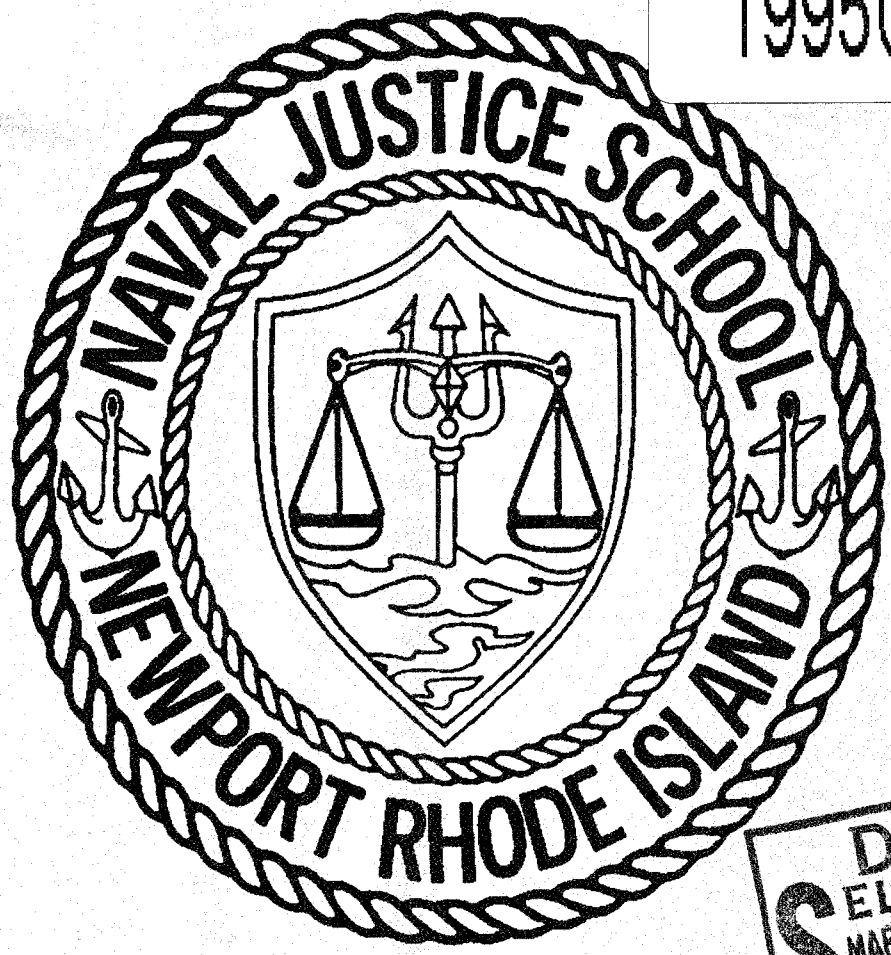
COMMANDER'S HANDBOOK

19950228 004



DTIC
ELECTE
MAR 06 1995
S D
B

ON MILITARY AND CIVIL LAW

DISTRIBUTION STATEMENT A
Approved for public release;
Distribution Unlimited

October 1994

NAVAL JUSTICE SCHOOL
360 Elliot Street
Newport, Rhode Island 02841-1523

Naval Justice School publications are updated periodically to incorporate recent changes in the law. Each edition contains the date of the new edition (month and year). As new editions containing major substantive changes are printed for distribution to students, copies are furnished to the Defense Technical Information Center (DTIC) and the National Technical Information Service (NTIS) for republication and sale. The availability of texts through these agencies lags approximately six months behind the date of the printing at the Naval Justice School. If updates or additional copies of publications are desired, the DTIC or the NTIS should be contacted directly to obtain the date of the edition available and ordering information. Copies are not available from the Naval Justice School.

Commands not already registered with the DTIC may obtain registration forms and information on ordering publications by writing to:

Defense Technical Information Center
Cameron Station, Building 5
Attention: Code DTIC-FDRA
Alexandria, Virginia 22314-6145

Individual purchasers may obtain information on ordering publications by writing to:

U.S. Department of Commerce
National Technical Information Service
5285 Port Royal Road
Springfield, Virginia 22161

Naval Justice School
Newport, Rhode Island
Commander's Handbook
Rev. 10/94

PREFACE

The *Commander's Handbook* is divided into five separate sections as follows:

Section

I. Evidence

II. Procedure

III. Criminal Law

IV. Civil Law

V. Glossary of Words and Phrases

DTIC
ELECTE
MAR 06 1995
S B D

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

Note: Effective 5 October 1994, the names of the military appellate courts were changed. The Court of Military Appeals was changed to the Court of Appeals for the Armed Forces, and the Navy-Marine Corps Court of Military Review was changed to the Navy-Marine Corps Court of Criminal Appeals. As this change occurred just as we were preparing to go to print with this publication, we have attempted to use the new names throughout. If we have missed any, please note that the two names refer to the same court.

Editor

DISTRIBUTION STATEMENT A
Approved for public release;
Distribution Unlimited

DTIC QUALITY INSPECTED 5

COMMANDER'S HANDBOOK

Master Table of Contents

EVIDENCE DIVISION

CHAPTER 1	THE LAW OF PRIVILEGES
CHAPTER 2	THE LAW OF SELF-INCRIMINATION
CHAPTER 3	PART I - SEARCH AND SEIZURE
	PART II - DRUG ABUSE DETECTION

PROCEDURE DIVISION

CHAPTER 4	MILITARY JUSTICE INVESTIGATIONS
CHAPTER 5	INFORMAL DISCIPLINARY ACTIONS: NONPUNITIVE MEASURES
CHAPTER 6	NONJUDICIAL PUNISHMENT
CHAPTER 7	INTRODUCTION TO THE COURT-MARTIAL PROCESS
CHAPTER 8	THE SUMMARY COURT-MARTIAL
CHAPTER 9	THE SPECIAL COURT-MARTIAL
CHAPTER 10	POTENTIAL LEGAL PROBLEMS OF THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY
CHAPTER 11	PRETRIAL ASPECTS OF GENERAL COURTS-MARTIAL
CHAPTER 12	REVIEW OF COURTS-MARTIAL

CRIMINAL LAW DIVISION

CHAPTER 13	PARTIES TO CRIME: PRINCIPALS AND ACCESSORIES AFTER THE FACT
CHAPTER 14	SOLICITATION, CONSPIRACY, AND ATTEMPTS
CHAPTER 15	ORDERS OFFENSES AND DERELICTION OF DUTY
CHAPTER 16	DISRESPECT
CHAPTER 17	ABSENCE OFFENSES
CHAPTER 18	THE GENERAL ARTICLE: ARTICLE 134
CHAPTER 19	CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN
CHAPTER 20	ASSAULTS
CHAPTER 21	DISTURBANCE OFFENSES
CHAPTER 22	CRIMES AGAINST PROPERTY
CHAPTER 23	DRUG OFFENSES
CHAPTER 24	DRUNKENNESS
CHAPTER 25	MISCONDUCT BY A SENTINEL OR LOOKOUT
CHAPTER 26	BREACHES OF RESTRAINT
CHAPTER 27	FALSIFICATION OFFENSES
CHAPTER 28	DEFENSES
CHAPTER 29	FRATERNIZATION AND SEXUAL HARASSMENT

CIVIL LAW DIVISION

CHAPTER 30	ADMINISTRATIVE FACT-FINDING BODIES
CHAPTER 31	LINE OF DUTY AND MISCONDUCT DETERMINATIONS
CHAPTER 32	ENLISTED ADMINISTRATIVE SEPARATIONS
CHAPTER 33	ADMINISTRATIVE SEPARATION PROCEDURES
CHAPTER 34	STANDARDS OF CONDUCT AND GOVERNMENT ETHICS
CHAPTER 35	FREEDOM OF EXPRESSION
CHAPTER 36	RELATIONS WITH CIVIL AUTHORITIES
CHAPTER 37	LEGAL ASSISTANCE
CHAPTER 38	FAMILY ADVOCACY PROGRAM
CHAPTER 39	ENVIRONMENTAL LAW

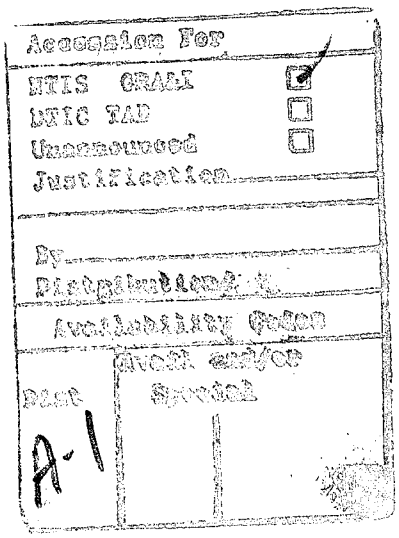


Table of Contents

EVIDENCE DIVISION

Page

CHAPTER 1 THE LAW OF PRIVILEGES

Introduction to the Law of Privileges 1-1
Husband-Wife Privilege - Mil.R.Evid. 504 1-1
Clergy-Penitent Privilege - Mil.R.Evid. 503 1-3
Doctor-Patient Privilege - Mil.R.Evid. 501(d) 1-3
Classified Information - Mil.R.Evid. 505 1-4
Identity of Informant - Mil.R.Evid. 507 1-4
Voluntary Disclosure for
Drug Abuse Rehabilitation 1-4

CHAPTER 2 THE LAW OF SELF-INCRIMINATION

Fifth Amendment 2-1
Article 31 of the Uniform Code
of Military Justice 2-1
The Right to Counsel 2-5
Counseling Sessions and Persons Acting
in a Private Capacity 2-6
Cleansing Warnings 2-7
Right to Terminate the Interrogation 2-8
Factors Affecting Voluntariness 2-8
Consequences of Violating the
Rights Against Self-Incrimination 2-9
The Suspect's Rights Acknowledgement /
Statement Form 2-9
The Government's Burden at Trial 2-10
Grants of Immunity 2-10

Table of Contents - continued

CHAPTER 3 PART I - SEARCH AND SEIZURE

Sources of the Law of Search and Seizure 3-2
The Language of the Law of Search and Seizure 3-3
Categorization of Searches 3-6
"Plain View" Seizure 3-17
The Use of Drug-Detector Dogs 3-17
Body Views and Intrusions 3-19
Inspections and Inventories 3-20

CHAPTER 3 PART II - DRUG ABUSE DETECTION

General Guidance 3-23
Uses of Urinalysis Results 3-26
The Collection Process 3-26
Drug Testing 3-27

Appendixes

I a Finding the Existence of Probable Cause to Order a Search 3-28
b Search Authorizations: Informant Addendum 3-30
c Searches: Describe What to Look for and Where to Look 3-31

II Urinalysis Consent Form 3-33

III Use of Drug Urinalysis Results 3-34

IV Urinalysis 3-35

V Drug Screening Labs 3-38

CHAPTER I

THE LAW OF PRIVILEGES

INTRODUCTION TO THE LAW OF PRIVILEGES

The law concerning privileges, found in Section V of the Military Rules of Evidence (Part III, MCM, 1984), represents the President's determination that it is in the best interests of the public to prohibit the use of specific evidence arising from a particular relationship in order to encourage such relationships and to preserve them once formed. For instance, it is considered to be in the public's best interest that the institution of marriage be preserved. Therefore, as will be explained in this chapter, evidentiary rules exist which prohibit, under certain circumstances, compelling one spouse to testify against the other or the disclosing by one spouse of confidential communications made between the spouses during their marriage. Such prohibitions represent public policy determinations that the rules of this privilege will foster the preservation of the institution of marriage and, further, that the public need for the preservation of the marital bonds outweighs the benefits that would be obtained at court if such prohibitions did not exist.

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

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

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

1. ***Spousal incapacity*** (Mil.R.Evid. 504(a)). Under this privilege, a person has the privilege either to elect to testify or refuse to testify against his or her spouse if, ***at the time the testimony is to be introduced***, the parties are lawfully married. A lawful marriage will also include a common-law marriage if contracted in accordance with the law of a state which recognizes common-law marriages. If, at the time of testifying, the parties are divorced, or if their marriage has been legally annulled, the privilege will not be available.

Assume, for example, that *A* commits a crime and is brought to trial while lawfully married to *B*. *B*, if called to testify against *A*, may refuse to testify against *A*; conversely, *B* may elect to testify against *A*. The privilege to refuse to testify belongs solely to the ***witness spouse***, not to the accused spouse. If *A* and *B* were married at the time *A* committed the crime but before *A*'s trial commences *A* and *B* were divorced, then *B* would not have the spousal incapacity privilege to refuse to testify. The spousal incapacity privilege is permitted only if the parties are lawfully married at the time the testimony is to be taken. A legal separation does not defeat the spousal incapacity privilege.

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

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

Assume *A* and *B* are lawfully married when *A* tells *B*, in confidence, that he robbed a bank. *B*, if called to testify, even if she elects to testify about other matters, may assert the confidential communication privilege and refuse to testify about what *A* ***told*** her in confidence. Also, *A* may assert the confidential communication privilege and prevent *B* from disclosing *A*'s statement. The situation would be the same even if *A* and *B* were legally divorced at time of trial. Unlike the spousal incapacity privilege to refuse to testify, the marital status of the parties at time of trial is irrelevant. As long as the confidential communication was made while the parties were lawfully married, and not legally separated, the confidential communication privilege may be asserted.

B. In the event that the testifying spouse elects to testify against the accused spouse, and the accused spouse invokes the confidential communication privilege to prevent his / her spouse from testifying about private communications made during the marriage, the latter privilege will prevail and the spouse will not be allowed to reveal such private communications.

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

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

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

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

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

B. The rule defines a clergyman as "a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman." This definition lends itself to broad interpretation. However, it does not appear to be so broad as to include self-styled or self-determined ministers—although it would include part-time ordained ministers.

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

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

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

CLASSIFIED INFORMATION - MIL.R.EVID. 505

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

IDENTITY OF INFORMANT - MIL.R.EVID. 507

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

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

C. *Exceptions*. No privilege exists once:

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

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

VOLUNTARY DISCLOSURE FOR DRUG ABUSE REHABILITATION

Voluntary self-referral for counseling, treatment, or rehabilitation is a one-time procedure that enables drug-dependent Navy personnel to obtain help without risk of disciplinary action. Disclosure of ***use*** or ***possession incident to use*** to designated officials will be considered confidential as long as the disclosure is solely to obtain assistance under the self-referral program. There is no confidentiality for disclosure of drug distribution. Any evidence obtained directly or derivatively from a qualified disclosure may not be used at disciplinary proceedings, on the issue of characterization of service in separation proceedings, or for vacating previously

suspended punitive action. Participation in the self-referral program does not preclude disciplinary action or adverse administrative action based upon "independent" evidence. Personnel in the program are subject to valid unit sweep and random urinalysis inspections pursuant to Mil.R.Evid. 313. The results of such testing can be used for all disciplinary purposes. *See* OPNAVINST 5350.4B, enclosure (5), for more information on self-referral. (***Note***: The Marine Corps Drug Exemption Program, which was similar to this Navy program, has been eliminated.)

NOTES

NOTES (continued)

CHAPTER II

THE LAW OF SELF-INCRIMINATION

FIFTH AMENDMENT

The fifth amendment of the U.S. Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."

ARTICLE 31 OF THE UNIFORM CODE OF MILITARY JUSTICE

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

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

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

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

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

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

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

D. ***Application to other interrogations.*** The agents of the Naval Criminal Investigative Service (NCIS) and the Marine Corps Criminal Investigation Division must comply with article 31(b) in all military interrogations. This rule applies with equal force to civilians acting as base or station police when acting as agents of the military.

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

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

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

G. ***Fair notice as to the nature of the offense.*** The question frequently arises, "[M]ust I warn the suspect of the specific article of the UCMJ allegedly violated?" There is no need to advise a suspect of the particular article violated. The warning must only give fair notice to the suspect of the offense or area of inquiry so

that (s)he can intelligently choose whether to discuss this matter. For example, Agent Smith is not sure of exactly what offense Seaman Jones has committed, but knows that Seaman Jones shot and killed Private Finch. In this situation, rather than advise Seaman Jones of a specific article of the UCMJ, it would be appropriate to advise Seaman Jones that he was suspected of shooting and killing Private Finch.

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

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

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

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

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

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

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

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

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

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

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

THE RIGHT TO COUNSEL

A. ***Counsel warnings***. Apart from a suspect's or accused's article 31(b) rights, a servicemember who is in "custody" must be advised of additional rights. These rights are sometimes referred to as *Miranda / Tempia* warnings. Counsel warnings should be stated as follows:

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

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

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

If the suspect or accused requests counsel, ***all interrogation and questioning must immediately cease***. Questioning may not be renewed unless the suspect initiates further conversation or the suspect's lawyer is present when questioning resumes.

B. "***Custody***." While custody might imply the "jail house" or "brig," the courts have interpreted this term far more broadly. Any deprivation of one's freedom of action in any significant way constitutes custody for the purpose of the counsel requirement. Suppose Seaman Apprentice Fuller is taken before his commanding officer, Commander Sparks, for questioning. Fuller is not under apprehension; furthermore, no charges have been preferred against him. Sparks proceeds to question Fuller concerning a broken window in Sparks' office. Sparks has been

informed by Petty Officer Jenks that he saw Fuller toss a rock through the window. Here, Fuller is suspected of damaging military property of the United States. In this situation, with Fuller standing before his commanding officer, it should be obvious that Fuller has been denied his freedom of action to a significant degree. Fuller is not free simply to leave his commanding officer's office or to refuse to appear for questioning. Thus, Commander Sparks would be required to advise Fuller of his counsel rights as well as his article 31(b) rights. If Sparks does not, Fuller's admission that he broke the window would be inadmissible in any forthcoming court-martial. Likewise, when a suspect is summoned to the NCIS office for an interview with NCIS agents, this will constitute custody necessitating article 31 *and* counsel warnings.

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

COUNSELING SESSIONS AND PERSONS ACTING IN A PRIVATE CAPACITY

The warning requirements apply to formal and informal counseling conducted in an official capacity *if* the counselor suspects or should suspect the servicemember of criminal misconduct. Statements obtained from an accused or suspect would not be admitted in a subsequent court-martial unless the "counselor" provided both article 31(b) and counsel warnings. This is not to suggest that counseling sessions should include such warnings as a matter of course, but rather that "counselors" be aware that failing to provide such warnings may render anything said at the counseling session inadmissible at a court-martial.

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

CLEANSING WARNINGS

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

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

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

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

RIGHT TO TERMINATE THE INTERROGATION

Although not required by article 31, case law, or the Military Rules of Evidence, some courts have recommended that a suspect be advised that (s)he has a right to terminate the interrogation at any time for any reason. Failure to give such advice will not render the suspect's confession inadmissible; however, advising a suspect that (s)he has a right to terminate the interview should help trial counsel prove the voluntariness of the suspect's confession.

FACTORS AFFECTING VOLUNTARINESS

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

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

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

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

CONSEQUENCES OF VIOLATING THE RIGHTS AGAINST SELF-INCRIMINATION

A. ***Exclusionary rule***. Any statement obtained in violation of any warning requirement under article 31, *Miranda / Tempia*, or Mil.R.Evid. 305 is inadmissible against the accused at a court-martial. Any statement that is considered to have been involuntary is likewise inadmissible at a court-martial; however, the statement could still be used at other proceedings—such as nonjudicial punishment or an administrative separation board.

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

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

THE SUSPECT'S RIGHTS ACKNOWLEDGEMENT / STATEMENT FORM

The Suspect's Rights Acknowledgement / Statement form (JAGMAN A-1-m(1)) contains the suspect's or accused's article 31(b) rights and a statement indicating that the accused or suspect understands his or her rights and has chosen to waive those rights. Additionally, this form contains counsel rights and an acknowledgement and waiver of these rights. This form should be used when the command desires to take a statement from a suspect in custody. The form will help ensure that appropriate rights warnings are given and that a record of the rights given and the acknowledgement and waiver of the same will be available if a dispute later arises. It is essential that these rights be read to the suspect or accused, that they be explained, that the individual be given ample opportunity to read them before signing an acknowledgement and waiver (if this is desired) and before making any statement or answering any questions.

THE GOVERNMENT'S BURDEN AT TRIAL

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

GRANTS OF IMMUNITY

A. *Who may issue grants of immunity*

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

2. *Civilian witness*. Prior to the issuance of an order by an officer exercising general court-martial jurisdiction granting immunity to a civilian witness, Federal law requires the approval of the Attorney General of the United States or his/ her designee. JAGMAN 0138c.

B. *Types of immunity*

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

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

While testimonial immunity is the more limited of the two, and it is conceivable that the government could later successfully prosecute an accused to whom a grant of testimonial immunity had been issued, this would be a rare case. The government must prove in such cases that the evidence being offered against the accused who had been given testimonial immunity has come from a source

independent of his / her testimony. A word to the wise: When considering immunity as a prosecutorial technique, make certain the facts have been developed. The immunity might otherwise be given to the wrong person (i.e., the more serious offender or mastermind).

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

D. ***Language of the grant***

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

E. ***Other problems***

Be extremely careful in any case involving national security or classified information. In a case that received widespread publicity, an Air Force lieutenant accused of spying for the Russians was released and the charges against him dismissed because of binding, albeit unauthorized, promises to grant him immunity. Procedural steps, reflected in JAGMAN 0138d and OPNAVINST 5510.1H, require the forwarding of any proposed grants of immunity to the Judge Advocate General in all such cases. Furthermore, JAGMAN 0137b and 0138d discuss the requirement for coordinating with Federal authorities in any case involving a major Federal offense. The best advice that can be given is that higher headquarters should be notified before anything is done (e.g., referral, immunity, pretrial agreements) in any case involving national security, classified information, or a major Federal offense.

NOTES

NOTES (continued)

CHAPTER III

SEARCH AND SEIZURE / DRUG ABUSE DETECTION

PART I - SEARCH AND SEIZURE

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

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

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

SOURCES OF THE LAW OF SEARCH AND SEIZURE

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

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

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

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

Although the fourth amendment mandates that only information obtained under oath may be used as a basis for a search warrant, military courts have not applied the oath requirement to information supporting a commanding officer's *search authorization*. Still, it is strongly recommended that information supporting a search authorization be given under oath. The oath is an important factor that can add to the believability of the person providing information.

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

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

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

THE LANGUAGE OF THE LAW OF SEARCH AND SEIZURE

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

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

a. A quest for evidence;

b. conducted by a government agent; and

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

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

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

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

a. A crime has been committed; and

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

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

(1) Written statements;

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

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

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

a. A crime was committed; and

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

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

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

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

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

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

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

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

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

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

d. persons, when probable cause exists for apprehension;

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

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

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

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

CATEGORIZATION OF SEARCHES

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

A. *Probable cause searches based upon prior authorization*

1. *Military search authorization.* This type of "prior authorization" search is similar to that described in the text of the fourth amendment. The rules governing this type of search are spelled out in Mil.R.Evid. 315. Under Mil.R.Evid. 315, the power to authorize a search follows the billet occupied by the person involved rather than being founded in rank or officer status. Thus, in those situations where senior noncommissioned or petty officers occupy positions as officers in charge or positions analogous to command, they are generally competent to authorize searches absent contrary direction from the service Secretary concerned.

In the typical case, the commander or other "competent military authority," such as an officer in charge, decides whether probable cause exists when issuing a search authorization. The authorizing official must be neutral and detached. Courts will determine neutrality on a case-by-case basis. Mil.R.Evid. 315(d) provides:

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

2. ***Jurisdiction to authorize searches.*** Before any competent military authority can lawfully order a search and seizure, (s)he must have the authority (or "jurisdiction") necessary over both the person and / or place to be searched and the persons or property to be seized. Any search or seizure authorized by one not having jurisdiction is generally a nullity and, even though otherwise valid, the fruits of any seizure will not be admissible in a trial by court-martial if objected to by the defense. If the commanding officer reasonably believes that the place to be searched is within his / her jurisdiction, and if the individual executing the search authorization shares that belief, the results of the search will be admissible even if there was no jurisdiction.

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

(1) ***Civilians.*** The search of civilians is permitted under Mil.R.Evid. 315(c) when they are present aboard military installations. Furthermore, a civilian desiring to enter or exit a military installation may be subject to a reasonable inspection as a condition of entry or exit. The courts have upheld such inspections by the command due to the administrative need for security of military bases. Inspections will be discussed later in this chapter.

(2) ***Military.*** Mil.R.Evid. 315 indicates two categories of military persons who are subject to search by the authorization of competent military authority: members of that commanding officer's unit and others who are subject to military law when in places under that commander's jurisdiction (e.g., aboard a ship or in a command area). There is military case authority for the proposition that the commander's power to authorize searches of members of his / her

command goes beyond the requirement of presence within the area of the command. In one case, the court held that a search authorized by the accused's commanding officer, although actually conducted ***outside*** the squadron area, was nevertheless lawful. Although this search occurred within the confines of the Air Force base, a careful consideration of the language of Mil.R.Evid. 315(d)(1) indicates that a *person* subject to military law could be searched even while outside the military installation. This would hold true *only* for the search of the *person*, since personal property, located off base, is *not* under the jurisdiction of the commander if situated in the United States, its territories, or possessions.

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

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

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

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

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

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

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

3. *Delegation of power to authorize searches*

Formerly, commanders delegated their power to authorize searches to their chief of staff, command duty officer, or even the officer of the day. This practice was found to be illegal by the Court of Appeals for the Armed Forces (formerly the Court of Military Appeals) which held that a commanding officer may not delegate the power to authorize searches and seizures to anyone. The court decided that most searches authorized by delegees such as CDO's would result in unreasonable searches or seizures in violation of the fourth amendment. If full command responsibility "devolves" upon a subordinate, that person may authorize searches and seizures since the subordinate in such cases is acting as the commanding officer. General command responsibility does not automatically devolve to the CDO, SDO, OOD, or even the executive officer simply because the commanding officer is absent. Only when full command responsibilities devolve to a subordinate member of the command may that person lawfully authorize a search. If, for example, the CDO, SDO, or OOD must contact a superior officer or the CO prior to taking action on *any* matter affecting the command, full command responsibilities have not devolved to that person and, therefore, (s)he cannot lawfully authorize a search or seizure. Guidance on this matter has been promulgated by CINCLANTFLT, CINCPACFLT, and CINCUSNAVEUR. Until the courts provide further guidance on this issue, readers should follow the guidance set forth by their respective CINC's / CG's.

4. *The requirement of neutrality and detachment*

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

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

5. *The requirement of probable cause*

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

(1) A crime has been committed; and

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

Before an authorized official may conclude that probable cause to search exists, (s)he must have a reasonable belief that the information giving rise to the intent to search is believable and has a factual basis.

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

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

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

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

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

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

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

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

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

(c) *Statement against interest*. Is the information given by the informant against the informant's own financial interests, or does it implicate the *informant* in criminal activity? If so, is it reasonable to conclude that the informant would not make such a statement if it weren't true?

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

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

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

6. *The use of a writing in the search authorization*

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

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

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

7. *Execution of the search authorization.* Mil.R.Evid. 315(h) provides that a search authorization or warrant should be served upon the person whose property is to be searched if that person is present. Further, the persons who actually perform the search should compile an inventory of items seized and should

give a copy of the inventory to the person whose property is seized. If searches are carried out in foreign countries, the rule provides that actions should conform to any existing international agreements. Failure to comply with these provisions, however, will not necessarily render the items involved inadmissible at a trial by court-martial.

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

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

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

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

a. ***Insufficient time***. No authorization need be obtained where there is probable cause to search, and there is a reasonable belief that the time required to obtain an authorization would result in the removal, destruction, or concealment of the property or evidence sought. Although both military and civilian case law, in the past, have applied this doctrine almost exclusively to automobiles, this exception may be a basis for entry into barracks, apartments, etc. in situations where drugs are being used. The Court of Appeals for the Armed Forces found that an OOD, when confronted with the unmistakable odor of burning marijuana outside the accused's barracks room, acted correctly when he demanded entry to the room and placed all occupants under apprehension without first obtaining the commanding officer's authorization for his entry.

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

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

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

C. *Searches not requiring probable cause*

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

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

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

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

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

Even where consent to search is obtained, if you ask anyone suspected of an offense any questions, you must first give proper article 31 warnings and, in most cases, counsel warnings as well.

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

3. ***Stop and frisk***. Although most often associated with civilian police officers, this type of limited "seizure" of the person is specifically included in Mil.R.Evid. 314(f). It is most often used where an experienced officer, NCO, or petty officer is confronted with circumstances that "just don't seem right." This "articulable suspicion" allows the law enforcement officer to detain an individual to ask for identification and an explanation of the observed circumstances. This is the "stop" portion of the intrusion. Should the person who makes the stop have reasonable grounds to fear for his / her safety, a limited "frisk" or "pat down" of the outer garments of the person stopped is permitted to determine whether the person is

armed. If any weapon is discovered in this pat down, its seizure can provide probable cause for apprehension and a subsequent search incident thereto. There is, however, no right to frisk or pat down a suspect in situations where no fear of personal danger is involved. Nor can the "frisk" be conducted in a more than cursory manner to ensure safety. Further, any detention must be brief and related to the original suspicion that underlies the stop.

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

Apprehension means taking a person into custody. This means the imposition of physical restraint, and is substantially the same as civilian "arrest."

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

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

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

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

An apprehension may not be used as a subterfuge to conduct an otherwise unlawful search (i.e., probable cause to apprehend must *precede* the apprehension). Furthermore, only the person apprehended and the immediate area within which that person could easily obtain a weapon or destroy evidence may be searched. For example, a locked suitcase next to the person apprehended may not be searched incident to the apprehension, but it may be seized and held pending authorization for a search based on probable cause; in addition, consent to search may always be requested of the apprehendee.

When a law enforcement officer lawfully apprehends the occupants of an automobile, the officer may conduct a search of the entire passenger compartment including a locked glove compartment and any container—open or closed—found in the passenger compartment.

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

5. ***Emergency searches to save life or for related purposes.*** In emergency situations, Mil.R.Evid. 314(i) permits searches to be conducted to save life or for related purposes. The search may be performed in an effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury. Such a search must be conducted in good faith and may not be a subterfuge in order to circumvent an individual's fourth amendment protections. If incriminating evidence is obtained during such a search, it may be used against the individual in any resulting disciplinary proceeding. This is true even though no search authorization was issued, no consent was obtained, and no probable cause existed.

"PLAIN VIEW" SEIZURE

When a government official is in a place where (s)he has a lawful right to be, whether by invitation or official duty, evidence of a crime observed in plain view may be seized in accordance with Mil.R.Evid. 316(d)(4)(C). An often repeated example of this type of lawful seizure arises during a wall locker inspection. While looking at the uniforms of a certain servicemember, a baggie of marijuana falls to the deck. Its seizure as contraband is justifiable under these circumstances as having been observed in plain view. Another situation could arise while a searcher is carrying out a duly authorized search for stolen property and comes upon a hand grenade in the search area. Since it is contraband, it is both seizable and admissible in court-martial proceedings.

THE USE OF DRUG-DETECTOR DOGS

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

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

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

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

Close attention must be given in this situation to establishing the reliability of the informers (i.e., the dog and doghandler). The drug-detector dog is simply an informant, albeit with a longer nose and more more hair than most informants. As in the usual informant situation, there must be a showing of both a factual basis (i.e., the dog's alert and surrounding circumstances) and the dog's reliability. This reliability may be determined by the commanding officer through either of two commonly used methods. The first method is for the commanding officer to observe the accuracy of a particular dog's alert in a controlled situation (i.e., with previously planted drugs). The second method is for the commanding officer to review the record of the particular dog's previous performance (i.e., the dog's success rate). Although either of these methods may be sufficient by themselves for a determination that a dog is reliable, both should be used whenever practicable. For more information on the use of military working dogs as drug detectors, and establishing their reliability as such, see OPNAVINST 5585.2A (*Military Working Dog Manual*) of 17 June 1988.

A few words of caution about the use of drug dogs are in order. One court has stated that a military commander who participates in an inspection involving the use of detector dogs in the command area cannot later authorize a search based upon subsequent alerts by the same dogs during that inspection. This illustrates the point that any person swept into the evidence-gathering process may find it impossible later to be considered an impartial official. Mere presence at the

scene does not automatically disqualify the commanding officer, but the line is difficult to draw. The better advice is for the commanding officer to distance him / herself from the evidence-gathering process.

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

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

2. when the dog alerts on the "air space" extending from an area where there is an expectation of privacy, such as a wall locker.

BODY VIEWS AND INTRUSIONS

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

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

1. Pursuant to a lawful search authorization; or

2. where the circumstances show a "***clear indication***" that evidence of a crime will be found, and that there is reason to believe that the delay required to seek a search authorization could result in the destruction of the evidence (i.e., its elimination from the body).

Involuntary extraction of body fluids, whether conducted pursuant to 1 or 2 above, must be done in a reasonable fashion by a person with the appropriate medical qualifications. Note that an order to provide a urine sample through normal elimination, as in the typical urinalysis inspection conducted pursuant to Mil.R.Evid. 313 and OPNAVINST 5350.4B, is not an "extraction" and need not be conducted by medical personnel.

B. ***Intrusions for valid medical purposes***. Mil.R.Evid. 312(f) permits the military to take whatever actions are necessary to preserve the health of a servicemember. Thus, evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and will be admissible at court-martial.

INSPECTIONS AND INVENTORIES

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

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

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

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

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

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

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

Mil.R.Evid. 313(b) indicates that certain classes of contraband inspections are especially likely to be subterfuge searches and thus not inspections at all. If the contraband inspection: (1) Occurs immediately after a report of some specific offense in the unit and was not previously scheduled; (2) singles out specific individuals for inspection; or (3) "inspects" some people substantially more thoroughly than others, then the government must prove that the inspection was not actually a subterfuge search. As a practical matter, the rule expresses a clear preference for ***previously scheduled*** contraband inspections. Such scheduling helps ensure that the inspection is a routine command function and not an excuse to search specific persons or places for evidence of crime. The inspection should be scheduled sufficiently far enough in advance so as to eliminate any reasonable probability that

the inspection is being used as a subterfuge. Such scheduling may be made as a matter of date or event. In other words, inspections may be scheduled to take place on any specific date (e.g., a commander may decide on the first of a month to inspect on the 7th, 9th, and 21st), or on the occurrence of a specific event beyond the usual control of the commander (e.g., whenever an alert is ordered, forces are deployed, a ship sails, etc.). The *previously scheduled* inspection, however, need not be *preannounced*.

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

C. *Inventories*. Under Mil.R.Evid. 313(c), evidence seized during a bona fide inventory is admissible. The rationale behind this exception to the usual probable cause requirement is that such an inventory is not prosecutorial in nature and is a reasonable intrusion. Commands may inventory the personal effects of members who are on an unauthorized absence, placed in pretrial confinement, or hospitalized. Contraband or evidence incidentally found during the course of such a legitimate inventory will be admissible in a subsequent criminal proceeding. However, an inventory may not be used as a subterfuge for a search, and all such inventories must be conducted in a reasonable manner. For example, it would be unreasonable to slice the linings of a servicemember's clothing in the course of conducting an inventory.

PART II - DRUG ABUSE DETECTION

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

GENERAL GUIDANCE

The urinalysis programs of the Navy, Marine Corps, and Coast Guard were established primarily to provide a means for the detection of drug abuse and to serve as a deterrent against drug abuse. Some of the important directives concerning the program are: DOD Dir. 1010.1; OPNAVINST 5350.4B; MCO P5300.12; COMDTINST 5355.1D; and COMDTINST M1000.6A, Chapter 20-C. Additional guidance is found in the Military Rules of Evidence. These rules and directives contain detailed guidelines for the collection, analysis, and use of urine samples.

The positive results of a urinalysis test may be used for a number of distinct purposes, depending on how the original sample was obtained. *See* the grid at Appendix III to this chapter. It is most important to be able to recognize when, and under what circumstances, a command may conduct a proper urinalysis.

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

1. *Search and seizure*

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

b. ***Probable cause and authorization.*** Urinalysis testing may be ordered, in accordance with Mil.R.Evid. 312(d) and 315, whenever there is probable cause to believe that a member has wrongfully used drugs and that a test

will produce evidence of such use. For example, during a routine locker inspection in the enlisted barracks, you find an open baggie of what appears to be marijuana under some clothes in Petty Officer Jones' wall locker. Along with the marijuana you find drug paraphernalia (e.g., a roach clip and some rolling papers). You notify the commanding officer of your find and he sends for Jones. A few minutes later, Petty Officer Jones staggers into the CO's office—eyes red and speech slurred. He is immediately apprehended and searched. A marijuana cigarette is found in his shirt pocket. Under these facts, a commander should have little trouble finding probable cause to order that a urine sample be given.

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

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

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

b. Selection, random or otherwise, of an entire subunit or identifiable segment of a command. Examples of such groups would include: an entire department, division, or watch section; all personnel within specific paygrades; all newly reporting personnel; or all personnel returning from leave, liberty, or UA.

c. *Urinalysis testing of an entire unit*

As a means of quota control, Navy commands are required to obtain second-echelon approval prior to conducting all unit sweeps and random inspections involving more than 20% of a unit, or 200 members. Failure to obtain

such approval, however, will not invalidate the results of the testing. The Marine Corps and Coast Guard have no such requirement.

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

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

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

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

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

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

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

USES OF URINALYSIS RESULTS

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

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

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

THE COLLECTION PROCESS

The weakest link in the urinalysis program chain is in the area of collection and custody procedures. Commands should conduct every urinalysis with the full expectation that administrative or disciplinary action might result. The use of chiefs, staff NCO's, and officers as observers and unit coordinators is strongly encouraged. Strict adherence to direct observation policy during urine collection to prevent substitution, dilution, or adulteration is an absolute necessity. Mail samples immediately after collection to reduce the possibility of tampering. Ensure all documentation and labels are legible and complete. Special attention should be given to the ledger and chain of custody to ensure that they are accurate, complete, and legible. Additional guidance is provided in OPNAVINST 5350.4B, Appendix B (Appendix IV to this chapter), and the Coast Guard Personnel Manual, COMDTINST 5355.1D.

DRUG TESTING

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

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

B. ***Navy drug screening laboratories***. The Navy operates five drug screening laboratories in support of the Navy and Marine Corps urinalysis program worldwide. Their addresses, phone numbers, and areas of responsibility are contained in Appendix V to this chapter. The Coast Guard has recently adopted Navy procedures and is now using the Navy Drug Screening laboratories as well.

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

APPENDIX I

FINDING THE EXISTENCE OF PROBABLE CAUSE TO ORDER A SEARCH

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

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

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

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

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

Ask yourself:

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

b. Is the person or place described with particularity?

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

5. Who is the source of this information?

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

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

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

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

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

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

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

Appendix I-a(2)

SEARCH AUTHORIZATIONS: INFORMANT ADDENDUM

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

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

a. Questions to determine the informant's reliability:

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

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

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

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

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

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

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

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

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

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

Appendix I-b

SEARCHES: DESCRIBE WHAT TO LOOK FOR AND WHERE TO LOOK

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

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

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

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

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

a. ***Contraband***: Something which is illegal to possess.

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

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

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

c. ***Evidence of crimes***

(1) ***Fruits of a crime***

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

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

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

(3) ***Evidence which may aid in a particular crime solution***: Things that help catch the criminal.

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

Appendix I-c(2)

APPENDIX II

URINALYSIS CONSENT FORM

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

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

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

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

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

_____

Signature

_____

Date

_____

Witness' Signature

_____

Date

Appendix II

APPENDIX III

OPNAVINST 5350.4B
13 SEP 1990

USE OF DRUG URINALYSIS RESULTS

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

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

Appendix A to Enclosure (4)

Appendix III

APPENDIX IV

URINALYSIS

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

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

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

The unit coordinator should:

1. Ask for the member's ID card.
2. Compare the ID picture with the face of the member.
3. Copy the social security number from the ID card onto the urinalysis label and chain of custody.
4. Copy the name and social security number from the card into the urinalysis ledger.
5. Allow the subject to verify the label information and chain of custody form.
6. Ask the member if (s)he is taking any prescription drugs; record the answer in the urinalysis ledger.
7. Place the label on a urine sample bottle and hand the bottle to member for production of a sample under supervision of observer.
8. When member returns the sample, ask the member if the bottle contains his / her urine.
9. Again, allow member to verify the information on the label, chain of custody form, and ledger.

10. Have member initial label.

11. Attach tamper-resistant tape so that it overlaps the label on both ends.

12. Have the member initial the tamper-resistant tape on top of the bottle.

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

14. Have member sign ledger.

15. Have observer sign ledger.

16. Have coordinator sign ledger.

17. Place bottle in original cardboard container.

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

The observer should:

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

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

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

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

5. Initial the ledger.

6. Sign the ledger.

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

Appendix IV(2)

Problems arise in the following situations:

1. When one individual tries to observe multiple members at one time.
2. When the observer is unprepared.
3. When the observer fails to initial the ledger.
4. When the observer fails to sign the ledger, or no ledger is maintained.
5. When the member is absent at the time that the label is finally attached to the bottle.
6. When the observer does not accompany the member from the unit coordinator's table to the head and back.
7. When the same exact procedures are not used on every member.
8. When an atmosphere of confusion surrounds the collection.
9. When only the last four digits of the social security number are printed on the label.

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

Appendix IV(3)

APPENDIX V

DRUG SCREENING LABS

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

Note: ** Scheduled to close in FY 95

AREAS OF RESPONSIBILITY

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

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

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

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

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

Note: After closure of NDSL GL and NDSL NorVa, JAX will handle Eastern U.S. and SD will handle Western U.S., with exceptions in the case of uneven workloads.

NOTES

NOTES (continued)

Table of Contents

PROCEDURE DIVISION

Page

CHAPTER 4 MILITARY JUSTICE INVESTIGATIONS

Preliminary Investigation of Suspected Offenses 4–1

CHAPTER 5 INFORMAL DISCIPLINARY ACTIONS: NONPUNITIVE MEASURES

Introduction 5–1
Nonpunitive Censure 5–1
Extra Military Instruction (EMI) 5–2
Denial of Privileges 5–3
Alternative Voluntary Restraint ("HACK") 5–4

CHAPTER 6 NONJUDICIAL PUNISHMENT

Introduction 6–1
Nature and Requisites of Nonjudicial Punishment 6–1
Authorized Punishments at NJP 6–12
Combinations of Punishments 6–17
Clemency and Corrective Action on Review 6–17
Appeal from Nonjudicial Punishment 6–21
Imposition of NJP as a Bar to Further Proceedings 6–26

CHAPTER 7 INTRODUCTION TO THE COURT-MARTIAL PROCESS

Prerequisites to Court-Martial Jurisdiction 7–1
Discussion 7–1

Page

CHAPTER 8 THE SUMMARY COURT-MARTIAL

Introduction 8-1
Creation of the Summary Court-Martial 8-1
Referral to Summary Court-Martial 8-5
Pretrial Preparation 8-7
Post-Trial Responsibilities of the Summary Court-Martial 8-14

CHAPTER 9 THE SPECIAL COURT-MARTIAL

Introduction 9-1
Creation of the Special Court-Martial 9-1
Constitution of Special Courts-Martial 9-3
Qualifications of Members 9-3
Qualifications of the Military Judge 9-4
Improper Constitution of the Court 9-4
Qualifications of Counsel 9-5
Special Court-Martial Referral 9-9
Trial Procedure 9-11
Special Court-Martial Punishment 9-14

CHAPTER 10 POTENTIAL LEGAL PROBLEMS OF THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY

Introduction 10-1
Accuser Concept Problems 10-1
Unlawful Command Influence 10-2
Pretrial Restraint Problems 10-2
Speedy Trial Problems 10-5
Pretrial Agreements 10-6

Page

CHAPTER 11 PRETRIAL ASPECTS OF GENERAL COURTS-MARTIAL

Introduction 11-1
Nature of the Pretrial Investigation 11-1
The Hearing Procedure 11-4
Post-Hearing Procedures 11-6

CHAPTER 12 REVIEW OF COURTS-MARTIAL

Introduction 12-1
Sequence of Review 12-2
Issues and Options for the Reviewing Authority 12-7

CHAPTER IV

MILITARY JUSTICE INVESTIGATIONS

PRELIMINARY INVESTIGATION OF SUSPECTED OFFENSES

A. *Complaints*

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

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

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

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

B. *Action upon receipt of complaint*

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

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

3. There are certain offenses for which referral to Naval Criminal Investigative Service (NCIS) is mandatory. SECNAVINST 5520.3B of 4 January 1993 and ALNAV 013/87 (2218/02 June 87) provide an extensive list and guidance for offenses that NCIS must investigate.

4. Upon referral of a case to NCIS, any command action on the case should be held in abeyance; however, if immediate referral to NCIS is impossible, steps should be taken to preserve evidence and record changing conditions. Care should be taken to ensure that further investigation will not be compromised or impeded.

C. *The preliminary inquiry*

1. There are no set procedures or forms for preliminary inquiries. For minor offenses normally disposed of at NJP, NAVPERS 1626/7 for the Navy and the UPB for the Marine Corps should be used. Instructions for the completion of the UPB are contained within chapter 2, MCO P5800.8B (LEGADMINMAN).

2. While NAVPERS 1626/7 serves the dual function of an investigative form and a report chit, the UPB does not. Consequently, a locally prepared preliminary inquiry report form may be used and appended to the UPB. Likewise, additional information or witness statements may be appended to NAVPERS 1626/7 as needed.

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

4. The accused should be interviewed last after appropriate rights advisements.

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

6. Charges and specifications should be drafted IAW the format provided in Part IV of the MCM; however, the preliminary inquiry officer should not sign and swear to the charges at this time. To do so constitutes "preferring charges" and may start the speedy trial clock discussed in Chapter 10.

7. A JAGMAN investigation does not have to be convened for all military justice matters; however, it is possible that a JAGMAN investigation may address suspected criminal activity.

NOTES

NOTES (continued)

CHAPTER V

INFORMAL DISCIPLINARY ACTIONS: NONPUNITIVE MEASURES

INTRODUCTION

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

The UCMJ and Secretarial regulations prescribe significant limitations on the use of nonpunitive measures. In this regard, it should be noted that nonpunitive measures may ***never*** be used as a means of informal punishment for any military offense. JAGMAN 0102.

NONPUNITIVE CENSURE

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

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

The only exception is administrative censure issued by the Secretary of the Navy. Secretarial letters of censure may be issued without conducting nonjudicial punishment and may be mentioned in fitness reports and forwarded to CHNAVPERS or HQMC for inclusion in the recipient's official record.

EXTRA MILITARY INSTRUCTION (EMI)

The term "extra military instruction" (EMI) is used to describe the practice of assigning extra tasks to a servicemember who is exhibiting behavioral or performance deficiencies for the purpose of correcting those deficiencies. Usually, such tasks are performed in addition to normal duties.

Because this leadership tool has a more severe impact on the member, there are significant guidelines to prevent abuse. All EMI involves an order from a superior to a subordinate to perform an assigned task. It is a long-standing principle in military law that orders imposing punishment are unlawful and need not be obeyed unless issued pursuant to NJP or court-martial sentence. Therefore, with every order to perform EMI, it must be resolved whether a valid training purpose is involved or whether the purpose of the order is punishment. In order to stay within the law, the person ordering EMI should always identify the particular character deficiency and assign a task that is related to correcting that deficiency. The language used in issuing the EMI order will frequently be scrutinized to determine if these steps were followed.

Section 0103 of the *JAG Manual* indicates that no more than two (2) hours of instruction should be required each day; instruction should not be required on the individual's Sabbath; the duration of EMI should be limited to a period of time required to correct the deficiency; and EMI cannot be used to deprive a member of normal liberty, but may be assigned at reasonable times after normal working hours and, after completing each day's instruction, the subordinate should be allowed normal limits of liberty. What "reasonable times" are will differ with the normal work schedule of the individual involved, but no great interference with normal hours of liberty should be involved.

-- ***Authority to impose.*** The authority to assign EMI to be performed during working hours is not limited to any particular rank or rate, but is inherent in authority vested in officers and noncommissioned petty officers. The authority to assign EMI to be performed after working hours rests in the commanding officer or officer in charge, but may be delegated to officers, petty officers, and noncommissioned officers. *See* OPNAVINST 3120.32B, Subj: Standard Organization and Regulations of the U.S. Navy; para. 1300.1b, *Marine Corps Manual.*

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

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

DENIAL OF PRIVILEGES

A third nonpunitive measure that may be employed to correct minor deficiencies is denial of privileges. A "privilege" is defined as a benefit provided for the convenience or enjoyment of an individual. JAGMAN 0104. Denial of privileges is a more severe leadership measure than either censure or EMI because denial of privileges does not necessarily involve or require an instructional purpose. Examples of privileges that may be withheld can be found in JAGMAN 0104. They include such things as special liberty (72/96-hour liberty), exchange of duty, special command programs, hobby shops, parking privileges, and access to base or ship movies, enlisted or officers' clubs. It may also encompass such things as withholding of special pay and commissary and exchange privileges, provided such withholding complies with applicable rules and regulations and is otherwise in accordance with law. *See, e.g.*, DOD Directive 5525.4 of 2 November 1981, as it applies to enforcement of traffic laws on DOD installations.

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

Normal liberty is technically a "privilege" and regulations permit the deprivation of normal liberty for: authorized pretrial restraint, liberty risk in a foreign country or in foreign territorial waters when such action is deemed essential for the protection of the foreign relations of the United States or as a result of international legal-hold restriction. Moreover, when it is necessary to the efficiency of the naval service that official functions be performed and that certain work be accomplished in a timely manner, it is not punishment to require personnel to remain on board and be physically present outside of normal working hours. JAGMAN 0104. Other grounds for deprivation of liberty include the health or safety of the individual or the public. This is the basis for ordering the military spouse into the barracks or back to the ship after a report of spouse abuse.

ALTERNATIVE VOLUNTARY RESTRAINT ("HACK")

Alternative voluntary restraint is a device whereby a superior promises not to report an offense or not to impose punishment in return for a promise by the subordinate not to take normal liberty and to remain on base or aboard ship (also referred to as "hack"). This type of deprivation of liberty is ***not*** authorized by the UCMJ, MCM, or *JAG Manual*. The commander is placed in a tenuous position because such agreements are unenforceable. Alternative voluntary restraint can be considered "former punishment" and thus preclude the imposition of NJP or referral of charges to a court-martial should the command later desire to take official disciplinary action (for example, where the servicemember does not live up to his / her part of the voluntary restraint bargain).

NOTES

NOTES (continued)

CHAPTER VI

NONJUDICIAL PUNISHMENT

INTRODUCTION

The terms "nonjudicial punishment" and "NJP" are used interchangeably to refer to certain limited punishments which can be awarded for minor disciplinary offenses by a commanding officer (CO) or officer in charge (OIC) to members of his/her command. In the Navy and Coast Guard, NJP proceedings are referred to as "captain's mast" or simply "mast." In the Marine Corps, the process is called "office hours," and, in the Army and Air Force, it is referred to as "Article 15." Article 15 of the *Uniform Code of Military Justice* (UCMJ), Part V of the *Manual for Courts-Martial, 1984* (MCM), and Part B of Chapter I of *The Manual of the Judge Advocate General* constitute the basic law concerning NJP procedures. The legal protections afforded an individual subject to NJP proceedings are more extensive than those for nonpunitive measures, but less extensive than for courts-martial. NJP is both administrative and nonadversarial in nature. When punishment is imposed, it is not considered a conviction; and, when a case is dismissed, it is not considered an acquittal which would preclude further prosecution at courts-martial.

NATURE AND REQUISITES OF NONJUDICIAL PUNISHMENT

A. *The power to impose NJP*

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

a. *A commanding officer*

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

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

b. *An officer in charge*

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

c. *Officers to whom NJP authority has been delegated*

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

(2) Additionally, where members of the naval service are assigned to a multiservice command, the commander of such multiservice command may designate one or more naval units and, for each unit, shall designate a commissioned officer of the naval service as CO for NJP purposes over the unit. A copy of such designation must be furnished to the CHNAVPERS or CMC, as appropriate, and to the Judge Advocate General. JAGMAN 0106d. However, Change 2 to the *JAG Manual* may change this rule. The new rule, which has not been published yet, will allow a joint service commander to take a person from another service to NJP. Change 2 to the *Manual* should be published in the near future.

2. *Limitations on power to impose NJP*

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

3. *Referral of NJP to higher authority*

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

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

B. *Persons on whom NJP may be imposed*

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

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

3. At the time the punishment is imposed, the accused must be a member of the command of the CO (or of the unit of the OIC) who imposes the NJP. JAGMAN 0107a(1).

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

b. A designated party to a *JAG Manual* fact-finding body remains "of the command or unit" to which (s)he was attached at the time of his / her designation as a party for the sole purpose of imposing a letter of admonition or reprimand as NJP. JAGMAN 0107b(2).

c. *Personnel of another armed force*

(1) Under present agreements between the armed forces, a Navy CO should not exercise NJP jurisdiction on Army or Air Force personnel assigned or attached to a naval command. As a matter of policy, such personnel are returned to their parent-service unit for discipline. If this is impractical and the need to discipline is urgent, NJP may be imposed; but, a report to the Department of the Army or Department of the Air Force is required. *See* MILPERSMAN 1860320.5a, b, as to the procedure to follow. However, Change 2 to the *JAG Manual*

may change this rule. The new rule, which has not been published yet, will allow a joint service commander to take a person from another service to NJP. Change 2 to the *Manual* should be published in the near future.

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

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

4. *Imposition of NJP on embarked personnel*

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

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

5. *Imposition of NJP on reservists*

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

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

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

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

(3) (s)he may request from the Regular Component officer exercising general court-martial jurisdiction (OEGCMJ) over the accused an involuntary recall of the accused to active duty or inactive duty training for purposes of imposing NJP; or

(4) if the accused waives his / her right to be present at the NJP hearing, the CO or OIC may impose NJP after the period of active duty or inactive duty training of the accused has ended. JAGMAN 0107b; R.C.M. 204, MCM, 1984.

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

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

a. Article 15a, UCMJ, and Part V, para. 3, MCM, 1984, provide another limitation on the exercise of NJP. Except in the case of a person attached to or embarked in a vessel, an accused may demand trial by court-martial in lieu of NJP. Note that such a demand does not require that charges be referred to a court-martial. Referral is a decision exercised by the convening authority, not by the member.

b. This right to refuse NJP exists up until the time NJP is imposed (i.e., up until the CO announces the punishment). Art. 15a, UCMJ. This right is not waived by the fact that the accused has previously signed a "report chit" (NAVPERS Form 1626/7 or UPB Form NAVMC 10132) indicating that (s)he would accept NJP.

c. The category of persons who may not refuse NJP includes those persons assigned or attached to the vessel; on board for passage; or assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body. Case law interprets "vessel" as commissioned ships of the U.S. Navy and precommissioning units which have been duly designated "in commission, special," or "in service." Whether the ship is at sea or in drydock is irrelevant. Case law also interprets "attached" to include submarine off-crews.

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

7. There is no power whatsoever for a CO or OIC to impose NJP on a civilian.

C. *Offenses punishable under article 15*

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

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

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

2. *Cases previously tried in civil courts*

a. Sections 0108b and 0124d of the *JAG Manual* permit the use of NJP to punish an accused for an offense for which (s)he has been tried (whether acquitted or convicted) by a state or foreign civilian court, or whose case has been diverted out of the regular criminal process for a probationary period, or whose case has been adjudicated by juvenile court authorities, if authority is obtained from the officer exercising general court-martial jurisdiction (usually the general or flag officer in command over the command desiring to impose NJP).

b. NJP may not be imposed for an act tried by a court that derives its authority from the United States, such as a Federal district court. JAGMAN 0108b, 0124d.

c. Clearly, cases in which a finding of guilty or not guilty has been reached in a trial by court-martial cannot be then taken to NJP. JAGMAN 0108b and 0124d.

3. *Off-base offenses*

a. COs and OICs may dispose of minor disciplinary infractions (which occur on or off-base) at NJP. Unless the off-base offense is one previously adjudicated by civilian authorities (*see* para. C.2a, *supra*), there is no limit on the authority of military authorities to resolve such offenses at NJP.

b. OPNAVINST 11200.5C and MCO 5110.1C state, as a matter of policy, that, in areas not under military control, the responsibility for maintaining law and order rests with civil authority. The enforcement of minor traffic infractions falls within the purview of this principle. However, the use of nonpunitive measures (i.e. deprivation of on-installation driving privileges) can be used for off-duty / off-installation traffic infractions. Moreover, imposition of NJP or referral to courts-martial is permitted for cases that meet the criteria of para C.2.a above.

D. *Hearing procedure*

1. ***Introduction***. NJP results from an investigation into unlawful conduct and a subsequent hearing to determine whether and to what extent an accused should be punished. Generally, when a complaint is filed with the CO of an accused, that commander is obligated to cause an inquiry to be made to determine the truth of the matter. When this inquiry is complete, a NAVPERS Form 1626/7 or the UPB Form NAVMC 10132 is filled out. (This inquiry is discussed in Chapter VI, *supra*.) The Navy NAVPERS 1626/7 functions as an investigation report as well as a record of the processing of the NJP case. The Marine Corps NAVMC 10132 is a document used to record NJP only (MCO P5800.8B provides details for the completion of the UPB form). The appropriate report and allied papers are then forwarded to the commander. The ensuing discussion will detail the legal requirements and guidance for conducting an NJP hearing.

2. ***Prehearing advice***. If, after the preliminary inquiry, the CO determines that disposition by NJP is appropriate, the CO must cause the accused to be advised of his / her rights outlined in Part V, para. 4, MCM, 1984. The CO need not give the advice personally, but may assign this responsibility to the legal officer or another appropriate person.

a. ***Right to confer with independent counsel***. Because an accused who is not attached to or embarked in a vessel has the right to refuse NJP, (s)he must be told of the right to confer with independent counsel regarding the decision to accept or refuse the NJP if the record of that NJP is to be admissible in evidence against him / her should the accused ever be subsequently tried by court-martial. A failure to properly advise an accused of the right to confer with counsel, or a failure to provide counsel, will not, however, render the imposition of NJP invalid or constitute a ground for appeal. Therefore, if the command imposing the NJP

desires that the record of the NJP be admissible for court-martial purposes, the record of the NJP must be prepared in accordance with applicable service regulations and reflect that:

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

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

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

In addition to the foregoing, Marine Corps commands are also required to advise an accused that acceptance of NJP / SCM does not preclude the command from taking other possible adverse administrative action. Recordation of the above so-called "*Booker* rights" advice and waivers should be made on page 13 (Navy) or page 12 (Marine Corps) of the accused's service record. The accused's Notification and Election of Rights Form (*see* JAGMAN appendices A-1-b, A-1-c, or A-1-d, as appropriate) should be attached to the 1026/7 or UPB. A simple, straightforward recordation of the three statements given above complies with these requirements. In this regard, sections 0109 and 0110 of the *JAG Manual* explain precisely how a Navy command may prepare service record entries which will be admissible at any subsequent trial by court-martial. Marine Corps commands should refer to para. 4014.2b(2) of the IRAM for the format required to document compliance with "*Booker* rights." If an accused waives any or all of the above rights, but refuses to execute such a waiver in writing, the fact that (s)he was properly advised of his / her rights, waived those rights, but declined to execute a written waiver, should be so recorded.

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

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

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

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

(4) be allowed to examine all evidence upon which the CO will rely in deciding whether and how much NJP to impose;

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

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

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

3. ***Forms***. The forms set forth in Appendices A-1-a, A-1-b, and A-1-c of the *JAG Manual* are designed to comply with the above requirements.

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

a. ***Personal appearance waived***. Part V, para. 4c(2), MCM, 1984, provides that, if the accused waives his / her right to personally appear before the CO, (s)he may choose to submit written matters for consideration by the CO prior to the imposition of NJP. Should the accused make such an election, (s)he should be informed of his / her right to remain silent and that any matters so submitted may be used against him / her in a trial by court-martial. Notwithstanding the accused's expressed desire to waive his / her right to personally appear at the NJP hearing, (s)he may be ordered to attend the hearing if the officer imposing NJP desires his/ her presence. NAVY JAG MSG 231630Z NOV 84. If the accused waives his / her personal appearance and NJP is imposed, the CO must ensure that the accused is informed of the punishment as soon as possible.

b. ***Hearing officer***. Normally, the officer who actually holds the NJP hearing is the CO of the accused. Part V, para. 4c, MCM, 1984, allows the CO or OIC to delegate his / her authority to hold the hearing to another officer under extraordinary circumstances. These circumstances are not detailed, but they must be unusual and significant rather than matters of convenience to the commander.

This delegation of authority should be in writing and the reasons for it detailed. It must be emphasized that this delegation does not include the authority to impose punishment. At such a hearing, the officer delegated to hold the hearing will receive all evidence, prepare a summarized record of matters considered, and forward the record to the officer having NJP authority.

c. The record of a formal fact-finding body convened pursuant to the *JAG Manual*, or other formal fact-finding body (e.g., an article 32 investigation) in which the accused was accorded the rights of a party with respect to an act or omission for which NJP is contemplated, may be substituted for the hearing. Part V, para. 4d, MCM, 1984; JAGMAN 0110d. Keep in mind the right to refuse, if it exists, may still be exercised up until the time punishment is imposed.

(1) It is possible to impose NJP on the basis of a record of a formal fact-finding body convened pursuant to the *JAG Manual* at which the accused was afforded the rights of a party because the rights of a party include all elements of the mast hearing, plus additional procedural safeguards, such as assistance of counsel. *See* JAGMAN 0209c.

(2) If the record of a formal fact-finding body convened pursuant to the *JAG Manual* discloses that the accused was not accorded all the rights of a party with respect to the act or omission for which NJP is contemplated, the CO must follow the regular NJP procedure or return the record to the fact-finding body for further proceedings to accord the accused all rights of a party. JAGMAN 0110d.

d. *Burden of proof.* The CO or OIC must decide that the accused is "guilty" by a preponderance of the evidence. JAGMAN 0110b.

e. *Personal representative.* The concept of a personal representative to speak on behalf of the accused at an Article 15, UCMJ, hearing has caused some confusion. The burden of obtaining such a representative is on the accused. As a practical matter, (s)he is free to choose anyone (s)he wants—a lawyer or a nonlawyer, an officer or an enlisted person. This freedom of the accused to choose a representative does not obligate the command to provide lawyer counsel, and current regulations do not create a right to lawyer counsel to the extent that such a right exists at court-martial. The accused may be represented by any lawyer who is willing and able to appear on his / her behalf without cost to the government. While a command does not have to provide a personal representative, it should help the accused obtain the representative (s)he wants. In this connection, if the accused desires a personal representative, a reasonable time must be allowed to obtain someone. Good judgment should be used here, for such a period should be neither inordinately short nor long.

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

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

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

i. ***Command observers***. Section 0110c of the *JAG Manual* encourages the attendance of representative members of the command during all NJP proceedings to dispel erroneous perceptions concerning the fairness and integrity of the proceedings.

j. ***Publication of NJP***. COs are authorized to publish the results of NJP under section 0115 of the *JAG Manual*. Within one month following the imposition of NJP, the name of the accused, his / her rate, offense(s), and their disposition may be published in the plan of the day, provided it is intended for military personnel only, posted upon command bulletin boards, and announced at daily formations (Marine Corps) or morning quarters (Navy).

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

a. ***Dismissal with or without warning***

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

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

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

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

d. *Award NJP*

AUTHORIZED PUNISHMENTS AT NJP

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

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

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

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

Maximum punishment limitations apply to each NJP action and not to each offense. Note also, there exists a policy that all known offenses of which the accused is suspected should ordinarily be considered at a single article 15 hearing. Part V, para. 1f(3), MCM, 1984. The chart on page 6-16 summarizes the maximum punishment limitations for NJP.

B. *Nature of the punishments*

1. *Admonition and reprimand*. Punitive censure for officers must be in writing, although it may be either oral or written for enlisted personnel. Procedures for issuing punitive letters are detailed in section 0114 and in appendix A-1-g of the *JAG Manual*. *See also* SECNAVINST 1920.6. These procedures must be complied with. It should be noted that reprimand is considered more severe than admonition.

2. ***Arrest in quarters***. The punishment is imposable only on officers. Part V, para. 5c(1), MCM, 1984. It is a moral restraint as opposed to a physical restraint and is similar to restriction, but has much narrower limits. The limits of arrest are set by the officer imposing the punishment and may extend beyond quarters. The term "quarters" includes military and private residences. The officer may be required to perform his / her regular duties as long as they do not involve the exercise of authority over subordinates. JAGMAN 0111f.

3. ***Restriction***. Restriction also is a form of moral restraint. Part V, para. 5c(2), MCM, 1984. Its severity depends upon the breadth of the limits as well as the duration of the restriction. If restriction limits are drawn too tightly, there is a real danger that they may amount to either confinement or arrest in quarters, which, in the former case, cannot be imposed as NJP, and, in the latter case, is not an authorized punishment for enlisted persons. As a practical matter, restriction ashore means that an accused will be restricted to the limits of the command except of course at larger shore stations where the use of recreational facilities might be further restricted. Restriction and arrest are normally imposed by a written order detailing the limits thereof and usually require the accused to log in at certain specified times during the restraint. Article 1103.1 of *U.S. Navy Regulations, 1990*, provides that an officer placed in the status of arrest or restriction shall not be confined to his / her room unless the safety or the discipline of the ship requires such action.

4. ***Forfeiture***. A forfeiture applies to basic pay and to sea or foreign duty pay, but not to incentive pay, allowances for subsistence or quarters, etc. "Forfeiture" means that the accused forfeits monies due him / her in compensation for military service only; it does not include any private funds. This distinguishes forfeiture from a "fine," which may only be awarded by court-martial. The amount of forfeiture of pay should be stated in whole dollar amounts, not in fractions, and indicate the number of months affected (e.g., "to forfeit $50.00 pay per month for two months"). Where a reduction is also involved in the punishment, the forfeiture must be premised on the new lower rank, even if the reduction is suspended. Part V, para. 5c(8), MCM, 1984. Forfeitures are effective on the date imposed unless suspended or deferred. Where a previous forfeiture is being executed, that forfeiture will be completed before any newly imposed forfeiture will be executed. JAGMAN 0113a.

5. ***Extra duties***. In addition to routine duties, various types of duties may be assigned as punishment. Part V, para. 5c(6), MCM, 1984, however, prohibits extra duties which constitute a known safety or health hazard, which constitute cruel and unusual punishment, or which are not sanctioned by the customs of the service involved. Additionally, when imposed upon a petty or noncommissioned officer (E-4 and above), the duties cannot be demeaning to rank or position. Section 0111d of the *JAG Manual* indicates that the immediate CO of the accused will normally designate the amount and character of extra duty, regardless of who

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

6. *Reduction in grade.* Reduction in pay grade is limited by Part V, para. 5c(7), MCM, 1984, and section 0111e of the *JAG Manual* to one grade only. The grade from which reduced must be within the promotional authority of the CO imposing the reduction. In the Navy and Coast Guard, E-7 and above cannot be reduced at NJP. In the Marine Corps, E-6 and above cannot be reduced at office hours. NAVMILPERSMAN 3420140.2; MARCORPROMAN, Vol. 2; ENLPROM, para. 1200.

7. *Correctional custody.* Correctional custody is a form of physical restraint during either duty or nonduty hours, or both, and may include hard labor or extra duty. Awardees may perform military duty, but not watches, and cannot bear arms or exercise authority over subordinates. *See* Part V, para. 5c(4), MCM, 1984. Specific regulations for conducting correctional custody are found in OPNAVINST 1640.7 and MCO 1626.7B. Time spent in correctional custody is not "lost time." Correctional custody cannot be imposed on grades E-4 and above. *See* JAGMAN 0111b. To assist commanders in imposing correctional custody, correctional custody units (CCU's) have been established at major shore installations. The local operating procedures for the nearest CCU should be checked before correctional custody is imposed.

8. *Confinement on bread and water or diminished rations.* These punishments can be used only if the accused is attached to or embarked in a vessel. These punishments involve physical confinement and are tantamount to solitary confinement because contact is allowed only with authorized personnel, but should not be so-called since "solitary confinement" may not be imposed. A medical officer must first certify in writing that the accused will suffer no serious injury and that the place of confinement will not be injurious to the accused. Diminished rations is a restricted diet of 2100 calories per day, and instructions for its use are detailed in SECNAVINST 1640.9. These punishments cannot be imposed upon E-4 and above.

C. *Execution of punishments*

1. *General rule.* As a general rule, all punishments, if not suspended, take effect when imposed. Part V, para. 5e, MCM, 1984; JAGMAN 0113. This means that the punishment in most cases will take effect when the CO informs the accused of his / her punishment decision. Thus, if the CO wishes to impose a prospective punishment—one to take effect at a future time—(s)he should simply

delay the imposition of NJP altogether. There are, however, several specific rules which authorize the deferral or stay of a punishment already imposed.

a. ***Deferral of correctional custody or confinement on bread and water or diminished rations.*** Section 0113b(3) of the *JAG Manual* permits a CO or an OIC to defer correctional custody, confinement on bread and water, or confinement on diminished rations for a period of up to 15 days when:

(1) Adequate facilities are not available;

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

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

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

c. ***Interruption of restraint punishments by subsequent NJPs.*** The execution of any NJP (or court-martial) involving restraint will normally be interrupted by a subsequent NJP involving restraint. Thereafter, the unexecuted portion of the prior restraint punishment will be executed. The officer imposing the subsequent punishment, however, may order that the prior punishment be completed prior to the service of the subsequent punishment. JAGMAN 0113b(2). This rule does not apply to forfeiture of pay which must be completed before any subsequent forfeiture begins to run. JAGMAN 0113a.

d. ***Interruption of punishments by unauthorized absence.*** Service of all NJPs will be interrupted during any period that the servicemember is UA. A punishment of reduction may be executed even when the accused is UA. JAGMAN 0113b(2).

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

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

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

(1) May not be combined with restriction

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

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

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

(5) Shall be expressed in whole dollar amounts only

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

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

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

COMBINATIONS OF PUNISHMENTS

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

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

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

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

4. restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum imposable for extra duties. If you award one day of extra duties, the maximum restriction is reduced to 45 days.

CLEMENCY AND CORRECTIVE ACTION ON REVIEW

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

B. ***Authority to act***. Part V, para. 6a, MCM, 1984, and section 0118 of the *JAG Manual* indicate that, after the imposition of NJP, the following officials have authority to take clemency action or remedial corrective action:

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

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

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

4. the CO or OIC of a unit, activity, or command to which the accused is properly transferred *after* the imposition of punishment by the first commander (JAGMAN 0118b); and

5. the successor in command of the latter.

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

1. *Setting aside punishment*. Part V, para. 6d, MCM, 1984. This power has the effect of voiding the punishment and restoring the rights, privileges, and property lost to the accused by virtue of the punishment imposed. This action should be reserved for compelling circumstances where the commander feels a clear injustice has occurred. This means normally that the commander believes the punishment of the accused was clearly a mistake. If the punishment has been executed, the action to set it aside should be taken within a reasonable time—normally within four months of its execution. The CO who wishes to reinstate an individual reduced in rate at NJP is not bound by the provisions of MILPERSMAN 2230200 limiting advancement to a rate formerly held only after a minimum of 12 months' observation of performance. Such action can be taken with respect to the whole or a part of the punishment imposed. All entries pertaining to the punishment set aside are removed from the service record of the accused. MILPERSMAN 5030500; LEGADMINMAN 2006.

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

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

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

(1) Arrest in quarters to restriction;

(2) confinement on bread and water or diminished rations to correctional custody;

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

(4) extra duties to restriction.

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

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

4. ***Suspension of punishment***. Part V, para. 6a, MCM, 1984. This is an action to withhold the execution of the imposed punishment for a stated period of time. This action can be taken with respect to unexecuted portions of the punishment, or, in the case of a reduction in rank or a forfeiture, such action may be taken even though the punishment has been executed.

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

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

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

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

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

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

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

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

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

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

(4) The order vacating a suspension must be issued within ten working days of the commencement of the vacation proceedings and the decision to vacate the suspended punishment is not appealable as an NJP appeal. JAGMAN 0118d.

e. The probationary period cannot exceed six months from the date of suspension and terminates automatically upon expiration of current enlistment. Part V, para. 6a(2), MCM, 1984. The running of the period of suspension will be interrupted, however, by the unauthorized absence of the accused or the commencement of any proceeding to vacate the suspended punishment. The running of the period of probation resumes again when the UA ends or when the suspension proceedings are terminated without vacation of the suspended punishment. JAGMAN 0118c.

APPEAL FROM NONJUDICIAL PUNISHMENT

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

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

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

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

4. A flag or general officer in command may, with the express prior approval of the CHNAVPERS or the CMC, delegate authority to act on appeals to a principal assistant. JAGMAN 0117d.

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

B. ***Time***. Appeals must be submitted in writing within 5 days of the imposition of NJP or the right to appeal shall be waived in the absence of good cause shown. Part V, para. 7d, MCM, 1984. The appeal period runs from the date the accused is informed of his / her appeal rights. Normally this is the day NJP is imposed. In the case of an appeal submitted more than 5 days after the imposition of NJP (less any mailing delays), the officer acting on the appeal shall determine whether "good cause" was shown for the delay in the appeal. JAGMAN 0116.

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

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

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

C. *Contents of appeal package*

1. *Appellant's letter (grounds for appeal).* The letter of appeal from the accused should be addressed to the appropriate appeal authority via the commander who imposed the punishment and other appropriate COs in the chain of command. The letter should set forth the salient features of the NJP (date, offense, who imposed it, and punishment imposed) and detail the specific grounds for relief. There are only two grounds for appeal: the punishment was unjust or the punishment was disproportionate to the offense committed. The grounds for appeal are broad enough to cover all reasons for appeal. Unjust punishment exists when the evidence is insufficient to prove the accused committed the offense; when the statute of limitations (Article 43(c), UCMJ) prohibits lawful punishment; or when any other fact, including a denial of substantial rights, calls into question the validity of the punishment. Punishment is disproportionate if it is, in the judgment of the reviewer, too severe for the offense committed. An offender who believes his / her punishment is too severe thus appeals on the ground of disproportionate punishment—whether or not his / her letter artfully states the ground in precise terminology. Note, however, that a punishment may be legal but excessive or unfair considering circumstances such as: the nature of the offense; the absence of aggravating circumstances; the prior record of the offender; and any other circumstances in extenuation and mitigation. The grounds for appeal need not be stated artfully in the accused's appeal letter, and the reviewer may have to deduce the appropriate ground implied in the letter. Unartful draftsmanship or improper addressees or other administrative irregularities are not grounds for refusing to forward the appeal to the reviewing authority. If any commander in the chain of addressees notes administrative mistakes, they should be corrected, if material, in that commander's endorsement which forwards the appeal. Thus, if an accused does not address his / her letter to all appropriate commanders in the chain of command, the commander who notes the mistake should merely readdress and forward the appeal. (S)he should not send the appeal back to the accused for redrafting since the appeal should be forwarded

promptly to the reviewing authority. The appellant's letter begins the review process and is a quasi-legal document. It should be temperate and state the facts and opinions the accused believes entitles him / her to relief. The offender should avoid unfounded allegations concerning the character or personality of the officer imposing punishment. *See* Article 1108, *U.S. Navy Regulations, 1990*. The accused, however, should state the reasons for his / her appeal as clearly as possible. Supporting documentation in the form of statements of other persons, personnel records, etc., may be submitted if the accused desires. In no case is the failure to do these things lawful reason for refusing to process the appeal. Finally, should the accused desire that restraint punishments or extra duties be stayed pending appeal, (s)he should specifically request this in the letter.

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

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

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

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

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

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

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

3. *Endorsement of the reviewing authority.* There are no particular legal requirements concerning the content of the reviewer's endorsement except to inform the offender of his / her decision. A legally sound endorsement will include the reviewer's specific decision on each ground of appeal, the basic reasons for his / her decision, a statement that a lawyer has reviewed the appeal (if such review is required), and instructions for the disposition of the appeal package after the offender receives it. The endorsement should be addressed to the accused via the appropriate chain of command. Where persons not in the direct chain of command (such as finance officers) are directed to take some corrective action, copies of the reviewer's endorsement should be sent to them. Words of exhortation or admonition, if temperate in tone, are suitable for inclusion in the return endorsement of the reviewer.

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

5. *Accused's endorsement.* The last endorsement should be from the accused to the CO holding the records of the NJP. The endorsement will acknowledge receipt of the appeal decision and forward the package for filing.

D. ***Review guidelines***

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

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

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

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

5. ***Delegation of authority to action appeals***. Pursuant to Part V, para. 7f(5), MCM, 1984, and section 0117d of the *JAG Manual*, an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his / her power to review and act upon NJP appeals to a "principal assistant" as defined in section 0106c of the *JAG Manual*. The officer who has delegated NJP powers may not act upon an appeal from punishment imposed by the principal assistant. In other cases, it may be inappropriate for the principal assistant to act on certain appeals and such fact should be noted by the command in the forwarding endorsement. JAGMAN 0117d.

E. *Authorized appellate action.* Part V, para. 7f, MCM, 1984; JAGMAN 0117. In acting on an appeal, or even in cases in which no appeal has been filed, the superior authority may exercise the same power with respect to the punishment imposed as the officer who imposed the punishment.

In addition, the reviewing authority may authorize a rehearing on an uncharged but supported offense, or on the same offense, if there has been a substantial procedural error not amounting to a finding of insufficient evidence to impose NJP. At the rehearing, however, the punishment imposed may be no more severe than that imposed during the original proceedings unless other offenses which occurred subsequent to the date of the original proceeding are added to the original offenses. If the accused, while not attached to or embarked in a vessel, waived his/her right to demand trial by court-martial at the original proceedings, (s)he may not assert this right as to those same offenses at the rehearing but may assert the right as to any new offenses at the rehearing. JAGMAN 0117e. Upon completion of action by the reviewing authority, the servicemember shall be promptly notified of the result.

IMPOSITION OF NJP AS A BAR TO FURTHER PROCEEDINGS

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

B. *Imposition of NJP as a bar to further NJP*

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

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

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

NOTES

NOTES (continued)

CHAPTER VII

INTRODUCTION TO THE COURT-MARTIAL PROCESS

PREREQUISITES TO COURT-MARTIAL JURISDICTION

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

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

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

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

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

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

DISCUSSION

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

person and the *offense*). Only if these two prerequisites are met can the decision be made as to which of the three courts should decide a particular case.

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

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

a. Voluntary submission to military authority;

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

c. receipt of military pay or allowances; and

d. performance of military duties.

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

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

A servicemember who commits an offense while on active duty, and then who is properly discharged, cannot be tried by a court-martial; however, if that person comes back on active duty, they are subject to court-martial prosecution for that offense as long as the statute of limitations has not run. This holds true for *any* break in service—no matter how long. For example, it covers: discharge and immediate reenlistment; early discharge and reenlistment; or discharge with a break in service—no matter how long. This extension of jurisdiction was accomplished by Section 803(a) [article 3(a)] of Title 10, U.S.C.

To meet this problem, the government must insure that an individual approaching the end of his / her enlistment and suspected of an offense is not discharged. The individual should be placed on "legal hold" *and* the government must also take certain steps to ***retain*** jurisdiction over an individual. Examples of actions which are sufficient to retain jurisdiction beyond the expiration of enlistment date are: apprehension, arrest, confinement, and preferral of charges. R.C.M. 202(c)(2).

3. ***Jurisdiction over reservists***. While serving on active duty or active duty for training, reservists are subject to the UCMJ. Persons engaged in inactive duty training are also subject to the UCMJ while in that inactive duty training status. Additionally, Article 3(d), UCMJ, states that a reservist is not relieved from amenability to military jurisdiction for an offense committed while subject to the UCMJ by virtue of the termination of a period of active duty or inactive duty training.

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

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

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

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

NOTES

NOTES (continued)

CHAPTER VIII

THE SUMMARY COURT-MARTIAL

INTRODUCTION

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

CREATION OF THE SUMMARY COURT-MARTIAL

A. ***Authority to convene***. An SCM is convened (created) by an individual authorized by law to convene summary courts-martial. Article 24, UCMJ; R.C.M. 1302a, MCM, 1984; and JAGMAN 0120c indicate those persons who have the power to convene an SCM. Commanding officers authorized to convene general or special courts-martial are also empowered to convene summary courts-martial.

The authority to convene SCMs is vested in the office of the authorized command and not in the individual commander. Thus, Captain Jones, U.S. Navy, has SCM convening authority while actually performing duty as CO, USS Brownson, but loses that authority when (s)he goes on leave or is absent from his/ her command for other reasons. The power to convene an SCM is nondelegable and, in no event, can a subordinate exercise such authority "by direction." When Captain Jones is on leave from his / her ship, authority to convene an SCM passes to his / her temporary successor in command (usually the executive officer) who, in the eyes of the law, becomes the acting CO.

COs or OICs not empowered to convene SCMs may request such authority by following the procedures contained in JAGMAN 0121e.

B. *Restrictions on authority to convene*. Unlike the authority to impose NJP, the power to convene summary and special courts-martial may be restricted by a competent superior commander. JAGMAN 0122a(1). Further, the commander of a unit which is attached to a naval vessel for duty therein should, as a matter of policy, refrain from exercising his summary or special court-martial convening powers and should refer such cases to the CO of the ship for disposition while the unit is embarked therein. JAGMAN 0122b. This policy does not apply to commanders of units which are embarked for transportation only. Finally, JAGMAN 0122b requires that the permission of the officer exercising general court-martial jurisdiction over the command be obtained before imposing NJP or referring a case to SCM for an offense which has already been tried in a state or foreign court. Offenses which have already been tried in a court deriving its authority from the United States may not be tried by court-martial, nor can NJP be awarded for these offenses. JAGMAN 0124a.

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

C. *Mechanics of convening*. Before any case can be brought before an SCM, the court must be properly convened (created). It is created by order of the convening authority detailing the SCM officer to the court. R.C.M. 504(d)(2) requires that the convening order specify that it is an SCM and designate the SCM officer. Additionally, the convening order may designate where the court-martial will meet. If the convening authority derives his / her power from designation by SECNAV, this should also be stated in the order. JAGMAN 0133 further requires that the convening order be assigned a court-martial convening order number; be personally signed by the convening authority; and show his / her name, grade and title, including organization and unit.

While R.C.M. 1302(c) authorizes the convening authority to convene an SCM by a notation on the charge sheet signed by the convening authority, the better practice is to use a separate convening order for this purpose. Appendix 6b of the *Manual for Courts-Martial, 1984*, contains a suggested format for the SCM convening order and a completed form is included at page 8-4, *infra*.

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

D. ***SCM officer***. An SCM is a one-officer court-martial. As a jurisdictional prerequisite, this officer must be a commissioned officer, on active duty, and of the same armed force as the accused (The Navy and Marine Corps are part of the same armed force: the naval service). R.C.M. 1301(a). Where practicable, the officer's grade should not be below O-3. As a practical matter, the SCM should be best qualified by reason of age, education, experience, and judicial temperament as his / her performance will have a direct impact upon the morale and discipline of the command. Where more than one commissioned officer is present within the command or unit, the convening authority may not serve as SCM. When the convening authority is the only commissioned officer in the unit, however, (s)he may serve as SCM and this fact should be noted in the convening order attached to the record of trial. In such a situation, the better practice would be to appoint an SCM officer from outside the command, as the SCM officer need not be from the same command as the accused.

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

E. ***Jurisdictional limitations: persons***. Article 20, UCMJ, and R.C.M. 1301(c) provide that an SCM has the power (jurisdiction) to try only those enlisted persons who consent to trial by SCM. The right of an enlisted accused to refuse trial by SCM is absolute and is not related to any corresponding right at NJP. No commissioned officer, warrant officer, cadet, aviation cadet and midshipman, or person not subject to the UCMJ (Article 2, UCMJ) may be tried by SCM. The form at pages 8-11 to 8-12, *infra*, may be used to document the accused's election regarding his / her right to refuse trial by SCM.

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

-- SAMPLE --

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

1 July 19CY

SUMMARY COURT-MARTIAL CONVENING ORDER 1-CY

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

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

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

REFERRAL TO SUMMARY COURT-MARTIAL

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

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

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

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

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

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

4. ***Oath***. The oath must be administered to the accuser and the affidavit so indicating must be executed by a person with proper authority. Article 136, UCMJ, authorizes commissioned officers who are judge advocates, staff judge advocates, legal officers, law specialists, summary courts-martial, adjutants, and Marine Corps and Navy commanding officers, among others, to administer oaths for this purpose. JAGMAN 0902a(5) further authorizes officers certified by the Judge Advocate General of the Navy as counsel under Article 27, UCMJ, all officers in pay grade 0-4 and above, executive officers, and administrative officers of Marine Corps aircraft squadrons to administer oaths. Often the legal officer will administer the

oath regardless of who conducted the preliminary inquiry. When the charges are signed and sworn to, they are "preferred" against the accused.

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

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

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

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

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

At this point, the importance of serializing convening orders becomes clear. A court-martial can only hear a case properly referred to it. The simplest and most accurate way to describe the correct court is to use the serial number and date of the order creating that court. Thus, the referral might read "referred for trial to

the summary court-martial appointed by my summary court-martial convening order 1-CY dated 15 January 19CY." This language precisely identifies a particular kind of court-martial and the particular SCM to try the case.

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

PRETRIAL PREPARATION

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

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

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

1. ***Purpose***. The purpose of the pretrial conference is to provide the accused with information concerning the nature of the court-martial, the procedure to be used, and his / her rights with respect to that procedure. No attempt should be

made to interrogate the accused or otherwise discuss the merits of the charges. The proper time to deal with the merits of the accusations against the accused is at trial. The SCM officer should provide the accused with a meaningful and thorough briefing in order that the accused fully understands the court-martial process and his / her rights pertaining thereto. This effort will greatly reduce the chances of post-trial complaints, inquiries, and misunderstandings.

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

a. That the officer has been detailed by the convening authority to conduct an SCM;

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

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

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

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

The accused should then be advised that (s)he has the legal rights listed on page 1 of the Record of Trial by Summary Court-Martial (appendix 14, MCM). The maximum punishment awardable depends upon paygrade: A chart listing punishments authorized at each type of court-martial is included at page 9-23.

(1) *E-4 and below*. The jurisdictional maximum sentence which an SCM may adjudge in the case of an accused who, at the time of trial, is in paygrade E-4 or below extends to reduction to the lowest paygrade (E-1); forfeiture of two-thirds of one-month's pay [convening authority may apportion collection over no more than three months—JAGMAN 0152a(2)] or a fine not to exceed two-thirds of one month's pay; confinement not to exceed one month; hard labor without confinement not to exceed 45 days (in lieu of confinement); and restriction to specified limits for two months. Also, if the accused is attached to or embarked in a vessel and is in paygrade E-3 or below, (s)he may be sentenced to

serve three days confinement on bread and water / diminished rations and 24 days confinement in lieu of 30 days confinement. R.C.M. 1301(d)(1), MCM, 1984.

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

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

3. ***Advice to accused regarding counsel***

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

b. ***Booker warnings***

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

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

(a) The accused was advised of his / her right to confer with counsel prior to deciding to accept trial by SCM;

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

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

(3) If an accused has been properly advised of his / her right to consult with counsel and to refuse trial by SCM, as well as the legal ramifications of these decisions, his / her elections and / or waivers in this regard should be made in writing and should be signed by the accused. Recordation of the advice / waiver should be made on page 13 (Navy) or page 11 (Marine Corps) of the accused's service record with a copy attached to the record of trial. The form found at pages 8-11 to 8-12, *infra*, may be used. The "Acknowledgement of Rights and Waiver," properly completed, contains all the necessary advice to an accused, and, properly executed, will establish a voluntary, knowing, and intelligent waiver of the accused's right to consult with counsel and / or his / her right to refuse trial by SCM.

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

SUMMARY COURT-MARTIAL
ACKNOWLEDGEMENT OF RIGHTS AND WAIVER

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

1. I have the right to consult with a lawyer prior to deciding whether to accept or refuse trial by summary court-martial. Should I desire to consult with counsel, I understand that a military lawyer may be made available to advise me, free of charge, or, in the alternative, I may consult with a civilian lawyer at my own expense.

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

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

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

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

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

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

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

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

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

a. The right to be represented at trial by a military lawyer, free of charge, including a military lawyer of my own selection if he is reasonably available. I would also have the right to be represented by a civilian lawyer at my own expense.

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

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

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

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

confinement for _____ months;

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

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

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

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

_____
Signature of accused and date

_____
Signature of witness and date

D. ***Final pretrial preparation***

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

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

2. ***Subpoena of witnesses.*** The SCM is authorized by Article 46, UCMJ, and R.C.M. 703(e)(2)(C) and 1301(f) to issue subpoenas to compel the appearance at trial of civilian witnesses. In such a case, the SCM officer will follow the same procedure detailed for a special or general court-martial trial counsel in R.C.M. 703(c) and JAGMAN 0146. Appendix 7 of the *Manual for Courts-Martial, 1984,* contains an illustration of a completed subpoena, while JAGMAN 0146 details procedures for payment of witness fees.

POST-TRIAL RESPONSIBILITIES OF THE SUMMARY COURT-MARTIAL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A sample of Record of Trial By Summary Court-Martial is included at pages 8-16 and 8-17.

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL

1a. NAME OF ACCUSED (*Last, First, MI*)	b. GRADE OR RANK	c. UNIT OR ORGANIZATION OF ACCUSED	d. SSN
SMITH, John J.	SN, USN	USS OLDSHIP (DD 111)	123-45-6789

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

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

(*Check appropriate answer*)	YES	NO
4. At a preliminary proceeding held on 1 January 19 CY, the summary court-martial gave the accused a copy of the charge sheet.	X	
5. At that preliminary proceeding, the summary court-martial informed the accused of the following:		
a. The fact that the charge(s) had been referred to a summary court-martial for trial and the date of referral.	X	
b. The identity of the convening authority.	X	
c. The name(s) of the accuser(s).	X	
d. The general nature of the charge(s).	X	
e. The accused's right to object to trial by summary court-martial.	X	
f. The accused's right to inspect the allied papers and immediately available personnel records.	X	
g. The names of the witnesses who could be called to testify and any documents or physical evidence which the summary court-martial expected to introduce into evidence.	X	
h. The accused's right to cross-examine witnesses and have the summary court-martial cross-examine on behalf of the accused.	X	
i. The accused's right to call witnesses and produce evidence with the assistance of the summary court-martial if necessary.	X	
j. That during the trial the summary court-martial would not consider any matters, including statements previously made by the accused to the summary court-martial, unless admitted in accordance with the Military Rules of Evidence.	X	
k. The accused's right to testify on the merits or to remain silent, with the assurance that no adverse inference would be drawn by the summary court-martial from such silence.	X	
l. If any findings of guilty were announced, the accused's right to remain silent, to make an unsworn statement, oral or written or both, and to testify and to introduce evidence in extenuation or mitigation.	X	
m. The maximum sentence which could be adjudged if the accused was found guilty of the offense(s) alleged.	X	
n. The accused's right to plead guilty or not guilty.	X	

6. At the trial proceeding held on 14 January 19 CY, the accused, after being given a reasonable time to decide,
☐ did ■ did not object to trial by summary court-martial.
(*Note: The SCM may ask the accused to initial this entry at the time the election is made.*) JJS (*Initial*)

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

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

d. COUNSEL QUALIFICATIONS
N/A

DD FORM 2329 (84 AUG)

S/N 0102-LF-002-3290

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

CHARGE(S) AND SPECIFICATION(S)	PLEA(S)	FINDINGS (*Including any exceptions and substitutions*)
Charge I:	Guilty	Guilty
Specification 1:	Guilty	Guilty
Specification 2:	Not Guilty	Not Guilty
Charge II:	Not Guilty	Guilty
Specification 1:	Not Guilty	Guilty, except for the figure "$74.00," substituting therefor the figure "$25.00." Of the excepted figure, Not Guilty. Of the substituted figure, Guilty.
Specification 2:	Not Guilty	Not Guilty

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

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

■ Yes ☐ No

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

■ Yes ☐ No

12. AUTHENTICATION

Brand S. New
Signature of Summary Court-Martial

14 January 19CY

13. ACTION BY CONVENING AUTHORITY

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

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

HANG M. HIGH
Typed Name of Convening Authority

COMMANDING OFFICER
Position of Convening Authority

CDR, USN
Rank

Hang M. High
Signature of Convening Authority

22 January 19CY
Date

DD Form 2329 Reverse, 84 AUG

NOTES

NOTES (continued)

CHAPTER IX

THE SPECIAL COURT-MARTIAL

INTRODUCTION

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

CREATION OF THE SPECIAL COURT-MARTIAL

A. ***Authority to convene***. Article 23, UCMJ, and JAGMAN 0120b prescribe who has the power to convene (create) an SPCM. The power to convene SPCM is nondelegable and, in no event, can a subordinate exercise such authority. When Captain Jones is on leave from his ship, his / her authority to convene an SPCM devolves upon his / her temporary successor-in-command (usually the executive officer) who, in the eyes of the law, becomes the CO. Thus, signature titles such as "Acting Commanding Officer" and "Executive Officer" should be avoided on legal documents regardless of the validity of such titles on other administrative correspondence.

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

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

R.C.M. 504 and JAGMAN 0133 contain guidance for the preparation of the convening order. Basically, the order should be under the command letterhead, be dated and serialized, and be signed personally by the CA. The order should specify the names and ranks of all members detailed to serve on the court. When a proper convening order is executed, an SPCM is created and remains in existence until dissolved. A sample convening order is set forth at page 9-7, below.

C. *Amendment of convening orders*

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

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

2. *Change of members*

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

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

CONSTITUTION OF SPECIAL COURTS-MARTIAL

As previously indicated, there are several configurations of SPCMs, depending on either the desires of the CA or the desires of the accused. The "constitution" of the court refers to the court's composition (i.e., the personnel involved).

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

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

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

QUALIFICATIONS OF MEMBERS

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

B. *Enlisted members*. Article 25(c), UCMJ, gives an enlisted accused a right to be tried by a court consisting of at least one-third enlisted members. The accused must submit a personally signed request before the conclusion of any Article 39(a), UCMJ, session (pretrial hearing), or before the assembly of the court at trial, or make the request orally on the record. Only enlisted persons who are of a different unit from the accused can lawfully be assigned to the court ("unit" means company, squadron, battery, ship, or similar sized elements).

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

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

QUALIFICATIONS OF THE MILITARY JUDGE

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

IMPROPER CONSTITUTION OF THE COURT

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

QUALIFICATIONS OF COUNSEL

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

A. ***Trial counsel***. The trial counsel in military criminal law serves as the prosecutor. For an SPCM, trial counsel need only be a commissioned officer.

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

1. ***Detailed defense counsel***

a. Article 27(c), UCMJ, describes the qualifications for detailed counsel at SPCM. An article 27(b) defense counsel must be detailed at no cost to the accused unless, due to military exigencies or physical conditions, one cannot be obtained.

b. R.C.M. 502(d)(1) expands the protection given to an accused by article 27(c) in that it requires article 27(b) counsel as detailed defense counsel in SPCMs.

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

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

b. ***Individual military counsel (IMC)***

(1) ***Availability***. At an SPCM, the accused has the right to be represented by military counsel of his / her own choice at no cost to the accused *if* such counsel is "reasonably available." JAGMAN 0132 provides that a Navy or Marine Corps military counsel is "reasonably available" to represent an accused if the requested counsel:

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

(b) is *not* one of the following persons: a flag or general officer, trial or appellate military judge, trial counsel, appellate defense or government counsel, principal legal advisor to a command, instructor or student at a military or civilian school, CO / XO / OIC, or a member of the staff of certain high-level DOD and Navy organizations.

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

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

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

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

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

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

3. *No defense counsel*. R.C.M. 506(d) recognizes the right of the defendant to represent him / herself at an SPCM without assistance of counsel.

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

23 Aug 19CY

SPECIAL COURT-MARTIAL CONVENING ORDER 4-CY

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

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

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

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

25 Aug CY

SPECIAL COURT-MARTIAL AMENDING ORDER 4A-CY

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

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

SPECIAL COURT-MARTIAL REFERRAL

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

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

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

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

1. ***Disestablishment of the court***. Perhaps the most frequently occurring withdrawal problem is presented when the CA wants to disestablish the court and create another to take its place. This usually happens when several members have been transferred, or the particular court has been in existence for a long time and the CA wants to relieve the court. Such grounds are valid and constitute a "proper reason." If evidence shows that a change has been made because the CA was displeased with the leniency of the sentence or the number of acquittals, the withdrawal would not be lawful. Whenever a new court relieves an old one, a problem is created with respect to the cases previously referred to the old court

(which is disestablished) and now being referred to the new court. Remember, only the court to which a case is specifically referred can try it. The CA can withdraw each case from the old court (by lining out the referral block) and then re-refer the case to the new court. This is accomplished by executing a new block 14 referral on the charge sheet, indicating therein the serial number and date of the convening order which appointed the new court. The new referral is taped along the top edge over the old lined-out referral to allow inspection of both referrals.

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

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

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

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

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

TRIAL PROCEDURE

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

B. ***Service of charges***. Article 35, UCMJ, states that, in time of peace, no person can be brought to trial in any SPCM until three days have elapsed since the formal service of charges upon that person. In computing the three-day period, neither the date of service nor the date of trial count; however, Sundays and holidays do count in computing the statutory period. Thus, if the accused is served on Wednesday, one must wait Thursday, Friday, and Saturday before compelling trial. Trial in the foregoing example could not be compelled before Sunday and, as a practical matter, not before Monday. The date of service of charges upon the accused is demonstrated by a certificate in block 15 at the bottom of page 2 of the charge sheet. Trial counsel executes this certificate when (s)he personally presents a copy of the charge sheet to the accused. This must be done even though the accused has previously been informed of the charges against him / her. This service of a copy of the charge sheet may also be accomplished by the command at any time after referral as long as the service is to the accused ***personally***. Any accused can lawfully object to participation in trial proceedings before the three-day waiting period has expired. The accused may, however, waive the three-day period so long as (s)he understands the right and voluntarily agrees to go to trial earlier.

C. ***Pretrial hearings***. Any time after elapse of the three-day waiting period, a military judge may hold sessions of court without members for the purpose of litigating motions, objections, and other matters not amounting to a trial of the accused's guilt or innocence. The accused may be arraigned and his / her pleas taken and determined at such a hearing. Art. 39(a), UCMJ; JAGMAN 0135. At such hearings, the judge, trial counsel, defense counsel, accused, and reporter will be present. Several such hearings may be held if desired.

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

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

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

G. *Pleas*. The arraignment is the process of asking the accused to plead to charges and specifications. The responses of the accused to each specification and charge are known as the pleas. The recognized pleas in military practice are "guilty," "not guilty," guilty to a lesser included offense (LIO) and, under some circumstances, a conditional plea of guilty. Any other pleas—such as nolo contendere (no contest)—are improper, and the military judge will enter a plea of not guilty for the accused.

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

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

3. *Conditional pleas*. With approval of the military judge and consent of trial counsel, an accused may enter a conditional plea of guilty. The main

purpose of such a conditional plea is to preserve for appellate review certain adverse determinations which the military judge may make against the accused regarding pretrial motions. If the accused prevails on appeal, his / her "conditional" plea of guilty may then be withdrawn.

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

I. ***Findings***. After the evidence has been presented, the court will deliberate to arrive at findings of "not guilty," "guilty," or "guilty of a lesser included offense." In order to convict an accused at an SPCM, two-thirds of the members present at trial must agree on each finding of guilty. In computing the necessary number of votes to convict, a resulting fraction is counted as one. Thus, on a court of five members, the mathematical number of votes required to convict is 3 1/3 or, applying the rule, four votes. In a trial by military judge alone, the required number of votes is one: the judge's. In contested member cases, after all evidence and arguments of counsel have been presented, the judge will instruct the members of the court on the law they must apply to the facts in reaching their verdict.

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

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

L. ***Record of trial***. After an SPCM trial has been completed, the reporter—under supervision of trial counsel—prepares the record of proceedings. The kind of record prepared depends upon the sentence adjudged and the wishes of the

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

SPECIAL COURT-MARTIAL PUNISHMENT

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

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

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

D. *Authorized punishments*. Appendix 12 and Part IV, MCM, 1984, list the specific maximum punishments for each offense as determined by statutory provision or by the President of the United States pursuant to authority delegated by Article 56, UCMJ. An accused, as a general rule, may be separately punished for each offense of which (s)he is convicted, unlike NJP where only one punishment is imposed for all offenses. Thus, an accused convicted of UA (article 86), assault (article 128), and larceny (article 121) is subject to a maximum sentence determined by totaling the maximum punishment for each offense. A chart which lists punishments authorized at each type of court-martial is included at page 9-22.

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

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

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

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

c. *Restriction*. Restriction is a moral restraint upon the accused to remain within certain specified limits for a specified time. Restriction may be imposed on all persons subject to the UCMJ, but not in excess of two months. Restriction is a less severe form of deprivation of liberty than confinement or hard labor without confinement and may be combined with any other punishment. The performance of military duties can be required while an accused is on restriction. See R.C.M. 1003(b)(6).

3. *Confinement on bread and water / diminished rations*. As its name suggests, this punishment involves confinement coupled with a diet of bread and water or diminished rations. A diet of bread and water allows the accused as much bread and water as (s)he can eat. Diminished rations is food from the regular daily ration constituting a nutritionally balanced diet, but limited to 2,100 calories per day. No hard labor may be required to be performed by an accused undergoing this punishment. Confinement on bread and water / diminished rations may be imposed only upon enlisted persons in paygrades E-1 to E-3 who are attached to or embarked in a vessel and then only for a maximum of three days. Further, both the prisoner and the confinement facility must be inspected by a medical officer who must certify in writing that the punishment will not be injurious to the accused's health and that the facility is medically adequate for human habitation. R.C.M. 1003(b)(9).

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

a. *Forfeiture of pay*. This kind of punishment involves the deprivation of a specified amount of the accused's pay for a specific number of months. The maximum amount that is subject to forfeiture at an SPCM is two-thirds of one month's pay per month for six months. The forfeiture must be stated in terms of pay per month for a certain number of months. A sentence "to forfeit $50.00 for six months" has been held by military appellate courts to mean $50.00 apportioned over six months or, in other words, $8.33 per month for six months. Thus, the language used to express this punishment must be meticulously accurate. The basis for computing the forfeiture is the base pay of the accused plus sea or foreign duty pay. Other pay and allowances are not used as part of the basis. If the sentence is to include a reduction in grade, the forfeiture must be based upon the grade to which the accused is to be reduced. A forfeiture may be imposed by an SPCM upon all military personnel. The forfeiture applies to pay becoming due after the forfeitures have been imposed and not to monies already paid to the accused or to his / her own personal independent resources. Unless suspended, forfeitures take effect on the date ordered executed by the CA when initial action is taken. JAGMAN 0157a.

b. ***Fine***. A fine is a lump sum judgment against the accused requiring him / her to pay specified money to the United States. A fine is not taken from the accused's accruing pay, as with forfeitures, but rather becomes due in one payment when the sentence is ordered executed. In order to enforce collection, a fine may also include a provision that, in the event the fine is not paid, the accused shall, in addition to the confinement adjudged, be confined for a time. The total period of confinement so adjudged may not exceed the jurisdictional limit of the SPCM (six months) should the accused fail to pay the fine. R.C.M. 1003(b)(3) indicates that, while an SPCM can impose a fine on all personnel tried before it, such punishment should not be adjudged unless the accused has been unjustly enriched by his / her crime. A fine cannot exceed the total of the amount of money which the court could have required to be forfeited. *See* R.C.M. 1003(b)(3). The court may, however, award both a fine and forfeitures so long as the total monetary punishment does not exceed the amount which could have been required to be forfeited.

5. ***Punishment affecting grade***. There are two punishments affecting grade authorized for SPCM sentences: reduction in grade and loss of numbers.

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

In accordance with the power granted in Article 58(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Article 58(a), UCMJ, shall be effected in the Navy and Marine Corps in accordance with JAGMAN 0152d. Under the provisions of this section, a court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the CA, that includes a punitive discharge or confinement in excess of 90 days (if the sentence is awarded in days) or three months (if awarded in other than days) ***automatically*** reduces the member to the pay grade E-1 as of the date the sentence is approved. As a matter within his / her sole discretion, the CA or the supervisory authority may retain the accused in the pay grade held at the time of sentence or at an intermediate pay grade and suspend the automatic reduction to pay grade E-1 which would otherwise be in effect. Additionally, the CA may direct that the accused serve in pay grade E-1 while in confinement, but be returned to the pay grade held at the time of sentence or an intermediate pay grade upon release from confinement. Failure of the CA to address automatic reduction will result in the automatic reduction to pay grade E-1 on the date of the CA's action.

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

6. ***Punitive reprimand.*** An SPCM may also adjudge a punitive reprimand against anyone subject to the UCMJ. A reprimand is nothing more than a written statement criticizing the conduct of the accused. In adjudging a reprimand, the court does not specify the wording of the statement but only its nature. JAGMAN 0152c contains guidance for drafting the reprimand.

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

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

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

3. ***Two or more offenses***. If an accused is convicted of two or more ***separate*** offenses, none of which authorizes a punitive discharge, and if the authorized confinement for these offenses totals six months or more, an SPCM may adjudge a bad-conduct discharge and forfeiture of two-thirds pay per month for six months. R.C.M. 1003(d)(3).

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (*Last, First, MI*)	2. SSN	3. GRADE OR RANK	4. PAY GRADE
LEE, Crumb B.	110-12-3456	LTJG	0-2

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
Naval Air Station Oceana Virginia Beach, Virginia	a. INITIAL DATE 15 Jan CY-3	b. TERM Indef

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$2,472.00	NONE	$2,472.00		N/A

II. CHARGES AND SPECIFICATIONS

10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE 92

SPECIFICATION: In that Lieutenant Junior Grade Crumb B. Lee, U.S. Navy, Naval Air Station Oceana, Virginia Beach, Virginia, on active duty, who knew of his duties at Naval Air Station Oceana, Virginia Beach, Virginia, on or about 16 June 19CY, was derelict in the performance of those duties in that he negligently failed to properly inspect and record temperature readings of Ordnance Magazines at Naval Air Station Oceana, Virginia Beach, Virginia, as it was his duty to do.

III. PREFERRAL

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

d. SIGNATURE OF ACCUSER	e. DATE
Willie M. Roberts	1 August 19CY

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 1st day of August, 19 CY, and signed the foregoing charges and specifications under oath that he / ▒▒ is a person subject to the Uniform Code of Military Justice and that he / ▒▒ either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his / ▒▒ knowledge and belief.

Woodrow E. Wilson
Typed Name of Officer

NLSO, NAS Oceana, Virginia Beach, Virginia
Organization of Officer

LCDR, JAGC, USN
Grade

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

Woodrow E. Wilson
Signature

DD FORM 458 84 AUG EDITION OF OCT 69 IS OBSOLETE S/N 0102-LF-000-4580

12.
On 2 August, 19 CY, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (*See R.C.M. 308(a)*). (*See R.C.M. 308 if notification cannot be made.*)

John E. Command
Typed Name of Immediate Commander

CAPT, USN
Grade

John E. Command
Signature

NAS Oceana, Virginia Beach, VA
Organization of Immediate Commander

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.
The sworn charges were received at 1100 hours, 2 August 19 CY at NAS Oceana, Virginia Beach, VA
Designation of Command or

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

~~FOR THE~~ [1]

John E. Command
Typed Name of Officer

CAPT, USN
Grade

John E. Command
Signature

Commanding Officer
Official Capacity of Officer Signing

V. REFERRAL : SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
NAS Oceana	Virginia Beach VA	4 Aug CY

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

_____ ~~By~~ _____ ~~of~~ _____
Command or Order

John E. Command
Typed Name of Officer

CAPT, USN
Grade

John E. Command
Signature

Commanding Officer
Official Capacity of Officer Signing

15.
On 4 August, 19 CY, I (caused to be) served a copy herof on ~~(each of)~~ the above named accused.

Joe E. Lawyer
Typed Name of Trial Counsel

Joe E. Lawyer
Signature

LCDR, JAGC, USNR
Grade or Rank of Trial Counsel

FOOTNOTES: 1 - *When an appropriate commander signs personally, inapplicable words are stricken*
2 - *See R.C.M. 601(e) concerning instructions. If none, so state.*

DD Form 458 Reverse, 84 AUG

PUNISHMENT CHART

PUNISHMENT	SCM		SPCM			GCM	
	E-4 & below	E-5 & above	EM's	O's & WO's	EM's	WO's	O's
1. Death	NO	NO	NO	NO	YES (*1)	YES (*1)	YES (*1)
2. Dismissal	NO	NO	NO	NO	NO	NO	YES
3. Dishonorable Discharge	NO	NO	NO	NO	YES	YES	NO
4. Bad-Conduct Discharge	NO	NO	YES	NO	YES	NO	NO
5. Confinement	30 days	NO	6 mos.	NO	YES (*5)	YES (*5)	YES (*5)
6. Solitary Confinement	NO	NO	NO	NO	NO	NO	NO
7. Confinement on Bread and Water or Diminished Rations	3 days (*2)	NO	3 days(*2)	NO	3 days(*2)	NO	NO
8. Restriction	2 mos.	2 mos.	2 mos.	2 mos.	2 mos.	2 mos.	2 mos.
9. Hard Labor Without Confinement	45 days	NO	3 mos.	NO	3 mos.	NO	NO
10. Forfeiture of All Pay and Allowances	NO	NO	NO	NO	YES	YES	YES
11. Forfeiture of two-thirds pay per month	1 mo. (*3)	1 mo. (*3)	6 mos.	6 mos.	YES (*5)	YES	YES
12. Fine	YES (*4)	YES (*4)	YES (*4)	YES (*4)	YES	YES	YES
13. Reduction to next inferior rate	YES	YES	YES	NO	YES	NO	NO
14. Reduction to lowest paygrade	YES	NO	YES	NO	YES	NO	NO
15. Loss of numbers	NO	NO	NO	YES	NO	YES	YES
16. Reprimand	YES	YES	YES	YES	YES	YES	YES

(*1) Where authorized or mandatory

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

(*3) May extend payment up to three months -- JAGMAN 0052a(2)

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

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

NOTES

NOTES (continued)

CHAPTER X

POTENTIAL LEGAL PROBLEMS OF THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY

INTRODUCTION

The unique responsibilities of a court-martial convening authority—to act as both a judicial officer and a commanding officer—frequently create potentially serious legal problems for the convening authority (CA) who tries to be true to both roles. In this chapter, the relationship of command and CA responsibility will be explored through the discussion of legal problems that are common to both.

ACCUSER CONCEPT PROBLEMS

The UCMJ is structured to give the CA extensive areas of permissible involvement in the military justice system. The UCMJ also defines certain areas of impermissible involvement by the CA. The "accuser" concept defines one of these impermissible areas (*see* Art. 1(9), Art. 22(b), Art. 23(b), UCMJ); illegal command influence (to be discussed later) defines another (*see* Art. 37, UCMJ). In the Navy and Marine Corps, the accuser concept applies *only* to special and general courts-martial. It does not strictly apply to summary courts-martial, nor to NJP. Art. 24(b), UCMJ; R.C.M. 1302(b), MCM, 1984. The accuser concept is applied to summary court-martial in the Coast Guard. Section 1000-1, MJM. If the CA becomes an accuser, (s)he is disqualified from taking any further action in a special or general court-martial. R.C.M. 504(c) (1). Any court convened by an accuser lacks jurisdiction (power) to hear a case. R.C.M. 1107(a). A CA becomes an accuser when (s)he signs and swears to the truth of the charges against the accused (at the bottom of page 1 of a charge sheet), when (s)he directs that someone else sign the charge sheet as a nominal accuser (distinguish the situation where the CA properly directs a subordinate to ***investigate*** a situation and prefer charges, if warranted, as opposed to where the CA directs the subordinate to prefer certain charges), or when (s)he has a personal rather than official interest in the prosecution of the accused (such as when the CA or his / her family are the victims of a crime). A significant policy underlying the accuser concept is that the accused is entitled to have the decisions affecting his / her case made by a CA who is unbiased and impartial and is not convinced beyond a reasonable doubt of the guilt of the accused. The accuser concept does not concern itself so much with the state of mind of the CA as it does with the ***appearance of impropriety*** in his / her actions.

UNLAWFUL COMMAND INFLUENCE

It should be noted that not all command influence is unlawful, inasmuch as the CA is authorized by law to appoint court members, to refer cases to trial, and to review the cases (s)he has referred to trial as well as other acts. ***Unlawful*** command influence, however, is an intentional or inadvertent act tending to impact on the trial process in such a way as to affect the impartiality of the trial process. Two notions form the basis of the unlawful command influence concept. The first notion is that military justice is the fair and impartial evaluation of probative facts by the judge and / or court members. The second notion is that nothing but legal and competent evidence presented in court can be allowed to influence the judge and / or court members. If unlawful command influence exists, the findings and sentence of the court may be invalidated. If the accused has pleaded guilty, it is possible that only the sentence may be invalidated. The primary prohibition against unlawful command influence is contained in Article 37, UCMJ. Those violating the provisions of article 37 are subject to court-martial.

Many instances of illegal command influence arise from the good-faith efforts of the CO to influence good order and discipline within his / her command through speeches, writings, or directives. These communications may be broadly directed (to the entire command) or more narrowly directed (to prospective court members). Ostensibly, these communications may be designed to educate members of the command as to their responsibilities in regard to the military justice system. But, in reality, these communications may serve as a forum for the CA to express dissatisfaction with certain aspects of the military justice system. While no guidelines can be advanced that can cover every situation, it is possible to point out several areas in which the law has been very sensitive in regard to communications by the CO. For example, discussing a case that is pending adjudication with prospective members is normally considered to be improper. It is improper to ask for a specific sentence, either in a particular case or in a particular class of cases. It is improper to criticize past findings or sentences from previous courts. It is also improper for the CO to evidence an inflexible attitude on review (for example, no punitive discharge will ever be suspended). In addition, the CO may not do indirectly what (s)he could not do directly; that is, (s)he cannot have someone such as the XO or the legal officer make statements that (s)he, as CO, could not make.

PRETRIAL RESTRAINT PROBLEMS

The term "pretrial restraint" is used to refer to the practice of restricting the freedom of movement of an accused, prior to trial, to insure his / her presence at that trial or for other permissible grounds. R.C.M. 304 and 305 discuss the various forms of such restraint which include confinement, arrest, restriction, and conditions on liberty.

A. *Forms of restraint*

1. ***Confinement***. *See* R.C.M. 304(b), 305. Confinement is the physical restraint of an accused in a correctional facility, detention cell, or other areas by means of walls, locked doors, guards, or other devices. This form of restraint is the most severe, and it is not surprising that the rules governing its use are stringent. For example, commissioned officers, warrant officers, and civilians (when subject to military jurisdiction) can be confined only on order of their CO; whereas enlisted persons can be ordered into confinement by any commissioned officer. A CO may not delegate authority to arrest officers and civilians, but may lawfully delegate his / her authority to confine enlisted persons to warrant officers, petty officers, or noncommissioned officers of his / her command. As a practical matter, however, confinement normally is ordered only by the CO, XO, or command duty officer (CDO). ***Note***: When an accused is placed in pretrial confinement, his / her CO must review the decision to impose pretrial confinement within 48 hours (although R.C.M. 707 provides for 72 hours, recent case law mandates a review by the CO within 48 hours). If his / her decision is to continue confinement, the CO must submit a written memorandum to the initial review officer (IRO) which states the reason for his / her conclusion that an offense triable by court-martial has been committed; that the accused committed it; that confinement is necessary because it is foreseeable that the accused will not appear at trial or will engage in serious criminal misconduct; and that less severe forms of restraint are inadequate. Such a memorandum must be submitted to the IRO within seven days after the accused was confined. A sample memorandum is included at pages 10-9 and 10-10.

2. ***The IRO program***. The law recognizes that pretrial confinement has serious consequences for an accused. Because of these consequences, a neutral and detached IRO has been mandated to decide whether an individual should continue to be held in confinement pending court-martial. The IRO will normally make this determination ***after*** the accused has already been confined by the accused's CO. The IRO will make a determination based upon materials presented to him / her by the command and the accused at an informal proceeding. If (s)he determines pretrial confinement is not warranted, there is no administrative appeal from his / her decision. Details of the IRO system are outlined in R.C.M. 305(e)-(i) and JAGMAN 0127. It should also be noted that, if other forms of pretrial restraint are imposed (such as arrest, restriction or conditions on liberty), the decision to impose these forms of restraint are not reviewed by an IRO.

B. ***Basis for restraint***. The decision to impose pretrial restraint must be viewed on a case-by-case basis by the restraining authority. Blanket policies of restraining all long-absence offenders, all thieves, etc., are patently unlawful. Before ***any*** form of pretrial restraint may be imposed, ***probable cause*** is required (i.e., the person imposing the restraint must have reasonable grounds to believe: (1) that an offense triable by court-martial has been committed; (2) that the person to be

restrained committed it; and (3) that the restraint ordered is required by the circumstances. Personal knowledge is not necessary. Restraint may be imposed based upon statements by witnesses.

1. *Necessity for pretrial confinement (PTC).* In order to impose PTC lawfully, the commander imposing the confinement must have reasonable grounds to believe that it is necessary because it is foreseeable that either: (1) the prisoner will not appear at trial, pretrial hearing, or investigation; or (2) the person will engage in serious criminal misconduct (including intimidation of witnesses, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or effectiveness of the command). In addition, the commander must believe upon probable cause that less severe forms of restraint would be inadequate. These are the ***only*** grounds on which PTC may be imposed. It is illegal to confine an accused, for example, solely because there is probable cause to believe (s)he has committed a serious offense or because (s)he is a discipline problem (a pain in the neck).

In determining whether PTC is necessary to insure the presence of the accused, the imposing individual should consider all the facts and circumstances relating to the case. These factors would include the prior disciplinary history of the accused (particularly relevant would be prior UA offenses and whether the accused had been released prior to disciplinary action on previous cases); his / her reputation, character, and mental condition; his / her family ties and relationships (whether (s)he has a family and whether family members are in the area); any economic connection to the area (such as home ownership); the presence or absence of responsible members of the military or of the civilian community who can vouch for his / her reliability; the nature of the offense charged; the apparent probability of conviction; the likely sentence; any statements made by the accused; and any other factors indicating the likelihood the accused will remain for his / her court-martial or will flee prior to court-martial.

2. *Necessity for restriction.* The same grounds that would justify PTC or arrest will justify pretrial restriction.

C. *Severity of restraint.* Article 13, UCMJ, indicates that pretrial restraint shall not be more rigorous than circumstances require to insure the accused's presence. Superior competent authority can impose restrictions on the use of pretrial restraint. Article 10, UCMJ, states that, when an accused is ordered into arrest or confinement prior to trial, *immediate* steps will be taken to inform him / her of the specific offense precipitating the restraint and to either try or release him/ her. Article 33, UCMJ, further provides that, when an accused is held in confinement or arrest for trial by general court-martial, his / her CO will, within eight days of the

imposition of that restraint, forward to the GCMCA the charges and pretrial investigation (Art. 32, UCMJ) or, if that is not practicable, a detailed written explanation of the reasons for delay will be forwarded within the eight-day period.

D. ***Relief from pretrial restraint***. The SPCMCA, through his / her legal officer, is the best check of the pretrial restraint process. By taking direct command action to correct errors of law or judgment, a CA can save much difficulty at trial and insure appropriate use of pretrial restraint as indicated by Congress. There are other alternatives for relief available to an accused. (S)he may request mast to superior authority; petition for relief under Article 138, UCMJ; request the IRO to reconsider his / her decision; or petition the Navy-Marine Corps Court of Military Review or the Court of Military Appeals for relief. If an accused has been restrained illegally, (s)he is, at a minimum, entitled to administrative credit against any confinement adjudged by a court-martial. This administrative credit would be computed at the rate of at least one day of credit for each day of ***illegal*** confinement served. Note also that the accused will receive administrative credit at the rate of one day of credit for each day of ***legal*** pretrial confinement, in accordance with Federal civilian sentence-computation procedures which have been specifically adopted by the Department of Defense. Although it may only involve psychological relief to the accused, it is possible for the person ordering illegal PTC to be prosecuted under Article 97, UCMJ (maximum sentence is dismissal or dishonorable discharge and three years confinement).

SPEEDY TRIAL PROBLEMS

The accused has both a constitutional and a statutory right to a speedy trial. The government is under an obligation to proceed to trial with ***all reasonable speed*** and, in cases where an accused has been subject to unreasonable or oppressive delay, (s)he is entitled to ***dismissal of charges***. In addition to this general rule, R.C.M. 707 imposes on the government the specific obligation to bring the accused to trial within 120 days of the commencement of the case (*see* para. B, below) or face dismissal of the charges. *See* Articles 10, 30(b), and 33, UCMJ, and R.C.M. 707.

A. ***Raising the issue***. The issue of denial of speedy trial normally is raised at trial by the accused by a motion to dismiss charges. In support of this motion, the accused need only show that the trial has been delayed. Once the issue is raised, the burden is upon the government to show by a preponderance of evidence that the delay was not unreasonable (i.e., that the government proceeded to trial with due diligence or that the accused was not harmed (prejudiced) by delay).

B. *Commencement of accountability*. The period of time for which the government must account begins either upon the imposition of any form of pretrial restraint (confinement or restriction) under R.C.M. 304 *or* the date of the preferral of charges—whichever occurs first. Therefore, charges should not be preferred until fully investigated and the government is prepared to proceed to trial. Note also that, where a military accused is held by civilian authorities for surrender to military authorities, the civilian confinement may commence the government's accountability. Each additional offense committed after an accountable period begins starts a new accountable period for that particular offense. Thus, in any case of multiple offenses, an accused could suffer a denial of speedy trial as to some offenses but not as to others. Each offense, therefore, has its own period of accountability.

C. *Termination of accountability*. The period of accountability, once begun, generally does not terminate until trial commences (i.e., arraignment). If charges are dismissed, a mistrial is granted, or if the accused is released from pretrial restraint for a significant period when no charges are pending, the 120-day period begins to run only from the date on which preferral of charges or restraint are reinstituted.

D. *Excludable periods*. R.C.M. 707(c) states that certain periods will be excluded when determining whether the 120-day rule has been satisfied (e.g., periods of delay resulting from other proceedings in the case—psychiatric evaluation, hearing on pretrial motions—unavailability of military judge, defense-requested continuance, accused's absence, unusual operational requirements and military exigencies).

E. *Confinement*. When an accused is placed in PTC, the government is charged with using "reasonable diligence" to bring the accused to trial. This standard of "reasonable diligence" enumerated in *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993) does not mean "constant motion," but, rather, reasonable and timely action designed to prevent unnecessary delay. Bringing an accused to trial is under 120 days could still trigger speedy trial sanctions if the government fails to act with "reasonable diligence" in a confinement case.

PRETRIAL AGREEMENTS

A pretrial agreement (PTA) is an agreement between the accused and the CA, whereby each agree to take or refrain from taking certain action regarding the trial by court-martial. R.C.M. 705 and JAGMAN 0137 detail procedures for negotiating PTA's and define the rules pertaining to them. Appendix A-1-h of the *JAG Manual* contains suggested forms for the finalized agreement, but these forms will require careful tailoring in all cases as the agreement must be clear, precise, and should cover all contingencies.

A. *Negotiations*. PTA negotiations may be initiated by the accused, defense counsel, trial counsel, SJA, CA, or their duly authorized representatives. After negotiations, defense may elect to submit a proposed pretrial agreement to the CA. This agreement shall be in writing and will normally be submitted through trial counsel and the legal officer. All terms and conditions should be precisely spelled out in the agreement itself, as oral understandings—or unwritten gentlemen's agreements—will not be enforced. Whenever a PTA offer is submitted, it ***must*** be forwarded to the CA for his / her personal consideration and may not be blocked by trial counsel, the legal officer, or SJA. To effect the PTA, the CA personally signs the document or delegates the authority to sign to another person—such as the SJA, legal officer, or trial counsel. The CA may reject the offer by signing the rejection form, after which counterproposals by the CA are permitted. The CA has sole discretion in deciding whether to accept or reject the proposed PTA.

B. *Permissible terms and conditions*. R.C.M. 705 outlines certain permissible and prohibited terms and conditions of PTA's. It must be noted that these are not totally inclusive, as each term is subject to the scrutiny of the military judge who may disapprove the term if it appears that the accused did not freely and voluntarily agree to it, or if it deprives the accused of a substantial right otherwise guaranteed to him / her. Generally, the PTA consists of an agreement by the accused to plead guilty to one or more charges in exchange for the CA agreeing to take specified action on the sentence adjudged by the court-martial.

C. *Prohibited terms and conditions*. R.C.M. 705(c)(1) provides that any term or condition to which the accused did not freely and voluntarily agree will not be enforced. Additionally, any term or condition which deprives the accused of certain substantial rights will not be enforced. Among these rights are the right to: counsel; due process; challenge the jurisdiction of the court-martial; a speedy trial; complete sentencing proceedings; and complete and effective exercise of post-trial and appellate rights. Since ambiguous, vague, or arguably improper provisions in PTA's will generally be interpreted strictly against the government, it is suggested that, before signing any PTA, the CA consult with trial counsel so that his / her understanding of the agreement is placed in the proper legal form and terminology. The CA should always consult with trial counsel directly or through his / her own SJA if one is assigned.

D. *Pitfalls*. The offer to plead guilty cannot be accepted if there is reason to believe that there is insufficient evidence to convict the accused of the offense concerned. Also, unreasonably multiplying offenses from an essentially single offense to coerce a PTA is improper. Also unlawful is the practice of pleading a baseless major offense on the charge sheet in order to induce a PTA on a lesser included offense (LIO). The agreed sentence aspect of the agreement must be clear, precise, and provide for all contingencies. In this connection, it is essential to obtain trial

counsel's (prosecutor's) advice before drafting or approving any PTA. Such agreements are technically complex, and the *JAG Manual* format does not cover all situations.

E. *Binding effect of the agreement*. In general, the accused may always withdraw from a PTA. The CA may withdraw at any time before the accused begins performance of promises contained in the agreement. Additionally, the agreement will be void if the accused fails to fulfill any material promise or condition in the agreement (e.g., fails to plead guilty, withdraws a guilty plea, renders a guilty plea improvident, etc.); when inquiry by the military judge discloses a disagreement as to a military term in the agreement; or when findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

F. *Judicial supervision*. The military judge must inquire into the existence and the provisions of the PTA to be sure the accused acted voluntarily and knowingly in executing the agreement. Normally, a misunderstanding of the terms of an agreement will cause rejection of guilty pleas and the entry of not guilty pleas. If the intent of the parties at the time the agreement was executed can be determined, the interpretation will control the agreement.

In spite of the effect of the PTA on the trial, the court members may not be informed of any negotiations, any existing agreement, or any agreement made but subsequently rejected. If trial is by military judge alone, (s)he may not examine the sentencing provisions prior to announcing the sentence in the case.

G. *Major Federal offenses*. In some cases, the misconduct which subjects the military member to trial by court-martial also violates other Federal laws and subjects the member to prosecution by civilian authorities in Federal courts. In these cases, decisions must be made as to which forum the case should go and which agency will conduct the investigation. In order to ensure actions by military CA's do not preclude appropriate action by Federal civilian authorities in such cases, JAGMAN 0137b requires that CA's shall ensure that appropriate consultation under the Memorandum of Understanding (MOU) between the Departments of Defense and Justice (MCM, 1984, app. 3) has taken place prior to any trial by court-martial or *approval of any pretrial agreement* in cases likely to be prosecuted in the Federal courts.

1640
Ser 00/
3 Jan CY

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

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

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

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

a. Hour, date, and place of pretrial confinement

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

b. Offenses charged

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

c. General circumstances

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

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

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

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

2. Previous disciplinary action

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

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

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

3. Extenuating or Mitigating circumstances: None.

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

ROBERT R. ROBERTS

NOTES

NOTES (continued)

CHAPTER XI

PRETRIAL ASPECTS OF GENERAL COURTS-MARTIAL

INTRODUCTION

The general court-martial (GCM) is the highest level of court-martial in the military justice system and may impose the greatest penalties provided by military law for any offense. The GCM is composed of a minimum of five members, a military judge, and lawyer counsel for the government and the accused. The GCM is created by order of a flag or general officer in command in much the same manner as the SPCM is created by subordinate commanders. Before trial by GCM may lawfully occur, a formal investigation of the alleged offenses must be conducted and a report forwarded to the GCMCA. This pretrial investigation (often referred to as an article 32 investigation) is normally convened by a summary court-martial convening authority (CA). This chapter will discuss the legal requisites of the pretrial investigation.

NATURE OF THE PRETRIAL INVESTIGATION

A. ***Scope***. The formal pretrial investigation (Art. 32, UCMJ) is the military equivalent of the grand jury proceeding in civilian criminal procedure. The purpose of this investigation is to inquire formally into the truth of allegations contained in a charge sheet, to secure information pertinent to the decision on how to dispose of the case, and to aid the accused in discovering the evidence against which (s)he must defend him / herself. Basically, this investigation is protection for the accused; but, it is also a sword for the prosecutor who may test his / her case for its strength and seek its dismissal if the charges are unsubstantiated.

B. ***Authority to direct***. An article 32 investigation may be directed by one authorized by law to convene summary courts-martial or some higher level of court-martial. *See* Art. 24, UCMJ. The power to order the article 32 investigation [hereinafter pretrial investigation] vests in the ***office*** of the commander and not the individual commander. *See* Chapter VIII, ***Authority to convene***, page 8-1, above.

C. ***Mechanics of directing***. When the summary court-martial or higher CA receives charges against an accused which are serious enough to warrant trial by GCM, the CA directs a pretrial investigation. This is done by written order of the CA, assigning personnel to participate in the proceedings. When the investigation

is ordered, the charge sheet will have been completed up to, but not including, the referral block (block 14) on page 2. Unlike courts-martial, pretrial investigations are directed as required and standing orders for such proceedings are inappropriate. A separate order creating the investigation will be drafted to refer the case to the pretrial investigation. This original appointing order is forwarded to the assigned investigating officer along with the charge sheet, allied papers, and a blank investigating officer's report form (DD Form 457; *see also* MCM, 1984, app. 5).

D. *Investigating officer (IO).* The pretrial investigation is a formal one-officer investigation created to inquire into alleged criminal misconduct. The IO must be a commissioned officer, who should be a major / lieutenant commander or above, or an officer with legal training. R.C.M. 405(d)(1). The advantages of appointing a judge advocate (when available) to act as the IO are substantial, especially in view of the increasingly complex nature of the military judicial process. Neither an accuser, prospective military judge, nor prospective trial or defense counsel for the same case may act as IO. Further, the IO must be impartial and cannot previously have had a role in inquiring into the offenses involved (e.g., as provost marshal, public affairs officer, etc.). Mere prior knowledge of the facts of the case will not, alone, disqualify a prospective IO. If such knowledge imparts a bias to the IO, (s)he obviously is not the impartial investigator required by law. The law contemplates an IO who is fair, impartial, mature, and with a judicial temperament. It is the responsibility of the CA to see that such an officer is appointed to pretrial investigations. If it is necessary for a nonlawyer IO to obtain advice regarding the investigation, that advice should not be sought from one who is likely to prosecute the case.

E. *Counsel for the government.* While the pretrial investigation need not be an adversarial proceeding, current practice favors having the CA detail a lawyer to represent the interests of the government—especially where the IO is not a lawyer. The assignment of a counsel for the government does not lessen the obligation of the IO to investigate the alleged offenses thoroughly and impartially. As a practical matter, however, the presence of lawyers representing the government and the accused make the pretrial investigation an adversarial proceeding. Counsel for the government functions much as a prosecutor does at trial and presents evidence supporting the allegations contained on the charge sheet.

F. *Defense counsel.* The accused's rights to counsel are as extensive at the pretrial investigation as at the GCM. More specifically, an accused is entitled to be represented by civilian counsel, if provided by the accused at no expense to the government, and by a detailed military lawyer, certified in accordance with Article 27(b), UCMJ, or by a military lawyer of his / her own choice at no cost to the accused if such counsel is reasonably available. *See* Chapter IX, pages 9-5 through 9-6, above, regarding an accused's right to defense counsel. *Detailed* defense counsel at a pretrial investigation must be a certified (Art. 27(b), UCMJ) lawyer and should be

designated by the appointing order. ***Individual*** counsel, military or civilian, is normally not detailed on the appointing order. An accused is generally not entitled to more than one military counsel in the same case.

G. ***Reporter***. There is no requirement that a record of the pretrial investigation proceedings be made, other than the completion of the IO's report. Accordingly, a reporter need not be detailed. It is common practice, however, to assign a reporter to prepare a verbatim record—particularly in complex cases. When such a record is desired, the CA, or a subordinate, may detail a reporter; but, such assignment is usually made orally and is not part of the appointing order.

H. ***Sample appointing order***. The order directing a pretrial investigation may be drafted in any acceptable form so long as an investigation is ordered and an IO and counsel are detailed. A suggested format follows.

PRETRIAL INVESTIGATION
SAMPLE APPOINTING ORDER

NAVAL JUSTICE SCHOOL
360 Elliot Street
Newport, Rhode Island 02840-1523

10 August 19CY

In accordance with Rule for Courts-Martial 405, Manual for Courts-Martial, 1984, Lieutenant Commander Carl Giese, U.S. Navy, is hereby appointed to investigate the attached charges preferred against Seaman John G. Guildersleeve, U.S. Navy. The charge sheet and allied papers are appended hereto. The investigating officer will be guided by the provisions of Rule for Courts-Martial 405, Manual for Courts-Martial, 1984, and pertinent case law relating to the conduct of pretrial investigations. In addition to the investigating officer hereby appointed, the following personnel are detailed to the investigation for the purposes indicated.

COUNSEL FOR THE GOVERNMENT

Lieutenant Andrew Bailey, JAGC, U.S. Naval Reserve, certified in accordance with Article 27(b), Uniform Code of Military Justice.

DEFENSE COUNSEL

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

THOMAS HART
Captain, U.S. Navy
Commanding Officer

THE HEARING PROCEDURE

A. *Prehearing preparation.* When the pretrial investigation officer (PTIO) receives his / her order of appointment, (s)he should first study the charge sheet and allied papers to become thoroughly familiar with the case. The charge sheet should be reviewed for errors, and any needed corrections should be noted. The PTIO should consult the accused, counsel, and the legal officer of the CA to set up a specific hearing date.

B. *Witnesses.* All reasonably available witnesses who appear necessary for a thorough and impartial investigation are required to be called before the article 32 investigation. Transportation and per diem expenses are provided for both military and civilian witnesses. *See* R.C.M. 405(g). For both military and civilian witnesses, the PTIO makes the initial determination concerning availability. Witnesses are "reasonably available," and therefore subject to production, when the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance. R.C.M. 405(g)(1)(A). This balancing test means that the more important the expected testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. The determination of "reasonable availability" of military witnesses beyond 100 miles of the location of the hearing is made by the CO of the military witness. Similar considerations apply to the production of documentary and real evidence. The decision not to make a witness or evidence available is subject to review by the military judge at trial.

A civilian witness whose testimony is material must be invited to testify, although (s)he cannot be subpoenaed or otherwise compelled to appear at the investigation. Thus, the PTIO should make a bona fide effort to have such civilian witnesses appear voluntarily, offering transportation expenses and a per diem allowance if necessary. R.C.M. 405(g)(3).

C. ***Statements***. The PTIO has a number of alternatives to live testimony. When a witness is not reasonably available, even if the defense objects, the PTIO may consider that witness' ***sworn*** statements. Unless the defense objects, a PTIO may also consider, regardless of the availability of the witness, sworn and unsworn statements, prior testimony, and offers of proof of expected testimony of that witness.

Upon objection, only sworn statements may be considered. Since objections to unsworn statements are generally made, every effort should be made to get sworn statements. All statements considered by the PTIO should be shown to the accused and counsel. The same procedure should be followed with respect to documentary and real evidence.

D. ***Testimony***. All testimony given at the pretrial investigation must be given under oath and is subject to cross-examination by the accused and counsel for the government. The accused has the right to offer either sworn or unsworn testimony. If undue delay will not result, the statements of the witnesses who testified at the hearing should be obtained under oath. In this connection, the PTIO is authorized to administer oaths in connection with the performance of his / her duties. JAGMAN 0902a(2)(d).

E. ***Rules of evidence***. The rules of evidence applicable to trial by court-martial do not strictly apply at the pretrial investigation (with a few exceptions), and the PTIO need not rule on objections raised by counsel except where the procedural requisites of the investigation itself are concerned. This normally means that counsels' objections are merely noted on the record. Care should be taken to insure that evidence relating to any search and seizure authorizations, Article 31, UCMJ warnings, or similar legal issues, is fully developed at the investigation. Since the rules of evidence do not strictly apply, cross-examination of witnesses may be very broad and searching and should not be unduly restricted.

F. ***Hearing date***. Once the prehearing preparation has been completed, the PTIO should convene the hearing. The pretrial investigation is a public hearing and should be held in a place suitable for a quasi-judicial proceeding. Accused, counsel, reporter (if one is used), and witnesses should be present. Witnesses must be examined one-by-one, and no witness should be permitted to hear another testify.

(***Note***: A hearing guide for use in pretrial investigations may be obtained from your local NLSO or LSSC.)

POST-HEARING PROCEDURES

After the hearing is completed, the IO prepares his / her report pursuant to R.C.M. 405(j) and submits it to the CO who directed the investigation. The CO should consider the IO's recommendation as to disposition, but (s)he need not follow it. The CO may dispose of the charges as (s)he sees fit pursuant to R.C.M. 401. In Navy commands, if (s)he deems a GCM appropriate, but lacks the authority to convene such a court-martial, (s)he must forward the report to the area coordinator, absent direction to the contrary from the GCMCA in his / her chain of command, pursuant to JAGMAN 0128a(1). In Marine commands, the charges are forwarded to the GCMCA in the chain of command pursuant to JAGMAN 0128b.

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

If the commander who ordered the investigation is also a GCMCA, (s)he may refer the case to trial by GCM if (s)he believes the charges are warranted by the evidence and such disposition is appropriate.

Before a case is referred to a GCM, the CA's SJA must review the case and prepare a written legal opinion on the sufficiency of the evidence and advisability of trial. *See* Art. 34, UCMJ. This written legal opinion is referred to as the pretrial advice.

The advice of the SJA shall include a written and signed statement which sets forth that person's:

A. Conclusion whether each specification on the charge sheet alleges an offense under the UCMJ;

B. conclusion whether each allegation is substantiated by the evidence indicated in the article 32 report of investigation;

C. conclusion whether a court-martial would have jurisdiction over the accused and the offense(s); and

D. recommendation of the action to be taken by the CA.

The SJA is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice, but the SJA is responsible for it and must sign it personally.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter and endorsements, and report of investigation are forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations, by commanders or others who have forwarded the charges, for disposition of the case. There is no legal requirement to include such information, however, and failure to do so is not error. Lastly, it should be noted that the legal conclusions reached by the SJA are binding on the CA; whereas, the recommendation is not.

DEPARTMENT OF THE NAVY
Naval Justice School
360 Elliot Street
Newport, Rhode Island 02841-1523

2 Sep CY

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

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

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

1. Forwarded.

2. Recommend trial by general court-martial.

CONVENING T. AUTHORITY

NOTES

NOTES (continued)

CHAPTER XII

REVIEW OF COURTS-MARTIAL

INTRODUCTION

This chapter describes the review of trials by summary, special, and general courts-martial. A summary of the chapter follows.

Upon completion of every trial by court-martial, a written record is prepared. This record is forwarded to the convening authority (CA) with a copy to the accused. Within certain time constraints, depending upon the type of court-martial and sentence adjudged, the accused may submit written "matters" which could affect the CA's decision whether to approve or disapprove the trial results. In a general court-martial (GCM) or a special court-martial (SPCM) case involving a bad-conduct discharge (BCD), the CA's decision must also await the written recommendation of the staff judge advocate (SJA) or legal officer (LO). With the benefit of this input, the CA determines, within his / her sole discretion, whether to approve or disapprove the sentence adjudged. This determination is in the form of a written legal document called the CA's action.

After the CA has taken his / her action, the record of trial (ROT) will be forwarded for further review. SCM'S, SPCM's not involving a BCD, and all other noncapital courts-martial in which appellate review has been waived will be reviewed by a judge advocate assigned, in most cases, to the staff of an officer exercising general court-martial jurisdiction (OECGMJ). This written review will generally terminate the mandatory review process although, in certain cases, the OEGCMJ him / herself will have to take final action.

GCM's and those SPCM's which include a BCD, after initial review by the CA, will normally be reviewed further by the Navy-Marine Corps Court of Criminal Appeals (formerly N.M.C.M.R.). Under certain circumstances, the case will thereafter be considered by the Court of Military Appeals and, possibly, the United States Supreme Court.

SEQUENCE OF REVIEW

A. *Report of results of trial.* Immediately following the final adjournment of a court-martial, trial counsel (TC) has an obligation to notify the CA and the accused's CO of the results of trial. JAGMAN 0149. Additionally, if the sentence includes confinement, the notification must be in writing—with a copy forwarded to the CO or OIC of the brig or confinement facility concerned. *See* JAGMAN A-1-j for a recommended form.

B. *The record of a trial by court-martial*

1. When proceedings at the trial court level have been completed, a ROT must be prepared. Once prepared, the ROT will be authenticated by the signature of a person who thereby declares that the record accurately reports the proceedings. Except in unusual circumstances, this person will be the military judge or SCM officer. R.C.M. 1104(a).

2. R.C.M. 1104 requires that a copy of the ROT be served on the accused as soon as the record has been authenticated. This is to provide him / her with the opportunity to submit any written "matters" which may reasonably tend to affect the CA's decision whether or not to approve the trial results. R.C.M. 1105. The content of such "matters" is not subject to the Military Rules of Evidence and could include:

a. Allegations of error affecting the legality of the findings of sentence;

b. matters in mitigation which were not available for consideration at the trial; and

c. clemency recommendations. The defense may ask any person for such a recommendation—including the members, military judge, or trial counsel.

3. Except in an SCM case, submission of matters by the accused in accordance with R.C.M. 1105 shall be made within 10 days after the accused has been served with an authenticated ROT and, if applicable; the service on the accused of the recommendation of the SJA or LO under R.C.M. 1106. In an SCM case, such submission shall be made within 7 days after the sentence is announced.

-- If the accused shows that additional time is required to submit such matters, the CA may, for good cause shown, extend the applicable period stated above for not more than an additional 20 days.

4. In addition to the input from the accused, the CA must receive a written recommendation from his / her SJA or LO before taking action on a GCM or an SPCM case involving a BCD. R.C.M. 1106.

The purpose of the recommendation is simply to assist the CA in deciding what action to take on the case. The recommendation is intended to be a concise written communication summarizing:

a. The findings and sentence adjudged;

b. the accused's service record, including length and character of service, awards and decorations, and any records of NJP and previous convictions;

c. the nature of pretrial restraint—if any;

d. obligations imposed upon the CA because of a pretrial agreement; and

e. a specific recommendation as to the action to be taken by the CA on the sentence.

Identifying legal error is not one of the required goals of this recommendation. In cases of acquittal of all charges and specifications, and cases where the proceedings were terminated prior to findings with no further action contemplated, the SJA or LO recommendation is not required. R.C.M. 1106(a).

5. Before forwarding the ROT and recommendation to the CA for action under R.C.M. 1107, the SJA or LO shall cause a copy of the recommendation to be served on counsel for the accused. Such counsel shall have 10 days to submit written comments on the recommendation, pursuant to R.C.M. 1106(f), for consideration by the CA.

C. ***Responsibility for CA's action.*** The first official action to be taken with respect to the results of a trial is the CA's action. All materials submitted by the accused, SJA / LO, and defense counsel are preparatory to this official review. Article 60, UCMJ, and JAGMAN 0151a place the responsibility for this initial review and action on the CA. This is true even when the accused is no longer assigned to the CA's command.

D. ***CA's action in general.*** The CA's action is a legal document attached to the ROT setting forth, in prescribed language, the CA's decisions and orders with respect to the sentence, the confinement of the accused, and further disposition. The action taken with respect to the sentence is a matter falling within the CA's sole discretion. (S)he may for any reason or no reason disapprove a legal sentence in

whole or in part, mitigate it, suspend it, or change a punishment to one of a different nature as long as the severity of the sentence is not increased. The CA's decision is a matter of command prerogative and is to be made in the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons.

In taking his / her action, the CA is ***required*** to consider the ***results*** of trial, the SJA / LO recommendation when required, and any matter submitted by the accused as previously discussed. Additionally, the CA ***may*** consider the ***record*** of trial, personnel records of the accused, and such other matters deemed appropriate by the CA. Any matters considered outside of the record, of which the accused is not reasonably aware, should be disclosed to the accused to provide an opportunity for rebuttal.

After taking his / her action, the CA will publish the results of trial and the CA's action in a legal document called a promulgating order.

E. *Subsequent review*

1. *Mandatory review*

The CA's action for every trial by court-martial is reviewed by higher authority. Certain reviews are mandatory; once these mandatory reviews are completed, the case is "final." Other reviews are discretionary; for example, the accused and his / her counsel must decide whether to petition the Court of Military Appeals for review of the case, whether to petition for review by the Judge Advocate General, or whether to petition for a new trial.

R.C.M. 1110 governs waiver and withdrawal: "After any general court-martial, except one in which the approved sentence includes death, and after any special court-martial in which the approved sentence includes a bad-conduct discharge, the accused may waive or withdraw appellate review." According to the Rule, the waiver or withdrawal must be a written document establishing that the accused and defense counsel have discussed the accused's right to appellate review; that they have discussed the effect that waiver or withdrawal will have on that review; that the accused understands these matters; and that the waiver or withdrawal is submitted voluntarily. An accused must file a waiver within 10 days after being served a copy of the CA's action, unless an extension is granted. A withdrawal may be submitted any time before appellate review is completed. In either case, however, once appellate review is waived or withdrawn, it is irrevocable and the case will thereafter be reviewed locally in the same manner as an SCM or an SPCM not involving a BCD.

2. ***SCM's, SPCM's not involving a BCD, and all other noncapital courts-martial where appellate review has been waived***

a. Article 64, UCMJ, and R.C.M. 1112 require that all SCM's, non-BCD SPCM's, and all other noncapital courts-martial where appellate review has been waived or withdrawn by the accused, be reviewed by a judge advocate. JAGMAN 0153a(1) requires this officer to be the SJA of an officer who exercises GCM jurisdiction and who, at the time of trial, could have exercised such jurisdiction over the accused. In all cases, the action of the CA will identify the officer to whom the record is forwarded by stating his / her official title.

b. The judge advocate's review is a written document containing the following:

(1) A conclusion as to whether the court-martial had jurisdiction over the accused and over each offense for which there is a finding of guilty which has not been disapproved by the CA;

(2) a conclusion as to whether each specification, for which there is a finding of guilty which has not been disapproved by the CA, stated an offense;

(3) a conclusion as to whether the sentence was legal;

(4) a response to each allegation of error made in writing by the accused; and

(5) in cases requiring action by the OEGCMJ, as noted below, a recommendation as to appropriate action and an opinion as to whether corrective action is required as a matter of law.

c. After the judge advocate has completed his / her review, most cases will have reached the end of mandatory review and will be considered final within the meaning of Article 76, UCMJ. If this is the case, the judge advocate review will be attached to the original ROT and a copy forwarded to the accused. The review is not final, and a further step is required, in the following two situations:

(1) The judge advocate recommends corrective action; or

(2) the sentence as approved by the CA includes a dismissal, a dishonorable or BCD, or confinement for more than six months.

The existence of either of these two situations will require the SJA to forward the ROT to the OEGCMJ for further action.

3. *SPCM's involving a BCD*

a. Assuming that appellate review has not been waived or withdrawn by the accused, an SPCM involving a BCD, whether or not suspended, will be sent directly to the Office of the Judge Advocate General of the Navy. R.C.M. 1111. After detailing appellate defense and government counsel, the case will then be forwarded to the Navy–Marine Corps Court of Military Review (N.M.C.M.R.). R.C.M. 1201, 1202. N.M.C.M.R. has review authority similar to that of the CA, except that it may not suspend any part of the sentence. It is also limited to reviewing only those findings and sentence which have been approved by the CA. In other words, it may not increase the sentence approved by the CA nor may it approve findings of guilty already disapproved by the CA.

b. After review by N.M.C.M.R., the case will go to the Court of Military Appeals (C.M.A.) for review in the following two instances:

(1) If certified to the C.M.A. by JAG; or

(2) if the C.M.A. grants the accused's petition for review. R.C.M. 1204.

c. Finally, review by the United States Supreme Court is possible under 28 U.S.C. § 1259 and Article 67(h), UCMJ.

4. *General court-martial (GCM)*

a. All GCM cases in which the sentence, as approved, includes dismissal, punitive discharge, or confinement of at least one year will be reviewed in precisely the same way as an SPCM involving a BCD. *See* paragraph 3, above. Cases involving death are reviewed in a similar fashion, except that review by C.M.A. is mandatory. Other GCM cases—those not involving death, dismissal, punitive discharge, or confinement of one year or more—are reviewed in the Office of the Judge Advocate General under Article 69(a), UCMJ, and R.C.M. 1201(b).

5. *Review in the Office of the Judge Advocate General*

Article 69(b), UCMJ, provides that certain cases may be reviewed in the Office of the Judge Advocate General and that the findings or sentence, or both, may be vacated or modified by the JAG on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction, or error prejudicial to the substantial rights of the accused. Review under this article may only be granted in a case which has been "finally" reviewed, but has not been reviewed by N.M.C.M.R. Even then, such review by the JAG is not automatic. The accused must petition JAG

to review the case, and JAG may or may not agree to review it. If the case is reviewed, the JAG may or may not grant relief.

6. *New trial*

a. Article 73, UCMJ, provides that, under certain limited conditions, an accused can petition the JAG to have his / her case tried again, even after conviction has become final, by completion of appellate review. The trial authorized by article 73 is not a rehearing such as is ordered where prejudicial error has occurred, nor is it another trial such as that ordered to cure jurisdictional defects. It is a trial de novo—a brand new trial—as if the accused had never been tried at all.

b. There are only two grounds for petition:

(1) newly discovered evidence; and

(2) fraud on the court.

c. Sufficient grounds will be found to exist only if it is established that an injustice has resulted from the findings or sentence and that a new trial would probably produce a substantially more favorable result. R.C.M. 1210.

ISSUES AND OPTIONS FOR THE REVIEWING AUTHORITY

The reviewing authority has many options available when (s)he takes action on review. As an example, the CA may approve, substantially reduce, or ***outright*** disapprove the sentence of a court-martial as a matter of command prerogative. Though no action on findings of guilty is required, the CA may, as a matter within his / her discretion, disapprove such findings or approve a lesser included offense (LIO). These actions may be taken for many reasons—including considerations of command morale, clemency for the accused, or error in the ROT. As far as error is concerned, it must be remembered that the CA is not required to search for legal error or factual sufficiency. (S)he may, on the other hand, determine that time and money may be saved by correcting error at his / her level of review rather than waiting for some other authority to return the record.

What follows is a discussion of the various issues and options which face the reviewing authority when (s)he takes action on review. Though much of the discussion will be applicable to all authorities within the chain of review, the primary emphasis will be upon the action of the CA.

A. *Sentence*

1. *Generally*. As long as the sentence is within the jurisdiction of the court-martial and does not exceed the maximum limitations prescribed for each offense in Part IV (Punitive Articles), MCM, 1984, it is a legal sentence and may be approved by the CA. Considerable discretion is given to the CA in acting on the sentence. R.C.M. 1107 states that "[t]he convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused." It also states, however, that he "may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased." These issues are discussed below.

2. *Determining the appropriateness of the sentence*. In determining what sentence should be approved or disapproved, the CA should consider all relevant factors—including the possibility of rehabilitation, the deterrent effect of the sentence, matters relating to clemency, and requirements of a pretrial agreement.

3. *Reducing and changing the nature of the sentence*

a. *Mitigation*. When a sentence is reduced in quantity (e.g., 4 months' confinement to 2 months' confinement) or reduced in quality (e.g., 30 days' confinement to 30 days' restriction), the sentence is said to have been mitigated.

b. *Commutation*. When a sentence is changed to a punishment of a different nature (e.g., BCD to confinement), the sentence is said to have been commuted.

c. *General rules*. In taking action on the sentence, the CA must observe certain rules.

(1) When mitigating forfeitures, the duration and amounts of forfeiture may be changed as long as the total amount forfeited is not increased and neither the amount nor duration of the forfeitures exceeds the jurisdiction of the court-martial.

(2) When mitigating confinement on bread and water or diminished rations, confinement, or hard labor without confinement, the CA should use the equivalencies at R.C.M 1003(b)(6), (7), and (9) as appropriate. For example, confinement on bread and water may be changed to confinement at the rate of 1 day of confinement on bread and water equaling 2 days of confinement.

(3) The sentence may not be increased in severity or duration.

(4) No part of the sentence may be changed to a punishment of a more severe type.

(5) The sentence as approved must be one which the court-martial could have adjudged.

d. ***Application***

(1) A punitive discharge cannot be commuted to an administrative discharge, as the latter could not have been adjudged by the court-martial.

(2) ***Example***. An SPCM adjudges a BCD, confinement for 6 months, forfeiture of $68.00 per month for 6 months. The CA commutes the BCD to confinement for 5 months and forfeitures of $68.00 per month for 5 months, then approves confinement for 11 months and forfeiture of $68.00 per month for 11 months. Result: CA's action is illegal; the approved confinement and forfeiture for 11 months is beyond the jurisdiction of an SPCM.

(3) Confinement and forfeitures for one year cannot be commuted to a BCD, even with accused's consent. A BCD is a more severe punishment and can only be approved when included in the sentence of the court-martial.

(4) A BCD can be commuted to confinement and forfeitures for 6 months. The latter is a less severe penalty. Confinement begins to run on the date the original sentence was imposed by the court-martial, rather than the date of the commutation.

(5) An unsuspended reduction in rate can be commuted to a suspended reduction and an unsuspended forfeiture of pay.

(6) It is often difficult to compare two authorized punishments of different types and decide which is less severe. For example, is the loss of 500 lineal numbers more or less severe than forfeiture of $25.00 per month for 12 months? The C.M.A. opted for ". . . affirmance of [the CA's] judgment on appeal, unless it can be said that, as a matter of law, he has increased the severity of the sentence."

4. *Suspending the sentence*

a. *When used*

(1) R.C.M. 1108 states: "Suspension of a sentence grants the accused a probationary period during which the suspended part of an approved sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence shall be remitted." Simply stated, the accused is being given an opportunity to show, by his / her good conduct during the probationary period, that (s)he is entitled to have the suspended portion of the sentence remitted. In this context:

-- *Suspend* means to conditionally withhold the execution.

-- *Remit* means to cancel the unexecuted sentence.

(2) CA's and OEGCMJ's are encouraged to suspend all or any part of a sentence when such action would promote discipline and when the accused's prospects for rehabilitation would more likely be enhanced by probation than by the execution of all or any part of the sentence adjudged. JAGMAN 0151a(3).

b. *Automatic reduction to paygrade E-1.* In accordance with the power granted in Article 58(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Article 58(a), UCMJ, shall be effected in the Navy and Marine Corps in accordance with JAGMAN 0152d. Under the provisions of JAGMAN 0152d, a court-martial sentence of an enlisted member in a paygrade above E-1, as approved by the CA, that includes a punitive discharge, whether or not suspended, or confinement in excess of 90 days (if the sentence is stated in days) or 3 months (if stated in other than days) automatically reduces the member to the paygrade E-1 as of the date the sentence is approved. As a matter within his / her sole discretion, the CA may retain the accused in the paygrade held at the time of sentence or at an intermediate paygrade and suspend the automatic reduction to paygrade E-1 which would otherwise be in effect. Additionally, the CA may direct that the accused serve in paygrade E-1 while in confinement, but be returned to the paygrade held at the time of sentence or an intermediate paygrade upon release from confinement. Failure of the CA to address automatic reduction will result in the automatic reduction to paygrade E-1 on the date of the CA's action. The CA may, in a pretrial agreement, agree to suspend or disapprove automatic reduction to paygrade E-1.

c. ***Requirements for a valid suspension of a sentence***

(1) The conditions of the suspension must be in writing and served on the accused in accordance with R.C.M. 1108. Unless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the UCMJ.

(2) The suspension period must be for a definite period of time which is not unreasonably long. This period shall be stated in the CA's action.

(3) A provision must be made for it to be remitted at the end of the suspension period without further action. This provision shall be included in the CA's action.

(4) A provision must be made for permitting it to be vacated prior to the end of the suspension period. This provision shall be included in the CA's action.

(***Note***: Vacating means to do away with the suspension. *See* ***Proceedings to vacate suspension***, below.)

d. ***Who has the power to suspend***? The CA, after approving the sentence, has the power to suspend any sentence except the death penalty. The military judge or members of a court-martial may recommend suspension of part or all of the sentence, but these recommendations are not binding on the CA or other higher authorities.

e. ***Proceedings to vacate suspension***

(1) ***General requirements***. An act of misconduct, to serve as the basis for vacation of the suspension of a sentence, must occur within the period of suspension. The order vacating the suspension must be issued prior to the expiration of the period of suspension. The running of the period of suspension is interrupted by the unauthorized absence of the probationer or by commencement of proceedings to vacate the suspension. R.C.M. 1109 indicates that vacation of a suspended sentence may be based on a violation of the UCMJ. Furthermore, when all or part of the sentence has been suspended as a result of a pretrial agreement, case law indicates that the suspension may be vacated for violation of any of the lawful requirements of the probation—including the duty to obey the local civilian law (as well as military law); to refrain from associating with known drug users / dealers; and to consent to searches of his person, quarters, and vehicle at any time.

(2) *Hearing requirements.* Procedural rules for hearing requirements depend on the type of suspended sentence being vacated.

(a) ***Sentence of any GCM or an SPCM including approved BCD.*** If the suspended sentence was adjudged by any GCM, or by an SPCM which included an approved BCD, the following rules apply. After giving notice to the accused in accordance with R.C.M. 1109(d), the officer having SPCM jurisdiction over the probationer personally holds a hearing to inquire into the alleged violation of probation. The procedure for the hearing is similar to that prescribed for a formal pretrial investigation (Art. 32, UCMJ), and the accused has the right to detailed and / or civilian counsel at the hearing. The record of the hearing and the recommendations of the SPCM authority are forwarded to the OEGCMJ, who may vacate the suspension. Art. 72, UCMJ; R.C.M. 1109.

(b) ***Sentence of SPCM not including BCD or sentence of SCM.*** If the suspended sentence was adjudged by an SPCM and does not include a BCD, or if the sentence was adjudged by an SCM, the following rules apply. The officer having SPCM jurisdiction over the probationer personally holds a hearing to inquire into the alleged violation of probation. The procedure for the hearing is similar to that prescribed for a formal pretrial investigation. The probationer must be accorded the same right to counsel at the hearing that (s)he was entitled to at the court-martial which imposed the sentence, except there is no right to request individual military counsel (IMC). Such counsel need not be the same counsel who originally represented the probationer. If the officer having SPCM jurisdiction over the probationer decides to vacate all or a portion of the suspended sentence, (s)he must record the evidence upon which (s)he relied and the reasons for vacating the suspension in his / her action. Art. 72, UCMJ; R.C.M. 1109.

(c) The officer who actually vacates the suspension must execute a written statement of the evidence (s)he is relying on and the reasons for vacating the suspension.

(d) If, based on an act of misconduct in violation of the terms of suspension, the accused is confined prior to the actual vacation of the suspended sentence, a preliminary hearing must be held before a neutral and detached officer to determine whether there is probable cause to believe the accused has violated the terms of his / her suspension. R.C.M. 1109. JAGMAN 0160a indicates that this officer should be one who is appointed to review pretrial confinement under R.C.M. 305. A guide for procedures for vacation of suspended sentences is included at page 12-17.

B. ***Post-trial restraint pending completion of appellate review***

1. ***Status of the accused.*** The accused's immediate commander must initially determine whether the accused will be placed in post-trial restraint pending review of the case. Specifically, (s)he must decide whether (s)he will confine, restrict, place in arrest, or set free the accused pending appellate review. This decision is necessary because an accused, who has been sentenced to confinement by court-martial for example, is not automatically confined as a result of the sentence announcement. Even though the sentence of confinement runs from the date it is adjudged by the court, the sentence will not be executed until the CA takes action. Thus, an accused cannot be confined on the basis of a court-martial sentence alone—an order from the CO is required.

2. ***Criteria.*** Since the sentence of confinement runs from the date adjudged, whether or not the accused is confined, a CO will usually take prompt action with respect to restraint. R.C.M. 1101(b) indicates that post-trial confinement is authorized when the sentence includes confinement or death. The CO may delegate the authority under this rule to the trial counsel.

C. ***Deferment of the confinement portion of the sentence***

1. ***Definition.*** As indicated in the previous section, the confinement portion of a sentence runs from the date the sentence is adjudged. Art. 57(b), UCMJ. Deferment of a sentence to confinement is a postponement of the running and service of the confinement portion of the sentence. It is not a form of clemency. R.C.M. 1101(c).

2. ***Who may defer?*** Only the CA or, if the accused is no longer under his / her jurisdiction, the OEGCMA over the command to which the accused is attached can defer the sentence. R.C.M. 1001(c).

3. ***When deferment may be ordered.*** Deferment may be considered only upon written application of the accused. If the accused has requested deferment, it may be granted anytime after the adjournment of the court-martial as long as the sentence has not been executed. R.C.M. 1101(c).

4. ***Action on the deferment request.*** The decision to defer is a matter of command discretion. As stated in R.C.M. 1101(c)(3), "the accused shall have the burden to show that the interests of the accused and the community in release outweigh the community's interest in confinement." Some of the factors the CA may consider include:

a. The probability of the accused's flight to avoid service of the sentence;

b. the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice;

c. the nature of the offenses (including the effect on the victim) of which the accused was convicted;

d. the sentence adjudged;

e. the effect of deferment on good order and discipline in the command; and

f. the accused's character, mental condition, family situation, and service record.

Although the decision to grant or deny the deferment request falls within the CA's sole discretion, that decision can be tested on review for abuse of discretion. In a decision from the Court of Military Appeals, they held that the CA abused his discretion by denying deferment where the accused (an Air Force captain who was a physician) showed that he had no prior record, that his conviction was not based on any act of violence, that he had made no previous attempt to flee, that he had custody of a minor child, and that he had substantial personal property in the area.

5. *Imposition of restraint during deferment.* No restrictions on the accused's liberty may be ordered as a substitute for the confinement deferred. An accused may, however, be restrained for an independent reason (e.g., pretrial restraint resulting from a different set of facts). R.C.M. 1101 (c)(5).

6. *Termination of deferment.* Deferment is terminated when:

a. The CA takes action unless the CA specifies in the action that service of the confinement after the action is deferred (In this case, deferment terminates when the conviction is final.);

b. the sentence to confinement is suspended;

c. the deferment expires by its own terms; or

d. the deferment is rescinded by the officer who granted it or, if the accused is no longer under his / her jurisdiction, by the OEGCMA over the accused's command. R.C.M. 1101(c)(7). Deferment may be rescinded when additional information comes to the authority's attention which, in his / her discretion, presents grounds for denial of deferment under paragraph 4, above. The accused must be given notice of the intended rescission and of the right to submit written matters.

(S)he may, however, be required to serve the sentence to confinement pending this action. R.C.M. 1107(c)(7).

7. ***Procedure***. Applications must be in writing and may be made by the accused at any time after adjournment of the court. The granting or denying of the application is likewise in writing. If the deferment request is used to effectuate the intent of a pretrial agreement term suspending all confinement, it may be submitted along with the pretrial agreement by the defense counsel, and the CA may sign both documents at once—well before trial.

8. ***Record of proceedings***. Any document relating to deferment or rescission of deferment must be made a part of the ROT. The dates of any periods of deferment and the date of any rescission are stated in the CA's action or supplementary actions.

D. ***Execution of the sentence***. An order executing the sentence directs that the sentence be carried out. In the case of confinement, it directs that it be served; in the case of a punitive discharge, that it be delivered. The decision as to execution of the sentence is closely related to other post-trial decisions involving suspension, deferment of confinement, and imposition of post-trial restraint.

1. ***Execution authorities***

a. No sentence may be executed by the CA unless and until it is approved by him / her. R.C.M. 1113(a). Once approved, every part of the sentence, except for a punitive discharge, dismissal, or death, may be executed by the CA in his / her initial action. R.C.M. 1113(b). Of course, a suspended sentence is approved, but not executed.

b. A punitive discharge may only be executed by:

(1) The OEGCMJ who reviews a case when appellate review has been waived under R.C.M. 1112(f); or

(2) the OEGCMJ over the accused after appellate review is final under R.C.M. 1209.

c. Dismissal may be ordered executed only by the Secretary of the Navy or by such Under Secretary or Assistant Secretary as the Secretary may designate. R.C.M. 1113(c)(2).

d. Death may be ordered executed only by the President. R.C.M. 1113(c)(3).

e. Though a punitive discharge may have been ordered executed, it shall not in fact be executed until all provisions of SECNAVINST 5815.3, concerning Naval Clemency and Parole Board action, are in compliance. JAGMAN 0157d.

2. *Appellate leave*. Under the provisions of Article 76(a), UCMJ, the Secretary of the Navy may prescribe regulations which require that an accused take leave pending completion of the appellate review process if the sentence, as approved by the CA, includes an unsuspended dismissal or an unsuspended dishonorable dischaege or BCD. The Secretarial regulations concerning appellate leave are contained in Article 3420280 of the MILPERSMAN for Navy personnel and paragraph 3025 of MCO P1050.3g, *Regulations for Leave, Liberty and Administrative Absence*, for Marine Corps personnel. Stated very simply, procedures applicable to Navy and Marine Corps personnel have been revised to provide authority to place a member on mandatory appellate leave; the member can also request voluntary appellate leave.

E. *Speedy review*

The accused has a right to have his / her case reviewed promptly and without unnecessary delay. The Court of Military Appeals has expressed great interest in protecting this right. As formerly applied, a presumption of prejudice to the accused arose whenever he was in 90 days of continuous confinement without the OEGCMJ taking action. The presumption placed a heavy burden on the government to show due diligence and, in the absence of such a showing, the charges were dismissed. Later, the court softened its stance, rejecting the rule of presumed prejudice in post-trial confinement cases. For cases after 18 June 1979, the court has required a showing of specific prejudice to the accused, a rule which now applies regardless of the post-trial confinement status. In the absence of any articulated prejudice to the accused caused by delay, no corrective action will be required.

PROCEDURES FOR VACATION OF SUSPENDED SENTENCES

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

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

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

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

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

NOTES

NOTES (continued)

COMMANDER'S HANDBOOK

Table of Contents

CRIMINAL LAW DIVISION

Page

CHAPTER 13 PARTIES TO CRIME: PRINCIPALS AND ACCESSORIES AFTER THE FACT

Introduction 13-1
Types of Principals 13-1
Scope of Criminal Liability of Principals 13-2
Withdrawal by Accessory Before the Fact and Aider and Abettor 13-2
Accessory After the Fact 13-2

CHAPTER 14 SOLICITATION, CONSPIRACY, AND ATTEMPTS

Solicitation 14-1
Conspiracy 14-1
Attempts 14-2

CHAPTER 15 ORDERS OFFENSES AND DERELICTION OF DUTY

Overview 15-1
The Lawful Order 15-1
Violation of General Orders or Regulations 15-4
Violation of Other Lawful Orders 15-5
Willful Disobedience of Certain Lawful Orders 15-5
Dereliction of Duty 15-7
Common Defenses to Orders Offenses and Dereliction of Duty 15-8

Page

CHAPTER 16 DISRESPECT

Overview 16–1
What is Disrespect? 16–1
Disrespect Toward a
Superior Commissioned Officer 16–2
Disrespect Toward Warrant (W–1),
Noncommissioned, or Petty Officer 16–2
Offenses Against Authority (Chart) 16–3

CHAPTER 17 ABSENCE OFFENSES

Overview 17–1
Failure to Go, or Going From,
an Appointed Place of Duty 17–1
Unauthorized Absence From Unit or Organization 17–2
Missing Movement 17–5
Desertion 17–6
Common Defenses to Absence Offenses 17–7
When UA Terminates (Chart) 17–10

CHAPTER 18 THE GENERAL ARTICLE: ARTICLE 134

Overview 18–1
Conduct Prejudicial to
Good Order and Discipline 18–1
Service–Discrediting Conduct 18–1
Conduct that is Both Prejudicial
and Discrediting 18–1
Federal Noncapital Crimes 18–2
Federal Assimilative Crimes Act 18–2

CHAPTER 19 CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN

Overview 19–1
Discussion 19–1

Page

CHAPTER 20 ASSAULTS

Overview 20-1
Simple Assault 20-1
Assault Consummated by a Battery 20-2
Assault with a Dangerous Weapon or Other Means or Force Likely to Produce Death or Grievous Bodily Harm 20-3
Intentional Infliction of Grievous Bodily Harm 20-3
Assault Upon Certain Officers 20-4
Assault Consummated by a Battery Upon a Child 20-4
Other Assaults Aggravated by the Victim's Status 20-5
Assault with Intent to Commit Certain Serious Offenses 20-6
Common Defenses to Assault Offenses 20-6

CHAPTER 21 DISTURBANCE OFFENSES

Overview 21-1
Breach of the Peace 21-1
Disorderly Conduct 21-2
Communicating a Threat 21-2
Provoking Words or Gestures 21-2

CHAPTER 22 CRIMES AGAINST PROPERTY

Overview 22-1
Larceny and Wrongful Appropriation 22-1
Receiving, Buying, or Concealing Stolen Property 22-6
Robbery 22-7
Burglary, Housebreaking, and Unlawful Entry 22-8
Offenses Against Military Property 22-9
Damage or Destruction of Nonmilitary Property 22-10
Bad Check Law 22-11

Page

CHAPTER 23 DRUG OFFENSES

Article 112a 23-1
Designer Drugs 23-2
Drug Paraphernalia 23-3
Common Defenses in Drug Cases 23-3

CHAPTER 24 DRUNKENNESS

Overview 24-1
"Drunk" Defined 24-1
Proof of Drunkenness 24-1
Drunk on Ship, on Station, in Camp, or in Quarters 24-2
Drunk on Duty 24-2
Incapacitation for Duty Through Prior Wrongful Indulgence in Intoxicating Liquor or any Drug 24-2
Drunken or Reckless Operation of a Vehicle, Aircraft, or Vessel 24-3

CHAPTER 25 MISCONDUCT BY A SENTINEL OR LOOKOUT

Overview 25-1
Who is a Sentinel or Lookout? 25-1
Drunk on Post 25-1
Sleeping on Post 25-1
Leaving Post Before Relief 25-2
Loitering on Post 25-2
Wrongful Sitting 25-2

CHAPTER 26 BREACHES OF RESTRAINT

Overview 26-1
Resisting Apprehension 26-1
Escape from Confinement and Escape from Custody 26-2
Breaking Arrest and Breaking Restriction 26-3

Page

CHAPTER 27 FALSIFICATION OFFENSES

Overview 27-1
False Official Statement 27-1
Forgery 27-2
Perjury 27-2
Frauds Against the United States 27-2
False Swearing 27-3

CHAPTER 28 DEFENSES

Overview 28-1
Defenses in Bar of Trial 28-1
Defenses on the Merits 28-2
Insanity 28-4

CHAPTER 29 FRATERNIZATION AND SEXUAL HARASSMENT

Fraternization 29-1
Sexual Harassment 29-3

CHAPTER XIII

PARTIES TO CRIME: PRINCIPALS AND ACCESSORIES AFTER THE FACT

INTRODUCTION

A party to a crime is one who, because of the involvement in a criminal act, is liable for punishment. The UCMJ classifies parties to crimes into two major groups: (1) principals, and (2) accessories after the fact. Principals include the perpetrator of the crime, any aiders and abettors, and any accessories before the fact.

TYPES OF PRINCIPALS

Under Article 77, UCMJ, the following three types of parties to a crime are considered principals:

A. ***Perpetrator***: A perpetrator of a crime is one who actually commits the crime, either personally or by causing the crime to be done through an animate / inanimate agency or innocent human agent.

B. ***Aider and abettor***. An aider and abettor does not actually commit the crime but is ***present*** at the crime, ***participates*** in its commission, and shares in the criminal ***purpose***. A person is present for purposes of being an aider and abettor when in a position to aid the perpetrator to complete the crime. Participation for purposes of being an aider and abettor requires that the aider and abettor ***actively*** participate in the crime by assisting the perpetrator. A mere bystander who doesn't try to stop the perpetrator is not an aider and abettor. A person such as a night watchman, however, who has a legal duty to prevent or stop crime, may become an aider and abettor by failing to take action.

C. ***Accessory before the fact***. An accessory before the fact is one who counsels, commands, procures, or causes another to commit an offense. The advice must be given with the intent to encourage and promote the crime. (S)he need not be present at the crime nor participate in the actual commission of the offense.

SCOPE OF CRIMINAL LIABILITY OF PRINCIPALS

A principal is criminally liable for all crimes committed by another principal if those crimes are the natural and probable consequences of the principals' plan.

WITHDRAWAL BY ACCESSORY BEFORE THE FACT AND AIDER AND ABETTOR

An accessory before the fact and an aider and abettor may escape criminal liability by unequivocally disassociating themselves from the crime before the perpetrator commits the offense. For the withdrawal to be effective, three requirements must be met. First, the accused must effectively countermand or negate any assistance previously given. Second, the accessory and aider and abettor must communicate their withdrawal in unequivocal terms to all the perpetrators or to appropriate law enforcement authorities. Finally, the communication must be made before the perpetrator commits the offense.

ACCESSORY AFTER THE FACT

A. *The principal's offense*. In reality, two crimes must be proven in every accessory after the fact prosecution: (1) the principal's crime; and (2) the accessory's crime of illegally assisting the principal to escape apprehension, trial, or punishment. The principal need not be a person subject to the UCMJ, but the crime must be one that is recognized by it. There is no requirement that the principal be prosecuted and convicted before the accessory after the fact is prosecuted.

B. *The accessory's knowledge*. The accessory must know that the principal had committed the offense. Knowledge, for purposes of article 78, must be actual knowledge that the principal had committed the offense.

C. *The accessory's assistance*. Article 78, UCMJ, defines an accessory after the fact as one who "receives, comforts, or assists" the principal. "Receives" refers to harboring or concealing the principal. "Comforts" includes providing food, clothing, transportation, and money to the principal. "Assists" includes any act which aids the principal's efforts to avoid detection, apprehension, or punishment. Such assistance would include acts such as concealing the fact that the crime had been committed, destroying evidence, or helping the principal escape. Mere failure to report a known offense, by itself, does not make one an accessory after the fact. There must be some active assistance rendered to the perpetrator.

D. ***The accessory's intent.*** Accessory after the fact is a specific intent offense. The prosecution must prove that the accused assisted the principal in order to help the principal avoid apprehension, trial, or punishment. The type of assistance given may be strong circumstantial evidence of the accused's criminal intent.

NOTES

NOTES (continued)

CHAPTER XIV

SOLICITATION, CONSPIRACY, AND ATTEMPTS

SOLICITATION

Concept of criminal solicitation. A criminal solicitation is any statement or conduct which constitutes a serious request or advice to another to commit an offense. This is a specific intent offense which requires that the accused actually intended that the act solicited be carried out. The fact that the solicited crime was not attempted or completed is no defense.

CONSPIRACY

A. ***Concept of conspiracy.*** A conspiracy is an agreement by two or more persons to commit an offense against the UCMJ, accompanied by the performance of an act by at least one of the conspirators to accomplish the criminal object of the conspiracy. Conspiracy is a separate and distinct offense from the intended crime. Thus, the fact that the intended crime was never committed is no defense. On the other hand, if the intended crime is completed, the conspirators are criminally liable for both the intended crime and for the separate offense of conspiracy.

B. ***Form of the agreement.*** No specific form of agreement is required. The agreement to commit a crime need not specify the means to be used nor the part each conspirator is to play. All that is required to satisfy the agreement requirement is that the conspirators agree to commit an offense against the Code. However, mere idle talk about committing some indefinite crime in the future is not, under most circumstances, a sufficient agreement.

C. ***Parties to the agreement.*** At least two persons are required for a conspiracy. None of the accused's fellow conspirators need be persons subject to the UCMJ. If the only other member of a conspiracy is a government agent or informant, however, there can be no conspiracy.

D. ***The overt act.*** The second element of conspiracy requires that one of the conspirators must commit an overt act in furtherance of the conspiracy. The overt act must be something other than the mere act of agreeing to commit the crime. Any act in preparation for the crime is sufficient. Also, any attempt to commit the

intended crime, or the commission of the crime itself, will likewise satisfy the requirement for an overt act.

E. *Criminal liability of conspirators.* Conspiracy is a separate offense from the intended crime. The fact that the intended crime was never attempted or completed is no defense to a conspiracy charge. If the intended crime is committed, however, all conspirators will be criminally liable not only for the conspiracy, but also as principals for the completed crime. Moreover, all conspirators are liable as principals for any other foreseeable crime committed by any conspirator acting in furtherance of the conspiracy.

F. *Withdrawal.* A conspirator may withdraw from the conspiracy and escape criminal liability for the conspiracy and for the intended crime. An effective withdrawal must consist of affirmative conduct which is ***wholly*** inconsistent with adherence to the unlawful agreement and which shows that the withdrawer has severed all connection with the conspiracy. The withdrawal must be made before any conspirator commits an overt act in furtherance of the conspiracy. As a practical matter, however, conspirators seldom withdraw in time to avoid liability for the conspiracy charge. Since the overt act required for conspiracy need only be a preliminary preparation, and since it may be committed by any conspirator, the withdrawing conspirator's communication of the withdrawal usually occurs after the overt act. Under such circumstances the conspirator is guilty of conspiracy, but will not be criminally liable for the completed crime.

ATTEMPTS

A. *Concept of criminal attempts.* Article 80, UCMJ, defines a criminal attempt as an act, done with the specific intent to commit an offense against the Code, which amounts to more than mere preparation and which would tend to result in the intended crime being completed.

B. *Specific intent to commit an offense.* The accused must have intended to commit an offense against the Code. Proof of this specific intent poses several problems.

1. *Proof of intent.* Proof of the accused's intent to commit an offense may be accomplished by direct or circumstantial evidence. The overt act that the accused performed may itself be strong circumstantial evidence of the necessary criminal intent. The law assumes that people normally intend the natural and probable consequences of their acts. When the accused engages in conduct which normally leads to the commission of an offense, the intent to commit a crime may be inferred from his / her actions.

2. ***Factual impossibility***. The law recognizes that one is guilty of a criminal attempt if (s)he purposely engages in conduct which would constitute the intended crime if the attendant circumstances were as (s)he mistakenly believed them to be.

C. ***The overt act***. The overt act required for an attempt must be more than mere preparation. Distinguish, therefore, the overt act required for a conspiracy, an act which can be merely preparatory, with that required for attempts. The overt act in an attempt must be one which would normally result in the completion of the crime. In other words, the act sets in motion a sequence of events which will result in the completion of the crime, unless someone or something unexpectedly intervenes. Whether the required overt act has been committed is often a close question.

D. ***Voluntary abandonment***. If an individual abandons the criminal scheme after the overt act, but before committing the target offense, (s)he ***may*** have a voluntary abandonment defense to the attempt. This defense is available only if the criminal scheme is abandoned for purely humanitarian reasons; the defense is not available if the abandonment is motivated by fear of apprehension or the target crime has been made more difficult.

NOTES

NOTES (continued)

CHAPTER XV

ORDERS OFFENSES AND DERELICTION OF DUTY

OVERVIEW. Three types of orders offenses are proscribed under the UCMJ:

A. Violations of general orders and regulations [article 92(1)];

B. violations of other lawful orders [article 92(2)]; and

C. willful disobedience of the lawful orders of superiors and / or of petty officers, noncommissioned officers, and warrant officers [articles 90(2)) and 91(2)].

Closely related to orders offenses is the offense of dereliction of duty [article 92(3)]. Both orders offenses and dereliction of duty involve the accused's failure to perform a military duty.

THE LAWFUL ORDER

Before an accused can be convicted of an orders offense, that particular order must be lawful. General orders and regulations, other orders requiring the performance of a military duty, and orders from superiors may be inferred to be lawful.

A. ***Punitive orders and regulations***. Before violation of an order or regulation can be a basis for prosecution (other than for dereliction of duty), the order or regulation must be punitive; that is, it must subject the violator to the criminal penalties of the UCMJ. It must impose a specific duty on the accused to perform or refrain from certain acts. The order may be oral or written, or a combination of both. It cannot require further implementation by subordinates.

1. ***Nonpunitive orders and regulations***. The armed forces have published millions of pages of instructions, regulations, directives, and manuals. Some of these regulations are merely policy statements; others detail rather complicated, specific procedures. Nonpunitive regulations are not intended to define individual conduct which will be considered criminal and which will result in prosecution under the UCMJ.

2. *Punitive or nonpunitive*? A frequent issue—especially in cases involving written orders—is whether the alleged order was a specific mandate or merely a nonpunitive regulation. The issue is always decided on a case-by-case basis. No single factor is decisive, but the issue will be determined by considering the following factors:

a. *Purpose*. If the stated purpose of the directive uses language such as "provide guidance," "establish policy," or "promulgate guidelines and procedures," the directive is most likely nonpunitive. If the stated purpose uses language such as "establish individual duties and responsibilities," the directive is most likely punitive.

b. *Specificity*. If the directive expressly commands or forbids specific acts, it is probably punitive. If it promulgates only general procedures or guidelines, it is probably nonpunitive. Specificity of language is an extremely important factor.

c. *Sanctions*. A nonpunitive directive will seldom provide sanctions for violations. If the directive indicates that violators will be subject to disciplinary action, the directive is probably punitive.

d. *Implementation*. If the directive provides that its provisions shall be implemented by subordinates, it is probably not punitive.

e. *Intent*. Sometimes it will be necessary to produce evidence of the intentions of the authority promulgating the directive. Any notes or memoranda that were written while the directive was being drafted may also be helpful. Intent is not a decisive factor by itself, but it permits the court to look behind the sometimes ambiguous language of a directive.

B. *Was the order issued by a proper authority*? The person issuing the order must have legal authority to do so. The authority to issue orders may arise by law, regulation, or custom of the service. Generally, a superior has authority to issue orders to a subordinate. A commanding officer has authority to issue orders to all persons subordinate in the chain of command, even those who may hold a higher military rank. A person in the execution of military police or shore patrol duties may issue orders related to law enforcement duties to all personnel, regardless of rank. Circumstances may control whether or not the person has the authority to give an order.

C. *Did the order relate to a military duty*? In order to be a lawful order under the Code, the order must relate to a military duty. Military duties include all activities reasonably necessary to safeguard or promote the morale, discipline, readiness, and mission of a command.

D. ***Is the order contrary to superior law***? An order is unlawful if it is contrary to the Constitution or to the UCMJ. In combat, an order to commit a violation of the law of armed conflict is unlawful. An order is also unlawful when it conflicts with the lawful order of an authority superior to the person issuing it.

E. ***Is the order an arbitrary infringement on individual rights***? Military orders frequently limit the free exercise of the servicemember's individual rights and liberties. Such an order will be unlawful, however, only if it arbitrarily or unreasonably interferes with individual rights. An infringement on individual rights is arbitrary when it bears no reasonable relationship to a legitimate military mission or interest. It will also be unlawful if it imposes a greater interference with individual rights than is reasonably necessary.

Conscience, ethical standards, religion, or personal philosophy must not be confused with the concept of arbitrary infringement of individual rights. The fact that an order may be contrary to an individual's morals is not, by itself, a defense.

F. ***Does the order unlawfully impose punishment***? Punishment in the military may be lawfully imposed only as a result of nonjudicial punishment or a court-martial sentence. Any other order that either expressly or impliedly imposes punishment is unlawful. Whether an order is punishment or is merely designed to correct a performance deficiency depends on the facts of each case. An order to perform extra work as a result of a deficiency must be reasonably related to correcting the deficiency. Remedial orders, often styled as "extra military instruction" (EMI), are common in the military. To be lawful, they must order the servicemember to perform duties reasonably related to correcting deficient performance. Moreover, the remedial duties must not be performed at unreasonable times or under clearly unreasonable conditions.

G. ***Is the order unreasonably redundant***? An order cannot merely restate a preexisting duty nor repeat another order already in effect.

H. ***Is the order specific***? The exact language of an order is insignificant so long as it amounts to a positive mandate and is so understood by the subordinate. Expressing an order in courteous language, rather than in a peremptory form, does not alter the order's legal effect. Moreover, the order must direct the accused to perform a specific act whether it is to do or refrain from doing something.

VIOLATION OF GENERAL ORDERS OR REGULATIONS [ARTICLE 92(1)]

A. *General order*. Part IV, para. 16c(1)(a), MCM, 1984, defines general orders or general regulations as those orders or regulations generally applicable to an armed force. General orders or regulations may be promulgated by the following authorities:

1. President of the United States;

2. Secretary of Defense (Secretary of Transportation for the U.S. Coast Guard);

3. Secretary of a military department, (e.g., Secretary of the Navy);

4. flag or general officers in command and their superior commanders; and

5. officers possessing general court-martial convening powers and their superior commanders. (Not every such commander has such authority. For example, the UCMJ gives commanders of overseas naval bases GCM authority; however, some cases have held that this grant alone is insufficient authority to issue general orders.)

B. *Discussion*

1. *Effective date of the order*. Normally, an order is effective when published. Sometimes, however, an order may provide that its provisions will not go into effect until a certain date after publication. Also, an order may be later superseded, amended, or canceled.

2. *Duty to obey the order*. Not only must the general order be lawful, but the accused must also have had a duty to obey the order. Thus, the order must have been applicable to the accused. Although many general orders apply to all members within a branch of service, some may apply only to commanding officers or commissioned officers. A general order which commands certain conduct from a commissioned officer would not be applicable to an enlisted person.

3. *Failure to obey the order*. If the order commands certain specific acts, the accused disobeys the order by failing to perform those acts. If the order forbids acts, the accused's commission of those acts will constitute a violation. The accused's ignorance of the provisions—or even of their existence—of a general order is no defense.

VIOLATION OF OTHER LAWFUL ORDERS [ARTICLE 92(2)]

A. ***Other lawful orders***. Violations of lawful orders other than general orders (and other than willful violations of orders of superiors and / or noncommissioned officers, petty officers, and warrant officers) are prosecuted under Article 92(2), UCMJ. The fundamental legal principles applicable to general orders violations also apply to article 92(2) cases, with a few exceptions which will be noted below.

B. ***Discussion***

1. ***The accused had knowledge of the order***. Unlike general orders offenses, the prosecution in an article 92(2) case must prove beyond a reasonable doubt that the accused had actual knowledge of the order. Actual knowledge may be proven by either direct or circumstantial evidence. Circumstantial evidence would include facts such as the order being announced at quarters when the accused was present, or the order being posted on a bulletin board that the accused normally read daily. The accused's lack of knowledge of the order is a complete defense to prosecution under article 92(2).

2. ***The accused failed to obey***. The accused's failure to obey the order may be willful or the result of forgetfulness or negligence. If the order requires instant compliance, any delay results in a violation. If no specific time for compliance is given, then the order must be complied with within a time reasonable under the circumstances. If the order calls for performance of an act at a later time, or no later than a specified time, the order is not violated until that time has passed. If the order does not state exactly how the duty is to be performed, the accused will not be guilty of an orders violation if the acts are performed in a reasonable manner.

WILLFUL DISOBEDIENCE OF CERTAIN LAWFUL ORDERS [ARTICLES 90(2) AND 91(2)]

A. ***Willful disobedience***. The willful disobedience offenses involve an intentional defiance of authority. Other orders offenses may be the result of either a willful or merely negligent failure to obey. Thus, willful disobedience is the most serious of the orders offenses. Article 90(2) prohibits willful disobedience of a superior commissioned officer (W-2 and above). Article 91(2) forbids willful disobedience of a warrant (W-1), noncommissioned, or petty officer.

B. *Discussion*

1. ***The accused received a lawful order.*** *See* "THE LAWFUL ORDER," *supra*, of this chapter for a discussion of the lawfulness of orders. The order must be directed to the accused from a superior, either personally or by way of the superior's intermediary.

2. ***The "ultimate offense."*** This doctrine specifies that an accused should not be punished for violating an order which merely restated an existing order or commanded the accused to perform an existing duty. In such cases, the accused should be punished for the ultimate offense (the preexisting duty).

3. ***Superiority.*** For article 90(2) violations, the order must be issued by the accused's superior commissioned officer. In its legal context, "superior" has a special, limited meaning. A superior is one who is superior to the accused either in rank or in the chain of command.

a. ***Superior in rank.*** A superior in rank is at least one paygrade senior to the accused and is a member of the accused's branch of service (the Navy and Marine Corps are considered the same branch of service). Therefore, a Navy ensign is superior in rank to a Marine corporal, but an Air Force general is *not* superior in rank to a Navy seaman recruit because they belong to different branches of the armed forces.

b. ***Superior in chain of command.*** Regardless of rank, one who is superior to the accused in the chain of command is the accused's superior. Thus, a Navy lieutenant commander who is commanding officer of a ship is superior to a Navy commander who is temporarily assigned to the ship as medical officer. Superiority in chain of command takes precedence over superiority in rank.

4. ***Knowledge.*** The prosecution must prove beyond a reasonable doubt that the accused actually knew that the person issuing the order was a superior commissioned officer or a petty officer, noncommissioned officer, or warrant officer. Knowledge may be proven by direct or circumstantial evidence.

5. ***The accused willfully disobeyed.*** The accused's failure to comply with the order must show an intentional defiance of the victim's authority. Failure to comply with an order because of forgetfulness or carelessness is not willful disobedience, although it may constitute an article 92 other lawful orders violation. Willful disobedience connotes an intentional flouting of the authority to issue an order to the accused.

DERELICTION OF DUTY [ARTICLE 92(3)]

A. ***Dereliction distinguished from orders offenses***. Dereliction of duty, under article 92(3), is closely related to the three types of orders offenses discussed previously. It is also distinguishable, however, from orders violations. The term "dereliction" covers a much wider spectrum of infractions in the performance of duties. Not only is failure to perform a duty prohibited, but performing one's duty in a culpably inefficient manner is also prohibited. The accused's duty may be one imposed by statute, regulation, order, or merely by the custom of the service. See Part IV, para. 16c(3), MCM, 1984.

B. ***Discussion***

1. ***The accused's duty***. The duty contemplated by article 92(3) is any military duty either specifically assigned to the accused or incidental to the accused's military assignment.

2. ***Knowledge***. Previous manuals did not have this specific element. On 15 May 1986, Change 2 to the MCM, 1984, added the constructive knowledge standard to the *Manual*. Actual knowledge does not have to be proven if the accused "should have known" of the duties. The knowledge can be established by custom, manuals, regulations, literature, past behavior, testimony of witnesses, or other ways.

3. ***The accused was derelict***. Dereliction of duty encompasses three specific types of failure to perform: willful, negligent, and culpably inefficient.

a. ***Willful dereliction***. The accused has full knowledge of the duty and deliberately fails to perform it.

b. ***Negligent dereliction***. The accused has full knowledge of the duty, but fails to exercise ordinary care, skill, or diligence in performing it. As a result of the accused's negligence, the duty is not performed or is performed incorrectly.

c. ***Dereliction through culpable inefficiency***. Culpable inefficiency is inefficient or inadequate performance for which there is no reasonable excuse. If the accused has the ability and opportunity to perform the required duty efficiently, but performs it in a sloppy or substandard manner, the accused is culpably inefficient. If the accused's failure is due to ineptitude, however, the poor performance is not the result of culpable inefficiency. Ineptitude is a genuine lack of ability to perform properly despite diligent efforts.

COMMON DEFENSES TO ORDERS OFFENSES AND DERELICTION OF DUTY

Three defenses which are especially applicable to orders violations and dereliction are illegality, impossibility, and conflicting orders. Other defenses may also be relevant in certain factual situations, but these three defenses are among the most common.

A. *Illegality*. The accused contends that the order violated was unlawful. The most common attacks on the alleged lawfulness of an order will be in the areas of the order not relating to a military duty, the order being contrary to superior law, and the order unlawfully infringing on individual rights.

B. *Impossibility*. Impossibility may be a defense to orders violations and dereliction of duty when a physical or financial inability prevented the accused from complying with an order or properly performing a duty.

Impossibility is not a defense to article 92(1) and 92(2) orders violations or to dereliction of duty if the impossibility was the accused's own fault. In willful disobedience cases, however, impossibility will be a defense regardless of whether the accused was at fault. Willful disobedience requires a willful noncompliance. Nothing less, not even gross negligence, will suffice. Of course, if the "impossibility" is deliberately created by the accused for the specific purpose of avoiding compliance with an order, this contrived impossibility will not be a defense.

C. *Subsequent conflicting orders*. When a subordinate receives an order from a superior, and that order is subsequently countermanded or modified by an order from another superior, the accused is not guilty of a violation of the original order. This is so whether or not the officer who issued the second order is superior to the officer who issued the first order or was authorized to countermand the first order. *See* Article 1024, *U.S. Navy Regulations, 1990*, for specific guidance.

NOTES

NOTES (continued)

CHAPTER XVI

DISRESPECT

OVERVIEW

Article 89 prohibits disrespect toward a superior commissioned officer. Article 91(3) prohibits disrespect toward a warrant (W-1), noncommissioned, or petty officer who is in the execution of office. (Note also that only warrant officers (W-1) and enlisted persons can violate article 91.) The concept of superiority is identical to that in willful disobedience: superior in rank or superior in chain of command.

WHAT IS DISRESPECT? A common element of the two disrespect offenses is that the accused's language or conduct was, under the circumstances, disrespectful to the victim.

A. ***The accused's behavior.*** Disrespect may consist of words, acts, failures to act respectfully, or any combination of the three. Disrespect connotes contempt. The accused's disrespectful behavior detracts from the respect and authority rightfully due the position and person of a victim. The accused's disrespectful language may attack the victim's military performance or may be a personal insult unrelated to military matters. The fact that the accused's statement is true is no defense. Disrespect may also consist of contemptuous behavior, such as turning and walking away from a superior who's talking to you.

B. ***The circumstances.*** Although the accused's language or conduct is the most important factor in determining whether the accused's behavior was disrespectful, the circumstances of the alleged disrespect are also important. Social engagements may allow greater familiarity than would be permitted during the regular performance of military duties. The prior relationship between the victim and the subordinate may be considered. The accused's intent and the victim's understanding of the behavior is important. If the accused meant no disrespect, and if the victim took no offense, the accused's behavior may not have been disrespectful under the circumstances.

1. ***Abandonment of rank.*** Sometimes a victim may provoke the disrespectful behavior by his or her own outrageous conduct. When a victim's conduct is so demeaning as to be undeserving of respect, the victim is considered to

have abandoned his / her rank. An accused who is provoked to disrespectful behavior by the victim's abandonment of rank will not be guilty of disrespect.

2. *Private conversations*. Part IV, para. 13c(4), MCM, 1984, counsels that ". . . ordinarily one should not be held accountable under this article for what was said or done in a purely private conversation." A private conversation is one conducted outside the course of government business and not in public. The victim concerned must not be party to the conversation. If the conversation is loud enough that others can overhear, the conversation is usually not a private one.

3. *Directed toward the victim*? The disrespectful language or conduct must be directed towards the victim. Contemptible language or gestures which are not directed towards the "victim" may not be disrespectful, even if said or done in the victim's presence; however, a superior commissioned officer need not be present for disrespectful language to be "directed toward" him or her.

DISRESPECT TOWARD A SUPERIOR COMMISSIONED OFFICER (ARTICLE 89)

Discussion. There are three significant distinctions between disrespect to a superior commissioned officer and disrespect to a warrant, noncommissioned, or petty officer. First, the commissioned officer must be the accused's superior. Second, the alleged disrespect to the superior commissioned officer need not occur in the presence of the commissioned officer. Third, the superior commissioned officer need not be in the performance of official duties when the disrespect occurs.

DISRESPECT TOWARD WARRANT (W-1), NONCOMMISSIONED, OR PETTY OFFICER [ARTICLE 91(3)]

A. *Discussion*. Unlike disrespect to a superior commissioned officer, disrespect to a warrant, noncommissioned, or petty officer must occur within the sight or hearing of the victim of the disrespect. The warrant, noncommissioned, or petty officer must also be in the execution of office at the time. "Execution of office" means that the person is on duty or is performing some military function. The victim need not be the accused's superior.

B. *Commissioned warrant officers*. Disrespect to superior commissioned warrant officers (W-2 through W-4) must be charged under article 89.

OFFENSES AGAINST AUTHORITY

	Article	Offense	Perpetrator	Victim	Knowledge
DISRESPECT	89	Disrespect to superior comm'd off'r	Anyone junior to the victim	Need not be present nor in execution of office	Of superior status
	91(3) (superior = aggravation)	Disrespect to WO, NCO, PO	Enlisted or WO	Must be present and in execution of office	Of status
ORDERS VIOLATIONS	92(1)	General order	Anyone		Need not be pleaded nor proved
	92(2)	Other lawful order	Anyone		Must be pleaded and proved
	92(3)	Dereliction of duty	Anyone		Must plead and prove that accused knew of duty
WILLFUL DISOBEDIENCE	90(2)	Willful disobedience of superior comm'd off'r	Anyone junior to the victim	comm'd off'r	Of superior status of victim and of order
	91(2)	Willful disobedience of WO, NCO, PO	Enlisted or WO	WO, NCO, PO	Of status of victim and of order
ASSAULT	90(1)	Assault on superior comm'd off'r	Anyone junior to the victim	Must be in execution of office	Of superior status
	91(1) (superior = aggravation)	Assault on WO, NCO, PO	Enlisted or WO	Must be in execution of office	Of status
	128	Assault on comm'd, WO, PO	Anyone	Need not be in execution of office or superior	Of comm'd, WO, NCO, PO status

NOTES

NOTES (continued)

CHAPTER XVII

ABSENCE OFFENSES

OVERVIEW. The UCMJ prohibits four major types of absence offenses. They are:

A. Failure to go to, or going from, an appointed place of duty [articles 86(1) and 86(2)];

B. unauthorized absence from unit or organization [article 86(3)];

C. missing movement (article 87); and

D. desertion (article 85).

FAILURE TO GO TO, OR GOING FROM, AN APPOINTED PLACE OF DUTY [ARTICLES 86(1) AND 86(2)]

A. ***General concept***. The two least serious absence offenses are failure to go to an appointed place of duty [article 86(1)] and going from an appointed place of duty [article 86(2)].

B. ***Discussion***

1. ***Lawful authority***. The accused must have been lawfully ordered to be at the appointed place of duty at the prescribed time. The order may be directed to the accused individually or as a member of a group.

2. ***Appointed place of duty***. The appointed place of duty must be a ***specific*** location to which the accused must report at a specific time. A location such as "USS *Cambria County*" or "Naval Station, Norfolk, Virginia" is too general to be an appointed place of duty. Articles 86(1) and 86(2) contemplate a specific location such as "the mess decks" or "Building 17."

3. ***A precise time***. A precise time must be appointed for the accused to report. Thus, an order to "report to Building M-6 when your duties are finished" is too general as to time. "Report to Building M-6 at 1400" is specific.

4. *Knowledge*. An accused must *actually know* that he was required to be at the appointed place of duty at the time prescribed.

5. *Without authority*. The common element of all absence offenses is that the accused had no authority to be absent.

6. *Failure to go*. Failure to go to an appointed place of duty may be either intentional or the result of negligence. Failure to go to an appointed place of duty is an instantaneous offense. If the accused does not report to the appointed place of duty at the prescribed time, the offense is completed. Reporting late is no defense.

7. *Going from appointed place of duty*. The offense of going from an appointed place of duty involves two distinct acts. First, the accused must have reported to the place of duty. Second, the accused must leave the appointed place of duty without authority. Like failure to go, going from appointed place of duty is an instantaneous offense. Once the accused leaves without authority, the offense is completed. The accused's subsequent return is no defense. If the accused goes too far from the appointed place to be reasonably able to perform the assigned duty, the accused has left the place of duty.

UNAUTHORIZED ABSENCE FROM UNIT OR ORGANIZATION [ARTICLE 86(3)]

A. *General concept*. Article 86(3) prohibits unauthorized absence from the servicemember's unit or organization. UA, as this offense is commonly called, is an instantaneous offense, complete the moment the accused becomes absent without authority. It is also an offense of duration, because the length of an absence is an important aggravating circumstance.

B. *Discussion*

1. *Absence from unit or organization*. "Unit" refers to a smaller command—such as a ship, air squadron, or company. "Organization" refers to a larger command—such as a large shore installation, base, or battalion. The terms may be used interchangeably. For purposes of article 86(3) offenses, the accused's unit is usually the military activity that holds the accused's service record. It is the command having summary court-martial jurisdiction over the accused. When an accused is on temporary duty away from the permanent command, the accused is technically a member of both the permanent and the temporary unit. When a servicemember, pursuant to permanent change-of-station orders, detaches from the old command, that person immediately becomes a member of the new command. Thus, should a person traveling under PCS orders fail to report to the new command,

the unauthorized absence would be from the new unit or organization even though the accused was never actually there.

2. ***"Place of duty" under article 86(3).*** The language of article 86(3) also provides for an unauthorized absence from a "place of duty." "Place of duty" under article 86(3) must not be confused with the "appointed place of duty" under articles 86(1) and 86(2). The article 86(3) "place of duty" refers to a general location to which the accused is assigned.

3. ***Commencement of the unauthorized absence.*** An unauthorized absence begins in one of three ways: The accused may leave the command without authority; the accused may fail to return to the command upon the expiration of leave or liberty; or the accused may fail to report to a permanent or temporary command pursuant to military orders.

4. ***Without authority.*** The accused's absence must be without authority from anyone competent to grant leave or liberty.

5. ***Intent.*** The accused's unauthorized absence may be intentional or the result of negligence. If unforeseen factors beyond the accused's control made it impossible to return from leave or liberty or to report on time, the accused will have a defense to unauthorized absence. Also, if the accused honestly and reasonably believed that the absence was authorized, the accused will not be guilty of unauthorized absence.

6. ***Termination of the unauthorized absence.*** An unauthorized absence terminates when there is a bona fide return to military control. The absence may be terminated either by the accused's surrender to military authorities or by the accused's apprehension.

a. ***Surrender.*** When the accused surrenders to military authorities, the unauthorized absence terminates. A surrender requires three things. First, the accused must appear in person before any military authority. Second, the accused must disclose his or her status as an unauthorized absentee. Third, the accused must actually submit (or demonstrate a willingness to submit) to military control. If these requirements are met, the absence is terminated even if the accused surrenders to a unit or armed force other than his / her own.

(1) ***Physical presence.*** Merely writing or telephoning military authorities is not sufficient.

(2) ***Disclosure of status.*** In order to end the unauthorized absence, the absentee must disclose his or her status of unauthorized absence.

(3) *Actual submission to military control.* The absentee must actually submit (or demonstrate a willingness to submit) to military control. The surrender must constitute a present, physical submission to military control. "Casual presence" aboard a military installation will not end an unauthorized absence.

b. *Apprehension by military authorities.* If military authorities apprehend someone they know to be an unauthorized absentee, the absence terminates. Usually, when military authorities apprehend a military member, they will be able to determine through reasonable inquiries and efforts if the person is an unauthorized absentee. If, however, the apprehended absentee deliberately conceals or misrepresents his / her status to the military authorities, and they reasonably rely on the absentee's statements and release the absentee, the absence will not usually be considered terminated.

c. *Apprehension by civilian authorities.* An unauthorized absence often ends in an arrest by civilian police and subsequent delivery to military authorities. The point at which the unauthorized absence terminates depends upon the circumstances of the civilian arrest.

(1) *General rule: Termination upon notification.* As a general rule, the unauthorized absence terminates when the civilian authorities notify the military that the absentee is in custody and is available to be returned to military control.

(2) *Exception: Civilian arrest pursuant to military request.* When military authorities request civilian authorities to apprehend an unauthorized absentee, the unauthorized absence will terminate when the person is apprehended *pursuant to the request*. After a servicemember has been an unauthorized absentee for a certain period of time, his / her command will issue a Form DD-553. This flyer requests (and authorizes) civilian authorities to apprehend the absentee. Whenever a military member is taken into civilian custody because of a Form DD-553, his / her unauthorized absence terminates immediately upon apprehension.

d. *Apprehension or surrender?* Sometimes it is difficult to determine whether an absence ended by apprehension or surrender. An unidentified military accused who is arrested for minor civilian offenses has nonetheless surrendered for military purposes if the accused freely and voluntarily discloses his military status. On the other hand, if the accused discloses military status only begrudgingly, or for an ulterior motive, or when faced with serious civilian charges, the absence is considered terminated by apprehension for military purposes as well.

7. ***Delivery of military personnel to civilian authorities.*** When military authorities deliver a military member to civilian authorities for prosecution of a civilian offense, the member is not in a status of unauthorized absence. The member's absence has been ordered by military authority. Even if the person is convicted of the civilian offense and sentenced to imprisonment, the entire period is an authorized absence.

MISSING MOVEMENT (ARTICLE 87)

A. ***General concept.*** Missing movement is an aggravated form of unauthorized absence from a unit or organization. The accused, while an unauthorized absentee, misses a significant movement of a ship, aircraft, or unit. The accused may have intended to miss the movement, or did so through carelessness or neglect.

B. ***Discussion***

1. ***What is a movement?*** A movement under article 87 is a significant move of a ship, aircraft, or unit. Whether a particular operation is a significant movement is a factual issue, to be decided by evaluating all the facts and circumstances of each case.

2. ***Individual or group travel.*** If the accused misses a significant movement of his / her command, article 87 applies. Article 87 also applies, under certain circumstances, to other instances where the military member is required to perform individual or group travel. The term "unit" not only includes a permanent military component—such as a company, platoon, or squadron—but also a group organized solely for purposes of group travel.

3. ***Military or commercial transportation?*** If the accused misses a movement, the mode of transportation used, military or commercial, is irrelevant. The mode of transportation may be important, however, when the accused is ordered to perform individual travel. If the individual travel was to be by military transportation (including civilian transportation leased by the military), the accused will usually be guilty of missing movement regardless of whether (s)he was a crewmember or merely a passenger.

4. ***Knowledge of the movement.*** The accused must actually know the approximate time and date of the upcoming movement.

5. *Missing movement by design.* Missing movement by design is a specific intent offense: the accused missed movement because (s)he specifically intended to do so. The accused's intent may be proven by direct or circumstantial evidence. As a practical matter, unless there is direct evidence of the accused's intent, it is difficult to prove missing movement by design.

6. *Missing movement through neglect.* Neglect connotes a failure to make reasonable efforts to make the movement. It also includes careless actions undertaken without considering the reasonable possibility that they might prevent the accused from making the movement.

DESERTION (ARTICLE 85)

A. *General concept.* Desertion is the most serious type of absence offense. Article 85a(1) prohibits unauthorized absence with the intent to remain away permanently from the unit or organization. Article 85a(2) prohibits unauthorized absence with the intent to avoid hazardous duty or to shirk important service.

B. *Discussion of article 85a(1) desertion*

1. *Relationship to unauthorized absence.* Desertion with the intent to remain away permanently is merely an aggravated form of unauthorized absence from the unit or organization. The additional element in article 85a(1) desertion is the intent to remain away permanently from the unit or organization.

2. *Intent to remain away permanently.* The accused must specifically intend to remain away permanently from his or her unit or organization. This intent may exist when the unauthorized absence begins, or it may be formed at a later time. Once the intent is formed, the offense of desertion is complete. A change of heart is no defense. The fact that the accused always intended to return to military control is no defense if the accused nonetheless never intended to return to the unit or organization the accused left. An intent to return to the unit at some indefinite time in the future is a defense to article 85a(1) desertion, as is an intent to return when a certain event occurs.

C. *Desertion with intent to avoid hazardous duty or to shirk important service [article 85a(2)]*

1. *General concept.* Article 85a(2) desertion is merely unauthorized absence plus one of two specific intents: the intent to avoid hazardous duty or the intent to shirk important service.

2. ***"Hazardous duty" and "important service."*** "Hazardous duty" involves danger, risk, or peril to the individual performing the duty. Hazardous duty need not involve combat. Even some training exercises would qualify as hazardous duty. "Important service" denotes service that is of substantially greater consequence than ordinary everyday military service.

COMMON DEFENSES TO ABSENCE OFFENSES

A. ***Ignorance or mistake of fact.*** The conditions under which ignorance or mistake of fact is available as a defense vary from one absence offense to another. To be a defense to a general intent offense, such as an article 86(3) unauthorized absence, the ignorance or mistake of fact must be both honest and reasonable. An honest ignorance or mistake of fact is one occurring in good faith. A reasonable ignorance or mistake of fact is one which a reasonable person would make under similar circumstances. Some other absence offenses are specific intent offenses. For example, in a "missing movement through design" case, the ignorance or mistake of fact need only be honest—it need not be reasonable.

B. ***Impossibility.*** When unforeseen circumstances beyond the accused's control prevent the accused from being at the appointed place of duty, unit, or organization when required, the accused has a defense of impossibility. The accused must not be at fault, nor can the accused contribute to the creation of the circumstances which make it impossible to be at the appointed place of duty, unit, or organization.

1. ***Three requirements for impossibility.*** In order to constitute a defense of impossibility, the circumstances must satisfy three requirements.

a. ***Unforeseen circumstances.*** The impossibility must result from circumstances or events that were not reasonably foreseeable.

b. ***Beyond the accused's control.*** The accused cannot contribute to the creation of the circumstances which caused the impossibility to arise.

c. ***The circumstances must cause actual impossibility.*** In order to be a defense, it must be actually impossible for the accused to be at the appointed place of duty, unit, or organization, not just inconvenient. The inability must be the accused's own inability and the circumstances must have actually made it impossible for the accused to avoid unauthorized absence. Thus, if the accused is already an unauthorized absentee when the impossibility arises, impossibility will not be a defense. Impossibility is a defense only when the only reason why the accused was absent was the unforeseen circumstance or event.

2. *Types of impossibility*. Impossibility may be an unforeseen act of God, the accused's physical or financial inability, or the unforeseen acts of third persons. "Acts of God" include sudden, unexpected, unforeseen occurrences such as natural disasters. If the accused is injured, ill, or destitute, and such condition was not reasonably foreseeable and was not the accused's fault, the accused's condition will be a defense if it makes it impossible for the accused to avoid being an unauthorized absentee. Unforeseen acts of third persons which make it impossible for the accused to avoid unauthorized absence will also give rise to a defense if the acts were not caused or provoked by the accused's acts.

3. *Impossibility caused by civilian arrest*. A very common type of impossibility by acts of third persons arises when the accused is unable to return when required to the unit or organization because the accused has been arrested and is in the custody of civilian authorities. Such circumstances may be a defense, depending upon the time of the arrest and the reason for the arrest.

a. *Accused in status of unauthorized absence*. If the civilian arrest occurs while the accused is already an unauthorized absentee, there is no defense. The arrest did not make it impossible for the accused to avoid unauthorized absence. The rule of "once UA, always UA" governs.

b. *Accused on duty, leave, or liberty*. An accused who is turned over to civilian authorities by the military is not UA while held by the civilians under that delivery. If a military turnover is not involved, and if the accused is on duty, leave, or liberty when the arrest occurs, the key issue is whether the accused was at fault.

(1) *Accused convicted of civilian charge*. If the accused is convicted of the civilian charge, the time in civilian custody is an unauthorized absence. If the arrest prevented the accused from returning from leave or liberty, the accused's unauthorized absence begins only at the time and date the leave or liberty was to expire. Impossibility is not a defense because the accused's arrest was his / her own fault, as evidenced by the conviction.

(2) *Accused acquitted of civilian charges*. If the accused is acquitted of all the civilian charges, the period in civilian custody is an excused absence. It was impossible for the accused to avoid the absence because of the civilian arrest. The fact that the accused was acquitted of all civilian charges is conclusive proof that the accused was not at fault.

(3) ***Accused returned to military without disposition of civilian charges.*** If the accused is returned to the military without having been tried for the civilian charges, the accused can be found guilty of the absence only if it can be proven that the accused actually committed the civilian crimes.

C. ***Duress.*** Duress may be raised when the accused or a family member is threatened with immediate harm and there is no opportunity to prevent the danger. Duress is controlled by the actual facts and may be unavailable when the accused has a chance, but fails to seek assistance through the chain of command.

D. ***Condonation of desertion.*** Condonation applies to desertion cases only. Condonation occurs where the accused's commander, knowing about the accused's alleged desertion, unconditionally restores the accused to normal duty without taking any steps toward disciplinary action.

WHEN UA TERMINATES

SITUATION	*UA TERMINATES*
Apprehension by the military	at the apprehension
Surrender to the military	at the surrender
Civilian apprehension for UA pursuant to DD 553	at the apprehension
Civilian apprehension for civilian crime, detained longer due to DD 553	when the accused is being held *for the military*
Civilian apprehension for civilian crime, NO DD 553	when military informed that accused is available to it

RELATIONSHIP BETWEEN UA STATUS AND CIVILIAN CRIMINAL CHARGE

SITUATION	*UA*	*NOT UA*	*DURATION*
UA, civ. arrest; acquit	X		for the entire period
UA, civ. arrest; no trial	X		for the entire period
UA, civ. arrest; convict	X		for the entire period
On Leave; arrest; acquit		X	no "unauthorized" absence
On Leave; arrest; no trial	X*		* if trial counsel proves accused "at fault" (for all the time over leave)
Leave; arrest; convicted	X**		** all the time over leave
Military turnover to civilians		X	always "authorized"

THE USUAL RULE: ONCE UA, ALWAYS UA

NOTES

NOTES (continued)

CHAPTER XVIII

THE GENERAL ARTICLE: ARTICLE 134

OVERVIEW

Article 134 offenses fall within three general categories of offenses: (1) conduct prejudicial to good order and discipline; (2) service-discrediting conduct; and (3) federal noncapital crimes. The concept of a general article such as article 134 is an ancient one in military law. General articles appeared in military codes as early as the fourteenth century. Much of article 134's language is substantially unchanged from the time of the American Revolution. An accused cannot be charged for a violation of article 134 for an offense specifically mentioned elsewhere in the UCMJ.

CONDUCT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE

The first clause of article 134 prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces." The accused's conduct must directly prejudice or tend to prejudice good order and discipline. The act must have a substantial relationship to military activity.

SERVICE-DISCREDITING CONDUCT

The second clause of article 134 prohibits "all conduct of a nature to bring discredit upon the armed forces." "Discredit" means an injury to the reputation of the armed forces. It is sufficient if the accused's conduct reasonably tends to injure the reputation of the armed forces.

CONDUCT THAT IS BOTH PREJUDICIAL AND DISCREDITING

Many of the article 134 offenses are both prejudicial to good order and discipline and service-discrediting. For this reason, article 134 pleadings need not specifically state that the accused's conduct was prejudicial or of a service-discrediting nature.

FEDERAL NONCAPITAL CRIMES

The third clause of article 134 prohibits "crimes and offenses not capital." This phrase refers to federal noncapital crimes not specifically mentioned elsewhere in the UCMJ. Federal noncapital offenses may be prosecuted under one of two types of statutes: federal statutes with unlimited application or federal statutes of limited application or jurisdiction. One of these federal statutes of limited jurisdiction is the Federal Assimilative Crimes Act found at 18 U.S.C. § 13. Prosecution under the third clause of article 134 is usually rather complicated, and an attorney should always be consulted.

FEDERAL ASSIMILATIVE CRIMES ACT

If conduct is not prohibited by a specific article of the UCMJ or by a federal statute, it still may be prosecuted under article 134 if the state in which the "offense" occurred prohibits it. A court-martial cannot enforce state law; however, the state statute can be assimilated into the federal law by use of the Federal Assimilative Crimes Act. This Act assimilates state law whenever there is no federal statute governing the accused's specific acts, provided that the acts occur in an area subject to either exclusive or concurrent federal jurisdiction.

NOTES

NOTES (continued)

CHAPTER XIX

CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN

OVERVIEW

The offense of conduct unbecoming an officer and gentleman, under article 133, is closely related to theories of prosecution under article 134. Both articles 133 and 134 prohibit general types of conduct rather than specifically defined acts. Like article 134, article 133 is the product of ancient traditions in military discipline. Unlike article 134, however, article 133 includes offenses specifically mentioned elsewhere in the UCMJ, as well as those unmentioned offenses which are nonetheless established in military tradition. Offenses listed elsewhere in the Code may be charged under article 133, as long as the terminal element of conduct unbecoming an officer can also be proven beyond a reasonable doubt.

DISCUSSION

A. ***Status of the accused.*** Article 133 applies ***only*** to commissioned officers, cadets, and midshipmen.

B. ***Accused's conduct.*** To constitute an offense under article 133, the accused's conduct must have a double significance. First, it must unbecome the accused ***as an officer*** by compromising his standing in the military profession. Second, it must also unbecome the accused ***as a gentleman*** by impugning his honor or integrity or otherwise subjecting the accused to social disgrace. Article 133 does not address every departure from the moral attributes common to the ideal officer and perfect gentleman: only serious departures are covered.

NOTES

NOTES (continued)

CHAPTER XX

ASSAULTS

OVERVIEW

Although the UCMJ provides for more than a dozen specific types of assault, the structure of the law of assaults is rather simple. All assaults are based on the simple assault, which is merely an unlawful offer or attempt to do bodily harm. All the other varieties of assaults are merely simple assaults plus additional aggravating facts.

SIMPLE ASSAULT (ARTICLE 128)

A. ***General concept***. The simple assault occurs when an accused unlawfully attempts or offers to do bodily harm to another person. No actual harm or striking occurs. Simple assault is significant because it is the foundation upon which all the various types of assault offenses are constructed.

B. ***Discussion***

1. ***Attempt-type assault***. The attempt-type simple assault occurs when the accused attempts to strike or do bodily harm to another person. Hence, there is no such crime as "attempted assault"; as soon as an attempt is made, an assault has been committed. The accused must specifically intend to strike or do bodily harm to the other person. The intended victim need not be aware of the attempt. Like any other attempt, the accused's act must be more than mere preparation.

2. ***Offer-type assault***. An offer-type simple assault involves an unlawful demonstration of violence which causes another person to reasonably apprehend imminent bodily harm. The accused need not intend to actually harm anyone. The offer may merely be a culpably negligent act that appears menacing or threatening. A culpably negligent act is the result of more than ordinary carelessness or neglect. It involves a wrongful disregard for the foreseeable consequences of one's actions. In the offer-type assault, it is the victim's state of mind that is important.

The victim must reasonably anticipate that bodily harm is imminent. The victim need not actually be afraid. The test is whether a reasonable person, in the same circumstances, would believe that unlawful force or violence was about to be applied to his / her person. Menacing or threatening words, ***by themselves***, do not constitute an offer-type assault.

3. *Conditional offers of violence*. Sometimes the accused's apparently threatening gestures may be accompanied by statements which seem to negate any intent by the accused to actually carry out the threat. For example, suppose the accused raises his clenched fist towards another person and says, "Smith, if you weren't my brother-in-law, I'd slug you." This is a conditional offer of violence. Despite the accused's menacing gestures, the accused's language indicates that no harm is intended. Therefore, no offer-type assault has occurred.

4. *Unlawful force or violence*. In the context of simple assaults, "force or violence" refers to actions that are of a violent nature or that threaten imminent violence. An act of force or violence is unlawful if it is done without legal justification or excuse.

ASSAULT CONSUMMATED BY A BATTERY (ARTICLE 128)

A. *General concept*. An assault consummated by a battery is merely a simple assault which results in bodily harm or a striking of the victim.

B. *Discussion*

1. *Bodily harm*. A battery is the unlawful application of force or violence to another person. "Bodily harm" includes any physical injury to or offensive touching of another person, however slight.

2. *Accused's state of mind*. A battery may be committed by the accused's intentional act or through culpable negligence. The accused need not intend to inflict any particular kind of bodily harm, nor does the accused's intent have to be directed toward any specific victim. The battery itself proves the assault, so no attempt-offer analysis is necessary. A battery may also be a result of culpable negligence. Simple negligence, which is merely the failure to exercise ordinary care, is insufficient to result in an assault.

ASSAULT WITH A DANGEROUS WEAPON OR OTHER MEANS OR FORCE LIKELY TO PRODUCE DEATH OR GRIEVOUS BODILY HARM (ARTICLE 128)

A. ***General concept***. One of the most common aggravated forms of assault is assault with a dangerous weapon or means likely to produce death or grievous bodily harm. Like all other aggravated forms of assault, this offense is merely a simple assault plus the aggravating circumstance of the nature of the weapon, means, or force used in the assault.

B. ***Discussion***

1. ***Bodily harm not required***. Assault with a dangerous weapon or means likely to produce grievous bodily harm may arise from a simple offer-type or attempt-type assault, or it may involve an assault consummated by a battery. Bodily harm is ***not*** required.

2. ***Weapon, means, or force***. This aggravated form of assault involves the use of a deadly or dangerous weapon. It also includes the use of other instruments, devices, means, or forces that are dangerous when used in the way the accused used them. The weapon, means, or force must actually be dangerous. A means or force is likely to produce grievous bodily harm when the natural and probable result of the accused's use of the means or force would be serious physical injury. The key is the way in which the accused used the means or force.

3. ***Grievous bodily harm***. "Bodily harm" includes any physical injury to, or offensive touching of, another person. "Grievous" bodily harm requires fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other grave physical injuries.

INTENTIONAL INFLICTION OF GRIEVOUS BODILY HARM (ARTICLE 128)

A. ***Grievous bodily harm inflicted***. The offense of intentional infliction of grievous bodily harm requires that grievous bodily harm, as defined earlier, actually be inflicted.

B. ***The accused's intent***. The accused must specifically intend to inflict harm. No degree of negligence, no matter how wanton or reckless, will suffice. Moreover, the accused must intend to inflict grievous harm, not just ordinary bodily harm.

ASSAULT UPON CERTAIN OFFICERS [ARTICLES 90(1) AND 91(1)]

A. *General concept*. Assault upon certain military authorities is one of several aggravated forms of assault where the principal aggravating circumstance is the status of the victim. Article 90(1) prohibits assaults upon superior commissioned officers in the execution of their office. Article 91(1) prohibits assaults upon warrant or noncommissioned and petty officers in the execution of office.

B. *Discussion*

1. *Basic assault*. The assault may be either a simple assault, either offer-type or attempt-type, or an assault consummated by a battery.

2. *Superiority*. The superiority concept is the same as is discussed with respect to willful disobedience and disrespect. Under article 90(1), the victim must be the accused's superior commissioned officer. Under article 91(1), however, superiority is merely an optional, aggravating element for victims who are noncommissioned or petty officers.

3. *Accused's knowledge*. The accused must have had actual knowledge that the victim was his / her warrant, superior commissioned, or (superior) noncommissioned or petty officer.

4. *Execution of office*. The victim must be in the execution of his / her office. One is in the execution of office when engaged in any act or service required or authorized by statute, regulation, superior orders, or military custom. The victim must be performing a lawful duty in a lawful manner in order to be in the execution of office. In order to remove one from the status of being in the execution of office, his / her actions must be definitely criminal or illegal and not just deviations from prescribed procedures.

ASSAULT CONSUMMATED BY A BATTERY UPON A CHILD (ARTICLE 128)

A. *General concept*. Another aggravating circumstance arises when the victim is a child under age sixteen. This offense is the last of the three types of assaults under article 128 that require that the assault be consummated by a battery.

B. *Discussion*

1. *Bodily harm*. This offense requires that bodily harm actually occur. Bodily harm includes any physical injury to or offensive touching of the victim, however slight.

2. ***Unlawful force or violence.*** This offense is commonly used to prosecute child-abuse cases. The bodily harm must be unlawful (i.e., without legal justification or excuse). A parent is authorized by law to administer corporal punishment to his / her child. The privilege to administer corporal punishment does not include unreasonable physical abuse.

3. ***Child under sixteen.*** At the time of the assault, the victim must be under age sixteen. The accused's knowledge or belief about the child's age is immaterial.

OTHER ASSAULTS AGGRAVATED BY THE VICTIM'S STATUS (ARTICLE 128)

A. ***General concept.*** Part IV, para. 54e, MCM, 1984, provides for increased maximum punishments when the victim of the assault falls within one of several other classes.

B. ***Discussion***

1. ***Commissioned, warrant, noncommissioned, or petty officer.*** Unlike the assaults prosecuted under articles 90(1) and 91(1), assaults on commissioned, warrant, noncommissioned, or petty officers under article 128 do not require that the victim be in the execution of office, and superiority is never an element.

2. ***Person in the execution of police duties.*** A person is in the execution of police duties whenever engaging in any law enforcement act or service authorized by statute, regulation, superior order, or military custom. The victim must perform the police duties in a lawful manner.

3. ***Sentinel or lookout.*** A sentinel or lookout is one who is assigned to a duty requiring extra alertness to constantly watch for the approach of an enemy, to look for danger, to maintain security of the perimeter of an area, or to guard stores.

4. ***Bodily harm.*** Bodily harm need not be inflicted on any of the above individuals. A simple offer-type or attempt-type assault will suffice.

5. ***Accused's knowledge.*** The accused must actually know of the victim's status. Constructive knowledge (i.e., that the accused should have known) will not suffice.

ASSAULT WITH INTENT TO COMMIT CERTAIN SERIOUS OFFENSES (ARTICLE 134)

A. *General concept*. Article 134 prohibits assaults committed with the intent to commit one of several serious crimes. Such assaults can also sometimes be charged as attempts to commit the intended crime.

B. *Discussion*. The accused must specifically intend to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking. The accused's intent is usually proven through circumstantial evidence involving all the accused's actions before, during, and after the assault.

COMMON DEFENSES TO ASSAULT OFFENSES

A. *Legal justification*. An act of force or violence committed during the proper performance of a lawful duty is legally justified. This defense of legal justification has two requirements. First, the accused must be performing a lawful duty which may be imposed by a statute, regulation, superior order, or custom of the service. Even when an order to commit an act of force or violence is not lawful, the accused has a defense if the accused honestly believed the order to be lawful, and if a person of ordinary understanding would not have known that the order was unlawful. Second, the duty must be performed in a proper manner. The accused may use only enough force reasonably necessary to carry out the duty.

B. *Self-defense*. One who is free from fault may use reasonable force, even deadly force if necessary, to defend against unlawful bodily harm. Self-defense will excuse an accused's acts only when both of the following questions are answered in the affirmative.

1. *Was the accused free from fault?* Self-defense will not excuse the accused's acts when the accused intentionally started the altercation. However, suppose that the accused provoked the other party's hostile actions and then withdrew, intending to avoid any further hostility. If the other party continues the attack, even after the accused's withdrawal, the accused may then act in self-defense. The other party has become the aggressor. Likewise, an accused who willingly engages in mutual combat, such as a barroom free-for-all, may not successfully claim self-defense. If the opponent should unexpectedly resort to deadly force (e.g., pulls a knife), thereby escalating the affray, the accused may be permitted to defend against the excessive force.

2. ***Did the accused use a reasonable degree of force?***

a. ***In homicide or assault involving deadly force, or battery involving deadly force***

(1) ***The accused reasonably believed that death was about to be inflicted.*** Taking into account all the circumstances, the accused's apprehension of death or grievous bodily harm must have been one which a reasonable, prudent person would have held under the circumstances.

(2) ***The accused honestly believed that the force used was necessary for protection against death or grievous bodily harm.*** This element is entirely subjective. The accused is not objectively limited to the use of reasonable force. Accordingly, such matters as the accused's emotional control, education, and intelligence are relevant in determining the accused's actual belief as to the force necessary to repel the attack.

b. ***In other assault cases***

(1) ***The accused reasonably believed that bodily harm was imminent.*** Taking into account all the circumstances, the accused's apprehension of imminent bodily harm must have been reasonable.

(2) ***The accused honestly believed that force used was necessary, providing it was less than force reasonably likely to result in death or grievous bodily harm.*** A person who perceives imminent bodily harm does not have an unlimited right to resort to force. The accused must have had an honest, good-faith belief that force was actually necessary to defend against imminent bodily harm. The accused's belief need not be the belief that the so-called "reasonable person" would have held. Thus, factors such as the accused's intelligence, emotional state, and sobriety are relevant. There is no duty imposed on the accused to retreat in the face of attack. This is a subjective test. The type and amount of force used is limited to that reasonably necessary to protect oneself. There is no requirement that the accused meet force with exactly the same kind of force.

C. ***Threatened use of deadly force.*** In order to deter an assailant, the accused may offer, but not actually apply or attempt, such means or force which might likely cause death or grievous bodily harm. Such deadly force may be threatened even though the accused only reasonably anticipated only minor bodily harm.

D. *Defense of another*. One may lawfully use force in defense of another person under the same conditions that self-defense could be invoked. The person aided must not be the aggressor nor a willing mutual combatant. The accused is limited to the use of that degree of force reasonably necessary to protect the victim. Mistake of fact as to who was really the aggressor is not a defense.

E. *Consent*. An accused is not guilty of an alleged assault consummated by a battery if the alleged victim lawfully consented to the battery. The victim's consent must be freely given before the striking or offensive touching. Consent obtained by threats, duress, or fraud is not lawful consent. No one can lawfully consent to a battery that is likely to produce death or serious physical injury, except where the act is necessary to save the victim's life. No one can lawfully consent to any act that constitutes an unlawful breach of the peace. Finally, the victim's consent may be limited. If the battery goes beyond the extent to which the victim consented, the battery will be unlawful.

F. *Duress*. Duress is available as a defense to any crime less serious than murder when the accused's acts were not voluntary, but the result of a reasonable, well-grounded fear that, if (s)he didn't commit the assault, the accused or any innocent person would be immediately killed or seriously injured.

G. *Accident*. In an assault case, the accused will not be guilty if his / her acts were unintentional and not due to culpable negligence. An accident is an unintentional act which occurs while the accused is otherwise acting lawfully. It is not the unexpected consequence of a deliberate act.

H. *Special privilege*. The law recognizes certain other limited situations where one may rightfully use force against another, even without the other person's consent. A parent is privileged to use reasonable amounts and types of corporal punishment to discipline a minor child. A custodian or guardian of children or mentally incompetent persons may use limited, reasonable force to care for or control the persons in the custodian's charge. The rightful occupant of any premises, whether home or place of business, is privileged to use reasonable force to expel persons unlawfully on the premises.

NOTES

NOTES (continued)

CHAPTER XXI

DISTURBANCE OFFENSES

OVERVIEW. The UCMJ prohibits five major offenses involving public disturbance or threats against the peace:

A. Riot (article 116);

B. breach of peace (article 116);

C. disorderly conduct (article 134);

D. communicating a threat (article 134); and

E. provoking words or gestures (article 117).

BREACH OF THE PEACE (ARTICLE 116)

For this offense to occur, there must be a violent or turbulent act which unlawfully disturbs the peace of the community.

A. ***Violent or turbulent act***. Examples include destroying or damaging property, discharging firearms, loud speech, or language which tends to induce or incite violence or unrest.

B. ***The peace of the community***. A breach of the peace disturbs public tranquility or impinges upon the peace and order to which the community is entitled. Thus, the acts must disturb the public peace, not just the peace of the persons who witness the acts.

C. ***Community***. Although "community" usually refers to the general public in the area, it also includes military communities—such as a base, vessel, or confinement facility.

D. ***Unlawful disturbance***. A breach of peace is unlawful when committed without legal justification or excuse. Legal justification refers to the proper performance of a legal duty. Legal excuse includes defenses such as self-defense.

DISORDERLY CONDUCT (ARTICLE 134)

Disorderly conduct affects the peace and quiet of persons witnessing it. It need not, however, be violent conduct. An act which outrages generally held standards of public decency—such as indecent exposure or window peeping—would also constitute disorderly conduct.

COMMUNICATING A THREAT (ARTICLE 134)

A. *Threat*. The threat may be to the person, property, or reputation of another. It must involve an avowed present intent to injure, either now or in the future. A conditional threat may not always be an offense. Thus, "If you weren't so old, I'd beat you to a pulp," is not a threat. On the other hand, "If you don't cooperate, we'll kill you," does constitute a threat. The condition ("If you don't cooperate. . .") is one the accused is not entitled to impose and doesn't negate the intent to injure, but merely explains the circumstances under which the threat will be carried out. Words which all parties understand to have been said in jest would not constitute a threat.

B. *Communication*. The threat must be communicated to another person; however, the threat does not have to be communicated to the intended victim. Thus, if *A* tells *B*, "I'm going to beat up *C*," a threat has been communicated for purposes of this offense.

C. *Intent*. The accused need not specifically intend to carry out the threat. The gist of the offense is communication of the threatening words, not the actual intent of the speaker. The fact that the accused said the words in jest is no defense if the person to whom they were communicated believed or understood the words to be an actual threat.

D. *Wrongful*. The threat must be wrongful, without legal justification or excuse. Not all threats are wrongful. For example, if a witness to a crime threatens to report the perpetrator to the authorities, the threat is not wrongful, even though it will certainly injure the perpetrator's reputation if carried out.

PROVOKING WORDS OR GESTURES (ARTICLE 117)

A. *Provoking*. Provoking words or gestures tend to induce breaches of the peace. They are "fighting words" or challenging gestures. It is not necessary, however, that a breach of the peace actually result. The person to whom the words

or gestures were used need not have been actually provoked to violence. Conditional threats may be provoking words. For instance, "If you weren't so ugly, I'd smack you," is not a threat, but is chargeable as provoking words.

B. ***Reproachful***. Reproachful words or gestures are punishable under this article and are ones that censure, blame, discredit, or otherwise disgrace another person's life or character. They also must tend to induce breaches of the peace.

C. ***Accused's intent***. The accused need not actually intend to provoke violence or a breach of the peace. The gist of the offense is the consequence of the provoking conduct, not the intent behind it.

D. ***Victim's status***. The person to whom the provoking or reproachful words or gestures were used must be a person subject to the UCMJ. Lack of knowledge of the victim's status is not a defense.

E. ***Wrongfulness***. Provoking or reproachful words or gestures do not include reprimands, censures, reproofs, and other admonitions which may be properly administered in the furtherance of military training, efficiency, or discipline.

F. ***The person to whom directed***. Unlike communicating a threat, provoking words must be communicated directly to the victim.

NOTES

NOTES (continued)

CHAPTER XXII

CRIMES AGAINST PROPERTY

OVERVIEW. The UCMJ prohibits a broad range of crimes against property. This chapter will discuss the more common property offenses:

A. Larceny and wrongful appropriation (article 121);

B. receiving stolen property (article 134);

C. robbery (article 122);

D. burglary, housebreaking, and unlawful entry (articles 129, 130, 134);

E. arson (article 126);

F. offenses against military property (article 108);

G. damage or destruction of nonmilitary property (article 109); and

H. bad check offenses (articles 123a and 134).

LARCENY AND WRONGFUL APPROPRIATION (ARTICLE 121)

A. ***General concept***. Article 121 prohibits larceny and its lesser included offense (LIO) of wrongful appropriation. The only difference between the two crimes is the required intent. In larceny, the accused specifically intends to deprive the owner permanently of the property stolen. In wrongful appropriation, the accused intends to deprive the owner of the property only temporarily.

B. ***Discussion***

1. ***Wrongfulness***. The accused's act is wrongful if it is without the lawful consent of the owner, or without legal justification or excuse. Legal excuse would include situations such as the accused's taking property (s)he honestly believes to be his / her own.

2. *Taking*. Article 121 describes three types of larceny: wrongful taking, wrongful obtaining, and wrongful withholding. A "taking" requires two acts by the thief. First, the thief must exercise physical dominion so as to impair the owner's control over the property. Second, the thief must remove the property. Any movement, however slight, will usually suffice. Both dominion and removal are necessary.

3. *Obtaining*. Wrongful obtaining is larceny by fraud. The thief makes a deliberate misrepresentation which induces the owner to give the property voluntarily to the thief. The misrepresentation must have all of the following characteristics.

a. *It must be a material misrepresentation*. The thief's misrepresentation must concern an important matter in the relationship or dealings between the thief and the victim. The misrepresentation is material if a reasonable person would rely upon it, at least in part, in deciding whether to give the property to the thief.

b. *It must be a misrepresentation of present or past fact*. A statement, such as "This watch lists for $500.00," could form the basis for a wrongful obtaining. On the other hand, a statement such as "This is the most beautiful picture in the world," is merely a statement of opinion. If, however, the thief says, "The art critic for the New York Times says that this is the most beautiful painting in the world," the thief has made a representation of fact (i.e., the fact that the art critic has expressed that opinion). A present fact includes the thief's present intentions. Thus, if the thief states, "I will gladly pay you Tuesday for a hamburger today," the thief has stated the fact of his / her intention to pay for the hamburger in the future.

c. *The representation must be false*.

d. *The accused must not believe that the misrepresentation is true*. Any one of three possible states of mind will satisfy this requirement. First, the accused may know that the representation is untrue. Second, the accused may believe that it is untrue, without actually knowing whether it is untrue. Third, the accused may have no actual knowledge or belief about whether the statement is true or false.

e. *The misrepresentation must induce the victim's transfer of the property to the thief*. The victim must actually rely on the thief's misrepresentation as a basis for giving the property to the thief or to the thief's agent. The misrepresentation usually must be made before, or simultaneously with, the transfer. Although the misrepresentation must induce the transfer, it need not be the only reason why the victim parted with the property.

f. ***Monetary loss irrelevant***. There is no requirement that the victim suffer a monetary loss as a result of the transaction.

4. ***Withholding***. In taking and obtaining types of larceny, the thief unlawfully comes into possession of the property. In wrongful withholding, however, the thief's initial possession of the property is usually lawful. Acts which constitute the offense of unlawfully receiving, buying, or concealing stolen property, or being an accessory after the fact, however, are ***not*** included within the meaning of "withholds." The act of withholding may take several forms. The thief may fail to return borrowed or rented property when lawfully required to do so. The thief may be a custodian who fails to account for, or deliver, the property to its owner when legally required to do so. Still another example of wrongful withholding would be the custodian of property who converts the property to his / her own use or benefit, or who uses it in an unauthorized manner to the detriment of the owner's rights.

5. ***Property***. The law divides property into two general classes: real property and personal property. Real property includes land, buildings, and permanent fixtures attached to the land. Real property ***cannot*** be the subject of a larceny. Personal property may be defined as any property that is not real property. Personal property includes tangible property which has a physical existence, and intangible property such as contract rights, patents, and rights to services.

"Property" for purposes of article 121 is limited to tangible personal property, money, and negotiable instruments such as checks. Services, such as telephone service or labor, cannot be the subject of larceny. Theft of services may be prosecuted under article 134 when the accused wrongfully obtained the services.

6. ***Ownership***. "Ownership" merely describes a person's right to possess, use, and dispose of property. The law identifies two types of owners of property: general owners and special owners. Owners include not only people, but also corporations, associations, governmental agencies, and partnerships.

a. ***General owners***. The general owner has the greatest right to possess, use, and dispose of property. The general owner's rights are generally superior to those of anyone else. The general owner is often said to have "title" to the property.

b. ***Special owners***. The special owner has ownership rights that are superior to the rights of anyone else except the general owner. Thus, a renter, borrower, or custodian of property would be a special owner (even a thief may be a special owner).

c. *Relationship to larceny*. A larceny may be either from a general owner or from a special owner. If the larceny is from a special owner, there is usually no need to plead or prove the general owner's identity or interest. Larcenies may occur between general and special owners. A special owner commits larceny against the general owner when the special owner wrongfully withholds the general owner's property.

7. *Value*. Value has a twofold importance in larceny cases. First, one of the elements of the offense is that the property had at least some value. Second, the property's value determines the authorized maximum punishment. A property's value for purposes of article 121 is its fair market value at the time and place of the theft. The concept of value may present several problems.

a. *Proof of value*. Value may be proven in several ways. First, the larceny victim may testify to the property's value. Second, evidence of the prevailing retail price in the community for the same or similar items may be introduced. Third, if the property was government property, official price lists are admissible to prove value. If the official price list conflicts with other evidence of fair market value, however, the fair market value governs.

b. *Unique property*. Rare or one-of-a-kind items such as antiques or paintings usually have no prevailing retail price in the community. Their value may be established by the expert testimony of an appraiser or other authority on that kind of property.

c. *Value of negotiable instruments*. Negotiable instruments are writings which represent money value, and which can be converted to cash. The value of a negotiable instrument depends upon whether the document is in a negotiable form (i.e., whether it can be cashed). If the check is unsigned or has some other defect that renders it non-negotiable, the accused has stolen only a piece of paper of nominal value.

d. *Deductions for condition and depreciation*. Fair market value reflects the property's condition and any appropriate depreciation. Some types of property may be subject to commonly recognized depreciation.

8. *Intent*. Larceny and wrongful appropriation are specific-intent offenses. In larceny, the accused must specifically intend to deprive the owner of the property permanently. Wrongful appropriation requires the specific intent to deprive temporarily.

9. ***Unexplained possession of recently stolen property***. The law recognizes a permissive inference arising from the accused's unexplained possession of recently stolen property. If, shortly after the property was stolen, the accused was found in unexplained, knowing, exclusive possession of the stolen property, one may infer that the accused was the thief.

a. ***Conscious possession***. The evidence must show that the accused knew that (s)he possessed the property. It is not necessary to prove that the accused knew the property was stolen.

b. ***Exclusive possession***. The evidence must show that the accused exercised exclusive control or dominion over the property.

c. ***Recently stolen property***. "Recent" is a relative concept. A practical test for determining if the property was "recently" stolen is as follows: Was it reasonably possible for the accused to have innocently acquired the property in the time between its theft and its discovery?

10. ***Found property***. Found property is property which has been inadvertently lost or mislaid by its owner and which is found by the accused. If the finder fails to make reasonable efforts to locate the property's owner, the finder may be criminally liable for larceny of the found property.

a. ***Clues to ownership***. The extent to which the finder will be legally required to try to locate the property's owner will be determined by the clues to ownership. Clues to ownership include identifying marks, the nature of the property, where it was found, when it was found, its apparent value, and how long it had apparently been located where it was found. Sometimes there may be no clues to ownership. Whether the property presented clues to ownership must be determined by analyzing all the facts and circumstances surrounding the finding of the property.

b. ***Finder's duty to make reasonable efforts***. The finder has a legal duty to make reasonable efforts to find the property's owner. What constitutes reasonable efforts is determined by the kind and quality of the clues to ownership. If the finder takes the found property and makes no reasonable efforts to return it to its owner, the finder commits a taking-type larceny. If the finder learns of subsequent clues to ownership, but makes no reasonable efforts to return the property, the finder commits a withholding-type larceny. The finder's initial possession was lawful, but the finder failed to return the property when legally required to do so.

11. *Abandoned property*. Abandoned property is property in which the owner has relinquished all title, rights, and possession. Anyone may lawfully take possession of abandoned property. Whether certain property was abandoned will be determined by the type of property, its condition, its location, and whether the prior owner actually abandoned the property. Moreover, even if the property was not in fact abandoned, the accused will not be guilty of larceny or wrongful appropriation if the accused honestly believed that the property was abandoned.

C. *Common defenses to larceny*. The following are the most frequently encountered defenses in larceny cases. Many are also applicable to other types of property crimes.

1. *Lack of criminal intent*. The accused claims that the alleged taking, obtaining, or withholding was not wrongful.

2. *Intoxication*. Although voluntary intoxication is not usually a complete defense, it may become a defense to larceny or wrongful appropriation when the accused was so intoxicated as to be unable to form the required intent.

3. *Honest mistake of fact*. If the accused honestly believed that the property was his / her own, such a mistake of fact will constitute a complete defense to larceny and wrongful appropriation. The accused's mistake need not be reasonable, only honest.

4. *Return of similar property*. After wrongfully taking / obtaining / withholding property, the accused's intent to return similar property is not a defense. The exception is when cash or a check is taken and an equivalent amount of currency is later returned. Because of the fungible nature of money, this return is usually a defense to larceny, but not wrongful appropriation.

RECEIVING, BUYING, OR CONCEALING STOLEN PROPERTY (ARTICLE 134)

A. *General concept*. Although closely related to larceny, receiving stolen property is *not* an LIO of larceny. Thus, whenever there is doubt about whether the accused was the thief, or merely a receiver of stolen property, a receiving stolen property charge is also appropriate.

B. *Discussion*

1. *Unlawfully received, bought, or concealed*. The accused must have received, bought, or concealed the goods without the rightful owner's consent and without legal justification or excuse. One who buys stolen goods in order to

return them to their rightful owner has not unlawfully bought stolen property. Any control over the property is sufficient to constitute receipt of the property.

2. ***Stolen property***. The property must actually be stolen property. The property must have been stolen by someone other than the receiver. A thief cannot receive stolen property (s)he has stolen.

3. ***Knowledge***. At the time the accused receives the property, the accused must actually know that the property is stolen.

C. ***Relationship to larceny***. Although closely related to larceny and wrongful appropriation, receiving stolen property is not an LIO of either crime. Nor does receiving stolen property merge into a wrongful withholding type of larceny when the receiver fails to return the property to its owner.

ROBBERY (ARTICLE 122)

A. ***General concept***. Robbery is essentially a larceny committed by means of an assault upon the victim. Both larceny and assault are LIOs of robbery.

B. ***Discussion***. Many of the concepts of larceny law also apply to robbery. Robbery has several other distinct principles which are discussed below.

1. ***From the victim's person or presence***. The robber must take the property from the victim's person or must take property in the victim's presence. Property is in the victim's presence when the victim has immediate control over it.

2. ***Against the victim's will***. The taking must be without the victim's freely given consent.

3. ***Force and violence***. The wrongful taking must be accomplished by force, violence, or threat of force or violence. This is the assault component of robbery. The accused's force or violence need only be enough to overcome the victim's resistance. The force or violence may precede or accompany the taking. There is no requirement that the victim offer resistance.

4. ***Threats of force or violence***. Robbery may also be accomplished by putting the victim in fear of force or violence. The threat may be to the victim's person or property. The threat may also be one which places the victim in fear of force or violence to the person or property of a relative or of another person in the victim's company. For purposes of robbery, "fear" means a reasonably well-founded

apprehension of immediate or future injury. While there need not be any actual force or violence, the threat must include demonstrations of force or menacing acts which reasonably raise an apprehension of impending harm.

C. *Lesser included offenses.* Both larceny and assault are LIOs of robbery.

BURGLARY (ARTICLE 129), HOUSEBREAKING (ARTICLE 130), AND UNLAWFUL ENTRY (ARTICLE 134)

A. *Burglary (article 129)*

1. *General concept.* Burglary is the unlawful breaking and entering of another person's dwelling, at night, with the specific intent to commit any of certain specified serious offenses. It is immaterial whether the intended serious offense is actually committed.

2. *Unlawful breaking and entering.* The burglar must break into the victim's dwelling. This may be done by an actual breaking such as forcing a lock, breaking a window, or even opening a closed door. There may also be a constructive breaking which occurs when the burglar gains entry to the dwelling by trick, fraud, or threats. The slightest entry into the dwelling, even if by only part of the body, will suffice. A breaking and entry is unlawful when done without lawful consent or legal justification.

3. *Dwelling.* The burglar must break into and enter the victim's dwelling. This term refers to any building occupied as a place of residence. It also usually includes apartments. The dwelling must be occupied, but there is no requirement that the occupant actually be on the premises.

4. *At night.* The burglary must occur at night (i.e., between sunset and sunrise).

5. *Intent to commit certain specified serious offenses.* The burglar must enter the dwelling with the intent to commit a serious crime. These include: murder, manslaughter, rape and carnal knowledge, larceny and wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, and assault. It is immaterial that the intended crime was not actually committed.

6. *Lesser included offenses.* Housebreaking (article 130) and unlawful entry (article 134) are LIOs of burglary.

B. ***Housebreaking (article 130)***

1. ***General concept.*** Housebreaking is the unlawful entry of another person's building or structure with the intent to commit a criminal offense inside. Housebreaking is less serious than burglary. The premises need not be a dwelling, but can be any building, room, shop, store, office, structure, houseboat, house trailer, railroad car, or tent. An automobile, however, cannot be the subject of housebreaking. The premises need not be occupied or in use at the time of the housebreaking. The unlawful entry can occur at any time, not just at night. Finally, the accused may intend to commit any crime except strictly military offenses.

2. ***Lesser included offense.*** Housebreaking's principal LIO is unlawful entry under article 134.

C. ***Unlawful entry (article 134)***

-- ***General concept.*** Unlawful entry occurs when the accused, without lawful consent or legal justification, enters a building or structure of another person. All those types of structures previously discussed with respect to burglary and housebreaking may be the subject of an unlawful entry. Note that the offense of unlawful entry does not require proof of an intent to commit any other offense once inside.

OFFENSES AGAINST MILITARY PROPERTY (ARTICLE 108)

A. ***General concept.*** Article 108 prohibits the unauthorized sale, disposition, damage, destruction, or loss of military property of the United States. Not only does article 108 prohibit these specific acts, it also prohibits allowing someone else to commit the unauthorized sale, disposition, damage, destruction, or loss of military property. Article 108 can be distinguished from larceny in that larceny is concerned with how the accused came into possession of the property. Article 108 deals with how the accused handled or disposed of the property.

B. ***Discussion***

1. ***Military property of the United States.*** Military property is all property, real or personal, that is owned, held, leased, or used by one of the armed forces of the U.S. Government. Thus, all property owned or used by the Department of the Navy, from paper clips to aircraft carriers, is covered by article 108. Retail exchange merchandise owned or used by a nonappropriated fund activity is not military property of the United States; however, merchandise in a ship's store is military property.

2. ***Wrongful sale or disposition.*** "Sale" of military property means a sale in the usual commercial sense. "Disposition" may include abandonment, loan, lease, or surrender of military property. Sale of military property is usually permanent. Disposition, however, need only be temporary. If the accused honestly and reasonably believed that the sale or disposition was authorized, the accused will not be guilty of an article 108 violation.

3. ***Damage, destruction, or loss.*** The accused's damaging, destruction, or loss of the military property may be intentional or negligent.

4. ***Allowing another to sell, dispose of, damage, destroy, or lose.*** The accused may be guilty of an article 108 violation even if (s)he merely allowed another person to wrongfully sell, dispose of, damage, destroy, or lose military property if the accused had a duty to protect the property and the accused either intentionally or negligently failed to perform that duty.

DAMAGE OR DESTRUCTION OF NONMILITARY PROPERTY (ARTICLE 109)

A. ***General concept.*** Article 109 prohibits certain types of damage or destruction to property other than military property of the United States. Wrongful sale or disposition of nonmilitary property is ***not*** covered by article 109.

B. ***Discussion***

1. ***Nonmilitary property.*** Article 109 covers any property, whether real property or personal property, that is owned by someone other than a military department of the United States.

2. ***Wasting or spoiling real property.*** Damage to real property may be either intentional or the result of the accused's recklessness. More than simple negligence is required, however.

3. ***Damaging or destroying personal property.*** Damage or destruction of personal property must be intentional. ***No*** form of negligence will suffice.

C. ***Relationship of article 109 to article 108.*** The offenses in articles 108 and 109 are often confused. Actually, the distinctions between the two types of offenses are rather simple. The following checklist will be helpful.

1. ***Is the property military property of the United States?***

a. ***If yes***, the accused may be convicted for either intentional or negligent sale, disposition, damage, destruction, or loss. The accused may also be prosecuted for allowing someone else to commit an offense against the military property. The property may be either real or personal property.

b. ***If no***, the type of the nonmilitary property must be determined.

2. ***Is the nonmilitary property real property or personal property?***

a. ***If real property***, the wasting or spoiling may be caused either intentionally or through recklessness.

b. ***If personal property***, the damage or destruction must be intentional.

BAD CHECK LAW (ARTICLES 123a AND 134)

A. ***Overview***. The UCMJ prohibits three types of bad check offenses. Article 123a prohibits using a bad check to procure something of value with the intent to defraud and using a bad check to pay a past-due obligation with the intent to deceive. Article 134 is used to prosecute dishonorable failure to maintain sufficient funds in an account. [Note that certain situations involving bad checks might also constitute violations of article 121 (larceny), but article 123a should be used when bad checks are involved.]

B. ***Using a bad check with intent to defraud [article 123a(1)]***

1. ***Make, draw, utter, deliver***. "Make" and "draw" are synonymous and constitute the acts of writing and signing the instrument. "Deliver" means to transfer the instrument to another person. Delivery also includes endorsing an instrument over to another person or depositing it in one's own account. "Utter" has a somewhat broader meaning than "deliver." "Utter" also includes an offer to transfer the instrument, with a representation that it will be paid when presented.

2. ***Procurement of an article of value***. The instrument must be used to procure an article or thing of value. An article or thing of value includes every kind of right or interest in property, or derived from contract, including interests and rights which are intangible or contingent or which mature in the future.

Payment of a past-due debt is *not* a thing of value. It is not necessary that the article actually be procured, only that the accused used the instrument in an attempt to procure the item.

3. *Knowledge*. The accused must actually know that there is not or will not be sufficient funds to pay the instrument in full upon presentment at the time the instrument was made, drawn, uttered, or delivered.

4. *Intent to defraud*. The accused must intend to defraud. One must be very careful not to confuse the intent to defraud, under article 123a(1), with the intent to deceive, under article 123a(2). They are separate, noninterchangeable intents. Intent to defraud denotes an intent to obtain an article or thing of value through a misrepresentation.

5. *Five-day rule*. If the maker or drawer of an instrument is notified that it has been dishonored, but fails to redeem it in full within five days of the notification, the court may infer both that the accused knew that there would be insufficient funds upon presentment and that the accused had an intent to defraud. The five-day rule does not apply to persons other than the maker or drawer of the instrument. Notification of dishonor can be oral or written and can be given by a bank or any other person.

C. *Using a bad check with intent to deceive [article 123a(2)]*

1. *Past-due obligation*. Under article 123a(2), the instrument is used to pay a past-due obligation [or for any other purpose not covered under article 123a(1)]. A past-due obligation is a legal obligation to pay a debt which has matured prior to the use of the instrument.

2. *Intent to deceive*. An intent to deceive is an intent to cheat, trick, or mislead. It involves a desire to gain an advantage for oneself, or to cause disadvantage to another person, through a misrepresentation.

3. *Five-day rule*. The five-day rule, discussed above, also applies to this offense for makers and drawers.

D. *Dishonorable failure to maintain funds (article 134)*

1. ***General concept.*** Dishonorable failure to maintain sufficient funds for the payment of checks differs from article 123a offenses in that there need be no intent to defraud or deceive at the time of making and uttering, and that the accused need not know at that time that (s)he did not or would not have sufficient funds for payment. The gist of the offense is the accused's conduct after uttering the instrument. Dishonorable failure to maintain sufficient funds is an LIO of both article 123a check offenses.

2. ***Dishonorable failure.*** A dishonorable state of mind is one characterized by fraud, deceit, deliberate misrepresentation, evasion, bad faith, or a grossly indifferent attitude toward one's obligations. Simple mistakes in bookkeeping or oversights are insufficient. Dishonorable failure to maintain funds also occurs when the accused innocently overdraws the account, but thereafter wrongfully fails to deposit enough money to cover the overdraft.

NOTES

NOTES (continued)

CHAPTER XXIII

DRUG OFFENSES

ARTICLE 112a

Article 112a prohibits the wrongful use, possession, manufacture, distribution, importing, exporting, introduction into a military installation, vessel, vehicle, or aircraft, or possession, manufacture, or introduction with intent to distribute, of any controlled substance. Punishment is increased if these acts occur on a ship, aircraft, or missile launch facility, or are done by persons performing certain duties.

A. *Definitions*

1. ***Wrongfulness***. To be punishable under article 112a, acts involving drugs must be wrongful. Such acts are wrongful if done without legal justification or excuse. Such acts would ***not*** be wrongful if done pursuant to legitimate law enforcement activities, or pursuant to authorized medical duties, or without knowledge of the contraband nature of the substance. Possession, use, distribution, introduction, or manufacture of a substance may be inferred to be wrongful in the absence of evidence to the contrary.

2. ***Marijuana***. Marijuana is defined as all parts of the plant *cannabis sativa L.* (except mature stalks). It would also include derivatives such as hashish and any other species of the plant.

3. ***Controlled substance***. A "controlled substance" is any substance listed in Schedules I through V as established by the Controlled Substances Act of 1970.

4. ***Possession***. "Possession" is the knowing exercise of control. Possession of a drug can be either direct physical custody—such as holding a drug in one's hand—or constructive—as in storing the drug in a locker in a bus terminal while keeping the key. Possession must be "exclusive" in the sense of having the authority to preclude control by others, but more than one person may possess a drug simultaneously. Possession does ***not*** require ownership.

5. ***Use***. "Use" includes any other act with the drug which provides a chemical effect in the body.

6. *Distribution*. "Distribution" is the delivery of possession to another. Distribution replaces the previously defined drug offenses of sale and transfer.

7. *Manufacture*. "Manufacture" is the production, preparation, and processing of a drug. Manufacture can be accomplished either directly or indirectly. It can be effected by extraction from a substance of natural origin or independently by chemical synthesis. "Manufacture" also includes the packaging or repackaging of a substance and the labeling or relabeling of a container. "Production" includes planting, cultivating, growing, or harvesting.

8. *Introduction*. "Introduction" is the act of bringing a drug or causing a drug to be brought into or onto a military unit, base, station, post, ship, or aircraft.

9. *Intent to distribute*. The presence of an intent to distribute increases the severity of possession, manufacture, or introduction. Indicia supporting such an intent would be the possession of a quantity of drugs in excess of a normal quantity for personal use, the manner in which a substance was packaged, and the fact that an accused was not normally a user.

B. *Relationships among the prohibited acts*. Some recent case law suggests that, if the accused possesses a separate "stash" of drugs which is kept hidden and remote from the drugs which are distributed, separate specifications alleging possession and distribution are appropriate.

C. *Proof of the substance's identity*. At trial, the prosecution must prove that the substance the accused distributed, used, possessed, manufactured, imported, exported, or introduced was a controlled substance. Of course, the most reliable evidence of the substance's identity and composition will be the results of chemical analysis. Nonexpert testimony may also be admissible sometimes to prove the substance's identity. A person who has used the same substance on previous occasions and is familiar with its appearance and effects may give his / her opinion about the substance's identity. Such testimony is rather common in marijuana cases.

DESIGNER DRUGS

The Controlled Substances Act of 1970 classifies illegal drugs by their precise molecular structure. A designer drug is a drug created by chemically altering the molecular structure of an existing controlled substance. Such an alteration of an illegal controlled substance removes the new drug, or analog, from the list of

schedules established by the Controlled Substances Act. Offenses involving designer drugs may be prosecuted, however, under article 134 as a violation of the Controlled Substances Analogue Enforcement Act of 1986 or as a violation of state law.

DRUG PARAPHERNALIA

Article 112a does not address drug paraphernalia, and resort must therefore be made to any applicable orders or regulations (or to article 134). For the Navy and Marine Corps, a service-wide drug paraphernalia regulation was promulgated in SECNAVINST 5300.28B, dated 11 July 1990, Subj: MILITARY ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL.

Analysis. Although the instruction uses somewhat broad language to define drug abuse paraphernalia, it is clear that nothing can be considered paraphernalia unless it is used, possessed, sold, or transferred with the intent that it be used as a medium through which illegal drugs are to be introduced into the body. Hence, the ***intent*** of an accused determines whether any given form of property is drug abuse paraphernalia. Under the Instruction, cigarette papers may be lawfully possessed if the intent of the possession is to roll tobacco cigarettes; but their possession constitutes an offense if they are to be used to roll marijuana cigarettes. The enclosure to the Instruction lists "evidentiary factors" to consider when making a determination of intent. Such factors include statements by the person in possession of the property, instructions provided with the property concerning its use, etc. The regulation also contains an exception for "authorized medicinal purposes." Hence, if an accused possesses a syringe with the purpose of injecting a controlled substance into his / her body, (s)he is not guilty of an offense if the possession was incident to an authorized medicinal purpose. Violations of this SECNAV instruction are meant to be enforced by "disciplinary or punitive action as may be . . . appropriate . . ." under article 92 (violation of a lawful general order).

COMMON DEFENSES IN DRUG CASES. Three defenses commonly arise in drug cases: lack of knowledge, entrapment, and lack of wrongfulness.

A. ***Lack of knowledge***. Three types of lack of knowledge on the part of the accused may be pertinent in drug possession cases. First, the accused may claim a lack of knowledge that (s)he possessed the substance. Second, the accused may claim lack of knowledge regarding the substance's true identity. Third, the accused may claim a lack of knowledge that possession of the substance was illegal.

The accused's possession must be knowing and conscious. Therefore, if the accused didn't know (s)he possessed the substance, the accused has a complete defense. Likewise, if the accused knew (s)he possessed the substance, but honestly didn't know the substance's true identity, the accused also has a complete defense. Ignorance of the fact that possession of the substance is illegal is no defense.

B. *Entrapment*. Entrapment may be a defense to any crime, but it often arises in prosecutions for distribution of drugs. Entrapment exists when the police or an undercover agent deliberately coerce the accused to commit a crime, even though the accused had no predisposition to do so. Entrapment involves overcoming the accused's desire to be a law-abiding person. It is not merely affording the accused an opportunity to commit a crime that the accused already was predisposed to commit; instead, the accused must have had *no* predisposition to commit the crime. For entrapment to lie, therefore, the accused must have committed the crime only because of overbearing, insistent coercion by the police or an undercover agent.

C. *Lack of wrongfulness*. Another defense that may be raised on drug use is the "authorized medicinal purposes" exception. Article 1138, *U.S. Navy Regulations, 1990*, permits handling of an otherwise illegal drug or controlled substance if such handling is for authorized medicinal purposes.

NOTES

NOTES (continued)

CHAPTER XXIV

DRUNKENNESS

OVERVIEW. The UCMJ prohibits four major types of drunkenness offenses:

A. Drunk on ship, on station, in camp, or in quarters (article 134);

B. drunk on duty (article 112);

C. incapacitation for duty (article 134); and

D. drunken or reckless driving (article 111).

"DRUNK" DEFINED

"Drunkenness" is "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties." Drunkenness is therefore measured in terms of the impairment of physical abilities such as vision, speech, balance, coordination, and reaction time. Drunkenness is also determined by the impairment of the accused's judgment. Drunkenness may be caused by alcoholic beverages or by drugs. There is no specific point at which a person becomes drunk.

PROOF OF DRUNKENNESS

Intoxication can be proven in several ways. Tests of physical coordination, such as walking a straight line or balancing on one leg, are frequently administered when the accused is apprehended. These tests do ***not*** require article 31 warnings. Their results, when considered in light of the totality of the circumstances, may be relied upon as evidence sufficient to prove intoxication. Scientific tests of the alcohol content of the suspect's blood or breath are also frequently administered. Since a 1993 change to the UCMJ, the offense of drunk or reckless operation of a vehicle, aircraft, or vessel (article 111) may be proven solely by evidence showing that the alcohol concentration in the suspect's blood or on the suspect's breath was .10 grams of alcohol per hundred milliliters of blood or .10 grams of alcohol per 210 liters of breath or greater. Nonexpert opinion is also admissible to prove intoxication. Any witness who observed the accused can testify regarding his / her observations of the accused's behavior.

DRUNK ON SHIP, ON STATION, IN CAMP, OR IN QUARTERS (ARTICLE 134)

A. *Discussion*. The accused must have been drunk while voluntarily present on a military installation or in military quarters. If the accused was brought aboard the installation against his / her will, the accused is not guilty of this offense. Not all instances of drunkenness on a military installation or in quarters are offenses against the Code. Drunkenness will be criminal only if the accused's behavior was directly prejudicial to good order and discipline or was service-discrediting.

B. *Drunk and disorderly*. The offense of drunk and disorderly is an aggravated form of drunk on ship, on station, in camp, or in quarters. This offense is also prosecuted under article 134. To be found guilty of drunk and disorderly, the accused must be drunk aboard a military installation or in quarters and must be engaged in disorderly conduct.

DRUNK ON DUTY (ARTICLE 112)

The term "duty" includes all types of military duties, *except* for those of a sentinel or lookout. Drunkenness by a sentinel or lookout is prosecuted under article 113. "Duty" includes standby duty, such as for flight crews, but it does not include liberty or leave. In order to be drunk on duty, the accused must first assume the duty and then be found drunk while still on duty. In many cases, this requirement will be satisfied by the accused's coming to work drunk. Where formal posting or assumption of duty is required, however, the accused will not be on duty until (s)he properly assumes the duty. Merely being hung-over is not sufficient for this offense.

INCAPACITATION FOR DUTY THROUGH PRIOR WRONGFUL INDULGENCE IN INTOXICATING LIQUOR OR ANY DRUG (ARTICLE 134)

"Incapacitation" occurs when the accused is unable to perform assigned duties in a proper manner. Drunkenness is not required, and incapacitation can result from a bad hangover. As a practical matter, if the accused is drunk when (s)he is to assume the duties, the accused will usually be considered to be incapacitated. This is not a lesser included offense of drunk on duty.

DRUNKEN OR RECKLESS OPERATION OF A VEHICLE, AIRCRAFT, OR VESSEL (ARTICLE 111)

A. ***Vehicle***. "Vehicle" includes any mechanical conveyance for land transportation, whether or not motor-driven or passenger-carrying. One operates a vehicle when one guides the vehicle while in motion, sets the vehicle in motion, or manipulates the vehicle's controls so as to cause the vehicle to move.

B. ***Drunk or reckless***. The accused must either be drunk while driving or driving in a reckless manner. "Drunk" has the same meaning as defined on page 1 of this chapter. Note that, for this offense, evidence that the alcohol content of the accused's blood or breath was .10 grams of alcohol per hundred millileters of breath of greater, is sufficient to prove drunkenness. "Reckless" involves a culpable disregard of the foreseeable consequences of one's actions. It is a significantly greater degree of carelessness than simple negligence. "Wanton" involves an even greater degree of negligence than recklessness. Wantonness involves an utter disregard of the probable consequences of one's actions.

Drunken driving is not always reckless driving. Drunkenness is a factor which, along with all the other evidence, may prove recklessness or wantonness. Thus, a drunk driver who nonetheless obeys the speed limit and is careful of the safety of others is not guilty of reckless driving, only drunken driving. There is no such offense as drunk ***and*** reckless driving.

C. ***Drunken or reckless driving resulting in personal injury***. If the accused's drunken or reckless driving results in personal injury to a person, including the accused, this fact increases the maximum authorized punishment. A personal injury is any injury serious enough to warrant medical attention.

NOTES

NOTES (continued)

CHAPTER XXV

MISCONDUCT BY A SENTINEL OR LOOKOUT

OVERVIEW

Article 113 makes it a criminal offense for a sentinel or lookout to be drunk on post, to sleep on post, or to leave the post before being properly relieved. Article 134 prohibits sitting or loitering on post. Sentinel and lookout offenses involve the accused's failure to remain vigilant and alert. They constitute a distinct group of serious military offenses, some of which are punishable by death if committed during time of declared war.

WHO IS A SENTINEL OR LOOKOUT?

A sentinel or lookout is one whose military duty requires constant vigilance and alertness. A sentinel or lookout is one whose duties include the requirement to maintain constant alertness, be vigilant, and remain awake, in order to observe for the possible approach of an enemy, or to guard persons, property, or a place, and to sound the alert, if necessary. The terms include one who is detailed to use any equipment designed to locate friend, foe, or possible danger, or at a designated place to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work.

DRUNK ON POST

"Drunk" has the same meaning under article 113 as it does for other drunkenness offenses under the Code.

SLEEPING ON POST

Sleeping on post is perhaps the most common sentinel or lookout offense. Sleep is a condition of ***insentience*** sufficient to impair the full exercise of mental and physical faculties. It is more than a dulling of the senses or drowsiness, but it is not necessary that the accused be wholly comatose. The accused is guilty of sleeping on post if (s)he either intentionally went to sleep or accidentally fell asleep. If the

accused falls asleep due to factors beyond his / her control, the accused will not be criminally liable. If the accused could have prevented falling asleep by getting proper rest before assuming his / her post, however, the accused may be found guilty of this offense.

LEAVING POST BEFORE RELIEF

The accused has left the post when (s)he goes far enough away to impair the maintenance of constant alertness.

LOITERING ON POST

Loitering connotes idle behavior and inattention by the sentinel or lookout. It includes all acts that detract from the maintenance of vigilance.

WRONGFUL SITTING

Sitting on post must be unauthorized sitting which detracts from the proper maintenance of vigilance.

NOTES

NOTES (continued)

CHAPTER XXVI

BREACHES OF RESTRAINT

OVERVIEW

Articles 95 and 134 prohibit five major offenses involving breaches of lawful restraint. Article 95 prohibits resisting apprehension, escape from confinement, escape from custody, and breaking arrest. Breaking restriction is prosecuted under article 134.

RESISTING APPREHENSION (ARTICLE 95)

A. ***Discussion***

1. ***Apprehension***. Article 7(a), UCMJ, defines apprehension as the act of taking a person into custody. Apprehension equates to a civilian arrest. In the military justice system, the terms "apprehension" and "arrest" must not be confused. They are not synonymous.

2. ***The attempt to apprehend***. Someone must have made an overt effort to apprehend the accused. This attempt must include clear notice to the accused that (s)he was being placed in custody. While words, such as "You are under apprehension," are the clearest notification to the accused, the accused may be notified by other words or acts importing the same meaning.

3. ***Authority to apprehend***. Article 7 of the Code and R.C.M. 302(b), MCM, 1984, authorize commissioned officers, warrant officers, noncommissioned officers, petty officers, and those engaged in law enforcement duties, to conduct military apprehensions.

R.C.M. 302(b) also states a policy that an enlisted member should apprehend a warrant or commissioned officer only when ordered to do so by another commissioned officer, when necessary to prevent disgrace to the service, or to prevent the escape of one who has committed a serious crime.

4. *Resistance*. Words, by themselves, are insufficient to constitute resisting apprehension. Some degree of physical resistance is also required. The resistance must occur before the accused has submitted to the apprehending officer's control. If the accused submits to the apprehension and then attempts to resist, the offense committed is escape from custody or attempted escape from custody.

5. *Knowledge*. The "clear notification" requirement for the attempt to apprehend implies that the accused must have knowledge that an apprehension is being attempted. There is apparently no requirement that the accused actually know that the person attempting the apprehension is lawfully empowered to apprehend. It is a defense, though, that the accused held a reasonable belief that the person attempting to apprehend him / her did not have authority to do so. Therefore, a reasonable belief that the apprehending person was acting without *authority* to apprehend is a complete defense.

6. *Alternate offenses*. An accused, who *forcibly* resists apprehension, may be convicted of assault even if the apprehending officers lacked probable cause to apprehend, provided the officers were acting in good faith and do not use extreme force themselves.

B. *Attempt not lesser included offense*. Resisting apprehension is one of the few offenses for which attempt is not an LIO. If the accused attempts to resist apprehension, the accused has, in fact, resisted apprehension.

ESCAPE FROM CONFINEMENT AND ESCAPE FROM CUSTODY (ARTICLE 95)

A. *General concept*. Although escape from confinement and escape from custody are two separate, distinct offenses, they share many common legal principles. Both offenses involve an escape from restraint. Confinement implies physical restraint, while custody need only be moral restraint, but may be physical restraint.

B. *Discussion*

1. *Confinement*. Confinement is the physical restraint of the person. One is in confinement if his / her freedom of movement is restrained by physical devices—such as leg irons, handcuffs, or a jail cell. A person, however, must ***first*** be delivered to and placed in a confinement facility prior to confinement status occurring. Thus, one who is in handcuffs is still only in custody if (s)he has not yet been placed in a confinement facility or delivered to brig personnel.

A person may pass in and out of a status of confinement depending upon the existence or absence of physical restraint at a given moment. Thus, a prisoner at a brig is in a status of confinement while inside the brig. Suppose, however, that the prisoner is permitted to leave the brig on a work-release program. The prisoner is accompanied by an unarmed escort, who is instructed not to attempt to stop a fleeing prisoner. When the prisoner leaves the brig with the escort, the prisoner passes from a status of confinement to one of custody. If the prisoner is accompanied by a guard who has the ***duty and the means*** to exercise physical restraint, however, confinement continues outside the brig. Dereliction in the execution of the brig guard's duty to exercise physical restraint does not terminate the confinement status.

2. ***Custody***. Custody may only involve moral, rather than physical, restraint of freedom of movement. As noted above, it can also involve physical restraint. Custody is usually imposed by lawful apprehension. Custody may also be imposed by lawful orders restricting the individual's freedom of movement to extremely limited confines.

3. ***Lawfully placed in restraint***. The accused must have been lawfully placed in confinement or custody. This merely means that the legal procedures for placing the accused in confinement or in custody must be substantially followed.

4. ***Freed before being properly released***. The accused's escape from the restraint need only be temporary or momentary. If the accused is stopped before completely throwing off the physical or moral restraint, the accused may be found guilty of attempted escape from confinement or custody.

C. ***Separate offenses***. Escape from confinement and escape from custody are entirely separate, distinct offenses. Custody and confinement are separate statuses; therefore, escape from custody is not an LIO of escape from confinement, even though custody would appear to be a factually less serious status. Likewise, escape from confinement is not an LIO of escape from custody.

BREAKING ARREST (ARTICLE 95) AND BREAKING RESTRICTION (ARTICLE 134)

A. ***General concept***. Breaking arrest, under article 95, and breaking restriction, under article 134, are closely related offenses. Both involve the accused going beyond certain geographical limits imposed by superior authority.

B. *Discussion*

1. *Arrest and restriction*. Arrest and restriction are both imposed by superior authority and prescribe certain geographical limits beyond which the accused may not go. As a practical matter, arrest often involves closer geographical limits than restriction. A person in arrest cannot be required to perform military duties. "Arrest" under article 95 also includes arrest in quarters, which is a status of restraint which may be imposed as nonjudicial punishment only on an officer.

2. *Proper authority*. The person who placed the accused in arrest or restriction must have been legally authorized to do so.

3. *Breaking arrest or restriction*. The breach occurs when the accused goes *beyond* the limits of the arrest or restriction. Merely failing to comply with some other condition of the arrest or restriction is not breaking arrest or restriction, although other violations of the Code may have been committed.

C. *Lesser included offenses*. Breaking restriction is an LIO of breaking arrest. Attempts are LIOs of both breaking arrest and breaking restriction.

NOTES

NOTES (continued)

CHAPTER XXVII

FALSIFICATION OFFENSES

OVERVIEW. The UCMJ prohibits five types of falsification offenses:

A. False official statements (article 107);

B. forgery (article 123);

C. perjury (article 131);

D. frauds against the United States (article 132); and

E. false swearing (article 134).

FALSE OFFICIAL STATEMENT (ARTICLE 107)

A. ***Discussion***

1. ***Official statement***. The statement may be oral or written, but it must be an official statement. An official statement is any one made in the line of military duties. The coverage is meant to be extremely broad. A suspect who is being interrogated normally has no duty to make a statement. Article 31, UCMJ, protects the suspect's right to remain silent. However, if article 31 warnings are given to a suspect, the suspect's duty to respond truthfully to investigators, if (s)he responds at all, is sufficient to impute officiality to his / her statements. Therefore, a suspect who lies to investigators, after being advised of his / her article 31 rights, could be charged with a violation of article 107. However, one must be cautious in dealing with false statements made by a suspect to investigators. Careful consideration should be given to alternative charges such as false swearing. On the other hand, if the suspect has an independent duty to make a statement or report, any statement such an accused makes may be an official statement.

2. ***Accused's knowledge***. The accused must have actually known, at the time the official statement was made, that the statement was false. This element is established if the accused had no belief that the statement was true.

3. *Intent*. The accused must make the false statement with an intent to deceive. This denotes an intent to mislead, trick, cheat, or induce someone to believe as true something that is false. No one actually need be deceived, nor any material benefit be obtained. If the accused knew that the official statement was false, the law will permit an inference that the accused intended to deceive.

FORGERY (ARTICLE 123)

Forgery is the false making or alteration of a signature or writing. The accused's acts must affect the document in such a way that, if genuine, it would impose a legal liability on another person or would adversely change another person's legal rights or liabilities. Forgery requires the specific intent to defraud. There is no requirement, however, that anyone actually suffer financial loss or legal detriment from the accused's acts. Forgery most frequently involves unlawfully signing another's signature or unlawfully altering a check or document.

PERJURY (ARTICLE 131)

Perjury occurs when a witness gives sworn testimony in a judicial proceeding, and the witness knows at the time that the testimony is false. The perjured testimony must concern a material fact or issue in the trial. Judicial proceedings include courts-martial and article 32 pretrial investigations. False sworn statements in other hearings, proceedings, or situations are prosecuted as false swearing in violation of article 134. Closely related to perjury is the article 134 offense of subornation of perjury, which occurs when the accused induces a witness in a judicial proceeding to give sworn testimony that the accused knows is untrue.

FRAUDS AGAINST THE UNITED STATES (ARTICLE 132)

Article 132 prohibits seven offenses which constitute, or relate to, frauds against the U.S. Government. These fraudulent offenses include:

A. Making a false or fraudulent claim against the United States;

B. presenting a false or fraudulent claim against the United States for approval or payment;

C. making or using a false writing or other paper in connection with a claim against the United States;

D. false oath in connection with claims against the United States;

E. forgery of a signature in connection with claims against the United States;

F. delivering less than the amount called for on a receipt; and

G. making or delivering a receipt without having full knowledge that it is true.

See Part IV, para. 58c, MCM, 1984, for an extensive discussion of the various types of frauds against the United States.

FALSE SWEARING (ARTICLE 134)

A. ***Oath or affirmation***. The accused must make a statement under a lawfully administered oath or affirmation. Article 136, UCMJ, and section 0902 of the *Manual of the Judge Advocate General* list the persons authorized to administer oaths and affirmations in the Department of the Navy. The oath or affirmation must actually be administered.

B. ***False statement***. The accused's statement under oath or affirmation must be false in fact. Moreover, the accused must not have believed that the statement was true when it was made. False swearing covers both official and unofficial statements. Thus, a suspect who knowingly makes a false statement during an interrogation under oath may be found guilty of false swearing. Article 31, UCMJ, merely protects the suspect's right to remain silent. Once the suspect takes an oath or makes an affirmation, the suspect is under a legal duty to tell the truth.

NOTES

NOTES (continued)

CHAPTER XXVIII

DEFENSES

OVERVIEW

Defenses may be grouped into two categories: defenses in bar of trial and defenses on the merits. Defenses on the merits can be subdivided into general defenses and affirmative defenses. Insanity can be both a defense in bar of trial and a defense on the merits.

DEFENSES IN BAR OF TRIAL

Defenses in bar of trial are matters which do not directly relate to the accused's guilt or innocence. They present legal grounds for preventing the trial from proceeding. A successful defense in bar of trial will usually result in a dismissal of the charges without any determination of the accused's guilt or innocence of those charges.

A. ***Lack of jurisdiction***. *See* R.C.M. 201-203, MCM, 1984, for a discussion of jurisdictional matters.

B. ***Statute of limitations***. The statute of limitations under the UCMJ is article 43. As to all offenses committed ***on or after*** 14 November 1986, the accused may not be tried unless sworn charges are received by the officer exercising summary court-martial jurisdiction over the accused within five (5) years after the commission of the offense. No time limit exists, however, for capital offenses, UA in time of war, or missing movement in time of war. Any period during which the accused is in a status of unauthorized absence is excluded from the computation of the 5-year period.

C. ***Former jeopardy***. Article 44(a) of the Code provides that no person may be tried, without his / her consent, a second time for the same offense. Former jeopardy does not apply to a rehearing which has been ordered to correct errors in a previous trial of the same charges, nor does former jeopardy preclude a trial by court-martial when the previous trial was by a state court or foreign court. *But see* JAGMAN 0124. Neither does former jeopardy apply when the former adjudication of the offense was at office hours or captain's mast.

D. *Former punishment.* When punishment has been imposed under article 15 for a *minor* offense, that offense cannot be tried at a subsequent court-martial. Former punishment also applies to article 13 punishments for minor disciplinary infractions by a person in pretrial restraint. If the offense is not minor, usually carrying a punishment in excess of one year in confinement, former punishment is not a bar to a subsequent court-martial.

E. *Denial of speedy trial.* *See* R.C.M. 707, MCM, 1984.

F. *Constructive condonation of desertion.* *See* chapter XVII ("Absence Offenses") of this section.

G. *Grant or promise of immunity.* *See* R.C.M. 704 and R.C.M. 907(b)(2)(D)(ii), MCM, 1984. If the accused has been previously promised or granted immunity from prosecution in return for his / her testimony at another proceeding, the accused may not be prosecuted for any offenses covered by the grant or promise of immunity. *See* JAGMAN 0138 for procedures for granting immunity.

H. *Insanity.* *See* "INSANITY," *infra*, for an analysis of the insanity defense.

DEFENSES ON THE MERITS

Defenses on the merits directly relate to the issue of guilt or innocence. A successful defense on the merits will usually result in a finding of not guilty to the charges and specifications to which the defense relates. Defenses on the merits may be subdivided into two categories: general defenses and affirmative—or special—defenses.

A. *General defenses.* A general defense denies that the accused committed any or all of the acts that constitute elements of the offense charged. It may also negate one specific element of the offense. The following are the most common general defenses:

1. *Lack of requisite criminal intent.* The defense offers evidence that the accused committed some of the alleged acts, but that these acts were done without the required criminal intent. Mistake of fact, discussed as an affirmative defense below, may also act as a general defense when the mistake prevented the accused from forming a required intent or state of mind. Diminished mental responsibility, discussed in paragraph D of this chapter, also functions as a general defense when, because of mental disease or defect, or because of intoxication, the accused was unable to form a required specific intent.

2. ***Alibi***. Under the alibi defense, the defense contends that the accused could not have committed the alleged offense because the accused was elsewhere when it occurred.

3. ***Illegality of orders***. *See* chapter XV ("Orders Offenses and Dereliction of Duty"), *supra*.

4. ***Good character***. Under the Military Rules of Evidence, ***general*** good character evidence is not admissible to show that a person acted in conformity therewith. This general rule has several exceptions. One exception is that evidence of a pertinent trait of character of the accused offered by the accused may be admissible. Good military character is admissible in a drug prosecution to show the accused wasn't involved. Evidence of the character trait of honesty is admissible in a larceny trial. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders to show that the accused was less likely to have committed the offense.

B. ***Affirmative defenses***. Affirmative defenses are also known as special defenses. The accused contends that his / her conduct was not criminal. In essence, the accused says, "I did it, but. . . ." It is the accused's responsibility to present evidence that raises the affirmative defense.

1. ***Legal justification***. Legal justification is the lawful performance of a lawful duty which results in the accused committing acts that otherwise would constitute a crime. The accused must be performing a lawful duty, which may be imposed by statute, regulation, orders, or custom of the service. Furthermore, the accused must be performing the duty in a lawful manner, although not necessarily in exact compliance with precise procedural regulations.

2. ***Obedience to apparently lawful orders***. If the accused commits acts that would otherwise constitute a crime because (s)he was ordered by competent authority to perform those acts, the accused will not be guilty of a crime if the orders were apparently lawful. An order is not apparently lawful if a person of ordinary sense and understanding would know or believe it to be illegal.

3. ***Accident or misadventure***. *See* chapter XX ("Assaults"), *supra*.

4. ***Self-defense or defense of another***. *See* chapter XX ("Assaults"), *supra*.

5. ***Duress***. *See* chapter XXIV ("Assaults"), *supra*.

6. ***Entrapment***. *See* chapter XXIII ("Drug Offenses"), *supra*.

7. *Physical or financial inability*. *See* chapters XV ("Orders Offenses") and XVII ("Absence Offenses"), *supra*.

8. *Lawful consent*. *See* chapter XX ("Assaults"), *supra*. A person cannot usually give lawful consent to an act likely to result in grievous bodily harm or death.

9. *Special privilege*. *See* chapter XX ("Assaults"), *supra*.

10. *Mistake of fact*. *See* chapters XVII ("Absence Offenses") and XXIII ("Drug Offenses"), *supra*. When the accused's mistake of fact negates a required specific intent, mistake of fact is a general defense.

11. *Insanity*. The accused's lack of mental responsibility at the time of the offense is a complete defense. Insanity is discussed, *infra*, and in R.C.M. 916(k), MCM, 1984.

INSANITY

In 1986, Congress enacted a new insanity standard under military law which applies to all offenses committed on or after 14 November 1986.

A. *General concepts*. Insanity is a legal concept, not a medical or psychological one. Insanity involves two distinct phenomena:

1. Lack of mental responsibility at the time of the offense; and

2. lack of mental capacity to stand trial.

These two concepts focus more on the effects of the accused's mental condition on his / her actions, rather than on the precise psychological nature of the accused's mental disorder. Thus, the law is more concerned with "How did this mental condition affect the accused?" than with "What type of mental disorder did the accused suffer?"

B. *Lack of mental responsibility*. A person is not responsible for criminal conduct if, at the time of such conduct, as a result of a severe mental disease or defect, the person was unable to appreciate the nature and quality or the wrongfulness of the acts.

C. ***Lack of mental capacity to stand trial.*** An accused may not be tried if lacking sufficient mental capacity either:

1. To understand the nature of the proceedings; or

2. to cooperate intelligently in his / her own defense.

If the accused lacks mental capacity to stand trial, court-martial proceedings will be held in abeyance until such time, if ever, that the accused is mentally capable of standing trial. The focus is on the accused's mental status on the day of trial rather than on the day the crime was committed.

D. ***Deciding insanity issues.*** The accused's insanity may be raised either before trial or during trial. It may even be raised after trial, but only under limited conditions.

1. ***Inquiry.*** R.C.M. 706, MCM, 1984, outlines procedures for inquiry into the accused's sanity. The issue of insanity may be raised by the accused's commanding officer, defense counsel, trial counsel, or the article 32 pretrial investigating officer. If the accused's commanding officer has reason to believe that the accused is insane, or was insane at the time of the offense, the commanding officer will refer the accused to a sanity board. It is wise to refer the accused to the sanity board whenever the issue is raised in order to avoid later delays in disciplinary proceedings. The sanity board consists of one or more physicians, and at least one member of the board should be a psychiatrist. Although sanity boards without a psychiatrist are permissible when a psychiatrist is not reasonably available, they are definitely unwise, as the finding of such a board would be subject to strong attack at trial. The sanity board will evaluate, examine, and observe the accused. The sanity board is required to report findings about whether the accused was free enough from mental disease or defect to:

a. Appreciate the criminality of his / her conduct;

b. understand the nature of the proceedings; and

c. cooperate intelligently in his / her own defense.

2. *Commanding officer's options*

After receiving the board's report, the accused's commanding officer may take one of four possible actions:

a. Dismiss the charges (if the commanding officer is competent to convene "a court-martial appropriate to try the offense charged");

b. suspend disciplinary proceedings (if the accused lacks mental capacity to stand trial);

c. institute an administrative separation proceeding; or

d. refer the charges for trial by court-martial.

NOTES

NOTES (continued)

CHAPTER XXIX

FRATERNIZATION AND SEXUAL HARASSMENT

FRATERNIZATION

A. ***Fraternization in general.*** Fraternization is a viable offense and there is an increasing number of fraternization cases being tried. Though each service appears to be handling the offense differently, cases have been successfully prosecuted under articles 92, 133, and 134. Presently, it is the negative effect that wrongful fraternization has on discipline and morale that has allowed the proscription to withstand all manner of legal attacks. The courts have held that wrongful fraternization compromises the chain of command, undermines a leader's integrity and, at the very least, creates the appearance of partiality and favoritism. Fraternization is a listed offense at Part IV, paragraph 83, MCM, 1984.

B. ***Definition.*** Because fraternization has traditionally been a breach of custom, it is more describable than definable. Frequently, it is not the acts alone which are wrongful per se, but rather the circumstances under which they are performed. OPNAVINST 5370.2A, dated 14 March 1994, provides detailed information regarding the implementation of the Navy's policy concerning fraternization. The OPNAVINST and Article 1165, *U.S. Navy Regulations, 1990* (as amended 25 January 1993) define fraternization generally as follows:

1. Any personal relationship between an officer and an enlisted member which is unduly familiar and does not respect differences in rank and grade.

2. When prejudicial to good order and discipline or of a nature to bring discredit on the naval service, personal relationships between officer members or between enlisted members that are unduly familiar and that do not respect differences in rank and grade.

3. Prejudice to good order and discipline or discredit to the naval service may result from, but are not limited to, circumstances which:

   a. call into question a senior's objectivity;

   b. result in actual or apparent preferential treatment;

c. undermine the authority of a senior; or

d. compromise the chain of command.

One of the most important changes OPNAVINST 5370.2A and Article 1165 implemented is the addition of perceived as well as actual preferential treatment by a senior. Another important change is the distinction made for chief petty officers, as follows:

> Unduly familiar relationships may exist with individuals outside one's direct chain of command. By longstanding custom and tradition, Chief Petty Officers (E-7 to E-9) are separate and distinct leaders within their assigned command. Chief Petty Officers provide leadership not just within their direct chain of command but for the entire unit. Due to this unique leadership responsibility, relationships between Chief Petty Officers and junior personnel (E-1 to E-6) that ar unduly familiar and that do not respect differences in grade or rank are typically prejudicial to good order and discipline when they are within the same command. . . .

OPNAVINST 5370.2A at section 6.d.

C. *Officer-enlisted fraternization.* Part IV, para. 83, MCM, 1984, prohibits commissioned or warrant officers from associating with enlisted personnel on terms of military equality in violation of a custom or tradition. A service custom or tradition which makes the alleged conduct wrongful must exist. Custom arises out of long-established practices which by common usage have attained the force of law in the military or other community affected by them. For example, it is the existence of a custom that makes conduct such as fornication between officers and enlisted wrongful in the naval service. Absent the existence of the servicewide custom, it is not unlawful. In the past, the government has relied on written documents (such as the *Marine Corps Manual*, para. 1100.4 or NAVMC 2767 of 12 March 1984 *User's Guide to Marine Corps Leadership Training*) to prove a custom. Until recently, there was little written policy available in the Navy; this has changed with the promulgation of OPNAVINST 5370.2A.

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

for such offenses. In addition, the following bases for prosecution should be explored as appropriate.

1. Fraternization may be charged as a violation of a general lawful regulation under article 92(1), UCMJ. Article 1165, *U.S. Navy Regulations, 1990* (as amended 25 January 1993), prohibits officer-officer / enlisted-enlisted / officer-enlisted fraternization in those instances where an unduly familiar relationship exists that does not respect differences in grade or rank. Such conduct must also be prejudicial to good order and discipline or service-discrediting. OPNAVINST 5370.2A can also be used as a basis for a charge under Article 92(1), UCMJ. It is recommended that you charge fraternization under this article using the OPNAVINST.

2. The conduct may violate an other lawful order or regulation and be punishable under Article 92(2), UCMJ. Notice that officer-officer and enlisted-enlisted overfamiliarity may have the same detrimental effect on morale and discipline in certain circumstances as officer-enlisted fraternization. As such, the participants may be subject to a lawful order to cease. Failure to terminate the relationship may constitute willful disobedience under Articles 90 or 91, UCMJ.

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

4. The conduct may be such that it would constitute conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ; however, a higher level of misconduct must be shown under this article.

E. *Handling fraternization allegations*. The chart at the end of this chapter provides guidance on handling fraternization allegations. Remember, there is *a duty to investigate* allegations.

SEXUAL HARASSMENT

A. *References*

1. *U.S. Navy Regulations (1990)*, Arts. 1164 (Equal Opportunity and Treatment), 1166 (Sexual Harassment); ALNAV 103/93 (current version of NAVREG 1166)

2. SECNAVINST 5300.26B

3. OPNAVINST 5300.9

4. MCO 5300.10A

5. Commander's Handbook, A Tool Kit for Prevention of Sexual Harassment

6. NAVADMIN 025/92, Zero Tolerance for Sexual Harassment

7. NAVOP 028/94 and NAVADMIN 212/94, Processing Sexual Harassment Cases in a Timely Manner

The most important of these references is SECNAVINST 5300.26B, dated 6 January 1993. The instruction is well written in "layperson's" terms, and we strongly encourage periodic review—especially when an allegation arises.

B. *Sexual harassment in general.* Basically, sexual harassment means bothering someone in a sexual way. It is behavior that is unwelcome, is sexual in nature, and is connected in some way with a person's job or work environment. A wide range of behaviors can meet these criteria, and therefore constitute sexual harassment. Even with this rather simplistic way of explaining it, trying to determine exactly what kinds of behavior constitute sexual harassment often is not easy. The policy established is not intended to prevent the types of behavior which are appropriate in normal work settings and which contribute to camaraderie. For a person's behavior to be considered sexual harassment, it must meet three criteria: it must be unwelcome, be sexual in nature, and occur in or impact on the work environment. More complete definitions of these terms may be found in the SECNAVINST. Leadership is the key. Professionalism, mutual respect, and dignity are the strongest forms of prevention against sexual harassment; however, mandatory training requirements include yearly General Military Training (GMT) and Command Indoctrination Training.

C. *Necessity of complaint.* There are no requirements under any regulations that the victim complain; though, certainly, if an innocent comment is made and the victim complains about the remark or gesture, such notice to the accused may go a long way in proving culpable negligence if the situation is repeated. Both SECNAVINST 5300.26B and MCO 5300.10A state that the victim should complain and make the situation known to the immediate superior. The commander is required to investigate and take whatever actions are necessary to ensure a work environment free from sexual harassment.

D. *Processing times of allegations.* Processing times of allegations have been established by the CNO (NAVOP 028/94, 241622Z JUN 94; and NAVADMIN 212/94, 082006Z NOV 94). Some highlights of these messages are as follows:

1. Investigations (whether formal or informal) will commence within three (3) days or less of initial notification. The CNO would like to see investigations commenced within one (1) day, but allows some latitude for weekends or special circumstances.

2. Notification to accuser of commencement of investigation must take place on the same day it is begun. Inform him / her that your goal is to get the truth and produce a just result.

3. Reassure the accuser that (s)he is to let you know immediately if there is any reprisal. Just saying it is not enough, this is something that you must follow up on periodically.

4. Resolution (completion of the investigation, determination of the validity of the allegations, holding of any counseling or article 15 punishment, preferring of charges if a court-martial is contemplated, notification to accused and accuser of command decisions) should be completed not later than 14 days from investigation commencement.

For more specific guidelines, please read the message. Remember that these cases do not get better with time.

E. ***Charging sexual harassment***. It is recommended that you charge sexual harassment under Article 92(1), UCMJ, for violation of the SECNAVINST.

F. ***Related orders***. SECNAVINST 5370.2J of 15 March 1989, Standards of Conduct and Government Ethics, is a punitive order. Paragraph 904, captioned "Using Official Position," prohibits naval personnel from misusing their official position for personal gain. This paragraph could be the basis for a sexual harassment prosecution. It applies to officers, enlisted, and civilians without reference to chain of command. There are numerous other military orders and directives that deal with sexual harassment, including: OPNAV 12720.3, NAVAIR 5350.1, NAVSEA 5350.1, OPNAV 5350.5, and CMC White Letter Number 18080 of 2 December 1980.

G. ***Alternatives to article 92 for sexual harassment***. There are many other articles of the Uniform Code of Military Justice under which the same misconduct could be prosecuted.

1. Comments may amount to disrespect under articles 89 or 91, provoking speech or gestures under article 117, communicating a threat under article 134, extortion under article 127, bribery under article 134, or indecent language under article 134. Comments or gestures of a sexual nature to a subordinate may be a form of abuse under article 93.

2. Where contact or physical acts are involved, articles 128 (assaults), 134 (indecent acts), 120 (rape), 125 (sodomy), or 134 (adultery) may be viable alternatives.

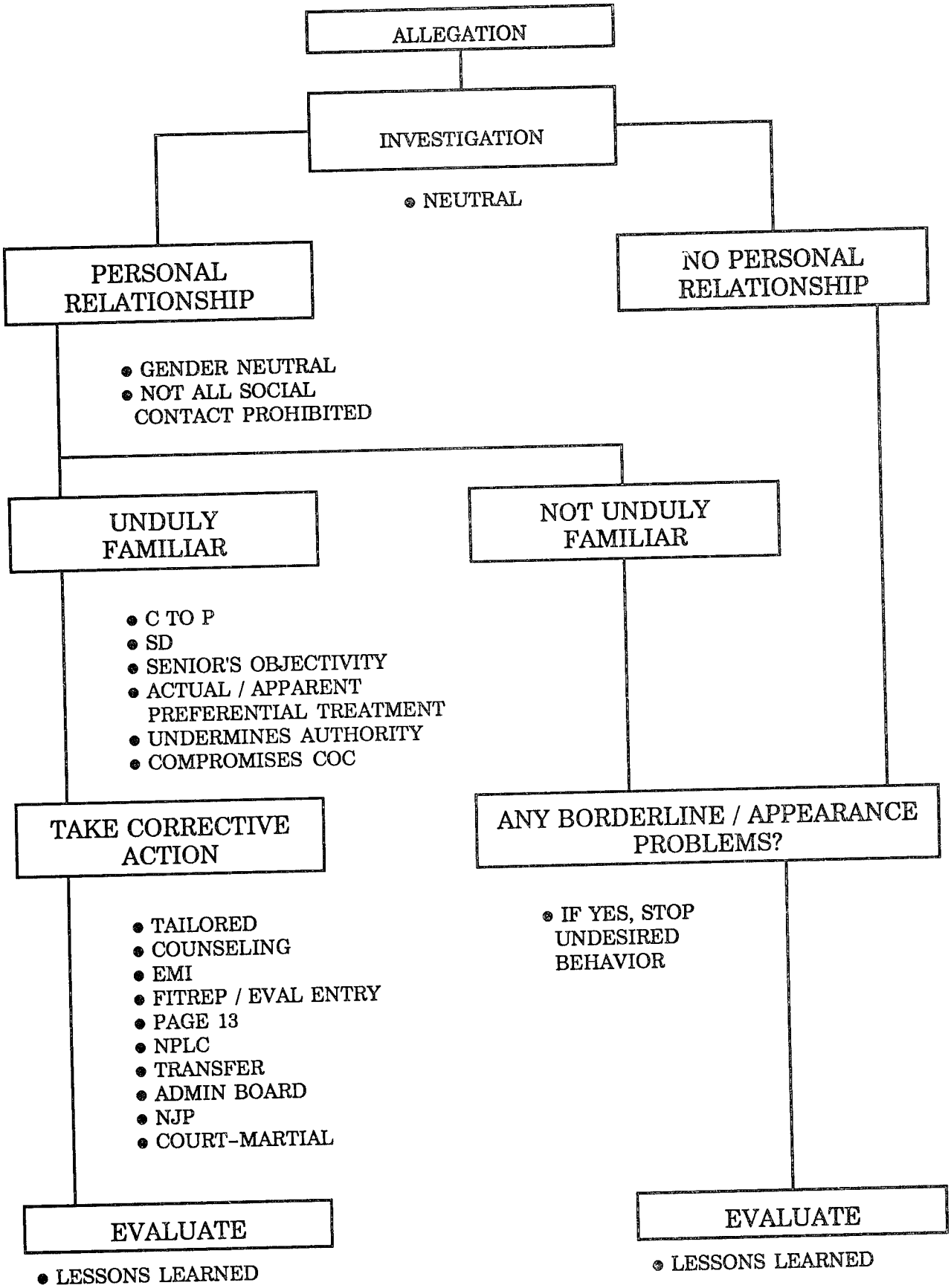
3. Finally, dereliction of duty under article 92, or conduct unbecoming an officer under article 133, may also be appropriate vehicles to allege sexual harassment.

H. *Informal resolution system.* The *Commander's Handbook for the Prevention of Sexual Harassment* also introduces naval personnel to an informal resolution system (IRS). The IRS was initiated by SECNAV to help resolve interpersonal conflicts at the lowest possible level. It is a tool which can be used to resolve many of the less severe forms of discrimination, harassment, or other inappropriate behavior. Basically, the system encourages recipients of offensive behavior to attempt to resolve the conflict directly with the offending person when appropriate. Commanders should establish a command climate that encourages individuals to resolve conflicts between themselves without fear of reprisal; however, commanders should also be careful not to substitute the informal procedures with appropriate command intervention and action.

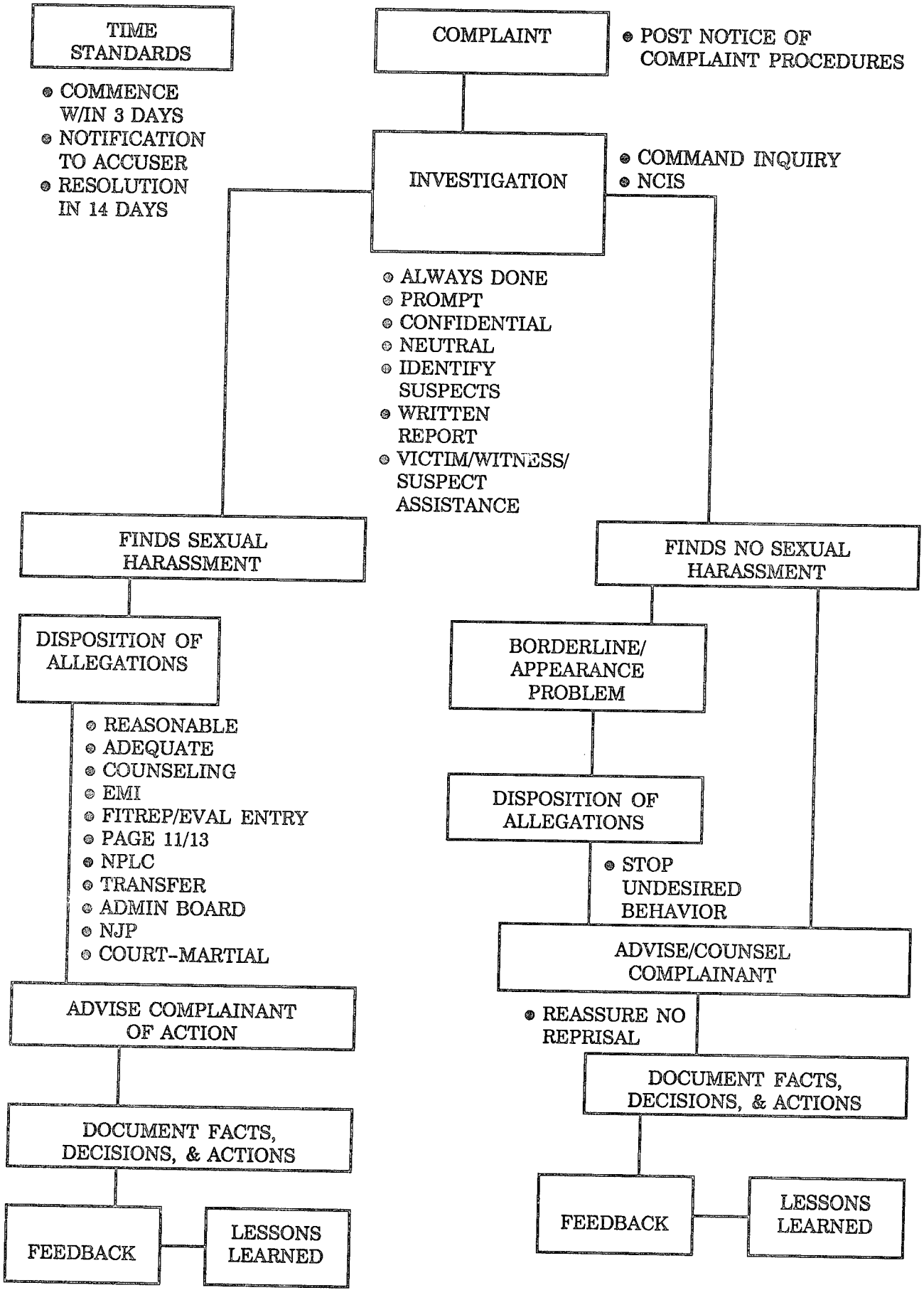
I. *Advice "Hotline."* The Sexual Harassment Prevention Advice "Hotline" is an anonymous hotline staffed by fully trained Equal Opportunity Specialists. The advice line is a resource for Sailors, Marines, and DON civilians, to call anonymously and ask questions about the Navy's Sexual Harassment policy, or for those who might have been sexually harassed to call and ask for advice or counseling. The actual content of the call is known only between the caller and the advice line counselor. The phone numbers are (800) 253-0931, (703) 614-2735, and DSN 224-2735. It is manned from 1000 to 1800 (EST), after hours callers receive a recorded message, and will be called back if a message is left. Make sure that this number receives the widest dissemination possible.

J. *Handling sexual harassment complaints.* The chart at the end of this chapter provides guidance on handling sexual harassment complaints.

HANDLING FRATERNIZATION ALLEGATIONS



STEPS IN HANDLING SEXUAL HARASSMENT COMPLAINTS



NOTES

NOTES (continued)

Table of Contents

CIVIL LAW DIVISION

Page

CHAPTER 30 ADMINISTRATIVE FACT-FINDING BODIES

Types and Functions of JAGMAN Investigations 30-1
Conducting the Investigation 30-8
Investigative Report - JAGMAN 0214 30-9
Action by Convening and Reviewing Authorities 30-11
Common Errors 30-12

CHAPTER 31 LINE OF DUTY AND MISCONDUCT DETERMINATIONS

General 31-1
Why LOD / Misconduct Determinations
Are Required 31-1
When LOD / Misconduct Determinations
Are Required - JAGMAN 0215 31-2
Who Should Initiate Action 31-3
What Constitutes Line of Duty - JAGMAN 0207 31-3
What Constitutes Misconduct - JAGMAN 0218 31-4
Possible LOD / Misconduct Determinations 31-5
How Findings Are Recorded 31-6
Reports in Death Cases 31-7
Convening Authority Review - JAGMAN 0225 31-7
Forwarding of Determinations 31-8
Common LOD / Misconduct Problems 31-8

CHAPTER 32 ENLISTED ADMINISTRATIVE SEPARATIONS

Primary References 32-1
Introduction 32-2
Punitive Discharges 32-2
Administrative Separations 32-3
Counseling 32-7
Bases for Separating Enlisted Personnel 32-9

CHAPTER 33 ADMINISTRATIVE SEPARATION PROCEDURES

Mandatory Enlisted Administrative Separation Processing 33-1
Dual Processing 33-2
Counseling 33-2
Notification and Administrative Board Procedures 33-3
Administrative Boards 33-9
Related References 33-19

CHAPTER 34 STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

Standards of Conduct References 34-1
Purpose and Scope 34-1
Application 34-2
General Principles 34-2
Ethics Counselors 34-2
Gifts From Outside Sources 34-3
Gifts Between Employees 34-7
Conflicting Financial Interests 34-8
Impartiality in Official Duties 34-8
Seeking Other Employment 34-9
Misuse of Position 34-9
Outside Activities 34-10
Gambling 34-11
Sanctions 34-12
Honoraria 34-13
Non-Federal Entities 34-14
Travel Benefits 34-16
Conflicts of Interest 34-16
Political Activities 34-17
Financial Disclosure Reports 34-19
Seeking Other Employment 34-21
Post-Employment Restrictions 34-22
Training Requirements 34-23
Fund-Raising 34-23

CHAPTER 34 (continued)

Appendixes

I Sample Gift Forwarding Letter 34-26
II Sample Memorandum of Disqualification 34-27
III Sample Procurement Integrity Certification 34-28
IV Sample Procurement Official Certification Documents 34-29
V Procurement Integrity Certification for Procurement Officials 34-30

CHAPTER 35 FREEDOM OF EXPRESSION

Introduction 35-1
Balancing Test 35-1
Freedom of Speech 35-2
Freedom of the Press 35-2
Writing or Publishing 35-4
Right to Peaceful Assembly 35-4
Membership in Organizations 35-7
Servicemembers' Union 35-7
Right of Petition (Grievances) 35-7
Political Activities 35-8
Reasonable Accommodation of Religious Practices 35-9

CHAPTER 36 RELATIONS WITH CIVIL AUTHORITIES

Criminal Jurisdiction Over Servicemembers in the United States 36-1
Service of Process and Subpoenas 36-5
Foreign Criminal Jurisdiction Over U.S. Servicemembers 36-9
Granting of Asylum and Temporary Refuge 36-13
Posse Comitatus 36-14

CHAPTER 37 LEGAL ASSISTANCE

Legal Assistance 37–1
Family Law 37–1
Indebtedness 37–6
Soldiers' and Sailors' Civil Relief Act 37–7
Notary 37–8

CHAPTER 38 FAMILY ADVOCACY PROGRAM

References 38–1
Overview of Family Violence 38–2
Military Response to Family Violence 38–2

CHAPTER 39 ENVIRONMENTAL LAW

References 39–1
Introduction 39–1
The Commanding Officer's Responsibilities 39–2
Notices of Violation, Environmental Litigation,
Citations, and Fines 39–3
Potential Civil and Criminal Liability 39–4
Federal Statutes 39–5
Pollution Control and Abatement Statutes 39–5
Resource Protection and Land Use Statutes 39–11
Environmental Response and Remediation 39–16
Environmental Law Issues
Useful Telephone Numbers 39–18

APPENDIX I FREEDOM OF INFORMATION / PRIVACY ACT GUIDES

CHAPTER XXX

ADMINISTRATIVE FACT-FINDING BODIES

Reference: (a) *JAG Manual*, Chapter II

TYPES AND FUNCTIONS OF JAGMAN INVESTIGATIONS

A. A *JAG Manual* investigation is an administrative fact-finding body convened to search out, develop, assemble, analyze, and record all available information relative to the matter under investigation. The report of the investigation is advisory in nature, intended primarily to provide convening and reviewing authorities with adequate information upon which to base decisions. *JAG Manual* investigations also serve as repositories of lessons learned, the contents of which may be disseminated to other naval units.

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

1. ***Courts of inquiry***. JAGMAN 0204b.

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

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

c. It is convened by a written appointing order.

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

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

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

g. It possesses the power to subpoena civilian witnesses in CONUS. (Article 47, UCMJ, provides for prosecution in U.S. District Court for anyone failing to appear, testify, or produce evidence before a court of inquiry.)

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

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

b. It is convened by a written appointing order.

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

d. It uses a hearing procedure.

e. Persons whose conduct is subject to inquiry may be designated parties by the convening authority in the appointing order. Additionally, the convening authority may authorize the fact-finding body to designate parties during the proceedings.

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

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

a. It usually consists of one commissioned officer, warrant officer, senior enlisted person, or civilian employee of the Department of the Navy as a member.

b. It is convened by a written appointing order.

c. It is ordinarily not directed to take testimony under oath or to record testimony verbatim.

d. It uses informal methods to collect evidence, including personal interviews, telephone inquiries, and correspondence.

e. It cannot designate any person as a party to the investigation.

f. It does not possess subpoena power.

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

D. ***Major incidents***. If the subject of the investigation is a major incident, a presumption exists that a court of inquiry will be convened. For less serious cases, an investigation not requiring a hearing will normally be adequate.

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

a. ***Multiple*** deaths;

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

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

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

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

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

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

G. *Death cases*

1. A *JAG Manual* investigation is required:

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

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

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

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

3. In death cases, an advance copy of a required *JAG Manual* investigation must be sent to the Office of the Judge Advocate General. The investigation should include the requisite autopsy report and death certificate;

however, completion of a death investigation and its forwarding will not be delayed to await final autopsy reports. MILPERSMAN 4210100 outlines personnel casualty reporting requirements in death cases, as well as status investigation reports on the death investigation required, to the Chief of Naval Personnel every fourteen days.

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

H. ***Parties***. Investigations required to conduct a hearing and courts of inquiry afford a hearing to any person whose conduct of performance of duty is subject to inquiry, or who has a direct interest in the subject of the inquiry (i.e., parties). JAGMAN 0205.

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

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

I. ***Selection of fact-finding bodies***. Any officer with article 15 power may convene an investigation not required to conduct a hearing type of investigation. Any officer with the authority to convene general or special courts-martial may convene an investigation required to conduct a hearing. Only officers with general court-martial authority may convene a court of inquiry. Appropriate guidance may well be sought from superiors in the chain of command, particularly if an investigation requiring a hearing or a court of inquiry is contemplated.

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

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

to deploy). Requests for an alternative command to perform the investigation should be made to the area coordinator, or to the subordinate commander authorized to convene general courts-martial and designated by the area coordinator for this purpose, in whose geographic area of responsibility the incident occurred. JAGMAN 0206.

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

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

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

3. Explicit instructions about scope of inquiry:

   a. Specific purposes.

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

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

4. Authority or lack of authority to designate parties.

5. Warnings:

   a. Privacy Act warning - JAGMAN 0202;

   b. Warning concerning origin of disease / injury - JAGMAN 0215b; and

   c. Article 31, UCMJ, warnings.

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

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

8. Identification of available assistance:

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

b. clerical support may be provided by the administrative officer; and

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

9. Deadline for completion

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

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

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

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

2. Witness statements from mishap investigation reports ***cannot*** be included in the record of the *JAG Manual* investigation. Witnesses providing information for use in mishap reports are advised that such disclosures are confidential in order that they may be encouraged to freely provide information which, hopefully, will preclude a recurrence of the incident. If mishap report

statements are incorporated into *JAG Manual* investigations, witnesses would be reluctant to speak since the veil of confidentiality would be pierced. OPNAVINST 3750.6.

CONDUCTING THE INVESTIGATION

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

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

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

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

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

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

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

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

INVESTIGATIVE REPORT - JAGMAN 0214

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

B. ***Preliminary statement***. A preliminary statement is prepared by the investigating officer as part of the report. JAGMAN 0214b.

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

2. The preliminary statement should not be a substitute for the findings of fact, opinions, or recommendations, which comprise the substance of the *JAG Manual*.

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

4. State that social security numbers were obtained from official record.

C. ***Findings of fact***. The findings of fact follow the preliminary statement. The findings are the investigating officer's description of what happened concerning the incident, and are recorded through his / her evaluation of the evidence. JAGMAN 0214c.

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

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

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

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

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

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

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

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

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

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

1. Recommendations may focus on corrective action, changes in standard operating procedures, disciplinary action, improvements, or awards.

a. If charges are recommended, an unpreffered charge sheet should be drafted by the investigating officer.

b. If a nonpunitive letter of caution is recommended, it should be drafted and separately forwarded for issuance, but will not be a part of the investigative report.

c. If a punitive letter of reprimand is recommended, a draft of the recommended letter should be prepared and forwarded as an enclosure to the investigative report.

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

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

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

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

ACTION BY CONVENING AND REVIEWING AUTHORITIES

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

1. In this endorsement, the convening authority may approve, disapprove, or modify findings of fact, opinions, and recommendations.

2. Amplifying material may also be submitted with respect to additional facts or opinions, as well as information concerning whether or not the recommendations have been implemented.

3. Specific approval / disapproval should be made concerning line of duty / misconduct opinions.

4. If the investigation is patently deficient, it should be returned to the investigating officer for corrective action before preparation of the first endorsement.

5. Material improperly enclosed in the investigation, such as NCIS narrative summary reports and mishap reports, should be extracted from the investigation by the convening authority.

6. In reviewing the investigation for sufficiency, reference should be made to the aforementioned checklists contained in the *JAG Manual* and other internal regulations.

B. *Routing* - JAGMAN 0209, 0210

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

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

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

COMMON ERRORS

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

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

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

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

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

5. Investigations improperly combining mishap reports or NCIS narratives in the body of the investigation.

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

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

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

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

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

11. Failing to support opinions with findings of fact.

B. Individuals with questions are encouraged to call the Office of the Judge Advocate General, Code 33 (Investigations), DSN 221-9530, commercial (703) 325-9530.

NOTES

NOTES (continued)

CHAPTER XXXI

LINE OF DUTY AND MISCONDUCT DETERMINATIONS

Reference: (a) *JAG Manual*, Chapter II

GENERAL

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

WHY LOD / MISCONDUCT DETERMINATIONS ARE REQUIRED

When a servicemember is injured with the possibility of a permanent disability, questions arise concerning the entitlement to benefits if the member is unable to continue on active duty. In addition, if a member is unable to perform duty for a period of time, that member may be required to make up the "lost time." The determination relating to the incurrence of the injury or disease will assist military officials and the Department of Veterans' Affairs (VA) in resolving questions of entitlement to benefits. JAGMAN 0216.

A. Several rights and benefits may be affected when a servicemember is injured.

1. A servicemember who is injured and misses duty because of his/her own misconduct may have their enlistment extended because of the time lost. Under 10 U.S.C. § 972 (1982), an individual unable to perform duty for more than one day because of intemperate use of drugs or alcohol, or because of disease or injury resulting from misconduct, is liable to have the enlistment extended for the period of time lost. Similarly, lost time is not "creditable service" and will not be counted in computing longevity or retirement multipliers. In this context, however, a return to "light duty" is the equivalent of returning to "full duty."

2. An adverse determination could result in a forfeiture of pay. This sanction is limited to cases where a member is absent from regular duties for more than one day because of disease caused by, and following, the intemperate use of liquor or habit-forming drugs. If pay is forfeited for more than one month, the member is entitled to $5.00 per month for personal expenses. Pay is not forfeited for absences caused by injuries.

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

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

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

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

WHEN LOD / MISCONDUCT DETERMINATIONS ARE REQUIRED - JAGMAN 0215

LOD / Misconduct determinations will be made if a servicemember incurs an injury which:

A. *Might* result in permanent disability;

or

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

1. With respect to the inability to perform duties for more than 24 hours, a period of hospitalization for treatment, rather than observation, should be used as the criteria. A light duty chit does not trigger the requirement to make a

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

2. The above-noted criteria apply only when a servicemember suffers an injury. With respect to a disease, an LOD / Misconduct determination is made whenever a disease is alcohol or drug induced; when a disability is incurred as a result of a member's unreasonable refusal to seek medical or dental treatment; or whenever a member has incurred a disability because of a failure to comply with regulations requiring reporting and receiving treatment for venereal disease.

WHO SHOULD INITIATE ACTION

A. Generally, the commanding officer or officer in charge of the individual concerned should make the determination. JAGMAN 0206.

B. Provisions are available, however, to allow another command to make the determination. This might result, for example, when:

1. An afloat unit is deploying, and an ashore command assumes responsibility for the incident; or

2. an incident occurs at a distant location from the primary command (servicemember injured while on leave) or when a primary command has a practical difficulty in making the determination (ship due to deploy). Whenever it is desired that another command make the determination, "a request should be made to the area coordinator, or to the subordinate commander authorized to convene general courts-martial and designated by the area coordinator for this purpose, in whose geographic area of responsibility the incident occurred." JAGMAN 0206b.

WHAT CONSTITUTES LINE OF DUTY - JAGMAN 0207

The phrase "line of duty" is a term of art under the *JAG Manual*.

A. An injury suffered by a servicemember is ***presumed*** to have been incurred in the line of duty.

B. The presumption can be overcome if ***clear*** and ***convincing*** evidence shows the servicemember was injured:

1. While avoiding duty by deserting;

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

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

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

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

WHAT CONSTITUTES MISCONDUCT - JAGMAN 0218

A. It is *presumed* that a servicemember's injuries were *not* incurred due to the member's misconduct.

B. The presumption can be overcome by clear and convincing evidence that the injury:

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

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

C. A violation of law standing alone will *not* constitute misconduct unless the injury was incurred through a foreseeable consequence of the violation. For example, if an individual, while in the process of robbing a bank, was struck by an out-of-control automobile, the injury incurred would not be due to his / her own misconduct since the runaway automobile was not a foreseeable consequence of the violation. On the other hand, if the individual is wounded by a security guard, the injury, as a foreseeable consequence of the violation, would be due to the member's own misconduct.

D. Intoxication alone is not a basis for a misconduct finding *unless* the following test listed in JAGMAN 0221 is met:

1. There must be a clear showing that the member's physical or mental faculties were impaired due to intoxication at the time of the injury;

2. the extent of the impairment must be shown; ***and***

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

E. The previous distinction between disease and injury is important with respect to the definition of misconduct. While the incurrence of a disease would generally not constitute misconduct, an unreasonable failure to accept medical treatment for a disease might be deemed misconduct. In particular, a member suffering a disability from venereal disease, who did not comply with regulations requiring the member to report and receive treatment for the disease, could be subject to a finding of misconduct. JAGMAN 0222.

F. A misconduct finding can only be made if an individual is mentally responsible at the time the injury is incurred. In the absence of evidence to the contrary, an individual is presumed responsible for his / her actions. The issue of mental responsibility is of particular concern with respect to suicide attempts, as noted in JAGMAN 0220.

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

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

POSSIBLE LOD / MISCONDUCT DETERMINATIONS

Given the definitions of line of duty and misconduct, three possible determinations can be made. JAGMAN 0219b.

A. The injury was incurred in the line of duty and was not due to the member's own misconduct. This is the only favorable determination.

B. The injury was incurred not in the line of duty and was not due to the member's own misconduct. For example, the member could incur an injury, neither intentionally nor through gross negligence, while an unauthorized absentee. This would be an adverse determination.

C. Finally, an injury could be incurred while not in the line of duty and due to the member's own misconduct (e.g., a deserter who intentionally shoots him / herself in the foot). This would also be an adverse determination.

HOW FINDINGS ARE RECORDED

After an LOD / Misconduct determination is made, the findings are recorded in one of three ways. JAGMAN 0224.

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

1. Used when:

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

b. the commanding officer deems it appropriate (for example, if a servicemember is injured in the line of duty by working with a piece of defective equipment, the commanding officer may decide to generate the investigation to determine the extent of the defect and whether action should be taken to replace the equipment); or

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

2. Forwarded to JAG via the general court-martial authority (GCMA) as with other investigations.

3. Checklist: JAGMAN 0229.

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

1. Used when:

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

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

c. possible permanent disability exists.

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

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

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

2. it is unlikely that permanent disability will occur. It is necessary to follow up on this requirement by ensuring that medical personnel make the entry to protect the servicemember.

REPORTS IN DEATH CASES

An LOD / Misconduct determination is never made in a death case. No Navy survivor's benefits are conditioned on such a finding, and the VA makes its own determination. If an investigation contains findings, opinions, and / or recommendations relating to such a determination, a reviewing authority should note the error and indicate its lack of validity in the forwarding endorsement. JAGMAN 0226.

CONVENING AUTHORITY REVIEW - JAGMAN 0225

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

B. If a *JAG Manual* investigation has been conducted, the convening authority, in his / her required endorsement, must specifically comment on the LOD/ Misconduct opinion.

C. When an adverse determination is possible (servicemember not in the line of duty), the servicemember may, in the convening authority's discretion, be afforded an opportunity to examine the report and rebut its contents.

1. Following notification and advisement of article 31 rights, as well as warnings pursuant to JAGMAN 0215 and the Privacy Act, the servicemember will be given an opportunity to examine and rebut the *JAG Manual* investigation.

2. The opportunity to examine and rebut should be provided *after* the investigation is completed, but *prior to* the preparation of the first endorsement. The member's rebuttal can take the form of a statement or other additional evidence. If the member elects not to make a statement, the convening authority should note this in the endorsement.

3. A servicemember does not have a right to military counsel at the hearing; however, if the member requests the assistance of military counsel to prepare the rebuttal, (s)he should be allowed to consult counsel for this purpose if possible.

D. Service record time-lost entries are made by the local command, subject to GCMA approval.

FORWARDING OF DETERMINATIONS

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

COMMON LOD / MISCONDUCT PROBLEMS

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

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

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

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

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

F. Compliance with the reporting requirements in *ITEM PAPA* MILPERSMAN 4210100.

G. Questions should be referred to the Office of the Judge Advocate General (Code 33), DSN 221-9530, commercial (703) 325-9530.

NOTES

NOTES (continued)

CHAPTER XXXII

ENLISTED ADMINISTRATIVE SEPARATIONS

PRIMARY REFERENCES

A. SECNAVINST 1910.4, Subj: ENLISTED ADMINISTRATIVE SEPARATIONS
B. SECNAVINST 1050.1, Subj: LEAVE FOR MEMBERS AWAITING REVIEW OF PUNITIVE OR ADMINISTRATIVE SEPARATION
C. SECNAVINST 5300.28, Subj: MILITARY ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL
D. Navy

1. MILPERSMAN, chapter 36
2. OPNAVINST 5350.4, Subj: ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL
3. NAVADMIN 033/94 (Implementation of DOD Policy on Homosexual Conduct)
4. NAVADMIN 067/93 (Advance Notice of MILPERSMAN chapter 36, change 5) 22 Apr 93
5. NAVADMIN 071/93 (Physical Readiness Program Changes) 29 Apr 93
6. NAVADMIN 148/94 (Physical Readiness Program Changes) 25 Aug 94

Best advice: If any doubt, call separation authority

-- BUPERS DSN 224-8245 / 8266 commercial (703) 614-8245
-- Status of unfavorable separation cases (Pers-832) -- 224-8245 / 8266 / 8194 / 8222
-- Advice (Pers-83) -- 224-8269
-- Voluntary separations (Pers-24) -- 224-1285 / 3893
-- Medical separations (Pers-242) -- 224-1412
-- Conscientious objectors (Pers-2E) -- 224-8372
-- Policy (OP-135) -- 224-5392 / 5559 / 5560 or (Pers-601) 224-5742
-- CHNAVRES SJA (commercial (504) 948) -- 363-5303
-- Reservists on Inactive Duty -- (Pers-913) 288-8664 / (202) 433-8664

E. Marines

1. MARCORSEPMAN, chapters 1 and 6
2. MCO P5300.12, Alcohol and Drug Abuse Prevention and Control
3. Marines = GCMA or SJA of CMC -- DSN 224-4250 / 4197; Reserves - 9100; Medical - 2091; MMSR - 1288 / 3288
4. MCO 1740.13, Establishment of Child Care Plans for Dual-Service Parents and Single Parents with Custody of their Children
5. ALMAR 84/94 (U.S. Marine Corps Implementation of DOD Policy on Homosexual Conduct) 28 Feb 94
6. ALMAR 57/93 (Revised Enlisted Separation Policy for Weight Control) 15 Feb 93

F. HIV and AIDS Policy

1. References

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

2. Policy (OP-13B) -- DSN 224-5562 / 5552
3. Assignment (Pers-453) -- DSN 224-3785
4. Retention (Pers-831) -- DSN 224-8223
5. Marines (MPP-39) -- DSN 224-1931 / 1519
6. Penalties -- 10 U.S.C. § 1002

INTRODUCTION

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

PUNITIVE DISCHARGES

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

ADMINISTRATIVE SEPARATIONS

Administrative separations are only awarded through an administrative process, not court-martial. Enlisted personnel may be administratively separated with a characterization of service (characterized separation) or description of separation (uncharacterized separation) as warranted by the particular facts of the case.

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

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

a. ***Navy***:

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

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

b. ***Marine Corps***:

(1) For paygrades E-4 and below, overall conduct marks for the current enlistment averaging 4.0 and proficiency marks averaging 3.0 are prima facie qualifications for an honorable separation. The Marine Corps places great weight on the commanding officer's recommendation of appropriate characterization, and a strong recommendation can turn what would otherwise be a general discharge into an honorable discharge and vice versa. MARCORSEPMAN, 1004, 6107, and 6305.

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

2. *General (under honorable conditions).* A general separation (discharge) is issued to servicemembers whose military record is satisfactory, but less than that required for an honorable discharge. It is a separation under honorable conditions and entitles the individual to all veterans' benefits. A servicemember will normally receive a general discharge when the member's service has been under honorable conditions, but either the overall average evaluation mark or the overall average personal behavior mark does not meet the 2.8 / 3.0 (Navy) or 3.0 / 4.0 (Marine) E-4 and below standards, respectively, and the member is not otherwise being processed for separation under other than honorable conditions. MILPERSMAN 3610300.3b.

Conduct in the civilian community of a member of a Reserve Component who is not on active duty may form the basis for a characterization as general if such conduct has an adverse impact on the overall effectiveness of the naval service—including military morale and efficiency (e.g., discreditable involvement with civilian authority while not on active duty for training and while wearing the Navy uniform without authorization).

3. *Under other than honorable conditions (OTH).* A characterization of OTH is appropriate when the reason for separation is based upon a pattern of adverse behavior or one or more acts that constitute a significant departure from the conduct expected from members of the naval service. An OTH discharge is an administrative separation that is now used in place of the former undesirable discharge. MILPERSMAN 3610300.3c.

a. Persons given an OTH discharge are not entitled to retain their uniforms (although they may be furnished civilian clothing at a cost of not more than $50.00), must accept transportation in kind to their homes, are subject to recoupment of any reenlistment bonus they may have received, are not eligible for notice of discharge to employers, and do not receive mileage fees from the place of discharge to their home of record.

b. The Department of Veterans Affairs will make its own determination with respect to the benefits listed in the table at pages 29-30 of this chapter as to whether the discharge was under OTH conditions. Generally, if a member receives an OTH discharge, very few VA benefits will be available to that member.

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

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

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

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

(3) A member of the naval service may be separated while absent without authority after receiving notice of separation processing. MILPERSMAN 3640200.1c; MARCORSEPMAN 6312.

(4) If a member is out of military control because of civil confinement, and if the civil authorities are unwilling to release the member, the member's case may be heard by the board in his / her absence (following appropriate notice to the confined servicemember) and the case may be presented on respondent's behalf by counsel for respondent. MILPERSMAN 3640200; MARCORSEPMAN 6303.4a.

e. Conduct in the civilian community of a member of a Reserve Component who is not on active duty may form the basis of an OTH discharge if such conduct directly and adversely affects the member's ability to perform military duties (e.g., arrested for robbery and confined so that member is unable to report for active duty for training, drilling, or mobilization). MILPERSMAN 3640200.2b(5); MARCORSEPMAN 1004, 6107.

4. Commanding officers are to explain periodically and issue a written fact sheet on the types of characterization of service, the bases on which they can be issued, and the possible adverse effect they may have upon employment in the civilian community, veterans' benefits, and reenlistment. The Navy and Marine Corps require explanations of the foregoing each time the punitive articles of the UCMJ are explained pursuant to Article 137, UCMJ. Article 137 provides that the explanation be made to enlisted personnel at the time of entering upon active duty, or within six days thereafter; and again after completing six months of active duty; and at the time of every reenlistment. Failure of any member to receive or understand this advice is not a bar to separation or characterization of service. MILPERSMAN 3610100.3d; MARCORSEPMAN 6103.

5. Any member being separated, except those separated for immediate reenlistment, must be advised of the purpose and authority of the Naval Discharge Review Board (NDRB) and the Board for Correction of Naval Records (BCNR) at the time of processing for such a separation. The advice includes a warning that an OTH based on a 180-day UA or more is a conditional bar to veterans' benefits, notwithstanding any action by the NDRB. Failure of any member to receive or understand this advice is not a bar to separation or characterization of service. Male servicemembers are also required to be advised before separation (if born in 1960 or later and 18 years old or older) of the requirement to register for Selected Service within 30 days of separation from active duty if they have not previously done so. Under 10 U.S.C. § 1046, servicemembers upon discharge or release from active duty must be counseled in writing—signed by the member and documented in his / her service record—on educational assistance benefits and the procedures for, and advantages of, affiliating with the Selected Reserve. MILPERSMAN 3610100.7, 3640497; MARCORSEPMAN 6104, 1101.4g.

B. *Uncharacterized separations*

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

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

C. *Additional procedural matters*

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

2. Generally, a member may not be separated on the basis of conduct that has been the subject of judicial proceedings resulting in an acquittal on the merits of the case or an action having the effect of an acquittal on the merits of the case. MILPERSMAN 3610260.12; MARCORSEPMAN 6106.1a.

3. Although a servicemember is processed and appropriately recommended for an OTH, the member may nevertheless still be awarded an honorable or general discharge if the separation or higher authority considers such to be warranted based on an overall evaluation of the member's current period of service. The convening authority may not modify board findings and recommendations when separating members under delegated authority. MILPERSMAN 3640370.2; MARCORSEPMAN 6309.2b(2)(b).

4. Contrary to popular myth, there is no "automatic upgrading" of discharge characterizations for good behavior.

5. If a board recommends retention, the convening authority may then request the member be separated in the best interest of the service. This is accomplished by notification procedure and not subject to an administrative separation board even if the member has over six (6) years of service. MILPERSMAN 3630900.

COUNSELING

A. In many cases, before a member may be processed for separation, the member must first be counseled concerning their behavior. Counseling is intended to give the member an opportunity to improve by identifying specific, undesirable behaviors which the member has the ability to alter or cease. The counseling warning is a commitment to the member that potential for further service exists and correction of identified deficiencies will result in continuation on active duty. The member, however, must be ***clearly*** informed of what is undesirable.

B. Once counseled, the member may not be processed for separation without first violating the counseling warning. (S)he must fail to correct the deficiency or commit misconduct after receiving the counseling and an opportunity to correct it. Counseling must be documented in the service record of the member, and only one entry is required. If more than one entry is made, the last entry applies (i.e., it must be violated prior to initiating administrative separation processing). Administrative separation cases containing an inviolated counseling warning must be rejected by the separation authority.

1. *Navy*: For Navy personnel, the counseling is documented by a page 13 entry or a letter. The counseling ***must*** be accomplished by the member's parent command within the current enlistment.

2. *Marine Corps*: For Marine Corps personnel, the counseling is documented by a page 11 MARCORSEPMAN 6105 entry. The counseling requirement can be accomplished at any command to which the Marine was assigned during the current enlistment.

C. Counseling and rehabilitation efforts (time to correct the deficiency) ***are required*** before the initiation of separation processing for the following:

1. Convenience of the government due to parenthood, personality disorder, and obesity (MILPERSMAN 3620200; MARCORSEPMAN 6203);

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

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

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

D. *Content and form*. MILPERSMAN 3610260.5; MARCORSEPMAN 6105. The command's counseling efforts must be documented in the member's service record and ***must*** include the following:

1. Written notification concerning deficiencies or impairments (the counseling warning given to the member must clearly inform the member of what is undesirable);

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

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

4. signed and dated by the member and witness; and

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

BASES FOR SEPARATING ENLISTED PERSONNEL

A. ***Bases for separation defined.*** The basis for separation is the reason for separation. The bases and criteria for each are set forth in MILPERSMAN, chapter 36 and MARCORSEPMAN, chapter 6.

1. ***Expiration of enlistment or fulfillment of service obligation.*** MILPERSMAN 3620150; MARCORSEPMAN 1005.

a. Honorable, general, or ELS.

b. Self-explanatory.

2. ***Selected change in service obligation.*** MILPERSMAN 3620100; MARCORSEPMAN 6202.

a. Honorable, general, or ELS.

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

3. ***Convenience of the government***

a. Honorable, general, or ELS.

b. Notification procedure used generally.

c. There are voluntary separations requiring application by the member and not requiring counseling, and involuntary separations where the convening authority initiates processing.

d. ***Specific grounds.*** These are the subcategories of the convenience-of-the-government basis for discharge; some are voluntary, some are involuntary.

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

(a) Genuine dependency or undue hardship;

(b) not temporary in nature;

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

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

(e) that a discharge will materially or wholly alleviate the hardship; and

(f) that no other means are available.

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

(2) *Pregnancy or childbirth*. MILPERSMAN, 3620220; MARCORSEPMAN 6408. This is a voluntary separation initiated upon written request by the female servicemember who requests separation due to childbirth. The request may be denied in the best interest of the naval service if, for example, the member is serving in a critical rate, has received special compensation during the current enlistment, has not completed obligated service incurred, or has executed orders in a known pregnancy status. This request must be made and acted on prior to childbirth or it becomes a parenthood case having different considerations.

(3) *Parenthood*. MILPERSMAN, 3620215; MARCORSEPMAN 6203.1.

(a) Notification procedures.

(b) Counseling required.

(c) Applicable when member is unable to perform duties satisfactorily, or is unavailable for worldwide assignment, due to parenthood. Navy members must have a current, updated OPNAV 1740/1 Form (Dependent Care Certificate); Marines must have a child care plan in their service records (MCO 1740.13). This requires counseling and is generally initiated by the convening authority.

(4) *Conscientious objection*. Persons who by reason of religious or moral training or belief have a firm, fixed, and sincere objection against participating in war in any form or the bearing of arms, which crystallized after they came on active duty, may claim conscientious objector status. This is a lengthy process and often may be avoided by moving the member to noncombatant

duties. Note, however, that requesting conscientious objector status is different from that of objecting to bearing arms, and issues must be addressed as they are raised. MILPERSMAN 3620200.1e, 1860120; MARCORSEPMAN 6409.

(5) *Surviving family member.* MILPERSMAN 3620240; MARCORSEPMAN 6410.

(6) *Alien.* This is a voluntary request initiated upon the written request of the servicemember. The request may be denied in the best interest of the naval service if, for example, the member is serving in a critical rate, has received special compensation during the current enlistment, or has not completed obligated service incurred. MILPERSMAN 3620250. *Note*: Marines do not separate for this basis.

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

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

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

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

(d) Excessive height.

(e) Personality disorder. Separation processing is discretionary with the member's commanding officer. For this to be a proper basis for separation, a two-part test must be satisfied. First, a psychiatrist or psychologist must diagnose the member as having a personality disorder such as to render the member incapable of serving adequately in the naval service. Second, there must be documented interference with the member's performance of duty. Counseling is required unless the member is a danger to him / herself or others. MILPERSMAN 3620225; MARCORSEPMAN 6203.3.

4. *Weight control failure. See* NAVADMIN 071/93 (29 Apr 93) (Physical Readiness Program Changes) and ALMAR 57/93 (15 Feb 93) (Revised Enlisted Separation Policy for Weight Control). In the Navy, members who fail body fat measurements, or fail the PFT any three (3) times in a 4-year period, shall be processed for separation. MILPERSMAN 3620260; MARCORSEPMAN 6203.2a(1), 6206.1. Counseling is required.

5. *Physical disability*. MILPERSMAN 3620270; MARCOR-SEPMAN, chapter 8.

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

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

6. *AIDS / HIV*. 10 U.S.C. § 1002; SECNAVINST 5300.30; NAVOP 013/86, 117/86, 026/87, 069/87. Navy points of contact: (1) Policy (OP-13B) DSN 224-5562; (2) Assignment (Pers 453) DSN 224-3785; (3) Retention (Pers 831) DSN 224-8223. Marine Corps point of contact: (MPP 39) DSN 224-1931 / 1519.

a. Individuals who are human immunodeficiency virus (HIV) positive are not allowed to enlist in the armed forces. Once on active duty, individuals who become HIV-positive will be allowed to reenlist and are retained. Retention will be continued so long as there is no evidence of immunological deficiency, neurological involvement, acquired immune deficiency syndrome (AIDS), or AIDS-related complex (ARC). If such conditions do develop, and interfere with the member's performance of duties, personnel are to be processed for disability. The member may request voluntary separation within the first 90 days of discovery of being HIV-positive, but may lose certain veterans' medical benefits. Personnel requesting voluntary separation must be counseled of this possibility.

b. Assignment limitations. Personnel who are HIV-positive can only be assigned to shore units within CONUS and within a 300-mile radius of certain medical treatment facilities. Only the immediate commanding officer and medical officer need know the HIV status of a member. Confidentiality is extremely important, and 10 U.S.C. § 1002 provides severe penalties for unauthorized disclosure of AIDS / HIV-related information (information is to be disseminated on a need-to-know basis only).

c. Adverse action

(1) It is in the best interest of all to encourage members to be tested for AIDS, to report having AIDS, and to seek treatment and care. Servicemembers may not be processed for separation nor have UCMJ action taken based solely on an HIV-positive blood test or the epidemiological assessment interview which is conducted by the medical treatment facility. To establish drug

abuse or homosexuality for processing or UCMJ action, independent evidence must be obtained. This cannot effect promotions or be reflected in fitness reports or enlisted evaluations.

(2) Exceptions -- Members who are HIV-positive may be ordered not to have unprotected sex, to inform future sex partners of their condition, and may be prosecuted for violating such orders.

7. ***Defective enlistment and induction***

a. ***Minority***. MILPERSMAN 3620285; MARCORSEPMAN 6204.1.

(1) Notification procedures.

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

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

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

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

b. ***Erroneous enlistment***. MILPERSMAN 3620280; MARCORSEPMAN 6204.2.

(1) Notification procedures.

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

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

c. *Fraudulent entry into naval service.* MILPERSMAN 3630100; MARCORSEPMAN 6204.3.

(1) Honorable, general, OTH or ELS, or OOR.

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

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

(4) Commands may request from CHNAVPERS a waiver of processing when the defect is no longer present, or the defect can be waived (*see* COMCRUITCOMINST 1130.9). A detailed request is required. *See* MILPERSMAN 3630100.

d. *New entrant drug and alcohol testing.* MILPERSMAN, chapter 36; OPNAVINST 5350.4; MARCORSEPMAN 6211.

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

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

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

e. *Defective enlistment.* MILPERSMAN 3620283; MARCORSEPMAN 6402.

(1) Honorable, ELS, or OOR.

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

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

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

(c) the enlistment was involuntary.

8. ***Entry level performance and conduct.*** MILPERSMAN 3630200; MARCORSEPMAN 6205.

a. ELS.

b. Notification procedures. *See* MILPERSMAN 3630200.4a, 3640200.

c. Counseling required.

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

9. ***Unsatisfactory performance.*** MILPERSMAN 3630300; MARCORSEPMAN 6206.

a. Honorable or general.

b. Notification procedures.

c. Counseling required (page 13 Navy) prior to latest qualifying enlisted evaluation and the specific unsatisfactory performance must be addressed.

d. A member may be separated for unsatisfactory performance, as characterized by performance of assigned tasks and duties that is not contributory to unit readiness and / or mission accomplishment as documented in the service

record, or failure to maintain required proficiency in rate as demonstrated by below average evaluations (Marine Corps) or one or more enlisted performance evaluations (Navy), regular or special, with unsatisfactory marks for professional factors of 2.6 or below in either military or rating knowledge and performance or with an overall evaluation, where applicable, of 2.6 or below. This basis for separation may *not* be used for separation of a member in an entry level status. Unsatisfactory performance is not evidenced by disciplinary infractions; cases involving only disciplinary infractions should be processed under misconduct.

e. The Marine Corps includes unsanitary habits as an example of unsatisfactory performance. MARCORSEPMAN 6206.

10. *Homosexual conduct.* MILPERSMAN 3630400; MARCOR-SEPMAN 6207; NAVADMIN 033/94; ALMAR 84/94.

a. *Policy*

(1) Homosexual conduct is considered to be incompatible with military service and is defined as a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A person's sexual orientation is considered a personal or private matter, and is not a bar to service entry or continued service unless manifested by homosexual conduct. Homosexual conduct is grounds for separation from the naval service and for barring entry into the naval service. Members are to be processed for administrative separation if the commanding officer believes that, by a preponderance of the evidence, homosexual conduct as defined above has occurred. Homosexual conduct is evidenced by:

(a) Member's own statement that (s)he is a homosexual or bisexual, or words to that effect, which creates a rebuttable presumption that (s)he engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts;

(b) member engaging in, attempting to engage in, or soliciting another to engage in a homosexual act or acts; and / or

(c) member's marriage or attempted marriage to a person known to be of the same biological sex.

(2) If the member has engaged in homosexual conduct, the member will be separated unless there are further findings that:

(a) Such conduct is a departure from the member's usual and customary behavior;

(b) such conduct under all the circumstances is unlikely to recur;

(c) such conduct was not accomplished by use of force, coercion, or intimidation;

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

(e) the member does not have a propensity or intent to engage in homosexual acts.

b. ***Procedure***. An administrative separation board procedure is used in all homosexual conduct cases unless the member requests the board be waived.

(1) ***Inquiry***. A commanding officer or officer in charge, who receives credible information indicating that a member has made an admission of homosexual conduct, shall inquire thoroughly into the matter to determine all the facts and circumstances of the case. Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when (s)he has received credible information that there is basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs. A fact-finding inquiry may be conducted by the commander personally or by a person (s)he appoints. It may consist of an examination of the information reported or a more extensive investigation, as necessary. The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations. If a commander has credible evidence of possible criminal conduct, (s)he shall follow the procedures outlined in the *Manual for Courts-Martial* and implementing regulations issued by the Secretary of the Navy. Credible information exists, for example, when a reliable person states that (s)he: observed or heard a servicemember engaging in homosexual acts, or saying that (s)he is a homosexual or bisexual or is married to a member of the same sex; heard, observed, or discovered a member make a spoken or written statement that a reasonable person would believe was intended to convey the fact that (s)he engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts; or observed behavior that amounts to a nonverbal statement by a member that (s)he is a homosexual or bisexual (i.e., behavior that a reasonable person would believe was intended to convey the statement that the member engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

(2) *Disposition*. If, upon completion of the inquiry, the commanding officer determines that there is no probable cause to believe that one or more of the circumstances for which separation is authorized has occurred, the CO should promptly terminate all action on the case; otherwise, the CO shall initiate administrative separation proceedings in accordance with applicable regulations.

(3) *Processing*. Administrative processing is mandatory and the member has a right to an administrative separation board.

(a) Process for the underlying way in which homosexual conduct is manifested (i.e., homosexual conduct as evidenced by a member's statement that (s)he is homosexual).

(b) In all cases, SECNAV / BUPERS is the separation authority.

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

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

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

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

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

(d) openly in public view;

(e) for compensation;

(f) aboard a military vessel or aircraft; or

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

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

11. ***Drug abuse rehabilitation failure.*** MILPERSMAN 3630500; MARCORSEPMAN 6208.

a. Honorable, general, or ELS.

b. Notification procedures.

c. A member who has been referred to a formal program of rehabilitation for personal drug abuse (Level II or III), in accordance with OPNAVINST 5350.4 or MCO 5300.12, may be separated for:

(1) Failure through inability or refusal to participate in, cooperate in, or successfully complete such a program;

(2) an alcohol incident or drug-related incident any time in his / her career following completion of the formal rehabilitation program and there is no potential for further useful service;

(***Note***: Alcohol incident—conduct or behavior caused by ingestion of alcohol resulting in discreditable involvement with civilian / military authorities. Drug incident—events requiring medical care or creating a public disturbance determine whether the incident is drug-related (any incident in which drug abuse is a factor; includes use, trafficking, and possession of controlled substances and / or paraphernalia).)

(3) failure to follow Level II or III aftercare; or

(4) drug abuse any time after Level II or III rehabilitation and there is no potential for further useful service. This category includes possession and/or use of controlled substances, nonmedical or improper use of other drugs (such as over-the-counter and prescription drugs), use of substances for other than intended use (such as sniffing glue or gasoline fumes), or steroid use.

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

12. ***Alcohol abuse rehabilitation failure.*** MILPERSMAN 3630550; MARCORSEPMAN 6209.

a. Honorable, general, or ELS.

b. Notification procedures.

c. A member who has been referred to a formal program of rehabilitation for personal alcohol abuse, per OPNAVINST 5350.4 or MCO 5370.6, may be separated for:

(1) Failure, through inability or refusal, to participate in, cooperate in, or successfully complete such a program;

(2) an alcohol or drug-related incident any time in his/her career following Level II or III rehabilitation treatment;

(3) failure to follow directed Level II or III aftercare; and

(4) returning to alcohol abuse after treatment.

d. Alcohol abuse is defined as the abuse of alcohol to an extent that it has an adverse effect on the user's health, behavior, family, community, the Navy, or leads to unacceptable behavior as evidenced by one or more alcohol incidents.

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

13. *Misconduct*. MILPERSMAN 3630600, 3630620; MARCOR-SEPMAN, para. 6210.

a. Honorable, general, OTH, or ELS.

b. Because an OTH is possible, administrative board procedures are used in all cases except, as noted below, with respect to the subcategories of minor disciplinary infractions and pattern of misconduct.

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

d. *Subcategories*. Subcategories under misconduct include: minor disciplinary infractions, pattern of misconduct, drug abuse, commission of a serious offense, and civilian convictions.

(1) *Minor disciplinary infractions*

(a) "Minor disciplinary infractions" is defined as a series of at least three (3), but not more than eight (8), minor disciplinary infractions appropriately disciplined under Article 15, UCMJ, and documented in the service record within one enlistment, and by not more than two (2) punishments under the UCMJ. None of these infractions could have resulted in a punitive discharge. The Marine Corps interpretation of this provision is that it is not even necessary the infractions result in NJP, only that they be documented in the service record (e.g., a page 11 counseling / warning regarding extra military instruction). The Navy interpretation of this provision is that the UCMJ violations must be between three (3) and eight (8) in number, non-drug related, and, in fact, punished under the UCMJ. If one or more of the violations cited could have resulted in a punitive discharge, or there are three (3) or more periods of unauthorized absence of more than three (3) days duration each, or there are three (3) or more punishments under the UCMJ (NJP's) within the current enlistment, processing in the Navy should be effected for pattern of misconduct rather than minor disciplinary infractions. If separation of a member in entry level status is warranted solely by reason of minor disciplinary infractions, processing should be under entry level performance and conduct rather than misconduct (minor disciplinary infractions).

(b) Counseling required.

(c) A commanding officer may elect to use the notification procedure, vice the administrative board procedure, if an OTH will not be recommended in the case. If the CO contemplates recommending an OTH, the administrative board procedure must be used. If any of the offenses for which the member is being processed have a punitive discharge authorized in the table of maximum punishments, misconduct commission of a serious offense is the proper basis for processing.

(2) *Pattern of misconduct*

(a) "Pattern of misconduct" is defined as a pattern of more serious misconduct than minor infractions consisting of two (2) or more discreditable involvements with civil or naval authorities or two (2) or more instances of conduct prejudicial to good order and discipline within one enlistment. Such a pattern may include both minor and more serious infractions. (For the Navy, the latest offense and counseling must have occurred while assigned to the parent command; such counseling must be violated prior to processing.) A pattern of misconduct includes the following:

-1- Any established pattern of involvement of a discreditable nature with civil or naval authorities within the current enlistment

(the Navy interprets this provision to include three (3) or more civilian convictions, three (3) or more punishments under the UCMJ (NJP's or courts-martial), or any combination of three (3) minor civilian convictions for misdemeanors or punishments under the UCMJ. MILPERSMAN 3630600.1a(2); MARCORSEPMAN 6210.3.);

-2- an established pattern of at least three (3) unauthorized absences over three (3) days;

-3- an established pattern of dishonorable failure to pay just debts (*see* MILPERSMAN 6210140.14; MARCORSEPMAN 6310.3); or

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

(b) The Marine Corps requires two (2) or more instances of discreditable conduct.

(c) Counseling required.

(d) In the Navy, the counseling must be from the current command. Both the Navy and Marine Corps require the counseling be within the current enlistment.

(3) *Drug abuse* (MILPERSMAN 3630620; MARCOR-SEPMAN 6210.5)

(a) A member must be processed for *all* drug-related incidents. OPNAVINST 5350.4 defines a drug-related incident, in pertinent part, as: "Any incident in which drugs are a factor. For the purposes of this instruction, voluntary self-referral, use or possession of drugs or drug paraphernalia, or drug trafficking constitute an incident." *See also* MCO P5300.12.

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

(c) Characterization of discharge. Under most circumstances involving possession, use, and / or trafficking, the member will receive an OTH discharge. If evidence of the drug-related incident was derived from a urinalysis test, the characterization of the discharge depends upon the circumstances under which the urine sample was obtained. Generally, if the urinalysis results could

be used in disciplinary proceedings, it can be used to characterize an administrative discharge as less than honorable. Processing is mandatory regardless of whether the evidence may be used toward an OTH or not. Some reasons for ordering urinalysis tests which yield results that can be used in disciplinary proceedings, and therefore can be utilized to characterize a discharge as OTH, include:

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

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

-3- medical tests for general diagnostic purposes.

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

(e) If the urinalysis result is not usable to characterize the discharge as OTH, the commanding officer may then elect to use the notification procedure vice the administrative board procedures if the member does not have over six (6) years of service.

(4) ***Commission of a serious offense*** (MILPERSMAN 3630600.1c and d; MARCORSEPMAN 6210.6)

(a) A member may be separated for commission of a serious military or civilian offense when a punitive discharge would be authorized for the same, or a closely related, offense under the UCMJ. There are some serious offenses which must be processed for separation and some that are left within the convening authority's discretion.

(b) In the Marine Corps, a serious offense is:

-1- The specific circumstances warrant separation; and

-2- a punitive discharge would be authorized.

(c) In the Navy, a serious offense is an offense which, if it or a similar offense is charged under the UCMJ, could receive a punitive discharge.

(d) If the offense is evidenced by a special or general court-martial conviction—the findings of which have been approved by the convening authority—the findings of the court-martial shall be binding on the administrative board. MILPERSMAN 3630600.1c(1).

(e) If the offense is one in which the member was convicted at special or general court-martial, but did not receive a punitive discharge or had a punitive discharge suspended, SECNAV must approve an OTH if it is recommended.

(f) Generally, a member may not be separated on the basis of conduct that has been the subject of judicial proceedings resulting in an acquittal on the merits or its equivalent. In the Navy, if the basis for processing under this provision is evidenced solely by a court-martial conviction and the court-martial convening authority has remitted or suspended a punitive discharge, the case should be forwarded to that court-martial convening authority for endorsement prior to forwarding the case to CHNAVPERS. MILPERSMAN 3630600.1c(2).

(g) In the Navy, it is mandatory processing for certain types of serious offenses:

-1- The CO believes by a preponderance that the member committed extremely serious misconduct resulting in, or having the potential to result in, death or producing serious bodily harm; or

-2- sexual perversion (including lewd and lascivious behavior, indecent assault, indecent acts, indecent exposure, or sodomy); or

-3- the first substantiated incident of aggravated sexual harassment involving:

-a- threats or attempts to influence another's career or job in exchange for sexual favors;

-b- rewards in exchange for sexual favors; and

-c- physical contact of a sexual nature which, if charged as a UCMJ violation, could result in a punitive discharge.

(***Note***: Substantiated means there has been a court-martial or NJP finding of guilty or the CO believes by a preponderance of the evidence that sexual harassment occurred.)

(h) A military or civilian conviction is not required to process for a serious offense.

(5) ***Civilian conviction*** (MILPERSMAN 3630600.1e and f; MARCORSEPMAN 6210.7.

(a) A member may be separated upon conviction by civilian authorities, foreign or domestic, or action taken which is tantamount to a finding of guilty provided the offense, or closely related offense, could warrant a punitive discharge under the UCMJ or the sentence includes confinement of six (6) months or more regardless of suspension or probation.

(b) In the Marine Corps, there is an additional element to establish a civilian conviction for which the member will be processed -- the facts must also warrant separation.

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

(d) In the Navy, it is mandatory to process those civilian convictions which resulted in, or could have resulted in, death or serious bodily injury. MILPERSMAN 3630600.1f.

(e) For separation of reservists for a civilian conviction, see MILPERSMAN 3610300.4c and MARCORSEPMAN 1004.4d.

14. ***Separation in lieu of trial by court-martial***. MILPERSMAN 3630650; MARCORSEPMAN 6419.

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

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

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

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

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

c. The Navy also requires that the member's request, when forwarded by the command to the separation authority, include the results of a medical exam attesting to the member's mental competence or a medical officer's statement that a psychiatric evaluation is not necessary. MILPERSMAN 3630650.4c(1). The examination is intended to ensure the member understands the nature and quality of the wrongful conduct and that (s)he had sufficient mental capacity to understand the nature of the proceedings.

d. The general court-martial convening authority is authorized to approve or disapprove such requests to direct discharges and to direct reduction to paygrade E-3 where applicable. In the Navy, CO's with SPCM authority may approve a discharge for an OTH for enlisted members who have been absent without authority over 30 days, have been declared deserters, have returned to naval control, and are charged only with unauthorized absence over 30 days.

15. *Security*. MILPERSMAN 3630700; MARCORSEPMAN 6212.

a. Honorable, general, OTH, or ELS.

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

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

16. ***Unsatisfactory participation in the Ready Reserve.*** MILPERSMAN 3630800; BUPERSINST 1001.39A; MARCORSEPMAN 6213.

a. Honorable, general, or OTH.

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

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

17. ***Separation in the best interest of the service.*** MILPERSMAN 3630900; MARCORSEPMAN 6214.

a. Honorable, general, or ELS.

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

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

d. Examples of processing a member in the best interest of the service include:

(1) Cross-dressers; and

(2) excessive tattoos in visible areas depicting hate groups.

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

DD -- Dishonorable Discharge

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

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

OTH -- Other than Honorable

GEN -- General (under honorable conditions)

HON -- Honorable Discharge

E -- Eligible

NE -- Not Eligible

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

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

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

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

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

NOTES

NOTES (continued)

CHAPTER XXXIII

ADMINISTRATIVE SEPARATION PROCEDURES

MANDATORY ENLISTED ADMINISTRATIVE SEPARATION PROCESSING

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

A. Homosexual conduct;

B. minority: under the age of 17 at the time of discovery (all);

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

D. drug abuse (all);

E. a civilian conviction (Navy only) (some mandatory / nonmandatory); and

F. commission of a serious offense (some mandatory / nonmandatory) including sexual perversion (preliminary notification should be provided to Pers-66/83 before the initiation of administrative processing in incest cases) and sexual harassment (aggravated cases) (all).

Per MILPERSMAN 3610200.2, 3620285.1a; MARCORSEPMAN 1004, 6204, 6207, 6210, all involuntary enlisted separations require the use of either the notification procedure or administrative board procedure. Primary references for administrative separation processing are the MILPERSMAN, chapter 36 (Navy) and the MARCORSEPMAN (Marine Corps).

DUAL PROCESSING

If a member is processed for separation, the member must be processed for *every* basis which exists under the circumstances. BUPERS routinely rejects cases in which processing is incomplete (Navy only).

COUNSELING

A. *Bases for separation.* Counseling warnings (page 13 Navy, page 11 Marine Corps) and rehabilitation efforts are a prerequisite to the initiation of separation processing for the following bases for separation discussed above:

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

2. weight control failure (MILPERSMAN 3620200; NAVADMIN 071/93; MARCORSEPMAN 6203; and ALMAR 57/93);

3. entry level performance and conduct (MILPERSMAN 3630200.2; MARCORSEPMAN 6205.);

4. unsatisfactory performance (MILPERSMAN 3630300.2; MARCORSEPMAN 6206.); and

5. misconduct due to minor disciplinary infractions or pattern of misconduct (MILPERSMAN 3630600.2; MARCORSEPMAN 6210.).

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

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

1. Written notification concerning deficiencies or impairments;

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

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

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

Forms for the counseling warning are contained in chapter 36 of the MILPERSMAN and in MARCORSEPMAN 6105. This counseling warning may be a page 13 entry or letter service record entry in the Navy and a page 11 SRB entry in the Marine Corps. It must be dated and signed by the servicemember. If the member refuses to sign, a notation to that effect should be made on the service record entry and signed and dated by an officer. A copy of the counseling warning must be included in the administrative separation package.

NOTIFICATION AND ADMINISTRATIVE BOARD PROCEDURES

A. *Notification procedure*

1. *Notice*. MILPERSMAN 3640200.5; MARCORSEPMAN 6303.3a. If the notification procedure is required, the respondent shall be notified in writing of the matter by the commanding officer. Such written notice, called the Letter of Notification, states:

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

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

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

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

e. the respondent's right to submit statements;

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

g. the right to request an administrative board if the respondent has six (6) or more years of total active and Reserve naval service;

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

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

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

Forms for this notification may be found in MILPERSMAN 3640200.5 (Navy) and MARCORSEPMAN, fig. 6-2 (Marine Corps).

2. *Counsel.* MILPERSMAN 3640200.3; MARCORSEPMAN 6303.3b.

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

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

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

(3) the commanding officer does not anticipate having access to qualified counsel from another vessel, unit, or activity for at least the next five (5) days; and

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

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

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

3. *Response*. MILPERSMAN 3640200.4; MARCORSEPMAN 6303.2c. The respondent shall be provided a reasonable period of time, not less than two (2) working days, to respond to the notice. This response is called the Statement of Awareness. An extension may be granted upon a timely showing of good cause by the respondent. The respondent's election as to each of the rights set forth above shall be recorded and signed by the respondent and witnessed by respondent's counsel if available.

The respondent's commanding officer shall forward a copy of the notice and the respondent's reply to the separation authority. Forms for the respondent's statement of awareness to the notification procedures may be found in MILPERSMAN 3640200.6 (Navy) and MARCORSEPMAN, fig. 6-3 (Marine Corps). The respondent may additionally submit a statement in response or rebuttal to the proposed action.

4. *Additional notification requirements*

a. ***Member confined by civil authorities***. MILPERSMAN 3640200.4; MARCORSEPMAN 6303.4a. If separation proceedings have been initiated against a respondent confined by civil authorities, the case may be processed in the absence of the respondent. When a board is appropriate or required, there is no requirement that the respondent be present at the board hearing. Rights of the respondent before the board can be exercised by counsel on behalf of the respondent.

b. *Certain reservists*. MILPERSMAN 3640200; MARCORSEPMAN 6303.4b.

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

(a) At the request of the member;

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

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

B. *Administrative board procedure*

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

a. If the proposed basis for separation is homosexual conduct;

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

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

2. *Notice*. If an administrative board is required, the member shall be notified in writing by the commanding officer of the following matters, in addition to those matters discussed for notification procedures (*Note*: forms for this notice may be found in MILPERSMAN 3640200.7 and MARCORSEPMAN, fig. 6-3.):

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

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

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

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

e. the right to waive the rights discussed above;

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

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

3. ***Counsel***. MILPERSMAN 3640200.3; MARCORSEPMAN 6304.3.

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

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

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

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

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

4. ***Response***. MILPERSMAN 3640200.4; MARCORSEPMAN 6304.4. The respondent shall be provided a reasonable period of time, but not less than two (2) working days, to respond to the notice. An extension may be granted upon a timely showing of good cause. The election of the respondent as to each of the rights set forth in para. B.2 shall be recorded and signed by the respondent and respondent's counsel.

Forms for the respondent's statement of awareness to the administrative board procedures may be found in MILPERSMAN 3640300.8 (Navy) and in MARCORSEPMAN, fig. 6-3 (Marine Corps).

5. ***Waiver***. MARCORSEPMAN 6304.5.

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

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

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

d. The Navy has no conditional waiver. MILPERSMAN 3610100.5. If a member waives an administrative board, (s)he must document that they understand they may receive an OTH. The convening authority may agree to recommend a discharge higher than OTH, but it will be the separation authority's determination.

C. ***Message submissions by Navy commanding officers***. MILPERSMAN 4640200.11. In the Navy, when command processing of a member for administrative separation has been completed, commanding officers are authorized to submit the case to the Chief of Naval Personnel (CHNAVPERS) by message for final action, except where the member's case has been heard by an administrative board where the convening authority is the separation authority, where the separation is in the best interest of the Navy, or cases processing USNR-R. Message submissions are to be transmitted by routine precedence in the format provided in MILPERSMAN, chapter 36. When an administrative separation case is submitted by message, formal submission of the case by letter of transmittal in accordance with MILPERSMAN is still required. Moreover, the letter of transmittal must be forwarded within 15 working days after submission of the message to CHNAVPERS.

D. ***Processing goals***. MILPERSMAN 3610100.6; MARCORSEPMAN 6102. To ensure efficient administration of enlisted separations, the Secretary of the Navy has established processing time goals.

1. ***Discharges without board action***. When board action is not required, or is waived, separation action should be completed in 15 working days from the date the command notifies a member of the commencement of separation proceedings to the date of separation, except when the initiating authority and the separation authority are not located in the same geographical region; in which case,

separation action should be completed in 30 working days (10 days of which is allocated in the Navy to the initiating command).

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

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

ADMINISTRATIVE BOARDS

A. ***Convening authority.*** MILPERSMAN 3640350.1b; MARCORSEPMAN 6314. An administrative board may, by written order, be appointed by the following:

1. In the Navy, any commanding officer with authority to convene special courts-martial (SPCM); and

2. in the Marine Corps, any Marine commander exercising SPCM authority when authorized by an officer who has GCM authority.

B. ***Composition.*** MILPERSMAN 3640350.1b; MARCORSEPMAN 6315.1. Administrative boards are composed of three (3) or more experienced Regular or Reserve officers (or senior enlisted, E-7 or above) senior to the respondent, in the naval service, at least one of whom must be a line officer serving in the grade of O-4 or higher. An officer frocked to the grade of O-4 (or an enlisted frocked to E-7) is not eligible to be the senior member. In the Navy, if an O-4 line officer is not available at the command, an O-4 staff corps officer may be used. An explanation as to why an O-4 line officer is not reasonably available should be included in the comments of the commanding officer in the letter of transmittal. A majority of the board shall be commissioned or warrant officers. Where the respondent is a member of a Reserve component, at least one member of the board shall be a Reserve commissioned officer and all members must be commissioned officers if the member is processed under administrative board procedures. When the respondent is an active-duty member, the senior member must be on the active-duty list of the service. The opportunity to serve on administrative boards should be given to women and minorities; however, the mere appointment or failure to appoint a member of such a group to the board does not provide a basis for challenging the proceedings. An odd number of board members should be appointed to avoid evenly divided decisions.

C. *Recorder*. MILPERSMAN 3640350.1e; MARCORSEPMAN 6315.3. The convening authority details an officer on active duty as recorder. The recorder's duties include clerical and preliminary preparation as well as presenting to the board, in an impartial manner, all available information concerning the respondent. The recorder also prepares the report of the board which, together with all allied papers, is forwarded to the separation authority.

D. *Reporter*. There is no requirement that a reporter be appointed. Where witnesses are expected to testify, however, the presence of a reporter is desirable.

E. *Legal advisor*. MILPERSMAN 3640350.1d; MARCORSEPMAN 6315.4. At the discretion of the convening authority, a nonvoting legal advisor who is a judge advocate certified in accordance with Art. 27(b), UCMJ, may be appointed to the administrative board. If appointed, the legal advisor shall rule finally on all matters of procedure, evidence, and challenges—except challenges to him / herself. A legal advisor shall not be junior to, nor in the same chain of command as, any voting member of the board. This procedure is rarely used.

F. *Hearing procedure*. MILPERSMAN 3640350.2; MARCORSEPMAN 6316, 6317.

1. *Rules of evidence*. An administrative board functions as an administrative, rather than a judicial, body; consequently, the strict rules of evidence applicable at courts-martial do *not* apply. Other than Article 31, UCMJ, limitations and witness privileges, the board should consider any competent evidence which is relevant and material in the case. The respondent and witnesses must be provided with Privacy Act statements whenever personal information is solicited.

2. *Preliminaries*. MILPERSMAN 3640350.3; MARCORSEPMAN 6316.2. At the outset of the hearing, the president of the board should inquire of the respondent concerning his / her knowledge of rights, including the right:

a. To appear in person, with or without counsel, or, in his / her absence, have counsel represent him / her at all open board proceedings;

b. to challenge any voting member of the board, for cause only (the member cannot render a fair and impartial decision):

(1) In the Navy, if a member is challenged, the convening authority or the legal advisor (if any) decides the challenge (MILPERSMAN 3640350.4);

(2) in the Marine Corps, the board (excluding the challenged member) or the legal advisor (if any) determines the propriety of a challenge to any member. (A tie vote or a majority vote in favor of sustaining the challenge disqualifies that member from sitting. MARCORSEPMAN 6316.7c.);

c. to request the personal appearance of witnesses;

d. to submit sworn or unsworn statements, depositions, affidavits, certificates or stipulations, including depositions of witnesses not reasonably available or unwilling to appear voluntarily;

e. to testify under oath and submit to cross-examination or, in the alternative, to make or submit an unsworn statement and not be cross-examined;

f. to question any witness who appears before the board;

g. to examine all evidence available to the board;

h. to notice of, and to interview, all witnesses to be called;

i. to have witnesses excluded except while testifying; and

j. to make argument.

Note: A failure on the part of the respondent to exercise any of these rights, after being advised of them, will not bar the board's proceeding.

3. ***Presentation of evidence***. The recorder presents the case for the government, providing the board with complete and impartial information. Next, the respondent has the opportunity to present matters in his / her behalf. Following any matter presented by the respondent, the recorder may present rebuttal evidence. When the recorder introduces rebuttal evidence, the respondent is entitled to do likewise. Finally, prior to closing for deliberation, the board may call any witness or hear other evidence it deems appropriate.

4. ***Burden of proof***. The burden of proof before administrative boards is on the government, and the standard of proof to be employed is the "preponderance of evidence" test. MILPERSMAN 3640350.5b; MARCORSEPMAN 6316.10, 6316.11.

G. *Witness requests.* MILPERSMAN 3640350.4c(2); MARCORSEPMAN 6317.

1. *General.* The respondent may request the attendance of witnesses in his / her behalf at the hearing.

2. *Respondent's witness request involving expenditure of funds.* If production of a witness will require expenditure of funds by the convening authority, the written request for the attendance of a witness shall also contain the following:

a. A synopsis of the testimony that the witness is expected to give;

b. an explanation of the relevance of such testimony to the issues of separation or characterization; and

c. an explanation as to why written or recorded testimony would not be sufficient to provide for a fair determination.

3. *Convening authority's action.* The convening authority may authorize expenditure of funds for production of witnesses *only if* the presiding officer (after consultation with a judge advocate, if reasonably available, or the legal advisor, if appointed) determines that:

a. The testimony of a witness is not cumulative;

b. the personal appearance of the witness is essential to a fair determination on the issues of separation or characterization;

c. written or recorded testimony will not accomplish adequately the same objective;

d. the need for live testimony is substantial, material, and necessary for a proper disposition of the case; and

e. the significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness, favors production of the witness. Guidance for funding the travel may be found in section 0137 of the *JAG Manual.*

4. *Postponement of the hearing.* If the convening authority determines that the personal testimony of a witness is required, the hearing shall be postponed or continued, if necessary, to permit the attendance of the witness.

5. ***Testimonial evidence***. Testimonial evidence may be presented through the use of oral or written depositions, unsworn statements, affidavits, testimonial stipulations, or any other accurate and reliable means in addition to personal appearance.

6. ***Witness unavailable***. The hearing shall be continued or postponed to provide the respondent with a reasonable opportunity to obtain a written statement from the witness, if the witness requested by the respondent is unavailable, when:

a. The presiding officer determines that the personal testimony of the witness is not required;

b. the commanding officer of a military witness determines that military necessity precludes the witness's attendance at the hearing; or

c. a civilian witness declines to attend the hearing.

7. ***Civilian government employee***. Paragraph G.6.c above does not authorize a Federal employee to decline to appear as a witness if directed to do so in accordance with applicable procedures of the employing agency.

H. ***Board decisions***. MILPERSMAN 3640350.5; MARCORSEPMAN 6319. The board shall determine its findings and recommendations in closed session. The board must make:

1. Findings of fact related to each basis for processing;

2. recommendations as to ***retention*** or ***separation***;

(***Note***: If the board recommends separation, it may ***recommend*** that the separation be suspended.)

3. if separation is recommended, the basis therefor, as well as the character of the separation, must be stated (In determining the character of the discharge to be recommended, the board may consider only those matters that occurred during the current enlistment or period of service.);

4. recommendations as to whether the respondent should be retained in the Ready Reserve;

5. in homosexual conduct cases:

a. if the board finds that one or more of the circumstances authorizing separation is supported by the evidence, the board shall recommend separation—unless the board finds that retention is warranted under the limited circumstances described [MILPERSMAN 3630400; MARCORSEPMAN 6207(3)(b)(1)] (There are no local separations for homosexual conduct; all cases must be forwarded to BUPERS or CMC, with SECNAV acting as separation authority.);

b. if the board does not find that there is sufficient evidence that one or more of the circumstances authorizing separation has occurred, the board shall recommend retention—unless the case involves another basis for separation of which the member has been duly notified; and

6. a recommendation as to whether the member should be transferred in the paygrade held or the next inferior paygrade (when the respondent is eligible for transfer to the Fleet Reserve / retired list) and the board recommends separation.

I. *Record of proceedings*

1. *General*. The record of proceedings shall be kept in summarized form unless the convening authority or separation authority directs that a verbatim transcript be kept. The record of proceedings is authenticated in the Navy by the president and in the Marine Corps by the president and the recorder. The record is then forwarded, together with all exhibits and the board's report, to the convening authority who will concur or nonconcur in a letter of transmittal.

2. *Contents of the record of proceedings*

a. *Navy*. In the Navy, per MILPERSMAN 3640350.6-7, the record of proceedings shall, as a minimum, contain:

(1) A summary of the facts and circumstances;

(2) supporting documents on which the board's recommendation is based, including (at least) a summary of all testimony;

(3) the identity of the respondent's counsel and the legal advisor, if any, including their legal qualifications;

(4) the identity of the recorder and members;

(5) a verbatim copy of the board's majority findings and recommendations signed by ***all members*** making the findings and recommendations;

(6) the ***authenticating signature of the president*** on the entire record of proceedings or, in his / her absence, any member of the board;

(7) signed, dissenting opinions of any member, if applicable, regarding findings and recommendations; and

(8) counsel for the respondent's authentication of findings.

(***Note***: It is no longer necessary for counsel for respondent (or respondent, if not represented by counsel) to review the record of proceedings and all supporting documentation before forwarding to CHNAVPERS. A statement of deficiencies can be submitted separately via the convening authority to CHNAVPERS.)

b. ***Marine Corps***. In the Marine Corps, per MARCOR-SEPMAN 6320, the record of proceedings shall contain as a minimum:

(1) An authenticated copy of the appointing order;

(2) any other communication from the convening authority;

(3) a summary of the testimony of all witnesses, including the respondent when the respondent testifies under oath or otherwise;

(4) a summary of any sworn or unsworn statements made by absent witnesses if considered by the board;

(5) the identity of the counsel for the respondent and the recorder with their legal qualifications, if any;

(6) copies of the letter of notification to the respondent, advisement of rights and acknowledgement of rights;

(7) a complete statement of facts upon which the board's recommendation for discharge is based, accompanied by appropriate supporting documents;

(8) a summary of any unsworn statement submitted by the respondent or his / her counsel; and

(9) the respondent's signed acknowledgement that (s)he was advised of, and fully understood, all of his / her rights before the board.

J. ***Actions by the convening authority***

1. *Navy*. MILPERSMAN 3640350.

a. If the commanding officer determines that the respondent should be retained, the case may be closed, except for any case in which processing is mandatory in accordance with MILPERSMAN; in which case, the matter must be referred to BUPERS for disposition.

b. If the commanding officer decides that separation is warranted or separation processing is mandatory, it is sent directly to BUPERS for action. In the Navy, any discharge recommendation must be signed by the commanding officer.

c. For Navy members, chapter 36 of the MILPERSMAN authorizes the special court-martial convening authority to be the separation authority in certain cases where the authorized discharge is honorable, general, or ELS and the member does not object to separation. In those cases where an administrative board is held and an honorable or general discharge is recommended, the special court-martial convening authority may act as the separation authority. In all cases, refer to chapter 36 for additional guidance. No homosexual conduct or sexual harassment cases may be separated by the commanding officer.

2. *Marine Corps*. MARCORSEPMAN 6305.

a. If the convening authority is not the appropriate separation authority, the convening authority will forward the case with a recommendation in a letter of transmittal to the appropriate separation authority.

b. If the convening authority is the appropriate separation authority, before taking final action, (s)he will refer the case to his / her staff judge advocate for a written review to determine the sufficiency in fact and law of the processing—including the board's proceedings, record, and report. MARCOR-SEPMAN 6308.1c.

K. ***Action by the separation authority***

1. ***General rules (other than homosexual conduct cases)***. When the separation authority receives the record of the board's proceedings and report in an administrative separation case, (s)he may specifically take one of the following actions (MILPERSMAN 3640370; MARCORSEPMAN 6309.2):

a. Approve the board's recommendation for retention;

b. disagree with the administrative board's recommendation for retention and refer the entire case to the Secretary of the Navy requesting to direct a separation under honorable conditions with an honorable or general discharge or, if appropriate, ELS or, if eligible, transfer to the Fleet Reserve / retired list in the current or next inferior paygrade as in the best interest of the Navy or Marine Corps (***Note***: This will not normally be accomplished if the board found no misconduct.);

c. approve the board's recommendation for separation and direct execution of the recommended type / description of separation (including, if applicable, transfer to the Fleet Reserve / retired list in the current or next inferior paygrade);

d. approve the board's recommendation for separation, but ***upgrade*** the type of characterization of service or description of service to a more creditable one;

e. approve the board's recommendation for separation, but change the ***basis*** therefore, when the record indicates that such action would be appropriate;

f. disapprove the recommendation for separation and *retain* the member;

g. disapprove the board's recommendation concerning transfer to the IRR;

h. approve the recommendation for separation, but *suspend* its execution for a specific period of time;

i. approve the separation, but disapprove the board's recommendation as to suspension of the separation; or

j. set aside the findings and recommendations of the board and send the case to another board hearing if the separation authority finds legal prejudice to the substantial rights of the respondent, or that findings favorable to the respondent were obtained by fraud or collusion.

2. *Suspension of separation.* MILPERSMAN 3610260.14; MARCORSEPMAN 6310.

a. Except when the basis for separation is fraudulent enlistment and, in the Marine Corps, when the approved separation is an OTH, a separation may be suspended by the separation authority or higher authority for a specified period of not more than twelve (12) months if the circumstances of the case indicate a reasonable likelihood of rehabilitation. In the Navy, administrative board and commanding officer recommendations for suspension are just that; BUPERS, as the separation authority, will make the final determination.

b. Unless sooner vacated, execution of the approved separation shall be remitted (rescinded) upon completion of the probationary period, upon termination of the member's enlistment or period of obligated service, or upon decision of the separation authority that the goal of rehabilitation has been achieved.

c. During the period of suspension, if further grounds for separation arise, or if the member fails to meet appropriate standards of conduct and performance, one or more of the following actions may be taken:

(1) Disciplinary action;

(2) new administrative action; or

(3) vacation of the suspension and execution of the separation.

d. Prior to vacation of a suspension, the member shall be notified in writing of the basis for the action and shall be afforded the opportunity to consult with counsel and to submit a statement in writing to the separation authority. The respondent must be afforded at least two (2) days to act on the notice.

3. *Homosexual conduct*

a. All homosexual conduct and sexual harassment cases must be forwarded to BUPERS / SECNAV for separation approval / action.

b. If there has been a waiver of board proceedings, the separation authority may dispose of the case as follows:

(1) If the separation authority determines that there is insufficient evidence to support separation, the separation authority should direct retention unless there is another basis for separation of which the member has been duly notified.

(2) If the separation authority determines that one or more of the circumstances authorizing separation has occurred, the member will be separated unless retention is warranted under the limited circumstances described.

c. Presuming evidence supporting the finding of homosexual conduct, the burden of proving that retention is warranted rests with the member except in cases where the member's conduct was solely the result of a desire to avoid or terminate military service.

d. Findings regarding the existence of the limited circumstances warranting a member's retention are required only if:

(1) The member, either personally or through counsel, asserts to the board or, when there has been a waiver of board proceedings, to the separation authority, that one or more such limited circumstances exists; or

(2) the board or separation authority relies upon such circumstances to justify the member's retention.

RELATED REFERENCES

A. Punitive separations: *Manual for Courts-Martial, 1984*

B. Detachment for cause

1. MILPERSMAN 3420260
2. MCO P1000.6 (ACTSMAN), 2209
3. NAVMILPERSCOMINST 1611.A, CH-2
4. CG PERSMAN, CH-12

C. Resignation

1. MILPERSMAN 3830340
2. MARCORSEPMAN, ch. 5
3. CG PERSMAN, CH-12

D. Disability retirement

1. SECNAVINST 1850.4A
2. MILPERSMAN 3860340 - 3860400
3. MARCORSEPMAN, ch. 8
4. COMDTINST M1850.2A; CG PERSMAN, CH-17

E. Retirement / separation

1. SECNAVINST 1811.3A, Subj: VOLUNTARY RETIREMENT AND TRANSFER TO THE FLEET RESERVE OF MEMBERS OF THE NAVY AND MARINE CORPS SERVING ON ACTIVE DUTY

2. SECNAVINST 1420.1A, Subj: PROMOTION AND SELECTIVE EARLY RETIREMENT OF COMMISSIONED OFFICERS ON THE ACTIVE-DUTY LISTS OF THE NAVY AND MARINE CORPS

3. SECNAVINST 1821.1, Subj: REGULATIONS TO GOVERN THE COMPUTATION OF TOTAL COMMISSIONED SERVICE FOR PURPOSES OF INVOLUNTARY RETIREMENT OR DISCHARGE OF CERTAIN STAFF CORPS OFFICERS

4. SECNAVINST 1900.7G, Subj: SEPARATION PAY FOR INVOLUNTARY SEPARATION FROM ACTIVE DUTY

5. MILPERSMAN 3860100 - 3860600

6. MARCORSEPMAN, chs. 2-5

NOTES

NOTES (continued)

CHAPTER XXXIV

STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

STANDARDS OF CONDUCT REFERENCES

A. 5 C.F.R. Part 2635, U.S. Office of Government Ethics (OGE) Regulations

B. DOD Directive 5500.7-R of 30 August 1993, Subj: DOD JOINT ETHICS REGULATIONS

C. SECNAVINST 5370.2, Subj: STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

D. SECNAVINST 4001.2, Subj: ACCEPTANCE OF GIFTS

PURPOSE AND SCOPE

The principal purpose of the federal standards of conduct is to ensure that public officials serve the public good as a whole, rather than private or personal interests. To deter conflicts of interest involving federal officials, the rules not only bar specific wrongful acts, such as bribery, but also inhibit a broad range of general situations that pose the threat or appearance of wrongful acts. That is because, even though many of the situations or actions barred by the rules are not bad in and of themselves, they could lead to situations where an official may be too easily tempted or where a reasonable person could perceive a conflict of interest. As noted by the Supreme Court in *United States v. Mississippi Valley Generating Company*, 364 U.S. 520, 549 (1961), "The moral principle upon which [the rules are based] is the Biblical admonition that 'no man may serve two masters,' Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest." Thus, a key purpose of standards of conduct is to remove the temptation for federal employees to violate their trust with the government. *Mississippi Valley Generating Company*, 364 U.S. at 550. At the same time, the rules seek to balance the ideal of conflict-free government with the reality of complex human situations, relationships, and interactions. In addition, to further clarify the balances involved in defining standards of conduct, the rules contain several examples of how they are applied.

APPLICATION

Although the Office of Government Ethics (OGE) regulations are generally only applicable to commissioned officers and civilian employees, the Joint Ethics Regulations (JER) have made the standards of conduct, contained in 5 C.F.R. Part 2635, applicable to enlisted personnel as well—subject to minor exceptions. In addition, service regulations—including SECNAVINST 5370.2—are applicable to all DON personnel.

GENERAL PRINCIPLES

A. The general principles of the standards of conduct, originally declared in Executive Order 12674 of April 12, 1989, and codified at 5 C.F.R. § 2635.101, are critically important in applying or interpreting the standards of conduct. Because of the complex nature of the rules, the general principles serve as a touchstone for ethical decision-making. The rules may be applied to permit a wide range of conduct, provided the conduct accords with the intent and spirit of the standards of conduct as declared in the general principles.

B. The general principles of the standards of conduct can be summarized as follows:

1. Public service is a public trust;

2. employees shall not use public office for private gain;

3. employees will not permit themselves to develop any interests in conflict with their official duties;

4. employees must avoid even the ***appearance*** of impropriety;

5. employees must act impartially in the performance of official duties; and

6. official property is for official use only.

ETHICS COUNSELORS

A. Because of the complexity of the rules regarding the standards of conduct, the regulations establish ethics officials in each agency. Agency ethics officials establish a number of ethics counselors throughout each agency to provide advice and assistance to employees regarding standards of conduct issues.

B. The following officers are designated as ethics counselors:

1. *Navy and Marine Corps*: General Counsels of Navy activities; commanding officers of NLSOs; and staff judge advocates for officers exercising general court-martial authority.

2. *Coast Guard*: district legal officers (MLC) and legal officers (G-LGL).

C. ***Safe harbor provision***. The rules provide that no disciplinary action may be taken against a person who engaged in conduct in good faith reliance upon the advice from an ethics official, provided the employee made full disclosure to the counselor. 5 C.F.R. § 2635.107(b).

-- The rules do not insulate persons from criminal liability, but reliance upon the advice of an ethics official is a factor considered by the Department of Justice (DOJ) in deciding whether to prosecute. 5 C.F.R. § 2635.107(b).

D. Any disclosures made to an ethics official are not protected by the attorney-client privilege. 5 C.F.R. § 2635.107(b). An agency ethics officer is required to report any information relating to a violation of the criminal code (Title 18 of the U.S. Code). 28 U.S.C. § 535. Persons acting as ethics counselors represent the Federal Government and not those seeking ethics advice. Attorneys must be particularly careful to ensure that persons seeking advice about the standards of conduct understand their relationship with the ethics counselor.

GIFTS FROM OUTSIDE SOURCES - 5 C.F.R. § 2635: Subpart B (200 *et seq.*)

A. ***General standards***. Federal employees are forbidden from soliciting or coercing gifts, or accepting gifts given because of the employee's official position. Also, employees may not accept gifts given by a prohibited source--defined as a person or entity that seeks action, does business with, or is affected by the performance of official duties.

B. *Definition of gifts*. In general, a gift is defined as anything of value (such as gratuities, meals, entertainment, hospitality, travel, favors, loans, or meals). Certain items, however, are excluded [5 C.F.R. § 2635.203(b)]:

1. *Snacks*: modest items of food (e.g., coffee, donuts, etc.), other than as a meal.

2. *Trinkets*: items with little intrinsic value (e.g., cards, trophies, or plaques).

3. *Widely available benefits*: loans, benefits, or discounts generally available to the public or all government employees, or all uniformed military personnel.

4. *Prizes*: awards from contests open to the public, unless the entry was part of official duty.

5. *Pensions*: pension payments from participation in a pension plan through a former employer.

6. *Government-provided items*: items paid for by the government or accepted by the government. *See also* 41 C.F.R. Part 304-1.

7. *Market value*: anything for which the employee paid market value.

C. *Exceptions*. Despite the general prohibition against gifts, federal employees may accept a number of gifts in circumstances where the gift would clearly not violate the general principles of the standards of conduct. 5 C.F.R. § 2635.204. Specifically:

1. *The de minimis exception*: Most employees may accept unsolicited gifts worth $20.00 or less; procurement officials may accept gifts worth $10.00 or less (41 C.F.R. § 3.104). Employees may decline any distinct and separate item to bring the aggregate value of a gift within the limitation, but they may not use the exception as a type of discount by paying the value over $20.00. Employees may not accept gifts totaling over $50.00 from the same source in any calendar year.

2. *Personal gifts exception*: Employees may accept gifts that are in fact based on a personal, unofficial relationship rather than the official position of the employee. The exception is very fact-specific; persons should look at factors such as who paid for the gift and the nature and history of the relationship.

3. *Group benefits and discounts*: Nondiscriminatory benefits that are available to all employees may be accepted if they are reduced fees for joining a professional organization, offered to a broad segment of the population in addition to the government employees, or offered by nonprohibited sources.

4. *Awards*: Awards of $200.00 or less may be accepted if they are received subject to an established recognition program, with written standards, for meritorious service from other than a prohibited source. An agency ethics official may approve a greater award under some circumstances.

5. ***Moonlighting exception***: Federal employees may accept gifts from outside employment activities not related to their official duties, provided the gifts are not offered because of official status and they are of a type customarily provided by employers or prospective employers. The employee, however, must first be disqualified from any future actions involving the outside employer.

6. ***Widely attended gathering exception***

a. Employees may accept gifts of free attendance at a gathering or event from the sponsor of the event under two circumstances:

(1) ***Speaking*** if the employee will participate or speak at the event; or

(2) ***agency interest***. If the event will be widely attended by persons throughout an industry, or will represent a range of interests, the employee's supervisor may permit attendance based on a determination that the attendance will further agency programs or operations.

b. Free attendance includes items such as food, entertainment and instruction, or materials, but does not include transportation, lodging, expenses, or meals not incident to the event.

7. ***Social exception***. Employees may freely attend parties and enjoy the food and entertainment provided, as long as the host is not a prohibited source and no fee is charged to others at the affair.

8. ***Foreign meals exception***. An employee may accept food and entertainment in conjunction with a meeting in a foreign area, provided the cost of the meal is within the applicable per diem rate and the attendance is part of the employee's official duties. In addition, the event must include participation by non-U.S. persons and the gift must be provided by a person other than a foreign government.

9. ***Charity participation exception***. Employees may accept free attendance, course and meeting materials, transportation, lodging, and food provided by a tax-exempt organization and incident to training or meetings if approved by the employee's agency. 5 U.S.C. § 4111.

10. ***Foreign gifts exception***. Employees may accept a gift from a foreign government or international organization pursuant to the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342, if the gift is of minimal value as defined at 41 C.F.R. § 101-49.001-5. Even so, members may never solicit or encourage gifts, decorations, or awards from a foreign government. All decorations, awards, and gifts

from foreign governments to U.S. military and civilian personnel, and their spouses and dependents, must be processed under the procedures outlined in chapter 7 of SECNAVINST 1650.1, *Navy and Marine Corps Awards Manual.*

11. *Festival exception.* In addition to the exceptions provided in the Federal Regulations, the JER states that DOD personnel may accept a gift of free attendance at an event sponsored by a state or local government, or a tax-exempt organization, if the supervisor approves it as justified by community relations.

D. Notwithstanding the foregoing exceptions, federal employees may not accept any gifts in the following circumstances. 5 C.F.R. § 2635.202(c). Specifically:

1. In return for being influenced in an official act;

2. given because of solicitation or coercion;

3. given on a recurring basis; or

4. in violation of any law, such as the Procurement Integrity Act.

E. *Gifts to the DON.* The DON may accept gifts to the department or certain commands under specific circumstances outlined in SECNAVINST 4001.2 and MCO 4001.2. All gifts received must be forwarded to an approval authority for decision. The department will decline any gift that might embarrass the department or the government, or that may imply an endorsement of commercial enterprise. In any event, personnel may not solicit gifts. A sample memorandum to the acceptance authority is provided in the appendices to this chapter.

F. *Returning gifts.* 5 C.F.R. § 2635.205.

1. In some instances, an employee may receive a gift that cannot be accepted. In those cases, the employee must either return it, pay for it, or accept it on behalf of the agency—if authorized. If the gift is perishable, though (such as food or flowers), the gift may be given to a charity, shared within the office or unit, or destroyed.

2. In any event, reciprocation does not equal reimbursement. An employee cannot accept a free meal in violation of the rules, even if the employee will or has paid for a free meal for the other person on some other occasion.

3. When accepting items on behalf of the government, the gifts must be properly forwarded. To forward gifts from foreign governments, see 41 C.F.R. § 101-49; materials from official travel, see 41 C.F.R. § 101-25.103.

GIFTS BETWEEN EMPLOYEES - 5 C.F.R. § 2635 Subpart C (300 *et seq.)*

A. ***General standards***. The regulations strictly prohibit supervisors from coercing the offering of a gift from a subordinate. 5 C.F.R. § 2635.301(c). In addition, the rules bar employees from giving gifts to superiors or their families and from soliciting for gifts, except under some specific exceptions.

B. ***Exceptions***. The exceptions to the general prohibition on gifts between employees are:

1. ***Gifts based on a personal relationship***. If the two employees have a personal relationship justifying a gift and they are not in a subordinate-superior relationship, one may give a gift to the other.

2. ***Voluntary contributions***. Groups may solicit contributions to gifts for fellow employees provided no coercion is used and the amount is determined by the giver. In addition, contributions cannot exceed $10.00, except for contributions towards food and entertainment. Finally, the total value of the group gift cannot exceed $300.00, regardless of the size of the group. 5 C.F.R. § 2635.303(f); JER 2-203.

3. ***Token gifts***. Occasionally, employees may give token gifts (with a value of $10.00 or less) to superiors. That exception would permit an employee to bring back a coffee mug or bag of candy from a vacation trip without violating the rules. 5 C.F.R. § 2635.304.

4. ***Food and refreshments***. Employees may share food and refreshments in the office. In addition, they may offer reasonable personal hospitality at a residence or provide a gift in return for personal hospitality. 5 C.F.R. § 2635.304(a).

5. ***Transferred leave***. Employees may transfer leave to a person other than an immediate supervisor under appropriate circumstances. 5 C.F.R. § 2635.304(a)(5).

6. ***Special occasions***. On special infrequent occasions—such as marriage, childbirth, retirement, or transfer—a subordinate may give a gift appropriate to the occasion. 5 C.F.R. § 2635.304(b).

CONFLICTING FINANCIAL INTERESTS - 5 C.F.R. § 2635 Subpart D (400 *et seq.*)

A. *Disqualifying financial matters.* Employees are prohibited by criminal law from taking official action in any particular matter in which they have a financial interest, actual or imputed, if the action will have a direct and predictable effect on the interest. 5 C.F.R. § 2635.402; 18 U.S.C. § 208a. Employees faced with such conflict of interest must provide written notice of their disqualification to the appropriate supervisor. JER 2-204.

B. *Definitions.* The following definitions are particularly important in this complex area of standards of conduct.

1. *Direct and predictable.* Actions have a "direct and predictable effect" when there is a close causal link between an action taken and a resulting effect on a certain financial interest—an effect that is not a result of unrelated matters and is not speculative. The actual amount of the direct effect is irrelevant to the regulations. 5 C.F.R. § 2635.402(b).

2. *Imputed interests.* In addition to the interests of the employee's family, the interests imputed to a federal employee include those of a general partner; an organization in which the employee is an officer, director, trustee, general partner, or employee; and any person with whom the employee is negotiating about prospective employment.

3. *Particular matter.* Particular matters that implicate the regulatory prohibition include only those that focus on specific facts and circumstances, not broad statements or principles. For example, although an employee with an interest in a small business could not negotiate a government contract with his / her own business, (s)he could make a broad statement that the government must receive full efficiency from its contractors.

C. *Required divesture.* 5 C.F.R. § 2635.403. An agency may prohibit employees, or classes or positions of employees, from holding specific financial interests where the agency determines that the holding will require the employee to be disqualified to such an extent that the employee cannot do the job or where the limitation would adversely affect the agency mission.

IMPARTIALITY IN OFFICIAL DUTIES - 5 C.F.R. § 2635.502 Subpart E (500 *et seq.*)

In order to foster public confidence in the government, the regulations prohibit employees from acting in matters where a reasonable person would question the

employee's impartiality unless the actions are authorized by an appropriate supervisor who determines that no conflict or possible lack of impartiality exists. Matters that would cast doubt on an official's impartiality would include those that could have a direct and predictable effect on the official's household or interests. Note that this section would prohibit some actions that would not violate 18 U.S.C. § 208 for lack of financial motive or imputed interest. In addition, federal officials who receive an "extraordinary payment" from a former employer are not permitted to act in matters affecting that former employer for a period of two years after receipt of the payment. 5 C.F.R. § 2635.503. The term "extraordinary payment" refers to a payment over $10,000.00 that is based on a determination made after the employee was considered or appointed to a government job and is from other than an established compensation, partnership, or benefits program.

SEEKING OTHER EMPLOYMENT - 5 C.F.R. § 2635 Subpart F (600 *et seq.*)

A federal official is not permitted to take any official action with regard to a prospective employer with whom person is seeking employment. 5 C.F.R. § 2635.604. When faced with a potential conflict, the member must give the supervisor a written notice of disqualification. JER 2-204. As long as the employee provides timely notice, the employee may accept interviews—including travel, lodging, and meals—even from a prohibited source. 5 C.F.R. § 2635.204(f).

MISUSE OF POSITION - 5 C.F.R. § 2635 Subpart G (700 *et seq.*)

A. A fundamental principle of the standards of conduct is that federal employees may not use public office for private gain. 5 C.F.R. § 2635.702. Therefore, they may not use their official positions to endorse products or services, coerce benefits, help friends, or give any appearance of government sanction for private benefit.

B. Employees may not use nonpublic information for personal benefit or allow the improper use of nonpublic information by others. 5 C.F.R. § 2635.703. Nonpublic information includes information exempt under 5 U.S.C. § 552; information otherwise protected by statute, Executive order, or regulation; information designated as confidential; and information not released or not authorized for release to the general public.

C. Federal employees may not misuse government property. 5 C.F.R. § 2635.704. Since government property is for government use only, actions such as using government computers for personal profit, mailing personal letters as official mail, or misusing a government vehicle, is clearly improper. Telephones are for

official use as well, although no-cost, no-interference-with-duty use for minor, necessary personal business is authorized by the JER. JER 2-301.

D. Federal officials shall also not misuse official time; either their own or that of their subordinates. Hours for which personnel are receiving pay from the government should be dedicated to the government, not personal interests. 5 C.F.R. § 2635.705. This rule bars such misuse as ordering junior personnel to trim the lawn of a superior or to provide off-duty taxi service.

E. DOD employees shall not solicit or make any sales, either on-duty or off-duty, to other DOD personnel who are junior to them, except for two specific situations. First, employees may sell or lease noncommercial personal or real property. Second, they may make sales in a retail store during off-duty employment. JER 2-205.

OUTSIDE ACTIVITIES - 5 C.F.R. § 2635 Subpart H (800 *et seq.*)

A. *Outside employment.* 5 C.F.R. § 2635.802; JER 2-206, 2-303. Personnel are authorized to engage in outside employment, both paid and unpaid, provided the second job doesn't conflict with the general principles of ethical conduct. Specifically, personnel may not engage in outside employment that interferes with official duties, involves conflicts of interest, violates regulations, or creates an appearance of impropriety. In addition, military members must have command approval before undertaking outside employment. JER 2-206, 2-303. Two other staunch prohibitions limit outside employment. First, employees may not receive outside compensation for their official duties in violation of 18 U.S.C. § 208. Second, employees may not act as agents for anyone, other than family members, in any matter in which the U.S. Government has a substantial interest or is a party. Certain employees, such as attorneys, have additional restrictions. *See* JAGINST 5803.1A.

B. *Expert witnesses.* 5 C.F.R. § 2635.805. Federal employees are prohibited by regulations from serving as expert witnesses in court, except on behalf of the United States or as authorized by the employee's agency in consultation with the DOJ and the agency most closely involved in the litigation. If subpoenaed, though, employees are permitted to testify as fact witnesses. Coast Guard employees and retirees are subject to even stricter limitations contained in 49 C.F.R. Part 9. Those regulations require parties seeking Coast Guard witnesses to first seek all available information through the Freedom of Information Act (FOIA), then to schedule one deposition only to examine the witness. The regulations, however, do not authorize an agency to disregard a court order or a court-approved subpoena. *Dean v. The Veterans Administration*, 151 F.R.D. 83 (N.D.Ohio 1993).

C. *Teaching, speaking, writing.* 5 C.F.R. § 2635.807.

1. Federal employees may not be compensated by outside entities for teaching, speaking, or writing, if the subject of the effort relates to official duties. The subject relates to official duties if the communication of the material is part of the employee's duties, the invitation was based upon the person's official position, the information is derived from nonpublic information, the subject deals with the employee's official ongoing duties or those within the past year, or the subject relates to any ongoing or announced policy, program, or operation of the agency.

2. Current regulations regarding honoraria further restrict federal officials, including commissioned officers, from receiving compensation for speaking, writing, or making an appearance, even when the subject matter does not relate to the person's official duties. Those restrictions are discussed below.

3. The rules provide an exception to the foregoing general prohibition for persons who engage in teaching at an approved school. Employees may be paid for teaching if it is not part of the employee's official duties and the course is part of the regular curriculum of an elementary school, secondary school, institute of higher learning as defined at 20 U.S.C. § 1141(a), or is sponsored by the state, local, or Federal Government.

4. Employees may generally not use their official title in connection with teaching, speaking, or writing, except that the title may be included in the author's biography or used in connection with a professional article as long as the article has a disclaimer that the views are not necessarily those of the government. In addition, employees who customarily use their titles as a term of address or rank may use the term in connection with speaking, writing, or teaching.

D. *Fund-raising.* 5 C.F.R. § 2635.808.

Employees may participate in charitable fund-raising, provided they do not personally solicit from subordinates or prohibited sources or use their official position. In addition, employees may not engage in actions that violate other ethics rules—such as giving away or using official property or creating an appearance of partiality or impropriety. As noted below, other regulations permit CO's to use official property in support of charitable organizations.

GAMBLING

Gambling is generally not allowed for DOD employees on duty or on federal property. JER 2-302. The rule makes an exception for private wagers in living quarters, based on personal relationships, provided that the wagers do not violate

local law. Note, however, that gambling with subordinates may violate Articles 133 or 134 of the UCMJ, by constituting fraternization. The rules also make an exception for gambling activities conducted by organizations made up of DOD members or dependents when the gambling is only among the members and is approved by the CO. Finally, gambling by undercover law enforcement agents in the line of duty does not violate the rule.

SANCTIONS

Supervisors may sanction violators of the standards of conduct in a number of ways. Although the federal regulations are limited only to civilians and commissioned officers, the JER has made most provisions of the ethics regulations applicable to enlisted members as well. JER 1-300(b).

A. *Administrative sanctions*. Practically speaking, most violations of the standards of conduct are not punished through criminal proceedings for a variety of reasons. The most common sanction is through administrative sanctions such as letters of reprimand, poor marks, or removal from positions of trust. Those administrative tools provide an immediate means of correcting potential ethics problems before they develop.

B. *Criminal sanctions*. Although the regulations themselves do not establish criminal sanctions, the underlying statutes do. 5 C.F.R. § 2635.106. For example, a person who accepts outside compensation for performing official duties not only violates the regulation, but also violates 18 U.S.C. § 208 and is subject to prosecution.

C. *Uniform Code of Military Justice*. In addition to the specific ethics statutes, most violations of the standards of conduct by military personnel may be punished under the UCMJ. The JER is a punitive general regulation and applies to all military members without further implementation. DOD Directive 5500.7, sec. B.2.a. Potential UCMJ violations include:

1. Misappropriation (article 121);

2. Bribery and graft (article 134);

3. False pretenses (article 134);

4. Failure to obey (article 92);

5. Conduct unbecoming (article 133);

6. Wrongful disposition of government property (articles 108, 109);

7. Wrongful appropriation (article 121);

8. Dishonorably failing to pay debts (article 134);

9. Bad checks (article 134); and

10. False pretenses (article 34).

HONORARIA

The current prohibition against honoraria contained in 5 C.F.R. Part 2636 is currently one of the most dynamic areas of standards of conduct regulations. The regulation has been successfully challenged by the National Treasury Employee's Union in Federal Circuit Court. The Department of Justice has filed an appeal with the Supreme Court, however, so the issue is still unresolved. Until the matter is settled, ethics practitioners must remain familiar with the rules regarding the receipt of honoraria by federal employees. The regulations were initiated in 1989 as a reaction to excessive speaking and writing fees received by some highly placed government officials. The rules seek to prohibit speaking, appearance, and article fees (which are subject to abuse), while permitting nonoffensive income (such as salaries, book royalties, and fees for artistic expression). Therefore, the term "honoraria" should be construed narrowly.

A. ***General standard***. An individual may not receive honoraria while serving as an employee of the Federal Government. 5 C.F.R. § 2636.201.

B. ***Definitions***. As always, when interpreting federal regulations, the definition of terms is critical.

1. ***Honoraria***: includes money, or anything of value, given for an appearance, speech, or article. 5 C.F.R. § 2636.203(a).

-- Honoraria does not include incidental items such as those acceptable under the gift rules or copies of an article, the refund of actual expenses for producing an article or speech, witness fees, awards, or salaries. In addition, it does not include compensation for producing a series of three or more different—but related—articles, speeches, or appearances. 5 C.F.R. § 2636.203(a).

3. *Appearance*. Includes attendance and incidental remarks at a conference, meeting, hearing, or other event—not including performances, a demonstration of skills, or a display. 5 C.F.R. § 2636.203(b).

-- For example, a federal employee who receives compensation for singing country-western tunes at a nightclub would not be making an "appearance" under the rules.

4. *Speech*. A speech is an address, oration, or other oral presentation, but not scripted material (such as theater, play, or religious ceremonies). 5 C.F.R. § 2636.203(c). Also note that a speech does not include writing a speech for presentation by someone else. 5 C.F.R. § 2636.203(c), example 4. Thus, a federal employee rendering Hamlet's soliloquy is not making a "speech" under the regulations.

5. *Article*. An article is a writing, other than a book or a chapter of a book, intended to be published. It does not include fiction, poetry, lyrics, or scripts. 5 C.F.R. § 2636.203(d).

6. *Receipt (as in compensation)*. To actually receive honoraria means that the honoraria was paid to the employee, or paid to someone else at the employee's direction. That regulatory definition does not include situations where the payment is given directly to a charity, as long as the funds are $2,000.00 or less, and does not violate conflict of interest rules or provide a direct benefit to the employee. 5 C.F.R. §§ 2636.203(e), 2636.204(b). Note, though, that the funds directed to charity by the employee may still be included in the person's gross income under federal tax law. Also, persons who are required to file financial disclosure reports must report to the ethics official any payments to charity in lieu of honoraria that exceed $200.00. 5 C.F.R. § 2636.205.

NON-FEDERAL ENTITIES

A. *Definition*. Non-Federal entities include a wide range of organizations that provide charitable, moral, civic, entertainment, and recreation support to servicemembers or the public. They include military spouse organizations, the Red Cross, the American Bar Association, the Girl Scouts, and the Reserve Officer's Association, among others.

B. *Official participation*. DOD employees may be permitted to attend meetings or other functions as a part of their official duties if the supervisor determines that the attendance would serve a legitimate Federal Government purpose. They may also be authorized to participate as speakers or panel members. JER 3-200. In addition, DOD members may be detailed to serve as official liaisons

where DOD has a significant and continuing interest that may be served. JER 3-201. Members, however, may not receive any payment for performing official duties, and may generally not serve in a management position with the non-Federal entity. JER 3-202.

C. ***Nonofficial participation***. In off-duty time, a federal employee may freely participate in non-Federal entities, provided that the participation is not within the scope of official duties and the employee does not take official action in any matter in which the employee is an active participant. JER 3-300.

D. ***Official support of non-Federal entities***. A unit may support non-Federal organizations for a number of proper and ethical considerations—such as supporting the local community, maintaining good public relations, enhancing morale, or assisting worthy charities. The restrictions imposed on support to outside organizations are intended to ensure that support is provided in an equitable and nondiscriminatory manner.

1. A unit may sponsor an event only when the activity is not a business function of the civilian entity, the event is relevant to the mission of the unit (including maintaining morale), and the entity is recognized or approved for the purpose. JER 3-208.

2. Units may endorse or support fund-raisers only when they involve the Combined Federal Campaign (CFC), emergency and disaster appeals approved by the Office of Personnel Management (OPM), or service relief funds. JER 3-210.

3. Units may support the events of a non-Federal entity only when the event serves community relations, is of interest to the local civilian or military community as a whole, and the support will not interfere with official duties and readiness. In addition, a unit providing such support to one entity must provide like support to other similarly situated organizations. Finally, the entity may only charge a reasonable admission to the event. JER 3-211.

4. The JER authorizes CO's to permit their members to use some federal resources in support of non-Federal entities. JER 3-305a. Specifically, a CO may authorize the occasional use of telephone systems, on a not-to-interfere with official duty basis. Also, a CO may authorize the use of office equipment, libraries, and so forth, as long as the entity is not a prohibited source. The use must serve a legitimate public interest or enhance the professional development of the employee, occur only during personal time, and not interfere with official duties. In no event, however, may personnel use clerical or staff personnel to support a non-Federal entity, nor may they use copiers. JER 3-305b. The use of the command secretary to photocopy newsletters for the spouse's club would be a clear violation of the regulations.

5. Notwithstanding all of the foregoing, military relationships with certain organizations—such as the USO, the CFC, and the Red Cross—are governed by specific regulations or statutes. *See* JER 3-212 for additional information.

TRAVEL BENEFITS

A. *Acceptance of travel from non-Federal sources.* Personnel may accept official travel from non-Federal sources in connection with their attendance in an official capacity at a meeting or similar event in accordance with 31 U.S.C. § 1353. However, personnel may not accept cash payments on behalf of the Federal Government. JER 4-100.

B. *Acceptance of incidental benefits.* JER 4-200.

1. Any benefit, such as frequent flyer miles, that a federal employee receives as a result of official travel becomes government property and must be used in connection with official travel. The best use of the benefits is to purchase additional official travel, although they may also be used for ticket upgrades. Personnel may use the government frequent flyer mileage to upgrade to business class, but not to the highest class of seat available on the flight because of the appearance of impropriety. JAG13 memo dated 10 Dec 93.

2. If the travel benefits from a non-Federal source cannot be used for official purposes, then they must be treated and handled as a gift. For example, frequent flyer miles on account when the member leaves active duty may not be used by the departing member without violating U.S. law; therefore, the mileage must be declined in accordance with 5 C.F.R. § 2635.

3. Many airlines provide free tickets to persons "bumped" from overbooked flights or persons who voluntarily surrender their tickets in lieu of later, less-crowded flights. When a member receives free tickets for surrendering a seat on an overbooked flight, the member may use the tickets for personal travel as long as the delay incurred was on the member's own time and not on duty time. If the delay was on government time, the tickets become the property of the U.S. Government.

CONFLICTS OF INTEREST - 18 U.S.C. § 208; JER 5-300

A. *Financial conflicts of interest.* 18 U.S.C. § 208 and JER 5-300 provide that DOD employees may not participate personally and substantially in a particular matter in which they have a private financial interest if the particular matter will have a direct and predictable effect on that interest. Members may seek

a waiver from the strict application of 18 U.S.C. § 208 and its accompanying regulations in cases where the financial interests are so minor or attenuated as to present little actual conflict of interest with official duties. SECNAVINST 5370.2; JER 5-302.

B. ***Representing others***

1. Employees, other than enlisted personnel, may not act as an agent or representative for anyone in any matter that involves the United States as a party, or in which the United States has a direct and substantial interest. 18 U.S.C. § 205. The types of matters in which representation are barred include: judicial or other proceedings, applications, requests for rulings or other determinations, contracts, claims, controversies, investigations, charges, accusations, arrests, or other matters.

2. The law does provide some exceptions to the general ban. Specifically, the law does not bar employees from giving testimony under oath; representing another person in a disciplinary, loyalty, or other administration proceeding; or representing family members or an estate in which the employee is the fiduciary. 18 U.S.C. § 205; JER 5-403.

C. ***Civil office***. JER 5-407. Officers on active duty may not hold civil office unless expressly authorized by law; however, officers may serve on a nonpartisan basis on an independent school board provided the school board is located wholly on military property. 10 U.S.C. § 973.

D. ***Commercial dealings***. JER 5-409. In general, personnel may not solicit or make solicited sales to junior personnel, on or off-duty, except in a few strictly limited circumstances. Specifically:

1. The sale or lease of noncommercial personal or real property in the absence of intimidation or coercion;

2. commercial sales solicited or made in a retail establishment during off-duty employment; and

3. sales made because the junior approached the senior and requested the sale, absent coercion or intimidation.

POLITICAL ACTIVITIES

A. ***Reference***: DOD Dir. 1344.10, Subj: POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY

B. *General policies and limitations*

1. Members on active duty are encouraged to take advantage of their rights as citizens, subject only to the limitations necessary to protect good order and discipline and ensure that the U.S. military remains an apolitical defender and protector of the Constitution of the United States.

2. Therefore, military members may engage in private political activity not involving partisan politics. They may not, however, participate in partisan politics, including management of campaigns or conventions, making campaign contributions to another member of the armed forces or employees of the Federal Government, or becoming a candidate for civil office. The law, however, does provide some exceptions to the ban on campaigning for office. Enlisted members may seek and hold nonpartisan civil offices—such as a notary public or member of the school board, neighborhood planning commission, or similar local agency—as long as it is in a private capacity and does not interfere with military duties. In addition, Reserve members not on extended active-duty may hold civil office as long as it is in a private capacity and does not interfere with the performance of military duties.

C. *Permissible political activities*. Members may engage in a number of political activities. Specifically, a member may:

1. Register, vote, and express personal opinion in a private capacity;

2. encourage others to exercise their vote (as long as it is not an attempt to influence or interfere with the outcome of an election);

3. join political clubs and attend meetings (as long as member is not in uniform);

4. serve as an election official with Secretarial approval;

5. sign petitions for specific legislative action or to nominate a candidate (as long as it does not require partisan activity and is done as a private citizen);

6. write letters to the editor;

7. make contributions to political organizations, subject to the certain limits; and

8. display a political sticker on the member's private vehicle.

D. ***Prohibited political activities***. In order to prevent the military from become politicized, military members are not allowed to:

1. Conduct any political activity while in uniform;

2. use official authority to influence or interfere with elections;

3. poll members of the armed forces (18 U.S.C. § 596);

4. be a candidate for civil office, except as noted above;

5. actively participate in partisan political activities—such as publishing partisan political articles, participating in partisan political management or campaigns, making public speeches in the course of partisan campaigns, making or soliciting contributions from or to other servicemembers or civilian officers or employees of the United States for promoting a political cause or objective;

6. use contemptuous words against the officeholders described in Article 88 of the UCMJ;

7. display a large political sign, banner, or poster on the top or side of a private vehicle; or

8. join in an effort to provide transportation to polls if organized by partisan activity.

E. ***Relationship to first amendment rights***. The Supreme Court has consistently upheld the foregoing and related regulations against challenges that the regulations unduly restrict the First Amendment rights of servicemembers. *See Greer v. Spock*, 424 U.S. 828 (1976); *Ethredge v. Hail*, 996 F.2d 1173 (11th Cir. 1993).

FINANCIAL DISCLOSURE REPORTS

A. ***Reference***: JER, chapter 7; 5 C.F.R. 2634.

B. ***Public financial disclosure reports*** (SF-278). The purpose of the public financial disclosure report system is to uncover actual or potential conflicts of interest involving senior government officials and to ensure public confidence in the integrity of government. 5 C.F.R. § 2634.104.

1. Only senior personnel are required to file the public financial disclosure report. Specifically, officers in paygrade O-7 or above, civilian presidential

appointees, members of the Senior Executive Service, and persons who are GS-15 or above, need to file the report. JER 7-200.a.; 5 C.F.R. § 2634.202.

2. *Filing deadline*. The report must be filed within thirty days of assuming the covered position. If the report is late, the employee must pay a late filing fee of $200.00. JER 7-203; 5 C.F.R. § 2634.201.

3. *Contents*. In the report, the employees must generally list their financial interests and holdings over $1,000.00. JER 7-204; 5 C.F.R. § 2634.301 - 5 C.F.R. § 2634.501. The regulations are extremely detailed regarding the specific interests that must be disclosed.

4. *Procedure*. The employee initially submits the report to the supervisor, who reviews it for apparent conflicts of interest. The supervisor then forwards the report to the ethics counselor, who reviews the report for completeness and conflicts. If the counselor detects conflicts, the counselor notifies the employee. The employee may respond by challenging the determination of conflict, or may apply the counselor's advice to resolve the conflict of interest. The counselor then forwards the report to the Agency Ethics Official for review. The report ultimately ends up on file for six years, although it may be forwarded to the Office of Government Ethics. The reports are available for public inspection upon request. JER 7-206; 5 C.F.R. § 2634.602 - 5 C.F.R. § 2634.605.

C. *Confidential financial disclosure reports* (SF-450). The purpose of the confidential financial disclosure report is to uncover actual or potential conflicts of interest regarding government officials involved in procurement matters or in particular positions of trust, other than those required to file public reports. 5 C.F.R. § 2634.901.

1. Those who must file the confidential report include CO's of Navy shore installations with 500 or more military or civilian personnel and CO's of all Army, Air Force, and Marine Corps installations, bases, air stations, or activities. In addition, the report must be filed by other employees, GS-15 or O-7 and below, who participate personally and substantially in contracting or procurement, licensing, auditing non-Federal entities, or other activities with a direct and substantial financial impact on non-Federal entities, and those who are determined by their supervisor to be in a position requiring disclosure to avoid actual or apparent conflicts of interest. People who would otherwise be required to file the report may be exempted by the agency designee if that senior official determines that the report is not necessary to preclude conflicts of interest or to protect the integrity of the government. JER 7-300.a.; 5 C.F.R. §§ 2634.9045, 2634.905.

2. ***Filing deadline***. The report must be filed within thirty days of assuming the covered position. In addition, an annual report must be filed by November 30 of each year. JER 7-303; 5 C.F.R. § 2634.908.

3. ***Contents***. In the report, the employees must list their financial interests and holdings over $1,000.00. JER 7-304; 5 C.F.R. § 2634.907.

4. ***Procedure***. The procedure for the confidential reports is generally the same as for the public reports. The primary difference is that the report is not normally available to the Office of Government Ethics. Further, the reports are exempt from disclosure to the public and are protected by the Privacy Act. JER 7-306 to 7-308.

5. ***Status reports***. Ethics counselors are required to file a status report with the Agency Ethics Official not later than December 15 every year. The report must provide the number of individuals required to file a confidential financial report and the number of those persons who had not filed as of November 30.

SEEKING OTHER EMPLOYMENT

A. ***Reference***: JER, chapter 8

B. ***General rules***

1. All members, including enlisted members, may not participate in matters in which they, their family, or an entity they are seeking employment from, have a financial interest. JER 8-200.

2. During a procurement, a procurement official may not discuss or negotiate employment with one of the competing contractors. JER 8-300; FAR 3.104-6. The only exceptions to that rule are when the procurement official has left the Federal Government service, has been recused from the procurement, or whose only communication with the competitor has been to reject the offer of employment.

C. ***Reporting employment contacts***. JER 8-400; 10 U.S.C. § 2397a. Any military officer of paygrade O-4 or above, or civilian employee GS-11 or above, who performed a procurement function involving a defense contractor who received at least $25,000.00 in DOD business, and who is subsequently contacted by that defense contractor about future employment, must report the fact of the contact in writing to the appropriate supervisor. The report must include the names of the government officer or employee and the contractor involved, as well as the date of the contact and a description of what happened. In addition, the federal official involved must submit

a written statement disqualifying the officer from any procurement function involving that contractor until such time as the employment negotiations have ceased without a hire.

POST-EMPLOYMENT RESTRICTIONS

A. *References*

1. JER, chapter 9

2. 5 C.F.R. 2641.

B. *Purpose*. Federal regulations impose a number of restrictions on federal employees after they leave the government service. The regulations seek to avoid the possibility that an employer could appear to make unfair use of an employee's prior government service and affiliations. At the same time, they seek to avoid unduly restricting the ability of persons to move back and forth between government and the private sector.

C. *Restrictions on post-government employment*. JER 9-300, 18 U.S.C. § 207.

1. No former employee may attempt to influence the government on a matter involving specific parties in which the employee participated personally and substantially as a government employee and in which the United States is a party or has a direct and substantial interest. This is a lifetime restriction.

2. For two years, a former employee may not represent another person before the government in an attempt to influence the government in connection with a matter that was pending under the former employee's responsibility.

3. For one year, a former employee may not represent another with regard to any ongoing treaty or trade negotiations in which the former employee participated.

4. For one year, a former senior employee, such as an O-7 or above, may not represent another before the former employee's agency in connection with seeking official action.

5. Military officers may not represent others in the sale of anything to the Federal Government through the department in which they hold retired status for a period of two years. 18 U.S.C. § 281a; JER 9-700. They may, however, represent themselves. JER 9-700.

TRAINING REQUIREMENTS

All DOD employees must receive initial ethics training within 90 days of entering on duty. JER 11-301. In addition, all employees who file an SF-278 or an SF-450, contracting officers and procurement officials, shall receive ethics training every year. JER 11-302. The training must last at least one hour, and must be conducted by a qualified person. A qualified person is someone who either serves as an agency ethics official, is an employee of the Office of Government Ethics, or who is determined by the agency to be sufficiently familiar with the statutes and regulations to respond to routine questions during training. The training must include, at a minimum, a review of Part I of Executive Order 12674, Principles of Ethical Conduct for Government Officers and Employees (JER 12-100); and 5 C.F.R. Part 2635 (JER 2-100) and the JER itself.

FUND-RAISING

A. ***References***

1. DODDIR 5035.1, Subj: FUND-RAISING WITHIN THE DEPARTMENT OF DEFENSE

2. SECNAVINST 5340.2, Subj: FUND-RAISING AND SOLICITATION OF PERSONNEL MILITARY AND CIVILIAN, IN THE NAVY DEPARTMENT; RESPONSIBILITY FOR

3. SECNAVINST 4001.2, Subj: ACCEPTANCE OF GIFTS

4. SECNAVNOTE 5340

B. ***General policies***

1. Preferential treatment. Command support of fund-raising activities must not involve or create an appearance of preferential treatment for any organization or person. If one organization is afforded support, the command must be prepared to give similar support to similarly situated organizations. This policy does not apply to fund-raising support for the CFC, Navy and Marine Corps Relief, a disaster appeal approved by OPM, or an approved Olympic event.

2. DOD policy prohibits government participation in events clearly sponsored by, or conducted for the benefit of, commercial interests.

3. Unless authorized by the Secretary of the Navy, personnel may not solicit contributions for Department of the Navy organizations or augment appropriated funds through outside resources. For example, commands are not permitted to seek donations from local merchants for a command holiday party.

4. Voluntariness. Where solicitation for charity is authorized, fund-raisers must ensure that requests are made in an environment and manner which ensures that contributions are in fact voluntary. Any actions that do not allow free choices or create the appearance that servicemembers do not have a free choice to give any amount, or not to give at all, are prohibited. The coercive practices prohibited by this rule include:

a. Supervisory solicitation of supervised employees;

b. setting 100% participation goals, mandatory personal dollar goals, or quotas;

c. providing or using contributor lists for purposes other than the routine collection and forwarding of contributions and pledges or, in the alternative, developing or using noncontributor lists; and

d. counseling or grading individual service personnel or civilian employees about their failure to contribute or about the size of their donation.

C. *On-the-job solicitations for the Combined Federal Campaign.* Servicemembers have the opportunity through a single on-the-job solicitation to make voluntary contributions to such charitable health and welfare agencies within the local CFC as they wish to support. Such solicitations must be conducted in strict conformity with guidelines published annually.

D. *Off-the-job solicitations.* An installation commander may authorize voluntary agencies to solicit at private residences or family quarters located in unrestricted areas of the base as long as similarly situated agencies are afforded the same privileges. In addition, charitable agencies may be permitted to engage in limited solicitation at public entrances or concourses of federal buildings or installations that are normally open to the public. Collection boxes for purely voluntary donations of goods may be placed in work spaces and offices. Federal employees may not conduct solicitations while on duty, however, or in any official capacity. Further, they may not allow the use of their titles, grades, or positions to support fund-raising for any private organization.

E. ***Navy-Marine Corps Relief Drive.*** The Secretary of the Navy publishes the "Navy-Marine Corps Relief Society Annual Call for Contributions" and specifically establishes the guidelines under which the campaign is to be conducted.

F. ***Fund-raisers conducted by Morale, Welfare, and Recreation (MWR) activities.*** Fund-raising events may be held in support of MWR activities provided that all members or patrons of the sponsoring MWR activity are authorized patrons, the activities are conducted entirely on federal property, the solicitations are restricted to authorized patrons, and all proceeds from the fund-raising event are used by the sponsoring MWR activity solely for the benefit of authorized patrons. Strict limitations apply to use of golf courses and bowling alleys for fund-raising.

G. ***Other fund-raising activities.*** Service public affairs manuals authorize participation in limited public fund-raising events: (a) military support organizations (e.g. USO); (b) local, community-wide programs (e.g. volunteer fire departments, rescue units, or youth activity funds); and (c) the Olympic and Pan American Games.

APPENDIX I

SAMPLE GIFT FORWARDING LETTER

5800
JA
2 Feb CY

MEMORANDUM FOR THE COMMANDING GENERAL

Subj: OFFER OF GIFT

Ref: (a) MCO 4001.2A

Encl: (1) CO, MCAS, Iwakuni ltr 4001 MASD of 18 Jan CY
(2) Iwakuni OWC ltr of 12 Jan CY

1. By the enclosure, the Commanding Officer, Marine Corps Air Station, Iwakuni, forwards a gift of $1,779.90 from the local Officers' Wives Club for the station Child Development Center. I recommend that you accept this gift on behalf of the Marine Corps.

2. This gift was not solicited. The value of the gift is within your authority to accept under the reference. Acceptance of this gift will not result in embarrassment to the Marine Corps. The donor has not placed any conditions on the gift other than using the money to enhance the Child Development Center. Acceptance of this gift will not create any expectation of reciprocal benefit for the donor. The donor does not do or seek business with the government.

3. I recommend you accept the gift. If you concur, we will coordinate its deposit with CMC (FD), notify the commander, and ensure he sends an appropriate letter thanking the donor.

Very respectfully,

S. J. ADVOCATE

CG Decision:

Approved _____

Disapproved _____

APPENDIX II

SAMPLE MEMORANDUM OF DISQUALIFICATION

MEMORANDUM FOR

Subj: FINANCIAL DISCLOSURE REPORT (SF-278) OR (SF-450)

Ref: (a) DOD Dir. 5500-7.R, Joint Ethics Regulations

Encl: (1) List of reported holdings involving defense contractors

1. As required by reference (a), I have reviewed your Financial Disclosure Report dated _____.

2. Your report reveals that you, your spouse, minor child, or a member of your household hold a financial interest in one or more entities that do business with the Department of the Navy. Comparing these reported holdings to your assigned duties as _____, I have concluded that your responsibilities require your participation in matters involving, directly or indirectly, the firms identified in enclosure (1). Therefore, as required by reference (a), you are hereby disqualified from taking any action in connection with matters involving these firms.

3. As a result of this disqualification, you and, by copy of this memorandum, your immediate subordinates, are directed to refer to me all official matters involving the firms listed in enclosure (1) (and their subsidiaries and affiliates) that would normally come to you for action.

4. You are advised that, in accordance with reference (a), your Financial Disclosure Report has been forwarded to _____, the cognizant Deputy Ethics Official, for final review.

F. P. ADAMS
Commander, Naval Sea Systems Command

Copy to:
(Immediate subordinates)

Received by: [Involved Employee]

Date: _____

APPENDIX III

SAMPLE PROCUREMENT INTEGRITY CERTIFICATION

3 Dec CY

MEMORANDUM FOR THE COMMANDING OFFICER

From: Staff Judge Advocate
Via: (1) Executive Officer

Subj: PROCUREMENT INTEGRITY CERTIFICATION

Ref: (a) 41 U.S.C. § 423

Encl: (1) Certifications

1. In my opinion, you, the Executive Officer, and the Supply Officer are considered "procurement officials" for the purposes of reference (a). All persons identified as procurement officials are required to file certifications that they are familiar with the requirements of the Federal Procurement Policy Act.

2. Should you concur, proposed memoranda for the affected individuals are enclosed. Once signed, the certificates will be retained on file.

Very respectfully,

S. J. ADVOCATE

APPENDIX IV

SAMPLE PROCUREMENT OFFICIAL CERTIFICATION DOCUMENTS

Date

MEMORANDUM

From: Commanding Officer
To: Colonel David Charles, USMC

Subj: PROCUREMENT OFFICIAL CERTIFICATION

Ref: (a) The Office of Federal Procurement Policy Act, Title 41, U.S.C. § 423, as amended by section 814 of Pub. L. No. 101-189

Encl: (1) OGE Memo of 31 Oct 90
(2) Procurement Official Certification

1. I have determined that the duties and responsibilities of your position, like my own, subject you to the certification requirements of reference (a) that took effect on December 1, 1990. All individuals subject to certification must review the information contained in enclosure (1) and indicate their understanding and compliance by signing enclosure (2), the Procurement Integrity Certification and the attached Privacy Act Notice.

2. This must be done before performing any procurement functions. If you have any questions, Major Dadd stands ready to assist you. Return the signed certification to Ms. DeMeana for filing.

Respectfully,

M. E. SHAWSHIK
Colonel, USMC
Commanding Officer

APPENDIX V

PROCUREMENT INTEGRITY CERTIFICATION FOR PROCUREMENT OFFICIALS

As a condition of serving as a procurement official, I, _____, hereby certify that I am familiar with the provisions of subsections 27(b), (c), and (e) of the Office of Federal Procurement Policy Act, Title 41, U.S.C. § 423, as amended by section 814 of Pub. L. No. 101-189. I further certify that I will not engage in any conduct prohibited by such subsections and will report immediately to the contracting officer any information concerning a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act and applicable implementing regulations. A written explanation of subsections 27(a) through (f) has been made available to me. I understand that, should I leave the government during the conduct of a procurement for which I have served as a procurement official, I have a continuing obligation under section 27 not to disclose proprietary or source selection information relating to that procurement and a requirement to so certify.

_____	_____
Signature of Procurement Official	Date
_____	_____
Department or Agency	Office Telephone Number
_____	_____
Name of Procurement Official	Social Security Number

* * * * *

PRIVACY ACT NOTICE TO EMPLOYEES AND OFFICIALS

In accordance with the Privacy Act of 1974, as amended (5 U.S.C. § 552a), the following notice is provided:

AUTHORITY FOR THE COLLECTION OF INFORMATION: 41 U.S.C. § 423 and Executive Order 9397.

Your signature on the Optional Form 333, Procurement Integrity Certification for Procurement Officials, and disclosure of your Social Security Number on this page, are voluntary, but possible effects upon you if the certification is not signed and the Social Security Number is not provided include the following:

Disqualification from the particular work or duty assignments, or from the position for which you applied or which you currently hold, or other appropriate action, or administrative delay in processing your certification.

PRINCIPAL PURPOSE FOR COLLECTION OF THIS INFORMATION

To obtain and maintain a completed certification from any person designated as a "procurement official," as defined by 41 U.S.C. § 423 and applicable procurement regulations.

ROUTINE USES WHICH MAY BE MADE OF THE COLLECTED INFORMATION

Transfers to federal, state, local, or foreign agencies when relevant to civil, criminal, administrative, or regulatory investigations or proceedings, including transfer to the Office of Government Ethics in connection with its program oversight responsibilities, or pursuant to a request by any appropriate federal agency in connection with hiring, retention, or grievance of an employee or applicant, the issuance of a security clearance, the award or administration of a contract, the issuance of a license, grant, or other benefit, to committees of the Congress, or any other use specified by the Office of Personnel Management (OPM) in the system of records entitled "OPM / GOVT-1 General Personnel Records," as published in the Federal Register periodically by OPM.

NOTES

NOTES (continued)

CHAPTER XXXV

FREEDOM OF EXPRESSION

INTRODUCTION

The five rights which collectively comprise the Freedom of Expression are found in the First Amendment to the U.S. Constitution, which states: "Congress shall make no law respecting an establishment of *religion* or prohibiting the free exercise thereof; or abridging the freedom of *speech*, or of the *press*; or the *right of the people peaceably to assemble* and to *petition the Government for a redress of grievances*."

When an individual enters military service, the member must perform in accordance with military standards and in a manner consistent with good order and discipline. While these constitutionally protected rights are preserved in the military, they must be balanced against the need for military effectiveness.

BALANCING TEST

The guiding directive, DOD Directive 1325.6, embodies the need for a balancing test when it states:

> "It is the mission of the Department of Defense to safeguard the security of the United States. The service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security. On the other hand, no commander should be indifferent to conduct which, if allowed to go unchecked, would destroy the effectiveness of his unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible commander."

This chapter presents a review of these constitutional protections in light of the conditions under which sanctions may be imposed if the exercise of such rights is inconsistent with military good order, discipline, and readiness.

FREEDOM OF SPEECH

A. As a protected right, freedom of speech must be preserved to the maximum extent possible. This is generally accomplished by prohibiting a prior restraint on the right to free speech. Prior restraints, in general, can be overly broad or ambiguous. On the other hand, the right to engage in free speech does not provide an absolute immunity from subsequent punishment if the speech violates the Uniform Code of Military Justice.

B. Possible violations of the UCMJ include disrespect under Article 89, UCMJ; disobedience under Article 91, UCMJ; and use of provoking words or gestures under Article 117, UCMJ.

FREEDOM OF THE PRESS

A. *Possession of printed material*

1. A member may possess material (other than classified matter) in a private capacity. For example, there would be no prohibition against the possession of pornographic material in one's individual locker.

2. On the other hand, private possession is different from public display of material. Display could be prohibited if the servicemember's interest in expression is outweighed by the command interest in maintaining morale, good order, and discipline. Also, the possession of such material could be prohibited if there was a clear and present danger that an unauthorized *distribution* would occur. This is a prior restraint and such a clear danger must be found. Also, under some circumstances, display could constitute sexual harassment.

3. DOD Dir 5030.49, which contains the U.S. Customs Inspection Regulations, specifically prohibits the importation of obscene and immoral articles, books, pictures, films, or publications into the United States. Prohibited obscene material is defined by U.S. Customs as pictures devoted solely to the portrayal of sexual acts, including homosexual acts or acts with an animal. It does not include the mere exposure, even in a grossly offensive way, of a person's "private parts." *See* JAGMAN 1111e.

B. ***Distribution of printed material***

1. ***Official channels***

a. A commander may completely remove a publication from an exchange or library. Although some discretion exists, the same standards of review must be applied to all publications.

b. The commanding officer may not, however, prohibit distribution of a specific issue (e.g., January, February) of a publication since (s)he might be engaging in censorship over an issue already accepted for distribution through official outlets.

c. Article 4134f of the *Navy Exchange Manual* contains broad guidance for screening for pornographic materials not acceptable for sale or circulation within the military establishment. *See* NAVRESSOINST 4066 (*Navy Exchange Manual*). Such unacceptable materials include those that:

(1) Are printed or circulated in violation of moral and ethical standards of civil and military law;

(2) feature illicit acts, whether heterosexual or homosexual, in such a way as to create sympathy for such acts or encourage their practice; and

(3) encourage or generally tend to promote violence, crime, horror, sadism, masochism, or similar attitudes or acts.

2. ***Unofficial channels***

a. The installation commander can determine whether distribution of material on base through unofficial channels will constitute a clear and present danger to good order and discipline. Prior approval may be established as a requirement before such distribution is made.

b. In determining whether a clear and present danger exists, the commanding officer should objectively review all material that is to be distributed and the manner of distribution. All reviews of material should be conducted in the same objective manner.

c. After a review, the commanding officer should notify the applicants in writing of the decision to approve or disapprove the proposed distribution. Not allowing the distribution of material on base through unofficial channels should be supported by a finding that such a distribution would present a

clear and present danger to loyalty, discipline, and morale, or would otherwise materially interfere with the accomplishment of the military mission. The commanding officer should retain the written review on file for two years after the application. Commanders should consult their staff judge advocates in making these decisions.

d. Finally, the doctrine of subsequent punishment remains applicable. If military members are involved in the distribution of material and, in doing so, violate the UCMJ, sanctions may be imposed even if the commanding officer gave prior approval of the distribution.

WRITING OR PUBLISHING

A. Military members cannot use duty time or government property for personal vice official writing. Standards of Conduct for the Executive Branch, 5 C.F.R. 2635.705, Use of Official Time.

B. Material originated by naval personnel concerning foreign or military policy is subject to security and policy review, per sections 401.2 and 403.4 of SECNAVINST 5720.44 (*Department of the Navy Public Affairs Manual*). *See* SECNAVINST 5510.25 (Responsibility for Security Review of Department of the Navy Information); DOD Directive 5230.9 (Clearance of DOD Information for Public Release); *U.S. Navy Regulations, 1990*, art. 1121. This review is required even if the material appears in a publication favorable to military interests (e.g., *Naval Institute Proceedings*), and must be completed *before* the article is submitted to any publisher. Published material which violates the UCMJ or security regulations could subject the author to disciplinary action.

C. *Honoraria*. *See* Chapter 34, Standards of Conduct and Government Ethics, for further discussion.

RIGHT TO PEACEFUL ASSEMBLY

A. *On-base demonstrations*

1. A commanding officer may prohibit on-base demonstrations if a legitimate finding is made that such demonstrations may present a clear and present danger to good order, discipline, and morale. For example, a pro-marijuana or anti-government demonstration may have such an impact. *See* SECNAVINST 5511.36 (Authority of Military Commanders under the Internal Security Act of 1950 to Issue Security Orders and Regulations for the Protection or Security of Property / Places

under their Command); MCO 5510.15 (Control and Access to Property / Places under Military Control).

2. When petitioned for the right to demonstrate on base, the commanding officer should conduct a review similar to the review provided when an application is submitted to distribute material through unofficial channels. The review should be conducted using the same standards for all applicants. The commanding officer should articulate the reasons for approving or disapproving the application and maintain a file for two years after the application is submitted. Even if the demonstration is permitted, the doctrine of subsequent punishment applies for violations of the UCMJ for servicemembers, or the Federal trespass statute (18 U.S.C. § 1382) for civilians.

B. ***Off-base demonstrations***

1. The commanding officer may engage in a prior restraint by prohibiting servicemembers from attending off-base demonstrations under circumstances which would provide for a material interference with the military mission. Such circumstances are as follows.

a. A servicemember may be prohibited from attending a demonstration while on duty. Obviously, a member's performance of duty is the primary concern and attendance at an off-base demonstration would place him / her in an unauthorized absence status.

b. The servicemember may be prohibited from attending a demonstration while in a foreign country. This prohibition applies to avoid embarrassing the United States by having military members involved in foreign disputes.

c. If the activity constitutes a breach of law and order, the member may be prohibited from participating. In this situation, the member could be prosecuted and jailed by civilian authorities, thereby causing the member to be away from the command for an extended period of time during which duty should otherwise be performed.

d. If violence is likely, the member may be prohibited from participating since there is the possibility that a member might be injured and, therefore, lost to the command for a substantial period of time. A commanding officer who uses this basis should not engage in a fanciful determination, but should clearly articulate the reasons for concluding that violence might result.

e. If the organization overtly discriminates on the basis of race, creed, color, sex, religion or national origin, such as Neo-Nazi and white supremacy groups, the member may be prohibited from ***participation***. Mere membership in such groups, without active participation, cannot be prohibited.

2. If the above conditions do not apply, the commanding officer would simply have the authority to prohibit the attendance at demonstrations ***while in uniform*** under the following conditions:

a. At subversive, Fascist, or Communist meetings;

b. in connection with political and commercial activities;

c. if wearing the uniform would discredit the military;

d. when specifically prohibited by regulations; or

e. when the member's appearance in uniform would suggest an endorsement of the group's views by the Department of Defense.

3. Generally, the prohibition against wearing a uniform at demonstrations will be broadly construed in favor of the military. *See* DOD Dir. 1334.1 (Wearing of the Uniform).

C. *Off-base gathering places*

1. The commanding officer may place an off-base area or activity "off-limits" only in *an emergency situation* or when overseas; however, normally the area coordinator does not delegate that authority overseas.

2. In most other instances, the Armed Forces Disciplinary Control Board, under the control of the area coordinator, will declare places "off-limits" where conditions exist that are detrimental to good health, welfare, good order, discipline, and morale. OPNAVINST 1620.2 / MCO 1620.2. Such places may include, but are not limited to:

a. Establishments where violence is commonplace or drugs are readily available;

b. establishments engaging in discriminatory practices; or

c. establishments where unhealthy conditions prevail.

3. A servicemember would be subject to punitive action under article 92 for visiting the establishment after the off-limits order.

MEMBERSHIP IN ORGANIZATIONS

A. A servicemember may engage in passive membership in almost any organization without any sanctions being imposed (see the next topic for exceptions).

B. An effort to engage in further activity may be prohibited by the commanding officer if such activity presents a clear and present danger to good order, morale, and discipline. For example, the distribution of materials or the recruiting of members into an organization may be inconsistent with such good order, particularly if the organization actively advocates discriminatory policies (e.g., KKK).

SERVICEMEMBERS' UNIONS

Pursuant to 10 U.S.C. § 976 (1988) and SECNAVINST 1600.1 (Relationships with Organizations which Seek to Represent Members of the Armed Forces in Negotiation or Collective Bargaining), a military member may not at any time engage in activities relating to servicemembers' unions. The servicemember is prohibited from joining a military labor organization and from negotiating terms and conditions of military service. The servicemember is also prohibited from organizing or participating in strikes that concern the terms or conditions of military service.

RIGHT OF PETITION (GRIEVANCES)

-- Servicemembers have several methods through which they may present complaints or grievances, including:

1. Requesting mast pursuant to Article 1151, *U.S. Navy Regulations, 1990*;

2. presenting viewpoints through command-sponsored councils and committees;

3. writing an individual letter to his Congressman, pursuant to 10 U.S.C. § 1034 (1988) and Article 1155, *U.S. Navy Regulations, 1990* (This authority, however, does not extend to group petitions. Approval must be obtained from the base commander before circulation on base of petitions addressed to members of Congress.);

4. pursuant to Article 138, UCMJ, filing a complaint against a commanding officer who engages in arbitrary and capricious action (Chapter III of the *JAG Manual* details the procedural requirements in filing such a complaint);

a. The officer exercising general court-martial jurisdiction will conduct proceedings on the complaint. If action on the complaint is not taken at the departmental level, the officer exercising general court-martial jurisdiction is responsible for forwarding a report of the proceedings to the Secretary of the Navy.

b. The commanding officer against whom the complaint is filed must be provided the opportunity to redress the wrong as a condition precedent to any action pursuant to article 138.

c. A complaint may be withdrawn at any time.

5. pursuant to Article 1150 of *U.S. Navy Regulations, 1990*, filing a complaint against a superior in rank or command, not his / her commanding officer, whom the servicemember believes committed a wrongdoing. (The complaint should be drafted in temperate language. The officer exercising general court-martial jurisdiction should investigate the complaint and take appropriate action.); and

6. per SECNAVINST 5430.57, communicating with the Naval Inspector General.

POLITICAL ACTIVITIES

A. A servicemember may participate in limited political activities while on active duty; but, in most circumstances, is prohibited from becoming a candidate for or holding partisan civil office and engaging in partisan political activities. *See* DOD Dir. 1344.10 (Political Activities by Members of the Armed Services); MCO 5370.7 (Political Activities); MILPERSMAN 6210240 (Political Activities by Members on Active Duty); Joint Ethics Regulation (JER), DOD Directive 5500.7-R, CH. 6.

B. *Partisan political activity* is that which is in support of, or related to, candidates representing, or issues specifically identified with, national or state political parties and associated or ancillary organizations. A *civil office* is one which involves the exercise of the powers or authority of civil government, whether appointed or elected.

C. *Authorized political activity includes the following*:

1. Voting and exercising personal opinions on an issue, though not as an armed forces representative;

2. writing a letter to the editor expressing personal views on public issues;

3. holding a local, part-time, nonpartisan civil office with prior SECNAV approval;

4. joining a political club and attending its meetings when not in uniform; and

5. displaying a political sticker on one's private automobile.

D. ***Prohibited activity by a servicemember on active duty for more than 30 days includes the following***:

1. Campaigning as a partisan candidate for civil office (this includes membership on a school board or municipal board of health);

2. making a public speech in a political campaign;

3. allowing or causing to be published political articles signed or authored by the member for partisan purposes;

4. making, soliciting, or receiving a campaign contribution for another member of the armed forces, or for a Federal employee or partisan political candidate; and

5. participating in any organized effort that is associated with a party or candidate to transport voters to the polls.

REASONABLE ACCOMMODATION OF RELIGIOUS PRACTICES

The accommodation of a member's religious practice depends upon military necessity, and that determination of military necessity rests entirely with the commanding officer. For example, if a servicemember—who is scheduled to stand duty on Friday evening—requests, based on religious principles, that (s)he not be directed to stand duty between sundown Friday and sundown Saturday, the commanding officer should carefully consider granting that accommodation request if others are available to stand duty during those hours. However, if no other person is reasonably available to stand duty at that time, the commanding officer could order that member to stand duty based on his / her determination of military necessity.

SECNAVINST 1730.8 provides guidelines to be used in the exercise of command discretion concerning the accommodation of religious practices, including requests based on religious and dietary observances, requests for immunization waivers, and requests for the wearing of religious items or articles other than religious jewelry—which is subject to the same uniform regulations as nonreligious jewelry—with the uniform.

The issue of religious accommodation and the military uniform has been an area of particular concern in recent years. In that regard, SECNAVINST 1730.8 provides that:

A. Religious items or articles which *are not visible* may be worn with the uniform as long as they do not interfere with the performance of the member's military duties; and that

B. religious items or articles which *are visible* may be authorized for wear with the uniform if:

1. The item or article is "neat and conservative" (meaning that it is discreet and not showy in style, color, design, or brightness), that it does not replace or interfere with the proper wearing of any authorized article of the uniform, and that it is not temporarily or permanently affixed or appended to any article of the member's uniform;

2. the wearing of the item or article will not interfere with the performance of the member's military duties due to either the characteristics of the item or article, the circumstances of its intended wear, or the particular nature of the member's duties; and

3. the item or article is not worn with historical or ceremonial uniforms, or while the member is participating in review formations, honor or color guards and similar ceremonial details and functions, or during basic and initial military skills or specialty training—except during off-duty hours designated by the cognizant commander.

a. For example, within the guidelines given above, a skullcap (yarmulke) may be worn:

(1) Whenever a military cap, hat, or other headgear is not prescribed; or

(2) it may be worn underneath military headgear as long as it does not interfere with the proper wearing, function, or appearance of the prescribed headgear.

b. Several factors for commanding officers to consider when examining requests for religious accommodations are:

(1) The importance of military requirements, including individual readiness, unit cohesion, health, safety, morale, and discipline;

(2) the religious importance of the accommodation by the requester;

(3) the cumulative impact of repeated accommodations of a similar nature;

(4) alternative means available to meet the requested accommodation; and

(5) previous treatment of the same or similar requests made for other than religious reasons.

c. Any visible item or article of religious apparel may not be worn with the uniform until approved.

d. When a commanding officer denies a request for religious accommodation, the member must be advised of the right to request a review of that refusal by CNO or CMC. That review will normally occur within 30 days following the request for review for cases arising in the United States, and within 60 days for cases overseas.

e. Administrative action (including reassignment, reclassification, or separation in the best interest of the service) consistent with SECNAV and service regulations is authorized if:

(1) Requests for accommodation are not in the best interests of the unit; and

(2) continued tension is apparent between the unit's requirements and the individual's religious beliefs.

NOTES

NOTES (continued)

CHAPTER XXXVI

RELATIONS WITH CIVIL AUTHORITIES

CRIMINAL JURISDICTION OVER SERVICEMEMBERS IN THE UNITED STATES

A. *Delivery of personnel*. Chapter VI, Part A, of the *JAG Manual* deals with the delivery of servicemembers, civilians, and dependents.

1. *Federal civil authorities*. Members of the armed forces will be released to the custody of U.S. Federal authorities (FBI, DEA, etc.) upon request by an agent of the Federal agency. The only requirements which must be met by the requesting agent is that the agent display proper credentials and a Federal warrant for the arrest of the servicemember. Actual production of the warrant is required. A judge advocate of the Navy or Marine Corps should be consulted before delivery takes place, if reasonably practicable. When military personnel are released to U.S. Federal authorities, agreements are not required but the individual will be returned, if desired, and the costs of the return will be paid by the Justice Department. JAGMAN 0608.

2. *State civil authorities*. Procedures to be followed where custody of a member of the armed forces is sought by state, local, or U.S. territorial officials depend upon whether the servicemember is within the geographical jurisdiction of the requesting authority. As where custody is requested by Federal authorities the requesting agent must not only identify him / herself through proper credentials, but must also display the actual warrant for the servicemember's arrest. Additionally, state, local, and U.S. territory officials must sign a delivery agreement providing for the no-cost return of the servicemember after civilian proceedings have terminated. JAGMAN 0603, 0604, 0607. A sample agreement appears in appendix A-6-b of the *JAG Manual*. Subject to these requirements, the following examples illustrate the procedures to be followed:

a. E-3 Jones is stationed ashore or afloat in a command ***within*** the geographical territory of the requesting authority. Generally, the request will be complied with by the commanding officer. JAGMAN 0603.

b. E-3 Jones is stationed ashore or afloat *outside* of the territorial jurisdiction of the requesting authority, *but not overseas*. The

servicemember must be informed of his / her right to require extradition. If the member does not waive extradition, the requesting authority must complete extradition proceedings before the Navy will release the individual. In any event, release under these conditions must be made by an officer exercising general court-martial jurisdiction (OEGCMJ), someone designated by him / her, or a commanding officer after consulting with a judge advocate. JAGMAN 0604. If the servicemember waives extradition in writing after consulting with military or civilian legal counsel, the OEGCMJ may authorize release without an extradition order. A sample waiver of jurisdiction appears in appendix A-6-a of the *JAG Manual*. If the state in which E-3 Jones is located requests delivery of a servicemember wanted by another state (usually based upon a fugitive warrant or other process from authorities of the other state), the OEGCMJ is authorized to release Jones to the local authorities and normally will do so; however, absent waiver by Jones, (s)he will then have the opportunity to contest extradition within the courts of the local state. JAGMAN 0604.

c. E-3 Jones is stationed ashore overseas or is deployed and is sought by U.S., state, territory, commonwealth, or local authorities. In this case, the request must be by the Department of Justice or the governor of the state addressed to SECNAV (JAG). If received by the command, it must be forwarded to JAG. The request must allege that the servicemember is charged, or is a fugitive from that state, for an extraditable crime. When all the requirements are met, the Secretary will issue the authorization to transfer the servicemember to the military installation in the United States most convenient to the Department of the Navy, where the member will be held until the requesting authority is notified and complies with the provisions of the *JAG Manual*, as appropriate. JAGMAN 0605; SECNAVINST 5820.9.

3. *Restraint of military offenders for civilian authorities.* R.C.M. 106, MCM (1984), provides that a servicemember may be placed in restraint by military authorities for civilian offenses upon receipt of a duly issued warrant for the apprehension of the servicemember or upon receipt of information establishing probable cause that the servicemember committed an offense, and upon reasonable belief that such restraint is necessary. Such restraint may continue only for such time as is reasonably necessary to effect the delivery. This provision provides express authority for restraining a military offender to be delivered to law enforcement authorities of the United States or its political subdivisions, but only when such restraint is justified under the circumstances. For delivery of a servicemember to foreign authorities, the applicable treaty or status of forces agreement (SOFA) should be consulted. The provision does not allow the military to restrain a servicemember on behalf of civilian authorities pending trial or other disposition. The nature and extent of restraint imposed is strictly limited to that reasonably necessary to effect the delivery. Thus, if the civilian authorities are dilatory in taking custody, the restraint must cease. An analogous situation is when civilian law enforcement

authorities temporarily confine a servicemember, pursuant to a DD-553 (Deserter/ Absentee Wanted by the Armed Forces form), pending delivery to or receipt by military authorities.

4. ***Circumstances in which delivery is refused***

a. If a servicemember is alleged to have committed several offenses, including major Federal offenses and serious—but purely military—offenses, the military offenses may be investigated and the accused servicemember retained for prosecution. This must be reported immediately to JAG and to the cognizant OEGCMJ. When military disciplinary proceedings are pending, guidance from a judge advocate of the Navy or Marine Corps should be obtained, if reasonably practicable, before delivery to Federal, state, or local authorities. JAGMAN 0610, 0125.

b. Where a servicemember is serving the sentence of a court-martial, Article 14, UCMJ, and JAGMAN 0613 permit delivery.

c. If a commanding officer considers that extraordinary circumstances exist which indicate that delivery should be denied, such denial is authorized by JAGMAN 0610b(2). This provision is rarely invoked.

d. In any case where it is intended that delivery will be refused, the commanding officer shall report the circumstances to the Judge Advocate General and the area coordinator by message (or by telephone if circumstances warrant). The initial report shall be confirmed by letter setting forth a full statement of the facts. JAGMAN 0610d and appendix A-6-c.

B. ***Recovery of military personnel from civil authorities***

1. ***General rule***. For the most part, civil authorities will be able to arrest and detain servicemembers for criminal misconduct committed within their territorial jurisdiction and proceed to a final disposition of the case without interference from the military. Military authorities have no legal right or power to interfere with the civil proceedings.

2. Whenever an accused is in the custody of civil authorities charged with a violation of local or state criminal laws as a result of the performance of official duties, the commanding officer should make a request to the nearest U.S. attorney for legal representation. This should be accomplished via the area coordinator, or naval legal service office, if practicable.

a. A full report of all circumstances surrounding the incident and any difficulties in securing the assistance of the U.S. attorney should be forwarded to JAG.

b. Where the U.S. attorney declines or is unable to provide legal services, the Judge Advocate General shall be advised of the circumstances.

3. *Local agreements*. In many areas where major naval installations are located, local arrangements and agreements have been negotiated between naval commands and the local civilian officials with regard to the release of servicemembers to the military before trial. These agreements are local and informal. There is no established Navy-wide procedure. Their success depends upon the practical relationships in the particular area. It is the duty of all commands within the area to comply with the local procedures and make such reports as may be required. Normally, details of the local procedures can be obtained from the area shore patrol headquarters, base legal officer, staff judge advocate, or similar official.

4. *Command representatives*. The command does not owe an accused who is held by civil authorities in the United States legal advice and should not take any action which could be construed as providing legal counsel to represent an accused. The command, however, may send a representative to contact the civil authorities for the purpose of obtaining information for the command. As a general rule, it is improper to release any personal information from the records of the accused, such as NJP results or enlisted performance marks, without either the servicemember's voluntary written consent or an order from the court trying the case.

5. *Conditions on release of accused to military authorities*

a. If the release of the member is on personal recognizance, or on bail to guarantee return for trial, there is little difficulty and there is no objection to a command receiving the servicemember. The commanding officer, upon verification of the attending facts, date of trial, and approximate length of time that should be covered by leave of absence, should normally grant liberty or leave to permit appearance for trial. *See* JAGMAN 0611. Personal recognizance is an obligation of record entered into before a court by an accused in which (s)he promises to return to the court at a designated time to answer the charge against him / her. Bail involves the accused's providing some security beyond mere promise to appear at the time and place designated and submit him / herself to the jurisdiction of the court. Service in the armed forces does not release an accused of the duty to conform to the requirements of release on bond or recognizance.

b. Accepting custody of an accused upon any conditions which would bind naval authorities is not advised. There are dangers in receiving an accused and at the same time promising to return him / her for trial since military

authorities are without power to place an accused in any sort of pretrial restraint based on the civilian charges. Further, ***there is no authority for accepting an accused subject to any conditions whatsoever***. Commands may inform civilian authorities of the Navy's customary policy of granting leave or liberty to permit attendance at civilian trials, but the *JAG Manual* states only that Navy policy is to ***permit*** servicemembers to attend their trials, not to force such attendance.

c. An accused should not be accepted from civil authorities on the condition that disciplinary action will be taken against him / her.

C. ***Special situations***

1. ***Interrogation by Federal civil authorities***. Requests to interrogate suspected military personnel by the FBI or other Federal civilian investigative agencies should be honored promptly. Any refusal and the reasons therefor must be reported immediately to JAG. JAGMAN 0612.

2. ***Writs of habeas corpus or temporary restraining orders***. JAGMAN 0615. Upon receipt of a writ of habeas corpus, temporary restraining order, or similar process, or notification of a hearing on such, the nearest U.S. attorney should be notified immediately and assistance requested. A message or telephone report of the delivery of the process or notification of the hearing must be made to SECNAV (JAG). *See* JAGMAN A-5-a for the appropriate OJAG litigation point of contact. An immediate request for assistance is necessary because such matters frequently require a court appearance with an appropriate response by the government in a very short period of time. When the hearing has been completed and the court has issued its order in the case, a copy of the order should be promptly forwarded to JAG.

SERVICE OF PROCESS AND SUBPOENAS

A. ***Service of process***. Part B, of the *JAG Manual* deals with service of process and subpoenas on personnel. This is generally defined as the establishing of the court's jurisdiction over a person by the handing of a court order to the person which advises him / her of the subject of the litigation and orders the person to appear or answer the plaintiff's allegations within a specified period of time or else be in default. When properly served, the process will make the person subject to the jurisdiction of a civil court.

1. ***Overseas***. A servicemember's amenability to service of process issued by a foreign court depends on international agreements (such as the NATO SOFA). Where there is no agreement, guidance should be sought from a local judge advocate or OJAG. JAGMAN 0616(c) (*see* JAGMAN A-5-a).

2. *Within the United States*

a. *Within the jurisdiction*. Where the member is within the jurisdiction of the court issuing the process, the commanding officer shall permit the service except in unusual cases where (s)he concludes that compliance with the mandate of the process would seriously prejudice the public interest. Personnel serving on a vessel within the territorial waters of a state are considered within the jurisdiction of that state for the purpose of service of process. Process should not be allowed within the confines of the command until permission of the commanding officer first has been obtained. Where practicable, the commanding officer shall require that process be served in his / her presence or in the presence of an officer designated by the commanding officer. Commanding officers are required to ensure that the nature of the process is explained to the member. This can be accomplished by a legal assistance officer. JAGMAN 0616a.

b. *Beyond the jurisdiction*. Where the member is beyond the jurisdiction of the court issuing the process, commanding officers will permit the service under the same conditions as within the jurisdiction, but shall ensure that the member is advised that (s)he need not indicate acceptance of service. Furthermore, in most cases, the commanding officer should advise the person concerned to seek legal counsel. When a commanding officer has been forwarded process with the request that it be delivered to a person within the command, it may be delivered if the servicemember voluntarily agrees to accept it. When the servicemember does not voluntarily accept the service, it should be returned with a notation that the named person has refused to accept it. JAGMAN 0616a(2).

c. *Arising from official duties*. Whenever a servicemember or civilian employee is served with Federal or state court civil or criminal process arising from activities performed in the course of official duties, the commanding officer should be notified and provided copies of the process and pleadings. The command shall ascertain the pertinent facts, notify JAG (Code 34) immediately by telephone, and forward the pleadings and process to that office. A military member or civilian employee may remove civil or criminal prosecutions from state court to Federal court when the action is on account of an act done under color of office or when authority is claimed under a law of the United States respecting the armed forces. 28 U.S.C. § 1442a (1982). The purpose of this section is to ensure a Federal forum for cases when servicemembers and civilian employees must raise defenses arising out of their official duties. If a military member or civilian employee is sued in his / her individual capacity, that military member or civilian employee may be represented by Justice Department attorneys in state criminal proceedings and in civil and congressional proceedings. When a military member or civilian employee believes (s)he is entitled to representation, a request—together with pleadings and process—must be submitted to the Judge Advocate General via the individual's commanding officer. The commanding officer shall endorse the request and submit

all pertinent data as to whether the military member or civilian employee was acting within the scope of employment at the time of the incident out of which the suit arose. If the Justice Department determines that the military member or civilian employee's actions reasonably appear to have been performed within the scope of employment and that representation is in the interest of the United States, representation will be provided. JAGMAN 0616b.

3. ***Service not allowed***. In any case where the commanding officer refuses to allow service of process, a report shall be made to SECNAV (JAG) by telephone or message as expeditiously as the circumstances allow or warrant. JAGMAN 0616e.

4. ***Leave / liberty***. In those cases where personnel either are served with process or voluntarily accept service of process, leave or liberty should be granted in order to comply with the process unless it will prejudice the best interests of the naval service. JAGMAN 0616d.

B. ***Subpoenas***. A subpoena is a court order requiring a person to testify in either a civil or criminal case as a witness. The same considerations exist in this instance as apply in the case of service of process, except for special rules where testimony is required ***on behalf of the United States*** in criminal and civil actions, or where the witness is a prisoner.

1. ***Witness on behalf of the Federal Government***. Where Department of the Navy interests are involved and departmental personnel are required to testify for the Navy, BUPERS or CMC will direct the activity to which the witness is attached to issue TAD orders. Costs of such orders shall be borne by that same command. In the event Department of Navy interests are not involved, the Navy will be reimbursed by the concerned Federal agency. JAGMAN 0618a.

2. ***Witness on behalf of accused in Federal court***. When naval personnel are served with a subpoena and the appropriate fees and mileage are tendered, commanding officers should issue no-cost permissive orders unless the public interest would be seriously prejudiced by the member's absence from the command. JAGMAN 0618b.

3. ***Witness on behalf of party to civil action or state criminal action with no Federal Government interest***. The commanding officer normally will grant leave or liberty to the person, provided such absence will not prejudice the best interests of the naval service. If the member is being called as a witness for a nongovernmental party only because of performance of official duties, the commanding officer is authorized to issue the member permissive orders at no expense to the government. JAGMAN 0618b.

4. *Witness is a prisoner*. JAGMAN 0619.

a. *Criminal cases*. SECNAV (JAG) must be contacted for permission which normally will be granted. Failure to produce the prisoner as a witness may result in a court order requiring such production.

b. *Civil action*. The member will not be released to appear, regardless of whether it is a Federal or state court making the request. A deposition may be taken at the place of confinement subject to reasonable conditions and limitations imposed by the prisoner's command.

5. *Pretrial interviews concerning matters arising out of official duties*. Requests for interviews and / or statements by parties to private litigation must be forwarded to the commanding officer / officer in charge of the cognizant naval legal service office or Marine Corps staff judge advocate. These interviews will be conducted in the presence of an officer designated by the commanding officer / officer in charge, naval legal service office, or Marine Corps staff judge advocate who will ensure that no line of inquiry is permitted which may disclose or compromise classified information or otherwise prejudice the security interests of the United States. JAGMAN 0620.

6. *Release of official information for litigation purposes and testimony by Department of the Navy personnel*. SECNAVINST 5820.8 provides that DON personnel shall not provide official information, testimony, or documents; submit to interview; or permit a view or visit for use in Federal courts, state courts, foreign courts, and other governmental proceedings without proper authorization. Additionally, DON personnel shall not provide, with or without compensation, opinion or expert testimony concerning DOD information, subjects, personnel, or activities -- except on behalf of the United States or a party represented by the Department of Justice—or with written special authorization. The above instruction outlines determining authorities, the required contents of a proper request by a requester, and consideration in granting or denying a request for official information. JAGMAN 0522 - 0529.

C. *Jury duty*. Active-duty servicemembers are exempted from service on Federal juries. DOD Directive 5525.8 (Service of the Armed Forces on State and Local Juries). Congress passed a similar exemption for state jury duty in the Defense Authorization Act of 1986 (codified at 10 U.S.C. § 982), but imposed a two-part test. Servicemembers may be excused from jury duty when it unreasonably interferes with performance of their military duties or adversely affects the readiness of a unit, command, or activity. Special court-martial convening authorities are empowered to make the decision and the decision is final. All personnel assigned to operating forces, in a training status, or stationed outside the United States are exempt from serving on a state or local jury. Servicemembers who serve on state and local juries

shall not be charged leave or lose any pay entitlements during the period of service. All fees accrued to members for jury service are payable to the U.S. Treasury. Members are entitled to any reimbursement from the state or local jury authority for expenses incurred in the performance of jury duty (such as for transportation, costs of parking fees, etc.). Commanding officers are responsible for notifying the responsible state or local official of this exemption when a servicemember is summoned. SECNAVINST 5822.2.

FOREIGN CRIMINAL JURISDICTION OVER U.S. SERVICEMEMBERS

A. ***Aboard U.S. warships***. A warship is considered an instrumentality of a nation in the exercise of its sovereign power; therefore, a U.S. warship is considered to be an extension of U.S. territory. As such, it is under the exclusive jurisdiction of the United States, and is thus immune from any other nation's jurisdiction during its entry and stay in foreign ports and territorial waters as well as on the high seas. Attachment or libel in admiralty may not be taken or effected against a warship for recovery of possession, for collision damage, or for salvage charges. The commanding officer of a ship shall not permit his / her ship to be searched by foreign authorities nor shall (s)he allow personnel to be removed from the ship by foreign authorities. If the foreign authorities use force to compel submission, the commanding officer should resist with the utmost power. Except as provided by international agreement, the rules for a shore activity are the same. *U.S. Navy Regulations, 1990*, arts. 0822, 0828. In addition, the laws, regulations, and discipline of the United States may be enforced on board a U.S. warship (personal and territorial jurisdiction) within the territorial precincts of a foreign nation without violating that nation's sovereignty. A warship present in a foreign port is expected to comply voluntarily with applicable health, sanitation, navigation, anchorage, and other regulations of the territorial nation governing her admission to the port. Failure to comply may result in the lodging of a diplomatic protest by the host nation and the possible ordering of the warship to leave the port and territorial sea. If such sanctions were imposed, immunity from seizure, arrest, or detention by any legal means would remain in force.

B. ***Overseas ashore***. JAGMAN 0609.

1. ***Servicemembers***. Military personnel visiting or stationed ashore overseas are subject to the civil and criminal laws of the particular foreign state ("territorial jurisdiction"). The United States has negotiated agreements, generally known as status of forces agreements (SOFA's), with all countries where its forces are stationed. Under most SOFA's, the question of whether the U.S. servicemember will be tried for crimes committed by U.S. authorities or by foreign authorities depends on which country has "exclusive" or "primary" jurisdiction. Exclusive jurisdiction exists when the act constitutes an offense against only one of the two states (e.g.,

unauthorized absence). Those areas constituting violations under both the UCMJ and foreign law are subject to concurrent jurisdiction. This situation raises the question of which state has "primary" jurisdiction. The United States will normally have primary jurisdiction over military personnel for:

a. Offenses solely against the property or security of the United States;

b. offenses arising out of any act or omission done in the performance of official duty; and

c. offenses solely against the person or property of another servicemember, a civilian employee, or a dependent.

The host country will retain the primary right to exercise jurisdiction in all other concurrent jurisdiction situations. If a servicemember commits a crime in which the host country has primary jurisdiction, the accused will be prosecuted under the laws and procedures of that country's criminal justice system and, if convicted, the accused will be punished in accordance with those laws. This rule exists unless the host country waives its primary right to exercise jurisdiction. This is possible because the United States always retains criminal jurisdiction under the UCMJ over all military personnel as an exercise of personal jurisdiction.

2. *Civilians*. Special privileges and exceptions from the application of foreign local law to U.S. bases overseas are governed by a "Base Rights Agreement" between the two governments. Such agreements may provide for the exercise of police power by the United States within the confines of the base, with the exercise usually being concurrent with that of the foreign sovereign. Residual sovereignty over the base usually is retained by the foreign government, and criminal offenses committed by U.S. nonmilitary personnel while on the base are generally triable in foreign criminal courts. It is questionable whether any U.S. court has jurisdiction to try U.S. civilians for crimes committed overseas with the exception of crimes committed by civilian personnel while accompanying U.S. military forces into declared war zones.

C. *U.S. policy*. It is the policy of the United States to maximize its jurisdiction and seek waivers in cases where it does not have primary jurisdiction. SECNAVINST 5820.4, Subj: Status of Forces Policies, Procedures, and Information, directs in paragraph 1-4(a) that "[c]onstant efforts will be made to establish relationships and methods of operation with host country authorities which will maximize US jurisdiction to the extent permitted by applicable agreements." This means that requests for waiver of jurisdiction should be made for all serious offenses committed by servicemembers regardless of the lack of a status agreement or exclusive jurisdiction by the host country.

D. ***Reporting***. Whenever a servicemember is involved in a serious or unusual incident, it will be reported to the Judge Advocate General. Serious or unusual incidents will include any case in which one or more of the following circumstances exist:

1. Pretrial confinement by foreign authorities;

2. actual or alleged mistreatment by foreign authorities;

3. actual or probable publicity adverse to the United States;

4. congressional, domestic, or foreign public interest is likely to be aroused;

5. a jurisdictional question has arisen;

6. the death of a foreign national is involved; or

7. capital punishment might be imposed.

The reporting provisions of OPNAVINST 3100.6 (OPREP-3 Navy Blue Reports) apply in appropriate circumstances. Local regulations and chain of command directives will also dictate what reports are required.

E. ***Custody rules***. When a servicemember is arrested and accused of a crime, which country retains custody of the individual is determined by the existing SOFA with the host country. General rules in this area follow:

ARRESTED BY	***PRIMARY JURISDICTION***	***CUSTODY***
U.S. Authorities	U.S.	U.S.
Foreign Authorities	U.S.	Turn over to U.S.
U.S. Authorities	Foreign Country	U.S. custody until officially charged or agreement provides for U.S. custody until criminal proceedings completed
Foreign Authorities	Foreign Country	Host country may maintain custody or turn over to U.S. authorities until criminal proceedings completed

Commanding officers should be aware that, except when provided by agreement between the United States and the foreign nation concerned, there is no authority to deliver military or civilian persons in the Department of the Navy, or their dependents, to foreign authorities. JAGMAN 0609. Where a U.S. servicemember is in the hands of foreign authorities and is charged with the commission of a crime, regardless of where it took place, the commanding officer should report the matter to JAG and other higher authorities for guidance. Since expeditious release from foreign incarceration is a matter of utmost interest, delay should be avoided at all cost. To secure the release of U.S. military personnel held by foreign authorities, U.S. military authorities may give assurances that the servicemember will not be removed from the host country except on due notice and adequate opportunity by the foreign authorities to object to that action. In appropriate cases, military authorities may order pretrial restraint of the servicemember in a U.S. facility to ensure his / her presence at trial on foreign charges.

F. *Procedural safeguards*. If a servicemember is to be tried for an offense in a foreign court, (s)he is entitled to certain safeguards. The rights guaranteed under the NATO SOFA include the following:

1. A prompt and speedy trial;

2. to be informed in advance of trial of the specific charge or charges made against him / her;

3. to be confronted with the witnesses against him / her;

4. to compel the appearance of witnesses in his / her favor if they are within the jurisdiction of the state;

5. to have legal representation of his / her own choice;

6. to have the services of a competent interpreter if necessary; and

7. to communicate with representatives of the U.S. Government and, when the rules permit, to have such representatives present at trial.

These rights are also provided for in most nations where status agreements exist. The in-court observer is not a participant in the defense of the servicemember, but rather reports to higher authority as to whether the safeguards guaranteed by the SOFA were followed and whether or not a fair trial was received. Section 1037 of title 10, *United States Code*, authorizes the armed forces to pay counsel fees, bail, court costs and other related expenses—such as interpreter's fees—for servicemembers tried in foreign courts.

GRANTING OF ASYLUM AND TEMPORARY REFUGE

A. *References*

1. *U.S. Navy Regulations, 1990*, art. 0939

2. SECNAVINST 5710.22, Subj: PROCEDURES FOR HANDLING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE

B. *Synopsis of provisions*

1. The provisions of the basic references for granting asylum or temporary refuge to foreign nationals depend on where the request is made. Basically, if the request is made either in U.S. territory (the 50 states, Puerto Rico, territories, or possessions) or on the high seas, the applicant will be received onboard the naval installation, aircraft, or vessel where (s)he seeks asylum. If a request for asylum or refuge is made in territory or territorial seas under foreign jurisdiction, the applicant normally will not be received onboard and should be advised to apply in person at the nearest American consulate or Embassy. Under these circumstances, an applicant may be received onboard and given temporary refuge only under extreme or exceptional circumstances where his / her life or safety is in imminent danger (e.g., being pursued by a mob).

2. Regardless of the location of the unit involved, any action taken upon a request for asylum or refuge must be reported to CNO or CMC, as appropriate, by the fastest available means. Telephone or other voice communication is preferred but, in any case, an immediate precedence message (info: SECSTATE) must be sent confirming the telephone or voice radio report. All requests from foreign governments for release of the applicant will be referred to CNO / CMC, and the requesting authorities shall be advised of the referral.

3. In any case, once an applicant has been received onboard an installation, aircraft, or vessel, (s)he will not be turned over to foreign officials without personal permission from the Secretary of the Navy or higher authority—regardless of where the accepting unit is located.

4. Personnel of the Department of the Navy are prohibited from directly or indirectly inviting persons to seek asylum or temporary refuge. No information concerning a request for political asylum or temporary refuge will be released to the public or media without the prior approval of the Assistant Secretary of Defense for Public Affairs.

POSSE COMITATUS

A. *References*

1. Posse Comitatus Act, 18 U.S.C. § 1385 (1982).

2. Military Cooperation with Civilian Law Enforcement Officials, 10 U.S.C. §§ 371-378 (1982).

3. DOD Dir. 5525.5 of 15 Jan 1986, DOD Cooperation with Civilian Law Enforcement Officials.

4. SECNAVINST 5820.7, Subj: COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS

B. ***Statutory authority***. The Posse Comitatus Act provides that:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years or both.

C. ***Navy policy***. Although not expressly applicable to the Navy and Marine Corps, the Act is regarded as a statement of Federal policy which has been adopted for the Department of the Navy by Secretarial regulation (i.e., SECNAVINST 5820.7).

D. ***Execution of civil laws defined***. The prohibition on use of military personnel as "a posse comitatus or otherwise to execute the laws" prohibits the following forms of direct assistance:

1. Interdiction of a vehicle, vessel, aircraft, or other similar activity;

2. a search or seizure;

3. an arrest, stop and frisk, or similar activity;

4. use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators; and

5. any other activity which subjects civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature.

E. ***"Armed forces" defined.*** The prohibitions of the Posse Comitatus Act are applicable to members of the Navy and Marine Corps acting in an official capacity. Accordingly, it does not apply to:

1. A servicemember off duty, acting in a private capacity, and not under the direction, control, or suggestion of DON authorities;

2. a member of a Reserve component not on active duty or active duty for training; or

3. civilian special agents of the Naval Criminal Investigative Service (NCIS) performing assigned duties under SECNAVINST 5520.3.

F. ***Posse Comitatus exceptions***

1. ***Use of information collected during military operations.*** All information collected during the normal course of military operations which may be relevant to a violation of Federal or state law shall be forwarded to the local NCIS field office or other authorized activity for dissemination to appropriate civilian law-enforcement officials pursuant to SECNAVINST 5520.3. The needs of civilian law enforcement officials may even be considered in scheduling routine training missions. This does not, however, permit the planning or creation of missions or training for the primary purpose of aiding civilian law enforcement officials, nor does it permit conducting training or missions for the purpose of routinely collecting information about U.S. citizens.

2. ***Use of equipment and facilities.*** Navy and Marine Corps activities may make available equipment, base facilities, or research facilities to Federal, state, or local civilian law enforcement officials for law enforcement purposes when approved by proper authority under SECNAVINST 5820.7.

3. ***Use of Department of the Navy personnel***

a. ***Military / foreign affairs purposes.*** Actions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States (e.g., enforcement of the UCMJ, maintenance of law and order on a military installation, protection of classified military information or equipment) are not restricted by the Posse Comitatus Act, regardless of incidental benefits to civilian law enforcement authorities.

b. ***Express statutory authority.*** Certain laws permit direct military participation in civilian law enforcement for suppression of insurrection or domestic violence; protection of the President, Vice President, and other designated

dignitaries; and assistance in the case of crimes against members of Congress, foreign officials, and other internationally protected persons.

c. *Operation and maintenance of equipment*. Where the training of non-DOD personnel is infeasible or impractical, DON personnel may operate or maintain, or assist in operating or maintaining, equipment made available to civilian law enforcement authorities.

d. *Training and expert advice*. Navy and Marine Corps activities may provide training on a small scale and expert advice to Federal, state, and local civilian law enforcement officials in the operation and maintenance of equipment.

e. *Secretarial authorization*. The DON Posse Comitatus Act policy is subject to Secretarial exceptions on a case-by-case basis.

4. *Reimbursement*. As a general rule, reimbursement is required when equipment or services are provided to agencies outside DOD. When DON resources are used in support of civilian law enforcement efforts, the costs shall be limited to the incremental or marginal costs incurred by DON. SECNAV waivers are available in some instances.

NOTES

NOTES (continued)

CHAPTER XXXVII

LEGAL ASSISTANCE

LEGAL ASSISTANCE

A. *Legal assistance officers*. All active-duty judge advocates are legal assistance officers.

B. *Scope*

1. *Regular program*

a. Eligible personnel include all active-duty members and their dependents, allied personnel, civilians (other than local-hire) serving overseas, retired personnel and their dependents, and survivors of members of the armed forces who would be eligible were the servicemember alive. Active-duty personnel and their dependents have preference.

b. The statutory authority for permitting legal assistance to servicemembers (10 U.S.C. § 1044) provides that, "subject to the availability of legal staff resources, the Secretary concerned may provide legal assistance in connection with their personal civil legal affairs. . . ."

2. *Expanded Legal Assistance Program (ELAP)*. ELAP allows judge advocates in certain limited situations to represent clients in civilian courts. It is available only in a limited number of areas because of the amount of time needed to process a case through the civil courts. Single personnel E-3 and below, and married personnel E-4 and below and their dependents, are eligible for the program. Personnel in other paygrades could be eligible for the program if it can be shown that they cannot afford the services of a civilian attorney.

FAMILY LAW

A. *Nonsupport*

1. *References*: MILPERSMAN 6210120; LEGADMINMAN, chapter 8.

2. The MILPERSMAN and LEGADMINMAN discuss dependent support and provide guidelines for the amount of support. These tables are only guidelines for use in counseling members on their obligations.

3. It is the policy of the Navy and Marine Corps that *all* personnel will provide continuous and adequate support to their lawful dependents.

a. Members must support their spouses unless:

(1) There is a court order (i.e., divorce decree, legal separation, etc.) which relieves the member of that obligation;

(2) the spouse gave up their right to support in writing;

(3) there is mutual agreement of the parties (e.g., a written separation agreement); or

(4) the Defense Finance and Accounting Service (Navy) or Commandant of the Marine Corps grants a waiver of support. The waiver must be requested in writing and is limited to those cases involving desertion, infidelity, or physical abuse.

b. Lawful minor dependents must be supported at all times unless:

(1) The child is adopted by another; or

(2) a custody and support order *specifically* relieves the member of any support obligation. The conduct of the custodial spouse does not affect the obligation to pay support (e.g., refusal to grant visitation rights or cohabitation). The proper remedy is a modification of the custody decree.

c. Use the support guidelines in the MILPERSMAN and LEGADMINMAN when counseling a member as to what constitutes "adequate support." Keep in mind that these are only guidelines.

d. If the member refuses to provide support, they should be counseled on the possible penalties. These include:

(1) Lower evaluation marks, especially in the areas of reliability and personal behavior;

(2) administrative separation for misconduct, pattern of misconduct (this could result in an OTH separation);

(3) garnishment of pay by a civilian court with proper jurisdiction (*see* para. D below);

(4) disciplinary action under Article 134, UCMJ, for dishonorable failure to pay a debt;

(5) the finance center may recoup previously paid BAQ and withhold future BAQ;

(6) the member may not be recommended for reenlistment; and / or

(7) loss of tax exemption for the dependent.

B. ***Paternity complaints***

1. ***References***: MILPERSMAN 6210125; LEGADMINMAN 8005.

2. Complaints alleging that a servicemember is the father of an illegitimate child may be received by the command before, as well as after, the birth of the baby. Neither civil law nor naval regulations require a man to marry the mother of his child. Local law, however, generally requires that a father support his natural children, and Navy and Marine Corps policy concerning support of dependents applies equally here. In many cases, a proper solution to a paternity problem involves not only the legal assistance officer who will advise the member as to his legal obligations and liabilities, but also the chaplain, who may advise the member concerning the moral aspects of the situation.

3. ***Procedures***: Upon receipt of a paternity complaint, the command concerned will arrange for the interview of the servicemember and action will be taken as follows:

a. ***Judicial order or decree of paternity or support.*** If a judicial order *or* decree of paternity or support is rendered by a state or foreign court of competent jurisdiction, the member shall be advised that he is expected to provide financial assistance to the child regardless of any doubts of paternity he may have. Questions concerning the competency of the court to enter such a decree against the servicemember, particularly one not present in court at the time the order or decree was rendered, should be directed to a legal assistance officer.

b. *Acknowledgement of paternity*. If, in the absence of legal action declaring him the father, a member admits to paternity or the legal obligation to support the child, he shall be informed that he is expected to furnish support payments for the child and he should be counseled as to his moral obligation to assist in the payment of prenatal expenses. He should be advised to consult with the nearest legal assistance officer before making the first support payment or before corresponding with the child's mother. The member should be advised that, once support payments are begun, the child will probably qualify for an armed forces dependents' identification card. *See* NAVMILPERSCOMINST 1750.1.

c. *Disputed or questionable cases*. When no legal action has determined the paternity of the child and the servicemember disputes or is uncertain of the accusation of the child's mother, he should be referred immediately to the nearest legal assistance officer. Since many states construe an offer of, or actual payment of, any support for the child as an admission of paternity, the servicemember should not be advised or directed to make any payments or give *any* indication of intent to provide financial support before he has consulted with the legal assistance officer.

4. *Correspondence*. Replies to individuals concerning paternity cases should be as kind and sympathetic as circumstances permit. MILPERSMAN 6201025; LEGADMINMAN 8005. Article 6210125.5 of the MILPERSMAN sets out sample replies which may be appropriate in some cases.

C. *Uniformed Services Former Spouses' Protection Act (USFSPA)*

1. This Federal law permits, but does not require, state courts to treat disposable military retired or retainer pay as community property, in accordance with state law, in marital dissolution actions. In effect, military retirement pay can be treated by the state court as a pension fund constituting a marital asset which can be divided and distributed as part of a court order of divorce, dissolution, or legal separation.

2. *Major provisions of this Act include*:

a. A limit of 50% on the total amount of the disposable retired or retainer pay that can be distributed by the state court order. However, the payment of this maximum amount will not relieve a member from liability for the payment of alimony, child support, or other payments required by a court order.

b. The spouse or former spouse to whom payments are to be made must have been married to the servicemember for a period of at least ten years, which overlap ten years of creditable military service, in order to receive the court-ordered payments directly from the military finance center.

c. The state court must have jurisdiction over the servicemember. That jurisdiction may be obtained only by:

(1) The in-state residence of the member, other than presence in the jurisdiction due to military orders;

(2) the consent of the member; or

(3) domicile in the jurisdiction.

d. The Act also provides medical, exchange, and commissary privileges to an ***unremarried*** former spouse if the following conditions are met:

(1) The marriage lasted at least 20 years; and

(2) the former spouse does not have medical coverage under an employer-sponsored health plan (this provision affects medical benefits only; dental and other coverages are still allowed); and

(3) the retired member was in the service for at least 20 years while married to the former spouse (where the marriage was for less than 20 years during military service, medical benefits continue for up to 2 years from date of divorce).

D. ***Garnishment***

1. The authority for garnishment of Federal pay is contained in 42 U.S.C. § 659 (1988) and in the USFSPA, *supra*. Procedures for handling a state garnishment order are contained in SECNAVINST 7200.16 of 14 March 1979, Subj: GARNISHMENT OF PAY OF NAVAL MILITARY AND CIVILIAN PERSONNEL FOR COLLECTION OF CHILD SUPPORT AND ALIMONY; and, in the Marine Corps, LEGADMINMAN, chapter 8.

2. Before the mid-1970's, Federal pay was not subject to garnishment for any reason. 42 U.S.C. § 659 provided for garnishment of Federal pay for arrearage in court-ordered child support or alimony and for attorney's fees in pursuing the garnishment order. An additional reason for garnishment was added by USFSPA (*see* above) in cases of court-ordered property settlements that meet certain requirements. As a result of the Hatch Act Reform Act of 1993 (Pub. L. No. 103-94), the garnishment of Federal civilian employees' pay has been expanded to include any judgment against the employee. Garnishment begins immediately upon the appropriate finance center being notified by the creditor of the existence of a judgment against the employee.

3. A garnishment order or wage / earnings withholding order served upon the member or the command should be forwarded immediately to the appropriate finance center.

E. *Involuntary allotments*. The Hatch Act Reform Act of 1993 (Pub. L. No. 103-94) states that the pay of military members is subject to involuntary allotments for debts reduced to judgment. Congress gave the DOD six months to implement the law; however, the services have not yet set out the procedures to implement the law. DODDIR 1344.9, Subj: INDEBTEDNESS OF MILITARY PERSONNEL, states that a garnishment order is not required to begin the involuntary allotment process. To start the process, a creditor will need a judgment from a court of competent jurisdiction and proof of compliance with the Soldiers' and Sailors' Civil Relief Act. The Defense Finance and Accounting Service will handle all applications for involuntary allotments.

INDEBTEDNESS

A. *References*. The primary references for handling letters of indebtedness are contained in MILPERSMAN 6210140 and LEGADMINMAN, chapter 7.

B. *Policy*. The Navy and Marine Corps will not be debt collectors, nor will the military services be a haven for debtors and shirkers. Each member is responsible for handling financial affairs in a responsible manner. Commands in the naval service will forward only "qualified correspondence" to the member concerning financial matters.

C. "*Qualified correspondence*." To be considered as qualified correspondence, a letter of indebtedness must meet at least one of the following criteria:

1. The creditor certifies in writing his / her compliance with the Truth in Lending Act and the DOD Standards of Fairness for financial transactions;

-- In the Marine Corps, a creditor not subject to Regulation Z should submit with the request a certification that no interest, finance charges, or other fee is in excess of that permitted by the law of the state in which the obligation was incurred.

2. the debt has been reduced to a judgment from a court of competent jurisdiction;

3. the credit given has facilitated the rendering of a service for the benefit of the members (e.g., utilities or delivering milk and collecting at the end of the month);

4. the debt results from a real estate transaction of any kind;

5. the debt is less than $50.00; or

6. the debt is from an open-end charge account (e.g., SEARS, revolving charge accounts, VISA, MASTERCARD, etc.).

D. Federal Fair Debt Collection Practices Act (FDCPA) prohibits against ***professional debt collectors*** from contacting employers. Letters from them are not considered qualified correspondence and shall be returned.

E. ***State statutes***. In addition to the FDCPA, local state law applies and frequently gives even more protection to the debtor. In some states, not even the creditor may contact the employer and this also gives the debtor a cause of action. If local state law is violated, such correspondence is not "qualified" and shall be returned.

F. ***Penalties***. The penalties or sanctions that the member should be counseled about are similar to those listed under nonsupport, section A.3.d in **FAMILY LAW**, above, with the exception of garnishment and involuntary allotment.

G. For dishonored personal checks written or endorsed by military personnel for purchases made at resale and nonappropriated fund activities, see SECNAVINST 7200.2.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

[50 U.S.C. app. §§ 501-591 (1988)]

A. ***Policy***. The Act seeks to provide some protection against civil proceedings at which the servicemember could not adequately represent him / herself because of his / her military duties. It is ***not*** an absolute shield against civil proceedings during military service. The Act does not apply to criminal proceedings.

B. ***Major provisions of this Act*** provide some measure of court protection in several areas, including:

1. If a court grants a default judgment in a civil case against a servicemember who did not enter a court appearance in the case, who has a

meritorious or legal defense to the action brought against him / her, and whose military service prejudiced his / her ability to present a defense in the case, that servicemember can request that the court set aside the default judgment and reopen the case so that (s)he can present his / her defense to the court. Members are strongly urged to consult a legal assistance officer in these areas. This relief only exists if the servicemember did not enter "an appearance" in the case, and the courts are divided on exactly what is necessary to constitute an appearance (e.g., whether a letter or telegram from the servicemember—or someone acting on his / her behalf, including a legal assistance officer—to the court while the case is pending is sufficient to constitute an appearance in the proceeding).

2. A servicemember who is either the plaintiff or the defendant in a civil action or proceeding may request, at any stage in the proceedings, that the court grant a stay (delay) in the proceedings due to the member's military service. That delay will normally be granted by the court unless, in the court's opinion, the ability of the servicemember to proceed as the plaintiff or to conduct his / her defense is not materially affected by reason of his / her military service. In this regard, many courts consider what efforts the servicemember has made to obtain leave to attend to the court proceedings, or otherwise exercised due diligence or acted in good faith in order to make him / herself available for those proceedings.

3. Servicemembers are protected from double taxation due to their temporary duty in a state other than their domicile. This protection prevents multiple-state taxation of the property and military income of servicemembers. However, any income earned by a nonmilitary spouse would normally be taxable in the state in which that spouse lives, even if that state is not that spouse's permanent state of residence. *See* JAGMAN 0632.

NOTARY

A. The authority and duties of a notary can be found in Art. 136, UCMJ, and the *JAG Manual*, chapter 9. Notarial acts performed under the authority of 10 U.S.C. § 1044a are legally effective for all legal assistance purposes. They may be performed without regard to geographic limitation.

B. *Oaths*

-- One of the primary duties of a notary public is to administer oaths for various purposes. The references cited above list the following as having authority to administer oaths for legal assistance purposes:

a. All judge advocates and law specialists;

b. adjutants; and

g. officers in paygrade O-4 and above.

NOTES

NOTES (continued)

CHAPTER XXXVIII

FAMILY ADVOCACY PROGRAM

REFERENCES

A. DOD Dir. 6400.1, Subj: FAMILY ADVOCACY PROGRAM (FAP)
B. SECNAVINST 1752.3 (NOTAL), Subj: FAMILY ADVOCACY PROGRAM
C. SECNAVINST 1754.1, Subj: DEPARTMENT OF THE NAVY FAMILY SERVICE CENTER PROGRAM
D. SECNAVINST 5800.11, Subj: PROTECTION AND ASSISTANCE OF CRIME VICTIMS AND WITNESSES
E. OPNAVINST 1752.2, Subj: FAMILY ADVOCACY PROGRAM (FAP)
F. OPNAVINST 1752.1, Subj: RAPE PREVENTION AND VICTIM ASSISTANCE
G. MCO 1752.3B, Marine Corps Family Advocacy Program
H. MCO 1710.30B, Child Care Center Policy and Operational Guidelines
I. MCO 1700.24, Marine Corps Family Services Center Program
J. BUMEDINST 6320.57 (NOTAL), Subj: FAMILY ADVOCACY PROGRAM
K. COMDINST 1750.7, Subj: FAMILY ADVOCACY PROGRAM
L. White Letter No. 3-93 (Marine Corps Family Advocacy Program) dtd 5 Apr 93

Headquarters sponsoring sections: Good numbers to keep handy

Marine Corps	*Navy*
Commandant of the Marine Corps (Code MHF) DSN 224-2895	Bureau of Naval Personnel (BUPERS 661D) DSN 224-1006
U.S. Coast Guard (COMDT (G-PS))	

OVERVIEW OF FAMILY VIOLENCE

A. *Extent of family violence*

Family violence is a significant social problem in American society. Each succeeding year the number of reported cases increases, as does the severity. The Navy and Marine Corps are not immune from the problems of spouse abuse and child maltreatment.

B. *Causes of family violence*

1. Family violence is a complex and multidimensional problem. There are many factors that contribute to the incidence of violence and neglect in families (e.g., experiencing or witnessing abuse as a child, the stress a family experiences due to the member's return from extended sea duty, severe financial difficulties, or other stressful periods). Also, abuse and neglect in families tends to be passed on from one generation to the other.

2. The costs of family violence are incalculable. The human costs are the most obvious and the most immediately tragic. There are, however, significant costs to the DON as well (e.g., jeopardizing mission of operating forces). Our ultimate goal, then, is to break the cycle of violence and neglect and to prevent it from recurring. This is not achieved easily. Just as the problem is complex, so must our intervention be varied and flexible.

MILITARY RESPONSE TO FAMILY VIOLENCE

A. Like the civilian community, the military began to seriously address the problem of family violence in the early 1970's. In 1976, the Navy established the Child Advocacy Program within the Navy Medical Department. In 1979, this program, which had addressed only the maltreatment of children, was expanded to include spouse abuse, sexual assault, and rape. The program was redesignated the Family Advocacy Program (FAP) and, in 1980, became line managed—with Chief of Naval Personnel (Code 66) serving as program manager. In 1981, DOD Directive 6400.1 established guidelines for the "Family Advocacy" program for all military services. In 1984, SECNAVINST 1752.3 was signed, setting Navy policy in the area of family violence. OPNAVINST 1752.2, signed in March 1987, and Marine Corps Order (MCO) 1752.3B provide detailed information regarding the implementation of the FAP.

B. ***DOD Directive 6400.1***

1. As stated previously, DOD Directive 6400.1 established a DOD-wide Family Advocacy Program (FAP). It encouraged each of the services to:

a. Develop programs to promote healthy family life and to treat families experiencing violence and neglect;

b. relinquish legislative jurisdiction as may be required to ensure the applicability of state laws regarding child and spouse protection;

c. identify suspected perpetrators of violence and neglect, so that further injury can be prevented and therapy for dysfunctional families provided;

d. cooperate with relevant civil authorities and report cases of child maltreatment as required by state law;

e. make specific efforts to fully serve families living on and off base; and

f. combine the management of the FAP with similar medical and social programs.

2. DOD Directive 6400.1 was revised on 23 June 1992. The reissued directive specifically addresses the need to minimize further trauma to victims of family violence. It further established the Military Family Resource Center which is available to assist the services to establish, develop, and maintain comprehensive FAPs.

C. ***SECNAVINST 1752.3***

1. SECNAVINST 1752.3 states "[f]amily violence and neglect can detract from military performance, efficient functioning of military units, and can diminish the reputation and prestige of the military service in the civilian community. It is incompatible with the high standards of professional and personal discipline required of members of the Naval service." The Instruction established DON policy on the prevention, evaluation, identification, intervention, treatment, follow-up, and reporting of all child and spouse maltreatment, sexual assault, and rape. SECNAVINST 1752.3 states that the objectives of the FAP are to:

a. Prevent family maltreatment;

b. deter illegal actions through knowledge that administrative or disciplinary action may be taken;

c. provide treatment for victims;

d. identify, support, and treat at-risk (having high potential for family violence) families; and

e. assist military personnel who have the potential for further useful service.

2. Further, the Instruction states that it is DON policy to provide the following program components in its FAP.

a. Prevent family violence by:

(1) Establishing and maintaining education and awareness programs; and

(2) developing programs that contribute to healthy family life.

b. Intervene effectively by:

(1) Recognizing the sensitive nature of family advocacy and responding, while ensuring careful handling of case information and following confidentiality guidelines scrupulously;

(2) identifying suspected abusers and / or neglecters;

(3) encouraging voluntary self-referral;

(4) cooperating with civilian agencies by observing local law pertaining to child / spouse abuse and neglect;

(5) ensuring that all involved agencies and individuals cooperate and coordinate; and

(6) applying disciplinary or administrative sanctions for maltreatment, when appropriate.

c. Treat family members involved in violence and neglect by:

(1) Breaking the cycle of abuse and neglect through identification and treatment—diversion into treatment / rehabilitation is encouraged for proven performers;

(2) ensuring that victims of maltreatment receive proper care and treatment; and

(3) ensuring that nonmedical personnel involved in treatment / counseling are properly trained and credentialed.

3. Finally, the Instruction provides for the establishment and maintenance of a central registry of cases. Information on substantiated and suspected cases is maintained by the Naval Medical Command. Personnel records of members with substantiated cases are flagged; unsubstantiated cases are listed by social security number and are expunged after four years.

D. ***OPNAVINST 1752.2; MCO 1752.3B***

1. In purpose, objective, and scope, OPNAVINST 1752.2 and MCO 1752.3B are similar. Perhaps the most notable difference is that the Marine Corps, unlike the Navy, does not centrally manage incest cases—although a treatment option is available at many installations. For purposes of the following sections, the organization and language is taken substantially from the OPNAV Instruction; however, where appropriate, the MCO reference is provided.

2. The following brief definitions from the Family Advocacy SECNAV and OPNAV Instructions guide the administration of the FAP. They do not modify or influence definitions applicable to statutory provisions and regulations that relate to determinations of misconduct and line of duty and criminal responsibility for a person's acts or omissions.

3. OPNAVINST 1752.2 defines the problems of child maltreatment and spouse abuse as:

a. ***Physical abuse of children*** which includes any ***major physical injury***—such as brain damage, skull or bone fracture, and severe lacerations or bruises—which constitutes a substantial risk to the life and / or well-being of the child. It also includes ***minor injuries***—such as twisting or shaking—which do not constitute a substantial risk to the life or well-being of the child. These nonaccidental injuries are inflicted on a child by the child's parent(s) or caretaker.

b. *Sexual abuse of children* includes the involvement of a child in any sexual act or situation, the purpose of which is to provide sexual gratification or financial benefit to the perpetrator; and all sexual activity between a caretaker and child is considered sexual abuse.

c. *Neglect* is defined as deprivation of necessities (when the caretaker is able to provide them) including failure to provide nourishment, shelter, clothing, health care, education, and supervision. Neglect is further defined as inadequate or improper care that results or could reasonably result in injury, trauma, or emotional harm—including failure to thrive.

d. *Emotional maltreatment of children* is defined as an act or *commission* (e.g., intentional berating or disparaging a child) or an *omission* (such as passive / aggressive inattention to a child's emotional needs by a caretaker). These acts must cause such effects in children as low self-esteem or undue fear or anxiety.

e. *Spouse abuse* includes any direct, nonaccidental physical injury inflicted on a partner in a lawful marriage.

4. The MCO has similar definitions. MCO 1752.3B, appendix A.

5. As a practical matter, most prosecutions for family violence in the DON involve physical and sexual child abuse. Child neglect, unless in conjunction with physical or sexual abuse charges, rarely results in disciplinary or administrative actions. Spouse abuse too has seen little prosecution in the DON.

6. The SECNAV Instruction sets forth the following policy regarding family advocacy:

a. The FAP is a line program, and COs will ensure that the FAP is a cooperative effort. *See* MCO 1752.3B, para. 1001(1).

b. Providing assistance to abusers will not be the basis for adverse action such as:

(1) Revocation of security clearances;

(2) removal from Personnel Reliability Program (PRP);

(3) disqualification from warfare speciality; and

(4) removal of Navy Enlistment Classification Code.

c. Perpetrators of family violence must be held accountable for their behavior. Swift and certain intervention and subsequent disciplinary action is one of the most effective deterrents to family violence. *See* MCO 1752.3B, paras. 1001(1), 1001(2)(d), 2002(8).

(***Note***: FAP has no disciplinary authority over members of other commands, but may make recommendations. The disciplinary authority is the member's chain of command.)

d. When deciding to pursue disciplinary action, consider the following:

(1) When the member is judged treatable and has potential for further effective service, the Navy's interests, justice, and the family / victim can be served by taking disciplinary action and then suspending the sentence while the member is in treatment. The MCO clearly states that the cognizant commander makes the determination of appropriate disciplinary or administrative action. *See* MCO 1752.3B, paras. 1001(2)(e), 2001(5).

(2) Disciplinary / administrative action is ***most*** appropriate when: the perpetrator does not acknowledge the unlawful behavior and assume responsibility for it; the perpetrator's behavior is compulsive and likely to recur; the victim receives a serious injury; there is sufficient evidence for conviction; and / or when court testimony is in the best interest of the victim. *See* MCO 1752.3B, para. 1001(2)(d).

E. ***FAP components***. OPNAVINST 1752.2 and MCO 1752.3B describe the operation of the FAP which consists of several program components: voluntary self-referral; prevention; identification and referral; intervention; rehabilitation / treatment; and coordination. The relevant components are described below.

1. ***Identification and referral***. Everyone has the responsibility to report suspected and known cases of abuse / neglect (except for privileged communications within the clergy-penitent relationship [*see* OPNAVINST 1752.2, para. 4.a(1)]. This policy is supported by state child abuse and neglect reporting laws. In addition, all reports should be made to the Family Advocacy Representative (FAR) who will report the incident to the appropriate civilian authorities, usually child protective services (CPS). *See* MCO 1752.3B, para. 2003(4), which encourages servicemembers to comply with local child abuse reporting laws.

2. ***Intervention***. The intervention strategies available to CO's include:

a. Temporary removal of the military member;

b. development of written memorandums of understanding (MOU's) with civilian social service agencies to establish cooperative intervention in child maltreatment cases (*see* MCO 1752.3B, para. 2001(2) and appendix J); and

c. establishment of a safe house or other overnight accommodation in order to protect victims and provide shelter.

3. ***Rehabilitation***. The following guidance is provided regarding rehabilitation / treatment.

a. The Medical Treatment Facility (MTF) has primary responsibility for determining the need for medical treatment. MTF's are responsible for referring individuals and families to other professional resources as needed.

b. Some problems are not amenable to treatment. In these cases, separation from the service should be recommended to the member's CO.

c. Counseling / treatment is recommended when the member has positive previous performance and good potential for treatment. At the same time, appropriate disciplinary accountability should be implemented. In some situations, the punishment could then be suspended—conditional on the member's good behavior.

d. When the member repeats the offense, fails to cooperate, to progress, or satisfactorily complete treatment, disciplinary / administrative action will occur. *See also* MCO 1752.3B, para. 2001(3)(f).

e. Treatment is generally limited to one year. *See also* MCO 1752.3B, para. 2001(3).

f. A member's case will be considered closed upon successful completion of treatment. Treatment is considered successfully completed when the abuse / neglect has stopped, the problems contributing to the maltreatment have been remedied, and it is determined that it is very unlikely that any further maltreatment will occur. At this point, the flagged record will be removed.

g. Dependents and retired members who are victims or perpetrators should be offered appropriate intervention and encouraged to participate voluntarily. *See also* MCO 1752.3B, para. 2001(3)(c).

F. ***FAP operation***. This section describes how the FAP is implemented at the installation level. The Marine Corps' FAP is a command-managed program operating under the umbrella of the Family Service Center (FSC) pursuant to the current edition of MCO P1700.24. The commander of each installation with an FSC

will appoint an FAP officer (FAPO) and ensure both a Family Advocacy Committee (FAC) and a Case Review Committee (CRC) are established in accordance with MCO 1752.3B.

1. ***Medical Treatment Facility (MTF)***. The MTF plays a central role in the implementation of the FAP. The CO of the MTF cooperates with the installation CO in establishing local policies and directives necessary to implement the FAP. The MTF CO's representative co-chairs the Area FAC and the MTF appoints the FAR. The FAR, typically a social worker, is responsible for implementing and managing the FAP in the MTF. The specific responsibilities of the FAR are to:

a. Receive all reports of maltreatment and refer them to the civilian authorities (as appropriate);

b. ensure protection of victims when civilian authorities are unavailable;

c. make clinical assessments, provide treatment, refer for treatment / action, and coordinate all aspects of case management; and

d. report cases to the Family Advocacy Case Review Subcommittee, the member's commander, and the command judge advocate and / or NCIS, as appropriate.

2. ***Family Advocacy Officer (FAO)***. The FAO, typically the Family Service Center (FSC) Director:

a. Serves as the point of contact for coordination of nonmedical family advocacy matters;

b. serves as the point of contact for unit commanders concerning the medical / intervention issues related to family advocacy;

c. coordinates local efforts designed to achieve FAP objectives; and

d. monitors and provides staff support for the program.

3. ***Area Family Advocacy Committee (FAC)***. The FAC is charged with the responsibility to:

a. Provide recommendations for FAP policy and procedures;

b. facilitate military and civilian interface and interaction of social service delivery;

c. ensure a team approach to prevention and intervention in family violence;

d. conduct ongoing needs assessment and evaluation of the FAP;

e. recommend new resources and programs;

f. identify long-range, intermediate, and immediate needs and ensure that the needs are met; and

g. serve as advocates for families and children.

The members of the FAC include, but are not limited to, the FAO, FAR, pediatrician, nurse, psychiatrist, social worker, dentist, drug / alcohol counselor, FSC, command judge advocate, chaplain, base security, NCIS, ombudsman, and child care and youth services. In addition, membership may include others such as a child protective services (CPS) worker and housing representative.

4. *Family Advocacy Case Review Subcommittee.* On each installation, there is at least one FAC subcommittee(s) to manage cases of spouse abuse, child maltreatment, sexual assault, and rape. The subcommittee(s) review and perform case management functions and determine the status of cases (i.e., substantiated, suspected, unsubstantiated, or at risk). This committee should have wide representation (including medical treatment personnel, counseling personnel, alcohol treatment personnel, chaplain, legal assistance, etc.). Commands may also want to have a command representative sit in on discussions of their member's cases.

NOTES

NOTES (continued)

CHAPTER XXXIX

ENVIRONMENTAL LAW

REFERENCES

A. Article 0832, *U.S. Navy Regulations, 1990*
B. OPNAVINST 5090.1, Subj: ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL
C. Executive Order No. 12,088, *Federal Compliance with Pollution Control Standards*
D. SECNAVINST 6240.6, Subj: ASSIGNMENT OF RESPONSIBILITY FOR DEPARTMENT OF THE NAVY ENVIRONMENTAL PROTECTION AND NATURAL RESOURCES MANAGEMENT PROGRAM
E. Executive Order No. 11,990, *Protection of Wetlands*
F. *Federal Facilities Compliance Manual*
G. JAGMAN, Chapter XIII
H. *Consolidated Environmental Law Deskbook*

INTRODUCTION

In the 1950's and 1960's, Federal agencies did not concern themselves much with the few environmental laws which then existed. The principles of sovereign immunity and federal supremacy excused Federal entities from compliance and, as a result, environmental concerns were often seen as irrelevant or incompatible with mission accomplishment. During the course of the 1970's, that situation changed dramatically. With the signing of the National Environmental Policy Act on 1 January 1970, the United States had its first real statement of national environmental policy. That policy required all Federal agencies, including the Navy, to heed environmental concerns. Public sentiment over the spoiling of the environment ran high, as demonstrated during the first Earth Day, 22 April 1970. On 2 December 1970, the Environmental Protection Agency (EPA) was established, unifying fifteen environmental control projects which had been scattered among various Federal agencies. And so continued the "decade of environment," with the passage of many environmental statutes and regulations intended to protect and enhance our natural resources.

In keeping with the general sentiment of the country at large, the Navy became increasingly aware of the fragile nature of the environment and officially committed itself to actively protecting and enhancing environmental quality. Today, the Navy is responsible for fully cooperating with Federal, state, interstate, and local EPA's and for complying with all their standards and criteria as well as with their procedural administrative requirements such as permitting, recordkeeping, reporting, payment of reasonable fees and service charges (but not taxes), and provisions for injunctive relief.

THE COMMANDING OFFICER'S RESPONSIBILITIES

A. Article 0832, *U.S. Navy Regulations, 1990*, places primary responsibility for environmental matters, including cooperation and coordination with environmental regulatory agencies, on the commanding officer. OPNAVINST 5090.1 sets out the specific responsibilities for commanding officers of both shore activities and afloat units. In general, commanding officers must:

1. Plan, program, budget, and execute adequate environmental quality and natural resources management programs;

2. maintain accurate, current information about all aspects of their operations which significantly affect the environment;

3. identify and report to the chain of command existing or impending environmental deficiencies in a timely manner;

4. train command personnel to recognize and be sensitive to environmental issues and regulatory requirements;

5. document every command effort at environmental compliance; and

6. actively seek funding for compliance efforts through the chain of command. (The Navy has established a central environmental compliance account. Procedures for requesting such funds are discussed in OPNAVINST 5090.1, Subj: *Environmental and Natural Resources Protection Manual.*)

B. Because of the absolute need for a consistent and uniform position throughout the Navy with respect to facilities compliance, commanding officers ***must*** maintain effective, frequent contact with the cognizant Navy Facilities Command (NAVFAC) Engineering Field Division (EFD) for technical compliance assistance. Commanders can also get help from their staff judge advocate, staff civil engineer, the Regional Environmental Coordinator (REC), major claimants (CINCLANTFLT, CNET, NAVSEASYSCOM, etc.), the joint Office of General Counsel (OGC) / Office of

the Judge Advocate General (OJAG) environmental law office, and the Navy Environmental Protection Support Service (NEPSS) office. *See* this chapter, *infra*, for a telephone listing of these, and other, resources.

C. Compliance must be the commanding officer's watchword. Failure to comply promptly and completely with environmental laws can endanger both human health and the environment. Noncompliance also invites disruptive enforcement actions and can result in civil and criminal penalties, cost the Navy vast sums of money, and lead to unfavorable public sentiment. Past instances of noncompliance have been used to justify the passage of even stricter laws limiting the Navy's ability to solve its problems "in-house" and potentially affecting its operational capabilities.

NOTICES OF VIOLATION, ENVIRONMENTAL LITIGATION, CITATIONS, AND FINES

A. Notices of violation (NOV's) and notices of noncompliance (NON's) issued by environmental regulatory agencies can lead to penalties and litigation. They should ***never*** be ignored. Instead, prompt compliance and a timely response to the agency should be the norm.

B. Report NOV's and NON's immediately by message to CNO (N-45) with information copies to the chain of command, Navy JAG, CHINFO, the appropriate NAVFAC EFD, and the Naval Energy and Environmental Support Activity (NEESA) in accordance with OPNAVINST 5090.1 or Volume V, MCO P11000.8B.

C. Report any citation by a regulatory agency for any alleged failure to meet substantive or administrative requirements, or any attempt to levy a fine against a naval facility, immediately by message (as in paragraph B, above). Conduct a preliminary inquiry and create a written investigative report in accordance with the procedures established by the major claimant (the format may be either a JAGMAN investigation or letter report). Forward the report to the major claimant via the chain of command, with copies to CNO (N-45), the Office of the Judge Advocate General (OJAG) (Codes 12 / 34), NEESA, and the appropriate NAVFAC EFD. Coordinate all communications with the regulatory agency with the NAVFAC EFD and obtain a legal opinion as to whether a defense exists. If there is no viable defense, negotiate the lowest possible amount of penalty, arrange for payment from the operating funds of the activity or major claimant, and advise all concerned. Where a defense does exist, refer the case to OJAG litigation (Code 34).

D. Handle any documents received in connection with litigation in accordance with Chapters V and VI of the *JAG Manual* and SECNAVINST 5820.8, Subj: Release of Official Information for Litigation Purposes and Testimony by Department of the Navy Personnel.

POTENTIAL CIVIL AND CRIMINAL LIABILITY

A. Although noncompliance with environmental laws can have serious legal consequences (both civil and criminal) for commanders—as well as for their military and civilian subordinates—as a practical matter, government officials who are acting within the scope of their official duties will have only limited exposure to civil litigation against them.

B. Nonetheless, the ***potential*** exists for personal ***civil*** liability under both statutory and state common law tort theories (such as for personal injury or property damage). For instance, the Clean Air Act (CAA), the Clean Water Act (CWA), and the Resource Conservation and Recovery Act (RCRA) allow ***statutory*** civil penalties to be assessed for violations. The CAA and the CWA, however, provide specific protections for Federal officers, agents, and employees acting within the scope of their official duties. On the other hand, the RCRA did not contain a similar provision until the passage of the Federal Facilities Compliance Act (FFCA) in 1992. The FFCA extended protection to Federal employees acting within the scope of their official duties from personal civil liability. These three major environmental statutes—CAA, CWA, RCRA—ensure that Federal employees will not be held personally liable for any civil penalties resulting from performance of their official duties.

C. There are also areas of potential exposure to suit under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA). Enacted in response to the Supreme Court case of *Westfall v. Erwin*, FELRTCA allows the United States to be substituted as the sole defendant in cases where a Federal employee is sued for a ***common law tort*** as a result of actions taken within the scope of official duties. FELRTCA will not, however, shield that same employee from ***statutory*** civil penalties nor will it shield the employee from ***criminal liability***. Again, a commander who acts in good faith within the scope of his / her official duties and actively attempts to ***comply*** with all applicable environmental laws is unlikely to face prosecution for violations. On the other hand, a commander tempts fate by failing to meet recordkeeping requirements, report hazardous waste spillage, document compliance efforts, request needed funds to bring his / her facility into compliance, or by intentionally falsifying data.

D. Since all commanders are expected to be knowledgeable of and comply with environmental laws and regulations, ignorance of the state of a facility's compliance is not an excuse for noncompliance. A commander need only know that an act, such as a given manner of waste storage, is happening to be criminally liable. A commander does not need to know that the act was a violation of the law, nor does (s)he need to be directly involved in the act.

E. The Aberdeen Proving Ground cases aptly illustrate the fact that criminal prosecution of Federal employees for environmental violations *is* possible. In those cases, three senior civilian employees who worked for the Army as engineers on a binary weapons project were convicted for RCRA violations involving improper storage and disposal of hazardous waste from 1983 - 1986. They received sentences of three years' probation and 1,000 hours of community service. In a more recent case, the fuels farm manager of Naval Air Station Adak, Alaska, was convicted of knowingly discharging 500,000 gallons of JP-5 into the waters of the United States. His conviction under the CWA (in March 1992) resulted in a ten month jail term.

FEDERAL STATUTES

A. Federal environmental statutes can be divided roughly into three categories by subject matter:

1. Pollution control and abatement;

2. resource protection and land use; and

3. environmental response and remediation.

B. The following discussion briefly summarizes the statutes which most frequently impact naval operations. Among them, the RCRA, the CAA, and the CWA are of primary importance to most commanders.

POLLUTION CONTROL AND ABATEMENT STATUTES

A. ***Resource Conservation and Recovery Act of 1976 (RCRA)***, formerly known as the ***Solid Waste Disposal Act (SWDA)***, 42 U.S.C. § 6901 *et seq.*

1. RCRA was the first comprehensive Federal statute to deal with solid and hazardous wastes. Its objectives are "to promote the protection of health and the environment and to conserve valuable material and energy resources. . ." by, among other things:

a. Prohibiting open dumping on the land and requiring the conversion of existing open dumps to facilities not posing a danger to health or the environment;

b. encouraging process substitution, materials recovery, recycling and reuse, and treatment so as to minimize the generation of hazardous waste and its land disposal; and

c. promoting a national research and development program to improve solid waste management and resource conservation techniques.

2. RCRA applies to active waste facilities and provides for "cradle to grave" tracking of hazardous wastes through a permitting and manifesting scheme. It covers "persons" (including Federal agencies such as the Navy) who generate, transport, treat, store, or dispose of hazardous waste.

3. The Federal EPA establishes the basic regulatory scheme under RCRA. The states then pattern programs on the Federal model. Upon EPA approval of the state plan, which must have requirements at least as strict as the EPA's, the state becomes the primary permitting, inspecting, licensing, and enforcement authority. The Federal EPA maintains oversight authority and remains empowered to issue orders to non-Federal facilities requiring corrective action or other response measures it deems necessary in order to minimize the effect of releases of hazardous wastes into the environment.

4. Under the FFCA of 1992, Federal facilities are now subject to all Federal, state, and local civil and / or administrative fines and penalties.

5. The EPA and state agencies are empowered to bring enforcement actions against Federal agencies when necessary, including suspension or revocation of permits, civil penalties of $25,000.00 for each day of continued noncompliance, and criminal penalties of up to $250,000.00 and / or 15 years imprisonment for a knowing violation which places a person in imminent danger of death or serious bodily injury.

6. RCRA also provides that citizens may bring suit on their own behalf against "any person, including the United States" who is believed to be in violation of a permit, standard, regulation, requirement, prohibition, or order. The citizen bringing the suit must give 60 to 90 days advance notice of an intent to sue.

7. Situations which signal potential RCRA waste problems for the commander include painting, paint stripping, electroplating, solvent cleaning, degreasing, and boiler cleaning operations.

8. FFCA exempted public vessels, including units of the U.S. Navy, from specified RCRA generator requirements. Basically, hazardous waste from public vessels will not be subject to RCRA regulation until transferred to a shore facility.

B. *Clean Air Act (CAA)*, 42 U.S.C. § 7401 *et seq.*

1. The CAA is the major Federal legislation concerning control of the nation's air quality. It was enacted to "promote public health and welfare" and "to encourage and assist the development and operation of regional air pollution control

programs." To accomplish this end, the Act waives Federal immunity from state actions and subjects all Federal agencies, including the Navy, to state and local air pollution requirements, both procedural and substantive. It also provides for Federal criminal and civil enforcement sanctions which can be levied in addition to state and local sanctions.

2. Under the Act, every state must develop and implement a Federal EPA-approved program—called a State Implementation Plan (SIP)—to control the release of certain regulated pollutants (such as carbon monoxide, nitrogen dioxide, lead, and particulates) into the air. Each state is divided into Air Quality Control Regions (AQCR's) which may cross state lines. Each AQCR seeks to be "in attainment" with federally established acceptable quantitative pollution levels for each regulated pollutant emitted from each major stationary source within its boundaries. (Pollution from vessels is not specifically addressed by the CAA, but is often included in state and / or local air pollution regulations.)

3. California has some of the strictest clean air standards in the country. For instance, painting of aircraft, ships, or yellow gear can be violations, as can leaving paint cans uncovered, if the paint gives off an unacceptable level of volatile organic compounds (VOC's). Certain southern California counties require installations to have a permit limiting the amount of paint which may be used each month. One base received an NOV (and subsequently paid a fine) when well-meaning aircraft maintenance personnel used aircraft paint to stripe their CO's parking space. Similarly, ships in San Diego are often fined for lighting off when their smoke exceeds a given opacity as determined by visual comparison of its darkness to a color-coded Ringleman chart. Perhaps the most serious Navy violation to have yet occurred involved the use of Methylethylketone (MEK), a banned solvent, to clean aircraft parts at North Island, California. A state inspection in 1988 resulted in a $5,000.00 per day fine totaling $2.9 million. After extensive negotiations, the Navy ultimately paid California $90,000.00.

4. One of the major impacts from the CAA on DON facilities in the future will be the requirement to obtain CAA permits to cover all emissions on the installation. Installations with emissions above certain levels, 100 tons per year (TPY) of all criteria pollutants combined or 10 TPY of certain hazardous pollutants, will be required to obtain CAA permits. These permits will specify how much pollutant by type each facility can release into the atmosphere. Additionally, each facility will be required to pay a fee per ton of pollutant to the state air quality control agency in order to receive the permit. CAA permits will be a growing area of expense and concern for base commanders and CO's of tenant commands.

C. *Federal Water Pollution Control Act (FWPCA) or Clean Water Act (CWA)*, 33 U.S.C. §§ 1251-1376

1. The CWA is the major Federal legislation concerning improvement of the nation's surface water resources. Enacted to restore and maintain the chemical, physical, and biological integrity of the nation's waters, the Act encourages construction of publicly owned treatment works (POTW's) by establishing Federal grants and provides for the development of municipal and industrial waste water treatment standards.

2. The CWA also requires that a permit be obtained from the Army Corps of Engineers (ACOE) before any pollutant is discharged from a point source into the "navigable waters" of the United States or before any dredge spoil is discharged into them. The EPA maintains veto power over the permit process. Where a state has an approved state permit program, both the EPA and ACOE will suspend their issuance of permits for activities covered under the state's program. Permits establish effluent limitations and monitoring, recordkeeping, reporting, and inspection requirements. "Navigable waters" has been defined broadly and clearly includes wetlands and other areas in which one would not expect to see shipping.

3. The CWA also contains specific provisions for the regulation of ships' waste waters, including the use of marine sanitation devices.

4. The Act further prohibits the discharge of oil or hazardous substances into navigable or territorial waters and provides for the establishment of a national contingency plan (NCP) for the containment, removal, and dispersal of oil and hazardous wastes. Any discharge of any radiological, chemical, or biological warfare agent, high-level radioactive waste, or medical waste into navigable waters is also prohibited.

5. When the commander of a vessel or facility becomes aware that there has been an unlawful release of oil or hazardous waste, (s)he must immediately report the release and all relevant facts.

a. All shore activities worldwide must report to the National Response Center (NRC) and the Navy On-Scene Coordinator (NOSC) by the most expeditious means possible, followed up with a message in the format found in OPNAVINST 5090.1. The NRC hotline, reachable in the continental United States, is: 1-800-424-8802.

b. Shipboard Navy On-Scene Commanders (NOSCDR's) must report oil spills occurring within the contiguous zone to the appropriate shoreside NOSC and the NRC by message. Outside the zone, immediate notification should be

given to the fleet NOSC by the most expeditious means practicable, followed by a message in the format prescribed by OPNAVINST 5090.1.

c. OPREP-3 reporting pursuant to OPNAVINST 3100.6C may also be required for oil discharges resulting from catastrophic events or subject to geopolitical implications. Following the OPREP-3 report, the cognizant fleet or shoreside NOSC must forward an amplifying report in the format prescribed by OPNAVINST 5090.1.

6. Regulators of affected states will be greatly interested in the report of release as well. It is absolutely essential that commanders provide state officials with ***accurate*** release information in good faith.

7. Federal facilities are required by the Act to comply with all Federal, state, interstate, and local water pollution laws. And, although a provision for Presidential exemption exists, it has never been invoked.

8. The Act provides for the assessment of judicial civil and criminal penalties in addition to administrative civil penalties and allows for citizen suits against alleged violators or against the Administrator of the EPA. For a knowing violation that puts any person in imminent danger of serious bodily harm, the CWA provides for criminal sanctions of up to 15 years' imprisonment and a $250,000.00 fine. Permit violations are civilly punishable up to $25,000.00 per day of violation.

9. The CWA most frequently impacts the Navy in the area of pretreatment standards for waste water discharged into public sewer systems. These standards are set out in the facility's National Pollution Discharge Elimination System (NPDES) permit and they must be strictly followed. Failure to meet the standards can result in the state shutting down the offending operation.

D. ***Marine Protection Research and Sanctuaries Act of 1972 (MPRSA) or Ocean Dumping Act (ODA)***, 33 U.S.C. § 1403 *et seq.*

1. The MPRSA regulates the dumping of all types of materials into ocean waters and prohibits or strictly limits the dumping of materials which could "adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities." These purposes are accomplished through a permitting scheme. Permits for dumping of dredged materials are issued by the ACOE. Those for all other materials are issued by the Federal EPA, with the EPA having veto authority over the ACOE with respect to disputed permits.

2. "Dumping" is defined as a "disposition of material" not including "routine discharge of effluent incidental to the propulsion or operation of motor driven equipment on vessels."

3. "Material" includes dredged matter, solid waste, munitions, chemicals, biological and laboratory waste, and medical wastes, but vessel sewage covered by the CWA is excluded.

4. No permits may be issued for radiological, chemical, and biological warfare agents, high-level waste, or medical waste.

5. Enforcement provisions include civil penalties of $50,000.00 per violation and criminal penalties of one year imprisonment and a $50,000.00 fine. Citizen suits are also authorized.

6. Violations of the medical waste dumping provisions are punishable by civil penalties of $125,000.00 per incident, and criminal penalties of 5 years' imprisonment and / or a $250,000.00 fine.

E. *Marine Plastic Pollution Research and Control Act of 1987 (MPPRCA)*, 33 U.S.C. § 1901 *et seq.*

1. The MPPRCA was enacted to implement the MARPOL Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships. The general provisions of the legislation do not apply to "warships, naval auxiliaries, or other ships owned or operated by the United States in noncommercial service," but the specific provisions regarding marine plastics will apply to these classes of vessels beginning 31 December 1998 for surface ships and the year 2008 for submarines.

2. Federal law, in accordance with the National Defense Authorization Act for fiscal year 1994, regulates plastics disposal based on the length of time a ship is at sea:

a. Three continuous days or less: retain all plastic waste onboard. Dispose ashore.

b. Four or more continuous days:

(1) Food contaminated plastics: retain onboard the last three days before reaching port; or

(2) non-food contaminated plastics: retain onboard at least 20 days, longer if space permits.

c. More than 20 continuous days:

(1) Only plastic waste generated after the twentieth day may be dumped, and then only if retaining it would endanger health or safety, create an unacceptable nuisance, or compromise combat readiness.

(2) If dumped, the waste must be properly packaged, weighted so it will sink to the bottom, and discharged more than 50 miles from land.

(3) The dumping must be approved by the commanding officer, logged, and reported by message at port.

3. Violations of the MPPRCA could result in criminal penalties of a $50,000.00 fine and / or 5 years' imprisonment. Each day of continuous violation will be considered a separate violation, and up to half of any fine assessed will be payable to informants.

RESOURCE PROTECTION AND LAND USE STATUTES

A. ***National Environmental Policy Act of 1969 (NEPA)***, 42 U.S.C. § 4321 *et seq*.

1. The NEPA is ***procedural*** in nature; that is, it sets up a mandatory decisionmaking process with regard to Federal actions which have the potential for affecting the environment in a significant way. According to the Council on Environmental Quality (CEQ) (which was established by the Act): "The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore and enhance the environment." Although NEPA requires a specific assessment process, it does not mandate any particular decision upon completion of the process.

2. NEPA relies upon a three-tiered scheme for environmental impact analysis:

a. Major Federal actions which have little environmental effect (such as reductions in force, or most repair, maintenance, and minor construction projects) are categorically excluded from analysis. These actions are called "CATEX's."

b. Where the impact of a Federal action may or may not be severe, or where a proposed action is likely to be controversial with respect to environmental effects, an environmental assessment (EA) must be made. As a result of the EA, it may be concluded that the proposed activity is a "major Federal action

significantly affecting the quality of the human environment" ("MFASAQHE"), or a "finding of no significant impact" ("FONSI") may be made.

-- All EA's must be forwarded to the Chief of Naval Operations (N-45) for review by a CNO Environmental Impact Review Panel which will determine whether an Environmental Impact Statement (EIS) or FONSI is appropriate.

c. If a proposed action is an MFASAQHE or is likely to be controversial, an EIS must be prepared.

-- Generally, an EA or an EIS will be necessary if the proposed action requires a permit from the ACOE or if consultation with the U.S. Fish and Wildlife Service or the State Historic Preservation Officer (SHPO) is required.

3. An EIS must fully discuss:

a. The environmental impact of the proposed action;

b. any adverse environmental effects which cannot be avoided if the proposal is implemented;

c. alternatives to the proposed action;

d. the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and

e. any irreversible and irretrievable commitments of resources which would be involved in the proposed action, if implemented.

4. Before actually preparing a draft environmental impact statement (DEIS), request comments on the appropriate scope of the statement from other Federal, state, and local agencies which have jurisdiction by law or special expertise with respect to any environmental impact involved or which are authorized to develop and enforce standards applicable to the proposed action, and from the public. DEIS's are normally forwarded, along with 15 copies, to CNO (N-45) for Federal Register publication and filing with the EPA. After a DEIS has been written and published, allow a minimum of 45 days from the date of publication for additional comments. If CNO (N-45) so decides, you may hold a public hearing to solicit comments. This process of determining the appropriate focus of the EIS is called "scoping."

5. A final environmental impact statement (FEIS) can be filed with the EPA after 60 days from the date of Federal Register publication. The FEIS must incorporate all comments received on the DEIS.

6. Ninety days after publication of the Federal Register notice announcing the filing of the DEIS with EPA, or thirty days after publication of the Federal Register notice of the filing of the FEIS with EPA, CNO (N-45) can prepare a public record of decision (PRD) for publication in the Federal Register.

7. Detailed guidance on the NEPA process and the preparation of EIS's is contained in OPNAVINST 5090.1.

8. Federal projects can be stopped by the issuance of a Federal injunction when a command has failed to prepare an EIS or has prepared an inadequate one. For example, a 200-unit housing project at one base was delayed two years at an additional cost of $9 million because of deficiencies in the NEPA process identified by public controversy. Consequently, it is essential that commanders carefully direct and monitor the EIS process, keep close liaison with the appropriate NAVFAC EFD, and ensure that ***all*** alternatives are addressed in the EIS.

B. ***National Historic Preservation Act of 1966 (NHPA)***, 16 U.S.C. § 470 *et seq.*

1. The policy of the NHPA is to protect federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship and to protect archeological resources and sites on public land. To this end, the Act establishes the National Register of Historic Places and requires that Federal agencies, such as the Navy, take into account the effects of any Federal "undertaking" on any district, site, building, structure, or object included in or eligible for inclusion in the Register. Like NEPA, NHPA is a ***procedural***, rather than substantive, statute intended to force consideration of environmental issues in the Federal decisionmaking process.

2. With facilities dating back to the 1700's, the Navy has many structures which require adherence to NEPA. A yellow flag should be raised when demolition of any structure 50 or more years old is considered.

C. ***Archaeological Resources Protection Act of 1979 (ARPA)***, 16 U.S.C. § 470aa *et seq.*

The ARPA provides criminal sanctions against individuals who excavate, remove, damage, or alter any archaeological resource located on public or Indian lands without a permit and against individuals who sell, purchase, exchange,

transport, or receive, or offer to sell, purchase, or exchange any archaeological resource which was unlawfully obtained.

D. *Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA) or Ocean Dumping Act (ODA)*, 33 U.S.C. § 1401 *et seq.*

1. The MPRSA allows the Secretary of Commerce to establish and promulgate regulations with regard to ocean marine sanctuaries in order to preserve or restore the area of their establishment for conservation, recreational, ecological, or aesthetic values.

2. The Act also provides for civil penalties of up to $50,000.00 per day for each day of violation.

E. *Marine Mammal Protection Act of 1972 (MMPA)*, 16 U.S.C. § 1361 *et seq.*

1. The MMPA protects certain marine mammals by proscribing their "taking," and by establishing a marine mammal commission.

2. Harassment of seals and dolphins is a violation of the Act which provides for both civil and criminal penalties.

F. *Endangered Species Act of 1973 (ESA)*, 16 U.S.C. § 1531 *et seq.*

1. The ESA prevents Federal agencies from taking any action that is likely to jeopardize the continued existence of any "endangered species" or "threatened species" or result in the destruction or adverse modification of the "critical habitat" of those species unless an exemption has been granted.

2. The Supreme Court clearly addressed the potential conflicts between endangered species preservation and mission accomplishment in *Tennessee Valley Authority v. Hill*, 98 S. Ct. 2276, at 2297 (1978).

> It was the intent of Congress in passing the ESA "to halt and reverse the trend toward species extinction, *whatever the cost*. This is reflected not only in the stated policies of the Act, but in literally every section of the statute. All persons, including federal agencies, are specifically instructed not to "take" endangered species, meaning that no one is 'to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect' such life forms. (Citations omitted) . . . . Agencies in particular are directed by

> sections 2(c) and 3(2) of the Act to "use . . . all methods and procedures which are necessary" to preserve endangered species. (Citations omitted). In addition, the legislative history . . . reveals an explicit congressional decision to *require agencies to afford first priority to the declared national policy of saving endangered species* (and) . . . *to give endangered species priority over the "primary missions" of federal agencies*. (Emphasis added.)

3. The ESA also makes it illegal to attempt to "possess, sell, deliver, carry, transport, or ship, by any means whatsoever," any taken endangered species.

4. The Act provides for civil penalties of $10,000.00 for each violation and criminal penalties of $20,000.00 and one year imprisonment.

5. Suits may be brought by citizens on their own behalf to enforce the ESA's provisions by injunction. They may recover attorney fees and court costs, but cannot be awarded damages.

6. Camp Lejeune, North Carolina is an outstanding example of a military installation whose day-to-day operations have been significantly impacted by the ESA. The camp is considered by the North Carolina Department of Natural Resources and Community Development (DNRCD) to have as many as 10 animal species and 28 plant species considered endangered, threatened, or rare.

Chief among the endangered species is the red-cockaded woodpecker. The woodpecker's critical habitat is mature southern pine forests containing "over mature," 60- to 80-year-old trees with red heart disease. The woodpeckers nest in the pulp of the diseased trees. Because of widespread timber management practices, few trees of this age remain on private lands.

In a biological opinion, the North Carolina DNRCD determined that the training activities in the camp's mechanized training area (such as cutting of pine trees for barricades, driving heavy vehicles over tree roots, digging foxholes, and girdling trees with communications lines) were destroying the species' critical habitat.

After several consultations with the DNRCD, Base Order 11015.6B was issued establishing a red-cockaded woodpecker program prohibiting, among other things, the use of any vehicle off designated trails; the cutting or damaging of pine trees, any digging which might cause root damage to pine trees, bivouacking, and the firing of any artillery within established habitat areas and buffer zones; and the removal or destruction of signs marking restricted areas.

G. *Coastal Zone Management Act of 1972 (CZMA)*, 16 U.S.C. § 1451 *et seq.*

The CZMA is intended to preserve, protect, develop, restore, and enhance the national coastal zone and to encourage intergovernmental participation and cooperation in connection with it. The Act requires that, where an approved state coastal zone management program exists, any Federal development project—the effects of which spill over to non-Federal coastal areas—must be consistent with the state program to the maximum extent practicable. Like NEPA and NHPA, CZMA mandates a decisionmaking process, the "consistency determination process," without creating substantive rights.

ENVIRONMENTAL RESPONSE AND REMEDIATION

A. *Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)*, as amended by the *Superfund Amendments and Authorization Act of 1986 (SARA)*

1. CERCLA is a nonpenal, strict liability statute intended to enforce the cleanup of nonoperating or abandoned hazardous waste sites known as "treatment, storage, or disposal facilities" (TSDF's) through "remedial actions." Owners / operators of contaminated facilities, generators of hazardous waste who arrange for disposal, and transporters of the waste to the site are jointly and severally liable for all costs of CERCLA response / remedial actions incurred by the Federal EPA, a state, or any other person.

2. CERCLA also establishes a National Priorities List (NPL) as a means of ranking hazardous waste sites nationwide to ensure that those posing the greatest environmental hazard are cleaned up first. When a site is listed on the NPL, a "remedial investigation" (RI) and "feasibility study" (FS) are undertaken. A proposed plan for cleanup is then published for public comment after which a "record of decision" (ROD) is made. Finally, a "remedial design" (RD) is established to fully detail the planned "remedial action" (RA) for the site. Throughout this process, the state will actively participate in long-term planning and must be given notice and an opportunity to comment on each major facet of the proposed cleanup.

3. Sites located on former and active Navy and Marine Corps shore activities are covered by the Installation Restoration Program (IRP). Phase I of the IRP involves a Preliminary Assessment and Site Investigation to determine the nature and extent of any contamination followed by consideration for listing on the NPL. In Phase II, which must begin within six months of any listing on the NPL, a Technical Review Committee (TRC) is established and a cleanup plan—which takes into account comments from the TRC and the public—is developed after the study.

At the completion of the study, the commanding officer must sign a Record of Intent (ROI) and forward it to the EPA which will ultimately issue a Record of Decision (ROD) on the plan. Phase III is the implementation of the approved plan.

4. In addition to the NPL, Congress established a Federal Facilities Hazardous Waste Compliance Docket (FFHWCD) when it enacted SARA. The purpose of the FFHWCD is to provide Congress with a means of monitoring Federal agencies to ensure that they are expeditiously addressing the cleanup of hazardous waste at Federal facilities.

5. SARA also establishes the "Defense Environmental Restoration Program" (DERP) and the "Defense Environmental Restoration Account" (DERA) under which DOD hazardous waste cleanups are planned, monitored, and funded. The Secretary of Defense is charged with ultimate responsibility for the program and for reporting annually to Congress on the status of cleanup efforts within DOD.

6. Although DERA provides funds for hazardous waste cleanup, recurring requirements for environmental compliance must be funded at the activity level.

7. CERCLA further requires the immediate reporting of any unpermitted release (land), discharge (water), or emission (air) of designated hazardous substances to the National Response Center (NRC). The NRC hotline is the same number as is used for reporting oil spills under CWA: 1-800-424-8802.

ENVIRONMENTAL LAW ISSUES - Useful Telephone Numbers

National Response Center

(Oil and Hazardous Substance Spills or Releases)	(800) 424-8802

Navy Policy

Office of the Assistant General Counsel (Installations and Environment)	(703) 602-2252 DSN 332-2252

Litigation

Office of the General Counsel Navy Litigation Office	(703) 602-3205 DSN 332-3205

Area Coordinators

Commander in Chief, U.S. Atlantic Fleet (Code N02LE)	(804) 445-5952 DSN 438-5952
Commander in Chief, U.S. Pacific Fleet	(808) 474-4954 DSN 430-4954

Regional Coordinators

Commander Naval Education and Training (CNET)	(904) 452-4844 DSN 922-4844
Commander, Naval Base, Jacksonville	(904) 772-5216 DSN 942-5216
Commander, Naval Base, Norfolk	(804) 444-3009 DSN 564-3009
Commander, Naval Base, San Diego	(619) 532-1418 DSN 522-1418

Regional Coordinators (cont)

Commander, Naval Base, San Francisco	(415) 395-3917 DSN 475-3917
Commander, Naval Base, Seattle	(206) 526-3012 DSN 941-3012
Commander, Naval Base, Pearl Harbor	(808) 474-4741 DSN 430-4741
Commander, Submarine Group TWO	(203) 449-4721 DSN 241-4721

NAVFAC

(Environmental counsel for NAVFAC issues, especially hazardous wastes, air and water permits, etc.)

Headquarters
Office of Counsel — (703) 325-8552, DSN 221-8552

Northern Division (Philadelphia and north)
Office of Counsel — (610) 595-0606, DSN 443-0606

Atlantic Division (Norfolk, Puerto Rico, Mid-Atlantic states)
Office of Counsel — (804) 322-4771, DSN 262-4771

Southern Division (Charleston and points south)
Office of Counsel — (803) 743-0708, DSN 563-0708

Southwestern Division (San Diego and vicinity)
Office of Counsel — (619) 532-2531, DSN 522-2531

Western Division (west coast except San Diego & Seattle)
Office of Counsel — (415) 244-2100, DSN 494-2100

OPNAV Contacts

N-45, Environmental Protection, Safety and Occupational Health Division Director	(703) 602-3028 DSN 332-3028

NAVSEA Contacts

Office of Counsel	(703) 602-1776 DSN 332-1776

Marine Corps

Headquarters (Overall coordination)	(703) 614-2150 DSN 226-2150
East Coast Counsel Office	(910) 451-5042 DSN 484-5042
West Coast Counsel Office	(619) 725-5610 DSN 365-5610

NOTES

NOTES (continued)

APPENDIX I

FREEDOM OF INFORMATION - SECNAVINST 5720.42D

QUICK REFERENCE GUIDE

Definition	Allows public access to Federal Government files and records
Requester	Anyone
Requirements	Must be in writing. Reference or imply FOIA with description of the record along with payment or promise to pay.
Action Upon Receiving Request	Ascertain if your command has cognizance. ***Ten working days*** to answer once received by appropriate command. Disclose material or send copy of forwarding letter to requester.
Guidelines	Provide material unless item is exempted and government interest at jeopardy. Consult SECNAVINST 5720.42 for exemptions.
Denial Route	OEGCMA ***only*** sends denial letter. Letter sent when matter is exempt, there is a dispute over payment, or record is lost.
Appeals	Service Secretary, Judicial Review
Report	Annual

PRIVACY ACT - SECNAVINST 5211.5C

QUICK REFERENCE GUIDE

Definition	Safeguard personal information in custody of Federal Government, permit individual access to own records to review or correct		
Requester	Federal Government seeking information from member	DOD, DON, DOT, other government agencies	Member seeking information regarding self
Requirements	Information collected will be stored in system of records by identifier	Must have need to know	Request in writing if you want access to info, correction of records
Action Upon Receiving Request	None	Release / deny	Answer in 10 working days; action must be taken by 30 working days
Guidelines	Use Privacy Act statement when asking for info that will be stored by identifier	Third person must have right to know	Given access unless matter is exempted. Consult SECNAVINST 5211.5 for exemption.
Denial Route	Person who refuses to sign must be told possible consequences	Custodian	OEGCMH denies request
Appeals	None	None, but criminal penalties for wrongful access	Service Sec'y; Statement of Dispute; Judicial Review
Report	1. Annual 2. Must account for disclosure in record		

SECTION FIVE

GLOSSARY OF WORDS AND PHRASES

The following words and phrases are those most frequently encountered in Military Justice which have special connotations in Military Law. This list is by no means complete and is designed solely as a ready reference for the meaning of certain words and phrases. Where it has been necessary to explain a word or phrase in the language of or in relation to a rule of law, no attempt has been made to set forth a definitive or comprehensive statement of such rule of law.

ABANDONED PROPERTY – property to which the owner has relinquished all right, title, claim, and possession with intention of not reclaiming it or resuming ownership, possession, or enjoyment.

ABET – to intentionally encourage or assist another in the commission of a crime.

ACCESSORY AFTER THE FACT – one who, knowing that an offense punishable by the UCMJ has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment.

ACCESSORY BEFORE THE FACT – one who counsels, commands, procures, or causes another to commit an offense—whether present or absent at the commission of the offense.

ACCUSED – one who is charged with an offense under the UCMJ.

ACCUSER – any person who signs and swears to charges; any person who directs that charges nominally be signed and sworn to by another; and any person who has an interest other than an official interest in the prosecution of the accused.

ACTIVE DUTY – the status of being in the active Federal service of any of the Armed Forces under a competent appointment or enlistment or pursuant to a competent muster, order, call, or induction.

ACTUAL KNOWLEDGE – a state wherein a person in fact knows of the existence of an order, regulation, fact, etc. in question.

ADDITIONAL CHARGES – new and separate charges preferred after others have been preferred against the same accused.

ADMISSION – a statement made by an accused which may admit part of an element, an element, or more than one element of an offense charged, but which falls short of a complete confession to every element of an offense charged.

AFFIDAVIT – a statement or declaration reduced to writing and confirmed by the party making it by an oath taken before a person who had authority to administer the oath.

AFFIRMATION – a solemn and formal external pledge, binding upon one's conscience, that the truth will be stated.

AIDER AND ABETTOR – one who shares the criminal intent or purpose of the perpetrator, and seeks to help him carry out his scheme, and, hence, is liable as a principal.

ALIBI – a defense that the accused could not have committed the offense alleged because he was somewhere else when the crime was committed.

ALLEGE – to assert or state in a pleading; to plead in a specification.

ALLEGATION – the assertion, declaration, or statement of a party to an action made in a pleading—setting out what he expects to prove.

ALL WRITS ACT – a Federal statute, 28 U.S.C. 1651(a) (1994), which empowers all courts established by Act of Congress, including the Court of Appeals for the Armed Forces, to issue such extraordinary writs as are necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

APPEAL – a complaint to a superior court of an injustice done or error committed by an inferior court whose judgment or decision the court above is called upon to correct or reverse.

APPELLATE REVIEW – the examination of the records of cases tried by courts-martial by proper reviewing authorities, including, in appropriate cases, the convening authority, the Navy-Marine Corps Court of Criminal Appeals, the Court of Appeals for the Armed Forces, the U.S. Supreme Court, and the Judge Advocate General.

APPREHENSION – the taking into custody of a person.

ARRAIGNMENT – the reading of the charges and specifications to the accused, or the waiver of their reading, coupled with the request that the accused plead thereto.

ARREST – a moral restraint, not intended as punishment, imposed upon a person by oral or written orders of competent authority limiting the person's liberty pending disposition of charges.

ARREST IN QUARTERS – a moral restraint limiting an officer's liberty, imposed as a nonjudicial punishment by a flag or general officer in command.

ARTICLE 39a SESSION – a session of a court-martial called by the military judge, either before or after assembly of the court, without the members of the court being present, to dispose of matters not amounting to a trial of the accused's guilt or innocence.

ASPORTATION – a carrying away; felonious removal of goods.

ASSAULT – an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated.

ATTEMPT – an act, or acts, done with a specific intent to commit an offense under the UCMJ, amounting to more than mere preparation, and tending to effect the commission of such offense.

AUTHENTICITY – the quality of being genuine in character, which in the law of evidence refers to a piece of evidence actually being what it purports to be.

BAD-CONDUCT DISCHARGE – one of two types of punitive discharges that may be awarded an enlisted member; designed as a punishment for bad conduct; a separation under conditions other than honorable; may be awarded by a GCM or SPCM.

BATTERY – an unlawful, and intentional or culpably negligent, application of bodily harm to the person of another by a material agency used directly or indirectly.

BEYOND A REASONABLE DOUBT – the degree of persuasion based upon proof such as to exclude not every hypothesis or possibility of innocence, but any fair and rational hypothesis except that of guilt; not an absolute or mathematical certainty but a moral certainty.

BODILY HARM – any physical injury to or offensive touching of the person of another, however slight.

BONA FIDE – in good faith.

BREACH OF THE PEACE – an unlawful disturbance of the public tranquility by an outward demonstration of a violent or turbulent nature.

BREAKING ARREST – going beyond the limits of arrest before being released by proper authority.

BURGLARY – the breaking and entering in the nighttime of the dwelling house of another with intent to commit murder, manslaughter, rape, carnal knowledge, larceny, wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, or assault.

BUSINESS ENTRY – any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, made in the regular course of any business, profession, occupation, or calling of any kind.

CAPTAIN'S MAST – the term applied, through tradition and usage in the Navy and Coast Guard, to nonjudicial punishment proceedings.

CAPITAL OFFENSE – an offense for which the maximum punishment includes the death penalty.

CARNAL KNOWLEDGE – an act of sexual intercourse with a female not the accused's wife and who has not attained the age of 16 years.

CHALLENGE – a formal objection to a member of a court or the military judge continuing as such in subsequent proceedings; either for cause, based on a fact or circumstance which has the effect of disqualifying the person challenged from further participation in the proceedings, or peremptorily, without grounds or basis.

CHARGE – a formal statement of the article of the UCMJ which the accused is alleged to have violated.

CHARGE AND SPECIFICATION – a formal description in writing of the offense which the accused is alleged to have committed; each specification, together with the charge under which it is placed, constitutes a separate accusation.

CHIEF WARRANT OFFICER – a warrant officer of the Armed Forces who holds a commission or warrant in warrant officer grades W–2 through W–4.

CIRCUMSTANTIAL EVIDENCE – evidence which tends directly to prove or disprove not a fact in issue, but a fact or circumstance from which, either alone or in connection with other facts, a court may, according to the common experience of

mankind, reasonably infer the existence or nonexistence of another fact which is in issue; sometimes called ***indirect evidence***.

CLEMENCY – discretionary action by proper authority to reduce the severity of a punishment.

COLLATERAL ATTACK – an attempt to impeach or challenge the integrity of a court judgment in a proceeding other than that in which the judgment was rendered and outside the normal chain of appellate review.

COMMAND – (1) the authority which a commander in the military service lawfully exercises over his subordinates by virtue of rank or assignment; (2) a unit or units, an organization, or an area under the authority of one individual; (3) an order given by one person to another who, because of the relationship of the parties, is under an obligation or sense of duty to obey the order.

COMMANDING OFFICER – a commissioned officer in command of a unit or units, an organization, or an area of the Armed Forces.

COMMISSIONED OFFICER – an officer of the Naval Service or Coast Guard who holds a commission in an officer grade, Chief Warrant Officer (W–2) and above.

COMMON TRIAL – a trial in which two or more persons are charged with the commission of an offense which, although not jointly committed, was committed at the same time and place and is provable by the same evidence.

COMPETENCY – the presence of those characteristics, or the absence of those disabilities (i.e., exclusionary rules), which renders a particular item of evidence fit and qualified to be presented in court.

CONCURRENT JURISDICTION – jurisdiction which is possessed over the same parties or subject matter at the same time by two or more separate tribunals.

CONCURRENT SERVICE OF PUNISHMENTS – two or more punishments being served at the same time.

CONFESSION – a statement made by an accused which admits each and every element of an offense charged.

CONFINEMENT – physical restraint, imposed by either oral or written orders of competent authority, depriving a person of his freedom.

CONSECUTIVE SERVICE OF PUNISHMENTS – two or more punishments being served in series, one after the other.

CONSPIRACY – a combination of two or more persons who have agreed to accomplish, by concerted action, an unlawful purpose or some purpose not in itself unlawful by unlawful means, and the doing of some act by one or more of the conspirators to effect the object of that agreement.

CONSTRUCTIVE ENLISTMENT – a valid enlistment arising where the initial enlistment was void but the enlistee submits voluntarily to military authority, is mentally competent and at least 17 years old, receives pay, and performs duties.

CONSTRUCTIVE KNOWLEDGE – a state wherein a person is inferred to have knowledge of an order, regulation, fact, etc. as a result of having a reasonable opportunity to gain such knowledge (e.g., presence in an area where the relevant information was commonly available).

CONTEMPT – in Military Law, the use of any menacing word, sign, or gesture in the presence of the court, or the disturbance of its proceedings by any riot or disorder.

CONTRABAND – items, the possession of which is in and of itself illegal.

CONVENING AUTHORITY – the officer having authority to create a court-martial and who created the court-martial in question, or his successor in command.

CONVENING ORDER – the document by which a court-martial is created, which specifies the type of court, details the members, and, when appropriate, the specific authority by which the court is created.

CORPUS DELICTI – the body of a crime; facts or circumstances showing that the crime alleged has been committed by someone.

COUNSELING – directly or indirectly recommending or advising another to commit an offense.

COURT-MARTIAL – a military court convened under authority of government and the UCMJ for trying and punishing offenses committed by members of the Armed Forces and other persons subject to Military Law.

COURT OF INQUIRY – a formal administrative fact-finding body convened under the authority of Article 135, UCMJ, whose function it is to search out, develop, analyze, and record all available information relative to the matter under investigation.

COURT OF APPEALS FOR THE ARMED FORCES (formerly the Court of Military Appeals) – the highest appellate court established under the UCMJ to review the records of certain trials by court-martial, consisting of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years.

COURT OF CRIMINAL APPEALS (formerly the Court of Military Review) – an intermediate appellate court established by each Judge Advocate General to review the record of certain trials by court-martial—formerly known as Board of Review.

CREDIBILITY OF A WITNESS – his worthiness of belief.

CULPABLE – deserving blame; involving the breach of a legal duty or the commission of a fault.

CULPABLE NEGLIGENCE – Culpable negligence is a degree of negligence greater than simple negligence. This form of negligence is also referred to as recklessness and arises whenever an accused recognizes a substantial unreasonable risk yet consciously disregards that risk.

CUSTODIAL INTERROGATION – questioning initiated by law enforcement officers or others in authority after a suspect has been taken into custody or otherwise deprived of his freedom of action in any significant way.

CUSTODY – that restraint of free movement which is imposed by lawful apprehension.

CUSTOM – a practice which fulfills the following conditions: (a) it must be long continued; (b) it must be certain or uniform; (c) it must be compulsory; (d) it must be consistent; (e) it must be general; (f) it must be known; (g) it must not be in opposition to the terms and provisions of a statute or lawful regulation or order.

DAMAGE – any physical injury to property.

DANGEROUS WEAPON – a weapon used in such a manner that it is likely to produce death or grievous bodily harm.

DECEIVE – to mislead, trick, cheat, or to cause one to believe as true that which is false.

DEFERRAL – discretionary action by proper authority, postponing the running of the confinement portion of a sentence, together with a lack of any post-trial restraint.

DEFRAUD – to obtain, through a misrepresentation, an article or thing of value and to apply it to one's own benefit or to the use and benefit of another—either permanently or temporarily.

DEMONSTRATIVE EVIDENCE – anything (such as charts, maps, photographs, models, drawings, etc.) used to help construct a mental picture of a location or object which is not readily available for introduction into evidence.

DEPOSITION – the testimony of a witness taken out of court, reduced to writing, under oath or affirmation, before a person empowered to administer oaths, in answer to interrogatories (questions) and cross-interrogatories submitted by the parties desiring the deposition and the opposite party, or based on oral examination by counsel for accused and the prosecution.

DERELICTION IN THE PERFORMANCE OF DUTY – willfully or negligently failing to perform assigned duties or performing them in a culpably inefficient manner.

DESIGN – on purpose, intentionally, or according to plan and *not* merely through carelessness or by accident; specifically intended.

DESTROY – sufficient injury to render property useless for the purpose for which it was intended, not necessarily amounting to complete demolition or annihilation.

DIRECT EVIDENCE – evidence which tends directly to prove or disprove a fact in issue.

DISCOVERY – the right to examine information possessed by the opposing side before or during trial.

DISHONORABLE DISCHARGE – the most severe punitive discharge; reserved for those warrant officers (W-1) and enlisted members who should be separated under conditions of dishonor, after having been convicted of serious offenses of a civil or military nature warranting severe punishment; it may be awarded only by a GCM.

DISORDERLY CONDUCT – behavior of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby.

DISRESPECT – words, acts, or omissions that are synonymous with contempt and amount to behavior or language which detracts from the respect due the authority and person of a superior.

DOCUMENTARY EVIDENCE – evidence supplied by writings and documents.

DOMINION – control of property; possession of property with the ability to exercise control over it.

DRUNKENNESS – (1) as an offense under the UCMJ, intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties; (2) as a defense in rebuttal of the existence of a criminal element involving premeditation, specific intent, or knowledge, intoxication which amounts to a loss of reason preventing the accused from harboring the requisite premeditation, specific intent, or knowledge; (3) as a defense to general intent offenses, involuntary intoxication which amounts to a loss of reason preventing the accused from knowing the nature of his act or the natural and probable consequences thereof.

DUE PROCESS – a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights; such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe.

DURESS – unlawful constraint on a person whereby he is forced to do some act that he otherwise would not have done.

DYING DECLARATION – a statement by a victim, concerning the circumstances surrounding his death, made while *in extremis* and while under a sense of impending death and without hope of recovery.

ELEMENTS – the essential ingredients of an offense which are to be proved at the trial; the acts or omissions which form the basis of any particular offense.

ENTRAPMENT – a defense available when actions of an agent of the government intentionally instill in the mind of the accused a disposition to commit a criminal offense, when the accused has no notion, predisposition, or intent to commit the offense.

ERROR – a failure to comply with the law in some way at some stage of the proceedings.

EVIDENCE – any species of proof, or probative matter, legally presented at trial, through the medium of witnesses, records, documents, concrete objects, demonstrations, etc., for the purpose of inducing belief in the minds of the triers of fact.

EXCULPATORY – anything that would exonerate a person of wrongdoing.

EXECUTION OF HIS OFFICE – engaging in any act or service required or authorized to be done by statute, regulation, the order of a superior, or military usage.

EX POST FACTO LAW – a law passed after the occurrence of a fact or commission of an act which makes the act punishable, imposes additional punishment, or changes the rules of evidence to the disadvantage of a party.

EXTRA MILITARY INSTRUCTION – extra tasks assigned to one exhibiting behavioral or performance deficiencies for the purpose of correcting those deficiencies through the performance of the assigned tasks; also known as Additional Military Duty or Additional Military Instruction.

FEIGN – to misrepresent by a false appearance or statement, to pretend, to simulate or to falsify.

FINE – a type of court-martial punishment in the nature of a pecuniary judgment against an accused, which, when ordered executed, makes him immediately liable to the United States for the entire amount of money specified.

FORMER JEOPARDY – a defense in bar of trial that no person shall be tried for the same offense by the same sovereign a second time without his consent; also known as Double Jeopardy.

FORMER PUNISHMENT – a defense in bar of trial that no person may be tried by court-martial for a *minor* offense for which punishment under Articles 13 or 15, UCMJ, has been imposed.

FORMER TESTIMONY – testimony of a witness given in a civil or military court at a former trial of the accused, or given at a formal pretrial investigation of an allegation against the accused, in which the issues were substantially the same.

FORFEITURE OF PAY – a type of punishment depriving the accused of all or part of his pay as it accrues.

GRIEVOUS BODILY HARM – a serious bodily injury; does not include minor injuries (such as a black eye or a bloody nose) but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs and other serious bodily injuries.

HABEAS CORPUS – "You have the body"; an order from a court of competent jurisdiction which requires the custodian of a prisoner to appear before the court to show cause why the prisoner is confined or detained.

HARMLESS ERROR – an error of law which does ***not*** materially prejudice the substantial rights of the accused.

HAZARD A VESSEL – to put a vessel in danger of damage or loss.

HEARSAY – an assertive statement, or conduct, which is offered in evidence to prove the truth of the assertion, but which was not made by the declarant while a witness before the court in the hearing in which it is offered.

IN CONCERT WITH – together with, in accordance with a design or plan, whether or not such design or plan was preconceived.

INCAPACITATION – the physical state of being unfit or unable to perform properly.

INCULPATORY – anything that implicates a person in a wrongdoing.

INDECENT – an offense to common propriety; offending against modesty or delicacy; grossly vulgar, or obscene.

INFERENCE – a fact deduced from another fact or facts shown by the state of the evidence.

INSANITY – *see* MENTAL CAPACITY and MENTAL RESPONSIBILITY, *infra*.

INSPECTION – an official examination of persons or property to determine the fitness or readiness of a person, organization, or equipment, not made with a view to any criminal action.

INTENTIONALLY – deliberately and on purpose; through design, or according to plan, and not merely through carelessness or by accident.

IPSO FACTO – by the very fact itself.

JOINT OFFENSE – an offense committed by two or more persons acting together in pursuance of a common intent.

JOINT TRIAL – the trial of two or more persons charged with committing a joint offense.

JURISDICTION – the power of a court to hear and decide a case and to award an appropriate punishment.

KNOWINGLY – having actual knowledge; consciously, intelligently.

LASCIVIOUS – tending to excite lust; obscene; relating to sexual impurity; tending to deprave the morals with respect to sexual relations.

LESSER INCLUDED OFFENSE – an offense necessarily included in the offense charged; an offense containing some but not all of the elements of the offense charged, so that if one or more of the elements of the offense charged is not proved, the evidence may still support a finding of guilty of the included offense.

LEWD – lustful or lecherous; incontinence carried on in a wanton manner.

LOST PROPERTY – property which the owner has involuntarily parted with by accident, neglect, or forgetfulness and does not know where to find or recover it.

MATTER IN AGGRAVATION – any circumstances attending the commission of a crime which increases the enormity of the crime.

MATTER IN EXTENUATION – any circumstances serving to explain the commission of the offense, including the reasons that actuated the accused, but not extending to a legal justification.

MATTER IN MITIGATION – any circumstance having for its purpose the lessening of the punishment to be awarded by the court and the furnishing of grounds for a recommendation of clemency.

MENTAL CAPACITY – the ability of the accused at the time of trial to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense.

MENTAL RESPONSIBILITY – the ability of the accused at the time of commission of an offense to appreciate the nature and quality or the wrongfulness of his or her acts.

MILITARY DUE PROCESS – due process under protections and rights granted military personnel by the Constitution or laws enacted by Congress.

MILITARY JUDGE – a commissioned officer, certified as such by the respective Judge Advocates General, who presides over all open sessions of the court–martial to which he is detailed.

MISLAID PROPERTY – property which the owner has voluntarily put, for temporary purposes, in a place afterwards forgotten or not easily found.

MISTRIAL – discretionary action of the military judge, or the president of a special court-martial without a military judge, in withdrawing the charges from the court where such action appears manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the trial.

MITIGATION – action by proper authority reducing punishment awarded at NJP or by court-martial.

MORAL TURPITUDE – an act of baseness, vileness, or depravity in private or social duties, which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

MOTION TO DISMISS – a motion raising any defense or objection in bar of trial.

MOTION FOR APPROPRIATE RELIEF – a motion to cure a defect of form or substance which impedes the accused in properly preparing for trial or conducting his defense.

MOTION TO SEVER – a motion by one or more of several co-accused that he be tried separately from the other or others.

NEGLIGENCE – unintentional conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. The failure of a person to exercise the care that a reasonably prudent person would exercise under similar circumstances; something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would, or would not, do.

NONJUDICIAL PUNISHMENT – punishment imposed under Article 15, UCMJ, for minor offenses, without the intervention of a court-martial.

NONPUNITIVE MEASURES – those leadership techniques, not a form of informal punishment, which may be used to further the efficiency of a command.

OATH – a formal external pledge, coupled with an appeal to the Supreme Being, that the truth will be stated.

OBJECTION – a declaration to the effect that the particular matter or thing under consideration is not done or admitted with the consent of the opposing party, but is by him considered improper or illegal, and referring the question of its propriety or legality to the court.

OFFICE HOURS – the term applied, through tradition and usage in the Marine Corps, to nonjudicial punishment proceedings.

OFFICER – any commissioned or warrant officer of the Armed Forces, Warrant Officer (W–1) and above.

OFFICER IN CHARGE – a member of the Armed Forces designated as such by appropriate authority.

OFFICIAL RECORD – a writing made as a record of a fact or event, whether the writing is in a regular series of records or consists of a report, finding, or certificate and made by any person within the scope of his official duties provided those duties included a duty to know, or to ascertain through appropriate and trustworthy channels of information, the truth of the fact or event, and to record such fact or event.

ON DUTY – in the exercise of duties of routine or detail, in garrison, at a station, or in the field: does not relate to those periods when, no duty being required of them by order or regulations, military personnel occupy the status of leisure known as "off duty" or "on liberty."

OPERATING A VEHICLE – driving or guiding a vehicle while in motion, either in person or through the agency of another, or setting its motive power in action or the manipulation of the controls so as to cause the particular vehicle to move.

OPINION OF THE COURT – a statement by a court of the decision reached in a particular case, expounding the law as applied to the case, and detailing the reasons upon which the decision is based.

ORAL EVIDENCE – the sworn testimony of a witness received at trial.

OWNER – a person who has a right to possession of property which is superior to that of the accused, in the light of all conflicting interests therein.

PAST RECOLLECTION RECORDED – memoranda prepared by a witness, or read by him and found to be correct, reciting facts or events which represent his past knowledge possessed at a time when his recollection was reasonably fresh as to the facts or events recorded.

PER CURIAM – "by the court"; a phrase used in the report of the opinion of a court to distinguish an opinion of the whole court from an opinion written by any one judge.

PER SE – taken alone; in and of itself; inherently.

PERPETRATOR – one who actually commits the crime, either by his own hand, by an animate or inanimate agency, or by an innocent agent.

PLEADING – the written formal indictment by which an accused is charged with an offense; in Military Law, the charges and specifications.

POSSESSION – actual physical control and custody over an item of property.

PREFERRAL OF CHARGES – the formal accusation against an accused by an accuser signing and swearing to the charges and specifications.

PREJUDICIAL ERROR – an error of law which materially affects the substantial rights of the accused and requiring corrective action.

PRESUMPTION – a fact which the law requires the court to deduce from another fact or facts shown by the state of the evidence unless that fact is overcome by other evidence before the court.

PRETRIAL INVESTIGATION – an investigation pursuant to Article 32, UCMJ, that is required before convening a GCM, unless waived by the accused.

PRIMA FACIE CASE – introduction of substantial evidence which, together with all proper inferences to be drawn therefrom and all applicable presumptions, reasonably tends to establish every essential element of an offense charged or included in any specification.

PRINCIPAL – (1) one who aids, abets, counsels, commands, or procures another to commit an offense which is subsequently perpetrated in consequence of such counsel, command or procuring, whether he is present or absent at the commission of the offense; (2) the perpetrator.

PROBABLE CAUSE – (1) for apprehension, a reasonable grounds for believing that an offense has been committed and that the person apprehended committed it; (2) for pretrial restraint, reasonable grounds for believing that an offense was committed by the person being restrained; and (3) for search, a reasonable grounds for believing that items connected with criminal activity are located in the place or on the person to be searched.

PROVOKING – tending to incite, irritate, or enrage another.

PROXIMATE CAUSE – that which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces a result, and without which the result would not have occurred.

PROXIMATE RESULT – a reasonably foreseeable result ordinarily following from the lack of care complained of, unbroken by any independent cause.

PUNITIVE ARTICLES – Articles 78 and 80 through 134, UCMJ, which generally describe various crimes and offenses and state how they may be punished.

PUNITIVE DISCHARGE – a discharge imposed as punishment by a court-martial, either a bad-conduct discharge or a dishonorable discharge.

RAPE – an act of sexual intercourse with a female, not the accused's wife, done by force and without her consent.

REAL EVIDENCE – any physical object offered into evidence at trial.

RECKLESSNESS – an act or omission exhibiting a culpable disregard for the foreseeable consequences of that act or omission; a degree of carelessness greater than simple negligence.

RECONSIDERATION – the action of the convening authority in returning the record of trial to the court for renewed consideration of a ruling of the court dismissing a specification on motion, where the ruling of the court does not amount to a finding of not guilty.

REFERRAL OF CHARGES – the action of a convening authority in directing that a particular case be tried by a particular court-martial previously created.

RELEVANCY – that quality of evidence which renders it properly applicable in proving or disproving any matter in issue; a tendency in logic to prove or disprove a fact which is in issue in the case.

REMEDIAL ACTION – action taken by proper reviewing authorities to correct an error or errors in the proceedings or to offset the adverse impact of an error.

REMISSION – action by proper authority interrupting the execution of a punishment and canceling out the punishment remaining to be served, while *not* restoring any right, privilege, or property already affected by the executed portion of the punishment.

REPROACHFUL – censuring, blaming, discrediting, or disgracing of another's life or character.

RESISTING APPREHENSION – an active resistance to the restraint attempted to be imposed by the person apprehending.

RESTRICTION – moral restraint imposed as punishment, or pretrial restraint upon a person by oral or written orders limiting him to specified areas of a military command, with the further provision that he will participate in all military duties and activities of his organization while under such restriction.

REVISION – a procedure to correct an apparent error or omission or improper or inconsistent action of a court-martial with respect to a finding or a sentence.

SALE – an actual or constructive delivery of possession of property in return for a valuable consideration and the passing of such title as the seller may possess, whatever that title may be.

SEARCH – a quest for incriminating evidence.

SEIZURE – to take possession of forcibly, to grasp, to snatch, or to put into possession.

SELF-DEFENSE – the use of reasonable force to defend oneself against immediate bodily harm threatened by the unlawful act of another.

SELF-INCRIMINATION – the giving of evidence against oneself which tends to establish guilt of an offense.

SET ASIDE – action by proper authority voiding the proceedings and the punishment awarded and restoring all rights, privileges, and property lost by virtue of the punishment imposed.

SIMPLE NEGLIGENCE – the absence of due care (i.e., an act or omission by a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances).

SOLICITATION – any statement, oral or written, or any other act or conduct, either directly or through others, which may reasonably be construed as a serious request or advice to commit a criminal offense.

SPECIFICATION – a formal statement of specific acts and circumstances relied upon as constituting the offense charged.

SPONTANEOUS EXCLAMATION – an utterance concerning the circumstances of a startling event made by a person while he was in such a condition of excitement, shock, or surprise, caused by his participation in or observation of the event, as to warrant a reasonable inference that he made the utterance as an impulsive and instinctive outcome of the event, and not as a result of deliberation or design. Also known as an *excited utterance*.

SPONTANEOUS STATEMENT – a statement volunteered by a suspect, not as a result of interrogation.

STATUTE OF LIMITATIONS – the rule of law which, unless waived, establishes the time within which an accused must be charged with an offense to be tried successfully.

STRAGGLE – to wander away, to rove, to stray, to become separated from, or to lag or linger behind.

STRIKE – to deliver a blow with anything by which a blow can be given.

SUBPOENA – a formal written instrument or legal process that serves to summon a witness to appear before a certain tribunal and to give testimony.

SUBPOENA DUCES TECUM – a formal written instrument or legal process which commands a witness who has in his possession or control some document or evidentiary object that is pertinent to the issues of a pending controversy to produce it before a certain tribunal.

SUBSCRIBE – to write one's signature on a written instrument as an indication of consent, approval, or attestation.

SUPERIOR COMMISSIONED OFFICER – a commissioned officer who is superior in rank or command.

SUPERVISORY AUTHORITY – an officer exercising general court-martial jurisdiction who acts as reviewing authority for SCM and SPCM records after the convening authority has acted.

SUSPENSION – action by proper authority to withhold the execution of a punishment for a probationary period pending good behavior on the part of the accused.

THREAT – an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future.

TOLL – to suspend or interrupt the running of.

USAGE – a general habit, mode or course of procedure.

UTTER – to make any use of, or attempt to make any use of, an instrument known to be false by representing, by words or actions, that it is genuine.

VERBATIM – in the exact words; word–for–word.

WANTON – behavior of such a highly dangerous and inexcusable character as to exhibit a callous indifference or total disregard for the probable consequences to the personal safety or property of other persons; heedlessness.

WARRANT OFFICER – an officer of the Armed Forces who holds a commission or warrant in a warrant officer grade, paygrades W–1 through W–4.

WILLFUL – deliberate, voluntary, and intentional, as distinguished from acts committed through inadvertence, accident, or ordinary negligence.

WRONGFUL – contrary to law, regulation, lawful order or custom.

*U.S. GOVERNMENT PRINTING OFFICE: 1995-600-080/00516