shield law" (Mil.R.Evid. 412) to be degrading. Consequently, facts within the lawful coverage of Mil.R.Evid. 412 is degrading within the ambit of article 31(c) and is arguably prohibited at all military tribunals, including article 32 investigation hearings.

1203 THE WARNING REQUIREMENT (Key Number 1109)

A. Historical development and policy

1. The fifth amendment. The warning requirements of the fifth and sixth amendments promulgated by *Miranda v. Arizona*, 384 U.S. 436 (1966) are the result of the Supreme Court's dissatisfaction with police interrogation techniques. The warnings are designed to interrupt the presumed inherent coerciveness of police stationhouse interrogations and to supply a useful defensive weapon to the suspect -- the right to counsel.

2. The article 31(b) warnings. The article 31(b) warnings were first enacted as an amendment to Article of War 24 in 1948. Although one reason for their enactment was to attempt to redress the imbalance in interrogations caused by rank differential, the primary reason for their original inclusion in the amendments to the Articles of War was the mistaken belief of their proponent that similar warnings were required in most states. *See* Lederer, *Rights Warnings in the Armed Services*, 72 Mil. L. Rev. 1 (1976).

3. Article 31(b) warnings predate *Miranda* warnings by more than 15 years. The article 31(b) warnings, unlike *Miranda*, do not include advice concerning the right to counsel. Article 31(b) warnings also have a different trigger than *Miranda* warnings: the statutory warnings are required for any interrogation or request for a statement from an accused or suspect, while the *Miranda* warnings come into play when the interrogation is custodial; that is, when the accused is in custody or deprived of freedom of action in any significant way.

B. Content of the warning

1. Fifth amendment. If the *Miranda* warning requirement applies, the accused must be told that he has a right to remain silent; that anything he says may be used against him in court; that he has a right to a lawyer during the

interrogation and that he may obtain a civilian lawyer, at his own expense, or, if the suspect cannot afford a lawyer, a lawyer will be appointed at no expense to him.

2. Article 31(b)

a. General. No person subject to the UCMJ may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing that individual 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. Art. 31(b), UCMJ.

b. The nature of the offense. The purpose of requiring that an accused or suspect be informed of the nature of the offense is to orient him about the accusation so he can intelligently decide whether to answer questions concerning it. *United States v. Johnson*, 5 C.M.A. 795, 19 C.M.R. 91 (1955). It is not necessary to delineate the details of the accused's alleged misconduct with technical nicety in order to adequately inform him of the nature of the charge being investigated. It suffices if the accused is made aware of the general nature of the allegations involved.

(1) *United States v. Nitschke*, 12 C.M.A. 489, 31 C.M.R. 75 (1961). The accused was involved in an automobile accident in Germany, killing a pedestrian. Because the accused had been drinking, he was asked by a CID agent to give a blood sample -- which was supplied. The agent did not tell the accused that he had killed someone because a local doctor advised against it, in view of the accused's mental state. The accused respectfully stated that he must have killed someone. The court found that the agent did not lie, but simply omitted the fatality, and that, in view of all the circumstances, the accused sufficiently knew the nature of the offense. Particularity is unnecessary. All the accused needs to know is the general nature of the offense.

(2) *United States v. Willeford*, 5 M.J. 634 (A.F.C.M.R.), *petition denied*, 6 M.J. 87 (C.M.A. 1978). Investigators suspected the accused of two housebreakings at a women's barracks, both on the same night and in the same building -- but in different rooms. One incident involved a rape; the other, an indecent exposure with a different victim. An investigator properly advised Willeford about the suspected rape, but failed to mention the indecent exposure incident. Willeford was then asked about both events. The court held that, as to the indecent exposure, the warning was deficient.

(3) *United States v. Quintana*, 5 M.J. 484 (C.M.A. 1978). The accused was advised that he was suspected of larceny of ship's store funds, but not that he was also suspected of wrongful appropriation of the same funds during

an earlier period. The court held that the warning adequately informed the accused that "misuse" of the fund was the object of the investigation.

(4) In *United States v. Erie*, 29 M.J. 1008 (C.M.A. 1990), the accused was given rights warnings for the use of hashish and cocaine. The Army court said this was sufficient to cover later charges for distribution of both drugs. The court reasoned that the investigators were focused on these controlled substances, and the rights warnings had oriented the accused to that fact. The court further stated that the legal sufficiency as to the nature of the accusation will be analyzed by a totality of the circumstances approach.

c. The right to remain silent

(1) A statement obtained from an accused or suspect in violation of the right to remain silent is inadmissible, even if the accused or suspect knew he had the right despite the lack of warning. Proof of warnings and voluntariness are two distinct requirements placed upon the prosecution before it may introduce an incriminating statement. *United States v. Dohle*, 1 M.J. 223 (C.M.A 1975).

(2) The right to remain silent is absolute. A warning that the accused has the right to remain silent only if his answers would tend to incriminate him, and that otherwise he is required to answer, is a violation of article 31(b). *United States v. Williams*, 2 C.M.A. 430, 9 C.M.R. 60 (1953); *United States v. Murray*, 11 C.M.R. 495 (A.B.R. 1953). *See also United States v. Hundley*, 24 C.M.A. 538, 45 C.M.R. 94 (1972). In *Hundley*, the accused was ultimately charged with riot, assault, and involuntary manslaughter. After having been properly warned by an investigator, the accused was told that, if he was not involved and refused to give a statement, he could be held responsible for interfering with the investigation. The court held that the agent's statement modified the original warnings and rendered them improper. A second statement (taken three days after the first) was found, in the absence of convincing evidence to the contrary, tainted by the first. At the second session, the statement taken during the first was left on the table before the accused. In *United States v. Peebles*, 21 C.M.A. 466, 45 C.M.R. 240 (1972), the accused was suspected of larceny and murder. CID agents told him that, if he were not involved and withheld knowledge, he could be an accessory after the fact and could receive 300 years in jail. Since article 31 rights depend only on whether the individual is a suspect, and not on whether he is guilty, the resulting confession was held involuntary.

d. Consequences of speaking. The individual must be told that any statement made by him may be used as evidence against him. Failure to add the words "in a trial by court-martial" will not necessarily render the warnings ineffective. *United States v. O'Brien*, 3 C.M.A. 325, 12 C.M.R. 81 (1953). The

warning, however, may be negated by further comments of the interrogator. A warning that leads an accused or suspect to believe that a statement would be used only for a limited purpose other than a trial by court-martial may violate article 31. However, an accused need not be told that his statement will be used against him. *United States v. Goldman*, 18 C.M.A. 389, 40 C.M.R. 101 (1970). *See also United States v. Erie, supra.*

(1) In *United States v. Green*, 15 C.M.A. 300, 35 C.M.R. 272 (1965), CID agents warned the two defendants properly, then granted a request that they be permitted to speak together privately. They were allowed to use a "bugged" room. The court held that, in effect, the agents negated the warnings by their conduct in promising confidentiality.

(2) In *United States v. Hanna*, 2 M.J. 69 (C.M.A. 1976), military investigators unsuccessfully questioned the accused for some time. Finally, one of the investigators, who was playing the "good guy" role, put his chair close to the accused and said "between you and me, did you do it?" The accused admitted his involvement in several arsons. The court held that this promise of confidentiality negated the warnings. Two questions must be asked in such cases: Can the statement be construed as a pledge?; and, what impact did the investigator's statement have on the accused?

(3) *See also United States v. Churnovic*, 22 M.J. 401 (C.M.A. 1986) (promise of immunity: "XO confirmed, the guy would not get in trouble") from prosecution in return for a confession renders the statement involuntary, as it operates to deprive suspect or accused of the mental freedom either to speak or to remain silent).

e. Rights to counsel (*See* § 1204, *infra*) (Key Number 1111)

C. Who must warn?

1. Fifth amendment. Government agents (police, FBI, Secret Service, etc.) must give warnings when the suspect is in custody.

2. Article 31

a. Persons not subject to the UCMJ

(1) Generally, any military member who interrogates a military suspect about an offense under the UCMJ must give article 31(b) warnings. Civilian police or investigators also must give article 31(b) warnings if they are acting in furtherance of a military investigation or the civilian investigation has merged into the military one. *See* Mil.R.Evid. 305(h). As a general rule, however, persons not

subject to the UCMJ have no duty to warn under article 31(b). In *United States v. Lonetree*, 31 M.J. 849 (N.M.C.M.R. 1990), civilian intelligence agents were not required to read art. 31 rights to the accused who was suspected of espionage. The court reasoned that the civilian investigation had not merged into an indivisible entity with the military investigation. Further, the court stated the civilian investigators were not acting in furtherance of, or as agents of, the military.

(2) In *United States v. Kellam*, 2 M.J. 338 (A.F.C.M.R. 1976), the accused, suspected of stealing stereo equipment, was advised of his rights by Air Force investigators and requested counsel. He was allowed to leave. A local deputy sheriff accompanied military investigators to the residence of the accused's girlfriend, where they hoped to obtain information concerning the stolen property. While the military investigators were inside talking to the accused's acquaintances, the civilian deputy obtained an inculpatory statement from the accused. The court held that the deputy's role in the critical stage of the investigation was substantial and was solely designed to further the military investigation. He was, therefore, bound by the accused's earlier request for counsel, and the government was prohibited from using the results of the deputy's improper interrogation.

(3) In *United States v. Jones*, 6 M.J. 226 (C.M.A. 1979), German authorities were not required to give warnings when their only connection with military authorities consisted of the latter making the accused available for interrogation. *See, e.g., United States v. Ravine*, 11 M. J. 325 (C.M.A. 1981). *United States v. Coleman*, 25 M.J. 679 (A.C.M.R. 1987), *aff'd*, 26 M.J. 451 (C.M.A. 1988), *cert. denied*, 109 S.Ct. 850 (1989).

(4) In *United States v. Quillen*, 27 M.J. 312 (C.M.A. 1988), the Court of Military Appeals opined that a civilian detectives was an agent of the military and should have given rights warnings to a soldier suspected of shoplifting. The court stated "The detective was an 'instrument of the military' whose conduct in questioning the suspect was at the behest of military authorities and in futherance of their duty to investigate crime."

(5) Mil.R.Evid. 305(h)(2) provides that, in interrogations conducted abroad by agents of a foreign government, the mere presence of American military personnel will not trigger article 31(b). Similarly, neither the fact that American personnel acted as interpreters nor that they took steps to mitigate harm to the accused will alter the character of the interrogation.

b. Unofficial interrogations

(1) Official questions. The phrasing of article 31(b) suggests that any member of the armed services attempting to question a suspect or accused must first give article 31(b) warnings. Case law, however, has sanctioned a number of exceptions to this literal interpretation of the statute.

(2) The *Duga* rule. In *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981), with Chief Judge Everett writing the opinion, the Court of Military Appeals set out the current standard for determining who is required to give article 31(b) warnings. Without disregarding the position of authority test, the court reviewed the background of article 31 and stated:

> Therefore, in light of Article 31(b)'s purpose and its legislative history, the Article applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. Accordingly, in each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation. Unless both prerequisites are met, Article 31(b) does not apply.

Id. at 210 [citations and footnote omitted].

In *Duga*, the two prerequisites had not been met. The questioner, a military policeman friend of the accused, had simply been asked to keep his eyes and ears open; hence, he was not acting in an official capacity. The conversation was purely casual, therefore the second prerequisite was not met. The *Duga* rationale was applied in *United States v. Barrett*, 11 M.J. 628 (A.F.C.M.R. 1981), where it was held that, even conceding the officiality of inquiries made by a higher ranking fellow security guard, the accused in no way perceived the conversation to be official interrogation or anything other than a casual inquiry. *See also United States v. McDonald*, 14 M.J. 684 (A.F.C.M.R. 1982) (casual conversation with security policeman friend did not require article 31 warnings); *United States v. Martin*, 21 M.J. 730 (N.M.C.M.R. 1985) (*Duga* applied to admit statements to victim, acting under direction of Naval Investigative Service agents, confirming the accused's acts of indecent assault).

c. Defining officiality. Normally, a superior in the immediate chain of command of the suspect subordinate will be presumed to be acting in a command disciplinary function and, thus, be "official" for purposes of necessitating

article 31(b) warnings. In *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990), however, the Court of Military Appeals wrestled with the issue of whether the operational nature of questioning by a superior requires warnings. *Loukas* was an aircraft crewman who was having hallucinations in-flight when he was asked by his crew chief whether he had taken any drugs. Loukas replied he had taken cocaine the night before. No article 31(b) warnings were given. The court held that the operational nature of the question does not equate to official capacity as required for warnings; rather, the interrogation need in some way be connected with a criminal justice or disciplinary purpose. It is unclear at this point whether *Loukas* is fact-specific or whether the criminal justice/disciplinary purpose is now a prerequisite to a finding of official capacity or the existence of an interrogation, thus requiring article 31(b) warnings. *United States v. Good*, 32 M.J. 105 (C.M.A. 1991) is good reading as the court tries to provide a legal analysis to be utilized in determining whether rights warnings are required. The court also builds on the *Loukas* officiality test by stating, "When the questioning is done by a military supervisor in the suspects' chain of command, the government must rebut a strong presumption that the questioning was done for disciplinary purposes."

d. Persons subject to the UCMJ -- specific examples

(1) "Personal" questioning by those not in an official capacity. Rights warnings are not required when the questioning is done by an individual not in a position of authority who is acting as a private citizen. The leading case in the private capacity area is *United States v. Trojanowski,* 5 C.M.A. 305, 17 C.M.R. 305 (1954). In *Trojanowski*, the accused admitted a barracks theft after the victim hit him and threatened to continue to beat him if he failed to return the missing wallet and money. The court held that the victim, another private, was acting in a personal capacity and did not have to give warnings prior to his request for the admission. However, the beating was in violation of article 3l(a), which prohibits obtaining a statement through the use of coercion; thus, the resulting evidence was held inadmissible at trial. A number of cases have discussed this joint article 31(a)/article 31(b) issue. *See, e.g., United States v. Johnson,* 5 C.M.A. 305, 17 C.M.R. 305 (1954). *Cf. United States v. Carter*, 15 C.M.A. 495, 35 C.M.R. 467 (1965) (requirement to surrender stolen property viewed as a search and seizure issue rather than a testimonial act problem). The coercion is usually the critical issue and renders the resulting statement involuntary and inadmissible.

(2) Defense counsel. In *United States v. Milburn*, 8 M.J. 110 (C.M.A. 1979), the court concluded that, in some cases, defense counsel may have an ethical obligation to warn a witness of his article 31(b) rights. The accused in *Milburn*, who at the time had no lawyer, was interviewed by the defense counsel for one Ellis. Milburn made several incriminating admissions during the interview. Later, Milburn was called to testify as a witness for Ellis. Still unrepresented by counsel, Milburn gave testimony that included more incriminating admissions.

Neither Ellis' defense counsel nor the military judge gave any warnings to Milburn. Milburn's testimony was later used against him at his own trial. In reversing the conviction, the court emphasized that, as an officer of the court, Ellis' defense counsel had an ethical duty to warn Milburn of his article 31(b) rights. The court also noted that Milburn was unsure of his potential criminal liability and that, at one point, he attempted to obtain Ellis' lawyer for himself. *Milburn* could present military defense counsel with an ethical dilemma: whether to warn the witness and risk losing exculpatory evidence; or omit the warnings and possibly be accused of unethical conduct. To some extent, the problem in *Milburn* has been solved. Mil.R.Evid. 301(b)(2) provides that the military judge may give article 31(b) warnings to apparently uninformed witnesses. Also, under R.C.M. 704(e), the defense has a mechanism for obtaining immunity for defense witnesses. Thus, a defense counsel who gives article 31(b) warnings will not invariably "lose" the testimony that might have been available had the witness not been warned.

(3) Trial counsel. In *United States v. Carter*, 4 M.J. 758 (A.C.M.R. 1977), *petition denied*, 5 M.J. 155 (C.M.A. 1978), the trial counsel was not required to give warnings during an interview with a government witness who attempted to bribe him. The court reasoned that the interview was not an "interrogation."

(4) Physicians. The common law doctor-patient privilege is inapplicable to the military. Mil.R.Evid. 501(d). Furthermore, the law of the forum determines the application of the privilege. Thus, if a servicemember should consult a doctor in a jurisdiction with a doctor-patient privilege, such a privilege would be inapplicable if the doctor were called as a witness before a court-martial. *See* analysis to Mil.R.Evid. 501. The traditional test as to whether article 31 warnings were necessary has been whether the physician was acting purely in a medical capacity or was acting in a disciplinary role. The Court of Military Appeals has held that a physician who questions an individual solely to obtain information upon which to predicate a diagnosis, so that he can prescribe appropriate medical treatment or care for the individual, is not performing an investigative or disciplinary function, nor is he engaged in perfecting a criminal case against the individual. As such, the doctor's questions are not within the reach of article 31, and the doctor may be called to testify not only as to his medical opinion, but also as to the specific answers given by the accused or suspect to his questions.

-- In *United States v. Fisher*, 24 C.M.A. 557, 44 C.M.R 277 (1972), the accused was brought into the emergency room with respiratory depression. The court held that it was proper for the doctor to question him without warning the accused of his rights under article 31. The accused was subsequently charged with use of cocaine. *See also United States v. Loukas, supra.*

(5) Article 32 investigating officer. Rights warnings must be given to a witness who is a suspect. *See United States v. Williams*, 9 M.J. 831 (A.C.M.R. 1980).

e. Psychiatrists

(1) The rules applicable to physicians, stated above, also apply to psychiatrists. Thus, psychiatrists need not administer article 31(b) warnings to patients when they are asking questions for diagnostic purposes. The tension between the right against self-incrimination and the presentation of psychiatric evidence by the defense at trial is substantial, particularly in the military -- which lacks a doctor-patient privilege. Having been given notice of a psychiatric defense, the prosecution will usually desire to have the accused submit to an examination by a government psychiatrist. To allow the accused to refuse to cooperate would seem to create an unsupportable and unfair burden for the prosecution, while forcing cooperation would seem to nullify the right against self-incrimination by providing the government with information which it could introduce in its case-in-chief. In the civilian courts, this problem has yet to be adequately dealt with, although a statutory privilege occasionally resolves the matter when dealing with a question of competency to stand trial rather than competency at the time of the offense. *See, e.g.*, 18 U.S.C. § 4244 (1982). A limited waiver rule has arisen in most of the civilian jurisdictions. *See, e.g.*, Fed. R. Crim. P. 12.2(c). *See also United States v. Cohen*, 530 F.2d 43 (5th Cir. 1976); *Karstetter v. Cardwell*, 526 F.2d 1144 (9th Cir. 1976); *United States v. Barrera*, 486 F.2d 333 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); *United States v. Mattson*, 469 F.2d 1234 (9th Cir. 1972), *cert. denied*, 410 U.S. 986 (1973); *United States v. Julian*, 469 F.2d 371 (10th Cir. 1972); *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1971); *United States v. Albright*, 338 F.2d 719 (4th Cir. 1968); *Lewis v. Thulemeyer*, 538 P.2d 441 (Colo. 1975); *Noyes v. State*, 516 P.2d 1368 (Okla. 1973). *But see United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975).

(2) A substantial number of critical comments have been engendered because of this tension. *See, e.g.*, Note, *Protecting the Confidentiality of Pretrial Psychiatric Disclosures: A Survey of Standards*, 51 N.Y.U. L. Rev. 409 (1976); Arsonson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?*, 26 Stan. L. Rev. 55 (1973); Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 Harv. L. Rev. 648 (1970); Danforth, *Death Knell for Pretrial Mental Examination? Privilege Against Self-Incrimination*, 19 Rutgers L. Rev. 489 (1965).

(a) Mil.R.Evid. 302 resolves this tension by providing that an accused, who has been examined to determine his mental status under R.C.M. 706, has a privilege to prevent his statements and any derivative evidence from being used against him at trial. The privilege may be claimed

regardless of whether rights warnings were given. The accused may, of course, waive the privilege by first introducing such statements or derivative evidence. *See* Yustas, *Mental Evaluations of an Accused Under the Military Rules of Evidence -- An Excellent Balance*, The Army Lawyer 24 (May 1980); *United States v. Littlehales*, 19 M.J. 512 (A.F.C.M.R. 1984), *aff'd*, 22 M.J. 17 (C.M.A. 1986) (derivative evidence does not include interviews by trial counsel with examining psychiatrist where no attempt is made to gain access to statements given by accused to psychiatrist). Note, however, that a member of the R.C.M. 706 board may still testify for the prosecution as to the board's conclusions regarding the mental state of the accused and the reasons therefore if expert testimony offered by the defense regarding the mental condition of the accused has first been received in evidence. Mil.R. Evid. 302(b)(2). *See United States v. Bledsoe*, 26 M.J. 97 (C.M.A. 1988) (trial counsel was allowed to introduce evidence relating to accused's mental state in its case-in-chief where defense counsel alerted members to this issue during voir dire and the accused was neither surprised nor prejudiced).

(b) Confidentiality and the AIDS virus. *See* chapter VI.

f. Undercover agents. Generally, undercover agents are not required to warn their "target" of his rights. *United States v. Hoffa*, 385 U.S. 293 (1966). Undercover personnel, civilian or military, are usually either law enforcement agents themselves or working for law enforcement agencies. Few people would expect an undercover agent making a drug buy to first interrupt the seller and inform him of his rights. Civilian cases escape the military statute, and thus the problem, because *Miranda v. Arizona* applies only to custodial interrogation, while article 31 applies to all interrogations of a suspect or an accused by a military member. While the *Miranda* rationale, that police stationhouse interrogation is inherently coercive, is inapplicable to undercover agent situations, basic questions of statutory interpretation and policy apply. In *Illinois v. Perkins*, 110 S.Ct. 2394 (1990), an undercover government agent was placed in the cell of an accused, who was incarcerated on charges unrelated to the undercover agent's investigation. The respondent made statements that implicated him in the crime the agent sought to solve. The court opined that an undercover law enforcement officer posing as a fellow inmate is not required to give *Miranda* warnings before asking questions that may elicit an incriminating response. A key point in this case was that the accused had not been charged, so the analysis was from a fifth amendment vice sixth amendment perspective. Furthermore, under the sixth amendment, counsel warnings are required before an indicted accused who has retained an attorney can be interrogated about the offense for which he was indicted. *Massiah v. United States*, 377 U.S. 201 (1964) (improper, after indictment of defendant, to bug co-defendant's car without knowledge of defendant to obtain incriminating statements). *Massiah* applies to bugging situations and undercover interrogations.

(1) As previously noted, the court, in *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981), adopted a two-part test for determining whether article 31 warnings must be given. Unless the questioner is acting in an official capacity and the person questioned perceives that something more than a casual conversation is involved, the article 31 warning requirement will not be triggered. As a practical matter, *Duga* means that most confidential informants will not be required to give article 31 warnings before questioning their target. *Duga* brought military practice in this area in line with the prevailing Federal rule. *See* discussion of *Duga, supra*. *See also United States v. Hoffa, supra*.

(2) Care must be taken to distinguish between the use of undercover agents or informers to obtain inculpatory statements before and after the accused has been arraigned and has retained a lawyer. The Supreme Court has put constitutional limitations on the latter. *Massiah v. United States, supra*. This is especially true where the accused is confined awaiting trial. Governmental activities of this nature may result in a denial of the effective assistance of counsel. In *United States v. Henry*, 447 U.S. 264 (1980), government agents told an informant, an inmate confined in the same cell block as the accused, to be alert to any statements made by him but not to initiate any conversations. The informant, who was paid for his services, reported certain incriminating statements made by the accused. The court ruled that the statements were inadmissible because the accused was in custody when the statements were made, and the government deliberately created a situation likely to induce an incriminating statement. Such actions by the government interfered with the accused's sixth amendment right to the assistance of counsel. In support of the *Massiah* rationale are *United States v. Lowry*, 2 M.J. 55 (C.M.A. 1976) and *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976). *Cf. Weatherford v. Bursey*, 429 U.S. 545 (1977) (sixth amendment does not establish a per se rule forbidding undercover agent from meeting with defendant's counsel).

g. Chaplains. Chaplains are generally not required to warn persons whom they are counseling. In *United States v. Richards*, 17 M.J. 1016 (N.M.C.M.R. 1984), the accused claimed that the chaplain to whom he admitted crimes should have warned him of his article 31 rights once she suspected him of an offense. The court held that there was no requirement for the chaplain to warn because the communications were privileged (the accused waived the privilege by asking that the chaplain report the crimes to Navy authorities).

D. Who must be warned?

1. Fifth amendment -- suspects in custody. *Miranda* and its military analogue, *United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (1967), indicate that both warnings of the right against self-incrimination and rights to counsel attach when an individual is involved in a "custodial interrogation." The difficulty has been in determining what constitutes such an interrogation.

2. Article 31(b) applies to "an accused or a person suspected of an offense."

a. Suspects or accused persons

(1) In *United States v. Good*, *supra*, the court explains that a servicemember's status as a suspect is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember questioned committed an offense. The court went on to recognize the subjective standard that courts historically utilized in determining whether one was a suspect, but opined the better approach is that of "a reasonable man" objective analysis utilized in *Berkmer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138 (1984). *See also Pennsylvania v. Burder*, 488 U.S. 9, 109 S.Ct. 205 (1988).

(2) In *United States v. Tibbetts*, 1 M.J. 1024 (N.C.M.R. 1976), an NIS special agent was called to a crime scene to investigate an aggravated assault. After receiving a description of the assailant and the vehicle used by him, the investigator located the accused. The accused matched the description of the assailant given by the victim, and was interrogated, but the agent did not give rights warnings until after the accused had made several incriminating remarks. The investigator testified that he failed to give warnings because he did not initially consider the accused a suspect. The court, however, held that the agent's subjective belief was not dispositive. Rather, on the facts of the case, a reasonable investigator should have considered the accused a suspect who was entitled to article 31 warnings. Accordingly, the accused's initial statements were suppressed, along with a subsequent statement, which was held to be "fruit of the poisonous tree." *See also United States v. Morris*, 13 M.J. 297 (C.M.A. 1982).

b. Imputed knowledge. Suspicion of the accused held by some government agents will not be imputed to other government agents. *See United States v. Dickenson*, 6 C.M.A. 438, 20 C.M.R 154 (1955). *Dickenson* involved a repatriated American prisoner of war who was suspected of offenses by counterintelligence officers in the United States, but not in Japan where the questioning took place. The court stated that "agency should not be confused with the chain of command. . . ." *Id.* at 444, 20 C.M.R. at 160. The court's opinion may be dictum, however, in view of its alternative finding that the only omission in the article 31 warnings given the accused by the counterintelligence officers was the advice on suspicion of the offense. Such omission was harmless because of the accused's knowledge of the officers' suspicion from the surrounding circumstances and the advice of the Red Chinese before repatriation. *See also United States v. Morris*, 13 M.J. 297 (C.M.A. 1982). *Cf. United States v. Brown*, 48 C.M.R. 181 (A.C.M.R. 1973) (failure of MP desk sergeant to tell CID agents of accused's request for counsel held not binding on CID). Imputing suspicion of one government agent to another

should be distinguished from that of a sixth amendment request for counsel that may be imputed to other government agents. *United States v. Simmons*, 11 M.J. 515 (N.C.M.R.), *petition denied*, 11 M.J. 409 (C.M.A. 1981) (statement not admissible where inexperienced 17-year-old, after twice telling military police he wanted to speak to a lawyer, was questioned by a Naval Investigative Service agent who had no knowledge of the prior questioning, and gave a statement after being given full warnings).

c. Suspicion arising during interrogation. When suspicion arises during an investigation, the mandate of article 31(b) must be followed. *See, e.g., United States v. Doyle*, 9 C.M.A. 302, 26 C.M.R. 82 (1958) (investigation into embezzlement of "United Success Drive" funds lasted over a number of months before a lieutenant was suspected). *See also United States v. Ravenel*, 26 M.J. 344 (C.M.A. 1988).

d. In order for one to be a suspect within the meaning of article 31(b), the suspicion must have crystallized to such an extent that a general accusation of some recognizable crime can be framed. *United States v. Haskins*, 11 C.M.A. 365, 29 C.M.R. 181 (1960) (accused was obviously guilty of poor records management, but questioner had no reason to believe a theft of funds was involved). *See also United States v. Lavine*, 13 M.J. 150 (C.M.A. 1982).

E. When must the warnings be given?

1. Interrogation. The general rule is that warnings must be given when questioning designed to elicit an incriminating response takes place. Mil.R.Evid. 305(b)(2) defines "interrogation" as including any formal or informal questioning in which an incriminating response is either sought or is a reasonable consequence of such questioning. The drafters state, in the analysis, that interrogation encompasses more than just the putting of questions to an individual. For discussions of "interrogation" and conversation that may be the functional equivalent, compare *Rhode Island v. Innis*, 446 U.S. 291 (1980) ("interrogation . . . refers . . . to express questioning, . . . [and] also to any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response. . . ."), where a conversation between police while transporting suspect to station -- that children from a nearby school for the handicapped might find suspect's gun and hurt themselves -- was held to not constitute an interrogation because it was not directed to the suspect and the police had no reason to believe he was susceptible to such remarks, with *Brewer v. Williams*, 430 U.S. 387 (1977) ("Christian burial speech" intended to elicit incriminating information and was tantamount to interrogation; police knew accused was "deeply religious," and directed speech to him). If *Miranda's* custody definition applies, the warnings must be given before questioning can take place. The general rule is that spontaneous statements are admissible, despite a failure to give the warnings, if they are otherwise voluntary.

See, e.g., Hicks v. United States, 382 F.2d 158 (D.C. Cir. 1967). For a good discussion on interrogation vis-a-vis warnings, see Kamisar, Brewer, *Williams, Massiah, and Miranda: What is "Interrogation?" When Does It Matter?* 67 Geo. L.J. 1 (1978).

Article 31(b) applies when questioning or conversation designed to elicit a response takes place. *United States v. Borodzik*, 21 C.M.A. 95, 44 C.M.R. 149 (1971) ("conversation" between NIS agent and accused, who was apprehended in his home and was awaiting transportation to a confinement facility, held to require article 31(b) warnings). In *United States v. Dowell*, 10 M.J. 36 (C.M.A. 1980), advising a confined accused of additional charges was held to be the functional equivalent of an interrogation. In *United States v. Ray*, 12 M.J. 1033 (A.C.M.R. 1982), *petition denied*, 13 M.J. 472 (C.M.A. 1983), keeping the accused in the investigator's office for a few minutes while the agent was "getting a few papers together" was not conduct designed to induce the accused to waive a prior invocation of his rights. *United States v. Byers*, 26 M.J. 132 (C.M.A. 1988) (investigative technique of lecturing a suspect on the weight of the evidence against him prior to a rights advisement is the functional equivalent of an interrogation for purposes of article 31 and *Miranda/Tempia*). *See also United States v. Steward*, 31 M.J. 259 (C.M.A. 1990).

a. Article 31(b) warnings are not needed when asking for consent to search. *United States v. Morris*, 1 M.J. 352 (C.M.A. 1976) (NIS agent, without giving article 31(b) warnings, preceded a request of the accused to search an automobile with a query as to who owned the car); *United States v. Stocker*, 17 M.J. 158 (C.M.A. 1984) (article 31(b) warnings not required to search the accused's car and barracks room with accused's consent). While the use of warnings is permissible, most criminal investigators will give "consent to search" advice, rather than article 31(b) warnings.

b. Article 31(b) and *Miranda* warnings are not needed in the limited situation where, under the "public safety" doctrine, there exists the possibility of saving human life or avoiding serious injury by rescuing the one in danger, and the situation is such that no course of action other than questioning the suspect promises relief. *New York v. Quarles*, 467 U.S. 649 (1984). In a military application of this exception, compliance with article 31(b) and *Miranda* warnings was excused by this "rescue" doctrine where the accused appeared at the military police station to report an injury to another person and the military policeman on duty, on eliciting that the accused had stabbed the victim, contacted the medical dispensary and, at the direction of the corpsman, inquired of the accused where and how he had stabbed the victim and where the victim was located. *United States v. Jones*, 26 M.J. 353 (C.M.A. 1988).

c. Article 31(b) warnings may be unnecessary at a subsequent interrogation if the warnings were read properly at the first interrogation and the time between the two sessions is short enough.

(1) In *United States v. Boster*, 38 C.M.R. 681 (A.B.R. 1968), seven military policemen were accused of trying to burn their sergeant's tent with him in it. All were represented by the same defense counsel. One accused, when first interviewed after receiving proper warnings, denied guilt. At a second session, held over a week later and with improper warnings, he confessed. The court held that the statement should have been suppressed, since the interrogation was not continuous and there was no carry-over between the two sessions.

(2) In *United States v. Schultz*, 22 C.M.A. 353, 41 C.M.R. 311 (1970), the accused was suspected of murder. In his first interview, the accused was told that there was a possible murder charge. Seven hours later, the accused's wall locker was searched and he identified the clothing he had been wearing at the time of the offense. The court found that, since "separate periods of inquiry can constitute a single continuous interrogation" [*citing United States v. White*, 17 C.M.A. 211, 38 C.M.R. 9 (1967)], and since the delay between the search and the first interview was so short, the period constituted a continuous interrogation and the failure of the agents to warn Schultz during the search was not error.

(3) A twenty-day delay and different offenses have been held not to involve a continuous investigation. *United States v. Weston*, 1 M.J. 789 (A.F.C.M.R. 1976) (first offense involved unlawfully opening three letters and the second involved opening 140 letters). But, in *United States v. Paul*, 24 C.M.R. 729 (A.F.B.R. 1957) and *United States v. Radford*, 17 C.M.R. 595 (A.F.B.R. 1954), delays of 13 and 30 days, respectively, were permissible because the same subject matter was being continuously investigated and there were no indications that the accused had forgotten or misunderstood their rights.

(4) In *United States v. Dowell*, 10 M.J. 36 (C.M.A. 1980), however, an interval of at least three, and probably as many as twelve, days was sufficient to require new warnings, especially where the accused was in confinement.

e. <u>After a previous inadmissible confession</u>. In *United States v. Steward*, 31 M.J. 259 (C.M.A. 1990), the Court of Military Appeals recognizes two distinct situations surrounding the admissibility of a statement after a previous statement has been illegally elicited. If an initial statement was improperly obtained because the suspect had not been properly warned of his panoply of rights to silence and counsel, voluntariness of the second confession is determined by the totality of the circumstances including the earlier, unwarned statement. Where a confession is obtained at a lawful interrogation that comes after an earlier interrogation in which a confession was obtained due to actual coercion, duress, or inducement, the

subsequent confession is presumptively tainted as a product of the earlier one. *See United States v. Phillip*, 32 M.J. 76 (C.M.A. 1991) (court seems to suggest that burden to show voluntariness is on the government by a preponderance in both situations, though a higher standard seems called for when a presumptive taint exists). The Supreme Court's unwillingness to continue to apply a presumptive taint which required "cleansing warnings" was demonstrated in *Oregon v. Elstad*, 470 U.S. 298 (1985). In this case, the suspect's previous unwarned admission did not require suppression of a second statement preceded by warnings (but not cleansing warnings), since there was no indication that the accused's second statement was the product of unlawful coercion. The exact application of *Elstad* to the military remains unclear, at least with respect as to whether an unwarned first admission creates a "presumptive taint" to later admissions. In *United States v. Spaulding*, 29 M.J. 156 (C.M.A. 1989), however, the Court of Military Appeals held that a confession is not automatically inadmissible even though it was made after another involuntary confession if the government can show that the second confession was preceded by an article 31(b) warning and was not the product of the earlier violation of article 31(b).

f. Spontaneous or volunteered statements. Spontaneous remarks are those not made in response to questioning, and no rights warnings are required. *United States v. Miller*, 7 M.J. 90 (C.M.A. 1979); *United States v. Barnes*, 19 M.J. 890 (A.C.M.R. 1985), *aff'd*, 22 M.J. 385 (C.M.A. 1986); *United States v. Seeloff*, 15 M.J. 978 (A.C.M.R. 1983). *See also* Mil.R.Evid. 304(a) analysis; Mil.R.Evid. 305(c) analysis. They may not permit, much less require, a preliminary warning under article 31(b). *United States v. Workman*, 15 C.M.A. 228, 35 C.M.R. 200 (1965) (accused requested a pass from his superior NCO for the purpose of obtaining money to make up a shortage in his mess funds); *United States v. Willeford*, 5 M.J. 634 (A.F.C.M.R. 1978) (wallet left at scene of rape -- OSI knocked on door of owner, who opened it and blurted out "I've been expecting you, you've got my wallet, you've got enough on me."); *United States v. Thompson*, 47 C.M.R. 565 (N.C.M.R. 1972).

Similarly, if an individual voluntarily initiates a conversation amounting to a confession, there is no requirement for authorities to stop him and give article 31(b) warnings. *United States v. Hinkson*, 17 C.M.A. 126, 128, 37 C.M.R. 390, 392 (1967) (No requirement to warn an accused when the government informant testified he asked no questions. After listening to the informant's story of his own criminal misconduct, "the accused elected to disclose his own complicity in a similar crime. His choice was not the product of a false sense of security induced by a friendly official. . . ."). *See also United States v. Seeloff, supra.*

Furthermore, if an interrogator, who does not suspect an individual of an offense, questions that person for a legitimate purpose, any spontaneous incriminating statements made are admissible against him. *United*

States v. Ballard, 19 C.M.A. 96, 37 C.M.R. 360 (1967) (When asked to identify himself, the accused said, "give me a break" and "how much is it worth to you," and "fifty dollars if ya let me go").

3. "Caught in the act" and preliminary questioning

a. *Miranda*

(1) Because *Miranda* involved a stationhouse interrogation, a number of courts have held it inapplicable to questions asked on the scene when police surprise and arrest individuals during criminal activity. The claim is that such questioning does not constitute "interrogation" in the *Miranda* sense. Some support for this position may be found in *Miranda*'s facts and the Court's view of the *Miranda* case itself. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Although the current civilian trend is in favor of limiting *Miranda*, military prosecutors should not attempt to rely upon this interpretation of *Miranda*, particularly when conducting classes for military police. It does, however, provide a fall-back position should military police, CID, or NIS agents give proper article 31(b) warnings but neglect proper counsel warnings during apprehension.

(2) A related topic is the propriety of preliminary or administrative questions not involving the offense. Although these questions will often supply incriminating information, the majority civilian rule appears to allow them. Questions usually relate to name, address, marital status, employment, etc., each of which is termed "pedigree" or "non-investigative." *See, e.g., United States ex rel. Hines v. LaValle*, 521 F.2d 1109 (2d Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976). *See generally The Applicability of Miranda to the Police Booking Process*, 1976 Duke L.J. 574 (1976). Because of the phrasing of article 31, administrative questions in the military should be considered suspect at best. *But cf. United States v. Davenport*, 9 M.J. 364 (C.M.A. 1980) (asking for identification need not be preceded by warnings). *See also United States v. Leiffer*, 13 M.J. 337 (C.M.A. 1092) [statement as to suspect's name/address not covered by article 31(b)].

b. Article 31

(1) The primary military case dealing with an accused "caught in the act" is *United States v. Vail*, 11 C.M.A. 134, 28 C.M.R. 358 (1960). Vail and two others were apprehended as a result of an attempted theft of arms from an Air Force warehouse in Morocco. At the time of the apprehension, the provost marshal asked one of Vail's co-accused to show him to the weapons that had been removed from the warehouse. The weapons were apparently produced in response to the demand which, had it occurred during a later interrogation, would have violated article 31(b). The court chose not to decide the key question of Vail's standing to raise a violation of his co-accused's rights. Rather, the court stated:

"The real question is whether an accused apprehended in the very commission of a larceny must be advised of his rights under article 31 as a condition to the admission of testimony of his reply to a demand to produce stolen weapons." *Id.* at 135, 28 C.M.R. at 359. Judge Quinn answered his own question thus:

> Common sense tells us the arresting officer cannot be expected to stop everything in order to inform the accused of his rights under Article 31. On the contrary, in such a situation he is naturally and logically expected to ask the criminal to turn over the property he has just stolen. . . . In our opinion, Article 31 is inapplicable to the situation presented in this case.

Id. at 136, 28 C.M.R. at 360.

(2) Judge Latimer concluded that the conditions necessary for article 31 to come into play were absent and that the demand for weapons was not an interrogation within the sense of article 31. Judge Ferguson's well-written and seemingly correct dissent argued that *Vail* was contrary to earlier decisions and contrary to congressional intent.

F. Waiver requirements

1. Questioning may not begin unless the accused or suspect has made a knowing and voluntary waiver of his rights. As a practical matter, this means that he has affirmatively indicated that he understands his rights, wishes to waive them, and wishes to make a statement. Usually these representations are made in response to the interrogator's questions. The degree to which an express affirmative waiver is required is unclear. The Air Force Court of Military Review has sustained the admission of an accused's statements obtained by a deputy sheriff who warned him of his rights. While the accused said he understood his rights, and then made a statement, he never affirmatively waived the right to counsel. *United States v. Gochenour*, 47 C.M.R. 979 (A.F.C.M.R. 1973). *Gochenour* is in accord with the majority civilian rule.

2. Questioning must stop whenever the suspect indicates a desire not to make a statement or a desire to stop making one.

a. In *Michigan v. Mosley*, 423 U.S. 96 (1975). the court indicated that the fact that a suspect has exercised his right to remain silent will not forever bar subsequent interrogation. Rather, the question in cases involving renewed interrogation will be whether the suspect's right to cut off questioning was "scrupulously honored." *Mosley* dealt with a case where the renewed interrogation pertained to an offense unrelated to the subject of the initial interrogation. Yet the

Mosley rationale could be applied to renewed interrogation regarding the same offense. Mil.R.Evid. 305(f) provides that questioning must cease immediately when the accused exercises his right to remain silent. The rule does not address renewed interrogation, although the analysis indicates that the drafters recognized the possible impact of *Mosley* on the rule.

b. Reconsideration. An interrogator may properly ask a suspect who has declined to make a statement, or stopped making a statement while the interrogation was in progress, to reconsider his decision not to make a statement. *See United States v. Lowry*, 2 M.J. 55, 60 n.6 (C.M.A. 1976). The question in such cases will be whether the accused's invocation of the right to remain silent was "scrupulously honored" by the interrogator. *See Mosley, supra.*

(1) While a polite second request is legitimate, the number and manner of follow-ups that will be held legitimate is uncertain. At some point, the interrogator will run the risk of being found to have violated the suspect's rights. In *United States v. Attebury*, 18 C.M.A. 531, 40 C.M.R. 243 (1969), the accused was charged with a number of offenses, including murder. He was interviewed by CID agents three times in a four-day period. The first time he was reluctant to talk about the offenses, the second time he refused to make a statement, and the third time, after preliminary warnings, he engaged in a conversation with the agents ultimately leading to an incriminating statement. Without deciding the particular point at which CID should have stopped trying for a statement, the court held that the final statement was the result of interrogation that should have ceased at some earlier time when the accused indicated his desire not to talk. The accused's judicial confession made in open court was found to have been impelled by the earlier statements, and the charges were dismissed.

(2) While a second attempt at interrogation may be possible, a second attempt made without warnings will usually be held unlawful. *See United States v. Heslet*, 27 C.M.A. 705, 48 C.M.R. 596 (1974).

3. Refusal to make a written statement. Mere refusal to make a written statement is insufficient to show a refusal to make any statement. *See United States v. Graham*, 21 C.M.A. 489, 45 C.M.R. 263 (1972). *See also United States v. Nielsen*, 392 F.2d 849 (7th Cir. 1968), stating that, where the accused said that he would not sign anything until he saw his lawyer, insufficient evidence of waiver existed. An honest belief that only a written statement can be used at court, however, may make an oral statement inadmissible. *But see United States v. Moore*, 10 M.J. 724 (C.G.C.M.R.), *petition granted*, 11 M.J. 341 (C.M.A. 1981) (no need for rights advisement form to address oral statements specifically).

1204 RIGHTS TO COUNSEL (Key Numbers 1106, 1109, 1111)

A. Rights to counsel at interrogations in the military: generally

1. Customary rights warnings. Any examination of rights to counsel at military interrogations must distinguish between those rights that are customarily extended and those that must be given according to law. Customary rights warnings can be found in any of the standard cards or waiver certificate (e.g., NAVJAG Form 5810/10 -- suspect's rights acknowledgement/statement).

2. Military warnings. The rights usually given by military interrogators are far broader than those required by *Miranda*. The minimum right to counsel at interrogations appears in Mil.R.Evid. 305, which creates a right to free appointed counsel for any military member (who may also have civilian counsel retained at no expense to the government). Under the military rule, the suspect has a right to both a military and a civilian attorney if he so desires. Prior to the adoption of the Military Rules of Evidence, the Court of Military Appeals held that the right to a free military lawyer depended on indigency, as in *Miranda*. *United States v. Hofbauer*, 5 M.J. 409 (C.M.A. 1978). Mil.R.Evid. 305 effectively overrules *Hofbauer* by affording the suspect a free military lawyer regardless of the suspect's financial situation. During the interrogation stage, the right to a military lawyer does not extend to a military lawyer of the suspect's choice (i.e., "individual military counsel") unless the suspect is already being represented as to the allegation by a particular military lawyer. The Secretary of the Navy has the authority to extend the right to individual military counsel to the interrogation stage, but thus far has not exercised that authority.

B. The *Miranda* rights to counsel

1. The minimum *Miranda* counsel warning is: "You have a right to have a lawyer present to assist you at this interrogation and if you cannot afford one, one will be appointed for you." Note that the minimum warning does not include the automatic right to free military counsel regardless of indigency, and the right to have free detailed military counsel in addition to a retained civilian attorney -- both of which are part of the military rights warnings.

2. When are *Miranda* warnings needed?

a. *Miranda* and its military analogue, *United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (1967), indicate that both warnings of the right against self-incrimination and rights to counsel attach when an individual is involved in a "custodial interrogation." The difficulty has been in determining what constitutes such an interrogation. A number of tests have been used or suggested. The "focus" test has its origins in *Escobedo v. Illinois*, which suggested that rights attached when

the investigation has "begun to focus on a particular suspect, the suspect has been taken into police custody [and] the police carry out a process of interrogations that lends itself to eliciting incriminating statements." *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964). While perhaps it can be argued that the *Escobedo* test is distinct from *Miranda's*, the language cited from *Escobedo* and footnote 4 from *Miranda*, 384 U.S. 436, 444, (1966), indicating that *Miranda's* custodial interrogation is what the court meant by "focus" in *Escobedo*, suggests that the difference, if any, is minimal. *See, e.g., United States v. Gardner*, 516 F.2d 334 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975). In 1976, however, approximately eight states utilized some form of focus test in determining whether a suspect was in custody for *Miranda* purposes. The remaining tests can best be classified as:

(1) The subjective view of the suspect test;

(2) the subjective view of the police test; and

(3) the objective test.

b. As *Miranda* dealt primarily with the psychological results of custodial interrogation, it was only natural for some courts to ask whether the suspect believed himself to be in custody, reasoning that the subjective belief of the suspect was determinative. The apparent difficulty with the subjective view of the suspect test is the ease with which an accused can claim to have had a good faith belief that he had been taken into custody.

c. Dissatisfied with the potential for abuse inherent in this test, a number of states chose to define custody by determining the subjective view of the police at the time of the interrogation. Under this test, the key question to be asked of interrogating police officers was: "Would you have let the suspect leave?" Partial support for this approach is found in the Supreme Court's decision in *Orozco v. Texas*, 394 U.S. 324 (1969), in which police raided the defendant's room at 0400. However, the facts of the case seem to make the decision of little precedential value because custody appears to have been present regardless of the test applied. This test, like a subjective view of the accused, is also prone to abuse for it also tends to encourage perjury -- but in the police rather than the accused.

d. The difficulty with the subjective tests is that people often have an unreasonable understanding of their circumstances. Thus, an objective test judging custody from the totality of facts has been suggested. *E.g., United States v. Temperly*, 26 C.M.A. 648, 47 C.M.R. 235 (1973) [which adopted Judge Friendly's opinion in *United States v. Hall*, 421 F.2d 540 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970)].

e. Mil.R.Evid. 305(d)(1)(A) indicates that counsel warnings are required whenever testimonial or communicative evidence is sought and the suspect or accused is "in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way." The drafters' analysis to this rule indicates that this language was intended to adopt the "objective" standard for determining custody. Mil.R.Evid. 305(d)(1)(B) provides that counsel warnings are also required whenever the suspect is in pretrial restraint, or where the interrogation takes place after preferral of charges, regardless of whether restraint has been imposed.

C. Non-*Miranda* rights to counsel

1. *Massiah v. United States*, 377 U.S. 201 (1964) held that an indicted defendant with known, retained, or appointed counsel could not be placed in a "bugged" area without notice to counsel, even though the defendant was not in custody, since a constitutional right to counsel exists at the post-indictment stage. Some authority exists for an extension of the *Massiah* rule to arraignment or other formal beginning of criminal proceedings. Referral in military practice seems the closest to indictment. *See* Mil.R.Evid. 305(d)(1)(B). *Massiah* is particularly important in undercover cases in which the interrogation is noncustodial and not subject to *Miranda* warnings. However, in *Maine v. Moulton*, 474 U.S. 159 (1985), the Supreme Court held that, where there is a pending indictment on the one hand and an ongoing investigation into additional charges on the other, the police are free to use a secret agent who elicits information from the accused, but the information may be used only in prosecutions for offenses that have not yet reached the indictment stage.

2. *Escobedo v. Illinois*, 378 U.S. 478 (1964), a stepping-stone to the *Miranda* decision, stands for the minimum proposition that a defendant in custody, with a retained or appointed lawyer, has a right to see his attorney if he should ask to do so during an interrogation involving a crime where suspicion has focused on him.

3. In *United States v. Turner*, 5 M.J. 148 (C.M.A. 1978), the Court of Military Appeals held that the right to counsel at interrogations may be invoked by the accused's counsel under the sixth amendment. *Turner* appears to be an aberrational case and its vitality is questionable in view of the Supreme Court case of *Moran v. Burbine*, 106 S.Ct. 1135 (1986) (even if suspect has already, prior to police questioning, established an attorney-client relationship, he has no sixth amendment right to have the police not interfere with that relationship; thus, accused's rights not violated when police declined to tell him that his family had retained a lawyer who was trying to contact him, or when police falsely told the lawyer that accused would not be interrogated until the following day).

4. The sixth amendment rights find some application under the Military Rules of Evidence. Mil.R.Evid. 305(d)(1)(B) provides that counsel warnings are required before questioning an individual after preferral of charges or imposition of pretrial restraint.

5. In *United States v. Henry*, 447 U.S. 264 (1980), the defendant made incriminating statements to a paid informant who was confined in the same cellblock as the defendant. The informant had been told by government agents to be alert to any statements made by prisoners but not to initiate conversations with or question the defendant regarding the charges against him. Nevertneless, the Court held that Henry's statements were inadmissible as being "deliberately elicited" from the defendant in violation of his sixth amendment right to counsel. However, in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), the court indicated it distinguishes between active eliciting of information and mere passive receipt of information. Thus, finding *Massiah* and *Henry* not violated, where a jailhouse informant was placed in accused's cell and told not to ask accused any questions, but simply to "keep his ears open" for information.

D. Notice to counsel of interrogation (Key Number 1112)

1. Civilian practice. Most civilian courts will allow interviews of an accused without notice to his counsel. *See, e.g., United States v. Zamora*, 460 F.2d 1272 (9th Cir.), *cert. denied*, 409 U.S. 881 (1972); *United States v. Springer*, 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972). Others either require notice or will be somewhat hostile to cases where notice was not given.

2. Military practice

a. *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976), now adopted by Mil.R.Evid. 305(e), requires an interrogator to notify counsel prior to interrogating a suspect whenever the interrogator knows or reasonably should know that the accused has an appointed or retained lawyer as to the suspected offense. The rule also provides that such counsel shall be afforded a reasonable opportunity to attend the interrogation. Waiver of the notice requirement is not effective unless reasonable efforts to notify counsel were unavailing or counsel did not attend within a reasonable time after notice. In effect, the accused cannot waive the notice requirement to his counsel. *See* Mil.R. Evid. 305(g)(2). *See also United States v. Barnes*, 19 M.J. 890 (A.C.M.R. 1985), *aff'd*, 22 M.J. 385 (C.M.A. 1986) (investigator need not notify counsel prior to listening to a voluntary and unsolicitated statement).

b. In *United States v. Rollins*, 23 M.J. 729 (A.F.C.M.R. 1986), a female enlistment applicant was acting as an agent for OIS, where recruiter (accused) was suspected of engaging in sexual intimacies with female applicants. The

court held that applicant's returning of recruiter's phone call was not an interrogation that triggered need for warning and/or notice to counsel.

c. In *United States v. Fountain*, 22 M.J. 561 (A.F.C.M.R. 1986), the accused agreed to submit to a polygraph examination. The examiner visited defense counsel to advise of this and provided the time and place, and left with opinion that counsel would advise accused not to submit to the examination; however, accused did submit to the examination and his subsequent confession was held not violative of Mil.R.Evid. 305(e).

d. Knowledge. Factors to consider in determining whether the investigator should have known that the suspect was represented by counsel are enunciated in the analysis to Mil.R.Evid. 305(e).

e. Independent civilian investigators are not subject to *McOmber*. *United States v. Harris*, 7 M.J. 154 (C.M.A. 1979).

f. Unrelated offenses. Once the suspect requests counsel or has obtained counsel, may he be interrogated concerning a new or unrelated offense without notifying counsel? No, despite the language of Mil.R.Evid. 305(e), which does not prohibit interrogation of a suspect without notice to counsel for an unrelated or new offense. In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court held that, once a suspect in a custodial interrogation asks for a lawyer, he cannot be interrogated further until a lawyer has been provided. In *Arizona v. Roberson*, 486 U.S. 675 (1988), the Supreme Court took this position one step further by holding that, after requesting a lawyer, the suspect may not be further interrogated about any offense. The *Roberson* decision was applied in the military setting in *United States v. Fassler*, 29 M.J. 193 (C.M.A. 1989), effectively overruling that portion of Mil.R.Evid. 305(e) which allowed interrogation without notice for unrelated offenses.

g. Effect of no notice. Under Mil.R.Evid. 304(b), the accused's statements can be used for impeachment purposes if they are otherwise voluntary, and where the only illegality involves failure to comply with Mil.R.Evid. 305(e).

E. Failure to comply with the warnings requirements

1. General rule. Failure to give the warnings properly will result in suppression of the evidence upon proper defense objection. Mil.R. Evid. 304(a).

2. Exception. If the warning defect involves the right to remain silent or counsel warnings, an otherwise voluntary statement may be used for impeachment purposes. Mil.R.Evid. 304(b).

3. In addition, where the statement itself constitutes an offense, it is admissible -- notwithstanding the absence of warnings. *See United States v. Olson*, 17 M.J. 176 (C.M.A. 1984) (charge of communicating a threat); *United States v. Lausin*, 18 M.J. 711 (A.C.M.R. 1984), *petition granted*, 22 M.J. 89 (C.M.A. 1986) (charge of false swearing from a statement made to CID agents).

4. Knowledge of rights. Evidence that the suspect knew his rights does not excuse the government from informing the accused of his rights, although, if the suspect intentionally frustrates the reading of the rights, he may be held to have waived them.

a. In *United States v. Sikorski*, 21 C.M.A. 345, 45 C.M.R. 119 (1972), the evidence showed not only that the accused knew his rights, but also that he frustrated the agent's continuing attempts to read the rights to him. The court found a knowing and intelligent waiver. At trial, the defense requested and received an instruction that, if the court found the pretrial statements to be involuntary, the court should decide if the accused's in-court testimony was impelled by the involuntary statements. On appeal, the instruction was held to be in error because it allowed the possibility of the court disregarding the defendant's testimony. However, due to the facts of the case, the error was not prejudicial.

b. The only omission from the rights warnings that may not invariably result in suppression of a statement appears to be the advice as to the nature of the offense of which the individual is suspected. There is some authority to support the proposition that, if the suspect can be shown to have known of what offense he was suspected, the failure to warn will not be fatal. *See United States v. Nitschke*, 12 C.M.A. 489, 31 C.M.R. 75 (1961) (no error for agents investigating an auto accident to fail to tell accused of a resultant fatality where they did so on a doctor's advi[illegible] the accused at least suspected that someone had died); *United States v. O'Brien*, 3 C.M.A. 105, 11 C.M.R. 105 (1953) (accused was not told of the offense, but his wife had died violently two days earlier, and the questioning concerned the details of her death); *United States v. Burns*, 47 C.M.R. 874 (N.C.M.R. 1973) (advising accused he was suspected of larceny, but failing to advise him he was also suspected of false swearing, not a fatal defect where statement falsely sworn to was an earlier statement attempting to cover up the facts of the larceny). Note, however, that only *O'Brien* involves a complete failure to advise the suspect of the nature of the suspected offense. It seems unlikely that the Court of Military Appeals will sanction such an omission today.

c. "Substantial compliance"? In *California v. Prysock*, 453 U.S. 355 (1981), the accused was not specifically told of his right to have a lawyer appointed for him prior to any further interrogation. The *Miranda* warnings were otherwise correct. The court held that the warnings were adequate and that *Miranda* does not require any precise "word formula" or "incantation."

d. "Presumption of regularity"? In *United States v. Annis*, 5 M.J. 351 (C.M.A. 1978), the court held that, in the absence of a defense objection, testimony that the investigator read the rights warning card to the accused creates a presumption of regularity.

F. Waiver (Key Numbers 1112, 1114)

1. A suspect or accused, having been informed of the rights to remain silent and to have counsel, may always waive them. The waiver, however, must be a voluntary, intelligent, affirmative waiver. Mil.R.Evid. 305(g) requires that the suspect or accused acknowledge affirmatively that he or she understands the rights involved, affirmatively declines the right to counsel, and affirmatively consents to the making of a statement. A passive waiver of the right to counsel, however, may be demonstrated by the prosecution. *See North Carolina v. Butler*, 441 U.S. 369 (1979); Mil.R.Evid. 305(g)(2).

2. The suspect must be asked if he or she wants a lawyer. Silence cannot be considered a waiver. *See, e.g., United States v. Long*, 37 C.M.R. 696 (A.B.R. 1967). The suspect must also be asked if he is willing to make a statement. *See* analysis to Mil.R.Evid. 305(g).

3. In *United States v. Masemer*, 22 C.M.A. 442, 41 C.M.R. 366 (1970), the affirmative use of a pretrial admission at trial by the defense constituted waiver.

4. Request for counsel (Key Numbers 1113, 1114). If, at any time, the individual indicates a desire to see or speak with counsel, questioning must stop. He is not subject to further interrogation until counsel has been made available to him, unless he, himself, initiates further communication. *United States v. Applewhite*, 23 M.J. 196 (C.M.A. 1987) (accused's failure to contact an attorney during five days between time that he agreed to polygraph examination after requesting an attorney and the time he appeared for the examination did not show a waiver of the prior invocation of right to counsel). The request should be treated as an indication that the individual does not wish to speak. There is some support for the proposition, however, that, if the individual merely states that he does not wish to continue the interrogation, the investigator may at some later point ask the individual to reconsider. *See, e.g., United States v. Lowry*, 2 M.J. 55, 60 n.6 (C.M.A. 1976); *United States v. Collier*, 1 M.J. 358 (C.M.A. 1976). *Cf. Edwards v. Arizona*, 451 U.S. 477 (1981), where the Supreme Court held that, once a suspect invokes the right to counsel, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. Furthermore, an accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by authorities until counsel has been made available, unless the accused himself initiates further communication, exchanges, or conversations with the police. In

Minnick v. Mississippi, 111 S.Ct. 486 (1990), we see the Supreme Court building on and clarifying the *Edwards* decision. Prior to *Minnick*, some confusion existed as to what happens once counsel had been made available. Some federal circuits interpreted *Edwards* to mean that, once counsel had been made available, government officials could initiate a reinterrogation. *Minnick* establishes a bright-line rule that neither the opportunity nor consultation itself is sufficient to open the door for officials to initiate a reinterrogation. Further, at any subsequent interrogation initiated by officials, counsel must be present. The one exception, once again, is if the accused initiates the interrogation. *See McNeil v. Wisconsin*, 111 S.Ct. 2204 (1991) (requesting assistance of an attorney at a bail hearing does not equate to . . . invoking a *Miranda/Edwards* interest). *See also Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (where accused given *Miranda* warnings requests lawyer, then later approaches police officer and asks "well, what is going to happen to me now," statement amounted to initiation of further conversation under *Edwards* and subsequent confession admissible); *United States v. Stinde*, 21 M.J. 734 (N.M.C.M.R. 1985) (*Edwards* applied and confession held inadmissible where suspect asked for a lawyer and CID ceased interrogation, but battalion legal officer later told suspect he "did not rate an attorney" until preferral); *United States v. Alba*, 15 M.J. 573 (A.C.M.R. 1983) (*Edwards* violated where accused was reapproached after requesting counsel and error not harmless beyond a reasonable doubt); *United States v. Ray*, 12 M.J. 1033 (A.C.M.R. 1982) (accused initiated further conversation where he told CID he did not want his CO to find out about the incident); *United States v. Vidal*, 23 M.J. 319 (C.M.A. 1987) (*Edwards* not triggered by request for counsel made to foreign official, and suspect adequately protected if warned under American law when first questioned by American officials); *Conn v. Barett*, 479 U.S. 523 (1987) (*Edwards* not violated where suspect stated that he was willing to talk verbally, but would put nothing in writing until he contacted his lawyer; court specifically held that an accused's ignorance of the full consequences of his decisions does not vitiate their voluntariness). *See also United States v. Coleman*, 26 M.J. 451 (C.M.A. 1988), where previous request for counsel made of German police did not invalidate later CID interrogation when no counsel was provided ("overseas exception").

5. The mental condition of the individual being questioned should bear heavily upon any waiver. That is, did the suspect understand his rights? *See, e.g., United States v. Dison*, 8 C.M.A. 616, 25 C.M.R. 120 (1958) (accused did not possess emotional stability or intelligence to understand); *United States v. Hernandez*, 4 C.M.A. 465, 16 C.M.R. 39 (1954) (limited grasp of English language, did not fully understand rights); *United States v. Molinary-Rivera*, 13 M.J. 975 (A.C.M.R. 1982) (deficiency in English comprehension, coupled with ambiguous statement of rights, prevented knowing waiver); *United States v. Michaud*, 2 M.J. 428 (A.C.M.R. 1975) (accused lacked mental ability to understand warnings); *United States v. Thornton*, 22 M.J. 574 (A.C.M.R. 1986) (prior ingestion of 6-8 beers did not preclude knowing waiver). However, accused's mental condition, by itself and apart from its relation to official coercion, should never dispose of an inquiry into constitutional

voluntariness. Thus, the taking of statements of a mentally ill accused, who, following the "voice of God," approached a police officer and confessed to homicide after being advised of his *Miranda* rights did not make the statement involuntary. *Colorado v. Connelly*, 479 U.S. 157 (1986).

6. Other factors bearing on whether a valid waiver was obtained include the accused's age, prior experience, nervousness, and condition as to sobriety. *See generally Fare v. Michael C.*, 422 U.S. 707 (1979).

1205 THE VOLUNTARINESS DOCTRINE (Key Numbers 1106, 1107)

A. Introduction

Although the voluntariness doctrine has its origins in the same policy considerations that gave rise to the privilege against self-incrimination, the doctrine was and is distinct from the privilege. It has been only recently that the voluntariness doctrine has tended to merge into the privilege, and then only in the United States. Traditionally, the privilege against self-incrimination has been a "fighting right" that is lost when an individual chooses to speak or act for whatever reason. Under the voluntariness doctrine, however, the admissibility of a statement requires that it have been made voluntarily. The assumption is made that involuntary statements are likely to be unreliable. As it is quite possible to obtain voluntary statements (the term "voluntary" being a term of art) in violation of the right against self-incrimination, it is important to distinguish between the two legal concepts.

Statements obtained in violation of either the voluntariness doctrine or in violation of the various warning requirements are generally termed "involuntary." This is particularly true in military practice, as Mil.R.Evid. 305(a) defines a statement obtained in violation of its warning requirements as being "involuntary." *See also* Mil.R.Evid. 304(a), which continues the use of the term "involuntary." Accordingly, counsel desiring to attack the admissibility of a confession or admission generally challenge the "voluntariness" of the statement regardless of the nature of the actual error involved.

B. The voluntariness doctrine in the United States

While the common law doctrine arose primarily as a check on the reliability of confessions as evidence, the American view in the 20th century has placed due process considerations above reliability. Thus, the primary consideration under the Constitution is the nature of the circumstances surrounding the statement. *See, e.g., Payne v. Arkansas*, 356 U.S. 560 (1958) (confession was held involuntary where "dull 19 year-old Negro" was not advised of any rights, kept incommunicado

for three days, denied food for long periods, and finally told that there would be 30 or 40 people there in a few minutes to "get him"); *Brown v. Mississippi*, 297 U.S. 278 (1936) (confession of blacks involuntary where a white mob extracted confessions after hanging defendants for short periods of time and whipping them; time from indictment to sentencing to death for murder was two days). Despite a brief foray into the reliability question, the Supreme Court has made it clear that the fact that a statement may indeed be reliable is irrelevant to considerations of voluntariness. In *Rogers v. Richmond*, 365 U.S. 534 (1961), the Court held that: "confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is not because such confessions are unlikely to be true, but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system." *Id.* at 540-41. If a statement is voluntary but unreliable, however, the judge may in his discretion refuse to admit it. The American rule seeks to assure that a statement was, considering "the totality of the circumstances," the product of an essentially free and unrestrained choice by its maker "whose will was not 'overborne' by the interrogator." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). *See also Culombe v. Connecticut*, 367 U.S. 568 (1961) (confession found to be involuntary where defendant with mental age of nine and one-half, who was easily influenced and subject to intimidation, was detained for four days and repeatedly questioned). In practice, the test cited above breaks down into two sub-tests: involuntary per se and causal connection.

1. Involuntary per se. Analysis of the cases reveals a range of conduct that will generally result in a confession being held to have been involuntary without regard to the actual effects of the improper conduct involved. Physical brutality is the primary conduct that results in near automatic exclusion. Conduct that "shocks the conscience" also escapes causal analysis. *See, e.g., Brooks v. Florida*, 389 U.S. 419 (1967) (15 days solitary confinement while naked); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (36 hours of constant questioning using relays of interrogators); *United States v. O'Such*, 16 C.M.A. 537, 542, 37 C.M.R. 157, 162 (1967) (confinement in lightless segregation cell in "conditions bespeaking a brutality completely at odds with any civilized notion of treatment. . .").

2. Causal connection. Most voluntariness cases involve police misconduct that would not necessarily overbear the will of a suspect. Accordingly, the trial court must determine whether under the actual facts of the case it was likely that the police misconduct, considering the totality of the circumstances, resulted in an overborne will. The line between these cases and those applying an automatic exclusion rule is narrow at best and frequently will depend upon the individual trial judge's perceptions. *See, e.g., United States v. Carmichael*, 25 C.M.A. 132, 45 C.M.R. 304 (1972), where a statement made by an Air Force accused, after being told that if he refused to make a statement his case would be turned over to the Nationalist Chinese for trial, was not involuntary. The trial court determined that

no causal connection existed between the confession and the statement of the interrogator's intent.

C. Improper law enforcement or command conduct

1. Physical coercion includes torture, improper confinement or detention, denial of medical treatment, or sustained interrogation. *See, e.g., Stidham v. Swenson*, 506 F.2d 478 (8th Cir. 1974), *cert. denied*, 429 U.S. 941 (1976) (discussion of conditions of imprisonment that might render confession inadmissible). In *United States v. Jones*, 6 M.J. 770 (A.C.M.R. 1978), *petition denied*, 7 M.J. 41 (C.M.A. 1979), eight hours in the company of investigators, without more, was not coercive per se. In *Mincey v. Arizona*, 437 U.S. 385 (1978), the accused was lying on his back in a hospital "encumbered by tubes, needles, and breathing apparatus" and the court found the confession made under the circumstances was involuntary. The mere status of being a drug addict will not render a statement involuntary. *Hayward v. Johnson*, 508 F.2d 322 (3d Cir. 1975), *cert. denied*, 422 U.S. 1011 (1975). However, a statement obtained during withdrawal is likely to be involuntary. *United States v. Arcediano*, 371 F. Supp. 457, 466 (S.D.N.Y. 1974).

2. Threats. Virtually any form of threat can render a statement involuntary. Particularly common are cases in which prosecution of friends or relatives is threatened if the accused fails to confess, and cases threatening harsher punishment if a statement is not given. *Cf. United States v. Allen*, 6 M.J. 633 (C.G.C.M.R. 1978) (agent's mention of possible prosecution of wife (legitimate suspect) did not affect voluntariness of accused's confession). *See also United States v. Butner*, 15 M.J. 139 (C.M.A. 1983) (investigator's threat to "hang a snitch coat" on accused unless accused named his accomplice rendered resulting statement involuntary); *United States v. O'Such*, 16 C.M.A. 557, 37 C.M.R. 157 (1967) (confession ruled involuntary where coercive interrogation methods were employed, including denying accused sleep and confinement under stringent physical conditions); *United States v. Houston*, 15 C.M.A. 211, 35 C.M.R. 211 (C.M.A. 1965) (voluntariness instruction necessary where several matters were brought forth, including a threat to involve accused's girlfriend); *United States v. Askew*, 14 C.M.A. 251, 34 C.M.R. 37 (1963) (improper for interrogator to tell accused that if he confessed, accused's wife would probably not have to be questioned).

3. Promises and inducements. Most improper inducements include promises of immunity (to be distinguished from an actual grant of immunity) or leniency towards either the accused or friends or family. *United States v. Murphy*, 18 M.J. 220 (C.M.A. 1984) (trial counsel's statement to accused that Japanese would favor accused making a statement and that, if Japanese took jurisdiction, U.S. likely would not prosecute, not unlawful inducement where accused did benefit in Japanese prosecution, although the U.S. later prosecuted on a related offense). An accused who initiates a bargaining session will not normally be heard to complain of improper

inducement. *See, e.g., United States v. Faulk*, 48 C.M.R. 185 (A.C.M.R. 1973) (where interrogators were unaware of the fact that the accused was married until he brought up the subject by expressing a desire to see his wife, the interrogator's denial of permission to do so until the accused made a statement was not sufficient coercion to render the statement involuntary). Traditionally, a mere exhortation to tell the truth was not an improper inducement. However, such a statement cannot be used unless the individual has already agreed to waive his right to remain silent. In *United States v. Whipple*, 4 M.J. 773 (C.G.C.M.R. 1978), the accused turned over his drug cache after being assured that he would fall within the drug exemption program. The court held that the accused's subsequent act of handing over his drugs amounted to an involuntary statement. *But see United States v. St. Clair*, 19 M.J. 833 (N.M.C.M.R. 1984) (NIS agent's promise to go to the legal officer and request that accused not be placed on restriction if the accused cooperated did not amount to an improper inducement).

4. Psychological coercion. Coercion may be psychological as well as physical. The line between proper and improper interrogation tactics is extremely difficult to define. While "Mutt and Jeff" interrogation may generally be acceptable [*United States v. Howard*, 18 C.M.A. 252, 39 C.M.R. 252 (1969)], specific facts may render a statement involuntary. Similarly, playing upon a suspect's religious, political, or sexual beliefs may render a statement involuntary. *See, e.g., State v. Edwards*, 111 Ariz. 357, 529 P.2d 1174 (1974) (female police officer playing upon female suspect's belief in "sisterhood"). In *United States v. Collier*, 1 M.J. 358 (C.M.A. 1976), the accused confessed after a one-hour parade of "emotion-laden matters." His statement was held to be involuntary. *But see United States v. Wheeler*, 18 M.J. 823 (A.C.M.R. 1984), *aff'd*, 22 M.J. 76 (C.M.A. 1986), *cert. denied*, 479 U.S. 827 (1986) (urging the accused to pray for forgiveness after the accused initiated the discussion of religion did not make the accused's subsequent confession involuntary).

D. Totality of the circumstances

1. Among the numerous factors that must be taken into account in determining voluntariness are:

a. Force, threats, promises, or deceptions;

b. the manner of interrogation (length of session or sessions, relays, number of interrogators, conditions, manner of interrogation);

c. the character of any detention (warning of rights, access to friends, relatives, or counsel, conditions); and

d. the character of the accused (health, age, education, intelligence, mental condition, and physical condition).

2. Frequently, the character of the suspect or accused may prove determinative. The health, intelligence, etc., of a suspect are factors to be considered. Thus, low intelligence or poor mental health may be determinative. *See United States v. Michaud*, 2 M.J. 428 (A.C.M.R. 1975) (psychiatrists testified that accused was not able to sufficiently understand his rights so as to knowingly and consciously waive those rights); *United States v. Dison*, 8 C.M.A. 616, 25 C.M.R. 120 (1958) (accused too intoxicated to understand warnings); *United States v. Rogan*, 8 C.M.A. 739, 25 C.M.R. 243 (1958) (accused lacked intelligence or emotional stability to understand advice). Conditions, such as hunger or sleeplessness, will not per se render a statement involuntary. *See United States v. Tua*, 4 M.J. 761 (A.C.M.R. 1977), *petition denied*, 5 M.J. 91 (C.M.A. 1978), where accused unsuccessfully argued an invalid waiver of rights because of his age, GT score, ethnic background (Samoan) and lack of food and sleep. Also, interrogation itself is not inherently coercive. *United States v. Moore*, 4 C.M.A. 482, 16 C.M.R. 56 (1954). The court, in *United States v. Jones*, 6 M.J. 770 (A.C.M.R. 1978), said that the fact that a person is easily led or of low mentality does not per se render a confession involuntary. *See also United States v. Vigneault*, 3 C.M.A. 247, 12 C.M.R. 3 (1953) and *United States v. Robinson*, 26 M.J. 361 (C.M.A. 1988), where the court held that a character defect or personality quirk of compulsion to make a confession does not automatically render an accused's statement inadmissible. This case is interesting because it involves the use of previous hypnotism.

E. Deception

Police use of deception to obtain confessions is far from unknown and usually takes the form of the police stating that the accused has been identified by an eyewitness, or an accomplice has confessed, or the evidence is enough to close the case when the exact opposite is true. According to McCormick, "except for a few early cases, there are almost no decisions holding that even intentional misrepresentation by interrogators of the accused's factual situation makes a resulting confession involuntary." C. McCormick, *Handbook of the Law of Evidence* 322 (2d ed. 1972). The military rule seems similar [*United States v. Kluttz*, 9 C.M.A. 20, 25 C.M.R. 282 (1958)], and has been phrased as follows: "Investigators may use deception to obtain confessions as long as the deception was not used to obtain an untrue confession." *United States v. McKay*, 9 C.M.A. 527, 531, 26 C.M.R. 307 (1958). Deception may be used after the suspect has made a valid waiver, but not to achieve a waiver of rights. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966). In *United States v. Melanson*, 15 M.J. 765 (A.F.C.M.R.), *petition denied*, 16 M.J. 321 (C.M.A. 1983), the court found no illegality where investigators falsely told the accused his crime was recorded on film, even though the deception occurred prior to waiver of rights by the accused. If deceit overbears the suspect's will, the resulting statement will be involuntary. *See*

generally White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581 (1979).

F. The voluntariness doctrine and overseas cases

Although foreign officials are not normally bound to give preinterrogation warnings [*United States v. Covington*, 758 F.2d 383 (9th Cir. 1985)], article 31(d) prevents admission into evidence of any statement obtained through coercion, unlawful influence, or unlawful inducement. No limitation appears on article 31(d)'s expansive scope to allow an exception for statements obtained by foreign officials or nonmilitary personnel. Thus, the voluntariness doctrine applies to all statements. *See, e.g., United States v. Jourdan*, 1 M.J. 482 (A.F.C.M.R. 1975), where the accused was held by Belgian authorities who threatened him and subsequently obtained statements. The court held that the article 31(d) exclusionary rule applied, notwithstanding foreign interrogation. *See also United States v. Talavera*, 2 M.J. 799 (A.C.M.R. 1976), *aff'd*, 8 M.J. 14 (C.M.A. 1979) (accused held by Japanese authorities; confessions admitted although he had been held for 24 days, suffered heroin withdrawal, and could not eat jail food); *United States v. Frostell*, 13 M.J. 680 (N.M.C.M.R. 1982) (statements to Japanese authorities not coerced where accused was confined in Iwakuni police station under cold and somewhat unsanitary conditions with a diet of Japanese prison food and U.S. C-rations); *United States v. Jones*, 6 M.J. 226 (C.M.A. 1979). *See also* Mil.R.Evid. 305(h)(2).

G. The voluntariness doctrine and *Miranda*

1. The Supreme Court's decision in *Miranda* was based on the assumption that stationhouse custodial interrogation constituted a form of psychological coercion. Thus, *Miranda* represents an expansion of the voluntariness doctrine. However, as *Miranda* also involves the right against self-incrimination, it represents a partial merger of two legal concepts. In practice, a proper *Miranda* waiver will usually show a voluntary statement. Indeed, many prosecutors feel that *Miranda* is far more helpful than it is harmful for that reason. However, the voluntariness doctrine should be more properly viewed as a significant factor in determining voluntariness of a statement, even when the rights warnings have been properly given.

2. *Miranda's* absolute exclusionary rule is in doubt, and it is possible that the constitutional rule will return to a determination of voluntariness using the pre-*Miranda* standard with the absence of proper *Miranda* warnings being only one factor to be considered. *See* 18 U.S.C. § 3501 (1982); *United States v. Crocker*, 510 F.2d 1129 (10th Cir. 1975); Gandara, *Admissibility of Confessions in Federal Prosecutions: Implementation of Section 3501 by Law Enforcement Officials and the Courts*, 63 Geo. L.J. 305 (1974).

H. Miscellaneous

The voluntariness doctrine applies even though the right against self-incrimination does not. Thus, if torture is used to extract a confession from a suspect who refuses to talk despite receipt of a grant of immunity, the confession would appear to be involuntary and inadmissible. The proper threat of contempt of court, however, will not make a statement involuntary.

1206 THE EXCLUSIONARY RULE

A. Involuntary statements inadmissible. Article 31(d), UCMJ;Mil.R.Evid. 304.

1. Definition of "involuntary." For purposes of admissibility, involuntary usually means that a statement was taken in violation of the right against self-incrimination, the rights warnings requirements, or the voluntariness doctrine. In practice, an involuntary statement is apt to be one in which the interrogator failed to obtain a proper article 31/*Miranda* waiver.

2. As a general rule, involuntary statements are not only inadmissible on the merits, they are also inadmissible for all purposes. However, Mil.R.Evid. 304(b) specifically adopts *Harris v. New York*, 401 U.S. 222 (1971), in that a statement inadmissible against a defendant during the prosecution's case-in-chief because the defendant had not been advised of his rights to counsel prior to making a statement, but which otherwise satisfied the legal standards of trustworthiness, is admissible for impeachment purposes to attack the defendant's trial testimony. *See, e.g., United States v. Lucas*, 19 M.J. 773 (A.F.C.M.R. 1984), *aff'd*, 25 M.J. 9 (C.M.A. 1987); Mil.R.Evid. 304(b) analysis. The statement must be otherwise voluntary to be admissible.

B. Exclusion of derivative evidence

1. General rule. The general rule in military practice is that evidence derived from an involuntary statement is inadmissible as "fruit of the poisonous tree," and is incorporated in Mil.R.Evid. 304(a). The Court of Military Appeals has adopted the inevitable discovery doctrine in the search and seizure area [*United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982)], but has never specifically applied it to confessions and evidence derived from them. *But see United States v. Anderson*, 21 M.J. 751 (N.M.C.M.R. 1985) (nonverbal statement pointing out gun suppressed, but doctrine of inevitable discovery permitted admission of gun). The Supreme Court sanctioned the doctrine of inevitable discovery in *Nix v. Williams*, 467 U.S. 431 (1984). Mil.R.Evid. 304(b)(2) incorporates *Nix*.

2. Inevitable discovery. The former military rule was to reject inevitable discovery (i.e, the government argument that it would have found the tainted evidence anyway) whenever an illegality has in fact been exploited. What has actually taken place is considered more important than what could have occurred. *United States v. Peurifoy*, 27 C.M.A. 157, 160, 48 C.M.R. 34 (1974). However, in *United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982), the Court of Military Appeals rejected *Peurifoy* and adopted the "inevitable discovery" rule. *See also Nix v. Williams*, 467 U.S. 431 (1984), in which the Supreme Court expressly adopted the inevitable discovery rule and *United States v. Anderson*, 21 M.J. 751 (N.M.C.M.R. 1985) for application of the rule.

3. Attenuation. Attenuation (i.e., the lessening of the illegal taint through time or factual circumstances) may deprive an illegality of its derivative evidence effect, depending on the circumstances; a "but for" test is not applied. *United States v. Wong Sun*, 371 U.S. 471 (1963) (the test of excludability is not whether evidence would not have come to light but for illegal actions of police, but whether evidence was come at by exploitation of illegality rather than by means sufficiently distinguishable to be purged of primary taint); *United States v. Collier*, 1 M.J. 358 (C.M.A. 1976) (attenuation found; no exploitive link between unwarned interview of the accused and the surrendering of a rifle by the accused a few days later, where the rifle was not brought up at the interview and accused conceded he was not upset by the interview); *United States v. Atkins*, 26 C.M.A. 153, 46 C.M.R. 244 (1973) (attenuation rejected; seizure invalidated where unwarned questioning provided the probable cause basis to apprehend and led to a search incident to the apprehension). *See also United States v. Butner*, 15 M.J. 139 (C.M.A. 1983) (attenuation found: "cleansing warning," passage of time, and lack of confinement dissipated taint of earlier unlawfully obtained confession).

C. Impelled statements at trial. If a pretrial statement was improperly introduced into evidence, the court on appeal must test the judicial confession made by the accused at trial to determine if it was impelled by the erroneous admission of the pretrial statement. *United States v. Bearchild*, 17 C.M.A. 598, 38 C.M.R. 396 (1968). If the government's evidence will show that the in-court statement was not so impelled, the judicial confession will override the prejudice otherwise resulting from the improper admission of the pretrial statements. *United States v. Hundley*, 24 C.M.A. 538, 45 C.M.R. 94 (1972) (the evidence aside from improperly admitted pretrial statements, although extensive, was insufficient to convince beyond a reasonable doubt that the accused's decision to testify was influenced by the use of his pretrial statements; thus, his testimony did not cure the prejudice resulting from the use of the statements). *See also United States v. DeWitt,* 3 M.J. 455 (C.M.A. 1977) (*Bearchild* rule does not apply to cases where there is no primary illegality on the part of government investigators). The court in *DeWitt* rejected the accused's argument that an improperly admitted Army form used to establish the inception date of an unauthorized absence impelled his judicial confession); *United States v.*

Carey, 23 C.M.A. 947, 43 C.M.R. 639 (1971) ("impelled" testimony instruction regarding accused's testimony held harmless error); *United States v. Hurt*, 19 C.M.A. 206, 41 C.M.R. 206 (1970) (dealing with instructions to members concerning the effect of in-court testimony if defense contests voluntariness of out-of-court statement).

1207 STANDING TO RAISE FIFTH AMENDMENT / ARTICLE 31 ISSUES AT TRIAL

The general rule is that fifth amendment/article 31 rights are personal ones and that only the accused at trial may raise a self-incrimination or confession issue. Mil.R.Evid. 304(a). Thus, even if a co-accused makes an unwarned statement that the prosecution intends to use against the accused, the accused lacks standing to raise the issue of the accomplice's lack of warnings. One exception seems to exist, however. Where the statement to be offered is claimed to be involuntary in the traditional sense (e.g., coerced, and if so, its reliability would be suspect), a hearing may be held to determine the voluntariness of the statement. *See LaFrance v. Bohlinger*, 499 F.2d 29 (1st Cir. 1974) (use of statement allegedly obtained by police from a witness "strung out on drugs," by threats, for impeachment of the witness required voluntariness determination by trial judge). *See also Meachum v. United States*, 419 U.S. 1080 (1974). Even if *LaFrance* is adopted by the military, a mere failure to give article 31 or *Miranda* warnings would not be cognizable. *See* Comment, *The Right of a Criminal Defendant to Object to Use of Testimony Coerced From a Witness*, 57 Nw. U.L. Rev. 549 (1962); Note, 58 Geo. L.J. 621 (1970).

1208 ADMISSION AT TRIAL OF CONFESSIONS AND ADMISSIONS (Key Number 1116)

A. General procedures

1. Disclosure of statements to defense

a. Mil.R.Evid. 304(d)(1) requires the prosecution to disclose to the defense, prior to arraignment, the contents of "all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces." If disclosure is made after arraignment, timely notice must be given to the military judge and the defense. Failure to give the required notice will not automatically result in the government's loss of the use of the accused's statements. *See United States v. Williams*, 20 M.J. 686 (A.C.M.R.), *petition granted*, 21 M.J. 103 (C.M.A. 1985) (statement admissible despite government's failure to disclose it prior to arraignment, where hearing was conducted to afford defense counsel opportunity to discover circumstances surrounding utterance of statement).

b. The prosecution should also disclose any derivative evidence prior to arraignment.

2. Raising confession and admission issues

a. The burden rests on the defense to raise the question of admissibility through a motion to suppress prior to plea. Mil.R.Evid. 304 (d)(2)(A). *United States v. Nakamura*, 21 M.J. 741 (N.M.C.M.R. 1985) (trial judge did not abuse his discretion in refusing to permit civilian counsel to raise confession issue after plea); *United States v. Mortimer*, 20 M.J. 964 (A.C.M.R. 1985) (accused who pled guilty and had notice of trial counsel's plan to introduce confession on sentencing phase, waived objection by not objecting prior to plea).

b. Absent a pre-plea motion, the defense may not later raise the issue except as allowed by the military judge for good cause shown.

c. Failure to raise the issue waives it. Mil.R.Evid. 304(d)(2). *See United States v. Miller*, 31 M.J. 247 (C.M.A. 1990).

d. Specific objections may be required by the military judge in order to focus the litigation on specific points. Mil.R.Evid. 304(d)(3).

3. Litigating the issues

Mil.R.Evid. 304 contemplates a one-step procedure before the military judge alone who determines the issue of voluntariness. The question of admissibility will not be submitted to the court members. Mil.R.Evid. 304(d). *See also* Mil.R.Evid 104(c). The defense may, however, present evidence to the court members to show that the statement should not be given great weight because it lacks credibility. Mil.R.Evid. 304(f). The accused may take the stand for the limited purpose of litigating the admissibility of his statements. Such testimony may not be used against the accused at trial, whether on the merits or for impeachment.

4. Burden of proof

Under Mil.R.Evid. 304(e), the prosecution has the burden of establishing by a preponderance of the evidence that the statement is admissible. The burden extends only to the extent of the defense objection where a specific objection has been required under Mil.R.Evid. 304(d)(3). Derivative evidence is measured by the same standard. Mil.R.Evid. 304(e)(3).

5. Effect of a guilty plea

A guilty plea waives confession issues even if the matter has been litigated before plea. *United States v. Dusenberry*, 23 C.M.A. 287, 49 C.M.R. 536 (1975). *See* Mil.R.Evid. 304(d)(5) (guilty plea waives all self-incrimination issues and objections to statements); *United States v. Mortimer*, 20 M.J. 964 (A.C.M.R. 1985) (trial court did not abuse his discretion in denying defense motion to suppress confession where motion not made until confession offered during sentencing following accused's guilty plea).

6. Findings of fact

Where factual issues are involved, the military judge must state "essential findings of fact" on the record. Mil.R.Evid. 304(d)(4). *See United States v. Postle*, 20 M.J. 632 (N.M.C.M.R. 1985).

B. Proving voluntariness at trial

The prosecution has the burden of showing voluntariness. This generally means that the prosecution must show that the rights warnings were properly given (or were unnecessary), that a proper waiver was obtained, and that the statement was voluntary under the voluntariness doctrine.

1. Showing compliance with article 31/*Miranda*

a. It is usually essential to call at least one witness to establish the rights warnings and waiver. The witness may testify purely by memory, or may utilize a rights warning card or a rights waiver certificate. If a document is used, the witness must normally authenticate it. *See* NJS, Evidentiary Foundations III-1 (Rev. 10/90).

b. The prosecution will generally have its witness(es) testify concerning compliance with the warning requirements, obtaining a waiver from the accused or suspect, the method by which the statement was actually obtained and recorded, and other factors going to voluntariness. *Cf. United States v. Annis*, 5 M.J. 351 (C.M.A. 1978) (the only statement made by the interrogator at trial was that he read the accused his rights "off a card"; absent a contrary showing by defense challenge, regularity of exposition of article 31 warnings would be presumed). *But see Tague v. Louisiana*, 444 U.S. 469 (1980) (merely reading accused rights "off a card" will not establish accused understood and validly waived rights).

c. Rights warning cards may be used to refresh recollection and sometimes as a partial substitute for testimony similar to past recollection recorded. *See United States v. Blake*, 50 C.M.R. 603 (A.C.M.R. 1975) (allowing a

witness' testimony that he had complied with rights warning "sheet" on his desk to substitute for affirmative testimony that the accused had been informed of the offense of which he was suspected). Is it enough for a prosecution witness to say, "I did everything the card said I had to do," or must he actually testify to what he did? *Cf. United States v. Girard*, 28 C.M.A. 152, 49 C.M.R. 438 (1975) (sufficient where interrogator testified he read the rights from a card); *United States v. Annis*, *supra*.

2. Complying with the voluntariness doctrine. Compliance with the voluntariness doctrine should necessitate counsel's showing the conditions of interrogation; length of detention; health and physical condition of the suspect at the time of interrogation; and the other factors discussed in § 1205, *supra*. Prosecutors should avoid leading questions, a particular problem in this area (i.e., make sure the witness knows what points you are trying to bring out).

C. Attacking voluntariness

The defense may, of course, call its own witnesses and present other affirmative evidence to establish involuntariness. However, in the usual case, the defense will choose to cross-examine prosecution witnesses. As the prosecution has the burden of proof, cross-examination can be highly effective. Cross-examination, however, can be incredibly damaging to the defense in this area. If the prosecution fails to establish an element of its proof (e.g., that the accused was informed of the offense of which he was suspected), cross-examination of the individual who took the statement may solicit the missing information. If the prosecution case appears perfect, there is no reason not to fish, and counsel may decide to try a few random probing questions.

D. Admission of statements of co-accused at joint trials

1. In a joint trial of two or more defendants, an admission or confession by one is not admissible against the other defendants unless the co-defendants take the stand, absent other exceptions to the hearsay rule. To prevent prejudice to the other defendants named in the statement, all references to the co-defendants must be removed from the statement before the court members see it. If this process (known as "redacting" a statement) is inadequate, trial of the co-accuseds must be severed. *United States v. Bruton*, 391 U.S. 123 (1968). *See United States v. Pringle*, 3 M.J. 308 (C.M.A. 1977) (speculation as to identity of redacted name was compulsively directed toward accused where other two co-defendants confessed and accused's name was "whited out" from redacted confessions). *See also United States v. Green*, 3 M.J. 320 (C.M.A. 1977) (direct, contextual, and even implied references should be eliminated).

2. Mil.R.Evid. 306 states that a statement of one of several co-accused may not be received into evidence "unless all references inculpating an

accused against whom the statement is inadmissible are deleted effectively or the maker of the statement is subject to cross-examination."

E. The silence of the accused

1. Pretrial silence. The prosecution may not show that the accused affirmatively exercised his rights against self-incrimination before trial. Mil.R.Evid. 301(f). *See, e.g., United States v. Christian*, 22 M.J. 519 (N.M.C.M.R. 1986) (error to allow government witness to testify accused invoked his right to silence and refused to sign chain of custody document). *See also United States v. Velez*, 22 M.J. 637 (A.C.M.R. 1986); *United States v. Bridges*, 499 F.2d 179 (7th Cir.), *cert. denied*, 419 U.S. 1010 (1974) (during a case for unlawfully possessing and using unregistered dynamite, a witness was improperly allowed to testify that upon surrender defendant refused to answer a question concerning his recent handling of explosives). The fact that the accused remained silent and failed to explain suspicious circumstances after receiving *Miranda* warnings cannot be shown in a court-martial. In *United States v. Hale*, 422 U.S. 171 (1975), the prosecutor, on cross-examination of the accused, was not permitted to impeach the credibility of an alibi by inquiring into the accused's silence at the police station. The court held that the trial court ruled correctly since silence is not inconsistent with a later claim of innocence. *See also Doyle v. Ohio*, 426 U.S. 610 (1976). In *United States v. Noel*, 3 M.J. 328 (C.M.A. 1977), the court held that, where the accused is entitled to rights warnings but does not receive them, his silence may not be used against him. However, in *Jenkins v. Anderson*, 447 U.S. 231 (1980), the Supreme Court held that *Hale* and *Doyle* do not prohibit the use of pre-arrest silence to impeach a defendant's credibility. *See also Fletcher v. Weir*, 455 U.S. 603 (1982), where the Supreme Court allowed the prosecution to use post-arrest, pre-warnings silence to impeach. The existence of article 31 in the military will reduce the occasions where *Jenkins* and *Fletcher* might be applied. It is permissible to impeach an accused's credibility by showing that he gave evasive answers to questions after being given full warnings, as opposed to remaining silent. *United States v. Philpot*, 10 M.J. 230 (C.M.A. 1981). Impeachment by showing recent fabrication as opposed to invocation of the right to remain silent is also proper cross-examination. *United States v. Garcia*, 18 M.J. 716 (A.F.C.M.R. 1984). No comment may be made upon the accused's silence at trial. *See, e.g., United States v. Albrecht*, 4 M.J. 573 (A.C.M.R. 1977), *petition denied*, 5 M.J. 300 (C.M.A. 1978) (trial counsel's comment upon accused's silence during sentencing argument was error, but harmless in this case); *United States v. Howell*, 18 M.J. 573 (N.M.C.M.R. 1984) (reversible error where government witness commented on accused's election to remain silent notwithstanding absence of defense objection). *See also* Mil.R. Evid. 304(h)(3), which provides that failure to deny an accusation may not be used to support an inference that the accused has admitted the accusation, where the accused is in confinement, arrest, or custody, or otherwise under official investigation. Silence when confronted with accusations by a private party, however, may constitute an admission by silence. *See United States v. Cain*, 5 M.J. 844

(A.C.M.R. 1978); *United States v. Wynn*, 23 M.J. 1726 (A.F.C.M.R. 1986) [base exchange store detective was a private party; therefore, testimony that accused remained silent when confronted with incident was not precluded by Mil.R.Evid. 304(h)(3)].

2. Request for counsel. It is also error to draw to the attention of the triers of fact that the accused, upon being questioned prior to trial, requested counsel. *United States v. Ross*, 7 M.J. 174 (C.M.A. 1979) (nonprejudicial error); *United States v. Moore*, 1 M.J. 390 (C.M.A. 1976) (no specific evidence of prejudice need be found for constitutional error to compel reversal; such error is not harmless unless the reviewing court can affirmatively find beyond a reasonable doubt that error might not have contributed to accused's conviction); *United States v. Williamson*, 2 M.J. 597 (N.C.M.R. 1976).

3. Silence at trial. If the accused chooses not to testify at trial, the defense may be entitled to an instruction directing the court members not to draw a negative inference from his silence (the actual effect of this instruction is unknown, and it may well be that it is more prejudicial than ignoring the point altogether). *Cf. Lakeside v. Oregon*, 435 U.S. 333 (1978) (judge may instruct jury not to hold accused's silence against him over defense objection). Mil.R.Evid. 301(g) allows the defense to request such an instruction, or that such an instruction not be given. The judge may nonetheless instruct the court on the accused's silence as "justice" requires.

F. Completing statements offered by the prosecution

If only part of an admission or confession is shown by the prosecution, the defense may by cross-examination or otherwise introduce the rest of the confession or statements explanatory of that part. Mil.R.Evid. 304(h)(2). *See United States v. Speer*, 2 M.J. 1244 (A.F.C.M.R. 1976).

G. Instructions. The military judge is required to instruct the members to give a confession or admission by the accused whatever weight they feel it deserves under all the circumstances of the case. Mil.R.Evid. 304(e)(2).

1209 CORROBORATION (Key Numbers 1115 - 1118)

A. Generally

Corroboration is needed before a pretrial confession or admission may be received in evidence at trial. *United States v. Robinson*, 21 M.J. 937 (A.F.C.M.R. 1986), *aff'd*, 26 M.J. 361 (C.M.A. 1988) (sufficient corroboration); *United States v. Poduszczak*, 20 M.J. 627 (A.C.M.R. 1985) (insufficient corroboration); *see also United States v. Nakamura*, 21 M.J. 741 (N.M.C.M.R. 1985) (accused waived corroboration

of the confession by raising the issue for the first time on a motion for a finding of not guilty after the confession had been admitted; but accused's guilt was not established beyond a reasonable doubt). Corroboration in the military is defined as independent evidence of the essential facts related within the corroborated statement. Mil.R.Evid. 304(g). This rule differs from that in use in many civilian jurisdictions inasmuch as it relates to admissions as well as to confessions and is concerned primarily with the truthfulness of the statement, rather than going to show, via independent evidence, that the offense in question took place (corpus delecti). Insofar as the latter is concerned, there is little practical difference in the proof used to show that an offense actually occurred and that normally offered to establish the accuracy of a statement. However, in *United States v. Loewen*, 14 M.J. 784 (A.C.M.R. 1982), the court indicated that the military corroboration requirement may place a greater burden on the prosecution than the corpus delecti rule because, in some cases the former requires corroboration of the identity of the accused as well as the essential facts. *See also United States v. Yates*, 24 M.J. 114 (C.M.A. 1987) (although corroboration is necessary for all elements of an offense established by admissions alone, it is sufficient for the independent evidence to bolster the confession itself to prove the offense through the statements of the accused).

1. Although corroboration is needed before a statement may finally be admitted, a statement may be admitted subject to a later showing of corroboration. *See* Mil.R.Evid. 304(g)(2). In practice, this frequently seems to take place without any formal acknowledgement except in cases resting purely on confession evidence. Defense counsel should normally object to an incriminating statement unless corroborating evidence is first introduced. If the statement is accepted with corroboration being postponed, defense counsel should be alert to a renewal of the objection if the prosecution fails to meet the requirement by the end of its case-in-chief. Inasmuch as the military requirement goes to admissions as well as confessions, the corroboration requirement could represent at least a tactical problem for the prosecution.

2. Corroboration is not required for a statement made prior to or in the course of an offense, nor for statements made in court (termed "judicial confessions"). Mil.R.Evid. 304(g). *See United States v. Baker*, 2 M.J. 360 (A.F.C.M.R.), *aff'd*, 4 M.J. 89 (C.M.A. 1977); *United States v. Crayton*, 17 M.J. 932 (A.F.C.M.R.), *petition denied*, 19 M.J. 57 (C.M.A. 1984). Further corroboration is not needed if the statement in question is admissible under a different hearsay exception. Mil.R.Evid. 304(g).

B. Quantum of proof needed (Key Number 1117)

Mil.R.Evid. 304(g)(1) provides that independent evidence, whether direct or circumstantial, need not be sufficient to prove the truth of the essential facts beyond a reasonable doubt although, if the confession is the only other evidence, the

evidence taken together with the confession must establish guilt beyond a reasonable doubt. Only an "inference of truth" is needed. *United States v. Melvin*, 26 M.J. 145 (C.M.A. 1988). *See also United States v. Rounds*, 30 M.J. 76 (C.M.A. 1990).

C. Type of proof needed for corroboration (Key Number 1115)

1. Corroborating proof may include types of evidence normally inadmissible. *See United States v. Stricklin*, 23 C.M.A. 728, 44 C.M.R. 39 (1971) (evidence that B possessed and sold marijuana aboard ship is sufficient corroboration for accused's confession to possession and sale where accused confessed he sold the marijuana to B and the details of the possession matched). *See also United States v. Wong Sun*, 371 U.S. 471 (1963); *United States v. Springer*, 5 M.J. 590 (A.F.C.M.R. 1978) (stipulations of fact or expected testimony may serve as corroboration).

2. Under Mil.R.Evid. 304(g), either direct or circumstantial evidence may be used.

D. Procedure to determine existence of corroboration

The military judge alone decides whether the statement has been corroborated. Mil.R.Evid. 304(g)(2). This changes prior military practice which had required instructions to the court where the defense so requests and the evidence was substantially conflicting, self-contradictory, uncertain, or improbable and court members made an independent evaluation of whether there had been sufficient corroboration. Under current practice, the amount and type of corroboration is a factor to be considered in determining how much weight should be given to the statement.

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CHAPTER XIII

SEARCH AND SEIZURE

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CHAPTER XIII

SEARCH AND SEIZURE

FOURTH AMENDMENT

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

1301 INTRODUCTION

A. History

1. The fourth amendment was included in the Bill of Rights largely as a response to abuses which occurred under general warrants or writs of assistance in colonial times. Such writs were used in several ways, but most notable was their use by customs officials to enforce what the colonists felt were unjust importation laws. The writs were, in effect, a blank check authorizing officials to rummage through people's homes and belongings to secure any evidence they might find.

2. The fourth amendment received relatively little judicial attention or development until the 20th century. *See generally* N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1973). The 20th century search and seizure law has mushroomed; this expansion has been impelled in large measure by two factors:

a. The use of an evidentiary rule (the exclusionary rule) as the primary sanction with which to enforce the fourth amendment, which has rendered the amendment a critical rule in criminal procedure; and

b. the extension of, and heightened interest in, enforcement of laws against possession of contraband substances; e.g., liquor in the 1920's and 30's, and narcotics ever since, which has resulted in a high number of cases in which searches and seizures are involved.

B. Policy behind the fourth amendment

1. Originally, the fourth amendment's protections were linked directly to property interests. Thus, a violation occurred only where the government committed some type of trespass into a "protected area." *See, e.g., Olmstead v. United States*, 277 U.S. 438 (1928).

2. More recently, the focus of the amendment has shifted to protection of personal privacy.

a. In *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court held that evidence of conversations overheard by FBI agents who placed an electronic listening device on the outside of a telephone booth used by Katz was inadmissible because seizure of the conversation was illegal. Specifically rejecting a "protected area" or trespass theory, the Court said that the fourth amendment may apply even where no such physical intrusion occurs. The following quotations illustrate the Court's analysis in *Katz*:

(1) "For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection [citations omitted). But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 354; and

(2) "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.*

b. Justice Harlan, concurring in *Katz*, attempted to define the majority's test more precisely: "there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as reasonable." 389 U.S. at 361. This formula has been reduced to the so-called "reasonable expectation of privacy" test. This template is commonly applied by courts to determine whether the fourth amendment applies to a given governmental activity. Also note that the test may dictate the extent of fourth amendment protections under some circumstances. *See, e.g., United States v. Chadwick*, 433 U.S 1 (1977); *Cady v. Dombrowski*, 413 U.S. 433 (1973).

c. The reasonable expectation of privacy test is analytically incomplete, however, for several reasons.

(1) "Privacy" is an imprecise concept incapable of an exhaustive definition. Moreover, the fourth amendment protects only certain aspects of privacy. What those aspects are is not entirely clear, nor does the amendment protect only privacy. As the majority said in *Katz*:

> [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy--his right to be let alone by other people--is, like the protection of his property and of his very life, left largely to the law of the individual states.

389 U.S. at 350-51 [emphasis in original, footnotes omitted].

(2) Making the subjective expectations of a given individual a necessary condition for fourth amendment protections to arise is somewhat circular. The real question is not whether a given individual thought he was protected, but whether as a society we want to recognize a protection against given governmental activity. While traditional expectations may be a factor in this determination, query to what extent they ought to be controlling. Justice Harlan, who originated the "reasonable expectation of privacy test," later recognized its shortcomings in his dissent in *United States v. White*, 401 U.S. 745 (1971):

> The analysis must, in my view, transcend the search for subjective expectations or legal attributions of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.
>
> Since it is the task of the law to form and project, as well as to mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.

401 U.S. at 786. *See also Smith v. Maryland*, 442 U.S. 735 (1979).

d. Despite its analytical shortcomings, the reasonable expectation of privacy test continues as a thumbnail description of the analysis that courts use in determining whether the fourth amendment applies to a given governmental activity.

3. Thus, as a general proposition, the fourth amendment protects against a broad (and ill-defined) range of governmental actions which intrude upon our private lives.

C. Application to the military

1. Application of the Bill of Rights generally

a. "[I]t is apparent that protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." *United States v. Jacoby*, 11 C.M.A. 428, 29 C.M.R. 244, 246-47 (1960).

b. Supreme Court treatment

(1) *See generally Middendorf v. Henry*, 425 U.S. 25 (1976); *Parker v. Levy*, 417 U.S. 733 (1974); *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Burns v. Wilson*, 346 U.S. 137 (1953).

(2) Several Supreme Court decisions indicate that the Court recognizes that substantial historical, structural, and social differences in the military society permit the elimination or relaxation of significant constitutional protections. *See Parker v. Levy, supra; Middendorf v. Henry, supra; Schlesinger v. Councilman*, 420 U.S. 738 (1975).

c. The Court of Military Appeals continues to apply tacitly a presumption that constitutional protections apply in the military system just as they do in civilian society.

(1) "The burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976).

(2) *See also United States v. Grunden*, 2 M.J. 116, 121 n.9 (C.M.A. 1977).

2. Application of fourth amendment protections to members of the military

a. Mode of application

(1) The Uniform Code of Military Justice is silent as to searches and seizures or the admission of illegally seized evidence in courts-martial. *But see* articles 7-13, UCMJ, which deal with seizure and detention of the person before trial. These become relevant to the evidentiary considerations in the areas of stop and frisk and search incident to apprehension. *See United States v. Hessler*, 4 M.J. 303, 307 (C.M.A. 1978) (Fletcher, C.J., concurring in the result).

(2) Therefore, the law of search and seizure in the military has generally been drawn from decisions of the Supreme Court and other judicial interpretations of the fourth amendment.

(3) Direct sources of military law of search and seizure:

(a) Decisions of the Court of Military Appeals and the courts of military review;

(b) Military Rules of Evidence 311-317 [hereinafter Mil.R.Evid.];

(c) service and local regulations; and

(d) tradition. *See United States v. Florence*, 1 C.M.A. 620, 5 C.M.R. 48 (1952).

b. The exclusionary rule

(1) The exclusionary rule has been applied in courts-martial at least since 1922. *See* J. Munster and M. Larkin, *Military Evidence* 9.1a n.2 (2d ed. 1978).

(2) The Military Rules of Evidence apply the exclusionary rule today.

(a) As a rule of evidence, Mil.R.Evid. 311 prohibits the admission of illegally obtained evidence and appears to be within the President's authority under Article 36, UCMJ.

(b) Mil.R.Evid. 312-317 discuss various types of "lawful" searches and seizures. These provisions are generally descriptive as opposed to merely prescriptive. *See United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977); *United States v. Heard*, 3 M.J. 14, 20 n.12 (C.M.A. 1977).

(3) Judicial decisions may also affect the scope of the exclusionary rule's application. *See, e.g., United States v. Jordan*, 1 M.J. 334 (C.M.A. 1976); *United States v. Thomas*, 1 M.J. 397, 402 (C.M.A. 1976) (Fletcher, C.J., concurring in the result).

(4) The violation of a military regulation by government agents may trigger application of the exclusionary rule where the underlying purpose of the regulation is the protection of personal liberties or interests. *Compare United States v. Dillard*, 8 M.J. 213 (C.M.A. 1980) *with United States v. Caceres*, 440 U.S. 741 (1979) *and United States v. Holsworth*, 7 M.J. 184 (C.M.A. 1979); *United States v. McGraner*, 13 M.J. 408 (C.M.A. 1982) *and United States v. Foust*, 17 M.J. 85 (C.M.A. 1983). *See also United States v. Hilbert*, 22 M.J. 526 (N.M.C.M.R. 1986) (OPNAVINST 5350.4 requirement for second-echelon approval of certain urine sample collections was not designed to protect individual rights, and its violation did not invoke exclusionary rule, citing *Caceres*); *United States v. Moreno*, 23 M.J. 622 (A.F.C.M.R. 1986) (under Right to Financial Privacy Act, base CO should not have authorized search of records at base credit union, but application of exclusionary rule not required -- especially since statute includes exclusive judicial remedy).

(5) The exclusionary rule is not a tool by which courts may exercise overall control over governmental search and seizure activities. In *United States v. Payner*, 447 U.S. 727 (1980), the Supreme Court refused to sanction the use of the rule as an adjunct to the supervisory power of the Federal courts. The trial court had applied the rule, although there was a lack of standing on the part of the defendant, where government agents had deliberately violated the constitutional rights of a third party in order to acquire evidence against the accused.

c. Substantive scope of fourth amendment protections of servicemembers

(1) Much of the remainder of this chapter is concerned with the applicability of the fourth amendment in the military context.

(2) The following general observations may be made.

(a) As a general rule, the principles applicable to the law of search and seizure in the civilian sphere also hold true in the military.

(b) The primary differences stem from the hierarchical, authoritarian structure in the military, the need for discipline in the military, and the need for combat readiness. *See generally Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Hessler*, 4 M.J. 303 (C.M.A. 1978), *aff'd on reconsideration*, 7 M.J. 9 (C.M.A. 1979).

-1- Thus, traditionally, the commanding officer of a military organization has had broad authority to examine persons and property within his or her organization for a variety of reasons.

-a- Such reasons may or may not include enforcement of the law in the normal sense.

-b- Whatever the reason, such examinations do involve intrusions into areas in which, in another setting, an individual would have privacy interest of the type protected by the fourth amendment.

-2- Law enforcement responsibility extends to a broad portion of the military society, i.e., military police are not the only ones charged with enforcing the law. Officers, noncommissioned officers, and petty officers, as well as others, share such responsibilities. This brings the fourth amendment into issue in a wider range of activities.

1302 FRAMEWORK FOR ANALYSIS OF FOURTH AMENDMENT QUESTIONS

A. Effect upon admissibility. A suggested methodology to follow in assessing the fourth amendment's effect upon the admissibility of a given piece of evidence is set forth below.

1. Does the fourth amendment apply to the means by which the evidence was obtained? That is:

a. Was there a quest for evidence of a crime;

b. was there an intrusion into an area in which an individual has a reasonable expectation of privacy;

c. was there governmental involvement in the means by which the evidence was obtained; and

d. did the questioned activity occur in a place protected by the fourth amendment? (E.g., if open fields, no fourth amendment application.)

2. Even if the fourth amendment applies, and regardless of whether there was compliance with it, was the accused protected by it, or is there some reason why the exclusionary rule should not be invoked? That is:

a. Did this accused have a personal, legally protected interest which was violated, i.e., did he or she have standing to contest the admissibility of the evidence;

b. was there a waiver of the fourth amendment's protections by someone legitimately capable of doing so?

3. Were the substantive requirements of the fourth amendment adhered to?

a. Was the evidence lawfully seized pursuant to the execution of a lawfully issued search warrant or its military equivalent, the "search authorization";

b. if not, can the search or seizure be justified under one of the "few and specifically limited exceptions," i.e., was the search or seizure "reasonable"?

B. Basic framework. The law of the fourth amendment is best understood by keeping in mind this basic framework. While the law of search and seizure is honeycombed with exceptions to these fundamental principles, one must maintain some structural overview to avoid falling into the chaos of a totally ad hoc analysis.

1303 APPLICABILITY OF THE FOURTH AMENDMENT TO THE ACTIVITY (Key Numbers 1045, 1046 et seq.)

A. Any intrusion by the government into an area in which an individual has a reasonable expectation of privacy may be a search within the meaning of the fourth amendment.

1. *See generally Katz v. United States*, 389 U.S. 347 (1967). *See also United States v. Bailey*, 3 M.J. 799 (A.C.M.R.), *petition denied*, 4 M.J. 149 (C.M.A. 1977) (accused had no reasonable expectation of freedom from governmental intrusion in a latrine of a barracks); *United States v. Olmstead*, 17 M.J. 247 (C.M.A. 1984) (accused retained no reasonable expectation of privacy in vehicle demolished in accident).

2. Not all such intrusions fall within the meaning of the fourth amendment. The following cases illustrate the point.

a. *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408 (1966) (act of friend, who was also government agent, entering Hoffa's apartment at Hoffa's invitation and overhearing incriminating conversations in his presence, held not to be a search). *See also United States v. White*, 401 U.S. 745 (1971); *United States v. Turck*, 49 C.M.R. 49 (A.F.C.M.R. 1974).

b. *United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Mara*, 410 U.S. 19 (1973) (grand jury subpoena for purpose of taking voice and handwriting exemplars not covered by fourth amendment).

c. *United States v. Miller*, 425 U.S. 435 (1976) (individual depositor has no protected fourth amendment interest in records of his banking transactions maintained by bank). *But see* Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 (1982).

d. *Smith v. Maryland*, 442 U.S. 735 (1979) (use of pen register did not violate fourth amendment).

e. *See United States v. Holmes*, 537 F.2d 227 (5th Cir. 1976) (*en banc*, equally divided court) (attaching beeper to car for purpose of surveillance did not violate fourth amendment).

f. In *United States v. Lewis*, 11 M.J. 188 (C.M.A. 1981) and *United States v. Cunningham*, 11 M.J. 242 (C.M.A. 1981), the Court of Military Appeals held that local command regulations forbidding the locking of doors of individuals' rooms were based on legitimate grounds and thus reduced any reasonable expectation of privacy therein.

B. Use of the term "search" in two different senses

1. Because the purpose of the original writs of assistance and general warrants, against which the fourth amendment was primarily aimed, was the seizure of contraband and the prosecution of offenders [*see Murray v. Hoboken Land Co.*, 59 U.S. (18 How.) 272 (1856)], and because of the exclusionary rule's

relation to criminal proceedings, the term "search" has frequently been limited to describing quests for evidence for use in prosecution. Thus, in this narrow sense, a distinction may be drawn between an "inspection" (i.e., an intrusion for administrative purposes) and a "search" (i.e., an intrusion for the purposes of finding evidence for prosecution).

2. Nevertheless, the fourth amendment also prohibits unreasonable intrusions by government agencies that do not directly involve or contemplate criminal prosecutions. *See Camara v. Municipal Court*, 387 U.S. 523 (1967). Therefore, under this broader definition, any intrusion into an individual's privacy may be a search, regardless of whether its purpose is prosecutorial or not (i.e., an inspection may be a form of search, which must be reasonable under the fourth amendment).

C. Nongovernmental agents

1. Generally. As a restraint on governmental authority, the fourth amendment protects individuals from unreasonable searches and seizures by government agents. The fourth amendment does not apply to searches by private parties or foreign officials. Sometimes, however, the line between who is a government agent, or who is acting in behalf of the government, is difficult to determine.

2. Foreign searches

a. Under *United States v. Jordan*, 1 M.J. 334 (C.M.A. 1976), in order for the fruits of a search by a foreign official to be admissible, the search must have:

(1) Met U.S. constitutional standards; or

(2) it must have been entirely a foreign venture (i.e., not instigated by U.S. agents, no U.S. presence, legal under local law, and not shocking to the conscience).

b. *Jordan* appeared to go farther than necessary to protect servicemembers' fourth amendment rights, which apply only vis-a-vis United States officials, and was probably a response to the practical difficulties inherent in deciding whether there had been "substantial" U.S. participation in a foreign search.

c. In *United States v. Morrison*, 12 M.J. 272 (C.M.A. 1982), the Court of Military Appeals expressly overruled *Jordan* in view of Mil.R.Evid. 311(c), which now alters the *Jordan* result in that:

(1) Mere presence of U.S. officials will not alter the foreign character of the search;

(2) compliance with local (foreign) law is not mandated for the fruits of a foreign search to be admissible; and

(3) the "conscience shocking" standard is changed to "gross and brutal maltreatment" (the foreign authorities must not have subjected the accused to gross and brutal maltreatment).

d. Consequently, absent proof that U.S. government officials initiated or actively participated in the foreign search, U.S. constitutional standards are irrelevant to the issue of the admissibility of any seized items. *See, e.g., United States v. Holland*, 18 M.J. 566 (A.C.M.R. 1984) (characterization of search as "foreign" inappropriate where military personnel initiated the action by German police).

3. Searches by private individuals. "Private capacity" searches are not covered by the fourth amendment as long as the individual was acting in a purely private capacity. *See* Mil.R.Evid. 311(a). *See* the cases listed below for illustrations.

a. *Burdeau v. McDowell*, 256 U.S. 465 (1921) (fourth amendment not violated by seizures of private papers by a private corporation from the defendant, a director of the corporation).

b. *United States v. Carter*, 15 C.M.A. 495, 35 C.M.R. 467 (1969) (search of accused's wall locker and person by fellow soldier who lived in same barracks upheld, even where soldier employed threats and physical violence prior to and during search).

c. *United States v. Faucett*, 50 C.M.R. 894 (A.F.C.M.R. 1975) (search conducted by roommate of defendant and victim of theft upheld).

d. *United States v. Rosado*, 2 M.J. 763 (A.C.M.R. 1976) (search conducted by roommate upheld).

e. *United States v. Hodges*, 27 M.J. 754 (A.F.C.M.R. 1988) (opening of package addressed to accused by private freight carrier employee who

then notified state law enforcement authorities that package contained suspected controlled substance did not violate accused's fourth amendment rights).

f. *United States v. Clow*, 26 M.J. 176 (C.M.A. 1988) (estranged husband's entry into the accused's apartment and his seizure of stolen videotapes was not a government search protected by the fourth amendment. When the husband gave CID access to the apartment for a subsequent search, however, the fourth amendment did apply).

g. *United States v. Jacobs*, 31 M.J. 138 (C.M.A. 1990) (accused's flight chief was acting as a government agent when he entered the accused's apartment at invitation of the landlord in order to inspect damage).

D. Situs of activity

1. Open fields doctrine. Mil.R.Evid. 314(j). By its terms, the fourth amendment protects persons, houses, papers, and effects. It does not include open fields. *See Hester v. United States*, 265 U.S. 57 (1924). This is true even in light of the more modern reasonable expectation of privacy doctrine. *See Air Pollution Variance Board v. Western Alfalfa Corp.* 416 U.S. 861 (1974). The open fields doctrine was reaffirmed in *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), where the Court held that the Constitution does not generally protect against an invasion of one's privacy in fields, except in the area immediately surrounding the home, even though the government intrusion may be a common law violation. A no-trespass sign and a fence do not create a reasonable expectation of privacy within the meaning of the fourth amendment. *Oliver* concerned marijuana farmers.

2. Curtilage concept. A barn, used as a drug manufacturing laboratory, was not within the curtilage (regardless, authorities shined a flashlight into the barn from an open field [*see Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535 (1983)] in *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), which also discussed some factors defining the curtilage. *See also United States v. Burnside*, 15 C.M.A. 326, 35 C.M.R. 298 (1965); *California v. Ciraolo*, 476 U.S. 207 (1986) (no reasonable expectation of privacy from aerial surveillance of curtilage).

1304 EXCLUSIONARY RULE (Key Number 1045)

A. General

1. The fourth amendment is an important subject in the law of criminal procedure because its primary mode of enforcement is an evidentiary

rule, the exclusionary rule, which forbids the admission of evidence secured in violation of the fourth amendment. *See Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961); *Weeks v. United States*, 232 U.S. 383 (1914). In addition to evidence which is itself obtained illegally, evidence which is derived from illegal government activities may be subject to the exclusion sanction. *Nardone v. United States*, 308 U.S. 338 (1939); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

2. The rationale for the exclusionary rule is deterrence of official misconduct. The rule is designed to discourage violations of the fourth amendment by denying law enforcement officials the use of the fruits of such violations in subsequent prosecutions. Mere violation of a statute providing civil remedies for noncompliance does not automatically trigger the exclusionary rule. *United States v. Jackson*, 25 M.J. 711 (A.C.M.R. 1987) (government failed to comply with Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 et seq., in that it failed to provide notice to the accused before obtaining bank record).

a. Other justifications have been advanced for the rule.

(1) Personal right. The individual has a right to preclude the government from using an invasion of his rights (i.e., an illegal search or seizure) to his disadvantage. *See Weeks v. United States*, 232 U.S. 383 (1914).

(2) Judicial integrity. The court must exclude illegally obtained evidence in order to avoid the appearance of approval of the illegal acts. *See United States v. Calandra*, 414 U.S. 338 (1974) (Brennan, J., dissenting); *Elkins v. United States*, 364 U.S. 206 (1960). A majority of the Supreme Court now identifies judicial integrity as a rationale for the rule only insofar as the judiciary must manipulate the rule to effectuate its deterrent purpose. *United States v. Janis*, 428 U.S. 433, 458 n.35 (1976).

b. The Supreme Court has now established that deterrence is the only justification for the exclusionary rule. *Compare Stone v. Powell*, 428 U.S. 465 (1976) *with United States v. Jordan*, 1 M.J. 145 (C.M.A. 1975), in which the United States Court of Military Appeals seems to adhere to a judicial integrity rationale for the rule. *See also United States v. Thomas*, 1 M.J. 397, 402 (C.M.A. 1976) (Fletcher, C.J., concurring in the result).

3. Good faith exception

a. In 1984, the Supreme Court embraced a "good faith" exception which severely restricts the scope of this suppression remedy. In essence, judges should conduct a case-by-case analysis to ascertain whether application of the exclusionary rule would further its deterrence justification.

When the police conduct is objectively reasonable, the rule should not be applied. When the police were dishonest or reckless, however, suppression of the fruits of this illegal search would deter such misconduct. *See United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (warrant unsupported by probable cause did not require suppression); *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424 (1984) (warrant which did not specifically describe the items seized did not warrant suppression); *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) (good faith exception applied to authorities relying on statute later held unconstitutional).

b. The Navy-Marine Corps Court of Military Review adopted the "good faith" exception in *United States v. Postle*, 20 M.J. 632 (N.M.C.M.R. 1985) and *United States v. Evans*, 32 M.J. 1016 (N.M.C.M.R. 1991). It is unclear whether it has been adopted by the Court of Military Appeals [*United States v. Morris*, 28 M.J. 8 (C.M.A. 1989)] or the Army [*United States v. Thompson*, 30 M.J. 577 (A.C.M.R. 1990)]. The Air Force [*United States v. Lopez*, 32 M.J. 924 (A.F.C.M.R. 1991)] has rejected the good faith exception for authorizations from commanders.

c. The good faith exception was expressly adopted forsearch authorizations as Mil.R.Evid. 311(b)(3) in 1986. It provides that the exclusionary rule will not be applied if the person authorizing the search was competent to do so, he had a substantial basis for deciding probable cause existed (even though a court now disagrees with that decision), and those seeking his authorization and those executing it acted in good faith. An objective standard is used (i.e., a reasonably well-trained law enforcement officer would have known. . . .). Examples of bad faith might include seeking search authorization with information known to be false or to have been obtained from an earlier illegal search, "magistrate shopping," or executing a search authorization which was patently deficient (e.g., place to be searched not specified) -- or was purpose of good faith exception to cover inadvertent omissions? *Massachusetts v. Sheppard, supra.*

d. The argument for the good faith exception is that the exclusionary rule does not deter the magistrate who has no interest in the outcome. Is this applicable in the military, and is it true that the commanding officer has no interest in the outcome? Did not *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981) distinguish between a commanding officer authorizing a search as a military function and a magistrate issuing a warrant as a judicial act? *Postle, supra*, stated that such objections were overcome by the requirement for he search authorizing official to be neutral and detached. *Lopez, supra* takes the opposite view.

4. Other alternatives to the exclusionary rule include:

a. Federal tort claims [*see* 28 U.S.C. § 2680h (1982); Gilligan, *The Federal Tort Claims Act: Alternative to the Exclusionary Rule*, 66 J. Crim. L.C.P.S. 1 (1975)];

b. a Federal common law cause of action for violations of the fourth amendment [*compare Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) *with Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d. 586 (1983) (military personnel may not recover damages against superior for constitutional violation)];

c. litigation under state substantive law;

d. disciplinary action against police [*see, e.g.*, Articles 98(2), 133 and 134, UCMJ, or disciplinary action against the commander under Article 92, UCMJ; *see United States v. Stuckey*, 10 M. J. 347 (C.M.A. 1981)];

e. a civil rights appeal board;

f. an ombudsman (for example, the inspector general);

g. complaints under Article 138, UCMJ;

h. injunctions [*see Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975); *but see Rizzo v. Goode*, 423 U.S. 362 (1976); *Schlesinger v. Councilman*, 420 U.S. 738 (1975)]; or

i. an administrative review board [*see, e.g.*, Gilligan & Lederer, *Doing Away with the Exclusionary Rule*, The Army Lawyer 1 (Aug. 1975)].

B. Prerequisite of causal connection. Showing that the initial search is legal does not per se make any evidence obtained thereafter inadmissible. Such inadmissibility must rest on the existence of a causal connection between the legal activity and the derivative evidence. *Wong Sun v. United States*, 371 U.S. 471 (1963); *United States v. Decker*, 16 C.M.A. 397, 402, 37 C.M.R. 17, 22 (1967); Mil.R.Evid. 311(e). The test is not a "but for" test, but rather one that looks to the actual causal link between the illegal act and the evidence. Evidence obtained after the initial illegality is inadmissible unless the government can establish that the causal connection between its illegal act and the subsequently obtained evidence was insubstantial. There are three basic means by which the government may do this: "independent source" [*see Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)]; "attenuation" [*see Wong Sun v. United States*,

371 U.S. 471 (1963)]; or "inevitable discovery" [*see Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501 (1984); *United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982)].

1. Independent source and attenuation

a. Courts examine how a given piece of evidence was obtained to determine:

(1) Whether it was procured through means totally unrelated to (independent of) the illegal governmental activity [*see United States v. Waller*, 3 M.J. 32 (C.M.A. 1977)]; or

(2) whether the causal relationship of the illegality and the obtaining of the evidence was so remote (attenuated) as to be of minimal effect, although a cause and effect relationship between the illegality and the proffered evidence may exist. *See Wong Sun v. United States, supra.*

b. If either of these conditions are proved by the government, the evidence will be admissible.

c. *Miranda* warnings do not automatically remove the taint of an illegal arrest.

(1) *Brown v. Illinois*, 422 U.S. 590 (1975). *See also Dunaway v. New York*, 442 U.S. 200 (1979). *But see Rawlings v. Kentucky*, 448 U.S. 98 (1980) (even if there was an illegal detention, use of confession was proper as adequate attenuation of the illegality found after an examination of 'totality of the circumstances'; *Miranda* warnings were given; short period of time had elapsed between seizure and confession; atmosphere was congenial; and government's conduct was not flagrant abuse of the law). *See also United States v. Wynn*, 13 M.J. 446 (C.M.A. 1982) (repeated confession after warnings 19 days following release from illegal arrest was admitted).

(2) Several other illustrative cases are set forth below.

(a) In *United States v. Lee*, 274 U.S. 559 (1927), a Coast Guard cutter illegally halted and boarded another ship on the high seas. During this operation, Federal agents saw several cases of contraband whiskey on the deck. The agents testified that, before halting the "rum runner," they observed and recognized the cargo in full view on the deck. This observation was held not to be the result of the illegal search.

(b) In *United States v. Boisvert*, 1 M.J. 817 (A.F.C.M.R. 1976), the accused's car was located without aid of the information illegally obtained from the accused as to its whereabouts.

(c) *United States v. Sparks*, 24 C.M.A. 126, 134, 44 C.M.R. 188, 196 (1971) ("As the statement followed so closely in time the illegal search, it would seem to be the direct result of exploitation by the Government of its illegal action....").

(d) *United States v. Crow*, 22 C.M.A. 480, 483, 41 C.M.R. 384, 387 (1970) (statement from the accused taken "immediately" after illegal search of the accused held a "direct result" of the illegal acts).

(e) *United States v. Foecking*, 22 C.M.A. 46, 46 C.M.R. 46 (1972) (pretrial statement admitted in evidence against accused did not result from exploitation of earlier illegal search and seizure of his gun or from accused's previous statement regarding gun where accused indicated in testimony that seizure did not affect his decision to make a statement).

(f) *United States v. Sowards*, 5 M.J. 864 (A.F.C.M.R.), *petition denied*, 6 M.J. 127 (C.M.A. 1978) (testimony of witness against accused was not tainted by allegedly illegal search of accused's quarters where witness' identity became known through totally independent source).

(g) *United States v. Corley*, 6 M.J. 526 (A.C.M.R. 1978), *petition denied*, 6 M.J. 192 (C.M.A. 1979) (consent to second search was tainted by illegality of first warrantless search since illegal first search served as coercive influence on consent to second search).

(h) In *United States v. Kesteloot*, 8 M.J. 209 (C.M.A. 1980), the court held that testimony by a woman with whom the accused was living was not derived from evidence tainted by an illegal search, but was derived from an independent investigation dealing with the woman. Additionally, the court determined that there was no connection between evidence discovered in an illegal search of the accused's apartment and the accused's subsequent confession where the evidence revealed the accused's impetus to confess was not due to the search, but rather to knowledge that his roommate had already explained the details of the offense.

(i) *United States v. Ward*, 19 M.J. 505 (A.F.C.M.R. 1984) (the confession by the accused was the product of an illegal search and there was insufficient attenuation to purge this taint).

2. Inevitable discovery

a. In *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501 (1984), the Court expressly adopted the inevitable discovery doctrine.

b. The Court of Military Appeals had adopted the rule in *United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982). The court in *Kozak* held that the seizure of drugs from a train station locker was justified since their discovery would have been inevitable through exercise of proper police procedures authorized by proper authority despite the prior illegal search of the locker.

> In applying this exception to the exclusionary rule in the future, we will require that after an accused challenges the legality of a search, the prosecution must, by a preponderence of the evidence, establish . . . that when the illegality occurred, the government agents possessed or were actively pursuing evidence or leads which would have inevitably led to the discovery of the evidence and that the evidence would have been inevitably discovered in a lawful manner had not the illegality occurred.

Id. at 394. It further appears that absolute inevitability of discovery is not required; rather, all that is required is "simply a reasonable probability that the evidence in question would have been discovered from other than a tainted source." *United States v. Lewis*, 15 M.J. 656, 657 (N.M.C.M.R. 1983), *petition denied*, 21 M.J. 284 (C.M.A. 1985). *See also United States v. Lawless*, 18 M.J. 255 (C.M.A. 1984). *But see Nix v. Williams*, *supra* (government must establish inevitability by preponderance of evidence). Mil.R.Evid. 304(b) and 311(b)(2) were amended in 1986 to incorporate the inevitable discovery exception.

c. In *United States v. Carrubba*, 19 M.J. 896 (A.C.M.R. 1985), although accused's consent to search the trunk of his car was invalid because of his intoxication, the evidence discovered in the vehicle was nonetheless admissible under the inevitable discovery doctrine. A military policeman was on his way to obtain command authorization to conduct the challenged search when he was recalled because the accused consented. The court said he had probable cause but, even if he did not, there was other information, unknown to him, which clearly established probable cause. Therefore, command authorization would have been obtained ultimately. Query: would the *Carrubba* theory of inevitable discovery eliminate the need ever to obtain command authorization? Does it exceed the objective of *Nix v. Williams*, which was to restore the government to the position in which it would have been if the unlawful act had not occurred? Note that *United States v. Portt*, 21 M.J. 333 (C.M.A. 1986) and *United States v. Anderson*, 21 M.J. 751 (N.M.C.M.R. 1985) supported the *Carrubba* theory.

C. Witness' testimony subject to exclusion

1. In *United States v. Ceccolini*, 435 U.S. 268 (1978), the Supreme Court reaffirmed the principle that a live witness may be subject to exclusion under the fruit of the poisonous tree rule, but the Court stated that the analysis of the effect of the initial illegal act is somewhat different with a witness than when the concern is the admissibility of physical or documentary evidence. Among the factors discussed by the Supreme Court as tending to attentuate the taint in this case were:

a. The free will (i.e., absence of coercion or inducement, of the witness in testifying);

b. the absence of collateral exploitation of the initial illegality;

c. the passage of time between the illegality and contact of the witness, and between the latter and the trial;

d. the lack of egregiousness of the initial illegality; and

e. the possibility of discovery "in due course."

2. Prior to *Ceccolini*, military case law tended to treat witnesses discovered as the result of illegal searches, or whose testimony was secured as the result of illegal searches, in much the same way as other evidence. *Ceccolini* may affect the case law in this area. *See, e.g., United States v. Butner*, 15 M.J. 139, 144 (C.M.A. 1983); *United States v. Leiffer*, 13 M.J. 337, 345 (C.M.A. 1982); *United States v. Kesteloot*, 8 M.J. 209 (C.M.A. 1980).

3. The following military cases discussing the exclusion of a witness' testimony should also be consulted.

a. Testimony discovered as a result of an illegal search. *United States v. Castro*, 23 C.M.A. 166, 48 C.M.R. 782 (1974); *United States v. Armstrong*, 22 C.M.A. 438, 47 C.M.R. 479 (1973); *United States v. Peurifoy*, 22 C.M.A. 549, 48 C.M.R. 34 (1973).

b. Willingness of witness to testify affected by illegal activity. *United States v. Nazarian*, 23 C.M.A. 358, 49 C.M.R. 817 (1975).

c. Testimony of witnesses discovered as a result of an illegal seizure. *United States v. VanHoose*, 11 M.J. 878 (A.F.C.M.R. 1981), *petition denied*, 12 M.J. 301 (C.M.A. 1982).

d. Counsel must distinguish motions to suppress testimony about the illegal search from motions seeking to suppress testimony which is itself the product of the illegal search. *See United States v. Hale*, 1 M.J. 323 (C.M.A. 1976).

D. Impeachment

1. Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused. Mil.R.Evid. 311(b)(1).

2. *See also United States v. Havens*, 446 U.S. 620 (1980) (proper to use illegally seized evidence to impeach an accused's testimony).

1305 ADEQUATE INTEREST (STANDING) (Key Number 1082)

A. Generally

1. Whether an accused has an adequate interest or standing (the terms are hereinafter used interchangeably) to contest the search or seizure depends upon property and privacy concepts. For an accused to have standing to object to a search or seizure, not only must a search or seizure under the fourth amendment have occurred, but the accused must have had a protectable interest in the place searched or the item seized. In other words, it is not necessary for an accused to have had a property interest in the place searched or item seized. A reasonable expectation of privacy in the place searched or item seized suffices.

2. The concept of "adequate interest" or "standing" is often blurred by the courts. Thus, it is not uncommon for a court to reject a motion to suppress on grounds that the accused lacks standing when, in fact, what the court is really saying is that a search and seizure occurred, that it affected the accused, but that it was, in the final analysis, reasonable. Standing should be viewed not as involving a question of the legitimacy of governmental actions under the fourth amendment; but rather as raising the questions of whether a fourth amendment interest is involved at all and, if so, whether this accused had sufficient personal interest affected in order to be permitted to litigate it. *See generally United States v. Bowles*, 7 M.J. 735 (A.F.C.M.R. 1979), *petition denied*, 8 M.J. 42 (C.M.A. 1980) (passenger in automobile who failed to show legitimate personal expectation of privacy within car did not have standing to contest search). Additionally, an accused cannot vicariously assert violations of another accused's fourth amendment rights. *United States v. Escobedo*, 11 M.J. 51 (C.M.A. 1981).

3. Mil.R.Evid. 311(a)(2) provides that an accused has an adequate interest, or standing, to object to evidence obtained in a search or seizure if:

> The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

Clearly, the rule covers three concepts. The first is the concept of standing to contest the legality of a search, which attack, if successful, could lead to the suppression of the seized items as fruits of the search. The second concept is that of standing to contest the legality of the seizure of the evidence, regardless of whether the accused has standing to challenge the search. Finally, by recognizing other constitutional grounds that may apply to members of the armed forces, the rule would incorporate other court-recognized rules that may evolve (e.g., the "automatic standing" concept, previously recognized and subsequently abandoned as discussed further below).

B. Standing to contest the search. While, in earlier cases, the Supreme Court had talked about governmental intrusion into "constitutionally protected areas," in *Katz v. United States*, 389 U.S. 347 (1967), the court rejected this notion and announced that the fourth amendment protects "people not places." Thus, while Katz had no property interest in the public phone booth to which government agents had attached an electronic listening device, he was found to have a "reasonable expectation of privacy" under the two-prong test announced by the Court. The "prongs" are: (1) Has the individual by his conduct exhibited an actual (subjective) expectation of privacy? and (2) Is this subjective expectation of privacy one that society is prepared to accept as reasonable? *See also Smith v. Maryland*, 442 U.S. 735 (1979) (no reasonable expectation of privacy where pen registers installed without a warrant).

1. Presence at site. Under former MCM, 1969 (Rev.) provisions and early military appellate decisions, the accused was deemed to have standing to contest the legality of a search of another person's premises if, at the time of the search, the accused was legitimately on those premises. *See Mancusi v. DeForte*, 392 U.S. 364 (1968); *Jones v. United States*, 362 U.S. 257 (1960); *United States v. Harris*, 5 M.J. 44 (C.M.A. 1978); *United States v. Rollins*, 3 M.J. 680 (N.C.M.R. 1977). Subsequently, however, the Supreme Court abandoned presence as a conclusive criteria for standing in *Rakas v. Illinois*, 439 U.S. 128 (1978), *reh'g denied*, 439 U.S. 1122 (1979), saying that presence was merely one factor to which the courts would look in determining whether the accused had a legitimate

expectation of privacy in the area searched. In *Rakas*, the Court held that the accused, as a passenger in a car, had no reasonable expectation of privacy under the seat and in the glove compartment of the automobile. *See also Rawlings v. Kentucky*, 448 U.S. 98 (1980) (accused, who was present within house at same time as associate, had no legitimate expectation of privacy in associate's purse where evidence was discovered); *United States v. Kesteloot*, 8 M.J. 209 (C.M.A. 1980) (inasmuch as accused was living in apartment with a woman at time of search, he had standing to contest search which occurred in his absence). For a comparison of *Rakas*, *Rawlings*, both *supra*, and *United States v. Salvucci*, 448 U.S. 83 (1980), see Bell, *Raising Fourth Amendment Claims After Rakas, Salvucci, and Rawlings*, 7 Search and Seizure Law Reporter 61 (Nov. 1980).

2. Presence of items seized. Several cases, both civilian and military, suggest that mere ownership of the items seized during a search will not necessarily provide the accused with standing to object to the search. The issue arises in several contexts (e.g., where the accused's property is seized from a third party's dwelling, automobile, or person). Court decisions have tended to make standing to object to such searches more difficult to establish. *See, e.g., Rawlings, supra* (mere ownership of drugs in associate's purse did not cover standing to object to search); *United States v. McCullough*, 14 M.J. 409 (C.M.A. 1983); *United States v. Miller*, 13 M.J. 75 (C.M.A. 1982); *United States v. Sanford*, 12 M.J. 170 (C.M.A. 1981) (accused retained no legitimate expectation of privacy in leather drug-filled pouch, hastily handed to soldier in full view of unit first sergeant); *United States v. Foust*, 17 M.J. 85 (C.M.A. 1983).

3. Automatic standing

a. Automatic standing is the practice of vesting the accused with the right to object to an alleged illegal act of the government solely by virtue of the manner in which the offense is charged. The rule was based on *Jones v. United States*, 362 U.S. 257 (1960). *Jones* held that, where an essential element of the crime for which the accused is being tried is possession of the item he is seeking to suppress, standing is automatic. The rule was devised in order to avoid requiring the accused to admit guilt in order to establish standing to contest the search.

b. The Supreme Court, however, overruled the automatic standing aspect of *Jones* in *United States v. Salvucci*, 448 U.S. 83 (1980). In *Salvucci*, the Court premised its decision on:

(1) The nullification of the dilemma which defendants face (i.e., providing self-incriminating testimony in order to establish standing); and

(2) the fact that prosecutors can, without legal contradiction, allege criminal possession of an item and claim that the defendant was not subject to a fourth amendment deprivation.

c. The doctrine of automatic standing is not followed by military courts. Although Mil.R.Evid. 311(a)(2) would be broad enough to embrace the notion of automatic standing if it were to be determined to be of constitutional magnitude, the Court of Military Appeals has now recognized the Supreme Court's rejection of the doctrine in *Salvucci, supra*. *See United States v. Miller*, 13 M.J. 75 (C.M.A. 1982) at n.5 of the opinion.

C. Standing to contest the seizure. Civilian case law does not now distinguish between the standing required to contest a search and that required to contest a seizure, requiring that the defendant demonstrate in either case that he had a legitimate expectation of privacy in the place where the seized article was located. *See Rawlings* and *Salvucci, supra*. Thus, a bona fide possessory or proprietary interest in the thing seized would not, of itself, establish standing to contest either the search or the seizure. Mil.R. Evid. 311(a)(2) expressly conveys standing upon an accused to contest the validity of a seizure, however, if the accused had "a legitimate interest" in the property or evidence seized. The analysis to the rule makes it clear that the drafters intended to differentiate between the test to be applied when contesting a search (reasonable expectation of privacy) and the test for contesting a seizure where the only invasion of one's rights is the removal of the property in question. However, contesting a seizure will usually be of little value if one may not contest the search (as occurs when the accused had a legitimate interest in the property seized but no reasonable expectation of privacy in the place searched). Consider *United States v. Perguson*, 13 M.J. 955 (A.F.C.M.R.), *petition denied*, 14 M.J. 441 (C.M.A. 1982); *United States v. Miller*, 13 M.J. 75 (C.M.A. 1982); and *United States v. Lawless*, 18 M.J. 255 (C.M.A. 1984). The exception may exist if the property seized was not obviously evidence of a crime, and the seizure was unlawful regardless of the legality of the search.

D. Standing - litigating the issue. Mil.R.Evid. 311(e)(1) provides:

> When an appropriate motion or objection has been made by the defense under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that evidence was not obtained as a result of an unlawful search or seizure.

The rule is silent as to which party has the burden of establishing the standing necessary to contest the search or seizure. Logic would indicate that this

burden should fall upon the defense. Clearly, the rule places the burden of proving the legality of the search or seizure upon the prosecution.

Notwithstanding the clear language of the rule, however, the Court of Military Appeals in *Miller, supra*, quoted with approval the following language from *Rawlings*: "The person seeking to suppress the evidence produced by the search bears the burden of proving not only that the search was illegal, but also that he had a legitimate expectation of privacy in the area being searched." *Miller, supra*, at 77. While it was the position of the Air Force Court of Military Review in *Perguson, supra*, that this language has now modified Mil.R.Evid. 311, it can be argued that the opinion in *Miller* was concerned chiefly with the accused's reasonable expectation of privacy and thus there was no real occasion to consider whether the burden of proof announced in *Rawlings* would apply to trials by court-martial.

E. Expectation of privacy. Because of the relative relationship of the accused and the government to the property searched, the fourth amendment simply may not apply to some property in which no one has a privacy interest.

1. Government property. Mil.R.Evid. 314(d) and 316(d)(3).

a. *United States v. Simmons*, 22 C.M.A. 288, 46 C.M.R. 288 (1973) (lack of standing when evidence found in emergency gas can).

b. *United States v. Muniz*, 23 M.J. 201 (C.M.A. 1987) held that one may have a reasonable expectation of privacy in government property in a government office, but not vis-a-vis one's supervisor (leaving the expectation of privacy in one's office desk as to a law enforcement officer acting without the concurrence of one's supervisor). (This was only J. Cox's opinion; C.J. Everett concurred in result on other grounds.) Note that *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) subsequently held that there is no probable cause requirement for a government employer's search of a subordinate's desk and files for a noninvestigatory work-related purpose or work-related misconduct. *See also United States v. Weshenfelder*, 20 C.M.A. 416, 43 C.M.R. 256 (1971) (accused had no standing to contest search for government property in government desk).

c. *United States v. Taylor*, 5 M.J. 669 (A.C.M.R. 1978), *aff'd in summary disposition*, 8 M.J. 98 (C.M.A. 1979) (accused had no standing to challenge postal inspector's warrantless search of unit mailroom); *United States v. Bailey*, 3 M.J. 799 (A.C.M.R.), *petition denied*, 4 M.J. 149 (C.M.A. 1977) (accused had no standing to contest search of latrine). *But see United States v. Miller*, 50 C.M.R. 303 (A.C.M.R. 1975), *aff'd*, 1 M.J. 367 (C.M.A. 1976) (standing existed to

contest legality of search of an air duct in accused's barracks room, where duct was accessible only from within the room).

d. *United States v. Lewis*, 11 M.J. 188 (C.M.A. 1981) (battalion policy preventing the locking of doors lowered expectation of privacy). *See also United States v. Cunningham*, 11 M.J. 242 (C.M.A. 1981); *United States v. Webb*, 4 M.J. 613 (N.C.M.R. 1977) (no reasonable expectation of privacy in open-bay berthing compartment). Consider J. Cox's concurring in result opinion in *United States v. Moore*, 23 M.J. 295 (C.M.A. 1987), in which he invited briefs in an appropriate case as to whether there should be a reasonable expectation of privacy in a barracks room. *United States v. Battles*, 25 M.J. 58 (C.M.A. 1987) implies that the only area in which an accused will have a reasonable expectation of privacy in a berthing area aboard ship is his own locker and storage area.

e. In *United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988), Ayala still retained some interest in his government family quarters because he had not checked out yet (he was retiring). However, he had moved out and given a key to cleaning persons, and his reasonable expectation of privacy had diminished to an extent that he no longer had an adequate interest to challenge a search.

f. *United States v. Portt*, 21 M.J. 333 (C.M.A. 1986) (no reasonable expectation of privacy in small, unlocked locker assigned to individual in work area, when other similar lockers were locked and this locker had no valuables in it and appeared abandoned).

2. Business property. *Mancusi v, DeForte*, 392 U.S. 364 (1968).

3. Private property

a. In *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), Federal Express damaged a package with a forklift. The package was opened for insurance purposes and only contained white powder under several wrappings. The Court held that it was permissible for a DEA agent to reopen the package because that created no additional intrusion beyond that already committed by a private individual. In addition, the agent's test for cocaine did not violate any reasonable expectation of privacy.

b. *New York v. Class*, 475 U.S. 106 (1986) (no reasonable expectation of privacy in manufacturer's vehicle identification number on car dashboard).

c. *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988) (no reasonable expectation of privacy in curbside garbage.

Note: Court was careful to point out that, if garbage remains on an accused's private property, it would be within the curtilage and force a different result).

d. *See* paragraph B.2 *supra*.

F. Abandonment. Mil.R.Evid. 316(d)(1). When an individual abandons property, he gives up any interest in it; and, thus, lacks standing under the fourth amendment as to that property.

1. *Abel v. United States*, 362 U.S. 217 (1960). After Colonel Abel was arrested by officers of the Immigration and Naturalization Service, a search of his room resulted in the seizure of a birth certificate. After the defendant was told to assemble the items he wished to take with him, Abel, with the help of two I.N.S. agents, packed nearly everything in his bags. Some items, however, he "deliberately" left on the windowsill, and other items that "he chose not to pack" he threw into a wastepaper basket. The defendant then checked out of the hotel and was taken to I.N.S. headquarters. FBI agents then searched the room and found microfilm in the wastebasket. The Supreme Court held that, since the defendant had vacated the room, it was lawful for the agents to seize the "entire contents" of the wastebaskets. "So far as [Abel] was concerned [the articles seized] were *bona vacanti*." 362 U.S. at 241. *Bona vacanti* in civil law meant "goods without an owner, or in which no one claims a property." Black's Law Dictionary (5th ed. 1979).

2. *United States v. Perkins*, 47 C.M.R. 259 (A.F.C.M.R. 1973). The court held that taking a crumpled note from the wastebasket near the defendant's desk was not a search.

3. *United States v. Weckner*, 3 M.J. 546 (A.C.M.R. 1977). Private Weckner threw a bag of heroin out a window when a sergeant, who reasonably suspected him of possessing drugs, ordered Weckner to accompany him to the commander's office. The court held the sergeant's order legal, and the subsequent seizure of the heroin under the window proper since the heroin had been abandoned by the accused.

4. If an individual abandons property as the result of illegal governmental activity, the accused may not lose standing because of the fruit of the poisonous tree theory.

a. *United States v. Robinson*, 6 M.J. 109 (C.M.A. 1979) (the fact that the accused fled when the military policeman asked him to stop did not provide probable cause for his arrest and thus package abandoned during chase was inadmissible).

b. *Fletcher v. Wainwright*, 399 F.2d 62 (5th Cir. 1968). The misconduct of police officials may be so grievous that the courts will not find there is a voluntary abandonment of specific property. Where property is discarded as a result of illegal conduct, such as breaking a door down in a hotel room, the seized property may be inadmissible.

c. *United States v. Swinson*, 48 C.M.R. 197, 201 (A.F.C.M.R. 1974) ("When an arrest is unlawful ... and an accused's disposition of an item was a response to that unlawful pressure, the accused retains a possessory right in the item entitling him to have it suppressed as evidence.").

d. *United States v. Edwards*, 3 M.J. 921 (A.C.M.R. 1977) (where accused dropped bag containing drugs onto street as he was being legitimately stopped, drugs were properly seized as abandoned property).

G. An accused has no reasonable expectation of privacy in a gym locker assigned to another servicemember, even when the accused put his own lock on the locker. *United States v. Britton*, 33 M.J. 238 (C.M.A. 1991).

H. Testimony of accused given to assert standing is privileged. Mil.R.Evid. 311(f) provides: "Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement."

1306 THE LEGALITY OF THE SEIZURE (Key Numbers 1076 et seq.)

A. Separate question. The legality of a seizure is a separate question from the legality of any search that may have taken place. Thus, one must examine not only how a government official got to a given place, but why, once there, he seized a given piece of evidence. *United States v. Burnside*, 15 C.M.A. 326, 35 C.M.R. 298 (1965).

1. In order for an item to be properly seized, the official seizing it must have a reasonable belief, at the time he or she seizes the item, that the item is connected with a crime (i.e., contraband), the fruit of a crime, or (in some circumstances) a weapon, or an aid in proving the party to the crime. *See Warden v. Hayden*, 387 U.S. 294 (1967). There is no rule that prohibits searches and seizures of "mere evidence" in the military.

2. The validity of the seizure is a question that cuts across all other categories of fourth amendment law. Therefore, whatever the legal theory under which the prosecution seeks to justify a search, it must also establish that

the seizure was legal. Various categories of legitimate seizures are listed in Mil.R.Evid. 316(d), including seizure of abandoned property or government property, seizure with the owner's consent or commander authorization based on probable cause, seizure due to exigent circumstances (and probable cause), temporary detention, and seizure based on the plain view doctrine. There may be circumstances in which a search is lawful, but a consequent seizure does not satisfy the criteria of any of the permissible Mil.R.Evid. 316(d) categories. Conversely, it may occur that evidence is inadmissible at trial because its legitimate seizure (e.g., of government property) was the result of an illegal search.

B. The plain view doctrine. Mil.R.Evid. 316(d)(4)(C).

1. The plain view doctrine is concerned with the legality of seizures. The plain view doctrine posits that, if the government official was legitimately situated when he or she saw an item, and if the government official reasonably believed that the item seen was connected with criminal activity, then the item can be seized.

a. This doctrine was described in the leading plain view case of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971): "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." *Id.* at 466 (Stewart, J., for plurality) (emphasis added).

b. Thus, *Coolidge* identified a three-factor test. *See* section 1306 B.2, *infra*.

c. Note that, if an official sees an item in plain view, he or she may not be able to seize it if to do so would entail a physical intrusion not already made. For example, a policeman walking down the street sees contraband through a picture window in a house. He may not, absent exigent circumstances, enter the house without a warrant in order to seize the item, although he may use his observations to secure a warrant. In *United States v. Whaley*, 781 F.2d 417 (5th Cir. 1986), marijuana was seen growing in the curtilage. There was probable cause but no exigent circumstance, and a warrant should have been sought. The plain view doctrine could have justified seizure of the marijuana if the officer legitimately had gained access to the curtilage, but it could not justify entrance into the curtilage.

d. Note also that, if an item is found under circumstances which indicate that it is abandoned (*see* section 1305 F., *infra*), then generally a

search or seizure need not be justified because no one has retained a privacy interest in the item.

2. The three factors for evaluating the applicability of the plain view doctrine are discussed below.

a. Prior justification for the intrusion

(1) Wherever the government official was when the item was first observed, the official must have been there legitimately.

(2) Under some circumstances, this may not involve any physical intrusion (e.g., climbing a tree in order to look into a second-story window). There is still a question whether the official was legitimately situated when he or she saw or heard or smelled the item, such that he or she could properly act upon this information.

(3) The question to be addressed when there is no physical intrusion is whether the government agent's acts were an intrusion upon a reasonable expectation of privacy; if so, they must be justified under the fourth amendment. Consider these illustrative authorities.

(a) *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081 (1983) (use of beeper in five-gallon can of chloroform, precursor ingredient of amphetamines, did not alter plain view character of surveillance of accused's actions in his automobile).

(b) *United States v. Kim*, 415 F. Supp. 1252 (D. Haw. 1976) (using binoculars to look from one apartment building into another held not plain view).

(c) *United States v. Young*, 35 C.M.R. 852 (A.F.B.R. 1965) (court implied that use of ultraviolet light to reveal stains on defendant's hand did not violate his fourth amendment rights).

(d) Rintamaki, *Plain View Searching*, 60 Mil. L. Rev. 28 (1973) (use of natural senses or artificial illumination does not by itself violate an individual's expectation of privacy). *See, e.g., Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535 (1983) (shining flashlight to illuminate the interior of the accused's car did not constitute a search).

(e) Using a concealed beeper to follow a container is permissible. Presumably, it would be impermissible to obtain information from such a beeper once it was in a private residence, which

information would not be obtainable otherwise without search authorization. *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081 (1983); *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, *reh'g denied*, 468 U.S. 1250, 105 S.Ct. 51 (1984).

(4) Other illustrative cases

(a) *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992 (1968) (evidence sighted during check for valuables in the interior of impounded car was properly seized).

(b) *Compare United States v. Hersh*, 464 F.2d 228 (9th Cir.), *cert. denied*, 409 U.S. 1008 (1972) (observations made by police through window of house not illegal; officers approached house openly, in broad daylight, merely looked through windows located immediately to left of front door and did not have to move bushes or other objects out of the way to do so) *with United States v. Johnson*, 561 F.2d 832 (D.C. Cir.), *cert. denied*, 432 U.S. 907 (1977).

(c) *Compare Texas v. Gonzales*, 388 F.2d 145 (5th Cir. 1968) (observations made at night by police officer through window located in rear of defendant's house violated defendant's right to privacy) *with Nordskog v. Wainwright*, 546 F.2d 69 (5th Cir. 1977).

(d) *United States v. Cruz*, 3 M.J. 707 (A.F.C.M.R. 1977) (agent opened car door to lock it; items viewed when he did so were properly seized as in plain view), *rev'd on other grounds*, 5 M.J. 286 (C.M.A. 1978).

(e) In *United States v. Hessler*, 4 M.J. 303 (C.M.A. 1978), *aff'd on reconsideration*, 7 M.J. 9 (C.M.A. 1979), Judge Cook addressed the question of the legitimacy of a duty officer's presence in the barracks. Finding him properly present, Judge Cook applied a "plain smell" theory to the officer's actions upon smelling marijuana.

(f) *United States v. Escobedo*, 11 M.J. 51 (C.M.A. 1981) (once properly on premises to search, agents entitled to seize paraphernalia as items in plain view, without regard to whether they were specified in search authorization).

(g) *United States v. Lawless*, 18 M.J. 255 (C.M.A. 1984) (the smelling of burning marijuana by military policemen while on foot patrol in the enlisted housing area justified their going to an open window of the house and looking inside).

(5) *United States v. Wisniewski*, 21 M.J. 370 (C.M.A.), *cert. denied*, 476 U.S. 1160 (1986) is a very interesting case which was ultimately decided on the basis of the plain view doctrine. The court held that no reasonable expectation of privacy was violated by looking through a 1/8" by 3/8" slot in the venetian blinds into a locked barracks room (plain view of any passerby). In addition, once in the room, the NCO could seize contraband from a locked locker under the plain view doctrine because he had earlier observed (through a slot in the blinds) the contraband being put in the locker.

b. Inadvertence. The inadvertence requirement was eliminated by the Supreme Court in *Horton v. California*, 496 U.S. 128, 110 S.Ct 2301 (1990).

c. Nexus to criminal prosecution. The inadvertent observation of an item does not by itself justify the seizure. Before such a seizure is justifiable, the prosecution must show that the officer who seized the item had a reasonable belief that the item had a nexus to criminal prosecution. *Texas v. Brown,* 460 U.S. 730, 103 S.Ct. 1535, 1544 (1983). This is merely another way of stating that there must be a basis for the seizure as well as for the activity which led up to it. Mil.R.Evid. 316(d)(4)(C) establishes a probable cause standard. In *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), police legitimately entered an apartment (bullet fired through floor had injured someone on floor below), but moving stereo equipment to locate serial numbers was an unlawful search. The equipment could have been seized under the plain view doctrine if the police had probable cause that it was stolen, but they did not. *See United States v. Gladdis*, 11 M.J. 845 (A.C.M.R. 1981), *remanded*, 12 M.J. 102 (C.M.A. 1982), wherein seizure of a spoon was upheld based upon knowledge that spoons are commonly used to prepare heroin for injection. *See also United States v. Sanchez*, 10 M.J. 273 (C.M.A. 1981), where a pipe was properly seized because it was a type of pipe normally used to smoke marijuana. *But see United States v. Van Hoose*, 11 M.J. 878 (A.F.C.M.R.), *petition denied*, 12 M.J. 301 (C.M.A. 1981) (command authorization to search room for marijuana did not give probable cause to seize homosexual magazines and literature as these items were not, on their face, "evidence of crime").

1307 "WARRANTED" PROSECUTORIAL SEARCHES: ESTABLISHING PROBABLE CAUSE

(Key Numbers 1069, 1072, 1073)

A. Generally

1. When discussing a probable cause search, several matters must be considered. Essentially, probable cause questions may be broken down into

three areas: Who made the probable cause determination; did the information establish probable cause; and did the information get to the authorizing official?

a. Who made the probable cause determination?

(1) Generally, the existence of probable cause is to be determined by a judicial officer ("a neutral and detached magistrate").

(a) Historically, judicially issued search warrants, based upon probable cause, have been the preferred form of search and seizure under the fourth amendment. *See United States v. Chadwick*, 433 U.S. 1 (1977).

(b) In the military, the commander of an organization may be viewed as the equivalent of a civilian magistrate, and hence has the power to authorize searches, upon probable cause, of persons or places under his control. *See* section 1308 C., *infra*.

-1- Mil.R.Evid. 315(d).

-2- *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) (military commanders are not per se disqualified to act as neutral and detached magistrates).

(2) Under some exigent circumstances, the requirement that probable cause be determined by a judicial officer (or commander) may be dispensed with. Note, however, that there still must be probable cause to search.

(a) *See, e.g., Chambers v. Maroney*, 399 U.S. 42 (1970) (vehicle which could be searched on street at place of seizure may be searched at police station as well).

(b) *See* section 1309, *infra*.

(3) Questions related to who made the probable cause determination are whether the proper procedures were followed in authorizing the search (e.g., did the magistrate properly issue a written warrant, based on sworn affidavits?); and whether the search was carried out in accordance with that authorization (e.g., did the police limit their search to the items described in the warrant?).

(4) These issues will be discussed below at section 1308.

b. Did the information presented to the person making the determination establish probable cause? That is, was there sufficient probability and specificity to conclude that evidence was in a given place? *See* Mil.R.Evid. 315(f). *See* section 1307 C., *infra*.

c. How did the information get to the authorizing official? In other words, was that official justified in accepting that information in making his or her probable cause determination? *See* section 1307 B., *infra*.

2. Probable cause to apprehend and probable cause to search must be distinguished.

a. Probable cause to apprehend. R.C.M. 302(c) provides that probable cause to apprehend exists upon "reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it." *See generally United States v. Wilson*, 6 M.J. 214 (C.M.A. 1979).

b. Probable cause to search. Mil.R.Evid. 315(f)(2) provides that probable cause to search exists upon "reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched."

c. *See United States v. Wenzel*, 7 M.J. 95 (C.M.A. 1979) and *United States v. Bowles*, 7 M.J. 735 (A.F.C.M.R. 1979), *petition denied*, 8 M.J. 177 (C.M.A. 1979), wherein the two concepts are distinguished against the same factual setting.

d. The degree of probability as to each concept is theoretically the same; the matters to which the probability extends are not. *See Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

e. Who makes the probable cause decision may differ. Generally speaking, the decision whether to apprehend (i.e., whether probable cause to apprehend exists) may be made by a wider range of officials (*see* section 1309 E., *infra*) than the decision to search based upon probable cause.

B. Information tending to establish probable cause: how did it get to the authorizing official?

1. The authorizing official receives information by (1) personal observations [*see United States v. Rushing*, 11 M.J. 95 (C.M.A. 1981)]; (2) reports from individuals who have themselves observed the facts reported; and (3) hearsay (i.e., second-, third-, or even fourth-hand reports).

a. The first two categories present few problems. The authorizing official need only assess the credibility of the person before him (or the reliability of his owr senses) before proceeding to decide whether the information establishes probable cause. *See* Mil.R.Evid. 315 drafters' analysis, MCM, 1984, app. 22-27.

b. With hearsay, however, the analysis becomes more complex.

2. Probable cause established by hearsay

a. Probable cause may be based upon hearsay evidence in whole or in part. Mil.R.Evid. 315(f)(2).

b. Where the authorizing official receives the information from someone else, the official must assess the person's credibility and source of information. This is especially important in the military setting in which a commander receives information not from a law enforcement official (as is typically the case where a civilian magistrate receives his information from a police officer), but directly from an informant.

c. Until 1984, Mil.R.Evid. 315(f)(2) followed the prevailing Federal rule that required the magistrate 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 so long as the authorizing official had a "substantial basis" for determining that probable cause existed.

d. 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.

3. The basis of knowledge prong (factual basis). How does the source know? How did the source come by the information which he is relating? We want to determine that we have a primary source of information and not just rumor or speculation. In addition, the basis of knowledge test requires that facts observed, not simply conclusions drawn, be related to the authorizing official. *See United States v. Lidle*, 21 C.M.A. 455, 45 C.M.R. 229 (1972); *United States v. Garcia*, 3 M.J. 927 (A.C.M.R.), *petition denied*, 4 M.J. 128 (C.M.A. 1977). There are several ways to satisfy the basis of knowledge test (e.g., direct observation, self-verifying detail, and informant's receipt of reliable information).

a. Direct observation. The informant has personally observed the facts reported. Note that the conclusions reported by the informant must be supported (at least by inference) by the facts he observed. *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584 (1969); *United States v. Scarborough*, 23 C.M.A. 51, 48 C.M.R. 522 (1974). *See United States v. Karathanos*, 531 F.2d 26 (2d Cir. 1976), *cert. denied*, 428 U.S. 910, 96 S.Ct. 322 (1976) (statement by informant that illegal aliens were being harbored on accused's premises was insufficient to establish probable cause where there was no showing how the informant knew that the foreigners he had observed there were illegally in the country). *But cf. United States v. Weekley*, 3 M.J. 1065 (A.F.C.M.R. 1977) (reasonable to infer that demonstrably reliable informant could recognize marijuana).

b. Self-verifying detail. It may be that a tip by an informant is so detailed that a magistrate can conclude that the informant must have first-hand information in order to provide such detail. Detail alone is to be distinguished from corroboration; with corroboration, some details provided by the informant are known to be true. While detail alone is a poor method of establishing an informant's basis of knowledge, it may be enough in some circumstances to establish a valid basis of knowledge. *See* the following cases for illustrations.

(1) *Spinelli v. United States*, 393 U.S. 410 (1969).

(2) *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329 (1959).

(3) *United States v. Marihart*, 472 F.2d 809, 813 (8th Cir. 1972).

(4) *United States v. Gamboa*, 23 C.M.A. 83, 48 C.M.R. 591 (1974) (indicates detailed information must be independently verified).

4. Veracity (believability) prong. Why should the source be believed? Is he a credible person, or are there other reasons why his information should be deemed reliable? *See United States v. Llano*, 23 C.M.A. 129, 48 C.M.R. 690 (1974); *United States v. Davenport*, 14 C.M.A. 152, 33 C.M.R. 364 (1963); *United States v. Burden*, 5 M.J. 704 (A.F.C.M.R. 1978), *aff'd in summary disposition*, 11 M.J. 151 (C.M.A. 1981).

a. "Track record." Has the informant provided accurate information on previous occasions?

(1) It may be sufficient to say that the informant has given information which proved reliable on a number of occasions in the past. *See United States v. Guerette*, 23 C.M.A. 281, 49 C.M.R. 530 (1975). *See also United States v. Williams*, 2 M.J. 81, 83 (C.M.A. 1976) (Cook, J., dissenting). *See United States v. Scarborough*, 23 C.M.A. 51, 48 C.M.R. 522 (1974).

(2) The preferable practice would be to identify the specific character and frequency of the information. Where possible, the commander should also know whether the informant's information has resulted in convictions, why the informant agreed to assist the government, whether the informant is being paid for his assistance, etc.

b. Declaration against interest. A statement against the informant's interest may indicate that his information is reliable. Such statements should be carefully scrutinized. Consider the following illustrative cases.

(1) *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075 (1971). The informant made a statement against his own penal interest when he admitted his illicit liquor purchases from a particular residence which was the subject of a search authorization request.

(2) *United States v. Hennig*, 22 C.M.A. 377, 47 C.M.R. 229 (1973).

(3) *United States v. Clifford*, 19 C.M.A. 391, 41 C.M.R. 391 (1970). Although the informants revealed their prior illegal activities with the accused, there was insufficient information given by them to link the accused with criminal activity at the scene of the search.

(4) *United States v. Goldman*, 18 C.M.A. 389, 40 C.M.R. 101 (1969). One informant admitted being engaged in counterfeit activities as a criminal associate of the accused.

c. Person not from criminal milieu. Often the informant's background renders him or her credible, so that the information can be relied upon. Note that the information about the informant must be known to the authorizing official.

(1) Victim-bystander. A victim or a bystander may be presumed reliable in the absence of other facts. (The definition of a bystander must be construed rather narrowly.)

(a) *United States v. Land*, 10 M.J. 103 (C.M.A. 1980), provides strong dicta to the effect that a "citizen informant" is presumptively reliable. It is not clear under the facts of the case whether the appellant's roommate came within the umbrella of this characterization, although for varying reasons the judges of the court found him to provide reliable information.

(b) *United States v. Hood*, 7 M.J. 128, 129 n.1 (C.M.A. 1979) (affirmative showing is necessary to support the proposition that informant is acting as concerned citizen and not involved in criminality).

(c) *United States v. Gutierrez*, 3 M.J. 796 (A.C.M.R. 1977) (good citizen eyewitness report to crime in progress is reliable).

(d) *United States v. Watford*, 14 M.J. 719 (A.F.C.M.R. 1982), *petition denied*, 15 M.J. 171 (C.M.A. 1983) (OSI agent's affidavit sufficient to establish probable cause where based upon information from an eyewitness but no information given as to eyewitness' reliability).

(e) *United States v. Tipton*, 16 M.J. 283 (C.M.A. 1983) (identified servicemember's "accountability" was sufficient to overcome his lack of proven reliability).

(2) Law enforcement officials

(a) *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741 (1965) (law enforcement official presumed reliable).

(b) Military courts generally have avoided saying that law enforcement officials may be presumed reliable. *But see United States v. Gutierrez*, 3 M.J. 796 (A.C.M.R. 1977) (police need not independently verify probable cause prior to acting on the direction of or as a result of communication with another police official).

(c) Information transmitted through law enforcement channels is assumed to be reliably transmitted.

-1- *Whitley v. Warden*, 401 U.S. 560, 91 S.Ct. 1031 (1971).

-2- *United States v. Herberg*, 15 C.M.A. 247, 35 C.M.R. 219 (1965).

(3) Officers and noncommissioned officers. *United States v. Smallwood*, 22 C.M.A. 40, 46 C.M.R. 40 (1972) (under the circumstances, an officer was properly deemed to be reliable).

(4) Anonymous informant. Generally speaking, a "tip" from an anonymous informant will not be adequate to establish probable cause. Even after *Illinois v. Gates, supra*, it appears that an effort must be made to corroborate all or part of the tip before the commander may conclude that probable cause to search has been established. The following cases may prove helpful.

(a) *Illinois v. Gates, supra.*

(b) *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329 (1959).

(5) Informant known to authorizing official. Where the authorizing official has personal knowledge about the informant, the official may use that information in assessing the reliability of the informant's information. *See* Mil.R.Evid. 315(f)(2). The following cases may also be helpful.

(a) *United States v. Miller*, 21 C.M.A. 92, 44 C.M.R. 146 (1971).

(b) *United States v. Weekley*, 3 M.J. 1065 (A.F.C.M.R. 1977).

(c) *United States v. Hernandez-Florez*, 50 C.M.R. 243 (A.C.M.R. 1975).

(6) Military record. The authorizing official may consider the informant's military record in assessing credibility. A good military record may suffice to establish the informant's reliability.

(a) *United States v. Salatino*, 22 C.M.A. 530, 48 C.M.R. 15 (1973).

(b) *United States v. Morales*, 49 C.M.R. 458 (A.C.M.R. 1974), *rev'd on other grounds*, 1 M.J. 647 (C.M.A. 1975).

(7) The informant's presence at the scene may tend to bolster credibility. *United States v. Buchanan*, 49 C.M.R. 620 (A.C.M.R. 1974).

(8) The fact that the informant was paid is a factor to consider. *United States v. Heitmann*, 46 C.M.R. 1242 (A.F.C.M.R. 1973).

(9) Where the informant's credibility is shaky or unknown, his personal appearance, under oath, before the magistrate may suffice to sufficiently establish his credibility. *See United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981).

(10) Where information provided by two informants would have been individually insufficient to establish probable cause, the interlocking of details in the two accounts may reduce the likelihood that each was simply surveying unreliable gossip and may establish probable cause. *United States v. Barton*, 11 M.J. 230 (C.M.A. 1981).

d. Corroboration. If the informant's reliability has not been established by more direct means, it may be established through independent verification. If enough of the information provided by the informant is independently corroborated, then it may reasonably be inferred that the informant is telling the truth (i.e., is reliable). As to what information is "enough" to corroborate an informant's tip, consider the nature and quantity of the corroborated facts.

(1) *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584 (1969). An FBI surveillance investigation detailing the defendant's "innocent-seeming conduct" was insufficient to corroborate an informant's tip.

(2) *United States v. Miller*, 21 C.M.A. 92, 44 C.M.R. 146 (1971). Informants advised a commanding officer that a "Chief Miller" had LSD in his room. The informants described his physical characteristics and further stated that "Chief Miller" was a cook living on the third floor of Bravo Company. This information was sufficiently verified by independently ascertaining the identity of the accused, his occupation, and the location of his room.

(3) *United States v. McFarland*, 19 C.M.A. 356, 41 C.M.R. 356 (1970). A hearsay report that accused was going to meet an individual and then fly to Hawaii to purchase marijuana was independently and sufficiently verified by observing the accused meet the individual in an airport where they had requested transportation to Hawaii.

(4) *United States v. Martin*, 3 M.J. 744 (N.C.M.R. 1977), *aff'd*, 7 M.J. 47 (C.M.A. 1979). Information derived from a surveillance of the accused's activities was sufficient to corroborate the informant's reports.

(5) *Illinois v. Gates, supra* (corroboration of details contained in anonymous letter established probable cause under a totality of the circumstances standard).

C. The information tending to establish probable cause: quantum and nature

1. The information establishing probable cause (as well as the information establishing that it has been reliably transmitted) must actually be given to the authorizing official. It is not enough for the authorizing official to approve the conclusions of another that probable cause exists; the official must personally weigh and pass upon that information. The authorizing official must be more than a "rubber stamp." The authorizing official should consider such facts as: whether the place to be searched is identified with particularity; whether the items sought are described with particularity; and whether the items sought are located in the place identified. *See Aguilar v. Texas*, 378 U.S. 108 (1964); *United States v. Lidle*, 21 C.M.A. 445, 45 C.M.R. 229 (1972).

2. Specific items. The information must establish that particular items are in a given place. Authorization to search a place for unspecified materials is impermissible.

a. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979).

b. *United States v. Hartsook*, 15 C.M.A. 291, 35 C.M.R. 263 (1965).

c. The authorizing official must reasonably believe that the information provided to him supports a conclusion that the items sought are evidence of a crime, contraband, or fruits or instrumentalities of a crime.

3. Specific location

a. Mil.R.Evid. 315(f)(2).

b. *United States v. Miller*, 21 C.M.A. 92, 44 C.M.R. 146 (1971).

c. *United States v. Clifford*, 18 C.M.A. 389, 40 C.M.R. 101 (1970).

d. Smell alone may provide probable cause. *United States v. Duncan*, 46 C.M.R. 1096 (A.C.M.R.), *petition denied*, 46 C.M.R. 1323 (C.M.A. 1973). *See United States v. Hessler*, 4 M.J. 303 (C.M.A. 1978), *aff'd on reconsideration*, 7 M.J. 9 (C.M.A. 1979). *See also United States v. Acosta*, 11 M.J. 307 (C.M.A. 1981). In *Acosta*, a first sergeant who detected the odor of marijuana smoke emanating from the accused's room did not inform his commander of how he concluded that the odor he detected was burning marijuana. The court held that this omission did not preclude a finding by the authorizing official of probable cause to order a search of the accused's room. *See also United States v. Cunningham*, 11 M.J. 242 (C.M.A. 1981) (where experienced noncommissioned officer makes statement to commander that he has smelled marijuana, statement causes implicit assurance of familiarity with odor).

e. If an individual is found in possession of drugs in one place, this by itself does not necessarily provide probable cause to search the individual's belongings in another place.

(1) *United States v. Racz*, 21 C.M.A. 24, 44 C.M.R. 78 (1971) (incriminating evidence found on accused in a defense bunker did not justify search of accused's barracks room).

(2) *United States v. Troy*, 22 C.M.A. 195, 46 C.M.R. 195 (1973) (presence of drugs in accused's shaving kit in common area did not justify subsequent search of his room).

(3) *United States v. Peters*, 11 M.J. 901 (A.F.C.M.R. 1981) (discovery of drugs in the accused's car during random gate inspection did not provide probable cause for a search of the accused's on-base quarters).

(4) *Compare United States v. Elwood*, 19 C.M.A. 376, 41 C.M.R. 376 (1970) (information that accused was arrested for possession of marijuana in town insufficient to authorize search of accused's locker in barracks four or five miles away) *with United States v. Smallwood*, 22 C.M.A. 40, 46 C.M.R. 40 (1972) (probable cause existed to search accused's room after accused found in

possession of marijuana and informant reported accused had marijuana in his room) *and United States v. Miller*, 21 C.M.A. 92, 44 C.M.R. 146 (1971).

(5) Note that the inference which the Court of Military Appeals refused to draw in these cases is not so much one of location, but rather one of quantity. The court refused to conclude that there were probably more drugs at another location, just because a servicemember was caught with drugs at a given place.

(6) *See also United States v. Gramlich*, 551 F.2d 1359 (5th Cir. 1977), *cert. denied*, 434 U.S. 866, 98 S.Ct. 201 (1977).

(7) The Court of Military Appeals has held, however, that the possession of marijuana on a suspect's person can be the basis of a probable cause urinalysis test. *United States v. Wood*, 25 M.J. 46 (C.M.A. 1987). *See also United States v. Jones*, 20 M.J. 594 (N.M.C.M.R. 1985), *aff'd*, 24 M.J. 294 (C.M.A. 1987).

f. Searches of an individual's living area as the place most likely to contain evidence or fruits of a crime. Generally, if the item sought is one of intrinsic value which would probably be retained by the suspect in a secure place, there may be probable cause to search his or her living area. On the other hand, if the item is of little inherent value, or is one not likely to be retained, then probable cause is less likely. Courts will also look to other factors, such as the temporal relationship of the search and other information, the exact nature of the item, the availability of other "hiding" places, etc.

(1) *United States v. Johnson*, 23 M.J. 209 (C.M.A. 1987) (information, identifying Johnson as suspect regarding theft of stereo component several weeks earlier at military base in Japan, was probable cause to search Johnson's quarters because someone of his age who would steal such equipment would likely retain it).

(2) *United States v. Barnard*, 23 C.M.A. 298, 49 C.M.R. 547 (1975).

(3) *United States v. Gill*, 23 C.M.A. 176, 48 C.M.R. 792 (1974).

(4) *United States v. Walters*, 22 C.M.A. 516, 48 C.M.R. 1 (1973).

(5) *United States v. Sparks*, 21 C.M.A. 134, 44 C.M.R. 188 (1971).

4. Specificity of probable cause. This issue goes to the focus of the information and also to the specificity of the authorization. Generally, military case law has permitted probable cause searches of a far broader area than is normally sanctioned in civilian jurisdictions. *Compare United States v. Drew*, 15 C.M.A. 449, 35 C.M.R. 421 (1964) *with United States v. Votteller*, 544 F.2d 1355 (CA 6th Cir. 1976). Thus, searches of entire barracks (where probable cause exists to believe that evidence is in the barracks) have been sanctioned.

a. *United States v. Drew, supra* (search of entire barracks for stolen property upheld). *See also United States v. Harman*, 12 C.M.A. 180, 30 C.M.R. 180 (1961); *United States v. Gebhart*, 10 C.M.A. 606, 28 C.M.R. 172 (1959).

b. *United States v. Owens*, 48 C.M.R. 636 (A.F.C.M.R. 1974), *aff'd*, 50 C.M.R. 906 (C.M.A. 1975) (equally divided court) (search of one floor of barracks for marijuana upheld).

c. *United States v. Schafer*, 13 C.M.A. 83, 32 C.M.R. 83 (1962) (search of area of post containing some 20 barracks, shortly after stabbing murder in the vicinity, upheld).

d. *United States v. Webb*, 4 M.J. 613 (N.C.M.R. 1977) (search of NCO portion of barracks for marijuana upheld).

e. Location of stolen property in barracks stairwell was not probable cause to search all rooms in the barracks for additional stolen property. *United States v. Moore*, 23 M.J. 295 (C.M.A. 1987).

5. "Stale information." The information establishing probable cause must lead to the conclusion that the items sought are, or will be, in the place to be searched at the time of the search. The question whether information as to the location of evidence sought to be seized is stale has to be determined on a case-by-case basis, with the length of time but one factor to be considered.

a. *United States v. Crow*, 24, 19 C.M.A. 384, 41 C.M.R. 384 (1970).

b. *United States v. Britt*, 17 C.M.A. 617, 38 C.M.R. 415 (1968).

c. *United States v. Lovell*, 8 M.J. 613 (A.F.C.M.R. 1979), petition denied, 9 M.J. 17 (1980) (information about stolen property was not stale when property was not readily saleable and accused had no reason to suspect the whereabouts of stolen goods would be divulged).

d. *United States v. Steeves*, 525 F.2d 33 (8th Cir. 1975). The timeliness of the information depends on the nature of the items sought. Inasmuch as it was reasonable to believe that the revolver, ski mask, and clothing used by the bank robber could be found in the robber's home, a delay of 87 days between the bank robbery and the issuance of the search warrant did not invalidate the warrant.

e. *United States v. Johnson*, 23 M.J. 209 (C.M.A. 1987) (several weeks timely where suspect likely to retain stolen property in his quarters).

1308 "WARRANTED" PROSECUTORIAL SEARCHES: THE AUTHORIZATION REQUIREMENT
(Key Numbers 1068, 1070, 1071, 1075, 1080)

A. General. As indicated above, probable cause normally must be determined by a neutral and detached magistrate. *See Walter v. United States*, 447 U.S. 649 (1980) (FBI agents exceeded private individual's actions by showing films without a search warrant when, previously, private citizens had only observed container markings). In the civilian community, this neutral and detached magistrate usually means a judge, magistrate, or justice of the peace. In the military, the commanding officer normally fills this role. In evaluating probable cause searches, one must ascertain whether a proper person authorized the search and whether he followed proper procedures.

B. Command authorization

1. General. Only "competent military authority" can authorize searches in the military. Mil.R.Evid. 315(b)(1). Commanders are included in this concept. Historically, by virtue of their responsibility, commanders had virtual plenary power to search persons and places within their organizations. *See United States v. Florence*, 1 C.M.A. 620, 5 C.M.R. 48 (1952); *United States v. Doyle*, 1 C.M.A. 545, 4 C.M.R. 137 (1952). Yet, limitations on the commander's power have been recognized. *See, e.g., United States v. Brown*, 10 C.M.A. 482, 28 C.M.R. 48 (1959) (compliance with the law is required; the commander cannot issue a search authorization based upon mere suspicion). More recently, the commander has been equated to a civilian magistrate in making probable cause determinations. *See United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979). Thus, despite procedural differences (examined above) in the commander's authorization, the commander's probable cause determination is subject to at least the same sort of review as is a civilian magistrate's. This review should not be in the form of a de novo determination by the military judge. Instead, great deference should be paid to the decision of the issuing magistrate and, so long as there was a "substantial

basis" for concluding that probable cause existed, the search should be upheld. *Illinois v. Gates*, 103 S.Ct. 2317, 2331 (1983); *United States v. Postle*, 20 M.J. 632 (N.M.C.M.R. 1985).

2. Mil.R.Evid. 315 describes the extent of a commander's power to search as follows:

> c. Scope of authorization. A search authorization may be issued under this rule for a search of:
>
> (1) Persons. The person of anyone subject to military law or the law of war wherever found;
>
> (2) Military property. Military property of the United States or of nonappropriated fund activities of an armed force of the United States wherever located;
>
> (3) Persons and property within military control. Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located; or
>
> (4) Nonmilitary property within a foreign country.
>
> (A) Property owned, used, occupied by, or in the possession of an agency of the United States other than the Department of Defense when situated in a foreign country. A search of such property may not be conducted without the concurrence of an appropriate representative of the agency concerned. Failure to obtain such concurrence, however, does not render a search unlawful within the meaning of Mil.R.Evid. 311.
>
> (B) Other property situated in a foreign country. If the United States is a party to a treaty or agreement that governs a search in a foreign country, the search shall be conducted in accordance with the treaty or agreement. If there is no treaty or agreement, concurrence should be obtained

> from an appropriate representative of the foreign country with respect to a search under paragraph (4)(B) of this subdivision. Failure to obtain such concurrence or noncompliance with a treaty or agreement, however, does not render a search unlawful within the meaning of Mil.R.Evid. 311.

a. In essence, the commander's power to search extends to persons and places under the organizational control of the commander. Interesting issues exist as to whether a commander has control over the person or place to be searched. Mil.R.Evid. 315(d)(1).

(1) Can the CO of a ship authorize a search of one of his sailor's lockers when the locker is located in a barracks "owned" by the CO of the naval support activity? The Navy-Marine Corps Court of Military Review, in an unpublished decision, has stated that the CO could authorize such a search. Some of the factors relied upon by the court were: The sailors billeted in the barracks were crew members of the ship; the CO of the ship "owned" the lockers and bunks used in the barracks; the ship's CO was responsible for the health and comfort of his crew; and the security of the barracks was maintained by crew members. *United States v. Clark*, No. 80-1743 (N.M.C.M.R. 22 May 1981).

(2) Can the CO of a ship authorize an inspection (Mil.R.Evid. 313) or a search (Mil.R.Evid. 315) of quarters provided for his crew by a civilian contractor while the ship is uninhabitable during an overhaul in a shipyard? Although case law has not addressed this issue, a JAG opinion has stated that the Holiday Inn, where the crew members were billeted, was not such a location as to justify the conclusion that it was under military control for purposes of inspections and searches. JAG ltr JAG:202.2:HSP:ch Ser:202/37028 of 8 Apr 1981 to CO, USS CLARK. *But see* JAG ltr JAG: 202.2:HSP:hsp Ser:202/37081 of 9 Nov 1981 to COMNAVSURFLANT, a JAG opinion which addresses the concept of "control" and recommends certain action that can be taken to improve the likelihood of courts deciding in favor of the existence of military control. For similar "control" issues, the following two Navy JAG opinions may provide assistance: JAG ltr JAG:202:MDR:dm Ser: 202/37027 of 26 Nov 1976 to Commandant, Fifth Naval District (CO's cannot authorize searches of off-base, government-leased civilian apartments housing their personnel); and JAG ltr JAG:131.6:WDB:ivh Ser: 13/5036 of 10 Feb 1981 to CO, Naval Station, Long Beach, CA (CO of Naval Station can authorize searches in a Navy housing area which is provided gas, water, electricity, trash pickup, and primary police and fire protection by the City of Long Beach). Because the opinions of the Judge Advocate General of the Navy are subject to reconsideration and possible modification in light of any future developments or court decisions bearing on

these issues, the reader should endeavor to seek the most recent JAG opinions when researching this issue.

b. The commander's authority may be limited or removed. *United States v. Dillard*, 8 M.J. 213 (C.M.A. 1980); *United States v. Reagan*, 7 M.J. 490 (C.M.A. 1979). But, note the last sentences of Mil.R.Evid. 315(c) (4)(A) and (B) (failure to obtain concurrence of nonmilitary agency or failure to comply with treaty or agreement does not render search in foreign country unlawful).

3. Officer in charge

a. "Officer in charge" is a term of art used in the Navy, Marine Corps, and Coast Guard for describing one who occupies a certain position.

(1) Article 1(4), UCMJ.

(2) Article 15, UCMJ.

(3) Article 24(a)(4), UCMJ.

(4) *See* R.C.M. 103, discussion.

b. Mil.R.Evid. 315(d)(1) permits the Secretary concerned to designate positions analogous to an officer in charge or a position of command and thereby allow such persons to authorize searches.

4. Neutral and detached magistrate

a. The Supreme Court has held that probable cause must be determined by a "neutral and detached magistrate" for a valid warrant to issue.

(1) *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (state attorney general, who later prosecuted Coolidge, was not a proper official to issue search warrant).

(2) *See also United States v. United States District Court*, 407 U.S. 297 (1972); *Johnson v. United States*, 333 U.S. 10 (1948).

(3) A magistrate, however, need not be legally trained. *Shadwick v. City of Tampa*, 407 U.S. 345 (1972).

b. The commander's involvement in law enforcement or the information-gathering process may give rise to questions concerning neutrality

and detachment. *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979); *United States v. Rivera*, 10 M.J. 55 (C.M.A. 1980).

(1) There is no per se rule disqualifying the commanding officer from authorizing probable cause searches. *See United States v. Ezell, supra.*

(2) The neutrality and detachment of a given commander may be challenged, however, depending upon the specific facts in a case. In *United States v. Ezell, supra,* the court set forth some of the various factors that will enter the analysis surrounding the efficacy of a command authorization. These factors are listed below.

(a) Personal involvement by the commander as an active participant in the gathering of evidence to be used as a basis for requesting the authorization as demonstrated by, e.g., approving or directing the use of: informants; drug detection dogs except for gate searches; or controlled buys, surveillance operations, and similar activities. *See United States v. Murray*, 12 M.J. 139 (C.M.A. 1981). *But see* Mil.R.Evid. 315(d), which suggests that these activities can be authorized impartially by the commander without being equated to improper personal involvement, and paragraph 5-2.c of enclosure (1) of OPNAVINST 5585.2A which requires the commander of a facility to authorize use of a drug detection dog in that facility.

(b) Personal involvement in the prosecution of the case.

(c) Other personal bias or involvement in the investigative or prosecutorial process against the accused. *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981).

(d) Presence at the site of a search while it is in progress. *See Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). *But see United States v. Powell*, 8 M.J. 260 (C.M.A. 1980) (presence by the authorizing official does not automatically result in command disqualification). Each case is considered on an ad hoc basis. Mil.R.Evid. 315(d).

(e) Failure of the commander to refer the matter to a military judge or magistrate, where available. *United States v. Ezell, supra.* (Fletcher, C.J., concurring). This factor will be of little interest in the Navy and Marine Corps, inasmuch as the Secretary of the Navy has not authorized military judges or magistrates to authorize searches.

(3) Examples

(a) *United States v. Carlisle*, 46 C.M.R. 1250 (A.C.M.R.), *aff'd*, 48 C.M.R. 71 (C.M.A. 1973) (commander who took tough public stand on drug offenses not disqualified as magistrate).

(b) *United States v. Guerette*, 23 C.M.A. 281, 49 C.M.R. 530 (1975) (commander who ordered general drug investigation of numerous individuals including accused was not disqualified as magistrate).

(c) *United States v. Bradley*, 50 C.M.R. 603 (N.C.M.R. 1975) (executive officer as acting commander not disqualified by prior knowledge of controlled purchase of drugs from accused).

(d) *United States v. Staggs*, 23 C.M.A. 111, 48 C.M.R. 672 (1974) (station judge advocate--commander's delegate and hence alter ego--who knew of earlier investigation of accused, provided agents with a scheme to perfect probable cause and made comments to the effect that "we'd been after" the accused, was disqualified as neutral and detached magistrate).

5. Devolution of command. If the commander of a unit or organization is absent and unavailable, command devolves upon the next individual in the chain of command, and that individual, as acting commander, may, upon probable cause, authorize searches within the command. No formal assumption of command orders are necessary, although, without them, courts will examine the nature and duration of the commander's absence to determine whether command actually devolved upon the next individual in line. Service regulations may also affect this determination.

a. *United States v. Murray*, 12 C.M.A. 434, 31 C.M.R. 20 (1964) (CO absent on TAD and XO absent on one-day pass; warrant officer was properly acting as commander for search authorization purposes).

b. *United States v. Gionet*, 41 C.M.R. 519 (A.C.M.R. 1969) (temporary absence of CO attending meeting at battalion HQ, a short distance from unit, not sufficient for authority to devolve upon XO).

c. *United States v. Azelton*, 49 C.M.R. 163 (A.C.M.R. 1974) (functional absence of CO, who was participating in field exercise nearby, held sufficient for authority to devolve).

d. *United States v. Bradley*, 50 C.M.R. 608 (N.C.M.R. 1975) (regularly assigned CO ashore, exact whereabouts unknown; therefore, the next

senior person, in accordance with Article 0857, *U.S. Navy Regulations*, 1973, succeeded to command and had authority to authorize a search).

e. *United States v. Carter*, 1 M.J. 318, 320 (C.M.A. 1976). "It is constitutionally impermissible to saddle noncommissioned officers not only with determining the necessity for inspections or searches but also with the responsibility for implementing appropriate inspection or search procedures" (citations omitted). Query whether authority to order searches can ever devolve upon an NCO. *But see* drafters' analysis, MCM, 1984, app. 22-27.

f. *United States v. Martin*, 3 M.J. 744 (N.C.M.R 1977), *aff'd in summary disposition*, 7 M.J. 47 (C.M.A. 1979) (upholding search authorizaton by officer who was acting chief of staff in the absence of commanding general and chief of staff).

6. Delegation of authority. As originally drafted, Mil.R. Evid. 315(d) gave the commander authority to delegate his search authorization responsibilities. This delegation power was severely limited in *United States v. Kalscheuer*, 11 M.J. 373 (C.M.A. 1981). In *Kalscheuer*, the court stated that a search performed by permission of a commander's delegee, other than a military judge or magistrate, does not meet fourth amendment requirements of reasonableness. Although the court did not specifically address the common occurrence of delegating the authority to issue search authorizations to the command duty officer, it appears that it is now improper to do so. Language in the case, however, clearly supports the proposition that, if the CO is on leave or TAD (generally unavailable), a search authorization may be granted by a person who is exercising "general command responsiblity" as a result of devolution of command. Judge Cook, in his dissenting opinion, commented that the majority overruled almost thirty years of precedent by this decision. Language authorizing delegation has been deleted from Mil.R.Evid. 315(d). *See also United States v. Law*, 17 M.J. 229 (C.M.A. 1984).

7. When competent military authority authorizes a search, he or she is not necessarily precluded from future official participation in the case. *See, e.g., United States v. Wilson*, 1 M.J. 694 (A.F.C.M.R. 1975) (reviewing and taking action in record of trial); *United States v. Cansdale*, 7 M.J. 143 (C.M.A. 1979) (reviewing and taking action in record of trial). *But see United States v. Cardwell*, 46 C.M.R. 1301 (A.C.M.R. 1973) (military judge deciding legality of search which he, acting as magistrate, authorized, held to be error).

8. The commander's authorization

a. Procedures

(1) Unlike the authorization by civilian judges, the commander's authorization to search had traditionally been issued in a relatively informal procedure. Thus, the commander's authorization had generally been oral, based on oral, unsworn statements to him or her in support of probable cause. *See* Mil.R.Evid. 315(b)(1), 315(f)(2).

(2) In 1980, the Court of Military Appeals held that an authorization to search must be predicated upon information supported by oath or affirmation. *United States v. Fimmano*, 8 M.J. 197 (C.M.A. 1980). Regulatory authority supported this decision. However, in 1981, the court ruled that the fourth amendment does not require that military commanders' authorization for search and seizure be "supported by oath or affirmation," since the commander is not a true "magistrate." Thus, his authorization is not a warrant within the contemplation of the fourth amendment. *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981). Although the court concluded that compliance with the oath requirement is not absolutely required, it went on to note:

> A military commander who fails to obtain evidence under oath when it is feasible for him to do so has neglected a simple means for enhancing the reliability of his probable cause determination. In a marginal case this lack of concern for obtaining the most reliable evidence available may prove fatal when the commander's finding of probable cause is being attacked before a court-martial.

Id. at 364.

(3) The commander may consider a combination of oral and written information. *United States v. Fleener*, 21 C.M.A. 174, 44 C.M.R. 228 (1972) (Quinn, J., concurring in the result).

b. The authorization must be reasonably specific as to place and items sought.

(1) *Andresen v. Maryland*, 427 U.S. 463 (1976).

(2) *United States v. Hartsook*, 15 C.M.A. 291, 35 C.M.R. 263 (1965).

(3) *But see United States v. Drew*, 15 C.M.A. 449, 35 C.M.R. 421 (1964); *United States v. Schafer*, 13 C.M.A. 83, 32 C.M.R. 83 (1962) (search of area, including 256 buildings, upheld when authorization directed seizure of items "pertinent to investigation of murder").

(4) Authorization to search barracks room and off-base residence was permissible where there was probable cause that property sought would be located in one of two identified areas under suspect's control. *United States v. Johnson*, 23 M.J. 209 (C.M.A. 1987).

c. Authorization may be conditional

(1) *United States v. Staggs*, 23 C.M.A. 111, 48 C.M.R. 672 (1974) (implied conditional authorization is permissible).

(2) *United States v. Kennard*, 49 C.M.R. 138 (A.F.C.M.R. 1974) (upholding search authorization which was contingent upon the accused leaving a hospital; and it was not executed until he left the hospital and put bags in his car).

(3) *See also United States v. Ness*, 13 C.M.A. 18, 32 C.M.R. 18 (1962).

C. Search pursuant to authorization. A search based on a search warrant (or its equivalent, the commander's authorization) is limited to the specific place, and to looking for the specific items, authorized by the issuing official. If, in the course of a properly authorized search, agents discover items not contained in the authorization, these may be seized if the requirements of the plain view rule have been met. *See* section 1306 B., *supra*.

1. Examples

a. *United States v. Schultz*, 19 C.M.A. 311, 41 C.M.R. 311 (1970).

b. *United States v. Hendrix*, 21 C.M.A. 412, 45 C.M.R. 186 (1972).

2. Mil.R.Evid. 315(h) sets forth the following basic procedures which should be adhered to during the actual execution of the search authorization:

Execution

(1) Notice. If the person whose property is to be searched is present during a search conducted pursuant to a search authorization granted under this rule, the person conducting the search should when possible notify him or her of the act of authorization and the general substance of the authorization. Such notice may be made prior to or contemporaneously with the search. Failure to provide such notice does not make a search unlawful within the meaning of Mil.R.Evid. 311.

(2) Inventory. Under regulations prescribed by the Secretary concerned, and with such exceptions as may be authorized by the Secretary, an inventory of the property seized shall be made at the time of a seizure under this rule or as soon as practicable thereafter. At an appropriate time, a copy of the inventory shall be given to a person from whose possession or premises the property was taken. Failure to make an inventory, furnish a copy thereof, or otherwise comply with this paragraph does not render a search or seizure unlawful within the meaning of Mil.R.Evid. 311.

(3) Foreign searches. Execution of a search authorization outside the United States and within the jurisdiction of a foreign nation should be in conformity with existing agreements between the United States and the foreign nation. Noncompliance with such an agreement does not make an otherwise lawful search unlawful.

D. Wiretapping/electronic eavesdropping. Mil.R.Evid. 317 generally excludes evidence obtained as a result of interceptions of wire or oral communications when such exclusion is required by the fourth amendment or by a statute applicable to members of the armed forces.

1. Criteria for electronic eavesdropping are established in 18 U.S.C. § 2510 et seq and in SECNAVINST 5520.2A of 1 Sep 1978, which implements DoD Dir. 5200.24 of 3 Apr 1978. Consensual telephone tracing on a military facility may be approved locally. Consensual interceptions (at least one party to the communication consents) require approval by the General Counsel of the Navy. Nonconsensual interceptions require a civilian court order except

overseas. ALNAV 063/78 (SECNAV Washington DC 201618Z Oct 78) designated the Circuit Military Judge, Atlantic Judicial Circuit, to consider applications for nonconsensual interceptions directed against persons abroad who are subject to the UCMJ, and for pen register operations on any military installations and directed against persons subject to the UCMJ. Pen register operations and consensual or nonconsensual interceptions may only be conducted by the NIS. Other requirements are identified in instructions cited above.

2. *Smith v. Maryland*, 442 U.S. 735 (1979) held that use of a pen register did not violate the accused's reasonable expectation of privacy; however, it appears that judicial approval of military pen register operations continues to be required legally though not constitutionally.

3. Police listening to the accused's voice coming over the phone receiver during a phone conversation between the accused and a government informant did not come within the activity regulated by Mil.R.Evid. 327. *United States v. Parrillo*, 34 M.J. 112 (C.M.A. 1992).

E. Financial institution records of individual. The Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422, applies to the military, and military commanders should not authorize seizure of an individual's records from a financial institution in the United States; a civilian search warrant should be sought. DoD Directive 5400.12 implemented by SECNAVINST 5500.33. (Note that the information also might be obtainable with a DoD IG administrative subpoena. *See* section 1312.C.3, *infra*.). Nevertheless, violation of the act does not support suppression [*United States v. Wooten*, 34 M.J. 141 (C.M.A. 1992)] and an accused does not have a reasonable expectation of privacy in his or bank records as against a government search. *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619 (1976).

F. Attacking probable cause determinations at trial. A search authorization and supporting information may be attacked as being legally insufficient on its face. *Aguilar v. Texas*, 378 U.S. 108 (1964). Can a judge "go behind" a search warrant and affidavits to evaluate their legal sufficiency? In other words, when may a judge at trial consider evidence not presented to or considered by the official who authorized the search?

1. Examples

a. *Aguilar v. Texas*, 378 U.S. 108 (1964) (the reviewing court may consider only information brought to the magistrate's attention).

b. *Whitely v. Warden*, 401 U.S. 560 (1971) (an otherwise insufficient affidavit for an arrest warrant cannot be rehabilitated by testimony

concerning information possessed by the affiant when he sought the warrant, but which he did not disclose to the issuing magistrate).

c. *United States v. Cobb*, 432 F.2d 716 (4th Cir. 1970).

2. The government is normally limited to supporting the authorization solely with information presented to the authorizing official. Whether the government can bolster written affidavits with information orally transmitted to the authorizing official, but not recorded, depends upon the procedural rules of the jurisdiction. Most civilian jurisdictions adhere to a "four corners" rule, under which the government is limited to written information supplied to the magistrate and the search warrant itself. The military rule is broader.

a. *Gramaglia v. Gray*, 395 F. Supp. 606 (S.D. Ohio 1975) (Rule 41(c) of the Federal Rules of Criminal Procedure precludes supplementing the affidavit with evidence orally transmitted to magistrate, but this rule is not of constitutional dimensions, so the Ohio procedure which permitted this was proper).

b. *United States v. Fleener*, 21 C.M.A. 174, 44 C.M.R. 228, 236 (1972) (Quinn, J., concurring in the result) (affidavit presented to the commander can be bolstered by oral information also provided to him).

c. *United States v. Garcia*, 3 M.J. 927 (A.C.M.R. 1977).

3. The defense may challenge as false the information in an affidavit relied upon by the authorizing official to support a search warrant even though the information and authorization appear facially sufficient. Mil.R.Evid. 311(g)(2). *See Franks v. Delaware*, 438 U.S. 154 (1978).

a. Although it was once axiomatic that both sides at trial were bound by the "four corners" of the affidavit, Federal courts have permitted the defense to challenge a facially sufficient warrant and affidavit when the defense can show any misrepresentation of a material fact or intentional misrepresentation of facts by a government agent. *See, e.g., United States v. Marihart*, 492 F.2d 897 (8th Cir.), *cert. denied*, 419 U.S. 827 (1974); *United States v. Carmichael*, 489 F.2d 983 (7th Cir. 1973); *United States v. Thomas*, 489 F.2d 664 (5th Cir. 1973), *cert. denied*, 423 U.S. 844 (1975).

b. In order to receive a full hearing on the accuracy of the information given to the authorizing official, the defense must fulfill certain prerequisites. *Franks v. Delaware, supra; United States v. Turck*, 49 C.M.R. 49 (A.F.C.M.R. 1974); Mil.R.Evid. 311(g)(2). Those prerequisites are set forth below.

(1) The defendant must make a substantial preliminary showing that the affidavit included a deliberate falsehood or that the statement was made with reckless disregard for the truth.

(2) It must be demonstrated that a government agent made the misstatement.

(3) The defendant must demonstrate that the falsity is necessary to a finding of probable cause.

(4) *Franks v. Delaware* suggests that the above steps may be initially accomplished if the defendant makes any offer of proof which:

(a) Points out that portion of the affidavit which is false, and submits a statement of supporting reasons; and

(b) includes supporting affidavits or sworn or otherwise reliable statements of witnesses, or an explanation of their absence. In some cases, an offer of proof may be sufficient. *See United States v. Colter*, 15 M.J. 1032 (A.C.M.R. 1983).

4. Once the defense is permitted to "go behind" the information presented to the authorizing official and challenge its accuracy, by what standards are we to judge the authorization and, ultimately, the admissibility of the evidence? What sort of misstatements or incorrect information will give rise to the sanction of the exclusionary rule? Although courts have handled this problem in a variety of ways, Mil.R.Evid. 311(g)(2) and *Franks v. Delaware, supra*, set the standards to be followed. Essentially, three questions must be asked: Who made the misstatement (i.e., government agent, informant, witness); what was the nature of the misstatement (i.e., intentional, reckless, negligent, or reasonable mistake); and was the misstatement material (i.e., without the misstated facts, did probable cause still exist)?

a. Who made the misstatement?

(1) Only a misstatement by a government agent will give rise to any relief. Note that, in the military, the lines between "government agent" and "private citizen" are blurred.

(a) *Franks v. Delaware, supra.*

(b) *United States v. Carmichael*, 489 F.2d 983 (7th Cir. 1973).

(c) *United States v. Marihart*, 492 F.2d 897 (8th Cir. 1974).

(d) *United States v. Turck*, 49 C.M.R. 49 (A.F.C.M.R. 1974) (Air Force OSI agent).

(e) *United States v. Corkill*, 2 M.J. 1118 (C.G.C.M.R. 1976) (base military security officer).

(2) Some courts have implied that misstatements by anyone in the chain of information might give rise to the exclusionary rule.

(a) *United States v. Thomas*, 489 F.2d 664 (5th Cir. 1973).

(b) *United States v. Salatino*, 22 C.M.A. 530, 48 C.M.R. 15 (1973).

(c) *Contra, United States v. Corkill, supra.*

b. Nature of the misstatement

(1) The minimum standard the Supreme Court has established which mandates a hearing is that a false statement was knowingly and intentionally made or was proffered with reckless disregard for the truth. Allegations of negligence or innocent mistake are insufficient.

(a) *Franks v. Delaware, supra.*

(b) *United States v. Carmichael, supra.*

(c) *United States v. Turck, supra* (involved OSI agent making only negligent misrepresentations; thus, search warrant not invalid).

(2) As to other misstatements, there is disagreement regarding their effect. Some courts will excise grossly negligent misstatements, but not other misstatements. Other courts appear willing to excise even misstatements made through simple carelessness. *Compare United States v. Marihart*, 492 F.2d 897 (8th Cir. 1974) *with United States v. Thomas*, 489 F.2d 664 (5th Cir. 1973).

c. Materiality of the misstatement

(1) The remedy enunciated by the court in *Franks v. Delaware, supra,* is to excise the misstatement and test the residue of the information for its necessity to a finding of probable cause. In other words, was the misstatement material to a finding of probable cause?

(a) *United States v. Marihart, supra.*

(b) *United States v. Turck, supra.*

(c) *United States v. Thomas, supra.*

5. May the defense challenge the affidavit/information by showing that additional information was not presented to the authorizing official, which might have affected his probable cause determination? *See United States v. Kelly,* 15 M.J. 1024 (A.C.M.R.), *petition denied,* 17 M.J. 22 (C.M.A. 1983) (special agent's omission of fact that he suspected confidential informant had lied to him about a previous incident was not material).

6. Misunderstanding by authorizing official. An erroneous understanding is not always sufficient to weaken the correctly understood information to such an extent that probable cause could not be found. *United States v. Sam*, 22 C.M.A. 124, 46 C.M.R. 124 (1973).

7. Disclosure of informant's identity. Mil.R.Evid. 507. In challenging probable cause at trial, the defense often wants to discover the identity of the informant who purportedly supplied the information. As a general rule, the defense is not entitled to discover the identity of an informant -- merely to challenge the validity of a search.

a. *United States v. Ness,* 13 C.M.A. 18, 32 C.M.R. 18 (1962) (government need not disclose the identity of an informer unless such disclosure is helpful to the defense).

b. *Roviaro v. United States,* 353 U.S. 53, 61 (1957) (government must disclose identity of informant unless sufficient evidence apart from his confidential communication was used to establish probable cause).

c. *McCray v. Illinois,* 386 U.S. 300 (1967) (failure to produce informant to testify against defendant at preliminary hearing held to determine probable cause for arrest and search, does not unconstitutionally deprive defendant of right to confrontation and cross-examination; disclosure is

not required unless identity is relevant and helpful to the defense or is essential to fair determination of probable cause).

d. *United States v. Miller*, 43 C.M.R. 671 (A.C.M.R. 1971), *aff'd*, 44 C.M.R. 146 (C.M.A. 1971).

e. *United States v. Bennett*, 3 M.J. 903 (A.C.M.R. 1977) (accused's burden to establish that the informant's identity is necessary to his defense is not satisfied by mere speculation).

G. Authorization and consent. Probable cause alone without authorization will not cure an involuntary consent.

1. In *United States v. White*, 27 M.J. 264 (C.M.A. 1988), the accused's commander had received information from an informant that she had been using drugs. The commander offered her the opportunity to prove her innocence by "consenting" to a urinalysis, but told her that, if she didn't "consent," he would order her to give a sample. Judge Cox, writing for the court, found the "consent" involuntary and set aside the findings of guilty, analogizing to the situation where a civilian official obtains "consent" only after asserting that he has a warrant. In the warrant/consent situation, it is the warrant and not the involuntary consent that validates the search and, the court reasoned, since the commander's ability to order a urinalysis is equivalent to a civilian policeman's possession of a warrant, the consent was invalid. *Id.* at 266. In this case, since there was no probable cause to order the urinalysis, there was no valid theory of admissibility to which the government could justify the seizure.

2. In *United States v. Simmons*, 29 M.J. 70 (C.M.A. 1989) (Cox, J.), the court was faced with a situation where the consent was invalid, but probable cause existed because of the accused's presence in a car with cocaine and drug paraphernalia in a heavy drug-trafficking area. The court held that, in those circumstances, the allegedly involuntary nature of the accused's "consent" to urinalysis did not invalidate test, even though accused was not told that results of "consent" test could be used against him and that results of command-directed test were inadmissible. Although the consent was invalid, the order that the commander could have given concerning the urinalysis (given the probable cause) was the functional equivalent of a civilian warrant and, thus, the results were admissible. *Id.* at 71.

3. In the case of *United States v. McClain*, 31 M.J. 130 (C.M.A. 1990), the accused gave an involuntary consent to a urinalysis. Although the commanding officer possessed information that would have constituted probable cause for a urinalysis, he was never asked for authorization. Instead, involuntary consent was obtained. At trial the military judge suppressed McClain's urinalysis

because it was obtained involuntarily. But, the Navy-Marine Corps Court of Military Review reversed, based on *Simmons, supra*, which seemed to hold that involuntary consent is cured when probable cause already exists. 30 M.J. 615, 618-19 (N.M.C.M.R. 1990). Nevertheless, the Court of Military Appeals "retreated from any suggestion in *Simmons* that "involuntary consent" can be ignored if there is probable cause to obtain a search authorization." *McClain*, 31 M.J. at 134. The court reaffirmed the need to obtain authorization prior to conducting a probable cause search; however, they left open the possibility first suggested in *White* that involuntary consent may be cured by probable cause when the accused is dealing directly with the commander who has authority to search since the commander could have issued an oral authorization anyway.

1309 REASONABLE PROSECUTORIAL ACTIONS: SEIZURES OF THE PERSON AND SEARCHES ACCOMPANYING THEM
(Key Numbers 1063, 1064)

A. General. Any time an agent of the government restricts the freedom of an individual to move about, a seizure of the individual's person under the fourth amendment may have taken place. *See United States v. Kinane*, 1 M.J. 309, 313 n.12 (C.M.A. 1976); *United States v. Rozier*, 1 M.J. 469 (C.M.A. 1976). The permissible nature, duration, and intrusiveness of the restraint depends upon the factors at hand. Generally, the more information available pointing to criminal activity, the greater the degree of restraint allowed. Two bench mark standards appear on this spectrum of information. On the lower end of the scale, "reasonable suspicion" or information leading to a conclusion that criminal activity may be afoot justifies a brief investigatory stop and frisk. On the upper end of the scale, probable cause based on a reasonable, fact-based belief that a crime has been committed by the one to be restrained justifies arrest. There appear also to be permissible police activities below the threshold for a stop and between a simple stop and frisk and an apprehension and search. Note, too, the peculiar situation in the military wherein a servicemember is always in some sense subject to the control of government agents in the form of his superiors. This tends to blur some of the distinctions drawn by civilian courts in this area of the law. *See Davis v. Mississippi*, 394 U.S. 721 (1969); *United States v. Scott*, 22 M.J. 297 (C.M.A. 1986); *United States v. Sanford*, 12 M.J. 170 (C.M.A. 1981); *United States v. Davis*, 2 M.J. 1005 (A.C.M.R. 1976).

B. "Contact": government interaction with an individual without formal restraint

In *Brown v. Texas*, 443 U.S. 47 (1979), the court held that law enforcement officials must have reasonable suspicion that an individual who is seized is engaging in, or has engaged in, criminal conduct before detaining the

person and requiring identification. *Compare Michigan v. DeFillippo*, 443 U.S. 31 (1979) *with United States v. Paige*, 7 M.J. 480 (C.M.A. 1979) (facts which did not provide an articulable suspicion that criminal activity was at hand) *and United States v. Gillis*, 8 M.J. 118 (C.M.A. 1979); *United States v. Texidor-Perez*, 7 M.J. 356 (C.M.A. 1979) (anonymous tip indicating accused would be in posssession of drugs did not permit investigative stop).

C. Consequences on an illegal "seizure" of the person

As discussed above, even a brief detention of a person may be, in effect, a "seizure" which, if held to be unlawful, will require that any evidence derived from the unlawful seizure be suppressed.

1. Subsequent confession of the accused

a. In *Brown v. Illinois*, 422 U.S. 590 (1975), the defendant was "arrested" after authorities had illegally searched his apartment and found nothing of an incriminating nature. At the police station, he was given *Miranda* warnings and he subsequently confessed. The Supreme Court held that the *Miranda* warnings alone were insufficient to cleanse the fourth amendment violation, as the *Miranda* warnings were designed primarily to protect fifth amendment rights.

b. In *Dunaway v. New York*, 442 U.S. 200 (1979), the police lacked probable cause to arrest, but nonetheless brought Dunaway to the police station for questioning, where he confessed after receiving his *Miranda* warnings. The Supreme Court found that an illegal seizure of the person had taken place, notwithstanding the fact that there had been no formal "arrest."

c. Military courts have generally followed the *Brown/ Dunaway* analysis while keeping in mind the specialized needs of the military. Generally, the inquiry proceeds along these lines.

d. If the accused was in custody within the meaning of Article 7, UCMJ, the court will test for probable cause for the apprehension. If the accused was held in custody without probable cause, the court must examine the causal connection between the illegality and the confession. Should there be insufficient attentuation between the illegal custody and the confession, the confession may not be admitted. Note, however, while even a brief detention of a suspect may be a seizure, such detention may not necessarily be an apprehension. Thus, something less than probable cause, such as "reasonable suspicion," may be sufficient to justify the detention.

e. In the military, it is often unclear whether an individual is in custody. *United States v. Thomas*, 21 M.J. 928 (A.C.M.R. 1986) includes a good discussion of this issue and asks whether an individual's freedom of movement was restrained significantly beyond the point where any servicemember's freedom of movement may be circumscribed without constitutional infringement. *United States v. Scott*, 22 M.J. 297 (C.M.A. 1986) also addresses the issue and outlines an approach for analyzing admissibility of a subsequent confession. *See also United States v. Schneider*, 14 M.J. 189 (C.M.A. 1982) (where accused was brought to investigator's office under guard and circumstances clearly indicated that he was a suspect, such seizure required probable cause); *United States v. Escobedo*, 11 M.J. 51 (C.M.A. 1981); *United States v. Texidor-Perez*, 7 M.J. 356 (C.M.A. 1979).

2. Subsequent eyewitness identification of the accused

Although eyewitness identification is covered in a separate chapter, *infra*, it should be noted that, where the witness' identity was discovered solely as a result of the unlawful detention or apprehension of the accused, any subsequent identification will be suppressed. *See Wong Sun v. United States*, 371 U.S. 471 (1963). The witness' in-court identification of the accused may still be permitted, however, if the prosecution shows that the apprehension did not produce the witness' presence at trial and did not taint the witness' ability to make an accurate in-court identification. *See United States v. Crews*, 445 U.S. 463 (1980).

3. Subsequent searches

a. In *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), it was permissible to detain Royer temporarily because he fit a drug courier profile, but retaining his airplane ticket and his driver's license and requesting him to go to a small police room constituted an arrest without probable cause. Consequently, the subsequent consent to search was invalid. *Royer* was distinguished in *United States v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985), where there were valid arrests and vehicle searches after a twenty-minute delay. The court stated, we must consider whether authorities diligently pursued means of investigation likely to confirm or dispel suspicions quickly.

b. *Hayes v. Florida*, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985), held that police could not lawfully take Hayes to the police station for fingerprinting based on mere reasonable suspicion. *But see United States v. Fagan*, 28 M.J. 64 (C.M.A.), *cert. denied,* 110 S.Ct. 83 (1989). Any military person can be ordered to give fingerprints for identification purposes. Such an order does not amount to a seizure of the person.

D. Stop and frisk

1. Limited investigatory stop. Mil.R.Evid. 314(f)(1).

a. It is not unreasonable for an officer to stop an individual when he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." Additionally, he may frisk the individual if he reasonably believes he may be armed and is presently dangerous to himself or others. If, while conducting the frisk of the outer clothing, the officer feels a weapon, the officer may reach in and seize it. Note that the stop and the frisk must each be justified; a proper stop does not necessarily justify a frisk. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1864 (1968). The Supreme Court has emphasized the ability of trained law officers to infer criminal activity from facts that might appear meaningless to the less experienced. The essence of the stop theory is that the totality of the circumstances must be taken into account. Based upon that "whole picture," the detaining officers must have a particularized and objective basis for inspecting that particular person stopped for criminal activity. *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690 (1981). The Supreme Court has found that reasonable suspicion may be based on: information read off police bulletin board [*United States v. Hensley*, 469 U.S. 221, 105 S.Ct. 675 (1985)], flight of an individual when police officer approaches [*California v. Hodari D.*, 111 S.Ct. 1547 (1991)], a detailed anonymous tip [*Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412 (1990)] and even noncriminal activity which fits a "drug courier" profile [*United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581 (1989)].

b. Military cases

(1) *United States v. Swinson*, 48 C.M.R. 197, 199-200 (A.F.C.M.R. 1974). In order to have a lawful stop, there must be a reasonable suspicion that criminal activity is afoot:

> Federal agents cannot constitutionally stop automobiles systematically or randomly on the chance of discovering something illegal . . . certainly there has been a seizure when a police officer pulls a motorist off the road by the use of a siren, even though he intended to make a routine investigation.

(2) *United States v. Summers*, 13 C.M.A. 573, 576, 33 C.M.R. 105, 108 (1963) ("When a police officer discovers a person at a place, and under circumstances, indicating he is not going about his legitimate business, the officer has the right, and the duty, to investigate.").

(3) *United States v. Hancock*, 49 C.M.R. 830 (A.C.M.R. 1975) (in determining whether there is reasonable suspicion that a crime has been, or is about to be, committed, officer may rely upon his experience as policeman and conduct of defendant).

(4) *See also United States v. Edwards*, 3 M.J. 921 (A.C.M.R. 1977) and *United States v. Yandell*, 13 M.J. 616 (A.F.C.M.R. 1982), *petition denied*, 16 M.J. 158 (C.M.A. 1983).

(5) *United States v. Phillips*, 30 M.J. 1 (C.M.A. 1990) (no reasonable suspicion for MP to stop and detain a soldier leaving in a taxi who had just exited a warehouse with a 27-inch television).

c. A stop and frisk may also be justified when the criminal activity has already occurred and the individual stopped is a suspect. *United States v. Cepulonis*, 530 F.2d 238 (1st Cir. 1976), *cert. denied*, 426 U.S. 908 (1976).

d. The stop (and frisk) may be based on hearsay. *Adams v. Williams*, 407 U.S. 143 (1972); *United States v. Edwards*, 3 M.J. 921 (A.C.M.R. 1977) (investigative stop in response to informant's tip was appropriate).

e. Motor vehicles. *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Swinson*, 48 C.M.R. 197 (A.F.C.M.R. 1974). *See Michigan v. Long*, 463 U.S. 1032 (1983) (after valid *Terry* stop of driver of automobile along roadside, police may perform limited examination of passenger compartment for weapons); Mil.R.Evid. 314(f)(3).

f. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). The court in *Mimms* held that it is lawful for a police officer who has stopped a car for a traffic violation to order the driver out of the car. Articulable suspicion, upon the driver's exit from car, that the driver was armed justified the frisk.

(1) *Mimms* does not hold that all drivers stopped for traffic violations may be frisked. They may be compelled to exit their car; but a frisk is justified only if independent grounds exist to suspect the individual is armed.

(2) The initial stop of the car must, of course, be justified.

(3) *Mimms* tacitly recognizes a distinction between a traffic arrest, where only a citation will be issued, and a lawful custodial arrest,

wherein a full search is justified. *See United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973).

2. Detention during a search. If the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, then it is constitutionally reasonable to detain the citizen at his residence while officers of the law execute a valid warrant to search it. *Michigan v. Summers*, 452 U.S. 692 (1981).

3. The frisk. Mil.R.Evid. 314(f)(2).

a. In addition to the stop, there must be a basis for the frisk; that is, there must be reason to believe that the suspect is armed.

(1) *Terry v. Ohio*, 392 U.S. 1 (1968).

(2) *Sibron v. New York*, 392 U.S. 40 (1968).

(3) *Pennyslvania v. Mimms*, 434 U.S. 106 (1977).

(4) *United States v. Mireles*, 583 F.2d 1115 (10th Cir.), *cert. denied*, 439 U.S. 936 (1978).

b. The frisk is limited to looking for weapons. *Sibron v. New York, supra.*

4. After the initial stop. It is unclear what can be done when, after the stop (and frisk, if any), the law enforcement official is still suspicious but does not have probable cause to make an apprehension. Probably, he must simply let the subject go on his way.

a. Continued detention. *See United States v. Montoya De Hernandez, 473 U.S. 531 (1985); Florida v. Royer, supra; United States v. Sharpe, supra; United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637 (1983). *See also United States v. Zeigler*, 20 C.M.A. 523, 43 C.M.R. 363 (1971). Although thought to be an unauthorized civilian who had twice given false information as to his true identity, it was lawful to detain the defendant until his true identity could be obtained. To determine his identity, it was appropriate to examine his wallet. This examination resulted in seizing an unauthorized identification card.

-- Police diligence test: "In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel the suspicions quickly during which time it was necessary to detain the defendant." *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

b. Questioning. There is little agreement on what questions can be asked of the detainee, at least beyond requesting identification. Note that the right to question does not necessarily include the right to compel answers. *See* Mil.R.Evid. 314(f) drafters' analysis, MCM, 1984, app. 22-25. Note, too, that if a military member who is stopped is suspected of committing an offense, warnings regarding the right against self-incrimination should be given.

E. Apprehension and search incident to apprehension. Mil.R.Evid. 314(g).

1. For evidentiary purposes, we are seldom concerned at trial with the legitimacy of an apprehension unless evidence was derived therefrom (e.g., seizure of items subsequent to a search incident to apprehension; a statement taken from the apprehendee). If such evidence is offered, we are concerned with two things:

a. Was the apprehension lawful? If not, is the evidence seized admissible?

b. Was the evidence otherwise obtained in a lawful fashion?

2. Legality of the apprehension

a. First, one must ascertain whether an apprehension occurred at all. *See United States v. Fisher*, 5 M.J. 873 (A.C.M.R.), *petition denied*, 5 M.J. 400 (C.M.A. 1978).

(1) Article 7(a), UCMJ, and R.C.M. 302 define apprehension as "the taking of a person into custody."

(2) "Apprehension" in military parlance describes what civilians call "arrest."

(3) In civilian practice, an arrest is normally the formal taking of a person into custody for the purpose of detaining him to answer for a criminal charge. In the military, such formalized procedures are not always followed; yet, an apprehension may occur. Again, given the fact that a

servicemember in the military is always under some degree of control by the government, the fact of an apprehension is sometimes difficult to ascertain. Nonetheless, for an apprehension to occur, it appears that, at a minimum, the official exercising control must believe he or she is apprehending, and must manifest a degree of control over, the individual such that the detainee should recognize that he or she is not free to go. *See United States v. Kinane*, 1 M.J. 309 (C.M.A. 1976).

(4) Notification of apprehension

(a) Article 9(a), UCMJ, indicates that the person to be restrained will be directed by an order to remain within specified limits.

(b) The order of apprehension "may be either by word of mouth, by writing, or by circumstances surrounding the arrest. Inasmuch as Article 9(a) of the Code does not limit the order to an oral or written command, so much of the *Manual* provision as attempts to establish such a requirement is inoperative." *United States v. Kinane*, 1 M.J. 309, 314 (C.M.A. 1976). In other words, an apprehension may occur without any formal announcement as long as it appears from the circumstances that the individual has been apprehended.

(c) *See also Dunaway v. New York*, 442 U.S. 200 (1979); *United States v. Schneider*, 14 M.J. 189 (C.M.A. 1982).

b. Who may apprehend?

(1) Generally, officers, NCO's and petty officers, military police and CID personnel, and civilian agents of the military (such as NIS agents) have authority to apprehend persons subject to the UCMJ, either under the UCMJ or by regulation. Others may be given the authority by regulation. Art. 7(b), 7(c), UCMJ; R.C.M. 302.

(2) No "arrest" or "apprehension" warrant exists in the military, but R.C.M. 302(e) provides that apprehension of a suspect in a private dwelling may require an "apprehension authorization," which appears to be the functional equivalent of an arrest warrant.

c. Where may an apprehension be made?

(1) Under the Constitution, no arrest warrant is necessary to arrest an individual in a public place. *United States v. Watson*, 423 U.S. 411, 96 (1976). *See* R.C.M. 302(e)(1).

(2) Entry into private dwellings to make arrest. As a general proposition, the fourth amendment prohibits civilian government officials from entering a private dwelling without a warrant to make an arrest [*see Payton v. New York*, 445 U.S. 573 (1980)] except when in "hot pursuit." *Warden v. Hayden*, 387 U.S. 294 (1967).

(3) Normally, military officials may not enter a private dwelling to make an apprehension without prior command or judicial approval. *United States v. Davis*, 8 M.J. 79 (C.M.A. 1979); R.C.M. 302(e) (2)(C). However, they may make an entry without such prior approval where there exists probable cause to apprehend and:

(a) Exigencies preclude obtaining authorization [*see United States v. Phinizy*, 12 M.J. 40 (C.M.A. 1981); *United States v. Davis*, 13 M.J. 671 (A.F.C.M.R. 1982); R.C.M. 302(e)(2)(B)];

(b) when the occupant consents [*see United States v. Ward*, 12 M.J. 846 (A.C.M.R.), *petition denied*, 13 M.J. 227 (C.M.A. 1982); R.C.M. 302(e)(2)(A)];

(c) when "hot pursuit" is authorized [*Warden v. Hayden, supra*]; or

(d) when entry is necessary for life-saving or related purposes. *See* Mil.R.Evid. 314(i). *See also United States v. Rodriguez*, 8 M.J. 648 (A.F.C.M.R. 1979), *petition denied*, 9 M.J. 48 (C.M.A. 1980).

(4) In the military, the term "private dwelling" does not include barracks rooms, vessels, aircraft, vehicles, tents, bunkers, field encampments, etc. R.C.M. 302(e)(2). *United States v. McCarthy*, 34 M.J. 768 (A.C.M.R. 1992).

(5) A military guest house (apparently equivalent to a Navy Lodge) was a "private dwelling" in *United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988). The court, however, found the accused was apprehended lawfully, since exigent circumstances existed.

(6) In *New York v. Harris*, 110 S.Ct 1640 (1990), police had probable cause but no warrant when they arrested Harris at his home. Harris made statements at his house and later at the police station. The court found that the taint of the illegal arrest affected the statement at Harris' home, but did not render inadmissible the later station house statement.

d. The apprehension must be based on preexisting probable cause. Art. 7(b), UCMJ; R.C.M. 302(c). *See* section 1307, *supra*, for a discussion of probable cause. *See United States v. Pope*, 3 M.J. 1037 (A.F.C.M.R. 1977), *aff'd on reconsideration*, 3 M.J. 1056 (A.F.C.M.R. 1977), wherein the court stated that an apprehension without probable cause cannot be validated by evidence obtained in a subsequent search.

(1) *United States v. Tolliver*, 6 M.J. 868 (N.C.M.R. 1979) (where arrest of accused was not based upon probable cause, items found in a search incident to that arrest and a subsequent confession were inadmissible).

(2) In *United States v. Robinson*, 6 M.J. 109 (C.M.A. 1979), a military policeman testified that he believed that the accused ran out of the gate because he possessed some kind of prohibited drug. The officer implied that his pursuit of the accused was not to investigate further the possibility of possession of contraband, but rather to apprehend the accused and search his person for such matter. The court held that the accused's discarding of a package of heroin was not a proper factor in determining whether probable cause existed to apprehend the accused, as that decision had already been made.

(3) *Dunaway v. New York*, 442 U.S. 200 (1979).

(4) *United States v. Kinane*, 1 M.J. 309 (C.M.A. 1976) (where the accused had not been placed under arrest at time detective ordered him to empty his pockets, resulting search was not justified as being incident to apprehension or custodial arrest). *But see United States v. Schlauch*, 20 M.J. 803 (N.M.C.M.R. 1985), which held that an actual apprehension need not precede the search incident to apprehension as long as the probable cause to apprehend precedes the search, relying on a similar holding in *United States v. Acosta*, 11 M.J. 307 (C.M.A. 1981). *United States v. Ward*, 19 M.J. 505 (A.F.C.M.R. 1984) held a search of Ward invalid, even though there was probable cause to apprehend Ward. However, the court stated that Ward was not apprehended before or after the search, so the search could not be justified as being incident to an apprehension which never occurred. *See also Smith v. Ohio*, 494 U.S. 541, 110 S.Ct. 1288 (1990).

3. Scope of search incident to apprehension. Once a lawful apprehension has occurred, what may be searched incident thereto becomes the issue that must be addressed.

a. Search of the person. Mil.R.Evid. 314(g)(1).

(1) A full search of the person apprehended is proper in any lawful custodial arrest, regardless of the likelihood (or lack thereof) of the

presence of weapons or evidence. The scope of the search in such situations is not limited by the nature of the crime for which the person is apprehended, nor by the likelihood that the individual is armed. *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973).

(2) *Accord United States v. Brashears*, 21 C.M.A. 552, 45 C.M.R. 326 (1972).

(3) *See also United States v. Salatino*, 22 C.M.A. 530, 48 C.M.R. 15 (1973) (upholding strip search at CID office conducted subsequent to an authorized search of the accused's car and his apprehension at his living quarters). *Cf.* Mil.R.Evid. 312(b)(2) (visual examination of unclothed body permissible pursuant to valid apprehension).

(4) Extraction of bodily fluids may not be justified as a search incident to apprehension. *Schmerber v. California*, 384 U.S. 757 (1966).

b. Search beyond the person

(1) It is proper to search an area within the arrestee's immediate control for weapons and destructible evidence. The "area within immediate control" generally describes that area into which the apprehendee could reach with a sudden movement in order to secure a weapon or destructible evidence. This has been described as "wingspan" or as "lunging distance." *Chimel v. California*, 395 U.S. 752 (1969).

(2) The majority of courts adopt an ad hoc test to evaluate whether the police could reasonably and honestly believe that the suspect could reach a given place when they searched more than the suspect's person.

(a) The Supreme Court apparently adopted this view in *United States v. Chadwick*, 433 U.S. 1 (1977).

-1- The Court held that a search of a locked footlocker weighing some 200 pounds, seized when Chadwick was arrested and searched an hour-and-a-half later, was illegal. The Court rejected the following contentions by the government:

-a- That the fourth amendment warrant requirement "protects only interests traditionally connected with the home";

-b- that, because a footlocker is, in a sense, "mobile," the same standards for warrantless searches of automobiles ought to be applied to a footlocker (or suitcase); *see* section 1311 C., *infra*; and

-c- that, because the footlocker was seized contemporaneously with the arrest, it could be examined as part of a valid search incident to arrest.

-2- While conceding that probable cause to search the footlocker apparently existed, Chief Justice Burger, writing for the seven-member majority, held that where, as here, the police had custody of the footlocker, and there was no danger of its contents being lost or destroyed, the failure to secure a search warrant was fatal.

-3- The search was not incident to arrest because "[o]nce law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." *Id.* at 5.

-4- *Chadwick* therefore reaffirms the historical emphasis the Supreme Court has placed upon the warrant requirement.

(b) *New York v. Belton*, 453 U.S. 454 (1981). In this far-reaching decision, all the occupants of an automobile were removed from the car and arrested. A police officer re-entered the automobile and retrieved a jacket from the rear seat of the passenger compartment. Cocaine was discovered in a jacket pocket. The Court upheld the seizure as a search incident to a lawful arrest. The Court stated:

> [W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.
>
> It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.

Id. at 460. The term "container" was defined by the Court in *Belton* at 453 U.S. 460 n.4 as follows:

> "Container" here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.

Mil.R.Evid. 314(g) adopts the *Belton* rule in searches incident to the apprehension of an occupant of an automobile.

(c) *United States v. Cordero*, 11 M.J. 210 (C.M.A. 1981) (under theory of search incident to lawful apprehension, the court upheld the seizure of a plastic bag containing hashish, found under the front seat of a car).

(d) *United States v. Acosta*, 11 M.J. 307 (C.M.A. 1981) (court relied on search incident to apprehension theory to uphold seizure of marijuana under pillow on bed of occupant of room, when occupant was standing a few feet away from the bed).

(3) Sometimes, where there is probable cause to believe that evidence is in the car, the car may be searched on a probable cause plus exigent circumstances theory. *See* section 1311 C., *infra*.

(4) It may also be possible to impound the car and inventory it, depending on the nature of the apprehension and the standard procedures of the apprehending agency. Again, an inventory may not be used as a subterfuge for a search. *See* section 1312 B., *infra*.

(5) Some courts apply a more mechanical or "radius" type test to determine the legitimate scope of a search incident to apprehension. While this is a minority view, and probably an incorrect view in light of *Chadwick*, the student should be aware of the cases espousing this view.

(a) *United States v. Eatherton*, 519 F.2d 603 (1st Cir.), *cert. denied*, 423 U.S. 987 (1975) (accused carrying briefcase when apprehended; briefcase was taken from him and he was handcuffed; contents of briefcase then searched; held valid search incident to apprehension).

(b) *United States ex rel. Muhammad v. Mancusi*, 432 F.2d 1046 (9th Cir 1970), *cert. denied*, 402 U.S. 911 (1971). The defendant was apprehended while attempting to cash a stolen money order at a bank. An FBI agent apprehended him, seized his briefcase, and took him to FBI headquarters. At the headquarters, his briefcase was searched without a warrant and stolen money orders were discovered in the briefcase. The search was upheld as being incident to an arrest even though it was conducted at FBI headquarters.

(c) *United States v. Birdsong*, 446 F.2d 325 (5th Cir. 1971) (search of auto trunk upheld as incident to driver's apprehension).

(d) *United States v. Sandoval*, 41 C.M.R. 407 (A.C.M.R. 1969) (attache case located behind driver's seat of pickup truck was within immediate control of accused even though he had dismounted).

(e) *United States v. Kennard*, 49 C.M.R. 138 (A.F.C.M.R. 1974) (search of trunk of car next to which accused was standing at time of apprehension upheld as incident to apprehension (alternative basis) although accused was elsewhere when search occurred). *But see Cardwell v. Lewis*, 417 U.S. 583, 593, n.7 (1974) [quoting *Preston v. United States*, 376 U.S. 364 (1964) ("Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.")].

c. Temporal limits. Generally, a search incident to apprehension must be conducted within a short time after apprehension. For example, in *Preston v. United States, supra*, the search of the suspect's car was not undertaken until the persons who had occupied it had been arrested and taken in custody to the police station and the car towed to a garage. The court found the search too remote in time or place to have been incidental to the arrest and, therefore, the evidence seized was inadmissible. In *Chambers v. Maroney*, 399 U.S. 42 (1970), a search of an automobile which produced incriminating evidence was made at a police station some time after the arrest of the car's occupants. The court held that the search could not be justified as a search incident to an arrest. Where circumstances make conducting the search within a short time infeasible, however, the search of the person may be delayed until it is more reasonable to conduct it. *See United States v. Edwards*, 415 U.S. 800 (1974) (valid search of person at place of detention ten hours after arrest). *See also United States v. Zeigler*, 14 M.J. 860 (A.C.M.R. 1982), *petition denied*, 15 M.J. 461 (C.M.A. 1983) (seizure of rape suspect's undershirts six hours after apprehension was still a search incident to arrest); *United States v. Pechefsky*, 13 M.J. 814 (A.F.C.M.R. 1982), *petition denied*, 14 M.J. 293 (C.M.A. 1983) (accused apprehended at bowling alley and strip-searched 120 minutes later, still searched incident to apprehension).

d. Scope of search beyond *Chimel* limits. A valid custodial apprehension justifies a search of the person and the area within his immediate control. Beyond that area, the apprehension alone will not justify a search. *Chimel v. California*, 395 U.S. 752 (1969). Other circumstances surrounding the apprehension may give rise to a need to search beyond the *Chimel* limits. *See generally Vale v. Louisiana*, 399 U.S. 30 (1970). Some of the possible justifications for such an additional intrusion are discussed below.

(1) Security of apprehending officials. Mil.R.Evid. 314(g). The officials may need to make a cursory check to ascertain the presence of others who might help the apprehendee escape. *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990). Police may make protective sweep of home during lawful arrest if they have "reasonable relief based on specific and articulable facts" that dangerous persons may be hiding in area to be swept. Evidence discovered during such a protective sweep is admissible.

(2) Seeking other offenders. Mil.R.Evid. 314(g) provides that, where other persons might be present who would interfere with the apprehension or endanger those apprehending, a reasonable examination may be made of the general area in which such persons might be located. A person's mere presence near those suspected of an offense does not, however, without more, give rise to apprehend or search that person. *Ybarra v. Illinois*, 444 U.S. 85 (1979).

(3) Obtaining wearing apparel. If the apprehendee wishes to secure clothing or toilet articles for his use while detained, police may examine those places from which the articles are to be obtained in order to check for weapons or destructible evidence.

(a) *United States v. Manarite*, 314 F. Supp. 607 (S.D.N.Y. 1970), *aff'd*, 448 F.2d 583 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971).

(b) *Giacalone v. Lucas*, 445 F.2d 1238 (6th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972).

(4) The courts have demonstrated a preference for the arresting officers maintaining the status quo and securing a search warrant, rather than immediately searching beyond the person, when it is believed evidence may be on the premises. Thus, surveillance or impoundment, rather than an immediate search, may be necessary.

(a) *Vale v. Louisiana*, 399 U.S. 30 (1970).

(b) *But see United States v. Johnson*, 561 F.2d 832 (D.C. Cir. 1977). Officers saw what appeared to be the packaging of narcotics through a basement window and, as a result, conducted a warrantless search. The court upheld the search on the belief that exigent circumstances existed due to the possibility that the narcotics could have been removed if time (approximately two hours) had been taken to get a search warrant.

1310 "REASONABLE" PROSECUTORIAL SEARCHES: CONSENT SEARCHES (Key Number 1062)

A. General. A search conducted with the voluntary consent of a person with control (who may consent will be examined below) of the place to be searched is legal, and evidence seized thereunder is admissible. Some view consent searches as a waiver rendering the fourth amendment inapplicable, while others treat consent searches as reasonable under the fourth amendment. In either case, they are legitimate.

B. Burden of proof. The government must prove voluntary consent by "clear and convincing evidence." Mil.R.Evid. 314(e)(5). This is a higher standard than the normal preponderance standard. Even when an individual is in custody and consents, the burden remains the same. *But see United States v. Decker*, 16 C.M.A. 397, 401, 37 C.M.R. 17, 21 (1966), wherein the court stated: "Special caution is required when the consent is obtained from a person in police custody." Under these circumstances, attention should be focused upon whether there is actual consent or merely acquiescence to the apparent authority of a law enforcement officer. *See also United States v. Childress*, 2 M.J. 1292 (N.C.M.R. 1975). Mil.R.Evid. 314(e)(5) provides that custody is a factor to be considered in determining the voluntariness of the consent.

C. Prerequisites for finding consent. Mil.R.Evid. 314(e)(4).

1. Consent must be voluntary. This does not mean that consent must be volunteered, nor that it must be made with complete knowledge of the right to withhold consent and of the possible consequences of giving consent. All that is necessary is that consent be an act of free will, unfettered by governmental coercion, pressure, or restraint. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). *United States v. Kesteloot*, 6 M.J. 706 (N.C.M.R. 1978), *aff'd*, 8 M.J. 209 (C.M.A. 1980); *United States v. Webb*, 4 M.J. 613 (N.C.M.R. 1977); *United States v. Carrubba*, 19 M.J. 896 (A.C.M.R. 1985) (accused's consent to search the trunk of his car was involuntary due to his intoxication).

2. No warnings are necessary. The subject need not be apprised of his or her rights under article 31 and *Miranda/Tempia*, nor be told that there is a right not to consent. *See* Mil.R.Evid 314(e)(4).

a. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

b. *United States v. Rushing*, 17 C.M.A. 298, 38 C.M.R. 96 (1967). *See also United States v. Noreen*, 23 C.M.A. 212, 49 C.M.R. 1 (1974); *United States v. Insani*, 10 C.M.A. 519, 28 C.M.R. 85 (1959).

c. No warning of rights is required even when the subject is in custody. *United States v. Watson*, 423 U.S. 411 (1976). But note that, under *United States v. Decker*, 16 C.M.A. 397, 37 C.M.R. 17 (1966), the government bears an especially heavy burden to prove consent where the subject was in custody.

d. The request for a consent search need not specifically indicate the items sought. *United States v. Kennedy*, 50 C.M.R. 892 (A.F.C.M.R. 1975).

e. The acknowledgment of ownership, possession, or control of a thing or place, implicit in consenting to a search of it, is not in itself such an admission as to require article 31 warnings. *United States v. Morris*, 1 M.J. 352 (C.M.A. 1976). *United States v. Britton*, 33 M.J. 238 (C.M.A. 1991). But once the accused invokes his right to remain silent, he may not be asked to identify his property. *United States v. Burns*, 33 M.J. 316 (C.M.A. 1991). *See United States v. Bennett*, 7 C.M.A. 97, 21 C.M.R. 223 (1956). In *United States v. Rice*, 3 M.J. 1094 (N.C.M.R.), *petition denied*, 4 M.J. 163 (C.M.A. 1977), it was held that a request for consent to search was not a statement as contemplated by article 31, UCMJ, and *Miranda*. Consequently, a request for a consent to search after the accused had indicated a desire to talk with his counsel did not, on the facts, violate the rule in *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976), which requires that notification of counsel be made before talking with an accused who has counsel.

f. Although warnings are not a legal requirement for a finding of consent, if the individual was warned, consent will more likely be found. The *JAG Manual* contains a sample consent to search form. (Appendix-1-o).

(1) *United States v. Morris*, 1 M.J. 352 (C.M.A. 1976) (accused signed written consent form which included advice as to his rights).

(2) *United States v. Nicholson*, 1 M.J. 616 (A.C.M.R. 1975).

3. Mere submission to authority is not consent.

a. *United States v. Mota Aros*, 8 M.J. 121 (C.M.A. 1979).

b. *United States v. Gillis*, 8 M.J. 118 (C.M.A. 1979).

c. *United States v. Chase*, 1 M.J. 275 (C.M.A. 1976).

d. *United States v. Mayton*, 1 M.J. 171 (C.M.A 1975).

4. Extent of consent. Consent may limit the time, place, or property to be searched. For example, "You may search my car, but don't look in the toolbox." In *Florida v. Jimeno*, 111 S.Ct. 1801 (1991), the Supreme Court found that consent to search a trunk implied consent to search a paper bag in the trunk, but not a locked briefcase.

5. Withdrawal of consent. The suspect is free to withdraw consent at any time. For the withdrawal to be effective, however, the investigators are entitled to clear notice that consent has been withdrawn or limited. *See United States v. Stoecker*, 17 M.J. 158 (C.M.A. 1984) (accused did not withdraw consent by attempting to conceal object from the eyes of the investigator); *United States v. Castro*, 23 C.M.A. 166, 48 C.M.R. 782 (C.M.A. 1974) (when Castro saw investigator reading names in notebook -- while conducting consent search for marked money -- his asking for return of notebook constituted withdrawal of consent).

D. Factors to look for to determine whether consent was voluntarily given

1. *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977), contains a good discussion of factors to be considered in weighing whether there was a valid, voluntary consent. Among the factors mentioned by the court are the following.

a. Factors tending to favor a finding of consent:

(1) Defendant's education;

(2) whether questioning was prolonged; and

(3) defendant's act of assisting in the search (e.g., unlocking containers).

b. Factors tending against a finding of consent:

(1) Unlawful detention [*see Brown v. Illinois*, 422 U.S. 590 (1975); *see also United States v. Watson*, 423 U.S. 411, *reh'g denied*, 424 U.S. 979 (1976)];

(2) whether defendant was detained in unfamiliar surroundings;

(3) whether defendant was told a warrant would be sought or secured;

(4) defendant's nonassistance in the search; and

(5) the absence of a formal statement of consent.

2. Claim of search warrant. A permission to search, given after authority to search under a warrant is claimed, is not consent because "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search." *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968). *See also* section 1308 G, *supra*.

3. Statement of intent to secure warrant

a. In *United States v. Rushing*, 17 C.M.A. 298, 38 C.M.R. 96 (1967), the court indicated that it is not coercive or a threat for a police officer to indicate to an accused in custody that, if he refuses to consent to a search, the officer will apply for a warrant. But, a different result might be reached where the officer is not reasonably certain he can obtain a warrant.

b. In *United States v. Nicholson*, 1 M.J. 616 (A.C.M.R. 1975), an accused's consent to the search of his car was valid although the consent was given while he was in custody and after he had been told that the police were going to obtain a search warrant if he did not consent.

4. Other factors bearing on finding of consent

a. Actions of the accused in assisting in search. *Robinson v. United States*, 325 F.2d 880 (5th Cir. 1964); *United States v. Decker*, 16 C.M.A. 397, 37 C.M.R. 17 (1966). When the accused assists in the search by providing a key or directing the officers to the contraband, consent is more likely to be found. This is particularly true where it is hoped the search will meet with negative results. *United States v. Glenn*, 22 C.M.A. 295, 46 C.M.R. 295 (1975).

b. Of course, the precise phraseology of the request (especially where it is made by one superior in rank to the suspect) and the response are of critical importance, as are the physical surroundings and presence of others. From the government's standpoint, it is usually preferable to get consent in writing.

5. An excellent example of the balancing test employed to determine if the "totality of the circumstances" reflected a voluntary consent may be found in *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981). In that case, the court balanced:

a. Advice of article 31 rights;

b. advice of right to refuse to consent;

c. action by appellant himself;

d. length of service of accused;

e. request for counsel by accused subsequent to the search; and

f. the fact that appellant:

(1) was under apprehension;

(2) was surrounded by a number of officials;

(3) had a limited education and GT score; and

(4) might have acquiesced to a claim of lawful authority.

6. The Court of Military Appeals discusses this "balancing test" under the consent theory in *United States v. Wallace*, 11 M.J. 445 (C.M.A. 1981).

7. Recent developments. *See* section 1308.G, *supra*.

E. Who may consent: third parties. Mil.R.Evid. 314(e)(2).

1. General. Whether a third party may consent to search appears to rest upon one or more of three theories.

a. First, if there is no reasonable expectation of privacy between the accused and the third party, the defendant assumes a risk of the third party's consent. *See United States v. Novello*, 519 F.2d 1078 (5th Cir. 1975), *cert. denied*, 423 U.S. 1060 (1976).

b. Second, the third party may consent to a search of his or her own property or that which is jointly owned, used, or possessed (except items within the exclusive control of the defendant). *See United States v. Turbyfill*, 525 F.2d 57 (8th Cir. 1975); *United States v. Fish*, 25 M.J. 732 (A.F.C.M.R. 1987).

c. Third, a search is valid if the police reasonably thought that the person who consented had apparent authority to give such consent. In *Illinois v. Rodriquez*, 497 U.S. 177, 110 S.Ct. 2793 (1990), when a girlfriend with a key let police into her boyfriend's apartment, police could enter and search without a warrant if they were relying on the consent of a third party whom they reasonably, but mistakenly, believed had common authority over the apartment. *United States v. Clow*, 26 M.J. 176 (C.M.A. 1988) contains broad dictum approving the theory of "apparent authority." (The case also contains a good review of all Supreme Court decisions dealing with third party consent scenarios.) *See also Rakas v. Illinois*, 439 U.S. 128 (1978) (Powell J., concurring), *reh'd denied*, 439 U.S. 1122 (1979).

2. Landlord or his agent

a. *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889 (1964) (clerk at hotel could not consent to search of accused's hotel room).

b. *Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776 (1961) (even though landlord was authorized to enter leased premises to view waste, he could not consent to search of leased premises).

c. *United States v. Cook*, 530 F.2d 145 (5th Cir.), *cert. denied*, 426 U.S. 909 (1976) (owner of shed could validly consent to search of shed used by tenant where owner retained right of entry for storage).

d. *United States v. Jacobs*, 31 M.J. 138 (C.M.A. 1990), *cert. denied*, 111 S.Ct. 966 (1991) (in an emergency, a landlord, acting pursuant to state law, could authorize entry into the accused's apartment).

3. Co-tenants

a. *United States v. Mathis*, 16 C.M.A. 522, 37 C.M.R. 142 (1967). The court held the accused's mistress could consent to the search of an apartment rented by her, and the police, once in the apartment, could seize

contraband in plain view. Additionally, however, the mistress could not allow access to any place personal to the accused, such as a closet or chest for his clothing and effects.

b. *Frazier v. Cupp*, 394 U.S. 731 (1969). The seizure of clothing from a duffel bag was legal where the bag was being used jointly by the accused and his cousin, and the bag had been left in his cousin's home. Upon arresting the cousin for the same offense as the accused, the police received consent from him and his mother to search the bag. The court held that the cousin, as a joint user of the duffel bag, had authority to consent to such search even though he was authorized only to use one compartment of the duffel bag.

c. *United States v. Dillon*, 17 M.J. 501 (A.F.C.M.R. 1983) (co-tenant's consent permitted entry into apartment, while smell of burning marijuana permitted exigent search of accused's room), *rev'd in part on other grounds in summary disposition*, 19 M.J. 48 (C.M.A. 1984).

4. Host. *United States v. Yarbrough*, 48 C.M.R. 449 (N.C.M.R. 1974) (host's consent upheld in situation where guest was staying in room of host's apartment).

5. Bailor-bailee

a. *United States v. Garlich*, 15 C.M.A. 362, 35 C.M.R. 334 1965). The court held that neither the legal owner (versus the equitable owner) nor the mechanic who had the car on his property could authorize a search of the accused's car.

b. *United States v. Novello*, 519 F.2d 1078 (5th Cir. 1975), *cert. denied*, 423 U.S. 1060 (1976) (consent of warehouse employee who had access to the accused's storage area upheld; accused took risk) (note that court upheld consent although it was secured by ruse).

c. *United States v. Boyce*, 3 M.J. 711 (A.F.C.M.R. 1977) (owner of garage could consent to search of garage where accused had stored items).

d. *United States v. Childress*, 2 M.J. 1292 (N.C.M.R. 1975) (person who had borrowed vehicle and was driving it with permission of owner was empowered to freely consent to search of vehicle).

e. *United States v. Miller*, 13 M.J. 75 (C.M.A. 1982) (owner of car could validly consent to search of accused's jacket which he had left therein).

6. Husband-wife

a. *See Coolidge v. New Hampshire*, 403 U.S. 443, *reh'g denied*, 404 U.S. 874 (1971).

b. *United States v. Matlock*, 415 U.S. 164 (1974). The court held that the defendant's mistress could consent to the search of the bedroom and closet which they shared even though the defendant was arrested in the yard and in the patrol car at the time his mistress consented. The court indicated that the government "may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Id.* at 171. In elaborating on this test, the court indicated that the "common authority" rationale is not related to property law concepts. It rests rather on mutual use of the property by persons generally having joint access or control for most purposes. It is therefore reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right, and that the others have assumed the risk that one member might permit the common area to be searched.

c. The Court of Military Appeals has ruled on the issue in a few cases. *See United States v. Mathis*, 16 C.M.A. 522, 37 C.M.R. 142 (1967) (woman living with accused could consent to search of areas over which she had joint control); *United States v. Smith*, 13 C.M.A. 553, 33 C.M.R. 85 (1963) (wife's consent not voluntary, and search of accused's apartment not upheld); *United States v. Sellers*, 12 C.M.A. 262, 30 C.M.R. 262 (1961) (wife consented to search of husband's car for government records; search upheld).

d. *United States v. Curry*, 15 M.J. 701 (A.C.M.R. 1983) (wife could consent to a search of husband's unlocked desk and cabinet absent specific indication by husband denying her access), *rev'd in part on other grounds in summary disposition*, 18 M.J. 103 (C.M.A. 1984).

7. Employer-employee

a. *United States v. Weshenfelder*, 20 C.M.A. 416, 43 C.M.R. 256 (1971) (employer may consent to search of unlocked government desks when investigator is looking for government property records maintained by accused in representative capacity). Note that *Weshenfelder* could also be analyzed as a case not involving a search at all, inasmuch as the accused arguably had no reasonable expectation of privacy in an unlocked government-owned desk.

b. *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951) (employer may not consent to search of desk which employee uses in connection with his employment to look for items not connected with the employment). *Blok*

was cited with approval in *United States v. Garlich*, 15 C.M.A. 362, 35 C.M.R. 334 (1965).

1311 "REASONABLE" PROSECUTORIAL SEARCHES: PROBABLE CAUSE SEARCHES (Key Number 1074)

A. General. Even though probable cause exists to obtain a search authorization, some circumstances may arise when there is not time to get a search authorization without substantial risk of loss of evidence, escape of individuals, or harm to innocent people. When such circumstances exist, the warrant (or command authorization) requirement may be excused; however, probable cause must still exist and the same considerations discussed in section 1307, *supra*, still apply. *See generally United States v. Kulesar*, 586 F.2d 1283 (8th Cir. 1978).

B. Hot pursuit. Mil.R.Evid. 315(g)(1).

1. *Warden v. Hayden*, 387 U.S. 294 (1967), established several criteria by which "hot pursuit" circumstances existed such that a search without a warrant was justifiable:

a. Probable cause to believe a violent crime had been committed;

b. probable cause to believe the individual who commited crime is in the house;

c. pursuit a short time after the occurrence of the crime; or

d. a need for immediate apprehension and identification before a warrant could be obtained.

2. Scope of search. In *Hayden, supra*, the Supreme Court upheld not only a search of the entire house for Hayden, but also an examination of areas (such as a washing machine) where a weapon might have been secreted. Once the subject has been apprehended, the general rules of search incident to apprehension would govern.

3. *See also United States v. Santana*, 427 U.S. 38 (1976).

C. Probable cause plus exigent circumstances: the "automobile exception." Mil.R.Evid. 315(g)(3).

1. Generally, searches of automobiles and other means of transportation, although still requiring probable cause, have been subject to much less stringent warrant requirements than those of persons or structures. This has resulted from two factors: the mobility of vehicles and a lesser expectation of privacy.

a. The mobility of vehicles. Under some circumstances, if police waited to get a warrant, a real possibility exists that the vehicle would be gone by the time they secured the warrant.

(1) *Carroll v. United States*, 267 U.S. 132 (1925).

(2) *Chambers v. Maroney*, 399 U.S. 42, *reh'g denied*, 400 U.S. 856 (1970).

(3) *Texas v. White*, 423 U.S. 67 (1975), *reh'g denied*, 423 U.S. 1081 (1976).

b. As a rule, a person has a lesser expectation of privacy in his car (or other conveyance) than he has in his person or house. *United States v. Chadwick*, 433 U.S. 1 (1977). *See also Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Olmstead*, 17 M.J. 247 (C.M.A. 1984) (accused had no reasonable expection of privacy in vehicle involved in fatal accident).

c. *But see Coolidge v. New Hampshire*, 403 U.S. 443, *reh'g denied*, 404 U.S. 874 (1971), where a car was located on private property and police had ample time to secure a warrant (indeed, they had gotten an invalid one), the warrantless seizure and search of Coolidge's car was not upheld. *United States v. Mills*, 46 C.M.R. 630 (A.C.M.R. 1972) reaches a similar result. *See also United States v. Garlich*, 15 C.M.A. 362, 35 C.M.R. 334 (1965), holding the *Carroll* doctrine inapplicable to a car which was immobile, "its engine having been completely dismantled for repairs."

d. Under Mil.R.Evid. 315(g), a vehicle is "operable" unless a reasonable person would have known at the time of the search that the vehicle was not functional for purposes of transportation. *Cf. Michigan v. Thomas*, 458 U.S. 259 (1982) (justification to conduct warrantless search of automobile does not "vanish" merely because vehicle has been immobilized by fact that accused has been taken into custody) and *Florida v. Meyers*, 466 U.S. 380, 104 S.Ct. 1852 (1984).

2. While earlier cases essentially held that an exigency search of an automobile would not justify the search of closed or locked containers within the automobile [*see, e.g., Robbins v. California*, 453 U.S. 420, *reh'g denied*, 453 U.S. 950 (1981)], more recently, the Supreme Court cleared up the existing confusion in this area by announcing a "bright-line" test in *United States v. Ross*, 456 U.S. 798 (1982). Essentially, the court held in *Ross* that, if there is probable cause to believe that the evidence will be found within the operable vehicle, then the officers may search the vehicle and any containers found therein in which there is probable cause to believe the evidence might be found. The fact that the officers could reasonably have seized the container and then secured a warrant or authorization for its search is no longer an issue in the analysis. Thus, in *Ross*, the police officers, having probable cause to believe that heroin would be found somewhere in the vehicle, were allowed to search the vehicle and a closed paper bag and zippered pouch in the trunk of the car without obtaining a warrant. What if probable cause is focused on a particular container and not on the car in general? May police search the container when they stop the car, or must they hold the container until a search authorization can be obtained? In *Chadwick*, police observed the defendant place a trunk, known to contain contraband, in his car. The court rejected a search without warrant of the trunk since the probable cause was focused on the trunk and not the entire car. *See also Arkansas v. Sanders, supra and United States v. Johns*, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985). But, in *California v. Acevedo*, 111 S.Ct. 1982 (1991), the court reversed the *Chadwick* holding and found that, when there is probable cause to believe a container in an automobile contains evidence they may open the container without warrant even if they do not have probable cause to search anywhere else in the vehicle.

3. A search of a mobile home based on probable cause, but without a warrant, was upheld by *California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). The mobile home was parked on a lot, and the court stated that the vehicle was readily mobile and that there was a reduced expectation of privacy stemming from its use as a licensed vehicle subject to regulation. In a footnote, the court added that it was not deciding on a vehicle exception for a mobile home used as a residence, as evidenced by being elevated on blocks, not licensed as a vehicle, connected to utilities, and without access to public roads.

4. The probable cause plus exigent circumstances doctrine also permits warrantless searches of places or things other than vehicles.

a. *See, e.g., United States v. Johnson*, 561 F.2d 832 (D.C. Cir.), *cert. denied*, 432 U.S. 907 (1977) (warrantless search of house upheld after police observed, through a window, occupants "cutting" large quantity of heroin; to

have secured a warrant might have taken too long and permitted occupants to depart with contraband; surveillance deemed too risky).

b. The Supreme Court has not expressly applied this doctrine to anything other than vehicles. *United States v. Chadwick*, 433 U.S. 1 (1977) clearly indicates that, to the extent that the doctrine may apply to other than vehicles, a true exigency must exist.

c. The Court of Military Appeals has indicated that the probable cause plus exigent circumstances exception, which the court calls "necessity searches," is not limited to automobile searches.

(1) In *United States v. Hessler*, 4 M.J. 303 (C.M.A. 1978), two judges upheld a warrantless entry into a room in a barracks by duty officer who smelled burning marijuana in the hallway. Judge Perry dissented, asserting that there were insufficient exigent circumstances to justify the warrantless intrusion.

(2) In *United States v. Acosta*, 11 M.J. 307 (C.M.A. 1981), the exigent circumstances doctrine was relied upon to uphold an entry of an officer into the accused's room. The officer, standing in a hall near the accused's door, recognized the odor of marijuana and, when the accused voluntarily opened the door of his room, the officer had probable cause to apprehend and he did not have to delay to seek a warrant to enter the room.

(3) *See also United States v. Dillon*, 17 M.J. 501 (A.F.C.M.R. 1983) (investigators legitimately in accused's apartment, who smelled the odor of marijuana coming from the accused's bedroom, could conduct an exigency search), *rev'd in part on other grounds in summary disposition*, 19 M.J. 48 (C.M.A. 1984).

(4) In *United States v. Hendrickson*, 10 M.J. 746 (N.C.M.R. 1981), *petition denied*, 11 M.J. 408 (C.M.A. 1981), a car owner noticed his television set was missing from his car after dropping a passenger off at the barracks. The duty NCO recalled seeing someone carrying a television set into one wing of the barracks. On these facts, the court found that the search of a barracks wing without authorization was a valid exigency search.

(5) *United States v. Murray*, 12 M.J. 139 (C.M.A. 1981).

(6) In *United States v. Baker*, 14 M.J. 602 (A.F.C.M.R. 1982), the court held that, if the search is performed after the exigency dissipates, the search is unlawful without authorization.

d. Mil.R.Evid. 315(g) expressly authorizes searches without command authorization where there is probable cause and: (1) a reasonable belief that delay needed to obtain a warrant will result in the removal, destruction, or concealment of the evidence; or (2) a reasonable belief that reasonable military operational necessity prevents communication with a person authorized to grant authorization and delay will result in loss of the evidence.

1312 REASONABLE ADMINISTRATIVE SEARCHES
(Key Numbers 1055, 1056, 1057, 1059, 1060, 1066)

A. General. As indicated above, any intrusion into an area in which an individual has a reasonable expectation of privacy is a search within the broad sense of the word. Thus, even an intrusion which has a nonprosecutorial purpose may be a search within the meaning of the fourth amendment. For evidence discovered during such a nonprosecutorial search to be admissible, it must therefore have been conducted in compliance with the fourth amendment (i.e., it must have been conducted pursuant to a valid search warrant [*see, e.g., Camara v. Municipal Court*, 387 U.S. 523 (1967)] or otherwise be reasonable [*see, e.g., South Dakota v. Opperman*, 428 U.S. 364 (1976); *United States v. Biswell*, 406 U.S. 311 (1972)]. If such an administrative intrusion is reasonable, then normally any evidence discovered therein is admissible under the plain view doctrine. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Harris v. United States*, 390 U.S. 234 (1968); *Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975). *But see United States v. Thomas*, 1 M.J. 397 (C.M.A. 1976) (Fletcher, C.J., concurring in the result).

B. Inventories. Mil.R.Evid. 313(c).

1. If, during the course of a bona fide inventory, items connected with criminal activity are discovered, they may be seized and are admissible.

a. *United States v. Hines*, 5 M.J. 916 (A.C.M.R. 1978) (inventory of property within BOQ which uncovered marijuana was admissible because purpose was to ensure property accountability during change of hand receipt holders), *aff'd in summary disposition*, 11 M.J. 88 (C.M.A. 1981).

b. *United States v. Talbert*, 10 M.J. 539 (A.C.M.R. 1980) (detailed search of impounded vehicle -- which included trunk, hood, ashtrays and glove compartment -- over objection of owner, was pretext for illegal search and not valid inventory).

c. *United States v. Law*, 17 M.J. 229 (C.M.A. 1984) (otherwise valid administrative inventory is lawful even though less intrusive

means are available for accomplishing same objective, and even where some suspicion exists that evidence of a crime will be found).

d. *United States v. Jasper*, 20 M.J. 112 (C.M.A. 1985) (legitimate inventory of deserter's personal effects in off-base residence in Germany).

2. Inventory of person's belongings when he is placed in confinement. *United States v. Kazmierczak*, 16 C.M.A. 594, 37 C.M.R. 214 (1967) (Air Force regulation requiring inventory of apprehended serviceman's property is not *per se* unconstitutional). Even if the basis for confinement is not valid, evidence discovered by officials conducting an inventory will not be excluded if the officials had a good faith belief that the confinement was valid. *United States v. Sharrock*, 32 M.J. 326 (C.M.A. 1991).

3. Subterfuge inventory. In *United States v. Mossbauer*, 20 C.M.A. 584, 44 C.M.R. 14 (1971), the accused's wall locker was opened after the accused was reported jailed by civilian police for criminal offenses. The court held that, while an inventory of an AWOL soldier's possessions would normally be reasonable and the resulting evidence admissible, the facts of this case, where the usual company waiting period of 24 hours was ignored, established that the inventory was a subterfuge for a search and lacked the requisite purpose of safeguarding the missing soldier's property. This case should be compared to *United States v. Barnett*, 18 M.J. 166 (C.M.A. 1984), where the fact that the commander ordering the inventory search may have suspected that stolen goods would be found among the accused's effects did not mean that the search was a pretext. Indeed, even the presence of law enforcement agents did not invalidate this "inventory" of the accused's locker.

4. Inventories of automobiles

a. *South Dakota v. Opperman*, 428 U.S. 364 (1976).

(1) In *Opperman*, the court upheld the constitutionality of inventorying an impounded car and the admissibility of the marijuana discovered in the unlocked glove compartment.

(2) Such inventories are permissible for the following reasons:

(a) They protect the owner from loss;

(b) they protect the government against claims; and

(c) they protect the police from possible dangerous contents.

(3) *Opperman* did not deal with:

(a) Entry into locked portions of the car (e.g., trunk or locked glove compartment). However, an inventory of property in a van (conducted on way to impound lot after stop for DWI), which revealed drugs in a container which was in a second container, was valid where police were following standard procedure and were not acting in bad faith or solely for investigation purpose. *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987).

(b) Proper bases for impoundment (car was concededly properly impounded in *Opperman*).

b. In *Illinois v. Lafayette*, 462 U.S. 640, 103 S.Ct. 2605 (1983), the Supreme Court extended the *Opperman* rationale to an inventory search of an accused's shoulder bag while the accused was being "booked" prior to confinement.

c. Other cases

(1) *Harris v. United States*, 390 U.S. 234 (1968).

(2) *Cady v. Dombrowski*, 413 U.S. 433 (1973).

(3) *Cooper v. California*, 386 U.S. 58 (1967).

(4) *United States v. Dulus*, 16 M.J. 324 (C.M.A. 1983) (automobile inventory after confinement of accused held reasonable under *Opperman* rationale).

d. Factors to examine

(1) Basis for impoundment. Was the car impounded for a valid reason?

(a) *United States v. Watkins*, 22 C.M.A. 270, 46 C.M.R. 270 (1973) (improper car registration was a valid reason).

(b) *United States v. Purite*, 3 M.J. 978, 981 n.5 (A.F.C.M.R. 1977) (accused abandoned his car at scene of crime with doors locked, headlights on, and wallet lying on seat; court found proper circumstances for

impoundment), *aff'd on other grounds in summary disposition*, 7 M.J. 369 (C.M.A. 1979).

(2) Procedure used to conduct inventory. Were the procedures used consistent with the purpose of the inventory? *United States v. Hines*, 5 M.J. 916 (A.C.M.R. 1978) (notice to and presence of the occupant of a BOQ room not required in conducting inventory of government property throughout BOQ), *aff'd in summary disposition*, 11 M.J. 88 (C.M.A. 1981).

(3) Scope of inventory. *See United States v. Watkins*, 26 C.M.A. 199, 46 C.M.R. 270 (1973) (inventory, which included looking under dash and rear seat of car, was justified after discovering pistol clip in glove compartment); *United States v. Eland*, 17 M.J. 596 (N.M.C.M.R. 1983) (master chief exceeded scope of lawful inventory when he read notebook of unauthorized absentee).

(4) Time when inventory is conducted. *See United States v. Hines, supra* (inventory held reasonable when conducted at mid-morning of a duty day).

(5) Who conducts inventory. *See United States v. Hines, supra* (inventorying officers had legitimate interest in inventory); *United States v. Barnett*, 18 M.J. 166 (C.M.A. 1984) (law enforcement officials permitted to be present during inventory of confined accused's effects).

(6) Inventories of the effects of a person who has been detained. *United States v. Brashears*, 25 C.M.A. 250, 45 C.M.R. 326 (1972); *United States v. Kazmieczak*, 16 C.M.A. 594, 37 C.M.R. 214 (1967); *United States v. Dulus*, 13 M.J. 807 (A.F.C.M.R. 1982), *aff'd*, 16 M.J. 324 (C.M.A. 1983).

C. Inspections

1. As they are searches, within the broad meaning of the term, inspections must be reasonable. By what criteria do we evaluate reasonableness? Who makes this evaluation?

2. Civilian administrative inspections

a. *Camara v. Municipal Court*, 387 U.S. 523 (1967) (building code inspections may not be conducted over individual's objection without warrant). *See Michigan v. Tyler*, 436 U.S. 499 (1978); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978); *See v. Seattle*, 387 U.S. 541, 875 S.Ct. 1737 (1967).

b. *United States v. Biswell*, 406 U.S. 311, 923 S.Ct. 1593 (1972) (warrantless inspections of highly regulated business (gun dealership) pursuant to statutory authority are permissible). *See United States v. Colonnade Catering Corp.*, 397 U.S. 72, 90 S.Ct. 774 (1970).

c. *See also Wyman v. James*, 400 U.S. 309 (1971) (warrantless home visitation by social worker to welfare recipient upheld as reasonable condition on receipt of welfare).

d. *Skinner v. Railway Labor Executives' Association*, 49 U.S. 602, 109 S.Ct. 1402 (1989) and *National Treasury Employees Union v. Van Raab*, 489 U.S. 656 (1989) upholding warrantless urine, blood, and breath inspections based on compelling state interest.

3. Department of Defense Inspector General Administrative Subpoena. Authority for this administrative subpoena was established by § 6(a)(4) of the Inspector General Act of 1978, 5 U.S.C. App. 3, §§ 1-12 (1982). It can be used to obtain nonprivileged documents from any source other than a Federal agency (i.e., businesses, financial institutions, individuals, state and local government agencies). There is no probable cause requirement but, in the case of the DoD IG, the information sought must be relevant to a legitimate operational concern of the Defense Department. The subpoena is granted at the discretion of the DoD IG and usually, though not necessarily, involves a fraud investigation.

4. Military inspections generally. Mil.R.Evid. 313(b).

a. On a military installation, most property, except for some personal property, is government property. Depending on the nature and use of such property, the government may retain an absolute or limited right to examine the property when it desires to do so. *See* Mil.R.Evid. 314(c).

b. Government property not issued for personal use

(1) *See generally United States v. Simmons*, 25 C.M.A. 987, 46 C.M.R. 288 (1973) (three separate opinions) (proper for MP's to examine contents of gas can on military jeep in which accused was a passenger since accused had no reasonable expectation of privacy in gas can).

(2) *United States v. Weshenfelder*, 23 C.M.A. 593, 43 C.M.R. 256 (1971) (supervisor's authorized search of government desk for government property (ration cards) held proper even without probable cause).

(3) *United States v. McClelland*, 49 C.M.R. 557 (A.C.M.R. 1974) (court reporter working in SJA office did not have reasonable

expectation of privacy in briefcase which was issued to him by the government for use in connection with his duties) (alternate basis for holding).

(4) *See also United States v. Miller*, 1 M.J. 367 (C.M.A. 1976) (Cook, J., dissenting). In *United States v. Sturdivant*, 13 M.J. 323 (C.M.A. 1982) (findings set aside on other grounds), the court held that a first sergeant's listening to a telephone conversation was not a violation of 18 U.S.C. § 2511 (1982). It was found that this was done in the ordinary course of business in ensuring that the orderly room was running properly (i.e., that phones were being used only for official business). Moreover, hearing information which would adversely affect the unit, the first sergeant could continue to listen to maintain the welfare and discipline of the members of the unit.

c. Once an area is set aside for a soldier's personal use, however, he or she may have a reasonable expectation of privacy which generates a fourth amendment protection against unreasonable searches and seizures. *See generally United States v. Roberts*, 2 M.J. 31 (C.M.A. 1976) (Perry, J.) (reasonable expectation of privacy in barracks room); *but see United States v. Webb*, 4 M.J. 613 (N.C.M.R. 1977) (accused had no reasonable expectation of privacy in his cubicle in NCO quarters which were divided from others by lockers, and not walls).

5. Unit inspections

a. The commander has traditionally had broad authority to conduct inspections of his unit or organization.

(1) *United States v. Gebhart*, 10 C.M.A. 606, 28 C.M.R. 172, 176 n.2 (1959):

> Both the generalized and particularized types of searches are not to be confused with inspections of military personnel entering or leaving certain areas, or those, for example, conducted by a commander in furtherance of the security of his command. These are wholly administrative or preventive in nature and are within the commander's inherent powers.

(2) This power to inspect has included not only work areas, but also living areas in the barracks. In other words, although a servicemember is assigned a bunk, wall locker, desk, and perhaps a cubicle or room for his personal use, the government, in the person of the commander, retains the right to examine such areas under at least some circumstances. *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981). The court in *Middleton*

also noted that, during the inspection, the area inspected becomes a "non-private" area, notwithstanding the accused's expectations.

(3) Inspections, sometimes called "health and welfare" inspections, generally are designed to ascertain the health, welfare, morale, state of readiness, and living conditions of unit members, and to check the state of physical repair or disrepair of buildings and equipment of the unit. Commanders sometimes inspect for more specific problems; such inspections have sometimes been called "shakedown inspections." *See United States v. Roberts*, 2 M.J. 31 (C.M.A. 1976) (shakedown inspection of accused's barracks was a "search" subject to fourth amendment scrutiny).

(4) Given such broad authority in the commander, inspections carry with them the potential for abuse. Indeed, even though most commanders act in good faith in conducting inspections; it must be recognized that among the goals of many health and welfare inspections are objects which are also evidence of crime (i.e., drugs, weapons, etc.). Thus, although an inspection may be administrative in purpose, it may also lead directly to prosecution. In a sense, then, the commander's purposes are dual. This leads to problems in the factual and legal analysis of these activities when courts try to assess their legitimacy. As a consequence, judicial treatment of inspections has varied and is presently somewhat unsettled.

b. The purpose test

(1) Courts have looked simply to determine whether the commander's purpose was administrative or prosecutorial (i.e., was an inspection used as a subterfuge to find evidence of a specific crime?). Traditionally, substantial deference was given to the commander in making this determination.

(2) *United States v. Lange*, 15 C.M.A. 486, 35 C.M.R. 458 (1965).

(3) *United States v. Grace*, 22 C.M.A. 502, 42 C.M.R. 11 (1970).

(4) Under this test, even if the commander's purposes were mixed, if the primary purpose was administrative, an inspection was upheld.

(5) Query the effect of *Roberts* on such cases as *United States v. Schafer*, 13 C.M.A. 83, 32 C.M.R. 83 (1962) (where search of 25 buildings was upheld) and *United States v. Drew*, 15 C.M.A. 449, 35 C.M.R. 421 (1964) (search of entire barracks upheld).

c. Cases dealing with unit inspections

(1) *United States v. Hayes*, 11 M.J. 249 (C.M.A. 1981). A box carried by the accused was searched by the charge of quarters (CQ) as the accused entered his barracks. Stolen property was thereby discovered. The commanding officer was acting in accordance with a program, established by the unit commander, for examining hand-carried items transported into or out of the barracks. The court held that the burden was on the government to show that the search was lawful and that, absent a showing of reasonableness of the barracks security inspection system under which the evidence was discovered, the government had not met its burden as to the admissibility of the evidence. The court did, however, permit a rehearing to permit the prosecution to establish the validity of the inspection system.

(2) *United States v. Fontenette*, 3 M.J. 566 (A.C.M.R. 1977). A unit inspection was ordered after several large caches of drugs were discovered by an NCO in the latrines of the barracks. Evidence incriminating the accused (and leading to further incriminating statements by him) was found in his room. Relying on *United States v. Drew*, 15 C.M.A. 449, 35 C.M.R. 421 (1964); *United States v. Schafer*, 13 C.M.A. 83, 32 C.M.R. 83 (1962); and *United States v. Owens*, 48 C.M.R. 636 (A.F.C.M.R. 1974), *aff'd*, 28 C.M.A. 347, 50 C.M.R. 906 (1975) (equally divided court), the court held, 2-to-1, that the inspection was legal. Noting that a divided Court of Military Appeals had not overruled these cases, the Army court distinguished *Roberts* on the ground that in *Roberts* there had been no probable cause to order the general search, since there had been no direct evidence of the presence of marijuana in the barracks.

(3) *United States v. Mitchell*, 3 M.J. 641 (A.C.M.R. 1977). In preparation for an impending movement of his unit to Alaska, and motivated by the discovery of sizeable amounts of marijuana in a recent routine inspection and by reports of marijuana in the barracks, the commander ordered a marijuana dog walk-through of the barracks. Marijuana was discovered in a duffel bag belonging to the accused after the dog alerted on the duffel bag. Applying a balancing test, the court held the search to be reasonable. Finding that the information the commander had amounted to probable cause and that the imminent movement to Alaska required action, the court upheld the search.

(4) *United States v. Hay*, 3 M.J. 654 (A.C.M.R. 1977). During an in-ranks inspection, members of a unit were required to empty the contents of their pockets into a helmet for examination. After some reluctance, the accused did so; heroin and paraphernalia were thereby revealed and seized. The court said: "Among the attributes of an inspection are: that it is regularly performed; often announced in advance; usually conducted during normal duty hours; personnel of the unit are treated evenhandedly; and there is no underlying

law enforcement purpose." The court also said that an inspection must be justified by military necessity; it could find no such necessity for the intrusion into accused's pockets. Hence, the inspection was illegal. *See also United States v. Neer*, 9 M.J. 575 (A.F.C.M.R. 1980) (order to remove object which was making "scraping metallic" sound during permissible inspection exceeded scope of intrusion).

(5) *United States v. Wilcox*, 3 M.J. 863 (A.C.M.R. 1977) (barracks inspection ordered on mere suspicion of marijuana presence, held illegal).

(6) *United States v. Moykkynen*, 1 M.J. 978 (N.C.M.R. 1976) (inspection for cleanliness of accused's BEQ room by BEQ manager was proper).

(7) *United States v. Jones*, 4 M.J. 589 (C.G.C.M.R. 1977) (shakedown search of vessel at sea, based on commander's suspicion drugs were aboard, upheld; ship at sea was distinguished from unit on land).

(8) *United States v. Webb*, 4 M.J. 613 (N.C.M.R. 1977) (noncommissioned officer had no reasonable expectation of privacy in open area of his cubicle in barracks; drug detection dog was in common area when it alerted from this area; alert provided probable cause to search).

d. Mil.R.Evid. 313(b) now provides a two-prong approach to inspections:

> An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, 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. An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. An order to produce body fluids, such as urine, is

> permissible in accordance with this rule. 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. If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Mil.R.Evid. 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

(1) Mil.R.Evid. 313 divides inspections into two groups: (1) those not involving an inspection for contraband and (2) those which include such an examination for contraband. Generally, contraband inspections will not be lawful unless they have been "previously scheduled" (although there is no need to "previously announce" the inspection). The rule also recognizes the danger that contraband inspections will be used as subterfuges to conduct general exploratory searches upon less than probable cause. Where a contraband inspector "singles out" specific individuals, as opposed to examining a random sample or a recognized part of a unit (e.g., a squad, a division, etc), or subjects individuals to varying types of inspections (e.g., inspecting "suspects" more thoroughly than other members), the inspection may be a subterfuge for a search. The same possibility arises where the inspection was not previously scheduled and immediately follows a report of a specific offense in the unit. In these cases, the government bears the heavy burden of proving by clear and convincing evidence that the inspection was valid. *See United States v. Vincent*, 15 M.J. 613 (N.M.C.M.R. 1982).

(2) "Previously scheduled." The drafters have displayed a clear preference for contraband inspections that are previously scheduled. Prior scheduling provides some guarantee that the inspection is not merely a ploy to search specific individuals, but rather a routine part of the unit's

operating procedures. The "schedule" may be tied to specific dates or specific events (i.e., return from field exercises).

(3) In *United States v. Brown*, 12 M.J. 420 (C.M.A. 1982), the Court of Military Appeals addressed the issue of contraband inspections and indicated it would: (1) Look to the stated purpose of the inspection; (2) ascertain if it was previously scheduled; (3) determine if it was conducted in a manner consistent with the stated purpose; and (4) examine it to see if it, under all the facts, was reasonable.

e. Normally, the justification for a fourth amendment intrusion increases in proportion with the reason to suspect that one will find evidence of a crime in the place to be searched. Curiously, just the opposite is true about the reasonable intrusion we call an inspection. Its primary purpose is administrative (perhaps deterrence to maintain unit readiness), and greater suspicion makes it look like a subterfuge for an illegal prosecutorial search vice an administrative inspection. That leaves a vague wilderness where there is suspicion which does not amount to probable cause. It seems ironic that the military commander has a greater latitude to search when he does not have suspicions than when he does.

(1) *United States v. Thatcher*, 28 M.J. 20 (C.M.A. 1989) involved the theft of government property. Thatcher was in a working party whose members had the best access to the missing property and was scheduled to be discharged the following day. The court found that the inspection was a subterfuge search because the accused was the prime suspect and others in the unit were not inspected until later in the day.

(2) In *United States v. Moore*, 23 M.J. 295 (C.M.A. 1987), a shakedown search of a barracks (because of stolen items found in an outside open-air stairwell) was not a valid inspection; there was no probable cause and the findings were set aside. In a concurring opinion, J. Cox questioned whether there should be a reasonable expectation of privacy in a barracks and invited litigation of the issue in an appropriate case.

f. Urinalysis

(1) The various services have expended substantial sums in providing laboratory testing facilities and in training personnel to perform urinalyses. In connection with a previous program of compulsory urinalysis conducted by the Army in Europe, the fourth amendment issue was resolved in favor of the government in *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975). There, the court of appeals relied on these factors:

(a) The increased incidence of drug abuse in the armed forces poses a substantial threat to the readiness and efficiency of our military forces.

(b) The "expectation of privacy" [citation omitted] is different in the military than it is in civilian life.

(c) The primary purpose of the drug inspections is to ferret out illegal drugs as a means of protecting the health of the unit and assuring its fitness to accomplish its mission.

(d) Given the nature of drugs and the paraphernalia associated therewith, unannounced drug inspections appear to be the most effective means of identifying drug users -- so that they might receive treatment -- and eliminating illegal and debilitating drugs from a unit.

(e) In authorizing drug inspections, the Army has attempted to guard the dignity and privacy of the soldier insofar as practical. 518 F.2d at 476-77.

(2) In *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983), the Court of Military Appeals addressed the constitutionality of the Navy's current urinalysis program and found the program "justified by the same considerations that permit health and welfare inspections." *Id.* at 82. The court went on to note, however, that "it is not necessary - or even profitable - to try to fit compulsory urinalysis within the specific terms of [Mil.R.Evid. 313(b)] ... a search may be reasonable even though it does not fit neatly into a category specifically authorized by the Military Rules of Evidence." *Id.* Mil.R.Evid. 313(b) now specifically includes "an order to produce bodily fluids such as urine . . ."

(3) Effect of violating collection procedure rules. In *United States v. Hillman*, 18 M.J. 638 (N.M.C.M.R. 1984), the court addressed whether the failure to strictly adhere to OPNAV Instruction 5350.4, which sets forth the procedure for collecting urine samples in the Navy, prevented the admissibility of the positive result under Mil.R. Evid. 313(b). In this case, the court held that the circumstances surrounding the collection of the sample went to the weight to be accorded to the positive result, rather than admissibility. *See also United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989) (deviating from a regulation which sets out procedures for collecting, transmitting, or testing urine samples does not render a sample inadmissible as a matter of law; rather, deviations may be considered in determining if the evidence is of sufficient reliability to be considered by the fact-finders). *But cf. United States v. Arguello*, 29 M.J. 198 (C.M.A. 1989) (due process is denied when trial counsel deliberately eschewed DoD urinalysis regulations to show evidence, on rebuttal, of accused's

negative urinalysis showing it was actually positive, but below cutoff levels) and *United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990) (collection was so faulty as to render sample inadmissible). Additionally, OPNAVINST 5350.4 (and MCO P5300.12 for the Marine Corps) prohibits the use of certain "command directed" urinalyses for disciplinary purposes or characterization of discharge. Presumably, it must be contemplated that such urinalyses are lawful as they are explicitly authorized by instruction; however, prohibitions contained in the instruction as to their use will be applied at a trial. *United States v. Ouellette*, 16 M.J. 911 (N.M.C.M.R. 1983).

(4) Purpose for urinalysis. *United States v. Austin*, 21 M.J. 592 (A.C.M.R. 1985) held that a unit sweep urinalysis, ordered immediately after a report that drill sergeants in the company were using drugs, was not a valid inspection; its primary purpose was prosecutorial. *United States v. Heupel*, 21 M.J. 589 (A.F.C.M.R. 1985) held that it was not a valid inspection because individuals were specifically selected, where the policy was for everyone reporting for correctional custody to submit a urine sample. *But see United States v. Rogers*, 30 M.J. 824 (C.G.C.M.R. 1990) (a surprise urinalysis following an anonymous tip was not a subterfuge) and *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990) (command policy requiring retesting for all personnel who tested positive following urinalysis random inspection upheld; the court reasoned that the retest was an extension of the initial inspection).

(5) Where the accused was selected for a valid random sweep urinalysis, it was permissible to require her to remain in the area until such time as she could privide a urine sample. *United States v. Mitchell*, 15 M.J. 937 (N.M.C.M.R. 1983). *See also* Chief Justice Burger's concurring opinion in *Winston v. Lee*, 470 U.S. 753 (1985) and *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989) (which upheld the constitutionality of the urine collection).

(6) What is a unit? A unit could include all personnel returning from unauthorized absence. *United States v. Daskam*, 31 M.J. 77 (C.M.A. 1990).

g. Narcotic and marijuana detection dogs

(1) Narcotic and marijuana detection dogs are often used in the military.

(a) *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981) (sanctions the use of drug detection dogs providing they are justified being in an area when they "alert"; and any evidence found as the result of the use of such an alert may be admissible in evidence).

(b) Mil.R.Evid. 313(b) implicitly permits the use of these animals ("Inspections may utilize any reasonable natural or technological aid...").

(2) Query whether a marijuana dog is more like the human nose or more like the electronic bug in *Katz*? Is using a marijuana dog a search in and of itself?

(a) In *United States v. Grosskreutz*, 5 M.J. 344 (C.M.A. 1978), the Court of Military Appeals held that the use of a drug dog in a public area to monitor the air space around an automobile, for the presence of drugs in the automobile, did not constitute a "search" for purposes of the fourth amendment.

(b) *See also Horton v. Goose Creek Independent School District*, 690 F.2d 470 (5th Cir. 1982) (sniffing, by trained dogs, of student lockers in public hallways and automobiles in parking lot did not constitute a search; however, sniffing of students' persons by large dogs was a "search" within the purview of the fourth amendment).

(3) In order to establish probable cause to search, the one authorizing the use of the dog should be informed of two things:

(a) The reaction of the animal should be detailed. *United States v. Paulson*, 2 M.J. 326 (A.F.C.M.R. 1976), *rev'd in part on other grounds in summary disposition*, 7 M.J. 43 (C.M.A. 1979).

(b) The animal's reliability should be established. In other words, a proper official must be apprised of the dog's background and "track record." *See United States v. Thomas*, 1 M.J. 397 (C.M.A. 1976) (Cook J.); *United States v. Boisvert*, 1 M.J. 817 (A.F.C.M.R. 1976); *United States v. Ponder*, 45 C.M.R. 428 (A.C.M.R. 1972), *petition denied*, 45 C.M.R. 928 (1972); *United States v. Unrue*, 26 C.M.A. 552, 47 C.M.R. 556 (1973). Paragraph 5-2c(2) of enclosure (1) of OPNAVINST 5585.2A specifies that the officer authorizing the search should have assurances of the dog's reliability. This might consist of a review of the dog's record or, presumably, reliance on validation of the dog's certification by the commanding officer who owns and controls the dog.

(4) The fact that a commanding officer has directed or approved the use of a drug-detection dog will not necessarily disqualify him from authorizing a search based on the dog's alert. Mil.R.Evid. 315(d). In fact, paragraph 7-3.a of enclosure (1) of OPNAVINST 5585.2 (Military Working Dog Manual) requires it (though this may be a management rule not affecting admissibility of evidence). Note that *United States v. Ezell*, 6 M.J. 307 (C.M.A.

1979) suggested that authorizing the use of a dog might involve the commander in the evidence-gathering process to the extent that he was no longer a neutral and detached magistrate. (*See* section 1308 B., *supra*.) *See also United States v. Porter*, 7 M.J. 32 (C.M.A. 1979).

D. Inspections at entry and exit points (gate searches)

1. General. Mil.R.Evid. 313(b).

-- Several judges of the Court of Military Appeals have individually addressed the question of the authority of a commander to carry out gate searches at entrances to the installation.

(1) *United States v. Gebhart*, 10 C.M.A. 606, 610, 28 C.M.R. 172, 176 n.2 (1959) (Quinn, C.J.: inspections at gate are "within the commander's inherent powers").

(2) *United States v. Poundstone*, 22 C.M.A. 277, 282, 46 C.M.R. 277, 282 (1973) (Darden, C.J., concurring)

> (In my opinion, the commanding officer of an installation or, as here, his alter ego, may without probable cause order the search of military personnel or vehicles entering or leaving his base as a necessary part of his authority and responsibility for the security of his command).

(3) Judge Duncan, in *Poundstone*, indicated in dissent that he would require a showing of military necessity before a gate search scheme would be deemed legitimate.

(4) *See also United States v. Keithan*, 1 M.J. 1056, 1058 (N.C.M.R. 1976) (Dunbar, J., concurring).

2. Various justifications that have been advanced for gate searches

a. Inherent authority of commander. Under any theory, the legal basis for a gate search stems from the authority of a commander. The commander may, in his discretion, order a gate search. His decision will not be reviewed except for an abuse of discretion.

(1) *United States v. Smith*, 46 C.M.R. 926, 929 (N.C.M.R. 1972). "A commanding general who is responsible for the security of his

command and the welfare of its personnel must have broad discretionary power over the private vehicles entering the area under his jurisdiction." The court indicated it was immaterial that the commanding general did not personally direct the inspection "since an administrative function of this nature is within the security duties normally discharged by the military police and the CID."

(2) *United States v. Dukes*, 48 C.M.R. 433, 434 (N.C.M.R. 1973). The base commander has the authority to order the search of military personnel entering his base. Such authority is a "necessary part of his authority and responsibility for the security and operations of his command."

(3) *United States v. Poundstone*, 22 C.M.A. 277, 281, 46 C.M.R. 277, 281 (1973) (Darden, C.J., concurring).

b. Military necessity. Although it is the commander who authorizes the gate search program, the decision to search must be based on military necessity and will be reviewed on that basis.

(1) *See* Judge Duncan's dissent in *United States v. Poundstone, supra.*

(2) A cautious approach would call for a showing of military necessity for any gate search.

c. Consent

(1) *United States v. Smith*, 46 C.M.R. 926 (N.C.M.R. 1972) (the operation of a vehicle on post may be conditioned on the giving of consent to search the vehicle while on post) (alternative basis for holding).

(2) *United States v. Vaughan*, 475 F.2d 1262 (10th Cir. 1973). A civilian's entry on a closed base might be conditioned on the consent search. *See also United States v. Ellis*, 547 F.2d 863 (5th Cir. 1977); *United States v. Mathews*, 431 F. Supp. 70 (W.D. Okla. 1976). Query the applicability of this rationale to a servicemember. *See United States v. Harris*, 5 M.J. 44 (C.M.A. 1978).

(3) *United States v. Glenn*, 22 C.M.A. 205, 46 C.M.R. 295 (1973).

(4) Military courts have not held that the mere fact that an individual proceeds through a gate to an installation is consent to a search. *See United States v. Mayton*, 1 M.J. 171 (C.M.A. 1975). *See also United*

States v. Chase, 1 M.J. 275 (C.M.A. 1976) and *United States v. Harris*, 5 M.J. 44, 61 (C.M.A. 1978).

d. Constitutionality

-- In *United States v. Robinson*, 14 M.J. 903 (N.M.C.M.R. 1982), the inspection order called for inspection of all vehicles entering the base with the exception of autos driven by officers in the grades of O-6 or above. The court found this not to be constitutionally objectionable since no suspect classification was involved and since the issue was not one involving the denial of a fundamental right.

3. Who may authorize a gate search?

a. The weight of authority now is that only an installation commander (or higher) may implement a gate search.

(1) *United States v. Neloms*, 48 C.M.R. 702 (A.C.M.R. 1974).

(2) *United States v. Umlauft*, 47 C.M.R. 812 (N.C.M.R. 1973).

b. Contra

(1) *United States v. Smith*, 46 C.M.R. 926 (N.C.M.R. 1972).

(2) *United States v. Poundstone, supra.*

4. Gate search program must be conducted in accordance with existing regulations.

a. *United States v. Chase*, 1 M.J. 275 (C.M.A. 1976).

b. *United States v. Rotramel*, 1 M.J. 559 (A.F.C.M.R. 1975).

c. *United States v. McLellan*, 1 M.J. 575 (A.C.M.R. 1975) (O'Donnell, J., concurring) (duties of gate guard must be established).

5. Overseas

a. The commander has extensive power to search at the gate to a U.S. installation in a foreign country. *United States v. Holsworth*, 7 M.J.

184 (C.M.A. 1979); *United States v. Rivera*, 4 M.J. 215 (C.M.A. 1978); *United States v. Parker*, 8 M.J. 584 (A.C.M.R. 1979), *aff'd on other grounds*, 10 M.J. 415 (C.M.A. 1981).

b. The authority to conduct intrusions of this nature at the foreign situs is predicated on:

(1) Its similarity to the border search;

(2) military necessity (e.g., the security of the command) and significant drug traffic problems; and

(3) the reasonableness of the procedures employed. *United States v. Giardina*, 8 M.J. 534 (N.C.M.R. 1979); *United States v. Rivera*, *supra*.

c. The legal rationale for a brow search or gate search overseas derives more comfortably from the traditional border search than the contraband inspection authorized by Mil.R.Evid. 313. *See* section 1312 E.3.

6. United States

a. The court indicated in *United States v. Harris*, 5 M.J. 44 (C.M.A. 1978), that gate searches of servicemembers entering a military reservation may be a legitimate exercise of a commander's authority.

(1) Analogizing gate stops and searches to checkpoint border stops and searches, the court identified the following factors as the criteria by which to evaluate the legitimacy of gate searches:

(a) Public need (i.e., the nature and impact of the problem sought to be confronted);

(b) available alternatives (i.e., whether other, less intrusive means are available to accomplish the same goal);

(c) degree of potential for frightening or offending motorists (i.e., where the stop occurs at a gate, and warning signs are posted, this potential is minimized); and

(d) scope of the intrusion (i.e., how intrusive the search was).

(2) Also, we might consider the following factors:

(a) Extent of interference with legitimate traffic;

(b) amount of discretion involved;

(c) practicality of requiring reasonable suspicion;

(d) the nature of the vehicle (i.e., a private vehicle, as opposed to a commercial or government vehicle);

(e) the commander's responsibilities;

(f) the right and duty to enter the base (i.e., a servicemember assigned to the base has the right and the duty to enter); and

(g) security considerations. Here, the court determined that the Internal Security Act, 50 U.S.C. § 797 (1982), applies only to civilians; the court also distinguished several civilian cases dealing with gate searches. The court further discussed the effect of a "closed" versus an "open" post.

(3) Military necessity. The *Harris* court said: "Likewise, military necessity is a significant, even overriding, factor in determining whether a gate search without probable cause or consent may be made at all, but it does not control the decision of how it may be conducted." 5 M.J. at 65.

b. In Harris, the court held the stop of the car in which Harris was a passenger and, consequently, the subsequent seizure of marijuana discarded by Harris, to be illegal. This result rested on the court's conclusion that discretion in the stop and search decision had improperly been lodged in the gate guard.

(1) The court said, at page 65:

> To insure the least possible intrusion into the constitutionally protected area, and thereby preserve freedom from unreasonable invasions of personal privacy, a procedure must be employed which completely removes the exercise of discretion from persons engaged in law enforcement activities. This contemplates a completely

> independent determination of times when the searches will be conducted, the method of selecting the vehicles to be stopped, the location of the operation, and the procedure to be followed in the event something is discovered.

[Footnotes omitted].

(2) The court did suggest that some of these functions might be delegated "to an officer who is neutral in outlook and has no connection with law enforcement activities." *Id.* at 65.

c. *But see United States v. Bowles*, 7 M.J. 735 (A.F.C.M.R. 1979).

d. While *Harris* essentially required that no discretion be given to the persons conducting the inspection as to the time, location, and manner of selecting vehicles to be stopped or the procedure to be followed, subsequent cases suggest that "reasonable discretion" may be delegated to these persons. In *United States v. Vargas*, 13 M.J. 713 (N.M.C.M.R. 1982), the court allowed the persons conducting the inspection to exercise some discretion in determining the scope of the inspection of each individual car where they in no case exceeded the broad scope of the procedure set by the base commander. *United States v. Jones*, 20 M.J. 594 (N.M.C.M.R. 1985) condoned the discretion being exercised by an on-the-scene supervisor. In *United States v. Jones*, 24 M.J. 294 (C.M.A. 1987), the Court of Military Appeals specifically overruled that part of the *Harris* decision requiring that persons conducting an inspection be totally divested of discretion in the selection process. The principal factors to determine legality are whether the inspection was planned or conducted with an intent to single out the accused, and whether the inspection was conducted for a valid military purpose such as safeguarding of the installation. *See also United States v. Flowers*, 26 M.J. 463 (C.M.A. 1988) (in determining the legality of a brow search, it must be found that the focus was the furtherance of command policies and objectives and not the particular accused).

7. Searches away from gate

a. *United States v. Unrue*, 26 C.M.A 552, 47 C.M.R. 556 (C.M.A. 1973) (search pursuant to roadblocks set up away from gate upheld on showing of military necessity).

b. *United States v. Neloms*, 48 C.M.R. 702 (A.C.M.R. 1974) (roadblock was set up within the military installation, and not at the entrance point).

c. Mil.R.Evid. 313 would seem to permit random vehicle inspection at points within the military installation.

E. Border searches

1. Border searches are designed to keep contraband and dutiable merchandise from entering the United States illegally. Because such items normally render the possessor or transporter liable to criminal charges, prosecution may result. Still, because the purpose of border searches is primarily prophylactic, they may be categorized as administrative. *See* Mil.R.Evid. 314(b).

2. Border searches conducted without warning have been recognized as reasonable per se. *United States v. Ramsey*, 431 U.S. 606 (1977); however, there may be some constitutional limitations with respect to highly intrusive searches at the border.

a. *United States v. Himmelwright*, 551 F.2d 991 (5th Cir. 1977), *cert. denied*, 434 U.S. 902, 98 S.Ct. 289 (strip search and body cavity search were upheld by custom agents because they had "reasonable suspicion" that accused was smuggling drugs).

b. *United States v. Guadalupe-Garza*, 421 F.2d 876 (9th Cir. 1970) (heroin recovered from defendant's stomach four hours after emetics were administered was product of illegal search; strip search which was also conducted in border search was improperly conducted).

c. *United States v. Shields*, 453 F.2d 1235 (9th Cir.), *cert. denied*, 406 U.S. 910 (1972).

d. *But see United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S.Ct. 3304 (1985) (reasonable suspicion was sufficient for customs agent to detain accused at border until she submitted to X-ray or defecated where she was suspected of alimentary canal smuggling).

3. Military installations, aircraft, and vessels overseas

a. Entrances and exits of U.S. military installations, aircraft, and vessels abroad are essentially "borders" and the same rules apply. The term "abroad" also includes vessels on the high seas and aircraft in international airspace. Searches conducted at such entrances or exits should comply with any treaty to which the United States is a party, but failure to do so will not render a search unlawful within the meaning of Mil.R.Evid. 311. *See* Mil.R.Evid. 314(c).

(1) *United States v. Rivera*, 4 M.J. 215 (C.M.A. 1978) (Fletcher, C.J.) (entrance point to overseas installation is functional equivalent of a border).

(2) *United States v. Alleyne*, 13 M.J. 331 (C.M.A. 1982) (extends the rule to exit points as well).

(3) *United States v. Watson*, 14 M.J. 593 (A.F.C.M.R. 1982) (search of aircraft landing at overseas installation upheld notwithstanding the fact that aircraft had flown in from another U.S. installation located in United States).

(4) *United States v. Greene*, 44 C.M.R. 420 (A.C.M.R. 1971) (evidence discovered during inspection of accused's luggage by Air Force police in an international airport in Thailand held to be admissible when luggage about to be given to check-in people).

(5) *United States v. Carson*, 22 C.M.A. 203, 46 C.M.R. 203 (1973) (evidence discovered as a result of customs-like search at Thailand airport inadmissible because accused had not relinquished control to check-in people).

(6) *See also United States v. Head*, 546 F.2d 6 (2d Cir. 1976).

b. Mil.R.Evid. 314(c) states that the military commander of an installation, aircraft, or vessel abroad may authorize appropriate personnel to search persons and their property entering or exiting the installation, aircraft, or vessel, to ensure the security, military fitness, or good order and discipline of the command. Such searches do not require probable cause or reasonable suspicion, since, like Mil.R.Evid. 313 contraband inspections, the primary purpose must be prophylactic and not disciplinary. However, like border searches and unlike Mil.R.Evid. 313 contraband inspections, the government should not bear a special burden of proof if a search was conducted immediately after report of a specific offense, was not prescheduled, or treated some individuals differently than others (see Drafters' Analysis, page A 22-24 of MCM). Unlike the limitations on a domestic gate or brow search, the person conducting a properly authorized Mil.R.Evid. 314(c) search may exercise discretion in determining whom to search. *See Alleyne, supra*, which cited *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) for support.

F. Mail and postal facilities

1. Domestic mail

a. Domestic first-class mail within the U.S. Postal System may not be opened except pursuant to search warrant or by an employee of the U.S. Postal Service to determine the delivery address or by authorization of the addressee. *See* 39 U.S.C. § 3623(d) (1982). *See also United States v. Van Leeuwen*, 397 U.S. 249, 90 S.Ct. 1029 (1970) (proper to detain mail for approximately one day in order to secure search warrant).

b. Domestic mail other than first class may be opened and inspected without a warrant where U.S. Postal Regulations permit. *United States v. Nazarian*, 48 C.M.R. 633 (A.F.C.M.R. 1974), *aff'd in part*, 28 C.M.A. 509, 49 C.M.R. 817 (1975):

> The opening of a fourth class mail package by mail authorities [at the request of a security police investigator] without a search authorization or the owner's consent is not, per se, an unreasonable search that is prohibited by the Fourth Amendment to the Constitution. Where appropriate postal regulations permit parcel post matter to be opened and inspected, it can be lawfully done without a search authorization and without probable cause.... Air Force directives permit parcel post packages that are other than first class to be inspected where it is expected or believed that they contain contraband.

Id. at 635.

2. First-class mail of foreign origin may be opened without a warrant and with less than probable cause. *United States v. Ramsey*, 431 U.S. 606, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977) (reasonable suspicion to search international mail as "border exception"). Some state courts have condoned custom agents putting beepers in parcels mailed from foreign countries (after drug detector dog alert) to effect a "controlled delivery."

3. Overseas mail within military postal system

a. Prior to 20 November 1982, overseas commanders were not empowered to authorize searches or inspections of mail within military postal systems abroad. This was changed by agreement between the U.S. Postal Service

and the Department of Defense, whereby responsibility for the security of the MPS overseas was transferred to the Department of Defense.

b. OPNAVINST 5112.4 now governs searches/inspections of military mail overseas.

(1) First class mail may be opened only:

(a) With consent of the sender or addressee;

(b) pursuant to the cognizant commander's search authorization based upon probable cause;

(c) pursuant to a foreign customs inspection (see border searches, *infra*); or

(d) when mail is reasonably suspected of being dangerous (letter bombs).

(2) Cognizant commanders (overseas) are now authorized:

(a) To conduct random inspections of mail parcels using fluoroscopes, metal detectors, detector dogs, etc. (but may not open first class mail without probable cause);

(b) to authorize the search and seizure of individual mail items based upon probable cause;

(c) to use mail covers when authorized by designated military officials to assist in investigations (very few officials are designated to authorize mail covers); and

(d) to permit customs inspections by foreign officials if mail is not exempted by status of forces agreements.

4. Searches in postal facilities

a. *United States v. Torres*, 25 C.M.A. 62, 46 C.M.R. 96 (1973). The commanding officer of the Army postal group was conducting a routine inspection of a base post office when he noticed in the mail work area a package with the return address of an individual in the unit and the addressee portion of the package inscribed with the name of a woman bearing the same surname. The commanding officer discovered that the package belonged to the

defendant. He ordered the defendant to open the package. The court held there was no expectation of privacy as to the package because it was a violation of the local regulations to have personal items stored in a postal activity.

b. *United States v. Carter*, 1 M.J. 318 (C.M.A. 1976). The postal facility NCOIC, upon examining a suspicious bag left by the accused on a coat rack, discovered stolen mail. He seized the bag and contents when the accused subsequently carried them out of the facility. The court held that the search was illegal because no statutory or regulatory scheme authorized such searches in a mail facility, and the NCO lacked authority to search on his own.

c. *See also United States v. Head*, 546 F.2d 6 (2d Cir. 1976).

G. Jails and restricted areas. Mil.R.Evid. 314(h).

1. In *United States v. Maglito*, 20 C.M.A. 456, 43 C.M.R. 296 (1971), the court stated that, with regard to the search of the defendant who was in a barracks that housed individuals undergoing article 15 punishment:

> Knowing the character of the facility, [the defendant] could not reasonably expect to be free of inspection on returning to it. On the contrary, the only reasonable expectation as regards this kind of facility is that a person entering with a package would be required to disclose its contents to guard against unauthorized introduction of dangerous weapons or other articles conducive to escape or disruption of the normal operation of the facility.

2. *Lanza v. New York*, 370 U.S. 139, 82 S.Ct. 1218 (1962). This case has been interpreted as holding that there is no right to privacy in a prison. The Court of Military Appeals, in *Maglito, supra*, indicated that *Katz* has "sapped" *Lanza* of much of its vitality "to make it no longer safe to construe that case as support for the view that an inmate of a prison has thereby certainly lost some constitutional rights, including protection . . . against unreasonable searches and seizures."

3. *But see Bell v. Wolfish*, 441 U.S. 520, 560, 99 S.Ct. 1861 (1979). The court upheld body cavity searches within a prison. It concluded that such searches were reasonable under the fourth amendment after "[b]alancing the significant and legitimate security interests of the institution against the privacy interests of the inmates."

4. Prison censorship of mail

a. *United States v. Ronholt*, 42 C.M.R. 933 (N.C.M.R. 1970). The defendant mailed a package to his home address before being placed in confinement; however, the package was returned to the defendant as unclaimed. At the stockade facility, the defendant was required to open the package pursuant to a provision of the Department of the Navy Corrections Manual requiring that outgoing and incoming mail shall be subject to inspection. The court held that the "contents of the package were not within the fourth amendment proscription against unreasonable searches and seizures and that under the circumstances of this case the marijuana cigarettes were lawfully seized." *Id.* at 936.

b. In *United States v. Kato*, 50 C.M.R. 19 (N.C.M.R. 1974), the court stated that the standards enunciated in *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct 1800 (1974), for the inspection of prisoner mail apply to the military. In order for there to be such an inspection: (1) the inspection must further an important and substantial governmental interest in security, order, and the rehabilitation of inmates; and (2) the inspection must be no greater than is essential to the protection of these legitimate government interests. *See also Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874 (1989).

H. Emergency intrusions. Mil.R.Evid. 314(i) (i.e, intrusions for the purpose of saving a life or for other essential purposes requiring no delay). Where police find an individual who is obviously sick or injured, and who is incapacitated, they may "search" him or her for identification or information which will assist in rendering medical aid. Similarly, a doctor or one who treats such an individual may remove clothing or items in order to diagnose and treat. Also, police may enter a building or room in an emergency where lives may be endangered. Evidence discovered in the course of such good faith activity is admissible. *See, e.g., United States v. Yarborough*, 50 C.M.R. 149 (A.F.C.M.R. 1975); *United States v. Mons*, 14 M.J. 575 (N.M.C.M.R. 1982); *United States v. Muniz*, 23 M.J. 201 (C.M.A. 1987) (CO broke into Muniz' office furniture to get information about his location in connection with medical operation for Muniz' daughter -- CO thought it was emergency, even though it may not have been).

1. *Mincey v. Arizona*, 437 U.S. 385 (1978). There is no "murder scene" exception to the fourth amendment's requirement of a warrant whereby law enforcement officers, who are legally on premises which are the scene of a homicide or of a serious personal injury with likelihood of death and there is reason to suspect foul play, may, within a reasonable period following the time when the officials first learn of the murder or potential murder, conduct a search for the limited purpose of determining the circumstances of death.

2. *Vauss v. United States*, 370 F.2d 250 (D.C. Cir. 1966) (evidence seized by police officer during search of an unconscious defendant, while looking for identification, held to be admissible).

3. *United States v. Barone*, 330 F.2d 543 (2d Cir. 1964) (police officers who heard loud screams in dead of night properly demanded entrance to a room from which screams came and, upon being admitted, properly entered bathroom and discovered remains of counterfeit currency floating in the commode).

4. *United States v. Dunavan*, 485 F.2d 201 (6th Cir. 1973) (despite the fact incriminating evidence was discovered, police officers acted properly when they opened a briefcase because they were rendering aid to person having a diabetic seizure).

5. *United States v. Smeal*, 28 C.M.A. 788, 49 C.M.R. 750 (1975) (law enforcement authorities, who properly entered the accused's residence without a warrant as an emergency response to a report that the accused's wife had shot herself, could lawfully seize evidence of criminal activity).

1313 BODY INTRUSIONS (Key Numbers 1049 et seq)

A. General. Mil.R.Evid. 312. Certain searches, such as searches of body cavities, or searches involving removal of evidence from within the body, are so intrusive that the probable cause/reasonableness considerations normally applied to searches and seizures may not provide all the protection society desires. Thus, additional safeguards, often described under the broad theory of "due process," may apply. *Rochin v. California*, 342 U.S. 165 (1952). Normally, the individual's interests in privacy, security, and dignity must be balanced against society's interests in obtaining evidence. *Schmerber v. California*, 384 U.S. 757 (1966). In *Winston v. Lee*, 470 U.S. 753 (1985), the court again performed this balancing test and determined that the government should not remove a bullet from a robbery suspect's chest.

B. Basic principles

1. The fifth amendment right against self-incrimination generally affords no protection against the taking of physical evidence from the body. *Schmerber v. California*, 384 U.S. 757 (1966) (blood specimen drawn from a driver who had been arrested for drunk driving, but had refused voluntary blood test, was admissible); *United States v. Lloyd*, 10 M.J. 172 (C.M.A. 1981); *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983).

2. Fourth amendment standards do apply to the taking of evidence from the body because of the application of reasonable expectation of privacy concepts. *Schmerber v. California*, 384 U.S. 757 (1966). The fourth amendment may govern not only the invasion of the body to secure the evidence, but also the seizure of the person in order to make the invasion. *See Chambers v. Mississippi*, 410 U.S. 284 (1973); *Schmerber v. California, supra.*

3. The term "extraction" in Mil.R.Evid. 312(d) does not encompass compelling someone to provide a urine sample. Instead, "extraction" refers to such procedures as authorization or drawing blood with a needle. *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983).

C. Illustrative cases

1. *United States v. Pyburn*, 47 C.M.R. 896 (A.F.C.M.R. 1973) (pubic hair samples from the defendant's body could be seized incident to his apprehension).

2. *United States v. Woods*, 3 M.J. 645 (N.C.M.R. 1977) (heroin-filled balloon retrieved from excrement which was passed by accused did not constitute search, but was matter "abandoned" by him).

3. *Compare United States v. Himmelwright*, 551 F.2d 991 (5th Cir. 1977) (upholds visual vaginal search) *with* Mil.R.Evid. 312(c)(2).

4. *United States v. Holtz*, 479 F.2d 89 (9th Cir. 1973) (strip search of female at border).

5. *United States v. Harvey*, 701 F.2d 800 (9th Cir. 1983) (formal arrest required to take a blood sample).

6. *United States v. Repp*, 23 M.J. 589 (A.F.C.M.R. 1986) (Repp told to remove flight suit so that his arms could be examined for needle marks). The court claimed that Repp had no expectation of privacy in the view of his arms, but the justification for the search might better be expressed as being one incident to apprehension.

D. Surgery over patient's objections. May a doctor provide treatment (maybe surgery) over an active duty patient's objection? Paragraph 2-18 of the Manual of the Medical Department provides for such treatment to preserve life, protect the mentally incompetent, handle quarantine problems, and accomplish some minor routine matters. In a situation in which a member cannot perform his duties and a doctor claims that treatment would make him fit for duty, paragraph 18-15 indicates that the matter is decided by the Physical Evaluation

Board, considering factors such as age, religious objection, and nature of the medical treatment.

1314 LITIGATING FOURTH AMENDMENT ISSUES IN COURTS-MARTIAL (Key Numbers 1081 et seq)

A. Prearraignment disclosure. Prior to arraignment, prosecution must disclose to defense all evidence seized from the accused which it intends to introduce. Mil.R.Evid. 311(d)(1).

B. Raising the issue. A motion to suppress evidence due to an illegal search or seizure should be made prior to submission of a plea. Failure to do so constitutes waiver. Mil.R.Evid. 311(d)(2). However, the Court of Military Appeals has ruled that this provision of the Military Rules of Evidence should be liberally construed in favor of permitting an accused the right to be fully heard in his defense. *United States v. Coffin*, 25 M.J. 32 (C.M.A. 1987). Absent good cause, a military judge will ordinarily rule on such motion before a plea is entered. He may not defer the motion or his ruling if the party's right to appeal the ruling is affected adversely by a plea of guilty. Mil.R.Evid. 311(d)(4).

C. Burdens

1. The burden of going forward with raising the issue of an illegal search and/or seizure is on the defense. Technically, however, the question of what properly raises the issue has not been answered. In practice, a simple claim of violation normally shifts the burden to the prosecution to demonstrate the admissibility of the evidence. To support the defense's contention, the defense counsel may consider having the accused testify for a limited purpose. Mil.R.Evid. 311(f). Normally, this will not be necessary to raise the issue. The defense must also show adequate interest by a preponderance of the evidence. *United States v. Miller*, 13 M.J. 75 (C.M.A. 1982).

2. The burden of proof is on the prosecution to prove the legality (or otherwise demonstrate admissibility) of the evidence obtained from the challenged search or seizure.

3. Generally, the standard of proof which the prosecution must meet is a preponderance of the evidence.

a. *See Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619 (1972).

b. *See* Mil.R.Evid. 311(e); R.C.M. 905(c)(1).

c. The standard of proof with respect to consent is proof by "clear and convincing evidence." Mil.R.Evid. 314(e).

4. The government burden extends only to the grounds enunciated by the defense in making its motion or objection. Mil.R.Evid. 311(e)(3).

D. Findings. The military judge is required to state the essential findings on the record. Mil.R.Evid. 311(d)(4); R.C.M. 905(d); *United States v. Postle*, 20 M.J. 632 (N.M.C.M.R. 1985).

E. Waiver

1. Failure to raise or specify search and seizure issues waives such issues. *See* Mil.R.Evid. 311(d)(3) and (e)(3).

a. Obviously, if the defense never moves to suppress, or objects to, a given piece of evidence, the item will be admitted and, barring a determination of ineffective assistance of counsel [*see United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977)] or "plain error," any question of the legality of the search and seizure of the item will be waived.

b. In addition, even if the defense does raise the issue of admissibility, it must take care to specify any and all grounds on which its challenge rests. *United States v. Wade*, 1 M.J. 600 (A.C.M.R. 1975); Mil.R. Evid. 311(d)(2).

(1) A motion or objection which specifies some grounds of alleged illegalities, but which fails to mention others, will normally be deemed to have waived those grounds not stated. *United States v. Walters*, 22 C.M.A. 516, 48 C.M.R. 1 (1973); Mil.R.Evid. 311(d)(2).

(2) *But see United States v. Rollins*, 3 M.J. 680 (N.C.M.R. 1977). *Cf. United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977) (reviewing court may not find waiver unless defense counsel fails to seek relief obviously available upon proper motion or objection, where no realistic tactical reason appears for the failure; but court may also find denial of effective assistance of counsel in such cases).

2. Guilty plea. Entry of a plea of guilty normally waives any issues as to the admissibility of evidence, including evidence allegedly obtained unlawfully. This is true even where the defense was permitted to litigate a search question through a motion to suppress prior to entering its plea. Mil.R.Evid. 311(i).

-- Where the accused pleads guilty to a lesser included offense, he can waive issues on admissibility of evidence if the evidence admitted goes to the element of the lesser offense and is not needed to support conviction of the greater offense. *United States v. Cooper*, 32 M.J. 83 (C.M.A. 1991).

F. Interlocutory appeal

1. Where the ruling is adverse to the government and excludes evidence that is substantial proof of a material fact, the government may appeal the military judge's ruling. UCMJ, Article 62(a); R.C.M. 908. R.C.M. 908 details the procedure for such appeals.

2. Where the ruling is adverse to the accused, the defense may petition for extraordinary relief [*see Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979)], but relief is highly unlikely.

CHAPTER XIV

CONFRONTATION, COMPULSORY PROCESS, EYEWITNESS IDENTIFICATION, AND IMMUNITY

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CHAPTER XIV

CONFRONTATION, COMPULSORY PROCESS, EYEWITNESS IDENTIFICATION, AND IMMUNITY

PART I - CONFRONTATION

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

U.S. Const. Amend. VI

1401 INTRODUCTION

A. History

1. The particular vice that gave impetus to adoption of the confrontation clause of the sixth amendment was the common law practice of trying defendants on evidence which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.

2. At the time of the adoption of the Bill of Rights, the colonial constitutions of Massachusetts, New Hampshire, North Carolina, Maryland, and Virginia contained provisions protecting the confrontation rights of the accused.

3. Because the confrontation clause was part of a package of rights adopted in the sixth amendment (along with public trial, right to jury, assistance of counsel, compulsory process, et al.), it was not subjected to a great deal of debate during the Constitutional Convention. Insofar as the basic purpose of the sixth amendment was to "constitutionalize" the adversary process as the most appropriate vehicle for achieving a fair trial, we can assume that the confrontation clause was designed to assist in accomplishing that end.

4. The paucity of historical information concerning the clause has given courts very little insight into its intended scope. As a result, the courts have attempted to give substance and meaning to this broad provision in a series of

decisions which have yet to announce a clear cut definition of the term "confrontation."

B. Purpose

1. The essential values furthered by the confrontation clause were recognized by the Supreme Court at an early date, when it stated:

> The primary object of this provision . . . [is] to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237 (1895).

2. The confrontation clause embraces three basic rights:

a. The accused's right to be present at trial;

b. the accused's right to cross-examine adverse witnesses; and

c. the accused's attendant right to have the fact-finder observe the demeanor of adverse witnesses.

1402 THE ACCUSED'S RIGHT TO BE PRESENT AT TRIAL
(Key Numbers 1227, 1228)

A. The general rule. An accused is constitutionally entitled to see and hear witnesses and other evidence presented against him at all stages of trial. *Lewis v. United States*, 146 U.S. 370 (1892); Art. 39, UCMJ; Rule of Court-Martial 804, MCM, 1984 [hereinafter R.C.M. ___].

B. Removal of accused from courtroom

1. In *Illinois v. Allen*, 397 U.S. 337 (1970), the Supreme Court concluded that a defendant's right to be present at trial is not absolute, and that

at least one governmental interest, the preservation of order in the courtroom, is sufficiently strong to justify an exception to the prohibition of taking evidence in his absence. The defendant in *Illinois v. Allen* was convicted following a trial during which he had been forcibly removed from the courtroom because of repeated disruptive behavior. In sustaining the conviction, the Court held that a defendant can "lose" his right to be present if he engages in behavior that makes it "difficult or wholly impossible to carry on the trial." *Id.* at 339.

2. The Court emphasized that removal must be critical to the continuation of the trial, not merely convenient.

3. The Court further held that, before removal may be ordered, there must be a showing that (1) the defendant has been warned by the judge that he will be removed if he continues his disruptive behavior, and (2) he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

4. The military has fully embraced the standards of *Illinois v. Allen*. R.C.M. 804(b)(2).

C. Physical restraint of accused at trial

1. Related to the removal of an accused from the courtroom is the issue of his physical restraint at trial. Although courtroom restraint does not constitute a pure confrontation issue, it is important in this regard since the physical restraint of the accused is usually the initial step in a progression toward the ultimate sanction of banishment from the proceeding.

2. R.C.M. 804(c)(3) provides that "physical restraint shall not be imposed upon the accused during open sessions of the court-martial unless prescribed by the military judge."

3. In *United States v. Gentile*, 1 M.J. 69 (C.M.A. 1975), the Court of Military Appeals elaborated on the law in this area when it considered the case of an accused who had been ordered handcuffed in court because, prior to trial, he had made numerous threats of his intent to remove his clothes once the court members were called.

a. The court held that physical restraint was permissible whenever an individual disrupts or evidences an intention to disrupt the orderly proceedings of the court.

b. Determining whether to restrain the accused and, if so, the degree of restraint necessary to maintain dignity, order, and decorum in the courtroom are matters within the sound discretion of the military judge.

4. If the military judge does order such restraint, he should enter into the record the reason therefore, and should instruct the court members that such restraint is not to be considered in weighing evidence or determining the issue of guilt. *See* para. 5.3, *ABA Standards Relating to the Administration of Criminal Justice* (1974).

5. For further discussion of this matter, see Lancaster, *Disruption in the Courtroom: The Troublesome Defendant*, 75 Mil. L. Rev. 35 (1977).

D. Trial in absentia

1. Except in capital cases, the accused may not defeat the proceedings by voluntarily absenting himself after the trial has been commenced in his presence. *Diaz v. United States*, 223 U.S. 442 (1911); *Taylor v. United States*, 414 U.S. 17 (1973).

2. R.C.M. 804(b), patterned on Rule 43 of the Federal Rules of Criminal Procedure, provides:

> Continued presence not required. The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present:
>
> (1) Is voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain during the trial); or
>
> (2) After being warned by the military judge that disruptive conduct will cause the accused to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

3. The absence must be voluntary. In *United States v. Knight*, 7 M.J. 671 (A.C.M.R. 1979), the accused was arraigned at an article 39(a) session and granted a continuance to secure civilian counsel. On the day of trial, he was confined in the local jail pursuant to a civilian conviction. Trial proceeded in his absence, and accused was convicted. The Army court reversed, holding that

accused's absence under these circumstances was involuntary. The requirement that the accused's absence be voluntary necessarily requires an informed and intentional choice in the matter, which in turn requires the accused's knowledge that the trial would continue during the period of absence. Such knowledge must be demonstrated in court by the government before trial in the accused's absence may proceed. R.C.M. 804(b)(2) discussion. *United States v. Sanders*, 31 M.J. 834 (N.M.C.M.R. 1991). The military judge should ensure that the reasons for the accused's absence appear on the record. *United States v. Abilor*, 14 M.J. 733 (A.F.C.M.R. 1982). *See also United States v. Matthews*, 19 M.J. 707 (A.F.C.M.R. 1984) (accused who is a voluntary unauthorized absentee waives the right to be represented by appellate defense counsel, just as that absence waives the accused's right to be present at trial).

4. The military judge should instruct court members that they must draw no inference of accused's guilt from his absence. *United States v. Powell*, 1 M.J. 612 (A.C.M.R. 1975); *United States v. Hardin*, 14 M.J. 880 (N.M.C.M.R. 1982) (military judge improperly considered accused's absence on findings). *See United States v. Minter*, 8 M.J. 867 (N.C.M.R. 1980), *aff'd*, 9 M.J. 397 (C.M.A. 1980), for an appropriate sample instruction. Such an instruction can be waived [*United States v. Allison*, 47 C.M.R. 968 (A.C.M.R. 1973)]. However, the military judge properly considered the accused's voluntary absence from trial in determining, for sentencing purposes, his prospects for rehabilitation and retention. *United States v. Chapman*, 20 M.J. 717 (N.M.C.M.R. 1985), *aff'd in summary disposition*, 23 M.J. 226 (C.M.A. 1986).

E. Ex parte proceedings

1. Federal. The confrontation clause provides accused with constitutional protection against proceedings ex parte.

a. *Lewis v. United States*, 146 U.S. 370 (1892) (confrontation clause violated by proceeding with voir dire in defendant's absence in violation of Federal common law right to challenge prospective jurors).

b. *Parker v. Gladden*, 385 U.S. 363 (1966) (conviction reversed on confrontation grounds where bailiff made out-of-court statements to jury concerning defendant's guilt).

2. Military. Article 39, UCMJ and R.C.M. 804 establish the military accused's right to be present at all stages of the court-martial, except deliberations and voting by the members. All hearings and motions must be made in accused's presence unless he voluntarily waives his presence. R.C.M. 802 provides that that conference may be held without the accused, but the accused can be present if he or she desires.

a. *United States v. Thomas*, 8 M.J. 661 (A.C.M.R. 1979), *petition denied*, 9 M.J. 13 (C.M.A. 1980) (accused, who slashed his wrist after making unsworn statement concerning his rape conviction and then chose to leave courtroom prior to sentencing, did so voluntarily).

b. *United States v. Dean*, 13 M.J. 676 (A.F.C.M.R. 1982). Actions of the military judge in having an ex parte session with a clinical psychologist, deputy SJA, and trial counsel to inquire preliminarily into the accused's competence to stand trial resulted in prejudicial error.

1403 THE ACCUSED'S RIGHT TO CROSS-EXAMINE ADVERSE WITNESSES (Key Number 1248)

A. Background

1. Dean Wigmore once described cross-examination as "the greatest legal engine ever invented for the discovery of truth." Indeed, the very essence of the constitutional right of confrontation is the defendant's opportunity to test the conscience, recollection, and bias of adverse witnesses through the vehicle of cross-examination. It is this feature more than any other which distinguishes the Anglo-American adversarial process from the more internationally prevalent inquisitorial system.

2. For nearly two hundred years, the Supreme Court has grappled with the problem of formulating a unified theory pertaining to the issue of cross-examination and determining its place within the framework of the confrontation clause. Although no rule for analyzing this difficult issue has yet emerged, some general principles do exist.

B. Hearsay versus confrontation

1. If read literally, the confrontation clause would require, on objection, the exclusion of any statement made by a declarant not present at trial. As such, this constitutional imperative reflects the basic principle set forth in the traditional evidentiary hearsay rule. Since its inception, however, the hearsay rule has given rise to exceptions that allow for admission of reliable extrajudicial statements when that evidence could be presented in no other form. Because the hearsay rule, and certain exceptions to it, had been in existence for more than a century prior to adoption of the sixth amendment, it has always been assumed that the Constitution did not reject per se the coexistence of the confrontation clause and exceptions to the hearsay rule.

2. Just as the hearsay rule has numerous exceptions, there are many exceptions to the literal application of the confrontation clause. (The hearsay rule and its exceptions are discussed in detail in chapter VIII, *supra*.) The *Dutton v. Evans*, 400 U.S. 74 (1970) plurality opinion indicated that the right of confrontation would not be violated if the out-of-court statement admitted was sufficiently reliable. *Ohio v. Roberts*, 448 U.S. 55 (1980) attempted to clarify the issue by adding a requirement that the out-of-court declarant be unavailable. Of course, *Ohio v. Roberts* did not clarify the issue, but seemed to create a question regarding several well-recognized hearsay exceptions which are not affected by the availability of the declarant. In practice, courts generally ignored the unavailability prong of *Ohio v. Roberts* and paid homage to the language about reliability. It is suggested, though, that the real concern was expressed by J. Harlan in his concurring opinion in *Dutton v. Evans*, where he claimed it was a question of due process fairness. For example, it is fair to admit an out-of-court statement that has traditionally been considered at trial, such as a business record, but our sensibilities are offended by convicting an accused principally by his confederate's out-of-court confession (which might satisfy the statement against interest hearsay exception). *United States v. Vietor*, 10 M.J. 69 (C.M.A. 1980) is an important, but confusing, case concerning a defense witness request for a chemist, which also held that the right of confrontation would not bar admissibility of a laboratory report because it was a business record. C.J. Everett extensively covered the reliability criterion and quickly dismissed J. Fletcher's discussion of the unavailability prong of *Ohio v. Roberts*.

3. *United States v. Inadi*, 106 U.S. 1121 (1986) effectively limited the *Ohio v. Roberts* two-prong test to former testimony, for whose admissibility the declarant's unavailability would have to be shown anyway, and returned to the *Dutton v. Evans* position that the right of confrontation would not be violated if the out-of-court statement admitted was sufficiently reliable. The co-defendant's confession was not sufficiently reliable in *Lee v. Illinois*, 476 U.S. 530 (1986), where its discrepancies with Lee's confession went to the very issues in dispute at trial (whether murder had been planned in advance).

4. With C.M.A. regularly addressing confrontation considerations, an advocate must anticipate and establish facts at trial which enforce the reliability of out-of-court statements. The important factors tend to fall into several categories such as characteristics of the declarant (age, maturity, character for veracity), the declarant's specific competence (ability to perceive incident, physical or emotional condition at time of incident, time lapse between incident and statement), the declarant's motives in making the statement, corroborating evidence, and the circumstances surrounding the making of the statement (location, physical environment, nature of audience, pressures on declarant).

a. In *Idaho v. Wright*, 110 S.Ct. 3144 (1990), the Supreme Court reassessed the reliability considerations needed to utilize the residual hearsay exceptions. *See United States v. Cordero*, 22 M.J. 216 (C.M.A. 1986); *United States v. Powell*, 22 M.J. 141 (C.M.A. 1986); and discussions in Chapter VIII, *supra*.

b. *United States v. Groves*, 23 M.J. 374 (C.M.A. 1987) was a bizarre case of larceny and false claims in which Groves asserted that he believed he had a common-law wife. She declined to testify, asserting the spousal incapacity privilege, and the prosecution introduced her earlier statement to CID that she and Groves were not husband and wife. The statement was admitted as a statement of personal history [Mil.R.Evid. 804(b)(4)]. The military judge could determine their marital status at the time of trial (for spousal incapacity and Mil.R.Evid. 804(a)(1) purposes) without deciding their marital status at the time of the offense (central issue in case); however, the declarant had also asserted the privilege against self-incrimination (apparently in connection with allowances she was receiving due to the death of one of her previous husbands). The court held that admission of the statement violated the right of confrontation. There was no information in the record regarding the making of the statement and no analysis of its reliability. It was suspicious because of the declarant's self-interest, and it was in part contrary to matters to which the prosecution had stipulated.

c. *United States v. Broadnax*, 23 M.J. 389 (C.M.A. 1987) limited *Vietor, supra*, to laboratory reports no more subjective than chemical analyses. The report of a handwriting expert was erroneously admitted in *Broadnax*, which held that the prosecution should determine in advance whether the defense desires the expert to testify at trial before admission of more subjective laboratory reports.

C. Waiver of confrontation right

1. A defendant who threatens the life of a witness and thereby convinces him not to testify cannot complain when the witness' grand jury testimony is introduced at trial. In these circumstances, the threat amounts to a waiver of defendant's right of confrontation. *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980). *Accord United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

2. Prior to admitting into evidence pretrial testimony, the trial judge should hold an evidentiary hearing at which the government must establish by a preponderance standard that the defendant's coercion made the witness unavailable. *United States v. Balano, supra*. Military cases have not addressed this issue.

D. Procedural matters

1. Scope of cross-examination

a. The Military Rules of Evidence prescribe various rules concerning the scope of cross-examination witnesses in general and of an accused in particular (which may be applicable to confrontation in a joint trial).

b. Rule 611(b) provides that "[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."

c. Mil.R.Evid. 301(e) provides that:

> [w]hen an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies. If the accused is on trial for two or more offenses and on direct examination testifies concerning the issue of guilt or innocence as to only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offense unless the cross-examination is relevant to an offense concerning which the accused has testified. This waiver is subject to rule 608(b).

Mil.R.Evid. 608(b) states that a witness, including the accused, retains the privilege against self-incrimination when examined with respect to matters which relate only to credibility.

d. Mil.R.Evid. 104(d) provides that "[t]he accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case."

2. Remedy for constraints on cross-examination

a. Mil.R.Evid. 301(f)(2) provides that "[i]f a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or in part, unless the matters to which the witness refuses to testify are purely collateral." The rule has been held to apply to both government and defense witnesses. *United States v. Richardson*, 15 M.J. 41 (C.M.A. 1983). Mil.R.Evid. 301(f)(2) has

even been applied to strike the testimony of the accused. *United States v. Vandemark*, 14 M.J. 690 (N.M.C.M.R. 1982).

b. The analysis to the above rule defines a collateral matter as one of minimal importance which, if sheltered, would create little danger of prejudice to the accused. MCM, 1984, app. 22-6. For example, in *United States v. Terrell*, 4 M.J. 720 (A.C.M.R. 1977), *aff'd*, 6 M.J. 13 (C.M.A. 1978), the accused was charged with transfer of heroin and, on cross-examination, a government witness refused to answer the question, "Have you ever used heroin yourself?" In upholding the conviction, the court stated that there was no requirement to strike the direct testimony since the only question the witness refused to answer was directed toward his general credibility and did not relate to the specific offense charged. *See also United States v. Hornbrook*, 14 M.J. 663 (A.C.M.R. 1982), *aff'd in summary disposition*, 16 M.J. 195 (C.M.A. 1983); *United States v. Lawless*, 18 M.J. 255 (C.M.A. 1984) (military judge's refusal to strike direct testimony of government witness upheld); *United States v. Hill*, 18 M.J. 459 (C.M.A. 1984) (testimony of defense witness was appropriately stricken where he refused to answer questions during cross-examination that were material to the subject of his direct).

c. This is in accord with the Federal standard which states that the right to bar direct testimony does not exist when the witness refuses to testify concerning a matter which is either collateral or cumulative and where the cross-examination is directed at the witness' general credibility rather than toward matters relating to specific events of the crime charged. *See, e.g., United States v. LaRiche*, 549 F.2d 1088 (6th Cir.), *cert. denied*, 430 U.S. 987 (1977); *United States v. Norman*, 402 F.2d 73 (9th Cir. 1968); *United States v. Cardillo*, 316 F.2d 606 (2d Cir. 1963), *cert. denied*, 375 U.S. 822 (1963).

1404 ACCUSED'S RIGHT TO HAVE FACT-FINDER VIEW ADVERSE WITNESSES AT TRIAL (Key Number 934)

A. Background

In *Mattox v. United States*, 156 U.S. 237 (1895), the preference for the physical presence of the witness before the fact-finder was emphasized when the Supreme Court defined the confrontation clause as requiring

> a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to

> face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 239. The right to have the fact-finder view the witness in the flesh, however, has never been considered paramount.

B. Alternatives to live testimony. With the escalation of child abuse cases, issues as to alternative means of testifying have come to the forefront.

In *Maryland v. Craig*, 110 S.Ct. 3157 (1990), the Supreme Court concluded that the confrontation clause reflects a preference for face-to-face confrontation at trial. The Court further stated that this preference must occasionally give way to considerations of public policy and the necessities of the case. In *Maryland v. Craig*, the accused was convicted of various sex offenses committed on a six-year-old child. A Maryland statute allowed the trial judge to receive, by one-way closed-circuit television, the testimony of a child witness who was the victim of the abuse. In upholding this procedure, the Court stated:

> We conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the confrontation clause does not prohibit the use of a procedure that, despite the absence of face to face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.

The Court also made clear the need for case-specific findings of necessity to justify alternatives to face-to-face confrontation.

C. Depositions generally. The most common procedure for introducing testimony at trial without affording the factfinder an opportunity to view the witness is through use of a deposition. The use of depositions in the military is controlled by Article 49, UCMJ, but the Court of Military Appeals has placed certain added limitations on their use. (*See* discussion in chapter II of this text.) In effect, an exemption or exception to the hearsay rule will have to be satisfied [perhaps Mil.R.Evid. 801(d)(1)(A) or 804(b)(1)]. A deposition would also be admissible under certain circumstances when the hearsay rule is relaxed. For example, see Mil.R.Evid. 405(c) and use of depositions per R.C.M. 1001(b)(4) and 1001(b)(5).

1. Confrontation requirements. Article 49, UCMJ, authorizes the use of "oral or written depositions." In *United States v. Jacoby*, 11 C.M.A. 428, 29 C.M.R. 244 (1960), the court held that the accused has a right to be present at the taking of the deposition in order to confront personally the witnesses against him. R.C.M. 702(g)(1)(A)(i)(c) provides that, under certain circumstances, depositions in lieu of production of a witness on the issue of sentencing can be taken without the accused present.

a. Deposing prosecution witnesses. In conformity with the requirement of *Barber v. Page*, 390 U.S. 719 (1968), the military now requires a showing of "actual unavailability" of the deposed witness at the time of trial before his deposition will be admitted into evidence. *United States v. Gaines*, 20 C.M.A. 557, 43 C.M.R. 397 (1971). *See United States v. Cokeley*, 22 M.J. 225 (C.M.A. 1986).

b. Deposing defense witnesses. In *United States v. Thornton*, 8 C.M.A. 446, 24 C.M.R. 256 (1957), the Court of Military Appeals held that an accused cannot be forced to present the testimony of a material defense witness by way of stipulation or deposition. *But see* R.C.M. 1001(e), which limits the availability of live testimony on sentencing and may "force" a depositions submission.

2. Unavailability requirement. Before a deposition will be admitted at trial, it must be affirmatively established that the deponent is "unavailable" on the day of trial.

a. Geographical unavailability. Article 49, UCMJ, defines witness unavailability geographically; that is, a witness is unavailable if he or she is located beyond the state, territory, or district in which the court is sitting or more than 100 miles from the place of trial. In spite of the mandate of article 49(d), subsequent case law has limited the effect of the 100-mile rule.

(1) Distance alone never makes a servicemember on active duty "unavailable." *United States v. Davis*, 19 C.M.A. 217, 41 C.M.R. 217 (1970); *Cokely, supra*. In *United States v. Vanderwier*, 25 M.J. 263 (C.M.A. 1987), the Court of Military Appeals held that the 100-mile rule of article 49(d) is not solely dispositive as to the unavailability of a witness. Rather, it is but one factor to consider in the determination of unavailability.

(2) When the government procures a witness' departure from the trial situs and effects his discharge from the service before the normal expiration of his enlistment, it is prevented from asserting the witness' unavailability even though, at the time of trial, he is a civilian. *United States v. Gaines*, 20 C.M.A. 557, 43 C.M.R. 397 (1971); *United States v. Hodge*, 20 C.M.A.

412, 43 C.M R. 252 (1971); *United States v. Ciarletta*, 7 C.M.A. 606, 23 C.M.R. 70 (1957). *Cf.* *United States v. Mohr*, 21 C.M.A. 360, 45 C.M.R. 134 (1972) (failure of defense to object to witness' departure and discharge constitutes waiver).

(3) Before a civilian witness will be declared "unavailable," the government must make every effort, both compulsory and voluntary, to secure the presence of the witness. *United States v. Obligacion*, 17 C.M.A. 36, 37 C.M.R. 300 (1967); *United States v. Seek*, 13 M.J. 946 (A.F.C.M.R. 1982).

b. Witness whereabouts unknown. A witness is unavailable if his whereabouts are unknown at the time of trial. The party offering the deposition must show that he has exercised due diligence in attempting to locate the witness. *United States v. Miller*, 7 C.M.A. 23, 21 C.M.R. 149 (1956) (deposition not admissible over objection of the defense because the only showing as to the nonavailability of the deponent was the trial counsel's attempt to telephone him on the day before trial, at which time he was informed by the operator that no telephone was listed in the deponent's name in the town of his presumed residence).

c. Inability or refusal of witness to appear and/or testify. A witness is unavailable, if, by reason of death, age, sickness, bodily infirmity, military necessity, nonamenability to process, or other reasonable cause, he is unable or refuses to appear and testify. Art. 49(d)(2), UCMJ.

(1) *United States v. Hoffman*, 29 C.M.R. 795 (A.F.B.R. 1960) (serious heart attack made deponent unavailable).

(2) *United States v. Parrish*, 7 C.M.A. 337, 22 C.M.R. 127 (1956) (deponent's insanity at the time of trial made him unavailable).

3. Representation by counsel. *Pointer v. Texas*, 380 U.S. 400 (1965), requires that the accused at a deposition hearing be represented by counsel to insure that his right to cross-examine witnesses will be adequately protected. (R.C.M. 702(g)(2)(B) provides that no party has a right to be present at a written deposition, but a written deposition may not be ordered without the consent of the opposing party except when it is ordered solely in lieu of producing a witness for presentencing. R.C.M. 702(c)(3)(B).)

a. The MCM requires that the qualifications of counsel be the same as those prescribed for trial by the type of court-martial before which the deposition is to be used, except for depositions to be used at summary court-martial. R.C.M. 506, *noted in* R.C.M. 702.

b. The rights to the various types of counsel attach at the deposition hearing. The accused can have appointed military counsel, or requested military counsel and a civilian counsel. R.C.M. 506.

c. Counsel must have been accepted by the accused. The mere publication of an order of appointment does not establish an attorney-client relationship. *United States v. Miller*, 7 C.M.A. 23, 21 C.M.R. 149 (1956). The accused's acceptance of the counsel, however, need not be formal and express. If he acquiesces in the counsel's appointment, there is an implied acceptance. *United States v. Ciarletta*, 7 C.M.A. 606, 23 C.M.R. 70 (1957).

d. Counsel must represent accused adequately. If the accused receives ineffective representation at the deposition hearing, the deposition is inadmissible. *United States v. Ciarletta, supra.*

e. Counsel's role at the hearing is to raise objections and cross-examine the deponent. If this opportunity is denied in any way, the deposition is inadmissible. *United States v. Blackburn*, 31 C.M.R. 340 (A.B.R. 1961).

f. Counsel need not be sworn at the hearing. The provisions of Article 42, UCMJ do not apply at the deposition hearing. *United States v. Parrish*, 7 C.M.A. 337, 22 C.M.R. 127 (1956).

g. The counsel who represents the accused at a deposition ordinarily will form an attorney-client relationship with the accused which will continue through a later court-martial. R.C.M. 702(d)(2) discussion.

h. If the accused has formed an attorney-client relationship with military counsel concerning the charges in question, ordinarily that counsel should be appointed to represent the accused. R.C.M. 702(d)(2) discussion.

D. Procedural requirements. R.C.M. 702 sets out in detail the mechanics for obtaining a deposition.

1. Request. After charges are preferred, a written request must be submitted to the convening authority (prior to referral) or to the military judge or convening authority (after referral). Ordinarily, the opposing party will be served a copy of the request and accompanying papers.

2. Approval. The approving authority must personally decide and order the deposition to be taken: This authority may not be delegated to the staff judge advocate. *United States v. Brady*, 8 C.M.A. 456, 24 C.M.R. 266 (1957).

3. Notice. Reasonable written notice must be given to the opposing party of the time and place of the deposition hearing and the name of each person to be examined. In determining whether the timing was reasonable, the court will consider travel time, time for preparation, and prior engagements of counsel. *United States v. Mathews*, 31 C.M.R. 620 (A.F.B.R. 1961). Notice must be made in writing. *United States v. Giles*, 42 C.M.R. 880 (A.C.M.R. 1970).

4. Taking testimony. Anyone authorized to administer oaths can serve as a deposing officer. Art. 49(c), UCMJ.

5. Authentication. The deposing officer must authenticate the deposition record. R.C.M. 702(f)(8).

6. Use at trial. A deposition is not an exhibit in the ordinary sense of the term, but rather testimonial evidence. As such, it is marked as an exhibit and appended to the record, but only read to the court members. Art. 49(f), UCMJ.

7. Instruction. It is error to equate testimony received in the form of a deposition to that which the witness would give were he present in court. *United States v. Griffin*, 17 C.M.A. 387, 38 C.M.R. 185 (1968). The proper instruction, on request of counsel, should inform the members that in assessing the credibility of the testimony they should consider that they have not had the opportunity to observe the demeanor of the witness.

8. Videotaped depositions. Videotaped depositions are specifically authorized. R.C.M. 702(g)(3).

1405 CONFRONTATION RIGHTS AT ARTICLE 32 INVESTIGATIONS (Key Number 924)

A. Article 32(b), UCMJ, states that the accused at a pretrial investigation will be given a "full opportunity . . . to cross-examine witnesses against him if they are available."

B. In the absence of defense objection, there are many vehicles available to the government to present statements of witnesses at the pretrial investigation. R.C.M. 405(g)(4)(A). The investigating officer can consider:

1. Sworn statements;

2. statements under oath taken by telephone, radio, or similar means if both parties had the opportunity to question the witness and it can be reasonably concluded that the witness' identity is as claimed;

3. prior testimony under oath;

4. depositions;

5. stipulations;

6. unsworn statements; and

7. offers of proof of expected testimony of the witness.

Because there is no defense objection, the availability/nonavailability of the witness is not relevant.

C. If a witness is unavailable, the government can introduce over defense objection:

1. Sworn statements;

2. statements under oath taken by telephone, radio, or similar means if both parties had the opportunity to question the witness and it can be reasonably concluded that the witness' identity is as claimed;

3. prior testimony under oath;

4. depositions of that witness; and

5. in time of war, unsworn statements.

D. If a witness is reasonably available and the defense objects to the use of the substitutes for testimony set forth in paragraph 1, *supra*, then that witness shall be produced if the testimony would be relevant and not cumulative. R.C.M. 405(g)(1)(A). Reasonable availability is determined by both a 100-mile rule and a balancing test. If a witness is located within 100 statute miles of the situs of an investigation, and 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, then the witness is reasonably available. A witness located beyond 100 statute miles is deemed to be unavailable. The production of an unavailable witness is within the discretion of the witness' commander (for military witness) or the commander ordering the investigation (for civilian

witnesses). Someone unavailable under Mil.R.Evid. 804(a)(1) through (6), is not reasonably available. R.C.M. 405(g)(1)(A).

E. The current R.C.M. 405 confrontation rights of the accused are based on two key cases. In *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976), the investigating officer did not attempt to invite the civilian rape victim to attend the investigation. The defense requested that the military judge order the investigation to be reopened and have the victim invited or continue the trial to allow the defense to depose the victim. The trial judge refused the request and the court ruled that the accused had been denied his right to examine the victim under oath before trial. R.C.M. 405(g)(2)(B) discussion, indicates that civilians should be invited to attend (and perhaps funded) before they are determined to be unavailable. The second case is *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978), wherein the investigating officer considered the sworn statements of two crucial prosecution witnesses over defense objection. The prosecution witnesses were civilians who were invited, but refused to attend. In upholding the conviction, the court paid homage to all prior enunciated rights of confrontation of the accused at a pretrial investigation but found that, absent a defense motion to depose the requested witness, the accused waived his pretrial right to confrontation. *See also United States v. Colter*, 15 M.J. 1032 (A.C.M.R. 1983) and *United States v. Jones*, 20 M.J. 919 (N.M.C.M.R. 1985).

F. Note: Articles 46 and 47 allow the government to subpoena witnesses to appear at deposition hearings. No such provision exists to compel attendance at an article 32 investigation.

PART II - COMPULSORY PROCESS (Key Number 1124)

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."

U.S. Const. Amend. VI

1406 INTRODUCTION

A. History

1. The compulsory process provision of the sixth amendment is rooted in English common law and was incorporated into the Bill of Rights to insure the accused an opportunity to present a defense. Unlike the confrontation clause, which restrains the prosecution by regulating the manner by which it presents its case against the accused, compulsory process comes into play at the conclusion of the prosecution's case and operates exclusively at the defendant's initiative.

2. Compulsory process is an outgrowth of the adversarial system of justice which first developed in England during the seventeenth century. In medieval times, criminal cases were tried before jurors who decided guilt or innocence based on their own prior knowledge of the facts without hearing from witnesses on either side. As the jury system came into being, independent testimony of prosecution witnesses began to be considered, but not that of the defense or its witnesses. Not until the eighteenth century did the defendant finally receive an equal opportunity with the prosecution to present his case through witnesses.

3. To insure that the defendant's right to present a defense was preserved, the compulsory process clause was adopted by the fledgling United States as part of the Bill of Rights.

4. In 1806, Chief Justice John Marshall, presiding as a circuit judge, gave a sweeping construction to the compulsory process clause in the treason and misdemeanor trials of Aaron Burr. In ruling that President Thomas Jefferson had to provide the accused with letters material to his defense, the Chief Justice stated that "the right given by this article must be deemed sacred by the courts, and . . . should be construed as something more than a dead letter." In spite of that statement, the clause was largely ignored by the courts until recently.

B. Purpose

1. In *Washington v. Texas*, 388 U.S. 14 (1967), the Supreme Court breathed new life into compulsory process when it struck down a Texas statute which rendered accomplices incompetent to testify for one another.

a. The Court rejected the argument that compulsory process was limited to the right to subpoena favorable witnesses without the attendant opportunity to have the witnesses take the stand and be heard. Emphasizing this point, the Court said, "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Id.* at 23.

b. Instead, in holding that the explicit right to subpoena witnesses carries with it the implicit right to put them on the stand to be heard, the Court enunciated the true purpose of the clause:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witness for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.

Id. at 19.

2. In *United States v. Manos*, 17 C.M.A. 10, 37 C.M.R. 274 (1967), the Court of Military Appeals adopted the Supreme Court position and declared this constitutional provision applicable to court-martial proceedings. The court went on to say that, even though the accused's right to secure the attendance of witnesses is not absolute, it is important for all concerned to be impressed with "the undoubted right of the accused to secure the attendance of witnesses in his own behalf, the need for seriously considering the request and [the importance of] taking necessary measures to comply therewith if such can be done without manifest injury to the service." *Id.* at 19, 37 C.M.R. at 283.

1407 COMPELLING THE GOVERNMENT TO PRODUCE FAVORABLE DEFENSE WITNESSES

A. Article 46, UCMJ. This article provides the military accused with an expanded right of compulsory process by mandating that the defense have an "equal opportunity" with the government to obtain witnesses, a phrase interpreted by the Court of Military Appeals in *United States v. Sweeney*, 14 C.M.A. 599, 34 C.M.R. 379 (1964), as eliminating the requirement to show indigency when requesting that the government pay the cost of producing a defense witness.

B. Procedure for securing witnesses

1. Article 46 allows the President to establish regulations prescribing the procedures to be used for securing defense witnesses. The President has exercised that authority in R.C.M. 703 and R.C.M. 1001(e), which set forth two different standards for witness requests, depending upon whether the witness is to be called to testify on the merits of the case or at the presentencing stage of the case. In either situation, the request should be in writing and be submitted in a timely manner.

a. If the request is for a witness on the merits or on interlocutory questions, it should contain:

(1) Name, telephone number, address, or location of the witness; and

(2) a synopsis of the expected testimony sufficient to show its relevance and necessity. R.C.M. 703(c)(2)(B)(i).

b. If the request is for a witness in the presentencing proceeding, it shall contain:

(1) Name, telephone number, address, or location of the witness;

(2) a synopsis of the prospective witness' expected testimony; and

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

2. Under R.C.M. 1001(e), counsel now have a more difficult standard to meet in attempting to obtain the appearance of witnesses in the

presentencing stage of the court-martial. A witness may be produced to testify during presentencing proceedings at government expense only if:

a. The testimony expected to be offered by the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact;

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

c. the other party is unwilling to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation would be an insufficient substitute for the testimony;

d. other forms of evidence, such as oral depositions, written interrogatories, or former testimony would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence; and

e. the significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered in relation to the balancing test provided in R.C.M. 1001(e)(2)(E) include, but are not limited to, the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, or the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training. Note that, under the language of R.C.M. 1001(e)(2)(A) through (E), the connecting notion "and" joins the five factors, indicating that all must be met before a defense witness will be produced at government expense to testify during presentencing proceedings. The bottom line is that, for all practical purposes, a defense witness will rarely, if ever, be produced at government expense. There does appear to be one problem area in the application of the criteria of R.C.M. 1001(e)(2)(C), and it derives from the language of the criterion which states that the government is unwilling to stipulate to the facts to which the witness is expected to testify. In *United States v. Gonzalez*, 14 M.J. 501 (A.F.C.M.R. 1982), the court held that the willingness of the prosecution to stipulate to expected testimony did not qualify as willingness to stipulate to facts to which witnesses were expected to testify under paragraph 75(e), MCM 1969 (Rev.). The Court of Military Appeals affirmed *Gonzalez* at 16 M.J. 58 (C.M.A. 1983), stating that the clear language of paragraph 75(e), MCM 1969 (Rev.), precluded any other interpretation; a prosecution offer to stipulate to expected testimony is not the equivalent of an offer to stipulate to the facts to

which a witness is expected to testify. R.C.M. 1001(e)(2)(C) also requires a stipulation of fact. There still exists little likelihood that defense counsel will be successful in obtaining compulsory process for live witnesses in extenuation and mitigation however, since, as the court points out, paragraph 75(e), MCM 1969 (Rev.) [now R.C.M. 1001(e)(2)], requires that all five criteria be met before the witness must be produced. *See also United States v. Combs*, 20 M.J. 441 (C.M.A. 1985).

3. Prior to trial, the determination of whether to produce the witness rests with the trial counsel. The trial counsel shall arrange for the presence of any witness listed by the defense unless the trial counsel contends that the witness is not required to be produced under R.C.M. 703. If the trial counsel refuses to produce a witness under this rule, the issue may be submitted to the military judge. If the military judge grants a motion for a witness, the proceedings will be abated until the witness is produced. R.C.M. 703(c)(2)(D).

4. A wise trial counsel will always consult with the convening authority, who will be paying for the witnesses, especially if significant or unusual costs are involved. R.C.M. 703(c)(2)(D) discussion.

C. Is R.C.M. 703 consistent with article 46?

There has been controversy in the past as to whether the requirements of paragraph 115a, MCM, 1969 (Rev.) (now R.C.M. 703) were consistent with the "equal opportunity" provision of article 46. Defense counsel have argued that the need for synopsis of testimony and averments of necessity place an unreasonable burden on the defense that is not shared by the government. The courts have not accepted that position, but *United States v. Vietor*, 10 M.J. 69 (C.M.A. 1980) apparently reduced the defense burden when requesting a laboratory chemist. Since it is really the government which is relying on the chemist through his out-of-court laboratory report, the accused is merely seeking to cross-examine a witness against him. While recognizing the legitimate purposes in requiring the defense to advance some justification for the witness request (e.g., some indication that the chemist's testimony may create doubt about his credibility or the reliability of lab procedures), the normal standards would not apply.

D. The materiality standard

1. Production of defense requested witnesses has never been an unlimited right. The Supreme Court has long held that there is no constitutional right to subpoena witnesses whose testimony is not material to the accused's defense.

2. The Supreme Court has never formulated a Federal standard of materiality.

3. The drafters of the Rules for Court-Martial have attempted to embrace various theories of "materiality," "relevance," and "essentiality" expounded by the Court of Military Appeals. The precision of R.C.M. 703(b)(1) is best appreciated when viewed from the cases which gave it birth.

a. In *United States v. Hampton*, 7 M.J. 284 (C.M.A. 1979), the Court of Military Appeals attempted to clarify this issue by declaring a witness to be "material" when there exists a reasonable likelihood that his testimony will have an affect on the judgment of the fact-finders at trial. As such, even though a witness' testimony may be favorable and relevant to a defendant's case, he has no right to produce that evidence if the impact of its exclusion will be too insignificant in the context of other evidence presented at trial to have any material bearing on the outcome.

b. The standard appears to have shifted again, however, making the defense counsel's burden more difficult to bear. The Court of Military Appeals signaled the change in footnote 4 of *United States v. Bennett*, 12 M.J. 463, 465 (C.M.A. 1982), when it said "the word material appears misused. . . . However, the terms may have been confused in earlier cases, the true test is essentiality. If a witness is essential for the presentation of the prosecution's case, he will be present or the case will fail. The defense has a similar right." The court appeared to confirm this dictum in *United States v. Cottle*, 14 M.J. 260 (C.M.A. 1982), which cited the *Bennett* footnote. The court upheld the denial of two requested defense witnesses, stating that the defense had not presented any evidence to show that the witnesses would be <u>essential</u> to the defense.

4. <u>R.C.M. 703(b)(1)</u>. Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary. The discussion following R.C.M. 703(b)(1) refers to Mil.R.Evid. 401 concerning relevance and defines necessary relevant testimony as testimony that is not cumulative and contributes to a party's presentation of the case in some positive way on a matter in issue. The analysis to R.C.M. 703(b)(1) indicates that the theories of materiality, relevance, and essentiality in *Hampton, supra; Bennett, supra*; and *Cottle, supra*, are expressed in R.C.M. 703(b)(1) and its discussion.

E. Conditions precedent to enforcement of right to compulsory process

1. Materiality must be averred

a. In *United States v. Lucas*, 5 M.J. 167 (C.M.A. 1978), the Court of Military Appeals held that the government need not produce a requested defense witness until the accused makes some legitimate assertion of materiality which places the military judge on notice that the witness will offer testimony to negate the prosecution evidence or support a defense. *See also United States v. Menoken*, 14 M.J. 10 (C.M.A. 1982); *United States v. Roberts*, 10 M.J. 308 (C.M.A. 1981).

b. This requirement exists independently of R.C.M. 703(c)(2)(B)(i) and is premised on the military judge's need for reliable information upon which to make his determination of whether to order the witness produced.

c. What constitutes a legitimate averment has never been clearly established, but a fair reading of the cases indicates that the defense should virtually quote the expected testimony and state that the witness is relevant and necessary.

d. In *United States v. Lucas*, 5 M.J. 167 (C.M.A. 1978), the Court of Military Appeals obliquely addressed this issue in footnote 11 by citing *Greenwell v. United States*, 317 F.2d 108 (D.C. Cir. 1963), wherein the District of Columbia Circuit Court of Appeals laid down the following rule:

> If the accused avers facts which, if true, would be relevant to any issue in the case, the request for subpoenas must be granted, unless the averments are inherently incredible on their face, or unless the government shows, either by introducing evidence or from matters already of record, that the averments are untrue or that the request is otherwise frivolous.

317 F.2d at 110. *Greenwell* was also favorably cited by the Court of Military Appeals earlier in *United States v. Sweeney*, 14 C.M.A. 599, 34 C.M.R. 379 (1964).

e. In *United States v. Young*, 40 C.M.R. 133 (A.F.C.M.R. 1974), the Air Force Court of Military Review held that the military judge did not err in refusing to compel the attendance of requested witnesses when the defense conceded that no effort to communicate with them had been made and that counsel could only speculate as to what the requested witnesses would say. According to the court, such "hopes" as to expected testimony did not equate to a legitimate averment, and witness production was therefore not required.

f. In *United States v. Carey*, 1 M.J. 761 (A.F.C.M.R. 1975), the Air Force court considered a similar problem with the exception that the request was based entirely on the accused's uncorroborated personal representations of what the witness would say. In upholding the trial judge's decision to deny the witness, the court stated, at page 767:

> If the defense truly desired the witnesses to appear, in our judgment they had a responsibility to exert at least a minimal effort to contact them and verify their alleged anticipated testimony. A recitation of such activity, together with the information obtained thereby, or an assertion of lack of success in spite of such efforts, should then have been presented to the military judge in support of the motion.

g. In *United States v. Christian*, 6 M.J. 624 (A.C.M.R. 1978), the Army Court of Military Review ruled that, even though the defense was uncertain as to what a requested witness would say, an adequate showing of materiality had been made when both the trial and defense counsel agreed that, if the witness had any testimony to provide at all, it would support either the government or defense theory. As such, the witness was material and should have been produced.

h. In *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980), the Court of Military Appeals reaffirmed the accused's unconditional right to interview all potential witnesses prior to trial but, in so doing, restated the general proposition that a witness may refuse to answer pretrial questions of defense counsel so long as the government has not induced that refusal. It went on to say, however, that "when there is some reason to believe that a witness has knowledge relevant to criminal charges and he refuses to talk to defense counsel, there usually will be lacking any 'good cause' to forbid his deposition or to refuse to compel his appearance at trial." *Id.* at 161. Accordingly, the defense counsel in this specific situation should normally be successful in either requesting a deposition or in requiring the appearance of the witness at trial.

i. In *United States v. Vietor*, 10 M.J. 69 (C.M.A. 1980), the Court of Military Appeals expressed the view that the defense counsel was remiss in not communicating with the laboratory analyst prior to submitting a witness request. Without such communication, defense counsel could not assess the potential benefit of requesting the witness.

j. In *United States v. Jefferson*, 13 M.J. 1 (C.M.A. 1982), the court stated that a defense counsel's oral averment of a witness' expected testimony based on a summary in a CID report was a sufficient mode of averment

where the government did not challenge the legitimacy of the report. *See also United States v. Phillips*, 15 M.J. 671 (A.F.C.M.R.), *petition denied*, 16 M.J. 149 (C.M.A. 1983) (defense must provide information which supports an averment).

k. In *United States v. Rappaport*, 19 M.J. 708 (A.F.C.M.R. 1984), *aff'd on other grounds*, 22 M.J. 445 (C.M.A. 1986), an Air Force Court of Military Review held that the trial judge's denial of a defense request for the production of a witness was not an abuse of his discretion where the affidavit/offer of proof in support of the request was "vague and uncertain and [was] not material and relevant" to the proposed issue. *Id.* at 711.

l. In *United States v. Jones*, 20 M.J. 919 (N.M.C.M.R. 1985), three requested character witnesses were not necessary because their testimony would have been cumulative of other witnesses. However, it was abuse of discretion to deny a request for another witness who would have testified that alleged drug activity was not occurring. An actual witness testified similarly, but his credibility had been attacked.

2. Request must be timely

a. R.C.M. 703(c)(2)(C) provides that witness requests must be timely so as to obtain the witness when they would be necessary. Untimely requests are subject to denial.

b. The Court of Military Appeals, in *United States v. Hawkins*, 6 C.M.A. 135, 142, 19 C.M.R. 261, 268 (1955), said:

> [T]he touchstone for untimeliness should be whether the request is delayed unnecessarily until such time as to interfere with the orderly prosecution of the case. Even then, if good cause is shown for the delay, a continuance should be granted to permit the evidence to be produced.

c. In *United States v. Nichols*, 2 C.M.A. 27, 36, 6 C.M.R. 27, 36 (1952), the court declared that a continuance should ordinarily be granted "if it appears reasonable that it is not made on frivolous grounds or solely for delay." Furthermore, "counsel for accused has the responsibility to make a full and fair disclosure of the necessity for, and the nature, extent and availability of, the desired evidence" which forms the basis of the request. *See United States v. Mitchell*, 11 M.J. 907 (A.C.M.R. 1981), *aff'd*, 14 M.J. 128 (C.M.A. 1982); *United States v. Cottle*, 14 M.J. 260 (C.M.A. 1982) (addresses dilatory tactics of civilian defense counsel).

F. Modes of evidence presentation; how much must be produced?

1. The question of whether all material witnesses requested by the defense must be physically produced at trial is one which has long plagued the military courts. R.C.M. 1001(e)(2) minimizes the opportunities to require government production of witnesses for presentencing.

2. In *United States v. Williams*, 3 M.J. 239 (C.M.A. 1977), the court stated that live production of material witnesses is unnecessary when the testimony of such witnesses would be merely cumulative. In this case, the accused had been charged with heroin possession and the defense case rested on the credibility of accused's denial of guilt. Four defense character witnesses on the merits were requested, but the trial judge denied the request as to two of them on the basis that their testimony was merely cumulative. The Court of Military Appeals reversed the conviction because the denied witnesses had known the accused at different periods of time and therefore were not cumulative under those circumstances.

In footnote 8, the court cautioned that the trial judge must be careful to distinguish between cumulative witnesses and corroborative witnesses -- the latter being witnesses whose repetitive testimony would have an "important impact" on the factfinder at trial. Such witnesses presumably must be produced if the trial's fairness would be affected by their absence. When the judge rules, for example, that only two of four witnesses must be produced at trial, the defense will select the two to be produced.

3. In *United States v. Scott*, 5 M.J. 431 (C.M.A. 1978), the court finally seems to have settled on a standard with regard to this matter when it stated that "although live testimony . . . is normally imperative to the fairness of the process, occasionally some alternative form of testimony will pass muster under the facts and circumstances of a given case." *Id.* at 432. It further noted that it is within the discretion of the military judge to determine the mode of evidence production, once the witness' materiality has been established; and that, in exercising this discretion, the trial judge must insure that the mode of production does not diminish the fairness of the proceedings.

4. In *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1991), *petition granted*, 32 M.J. 492 (C.M.A. 1991), the Navy-Marine Corps Court of Review stated that, in exercising discretion whether to require the personal attendance of a material witness, a judge must balance the following factors:

(a) Issues involved in the case and importance of requested witness to those issues;

(b) whether witness was desired on the merits or on sentencing;

(c) whether testimony of witness would be merely cumulative;

(d) availability of alternatives to personal appearance of witness such as depositions, interrogatories, or previous testimony;

(e) unavailability of witness;

(f) whether requested witness is in the armed forces or subject to military orders; and

(g) whether absence of witness will adversely affect accomplishment of an important military mission or cause manifest injury to the service.

The court also went on to describe a three-prong analysis in determining whether a witness is cumulative. The questions to be resolved include:

(a) Is credibility and demeanor of the requested witness greater than that of the attending witness;

(b) is testimony of requested witness relevant to the accused with respect to character traits or other material evidence observed during periods of time different than that of attending witness; and

(c) will any benefit accrue to the accused from an additional witness saying the same thing that other witnesses have already said?

G. Expert witnesses

1. R.C.M. 703(d) states that, when a party considers employment of an expert at government expense to be necessary, that party should notify opposing party and submit a request to the convening authority to authorize employment and fix compensation. The request must explain why the expert is necessary and estimate the cost.

2. The government can often provide an adequate substitute.

a. *Ake v. Oklahoma*, 470 U.S. 68 (1985) held the government was required to provide access to a psychiatrist if an indigent criminal

defendant showed that his sanity was in issue. R.C.M. 706 satisfies any such constitutional requirements.

b. The defense wanted $1500.00 for an independent investigator in *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986), and declined the services of an Air Force investigator who would have worked under an order of confidentiality (and refused to explain why unless the military judge would grant an ex parte hearing). It was permissible for the judge to deny the defense request. (Apparently, defense had already hired an investigator, but could not discover the results without $1500.00, and was afraid to inform the prosecution of the existence of the private investigator's report.)

c. In *United States v. Robinson*, 24 M.J. 649 (N.M.C.M.R. 1987), the defense requested a civilian expert who would testify that the level of THC metabolite in the accused's urine could have been caused through "passive inhalation." The trial judge denied the request, saying the government's expert could also testify as to these issues. In reversing the case, the Navy-Marine Corps Court of Military Review noted that, upon a request for an expert to testify on an accused's behalf, the government can produce an "adequate substitute." However, in addition to possessing similar qualifications, the substitute must also be willing to testify as to the same conclusions and opinions.

d. *United States v. Horn*, 26 M.J. 434 (C.M.A. 1988) held that the denial of an accused's request for employment of an expert witness, who could have testified that government chemists had not followed proper procedures in analyzing the accused's urine for cocaine metabolites, constituted reversible error.

1408 THE SUBPOENA PROCESS

A. Military witnesses. R.C.M. 703(e)(1) sets out the procedures for securing the presence of witnesses who are on active duty.

1. Attendance of such witnesses is obtained by the trial counsel's notifying the witness' commanding officer and requesting that the witness be ordered to attend the trial.

2. In *United States v. Davis*, 19 C.M.A. 217, 41 C.M.R. 217 (1970), the Court of Military Appeals held that distance alone never makes a servicemember on active duty unavailable to appear personally as a witness in a court-martial.

B. Domestic civilian witnesses required to appear in a court-martial held in the United States. Article 46, UCMJ, provides that a process issued in a court-martial shall be similar to that issued by United States district courts and shall run to any part of the United States, its territories, commonwealths, or possessions. *See* JAGMAN, § 0146.

-- R.C.M. 703(e)(2) sets out the specific mechanics for issuing a subpoena upon a civilian.

a. The trial counsel is authorized to subpoena civilian witnesses at government expense.

b. A subpoena normally is prepared, signed, and issued in duplicate on DD Form 453. MCM, 1984, app. 7. If a subpoena requires the witness to bring with him a document or an exhibit to be used in evidence, each document or exhibit will be described in sufficient detail to enable the witness to identify it readily.

c. If practicable, a subpoena will be issued in time to permit service to be made or accepted at least 24 hours before the time the witness will have to start from home in order to comply with the subpoena.

d. Informal service. Unless he believes that formal service is advisable, the trial counsel will mail the subpoena to the witness in duplicate, enclosing a postage-paid envelope bearing a return address, with the request that the witness sign the acceptance of service on the copy and return it in the postage-paid envelope. The return envelope should be addressed to the trial counsel of the court. The trial counsel may, and ordinarily should, include with the request a statement to the effect that the rights of the witness to fees and mileage will not be prejudiced by voluntary compliance with the request and that a voucher for fees and for mileage going to and returning from the place of the sitting of the court will be delivered to him promptly on being discharged from attendance at the proceedings.

e. Formal service. Formal service is accomplished by personally serving the subpoena on the witness. If the witness is near the place where the court is convened, the trial counsel, or someone detailed or designated by the commanding officer of the installation, may serve the subpoena. If the witness is near some other military installation, the duplicate subpoenas may be enclosed with a suitable letter to the commanding officer of that installation, or the duplicate subpoenas may be enclosed with a suitable letter to the commander of an army area, naval district, air command, or other comparable command within which the witness resides or may be found. The commanders will take appropriate action to complete prompt service of the subpoena by the most

economically available means. Service ordinarily will be made by persons subject to the code, but may legally be made by others. The second copy of DD Form 453, with proof of service made as indicated on the form, will be returned to the trial counsel. If the service cannot be made, trial counsel should be notified immediately. When use for it is probable, a return postage-paid envelope addressed to the trial counsel of the court may be sent to the person who is to serve the subpoena.

C. Civilian witnesses in a foreign country required to appear in a court-martial held in the United States. Title 28 U.S.C. § 1783 (1976), made applicable to the armed forces through Article 46, UCMJ, allows courts of the United States or bodies designated by them to subpoena American nationals or residents who are in a foreign country to return to the United States for trial. Such subpoenas must be served in accordance with the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country. The person serving the subpoena must tender to the person subpoenaed his estimated travel and attendance expenses. *See United States v. Daniels*, 23 C.M.A. 94, 48 C.M.R. 655 (1974). *But see United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982) (applicability to courts-martial not clear).

D. Civilian witnesses in a foreign country required to appear in a court-martial held in a foreign country. In a foreign territory, the attendance of civilian witnesses may be obtained in accordance with existing agreements or, in the absence thereof, within the principles of international law. However, in occupied enemy territory, the appropriate commander is empowered to compel the attendance of a civilian witness in response to a subpoena issued by the trial counsel. *United States v. Daniels, supra.*

E. Civilian witnesses in the United States required to appear in a court-martial held in a foreign country. Military courts do not have the power to compel civilians to leave the United States to attend a court-martial in a foreign country. *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982). However, the government could tender fees and travel to the civilian witness who would testify voluntarily. It is not an abuse of discretion for the military judge to order a trial to proceed where the civilian witness refuses invitational travel orders and the government is willing to enter into a stipulation of expected testimony. *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988) (civilian wife of accused, who had been expelled from base housing in Germany after drugs were found there, would testify that the drugs were hers and accused had no knowledge of their presence).

F. Enforcement of domestic subpoenas. Two options exist regarding persons who fail to respond to a subpoena. A warrant of attachment may issue from the court-martial or a criminal charge may be brought in Federal district court.

1. Warrant of attachment. R.C.M. 703(e)(2)(G) provides that a military judge or convening authority may issue a warrant for the arrest of any person who refuses to appear pursuant to a properly issued subpoena. It further recommends that such a warrant be executed through a civil officer of the United States (e.g., a U.S. Marshal). JAGMAN, § 0147, requires prior approval by the Judge Advocate General. In *United States v. Hinton*, 21 M.J. 267 (C.M.A. 1986), a civilian defense alibi witness had not complied with a subpoena. The findings were set aside because the government failed to issue a warrant of attachment. In *United States v. Williams*, 23 M.J. 724 (A.F.C.M.R. 1986), a key defense witness complied with a subpoena, but failed to return on the appointed day to which the case had been continued in order to obtain immunity for the witness. The court held that it was not abuse of discretion to exclude his out-of-court statement, but a warrant of attachment should have been issued.

2. Criminal charge. Article 47, UCMJ, states that a person who willfully neglects or refuses to appear as a witness, after having been properly subpoenaed to do so, is guilty of a Federal offense carrying a maximum punishment of a $500 fine and/or 6 months imprisonment. Enforcement of article 47 in Federal court can be pursued only by a U.S. Attorney.

In order to maintain a prosecution under article 47, a person must not only be duly subpoenaed but must be paid or tendered fees, including the fee for one day of actual attendance and mileage both ways, at the rates allowed to witnesses attending the courts of the United States. Article 47, UCMJ; JAGMAN, § 0146.

PART III - IMMUNITY (Key Numbers 849, 1140)

1409 INTRODUCTION

A. The concept of immunity. Because the privilege against self-incrimination protects an individual against the consequences of a criminal conviction or its equivalent, it follows that, if the possibility of a conviction can be nullified (through a grant of immunity), the right to refuse to testify becomes moot. The only difficulty with this reasoning is that compelled, though immunized, testimony may well lead to loss of employment and significant public stigma.

B. Forms of immunity

1. Testimonial and transactional immunity

a. Testimonial immunity, sometimes termed either "use" immunity or "use plus fruits" immunity, immunizes a witness against the subsequent use of his or her testimony and any derivative use. In theory, testimonial immunity allows prosecution of the witness for the offenses testified to if independent evidence is used. *See United States v. Lucas*, 25 M.J. 9 (C.M.A. 1987). There is, however, a heavy burden on the government to prove that none of the evidence against the accused was derived directly or indirectly from his immunized testimony. *United States v. Boyd*, 27 M.J. 82 (C.M.A. 1988). *See also United States v. England*, 33 M.J. 37 (C.M.A. 1991).

b. Transactional immunity immunizes the witness against prosecution for any offenses concerning which the witness testified.

2. Minimum constitutional requirement. The minimum requirement is "use" or testimonial immunity. *Kastigar v. United States*, 406 U.S. 441 (1972). This form of immunity protects a witness or accused from the use of the immunized testimony or its fruits, but it does not guarantee that the witness for accused will be free from prosecution of the offense suspected or revealed if other evidence, independent of the immunized testimony, is available.

3. Immunity in the military. The minimum form of immunity required by article 31 is "use" or testimonial immunity. *See United States v. Rivera*, 49 C.M.R. 259 (A.C.M.R. 1974), *rev'd on other grounds*, 1 M.J. 107 (C.M.A. 1975); Mil.R.Evid. 301(c)(1); R.C.M. 704(a) discussion. *See generally* Green, *Grants of Immunity and Military Law*, 1971-1976, 73 Mil. L. Rev. 1 (1976); Green, *Grants of Immunity and Military Law*, 53 Mil. L. Rev. 1 (1971).

1410 AUTHORITY TO GRANT IMMUNITY

A. Military personnel accused of offenses cognizable by court-martial may be granted immunity by the appropriate GCM convening authority. *United States v. Kirsch*, 15 C.M.A. 84, 35 C.M.R. 56 (C.M.A. 1964); R.C.M. 704(c). The decision to grant immunity is an executive decision, not subject to review by the military courts. As a general rule, an accused has no standing to contest the propriety of grants of immunity to prosecution witnesses. *United States v. Martinez*, 19 M.J. 744 (A.C.M.R. 1984), *petition denied*, 21 M.J. 27 (C.M.A. 1985). Note that approval of grants of immunity for military personnel subject to trial by court-martial will also require approval by the Attorney General of the United States if the case could possibly have Department of Justice interest. Concurrent Federal civilian and military jurisdiction is possible. *See* R.C.M. 704(c); *Grants of Immunity*, The Army Lawyer 22-25 (December 1973).

B. To what extent can a subordinate's actions (for example a staff judge advocate) bind a GCM convening authority in effectively granting immunity?

1. *In Cook v. Orser*, 12 M.J. 335 (C.M.A. 1982), the petitioner, an Air Force officer charged with failing to report visits to and contact with the Soviet Embassy, sought extraordinary relief in the form of a writ of mandamus directing the military judge to dismiss the charges in the case. In requesting this relief, he relied on two arguments. First, he claimed that his prosecution for these offenses was barred by a promise of immunity made by competent authority. Second, in the alternative, he maintained that due process of law required that his agreement with military authorities be enforced, and that the charges should be dismissed. The court granted the requested relief in a 2-to-1 decision. Judge Fletcher, writing the opinion of the court, concluded that the SJA as "prosecutor" made promises concerning nonprosecution to the petitioner, and that due process required appellate enforcement of the promise. Chief Judge Everett, in a concurring opinion, agreed with Judge Fletcher's due process analysis and also held that the GCM convening authority had delegated his authority to his SJA to negotiate a binding immunity agreement, which was subsequently ratified by the convening authority, thereby barring prosecution. Chief Judge Everett wrote: "Thus, if a subordinate acting for that commander -- especially if it is his staff judge advocate -- offers immunity and at a later time the commander ratifies the offer, then, once the accused meets its conditions, he cannot be prosecuted." *Id.* at 354.

2. In *United States v. Brown*, 13 M.J. 253 (C.M.A. 1982), the court judicially enforced a promise from an SJA to the accused to the effect that a discharge would be provided in exchange for "good information on drug activity." Chief Judge Everett reasoned that "fair play" requires enforcement of such an

agreement. Judge Fletcher held that an SJA, as a prosecutor, can bind the convening authority.

3. *In United States v. Kimble*, 33 M.J. 284 (C.M.A. 1991), the court enforced a special court-martial convening authority's promise to the accused that, if he successfully participated in a diversionary program, he would not be court-martialed. In upholding this de facto immunity from trial by court-martial, the court stated, "Regardless of whether the promise be one formally of immunity pursuant to RCM 704, or whether it be one that induces an accused into making admissions . . . or whether it is one that is in some other way relied on by the accused to his detriment, due process requires that the accused get the benefit of his bargain." This type of equitable immunity was also imposed in *United States v. Churnovic*, 22 M.J. 401 (C.M.A. 1986), in which Churnovic received the benefit of the command chief's promise that he would not get in trouble if he revealed the location of drugs. In that case, Churnovic's involvement was more extensive than the chief had originally suspected.

4. *See* JAGMAN, § 0138, for the procedural considerations involved in granting immunity. In general, a written recommendation for immunity is forwarded to the general court-martial convening authority. That officer will act upon the request after referring it to his staff judge advocate for advice. In cases involving espionage, subversion, aiding the enemy, sabotage, spying, violation of rules or statutes concerning classified information or the foreign relations of the United States, or other national security matters, the approval of the Attorney General is required. Approval of the Attorney General or his designee may also be required in cases involving any "major federal crimes." *See* "Memorandum of Understanding Between the Department of Defense and Justice," *reprinted in* MCM, 1984, app. 3.

B. Persons <u>not</u> triable by court-martial must be granted immunity by the Attorney General of the United States <u>or</u> by the GCM convening authority who has obtained approval from the Attorney General for such a grant. Title II, Organized Crime Control Act of 1970, 18 U.S.C. § 6004 (1970); R.C.M. 704(c)(2); JAGMAN, § 0138c.

C. The Organized Crime Control Act presents some questions. There appears to be an argument that the act superseded whatever inherent authority the military had to grant <u>any</u> immunity without a delegation of immunity power to the armed services. In a similar vein, the <u>insistence</u> that Department of Justice approval must be obtained where DOJ might have an interest--even when military authorities would otherwise have power to grant immunity--does not appear grounded in the statute (although the statute's underlying policy would support the conclusion). This issue has been addressed in a memorandum in

which then Assistant Attorney General Rehnquist opined that the Act did not supersede military authority to grant immunity except in those cases having Department of Justice interest.

1411 SCOPE OF MILITARY IMMUNITY -- POWER TO IMMUNIZE FOR NONMILITARY PROSECUTORS

To what extent could an immunized military witness be subject to a subsequent prosecution in a nonmilitary forum? This question is addressed in the following sections.

A. Federal prosecution. Military grants of immunity are binding on the Department of Justice (same sovereign). *See also* Art. 76, UCMJ.

B. State prosecution. State prosecutions are prohibited from using any immunized testimony or derivative evidence. *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

C. Foreign prosecution

1. The application of the fifth amendment right to matters involving possible foreign prosecution was left open by the Supreme Court in *Zicarelli v. Commission of Investigation*, 406 U.S. 472 (1974). At least three circuits have held that the possibility of grand jury testimony reaching the foreign country is so minimal that the fifth amendment privilege against self-incrimination is not raised. *In re Tierney*, 465 F.2d 806, 811-12 (5th Cir. 1972); *In re Parker*, 411 F.2d 1067, 1069-70 (10th Cir. 1969), *vacated*, 397 U.S. 96 (1970); *In re Weir*, 377 F. Supp. 919 (S.D. Cal.), *aff'd*, 495 F.2d 879 (9th Cir.), *cert. denied*, 419 U.S. 1038 (1974). *See also In re Cahalane* (also reported as *United States v. Doe*), 361 F. Supp. 226 (E.D. Pa.), *aff'd*, 485 F.2d 682 (3d Cir. 1973), *cert. denied*, 415 U.S. 989 (1974). Similarly, in *United States v. Yanagita*, 552 F.2d 940 (2d Cir. 1977), the court found the privilege inapplicable to a witness at trial who refused to answer for fear of prosecution by Japan. On the other hand, the District Court for Connecticut held otherwise in a well-written and persuasive opinion. *In re Cardass*, 351 F. Supp. 1080 (D. Conn. 1972). Other authority supporting the right to exercise the right against self-incrimination when only foreign prosecution makes the testimony incriminating is McCormick, *Evidence* at 260-62 (2d Ed. 1972). *See generally* Comment, *Fear of Foreign Prosecution and the Fifth Amendment*, 58 Iowa L. Rev. 1304 (1973); Comment, *The Fifth Amendment Protects a Witness Who Refuses to Testify for Fear of Self-Incrimination Under the Laws of a Foreign Jurisdiction, In re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972), 5 Rut.-Cam. L.J. 146 (1973). One of the usual justifications for finding the risk of foreign prosecution to be de minimis in the civilian cases is the ability of the

civilian to avoid foreign travel. Clearly, this argument does not apply to the servicemember subject to transfer overseas. As it is frequently difficult, if not impossible, to obtain immunity from the foreign state involved, a decision sustaining a refusal to testify for fear of possible foreign prosecution would usually mean an absolute inability to obtain the desired testimony.

2. The only military case to discuss the issue fully held that article 31 applied only to offenses triable in United States courts. *United States v. Murphy*, 7 C.M.A. 32, 21 C.M.R. 158 (1956). This case was decided, however, before *Murphy v. Waterfront, supra*, and was based in part on cases which would not have had the same significance in light of the *Waterfront* decision. Thus, this issue is not clearly resolved. What the *Murphy* case does make clear is that the accused cannot assert the right of a witness to refuse to answer. The privilege is one that is personal with the witness.

D. Possibility of incrimination must be real. For a witness to claim the right, and for immunity to be necessary, the possibility of incrimination must be "real and appreciable" rather than "imaginary and unsubstantial." McCormick, *supra*, at 263, *citing Brown v. Walker*, 161 U.S. 591 (1896); *Marchetti v. United States*, 390 U.S. 39, 48 (1968). As a practical matter, however, it takes only the merest possibility to allow the right to be invoked.

E. Effects of granting immunity

1. On the witness

a. The witness is required to testify, on pain of trial for refusal to testify, and possibly contempt, if the grant was broad enough. *E.g., United States v. Croley*, 50 C.M.R. 899 (A.F.C.M.R. 1975). Fear for one's safety is not a defense in a case for refusal to testify. *United States v. Quarles*, No. 74-0537 (N.C.M.R. 28 March 1976) (unpublished). Note that the grant of immunity usually constitutes an order to testify. If the order is legal, the witness could be prosecuted under Article 90 or 92, UCMJ.

b. Prosecution of the witness for the offenses involved in the grant becomes impossible or unlikely. *See United States v. Rivera*, 1 M.J. 107 (C.M.A. 1975); *United States v. Eastman*, 2 M.J. 417 (A.C.M.R. 1975).

2. On the convening authority, supervisory authority, and the staff judge advocate. In some cases, the grant of immunity may preclude these officers from taking post-trial review action if they or their subordinates recommend or grant either immunity or clemency for a witness in a case. *But cf. United States v. Newman*, 14 M.J. 474 (C.M.A. 1983) (since granting use immunity does not equate to expression of convening authority's views as to credibility of

witness, such convening authority not necessarily disqualified from taking post-trial action on case).

F. Obtaining a grant of immunity. *See generally* JAGMAN, § 0138.

G. Immunity at trial

1. Notice. Mil.R.Evid. 301(c)(2) requires that grants of immunity (or lesser promises of leniency in exchange for testimony) be in writing and served on the accused prior to arraignment (or within a reasonable time before the witness testifies). Otherwise, the witness involved may be disqualified from testifying. This notice requirement was adopted from *United States v. Webster*, 1 M.J. 216 (C.M.A. 1976). *See also United States v. Saylor*, 6 M.J. 697 (N.C.M.R. 1978) (military judge has responsibility of fashioning a ruling designed to protect the accused's substantial rights); *United States v. Carrol*, 4 M.J. 674 (N.C.M.R.), *aff'd*, 4 M.J. 89 (C.M.A. 1977) (notice requirement may be waived).

2. Motion to dismiss. If an immunized witness is improperly brought to trial despite the terms of the grant or promise involved, the defense should raise the matter by a motion to dismiss pursuant to R.C.M. 704.

3. Burden of proof. If the government is prosecuting an accused who had testified earlier pursuant to a grant of immunity, the government bears a heavy burden of showing in an article 39(a) session that it will be using independent, legitimate evidence against the accused. *United States v. Whitehead*, 5 M.J. 294 (C.M.A. 1978); *United States v. Rivera, supra*. The government will be required to prove, not merely represent, that no use was made of the immunized testimony. Thus, it may be appropriate, where prosecution of the immunized witness is contemplated, to make a record of evidence available against the witness prior to issuance of the grant. *See also United States v. Gardner*, 22 M.J. 28 (C.M.A. 1986) (government discharged its burdens of proving that its evidence against the accused was not derived from his immunized testimony in a previous proceeding); R.C.M. 704 (a) discussion.

H. De facto immunity. While the issuance of grants of immunity is a formal and highly controlled process, it is possible to obtain the same effects via the exclusionary rule. Thus, a violation of someone's fifth amendment or article 31 rights will exclude any resulting or derivative evidence. A promise of clemency that is relied upon may be ineffective insofar as it may not prevent trial per se, but it will result in the exclusion of the witness' pretrial testimony given pursuant to the promise. *See United States v. Whipple*, 4 M.J. 773 (C.G.C.M.R. 1978) (promise that nothing would happen if the accused turned himself in held binding).

1412 COMPELLING THE GOVERNMENT TO GRANT "USE IMMUNITY" TO DEFENSE WITNESSES

A. In section 1411 of this chapter, the concept of immunity for government witnesses is discussed. In recent years, commentators have increasingly urged that a criminal defendant should have the right, in limited circumstances, to obtain immunity from prosecution for a potential defense witness. Westen, *Compulsory Process*, 73 Mich. L. Rev. 71, 166 (1974); Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 Colum. L. Rev. 953 (1967); *Note, A Re-examination of Defense Witness Immunity: A New Use for Kastigar*; 10 Harv. J. on Legis. 74 (1972); *Note, The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 Harv. L. Rev. 1266 (1978). This right is based on one of two constitutional theories: due process or compulsory process.

B. The due process argument claims that, under the fifth amendment, it is unfair for the government to grant use immunity to its witnesses and not to grant immunity to potential defense witnesses. Furthermore, denial of defense witness immunity creates a serious obstacle to the search for truth. Both arguments were rejected by the Second Circuit in *United States v. Turkish*, 633 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); however, the two theories do seem consistent with the Supreme Court's holding in *Chambers v. Mississippi*, 410 U.S. 284 (1973), wherein the court found a due process denial in the state's refusal to allow a defendant to introduce certain trustworthy, exculpatory evidence. *Chambers* arose when the state, in reliance on its rule against permitting a party to impeach its own witness, prevented the defendant from cross-examining a witness who had confessed to the crime. The *Turkish* case appears to adopt the majority position. *Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966).

C. In *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976), the Third Circuit indicated a willingness to dismiss a case in which the state refused to grant immunity to a defense witness after the prosecutor had engaged in improper conduct. In that case, a defense witness was allegedly going to testify that she, rather than the accused, committed the crime in question. The prosecutor confronted the witness outside the court and threatened her with prosecution if she incriminated herself. She thereafter refused to answer questions, and the accused was convicted. Reversing, the court held that the accused had been denied a fair trial in that he had been deprived of his constitutional right to call witnesses in his defense by the actions of the prosecutor.

The majority rule of the Federal courts of appeal is that a criminal accused has no constitutional right to have defense witnesses immunized. For a discussion of the cases, see *United States v. Villines*, 13 M.J. 46 (C.M.A. 1982).

D. Position of the Court of Military Appeals

In *United States v. Villines, supra*, the Court of Military Appeals addressed the issue of defense entitlement to witness immunity. A majority of the court (Chief Judge Everett and Judge Fletcher) held that a military judge could review for abuse of discretion the decision of the government in failing to grant immunity to a defense witness. Judge Fletcher declined to adopt a standard of review. Chief Judge Everett held that Article 46, UCMJ provides an accused a statutory entitlement to immunity for defense witnesses and that the military judge possesses the authority to grant testimonial immunity. Judge Cook held that a military judge has no authority to review the government's decision to deny immunity and no authority to grant immunity.

E. Immunity for defense witnesses under R.C.M. 704(e)

R.C.M. 704(e) provides a mechanism for dealing with defense requests for immunity. Initially, the defense must seek immunity from the appropriate GCM convening authority. If the request if denied, the defense may renew the request before the military judge. The military judge must make two findings: (a) That the proffered testimony is of such central importance to the defense case that it is essential to a fair trial; and (b) that the witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify. If the defense satisfies both requirements, the military judge may grant relief by directing that the proceedings be abated unless an appropriate GCM convening authority grants immunity. The rule does not permit the judge to grant immunity himself. The burden is on the defense to show the need for immunity. The standard of proof is unsettled, although it appears the minimum standard will be proof by a preponderance of the evidence. *See Villines, supra*; R.C.M. 905 (c)(1). *See also United States v. O'Bryan*, 16 M.J. 755 (A.F.C.M.R. 1983), *petition denied*, 18 M.J. 16 (C.M.A. 1984), which held that it was not abuse of discretion in refusing to grant immunity to a defense witness whose pretrial admission was not clearly exculpatory of the accused. In *United States v. James*, 22 M.J. 929 (N.M.C.M.R. 1986), there was no need to abate the proceedings where an alleged co-conspirator was not immunized; his expected testimony was only marginally exculpatory, and the government intended to prosecute him.

1413 LIMITED IMMUNITY FOR SUBSTANCE ABUSE SELF-REFERRAL

Statements regarding past drug use or possession, which are made to appropriate persons in the course of voluntary self-referral and are made for treatment or rehabilitation purposes, may not be used for disciplinary purposes or to characterize a discharge. They may be used for impeachment or rebuttal, though, and the members' commanding officer has access to the statements. This limited use immunity does not prohibit disciplinary action or other adverse action based on independently derived evidence. *See* OPNAVINST 5350.4 and MCO P5300.12.

PART IV
EYEWITNESS IDENTIFICATION (Key Numbers 1099 et seq)

1414 BACKGROUND

In order to mitigate the grave danger of mistake resulting from eyewitness identification testimony, the Supreme Court has established two constitutional safeguards applicable in criminal proceedings. First, the Court has established a sixth amendment right to counsel at post-indictment identifications at which the defendant is present. Second, the Court has recognized a due process right to exclude unreliable identification testimony that results from procedures which are both unnecessarily suggestive and conducive to irreparable misidentification. *See generally United States v. Quick*, 3 M.J. 70 (C.M.A. 1977) for a military case which addresses these safeguards. Rule 321 of the Military Rules of Evidence attempts to codify these Supreme Court standards as well as provide procedures for admitting eyewitness testimony at trial.

1415 RIGHT TO COUNSEL

A. When does the right attach?

1. In *United States v. Wade*, 388 U.S. 218 (1967), the Supreme Court held that:

a. The sixth amendment guaranty of the assistance of counsel applies to "critical stages" of the proceedings.

b. The accused is guaranteed, in addition to counsel's presence at trial, that he need not stand alone against the state at any stage of the prosecution, formal or informal, in or out of court, where counsel's absence might derogate the accused's right to a fair trial.

c. A post-indictment lineup is a "critical stage" of a criminal prosecution at which the accused is entitled to the assistance of counsel unless the right is waived.

2. In *Kirby v. Illinois*, 406 U.S. 682 (1972), the Supreme Court ruled that the right to counsel does not attach until adversary judicial proceedings are initiated, whether by way of a formal charge, preliminary hearing, indictment, information, or arraignment. In *Kirby*, the Court specifically held that the right did not attach to an identification made at a police station showup after the

accused had been arrested, but before he had been indicted or otherwise formally charged with any criminal offense.

3. In *Gilbert v. California*, 388 U.S. 263 (1967), the Supreme Court held that, in those situations where counsel rights have attached, violation of these rights results in the automatic exclusion of that identification and all subsequent identifications which are not based on an independent source.

4. In *Moore v. Illinois*, 434 U.S. 220 (1977), the Supreme Court overturned an accused's conviction where the trial court had permitted the prosecution to introduce the rape victim's testimony that she had previously identified the accused as her assailant at a preliminary hearing. The accused had been neither represented by counsel nor offered appointed counsel during that preliminary hearing. The trial court had ruled that the victim's testimony was admissible because the prosecution had shown an independent basis for the victim's identification of the accused. The Supreme Court specifically ruled that the sixth amendment right to the assistance of counsel at pretrial identification proceedings conducted after the initiation of adversary judicial criminal proceedings against the accused applies:

a. To one-on-one identification proceedings as well as to lineups; and

b. to identification procedures conducted at judicial proceedings, such as a preliminary hearing.

The court further ruled that the identification resulting from the uncounseled confrontation was per se excludable at trial, regardless of whether there was an independent basis for the victim's identification at that proceeding.

5. Rule 321 of the Military Rules of Evidence differentiates between the right to counsel at military and nonmilitary lineups.

a. A "military lineup" is one conducted by persons subject to the UCMJ or by their agents. At such a lineup, counsel rights attach only after preferral of charges or imposition of pretrial restraint as defined by R.C.M. 304 and 305 (i.e., arrest, restriction in lieu of arrest, or pretrial confinement--not apprehension).

b. A "nonmilitary lineup" is one conducted by an official or agent of a domestic governmental entity (Federal, state, or local). The time of attachment and scope of counsel rights in such cases is determined by applicable Federal law.

c. The right to counsel at a "military lineup" is limited to appointed article 27(b) counsel. The suspect has no right to individual military counsel by name or to privately retained civilian counsel. Furthermore, the right may be waived if freely, knowingly, and intelligently made.

d. No mention is made in the Military Rules of Evidence regarding any counsel rights at lineups conducted by foreign authorities.

B. Special situations

1. Photographic identifications

a. In *United States v. Ash*, 413 U.S. 300 (1973), the Supreme Court held that there was no right to counsel at a photographic lineup even though the lineup took place after the initiation of judicial adversary proceedings. The Court felt that such a proceeding did not constitute a "critical stage" in the criminal prosecution so as to require the presence of counsel to assist the accused in confronting the government within the adversarial arena. Comparing a photographic array to the prosecutor's pretrial interview of a witness, the Court held that, since the accused had no right to be present at either proceeding, no requirement for counsel existed.

b. In *United States v. Smith*, 44 C.M.R. 904 (A.C.M.R. 1971), the Army Court of Review adopted an approach similar to that of *Ash* by holding that the right to the presence of counsel applies only to corporal, not photographic, exhibitions of an accused to witnesses.

2. On-the-scene identifications

a. Both military and civilian courts have generally adopted the position that no counsel rights attach to crime scene identifications.

(1) *Russell v. United States*, 408 F.2d 1280 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 928 (1969).

(2) *United States v. Batzel*, 15 M.J. 640 (N.M.C.M.R. 1982).

b. When considering such confrontations, these courts have held that the delay occasioned by summoning counsel may diminish the reliability of any identification obtained, thus defeating a principal purpose of the counsel requirement.

3. Accidental viewings

a. In *Stovall v. Denno*, 388 U.S. 293 (1967), the Supreme Court said that the reason for fashioning the exclusionary rule of *Wade* and *Gilbert* was to "deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel." *Id.* at 297.

b. Most courts therefore refuse to apply the *Wade/Gilbert* counsel requirements to inadvertent and unintentional post-indictment confrontations between the accused and a witness because to do so would not further the purposes which the rule is designed to achieve.

(1) *United States v. Young*, 44 C.M.R. 670, 677 (A.F.C.M.R. 1971) (where robbery victims observed accused being brought into confinement facility, court ruled that the "requirement for counsel can have no logical application to a situation in which the accused is inadvertently and unintentionally exposed to witnesses").

(2) *Green v. Loggins*, 614 F.2d 219 (9th Cir. 1980), (excellent discussion of accidental viewing cases). (While counsel rights did not attach at the accidental viewing, that identification was inadmissible on due process grounds. *See* section 1416, *infra*.)

C. Counsel's role at lineup

1. *United States v. Webster*, 40 C.M.R. 627 (A.C.M.R.), *petition denied*, 18 C.M.A. 640, 40 C.M.R. 327 (1969), states that counsel's presence at a lineup does not invest him with any authority to prevent, interfere with, or control the lineup procedure. He may offer suggestions to the individual running the lineup, but that person is not required to acquiesce to such desires or demands.

2. If counsel cannot control the conduct of a lineup, it is clear that he will not be deemed to have waived any suggestive procedures which he cannot change. Considerable difference of opinion exists as to the effect of counsel's failure to object to the government's employment of suggestive procedures when he is given the opportunity to lodge objections.

3. If, in fact, counsel is to serve only as an observer to preserve accused's confrontation right at trial, it would seem that there exists no affirmative duty to lodge objections at the actual lineup proceedings. *See ALI Model Code of the Pre-Arraignment Procedure*, Comment 211 (Ten. Draft No. 6, 1974).

4. A failure to object at the time of the lineup, however, could possibly carry some factual implication that the accused and his counsel acquiesced to the fairness of the identification process to which they later object at trial. Some courts consider counsel's pretrial failure to object as one factor in determining whether the totality of the circumstances resulted in an unfair confrontation. *Clemons v. United States*, 408 F.2d 1230 (D.C. Cir. 1968) (*en banc*); *United States v. Rundle*, 464 F.2d 1348 (3d Cir. 1972); *Sutton v. United States*, 434 F.2d 462 (D.C. Cir. 1970).

D. Substitute counsel

1. In *United States v. Wade*, 388 U.S. 218, 238 n.27 (1967), the Supreme Court said that "although the right to counsel usually means a right to the suspect's own counsel, provision for a substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's own counsel."

2. Some courts have interpreted the *Wade* language to mean that as long as an impartial attorney is present to observe the lineup, the demands of the sixth amendment have been met even though the attorney does not establish a confidential relationship with the accused in regard to the charges being investigated. *Zamora v. Guam*, 394 F.2d 815 (9th Cir. 1968).

3. Although the use of substitute counsel may be appropriate in cases where the accused's counsel refuses to appear or is not able to appear immediately, such a procedure should be discouraged.

4. When a substitute is employed, efforts to insure impartiality are critical. Furthermore, the observations and opinions of the surrogate with regard to the identification proceeding must be transmitted to accused's actual counsel. *See Marshall v. United States*, 436 F.2d 155 (D.C. Cir. 1970).

5. In *United States v. Longoria*, 43 C.M.R. 676 (A.C.M.R. 1971), *petition denied*, 20 C.M.A. 669, 43 C.M.R. 413 (1971), military defense counsel was called upon to represent the interests of some twenty soldiers required to appear in a lineup. No attorney-client relationship was established with the suspects either before or after the lineup, but substitute counsel did relay to accused's subsequently appointed counsel the nature and conduct of the confrontation. The procedure was sanctioned by the appellate court.

6. In *United States v. Kirby*, 427 F.2d 610 (D.C. Cir. 1970), a post-indictment lineup was held in the absence of accused's previously appointed attorney. A substitute counsel from the legal aid agency was present, however, to

protect accused's interests. In allowing the testimony of identification obtained at this proceeding, the Federal district court ruled that the use of substitute counsel here was allowable since failure to notify accused's actual counsel was the result of administrative oversight and not governmental misconduct.

1416 DUE PROCESS

A. Case law

1. In *Stovall v. Denno*, 388 U.S. 293 (1967), the Supreme Court first recognized accused's due process right to exclude from evidence testimony of identifications resulting from unnecessarily suggestive procedures conducive to irreparable misidentification. *Stovall* involved a confrontation between the accused and an assault victim one day after the victim underwent major surgery to save her life. In a one-man showup conducted in the victim's hospital room, the handcuffed accused was presented to the victim and asked whether the accused "was the man." The accused, the only black man in a room containing five white policemen and two white hospital attendants, was identified as the assailant.

a. In rejecting the defense claim that the accused's right to due process had been violated, the Court stated that the applicable test was whether, judged by the totality of the circumstances, the procedures used were unnecessarily suggestive and conducive to irreparable misidentification.

b. The Court concluded that the procedures used in *Stovall* were not unnecessarily suggestive and conducive to irreparable misidentification since the suggestive nature of the confrontation was indeed necessary, and the need to secure an identification from a dying victim was a circumstance that outweighed the highly suggestive procedure employed.

c. Similar circumstances occurred in a military case, *United States v. Batzel*, 15 M.J. 640 (N.M.C.M.R. 1982), where the court found nothing improper in the showup, minutes after the offense, of the assailant to the victim who already had one eye swollen shut as a result of her injuries and was rapidly losing sight in the other eye. The court reflected that perhaps a showup involving a single handcuffed individual in the custody of police is always suggestive, but quickly recognized that it does not follow that the showup was unnecessary under the circumstances.

The need to analyze the circumstances surrounding the requirement for a showup is emphasized in *United States v. White*, 17 M.J. 953 (A.F.C.M.R. 1984), wherein the victim of a locker theft chased the thief but lost

him. The police apprehended a suspect, matching a very detailed description of the thief himself, and his clothing. Fifteen to twenty minutes later the victim viewed the accused, while the accused was the only black male in the room and the only person not in uniform. The court found the identification to be unreliable because it was unnecessarily suggestive. (However, a subsequent lineup was not the product of the unduly suggestive pretrial showup.)

2. In *Simmons v. United States*, 390 U.S. 377 (1968), FBI agents showed snapshots of the accused to witnesses of a bank robbery in order to obtain a lead in solving the crime. Identification of the accused as the robber led to his arrest and indictment. At trial, witnesses who had previously viewed the snapshots made in-court identifications of the accused that helped lead to his conviction. On appeal, the accused claimed that the unnecessarily suggestive photo identification fatally tainted the subsequent in-court identifications.

a. In rejecting the accused's argument, the Supreme Court held that the in-court identifications would be suppressed only upon a showing that the photographic identification procedure was so impermissibly suggestive as to raise a very substantial likelihood of irreparable misidentification.

b. The identification procedure used in *Simmons* was not impermissibly suggestive, since the police use of the photographs was proper in light of the requirement for swift action. In addition, the possibility of irreparable misidentification was remote, since the witnesses had ample time and opportunity to view the accused under favorable conditions during the robbery.

3. In *Coleman v. Alabama*, 399 U.S. 1 (1970), while the accused's conviction for assault with intent to commit murder was vacated, and the case remanded to determine whether the denial of counsel at a preliminary hearing constituted prejudicial error, the Court also decided whether a pretrial lineup was so conducive to irreparable misidentification as to fatally taint the victim's in-court identification of the accused. Rejecting this due process argument, the Court found that the victim's courtroom ID was based entirely on observations made at the time of the assault and not induced by the conduct of the lineup. It was immaterial that (1) the victim testified that, when called to the station house, he took it for granted that the police had caught his assailants, since there was no evidence that anything the police said or did prompted the victim's spontaneous lineup identification of the accused; (2) only the accused was required to speak at the lineup, since the victim identified accused before he said anything; and (3) accused was the only lineup participant wearing a hat, since there was no evidence that the victim's identification of accused was based on that point or that the police required the wearing of the hat.

4. *Neil v. Biggers*, 409 U.S. 188 (1972), synthesized the prior case law by announcing that evidence of a pretrial identification is not inadmissible simply because the process is unnecessarily suggestive. In addition, the process must be conducive to misidentification. This principle has been affirmed by the Court of Military Appeals in *United States v. Quick*, 3 M.J. 70 (C.M.A. 1977) and in *United States v. Fors*, 10 M.J. 367 (C.M.A. 1981).

a. In the *Biggers* case, the accused was identified as the victim's rapist at a stationhouse showup seven months after the crime. The victim had been in her assailant's presence for some time and had directly observed him both indoors and under a full moon outdoors. She testified that she had "no doubt" that Biggers was her assailant. She previously had given the police a description of the assailant. Furthermore, she had made no identification of others presented at previous lineups or through photographs.

b. In allowing the identification into evidence, the court held that "admission of evidence of a [unnecessarily suggestive] showup without more does not violate due process." Rather, the "central question is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." *Id.* at 199.

c. In determining whether there is a substantial likelihood of misidentification, the trial judge must balance the following factors:

(1) The opportunity of the witness to view the criminal at the time of the crime;

(2) the witness' degree of attention;

(3) the accuracy of the witness' prior description of the criminal;

(4) the level of certainty demonstrated by the witness at the confrontation; and

(5) the length of time between the crime and the confrontation.

5. In *Manson v. Brathwaite*, 432 U.S. 98 (1977), the Supreme Court ruled that a one-photo identification did not violate due process when, under the totality of the circumstances as determined by an application of the *Biggers'* criteria, the identification was reliable.

6. In addition to the factors laid out in *Biggers*, courts have considered the following in determining whether an identification is reliable.

a. The exercise by the witness of unusual care in making the observation. *United States v. Green*, 436 F.2d 290 (D.C. Cir. 1970).

b. Prompt identification at first confrontation. *People v. Covington*, 265 N.E. 2d 112 (1970).

c. Fairness of the lineup. *United States v. Longoria*, 43 C.M.R. 676 (A.C.M.R.), *petition denied*, 20 C.M.A. 669, 43 C.M.R. 413 (1971).

d. The presence of distinctive characteristics in defendant. *United States v. Zeiler*, 447 F.2d 993 (3d Cir. 1971).

e. Prior acquaintance of witness with suspect. *People v. Davis*, 201 N.E. 2d 314 (1970).

f. Witness' ability and training in identification. *United States v. Ganter*, 436 F.2d 364 (7th Cir. 1970).

7. Using reliability as a standard, the courts have been loath to exclude identifications based on due process grounds. In the following cases, however, identifications were held to be constitutionally impermissible.

a. *Swicegood v. Alabama*, 577 F.2d 1322 (5th Cir. 1978). (Excellent discussion of standards court must apply in reliability analysis. Lineup involved persons who were all of different age than accused, occurred three weeks after the offense, and involved two victims who had only given very general descriptions and had an opportunity to discuss their view of accused during lineup with each other).

b. *Foster v. California*, 394 U.S. 440 (1969) (accused first placed in lineup with considerably shorter men and, after one positive identification was made, a one-on-one confrontation was arranged with robbery victim who made only tentative identification until second lineup at which accused was only man who had been in the first lineup).

c. *United States v. Field*, 625 F.2d 862 (9th Cir. 1980) (in-court identification of two witnesses tainted where both had seen accused only briefly during robbery, both had learned before trial that a particular photo of accused was of the person police had arrested, both had failed to identify accused from a pretrial photo spread, and both had seen accused in courthouse before trial at which adduced he was the suspect).

8. As with the fourth amendment's "fruit of the poisonous tree," the taint of a too suggestive pretrial identification will presumptively carry over to all subsequent identification unless the government can establish that the subsequent identification is based on an independent source. This will not be the case, however, if the initial identification creates a very substantial likelihood of irreparable misidentification. In this latter situation, all subsequent identifications will be suppressed regardless of what other evidence of reliability the government desires to present. *Neil v. Biggers*, 409 U.S. 188 (1972).

9. In the following cases, in-court identifications based on an independent source have been admitted even though suggestive pretrial identifications have been suppressed.

a. *United States v. Smith*, 44 C.M.R. 904 (A.C.M.R. 1971).

b. *United States v. Talavera*, 2 M.J. 799 (A.C.M.R. 1976), *aff'd on other grounds*, 8 M.J. 14 (C.M.A. 1979).

B. Military Rule of Evidence 321

1. Mil.R.Evid. 321 has adopted the Supreme Court standards of due process pertaining to eyewitness evidence. The rule provides specifically that:

> When an objection raises the issue of an unreliable identification, the prosecution must prove by a preponderance of evidence that the identification was reliable under the circumstances; provided, however, that if the military judge finds the evidence of an identification inadmissible under this subdivision, a later identification may be admitted if the prosecution proves by clear and convincing evidence that the later identification is not the result of the inadmissible identification.

Mil.R.Evid. 321(d)(2).

1417 FOURTH AMENDMENT CONSIDERATIONS

A. May a person be compelled to appear in a lineup?

1. In *United States v. Kittell*, 49 C.M.R. 225 (A.F.C.M.R. 1974), the Air Force Court of Military Review held that it was not improper to require airmen to appear in formation for the purpose of identifying an unknown suspect

to a crime. Such a practice does not constitute a seizure within the meaning of the fourth amendment such that a preliminary showing of reasonableness is required.

2. The procedure in *Kittel* was a lawful exercise of the commander's inherent responsibility to investigate offenses allegedly committed by members of his command similar in nature to the subpoenas issued to "potential defendants" in *United States v. Dionisio*, 410 U.S. 1 (1973). In *Dionisio*, the Supreme Court concluded that compelling a person to appear before a grand jury did not constitute an unreasonable "seizure." *Cf. Davis v. Mississippi*, 394 U.S. 721 (1969), where accused's rape conviction was overturned because fingerprints linking him to the crime were obtained as the result of an illegal arrest of his person.

B. What effect does an illegal apprehension have on a subsequent eyewitness identification?

1. If the witness' identity was discovered, or his cooperation secured only as a result of an unlawful search or arrest of the accused, then any subsequent identification will be suppressed unless based on an independent source. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

2. In *United States v. Crews*, 445 U.S. 463 (1980), the accused was illegally arrested and photographed while in custody. These photographs were subsequently shown to the robbery victim who identified the accused as her assailant. At trial, the victim made an in-court identification of the accused. In refusing to suppress evidence of the in-court identification, a majority of the Supreme Court held that the illegal arrest did not taint any of the "three distinct elements" that normally comprise an in-court identification. These "three distinct elements" were described as follows:

a. First, the arrest did not produce the victim's presence at trial, since she had called the police immediately after having been robbed and well before the accused's illegal arrest.

b. Second, the arrest did not taint the victim's ability to give accurate in-court identification testimony. Applying the criteria set forth in *Neil v. Biggers*, 409 U.S. 188 (1972), the Court concluded that the victim's courtroom identification was based on her independent recollection of the event, not on the suppressible pretrial photo array.

c. Third, the accused's physical presence at trial is not challengeable on the grounds of an illegal arrest. *Frisbie v. Collins*, 342 U.S. 519

(1952), stands for the proposition that an illegal arrest, without more, cannot bar subsequent prosecution, nor is it a defense in a trial which is based on evidence wholly untainted by police misconduct.

3. See chapter XIII, SEARCH AND SEIZURE, *supra*, for a more detailed discussion on the effect of an improper seizure on derivative evidence. The issue has been raised in a number of cases, and what constitutes a "seizure" in the military setting remains inexact.

1418 RELATED ISSUES

A. Article 31 warnings not required

1. In *Holt v. United States*, 218 U.S. 245 (1910), Justice Holmes observed that "[t]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it is material."

2. In *United States v. Webster*, 40 C.M.R. 627 (A.C.M.R.), *petition denied*, 18 C.M.A. 640, 40 C.M.R. 327 (1969), an Army Court of Military Review held that it is not necessary that a suspect be advised under article 31 before placing him in a lineup. Furthermore, the use of reasonable coercion is permissible when requiring a suspect to participate in a lineup.

B. Countering obstructionist defense tactics

1. Occasionally, suspects, by drastically altering their physical appearance prior to a confrontation (e.g., cutting hair, growing beard, etc.), will attempt to frustrate efforts by the government to conduct a meaningful lineup.

2. In *United States v. Rosato*, 3 C.M.A. 143, 11 C.M.R. 143 (1953), and again in *United States v. Eggers*, 3 C.M.A. 191, 11 C.M.R. 191 (1953), the Court of Military Appeals laid down standards which recognize that acts requiring only the passive cooperation of the accused can be compelled without violating the privilege against self-incrimination. Thus, it allows the compulsion of such acts as forcibly shaving a man, or trimming his hair, requiring him to grow a beard, or to wear a wig. *See also United States v. Cain*, 5 M.J. 844 (A.C.M.R. 1973) (required act of showing a tooth to the court was not incriminating communication within the meaning of article 31 or the fifth amendment); *United States v. Akgun*, 19 M.J. 770 (A.C.M.R. 1984) (compelling a suspect to produce a voice exemplar does not violate the privilege against self-incrimination).

3. *United States v. Jackson*, 476 F.2d 249 (7th Cir. 1973) (allows prosecution to present evidence of accused's recent alteration of appearance and to argue its relevance on the issue of guilt or innocence).

C. Expert testimony

1. Can the defense present expert testimony to show that eyewitness identifications are inherently unreliable and therefore not worthy of belief? This question is yet unresolved in the military justice system.

2. The leading military case in this area is *United States v. Hulen*, 3 M.J. 275 (C.M.A. 1977), wherein the Court of Military Appeals upheld the trial judge's denial of a defense requested expert witness in the area of eyewitness identification. The Court of Military Appeals found the judge's action to be proper, since the defense failed to establish that the proposed testimony was based upon any generally accepted demonstrable scientific principle. From this position of unanimity, the court members split in their opinion as to whether such evidence could ever be admissible. Judge Perry and Chief Judge Fletcher suggested that, under proper circumstances, such testimony might rise to the level of a scientific principle and therefore would, as a matter of right, warrant consideration by the trier of fact. Judge Cook, on the other hand, felt that the admissibility of such evidence should always be within the sound discretion of the military judge.

3. In *United States v. Hicks*, 7 M.J. 561 (A.C.M.R.), *petition denied*, 7 M.J. 249 (C.M.A. 1979), one panel of the Army Court of Military Review sided with Judge Cook and called upon extensive Federal court authority to support its position. Essentially, the court stated that, even if such testimony could rise to the level of a scientific principle, the trial judge would ultimately determine its admissibility based on its probative value compared to its prejudicial effect. *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973); *United States v. Brown*, 501 F.2d 146 (9th Cir. 1974); *United States v. 60.14 Acres of Land*, 362 F.2d 660 (3d Cir. 1966). *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), held that expert testimony on eyewitness identification may be admissible, but that such admission is not automatic. *Downing* discarded the test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) regarding expert testimony and recommended focusing on the reliability of the scientific principles, the connection between them, the facts in issue, and the likelihood of confusing the jury.

4. Mil.R.Evid. 702 does not follow the *Frye* doctrine, which required expert testimony to be premised on a generally accepted scientific principle. Instead, the rule sets as the standard for admitting such evidence that it "assist the trier of fact to understand the evidence or to determine a fact in issue." If the evidence is found to be useful under Mil.R.Evid. 702, it may be

admissible unless the trial judge decides that under Mil.R.Evid. 403 its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. The continuing validity of *Frye* is unclear.

5. Buckhout, *Eyewitness Testimony*, 231 Scientific American 23 (1974); Buckhout, *Psychology and Eyewitness Testimony*, 2 Law and Psych. Rev. 75 (1976); Doob & Kirshenbaum, *Bias and Police Lineups - Partial Remembering*, 1 J. of Police Science and Admin 287 (1973); Loftus, *Reconstructing Memory; The Incredible Eyewitness*, 15 Jurismetrics J. 188 (1975) provide discussions of the highly unreliable nature of eyewitness identifications.

D. Defense right to compel a lineup

1. The majority position is that an accused has no right to force the government to conduct a lineup to test the reliability of a previously held photographic array or to otherwise test a witness' powers of perception. *United States v. Zane*, 495 F.2d 683 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974); *United States v. McGhee*, 488 F.2d 781 (5th Cir. 1974); *United States v. White*, 482 F.2d 485 (4th Cir. 1973), *cert. denied*, 415 U.S. 949 (1974); *United States v. Furtney*, 454 F.2d 1 (3d Cir. 1972); *United States v. Kennedy*, 450 F.2d 1089 (9th Cir. 1971), *cert. denied*, 406 U.S. 924 (1972); *United States v. Ravich*, 421 F.2d 1196 (2d Cir. 1970); *United States v. Hill*, 449 F.2d 743 (3d Cir. 1971); *United States v. Hurt*, 476 F.2d 1164 (D.C. Cir. 1973).

2. In *Evans v. Superior Court*, 114 Cal. Rptr. 121, 522 P.2d 681 (1971), the California Supreme Court held that an accused has a due process right to a lineup "when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." *See also In re W.C.*, 29 Cr.L. 1007 (8 April 1981), where the New Jersey Supreme Court said that the trial judge has inherent authority to order a pretrial defense-requested lineup if (1) identification will be a material issue, (2) a reasonable likelihood exists that a lineup would be of some probative value, and (3) the request is timely raised by the defense.

3. Whether an in-court lineup may be held, or the accused allowed to sit with spectators at trial, is a matter within the trial judge's discretion. *United States v. Archibald*, 734 F.2d 938 (2d Cir. 1984); *United States v. Hamilton*, 469 F.2d 880 (9th Cir. 1972); *United States v. Williams*, 436 F.2d 1166 (9th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971).

4. Trant, *Defense-Requested Lineups*, The Advocate, (Jul-Aug 1979) discusses this issue further.

E. Cautionary instruction

1. There exists no specific requirement in the military that a special instruction concerning eyewitness testimony be given. The trial judge need only instruct on the witness' credibility and the government's burden of proof.

2. In *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), the court recognized the need for an instruction on eyewitness identification that would specifically alert the jury to the vagaries of such testimony and provided a sample instruction to that effect. It held that trial judges should, as a matter of routine, include such an instruction in cases where identification is a major issue, even absent a defense request, though failure to give such an instruction in this case was held not to be prejudicial in the absence of a defense request. *United States v. McLaurin*, 22 M.J. 310 (C.M.A. 1986) held that the military judge need not give a *Telfaire* instruction sua sponte. However, the opinion did suggest that military judges give a *Telfaire* instruction when requested.

3. In *United States v. Cannon*, 26 M.J. 674 (A.F.C.M.R. 1988), the accused was found guilty of stealing some money from the credit union account of another servicemember by using the victim's ATM card to withdraw the money without his permission. At trial, the government produced two witnesses against the accused who were able to testify that they saw the accused making a withdrawal from the ATM in question at about the same time as the illegal withdrawals were known to have occurred. Prior to trial, the witnesses were also able to pick the accused out of a photo lineup. The accused was black. One of the government witnesses was white and the other one was Asian-Indian. The defense counsel requested an instruction regarding the potential for misidentification in cases of interracial identification, but the military judge declined to give it. The court found this to be error, reasoning that, in cases of interracial identification, an instruction along the lines of *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972) must be given when defense counsel requests it. The Court of Military Appeals expanded on the *Cannon* decision in *United States v. Thompson*, 31 M.J. 125 (C.M.A. 1990). In *Thompson,* the court opined that a cross-racial identification instruction is required when requested by the defense and when cross-racial identification is a primary issue in a case. The court highlighted that, just because the accused and the witness are of a different race, this alone is not enough to mandate issuance of the instruction.

1419 INTRODUCTION OF EYEWITNESS TESTIMONY

A. Admissibility of eyewitness testimony

1. Under the pre-Mil.R.Evid. rules in the MCM, the hearsay definition encompassed any in-court reference to extrajudicial statements of

identification and, therefore, those statements were inadmissible hearsay unless they fell within a hearsay exception or a then-existing special bolstering provision. The bolstering provision permitted the admission of extrajudicial identifications for the limited purpose of corroborating courtroom testimony after the witness made an in-court identification of the accused.

2. Mil.R.Evid. 801(d)(1)(C) now defines as not hearsay any identification made "after perceiving" the person if the identifying witness is testifying in court, under oath, and subject to cross-examination. There is no prerequisite for an in-court identification by the witness before reference can be made to an extrajudicial identification. The rule permits a witness to refer to such extrajudicial identifications even though they do not fit within any of the hearsay exceptions. If the eyewitness does not testify, though, another witness' testimony about the eyewitness' out-of-court identification would have to satisfy the criteria for a hearsay exception.

3. Mil.R.Evid. 321(a)(1) provides that testimony concerning a relevant extrajudicial identification by any person is admissible if such testimony is otherwise admissible under the Mil.R.Evid. This allows use of an extrajudicial identification to bolster one given in court, even though the witness' credibility has not been attacked.

4. In *United States v. Lewis*, 565 F.2d 1248 (2d Cir. 1977), an eyewitness was unsuccessful in identifying the accused at trial, even though she had identified his photograph shortly after the bank robbery. An FBI agent was allowed to testify about the out-of-court identification. *Lewis* held that the agent's testimony was included in the Rule 801(d)(1)(C) hearsay exemption because the eyewitness declarant testified at trial subject to cross-examination. *Lewis* also held that Rule 801(d)(1)(C) language about "identification of a person after perceiving him" includes photograph identification.

It must be noted, however, that the eyewitness must testify prior to such testimony being admissible under either Mil.R.Evid. 321(a)(1) or 801(d)(1)(C). *United States v. Evans*, 27 M.J. 34 (C.M.A. 1988).

5. In *United States v. Owens*, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988), a prisoner brutally assaulted a guard with intent to murder. The victim knew Owens and identified him by name after the assault, but suffered extensive memory loss and could not answer questions at trial regarding the assault or the identification. The 9th Circuit held that the Rule 801(d)(1)(C) language about "identification of a person after perceiving him" includes identification of a person already known to the declarant without having to see him again after the incident. It held that another person with personal knowledge of the identification could testify under Rule 801(d)(1), as long as the eyewitness

who made the identification was subject to cross-examination concerning it. However, it held that Rule 801(d)(1) was not satisfied in *Owens*. This was not a case in which the eyewitness simply could no longer make an in-court identification due to the passage of time or the defendant's change in appearance (as in *Lewis*), but one in which the eyewitness -- though testifying -- was not really subject to cross-examination because of his memory loss. The United States Supreme Court reversed, holding that the confrontation clause only requires that the accused be permitted an opportunity to conduct effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. Therefore, the accused's sixth amendment right to confront his accuser was protected by a procedure which allowed him to cross-examine the victim even though the victim was unable to recall seeing the accused during the assault. The victim's identification of the accused was admissible under Mil.R.Evid. 801(d), since the victim was present to testify in court under oath and was subject to cross-examination. He did not cease to be subject to cross-examination simply because of his inability to recall seeing the accused at the time of the assault.

B. Identification after prior inadmissible identification. If a military judge finds the evidence of an identification inadmissible, a later identification may be admitted if the prosecution proves by clear and convincing evidence that the later identification was not the result of the inadmissible identification. Mil.R.Evid. 321(d)(2). *See United States v. White*, 17 M.J. 953 (A.F.C.M.R. 1984).

C. Other relevant out-of-court identifications. Other relevant out-of-court identifications are analyzed under the same principles that apply to having the suspect showup or lineup, except there is no right to have counsel present. *See United States v. Tyler*, 17 M.J. 381 (C.M.A. 1984) (Mil.R.Evid. 321(a)(1) applies to setting up a display of several different compounds to see if informants could identify cocaine); *United States v. Chandler*, 17 M.J. 678 (A.C.M.R. 1983), *petition denied*, 18 M.J. 132 (C.M.A. 1984) (voice identification procedures are governed by legal principles concerning suggestiveness applicable to eyewitness lineups); *United States v. Akgun*, 19 M.J. 770 (A.C.M.R. 1984) (no right to counsel exists at voice exemplar spread).

D. Requirement for an objection. Mil.R.Evid. 321(c)(2) requires the defense counsel to object at the appropriate time, usually prior to pleas, assuming that trial counsel has disclosed prior identification information as required. Failure to object constitutes a waiver of the issue. *United States v. Gordon*, 18 M.J. 463 (C.M.A. 1984).

CHAPTER XV

OPENING STATEMENTS AND ARGUMENTS

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CHAPTER XV

OPENING STATEMENT AND ARGUMENTS

1501 INTRODUCTION

Experts agree that properly crafted and presented opening statements and arguments are the key to effective courtroom advocacy. These provide counsel opportunities to talk directly with the court, characterize facts in a light most favorable to their position, and to sell themselves as confident and trustworthy professionals. This chapter will discuss the various times during a trial when opening statements and argument are appropriate and the restrictions on the content of counsel's comments.

First addressed are the procedural aspects of opening statements and the most common errors relating to them; next are the procedural aspects of arguments, including the references governing each type of argument; then the general rules as to the contents of argument; and, finally, a discussion of errors applicable only to specialized argument such as argument as to appropriate punishment at the conclusion of the presentencing hearing.

1502 STRATEGIC ASPECTS OF ADDRESSING THE COURT

Lengthy discussion of the style, tactics, and strategy involved in the presentation of opening statements and argument is beyond the scope of this chapter. Generally, the key to effective argument is to plan in advance of trial the points you wish to argue (given the facts of the case), then, working backward, ensure these points will be supported by facts in evidence. In this way, planning each presentation helps counsel shape the entire case such that essential objectives are met and surplusage avoided during the presentation of evidence. More specific strategic, tactical, and stylistic aspects of opening statements and argument are covered in the trial advocacy portion of the course.

1503 OPENING STATEMENTS

A. Purpose

The opening statement is a brief account of the issues to be tried and the evidence to be introduced. The fundamental purpose of an opening statement is to prepare the court to listen to the evidence, not to argue the case. Counsel may also use an opening statement to "educate" the court or to develop rapport. To achieve these ends, most trial lawyers use the format of a simple story, setting forth the basic facts in chronological order. This alerts the court to important items of evidence to watch for during the trial.

Trial counsel may make an opening statement before the government's case-in-chief. The defense counsel may make an opening statement either before the government's case-in-chief or before the defense presents its evidence. As a matter of discretion, the military judge may permit counsel to address the court at other stages of the proceedings. R.C.M. 913(b).

B. Errors relating to opening statements

1. Opening statements are not argument. The purpose of the opening statement is not to argue the evidence, but to alert the trier of fact to the evidence about to be presented. Therefore, the opening statement must not become argumentative, nor may legal authorities be cited.

2. Counsel must avoid matters as to which no admissible evidence is available or intended to be offered. *See* discussion to R.C.M. 913(b). In *United States v. Matthews*, 13 M.J. 501, 515 (A.C.M.R. 1982), the trial counsel asserted that he would prove that the accused had "repeatedly expressed a desire to brutally rape a woman." The trial counsel's assertion was found to be in good faith, but his proof fell short when his reluctant witness, a friend of the accused, related only that, on one occasion, the accused had stated he would like to rape a woman. The court found error, citing ABA Standard 3-5.5 (2d ed. 1980) and MCM, 1969 (Rev.), para. 44g(2), but declined to rule that there was an abuse of discretion in the denial of the defense-requested mistrial:

> In view of the trial counsel's apparent good faith and the repeated admonitions by the military judge that statements of counsel are not evidence, we are satisfied that the military judge's curative instructions were an adequate remedy for the trial counsel's overstatement of his case, and that the military judge did not abuse his discretion by declining to invoke the drastic remedy of a mistrial.

13 M.J. at 516.

1504 OPPORTUNITIES FOR ARGUMENT (Key Numbers 1253-1259)

Argument is counsel's opportunity to speak directly to the members or to the military judge without presenting any new evidence. There are basically four instances during the trial that counsel has an opportunity to present argument. These include argument on motions, on evidentiary objections, on findings, and on sentence.

A. Motions. Before action is taken on a contested motion, each side has the opportunity to present evidence and make an argument. R.C.M. 905(h), MCM, 1984 [hereinafter R.C.M.]. *Restricting arguments or arbitrarily* refusing to hear arguments on an interlocutory question may constitute error. The military judge may, within his or her discretion, limit or refuse to hear arguments which are trivial, mere repetition, or designed as a delaying tactic. Traditionally, the party who must carry the burden of proof on any contested motion will have the opportunity to argue first and make a rebuttal argument. For examples of the various possible motions, and upon which side the burden of proof rests, see the table in the NJS Procedure Study Guide, chapter XII. It appears to be within the discretion of the military judge to vary the traditional approach (e.g., by restricting counsel to one argument each). *See* discussion to R.C.M. 801(a)(3). Generally, however, when the military judge states (to no one in particular): "The court will hear argument on the motion," he or she will expect the party bearing the burden on the issue to argue first.

B. Evidentiary objections and any other questions or matters presented to the court for decision during the course of the courts-martial. Generally, the military judge may permit comment by counsel on any point under litigation. When objecting to the admissibility of items of evidence, counsel must be guided by Rule 15 of the Uniform Rules of Practice Before Navy and Marine Corps Courts-Martial:

> When counsel initially enters an objection, he shall state only the objection and the basis for it. Before proceeding to argue an objection, counsel will request permission of the trial judge and ascertain whether argument will be entertained in open or in an out-of-court session. Although argument identifying legal issues and presenting authorities is ordinarily appropriate, an objection or argument for the purpose of making a speech, recapitulating testimony, or attempting to guide a witness is prohibited. (Emphasis added.)

This would also include argument on proposed instructions and argument on challenges for cause. *See* R.C.M. 920(b) and 1005(b) regarding instructions and *United States v. Michaud*, 48 C.M.R. 379 (N.C.M.R. 1973) for challenges.

C. Argument on findings (Key Numbers 1253-1254). The *Manual for Courts-Martial*, 1984 [hereinafter MCM], sets forth the general procedure to be followed by counsel in presenting argument on findings. R.C.M. 919. The MCM provides that, after both sides have rested, counsel for both sides are permitted to make argument. Trial counsel may make the first argument and defense the second. Trial counsel may then make the last argument, but his or her remarks are limited to a discussion of those matters raised by the defense counsel in his argument. If trial counsel is permitted to introduce new matter in his or her last argument, defense counsel is then entitled to a second argument. However, if no new matters are raised by trial counsel, a second argument by defense is within the discretion of the military judge. Finally, if defense counsel is allowed to make a second argument, trial counsel still has the right to present the last argument.

D. Argument as to appropriate sentence (Key Number 1316)

After the introduction of all evidentiary matters during the presentencing hearing, counsel for both sides may make arguments relating to their respective views as to what sentence, if any, is appropriate under the facts and circumstances of the case. Traditionally, most judges have followed the procedure for findings arguments; that is, an opening argument by trial counsel, an argument by defense counsel, and a rebuttal argument by trial counsel. The rebuttal argument by trial counsel is discretionary with the military judge. Therefore, trial counsel should request of the military judge an opportunity to make a rebuttal argument, if desired, or at least permission to argue after the defense counsel. R.C.M. 1001(g).

1505 IMPROPER ARGUMENT

A. Errors common to all arguments. Proper content in argument may simply be defined as what counsel may say without risking error. Since the nature and type of argument that may be within or without this definition is limited only by the imagination of counsel, it is impossible to evaluate and comment upon every conceivable type of remark. Thus, this section will deal with the most common areas where errors occur.

1. Criticizing or denouncing the accused. As long as the argument concerns the issues, facts, and circumstances of the case, it will not be held improper because it may incidentally criticize or denounce the accused or stir the sympathies or prejudices of the court members. Two decisions of the Court of Military Appeals illustrate the extent to which the propriety of arguments depends upon the issues, facts, and circumstances of the case.

In the first case, *United States v. Doctor*, 7 C.M.A. 126, 21 C.M.R. 252 (1956), the Court of Military Appeals considered argument of trial counsel to the effect that the accused was a psychopathic liar and a schemer who would falsify to anyone. Additionally, trial counsel stated that he did not cross-examine the accused because he disliked listening to lies from the witness stand. The court held the comments proper since they accurately described the crime charged and their use was supported by testimony. The crime charged was false swearing, which supported the statement that the accused would falsify to anyone, and there was a conflict between the testimony of the government's witnesses and that of the accused, which supported the comment concerning lies from the witness stand.

In the second case, *United States v. Pettigrew*, 19 C.M.A. 191, 41 C.M.R. 191 (1969), the court evaluated a statement by trial counsel that the accused perjured himself when he testified. The charge was a violation of an order, and the accused testified that he did not hear the order. No witness testified to the contrary, and there was no evidence in the record that the accused was lying. Finding that the comment by trial counsel was not based upon evidence in the record and that the comments were so inflammatory as to prejudice the accused, the court reversed the conviction.

The distinction between what might appear to be virtually identical comments by the trial counsel is the general principle that argument must be supported by the facts of the case. In *Doctor*, *supra*, the evidence supported the comments that the accused was lying, but this was not the case in *Pettigrew*, *supra*, in which there was no evidence contradicting the accused's testimony that he simply did not hear the order given. *See also United States v. Fuentes*, 18 M.J. 41, 52 (C.M.A. 1984) (the trial counsel's characterization of the

accused's testimony as "improbable, contradictory, and . . . fabricated" was properly based upon evidence that had been received) and *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977) (the trial counsel had very extensive remarks disparaging the credibility of the accused as a witness).

The Court of Military Appeals has further defined the limits on sentencing arguments by trial counsel that the accused has testified falsely. In *United States v. Warren*, 13 M.J. 278 (C.M.A. 1982), the court applied the rationale of *United States v. Grayson*, 438 U.S. 41 (1978), and held that, when the accused testifies on the merits and is subsequently convicted, trial counsel may argue that the court consider the fact that the accused lied under oath in deciding the accused's potential for rehabilitation in arriving at an appropriate sentence. Upon request of the accused, however, the military judge must instruct the members that they may consider the accused's false testimony only so far as it bears upon the likelihood that the accused can be rehabilitated (not merely to punish the accused for lying) and only if the members conclude that the accused did lie under oath and that such lies were willful and material. *See also United States v. Cabebe*, 13 M.J. 303 (C.M.A. 1982); *United States v. Beaty*, 14 M.J. 155 (C.M.A. 1982); *United States v. Fisher*, 17 M.J. 768 (A.F.C.M.R. 1983) (no abuse of discretion for MJ to give *Warren* instruction where warranted, even over DC's objection).

2. Citation of legal authorities to court members (Key Number 1254). The Court of Military Appeals and the MCM specifically provide that counsel may not cite legal authorities or the facts of other cases when arguing to members on findings. *See United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983) and the discussion to R.C.M. 919(b). The rationale for this rule is twofold, as there is a distinction between the prohibition against reading the facts of other cases and reading the law set forth in other cases. The prohibition against reading the facts of other cases is simply an application of the general rule confining arguments to the facts of the case being heard. In regard to reading principles of law set forth in other cases, the practice would violate not only the rule that argument is to be confined to reasonable comment upon the evidence but, additionally, the rule that the law of the case is to be provided by the military judge. R.C.M. 920.

This rule against reading legal authorities during argument to the court members does not preclude a discussion of the applicability of the facts to the law of the case before the court. It would be impossible for counsel to present a persuasive argument on the matters before the court without reference to the law of the case. Counsel risk error, however, if their discussion sets forth an erroneous principle of law. *United States v. Henthorne*, 8 C.M.A. 752, 25 C.M.R. 256 (1957) (erroneous statement that intent to desert could be inferred from the length of the absence alone).

3. Misstatements of facts in evidence (Key Numbers 1254 and 1318). Closely related to erroneous statements of law in argument are erroneous statements of fact by counsel. In a long and complicated trial, counsel have a tendency to misstate facts brought out in testimony or to argue facts that were not in evidence. Misstatements of fact have a propensity for error because the court members may tend to be influenced by counsel's recollection of the evidence as related to them in argument. *United States v. Gifford*, 41 C.M.R. 537 (A.C.M.R. 1969); *United States v. Shows*, 5 M.J. 892 (A.F.C.M.R. 1978). In many cases, such error, if committed, can be cured by the trial judge through the typical instruction that it is the court members' recollection of the evidence, not that of counsel, which is controlling. Since objection is nearly always required to avoid waiving the issue, the trial judge will necessarily be placed on notice of the perceived problem and will virtually always act to cure any potential error.

4. Arguing facts not in evidence (Key Number 1257). All comments by counsel must be supported by some evidence in the record. This is consistent with the principle, as the military judge instructs the members, that counsel's arguments are not evidence. In *United States v. Clifton*, 15 M.J. 26, 29 (C.M.A. 1973), the court stated, "The reasons are obvious: arguments are not given under oath, are not subject to objection based upon the rules of evidence, and are not subject to the testing process of cross-examination. If the rule were contrary, an accused's right of confrontation would be abridged, and the opportunity to impeach the source denied." *See also United States v. Adkinson*, 40 C.M.R. 341 (A.B.R. 1968) (trial counsel erred in arguing that the Army was having more disciplinary problems with E-5's than any other single group, there being no foundation in the record to support that claim); *United States v. Eck*, 10 M.J. 501 (A.F.C.M.R. 1980) (trial counsel argued that the accused was "no novice to the drug trade" but was "an experienced dealer" based upon the accused's conviction for a one-time sale of 405 grams of marijuana).

This principle does not prevent the counsel from making comments regarding the inferences which may be drawn from the evidence presented. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975). In *United States v. Soto*, 30 C.M.R. 859 (A.F.B.R. 1960), the court held that trial counsel did not commit error by arguing that a larceny victim had not given the accused permission to take the property, despite a lack of such evidence in the victim's testimony. The court reasoned that the court members had heard the testimony in question and would reach their own conclusions as aided by rebuttal arguments and the military judge's instructions. If counsel is going to draw inferences from the evidence, these inferences must be reasonable ones. In *United States v. Falcon*, 16 M.J. 528, 530 (A.C.M.R. 1983), the court found error where the trial counsel insinuated that there was evidence, not before the court, of uncharged assaults committed by the accused. In rebuttal argument on the issue of the accused's peaceable character, the trial counsel commented, "Consider also

something too, this peacefulness business. There's always a first time. Probably wasn't his first time actually, but there's always a first time for a record anyway and that was it." (Emphasis added.)

Additionally, counsel may comment on facts of contemporary history although they are not in evidence. *United States v. Priest*, 46 C.M.R. 368 (N.M.C.M.R. 1971) (comments on contemporary assassinations and civil strife after disloyal statements convictions). Generally, comments on matters of common knowledge within the community are permissible. *United States v. Long*, 17 C.M.A. 323, 38 C.M.R. 121 (1967) (comments on commonly known military facts). However, the courts will not permit counsel, in sentencing, to make reference to the policy of the services on drug abuse. The courts have found this to be plain error, especially if the military judge did not give a curative instruction. *United States v. Schomaker*, 17 M.J. 1122 (N.M.C.M.R. 1984) and *United States v. Brown*, 19 M.J. 826 (N.M.C.M.R. 1984).

Two types of argument are analogous to counsel stating a fact upon which the court has no evidence. The first of these occurs when counsel states that he had additional witnesses available to bolster his case or when government counsel suggests that an inference of recent fabrication can be made because the defense did not produce the names of possible exculpatory witnesses. *United States v. Tackett*, 16 C.M.A. 226, 36 C.M.R. 382 (1966) and *United States v. Swoape*, 21 M.J. 414 (C.M.A. 1986), respectively. The second situation occurs when counsel refer to the effect of the case upon relations between the military and civilian communities. In *United States v. Cook*, 11 C.M.A. 99, 28 C.M.R. 323 (1959), the Court of Military Appeals reversed a conviction for murder of a Filipino because the trial counsel argued to the court members that their decision would have a great impact on life in the Philippines for American forces, and they must show everyone that justice could be done. The court's holding was based upon the rationale that such argument incorporates theories or facts not supported by the evidence. *See also United States v. Ernst*, 17 M.J. 835 (C.G.C.M.R. 1984) (unsupported comments by trial counsel on effect of offenses on relations between Coast Guard and civilian law enforcement agencies).

5. Personal opinion (Key Number 1255). The rule in this area is that counsel may not express to the court his personal opinion of the guilt, innocence, or veracity of the accused. The Court of Military Appeals has held that to do so is not only impermissible, it is unprofessional. *See, e.g., United States v. Fuentes*, 18 M.J. 26 (C.M.A. 1983); *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977). In *United States v. Horn*, 9 M.J. 429 (C.M.A. 1980), the Court of Military Appeals held that the prosecutor's use of the phrase, "I think" some twenty-eight times in opening and closing arguments was an improper expression of his personal belief. The court cited the then-existing ABA Code of Professional Responsibility, Disciplinary Rule 7-106(C)(4) declaring:

> While a prosecutor may argue all reasonable inferences from evidence in the record it is unprofessional for him to express his personal belief or opinion as to the truth or falsity of any testimony or evidence. Such beliefs or opinions are merely a form of unsworn, unchecked testimony and tend to exploit the influence of his office and undermine the objective detachment which should separate a lawyer from the cause for which he argues.

9 M.J. at 430 (emphasis added).

While it is the safer practice to avoid the use of the pronoun "I" in argument, there is nothing wrong, per se, in its use by the prosecution. In *United States v. Zeigler*, 14 M.J. 860 (A.C.M.R. 1982), the court held that the use of the word "I" by the trial counsel in argument was not error, as the word was not used to express a personal belief or opinion as to the truth or veracity of any testimony or evidence or the guilt of the accused. The court did, however, describe what use of "I" was improper:

> What is condemned is a statement of personal belief or opinion. "It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant". Standards for Criminal Justice, § 3-5.8(b) (1979). To illustrate, it is error for a prosecutor repeatedly to use the term "I think" in his argument, *United States v. Horn*, 9 M.J. 429 (C.M.A. 1980), and to say that he has no doubt as to the guilt of the defendant. *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977). But we have none of that here, for not once did the prosecutor couple use of the word "I" with an expression of personal belief or opinion.

Id. at 864.

Another example of the improper expression of personal opinion occurred in *United States v. Barnack*, 10 M.J. 799 (A.F.C.M.R. 1981), where an Air Force appellate court found that a trial counsel's comments during sentencing argument "exceeded acceptable bounds of fair advocacy and affronted the spirit, if not the letter, of the *ABA Standards, The Prosecution Function* § 5.8(b)(c), 5.9 and 6.1(a)." *Id.* at 799-800. The trial counsel's offensive comments were inter alia: "The accused . . . has the most deplorably, despicable, military record that has ever been seen, at least by this trial counsel in a military court . . .

Any period of confinement less than four years would be an absolute mockery and a joke . . . ." *Id.* at 800 (emphasis added).

The court was particularly displeased with trial counsel's conduct when defense counsel was responding to the trial counsel's suggestion that the court "should lock [the accused] up and throw away the key":

> IDC: . . . It's not going to make [the accused's] parents happy, it's certainly not going to make him happy. It's not going to make the people in this courtroom watching happy. . . .
>
> TC (interrupting): Actually, it will make me happy, your honor.

Id. at 800.

6. Commenting upon the silence of the accused. (Key number 1259). Argument upon the silence of the accused tending to raise an inference of guilt is a crucial concern to judges and appellate courts, and counsel tending to so argue will be given little, if any, latitude. Rigorous application of the rule against such argument is necessary because comments upon the silence of the accused infringe upon the accused's right to remain silent under the Constitution and Article 31, Uniform Code of Military Justice. Additionally, such an argument is not based upon evidence before the court and, therefore, is improper as a violation of the general principle relating to arguments.

The general rule in the military concerning argument on the silence of the accused is stated in Mil.R.Evid. 512(a) and R.C.M. 919(b) discussion. The language of the MCM is clear: "trial counsel may not comment on the accused's exercise of the right against self-incrimination." R.C.M. 919(b). The MCM provides an exception to this rule, however, by stating that: "When the accused testifies on the merits regarding an offense charged, trial counsel may comment on the accused's failure in that testimony to deny or explain specific incriminating facts that the evidence for the prosecution tends to establish regarding that offense." *See also United States v. Caramans*, 9 M.J. 616 (A.C.M.R.), *aff'd on other grounds*, 10 M.J. 50 (C.M.A. 1980). The military judge is also required to give a protective instruction to the court regarding the accused's failure to testify if requested by the defense. *United States v. King*, 13 M.J. 863 (N.M.C.M.R. 1982).

These rules are not difficult to apply when there is a direct comment upon accused's failure to testify. More difficult questions arise when the comment of trial counsel may be interpreted either as an improper comment upon

the silence of the accused or as a proper comment upon the evidence before the court. The Court of Military Appeals has announced the following test for determining whether argument is improper comment upon the silence of the accused: "[The test is] whether the language used was manifestly intended or was of such character that the triers of fact could naturally and necessarily take the prosecutor's remarks to be a comment on the failure of the accused to testify." *United States v. Gordon*, 14 C.M.A. 314, 318, 34 C.M.R. 94, 98 (1963). Thus, the test is: (1) Whether the trial counsel intended the court to take his remarks as comment upon the silence; or (2) whether the court members could have understood the language to be such a comment. Whether either prong of the test has been met must depend upon the type of language used, the manner in which it relates to the testimony or other evidence before the court, and whether there is objection by defense counsel. The practical application of this test confronted the Army court when it reviewed the propriety of counsel arguing that there had been no evidence presented to impeach, discredit, or rebut the government's witnesses. The court upheld the argument on the ground that it was a fair comment upon the evidence. *United States v. Simmons*, 44 C.M.R. 804 (A.C.M.R. 1971). It also upheld an argument to the effect that only the victim and the accused knew what happened and the victim could not appear in court to testify; the basis of the court's decision was that the argument was a fair comment on the nonavailability of a murder victim to testify. *United States v. Gordon*, *supra*. In determining that the language was not intended or could not be taken as comment upon the accused's silence, the court gave considerable weight to defense counsel's interpretation of the language and its relation to the evidence as shown by defense counsel's failure to object.

The line between proper and improper comment is, however, a fine one. In *United States v. Goodyear*, 14 M.J. 567 (N.M.C.M.R. 1982), the defense had presented no evidence on the merits. Trial counsel argued, "There's absolutely no motive which has been proffered by the defense to show that [the victim] may have told a falsehood to this court." The court ruled that the military judge had properly granted a mistrial, holding that the comments had placed an improper inference and burden upon the accused to present evidence in response to the government's case. It should be noted that the trial counsel's conduct of that case was improper in a number of other areas as well. In *United States v. Harris*, 14 M.J. 728 (A.F.C.M.R. 1982), the accused did not testify after the defense counsel, in his opening statement, said it would be a "one-on-one" case. Trial counsel committed prejudicial error and threw away a golden opportunity when, in argument, he reminded the members of the defense counsel's promise and noted that only prosecution witnesses had testified. Trial counsel would be well advised to steer clear of this potential problem area.

Apparently, the same general rule applies to comments by the trial counsel upon the accused's pretrial silence. It has long been the rule that

trial counsel can not bring to the attention of the members that the accused has exercised his right to remain silent prior to trial, and the Court of Military Appeals has taken a strong stand in the protection of the accused's ability to assert his rights. In *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983), the court said ". . . .it was unconscionable for trial counsel repeatedly to emphasize appellant's assertion of his rights. A servicemember may "assert his rights" without fear of exploitation. . . . He is not obligated to "admit to anything," upon being accused of wrongdoing." *See also United States v. Frentz*, 21 M.J. 813 (N.M.C.M.R. 1985); *United States v. Stegar*, 16 C.M.A. 569, 37 C.M.R. 189 (1967); *United States v. Tackett*, 16 C.M.A. 226, 36 C.M.R. 382 (1966); *United States v. Brooks*, 12 C.M.A. 423, 31 C.M.R. 9 (1961). The Court of Military Appeals, however, has allowed trial counsel to show, during cross-examination of the accused, the fact that the accused was present at the article 32 investigation and thus knew well in advance of trial what the prosecution's evidence would be, while the prosecution had enjoyed no similar opportunity to learn from the accused his version of the events. *United States v. Fitzpatrick*, 14 M.J. 394 (C.M.A. 1983); *United States v. Reiner*, 15 M.J. 38 (C.M.A. 1983).

B. Errors relating primarily to sentencing arguments (Key Numbers 1254 - 1257 and 1316 - 1320). As will be seen, R.C.M. 1001(g) resolves two troublesome areas with regard to argument on sentencing. It is quoted here preceding discussion of several of its included sections.

> *Argument.* After introduction of matters relating to sentence under this rule, counsel for the prosecution and defense may argument for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than that court-martial may adjudge. Trial counsel may, however, recommend a specific lawful sentence and may also refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. . . .

R.C.M. 1001(g) (emphasis added).

1. General deterrence. The propriety of arguing that a particular accused should receive a stiff sentence in order to deter others from committing similar crimes ("general" deterrence) has long been the subject of appellate review. In some early cases, general deterrence arguments were considered improper since

that factor was "included within the maximum punishment prescribed by law, but not as a separate aggravating circumstance that justifies an increase in punishment beyond what would be a just sentence for the individual accused determined on the basis of the evidence before the court." *United States v. Mosely*, 1 M.J. 350, 351 (C.M.A. 1976).

That view was based on *United States v. Mamaluy*, 10 C.M.A. 102, 27 C.M.R. 176 (1959), in which the Court of Military Appeals reasoned that:

> [A]ccused persons are not robots to be sentenced by fixed formulae but rather, they are offenders who should be given individualized consideration on punishment. . . . There is no real value in reciting generalities to courts-martial. They should operate on facts, and instructions should be tailored. . . . [T]he difficulty with these instructions is that they pose theories which are not supported by testimony and which operate as a one way street against the accused.

Id. at 106-107, 27 C.M.R. at 180-181.

In 1980, the appellate courts began to change their opinion regarding the propriety of arguing general deterrence. In *United States v. Lania*, 9 M.J. 100 (C.M.A. 1980), the court held that general deterrence is relevant to sentencing. Additionally, as noted above, R.C.M. 1001(g) now allows trial counsel to argue general deterrence. Although both case law and R.C.M. 1001(g) allow general deterrence to be argued, it should be noted that current case law requires that this one factor not be argued to the exclusion of all other sentencing factors. *See United States v. Smith*, 9 M.J. 187 (C.M.A. 1980); *United States v. Thompson*, 9 M.J. 166 (C.M.A. 1980); *United States v. Geidl*, 10 M.J. 168 (C.M.A. 1980).

R.C.M. 1001(g) purports to make clear that any generally accepted sentencing philosophy, including general deterrence, may be referred to during argument on sentence. It makes no mention of the caveat found in the appellate cases that the trial counsel's arguments must also "invite consideration of other sentencing factors." It is not clear if the R.C.M. is an attempt to overrule this line of cases sub silentio, or merely an attempt to incorporate the holding of *United States v. Lania, supra*, into the MCM. Until this question is resolved, the conservative (and prudent) trial counsel will not stress general deterrence as the sole consideration on sentencing.

2. Arguing for specific sentence. R.C.M. 1001(g) also makes clear that argument may include recommendations for a specific lawful sentence. While the defense counsel has always been able to so argue, it had been held that trial

counsel may not suggest a specific sentence for the accused. Such an argument had been considered beyond the scope of proper argument. *United States v. Razor*, 41 C.M.R. 708 (A.C.M.R. 1970). The perceived danger lies in giving the impression that the suggested sentence is one approved by the convening authority. *See* section 1505 B.3 below. *See United States v. Higdon*, 2 M.J. 445 (A.C.M.R. 1975). It would appear that specific sentences now may be urged by either trial or defense counsel. *See United States v. Rich*, 12 M.J. 661 (A.C.M.R. 1981). Trial counsel may not refer to a quantum of punishment greater than that court-martial may adjudge, [*United States v. Boese*, 32 C.M.R. 131 (C.M.A. 1962)] or suggest that convening authority already gave accused a break by referring to SPCM. *United States V. Luby*, 14 M.J. 619 (A.F.C.M.R. 1982), *petition denied*, 15 M.J. 172 (C.M.A. 1983). Defense counsel may not argue that an administrative discharge is more appropriate than a punitive discharge or that accused will be discharged even if the court does not impose one. *United States v. Keith*, 46 C.M.R. 59 (C.M.A. 1972).

3. Convening authority and command influences. The trial counsel still may not "purport to speak for the convening authority ... or refer to the views of such convening authorities," R.C.M. 1001(g), since references to his desires improperly impinge upon the court members' discretion. *See United States v. Lackey*, 8 C.M.A. 718, 25 C.M.R. 222 (1958); *United States v. Kiddo*, 16 M.J. 775, 776 (A.F.C.M.R. 1983). ("The commanders in this case have decided, by their recommendations, that the punishment is fitting, suitable. This is a suitable punishment, the maximum punishment is suitable.") Nor may the trial counsel argue that a severe sentence is warranted because the convening authority ordered a general court-martial [*see United States v. Daley*, 35 C.M.R. 718 (A.B.R. 1964)] or effectively reduced the punishment by convening a special rather than a general court-martial. *See United States v. Crutcher*, 11 C.M.A. 483, 29 C.M.R. 299 (1960); *United States v. Carpenter*, 11 C.M.A. 418, 29 C.M.R. 234 (1960). In *United States v. Reese*, 22 C.M.R. 612 (A.B.R. 1956), the court held that the trial counsel erroneously argued that, because the members represented the convening authority, they should punish the accused in order to set an example for prospective offenders.

Appellate courts view external command influence in the same light as references to the convening authority. Trial counsel may not incorporate such considerations in their argument because they exceed the proper scope of the court members' deliberations. One of the most prevalent areas where error occurs is when trial counsel refers to the various service policies against drug abuse in the military. Trial counsel may not refer to the views of either the convening authority, or his superiors, or policy directives. *See, e.g., United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983) ("You know what SAC policies are, and I think you are somewhat bound to adhere to these policies in deciding on a sentence"); *United States v. Brown*,, 19 M.J. 826 (N.M.C.M.R. 1984) (trial counsel's impermissible

reference in sentencing argument to policy of the Commandant of Marine Corps on drugs -- note, however, that the error was cured by military judge's instruction). Some other problem areas where the courts have found error have included references to command policies or directives concerning certain offenses; comments that a record of the adjudged sentence would be posted on the command bulletin board; and arguments incorporating a command policy in regard to troublemakers in certain ranks.

4. Reference to other misconduct. Evidence of uncharged misconduct may not be considered for sentencing purposes unless it is properly introduced before findings or admitted during the presentencing proceedings. *See United States v. Wingart*, 27 M.J. 128 (C.M.A. 1988). As a result, trial counsel may not associate the accused with other offenses if there is no relevant evidence to that effect. In *United States v. Edwards*, 39 C.M.R. 952 (A.B.R. 1968), the court held that the trial counsel erred by referring to an offense to which a finding of not guilty had been entered. In *United States v. Baker*, 34 C.M.R. 833 (A.F.B.R. 1964), the court condemned an argument based on a prior offense involving moral turpitude.

Trial counsel may not argue a greater offense theory when the accused was only convicted of a lesser included offense, [*United States v. Martinez*, 30 M.J. 1194 (A.F.C.M.R. 1990)] or a theory of the crime contrary to accused's unsworn statement unless there is some evidence admitted to support trial counsel's theory. *United States v. Rutherford*, 29 M.J. 1030 (A.C.M.R. 1990).

5. Placing members in position of victim or relative. An accused is entitled to have his sentence determined by court members who are impartial to the outcome of the case. When the triers of fact are asked to place themselves in the position of the victim, their impartiality is undermined. Consequently, arguments which advocate such comparisons are improper, as are suggestions that members consider what it would be like if a close relative had been victimized by the accused. *See United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976) (court members should put themselves in the position of the rape victim's husband). *Cf. United States v. Williams*, 23 M.J. 776 (A.C.M.R. 1987) (It is not plain error for trial counsel, in a rape and forcible sodomy GCM, to ask members how long do you want before the accused again walks among "your daughters" - "our daughters" (emphasis added). Any remaining error was waived by defense counsel's failure to object at trial.) and *United States v. Wood*, 18 C.M.A. 291, 40 C.M.R. 3 (1969) (court members should imagine their sons as the victims of accused's, a Boy Scoutmaster, indecent liberties).

6. Inflammatory and prejudicial arguments. The United States Supreme Court has criticized prosecutorial arguments which are "undignified and intemperate [and] contain improper insinuations and assertions calculated to

mislead the jury." *Berger v. United States*, 295 U.S. 78, 85 (1935). The military appellate courts have similarly held that the trial counsel may not use "vituperative and denunciatory language, or appeal to, or make reference to religious beliefs, or other matters, where such language and appeal is calculated only to unduly excite or arouse the emotions, passions, and prejudice of the court to the detriment of the accused." *United States v. Weller*, 18 C.M.R. 473, 478 (A.F.B.R. 1954). In *United States v. Nellum*, 21 M.J. 700, 701 (A.C.M.R. 1985), the court indicated that trial counsel had "exceeded the bounds of propriety when he asked the military judge whether he would like appellant to walk the streets in his community or neighborhood." This was a trial by military judge alone, yet the court still found error because the court felt that such argument asked the military judge to use his personal interest in adjudging a sentence instead of his impartial interest as a military judge. An inconclusive line of cases, however, suggests that such inflammatory and prejudicial arguments are not per se improper. *See United States v. Arnold*, 6 M.J. 520 (A.C.M.R. 1978) (trial counsel called the accused a liar); *United States v. Fields*, 40 C.M.R. 396 (A.B.R. 1968); *United States v. Vilches*, 17 M.J. 851, 855 (N.M.C.M.R. 1984) (although "inartful" and "pedestrian," it was fair comment and not error for trial counsel on the merits to characterize the accused, a lieutenant commander charged with sodomizing a junior enlisted man, as a "closet homosexual," "pervert," and "chickenhawk"). These cases indicate that an apparently inflammatory argument may be proper if it amounts to fair comment on evidence in the record.

Many of the previously discussed improprieties, such as attempts to place court members in the place of the victim, are also inflammatory. The most common type of inflammatory argument is a denunciatory reference to the accused. In *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975), the trial counsel compared the accused to Adolph Hitler, an analogy which the Court of Military Appeals easily identified as inflammatory. Other comments which courts have held to be inflammatory include references to the socialist and Marxist background of the accused and his family [*see United States v. Garza*, 20 C.M.A. 536, 43 C.M.R. 376 (1971)] and characterizations of the accused as a moral leper who needs to be put where moral lepers belong [*see United States v. Douglas*, 13 C.M.R. 529 (N.B.R. 1953)].

Occasionally, an argument will be held inflammatory because of references to other parties to the trial. In *United States v. Begley*, 38 C.M.R. 488 (A.B.R. 1966), for example, the trial counsel appealed to the court members' emotions. The accused was a noncommissioned officer. The trial counsel addressed the noncommissioned officer members by name, and invited them to consider how the accused had disgraced the noncommissioned officer corps. Another example of the inflammatory argument arose when the trial counsel insinuated that the defense counsel had made an unsworn statement on behalf of the accused with the hope of financial gain from the accused's $800,000

inheritance. *United States v. Vogt*, 30 C.M.R. 746 (C.G.B.R. 1960). Although there was evidence of an inheritance, the statements exceeded the bounds of fair comment. When the trial counsel exposes the members to embarrassment or contempt if they do not return a stiff sentence, their potential emotional reaction renders the argument inflammatory. For example, the trial counsel may not assert that the members are "selfish, self-centered and are not fulfilling [their] responsibility to . . . society" if the adjudged sentence does not include a discharge and confinement. *United States v. Wood*, 18 C.M.A. 291, 296, 40 C.M.R. 3, 8 (1969).

Prejudicial arguments, like inflammatory ones, usually are also improper on other grounds. In *United States v. Johnson*, 1 M.J. 213, 215 (C.M.A. 1975), the trial counsel argued that whereas two accomplices, by their pleas of guilty, had taken the first step toward rehabilitation, the accused, by pleading not guilty, had not taken this first step. The court found this argument to be improper comments on the accused's right to plead not guilty. In *United States v. Ryan*, 21 C.M.A. 9, 44 C.M.R. 63 (1971), the trial counsel asserted that higher ranking witnesses were more credible than their subordinates. Although this is obviously improper and incorrect, the prejudicial impact stemmed from the fact that most of the higher ranking witnesses had testified for the prosecution. *See also United States v. Ruggiero*, 1 M.J. 1089 (N.C.M.R. 1977), *petition denied*, 3 M.J. 117 (C.M.A. 1977). Trial counsel may not attempt to unfairly influence the members by presenting irrelevant and unnecessary arguments. In *United States v. Simpson*, 10 C.M.A. 229, 27 C.M.R. 303 (1959), the trial counsel urged the members to adjudge a dishonorable discharge by noting that a bad-conduct discharge could eventually be removed from the accused's record administratively. In another case, the trial counsel erred by introducing evidence of credit card theft in order to establish identity in a court-martial for larceny of a wallet because the former was a much more serious offense than that charged, and there was no issue of identity. *United States v. Brown*, 8 M.J. 749 (A.F.C.M.R. 1980). *Cf.* Mil.R.Evid. 403 (relevant evidence may be excluded if danger of unfair prejudice exceeds probative value). The trial counsel erred by commenting that the making and uttering of checks was tantamount to stealing since that argument injected an irrelevant specific intent into the court members' consideration and ignored the fact that stealing is a much more serious offense. *United States v. Bethea*, 3 M.J. 526 (A.F.C.M.R. 1977). *See, e.g., United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983) (trial counsel's comparison of the charged offense of adultery with the more serious offense of heroin possession was prejudicial).

In *United States v. Pinkney*, 22 C.M.A. 595, 48 C.M.R. 219 (1974), the Court of Military Appeals held that undue prejudice resulted from the trial counsel's reference to the accused's request for an administrative discharge. Since such a request is not incriminatory or an admission of guilt, it should not have been used against the accused. Similarly, since an accused has a right to

plead not guilty to a given offense, any comment to the effect that his not guilty plea should be held against him improperly impeded his exercise of that right. *See United States v. Johnson*, 1 M.J. 213 (C.M.A. 1975). Finally, arguments based on evidence in the record can still be considered prejudicial if the trial counsel oversteps the bounds of fair comment. Thus, military appellate courts have found comments on the accused's stupidity [*see United States v. Ortiz*, 33 C.M.R. 536 (A.B.R. 1963)], or cowardice [*see United States v. Brewer*, 39 C.M.R. 388 (A.B.R. 1968)], and arguments which focus on a lack of promotions during a 17-year career [*see United States v. Larochelle*, 41 C.M.R. 915 (A.F.B.R. 1969)] to be improper.

7. Comments on accused's statements during providency. In *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988), the trial counsel commented on an inconsistency between the accused's statement during the providency inquiry and testimony of a defense witness on sentencing. The Court of Military Appeals held that trial counsel's argument did not deny the accused's right against self-incrimination under either Article 31, UCMJ, or the fifth amendment. When an accused pleads guilty, he is on notice that his answers during the providency inquiry may be used adversely to him. The court specifically indicated that the same rule applies regardless of forum since the trial counsel may admit the providency inquiry in aggravation by means of an authenticated transcript or the live testimony of any witness who was present in the courtroom during the providency inquiry. It must be noted, however, that the rule only applies to statements of the accused regarding offenses to which he is pleading guilty.

8. Miscellaneous considerations

a. Defense counsel may argue for a sentence that is inconsistent with the terms of a pretrial agreement. *See, e.g., United States v. Wood*, 23 C.M.A. 57, 48 C.M.R. 528 (1974) (a pretrial agreement is with the convening authority and cannot impact the imposition of sentence by members); *United States v. Sanders*, 23 C.M.A. 75, 48 C.M.R. 546 (1974). Trial counsel may also argue for such a sentence. *See, e.g., United States v. Kich*, 12 M.J. 661 (A.C.M.R. 1981) (the trial counsel's argument for a sentence which exceeded the terms of the pretrial agreement was not error).

b. Under certain conditions, a defense counsel may argue for a BCD for his client; however, the counsel must carefully analyze the facts before urging the court to give an accused a punitive discharge. For example, a defense counsel may argue for a BCD if it amounts to a plea for leniency, if there is no evidence in the record that indicates that the accused desires to be retained, and if the BCD is appropriate for the case. *United States v. Volmar*, 15 M.J. 339 (C.M.A. 1983) (with no reasonable likelihood of retention, and when a DD was authorized, counsel could argue the appropriateness of a BCD as an alternative to

a DD); *United States v. Drake*, 21 C.M.A. 226, 44 C.M.R. 280 (1972); *United States v. Richard*, 21 C.M.A. 227, 44 C.M.R. 281 (1972); *United States v. Weatherford*, 19 C.M.A. 424, 42 C.M.R. 26 (1970).

Defense counsel may not concede the appropriateness of a discharge in the face of the accused's expressed desire to return to duty. *United States v. Mitchell*, 16 C.M.A. 302, 36 C.M.R. 458 (1966). The appellate courts will look to the record to determine the underlying facts in determining the appropriateness of the defense counsel's actions. *United States v. McNally*, 16 M.J. 32 (C.M.A. 1983) (it was an error for the defense counsel to urge a BCD as an appropriate sentence where the facts disclosed no indication that a BCD was inevitable, that defense counsel was acting pursuant to his client's wishes, and a DD was not authorized). *But see United States v. Adams*, 17 M.J. 604 (N.M.C.M.R. 1983) (not error for defense counsel to argue for suspended BCD in face of accused's expressed desire to be retained where defense counsel's objective was reasonable and consistent with accused's desires, since no reasonable likelihood retention would be considered in sale of drugs case); *United States v. Robertson*, 17 M.J. 846 (N.M.C.M.R. 1984) (no ineffective assistance by defense counsel when he conceded appropriateness of dismissal for an officer accused convicted of multiple drug offenses when retention was not a reasonable alternative).

c. Defense counsel's failure to object to error before the military judge begins sentencing instruction constitutes a waiver unless it is plain error. Error must be obvious and substantial, and it must have had an unfair prejudicial impact. *United States v. Fischer*, 21 M.J. 327 (C.M.A. 1986).

d. Trial counsel may comment upon the accused's unsworn statement, if made, and contrast that method of placing information before the members with sworn testimony as long as the military judge's instructions concerning unsworn statements are clearly given. *United States v. Breese*, 11 M.J. 17 (C.M.A. 1981); *United States v. Dunavent*, 11 M.J. 69 (C.M.A. 1981).

1506 CONCLUSION

In preparation for argument, counsel should review the types of comments courts have found improper in the past. Counsel must avoid making the spontaneous "vigorous" argument which "sounds good at the time," as it is just such comments that make for entertaining reading for others in the appellate case law.

For further reference, students should consult the articles on argument found in Part I of the NJS *Aids to Practice Manual*.

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