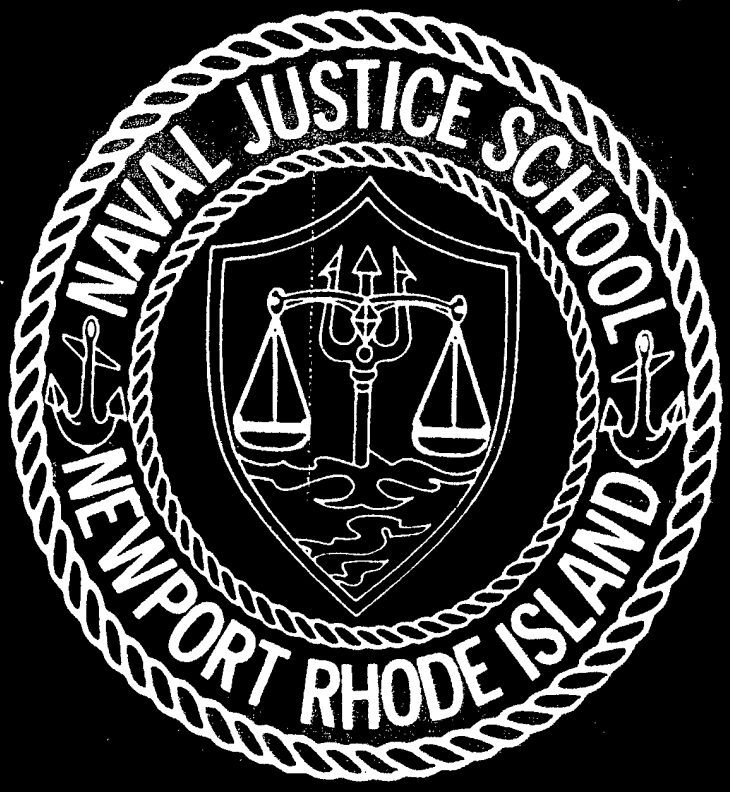
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HANDBOOK FOR MILITARY JUSTICE AND CIVIL LAW



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INTRODUCTION TO EVIDENCE

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CHAPTER I

INTRODUCTION TO EVIDENCE

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

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

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

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

The President has done this in the *Manual for Courts-Martial, 1995* [hereinafter MCM], which incorporates a change promulgated in September 1980 that instituted a new body of rules in the mold of the Federal Rules of Evidence, which are the rules followed in the Federal district courts. These Military Rules of Evidence [hereinafter Mil.R.Evid.] are found in Part III, MCM. Although the bulk of evidentiary rules are set forth in this section of the MCM, other chapters of the MCM deal with matters related to the law of evidence as well.

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

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

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

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

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

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

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

D. ***Forms of evidence***. Evidence can be divided into at least three basic forms: oral evidence, **Error! Bookmark not defined.**documentary evidence, and **Error! Bookmark not defined.**real evidence.

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

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

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

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

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

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

2. ***Circumstantial evidence***. Circumstantial evidence, on the other hand, is evidence that tends to establish a fact from which a fact in issue may be ***inferred***. For

example, a pistol found at the scene of the crime and inscribed with the name "John Jones" is circumstantial evidence that he was either at the scene or that the pistol is his. The pistol may not be his at all, or this pistol may have been lost or stolen from his possession.

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

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

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

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

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

Another way to achieve authentication is to have the trial counsel and the

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

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

3. *Error! Bookmark not defined.****Competency***. "Competent," as used to describe evidence, means that the evidence is appropriate proof in a particular case. Several considerations bear on this determination.

a. ***Public policy***. First, the evidence sought to be introduced must not be obtained contrary to public policy. An "exclusionary rule" is a recognition by the courts that in certain instances there is a public policy that requires the exclusion of certain evidence because of a counterbalancing need to encourage or prevent certain activity or types of conduct. The exclusionary rule in action will be discussed at length in subsequent chapters of this text as it relates to evidence obtained in violation of the law of self-incrimination (chapter III) and evidence obtained in violation of the law of search and seizure (chapter IV). Additionally, public policy sometimes acts to protect certain relationships at the expense of excluding certain evidence (e.g., the husband-wife privilege precludes under certain circumstances the calling of one spouse to testify against the other). Similar privileges protect the relationships of attorney-client and clergyman-penitent. There is no such protection afforded in military law to a doctor and his patient.

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

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

ADMISSIBILITY FORMULA CHART

$$A + R + C = AE$$

AUTHENTICITY

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

RELEVANCY

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

COMPETENCY

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

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

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

ADMISSIBLE EVIDENCE

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

CHAPTER II

THE LAW OF PRIVILEGES

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CHAPTER II

THE LAW OF PRIVILEGES

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

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

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

1. As previously stated, the husband-wife privilege is based on the policy that society's need to protect the **Error! Bookmark not defined.**marital relationship is greater than the benefit that society would reap by the use of the testimony of one spouse against the other, or the use of statements made in confidence by one spouse to the other while married. Mil.R.Evid. 504 sets forth two distinct privileges. One relates to the ***capacity of one spouse to testify*** against the other (spousal incapacity). The other privilege relates to ***confidential communications*** between the spouses while married.

a. ***Spousal incapacity***. Under this privilege, a person has the right either to elect to testify or refuse to testify against his or her spouse, if, ***at the time the testimony is to be introduced***, the parties are lawfully married. A lawful marriage will also include a common-law marriage if established in a state which recognizes common-law marriages.

If, at the time of testifying, the parties are divorced, or if their marriage has been legally annulled, the privilege will not be available.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Not every communication made between a lawyer and client, or between those persons listed above, is privileged. Only those confidential communications made for the purpose of facilitating the rendition of professional legal services to the client are privileged under Mil.R.Evid. 502. Confidential communications made between lawyer and client for the purpose of facilitating the rendition of legal services are privileged, even if the lawyer does not take the client's case or later withdraws from the case. If a client charges the lawyer with malpractice or other improprieties in rendering legal services, however, the privilege will no longer exist and the lawyer may disclose the confidential communication as necessary to defend against the claim. Also, the privilege will not apply to situations in which the client reveals to the lawyer a plan or intent to commit a fraud or other crime in the ***future***. Discussion of ***past*** crimes, however, is privileged under this rule.

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

inadvertently hold themselves out as persons authorized to practice law.. Otherwise, the consultation / counseling session, etc., may be deemed to be privileged.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. ***Doctor-patient privilege - Mil.R.Evid. 501(d).*** The Military Rules of Evidence do not recognize any doctor-patient privilege. Statements made by a military member to either a civilian or military physician are not privileged and, assuming such statements are otherwise admissible, the statements may be disclosed and admitted into evidence at a court-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 re-enlistment. *See* SECNAVINST 5300.30C (14 March 1990).

G. ***Psychotherapist-Patient Privilege.*** An interesting issue concerns the applicability of the psychotherapist-patient privilege to the military justice system. In *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996), the Supreme Court established a psychotherapist privilege under Federal Rule of Evidence 501. The Army Court of Criminal Appeals, however, insinuated it would recognize a psychiatrist patient privilege in *United States v. Demmings*, 46 M.J. 877 (Army Ct.Crim.App. 1997). Sergeant Demmings, upset at the possibility of loosing his wife of 8 years and daughter, became despondent. In an altercation with his wife, he threatened her

with a gun and threatened to kill her and himself. After negotiators safely apprehended him with a pistol in his mouth, Sergeant Demmings was taken for an emergency mental evaluation. At trial, the psychiatrists testified extensively about Sergeant Demmings' statements and intentions during the assault. The Army Court, relying of *Jaffee v. Redmond* and Mil.R.Evid. 101(b), stated: "We culd hold that confidential communications between an accused and mental health professionals in the course of diagnosis or treatment are protected." *Id.* At 883. The court distinguished between the physician-patient privilege and psychotherapist patient privilege, concluding they are separate and distinct privileges. Therefore, the court reasoned Mil.R.Evid. 501(d) does not preclude psychotherapist-patient privilege. The court then held that they need not decide the issue since appellant waived the issue by failing to assert the privilege at trial.

H. ***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.

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

CHAPTER III

THE LAW OF SELF-INCRIMINATION

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CHAPTER III

THE LAW OF SELF-INCRIMINATION

A. *Article 31 of the Uniform Code of Military Justice*

1. ***Text.*** Article 31 provides servicemembers with a broad protection against being compelled to incriminate themselves. The text of Article 31 provides as follows:

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

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

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

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

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

3. ***To which interrogators does Article 31 apply?*** Article 31(b) requires a "person subject to this chapter" (UCMJ) to warn an accused or suspect prior to requesting a statement or conducting an interrogation. The term "person subject to this

chapter" has been the subject of some confusion. If this provision were applied literally, all persons in the military would be required to give warnings regardless of their position in the command structure or their involvement in a case. It is clear from the legislative history,

however, that Congress never intended a literal application of this portion of the Code. Basically, all military personnel, ***when acting for the military***, must operate within the framework of the UCMJ. Thus, when military personnel act as investigators or interrogators, theymust warn a suspect under Article 31(b) prior to conducting an interview of the suspect.

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

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

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

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

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

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

Normally a superior in the immediate chain of command of the suspect subordinate will be presumed to be acting in a command disciplinary function and, thus, be "official" for purposes of Article 31(b) warnings. In *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990), however, the Court of Military Appeals wrestled with the issue of whether questions asked for operational, rather than disciplinary, purposes require warnings. Loukas was an aircraft crewman who was having hallucinations in-flight when he was asked by his crew chief whether he had taken any drugs. Loukas replied he had taken cocaine the night before. No Article 31(b) warnings were given. The Court held that the operational nature of the question

does not equate to official capacity as required for warnings; rather, the interrogation need in some way be connected with a criminal justice or disciplinary purpose. It is unclear at this point whether Loukas is fact-specific or whether the criminal justice / disciplinary purpose is now a prerequisite to a finding of official capacity or the existence of an interrogation. In *United States v. Good*, 32 M.J. 105 (C.M.A. 1991), the Court provided a legal analysis to be used in determining whether rights warnings are required. The Court built on the *Loukas* officiality test by stating: "[w]hen the questioning is done by a military supervisor in the suspect's chain of command, the government must rebut a strong presumption that the questioning was done for disciplinary purposes.

4. ***Application to other interrogations***. The agents of the Naval Criminal

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

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

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

Does Article 31 apply to interrogations of military suspects conducted by foreign officials? Case law and the Military Rules of Evidence indicate that, unless foreign

authorities are acting as agents of the military or the interrogation is instigated or participated in by military personnel or their agents, no Article 31(b) warning is required. Mere presence of U.S. military personnel at a foreign interrogation does not rise to the level of "joint participation." Still, any statement given by a suspect to foreign authorities must be voluntary if the statement is to be used at a subsequent court-martial. Mil.R.Evid. 305(h)(2). Thus, if he foreign authorities use physical or psychological coercion or inducements, the suspect's statements may be held to be inadmissible.

5. ***Who must be warned***? Article 31(b) requires that an accused or suspect be

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

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

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

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

b. ***Warning of the right to remain silent***. The right to remain silent is not a limited right in the sense that an accused or suspect may be interrogated or questioned concerning matters that are not self-incriminating. Rather, the right to remain silent is an absolute right to silence—a right to say nothing at all. Concerning this point, the Court of Military Appeals has said: "We are not disposed to adopt the view . . . that Article 31(b)

should be interpreted to require . . . that the suspect can refuse to answer only those questions which are incriminating." *United States v. Williams*, 2 C.M.A. 430, 9 C.M.R. 60, 62-63 (1953).

c. ***Warning regarding the consequences of speaking.*** The exact language of Article 31(b) requires that the warning advise an accused or suspect that any statement made may be used as evidence against him in a trial by court-martial. In one older case, the interrogator merely advised the accused that anything that the accused said could be used against him. The words "in a trial by court-martial" were omitted. The Court of Military

Appeals held that this was not error, reasoning that the advice was actually broader in scope than the provisions of Article 31. While this might be entirely true, there is no excuse for lack of precision in language when advising an accused or suspect of his rights. Many convictions have been reversed merely because the interrogator attempted to advise an accused or suspect "off the top of his head."

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

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

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

concerning this additional crime.

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

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

First, a statement can be oral or written. In court, if the statement were oral, the interrogator can relate the substance of the statement from recollection or notes. If written, the statement of the accused or suspect may be introduced in evidence by the prosecution. Many individuals, after being taken to an 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 rights, understood and voluntarily waived those rights, an oral confession or admission is as valid for a court's consideration as a writing. Naturally, where the confession or admission is in writing and signed by the accused, the accused will have great difficulty denying the statement or attributing it to a fabrication by the interrogator. Thus, where possible, pretrial statements from an accused or suspect should be reduced to writing, whether or not the accused or suspect agrees to sign it.

In addition to oral statements, some actions of an accused or suspect may be considered the equivalent of a statement and are thus protected by Article 31. During a search, for example, a suspect may be asked to identify an item of clothing in which contraband has been located. Because the servicemember is a suspect, these acts on his part may amount to admissions. Therefore, care must be taken to see that the suspect is warned of his Article 31(b) rights or the identification of the clothing is obtained from some other source. In most cases, however, to an individual to identify himself is not an "interrogation," and production of the identification is not a "statement" within the meaning of Article 31(b). Consequently, no warnings are required. Superiors and those in positions of authority may lawfully demand a servicemember to produce identification at any time without first warning the servicemember under Article 31(b). Merely identifying one's self upon request is generally considered to be a neutral act. An exception to this general rule arises when the servicemember is suspected of carrying false identification. In such cases, the act of producing identification is an act that directly relates to the offense of which the servicemember is suspected. The act, therefore, is "testimonial" and not neutral in nature.

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

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

25 C.M.R. at 364-65

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

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

10. ***Body fluids***. From 1957 to October 1980, the same rationale which has been applied to "testimonial acts" was also applied to the taking of body fluids. Thus, prior to October 1980, the law had been that the taking of blood, urine, and other body fluids required an Article 31(b) warning to the effect that the individual was suspected of a specific crime; that he did not have to produce the body fluid requested; and that if he did produce the fluid it could be subjected to tests, the results of which could be used against him in a trial by court-martial. *United States v. Ruiz*, 23 C.M.A. 181, 48 C.M.R. 797 (1974). In *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980), however, the Court of Military Appeals ruled that the taking of blood specimens is not protected by Article 31 and, hence, Article 31(b) warnings are not required before taking such specimens. In *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983), the Court of Military Appeals extended the *Armstrong* rationale to urine specimens. The Military Rules of Evidence treat the taking of all body fluids as nontestimonial and neutral acts and thus not protected by Article 31. Although the extraction of body fluids no longer falls within the purview of Article 31, the laws concerning search and seizure and inspection remain applicable, and compliance with Mil.R.Evid. 312 is a prerequisite for the admissibility in court of involuntarily obtained body fluid samples. *See* chapter IV, *infra*. Furthermore, even though urinalysis results are not subject to the requirements of Article 31(b), they sometimes may not be admissible in courts-martial because of administrative policy restraints imposed by departmental or service regulations.

11. ***Other nontestimonial acts***. To compel a suspect to display scars or injuries, try on clothing or shoes, place feet in footprints, or submit to

fingerprinting does not require an Article 31(b) warning. A suspect does not have the option of refusing to perform these acts. The reason for this rests on the fact that these acts do not,

in or of themselves, constitute an admission, even though they may be used to link a suspect with a crime. The same rule applies to voice and handwriting exemplars and participation in lineups. As a rule however, commanders should seek professional legal advice before attempting a lineup or exemplar.

12. ***Consent to search.*** Article 31(b) warnings are not needed when asking for consent to search. While use of warnings are permissible, most criminal investigators will give "consent to search" advice, rather than Article 31(b) warnings.

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

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

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

B. *The right to counsel*

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

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

b. "You have the right to have such retained civilian lawyer or appointed

military lawyer or both present during this or any other interview."

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

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

2. "***Custody***." While custody might imply the "jail house" or "brig," the courts have interpreted this term in a far broader sense. Any deprivation of one's freedom of action in any significant way constitutes custody for the purpose of the counsel requirement. Suppose Seaman Apprentice Fuller is taken before his commanding officer, Commander Sparks, for questioning. Fuller is not under apprehension or arrest; furthermore, no charges have been preferred against him. Sparks proceeds to question Fuller concerning a broken window in the former's office. Sparks has been informed by Petty Officer Jenks that he saw Fuller toss a rock through the window. Here, Fuller is suspected of damaging military property of the United States. In this situation, with Fuller standing before his commanding officer, it should be obvious that Fuller has been denied his freedom of action to a significant degree. Fuller is not free simply to leave his commanding officer's office, or to refuse to appear for questioning. Thus, Commander Sparks would be required to advise Fuller of his counsel rights as well as his Article 31(b) rights. If Sparks does not, Fuller's admission that he broke the window would be inadmissible in any forthcoming court-martial. Likewise, where a suspect is summoned to the NCIS office for an interview with NCIS agents, this will constitute custody necessitating Article 31 ***and*** counsel warnings.

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

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

4. ***Notice to counsel.*** Under a 1995 change to the MCM, a suspect may waive his right to have counsel notified and present at questioning.

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

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

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

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

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

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

4. The Court of Appeals for the Armed Forces has recently taken a look at several cases dealing with an accused's request for counsel. The court has held that the accused must "unequivocally " request counsel. Ambiguous requests will not suffice. However, the court also recommends that when faced with such an ambiguous request, the wise interrogator will further explore the accused's desires for counsel.

E. ***Consequences of violating the rights against self-incrimination***

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

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

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

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

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

The Suspect's Rights Acknowledgement / Statement form JAGMAN, app. A-1-m(1)] contains the suspect's or accused's Article 31(b) rights and a statement indicating that the accused or suspect understands his or her rights and has chosen to waive those rights. Additionally, this form contains counsel rights and an acknowledgement and waiver of these rights. This form should be used when the command desires to take a statement from a suspect in custody. The form will help ensure that appropriate rights warnings are given and that a record of the rights given and the acknowledgement and waiver of the same

will be available if a dispute later arises. It is essential that these rights be read to the suspect or accused, that they be explained, and 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.

3. ***Standing to raise fifth amendment / Article 31 issues at trial.*** The general rule is that fifth amendment / Article 31 rights are personal ones and that only the accused at trial may raise a self-incrimination or confession issue. Mil.R.Evid. 304(a). Thus, even if a co-accused makes an unwarned statement that the prosecution intends to use against the accused, the accused lacks standing to raise the issue of the accomplice's lack of warnings. One exception seems to exist, however. Where the statement to be offered is claimed to be involuntary in the traditional sense (e.g., coerced), a hearing ***may*** be held to determine the voluntariness of the statement.

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

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

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

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

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

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

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

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

G. ***Grants of immunity***

1. ***Who may issue grants of immunity***

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

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

2. ***Types of immunity***

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

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

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

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

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

5. ***Other problems.*** Be extremely careful in any case involving national security or classified information. In a case that received widespread publicity, *Cooke v. Orser*, 12 M.J.

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

SUSPECT'S RIGHTS ACKNOWLEDGEMENT / STATEMENT (*SEE* JAGMAN 0170)

SUSPECT'S RIGHTS AND ACKNOWLEDGEMENT / STATEMENT

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

RIGHTS

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

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

_____

_____

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

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

_____

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

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

WAIVER OF RIGHTS

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

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

(2) I expressly desire to make a statement; _____

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

_____

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

_____

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

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

A-1-m(2)

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

_____
SIGNATURE (ACCUSED / SUSPECT)

_____

_____

_____

A-1-m(3)

CHAPTER IV

SEARCH AND SEIZURE / DRUG ABUSE DETECTION

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CHAPTER

SEARCH AND SEIZURE / DRUG ABUSE DETECTION

PART I - SEARCH AND SEIZURE

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

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

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

A. *Sources of the law of search and seizure*

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

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

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

The next important term contained in the Fourth Amendment is that of "probable cause." Probable cause exists when there are reliable facts that indicate that evidence will be found in a particular location

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

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

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

despite technical violations of the Fourth Amendment.

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

3. ***Purpose and effect***. The purpose of both the constitutional and Mil.R.Evid. provisions dealing with searches and seizures is to protect the right of privacy guaranteed to all persons. Both provisions forbid the use at trial not only of the unlawfully seized evidence itself, but also of any other evidence derived from the unlawfully seized evidence.

B. ***The language of the law of search and seizure***.

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

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

(1) A quest for evidence;

(2) conducted by a government agent; and

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

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

b. ***Seizure***. A seizure is the taking of possession of a person or some item of evidence in conjunction with the investigation of criminal activity. The act of seizure is separate and distinct from the search; the two terms 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, 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) generally must be the one to make the seizure, except in cases of abandoned property. Mil.R.Evid. 316(e).

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

(1) A crime has been committed; and

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

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

(1) Written statements;

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

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

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

(1) A crime was committed; and

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

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

e. ***Civil liability***. This is a term relatively new to the area of search and seizure

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

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

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

nature.

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

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

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

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

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

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

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

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

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

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

(b) Footlockers or wall lockers are presumed to carry with

them an expectation of privacy; thus, they can be searched only where the Military Rules of Evidence permit.

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

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

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

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

In the typical case, the commander or other "competent military authority," such as an officer in charge, decides whether probable cause exists when issuing a search authorization. The practice of using commanding officers rather than military judges or magistrates to determine probable cause was challenged in *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979). In *Ezell*, the defense argued that, due to the obligations and considerations of command, commanding officers could never possess the necessary neutrality and detachment to fairly decide the issue of probable cause. This broad argument was rejected by the Court of Military Appeals. Still, courts will decide, on a case-by-case

basis, whether a particular commander was in fact neutral and detached. In reaction to some very stringent guidelines for commanders that were set forth in the *Ezell* decision, Mil.R.Evid. 315(d) provides that:

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

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

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

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

(b) ***Military*** Mil.R.Evid. 315 indicates two categories of military persons who are subject to search by the authorization of competent military authority: members of that commanding officer's unit and others who are subject to military law when in places under that commander's jurisdiction (e.g., aboard a ship or in a command area). There is military case authority for the proposition that the commander's power to authorize searches of members of his or her command goes beyond the requirement of presence within the area of the command. In one Air Force case, the court held that a search authorized by the accused's commanding officer, although actually conducted ***outside*** the squadron area, was nevertheless lawful. Although this search

occurred within the confines of the Air Force base, a careful consideration of the language of Mil.R.Evid. 315(d)(1) indicates that a ***person*** subject to military law could be searched even while outside the military installation. This would hold true ***only*** for the search of the ***person***, since personal property, located off base, is ***not*** under the jurisdiction of the commander if situated in the United States, its territories, or possessions.

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

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

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

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

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

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

(e) Searches outside the United States, its territories or

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

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

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

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

e. ***The requirement of neutrality and detachment.*** As noted earlier, the defense argued in *Ezell* that a military commander could never be neutral and detached when authorizing searches because a commanding officer's duties include prosecutorial functions. The court did not agree and instead held that whether a commander was neutral and detached when acting on a request for search authorization would be determined on a case-by-case basis. The court promulgated certain rules that, if violated, will void any search

authorized by a commanding officer on the basis of lack of neutrality and detachment. These rules are designed to prevent an individual who has entered the "evidence-gathering process" from thereafter acting to authorize a search. They are spelled out to a certain degree in the *Ezell* decision, but were clarified to a greater extent by the drafters of the new rules. The intent of both the court's decision and the rules of evidence is to maintain impartiality in each case. Where a commander has become involved in any capacity concerning an individual case, the commander should carefully consider whether his or her perspective can truly be objective when reviewing later requests for search authorization.

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

f. ***The requirement of probable cause***

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

(a) A crime has been committed; and

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

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

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

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

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

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

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

(b) If an individual making a probable cause determination is relying upon the in-person report of an ***informant***, he 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, as well as the factors noted under paragraph (c) below, to help determine whether the informant is believable. An individual known to have a "clean record" and no bias against the suspect is likely to be credible.

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

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

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

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

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

The factors listed above are not the only ways to determine an informant's believability. The commander may consider any factor tending to show

believability, such as the informant's military record, his duty assignments, and whether the informant has given the information under oath.

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

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

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

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

The Judge Advocate General of the Navy has recommended the use of the standard request for search authorization and record of search authorization form set forth in appendix A-1-n to the *JAG Manual*. Should the exigencies of the situation require an immediate determination of probable cause, with no time to use the form, make a record of

all facts 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.

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

2. ***Probable cause searches without prior authorization.*** As discussed earlier, searches with prior authorization are preferred. However, the courts have recognized that some situations require immediate action and do not allow the government agent the opportunity to secure proper authorization. In these "exigent" situations, the agent may proceed without authorization from the commander, if probable cause exists.

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

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

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

room and was on an authorized tour of living spaces are considered crucial, as well as the fact that the unit was overseas. The court felt that this was a "present danger to the military mission," and thus military necessity warranted immediate action. If in doubt, the best course of action is to attempt to "freeze the scene", postguards and obtain a search authorization.

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

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

3. ***Searches not requiring probable cause.*** We will now discuss those categories of searches that have been recognized as exceptions to the general rule requiring probable cause prior to the search. Mil.R.Evid. 314 lists several types of lawful searches that do not require either a prior search authorization or probable cause.

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

b. ***Consent searches.*** If the owner, or other person in a position to do so, consents to a search of his person or property over which he has control, a search may be conducted by anyone for any reason (or for no reason) pursuant to Mil.R.Evid. 314(e). If a free and voluntary consent is obtained, no probable cause is required. For example, where an investigator asks the accused if he "might check his personal belongings" and the accused answers, "Yes . . . it's all right with me," the Court of 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 31b, even when the individual is a suspect before requesting consent. OPNAVINST 5350.4B currently requires the Navy to inform a member of his right to refuse a consent urinalysis. The Marine Corps program, as outlined in MCO P5300.12 of 25 June 1984, Change 3, 1988 has no such requirement. Both warnings can help show that consent was voluntarily given. The courts have been unanimous in finding such warnings to be strong indicia that any waiver of the right to privacy thereafter given was free and voluntary.

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

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

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

"control." However, if officials requesting consent reasonably believed in "good faith" that Tripper had authority to authorize a search of Jones' box, even though in fact he did not, his consent is valid.

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

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

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

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

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

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

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

An apprehension may not be used as a subterfuge to conduct an otherwise unlawful search. Furthermore, only the person apprehended and the immediate area where

that person could easily obtain a weapon or destroy evidence may be searched. For example, a locked suitcase next to the person apprehended may not be searched incident to the apprehension, but it may be seized and held pending authorization for a search based on probable cause.

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

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

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

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

E. ***The use of drug-detector dogs.*** Military working dogs can be used as drug-detector dogs. As such, they can be used to assist in the obtaining of evidence for use in courts-martial. For example, drug-detector dogs can be used in gate searches, or other inspections under Mil.R.Evid. 313; the fact that a dog "alerts" on a vehicle can establish the probable cause necessary for a subsequent search or an apprehension. *See* ***Inspections and***

inventories, para. G below.

Close attention must be given to establishing the reliability of the informers in this situation (i.e., the dog and dog handler). The drug-detector dog is simply an informant, albeit with a longer nose and a somewhat more scruffy appearance. As in the usual informant situation, there must be a showing of both factual basis (i.e., the dog's alert and surrounding circumstances) and the dog's reliability. This reliability may be determined by the commanding officer through either of two commonly used methods. The first method is for the commanding officer to observe the accuracy of a particular dog's alert in a controlled situation (i.e., with previously planted drugs). The second method is for the commanding officer to review the record of the particular dog's previous performance in actual cases (i.e., the dog's success rate). Although either of these methods may be sufficient by themselves for a determination that a dog is reliable, both should be used whenever practicable. For more information on the use of military working dogs as drug detectors and establishing their reliability as such, see OPNAVINST 5585.2A (*Military Working Dog Manual*) of 7 June 1988.

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

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

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

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

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

1. ***Visual examinations of the body***. Visual examinations of the unclothed body

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

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

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

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

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

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

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

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

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

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

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

appropriate medical qualifications).

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

a. Pursuant to a lawful search authorization; or

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

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

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

G. ***Inspections and inventories.***

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

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

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

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

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

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

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

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

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

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

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

legitimate inventory will be admissible in a subsequent criminal proceeding; however, an inventory may not be used as a subterfuge for a search.

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

H. ***Consequences of obtaining evidence from unlawful searches and seizures.***

1. ***Exclusionary rule.*** Any evidence obtained as a result of an unlawful search or seizure is inadmissable against the accused at a court-martial. Mil.R.Evid 311.

2. ***Fruit of the poisonous tree.*** If the government finds additional evidence through the use of inadmissible evidence, then that additional evidence is also inadmissible. The additional evidence is called "fruit of the poisonous tree" because if the initial search is tainted, then all evidence branching out from that tainted search is also tainted. For example, if an NCIS agent conducts an impermissible search of a wall locker and finds a safe deposit key, that safe deposit key is inadmissible. If the NCIS agent then obtains a search warrant from a civilian magistrate and opens the safe deposit box, the contents of that safe deposit box are "fruits of the poisonous tree" and are also inadmissible.

3. ***Standing.*** If evidence is obtained illegally, it will be inadmissible only against the individual whose rights are violated. If the evidence also implicates a second person, it may still be admissible at that second person's court-martial. The person whose rights are violated has "standing" to object to the evidence's admission at court-martial; the second person does not have "standing." For search and seizure purposes, an accused has standing to object to the introduction of evidence if the accused has a reasonable expectation of privacy in the place that was searched or in the item that was seized.

Example: NCIS suspects that YN3 Simon and YN3 Garfunkle are selling drugs from YN3 Simon's married enlisted quarters. An NCIS agent breaks into YN3 Simon's house without a search authorization. Inside the house, the NCIS agent seizes several ounces of white powder, a scale, plastic baggies, and $500.00 cash. This evidence is inadmissible against YN3 Simon because his reasonable expectation of privacy in his house gives him "standing" to object to the illegal search. The evidence is therefore inadmissible at YN3

Simon's court-martial. YN3 Garfunkle, on the other hand, does not have a reasonable expectation of privacy in YN3 Simon's house, thus he has no "standing" to object to the illegal search. The evidence is therefore admissible against YN3 Garfunkle.

Keep in mind that if the government uses the evidence seized at YN3 Simon's house to locate other evidence, that evidence will also be inadmissible at YN3 Simon's court-martial under the "fruits of the poisonous tree" doctrine. Such "fruits of the poisonous tree" will be inadmissible even if YN3 Simon does not have a reasonable expectation of privacy in the place where the second search occurred.

4. ***Inevitable discovery.*** The United States Supreme Court has held that evidence discovered during an unlawful search or seizure may nevertheless be admissible under the doctrine of "inevitable discovery" if government agents possessed or were actively pursuing evidence or leads that would inevitably have resulted in the lawful discovery of the same evidence.

5. ***Good faith exception.*** Mil.R.Evid. 311(b)(3) provides that the exclusionary rule will not be applied if the person authorizing the search was competent to do so and had a substantial basis for deciding probable cause existed, and if those seeking his authorization and those executing it acted in good faith. The Court of Military Appeals adopted the exception in *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992).

PART II - DRUG ABUSE DETECTION

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

A. ***General guidance***. The urinalysis programs of the Navy, Marine Corps, and Coast Guard were established primarily to provide a means for the detection of drug abuse and to serve as a deterrent against drug abuse. Some of the important directives concerning the program are: DoD Directive. 1010.1 of 9 Dec. 1994; OPNAVINST 5350.4B of 13 Sep. 1990; MCO P5300.12 of 25 June 1984, *as amended*, change 3; and COMDTINST 5355.1B of 21 Dec 89. Additional guidance is found in the Military Rules of Evidence. These rules and directives contain detailed guidelines for the collection, analysis, and use of urine samples.

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

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

1. ***Search and seizure***.

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

b. ***Probable cause and authorization***. Urinalysis testing may be ordered, in accordance with Mil.R.Evid. 312(d) and 315, whenever there is probable cause to believe that a member has wrongfully used drugs and that a test will produce evidence of such use. For example, during a routine locker inspection in the enlisted barracks, you find an open baggie of what appears to be marijuana under some clothes in Petty Officer Jones' wall locker. Along with the marijuana you find a roach clip and some rolling papers. You notify

the commanding officer of your find and he sends for Jones. A few minutes later, Petty Officer Jones staggers into the CO's office—eyes red and speech slurred. He is immediately apprehended and searched. A marijuana cigarette is found in his shirt pocket. Under these facts, a commander would have little trouble finding probable cause to order that a urine sample be given.

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

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

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

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

c. urinalysis testing of an entire unit.

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

3. ***Service-directed testing.*** Service-directed testing is actually nothing more than inspections of units expressly designated by the Chief of Naval Operations. These

include: rehabilitation facility staff; security personnel; fleet "A" School candidates; officers and enlisted in the accession pipeline; and those executing PCS orders to an overseas duty station. *See* OPNAVINST 5350.4B, encl. (4).

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

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

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

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

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

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

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

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

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

D. ***The collection process.*** The weakest link in the urinalysis program chain is in the area of collection and custody procedures. Commands should conduct every urinalysis with the full expectation that administrative or disciplinary action might result. The use of chiefs, staff NCO's, and officers as observers and unit coordinators is strongly encouraged. Strict adherence to direct observation policy during urine collection to prevent substitution, dilution, or adulteration is an absolute necessity. Mail samples immediately after collection to reduce the possibility of tampering. Ensure all documentation and labels are legible and complete. Special attention should be given to the ledger and chain of custody to ensure that they are accurate, complete, and legible. Additional guidance is provided in OPNAV 5350.4B, encl.(2), Appendix B, and appendix IV to this chapter.

E. ***Drug testing.***

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

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

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

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

FINDING THE EXISTENCE OF PROBABLE CAUSE TO ORDER A SEARCH

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

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

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

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

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

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

b. Is the person or place described with particularity?

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

5. Who is the source of this information?

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

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

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

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

Appendix I-a(1)

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

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

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

Appendix I-a(2)

SEARCH AUTHORIZATIONS: INFORMANT ADDENDUM

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

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

a. Questions to determine the informant's reliability:

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

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

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

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

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

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

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

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

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

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

Appendix I-b

SEARCHES: DESCRIBE WHAT TO LOOK FOR AND WHERE TO LOOK

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

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

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

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

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

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

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

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

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

c. ***Evidence of crimes***

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

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

Appendix I-c(1)

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

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

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

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

Appendix I-c(2)

URINALYSIS CONSENT FORMURINALYSIS CONSENT FORM

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

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

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

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

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

□□□□□□□□□□□
Signature

_____
Date

_____
Witness' Signature

_____
Date

Appendix II

USE OF DRUG URINALYSIS RESULTSOF DRUG URINALYSIS RESULTS

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

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

Appendix III

URINALYSIS

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

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

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

The unit coordinator should:

1. Ask for the member's ID card.

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

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

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

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

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

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

8. Seal bottle with tamper resistant tape.

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

10. Have member initial label.

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

Appendix IV(1)

12. Have member sign ledger.

13. Have observer sign ledger.

14. Have coordinator sign ledger.

15. Place bottle in original cardboard container.

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

The observer should:

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

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

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

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

5. Initial the ledger.

6. Sign the ledger.

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

Problems arise in the following situations:

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

2. When the observer is unprepared.

Appendix IV(2)

3. When the observer fails to initial the ledger.

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

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

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

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

8. When an atmosphere of confusion surrounds the collection.

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

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

Appendix IV(3)

DRUG SCREENING LABSDRUG 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 Hospital, Bldg. 10-2 San Diego, CA 92134-6900	DSN: 522-9372 Commercial: (619) 532-9372 NAVDRUGLAB SAN DIEGO CA

AREAS OF RESPONSIBILITYAREAS OF RESPONSIBILITY

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

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

Appendix V

RECORD OF AUTHORIZATION FOR SEARCH (See JAGMAN 0170)

RECORD OF AUTHORIZATION FOR SEARCH

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

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

_____
_____
_____
_____
_____
_____

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

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

_____
Grade Signature Title

A-1-n(1)

INSTRUCTIONS

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

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

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

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

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

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

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

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

A-1-n(2)

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

A-1-n(3)

CONSENT TO SEARCH (*See* JAGMAN 0170)

CONSENT TO SEARCH

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

Position(s)

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

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

Date

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

_____

Signature

WITNESSES

_____

_____

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CHAPTER V

DISCOVERY AND REQUESTS FOR WITNESSES

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

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

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

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

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

Both the government's and the accused's right to discovery under the UCMJ is implemented by various provisions of the *Manual for Courts-Martial (1998 ed.)* [hereinafter MCM] and rules developed by case law. Each of these MCM provisions sets forth certain limits relating to what may be discovered. These limits are rather broad compared to civilian procedures.

B. ***Methods of discovery***

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

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

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

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

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

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

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

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

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

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

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

and

(7) the accused's service record.

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

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

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

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

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

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

4. ***Disclosure by the defense***

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

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

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

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

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

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

6. ***Prior statements***. The Jencks Act, 18 U.S.C. § 3500 (1982), requires the government to produce, upon defense request, any statements made by a witness whom the government has called to testify at a court-martial. Mil.R.Evid. 612 requires disclosure by the government of any report or other document that the witness has used to refresh his memory for the purpose of testifying, before or during trial. With the creation of R.C.M. 914, we see a codification of the Jencks Act that now allows both the government and defense to request to examine any statement of a witness, except the accused, that relates to their testimony. Of practical importance is the fact that a possible sanction for failure to comply with the Jencks Act, Mil.R.Evid. 612, or R.C.M. 914 is for the military judge to strike the witness's testimony. Legal officers should take care to ensure that all notes of interviews with witnesses, handwritten statements, or drafts of statements are ***kept*** and ***turned over*** to the trial counsel prior to court-martial. Failure to preserve such items, as discussed, could result in lost cases at courts-martial. For a more thorough discussion on the issue of loss / destruction, however, see *United States v. Jones*, 20 M.J. 919 (N.M.C.M.R. 1985).

C. ***Requests for witnesses***

1. ***Compulsory process***

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

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

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

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

(4) ***Subpoena*** A subpoena is an order issued to a witness to appear at a designated proceeding and testify. A subpoena *duces tecum*, which is a similar order, requires the witness to bring with him to the proceeding certain documents or evidentiary objects. In the military, there is no distinction; the subpoena contained in Appendix 7 of the MCM, a copy of which appears on page 5-10, below, contains a section where the witness may be ordered to bring with him any documents, evidentiary items, etc.

b. Articles 46 and 47, UCMJ implement the Sixth Amendment right to compulsory process in the military justice system. Article 46 provides that the prosecution, defense, and the court-martial "shall have equal opportunity to obtain evidence in accordance with such regulations as the President may prescribe." Travel expenses and witness fees incurred in the production of defense witnesses are paid for by the government. These funds come from the operating budget of the command convening the court-martial. Article 47(d), UCMJ. Where the parties desire to preserve the testimony of a witness who may be unavailable for trial, Article 47 provides for compelling the attendance of such a witness at the taking of a deposition. There are three ways in which this production of evidence can be compelled: subpoena (for civilian witnesses), subpoena *duces tecum* (for production of records, writings, etc.), and military orders (for military witnesses, including civilian employees). The table on page 5-9 illustrates when the subpoena power and depositions may be utilized.

LEGAL REFERENCES FOR COMPULSORY PROCESS

TYPE	SUBPOENA	DEPOSITION
NJP	No provision	Art. 49*, UCMJ
PTI Article 32	No provision (except for military witnesses; by military order), invitational travel orders may be issued to civilians requested to testify. *See* R.C.M. 405.	Art. 49*, UCMJ
SCM	Art. 46, UCMJ R.C.M. 703	Art. 49, UCMJ R.C.M. 702
SPCM	Art. 46, UCMJ R.C.M. 703	Art. 49, UCMJ R.C.M. 702
GCM	Art. 46, UCMJ R.C.M. 703	Art. 49, UCMJ R.C.M. 702
Court of Inquiry	Art. 135(f), UCMJ JAGMAN, § 0204(b)(7)	Art. 49*, UCMJ
Other Fact-finding Bodies	No provision *See* JAGMAN, § 0204(c)(6) +	Art. 49*, UCMJ

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

SUBPOENA

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

You are hereby summoned and required to appear on the __ day of _____, 20_ , at ___ o'clock __.M., at _____, (before _____
_____
(Place of Proceeding) (Name and Title of Deposition Officer)
designated to take your deposition) (a _____ court-martial of the United States) (a court of inquiry), appointed by _____
_____,
(Identification of Convening Order or Convening Authority
dated _____ 20__, to testify as a witness in the matter of _____
___
(Name of Case)
(and bring with you _____).
(Specific Identification of Documents or Other Evidence)

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

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

Subscribed at _____ this _____ day of _____ 20_

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

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

I hearby accept service of the above subpoena.

_____
(Signature of Witness)

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

Personally appeared before me, the undersigned authority, _____
___, who, being first duly sworn according to law, deposes and says that at _____
_____, on _____ 20__, he personally delivered to _____
____ in person a duplicate of this subpoena.

_____ Grade	_____ Signature

Subscribed and sworn to before me at _____, this _____ day of _____ 20__.

_____ Grade	
_____ Official Status	_____ Signature

DD Form 453 / 84 AUG EDITION OF OCT 69 IS OBSOLETE. S/N 0102-LF-000-4530

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

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

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

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

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

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

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

(a) The issues involved in the case;

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

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

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

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

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

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

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

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

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

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

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

(d) whether other forms of evidence are available, such as a deposition or former testimony, and such alternative forms of evidence are sufficient to meet

the needs of a court-martial in the determination of an appropriate sentence; and

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

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

c. ***Action taken to produce required witness***

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

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

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

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

(d) In some cases, particularly where doubt exists as to whether or not a civilian witness will appear for trial, formal service of a subpoena will be required. Usually an officer is detailed personally to carry a copy of the subpoena to the

witness, ascertain the witness' identity, and present the witness with the copy of the subpoena. When this is done, the officer serving the subpoena on the witness will execute an oath to the effect that a copy of the subpoena has been personally delivered to the witness.

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

CHAPTER VI

MILITARY JUSTICE INVESTIGATIONS

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CHAPTER VI

MILITARY JUSTICE INVESTIGATIONS

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

B. ***Preliminary investigation of suspected offenses***

1. ***Initiation of charges***

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

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

Note: It is important to differentiate between ***initiating a complaint*** and ***preferring charges***. The latter is accomplished when a person subject to the UCMJ signs and swears to charges in Block 11 on page 1 of the charge sheet (DD Form 458) (*see* Chapter 10 and 11).

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

(1) The complaint of a victim or his parents or friends or a spectator;
(2) receipt of a Shore Patrol report;

(3) receipt of an investigative report from the Naval Criminal Investigation Service (NCIS);

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

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

(6) receipt of a locally prepared report chit.

d. ***Duty to report offenses.*** Article 1137, *U.S. Navy Regulations, 1990,* requires personnel of the naval service to report to proper authority offenses committed by persons in the naval service that they observe.

e. ***To whom made***

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

(2) The great majority of reports will be initiated by the accused's immediate supervisors. These reports, normally in writing on a report chit, should be forwarded to the discipline / legal officer.

2. ***Action upon receipt of complaint***

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

b. ***Preliminary inquiry.*** R.C.M. 303 makes it mandatory for the immediate commander to make, or cause to be made, a preliminary inquiry into the charges or the suspected offenses sufficient to enable him to make an intelligent disposition of them. Because of potential accuser problem issues (discussed in Chapter 12, *infra*), a commanding officer should not conduct a preliminary inquiry himself or herself.

(1) ***Investigation by the Naval Criminal Investigative Service.*** SECNAVINST 5520.3B of January 1993.

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

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

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

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

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

-4- incidents involving ordnance;

-5- incidents of perverted sexual behavior, including any allegations of child abuse;

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

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

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

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

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

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

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

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

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

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

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

-1- If both a major Federal offense and a military offense have been

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

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

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

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

(2) ***Fact-finding bodies***

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

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

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

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

3. ***The preliminary inquiry***

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

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

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

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

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

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

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

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

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

(7) The next block on the NAVPERS 1626/7 deals with "pre-mast" restriction. There are no provisions in the Manual for Courts-Martial (1998 ed.) that allow for "pre-mast restraint." The NAVPERS 1626/7 is an old form (Rev 8-81). If the offense is of a serious nature that requires restraint, the command must have the intent to court-martial the accused and must comply with the provisions of R.C.M. 304 and 305.

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

commanding officer who will conduct an inquiry into the offense at office hours before imposing punishment. At small Navy commands, frequently the discipline / legal officer will conduct a more formal preliminary inquiry into the reported offense. If the discipline / legal officer does not perform the functions of a PIO, he should, after completing the above, forward the file to an officer of the command appointed to conduct a preliminary inquiry of the alleged offenses. (Note: there is no requirement, explicit or implicit, that a PIO be a *commissioned* officer. Petty and noncommissioned officers frequently conduct preliminary inquiries.)

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

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

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

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

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

(d) complete and accurate information for the "REMARKS OF THE DIVISION OFFICER" block, based on a personal interview with the division officer of the accused. If the PIO is the division officer, he should so indicate. (It is usually preferable to have someone not in the accused's chain of command appointed to act as the PIO.)

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

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

Because the normal circumstance results in an accused being interviewed by a military superior acting as the PIO, the accused is technically "in custody" at the time of the interview. As a consequence, the PIO must advise the accused of the right to consult with counsel. If an accused indicates that he or she desires to speak with a lawyer prior to any questioning, and counsel is either not physically available or the command declines to make counsel available, the appropriate remedy is to terminate any

questioning of the accused.

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

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

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

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

4. ***Final premast screening***

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

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

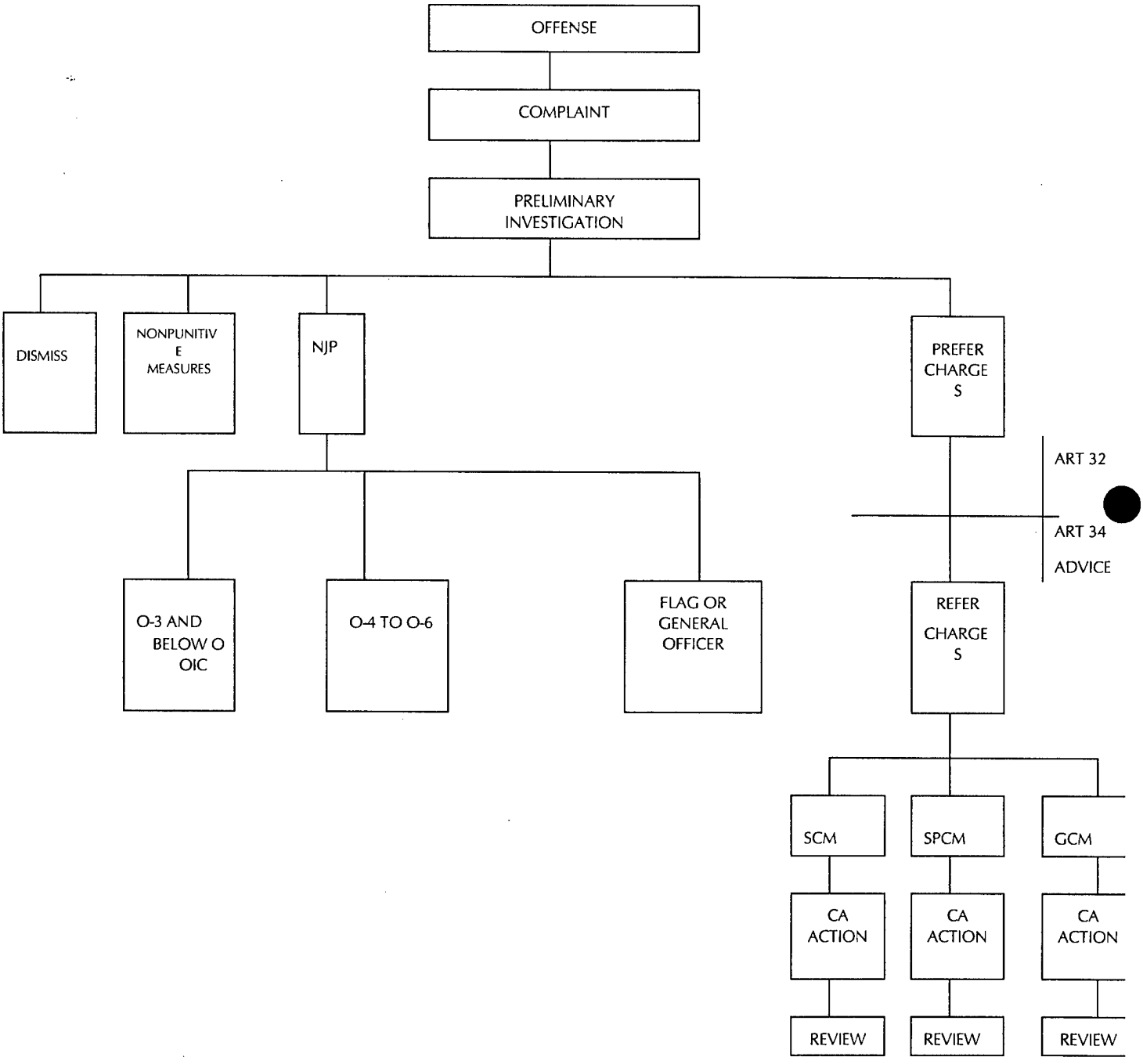
c. The executive officer reviews the report and calls the accused before him, whereupon he is advised of his rights under Article 31(b), UCMJ and, if the accused is not attached to or embarked in a naval vessel, his right to refuse nonjudicial punishment pursuant to Article 15(a), UCMJ.

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

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

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

OVERVIEW OF MILITARY JUSTICE SYSTEM



REPORT AND DISPOSITION OF OFFENSE(S)
NAVPERS 1636/7 (REV. 9/81) S/N 0106-LF-016-2636

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

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

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

PLACE OF OFFENSE(S)	DATE OF OFFENSE(S)
Naval Station Newport, Rhode Island	25 MAY CY

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

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

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

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

Hugh C. Caughtem
HUGH C. CAUGHTEM
(Signature of Accused)

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

Witness: */s/Andrew S. Lookin, LT, USN* (Signature) Acknowledged: */s/Clyde E. Ferndock, YN3, USN* (Signature of Accused)

PRE-MAST RESTRAINT

☐ PRE TRIAL CONFINEMENT
■ NO RESTRICTIONS

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

_____ (Signature and title of person imposing restraint)

_____ (Signature of Accused)

INFORMATION CONCERNING ACCUSED

Current Enl. Date	Expiration Current Enl. Date	Total Active Naval Service	Total Service on Board	Education	GCT	Age
6 Jun CY(-2)	5 Jun CY(+2)	2 yrs	10 mos	12	50	22

Marital Status	No. Dependents	Contribution to Family or Qtrs Allowance (Amount required by law)	Pay per Month (Including sea or foreign duty pay, if any)
Single	None	Not Applicable	$779.10

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

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

CY(-1)JUN23: CO'S NJP: Viol. UCMJ, Art. 121, Larceny ($100 on CY(-1)JUN17). Awarded: 10 days Correctional Custody.CY(-1)JUL15: CO'S NJP: Viol. UCMJ, Art. 91, Disrespect (to a PO on CY(-1)JUL03). Awarded: Reduction in Rate to E-3; suspended x 6 months.

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

PRELIMINARY INQUIRY REPORT

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

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

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

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

RECOMMENDATION AS TO DISPOSITION:

☐ REFER TO COURT MARTIAL FOR TRIAL OF ATTACHED CHARGES (Complete Charge Sheet (DD Form 458) through Page 2)

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

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

See attached investigator's report.

/s/ Andrew s. Lookin, LT, USN
(Signature of Investigation Officer)

ACTION OF EXECUTIVE OFFICER

☐ DISMISSED ☐ REFERRED TO CAPTAIN'S MAST

SIGNATURE OF EXECUTIVE OFFICER
/s/

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

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

WITNESS

SIGNATURE OF ACCUSED

ACTION OF COMMANDING OFFICER

☐ DISMISSED
☐ DISMISSED WITH WARNING (Not considered NJP)
☐ ADMONITION: ORAL/IN WRITING
☐ REPRIMAND: ORAL/IN WRITING
☐ REST. TO _____ FOR ____ DAYS
☐ REST. TO _____ FOR ____ DAYS WITH SUSP. FROM DUTY
☐ FORFEITURE: TO FORFEIT _____ PAY PER MO. FOR _ MO(S)
☐ DETENTION: TO HAVE $___ PAY PER
MONTH FOR ____ MONTHS, BUT NOT TO EXCEED TWO-THIRDS PAY PER MONTH FOR ____ MONTHS
☐ CONF. ON _____ 1, 2, OR 3 DAYS
☐ CORRECTIONAL CUSTODY FOR ___ DAYS
☐ REDUCTION TO NEXT INFERIOR PAY GRADE
☐ REDUCTION TO PAY GRADE OF _____
☐ EXTRA DUTIES FOR ___ DAYS
☐ PUNISHMENT SUSPENDED FOR _____
☐ ART. 32 INVESTIGATION
☐ RECOMMENDED FOR TRIAL BY GCM

☐ AWARDED SPCM ☐ AWARDED SCM

DATE OF MAST: | DATE ACCUSED INFORMED OF ABOVE ACTION | SIGNATURE OF COMMANDING OFFICER */s/*

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

SIGNATURE OF ACCUSED
/s/
DATE:

I have explained the above rights of appeal to the accused.
SIGNATURE OF WITNESS */S/* _____
DATE _____

FINAL ADMINISTRATIVE ACTION

APPEAL SUBMITTED BY ACCUSED
DATED: _____
FORWARDED FOR DECISION ON _____

FINAL RESULT OF APPEAL

APPROPRIATE ENTRIES MADE IN SERVICE RECORD AND PAY ACCOUNT ADJUSTED WHERE REQUIRED
DATE: _____
/s/ _____ (Initials)

FILED IN UNIT PUNISHMENT BOOK:
DATE: _____
/s/ _____ (Initials)

WITNESS'S STATEMENT

Alvin P. Jones	YN2/USN	002-02-0002
Name	Rank/Rate	Social Security Number

Naval Justice School, Newport, Rhode Island	Paralegal (Student)
Command	Division

N/A	
TAD from/to	until (give date)

Naval Justice School, Newport, Rhode Island	3255
Whereabouts for next 30 days	Phone

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

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

(use additional pages if necessary)

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

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

Sworn to before me this date.

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

Appendix II-b

NAVJUSTSCOLINST 5811.1C
22:RLR:cas
15 November 1988

NAVJUSTSCOL INSTRUCTION 5811.1C

Subj: DUTIES OF PRELIMINARY INQUIRY OFFICERS

Ref: (a) Rule for Courts-Martial 303, *Manual for Courts-Martial, 1995*
(b) Uniform Code of Military Justice
(c) SECNAVINST 5520.3 (Series)

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

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

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

3. ***Information***

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

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

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

4. ***Action***

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

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

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

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

Distribution:
NAVJUSTSCOLINST 5216.3 (Series)
List 2

NAVJUSTSCOLINST 5811.1C
15 November 1988

INSTRUCTIONS FOR
PRELIMINARY INQUIRY OFFICERS

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

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

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

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

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

e. originals or copies of documentary evidence;

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

g. any additional comments by the investigator as desired.

2. ***Objectives***

a. The primary objective of the PIO is to collect all available evidence pertaining to the alleged offense(s). As a first step, the PIO should be familiar with those paragraphs of the *Manual for Courts-Martial, 1995*, describing the offense(s). Each of the common offenses is described in Part IV, MCM. Within each paragraph is a section entitled "elements," which lists the elements of proof for that offense. The PIO must be careful to focus on the correct variation. The elements of proof should be copied down to guide the PIO in searching for the relevant evidence. The PIO is to consider everything which tends to prove or disprove an element of proof.

b. The secondary objective of the PIO is to collect information about the accused which will aid the commanding officer in making a proper disposition of the case and, in the event nonjudicial punishment is to be imposed, what the appropriate punishment, if any,

Enclosure (1)

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should be. Items of interest to the commanding officer include: the accused's currently assigned duties; evaluation of performance; attitudes and ability to get along with others; and particular personal difficulties or hardships which the accused is willing to discuss. Information of this sort is best reflected in the statements of the accused's supervisors, peers, and the accused himself.

3. ***Interrogate the witnesses first (not the accused)***

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

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

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

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

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

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

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

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

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

7. ***Interrogate the accused***

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

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

inducement is not voluntary. The presence of an impartial witness during the interrogation of the accused is recommended.

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

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

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

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

NJS Form 5811/1

INVESTIGATOR'S REPORT IN THE CASE OF _____

1. Read paragraphs in MCM concerning offenses / charges Yes: /___/

2. Witnesses interviewed (not the accused).

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

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

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

4. Documentary evidence:

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

5. Real evidence:

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

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

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

b. /___/ Summary of interrogation attached.

Enclosure (2)

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WITNESS' STATEMENT
~~NJS Form 5811/2~~

Name Grade / Rate Social Security No.

Command Division

TAD from / to _____ until _____

Whereabouts for next 30 days Phone

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

(use additional pages if necessary)

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

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

Sworn to before me this date.

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

Enclosure (3)
Appendix III(8)

NAVJUSTSCOLINST 5811.1C
15 November 1988

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

(Date)

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

Interviewer Social Security No. Grade / Rate

RIGHTS

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

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

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

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

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

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

WAIVER OF RIGHTS

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

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

(2) I expressly desire to make a statement——— Initial _____

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

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

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

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

Signature (Accused / suspect) Time Date

Signature (Interviewer) Time Date

Signature (Witness) Time Date

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

Signature (Accused / suspect)

[INSERT STATEMENT]

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APPENDIX A

INSTRUCTIONS FOR PRELIMINARY INQUIRY OFFICERS (PIOs)

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

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

b. an Investigator's Report Form (the sample form following these instructions provides a chronological checklist for conducting the preliminary inquiry);

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

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

e. originals or copies of documentary evidence;

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

g. any additional comments by the investigator as desired.

2. ***Objectives***

a. The PIOs primary objective is to collect all available evidence pertaining to the alleged offense(s). As a first step, the PIO should be familiar with those paragraphs in Part IV of the *Manual for Courts-Martial, 1995*, describing the offense(s). Within each paragraph is a section entitled "elements," which lists the elements of proof for that offense. The PIO must be careful to focus on the correct variation. The elements of proof should be copied down to guide the PIO in searching for the relevant evidence. The PIO is to consider everything which tends to prove or disprove an element of proof.

b. The PIOs secondary objective is to collect information about the accused which will aid the commander in making a proper disposition of the case. Items of interest to the commander include: the accused's currently assigned duties, performance evaluation, attitude and ability to get along with others, and particular personal difficulties or hardships which the accused is willing to discuss. Information of this sort is best reflected in the statements of the accused's supervisors, peers, and of the accused him / herself.

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

a. The PIO should not begin by interrogating the accused because, if guilty, the

accused is the person with the greatest motive to lie. The interrogator should meet with the accused last, when thoroughly prepared. Even when the accused confesses guilt, the PIO should nevertheless collect independent evidence corroborating the confession.

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

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

4. ***Collect the documentary evidence.*** Documentary evidence—such as shore patrol reports, log entries, watchbills, service record entries, local instructions, or organization manuals—should be obtained. The original or a certified copy of relevant documents should be attached to the report. As an appointed investigator, PIOs have the authority to certify copies to be true by subscribing the words "***CERTIFIED TO BE A TRUE COPY***" with their signature.

5. ***Collect the real evidence.*** Real evidence is a physical object (such as the knife in an assault case or the stolen camera in a theft case, etc). Before seeking out the real evidence, if any, the PIO must be familiar with the Military Rules of Evidence concerning searches and seizures. If the item is too big to bring to an NJP hearing or into a courtroom, a photograph of the item should be taken. If real evidence is already in the custody of a law enforcement agency, it should be left there unless otherwise directed. The PIO should inspect it personally.

6. ***Rights advisement***

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

b. A form follows which may be used to ensure the PIO correctly advises suspects of their rights before asking any questions. Filling in that page must be the first order of business when meeting with the suspect. Only one witness is necessary, and that witness may be the PIO.

7. ***Interrogate the accused.*** The accused may be questioned ***only*** after knowingly and intelligently waiving all constitutional and statutory rights. Such waiver, if made, should be recorded on a copy of the suspect's

statement form which follows. If the accused asks questions regarding the waiver of these rights, the PIO must decline to answer or give any advice on that question. The decision must be left to the accused. Other than advising the accused of the rights as stated in paragraph 6b above, the PIO should never give any other form of legal advice to the accused. If the accused wants a lawyer, NLSO judge advocates are available.

a. If the accused has waived all rights, the PIO may begin questioning. After the accused has made a statement, the PIO may probe with pointed questions and confront the accused with inconsistencies in the story or contradictions with other evidence. The PIO should, with respect to his own conduct, keep in mind that, if a confession is not "voluntary," it cannot be used as evidence. To be admissible, a confession or admission which was obtained through the use of coercion, unlawful influence, or unlawful inducement is not voluntary. The presence of an impartial witness during the interrogation of the accused is recommended.

b. If the accused is willing to make a written statement, ensure the accused has acknowledged and waived all rights. While the PIO may help the accused draft the statement, the PIO must avoid putting words in the accused's mouth. If the draft is typed, the accused should read it over carefully and be permitted to make any desired changes. All changes should be initialed by the accused and witnessed by the PIO.

c. Oral statements, even though not reduced to writing, are admissible into evidence against a suspect. If the accused does not wish to reduce an oral statement to writing, the PIO must attach a certified summary of the interrogation to the report. Where the accused has made an incomplete written statement, the PIO must add a certified summary of matters omitted from the accused's written statement which (s)he stated orally.

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

APPENDIX B

SAMPLE INVESTIGATOR'S REPORT

INVESTIGATOR'S REPORT IN THE CASE OF _____

1. Read paragraphs in the MCM concerning offenses / charges. _____

2. Witnesses interviewed (not the accused).

NAME	PHONE	Signed statement	Summary of interview

4. Documentary evidence:

Description	Original or copy	Attached or location

INVESTIGATOR'S REPORT IN THE CASE OF _____

5. Real evidence:

Description	Name of Custodian	Custodian's Phone number

6. Permit the accused to inspect report chit. Yes___ No__

7. Accused initialed second page of charges. N/A___ Yes___ No__

8. Accused signed acknowledgement line on NAVPERS 1626/7. Yes___ No__

9. Investigator signed witness line on NAVPERS 1626/7. Yes___ No__

10. Accused waived rights. Yes___ No__

11. Accused made statement (only when #10 is Yes), and

Accused's signed statement attached __

Summary of interrogation attached __

APPENDIX C

WITNESS' STATEMENT

Name _____Grade / Rate _____Social Security No._____

Command _____Division _____
TAD from / to _____ until _____

Whereabouts for next 30 days _____ Phone _____

I, _____, hereby make the following statement to _____, who has been identified to me as a preliminary inquiry officer for the _____.

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

(use additional pages if necessary)

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

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

Sworn to before me this date.

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

[Obtain SSN's from official records; if member asked to provide SSN, obtain a signed Privacy Act statement.]

APPENDIX D

SUSPECT'S RIGHTS ACKNOWLEDGEMENT / STATEMENT

(*see* JAGMAN 0170)

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

RIGHTS

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

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

_____

_____ ..... _____

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

(3) Any statement I do make may be used as evidence against me ..... _____

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

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

WAIVER OF RIGHTS

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

(1) I expressly desire to waive my right to remain silent; ..... _____

(2) I expressly desire to make a statement; ..... _____

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

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

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

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

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

_____
SIGNATURE (ACCUSED / SUSPECT)

_____

_____

_____

APPENDIX E

REQUEST FOR LEGAL HOLD

From: Commanding Officer,
To: Commanding General, Marine Corps Base, Camp Lejeune
(Attn: SJA)

Subj: REQUEST FOR LEGAL HOLD ICO _____

1. The following personnel have been identified as victims / witnesses in the subject case:

Name	Rank	SSN	Unit	RTD

2. I request that the personnel listed above be placed on legal hold to ensure their presence for trial.

3. The request for legal services in the subject case (was) (will be) forwarded to the Office of the Staff Judge Advocate (on) (not later than) _____.
(date)

SIGNATURE

CHAPTER VII

INFORMAL DISCIPLINARY ACTIONS: NONPUNITIVE MEASURES

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CHAPTER VII

INFORMAL DISCIPLINARY ACTIONS: NONPUNITIVE MEASURES

A. **INTRODUCTION.** While many violations of the Uniform Code of Military Justice could be handled formally, by imposition of nonjudicial punishment or referral to various levels of courts-martial, this is not necessary — or even desirable — in every case. Often, wise use of nonpunitive measures can be as effective in dealing with minor disciplinary problems. Consequently, the military justice system recognizes the need to provide for informal disciplinary measures. *See, e.g.*, OPNAVINST 3120.32C of 11 April 1994, Subj: STANDARD ORGANIZATION AND REGULATIONS OF THE U.S. NAVY, para. 142.2; para. 1300.1b, Marine Corps Manual.

The term "nonpunitive measures" is used to refer to various leadership techniques which can be used to develop acceptable behavioral standards in members of a command. Nonpunitive measures generally fall into three areas: nonpunitive censure, extra military instruction (EMI), 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 commands. *See* R.C.M. 306(c)(2), Manual for Courts-Martial (1998 ed.) [hereinafter R.C.M. ____]; *Manual of the Judge Advocate General*, JAGINST 5800.7C, section 0102 [hereinafter JAGMAN, § ____]; and COMDINST 5810.1C, Military Justice Manual, 1-F [thereafter MJM, ____].

While it is commonly believed that a commander's discretion is virtually unlimited in the area of nonpunitive measures, in fact the UCMJ and secretarial regulations prescribe significant limitations on the use of nonpunitive measures. In this regard, it should be noted initially that nonpunitive measures may never be used as a means of informal punishment for any military offense. JAGMAN, § 0102. Indeed, whatever type of nonpunitive measure is applied, it must further the efficiency of their commands or units. This chapter discusses the various types of nonpunitive measures and provides guidelines for their correct application.

B. **AUTHORITY FOR NONPUNITIVE MEASURES** The use of nonpunitive measures is encouraged and, to a degree, defined in R.C.M. 306(c)(2), which states:

> ***Administrative action.*** A commander may take or initiate administrative action, in addition to or instead of other action taken under this rule [e.g., NJP, court-martial], subject to regulations of the Secretary concerned. Administrative actions include corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges, or any combination of the above.

Other administrative actions available to a commander include matters related to fitness reports, reassignment, career-field reclassification, administrative reduction for inefficiency, etc. *See* R.C.M. 306(c)(2) discussion. Section 0102 of the *JAG Manual* sets forth the general policy concerning the use of nonpunitive measures.

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

A sample NPLOC is set forth in Appendix A-1-a of the *JAG Manual* and appendix B Infra. 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 *JAG Manual* or other investigative reports, or otherwise included in the official departmental records of the recipient. *Id.* The deficient performance of duty or other facts which led to the issuance of a letter of caution can be mentioned, however, in the recipient's next fitness report or enlisted evaluation. In this regard, the requirements of the *JAG Manual* are met by avoiding any reference to the fact that a nonpunitive letter of caution was issued. There is only one exception to the rule that letters of censure are not forwarded to CHNAVPERS or HQMC: Secretarial letters of censure issued by the Secretary of the Navy are submitted for inclusion in the recipient's service records. JAGMAN, § 0105b(2). Secretarial letters of censure are actually punitive in nature and, although no appeal is authorized, a rebuttal may be submitted. JAGMAN, § 0114(b) and CG Persman, Sec. 10-B.

D **EXTRA MILITARY INSTRUCTION** The term "extra military instruction" (EMI) is used to describe the practice of assigning extra tasks to a servicemember who is exhibiting behavorial or performance deficiencies for the purpose of correcting those deficiencies through the performance of the assigned tasks. Normally such tasks are performed in addition to normal duties. Because this kind of leadership technique is more severe than nonpunitive censure, the law has placed some significant restraints on the commander's discretion in this area.

All EMI involves an order from a superior to a subordinate to do the task assigned. However, it has long been a principle in military law that orders imposing punishment are unlawful and need not be obeyed unless issued pursuant to nonjudicial punishment or a court-martial sentence. Thus, the problem that must be resolved in every EMI situation is whether a valid training purpose is involved or whether the purpose of the EMI is punishment. The resolution of this problem requires some thought, but the analysis involved is not complex and should be used to avoid legal complications.

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

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

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

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

3. ***Language used.*** Whenever courts or judges try to determine the purpose of an

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

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

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

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

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

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

5. ***Authority to impose.*** The authority to assign EMI to be performed during working hours is not limited to any particular rank or rate but is an inherent part of the authority vested in officers and 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* JAGMAN, §§ 0103b(6) & (7); OPNAVINST 3120.32C of 11 April 1994, para. 142.2.a, and MJM 1-F-1.b(6).

For the Navy, OPNAVINST 3120.32C 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 an organizational unit which contains no CPO, authority may be delegated to a mature senior petty officer. There is no Marine Corps or Coast Guard order which is equivalent to the Navy's OPNAVINST 3120.32C; however, the use of nonpunitive measures by officers and noncommissioned officers is discussed in paragraph 1300 of the *Marine Corps Manual.*

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

6. ***Cases involving orders to perform EMI***

In *United States v. Trani*, 1 C.M.A. 293, 3 C.M.R. 27 (1952), C.M.A. held that an order given to a prisoner to perform close order drill was valid as a corrective measure to cure a want of discipline and self-control where the prisoner had burned certain confinement records. The C.M.A. concluded that the purpose of the drill was training, not punishment, and there was a reasonable relationship between the duty assigned, close order drill, as a corrective measure in light of the deficiencies exhibited by the accused, i.e., a want of discipline and self-control. *See also United States v. Cagle*, 40 C.M.R. 550 (A.B.R. 1969), where an Army Board of Review found that an order given to an unsentenced prisoner to drill with sentenced prisoners was a valid order to perform a military duty rather than an imposition of punishment.

Compare Trani and *Cagle with United States v. Roadcloud*, 6 C.M.R. 384 (A.B.R. 1952), in which an Army Board of Review found an order to the accused to perform close order drill at 2230 was punishment rather than additional training. The timing of the assignment, the antecedent circumstances, and the fact that the accused was held in the bullpen for two hours until he consented to drill, demonstrated the punitive nature of the order in this case.

EMI must have a valid training purpose and be reasonably related to the deficiency to be corrected. EMI may extend to a review of proper procedures for performance of assigned tasks or the performance of additional work designed to improve the skills of the individual. The ramifications of failing to adhere to this standard is emphasized

by the following cases.

United States v. Raneri, 22 C.M.R. 694 (N.B.R 1956). The accused improperly deposited a parachute on the floor and was ordered, in company with a petty officer, to take a parachute and deposit it properly in each area of the hangar and to announce to those present, each time, that this was the proper way to deposit a parachute. The Navy Board of Review held that the order was punitive and, therefore, illegal because punishment may legally be imposed only as a result of article 15 proceedings or as a result of conviction by court-martial.

United States v. Robertson, 17 C.M.R. 684 (A.F.B.R. 1954). An inspection of the accused's quarters on Saturday resulted in an unsatisfactory mark. Normal cleaning hours were from 0730-1000. The accused was ordered to draw cleaning gear at 1600 to clean his spaces. The Air Force Board of Review found the order to clean after normal working hours was not additional training but an attempt to punish the accused by assignment of extra duties; therefore, the order was illegal.

United States v. Reeves, 1 C.M.R. 619 (A.F.B.R. 1951). The accused received a "gig" and was placed on a work detail roster. No reference was made to the observed deficiency; rather, the accused was assigned to cut a lawn from a list of jobs which needed doing. The Air Force Board of Review found that the work detail was punitive extra duty and could not be classified as an assignment of extra instruction for training. The board also determined that the word "gig" had punitive connotations.

E **DENIAL OF PRIVILEGES.** A third nonpunitive measure which 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, § 0104a and MJM 1-F-1(c). 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 section 0104 of the *JAG Manual*. They include such things as special liberty, 72-hour liberty, exchange of duty, special command programs, access to base or ship movies, access to enlisted or officers' clubs, hobby shops, and parking privileges. 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.

1. Final authority to withhold a privilege, however temporarily, ultimately rests with the 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 and necessary to further efficiency of the command. Authority to withhold privileges of personnel in a liberty status is vested in the commanding officer or officer in charge. Such authority may, however, be delegated to the appropriate echelon, 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. *See* OPNAVINST 3120.32C of 11 April 1994, para. 142.2.b.

2. In three cases, the C.M.A. has indicated that the UCMJ does not authorize deprivation of an individual's liberty except as punishment by court-martial or NJP without a clear necessity for such restraint, either as pretrial restraint or in the interest of health, welfare, discipline, or training.

a. *United States v. Haynes*, 15 C.M.A. 122, 35 C.M.R. 94 (1964). An order restricting the accused for an indefinite period due to prior misconduct, for which the accused had been tried, was held to be punishment and illegal.

b. *United States v. Gentle*, 16 C.M.A. 437, 37 C.M.R. 57 (1966). An order to the accused to sign in hourly, designated to enforce a restriction to the base, which was imposed "so that he would be present for duty during normal working hours," was held to be illegal as designed to punish the accused.

c. *United States v. Wallace*, 2 M.J. 1 (C.M.A. 1976). An order issued to the accused, placing him in company arrest in order to insure his presence for duty each day, was held to be illegal and hence breach of the arrest limits would not support a charge of breaking arrest.

F. **USE OF ALTERNATIVE VOLUNTARY RESTRAINTS OR SELF-DENIAL OF PRIVILEGES.** The offer to an individual, as an alternative to formal punishment or reporting of misconduct, to withhold action, if he will voluntarily restrict himself or accede to an order that is beyond the authority of the superior to give (also known as "putting him in hack"), is unenforceable and not sanctioned as a nonpunitive measure.

1. Finally, it should be noted that there is a common, although unauthorized, practice of withdrawing and withholding the green military identification card from an individual as a nonpunitive measure, or even as part of an NJP restriction, in order to enforce the presence of the individual for the required period of time. Frequently, an individual must show his identification card to leave the limits of the command and, without it, that individual may not leave. MILPERSMAN 1000-080, Paragraph 1004 of MCO P5512.11 and Ch 13E of COMDTINST M1000.6A, the CG PERSMAN, require that such cards be carried at all times by all military personnel and is to be surrendered only for identification or investigation or while in disciplinary confinement.

G. **LIBERTY RISK**

1. ***Basis.*** There are two recognized purposes behind a lawful liberty risk program: (1) the essential protection of the foreign relations of the United States, and (2) international legal hold restriction. The commander has substantial discretion in deciding to place a member on liberty risk; however, the decision should generally be limited to cases involving a serious breach of the peace or flagrant discredit to the Navy. Contrary to the

beliefs and desires of many commanding officers (COs), the program applies ***only*** overseas, either in a foreign country or in foreign territorial waters. Remember that the deprivation of normal liberty, except as specifically authorized under the UCMJ and applicable regulations (e.g. medical quarantine), is illegal. The Coast Guard PCO/PXO Legal Desk Book authorizes a USCG CO the same authority.

2. ***Due Process***. The commander must afford adequate administrative due process safeguards. After reviewing each case individually, the commander should advise the member in writing of assignment to the program, the basis for the action, and the opportunity to respond (e.g., request mast). The commander should consider whether less restrictive means (e.g., liberty hours) will be effective in a given case before curtailing all liberty. The command should use incremental categories ("A," "B," "C," "D") where possible. The CO must periodically review each assignment to assess whether continued curtailment of liberty is justified.

3. ***Procedures***. The program is administrative, not punitive, restraint; thus, a servicemember's liberty may be curtailed regardless of whether charges are pending at a court-martial or nonjudicial punishment (NJP). Conversely, members punished at NJP or a court-martial should not be automatically placed on liberty risk unless their offense and predilections otherwise justify that assignment. No service record entries are made. Members on liberty risk should ***not*** be required to muster or work with members undergoing punitive restriction. If not proper, assignment to liberty risk may constitute a prior punishment or pretrial restraint, thereby inadvertently starting the speedy trial clock. Other legitimate bases for limitations on liberty outside the military justice system include: extra military instruction (EMI), bona fide training, operational necessity, medical reasons, safety / security of personnel, and command integrity. Liberty may also be denied if a member's appearance is contentious, inflammatory, lewd, or unlawful.

APPENDIX A

SAMPLE EMI ASSIGNMENT ORDER

(Date)

From: (Rate and full name of person imposing EMI)
To: (Rate and full name of person being assigned EMI)

Subj: ASSIGNMENT OF EXTRA MILITARY INSTRUCTION (EMI)

Ref: (a) JAGMAN, § 0103 [or local instruction]

1. Your performance indicates the following deficiencies: [you failed to make required log entries to record certain events and failed to make proper tours of your watch area.]

2. These performance deficiencies stem from: [your inattention to duty in preparing for your assigned watch.]

3. Per the reference, the following extra military instruction is assigned to assist you in overcoming these deficiencies: [you will study the pertinent orders for watchstanders and develop a checklist for use by personnel standing this watch.]

4. This EMI shall be performed between 1630 and 1800 from Monday 1 June CY through Friday 5 June CY. On Monday, 8 June CY, you will present a 30-minute class on this subject to your division.

_____
(Signature)

_____
(Date)

1. I hereby acknowledge notification of the above EMI. I have read and understand reference (a) and am aware that failure to perform said EMI in the manner set out therein is a violation under Article 92, UCMJ, which is punishable by either nonjudicial punishment or at court-martial.

_____
(Signature)

Copy to:
Members' training record (original)
Command Master Chief
Legal Officer
Division Officer

APPENDIX B

SAMPLE NONPUNITIVE LETTER OF CAUTION

From: Commanding Officer, USS JOHN QUINCY ADAMS (CV 11)
To: CTOCS Michael Stipe, USN, 123-45-6789

Subj: NONPUNITIVE LETTER OF CAUTION

Ref: (a) Report of JAG Investigation of 7 Sep CY
(b) JAGMAN, § 0105
(c) R.C.M. 306(c)(2), Manual for Courts-Martial (1998 ed.)

1. Reference (a) is the record of investigation convened to inquire into the transmission of a certain message on board USS JOHN QUINCY ADAMS while you were SSES Assistant Division Officer.

2. The investigation disclosed that, as Assistant Division Officer, on 19 July CY, you participated in the writing and printing of a bogus message to perpetrate a joke against a chief petty officer stationed onboard USS JOHN QUINCY ADAMS. After printing and delivering a hard copy of the bogus message to the chief petty officer in question, you failed to ensure that the bogus message was completely deleted from the message database, resulting in the bogus message being transmitted to the Bureau of Naval Personnel. To compound the error, when you realized that the bogus message had been sent you did not notify your superiors but instead took steps to prevent their ever discovering your misconduct.

3. Your performance and judgment during this incident was substandard. As Assistant Division Officer, it was inappropriate for you to participate in the drafting of a bogus message on USS JOHN QUINCY ADAMS communications equipment. More critical, however, was your failure to notify your superiors about the incident. You are hereby administratively admonished for your actions on 19 July CY.

4. This letter, being nonpunitive in nature, is addressed to you as a corrective measure. It does not become a part of your official record. However, you are advised that, as Assistant SSES Division Officer, you are in a position of special trust. In the future, I expect you to exercise greater care in the performance of your duties in order to measure up to the high standards of USS JOHN QUINCY ADAMS. I trust the instructional benefit you receive from this experience will heighten your awareness of the extent of your responsibilities and help you become a more proficient Senior Chief Petty Officer.

E. D. BRICKELL

APPENDIX C

SAMPLE LETTER OF INSTRUCTION

From: Commanding Officer, USS NEVERSAIL (CV 11)
To: LCDR Mike Rowmanage, USN, 987-65-4321/1300
Aviation Fuels Officer, USS NEVERSAIL (CV 11)

Subj: LETTER OF INSTRUCTION

Ref: (a) MILPERSMAN 1611-080

1. This Letter of Instruction is issued per the reference to discuss specific measures required to improve the unsatisfactory performance of the Aviation Fuels Division on board NEVERSAIL.

2. Since your assumption of duties as aviation fuels officer on board NEVERSAIL, you have allowed unauthorized procedures to exist in the Aviation Fuels Division that resulted in the structural damage to JP-5 storage tank 8-39-02J during underway replenishment on 18 July CY. You failed to familiarize yourself with appropriate aviation fuels directives and thus you were unable to verify the proceedings in your division. You also failed to ensure all directives were maintained up-to-date. Generally, you relied totally upon your assistant aviation fuels officer for the day-to-day operation of your division.

3. To function effectively as the aviation fuels officer, you must become more involved in the day-to-day aspects of your division. You cannot manage from your office, accepting the counsel of your assistants without developing an adequate personal knowledge of specific procedures. You must personally set your division's goals and personally verify they are being met.

a. You must review every aviation fuels directive applicable to USS NEVERSAIL. You will ensure that you are familiar with directed procedures. As a matter of routine, you will personally verify that your division does not deviate from directed procedures unless authorized by higher authority.

b. You will submit quota requests for yourself and CWO2 J. S. Ragmann to attend an aviation fuels officer course upon completion of this deployment.

4. This letter is designed to aid you in correcting deficiencies in your performance as a division officer. The entire chain of command is available to assist you in any way possible. We want and need your success.

D. R. PEPPER

CHAPTER VIII

NONJUDICIAL PUNISHMENT

(West's Key Number: MILJUS Key Number 525)

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CHAPTER VIII

NONJUDICIAL PUNISHMENT
(West's Key Number: MILJUS Key Number 525)

INTRODUCTION

The terms "nonjudicial punishment" and "NJP" are used interchangeably to refer to certain limited punishments which can be awarded for minor disciplinary offenses by a commanding officer or officer in charge to members of his command. In the Navy and Coast Guard, nonjudicial punishment proceedings are referred to as "captain's mast" or simply "mast." In the Marine Corps, the process is called "office hours," and in the Army and Air Force, it is referred to as "Article 15." Article 15 of the *Uniform Code of Military Justice* (UCMJ), Part V of the *Manual for Courts-Martial,* (MCM, 1998 ed.), Part B of Chapter I of *The Manual of the Judge Advocate General* (JAGMAN), and the USCG Military Justice Manual (MJM) CONDTINST M5810.1C constitute the basic law concerning nonjudicial punishment procedures. The legal protection afforded an individual subject to NJP proceedings is more complete than is the case for nonpunitive measures, but, by design, is less extensive than for courts-martial.

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

a. Request mast (Arts. 1151 & 0820c, *U.S. Navy Regulations, 1990* and para 9-2-3, USCG regulations, CONDTINST M5000.3B) is a hearing before the CO, at the request of service personnel, for the purpose of making requests, reports and statements, and airing grievances.

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

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

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

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

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

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

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

a. They are not a trial, as the term "nonjudicial" implies;

b. a conviction; and

c. an acquittal if a determination is made not to impose punishment.

NATURE AND REQUISITES OF NONJUDICIAL PUNISHMENT

A. *The power to impose nonjudicial punishment*

1. Authority under Art. 15, UCMJ, may be exercised by a commanding officer, an officer in charge, or by certain officers to whom the power has been delegated in accordance with regulations of the Secretary of the Navy. Part V, para. 2, MCM (1998 ed.).

(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 officer in charge is a commissioned officer who is designated as officer in charge of a unit by departmental orders, tables of organization, manpower authorizations, orders of a flag or general officer in command or orders of the Senior Officer Present. *See* JAGMAN, § 0106b; *see also* Art. 0801, *U.S. Navy Regulations, 1990 and MJM, 1-A-2.(a).*

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

(1) Ordinarily, the power to impose NJP cannot be delegated. One exception is that a flag or general officer in command may delegate all or a portion of his article 15 powers to a "principal assistant" (a senior officer on his staff who is eligible to succeed to command) with the express approval of the Chief of Naval Personnel or the Commandant of the Marine Corps (CMC). Art. 15(a), UCMJ; JAGMAN, § 0106c; MJM 1-A-2.d.

(2) Additionally, where members of the naval service are assigned to a multiservice command, the commander of such multiservice command may designate one or more naval units and for each unit shall designate a commissioned officer of the naval service as commanding officer for NJP purposes over the unit (often referred to as the "Navy Element Commander." A copy of such designation must be furnished to the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, and to the Judge Advocate General. JAGMAN, § 0106d; MJM 1-A-3.b.

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

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

(a) If a commanding officer determines that his authority under article 15 is insufficient to make a proper disposition of the case, he may refer the case to a superior commander for appropriate disposition. R.C.M. 306(c)(5), 401(c)(2), MCM (1998 ed.).

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

B. ***Persons on whom NJP may be imposed***

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

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

3. At the time the punishment is imposed, the accused must be a member of the command of the commanding officer (or of the unit of the officer in charge) who imposes the NJP. JAGMAN, § 0107a(1) and MJM 1-A-3.a.

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

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

4. ***Personnel of another armed force***

(a) Under present regulations, joint commanders have jurisdiction over personnel of Army, Air Force, and Naval Services for nonjudicial punishment purposes; however, there is little guidance with regard to exercising such authority. Until such guidance is received is it recommended that such personnel be punished by 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 1300-070 as to the procedure to follow.

(b) Express agreements do not extend to Coast Guard personnel serving with a naval command; but other policy statements indicate that the naval commander should not attempt to exercise NJP over such personnel assigned to his unit without express permission from the Coast Guard. Sec. 1-3(c), *Coast Guard Military Justice Manual*, COMDTINST M5810.1.

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

5. ***Imposition of NJP on embarked personnel***

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

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

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

6. ***Imposition of NJP on reservists***

(a) Reservists on active duty for training, or under some circumstances inactive duty training, are subject to the UCMJ and therefore to the imposition of NJP.

(b) The provisions of JAGMAN, §§ 0107b, 0112, and 0112a(2); and MJM 1-A-3.g, discuss the exercise of NJP over reservists. A member of a Reserve component

who is subject to the UCMJ at the time he / she commits an offense in violation of the UCMJ is not relieved from amenability to NJP or court-martial proceedings solely because of the termination of his / her period of active duty for training or inactive duty training before the allegation is resolved at NJP or court-martial.

(1) Hence, the commanding officer seeking to impose NJP over Reserve personnel has the following options:

(2) Impose NJP during the active duty or inactive duty training when the misconduct occurred;

(3) 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);

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

(5) if the accused waives his right to be present at the NJP hearing, the commanding officer or officer in charge may impose NJP after the period of active duty or inactive duty training of the accused has ended.

(6) Confinement is not an authorized punishment without the approval of the Secretary of the Navy for those Reserve members who have been involuntarily recalled for purposes of imposition of discipline.

(7) For those Reserve personnel who receive restriction or extra duty as a result of NJP imposed during a normal period of active duty training or inactive duty training, the restraint may not extend beyond the normal termination of the training period. JAGMAN, § 0112a; MJM 1-E-5.h. This provision does not preclude a "carry-over" of awarded but unserved restraint at a later period of active duty training or inactive duty training.

(8) For those Reserve personnel who receive a restraint form of punishment from an NJP or court-martial for which they have been involuntarily recalled to active duty, such punishment cannot be served at any time other than a subsequent active duty training session unless the Secretary of the Navy so approves. Art. 2(d)(5), UCMJ; JAGMAN, §§ 0112a and 0123e.

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

(a) Article 15a, UCMJ, and Part V, para. 3, MCM (1998 ed.), 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. *See United States v. Forester*, 8 M.J. 560 (N.C.M.R. 1979), to determine when a ship becomes a "vessel" for article 15 purposes. (But cf., *United States v. Edwards*, 46 M.J. 41 (1997), which,

while it does not effect the administration of NJP, held that the actual operational status of a ship is relevant to the admissibility of evidence that a member of the ship's crew received NJP without being afforded the opportunity to refuse.)

(b) This right to refuse NJP exists up until the time NJP is imposed (i.e., up until the commanding officer announces the punishment). Art. 15a, UCMJ. This right is not waived by the fact that the accused has previously signed a "report chit" (NAVPERS Form 1626/7, UPB Form NAVMC 10132, or CG-4910) indicating that he would accept NJP.

(c) The category of persons who may not refuse NJP includes those persons assigned or attached to the vessel; on board for passage; or assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body. *United States v. Penn*, 4 M.J. 879 (N.C.M.R. 1978), gives an analysis of the "equal protection" aspects of denying this right to persons attached to or embarked in a vessel.

(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.

(e) There is no power whatsoever for a commanding officer or officer in charge to impose NJP on a civilian.

C. *Offenses punishable under article 15*

1. Article 15 gives a commanding officer power to punish individuals for minor offenses. The term minor offense" has been the cause of some concern in the administration of NJP. Article 15, UCMJ, and Part V, para. 1e, MCM (1998 ed.), indicate that the term "minor offense" means misconduct normally not more serious than that usually handled at summary court-martial (where the maximum punishment is thirty days' confinement). These sources also indicate that the nature of the offense and the circumstances surrounding its commission are also factors which should be considered in determining whether an offense is minor in nature. The term "minor offense" ordinarily does not include misconduct which, if tried by general court-martial, could be punished by a dishonorable discharge or confinement for more than one year. The Navy and Marine Corps, however, have taken the position that the final determination as to whether an offense is "minor" is within the sound discretion of the commanding officer.

(a) ***Nature of offense.*** The *Manual for Courts-Martial, 1998 edition*, also indicates in Part V, para. 1e, that, in determining whether an offense is minor, the "nature of the offense" should be considered. This is a significant statement and often is misunderstood as referring to the seriousness or gravity of the offense. Gravity refers to the maximum possible punishment, however, and is the subject of separate discussion in that paragraph. In context, nature of the offense refers to its character, not its gravity. In military criminal law, there are two basic types of misconduct—disciplinary infractions and crimes. Disciplinary infractions are breaches of standards governing the routine functioning of

society. Thus, traffic laws, license requirements, disobedience of military orders, disrespect to military superiors, etc., are disciplinary infractions. Crimes, on the other hand, involve offenses commonly and historically recognized as being particularly evil (such as robbery, rape, murder, aggravated assault, larceny, etc.). Both types of offenses involve a lack of self-discipline, but crimes involve a particularly gross absence of self-discipline amounting to a moral deficiency. They are the product of a mind particularly disrespectful of good moral standards. In most cases, criminal acts are not minor offenses and, usually, the maximum imposable punishment is great. Disciplinary offenses, however, are serious or minor depending upon circumstances and, thus, while some disciplinary offenses carry severe maximum penalties, the law recognizes that the impact of some of these offenses on discipline will be slight. Hence, the term "disciplinary punishment" used in the *Manual for Courts-Martial, 1998 edition*, is carefully chosen.

(b) ***Circumstances***. The circumstances surrounding the commission of a disciplinary infraction are important to the determination of whether such an infraction is minor. For example, willful disobedience of an order to take ammunition to a unit engaged in combat can have fatal consequences for those engaged in the fight and, hence, is a serious matter. Willful disobedience of an order to report to the barbershop may have much less of an impact on discipline. The offense must provide for both extremes, and it does because of a high maximum punishment limit. When dealing with disciplinary infractions, the commander must be free to consider the impact of circumstance since he is considered the best judge of it; whereas, in disposing of crimes, society at large has an interest coextensive with that of the commander, and criminal defendants are given more extensive safeguards. Hence, the commander's discretion in disposing of disciplinary infractions is much greater than his latitude in dealing with crimes. Where the commander determines the offense to be minor, a statement is recommended on the NAVPERS 1626/7 (Navy) and CG-4910 (Coast Guard) and is required on the UPB NAVMC 10132 (Marine Corps), indicating that the commander, after considering all facts and circumstances, has determined that the offense is minor.

2. Notwithstanding the case of *Hagarty v. United States*, 449 F.2d 352 (Ct.Cl. 1971), the Navy has taken the position that the final determination as to what constitutes a minor offense" is within the sound discretion of the commanding officer.

Imposition of NJP does not, in all cases, preclude a subsequent court-martial for the same offense. *See* Part V, para. 1e, MCM (1998 ed.) and page 4-34, *infra*.

3. *The statute of limitations is applicable to NJP*

Article 43(b)(2), UCMJ, prohibits the imposition of NJP more than two years after the commission of the offense. This is true even where block 13 of the charge sheet has been completed showing receipt of sworn charges by the officer exercising summary court-martial jurisdiction. (This action normally tolls the running of the statute of limitations for purposes of trial by court-martial.) For NJP purposes completion of block 13 does not toll the statue of limitations.

4. *Cases previously tried in civil courts*

a. Section 0124 of the *JAG Manual* and MJM 1-A-5.c permit the use of NJP to punish an accused for an offense for which he has been tried by a domestic 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 (USN/USMC) or the Commandant (G-1) (USCG)).

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, § 0124d; MJM 1-A-5.c. *See also* page 4-34, *infra*.

c. Clearly, cases in which a finding of guilt or innocence has been reached in a trial by court-martial cannot be then taken to NJP. JAGMAN, § 0124d; MJM 1-A-5. However, the last point at which cases may be withdrawn from court-martial before findings with a view toward NJP is presently unclear. *See, e.g., Dobzynski v. Green*, 16 M.J. 84 (C.M.A. 1983); and *Jones v. Commander, Naval Air Force, U.S. Atlantic Fleet*, 18 M.J. 198 (C.M.A. 1984).

5. *Off-base offenses*

a. Commanding officers and officers in charge may dispose of minor disciplinary infractions (which occur on or off-base) at NJP. Unless the off-base offense is a traffic offense (*see* para. b, *infra*) or one previously adjudicated by civilian authorities (*see* para. 4a, *supra*), there is no limit on the authority of military authorities to resolve such offenses at NJP.

b. OPNAVINST 11200.5C and MCO 5110.1C state (as a matter of policy) that, in areas not under military control, the responsibility for maintaining law and order rests with civil authority. The enforcement of traffic laws falls within the purview of this principle. Off-duty, off-installation driving offenses, however, are indicative of inability and lack of safety consciousness. Such driving performance does not prevent the use of nonpunitive measures (i.e., deprivation of on-installation driving privileges).

D. ***Hearing procedure***

1. ***Introduction.*** Nonjudicial punishment results from an investigation into unlawful conduct and a subsequent hearing to determine whether and to what extent an accused should be punished. Generally, when a complaint is filed with the commanding officer of an accused, that commander is obligated to cause an inquiry to be made to determine the truth of the matter. When this inquiry is complete, a NAVPERS Form 1626/7, the UPB Form NAVMC 10132, or CG Form 4910 is filled out. (This inquiry is discussed in Chapter II, *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 commanding officer determines that disposition by NJP is appropriate, the commanding officer must cause the accused to be given certain advice. Part V, para. 4, MCM (1998 ed.). The commanding officer need not give the advice personally, but may assign this responsibility to the legal officer or another appropriate person. The following advice must be given, however.

a. ***Contemplated action.*** The accused must be informed that the commanding officer is considering the imposition of NJP for the offense(s).

b. ***Suspected offense.*** The suspected offense(s) must be described to the accused and such description should include the specific article of the UCMJ which the accused is alleged to have violated.

c. ***Government evidence.*** The accused should be advised of the information upon which the allegations are based or told that he may, upon request, examine all available statements and evidence.

d. ***Right to refuse NJP.*** Unless the accused is attached to or embarked in a vessel (in which case he has no right to refuse NJP), he should be told of his right to demand trial by court-martial in lieu of NJP; of the maximum punishment which could be imposed at NJP; of the fact that, should he demand trial by court-martial, the charges could be referred for trial by summary, special, or general court-martial; of the fact that he could not be tried at summary court-martial over his objection; and that, at a special or general court-martial, he would have the right to be represented by counsel.

e. ***Right to confer with independent counsel.*** *United States v. Booker*, 5 M.J. 238 (C.M.A. 1977), held that, because an accused who is not attached to or embarked in a vessel has the right to refuse NJP, he must be told of his right to confer with independent counsel regarding his decision to accept or refuse the NJP if the record of that NJP is to be admissible in evidence against him should the accused ever be subsequently tried by court-martial. (**Note:** In *United States v. Edwards*, 46 M.J. (CAAF 1997) a vessel must be operational for the so-called 'vessel exception" to apply.) A failure to properly advise an accused of his right to confer with counsel, or a failure to provide counsel, will not, however, render the imposition of NJP invalid or constitute a ground for appeal. Therefore, if the command imposing the NJP desires that the record of the NJP be admissible for courts-martial purposes, the record of the NJP must be prepared in accordance with applicable service regulations and reflect that:

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

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

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

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. In the Coast Guard the member signs the rights disclosure form which is attached to the 4910. No service record entries are made. 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 was accepted by the Court of Military Appeals in *United States v. Hayes*, 9 M.J. 331 (C.M.A. 1980), as compliance with the *Booker* requirements. In this regard, section 0109 of the *JAG Manual* explains precisely how a command may prepare service record entries which will be admissible at any subsequent trial by court-martial. If an accused waives any or all of the above rights, but refuses to execute such a waiver in writing, the fact that he was properly advised of his rights, waived his rights, but declined to execute a written waiver should be so recorded.

Because of Federal court litigation involving an attack on the Navy for issuing a discharge under other than honorable conditions based, at least in part, on prior NJP's, the Commandant of the Marine Corps has directed, in ALMAR 097-87, that the *Booker* advice and service record book entry reflecting compliance with *Booker* contain the following language:

> Date. I certify that I have been given the opportunity to consult with a lawyer, provided by the government at no cost to me, in regard to a pending (NJP/SCM) for violation of Article(s) (Art. No.(s)) of the UCMJ. I understand that I have the right to refuse that (NJP/SCM): I (do) (do not) choose to exercise that right. I further understand that acceptance of (NJP/SCM) does not preclude my command from taking other adverse administrative action against me. I (will) (will not) be represented by a civilian / military lawyer. Signature of accused.

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

(1) Be informed of his rights under Art. 31, UCMJ;

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

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

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

(5) present matters 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, and if they are reasonably available. A witness is reasonably available if his or her 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 or her being excused from other important duties; and

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

3. ***Forms.*** The forms set forth in Appendices A-1-b, A-1-c, and A-1-d of the *JAG Manual*, and enclosures 3 and 4 of the MJM are designed to comply with the above requirements. Appendix A-1-b is to be used when the accused is attached to or embarked in a vessel. Appendix A-1-c or enclosure (3) is to be used when the accused is not attached to or embarked in a vessel, and the command does not desire to afford the accused the right to consult with a lawyer to assist the accused in deciding whether to accept or refuse NJP. (Note: In this case, the record of NJP will not be admissible for any purpose at any subsequent court-martial.) Appendix A-1-d or enclosure (4) is to be used when an accused is not attached to or embarked in a vessel, and the command does afford the accused the right to consult with a lawyer to decide whether to accept or reject NJP. Use and retention of the proper forms are essential.

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 (1998 ed.), provides that, if the accused waives his right to personally appear before the commanding officer, he may choose to submit written matters for consideration by the commanding officer prior to the imposition of NJP. Should the accused make such an election, he should be informed of his right to remain silent and that any matters so submitted may be used against him in a trial by court-martial. Notwithstanding the accused's expressed desire to waive his right to personally appear at the NJP hearing, he may be ordered to attend the hearing if the officer imposing NJP desires his presence. NAVY JAG MSG 231630Z NOV 84. If the accused waives his personal appearance and NJP is imposed, the commanding officer must ensure that the accused is informed of the punishment as soon as possible.

b. ***Hearing office***. Normally, the officer who actually holds the NJP hearing is the commanding officer of the accused. Part V, para. 4c, MCM (1998 ed.), allows the commanding officer or officer in charge to delegate his authority to hold the hearing to another officer under extraordinary circumstances. These circumstances are not detailed, but they must be unusual and significant rather than matters of convenience to the commander. This delegation of authority should be in writing and the reasons for it detailed. It must be emphasized that this delegation does not include the authority to impose punishment. At such a hearing, the officer delegated to hold the hearing will receive all evidence, prepare a summarized record of matters considered, and forward the record to the officer having NJP authority. The commander's decision will then be communicated to the accused personally or in writing as soon as practicable.

c. The record of a formal *JAG Manual* investigation or other fact-finding body (e.g., an article 32 investigation) in which the accused was accorded the rights of a party with respect to an act or omission for which NJP is contemplated may be substituted for the hearing. Part V, para. 4d, MCM (1998 ed.); JAGMAN, § 0110d; MJM 1-H.

(1) It is possible to impose NJP on the basis of a record of a *JAG Manual* investigation at which the accused was afforded the rights of a party because the rights of a party include all rights to which the accused would have been entitled at the mast hearing plus additional procedural safeguards, such as assistance of counsel. *See* JAGMAN, § 0110d; MJM 1-H.

(2) If the record of a *JAG Manual* investigation or other fact-finding body discloses that the accused was not accorded all the rights of a party with respect to the act or omission for which NJP is contemplated, the commanding officer must follow the regular NJP procedure or return the record to the fact-finding body for further proceedings to accord the accused all rights of a party. JAGMAN, § 0110d; MJM 1-H.

d. ***Burden of proof***. The commanding officer or officer in charge must decide that the accused committed the offenses(s) by a preponderance of the evidence. JAGMAN, § 0110b; MCM part V, 4(c)(4)(B).

e. ***Personal representative***. The concept of a personal representative to speak on behalf of the accused at an Article 15, UCMJ, hearing has caused some confusion. The burden of obtaining such a representative is on the accused. As a practical matter, he is free to choose anyone he wants – a lawyer or a nonlawyer, an officer or an enlisted person. This freedom of the accused to choose a representative does not obligate the command to provide lawyer counsel, and current regulations do not create a right to lawyer counsel to the extent that such a right exists at court-martial. The accused may be represented by any lawyer who is willing and able to appear at the hearing. While a lawyer's workload may preclude the lawyer from appearing, a blanket rule that no lawyers will be available to appear at article 15 hearings would appear to contravene the spirit if not the letter of the law. It is likewise doubtful that one can lawfully be ordered to represent the

accused. It is fair to say that the accused can have anyone who is able and willing to appear on his behalf without cost to the government. While a command does not have to provide a personal representative, it should help the accused obtain the representative he wants. In this connection, if the accused desires a personal representative, he must be allowed a reasonable time to obtain someone. Good judgment should be utilized here, for such a period should be neither inordinately short nor long.

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

g. ***Witnesses.*** When the hearing involves controverted questions of fact pertaining to the alleged offenses, witnesses shall be called to testify if they are present on the same ship or base or are otherwise available at no expense to the government. Thus, in a larceny case, if the accused denies he took the money, the witnesses who can testify that he did take the money must be called to testify in person if they are available at no cost to the government. Part V, para. 4c(1)(F), MCM (1998 ed.). 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 (1998 ed.), provides that the accused is entitled to have the hearing open to the public unless the commanding officer determines that the proceedings should be closed for good cause. The commanding officer is not required to make any special arrangements to facilitate the public's 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.*** Commanding officers are authorized to publish the results of NJP under section 0115 of the *JAG Manual* and in COMDTNOTE 1620. Within one month following the imposition of NJP, the name of the accused, his rate, offense(s), and their disposition may be published in the plan of the day, posted upon command bulletin boards, and announced at daily formations (Marine Corps) or morning quarters (Navy). If the plan of the day is disseminated to nonmilitary personnel, or the bulletin board is accessible to nonmilitary personnel, the published results may not include the name of the accused.

5. **Possible actions by the commanding officer at mast/office hours (listed on NAVPERS 1626/7 and Enclosure (2), MJM)**

a. *Dismissal with or without warning*

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

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

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

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

d. *Imposition of NJP.* When Marine Corps commanding officers and officers in charge impose NJP, para. 3004.3, MCO P5354.1 (Marine Corps Equal Opportunity Manual) requires racial / ethnic identifiers (e.g., Male / Female / White / Black / Hispanic / Other) should be reflected in unit punishment books and records of NJP proceedings.

AUTHORIZED PUNISHMENTS AT NJP

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

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

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

3. *The status of the accused.* Punishment authority is also limited by the status of the accused. Is he an officer or an enlisted person? If enlisted, what is his / her rate?

4. *The nature of the command.* Is it a shore command or is the accused attached to or embarked in a vessel? The maximum punishment limitations discussed below apply to each NJP action and not to each offense. Note, also, there exists a policy that all known offenses of which the accused is suspected should ordinarily be considered at a single article 15 hearing. Part V, para. 1f(3), MCM (1998 ed.).

B. *Maximum limits – specific*

1. *Officer accused.* If punishment is imposed by officers in the following grades, the limits are as indicated below.

a. By officer exercising general court-martial jurisdiction or a flag/general officer in command, or designated principal assistant. Part V, para. 5b(1)(B), MCM (1998 ed.); JAGMAN, § 0111; MJM 1-E-2.

(1) Punitive admonition or reprimand.

(2) Arrest in quarters: not more than 30 days.

(3) Restriction to limits: not more than 60 days.

(4) Forfeiture of pay: not more than 1/2 of one month's pay per month for two months.

b. *By officers O-4 to O-6.* Part V, para. 5b(1), MCM (1998 ed.); JAGMAN, § 0111; MJM 1-E-2.

(1) Admonition or reprimand.

(2) Restriction: not more than 30 days.

c. *By officers O-1 to O-3.* JAGMAN, § 0111.

(1) Admonition or reprimand.

(2) Restriction: not more than 15 days.

d. *By officer in charge:* none.

2. *Enlisted accused.* Part V, para. 5b(2), MCM (1998 ed.); JAGMAN, § 0111; MJM 1-E-2.

a. *By commanding officers in grades O-4 and above*

(1) Admonition or reprimand.

(2) Confinement on bread and water/diminished rations: imposable only on grades E-3 and below, attached to or embarked in a vessel, for not more than 3 days (USN and USMC only).

(3) Correctional custody: not more than 30 days and only on grades E-3 and below.

(4) Forfeiture: not more than 1/2 of one month's pay per month for two months.

(5) Reduction: one grade, not imposable on E-7 and above (Navy) or on E-6 and above (Marine Corps).

(6) Extra duties: not more than 45 days.

(7) Restriction: not more than 60 days.

b. *By commanding officers in grades O-3 and below or any commissioned officer in charge*

(1) Admonition or reprimand.

(2) Confinement on bread and water / diminished rations: not more than 3 days and only on grades E-3 and below attached to or embarked in a vessel (USN and USMC only).

(3) Correctional custody: not more than 7 days and only on grades E-3 and below.

(4) Forfeiture: not more than 7 days' pay.

(5) Reduction: to next inferior pay grade; not imposable on E-7 and above (Navy) or E-6 and above (Marine Corps), if rank from which demoted is within the promotion authority of the OIC.

(6) Extra duties: not more than 14 days.

(7) Restriction: not more than 14 days.

C. *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 app. A-1-g of the *JAG Manual* and MJM, 1-E-3(a). *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(3), MCM (1998 ed.). It is a moral restraint, as opposed to a physical restraint. It is similar to restriction, but has much narrower limits. The limits of arrest are set by the officer imposing the punishment and may extend beyond quarters. The term "quarters" includes military and private residences. The officer may be required to perform his regular duties as long as they do not involve the exercise of authority over subordinates. JAGMAN, § 0111f and MJM 1-E-3(c).

3. *Restriction.* Restriction also is a form of moral restraint. Part V, para. 5c(2), MCM (1998 ed.). Its severity depends upon the breadth of the limits as well as the duration of the restriction. If restriction limits are drawn too tightly, there is a real danger that they may amount to either confinement or arrest in quarters, which in the former case cannot be imposed as NJP and in the latter case is not an authorized punishment for enlisted persons. As a practical matter, restriction ashore means that an accused will be restricted to the limits of the command except of course at larger shore stations where the use of recreational facilities might be further restricted. Restriction and arrest are normally imposed by a written order detailing the limits thereof and usually require the accused to log in at certain specified times during the restraint. Article 1103.1 of *U.S. Navy Regulations, 1990,* provides that an officer placed in the status of arrest or restriction shall not be confined to his room unless the safety or the discipline of the ship requires such action.

4. *Forfeiture.* A forfeiture applies to basic pay and to sea or foreign duty pay, but not to incentive pay, allowances for subsistence or quarters, etc. "Forfeiture" means that the accused forfeits monies due him in compensation for his military service only; it does not include any private funds. This distinguishes forfeiture from a "fine," which may only be awarded by courts-martial. The amount of forfeiture of pay should be stated in whole dollar amounts, not in fractions, and indicate the number of months affected (e.g., "to forfeit $50.00 pay per month for two months"). Where a reduction is also involved in the punishment, the forfeiture must be premised on the new lower rank, even if the reduction is suspended. Part V, para. 5c(8), MCM (1998 ed.). Forfeitures are effective on the date imposed unless suspended. Where a previous forfeiture is being executed, that forfeiture will be completed before any newly imposed forfeiture will be executed. JAGMAN, § 0112b.

5. *Extra duties.* Various types of duties may be assigned, in addition to routine duties, as punishment. Part V, para. 5c(6), MCM (1998 ed.), however, prohibits extra duties which constitute a known safety or health hazard, which constitute cruel and unusual punishment, or which are not sanctioned by the customs of the service involved. Additionally, when imposed upon a petty or noncommissioned officer (E-4 and above), the duties cannot be demeaning to his rank or position. Section 0111d of the *JAG Manual* indicates that the immediate commanding officer of the accused will normally designate the amount and character of extra duty, regardless of who imposed the punishment, and that such duties normally should not extend beyond two (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 seven (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 (1998 ed.), and section 0111e of the *JAG Manual* and MJM 1-E-3(h) to one grade only. The grade from which reduced must be within the promotional authority of the CO imposing the reduction. MILPERSMAN 1450-010; 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 (1998 ed.). Specific regulations for conducting correctional custody are found in SECNAVINST 1640.7C 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.* This punishment can be utilized only if the accused is attached to or embarked in a vessel. The punishment involves physical confinement and is 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. *See* Part V, para 5c(5), MCM (1998 ed.). Diminished rations is a restricted diet of 2100 calories per day, and instructions for its use are detailed in SECNAVINST 1640.9. This punishment cannot be imposed upon grades E-4 and above. Confinement on bread and water or diminished rations is not authorized in the Coast Guard, MJM 1-E-3(e).

D. *Execution of punishments*

1. *General rule.* As a general rule, all punishments, if not suspended, take effect when imposed. Part V, para. 5g, MCM (1998 ed.); JAGMAN, § 0113; MJM 1-E-5. This means that the punishment in most cases will take effect when the commanding officer informs the accused of his punishment decision. Thus, if the commanding officer wishes to impose a prospective punishment, one to take effect at a future time, he should simply delay the imposition of NJP altogether. There are, however, several specific rules which authorize the deferral or stay of a punishment already imposed.

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

(1) Adequate facilities are not available;

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

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

b. *Deferral of restraint punishments pending an appeal from NJP.* Part V, para. 7d, MCM (1998 ed.), 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 NJP's.* The execution of any nonjudicial (or court-martial) punishment involving restraint will normally be interrupted by a subsequent NJP involving restraint. Thereafter, the unexecuted portion of the prior restraint punishment will be executed. The officer imposing the subsequent punishment, however, may order that the prior punishment be completed prior to the service of the subsequent punishment. JAGMAN, § 0113b; MJM 1-E-5. 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 unexecuted portions of punishment imposed at NJP's will be interrupted during any period that the servicemember is UA.

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

ARTICLE 15 PUNISHMENT LIMITATIONS
Navy and Marine Corps

Imposed By	Imposed On	Bread & Water or DIMRATS (1)	Correctional Custody (2)	Arrest in Quarters (3)	Forfeitures (4 & 5)	Reduction (4 & 6)	Extra Duties (7)	Restriction (7)	Reprimand or Admonition (4)
Flags/Generals in Command	Officers	No	No	30 Days	1/2 of 1 Mo. for 2 Mos.	No	No	60 Days	Yes
	E-4 to E-9	No	No	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
	E-1 to E-3	3 Days	30 Days	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
O-4 to O-6	Officers	No	No	No	No	No	No	30 Days	Yes
	E-4 to E-9	No	No	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
	E-1 to E-3	3 Days	30 Days	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
O-3 / Below & OICs (8)	Officers	No	No	No	No	No	No	15 Days (9)	Yes
	E-4 to E-9	No	No	No	7 Days	1 Grade	14 Days	14 Days	Yes
	E-1 to E-3	3 Days	7 Days	No	7 Days	1 Grade	14 Days	14 Days	Yes

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

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

(3) May not be combined with restriction

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

(5) Shall be expressed in whole dollar amounts only

(6) Navy CPOs (E-7 to E-9) may not be reduced at NJP; Marine Corps NCOs (E-6 to E-9) may not be reduced at NJP (Check directives relating to promotion)

(7) Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum possible for extra duties

(8) OICs regardless of rank have NJP authority over enlisted personnel only. Marine CC may only reduce personnel within their promotion authority.

(9) Restriction imposed upon commissioned and warrant officers may not exceed 15 days when imposed by a CO below the grade of MAJ or LCDR (JAGMAN 0111a)

ARTICLE 15 PUNISHMENT LIMITATIONS
Coast Guard

Imposed By	Imposed On	Bread & Water or DIMRATS	Correctional Custody (1)	Arrest in Quarters (2)	Forfeitures (3 & 4)	Reduction (3 & 5)	Extra Duties (6 & 7)	Restriction	Admonition (3)
Flag Officers in Command	Officers	No	No	30 Days	1/2 of 1 Mo. for 2 Mos.	No	No	60 Days	Yes
	E-4 to E-9	No	No	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
	E-1 to E-3	No	30 Days	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
O-4 to O-6	Officers	No	No	No	No	No	No	30 Days	Yes
	E-4 to E-9	No	No	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
	E-1 to E-3	No	30 Days	No	1/2 of 1 Mo. for 2 Mos.	1 Grade	45 Days	60 Days	Yes
O-3 / Below	Officers	No	No	No	No	No	No	15 Days (8)	Yes
	E-4 to E-9	No	No	No	7 Days	1 Grade	14 Days	14 Days	Yes
	E-1 to E-3	No	7 Days	No	7 Days	1 Grade	14 Days	14 Days	Yes
2 OINCs (9)	Officers	No	No	No	No	No	No	No	No
	E-4 to E-9	No	No	No	3 Days	No	14 Days	14 Days	No
	E-1 to E-3	No	No	No	3 Days	No	14 Days	14 Days	No

** *Note: See footnote information listed on next page*

Coast Guard Art. 15 Punishment Limitations Chart Information

This information goes with the chart on the preceding page

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

(2) May not be combined with restriction

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

(4) Shall be expressed in whole dollar amounts only

(5) USCG CPOs (E-7 to E-9) may not be reduced at NJP

(6) Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum possible for extra duties

(7) May be imposed only upon personnel E-6 and below

(8) Restriction imposed upon commissioned and warrant officers may not exceed 15 days when imposed by a CO below the grade of LCDR (Art. 1-E-2b MJM)

(9) OICs regardless of rank have NJP authority over enlisted personnel only

COMBINATIONS OF PUNISHMENTS

A. *General rules.*. Part V, para. 5d, MCM (1998 ed.), provides that all authorized NJP's 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.

B. *Examples.*

1. If an O-4 commanding officer wishes to impose the maximum amount of all permissible NJP's upon an E-3, the maximum that could be imposed would be:

a. A punitive letter of reprimand or admonition (or an oral reprimand or adminition);

b. reduction to E-2;

c. forfeiture of one-half pay per month for two months (based upon the reduced rate); and

d. forty-five days restriction and extra duties to be served concurrently.

2. If an O-3 commanding officer (or any officer in charge, regardless of grade) wishes to impose the maximum amount of all permissible NJP's upon an E-3, the maximum that could be imposed would be:

a. A punitive letter of reprimand or admonition (or an oral reprimand or admonition);

b. reduction to E-2 (Marine Corps CO's must have special court-martial convening authority to reduce);

c. forfeiture of 7 days' pay (based upon the reduced rate); and

d. fourteen days restriction and extra duties to be served concurrently.

2. *Remission.* Part V, para. 6d, MCM (1998 ed.). This action relates to the unexecuted parts of the punishment; that is, those parts which have not been completed. This action relieves the accused from having to complete his punishment, though he may have partially completed it. Rights, privileges, and property lost by virtue of executed portions of punishment are not restored, nor is the punishment voided as in the case when it is set aside. The expiration of the current enlistment or term of service of the servicemember automatically remits any unexecuted punishment imposed under article 15.

3. *Mitigation.* Part V, para. 6b, MCM (1998 ed.). 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 the 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. *Example:* As was mentioned, in mitigating NJP's, neither the quantity nor the quality of the punishment may be increased. For example, it would be impermissible to mitigate 3 days' confinement on bread and water to 4 days' restriction because this would increase the quantity of the punishment. It would also be impermissible to mitigate 60 days' restriction to one day of confinement on bread and water because this would increase the quality of the punishment.

d. *Reduction in grade.* Reduction in grade, even though executed, may be mitigated to forfeiture of pay. The amount of forfeiture can be no greater than that which could have been imposed by the mitigating commander had he initially imposed punishment. This mitigation may be done only within four months after the date of execution. Part V, para. 6b, MCM (1998 ed.).

4. *Suspension of punishment.* Part V, para. 6a, MCM (1998 ed.). 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 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); refraining from associating with particular individuals (i.e., known drug users); not entering particular establishments or trouble spots; requirement to agree to searches of person, vehicles, or lockers; to successfully graduate from a particular rehabilitation course (i.e., ARS, CAAC); to make specified restitution to a victim; to conduct specified GMT on a topic related to the offense; or any variety of conditions designed to rehabilitate or curtail risk-oriented conduct.

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

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

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

(2) Before a suspension may be vacated, the servicemember ordinarily should be notified that vacation is being considered and informed of the reasons for the contemplated action and his right to respond. A formal hearing is not required unless the punishment suspended is of the kind set forth in Article 15(e)(1)-(7), UCMJ, in which case the accused should, unless impracticable, be given an opportunity to appear before the officer contemplating vacation to submit any matters in defense, extenuation, or mitigation of the offense on which the vacation action is to be based. MCM Part V, para 6a(5).

(3) Vacation of a suspension is not punishment for the misconduct that triggers the vacation. Accordingly, misconduct may be punished and also serve as the reason for vacating a previously suspended punishment imposed at mast.

Vacation proceedings are often handled at NJP. First, the suspended punishment is vacated; then the commanding officer can impose NJP for the new offense, but not for a violation of a condition of suspension unless it is itself a violation of the UCMJ. If NJP is imposed for the new offense, the accused must be afforded all of his hearing rights, etc.

(4) The order vacating a suspension must be issued within ten working days of the commencement of the vacation proceedings and the decision to vacate the suspended punishment is not appealable as 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 (1998 ed.). The running of the period of suspension will be interrupted, however, by the unauthorized absence of the accused or the commencement of any proceeding to vacate the suspended punishment. The running of the period of probation resumes again when the unauthorized absence ends or when the suspension proceedings are terminated without vacation of the suspended punishment. JAGMAN, § 0118c; MJM 1-E-6.

APPEAL FROM NONJUDICIAL PUNISHMENT

A. *Procedure.* If punishment is imposed at NJP, the commanding officer is required to ensure that the accused is advised of his right to appeal. Part V, para. 4c(4)(B)(iii), MCM (1998 ed.); JAGMAN, § 0110e and app. A-1-f. A person punished under article 15 may appeal the imposition of such punishment through proper channels to the appropriate appeal authority. Art. 15e, UCMJ; JAGMAN, § 0117; MJM 1-E-11 and enclosure (4). If, however, the offender is transferred to a new command prior to filing his appeal, the immediate commanding officer of the offender at the time the appeal is filed should forward the appeal directly to the officer who imposed punishment. JAGMAN, §§ 0116 and 0117.

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.

a. A GCM authority superior to the officer imposing punishment may, however, set up an alternative route for appeals.

b. When the area coordinator is not superior in rank or command to the officer imposing punishment, or when the area coordinator is the officer imposing punishment, the appeal will be forwarded to the GCM authority next superior in the chain of command to the officer who imposed the punishment.

c. An immediate or delegated area coordinator who has authority to convene GCM's may take action in lieu of an area coordinator if he is superior in rank or command to the officer who imposed the punishment.

d. For mobile units, the area coordinator for the above purposes is the area coordinator most accessible to the unit at the time of forwarding the appeal.

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 operational chain of command to the officer who imposed the punishment (e.g., an appeal from company office hours should be submitted to the battalion commander). When such review is impractical due to operational commitments, as determined by the officer who imposed the punishment, appeal from NJP shall be made to the Marine officer authorized to convene general courts-martial geographically nearest and senior to the officer who imposed the punishment. JAGMAN, § 0117b.

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

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

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

6. In the Coast Guard, appeals are submitted via the chain of command of the officer who imposed the punishment to the next superior commissioned officer in the commanding officer's chain of command who has a military lawyer regularly assigned. *MJM* 1-E-11d.

B. *Time*. Appeals must be submitted in writing within five working days (defined as any day that is not a Saturday, Sunday, or federal holiday) 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 (1998 ed.). The appeal period begins to run from the date of the imposition of NJP, even though all or any part of the punishment imposed is suspended. In computing the 5 working day period, allowance must be made for the time required to transmit the notice of imposition of NJP and the appeal itself through the mails. In the case of an appeal submitted more than five working 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, § 0116a(1).

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 working 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 five days (not working 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 (1998 ed.). It is helpful if the accused includes in his written appeal any request for stay of restraint punishment or extra duties; however, a written request for a stay is not specifically required, nor is it required to be submitted with the original appeal request.

C. *Contents of appeal package.* Sample NJP appeal packages are included as appendices at the end of this chapter. One is a suggested format for Marine Corps use and the other is for use in Navy cases. *See* appendices 4-1 and 4-2.

1. *Appellant's letter (grounds for appeal).* The letter of appeal from the accused should be addressed to the appropriate appeal authority via the commander who imposed the punishment and other appropriate commanding officers in the chain of command. The letter should set forth the salient features of the 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. Unjust punishment exists when the evidence is insufficient to prove the accused committed the offense; when the statute of limitations (Art. 43(b)(2), UCMJ) prohibits lawful punishment; or when any other fact, including a denial of substantial rights, calls into question the validity of the punishment. Punishment is disproportionate if it is, in the judgment of the reviewer, too severe for the offense committed. An offender who believes his punishment is too severe thus appeals on the ground of disproportionate punishment, whether or not his letter artfully states the ground in precise terminology. Note, however, that a punishment may be legal but excessive or unfair considering circumstances such as: the nature of the offense; the absence of aggravating circumstances; the prior record of the offender; and any other circumstances in extenuation and mitigation. The grounds for appeal need not be stated artfully in the accused's appeal letter, and the reviewer may have to deduce the appropriate ground implied in the letter. Inartful draftsmanship or improper addressees or other administrative irregularities are not grounds for refusing to forward the appeal to the reviewing authority. If any commander in the chain of addressees notes administrative mistakes, they should be corrected, if material, in that commander's endorsement which forwards the appeal. Thus, if an accused does not address his letter to all appropriate commanders in the chain of command, the commander who notes the mistake should merely readdress and forward the appeal. He should not send the appeal back to the accused for redrafting since the appeal should be forwarded promptly to the reviewing authority. The appellant's letter begins the review process and is a quasi-legal document. It should be temperate and state the facts and opinions the accused believes entitles him to relief. The offender should avoid unfounded allegations concerning the character or personality of the officer imposing punishment. *See* Article 1108, *U.S. Navy Regulations, 1990.* The accused, however, should state the reasons for his appeal as clearly as possible. Supporting documentation in the form of statements of other persons, personnel records, etc., may be submitted if the accused desires. In no case is the failure to do these things lawful reason for refusing to process the appeal. Finally, should the accused desire that his restraint punishments or extra duties be stayed pending the appeal, he may specifically request this in the letter.

2. *Contents of the forwarding endorsement.* All via addressees should use a simple forwarding endorsement normally and should not comment on the validity of the

appeal. The exception to this rule is the endorsement of the officer who imposed the punishment. Section 0116c of the *JAG Manual* requires that his endorsement should normally include the following information. (Marine Corps units should also refer to LEGADMINMAN, chapter 2 and Coast Guard units to MJM 1-E-11, for more specific information.):

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

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

c. as an enclosure, a copy of the completed mast report form (NAVPERS 1626/7 or CG-4910) 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 Record of Service and NAVM C 118(3) (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 authorit.* There are no particular legal requirements concerning the content of the reviewer's endorsement except to inform the offender of his decision. A legally sound endorsement will include the reviewer's specific decision on each ground of appeal, the basic reasons for his decision, a statement that a

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

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

D. *Review guidelines.* As a preliminary matter, it should be noted that NJP is not a criminal trial, but rather an administrative proceeding, primarily corrective in nature, designed to deal with minor disciplinary infractions without the stigma of a court-martial conviction. As a result, the standard of proof applicable at article 15 hearings is "preponderance of the evidence" vice "beyond reasonable doubt." JAGMAN, § 0110b.

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 (1998 ed.). Thus, if an offender was not properly warned of his right to remain silent at the hearing, but made no statement, he has not suffered a substantial injury. If an offender was not informed that he had a right to refuse NJP, and he had such a right, then the error amounts to a denial of a substantial right.

2. *Evidentiary errors.* Strict rules of evidence do not apply at NJP hearings. Evidentiary errors not amounting to insufficient evidence, will not normally invalidate punishment. 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 (1998 ed.).

3. *Lawyer review.* Part V, para. 7e, MCM (1998 ed.), requires that, before taking any action on an appeal from any punishment in excess of that which could be given by an O-3 commanding officer, the reviewing authority must refer the appeal to a lawyer for consideration and advice. The advice of the lawyer is a matter between the reviewing authority and the lawyer and does not become a part of the appeal package. Many commands now require that all NJP appeals be reviewed by a lawyer prior to action by the reviewing authority.

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 (1998 ed.).

5. *Delegation of authority to action appeals.* Pursuant to Part V, para. 7f(5), MCM (1998 ed.), section 0117d of the *JAG Manual* and MJM 1-E-12(e), an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his power to review and act upon NJP appeals to a "principal assistant" as defined in section 0106d of the *JAG Manual* and Article 1-A-2d of the MJM. The officer who has delegated his NJP powers may not act upon an appeal from punishment imposed by the principal assistant. In some cases, it may be inappropriate for the principal assistant to act on certain appeals (as where an identity of persons or staff may exist with the command which imposed the punishment), and such fact should be noted by the command in the forwarding endorsement. JAGMAN, § 0117d.

E. *Authorized appellate action.* Part V, para. 7f, MCM (1998 ed.); JAGMAN, § 0117; MJM 1-E-12c. In acting on an appeal, or even in cases in which no appeal has been filed, the superior authority may exercise the same power with respect to the punishment imposed as the officer who imposed the punishment. Thus, the reviewing authority may:

1. Approve the punishment in whole;

2. mitigate, remit, or set aside the punishment to correct errors;

3. mitigate, remit, or suspend (in whole or in part) the punishment for reasons of clemency;

4. dismiss the case (If this is done, the reviewer must direct the restoration of all rights, privileges, and property lost by the accused by virtue of the imposition of punishment.); or

5. authorize a rehearing where there are substantial procedural errors not amounting to a finding of insufficient evidence to impose NJP. At the rehearing, however, the punishment imposed may be no more severe than that imposed during the original proceedings, unless other offenses which occurred subsequent to the date of the original proceeding are added to the original offenses. If the accused, while not attached to or embarked in a vessel, waived his right to demand trial by court-martial at the original proceedings, he may not assert this right as to those same offenses at the rehearing but may assert the right as to any new offenses at the rehearing. JAGMAN, § 0117e.

Upon completion of action by the reviewing authority, the servicemember shall be promptly notified of the result.

IMPOSITION OF NJP AS A BAR TO FURTHER PROCEEDINGS

A. *General.* Proceedings related to NJP are not a criminal trial and, as a result, the defense of former jeopardy is not available to one whose case has been disposed of at mast or office hours. The MCM (1998 ed.), however, does provide a bar to further proceedings in certain instances.

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

1. Part V, para. 1f, MCM (1998 ed.) provides that, once a person has been punished under article 15, punishment may not again be imposed upon the individual for the same offense at NJP. This same provision precludes a superior in the chain of command from increasing punishment imposed at NJP by an inferior in the chain of command.

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

2. A superior in the chain of command may require that certain types of cases be forwarded to him prior to the immediate commanding officer imposing NJP. *See* R.C.M. 401, MCM (1998 ed.). But, a superior may not withhold or limit the exercise of a subordinate's NJP authority without the express authorization of the Secretary of the Navy. *See* JAGMAN, § 0106e.

C. *Imposition of NJP as a bar to subsequent court-martial*

1. R.C.M. 907(b)(2)(D)(iv), MCM (1998 ed.), would prohibit an accused from being tried at court-martial for a minor offense for which he has already received NJP. Part V, para. 1e, MCM (1998 ed.), defines "minor" offenses, in part, as "offense(s) for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial." The rule further provides, however, that the commanding officer imposing punishment has the discretion to consider as "minor" even certain offenses carrying punishments in excess of that provided in the rule. *See, e.g., Capella v. United States*, 624 F.2d 976 (Ct.Cl. 1980) (possession of heroin); *United States v. Rivera*, 45 C.M.R. 582, n.3 (A.C.M.R. 1972) (possession of heroin). Should the court-martial determine that the offense was not "minor," it may go ahead and try the offense notwithstanding the prior imposition of NJP. *See, e.g., Hagarty v. United States*, 449 F.2d 352 (Ct.Cl. 1971); *United States v. Fretwell*, 11 C.M.A. 377, 29 C.M.R. 193 (1960); *United States v. Vaughan*, 3 C.M.A. 121, 11 C.M.R. 121 (1953). See *U.S. v. Hudson*, 39 M.J. 958 (1994).

2. Although it is clear that Congress did not intend for the imposition of NJP to preclude the subsequent court-martial of an individual who has been accused of committing a serious offense, it is also clear that a servicemember cannot be punished for the same offense twice. Therefore, when an accused is convicted at a court-martial for the same offense for which NJP was received, credit must be given for any and all punishments incurred. *United States v. Pierce*, 27 M.J. 367 (C.M.A.1989). The military judge will determine the appropriate computation of credit to be given to the accused.

TRIAL BY COURT-MARTIAL AS A BAR TO NJP

A. *General.* In two cases, the Court of Military Appeals has considered the propriety of the imposition of NJP for offenses which have already been litigated (at least to some degree) before a court-martial. A reading of these cases would appear to indicate that the question of whether the offense may lawfully be taken to NJP following a court-martial will depend upon whether trial on the merits had begun on the offenses at court-martial prior to the imposition of NJP.

B. *Imposition of NJP after dismissal at court-martial before findings.* In *Dobzynski v. Green*, 16 M.J. 84 (C.M.A. 1983), a charge of possession of marijuana was referred to special court-martial. After the military judge granted the defense motion to suppress the marijuana, the convening authority withdrew the charge and imposed NJP upon the accused for the offense. As the accused was then attached to a vessel, he was unable to refuse the NJP. On petition for extraordinary relief before the Court of Military Appeals, the accused argued that the military judge violated his due process rights by allowing withdrawal of the charge after arraignment and prior to the presentation of evidence on the merits. In denying the petition for extraordinary relief, the court held not only that the military judge properly allowed the withdrawal, but also that the "convening authority acted in accordance with the law and within his discretion in withdrawing the charges from the special court-martial." *Id.* at 86.

C. *Imposition of NJP after acquittal at court-martial.* In *Jones v. Commander, Naval Air Force, U.S. Atlantic Fleet*, 18 M.J. 198 (C.M.A. 1984), the accused's motion for a finding of not guilty was granted by the military judge following the presentation of the government's case-in-chief. The convening authority then imposed NJP upon the accused for substantially the same offense. Here, the court again denied the petition for extraordinary relief, but in dicta condemned the imposition of NJP following the earlier court-martial conviction as an "unreasonable abuse of command disciplinary powers which cannot be tolerated in a fundamentally fair military justice system." *Id.* at 198-99.

D. *Cases arising after 1 August 1984.* Significantly, both *Dobzynski, supra*, and *Jones, supra*, involved offenses committed and punished prior to 1 August 1984. For cases arising after this date, the provisions of section 0124d of the *JAG Manual* and 1-A-5d of the MJM would apply. This section provides that "[P]ersonnel who have been tried by courts that derive their authority from the United States, such as U.S. District Courts, shall not be tried by court-martial *or be the subject of nonjudicial punishment for the same act or acts*" (emphasis added). Assuming that the term "tried" as used in JAGMAN, § 0124d and MJM 1-A-5d means that point in the trial after which jeopardy would attach and prevent the referral of charges to a subsequent forum. Thus, NJP would be barred for an offense previously referred to court-martial at which jeopardy had attached and which could not be retried at a subsequent court.

SAMPLE

NAVY APPEAL PACKAGE

OF

NONJUDICIAL PUNISHMENT

5800
27 Jun CY

From: RMSN John P. Williams, USN, 434-52-9113
To: Commander, Cruiser-Destroyer Group ONE
Via: Commanding Officer, USS BENSON (DD-895)

Subj: APPEAL FROM NONJUDICIAL PUNISHMENT

Ref: (a) Art. 15(e), UCMJ
(b) Part V, para. 7, MCM (1998 ed.)
(c) JAGMAN, § 0116

Encl: (1) (Statements of other persons of facts or matters in mitigation which support the appeal)
(2) " " "
(3) " " "

1. As provided by references (a) through (c), appeal is herewith submitted from nonjudicial punishment imposed upon me on 25 June CY by CDR S. D. Dunn, Commanding Officer, USS BENSON (DD-895) as follows:

a. Offenses

Charge: Violation of Article 134, UCMJ

Specification: In that RMSN John P. Williams, USN, on active duty, did, on board USS BENSON (DD-895), on or about 16 June CY, unlawfully carry a concealed weapon, to wit: a switchblade knife.

b. Punishment: Forfeiture of $100.00 pay per month for 2 months

c. Grounds of Appeal

Punishment for the Charge is unjust because I, in fact, did not know there was a knife in my pants pocket. The clothes were borrowed.

/s/ John P. Williams
JOHN P. WILLIAMS

SAMPLE

5800
Ser /
29 Jun CY

FIRST ENDORSEMENT on RMSN John P. Williams, USN, 434-52-9113 ltr 5800
of 27 Jun CY

From: Commanding Officer, USS BENSON (DD-895)
To: Commander, Cruiser-Destroyer Group ONE

Subj: APPEAL FROM PUNISHMENT ICO RMSN JOHN P. WILLIAMS, USN, 434-52-9113

Encl: (4) NAVPERS 1626/7 with attachments thereto

1. Forwarded, recommending denial. Enclosure (4) is attached in amplification of the appeal.

2. On 25 June CY RMSN Williams appeared before me at Captain's mast. He was suspected of a violation of Article 134, UCMJ, unlawfully carrying a concealed weapon on board USS BENSON (DD 895). I found that he had committed the misconduct alleged and awarded a forfeiture of $100.00 pay per month for 2 months. RMSN Williams now appeals his punishment on the basis that it was unjust.

3. The nonjudicial punishment in this case is far from unjust. The evidence adduced at Captain's mast included the following verbal statements in addition to the written statements included in enclosure (4):

a. RMC(SW) William Sharkey, RMSN Williams' divisional chief petty officer, testified that he had heard rumors of RMSN Williams carrying a large "Buck" brand folding knife on his person on board the ship because he wanted to intimidate a shipmate who had started dating RMSN Williams' ex-girlfriend. Chief Sharkey paid particular attention to RMSN Williams, and on 16 June CY he saw RMSN Williams attempt to hide something behind a piece of equipment in a communications space on board the ship. Chief Sharkey waited for RMSN Williams to depart the space and found a "Buck" brand folding knife with a 4-inch blade on it. He seized the knife and turned it in to MAC(SW) Thomas Holding, the ship's chief master-at-arms.

b. Chief Holding called RMSN Williams to his office and executed a suspect's rights advisement/waiver form. RMSN Williams waived his rights and agreed to answer Chief Holding's questions. In his oral statement to Chief Holding RMSN Williams admitted to carrying the knife concealed in his coveralls in an attempt to intimidate ET3 Charles White, how had been dating RMSN Williams former girlfriend, a civilian. RMSN Williams declined to execute a written statement.

c. Lieutenant(j.g.) Stephen Armando, RMSN Williams' division officer, testified that he inspected the coveralls RMSN Williams was wearing on the day in question and they were, in fact, the property of RMSA David Macke. RMSA Macke told LTJG Armando that he (Macke) had lent them to RMSN Williams on 16 June CY.

3. The clear preponderance of the evidence in this case led me to the conclusion that RMSN Williams knowingly possessed a concealed weapon on board USS BENSON. While it is true that the coveralls he was wearing on the day in question did not belong to RMSN Williams, his own statements at the time of the investigation of the incident clearly indicate that he was the owner of the knife and wrongfully in possession of said knife in a concealed fashion on board my ship. His punishment was just, and should not be disturbed on appeal.

/s/ S. D. Dunn
S. D. DUNN

See JAGMAN 0116c

REPORT AND DISPOSITION OF OFFENSE(S)
NAVPERS 1626/7 (REV. 8-81) S/N 0106-LF-016-2636

To: Commanding Officer, USS BENSON (DD-895) Date of Report: 16 June CY

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

NAME OF ACCUSED	SERIAL NO.	SSN	RATE/GRADE	BR. & CLASS	DIV/DEPT
WILLIAMS, John P.	NA	434-52-9113	RMSN	USN	OPS

PLACE OF OFFENSE(S)	DATE OF OFFENSE(S)
Compartment O1-115-4-Q (Radio Central)	16 June CY

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

Violation of Art. 134, UCMJ. In that RMSN John P. Williams, USN, on active duty, did, on board USS BENSON (DD 895), on or about 16 June CY, unlawfully carry a concealed weapon, to wit: a switchblade knife.

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT
William Sharkey	CPO	OPS			
Thomas A. Holding	CPO	X			

RMC(SW), USN
(Rate/Grade/Title of person submitting report)

/s/ William A. Sharkey
(Signature of person submitting report)

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

Witness: */s/ H. O. Kay, Legal Officer*
(Signature)

Acknowledged: */s/ John P. Williams*
(Signature of Accused)

PRE-MAST RESTRAINT

☐ PRE TRIAL CONFINEMENT

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

■ NO RESTRICTIONS

(Signature and title of person imposing restraint)

(Signature of Accused)

INFORMATION CONCERNING ACCUSED

CURRENT ENL. DATE	EXPIRATION CURRENT ENL. DATE	TOTAL ACTIVE NAVAL SERVICE	TOTAL SERVICE ON BOARD	EDUCATION	GCT	AGE
24 May CY	23 May CY+2	2yr 1mo	10 mos	HS	57	19

MARITAL STATUS	NO. DEPENDENTS	CONTRIBUTION TO FAMILY OR QTRS ALLOWANCE (Amount required by law)	PAY PER MONTH (Including sea or foreign duty pay, if any)
Single	none	none	$965.40

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

None

PRELIMINARY INQUIRY REPORT

From: Commanding Officer
To: ENS David S. Willis, USNR
Date: 20 June CY

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

REMARKS OF DIVISION OFFICER (Performance of duty, etc.)
SN Williams is a good worker who is learning his rate thru on-the-job training. He needs occasional supervision, but works willingly when assigned a job to do. I consider him petty officer material. This is the first time he's been in trouble. */s/ LT G.V. Jones*

NAME OF WITNESS	RATE/GRADE	DIV/DEPT	NAME OF WITNESS	RATE/GRADE	DIV/DEPT
William Sharkey	CPO	OPS			
Thomas Holding	CPO	X			

RECOMMENDATION AS TO DISPOSITION:

■ DISPOSE OF CASE AT MAST

☐ REFER TO COURT MARTIAL FOR TRIAL OF ATTACHED CHARGES (Complete Charge Sheet (DD Form 458) through Page 2)

☐ NO PUNITIVE ACTION NECESSARY OR DESIRABLE ☐ OTHER

COMMENT (*Include data regarding availability of witnesses, summary of expected evidence, conflicts in evidence, if expected. Attach statements of witnesses, documentary evidence such as a service record entries is UA cases, items of real evidence, etc.)*
SN Williams was observed hiding something behind a piece of equipment in radio central. Chief Sharkey discovered that it was a Buck knife with a 4-inch blade. MAC(SW) Holding questioned RMSN Williams, who admitted to owning the knife and carrying it in his coveralls on board in an attempt to intimate ET3 White, who was dating RMSN Williams former girlfriend.

/s/ D. S. Willis, ENS, USNR
(Signature of Investigation Officer)

ACTION OF EXECUTIVE OFFICER

☐ DISMISSED ■ REFERRED TO CAPTAIN'S MAST

SIGNATURE OF EXECUTIVE OFFICER
/s/ R. D. Line, LCDR, USN

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

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

WITNESS
NA

SIGNATURE OF ACCUSED
NA

ACTION OF COMMANDING OFFICER

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

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

☐ AWARDED SPCM ☐ AWARDED SCM

DATE OF MAST: 25 June 19CY	DATE ACCUSED INFORMED OF ABOVE ACTION 25 June 19CY	SIGNATURE OF COMMANDING OFFICER */s/ S. D. Dunn, CDR, USN*

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

SIGNATURE OF ACCUSED */s/ J. P. Williams*	DATE: 25 Jun 19CY	I have explained the above rights of appeal to the accused. SIGNATURE OF WITNESS */S/ H.O. Kay* DATE 25 Jun 19CY

FINAL ADMINISTRATIVE ACTION

APPEAL SUBMITTED BY ACCUSED DATED: 27 Jun 19CY FORWARDED FOR DECISION ON 28 Jun 19CY	FINAL RESULT OF APPEAL DENIED
APPROPRIATE ENTRIES MADE IN SERVICE RECORD AND PAY ACCOUNT ADJUSTED WHERE REQUIRED DATE: 25 Jun 19CY /s/ Leg Off (Initials)	FILED IN UNIT PUNISHMENT BOOK: DATE: 25 Jun 19CY /s/ Leg Off (Initials)

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

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S NOTIFICATION AND ELECTION OF RIGHTS
ACCUSED ATTACHED TO OR EMBARKED IN A VESSEL
(*See* JAGMAN 0109)

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case of RMSN John P. Williams, USN, SSN 434-52-9113, assigned or attached to USS BENSON (DD 895).

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM (1998 ed.) you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:
Art. 134: Unlawfully carrying switchblade on board, 16 Jun CY.
(Note: Here describe the offenses, including the UCMJ article(s) allegedly violated.)

2. The allegations against you are based on the following information: Statements of RMC(SW) Sharkey and MAC(SW) Holding.
(Note: Here provide a brief summary of that information.)

3. You may request a personal appearance before the commanding officer or you may waive this right.

a. Personal appearance waived. If you waive your right to appear personally before the commanding officer, you will have the right to submit any written matters you desire for the commanding officer's consideration in determining whether or not you committed the offenses alleged, and, if so, in determining an appropriate punishment. You are hereby informed that you have the right to remain silent and that anything you do submit for consideration may be used against you in a trial by court-martial.

b. Personal appearance requested. If you exercise your right to appear personally before the commanding officer, you shall be entitled to the following rights at the proceeding:

(1) To be informed of your rights under Article 31(b), UCMJ;

(2) To be informed of the information against you relating to the offenses alleged;

(3) To be accompanied by a spokesperson provided or arranged for by you. A spokesperson is not entitled to travel or similar expenses, and the proceedings will not be delayed to permit the presence of a spokesperson. The spokesperson may speak on your behalf, but may not question witnesses except as the commanding officer may permit as a matter of discretion. The spokesperson need not be a lawyer;

(4) To be permitted to examine documents or physical objects against you that the commanding officer has examined in the case and on which the commanding officer intends to rely in deciding whether and how much nonjudicial punishment to impose;

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

(6) To have witnesses attend the proceeding, including those that may be against you, if their statements will be relevant and they are reasonably available. A witness is not reasonably available if the witness requires reimbursement by the United States for any cost incurred in appearing, cannot appear without unduly delaying the proceedings, or if a military witness, cannot be excused from other important duties; and

(7) To have the proceedings open to the public unless the commanding officer determines that the proceedings should be closed for good cause. However, this does not require that special arrangements be made to facilitate access to the proceeding.

A-1-b(1)

ELECTION OF RIGHTS

4. Knowing and understanding all of my rights as set forth in paragraphs 1 through 3 above, my desires are as follows:

a. Personal appearance. (Check one)

JPW __X__ I request a personal appearance before the commanding officer.

____ I waive a personal appearance. (Check one)

____ I do not desire to submit any written matters for consideration.

____ Written matters are attached.

(Note: The accused's waiver of personal appearance does not preclude the commanding officer from notifying the accused, in person, of the punishment imposed.)

b. Elections at personal appearance. (Check one or more)

JPW __X__ I request that the following witnesses be present at my nonjudicial punishment proceeding:

RMSN Quigley

JPW __X__ I request that my nonjudicial punishment proceeding be open to the public.

/s/ H. O. Kay
(Signature of witness)

H. O. KAY, ENS, USNR
(Name of witness)

/s/ J. P. Williams
(Signature of accused)

J. P. Williams, RMSN, USN
(Name of accused)

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

FULL NAME (ACCUSED/SUSPECT)	SSN	RATE/RANK	SERVICE (BRANCH)
John P. Williams	434-52-9113	RMSN	USN
ACTIVITY/UNIT			DATE OF BIRTH
USS BENSON (DD 895)			22 May 19xx
NAME (INTERVIEWER)	SSN	RATE/RANK	SERVICE (BRANCH)
D. S. Willis	000-00-0000	ENS	USNR
ORGANIZATION		BILLET	
USS BENSON (DD 895)		PIO	
LOCATION OF INTERVIEW		TIME	DATE
USS BENSON (DD 895)		1000	19 Jun 19cy

RIGHTS

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

(1) I am suspected of having committed the following offense(s); Unlawfully carrying a concealed weapon, to wit: a switch blade knife *JPW*

(2) I have the right to remain silent; .....*JPW*

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

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

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

A-1-m(1)

WAIVER OF RIGHTS

I further certify and acknowledge that I have read the above statement of my rights and fully understand them, and that. .....*JPW*

(1) I expressly desire to waive my right to remain silent; .....*JPW*

(2) I expressly desire to make a statement; .....*JPW*

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

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

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

SIGNATURE (ACCUSED / SUSPECT	TIME	DATE
/s/ *John P. Williams*	1015	19 Jun cy
SIGNATURE (INTERVIEWER)	TIME	DATE
/s/ *David S. Willis*	1015	19 Jun cy
SIGNATURE (WITNESS)	TIME	DATE
attached hereto and		

A-1-m(2)

The statement[illegible] signed by me), is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me.

/s/ John P. Williams
SIGNATURE (ACCUSED/SUSPECT)

A-1-m(3)

18 June 19cy

I, William A. Sharkey, RMC(SW), USN, have been asked by ENS D. S. Willis to make the following statement:

On 16 July 19cy, I was in Radio Central on board USS BENSON (DD 897). At approximately 1030, I noticed RMSN Williams start fumbling in the pocket of his coveralls and mumbling about needing money to buy a soda. He dug deep into the right front pocket of his coveralls and quickly turned his back to me. He dropped to his knees and quickly shoved something underneath a piece of crypto gear. He then asked me if I wanted a soda and left the space. I was curious, and looked underneath and behind the piece of crypto gear RMSN Williams had been kneeling in front of. It was under there where I found a folding "Buck" knife with a long blade. I saw nothing else under the piece of crypto gear that would explain the way RMSN Williams was acting. I took the knife immediately to Chief Holding at the MAA Shack.

William A. Sharkey
RMC(SW) USN

WITNESS: David S. Willis
ENS, USNR

[HAND-WRITTEN]

19 June 19cy

I, John P. Williams, RMSN, USN, having been advised of my rights by Ensign David S. Willis, which I have acknowledged on the attached rights form, make the following statement freely and voluntarily, understanding my rights to remain silent and to consult a lawyer.

I did not own the coveralls I was wearing on 16 June CY. I borrowed them from RMSA Macke. I did not know there was a knife in the pocket.

John P. Williams

WITNESS: */s/ David S. Willis*
DAVID S. WILLIS
ENS, USNR

[HAND-WRITTEN]

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S ACKNOWLEDGEMENT OF APPEAL RIGHTS

I, RMSN John P. Williams, SSN 434-52-9113,
(Name and grade of accused)

assigned or attached to USS BENSON (DD 895), have been informed of the following facts concerning my rights of appeal as a result of (captain's mast) (office hours) held on 25 June CY:

a. I have the right to appeal to (specify to whom the appeal should be addressed).

b. My appeal must be submitted within a reasonable time. Five working days after the punishment is imposed is normally considered a reasonable time, in the absence of unusual circumstances. Any appeal submitted thereafter may be rejected as not timely. If there are unusual circumstances which I believe will make it extremely difficult or not practical to submit an appeal within the 5 working day period, I should immediately advise the officer imposing punishment of such circumstances, and request an appropriate extension of time in which to file my appeal.

c. The appeal must be in writing.

d. There are only two grounds for appeal; that is:

(1) The punishment was unjust, or

(2) The punishment was disproportionate to the offense(s) for which it was imposed.

e. If the punishment imposed included reduction from the pay grade of E-4 or above, or was in excess of: arrest in quarters for 7 days, correctional custody for 7 days, forfeiture of 7 days' pay, extra duties for 14 days, restriction for 14 days, or detention of 14 days' pay, then the appeal must be referred to a military lawyer for consideration and advice before action is taken on my appeal.

/s/ John P. Williams
(Signature of Accused and Date)

25 June 19cy

/s/ I. M. Witness
(Signature of Witness and Date)

25 June 19cy

A-1-f

5800
Ser /
1 Jul CY

From: Commander, Cruiser-Destroyer Group ONE
To: RMSN John P. Williams, USN, 434-52-9113
Via: Commanding Officer, USS BENSON (DD-895)

Subj: APPEAL FROM PUNISHMENT ICO RMSN JOHN P. WILLIAMS

1. Returned, appeal (granted) (denied).

2. Your appeal was referred to a lawyer for consideration and advice prior to my action.

3. (Statement of reasons for action on appeal, and remarks of admonition and exhortation, if desired.)

4. You are directed to return this appeal and accompanying papers to your immediate commanding officer for file with the record of your case.

/s/ M. J. Hughes
M. J. HUGHES

5800
Ser /
6 Jul CY

FIRST ENDORSEMENT on Commander, Cruiser-Destroyer Group ONE ltr 5800
Ser / of 1 Jul CY

From: Commanding Officer, USS BENSON (DD-895)
To: RMSN John P. Williams, USN, 434-52-9113

Subj: APPEAL FROM PUNISHMENT ICO RMSN JOHN P. WILLIAMS

1. Returned for delivery.

/s/ S. D. Dunn
S. D. DUNN

5800
Ser /
6 Jul CY

SECOND ENDORSEMENT on Commander, Cruiser-Destroyer Group ONE ltr 5800
Ser / of 1 Jul CY

From: RMSN John P. Williams, USN, 434-52-9113
To: Commanding Officer, USS BENSON (DD-895)

Subj: APPEAL FROM NONJUDICIAL PUNISHMENT

1. I acknowledge receipt, and have noted the contents, of the first endorsement on my appeal from nonjudicial punishment.

2. The appeal and all attached papers are returned for file with the record of my case.

/s/ John P. Williams
JOHN P. WILLIAMS

SAMPLE

MARINE CORPS APPEAL PACKAGE

OF

NONJUDICIAL PUNISHMENT

Appendix 8-2

UNITED STATES MARINE CORPS
Schools Company, Schools Battalion
Marine Corps Base
Camp Pendleton, California 92055

5812
21 July CY

From: Private John Q. Adams 456 64 5080/0311 USMC
To: Commanding Officer, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055
Via: Commanding Officer, Schools Company, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) MCM (1998 ed.)

1. In accordance with reference (a), I am appealing the punishment awarded me at company office hours on 18 July CY.

2. Because this was my first offense, I feel that the punishment handed down to me at office hours was too hard and disproportionate to the offense that I committed. Additionally, I feel that my commanding officer did not consider my state of mind at the time I went UA.

/s/ John Q. Adams
JOHN Q. ADAMS

UNITED STATES MARINE CORPS
Schools Company, Schools Battalion
Marine Corps Base
Camp Pendleton, California 92055

5812
23 Jul CY

FIRST ENDORSEMENT on Private John Q. Adams 456 64 5080/0311 USMC ltr 5812 of 21 July CY

From: Commanding Officer
To: Commanding Officer, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) JAGMAN
(b) LEGADMINMAN

Encl: (1) Unit Punishment Book
(2) Summary of Hearing
(3) Acknowledgment of Rights Forms

1. In accordance with the provisions of references (a) and (b), the following information setting forth a summary recitation of facts of the office hours' proceedings and a summary of the assertion of facts made by Private Adams are submitted:

a. Summary of recitation of facts

(1) Private Adams appeared at Company Office Hours on 18 July CY for the following offense:

Article 86, UA 1300, 5 July CY to 2344, 15 July CY, from Schools Company, Schools Battalion, Marine Corps Base, Camp Pendleton, California 92055.

(2) The offense was read to Private Adams and then discussed with him. He was asked at least twice if he understood the offense, and he replied that he did.

(3) Private Adams' rights were explained to him and thereafter he signed item 6 on enclosure (1).

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

(4) Private Adams was asked what he pled to the offense; he pleaded guilty and was found guilty.

(5) Private Adams was awarded reduction to Private, restriction to the limits of Schools Company, Schools Battalion, for seven days, without suspension from duty, and forfeiture of $25.00 per month for one month.

b. Summary assertion of facts made by Private Adams:

The findings of guilty are appealed because he feels the punishment is too harsh.

c. Basic record data

(1) Summary of military offenses:

None.

(2) Performance, Proficiency, and Conduct marks are 4.3 and 4.5, respectively.

2. In summary, Private Adams was found guilty of the offense against the Uniform Code of Military Justice. Subject-named Marine was aware of regulations pertaining to unauthorized absence and the steps he should have taken to obtain leave. Private Adams' age, length of service, SRB, and matters presented in extenuation and mitigation were also considered in arriving at an appropriate punishment. A brief summarization of the office hours is contained on the attached sheet of enclosure (1).

/s/ Andrew Jackson
ANDREW JACKSON
Major USMC

Copy to:
Private Adams

NOTE: When a Marine makes an appeal, the original UPB is forwarded as an enclosure with the commanding officer's endorsement. A duplicate is retained by the commanding officer pending final disposition. The duplicate copy may be used as the Marine's copy upon completion of the appeal.

UNIT PUNISHMENT BOOK (5812)
NAVMC 10132 (Rev. 10-81) (*8-75 EDITION WILL BE USED*)
SN 0000-00-002-1305 U/I: PD (*100 sheets per pad*)

← Staple Additional pages here.

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

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

4. UNIT
ScolsCo, ScolsBn, MCB, CamPen

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

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

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

(Date) 18 Jul cy (Signature of accused) */s/ John Q. Adams*

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

(Date) 18 Jul cy (Signature of immediate CO of accused) */s/ Andrew Jackson*

8. FINAL DISPOSITION TAKEN AND DATE
Reduction to Pvt, restriction to the limits of ScolsCo, ScolsBn, for 7 days, without suspension from duty, and forfeiture of $25.00 per month for 1 month. 18 Jul cy.

9. SUSPENSION OF EXECUTION OF PUNISHMENT, IF ANY.

None.

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

11. Upon consideration of the facts and circumstances surrounding (this offense) (these offenses) and upon further consideration of the needs of military discipline in this command, I have determined the offense(s) involved herein to be minor and properly punishable under Article 15, UCMJ, such punishment to be that indicated in 8 and 9. (Signature of CO who took disposition in 8 and 9) */s/ Andrew Jackson*	12. DATE OF NOTICE TO ACCUSED OF FINAL DISPOSITION TAKEN. 18 Jul cy

13. The accused has been advised of the right of appeal. 18 Jul cy */s/ Andrew Jackson* (Date) (Signature of CO who took final action in 11)	14. Having been advised of and understanding my right of appeal, at this time I (intend) (do not intend) to file an appeal. 18 Jul cy */s/ John Q. Adams* (Date) (Signature of accused)	15. DATE OF APPEAL, IF ANY. 21 Jul cy

16. DECISION ON APPEAL (IF APPEAL IS MADE), DATE THEREOF, AND SIGNATURE OF CO WHO MADE DECISION. Appeal granted. See 2d encl on the basic ltr for decision. 24 Jul cy */s/ Martin Van Buren* (Date) (Signature of CO making decision on appeal)	17. DATE OF NOTICE TO ACCUSED OF DECISION ON APPEAL. 24 Jul cy

18. REMARKS 18 Jul - Intent to appeal indicated. Permission of Rest. for 7 days stayed.	19. Final administrative action, as appropriate, has been completed. *TBP*

18 July CY

PVT John Q. Adams 456-64-5080 USMC

Summary of evidence presented.

The accused admitted to the offense contained in item 5. Accordingly, the accused was found guilty of the single offense.

Extenuating or mitigating factor considered.

PVT Adams stated, relating to the UA, that he had received a phone call from his brother stating that his dog was seriously ill and not expected to live. PVT Adams stated that he knows it was wrong to leave without permission and that he was sorry for his actions.

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

[HAND-WRITTEN]

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S NOTIFICATION AND ELECTION OF RIGHTS
ACCUSED NOT ATTACHED TO OR EMBARKED IN A VESSEL
RECORD MAY BE USED IN AGGRAVATION IN EVENT OF LATER COURT-MARTIAL
(*See* JAGMAN 0109)

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case of _____, SSN _____, assigned or attached to _____.

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM (1998 ed.), you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:

(Note: Here describe the offenses, including the UCMJ article(s) allegedly violated.)

2. The allegations against you are based on the following information:

(Note: Here provide a brief summary of that information.)

3. You have the right to refuse imposition of nonjudicial punishment. If you refuse nonjudicial punishment, charges could be referred to trial by court-martial by summary, special, or general court-martial. If charges are referred to trial by summary court-martial, you may not be tried by summary court-martial over your objection. If charges are referred to a special or general court-martial you will have the right to be represented by counsel. The maximum punishment that could be imposed if you accept nonjudicial punishment is:

_____

4. If you decide to accept nonjudicial punishment, you may request a personal appearance before the commanding officer or you may waive this right.

a. Personal appearance waived. If you waive your right to appear personally before the commanding officer, you will have the right to submit any written matters you desire for the commanding officer's consideration in determining whether or not you committed the offenses alleged, and, if so, in determining an appropriate punishment. You are hereby informed that you have the right to remain silent and that anything you do submit for consideration may be used against you in a trial by court-martial.

b. Personal appearance requested. If you exercise your right to appear personally before the commanding officer, you shall be entitled to the following rights at the proceeding:

(1) To be informed of your rights under Article 31(b), UCMJ;

(2) To be informed of the information against you relating to the offenses alleged;

(3) To be accompanied by a spokesperson provided or arranged for by you. A spokesperson is not entitled to travel or similar expenses, and the proceedings will not be delayed to permit the presence of a spokesperson. The spokesperson may speak on your behalf, but may not question witnesses except as the commanding officer may permit as a matter of discretion. The spokesperson need not be a lawyer;

(4) To be permitted to examine documents or physical objects against you that the commanding officer has examined in the case and on which the commanding officer intends to rely in deciding whether and how much nonjudicial punishment to impose;

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

(6) To have witnesses attend the proceeding, including those that may be against you, if their statements will be relevant and they are reasonably available. A witness is not reasonably available if the witness requires reimbursement by the United States for any cost incurred in appearing, cannot appear without unduly delaying the proceedings, or if a military witness, cannot be excused from other important duties; and

(7) To have the proceedings open to the public unless the commanding officer determines that the proceedings should be closed for good cause. However, this does not require that special arrangements be made to facilitate access to the proceeding.

5. In order to help you decide whether or not to demand trial by court-martial or to exercise any of the rights explained above should you decide to accept nonjudicial punishment, you may obtain the advice of a lawyer prior to any decision. If you wish to talk to a lawyer, a military lawyer will be made available to you, either in person or by telephone, free of charge, or you may obtain advice from a civilian lawyer at your own expense.

ELECTION OF RIGHTS

6. Knowing and understanding all of my rights as set forth in paragraphs 1 through 3 above, my desires are as follows:

a. Lawyer. (Check one or more, as applicable)

_____ I wish to talk to a military lawyer before completing the remainder of this form.

_____ I wish to talk to a civilian lawyer before completing the remainder of this form.

------ I hereby voluntarily, knowingly, and intelligently give up my right to talk to a lawyer.

_____
(Signature of witness)

(Signature of accused)

(Date)

(Note: If the accused wishes to talk to a lawyer, the remainder of this form shall not be completed until the accused has been given a reasonable opportunity to do so.)

___ I talked to _____, a lawyer on _____.

_____
(Signature of witness)

_____
(Signature of accused)

(Date)

b. Right to refuse nonjudicial punishment. (Check one)

_____ I refuse nonjudicial punishment.

_____ I accept nonjudicial punishment. I am advised that acceptance of nonjudicial punishment does not preclude further administrative action against me. This may include being processed for an administrative discharge which could result in an other than honorable discharge.

(Note: If the accused does not accept nonjudicial punishment, the matter should be submitted to the commanding officer for disposition.)

c. Personal appearance. (Check one)

____ I request a personal appearance before the commanding officer.

____ I waive a personal appearance. (Check one)

____ I do not desire to submit any written matters for consideration.

____ Written matters are attached.

(Note: The accused's waiver of personal appearance does not preclude the commanding officer from notifying the accused, in person, of the punishment imposed.)

d. Elections at personal appearance. (Check one or more)

____ I request that the following witnesses be present at my nonjudicial punishment proceeding:

____ I request that my nonjudicial punishment procceding be open to the public.

_____
(Signature of witness)

(Signature of accused)

_____
(Name of witness)

(Name of accused)

(CAPTAIN'S MAST) (OFFICE HOURS) ACCUSED'S ACKNOWLEDGEMENT
OF APPEALS RIGHTS

I, Pvt John Q. Adams, SSN 456 64 5080,
(Name and grade of accused)

assigned or attached to ScolsCo, ScolsBn, MCB CamPen, have been informed of the following facts concerning my rights of appeal as a result of (captain's mast) (office hours) held on 18 Jul CY:

a. I have the right to appeal to (specify to whom the appeal should be addressed).

b. My appeal must be submitted within a reasonable time. Five days after the punishment is imposed is normally considered a reasonable time, in the absence of unusual circumstances. Any appeal submitted thereafter may be rejected as not timely. If there are unusual circumstances which I believe will make it extremely difficult or not practical to submit an appeal within the 5 day period, I should immediately advise the officer imposing punishment of such circumstances, and request an appropriate extension of time in which to file my appeal.

c. The appeal must be in writing.

d. There are only two grounds for appeal; that is:

(1) The punishment was unjust, or

(2) The punishment was disproportionate to the offense(s) for which it was imposed.

e. If the punishment imposed included reduction from the pay grade of E-4 or above, or was in excess of: arrest in quarters for 7 days, correctional custody for 7 days, forfeiture of 7 days' pay, extra duties for 14 days, restriction for 14 days, or detention of 14 days' pay, then the appeal must be referred to a military lawyer for consideration and advice before action is taken on my appeal.

/s/ JOHN Q. ADAMS — (Signature of Accused and Date) 18 Jul cy

/s/ I. M. WITNESS — (Signature of Witness and Date) 18 Jul cy

A-1-f

UNITED STATES MARINE CORPS
Schools Battalion, Marine Corps Base
Camp Pendleton, California 92055

5812
Ser /
23 Jul CY

From: Commanding Officer
To: Staff Judge Advocate, Marine Corps Base, Camp Pendleton, CA 92055

Subj: REVIEW AND ADVICE OF NJP APPEAL IN THE CASE OF PRIVATE JOHN Q. ADAMS 456 64 5080/0311 USMC

Ref: (a) MCM (1998 ed.)

Encl: (1) NJP Appeal Package

1. In accordance with reference (a), enclosure (1) is forwarded for review and advice by a judge advocate.

2. It is noted that the Commanding Officer, Schools Company, Schools Battalion, has the authority to promote up to and including the grade of E-3.

/s/ Martin Van Buren
MARTIN VAN BUREN

UNITED STATES MARINE CORPS
Marine Corps Base
Camp Pendleton, California 92055

5812
24 Jul CY

MEMORANDUM ENDORSEMENT

From: Staff Judge Advocate
To: Commanding Officer, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055

Subj: REVIEW AND ADVICE OF NJP APPEAL IN THE CASE OF PRIVATE JOHN Q. ADAMS 456 64 5080/0311 USMC

1. The basic correspondence has been reviewed by a judge advocate. The proceedings are considered to be correct in law and fact, and the punishment awarded is not considered to be unjust or disproportionate to the offense committed.

2. Rejection of the appeal is recommended.

/s/ William H. Harrison
WILLIAM H. HARRISON

NOTE: Once the battalion commander has received a reply from a judge advocate, his letter requestng review and advice and the reply are not provided to the Marine. This correspondence is retained by the battalion.

UNITED STATES MARINE CORPS
Schools Battalion, Marine Corps Base
Camp Pendleton, California 92055

5812
Ser /
24 Jul CY

From: Commanding Officer
To: Private John Q. Adams, 456 64 5080/0311 USMC, Schools Company, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055
Via: Commanding Officer, Schools Company, Schools Battalion, Marine Corps Base, Camp Pendleton, CA 92055

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

1. Returned.

2. Your case has been reviewed by a judge advocate. The proceedings in this case are considered to be correct in law and fact, and the punishment is not considered to be unjust or disproportionate to the offense committed. However, as an act of clemency, only so much of the punishment as provides for reduction to private, restriction to the limits of Schools Company, Schools Battalion, for five days, without suspension from duty, and forfeiture of $25.00 per month for one month will take effect. That portion of the punishment providing for forfeiture of $25.00 per month for one month and restriction to the limits of Schools Company, Schools Battalion, for five days, without suspension from duty, is suspended for six months and, unless sooner vacated, will be remitted at that time.

/s/ Martin Van Buren
MARTIN VAN BUREN

UNITED STATES MARINE CORPS
Schools Company, Schools Battalion
Marine Corps Base
Camp Pendleton, California 92055

5812
Ser /
25 Jul CY

FIRST ENDORSEMENT on Commanding Officer, Schools Battalion ltr 5812 Ser / of 24 Jul CY

From: Commanding Officer
To: Private John Q. Adams, 456 64 5080/0311 USMC

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

1. Returned.

2. Action has been taken on your appeal, and your attention is invited to the Commanding Officer, Schools Battalion ltr 5812 of 24 Jul CY.

3. Inasmuch as the original correspondence is to be filed in the Unit Punishment Book, you are provided with a copy of your appeal.

/s/ Andrew Jackson
ANDREW JACKSON

Copy to:
Private Adams

NOTE: Once the commanding officer has received the decision, any necessary administrative action should be taken. The Marine is provided with a copy of the entire appeal package, excluding the battalion commander's letter to the SJA and the memorandum endorsement from the SJA.

SAMPLE

COAST GUARD APPEAL PACKAGE

OF

NONJUDICIAL PUNISHMENT

(SEE ENCLOSURE (7) MJM)

UNAUTHORIZED ABSENCES / DESERTIONS

NAVY UNAUTHORIZED ABSENCE

A. *Policy.* The policies and procedures regarding UAs and desertion of enlisted members are found in MILPERSMAN, arts. 1050-110, 1600-010, 1600-020, 1600-030, 1600-040, 1600-050, 1600-060, 1600-070, 1640-140, 1600-100. Consult these sections for further amplification of the checklist given below.

B. *Procedures.* The procedures for completing the service record entries can be found in the MILPERSMAN sections above and PAYPERSMAN sections 10381, 90419, and 90435.

C. *Checklist*

1. When a member is reported UA, immediately prepare a page 13 to document inception of UA.

2. When a member has been UA over 24 hours, ensure that the NAVPERS 601-6R is prepared. This will stop the servicemember's pay.

3. If member is absent less than 24 hours, prepare a page 13 to document the termination of absence.

4. If the member is gone 10 days, prepare a letter to the next of kin (NOK) notifying them of the member's absence; his / her personal effects should be collected, inventoried, and placed in safekeeping; prepare NAVCOMPT 3060.

5. Upon return of a member gone less than 30 days, complete the NAVPERS 601-6R and decide what type, if any, disciplinary action will be taken.

6. If the member is gone 30 days, he / she is declared a deserter. This may be done earlier if there is an indication the member has no intention to return. The following documents should be prepared and actions taken:

a. Deserter message;

b. DD Form 553 (Absentee Wanted by the Armed Forces);

c. charge sheet DD Form 458 (charge violation of Article 85, UCMJ; prefer and receive charges only; do not refer);

d. any evidence of desertion should be gathered (such as witness statements, pending incident complaint reports, restriction orders, any relevant message traffic, and any documentation of other pending disciplinary action); and

e. obtain health, dental, and pay records.

7. If member is gone 180 days, send the following to BUPERS:

a. Service record (including the page 601-6R, original charge sheet, and restriction orders);

b. health record;

c. dental record; and

d. pay record.

8. After 180 days, send the personal effects to Naval Supply Center, Oakland, CA, or Supply Annex, Williamsburg, VA.

9. A deserter file should be retained by the command. It should include the following:

a. Certified copy of the charge sheet;

b. certified copy of the restriction order;

c. right side of the service record (SRB);

d. copy of page 601-6R;

e. performance evaluations;

f. last leave and earning statement (LES);

g. copy of DD 553;

h. copy of deserter message; and

i. any other relevant messages.

10. Upon return of a member from UA, prepare page 13 documenting return.

11. Upon return of a member from UA over 24 hours, but less than 10 days, complete page 601-6R—sending fourth copy to disbursing. This starts member's pay.

12. Upon return of a member from UA over 10 days, but less than 30 days, complete page 601-6R; prepare letter to NOK notifying them of member's return.

13. Upon return of a member from UA over 30 days, complete page 601-6R; prepare letter to NOK notifying them of member's return; and prepare return deserter message if not done by an intermediate command.

MARINE CORPS

A. *References*

1. MCO P5800.8, *Marine Corps Manual for Legal Administration* (LEGADMINMAN), Chapter 5

2. MCO P1080.35 (PRIM)

3. MCO P4050.38, *Marine Corps Personal Effects and Baggage Manual*

4. MCO P1070.12, *Marine Corps Individual Records and Administration Manual* (IRAM)

5. MCO P5512.11, Uniformed Service Identification and Privilege Card, DD Form 1173

6. MCO P11000.17, *Real Property Facilities Manual*, Vol. X

B. *Checklist*

1. UA entry (in excess of 24 hours) run on unit diary.

2. Page 12 SRB "to UA" entry made (IRAM 4015).

3. Inventory of government and personal property of absentee accomplished within 24 hours.

4. After 48th hour of absence, the CO telephoned NOK (if not in CONUS, only if dependents reside locally).

5. Prior to 10th day of UA, letter mailed to NOK and copy filed on document side of SRB (fig. 5-1, LEGADMINMAN).

6. Prepare charge sheet *through* block IV prior to 31st day of absence for violation of article 85 and all other known charges:

a. Charges sworn to, block III;

b. receipted for in block IV; and

c. original placed on document side of SRB.

7. Unit diary entry run declaring deserter status and dropping from roles to desertion on 31st day.

8. SRB pages 3, 12, and 23 completed per IRAM:

a. Chronological record (page 3);

b. offenses and punishments (page 12) administratively declaring deserter status and dropping from rolls; and

c. markings page (page 23).

9. DD 553 prepared and distributed (per para. 5002 of LEGADMINMAN):

a. Date published matches that of page 12 entry date (normally 31st day of UA);

b. if insufficient information, priority message sent to MMRB-10;

c. if incomplete information, permission requested from MHL-30; and

d. original sent to CMC (MHL-30) (Report Symbol MC-5800-01) within seven days of administrative declaration of desertion on page 12.

10. DD 553 distributed properly (para. 5002.2e(4) LEGADMINMAN):

a. Copy on document side of SRB;

b. copy to NOK and all known associates;

c. copy to each chief of police and county sheriff in area of civilian addressees of DD 553; and

d. copy to units assigned admin responsibility and appropriate area police (*see* MCO 5800.10).

11. If deserter has dependents, see para. 5004 of LEGADMINMAN:

a. Retrieved dependent ID cards;

b. if *not* surrendered, notify local medical facilities and military activities;

c. a *terminate* DD 1172 submitted to DEERS; and

d. dependents directed to vacate quarters.

12. Return of deserter within 91 days:

a. "From UA" entry made in diary;

b. page 12 entry recording date, hour, and circumstances of return to military control (see 4015 of IRAM);

c. page 12 SRB entry made removing mark of desertion (not removed if apprehended and / or convicted by civil authorities except as per LEGADMINMAN); and

d. if mark of desertion removed, notify disbursing office in writing of removal per LEGADMINMAN.

13. If no return by 91st day of absence:

a. Audit of SRB, pages 3, 12, and 23 completed and entries correct; and

b. charge sheet on document side correctly receipts for charge prior to page 12 date accused dropped from rolls (if not, redo).

0411 COAST GUARD

See MJM, Chapter 1.

APPENDIX A

SAMPLE 10-DAY UA NOTIFICATION LETTER FOR NEXT OF KIN

DEPARTMENT OF THE NAVY
USS NEVERSAIL (AS 00)
FPO AE 09501

1610
00
Date

Mr. & Mrs. Ronald Jones
235 Long Street
Los Angeles, CA 14790-9999

Dear Mr. and Mrs. Jones:

I regret the necessity of informing you that your son, Yeoman Third Class Fred Paul Jones, who enlisted in the Navy on June 24, CY-2, and was attached to USS NEVERSAIL (AS 00), has been on unauthorized absence since June 25, CY. Should you know of his whereabouts, please urge him to surrender to the nearest naval or other military activity immediately since the gravity of the offense increases with each day of absence. At this time, all pay and allowances, including allotments, have been suspended pending return to Navy jurisdiction. Should he remain absent for 30 days, we will declare him a deserter and a federal warrant will be issued. Information will be provided to the National Crime Information Center wanted person's file, which is available to all federal, state, and local law enforcement agencies.

Sincerely,

A. B. SEAWEED
Captain, U.S. Navy
Commanding Officer

Copy to:
(Apply name and address of Reserve chaplain nearest the absentee's home of record, according to NAVMILPERSCOMNOTE 1600)
Example:
Bee U. Humble
LCDR, CHC, USNR
1 Way Street
Upview, CA 12345-6789

APPENDIX B

SAMPLE LETTER NOTIFYING NEXT OF KIN OF RETURN FROM UA

DEPARTMENT OF THE NAVY
USS NEVERSAIL (AS 00)
FPO AE 09501

1610
00
Date

Mr. & Mrs. Ronald Jones
235 Long Street
Los Angeles, CA 14790-9999

Dear Mr. and Mrs. Jones:

Please be advised that your son, Yeoman Third Class Fred Paul Jones, was returned to USS NEVERSAIL (AS 00), on December 24 CY. You may write to your son at the above address.

Sincerely,

A. B. SEAWEED
Captain, U.S. Navy
Commanding Officer

Copy to:
(Include name and address of Reserve chaplain who was originally notified in the Letter of Notification sent out on 10th day)
Example:
Bee U. Humble
LCDR, CHC, USNR
1 Way Street
Upview, CA 12345-6789

[UPON RETURN OF ABSENTEE TO PARENT COMMAND, PREPARE A LETTER NOTIFYING NOK OF MEMBER'S RETURN - NO SPECIFIC LANGUAGE IS DICTATED BY MILPERSMAN. LANGUAGE OF LETTER IS LEFT TO DISCRETION OF PARENT COMMAND. WE RECOMMEND THAT THIS LETTER NOT BE SENT UNTIL THE ABSENTEE IS PHYSICALLY BACK ON BOARD THE COMMAND. *SEE* MILPERSMAN 1600-050]

APPENDIX C

SAMPLE ACKNOWLEDGMENT OF NJP NOTIFICATION

1621
17
Date

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC
To: Commanding General, 1st Marine Aircraft Wing

Subj: NOTIFICATION OF OFFICE HOURS HEARING

Ref: (a) CG, 1stMAW ltr 1621 17 of _____

1. I acknowledge receipt of the reference which gave me notification of the intent to conduct office hours and I understand my rights in that regard.

2. I have received a copy of the information to support the allegations.

3. I have had an opportunity to consult with counsel. I (did / did not) consult with counsel.

4. I (will / will not) accept office hours and (do / do not) demand trial by court-martial. At office hours, I (will / will not) plead guilty to the offenses alleged against me.

5. I (do / do not) request a personal appearance. Written matters (are / are not) attached.

6. I request that the following witnesses, if reasonably available, be present to testify at the hearing:

SIGNATURE

APPENDIX D

SAMPLE RECORD OF OFFICER NJP

LETTERHEAD

1621
17
Date

Subj: RECORD OF HEARING UNDER ARTICLE 15, UCMJ ICO, FIRST LIEUTENANT JOHN J. JONES 123 45 6789/1369 USMC

Ref: (a) Article 15, UCMJ
(b) Part V, MCM (1998 ed.)
(c) MCO P5800.8B (LEGADMINMAN)

Encl: (1) CG, 1stMAW ltr 1621 17 of [date]
(2) [SNO's] ltr 1621 17 of [date]
(3) Maj Smith's Report of article 32 investigation of [date] 90 w/ encls

1. First Lieutenant Jones received nonjudicial punishment (NJP) from MajGen Smith, Commanding General of the 1st Marine Aircraft Wing, on [date] for conduct unbecoming an officer. He was awarded a punitive letter of reprimand and forfeiture of $500.00 pay per month for two months.

2. The NJP hearing was conducted in substantial compliance with references (a) and (b). As reflected in enclosures (1) and (2), First Lieutenant Jones was notified of his rights prior to the hearing and elected to accept NJP.

3. This report is prepared by the staff judge advocate, who was present throughout the proceedings, per paragraph 4003 of reference (c).

4. During the hearing, First Lieutenant Jones acknowledged his rights and restated his election to accept NJP. He pled guilty to the charge. Details of the allegations are contained in the article 32 investigation report, attached as enclosure (3).

5. Prior to imposing punishment, the Commanding General deliberated and specifically stated that he considered enclosure (3), including the numerous statements of good character, the Officer Qualification Record, and the oral statements of the witness, First Lieutenant Jones, and the command representative. After the punishment was announced, the Commanding General advised First Lieutenant Jones of his right to appeal to the Commanding General, III Marine Expeditionary Force.

Subj: RECORD OF HEARING UNDER ARTICLE 15, UCMJ ICO, FIRST LIEUTENANT JOHN J. JONES 123 45 6789/1369 USMC

6. At the hearing, First Lieutenant Jones and a character witness, Major Johnson, made statements substantially as follows:

a. First Lieutenant Jones: Sir, every day, for the last four months, I have regretted this incident. I believe that alcohol affected my judgment that night. It was totally out of character for me. It will never happen again. My statement at the article 32 hearing was to the best of my recollection. I am responsible for my actions and I am willing to face the consequences. I would love to be able to stay a Marine.

b. Major Johnson, Executive Officer, [unit]. I am First Lieutenant Jones' executive officer, but I have known him since August of CY-2 when we were both students in the aviation supply school at Athens, Georgia. He did well at school and was well-respected. I believe he just exercised bad judgment on the night in question. It was an isolated incident. While I was at The Basic School, I filled several billets and observed many lieutenants. In my opinion, First Lieutenant Jones rates at the top of the batch. I would not hesitate to have him continue to serve with me.

7. The command representative, Colonel Brown, USMC, CO, [unit], made a statement substantially as follows: After reviewing all the facts in this incident, I do not have confidence in First Lieutenant Jones' judgment or integrity. While the overall incident may have been isolated, he made several separate judgment errors that evening. First Lieutenant Jones does not have the integrity required of Marine Corps officers.

Record Authenticated by:

C. L. VARREC
Lieutenant Colonel, USMC
Staff Judge Advocate

APPENDIX E

SAMPLE OFFICER NJP REPORT

LETTERHEAD

1621
17
Date

FOR OFFICIAL USE ONLY

From: Commanding General, 1st Marine Aircraft Wing
To: Commandant of the Marine Corps (JAM)
Via: (1) Commanding General, III Marine Expeditionary Force
(2) Commanding General, Fleet Marine Force Pacific

Subj: REPORT OF NONJUDICIAL PUNISHMENT ICO FIRST LIEUTENANT JOHN J. JONES 123 45 6789/1369 USMC

Ref: (a) MCO P5800.8B (LEGADMINMAN)
(b) FMFPacO 5810.1L
(c) Art. 15, UCMJ
(d) Part V, MCM (1998 ed.)
(e) Ch. 1, Part B, *JAG Manual*
(f) Article 1122, *U.S. Navy Regulations, (1990)*

Encl: (1) Record of hearing under Article 15, UCMJ
(2) Punitive letter of reprimand
(3) First Lieutenant Jones' ltr 1621 17 of [date]
(4) First Lieutenant Jones' statement regarding adverse matter

1. This report is forwarded for inclusion on First Lieutenant Jones' official records per paragraph 4003 of reference (a) via intermediate commanders, as directed by paragraph 3d(2) of reference (b).

2. On [insert date], in accordance with references (c), (d), and (e), nonjudicial punishment (NJP) was imposed on First Lieutenant Jones for conduct unbecoming an officer. As a result, he was awarded a punitive letter of reprimand and a forfeiture of $500.00 pay per month for two months.

3. Details of the hearing and the circumstances of the offenses are set forth in enclosure (1). A copy of the punitive letter of reprimand is attached as enclosure (2).

4. As reflected in enclosure (3), First Lieutenant Jones did not appeal the punishment. Accordingly, the NJP is now final and will be reflected in the fitness report that includes the date it was imposed, [insert date].

5. I recommend that First Lieutenant Jones be retained on active duty until the expiration of his obligated active service.

6. By copy hereof, First Lieutenant Jones is notified of his right, per reference (f), to submit his comments, within 15 days of receipt, concerning this report of NJP and the letter of reprimand which will be included as adverse matter in his official records. His comments, if any, will be attached as enclosure (4).

Copy to:
CO, MAG-32
CO, MALS-32
First Lieutenant Jones

SAMPLE FIRST ENDORSEMENT

LETTERHEAD

FIRST ENDORSEMENT on CG, 1stMAW ltr 1621 17 of [date]

From: Commanding Officer, Marine Wing Aircraft Squadron 1
To: First Lieutenant John J. Jones 123 45 6789/1369 USMC

Subj: PUNITIVE LETTER OF REPRIMAND

1. Delivered.

SIGNATURE
By direction

APPENDIX F

SAMPLE PUNITIVE LETTER OF REPRIMAND

LETTERHEAD

1621
17
Date

From: Commanding General, 1st Marine Aircraft Wing
To: First Lieutenant John J. Jones 123 45 6789/1369 USMC
Via: Commanding Officer, Marine Wing Headquarters Squadron 1

Subj: PUNITIVE LETTER OF REPRIMAND

Ref: (a) UCMJ, Art 15
(b) Part V, MCM (1998 ed.)
(c) JAGMAN, § 0114
(d) Record of office hours proceeding

1. On [date], you received nonjudicial punishment (NJP) per references (a), (b), and (c). Prior to the hearing, you were advised of your right to demand trial by court-martial and you elected not to do so. Reference (d) is a summary of the hearing.

2. During July CY, you were involved in two separate alcohol-related incidents that resulted in this letter. You were drunk and disorderly on both occasions. On 15 July CY, you hosted a party in your BOQ room in Plaza Housing, Okinawa, Japan. At about 0300, a female military policeman asked you to turn down your stereo. In response, you called her a "bitch," told her to "go to hell," threatened her with your fists, and threatened another corporal. At about 0300, 16 July CY, you were found asleep in your car near a gangster residence in Okinawa City, Okinawa, Japan. Upon being awakened by Japanese police and asked to leave the area, you got out of your car and became violent, scuffling with the police and Air Force Security Police who were called to the scene, resulting in your being handcuffed and led away.

3. Your misconduct as an officer in dealing with enlisted military police and with Japanese law enforcement personnel brought discredit upon the officer corps. Your conduct reflects adversely on the leadership, judgment, and discipline required of you as an officer of Marines. Accordingly, pursuant to references (a), (b), and (c), you are reprimanded.

4. You are hereby advised of your right to appeal this action within five days of receiving this letter to the next superior authority, the Commanding General, III Marine Expeditionary Force, via the Commanding General, 1st Marine Aircraft Wing, per references (a), (b), and (c).

5. If you do not desire to appeal this action, you are directed to so inform me in writing within five days after receipt of this letter.

6. If you do desire to appeal this action, you are advised that an appeal must be made within a reasonable time and that, in the absence of unusual circumstances, an appeal made more than five days after receipt of this letter may be considered as not having been made within a reasonable time. If, in your opinion, unusual circumstances exist which make it impractical or extremely difficult for you to prepare and submit your appeal within the five days, you shall immediately advise me of such circumstances and request an appropriate extension of time to submit your appeal. Failure to receive a reply to such request will not, however, constitute a grant of such extension of time to submit your appeal. In all communications concerning an appeal of this letter, you are directed to state the date of your receipt of this letter.

7. Unless withdrawn or set aside by higher authority, a copy of this letter will be placed in your official record at Headquarters, U.S. Marine Corps. You may forward within 15 days after receipt of final denial of your appeal or after the date of notification of your decision not to appeal, whichever may be applicable, a statement concerning this letter for inclusion in your record. If you do not desire to submit a statement, you shall so state, in writing, within 5 days. You are advised that the statement submitted shall be couched in temperate language and shall be confined to the pertinent facts. Opinions shall not be expressed nor the motives of others impugned. Your statement may not contain countercharges.

8. Your reporting senior must note this letter in the next fitness report submitted after this letter becomes final, either by decision of higher authority upon appeal or by your decision not to appeal.

9. A copy of reference (d) has been provided to you for your use in deciding whether to appeal the issuance of this letter.

G. LEVY

APPENDIX G

SAMPLE ADVERSE MATTER STATEMENT

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC
To: Commanding General, 1st Marine Aircraft Wing

Subj: STATEMENT REGARDING ADVERSE MATTER IN OFFICIAL RECORDS

Ref: (a) CG, 1stMAW ltr 1621 17 of [date]
(b) Art. 1122, *U.S. Navy Regulations (1990)*

1. I received a copy of reference (a) on [date].

2. I understand my right per reference (b) to make a statement concerning the report of nonjudicial punishment, with enclosures, including the punitive letter of reprimand.

3. I choose to make (no statement) (the following statement).

APPENDIX H

SAMPLE OFFICER NJP APPEAL

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC
To: Commanding General, III Marine Expeditionary Force
Via: Commanding General, 1st Marine Aircraft Wing

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) CG, 1stMAW ltr of reprimand 1620 17 of [date]
(b) Record of hearing
(c) Article 15, UCMJ
(d) Part V, MCM (1998 ed.)

1. I acknowledge receipt of references (a) and (b) on [date].

2. I further acknowledge that I understand my rights under references (c) and (d) to appeal the imposition of nonjudicial punishment, including the punitive letter of reprimand, to the Commanding General, III Marine Expeditionary Force.

3. I desire to appeal on the ground that the punishment was (unjust, disproportionate to the offenses committed) as follows:

APPENDIX I

MAST / OFFICE HOURS CHECKLIST FOR STAFF JUDGE ADVOCATES

A. Maintain log book tracking each report chit (i.e., report initiated, sent to division for investigation and completion of rights form—have someone in division initial receipt in log book), return to legal (dismissed, EMI, or XO screening), sent to XO (dismissed, XOI, to CO), return to legal (*Booker* if shore command), mast / office hours (dismissed, NJP).

B. Coordinate with division and with MAA to ensure witnesses and division representative will be present.

C. Have CO record NJP and sign.

D. Post mast / office hours:

1. Post-mast yeoman standing by with appellate rights form;

2. know in advance who may need page 13 warning / counseling; and

3. service record entries should be made without delay.

E. Maintain Unit Punishment Book (UPB)

1. Original report chit with NJP signed by CO;

2. record of mast / office hours proceeding;

3. all documents considered by CO;

4. original—signed and dated—rights warning statements;

5. copies of service record entries; and

6. copies of appeals, endorsements, and responses (originals in NJP appeal correspondence file).

CHAPTER IX

INTRODUCTION TO THE COURT-MARTIAL PROCESS

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CHAPTER IX

INTRODUCTION TO THE COURT-MARTIAL PROCESS

A. ***Introduction.*** Many of the rules and procedures used in courts-martial closely resemble those employed in state and Federal criminal courts. This close parallel is dictated by Article 36, UCMJ, which states:

> [P]rocedures, including the modes of proof . . . in cases before courts-martial . . . may be prescribed by the President by regulations which shall, so far as . . . practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the U.S. district courts, but which may not be contrary to or inconsistent with this Chapter.

The result of this delegation of authority by the Congress to the President is the *Manual for Courts-Martial (1998 edition)*. Military necessity has dictated certain procedures in the MCM that are quite different than civilian Federal practice. These differences are implicitly recognized and authorized by the last phrase of Article 36, UCMJ, quoted above. The chief ways in which these differences manifest themselves are in the procedural steps necessary to create a court-martial and to bring a case before the court.

B. ***Prerequisites to court-martial jurisdiction.*** "Jurisdiction" is the power to hear and to decide a case. In a criminal prosecution in state and Federal courts, the jurisdiction of these courts is specified by statutes that 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 that are unique to the military. *See* R.C.M. 201(b), MCM [hereinafter R.C.M. ____].

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

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

3. The court must have jurisdiction over the person (i.e., the offense must occur

and action must be initiated with a view toward prosecution at some time between a valid enlistment and a valid discharge).

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

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

Note that, unlike the jurisdiction of a Federal court, the jurisdiction of a court-martial is not dependent upon ***where*** the offense was committed, since Article 5, UCMJ, states that the UCMJ is applicable "in all places."

C. ***Discussion.*** Proper convening procedures and the constitution of summary, special, and general courts-martial are discussed in detail in the following chapters, as these requirements and procedures vary with each type of court-martial. The requirements of jurisdiction over the person and jurisdiction over the offense vary only slightly among the three types of courts. These differences are discussed in detail below. It is important to note that certain minimum criteria must be met before a criminal offense may be brought before any court-martial (i.e., jurisdiction of the court must exist over the ***person*** and the ***offense***). Only if these two prerequisites are met can the decision be made as to which type of court should decide a particular case.

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

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

(1) Voluntary submission to military authority;

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

(3) receipt of military pay or allowances; and

(4) performance of military duties.

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

properly discharged—despite any recruiting defect.

b. ***Discharge***. The exercise of military jurisdiction ends with the delivery of a discharge certificate with the intent to effect separation and when there has been a final accounting of pay and the member has completed the clearing house process. In cases where the member fraudulently obtained the discharge certificate, jurisdiction will not be lost. Assuming the member received a valid discharge, crimes committed by the member while on active duty would have to be prosecuted by civilian authorities unless the member later reenlists.

c. ***Reenlistment***. Historically, offenses committed by the member during an earlier enlistment were barred from prosecution upon reenlistment if there was a break in service. Article 3, UCMJ was amended in 1994 to allow for the prosecution of offenses committed by a member during a prior enlistment even if there was a break in service. Therefore, a member on active duty can be tried under the UCMJ for any offense committed while on active duty, regardless of a break in service, as long as the statute of limitations has not run on the offense.

d. ***Retaining Jurisdiction At End Of Active Obligated Service (EAOS)***. To ensure that jurisdiction is not lost when a member is suspected of a crime and is approaching his / her EAOS, the member should be placed on "legal hold." Legal hold can be accomplished by a voluntary or involuntary extension of the member's enlistment. MILPERSMAN 1160-050 provides guidance on voluntary and involuntary extensions. Additionally, R.C.M. 202 allows for the retention of a member beyond the EAOS. A member ***may not*** be retained beyond the EAOS for nonjudicial punishment or to serve an NJP sentence. Retention of a member beyond the EAOS has potential serious consequences and should not be done without liaison with the local trial counsel.

2. ***Jurisdiction over the offense***. Article 5, UCMJ, states that the Code applies "in all places." Previously, this jurisdiction was limited by the requirement of a service connection between the military and the offense charged. A Supreme Court decision, Solorio v. United States, 483 U.S. 435 (1987), eliminated the "service-connection" prerequisite for court-martial jurisdiction. Consequently, the jurisdiction of a court-martial over a particular offense depends solely on the accused's status as a member of the armed forces at the time of offense and not on the service connection of the offense charged.

CHAPTER X

THE SUMMARY COURT-MARTIAL

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CHAPTER X

THE SUMMARY COURT-MARTIAL

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

As the SCM has no "civilian equivalent," but is strictly a creature of statute within the military system, persons unfamiliar with the military justice system may find the procedure something of a paradox at first blush. While it is a criminal proceeding at which the technical rules of evidence apply, and at which a finding of guilty can result in loss of liberty and property, there is no constitutional right to representation by counsel and it, therefore, is not a true adversary proceeding. The United States Supreme Court examined the SCM procedure in *Middendorf v. Henry*, 425 U.S. 25 (1976). Holding that a SCM was not a "criminal prosecution" within the meaning of the sixth amendment, the Supreme Court cited its rationale previously expressed in *Toth v. Quarles*, 350 U.S. 11 (1955):

> [I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served . . . [M]ilitary tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed

essential to fair trials of civilians in federal courts.

B. *Creation of the summary court-martial*

1. ***Authority to convene***. An SCM is convened (created) by an individual authorized by law to convene SCMs. Article 24, UCMJ, R.C.M. 1302a, Manual for Courts-Martial (1998 ed.), and JAGMAN, § 0120c specify those persons who have the power to convene an SCM. Commanding officers authorized to convene GCMs or SPCMs are also empowered to convene SCMs. Thus, the commanding officer of a naval vessel, base, or station, all commanders and commanding officers of Navy units or activities, commanding officers of Marine Corps battalions, regiments, aircraft squadrons, air groups, and barracks have this authority.

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

Commanding officers or officers in charge not empowered to convene SCMs may request such authority by following the procedures contained in JAGMAN, § 0121b.

2. ***Restrictions on authority to convene***. Unlike the authority to impose NJP, the power to convene SCMs and SPCMs may be restricted by a competent superior commander. JAGMAN, § 0122a(1). Further, the commander of a unit that is attached to a naval vessel for duty therein should, as a matter of policy, refrain from exercising his SCM or SPCM convening powers and should refer such cases to the commanding officer of the ship for disposition. JAGMAN, § 0122b. This policy does not apply to commanders of units which are embarked for transportation only. Finally, JAGMAN, § 0124c(2) requires that the permission of the officer exercising general court-martial jurisdiction over the command be obtained before imposing NJP or referring a case to SCM for an offense which has already been tried in a state or foreign court. Offenses which have already been tried in a court deriving its authority from the United States may not be tried by court-martial. JAGMAN, § 0124d.

It is important to note that, even if the convening authority or the SCM officer is the accuser, the jurisdiction of the SCM is not affected and it is discretionary with the convening authority whether to forward the charges to a superior authority or to simply convene the court himself. R.C.M. 1302(b).

3. ***Mechanics of convening***. Before any case can be brought before a SCM, the court must be properly convened (created). It is created by the order of the convening

authority detailing the SCM officer to the court. R.C.M. 504(d)(2) requires that the convening order specify that it is a SCM and designate the SCM officer. Additionally, the convening order may designate where the court-martial will meet. If the convening authority derives his power from designation by SECNAV, this should also be stated in the order. JAGMAN, § 0133 further requires that the convening order be assigned a court-martial convening order number; be personally signed by the convening authority; and show his name, grade, and title—including organization and unit.

While R.C.M. 1302(c) authorizes the convening authority to convene a 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 6 of the *Manual for Courts-Martial (1998 ed.)*, contains a suggested format for the SCM convening order and a completed form is included at page 10-5, *infra*.

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

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

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

5. ***Jurisdictional limitations: persons***. Article 20, UCMJ, and R.C.M. 1301(c) provide that a 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, even if attached to or embarked on a vessel. It is not related to any corresponding right at nonjudicial punishment. No commissioned officer, warrant officer, cadet, aviation cadet and midshipman, or person not subject to the UCMJ (Article 2, UCMJ) may be tried by SCM. The forms at pages 10-16 to 10-17, *infra*, may be used to document the accused's election regarding his right to refuse trial by SCM.

The accused must be subject to the UCMJ at the time of the offense and at the time of trial; otherwise, the court-martial lacks jurisdiction over the person of the accused. *See* Chapter IX, *supra*.

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

In 1977, the United States Court of Military Appeals ruled that the jurisdiction of SCMs is limited to "disciplinary actions concerned solely with minor military offenses unknown in the civilian society." *United States v. Booker*, 3 M.J. 443 (C.M.A. 1977). Read literally, this would have precluded SCMs from trying civilian crimes such as assault, larceny, drug offenses, etc. Following a reconsideration of that decision, the court rescinded that ruling and affirmed that "'with the exception of capital crimes, nothing whatever ***precludes*** the exercise of summary court-martial jurisdiction over serious offenses in violation of the Uniform Code of Military Justice." *United States v. Booker*, 5 M.J. 246 (C.M.A. 1978).

- SAMPLE -

USS FOX (DD-983)
FPO New York 09501

1 July CY

SUMMARY COURT-MARTIAL CONVENING ORDER 1-CY

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

ABLE B. SEEWEED
Commander, U.S. Navy
Commanding Officer, USS FOX
FPO New York 09501

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

C. ***Referral to summary court-martial***

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

2. ***Preliminary inquiry***. Every court-martial case begins with either a complaint by someone that a person subject to the UCMJ has committed an offense or some inquiry that results in the discovery of misconduct. *See* Chapter IV, *supra*. In any event, R.C.M. 303 imposes upon the officer exercising immediate NJP (Article 15, UCMJ) authority over the accused the duty to make, or cause to be made, an inquiry into the truth of the complaint or apparent wrongdoing. This investigation is impartial and should touch on all pertinent facts of the case, including extenuating and mitigating factors relating to the accused. Either the preliminary investigator or other person having knowledge of the facts may prefer formal charges against the accused if the inquiry indicates such charges are warranted.

3. ***Preferral of charges***. R.C.M. 307(a). Charges are formally made against an accused when signed and sworn to by a person subject to the UCMJ (known as "the accuser"). This procedure is called "preferral of charges." Charges are preferred by executing the appropriate portions of the charge sheet. Manual for Courts-Martial (1998 ed.), app. 4. Implicit in the preferral process are several steps.

a. ***Personal data***. Block I of page 1 of the charge sheet should be completed first. The information relating to personal data can be found in pertinent portions of the accused's service record, the preliminary inquiry, or other administrative records.

b. ***The charges***. Block II of page 1 of the charge sheet is then completed to indicate the precise misconduct involved in the case. Each punitive article found in Part IV, Manual for Courts-Martial (1998 ed.), contains sample specifications. A detailed treatment of pleading offenses is contained in the criminal law portion of the course.

c. ***Accuser***. The accuser is a person subject to the UCMJ who signs item 11 in block III at the bottom of page 1 of the charge sheet. (As previously discussed, this person is only one of several possible types of accusers. This is relevant when considering potential disqualification of a convening authority. *See* Chapter XII, *infra*.) The accuser should swear to the truth of the charges and have the affidavit executed before an officer authorized to administer oaths. This step is important, as an accused has a right to refuse trial on unsworn charges.

d. ***Oath***. The oath must be administered to the accuser and the affidavit so indicating must be executed by a person with proper authority. Article 136, UCMJ, authorizes commissioned officers who are judge advocates, staff judge advocates, legal officers, law specialists, summary courts-martial, adjutants, and Marine Corps and Navy commanding officers, among others, to administer oaths for this purpose. JAGMAN, § 0902a(1) further authorizes officers certified by the Judge Advocate General of the Navy as

counsel under Article 27, UCMJ, all officers in paygrade 0-4 and above, executive officers, and administrative officers of Marine Corps aircraft squadrons to administer oaths. No one can be ordered to prefer charges to which he cannot truthfully swear. Often, the legal officer will administer the oath regardless of who conducted the preliminary inquiry. When the charges are signed and sworn to, they are "preferred" against the accused. This step also starts the "speedy trial" clock. *See* Chapter XII.

4. ***Informing the accused.*** After formal charges have been signed and sworn to, the preferral process is completed when the charges are submitted to the accused's immediate commanding officer. Normally, the legal officer or discipline officer will actually receive these charges and, indeed, may have drafted them. Often, in the Navy, the accused's immediate commanding officer for Article 15, UCMJ, purposes is also the SCM convening authority (commanding officer of a ship, base, or station, etc.). In the Marine Corps, the company commander is normally the immediate commander for Article 15, UCMJ cases, and he does not possess SCM convening authority. Thus, the remaining discussion is premised on the assumption that the Marine Corps company commander has forwarded the charges to the battalion commander (who has convening authority) recommending trial by SCM.

Assuming that the legal / discipline officer of the SCM convening authority has the formal charges and the preliminary inquiry report, the first step which must be taken is to inform the accused of the charges against him. The purpose of this requirement is to provide an accused with reasonable notice of impending criminal prosecution in compliance with criminal due process of law standards. R.C.M. 308 requires the immediate commander of the accused to have the accused informed as soon as practicable of the charges preferred against him, the name of the person who preferred them, and the person who ordered them to be preferred.

The important aspect of this requirement is that notice must be given through official sources. The accused should appear before the immediate commander or other designated person giving notice and should be told of the existence of formal charges, the general nature of the charges, and the name of the person who signed the charges as accuser. A copy of the charges can also be given to the accused, although not required by law at this time. No attempt should be made to interrogate the accused. After notice has been given, the person who gave notice to the accused will execute item 12 at the top of page 2 of the charge sheet. If not the immediate commander of the accused, the person signing on the "signature" line should state their rank, component, and authority. The law does not require a formal hearing to provide notice to the accused, but the charge sheet must indicate that notice has been given. A failure to properly record the notice to the accused will not necessarily void subsequent processing steps or trial, but care should be taken to avoid such possibilities.

5. ***Formal receipt of charges.*** R.C.M. 403(a). Item 13 in block IV on page 2 of the charge sheet records the formal receipt of sworn charges by the officer exercising SCM jurisdiction. Often this receipt certification and the notice certification will be executed at the same time, although it is not unusual for the notice certification to be executed prior to the receipt certification—especially in Marine Corps organizations. The purpose of the receipt certification is to establish that sworn charges were preferred before the statute of limitations operated to bar prosecution.

Article 43, UCMJ, sets forth time limitations for the prosecution of various offenses. If sworn charges are not received by an officer exercising SCM jurisdiction over the accused within the time period applicable to the offense charged, then prosecution for that offense is barred by Article 43, UCMJ. The time period begins on the date the offense was committed and ends on the date appropriate to that offense.

For example, assume Seaman Jones unlawfully absents himself from his ship, USS Brownson, on 1 October 19CY(-5). Article 43, UCMJ, requires (in peacetime) that sworn charges of UA be received within two years of its commission. Accordingly, if sworn charges are not received by the officer exercising SCM jurisdiction by 2400, 30 September 19CY, Article 43 prohibits trial for that offense unless the accused knowingly agrees to be tried notwithstanding the bar.

Periods of time during which the accused is in the hands of the enemy, in the hands of civilian authorities for reasons relating to civilian matters, or absent without authority in territory where the United States could not apprehend him do not count in computing the limitations set forth in Article 43, UCMJ. Thus, the receipt certification is extremely important and must be completed in exacting detail to preserve the right to prosecute the accused.

Where the accused is absent without leave at the time charges are sworn, it is permissible and proper to execute the receipt certification even though the accused has not been advised of the existence of the charges. In such cases, a statement indicating the reason for the lack of notice should be attached to the case file. When the accused returns to military control, notice should then be given to him. The receipt certification need not be executed personally by the SCM convening authority and is often completed for him by the legal officer, discipline officer, or adjutant.

6. ***The act of referral.*** Once the charge sheet and supporting materials are presented to the SCM convening authority and he makes his decision to refer the case to a SCM, 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 at hard labor is not an authorized punishment in this case" or other instructions desired by the convening authority. If no instructions are applicable to the case, the referral should so indicate by use of the word "none" in the appropriate blank. Once the referral is properly executed, the case is "referred" to trial and the case file forwarded to the proper SCM officer.

D. ***Pretrial preparation***

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

2. ***Preliminary preparation***. Upon receipt of the charges and accompanying papers, the SCM officer should begin preparation for trial. The charge sheet should be carefully examined, and all obvious administrative, clerical, and typographical errors corrected. R.C.M. 1304. The SCM officer should initial each correction he makes on the charge sheet. If the errors are so numerous as to require preparation of a new charge sheet, reswearing of the charges and rereferral is required. In this connection, Article 30, UCMJ, requires that the person who swears to the charges be subject to the UCMJ. In addition, the accuser must either have knowledge of or have investigated the charges and swear that the charges are true in fact to the best of his / her knowledge and belief. The accuser may rely upon the results of an investigation conducted by others in preferring charges. The oath that the accuser takes must be administered by a commissioned officer authorized to administer such oaths [the form of the oath is found in R.C.M. 307(b)]. If the SCM officer changes an existing specification to include any new person, offense, or matter not fairly included in the original specification, R.C.M. 603 requires the new specification to be resworn and rereferred. The SCM officer should continue his examination of the charge sheet to determine the correctness and completeness of the information on pages 1 and 2 thereof:

a. The accused's name, social security number, rate, unit, and pay grade;

b. pay per month;

c. initial date and term of current service;

d. data as to restraint, including the correct type and duration of pretrial restraint, including restriction;

e. signature, rank or rate, and armed force of the accuser;

f. signature and authority of the officer who administered the oath to the accuser;

g. date of receipt of sworn charges by the officer exercising SCM jurisdiction (important, as it stops the running of the statute of limitations);

h. block V, referring charge(s) to a specific SCM for trial (compare with convening order to ensure proper referral); and

i. the charge(s) and specification(s). Check for proper form and determine the elements of the offense. "Elements" are facts which must be proved in order to convict the accused of an offense. Part IV, Manual for Courts-Martial (1998 ed.), contains some guidance in this respect, but for more detailed guidance consult the *Military Judge's Benchbook*, DA Pam. 27-9. The SCM officer should also review the evidence relating to the charges. Problems in connection with proof of the charges should be brought to the attention of the convening authority.

3. ***Pretrial conference with accused***. After initial review of the court-martial file, the SCM officer should meet with the accused in a pretrial conference. The accused's right to counsel is discussed later in this chapter. If the accused is represented by counsel, all dealings with the accused should be conducted through his counsel. Thus, the accused's counsel, if any, should be invited to attend the pretrial conference. At the pretrial conference, the SCM officer should follow the suggested guide found in appendix 9, Manual for Courts-Martial (1998 ed.),, and should document the fact that all applicable rights were explained to the accused by completing blocks 1, 2, and 3 of the form for the record of trial by SCM found at appendix 15, Manual for Courts-Martial (1998 ed.),.

a. ***Purpose***. The purpose of the pretrial conference is to provide the accused with information concerning the nature of the court-martial, the procedure to be used, and his rights with respect to that procedure. It cannot be overemphasized that ***no attempt*** should be made to interrogate the accused or otherwise discuss the merits of the charges. The proper time to deal with the merits of the accusations against the accused is at trial. The SCM officer should provide the accused with a meaningful and thorough briefing in order that the accused fully understands the court-martial process and his rights pertaining thereto. This effort will greatly reduce the chances of post-trial complaints, inquiries, and misunderstandings.

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

(1) That the officer has been detailed by the convening authority to conduct a SCM;

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

(3) the general nature of the charges and the details of the specifications thereunder;

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

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

The accused should then be advised that he has the following legal rights:

(a) The right to refuse trial by SCM;

(b) the right to plead "not guilty" to any charge and / or specification and thereby place the burden of proving his guilt, beyond reasonable doubt, upon the government;

(c) the right to cross-examine all witnesses called to testify against him or to have the SCM officer ask a witness questions desired by the accused;

(d) the right to call witnesses and produce any competent evidence in his own behalf and that the SCM officer will assist the accused in securing defense witnesses or other evidence which the accused wishes presented at trial;

(e) the right to remain silent, which means that the accused cannot be made to testify against himself nor will the accused's silence count against him in any way should he elect not to testify;

(f) rights concerning representation by counsel (see subparagraph 3 below);

(g) that, if the accused refuses SCM, the convening authority may take steps to dismiss the case or refer it to trial by special or general court-martial, or dispose of the case at NJP;

(h) the right, if the accused is found guilty, to call witnesses or produce other evidence in extenuation or mitigation and the right to remain silent or to make a sworn or unsworn statement to the court; and

(i) the maximum punishment which the SCM could adjudge if the accused is found guilty of the offense(s) charged.

-1- ***E-4 and below.*** The jurisdictional maximum sentence that a 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; confinement not to exceed one month; hard labor without confinement for forty-five days (in lieu of confinement); and restriction to specified limits for two months. Effective 12 May 1995, confinement on bread and water / diminished rations is no longer an authorized court-martial punishment.

If confinement is 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.

The effective date of restriction and / or extra duties is the date the CA approves the sentence and orders it executed. This means that the CA can neither impose not require immediate service of such punishment on the date it is adjudged by the SCM officer unless the member waives the seven day period to submit clemency matters ***and*** the CA takes his / her action immediately. Ordinary confinement, however, begins to run from the date the sentence was adjudged by the SCM officer.

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

c. ***Advice to accused regarding counsel***

(1) In 1972, the Supreme Court held, with respect to "criminal prosecutions," that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at this trial." *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S.Ct. 2006,

2007, 32 L.Ed.2d 530 (1972).

(2) The Supreme Court, in *Middendorf v. Henry*, 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976), held that a SCM was ***not*** a "criminal prosecution" within the meaning of the sixth amendment, reasoning that the possibility of loss of liberty does not, in and of itself, create a proceeding at which counsel must be afforded. Rather, it reasoned that a SCM was a brief, nonadversary proceeding, the nature of which would be wholly changed by the presence of counsel. It found no factors that were so extraordinarily weighty as to invalidate the balance of expediency that has been struck by Congress.

(3) In *United States v. Booker*, 5 M.J. 238 (C.M.A. 1977), *reconsidered at* 5 M.J. 246 (C.M.A. 1978), the C.M.A. considered the Supreme Court's decision in *Middendorf* and concluded that there existed no ***right*** to counsel at a SCM.

(4) While the *Manual for Courts-Martial (1998 ed.)* created no statutory right to detailed military defense counsel at a SCM, the convening authority may still permit the presence of such counsel if the accused is able to obtain such counsel. The Manual for Courts-Martial (1998 ed.), has created a limited right to civilian defense counsel at SCM, however. R.C.M. 1301(e) provides that the accused has a right to hire a civilian lawyer and have that lawyer appear at trial, if such appearance will not unnecessarily delay the proceedings and if military exigencies do not preclude it. The accused must, however, bear the expense involved. If the accused wishes to retain civilian counsel, the SCM officer should allow him a reasonable time to do so.

(5) ***Booker warnings***

(a) Although holding that an accused had no right to counsel at a SCM, the C.M.A. ruled in *Booker, supra*, that if an accused was not given an opportunity to consult with independent counsel before accepting a SCM, the SCM will be inadmissible at a subsequent trial by court-martial. The term "independent counsel" has been interpreted to mean a lawyer qualified in the sense of Article 27(b), UCMJ, who, in the course of regular duties, does not act as the 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 VIII, *supra*.

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

-1- The accused was advised of her right to confer with counsel prior to deciding to accept trial by SCM;

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

-3- the accused voluntarily, knowingly and intelligently waived her right to refuse a SCM.

(c) If an accused has been properly advised of her right to consult with counsel and to refuse trial by SCM, as well as the legal ramifications of these decisions, 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 forms found at pages 10-16 and 10-17, *infra*, may be utilized to comply with the requirements of *United States v. Booker*, *supra*. The "Acknowledgement of Rights and Waiver," properly completed, contains all the necessary advice to an accused and, properly executed, will establish a voluntary, knowing, and intelligent waiver of the accused's right to consult with counsel and / or her right to refuse trial by SCM. The "Waiver of Right to Counsel" may be used to establish a voluntary, knowing, and intelligent waiver of counsel at an SCM. Should the accused elect to waive her rights, but refuse to sign these forms, this fact should be recorded on page 13 of the service record with a copy attached to the record of trial.

(d) Assuming that the requirements of *Booker* have been complied with (proper advice and recordation of election / waivers), evidence of the prior SCM will be admissible at a later trial by court-martial as evidence of the character of the accused's prior service pursuant to R.C.M. 1001(b)(2). Unless the accused was actually represented by counsel at her SCM or affirmatively rejected an offer to provide counsel, however, the SCM would not be considered a "criminal conviction" and would not be admissible as a prior conviction under R.C.M. 1001(b)(3), nor for purposes of impeachment under Mil.R.Evid. 609, Manual for Courts-Martial (1998 ed.),. *See United States v. Booker*, 3 M.J. 443, 448 (C.M.A. 1977). *See also United States v. Rivera*, 6 M.J. 535 (N.C.M.R. 1978); *United States v. Kuehl*, 9 M.J. 850 (N.C.M.R. 1980); *United States v. Cofield*, 11 M.J. 422 (C.M.A. 1981). While these cases would seem to allow a prior SCM's use as a "conviction" to trigger the increased punishment provisions of R.C.M. 1003(d) if the accused had been actually represented by counsel or had rejected the services of counsel provided to her, the discussion following R.C.M. 1003(d) opines that convictions by SCM may not be used for this purpose. As the discussion and analysis sections of the Manual for Courts-Martial (1998 ed.), have no binding effect and represent only the drafters' opinions, this issue remains unresolved.

SUMMARY COURT-MARTIAL
ACKNOWLEDGMENT OF RIGHTS AND WAIVER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

confinement for _____ months;

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

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

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

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

_____

Signature of accused and date

_____

Signature of witness and date

WAIVER OF RIGHT TO COUNSEL

SUMMARY COURT-MARTIAL

I have been advised by the summary court-martial officer that I cannot be tried by summary court-martial without my consent. I have also been advised that if I consent to trial by summary court-martial, I may be represented by civilian counsel provided at my own expense. If I do not desire to be represented by civilian counsel provided at my own expense. At the option of the convening authority, a military lawyer may be appointed to represent me upon my request, if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it. It has also been explained to me that if I am represented by a lawyer (either civilian or military) at the summary court-martial, or if I reject an offer to be represented by a lawyer, the summary court-martial will be considered a criminal conviction and will be admissible as such at any subsequent court-martial. On the other hand, if I request a military lawyer to represent me and a military lawyer is not available to represent me, or is not provided, and I am not represented by a civilian lawyer, the results of the court-martial will not be admissible as a prior conviction at any subsequent court-martial. I further understand that the maximum punishment which can be imposed in my case will be the same whether or not I am represented by a lawyer. Understanding all of this, I consent to trial by summary court-martial and I waive (give up) my right to be represented by a lawyer at the trial.

Signature of Summary Court-Martial	Signature of Accused
Date	Typed Name, Rank, Social Security Number of Accused

This form must be completed in order for the SCM to be admissible under R.C.M. 1001(b)(3) or M.R.E. 609 as a prior conviction in a subsequent courts-martial. See p. 10-15.

If the accused is not represented by counsel, or does not waive the right to counsel (even though military counsel is not being made available), the record of SCM will only be admissible under R.C.M. 1001(b)(2) as character of service.

4. ***Final pretrial preparation***

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

An orderly trial procedure should be planned to include a chronological presentation of the facts. The admissibility and authenticity of all known evidentiary matters should be determined and numbers assigned all exhibits to be offered at trial. These exhibits, when received at trial, should be marked "received in evidence" and numbered (prosecution exhibits) or lettered (defense exhibits). The evidence reviewed should include not only that contained in the file as originally received, but also any other relevant evidence discovered by other means. The SCM officer has the duty of insuring that all relevant and competent evidence in the case, both for and against the accused, is presented. It is the responsibility of the SCM officer to insure that only legal and competent evidence is received and considered at the trial. Only legal and competent evidence received in the presence of the accused at trial can be considered in determining the guilt or innocence of the accused. The Military Rules of Evidence apply to the SCM and must be followed.

b. ***Subpoena of witnesses***. The SCM is authorized by Article 46, UCMJ, and R.C.M.'s 703(e)(2)(C) and 1301(f) to issue subpoenas to compel the appearance at trial of civilian witnesses. In such a case, the SCM officer will follow the same procedure detailed for a SPCM or GCM trial counsel in R.C.M. 703(c) and JAGMAN, § 0146. Appendix 7 of the *Manual for Courts-Martial (1998 ed.)* contains an illustration of a completed subpoena, while JAGMAN, § 0146 details procedures for payment of witness fees. Depositions may also be used, but the advice of a lawyer should be first obtained. *See* Article 49, UCMJ; R.C.M. 702.

E. ***Trial procedure***. *See* app. 9, Manual for Courts-Martial (1998 ed.).

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

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

a. Announce the findings to the accused in open session [R.C.M.

1304(b)(2)(F)(i)];

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

c. prepare the record of trial in accordance with R.C.M. 1305, using the record of trial form in appendix 15, Manual for Courts-Martial (1998 ed.);

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

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

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

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

b. advise the accused of the following appellate rights under R.C.M. 1306:

(1) The right to submit in writing to the convening authority any matters which may tend to affect his decision in taking action (see R.C.M. 1105) and the fact that his failure to do so will constitute a waiver of this right (Additionally, the accused may be informed that he may expressly waive, in writing, his right to submit such written matters [R.C.M. 1105(d)].); and

(2) the right to request review of any final conviction by SCM by the Judge Advocate General in accordance with R.C.M. 1201(b)(3).

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

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

e. prepare the record of trial in accordance with R.C.M. 1305, using the form in appendix 15, Manual for Courts-Martial (1998 ed.);

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

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

NOTE: The convening authority's action and the review procedures for SCMs are discussed in chapter XIV, *infra*.

ADDENDA TO TRIAL GUIDE

SPECIAL EVIDENCE PROBLEM—CONFESSIONS

NOTE: Before you consider an out-of-court statement of the accused as evidence against him, you must be convinced by a preponderance of the evidence that the statement was made voluntarily and that, if required, the accused was properly advised of his rights. Mil.R.Evid. 304, 305.

A confession or admission is not voluntary if it was obtained through the use of coercion, unlawful influence, or unlawful inducement, including obtaining the statement by questioning an accused without complying with the warning requirements of Article 31(b), UCMJ, ***and*** without first advising the accused of his rights to counsel during a custodial interrogation. You must also keep in mind that an accused cannot be convicted on the basis of his out-of-court self-incriminating statement alone, even if it was voluntary, for such a statement must be corroborated if it is to be used as a basis for conviction. Mil.R.Evid. 304(g). If a statement was obtained from the accused during a custodial interrogation, it must appear affirmatively on the record that the accused was warned of the nature of the offense of which he was accused or suspected, that he had the right to remain silent, that any statement he made could be used against him, that he had the right to consult lawyer counsel and have lawyer counsel with him during the interrogation, and that lawyer counsel could be civilian counsel provided by him at his own expense or free military counsel appointed for him. After the above explanation, the accused or suspect should have been asked if he desired counsel. If he answered affirmatively, the record must show that the interrogation ceased until counsel was obtained. If he answered negatively, he should have been asked if he desired to make a statement. If he answered negatively, the record must show that the interrogation ceased. If he affirmatively indicated that he desired to make a statement, the statement is admissible against him. The record must show, however, that the accused did not invoke any of these rights at any stage of the interrogation. In all cases in which you are considering the reception in evidence of a self-incriminating statement of the accused, you should call the person who obtained the statement to testify as a witness and question him substantially as follows:

SCM: (After the routine introductory questions) Did you have occasion to speak to the accused on _____?

WIT: (Yes) (No) _____.

SCM: Where did this conversation take place, and at what time did it begin?

WIT: _____.

SCM: Who else, if anyone, was present?

WIT: _____.

SCM: What time did the conversation end?

WIT: _____.

SCM: Was the accused permitted to smoke as he desired during the period of time involved in the conversation?

WIT: _____.

SCM: Was the accused permitted to drink water as he desired during the conversation?

WIT: _____.

SCM: Was the accused permitted to eat meals at the normal meal times as he desired during the conversation?

WIT: _____.

SCM: Prior to the accused making a statement, what, if anything, did you advise him concerning the offense of which he was suspected?

WIT: (I advised him that I suspected him of the theft of Seaman Jones' Bulova wristwatch from Jones' locker in Building 15 on 21 January 19CY.)

SCM: What, if anything, did you advise the accused concerning his right to remain silent?

WIT: (I informed the accused that he need not make any statement and that he had the right to remain silent.)

SCM: What, if anything, did you advise the accused of the use that could be made of a statement if he made one?

WIT: (I advised the accused that, if he elected to make a statement, it could be used as evidence against him at a court-martial or other proceeding.)

SCM: Did you ask the accused if he desired to consult with a lawyer or to have a lawyer present?

WIT: (Yes.) (No.)

SCM: (If answer to previous question was affirmative) What was his reply?

WIT: (He stated he did (not) wish to consult with a lawyer (or to have a lawyer present).)

NOTE: If the interrogator was aware that the accused had retained or appointed counsel in connection with the charge(s), then such counsel was required to be given notice of the time and place of the interrogation.

SCM: To your knowledge, did the accused have counsel in connection with the charge(s)?

WIT: (Yes.) (No.)

SCM: (If answer to previous question was affirmative) Did you notify the accused's counsel of the time and place of your interview with the accused?

WIT: (Yes.) (No.)

SCM: What, if anything, did you advise the accused of his rights concerning counsel?

WIT: (I advised the accused that he had the right to consult with a lawyer counsel and have that lawyer present at the interrogation. I also informed him that he could retain a civilian lawyer at his own expense and additionally a military lawyer would be provided for him. I further advised him that any detailed military lawyer, if the accused desired such counsel, would be provided at no expense to him.)

SCM: Did you provide all of this advice prior to the accused making any statement to you?

WIT: (Yes.)

SCM: What, if anything, did the accused say or do to indicate that he understood your advice?

WIT: (After advising him of each of his rights, I asked him if he understood what I had told him and he said he did. (Also, I had him read a printed form containing a statement of these rights and sign the statement acknowledging his understanding of these rights.)

SCM: (If accused has signed a statement of his rights) I show you Prosecution Exhibit #2 for identification, which purports to be a form containing advice of a suspect's rights and ask if you can identify it?

WIT: (Yes. This is the form executed by the accused on _____ 19___. I recognize it because my signature appears on the bottom as a witness, and I recognize the accused's signature, which was placed on the document in my presence.)

SCM: Did the accused subsequently make a statement?

WIT: (Yes.)

SCM: Was the statement reduced to writing?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, threaten the accused in any way?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, make any promises of reward, favor, or advantage to the accused in return for his statement?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, strike or otherwise offer violence to the accused should he not make a statement?

WIT: (Yes.) (No.)

SCM: (If the accused's statement was reduced to writing) Describe in detail the procedure used to reduce the statement in writing.

WIT: _____.

SCM: Did the accused at any time during the interrogation request to exercise any of his rights?

WIT: (Yes.) (No.)

NOTE: If the witness indicates that the accused did invoke any of his rights at any stage of the interrogation, it must be shown that the interrogation ceased at that time and was not continued until such time as there had been compliance with the request of the accused concerning the rights invoked. If the witness testifies that he obtained a written statement from the accused, he should be asked if and how he can identify it as a written statement of the accused. When a number of persons have participated in obtaining a statement, you may find it necessary to call several or all of them as witnesses in order to inquire adequately into the circumstances under which the statement was taken.

SCM: I now show you Prosecution Exhibit 3 for identification, which purports to be a statement of the accused, and ask if you can identify it?

WIT: (Yes. I recognize my signature and handwriting on the witness blank at the bottom of the page. I also recognize the accused's signature on the page.)

SCM: (To accused, after permitting him to examine the statement when it is in writing) The Uniform Code of Military Justice provides that no person subject to the Code may compel you to incriminate yourself or answer any question which may tend to incriminate you. In this regard, no person subject to the Code may interrogate or request any statement from you if you are accused or suspected of an offense without first informing you of the nature of the offense of which you are suspected and advising you that you need not make any statement regarding the offense of which you are accused or suspected; that any statement you do make may be used as evidence against you in a trial by court-martial; that you have the right to consult with lawyer counsel and have lawyer counsel with you during the interrogation; and that lawyer counsel can be civilian counsel provided by you or military counsel appointed for you at no expense to you. Finally, any statement obtained from you through the use of coercion, unlawful influence, or unlawful inducement, may not be used in evidence against you in a trial by court-martial. In addition, any statement made by you that was actually the result of any promise of reward or advantage, or that was made by you after you had invoked any of your rights at any time during the interrogation, and your request to exercise those rights was denied, is inadmissible and cannot be used against you. Before I consider receiving this statement in evidence, you have the right at this time to introduce any evidence you desire concerning the circumstances under which the statement was obtained or concerning whether the statement was in fact made by you. You also have the right to take the stand at this time as a witness for the limited purpose of testifying as to these matters. If you do that, whatever you say will be considered and weighed as evidence by me just as is the testimony of other witnesses on this subject. I will have the right to question you upon your testimony, but if you limit your testimony to the circumstances surrounding the taking of the statement or as to whether the

statement was in fact made by you, I may not question you on the subject of your guilt or innocence, nor may I ask you whether the statement is true or false. In other words, you can only be questioned upon the issues concerning which you testify and upon your worthiness of belief, but not upon anything else. On the other hand, you need not take the witness stand at all. You have a perfect right to remain silent, and the fact that you do not take the stand yourself will not be considered as an admission by you that the statement was made by you under circumstances which would make it admissible or that it was in fact made by you. You also have the right to cross-examine this witness concerning his testimony, just as you have that right with other witnesses, or, if you prefer, I will cross-examine him for you along any line of inquiry you indicate. Do you understand your rights?

ACC: _____.

SCM: Do you wish to cross-examine this witness?

ACC: _____.

SCM: Do you wish to introduce any evidence concerning the taking of the statement or concerning whether you in fact made the statement?

ACC: _____.

SCM: Do you wish to testify yourself concerning these matters?

ACC: _____.

SCM: Do you have any objection to my receiving Prosecution Exhibits 2 and 3 for identification into evidence?

ACC: (Yes, sir (stating reasons).) (No, sir.)

SCM: (Your objection is sustained.)

(Your objection is overruled. These documents are admitted into evidence as Prosecution Exhibits 2 and 3.)

(There being no objection, these documents are admitted into evidence as Prosecution Exhibits 2 and 3.)

NOTE: If the accused's statement was given orally, rather than in writing, anyone who heard the statement may testify as to its content if all requirements for admissibility have been met.

SAMPLE INQUIRY INTO THE FACTUAL BASIS OF A PLEA OF GUILTY TO THE OFFENSE OF UNAUTHORIZED ABSENCE

1. Assumption. Assume the accused has entered pleas of guilty to the following charge and specification:

Charge: Violation of the UCMJ, Article 86

Specification: In that Seaman Virgil A. Tweedy, U.S. Navy, on active duty, Naval Justice School, Newport, Rhode Island, did, on or about 5 July 19_, without authority, absent himself from his unit, to wit: Naval Justice School, Newport, Rhode Island, and did remain so absent until on or about 23 July 20__.

2. Procedure. The summary court-martial officer, after he has completed the inquiry indicated in the TRIAL GUIDE as to the elements of the offense, should question the accused substantially as follows:

SCM: State your full name and rank.

ACC: Virgil Armond Tweedy, Seaman.

SCM: Are you on active duty in the U.S. Navy?

ACC: Yes, sir.

SCM: Are you the same Seaman Virgil A. Tweedy who is named in the charge sheet?

ACC: Yes, sir.

SCM: Were you on active duty in the U.S. Navy on 5 July 20_?

ACC: Yes, sir.

SCM: What was your unit on that date?

ACC: The Naval Justice School.

SCM: Is that located in Newport, Rhode Island?

ACC: Yes, sir.

SCM: Tell me in your own words what you did on 5 July that caused this charge to be brought against you.

ACC: I stayed at home.

SCM: Had you been at home on leave or liberty?

ACC: Yes, sir.

SCM: Which one was it?

ACC: I had liberty on the 4th of July.

SCM: When were you required to report back to the Naval Justice School?

ACC: At 0800 on the 5th of July.

SCM: And did you fail to report on 5 July 20_?

ACC: Yes, sir.

SCM: When did you return to military control?

ACC: On 23 July 20_.

SCM: How did you return to military control on that date?

ACC: I took a bus to Newport and turned myself in to the duty officer at the Naval Justice School.

SCM: When you failed to report to the Naval Justice School on 5 July, did you feel you had permission from anyone to be absent from your unit?

ACC: No, sir.

SCM: Where were you during this period of absence?

ACC: I was at home, sir.

SCM: Where is your home?

ACC: In Blue Ridge, West Virginia.

SCM: Is that where you were for this entire period?

ACC: Yes, sir.

SCM: During this period, did you have any contact with military authorities? By "military authorities" I mean not only members of your unit, but anyone in the military.

ACC: No, sir.

SCM: During this period, did you go on board any military installations?

ACC: No, sir.

SCM: Were you sick or hurt or in jail, or was there anything which made it physically impossible for you to return?

ACC: No, sir.

SCM: Could you have reported to the Naval Justice School on 5 July 20__ if you had wanted to?

ACC: Yes, sir.

SCM: During this entire period, did you believe you were an unauthorized absentee from the Naval Justice School?

ACC: Yes, sir; I knew I was UA.

SCM: Do you know of any reason why you are not guilty of this offense?

ACC: No, sir.

CHAPTER XI

THE SPECIAL COURT-MARTIAL

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CHAPTER XI

THE SPECIAL COURT-MARTIAL

A. ***Introduction.*** The special court-martial is the intermediate level court-martial created by the Uniform Code of Military Justice. The maximum penalties that an accused may receive at a special court-martial are generally greater than those of a summary court-martial, but less than those of a general court-martial. The rights of an accused at a special court-martial are also generally greater than the rights at a summary court-martial, but less than the rights at a general court-martial. Basically, the special court-martial is a court consisting of at least three members, trial and defense counsel, and a judge.The maximum imposable punishment for an enlisted person includes a bad-conduct discharge, six months confinement, forfeiture of 2/3 pay per month for six months, and reduction to paygrade E-1. This chapter will discuss in some detail the special court-martial and the mechanics of its operation.

B. ***Creation of the Special Court-Martial***

1. *Authority to convene.* Article 23, UCMJ, and JAGMAN, § 01 20b prescribe who has the power to convene (create) a special court-martial. The power to convene special courts-martial is nondelegable: in no event can a subordinate exercise such authority. When Captain Jones is on leave from his ship, his authority to convene special courts-martial devolves upon his temporary successor-in-command (usually the executive officer) who, in the eyes of the law, becomes the commanding officer. Trial counsel will have to demonstrate on the record at trial that the successor devolved to command, this is to avoid later appeal when someone questions why the CAs name changed on various documents in the record of trial.

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

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

R.C.M. 504 and JAGMAN, § 01 33 contain guidance for the preparation of the convening order. Basically, the order should be on the command letterhead, dated and serialized, and signed personally by the CA. The order should specify the names and ranks of all members detailed to serve on the court. When a proper convening order is executed, a special court-martial is created and remains in existence until dissolved. A sample convening order is set forth at page 11-7, below.

3. ***Amendment of convening orders***

a. ***General rules.*** Changes in personnel detailed to the court should be accomplished by written amendment to the order that 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 I-CYA, 1-CYB, or 1 A-CY, 1 B-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 is set forth at page 1 1 -8.

b. ***Change of members***

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

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

C. ***Constitution of Special Courts-Martial.*** As previously indicated, there are several configurations of special courts-martial, depending upon either the desires of the CA or the desires of the accused. The "constitution" of the court refers to the court's composition-i.e., the personnel involved.

1 ***Three members.*** One type of special court-martial consists of a minimum of three members and counsel, but no military judge. Such a special court-martial can try any case referred to it, but cannot adjudge a sentence (in enlisted cases) in excess of six months confinement, forfeiture of two-thirds pay per month for six months, and reduction to paygrade E-1. In other words, in ordinary circumstances, a punitive discharge may not be adjudged. This forum is virtually never used in current practice.

2. ***Military judge and members.*** This type of special court-martial includes counsel, at least three members, and a military judge. The members' role is similar to that of a civilian jury. They determine findings of guilty / not guilty and impose a sentence. The senior member is, in effect, the jury foreman who presides during deliberations. The military judge's functions are similar to those of a civilian criminal court judge. He resolves all legal questions that arise and otherwise directs the trial proceedings. This form of special court-martial is authorized by Article 19, UCMJ, to adjudge a punitive discharge and has become fairly standard in the naval service.

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

D. ***Qualifications of members***

1 . *Commissioned officers.* The members of a special court-martial 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 an armed force other than that of the accused may be utilized, but at least a majority of the members should be of the same armed force as the accused.

2. ***Enlisted members***. Article 25(c), UCMJ, gives an en I isted accused a right to be tried by a court consisting of at least one-third enlisted members. The accused desiring enlisted membership must submit a personally signed request before the conclusion of any Article 39(a), UCMJ, session (pretrial hearing), or before the assembly of the court at trial, or make the request orally on the record. Only enlisted persons who are not of the same

unit as the accused can lawfully be assigned to the court ("unit" means company, squadron, battery, ship, or similar sized elements).
if, when requested, enlisted members cannot be detailed to the court, the CA may direct the original court to proceed with trial. Such actions should only be taken when enlisted service members cannot be assigned because of extraordinary circumstances. In such a case, the CA must forward to the trial counsel for attachment to the record of trial a detailed explanation of the extraordinary circumstances and why the trial must proceed without enlisted members. See R.C.M. 503(a)(2).

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

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

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

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

1 . ***Trial counsel***. The trial counsel in military criminal law serves as the prosecutor. For a special court-martial, the trial counsel need only be a commissioned officer. In current practice, trial counsel is typically a judge advocate.

2. ***Defense counsel***. There are various types of defense counsel in military practice. The detailed defense counsel is the military defense counsel initially assigned to

case. Individual counsel is a counsel requested by the accused and can be a civilian or military lawyer.

a. ***Detailed defense counsel***

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

(2) R.C.M. 502(d)(1) expands the protection given to the accused by Article 27(c) in that it requires Article 27(b) counsel as detailed defense counsel in special courts-martial.

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

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

(2) ***Individual military counsel (IMC)***

(a) ***Availability.*** At a special court-martial, the accused has the right to be represented by a military counsel of his own choice at no cost to the accused *if* such counsel is "reasonably available." JAGMAN, § 01 31 provides that a Navy or Marine Corps military counsel is "reasonably available" to represent an accused if the requested counsel:

-1- Is assigned to an activity within the same NavyMarine Corps trial judiciary circuit, or within 1 00 miles of where the trial will be held; and

-2- is *not* one of the following persons: a flag or general officer; a trial or appellate military judge; a trial counsel; an appellate defense or government counsel; a principal legal advisor to a command; an instructor or student at a military or civilian school; a commanding officer, executive officer, or officer in charge; or a member of the staff of certain high-level DOD and Navy organizations.

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

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

-1- The ability of other counsel to assume the workload of the requested counsel during his / her absence;

-2- the nature and complexity of the charges or legal issues involved in the case and any special qualifications possessed by the requested counsel; and

-3- the experience level and qualifications of detailed defense counsel.

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

C. ***Recapitulation-right to counsel.*** At a special court-martial, the accused has the right to be represented by civilian counsel (i f provided at no expense to the government) and either detailed Article 27(b) military counsel or IMC of the accused's own selection, if reasonably available. If IMC is made available, detailed defense counsel is normally relieved. The accused may request that detailed defense counsel remain on the case; however, it is in the sole discretion of the convening authority to grant or deny the request.

d. ***No defense counsel.*** R.C.M. 506(d) recognizes the right of the defendant to represent himself at a special court-martial without assistance of counsel.

DEPARTMENT OF THE NAVY
NAVAL STATION NEWPORT
Newport, Rhode Island 02841-5030

23 August CY

SPECIAL COURT-MARTIAL CONVENING ORDER 4-CY

Pursuant to authority contained in paragraph 01 20b(3), Judge Advocate General of the Navy Instruction 5800.7C, of 3 October 1990, a special court-martial is convened with the following members:

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 Warrant Officer CWO3 Samuel F. Prescott, U.S. Navy.

/s/ **C. T. PINETREE**
CHERYL T. PINETREE
Captain, U. S. Navy
Commanding Officer
Naval Station Newport, Rhode Island

DEPARTMENT OF THE NAVY
NAVAL STATION NEWPORT
Newport, Rhode Island 02841-5030

25 August 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 Naval Station Newport convening order 4-CY, dated 23 Aug CY, vice Lieutenant Lance Q. Lawrence, U.S. Navy, who is relieved.

/s/ **C. T. PINETREE** CHERYL T. PINETREE

Captain, U. S. Navy
Commanding Officer
Naval Station Newport, Rhode Island

H. *Special court-martial referral*

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

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

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

3. ***Withdrawal of charges.*** Withdrawal of charges is a process by which the CA takes from a court-martial a case previously referred to it for trial. Charges withdrawn are normally dismissed unless they will be immediately re-referred to another court-martial. The CA cannot withdraw charges from one court and re-refer them to another court for an improper reason. The 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 when there are sound reasons for not pursuing a court-martial. Charges that have been dismissed before the court-martial has begun may be brought to another court-martial at a later date if there were sound reasons for dismissing the charge. 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. If the charges are dismissed, the CO should also write "dismissed" and draw a diagonal line across the charges in block 10 of the charge sheet.

a. ***Disestablishment of the court.*** Perhaps the most frequently occurring withdrawal problem is presented when the CA wants to disestablish the court and create another to take its place. This usually happens when several members have been transferred, or the particular court has been in existence for a long time, and the CA wants to relieve the court. Such grounds are valid and constitute a "proper reason." If evidence

shows that a change has been made because the CA was displeased with the leniency of the sentence or the number of acquittals, then the withdrawal would not be lawful. Whenever a new court relieves an old one, a problem is created with respect to the cases previously referred to the old court (which is disestablished) and now being referred to the new court. Remember, only the court to which a case is specifically referred can try it. The CA can withdraw each case from the old court (by lining out the referral block) and then re-refer the case to the new court. This is accomplished by executing a new block 14 referral on the charge sheet, indicating therein the serial number and date of the convening order which appointed the new court. The new referral is taped along the top edge over the old lined-out referral to allow inspection of both referrals.

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

C. ***Withdrawal before arraignment***. Withdrawal before the accused is arraigned (asked how he pleads) is lawful only where "proper reason" is shown. This means that the CA must attach to the record of trial a comprehensive statement of the reasons necessitating the withdrawal. Proper reasons for withdrawal before arraignment include receipt of additional charges, absence of the accused, reconsideration by the CA of the seriousness of the offenses, questions concerning the mental capacity of the accused, or routine duty rotation of court-martial personnel. After evidence has been received on the guilt or innocence of the accused, withdrawal cannot lawfully be accomplished unless an urgent and unforeseen military necessity exists requiring such action in the manifest interest of justice. Such circumstances would be exceedingly rare.

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

5. ***Avoiding statute of limitations problems.*** Article 43, UCMJ, provides that most offenses must have sworn charges formally receipted for within five years after the date of the offense in order to preserve the government's ability to prosecute the crime(s). the formal receipt of charges tolls the running of the statute of limitations. Murder, mutiny,

aiding the enemy, and desertion in time of war (including the conflicts in Korea or Vietnam) may be tried at any time. There is no statute of limitations as to those crimes.

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

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

1. ***Trial procedure***

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

2. ***Service of charges.*** Article 35, UCMJ, states that, in time of peace, no person can be brought to trial in any special court-martial until three days have elapsed since the formal service of charges upon that person. In computing the three-day period, neither the date of service nor the date of trial count. Sundays and holidays do count, however, in computing the statutory period. Thus, if the accused is served on Wednesday, one must wait Thursday, Friday, and Saturday before compelling trial. Trial in the foregoing example could not be compelled before Sunday and, as a practical matter, not before Monday. The date of service of charges upon the accused is demonstrated by a certificate in block 1 5 at the bottom of page 2 of the charge sheet. Trial counsel executes this certificate when he presents a copy of the charge sheet to the accused personally. He must do this even though the accused has previously been informed of the charges against him. This service of a copy of the charge sheet may also be accomplished by the command at any time after referral as long as the service is to the accused ***personally.*** Any accused can lawfully object to participation in trial proceedings before the three-day waiting period has expired. The accused may, however, waive the three-day period, so long as he understands the right and voluntarily agrees to go to trial earlier.

3. ***Pretrial hearings.*** Any time after elapse of the three-day waiting period, a military judge may hold sessions of court without members for the purpose of litigating motions, objections, and other matters not amounting to a trial of the accused's guilt or innocence. The accused may be arraigned 'and his pleas taken and determined at such a hearing. Art. 39(a), UCMJ; JAGMAN, § 01 35. At such hearings, the judge, trial counsel,

defense counsel, accused, and court reporter will be present. Several such hearings may be held if desired.

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

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

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

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

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

b. ***Guilty pleas.*** Where guilty pleas are entered or the accused pleads guilty to a lesser included offense, the judge must determine that such pleas are made knowingly and voluntarily and that the accused understands the meaning and effect of

such pleas. The accused must be advised of the maximum sentence that can be imposed in his case; that a plea of guilty is the strongest form of proof known to the law; that by pleading guilty the accused is giving up the right to a trial of the facts, the right against self-incrimination, and the right to confront and to cross-examine the witnesses) against him her. In addition, the court must explore the facts thoroughly with the accused to obtain from the accused an admission of guilt-in-fact to each element of the offense (or offenses) to which the pleas relate.

C. ***Conditional pleas.*** With the approval of the military judge and the consent of the trial counsel, an accused may enter a conditional plea of guilty. The main purpose of such a conditional plea is to preserve for appellate review certain adverse determinations which the military judge may make against the accused regarding pretrial motions. If the accused prevails on appeal, his / her "conditional" plea of guilty may then be withdrawn.

8. ***Challenge procedure.*** Where the court is composed of members, the next stage will involve a determination of the eligibility of court members to participate in the trial. Article 25(d)(2), UCMJ, and R.C.M. 912 list numerous grounds that, 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 that can be made at trial. A peremptory challenge is a challenge that can be made for any reason. The trial counsel and each accused is entitled to one peremptory challenge. Art. 41, UCMJ.

9. ***Findings.*** 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. The court will then deliberate to arrive at findings of "not guilty," "guilty," or "guilty of a lesser included offense." In order to convict an accused at a special court-martial, two-thirds of the members present at trial must agree on each finding of guilty. In computing the necessary number of votes to convict, a resulting fraction is counted as one. Thus, on a court of five members, the mathematical number of votes required to convict is 3 1/3 or, applying the rule, four votes. In a trial by military judge alone, the required number of votes is one: the judge's.

10. ***Sentence.*** If the accused has been convicted of any offense, the trial will normally move directly into the sentencing phase. Evidence relating to the kind and amount of punishment that should be adjudged is presented to the court after which the court will close to deliberate. Where members are present, instructions must be given on

the law to be applied by the court in reaching a sentence. See R.C.M. 1001-1009 for a detailed discussion of the sentencing phase of the trial.

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

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

J. *Special court-martial punishment*

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

2. ***Prohibited punishments.*** Article 55, UCMJ, flatly prohibits flogging, branding, marking, tattooing, the use of irons (except for safekeeping of prisoners), and any other cruel and unusual punishment. Other punishments not recognized by service custom include shaving the head, tying up by hands, carrying a loaded knapsack, placing in stocks, loss of good conduct time (a strictly administrative measure), and administrative discharge.

3. ***Jurisdictional maximum punishment.*** In no case can a special court-martial lawfully adjudge a sentence in excess of a bad-conduct discharge, confinement for six months, forfeiture of two-thirds pay per month for six months, and reduction to paygrade E-1. Art. 19, UCMJ. Within those outer limits are a number of variations of lesser forms of punishment which may be adjudged.

4. ***Authorized punishments.*** Appendix 12 and Part IV, MCM, list the specific maximum punishments for each offense as determined by statutory provision or by the

President of the United States pursuant to authority delegated by Article 56, UCMJ. An accused, as a general rule, may be separately punished for each offense of which he is convicted, unlike NJP where only one punishment is imposed for all offenses. Thus, an

accused convicted of UA (art. 86), assault (art. 1 28), and larceny (art. 1 2 1) is subject to a maximum sentence determined by totaling the maximum punishment for each offense, subject to the previously cited jurisdictional maximum of the special court-martial. A chart which lists punishments authorized at each type of court-martial is included at page 11-24.

a. ***Punitive separation from the service.*** A special court-martial is empowered to sentence an enlisted accused to separation from the service with a bad conduct discharge, provided the discharge is authorized for one or more of the offenses for which the accused stands convicted or by virtue of an escalator clause (discussed below). A special court-martial is not authorized to sentence any officer or warrant officer to separation from the service. A bad-conduct discharge is a separation from the service under conditions not honorable and is designed as a punishment for bad conduct rather than as a punishment for serious military or civilian offenses. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary. R.C.M. 1003(b)(10)(C). The practical effect of this type of separation is less severe than a dishonorable discharge, where the accused automatically becomes ineligible for almost all veterans' benefits. The effect of a bad-conduct discharge on veterans' benefits depends upon whether it was adjudged by a general or special court-martial, whether the benefits are administered by the service concerned or by the Department of Veteran Affairs, and upon the particular facts of a given case.

b. ***Restraint and/or hard labor.*** Under this category of punishment, there are three variations of sentence in addition to the basic punishment of confinement. Confinement is, of course, the most severe form of restraint.

(1) ***Confinement.*** Confinement involves the physical restraint of an adjudged servicemember in a brig, prison, etc. Under military law, confinement automatically includes hard labor; however, the law prefers that the sentence be stated as confinement-omitting the words "at hard labor." Omission of the words "hard labor" does not relieve the accused of the burden of performing hard labor. R.C.M. 1003(b)(8). A special court-martial can adjudge six months confinement upon an enlisted servicemember, but may not impose any confinement upon an officer or warrant officer. Part IV, MCM, limits this punishment to an even lesser period for certain offenses (e.g., failure to go to appointed place of duty under Article 86 has a maximum confinement punishment of only one month).

(2) ***Hard labor without confinement.*** This form of punishment is performed in addition to routine duties and may not lawfully be utilized in lieu of regular duties.

The number of hours per day and character of the hard labor will be designated by the immediate commanding officer of the accused. The maximum amount of hard labor that can be adjudged at a special court-martial is three months. This punishment is imposable only on enlisted persons and not upon officers or warrant officers. After each day's hard labor assignment has been performed, the accused should then be permitted normal liberty or leave. R.C.M. 1003(b) indicates that hard labor is a less severe punishment than confinement and more severe than restriction. "Hard labor" means rigorous work, but not so rigorous as to be injurious to health. Hard labor cannot be required to be performed on Sundays, but may be performed on holidays. Hard labor can be combined with any other punishment. See R.C.M. 1003(b)(7).

(3) ***Restriction***. Restriction is a moral restraint upon the accused to remain within certain specified limits for a specified time. Restriction may be imposed on all persons subject to the UCMJ, but not in excess of two months. Restriction is a less severe form of deprivation of liberty than confinement or hard labor without confinement and may be combined with any other punishment. The performance of military duties can be required while an accused is on restriction. See R.C.M. 1003(b)(6).

C. ***Monetary punishments***. The types of monetary punishment authorized by R.C.M. 1003(b) include forfeiture and fine.

(1) ***Forfeiture of pay***. This kind of punishment involves the deprivation of a specified amount of the accused's pay for a specific number of months. The maximum amount that is subject to forfeiture at a special court-martial is two-thirds of one month's pay per month for six months. The forfeiture must be stated in terms of pay per month for a certain number of months. A sentence "to forfeit $50.00 for six months" has been held by military appellate courts to mean $50.00 apportioned over six months or, in other words, $8.33 per month for six months. Thus the language used to express this punishment must be meticulously accurate. The basis for computing the forfeiture is the base pay of the accused plus sea or foreign duty pay. Other pay and allowances are not used as part of the basis. If the sentence is to include a reduction in grade, the forfeiture must be based upon the grade to which the accused is to be reduced. A forfeiture may be imposed by a special court-martial upon all military personnel. The forfeiture applies to pay becoming due after the forfeitures have been imposed and not to monies already paid to the accused or to his own personal independent resources. Unless suspended, forfeitures take effect on the date ordered executed by the CA when initial action is taken. JAGMAN, § 0157a.

(2) ***Fine***. A fine is a lump sum judgment against the accused requiring him to pay specified money to the United States. A fine is not taken from the accused's accruing pay, as with forfeitures, but rather becomes due in one payment when the sentence is ordered executed. In order to enforce collection, a fine may also include a provision that, in the event the fine is not paid, the accused shall, in addition to the confinement adjudged, be confined for a time. The total period of confinement so adjudged may not exceed the jurisdictional limit of the special court-martial (six months)

should the accused fail to pay the fine. R.C.M. 1003(b)(3) indicates that; while a special court-martial can impose a fine upon all personnel tried before it, such punishment should not be adjudged unless the accused has been unjustly enriched by his crime. A fine cannot exceed the total of the amount of money that 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 of pay which could have been required to be forfeited.

d. ***Punishment affecting grade***. There are two punishments affecting grade authorized for special court-martial sentences. These are reduction in grade and loss of numbers.

(1) ***Reduction in grade***. This form of punishment has the effect of taking away the pay grade of an accused and placing him in a lower pay grade. Accordingly, this punishment can only be utilized against enlisted persons in other than the lowest pay grade; officers may not be reduced in grade. A special court-martial may reduce an enlisted servicemember to the lowest pay grade regardless of grade before sentencing. A reduction can be combined with all other forms of punishment. See R.C.M. 1003(b)(5).

In accordance with the power granted in Article 58(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Article 58(a), UCMJ, shall be effected in the Navy and Marine Corps in accordance with JAGMAN, § 0152d. Under the provisions of this section, a court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the CA, that includes a punitive discharge or confinement in excess of 90 days (if the sentence is awarded in days) or 3 months (if awarded in other than days) *automatically* reduces the member to the pay grade E-1 as of the date the sentence is approved. As a matter within his sole discretion, the CA or the supervisory authority may retain the accused in the pay grade held at the time of sentence or at an intermediate pay grade and suspend the automatic reduction to pay grade E-1 which would otherwise be in effect. Additionally, the CA may direct that the accused serve in pay grade E-1 while in confinement, but be returned to the pay grade held at the time of sentence or an intermediate pay grade upon release from confinement. Failure of the CA to address automatic reduction will result in the automatic reduction to pay grade E-1 on the date of the CA's action.

(2) ***Loss of numbers***. As of 1999, loss of numbers is no longer an authorized punishment at court-martial.

e. ***Punitive reprimand***. A special court-martial may also adjudge a punitive reprimand against anyone subject to the UCMJ. A reprimand is nothing more than a written statement criticizing the conduct of the accused. In adjudging a reprimand, the court does not specify the wording of the statement but only its nature. The accused's command bears the ultimate responsibility in drafting the actual letter. JAGMAN, § 01 52c contains guidance for drafting the reprimand.

Note: Confinement on bread and water or diminished rations is no longer an authorized court-martial punishment.

5. ***Multiplicity.*** As a general rule, an accused convicted of more than one offense at a trial is subject to a maximum sentence computed by aggregating the maximum punishments for each offense. R.C.M. 1003(c)(1)(C) states the rule that the accused can be punished in the maximum for each of two or more ***separate*** offenses even though arising out of a series of acts. What is essentially a single transaction, however, may not be

subject to multiple punishment simply because the circumstances can be characterized as more than one offense. To allow an aggregation in the latter case would be to subject an accused to a higher maximum for one offense. The determination of when two or more offenses are separate is not easy. The Court of Appeals for the Armed Forces has applied many tests for separateness, and no single test can be relied upon. Some examples:

a. ***Separate elements.*** Offenses are separate if each requires proof of an element not required to prove the other.

b. ***One offense included in the other.*** If one offense is a lesser included offense of the other, the offenses may not be separate.

c. ***Evidence sufficient to prove one also proves the other.*** If the evidence that is sufficient to prove one offense also is sufficient to prove another offense, the two may not be separate.

d. ***Single impulse.*** Where both offenses were prompted by a single impulse, the two offenses may not be separate. This test is particularly difficult to apply inasmuch as fast-moving circumstances of some offenses make impulse determination difficult.

e. ***Single transaction.*** A single transaction is a combination of a single objective and a continuous flow of events. If several offenses are committed in the course of accomplishing a single purpose, they are probably not separate. One who steals an automobile and its contents is punished for only one offense, since the purpose is singular (steal property) and the events are integrated. One who wrongfully appropriates the auto and then later steals the contents, however, commits separate offenses.

f. ***Summary.*** If two or more offenses are multiplicious, the accused can lawfully be punished only for the maximum authorized for the most severe case. In no event may the jurisdictional limitations of the special court-martial be exceeded. To minimize multiplicity problems, apply the facts of each case to all of the foregoing tests. If each test results in a determination of separateness, the offenses are probably not

6. ***Circumstances permitting increased punishments.*** There are three situations in which the maximum limits of Part IV, MCM may be exceeded. These are known as the "escalator clauses" and are designed to permit a punitive discharge in cases involving chronic offenders despite the fact that a punitive discharge is not authorized for the individual offense alone. In no event, however, may the so-called escalator clauses operate to exceed the jurisdictional limits of a particular type of court-martial. With respect to a special court-martial, these three clauses have the following impact. See R.C.M. 1003(d).

a. ***Three or more convictions.*** If an accused is convicted of an offense for which Part IV, MCM does not authorize a dishonorable discharge, proof of three or more previous convictions by court-martial during the year preceding the *commission* of any offense of which the accused is convicted will allow a special court-martial to adjudge a bad-conduct discharge, forfeiture of 2/3 pay per month for six months and confinement for six months, even though that much punishment is not otherwise authorized. In computing the one-year period, any unauthorized absence time is excluded. R.C.M. 1 001 (d)(1).

b. ***Two or more convictions.*** If an accused is convicted of an offense for which Part IV, MCM, does not authorize a punitive discharge, proof of two or more previous convictions within three years next preceding the *commission* of any of the current offenses will authorize a special court-martial to adjudge a bad-conduct discharge, forfeiture of two-thirds pay per month for six months, and, if the confinement authorized by the offense Is less than three months, confinement for three months. For purposes of the second escalator clause, periods of unauthorized absence are excluded in computing the three year period. R.C.M. 1003(d)(2).

C. ***Two or more offenses.*** If an accused is convicted of two or more *separate* offenses, none of which authorizes a punitive discharge, and if the authorized confinement for these offenses totals six months or more, a special court-martial may adjudge a bad-conduct discharge and forfeiture of two-thirds pay per month for six months. R.C.M. 1003(d)(3).

CHAPTER XII

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CHAPTER XII

POTENTIAL LEGAL PROBLEMS OF THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY

A. ***Introduction.*** The unique responsibilities of a court-martial convening authority to act as both a judicial officer and a commanding officer frequently create potentially serious legal problems for the convening authority who tries to be true to both roles. There is no getting around the fact that it is extremely difficult for an aggressive commanding officer to discharge his responsibilities of command and, at the same time, remain completely impartial in his attitude toward each wrong doer. Frequently, the necessity for decisive command action clashes directly with legal rights designed to protect the individual from arbitrary or unjust action. In this chapter, the relationship of command and convening authority responsibility will be explored through the discussion of common legal problems. If commanders are sensitive to both the principles of command and the principles of convening authority responsibility, the apparent friction between the two roles can be minimized.

B. ***Accuser concept problems.*** The Uniform Code of Military Justice is structured to give the convening authority extensive areas of permissible involvement in the military justice system. For example, he may administer NJP; he may determine to what type of court-martial a case may be referred; he may choose the members at a court-martial; he may determine what charges will be prosecuted; he may authorize searches and seizures; he may order an accused into pretrial restraint; he may approve or deny pretrial agreements; he may suspend a punishment imposed at a court-martial; and he may review the actions of a court-martial. The Uniform Code of Military Justice also defines, however, certain areas of impermissible involvement by the convening authority. The "accuser" concept defines one of these impermissible areas (*see* Art. 1(9), Art. 22(b), Art. 23(b) UCMJ); illegal command influence (to be discussed later) defines another (*see* Art. 37, UCMJ). In the Navy and Marine Corps, the accuser concept applies ***only*** to special and general courts-martial. Arts. 22(b) and 23(b), UCMJ. It does not strictly apply to summary courts-martial nor to NJP. Art. 24(b), UCMJ; R.C.M. 1302(b), MCM. The accuser concept is applied to summary court-martial in the Coast Guard. Section 1001-1, MJM. If the convening authority is an accuser, he is disqualified from convening a special or general court-martial. R.C.M. 504(c)(1). Any court convened by an accuser lacks jurisdiction (power) to hear a case. In some situations, the convening authority does not become an accuser until after the court has been convened. If this occurs, the convening authority is then disqualified from taking any action to review the case. R.C.M. 1107(a).

A convening authority becomes an accuser when he signs and swears to the truth of the charges against the accused, when he directs that someone else sign the charge sheet as a nominal accuser, or when he has other than an official interest in the prosecution of the accused. A significant policy underlying the accuser concept is that the accused is entitled to

have the decisions affecting his case made by a convening authority who is unbiased and impartial and is not convinced beyond a reasonable doubt of the guilt of the accused. The accuser concept does not concern itself so much with the state of mind of the convening authority as it does with the ***appearance of impropriety*** in his actions. In other words, if a reasonable man would conclude from observing the actions of the convening authority that he cannot be unbiased and impartial in the case, the convening authority will be considered by the law to be an accuser, regardless of whether the convening authority himself believes that he is impartial.

1. ***Signs charges*** A convening authority becomes an accuser by signing the accuser certificate at the bottom of page 1 of the charge sheet. The effect of this signature, and the subsequent oath, is to represent that the allegations contained in the charges are true. A person who makes such a manifest judgment of the facts of the case in its preliminary stages cannot reasonably be expected to be impartial when making quasi-judicial decisions at later stages of the trial process. The circumstance of the convening authority preferring charges is very rare (e.g., when a subordinate officer succeeds to command after having signed the charge sheet as the accuser).

2. ***Direct nominal signing of charges*** A convening authority may become an accuser by ordering another to sign charges as an accuser. In such a situation, the law concludes that the convening authority is doing indirectly that which he cannot do directly. The obvious cases are easily distinguishable, but some accuser problems arise in subtle ways. A convening authority may, in many instances, be the commander who first receives information that the accused has committed an offense. It is entirely lawful and appropriate for the convening authority to direct a subordinate to ***investigate*** the complaint with a view toward preferring whatever charges the subordinate deems appropriate. Such action is strictly official and involves no accuser concept problems unless the convening authority directs the subordinate to prefer ***certain specific charges*** against a ***certain accused***. In the latter circumstances, the convening authority may be an accuser in fact.

There are two common practices that involve this basic problem. In the first instance, a criminal investigation report may be submitted to the convening authority by the Naval Criminal Investigative Service or some other organized investigating unit. The convening authority may then read the report, decide upon the propriety of certain charges, and order his legal officer to ". . . take this report and prepare a charge sheet on Jones charging him with larceny and have it on my desk for referral to special court-martial this afternoon." The other situation exists when a subordinate commander forwards a case, without a charge sheet, to a superior commander for NJP. The superior commander, also a convening authority, decides to refer the case to trial and issues an order to his legal officer similar to that issued in the first instance. While, in a sense, the convening authority's interest in these cases is, in fact, official, he, nevertheless, has given an order which amounts to a directive to the legal officer or his subordinate to prefer certain charges against a certain person. In such a posture, the convening authority technically may have become an accuser and disqualified from convening a court-martial in the affected cases. To avoid this problem, it behooves the convening authority to have all potential criminal cases forwarded through

his legal officer or, if he has none, the executive officer. By working closely together, the subordinate can determine safely whether there is any reasonable possibility that the convening authority will refer the potential case to trial. If there is a reasonable chance, a charge sheet can then be prepared ***before*** the case is actually presented to the convening authority. Such a procedure is not unduly cumbersome and will avoid legal complications of a technical nature with the accuser concept. There are several related problems which do not involve a violation of the accuser principle though, at first examination, it may so seem.

a. ***Direct change in charges.*** The convening authority of all types of court-martial is under a legal obligation to see that the charges against an accused accurately conform to available evidence. If a convening authority receives a charge sheet that contains charges that do not conform to available evidence, he may lawfully direct a subordinate to amend the charge sheet in order that there be accurate charges. The convening authority may do this for this limited purpose only and not for any other reason. The rule in this situation is consistent with the notion that the convening authority may act in the interest of justice on charges preferred by others because it protects the accused from trial on baseless charges and protects the interest of the government in ensuring justice.

b. ***Orders to subordinates.*** When the convening authority discovers that a subordinate commander is about to impose NJP or that other administrative action is about to be taken against an accused, and the convening authority believes such action is inappropriate, he may lawfully direct that an investigation be conducted and appropriate charges be forwarded to him for action. This is also an example of a convening authority acting impartially on charges preferred by others. He may do so in this instance because senior commanding officers have overall responsibility for justice and discipline within their commands. Other kinds of orders are more dangerous, however. Policy letters or directives that indicate that certain offenders or kinds of offenses will be prosecuted by court-martial or by a specific level of court-martial are nothing more than orders to prefer charges as the law views them. Historically, thieves, bad-check artists, and various firearm offenders have been targets of such directives. Command guidance is sometimes issued for the control of certain problem offenders, but should never contain references to the disposition of such cases. Such letters are of dubious value and should be avoided because of their legal complications. Such letters also create problems with regard to illegal command influence.

3. ***Personal interest.*** The third type of accuser is the convening authority who exhibits a personal interest in a given case. A personal interest exists if a reasonable man, viewing the facts of the convening authority's actions in a case, would believe the convening authority was too personally involved in the case to be impartial and fair. Though state of mind is not a critical factor by itself, the personal views of the convening authority may help explain the import of his actions. When the convening authority is the victim of an offense, the law will assume his interest is personal and hold him disqualified from exercising convening authority in that case. If a direct order of the convening authority is violated by the accused, the law will assume the convening authority has a personal interest even though the order may have been issued through another party. This situation contemplates orders specifically directed at the accused and not standing orders, routine transfer orders, etc. If the

offense involves a pet project of the convening authority and he has manifested a great interest in its enforcement by speeches, directives, and follow-up disciplinary action, the court will most likely find a disqualifying personal interest. If the convening authority is a witness for the prosecution, he may have a disqualifying personal interest. This disqualifying interest would normally arise if the convening authority were an eyewitness to an offense and not if he took such official actions as authenticating unit diaries, although in the latter situation he might be disqualified from reviewing the case.

4. ***Effect of disqualification.*** Once the convening authority violates the accuser principle, neither he [R.C.M. 504(c)(1)], nor any subordinate or junior commander, nor anyone junior in grade who succeeds him [R.C.M. 504(c)(2)], may lawfully refer the particular case to trial by special or general court-martial as the court would then be without jurisdiction to try the case. While an accuser in the Navy or Marine Corps may refer such a case to a summary court-martial without divesting it of jurisdiction, the better practice would be to exercise discretion and forward the charges to a superior authority with a recommendation that the charges be referred. R.C.M. 1302(b). In this regard, JAGMAN, § 0129a and § 0129b define the "superior competent authority" in both the Navy and Marine Corps to whom the charges should be forwarded. The letter of transmittal should indicate in general terms the reasons necessitating the unusual referral procedures. Should the disqualification occur after charges have already been referred, the convening authority should forward the record of trial for review and action in the same manner.

C. ***Unlawful command influence.*** Perhaps no single legal issue relating to the military criminal system arouses as much emotion as the issue of command influence of court-martial cases. It should be noted initially that not all command influence is unlawful, inasmuch as the convening authority is authorized by law to appoint court members, to refer cases to trial, and to review the cases he has referred to trial as well as other acts. Unlawful command influence is an intentional or inadvertent act tending to impact on the trial process in such a way as to affect the impartiality of the trial process. Since the court-martial is no longer viewed as an instrument of executive power subordinate to the will of its creator, courts are very quick to react to even the appearance of unlawful influence. (As an historical note, in 1951, the primary evil that the UCMJ was enacted to correct was unlawful command influence.) Two notions form the basis of the unlawful command influence concept. The first notion is that military justice is the fair and impartial evaluation of probative facts by judge and / or court members. The second notion is that nothing but legal and competent evidence presented in court can be allowed to influence the judge and / or court members. If unlawful command influence exists, the findings and sentence of the court may be invalidated. If the accused has pleaded guilty, it is possible that only the sentence may be invalidated. In some instances, the unlawful command influence could arise from an impermissible personal interest so that the convening authority is also an accuser. In other instances, the convening authority may be disqualified from taking an action on review. There are several ways in which command influence issues may arise.

1. ***Article 37, UCMJ*** The primary prohibition against unlawful command

influence is contained in Art. 37, UCMJ. *See also* R.C.M. 104. This provision prohibits commanders and others from censuring, reprimanding, or admonishing any court personnel (members, counsel, judge, reporter, or accused) for their in-court performance on findings, sentence, or other court-related functions. The Code also prohibits the attempt by any person subject to the Code to coerce or, through any unauthorized means, to influence the court-martial process or any personnel connected therewith. Basically, the Code addresses itself to overt attempts directly to influence court results through the application of various administrative techniques available to all commanders and others by virtue of grade or position in the service. Those violating the provisions of Art. 37, UCMJ, are subject to court-martial prosecution.

2. ***Other direct influence*** Many instances of illegal command influence arise from the good-faith efforts of the commanding officer to influence good order and discipline within his command through speeches, writings, or directives. These communications may be broadly directed (to the entire command) or more narrowly directed (to prospective court members). Ostensibly, these communications may be designed to educate members of the command as to their responsibilities in regard to the military justice system. But, in reality, these communications may serve as a forum for the convening authority to express dissatisfaction with certain aspects of the military justice system. While no guidelines can be advanced that can cover every situation, it is possible to point out several areas in which the law has been very sensitive in regard to communications by the commanding officer.

Discussing a case that is pending adjudication with prospective members is normally considered to be improper. It is improper to ask for a specific sentence, either in a particular case or in a particular class of cases. For example, it would be improper to ask that all thieves be given a bad-conduct discharge or to state that the only reason a case is sent to a special court-martial is that a bad-conduct discharge is desired. It is improper to criticize past findings or sentences from previous courts. It is also improper for the commanding officer to evidence an inflexible attitude on review (for example, no punitive discharge will ever be suspended). While illegal command influence may be found regardless of the size of the audience, it is more likely to be found if the communication is directed to a smaller group (such as prospective court members) than if it is directed to the whole command. In addition, the commanding officer may not do indirectly what he could not do directly; that is, he cannot have someone such as the executive officer or the legal officer make statements that he, as commanding officer, could not make.

In regard to the specific problem of addressing prospective court members, theoretically the law recognizes the propriety of convening authorities making sure that court personnel understand their duties and court-martial procedure. In practice, it is difficult for a communication or lecture to avoid the expression or apparent expression of personal views respecting the court-martial process. Before embarking on such education methods, the convening authority should seek the advice of a lawyer. The safest practice is to avoid this type of communication, if possible.

3. ***Trial counsel influence*** This type of unlawful influence is not the direct result of an act by the convening authority. It occurs when the trial counsel, in an effort to ensure a conviction or a severe sentence, injects the personal or command view of the convening authority through evidentiary procedures or by way of argument. Historically, most of these cases have involved various department-level policies regarding homosexuals and thieves, but many have involved local policies. To be sure, the trial counsel errs when he argues to the court that ". . . the convening authority considers the accused worthy of a punitive discharge." A convening authority cannot control the words of others so as to preclude inadvertent interjection of his personal views or policies, but he can avoid public expressions of these views by keeping his views to himself. He can only avoid this kind of unlawful influence by realizing that his convening authority responsibilities necessitate more closely held views and policies on military criminal matters.

4. ***Court's independent knowledge*** Another form of unlawful influence exists when a court member is aware of certain personal views of the convening authority through some independent source rather than through the trial counsel or through direct policy statements. This influence problem usually arises from wardroom expressions of the convening authority, or a staff member, which detail certain views or policies regarding certain offenses, severity of sentences, a certain case, etc. A person who hears these views may be unduly influenced by those views when he sits on a related case as a court member. A court member so influenced is not an impartial member. Accordingly, when the challenge procedure discloses to the judge such knowledge by a member, the law treats the matter as relating to the qualification of the member in the particular case and the court member would be discharged from sitting on the case. Moreover, if it appears that the convening authority has been using an informal setting deliberately to affect the trial process, then he may be involved with criminal command influence and he would force the trial counsel to disprove such influence or the appearance of it. The best solution to the problem is for the convening authority to keep his personally held views and policies between himself and his legal officer. He should not discuss criminal cases or problems at staff conferences, meetings, social hours, etc. Article 6, UCMJ, was designed to protect such conversations between commanders and legal officers and to discourage public discussion of these important matters.

D. ***Pretrial restraint problems.*** The term "pretrial restraint" is used to refer to the practice of restricting the freedom of movement of an accused, prior to his trial, to ensure his presence at that trial or for other permissible grounds. R.C.M. 304 and 305 discuss the various forms of such restraint.

1. ***Forms of restraint***

a. ***Confinement*** *See* R.C.M. 304(b), 305. Confinement is the physical restraint of an accused in a correctional facility, detention cell, or other areas by means of walls, locked doors, guards, or other devices. Confinement is a status that

commences when the accused is delivered to the facility with an order to confine him. This form of restraint is the most severe, and it is not surprising that the rules governing its use are stringent. Commissioned officers, warrant officers, and civilians (when subject to military jurisdiction) can be confined only on order of their commanding officer. In these cases, the commanding officer's authority cannot be delegated. Enlisted persons can be ordered into confinement by any commissioned officer. A commanding officer may lawfully delegate his authority to confine enlisted persons to warrant officers, petty officers, or noncommissioned officers of his command. In such cases, those possessing delegated authority may confine enlisted persons of that command—meaning enlisted persons assigned to, attached to, or temporarily in the jurisdiction of the command (e.g., on-base, onboard ship, on-post, etc.). As a practical matter, however, confinement normally is ordered only by the commanding officer, executive officer, or command duty officer (examples of completed pretrial and post-trial confinement orders are provided at the end of this chapter). Note that, when an accused is placed in pretrial confinement, his commanding officer must review his decision to impose pretrial confinement within 48 hours. If his decision is to continue confinement, the commanding officer must submit a written memorandum to the initial review officer (IRO) which states the reasons for his conclusion that an offense triable by court-martial has been committed; that the accused committed it; that confinement is necessary because it is foreseeable that the accused will not appear at trial or will engage in serious criminal misconduct; and that less severe forms of restraint have been considered and found to be inadequate. (*See* appendix III-a at the end of this chapter for examples.)

b. ***The initial review officer program***. The law recognizes that pretrial confinement has serious consequences for an accused. Loss of liberty is, in reality, a form of punishment. It punishes not only the accused, but also his family. Pretrial confinement also hampers an accused in the preparation of his defense. Studies have indicated that the conviction rate for confined accuseds exceeds the rate for those who are not confined. In addition, a confined accused may be more likely to receive additional confinement as a sentence than a released accused. Because of these consequences, a neutral and detached IRO has been mandated to decide whether an individual should be confined pending his court-martial. The IRO hearing must be held within seven days of the accused's confinement. The IRO will make a determination based upon materials presented to him by the command and the accused at an informal proceeding. If he determines pretrial confinement is not warranted, there is no administrative appeal from his decision. Details of the IRO system are outlined in R.C.M. 305(e)-(i) and JAGMAN, § 0127.

c. ***Arrest***. Arrest is a ***moral*** restraint of an accused involving no physical measures whatever. The person in the status of arrest is morally bound to remain within certain narrowly defined limits (such as a room, quarters, or building). The accused, while in arrest, cannot be required to perform military duties (such as commanding or supervising personnel, serving as guard, or bearing arms); he may, however, be required to take part in routine training and duties and to perform normal housekeeping duties. Authority to order an accused into the status of arrest is governed by the same principles applicable to confinement; however, the decision to place the accused in the status of arrest is not reviewed by an IRO.

d. ***Restriction***. Restriction is the moral restraint of an accused within limits which are broader than arrest. Authority to order an accused into the status of restriction is governed by the same principles applicable to confinement. The decision to restrict is not reviewed by an IRO.

e. ***Conditions on liberty***. This form of pretrial restraint was first authorized by the 1984 revision of the *Manual for Courts-Martial*. *See* R.C.M. 304(a). It is imposed by orders directing the accused to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of pretrial restraint or separately. Examples are: orders to report periodically to a designated officer; not to go to a specific place (such as the scene of the alleged crime); or not to associate with specific persons (such as the alleged victim). Conditions on liberty must be sufficiently flexible to permit pretrial preparation. Authority to impose conditions on liberty as a form of partial restraint is governed by the same principles applicable to confinement. The decision to impose conditions on liberty is not reviewed by an IRO.

2. ***Basis for restraint***. Pretrial restraint is the subject of five separate articles of the UCMJ, more than any other single subject covered in the Code. This fact is a significant indication of the gravity of congressional concern over the use of pretrial restraint and an indication of the gravity that should attend any decision to impose pretrial restraint. Each case must be viewed on its own merits by the restraining authority. Blanket policies of restraining all long absence offenders, all thieves, etc. are patently unlawful. Before ***any*** form of pretrial restraint may be imposed, ***probable cause*** is required (i.e., the person imposing the restraint must have reasonable grounds to believe: (1) that an offense triable by court-martial has been committed; (2) that the person to be restrained committed it; and (3) that the restraint ordered is required by the circumstances). Personal knowledge is not necessary. Restraint may be imposed based upon statements by witnesses.

a. ***Necessity for pretrial confinement***. In order to impose pretrial confinement lawfully, the commander imposing the confinement must have reasonable grounds to believe that it is necessary because it is foreseeable that either: (1) the prisoner will not appear at a trial, pretrial hearing, or investigation; or (2) the prisoner will engage in serious criminal misconduct (including intimidation of witnesses, seriously injuring others, or other offenses that pose a serious threat to the safety of the community or effectiveness of the command). In addition, the commander must believe upon probable cause that less severe forms of restraint are inadequate. These are the ***only*** grounds on which pretrial confinement may be imposed. It is illegal to confine an accused, for example, solely because there is probable cause to believe he has committed a serious offense or because he is a discipline problem (a pain in the neck).

In determining whether pretrial confinement is necessary to ensure the presence of the accused, the imposing individual should consider all the facts and circumstances relating to the case. These factors would include the prior disciplinary history

of the accused (particularly relevant would be prior unauthorized absence offenses and whether the accused had been released prior to disciplinary action on previous cases); his reputation, character, and mental condition; his family ties and relationships (whether he has a family and whether his family members are in the area); any economic connection to the area (such as home ownership); the presence or absence of responsible members of the military or of the civilian community who can vouch for his reliability; the nature of the offense charged; the apparent probability of conviction; the likely sentence; any statements made by the accused; and any other factors indicating the likelihood of his remaining for his court-martial or his fleeing prior to court-martial.

b. ***Necessity for restriction.*** The same grounds that would justify pretrial confinement or arrest will justify pretrial restriction.

3. ***Severity of restraint.*** Article 13, UCMJ, indicates that pretrial restraint shall not be more rigorous than the circumstances require to ensure the accused's presence. Implicit in this principle is the notion that the accused is not to be punished prior to trial, only detained to ensure his presence at trial. In no event will a pretrial confinee be required to perform punitive labor or wear a uniform other than that prescribed for unsentenced prisoners. Military courts have included other criteria for determining whether the accused is compelled to work with sentenced prisoners: whether duty hours or work schedules are the same as those for sentenced prisoners; whether the type of work assigned is the same as that for sentenced prisoners; whether the facility policy is to have all prisoners subject to the same set of instructions; and any other factors indicating that pretrial confinees are treated as sentenced prisoners. Though these principles apply specifically to confinement, they are also relevant to other forms of pretrial detention. Superior competent authority can impose further restrictions on the use of pretrial restraint. Article 10, UCMJ, states that, when an accused is ordered into arrest or confinement prior to trial, ***immediate*** steps will be taken to inform him of the specific offense precipitating the restraint and to either try or release him. Article 33, UCMJ, further provides that, when an accused is held in confinement or arrest for trial by general court-martial, his commanding officer will, within eight days of the imposition of that restraint, forward to the general court-martial convening authority the charges and pretrial investigation (Art. 32, UCMJ) or, if that is not practicable, a detailed written explanation of the reasons for delay will be forwarded within the eight-day period.

4. ***Minor offenses and pretrial restraint.*** When an accused is charged with a minor offense (i.e., one normally tried by summary court-martial or one which authorizes a maximum penalty of less than confinement for one year or dishonorable discharge), he ordinarily shall not be placed into confinement. Art. 10, UCMJ. Since only minor offenses may be disposed of at NJP, confinement normally is not authorized. Arrest would be covered by the same general prohibitions. The 1995 MCM makes no provision for premast restraint.

5. ***Relief from pretrial restraint.*** The special court-martial convening authority, through his legal officer, is the best check of the pretrial restraint process. By taking direct command action to correct errors of law or judgment, a convening authority can save much

difficulty at trial and ensure appropriate use of pretrial restraint as indicated by Congress. In this connection, the convening authority should not await application for relief by the accused, but should initiate corrective action where appropriate. There are other alternatives for relief available to an accused. He may request mast to superior authority; he may petition for relief under Art. 138, UCMJ; he may request the initial review officer to reconsider his decision; or he could petition the Navy-Marine Corps Court of Criminal Appeal or the Court of Appeals for the Armed Forces for relief. If an accused has been restrained illegally, he is, at a minimum, entitled to administrative credit against any confinement adjudged by a court-martial. This administrative credit would be computed at the rate of at least one day of credit for each day of ***illegal*** confinement served. Note also that the accused will receive administrative credit at the rate of one day of credit for each day of ***legal*** pretrial confinement, in accordance with Federal civilian sentence-computation procedures that have been specifically adopted by the Department of Defense. *See United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Although it may only involve psychological relief to the accused, it is possible for the person ordering illegal pretrial confinement to be prosecuted under Art. 97, UCMJ (maximum sentence is dismissal or dishonorable discharge and three years confinement).

E. ***Speedy trial problems.*** The accused has both a constitutional and a statutory right to a speedy trial. The government is under an obligation to proceed to trial with all reasonable speed and, in cases where an accused has been subject to unreasonable or oppressive delay, he is entitled to ***dismissal of charges***. In addition to this general rule, R.C.M. 707 imposes on the government the specific obligation to bring the accused to trial within 120 days of the commencement of the case (*see* para. 2, below) or face dismissal of the charges. Since the essence of a denial of speedy trial is delay, an analysis of the issue must begin with the period of time for which the government is responsible.

The government faces a tougher "speedy trial" burden if the accused is in pre-trial confinement. Under *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993), failure by the government to exercise reasonable diligence in bringing a case to trial in a timely fashion amounts to denial of the accused's right to a speedy trial. If this occurs, the only available remedy is dismissal of the charge(s) with prejudice. Because of the special speedy trial considerations following confinement of an accused, the command should notify trial counsel ***immediately*** upon placing a member in pretrial confinement.

1. ***Raising the issue*** The issue of denial of speedy trial is raised at trial by the accused by a motion to dismiss charges. In support of this motion, the accused need only show that the trial has been delayed. Once the issue is raised, the burden is upon the government to show by a preponderance of evidence that the delay was not unreasonable (i.e., that the government proceeded to trial with reasonable diligence) or that the accused was not harmed (prejudiced) by the delay.

2. ***Commencement of accountability*** The period of time for which the government must account begins either upon the imposition of any form of pretrial restraint

under R.C.M. 304, other than conditions on liberty, or when the charges are preferred, 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 will commence the government's accountability under R.C.M. 707. Each additional offense committed after an accountable period begins starts a new accountable period for that particular offense. Thus, in any case of multiple offenses, an accused could suffer a denial of speedy trial as to some offenses, but not as to others. Each offense, therefore, has its own period of accountability.

3. ***Termination of accountability.*** The period of accountability, once begun, generally does not terminate until trial commences (i.e., a plea of guilty is entered or presentation to the fact-finder of evidence on the merits begins). If charges are dismissed, if a mistrial is granted, or if the accused is released from pretrial restraint for a significant period when no charges are pending, the 120-day period begins to run only from the date on which notification of charges or restraint are reinstituted.

4. ***Excludable periods.*** R.C.M. 707(c) states that all periods of time covered by stays issued by appellate courts and all other pretrial delays approved by a military judge or the convening authority shall be excluded when determining whether the 120-day rule has been satisfied. Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority. After referral, such requests for pretrial delay will be submitted to the military judge for resolution. Decisions on whether to exclude delay should generally be made contemporaneously with the event causing the need for delay, but this is not required in all cases. See *United States v. Thompson*, 46 M.J. 472 (C.A.A.F. 1997) Periods of unauthorized absence will be excluded from the speedy trial clock. See *United States v. Dies*, 45 M.J. 376 (C.A.A.F. 1996).

– ***Reasons to grant delay.*** The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge. This decision should be based on the facts and circumstances then and there existing. Reasons to grant delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the Reserve Component to active duty for disciplinary action; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or time for other good cause. Pretrial delays should not be granted ex parte and, when practicable, the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing.

5. ***Remedy.*** A failure to comply with the right to a speedy trial will result in dismissal of the affected charges. This dismissal will be either with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed ***with prejudice*** where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of

the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

6. ***Recapitulation*** The strictures relating to speedy trial are such that commanders must be ever mindful of them to avoid untoward dismissal of criminal cases. In practice, speedy trial should be viewed as a limitation on the use of pretrial restraint as much as a limitation on time of trial. The law does not demand unusual action in a case until pretrial restraint is imposed or charges preferred. At that point, the government must proceed with all reasonable speed, particularly when the accused is in pretrial confinement. Thus, the commander / convening authority should ensure that pretrial restraint is utilized only when necessary, as opposed to convenient or desirable. Difficulties in obtaining service records or other documents held by department level offices will have to be resolved by bringing to bear as much command pressure as possible. Therefore, regardless of the level of command responsible in an administrative sense for delay, the convening authority must assume total responsibility once pretrial restraint is involved or charges preferred.

F. ***Pretrial agreements*** A pretrial agreement is an agreement between the accused and the convening authority whereby each agrees to take or refrain from taking certain action regarding the trial by court-martial. R.C.M. 705 and JAGMAN, § 0137, detail procedures for negotiating pretrial agreements and define the rules pertaining to them. Appendix A-1-h of the *JAG Manual* contains suggested forms for the finalized agreement, but these forms will require careful tailoring in all cases as the agreement must be clear and precise and should cover all contingencies.

1. ***Negotiations*** Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. After negotiations, the defense may elect to submit a proposed pretrial agreement to the convening authority. This agreement shall be in writing and will normally be submitted through the trial counsel and legal officer. All terms and conditions should be precisely spelled out in the agreement itself, as oral understandings, or unwritten gentlemen's agreements will not be enforced. Whenever a pretrial agreement offer is submitted, it ***must*** be forwarded to the convening authority for his personal consideration and may not be blocked by the trial counsel, legal officer, or staff judge advocate. To effect the pretrial agreement, the convening authority personally signs the document or delegates the authority to sign to another person such as the staff judge advocate, legal officer, or trial counsel. The convening authority may reject the offer by signing the rejection form, after which counter-proposals by the convening authority are permitted. The convening authority has sole discretion in deciding whether to accept or reject the pretrial agreement proposed.

2. ***Permissible terms and conditions*** R.C.M. 705 outlines certain permissible and prohibited terms and conditions of pretrial agreements. It must be noted that these are not

totally inclusive, as each term is subject to the scrutiny of the military judge who may disapprove the term if it appears that the accused did not freely and voluntarily agree to it, or if it deprives the accused of a substantial right otherwise guaranteed to him.

a. ***Concessions by the convening authority.*** The convening authority may agree:

(1) To refer the charges to a certain type of court-martial;

(2) to refer a capital case as noncapital;

(3) to withdraw one or more charges or specifications from the court-martial;

(4) to have the trial counsel present no evidence as to one or more specifications or portions thereof; and

(5) to take certain specified action on the sentence adjudged by the court-martial.

b. ***Concessions by the accused.*** The accused may agree:

(1) To plead guilty or to enter a confessional stipulation as to one or more charges or specifications (including lesser included offenses); and

(2) to fulfill other terms and conditions which are not expressly prohibited under R.C.M. 705. The following, for example, would be permitted:

(a) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or confessional stipulation will be entered;

(b) a promise to testify truthfully as a witness in a trial of another person;

(c) a promise to provide restitution;

(d) a promise to conform the accused's conduct to certain conditions of probation before action of the convening authority as well as during any period of suspension of the sentence (subject to the requirements concerning vacations of suspensions found in R.C.M. 1109); and

(e) a promise to waive procedural requirements (such as the Article 32 investigation, the right to trial by members, the right to request trial by military judge alone, the right to request an administrative separation board, and the opportunity to obtain the personal appearance of witnesses at sentencing proceedings).

3. ***Prohibited terms and conditions*** R.C.M. 705(c)(1) provides that any term or condition to which the accused did not freely and voluntarily agree will not be enforced. Additionally, any term or condition that deprives the accused of certain substantial rights will

not be enforced. Among these rights are: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; and the right to complete and effective exercise of post-trial and appellate rights. Since ambiguous, vague, or arguably improper provisions in pretrial agreements will generally be interpreted strictly against the government, it is suggested that, before signing any pretrial agreement, the convening authority consult with the trial counsel so that his understanding of the agreement is placed in the proper legal form and terminology. The convening authority should always consult with the trial counsel directly or through his own staff judge advocate if one is assigned.

4. ***Pitfalls***. The offer to plead guilty cannot be accepted if there is reason to believe that there is insufficient evidence to convict the accused of the offense concerned. Also, unreasonably multiplying offenses from essentially a single offense to coerce a pretrial agreement is improper. Also unlawful is the practice of pleading a baseless major offense on the charge sheet in order to induce a pretrial agreement on a lesser included offense. The agreed sentence aspect of the agreement must be clear and precise and it must provide for all contingencies. In this connection, it is essential to obtain the trial counsel's advice before drafting or approving any pretrial agreement. Such agreements are technically complex, and the *JAG Manual* format does not cover all situations.

5. ***Binding effect of the agreement***. In general, the accused may always withdraw from a pretrial agreement. The convening authority may withdraw at any time before the accused begins performance of promises contained in the agreement. Additionally, the agreement will be void in the following circumstances:

a. When the accused fails to fulfill any material promise or condition in the agreement (e.g., fails to plead guilty, withdraws a guilty plea, renders a guilty plea improvident, etc.);

b. when inquiry by the military judge discloses a disagreement as to a material term in the agreement; or

c. when findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

6. ***Judicial supervision***. The military judge must inquire into the existence and the provisions of the pretrial agreement to be sure the accused acted voluntarily and knowingly in executing the agreement. Normally, a misunderstanding of the terms of an agreement will cause rejection of guilty pleas and the entry of not guilty pleas. If the intent of the parties at the time the agreement was executed can be determined, that interpretation will control the agreement.

In spite of the effect of the pretrial agreement on the trial, the court members may not be informed of any negotiations, of any existing agreement, or of any agreement

made but subsequently rejected. If trial is by military judge alone, he may not examine the sentencing provisions prior to announcing the sentence in the case.

7. ***Major Federal offenses.*** In some cases, the misconduct that subjects the military member to trial by court-martial also violates other Federal laws and subjects the member to prosecution by civilian authorities in the Federal courts. In these cases, decisions must be made as to which forum the case should go and as to which agency will conduct the investigation. In order to ensure that actions by military convening authorities do not preclude appropriate action by Federal civilian authorities in such cases, JAGMAN, § 0137b, requires that convening authorities shall ensure that appropriate consultation under the Memorandum of Understanding between the Departments of Defense and Justice (MCM, app. 3) has taken place prior to any trial by court-martial or ***approval of any pretrial agreement*** in cases likely to be prosecuted in the Federal courts.

CONFINEMENT ORDERORDER
NAVPERS 1640/4 (Rev. 7-82) S/N 0106-LF-016-4023

NAME (*Last, first, middle*)	SSN	RATE/GRADE	BRANCH SER
TYPIST, David L.	222-22-2222	YN3/E-4	U.S. Navy
SHIP OR ORGANIZATION		DATE	
USS PUGET SOUND (AD 38)		2 January CY	

STATUS

DETAINED *(Alleged violation of UCMJ Articles)*

Viol. UCMJ, Art. 86 - Unauthorized absence from unit (fm 23OCTCY (-1) to 2JANCY).

"I have been informed that I am being confined for the above alleged offense(s)"

2 JAN CY _____ */s/ David L. Typist*
Date *Signature of accused*

2 JAN CY _____ */s/ I. O. Ewe*
DateSignature of witness

CONFINED AS RESULT OF

☐ VACATED SUSPENSION
☐ NJP ☐ SCM ☐ SPCM ☐ GCM

CHARGES AND SPECIFICATIONS CONVICTED OF

SENTENCE ADJUDGED:	DATE:

IF SENTENCE DEFERRED, DATE DEFERMENT TERMINATED:

SENTENCE APPROVED	APPROVED BY	DATE
	CA	
	SA	
	NCMR	
	COMA	
	OTHER	

PRE-TRIAL CONFINEMENT NECESSARY

X TO ENSURE THE PRESENCE OF THE ACCUSED AT THE TRIAL ☐ BECAUSE OF THE SERIOUSNESS OF THE OFFENSE CHARGED

CONFINEMENT DIRECTED AT		TYPED NAME / RANK / TITLE
		ROBERT R. ROBERTS, CAPT, USN, CO, USS PUGET SOUND (AD 38)
HOUR	DATE	
1400	2 January CY	SIGNATURE */s/ Robert R. Roberts*

MEDICAL CERTIFICATE

The above named individual was examined by me at _____ *on* _____ *and found to be*
(HOUR) (DATE)

☐ *fit* ☐ *unfit for confinement. The following irregularities were noted during the examination: (If none, so state)*

☐ *I certify that from an examination of* _____
Name *Rate* *SSN*

and of the place where he/she is to be confined. I am of the opinion that the execution of the foregoing sentence to confinement on (bread and water) (diminished rations) will/will not produce serious injury to his/her health.

TYPED NAME / RANK / TITLE	SIGNATURE

RECEIPT FOR PRISONER

The above named individual was received at _____
(NAME OF BRIG / CORRECTIONAL FACILITY)

at _____ *on* _____
(HOUR) (DATE)

TYPED NAME / RANK / TITLE	SIGNATURE

* U.S. GPO: 1987-541-902/60063

Appendix I(1)

CONFINEMENT ORDER
NAVPERS 1640/4 (Rev. 7-82) S/N 0106-LF-016-4023

NAME (*Last, first, middle*)	SSN	RATE/GRADE	BRANCH SER
BYERS, Thomas G.	987-65-4321	BT3/E-4	U.S. Navy
SHIP OR ORGANIZATION		DATE	
USS IOWA (BB 61)		28 February CY	

STATUS

DETAINED *(Alleged violation of UCMJ Articles)*

"I have been informed that I am being confined for the above alleged offense(s)"

Date *Signature of accused*

Date *Signature of witness*

CONFINED AS RESULT OF

☐ VACATED SUSPENSION

☐ NJP ☐ SCMX SPCM ☐ GCM

CHARGES AND SPECIFICATIONS CONVICTED OF

VIOL ART. 128, UCMJ
VIOL ART. 134, UCMJ

SENTENCE ADJUDGED:	DATE:
CONF x 2 mos.	28 Feb CY

IF SENTENCE DEFERRED, DATE DEFERMENT TERMINATED:

SENTENCE APPROVED	APPROVED BY	DATE
	CA	
	SA	
	NCMR	
	COMA	
	OTHER	

PRE-TRIAL CONFINEMENT NECESSARY

☐ TO ENSURE THE PRESENCE OF THE ACCUSED AT THE TRIAL ☐ BECAUSE OF THE SERIOUSNESS OF THE OFFENSE CHARGED

CONFINEMENT DIRECTED AT		TYPED NAME / RANK / TITLE
		C. MEMMESHEIMER, LT, JAGC USN, BYDIRCO USS IOWA (BB61)
HOUR	DATE	
1600	28 February CY	SIGNATURE */s/ C. Memmesheimer*

MEDICAL CERTIFICATE

The above named individual was examined by me at _____ *on* _____ *and found to be*
(HOUR) (DATE)

☐ *fit* ☐ *unfit for confinement. The following irregularities were noted during the examination: (If none, so state)*

☐ *I certify that from an examination of* _____
Name *Rate* *SSN*
and of the place where he/she is to be confined. I am of the opinion that the execution of the foregoing sentence to confinement on (bread and water) (diminished rations) will/will not produce serious injury to his/her health.

TYPED NAME / RANK / TITLE	SIGNATURE

RECEIPT FOR PRISONER

The above named individual was received at _____
(NAME OF BRIG / CORRECTIONAL FACILITY)
at _____ *on* _____
(HOUR) (DATE)

TYPED NAME / RANK / TITLE	SIGNATURE

* U.S. GPO: 1987-541-902/60063

Appendix I(2)

INITIAL REVIEW OFFICER HEARING

(R.C.M. 305, MCM; JAGMAN § 0127)

I. ***Who must appoint?***

A. All officers exercising general court-martial jurisdiction over a shore activity having a place of confinement.

B. All area coordinators exercising authority over a shore activity who have made arrangements with civil authorities for the confinement of military personnel in civilian facilities.

II. ***Applicability of pretrial confinement review procedures***

A. These rules apply to members of the naval service confined ashore in naval places of confinement or in civilian confinement pursuant to an authorized agreement, including individuals in naval places of confinement awaiting transportation to their parent commands (unless confined for less than 72 hours in any particular facility).

B. Members of the naval service confined afloat shall be transferred as soon as practicable to the nearest shore command having an approved confinement facility. The required report must be forwarded to the initial review officer (IRO) immediately upon this transfer.

C. The confinement of members of the naval service in naval places of confinement in connection with foreign criminal proceedings shall not be reviewed under the terms of this program.

D. The review of the pretrial confinement of members of the naval service confined in places of confinement under the jurisdiction of other armed forces shall be governed by the IRO regulations of the armed force that has jurisdiction over the place of confinement.

E. The review of the pretrial confinement of members of the Army, Air Force, or Coast Guard confined in naval places of confinement shall be in accordance with the IRO regulations of the member's own armed force, but, if no action is taken within 72 hours by an IRO of that armed force, then the review shall be promptly conducted by a naval service IRO as if the confinee were a member of the naval service.

Appendix II(1)

III. ***Qualifications of the IRO:***

A. Shall be O-4 or above;

B. need not be a judge advocate;

C. not connected with law enforcement;

D. not connected with the prosecution or defense function;

E. not a member of the Navy-Marine Corps Trial Judiciary;

F. otherwise eligible inactive duty Reserve officers may be appointed when it is impracticable to appoint an active duty IRO; and

G. although appointed by a GCM authority, the IRO is not subject to the direction or control of the officer who appointed him / her.

IV. ***Advice to the accused upon confinement.*** Each person confined shall be promptly informed of:

A. The nature of the offense(s) for which held;

B. the right to remain silent and that any statement made by the person may be used against the person;

C. the right to retain civilian counsel at his own expense and the right to request assignment of military counsel; and

D. the procedures by which pretrial confinement will be reviewed.

V. ***Information to be furnished by officer ordering pretrial confinement*** (in a written memorandum submitted to the IRO):

A. Hour, date and place of confinement;

B. offense(s) charged and general circumstances known (specifically, information showing that an offense triable by court-martial was committed and that this accused committed it; may include hearsay and may incorporate by reference other documents—e.g., witness statements, investigative reports, or official records);

Appendix II(2)

C. previous disciplinary record;

D. any extenuating or mitigating circumstances known; and

E. specific reason(s) why continued pretrial confinement is considered necessary (specifically, information showing that the accused either is a flight risk or will engage in serious criminal misconduct and that less severe forms of restraint are inadequate).

VI. ***The informal hearing*** (within 7 days of the imposition of pretrial confinement):

A. Servicemember shall be present;

B. servicemember shall be advised pursuant to Article 31, UCMJ;

C. servicemember shall be advised of the purpose of the hearing and of the right to present evidence concerning the continuation of confinement;

D. if requested by the accused, military counsel shall be provided and he shall be present and may speak on the accused's behalf; and

E. except for the rules regarding privileges, the Military Rules of Evidence do not apply, and there is no right to confront and cross-examine witnesses during the nonadversarial proceeding.

VII. ***IRO shall determine:***

A. Whether there is probable cause to believe the confinee committed the offense(s);

B. whether there is apparent court-martial jurisdiction over the confinee for the offense(s) involved;

C. whether the confinee should be continued in pretrial confinement; and

D. whether the time limit for completion of the initial review should be extended to 10 days after the imposition of pretrial confinement.

Appendix II(3)

VIII. ***The IRO's decision***

A. Continued confinement

1. In writing

2. Statement of reasons in support of decision

3. Copies to:

a. Officer ordering confinement

b. Accused

c. Commanding officer of confinement facility

4. Confinee's CO may order release notwithstanding decision of IRO to continue confinement.

5. A rehearing may be held by the IRO on own motion or on petition by confinee prior to an Article 39a session. Once a military judge has held an Article 39a session in the confinee's (accused's) case, the IRO is divested of authority to order the confinee's release.

B. Release from confinement

1. In writing

2. To commanding officer of the confinee

3. Commanding officer of the confinee must order release of the servicemember immediately (copy of release order to GCM authority)

4. Commanding officer may not reconfine unless:

a. Discovery of a NEW OFFENSE which may authorize pretrial confinement; or

b. discovery of NEW EVIDENCE which may indicate that the servicemember will flee to avoid trial; or

c. discovery of any other evidence establishing both a lawful basis and a need for pretrial confinement.

5. Commanding officer may impose another form of pretrial restraint if all legal requirements are met. IRO may have recommended this if release was ordered, but not necessarily.

6. The decision of the IRO is final in all cases. The commanding officer MAY NOT appeal the decision.

DEPARTMENT OF THE NAVY
USS Puget Sound (AD 38)
FPO New York 09501

1640
Ser 00/
3 Jan CY

From: Commanding Officer, USS Puget Sound (AD 38)
To: Initial Review Officer, Naval Station, Rota, Spain

Subj: PRETRIAL CONFINEMENT ICO YN3 DAVID L. TYPIST, USN, 222-22-2222

Ref: (a) R.C.M. 305, MCM
(b) SECNAVINST 1640.10

1. In accordance with references (a) and (b), the following information is provided for the purpose of conducting a hearing into the pretrial confinement of YN3 David L. Typist, USN, 222-22-2222.

a. ***Hour, date, and place of pretrial confinement***:

1400, 2 January 20CY, Navy Brig, Naval Station, Rota

b. ***Offenses charged***:

Violation of UCMJ, Article 86—Unauthorized absence from USS Puget Sound (AD 38) from 23 October 20CY(-1) until apprehended on 2 January 20CY.

c. ***General circumstances***:

(1) Petty Officer Typist's absence commenced over liberty which expired on board at 0700, 23 October 20CY(-1). The circumstances, as related by Petty Officer Typist to his Division Officer, are that YN3 Typist was dissatisfied working in the Admin Office and did not like his immediate supervisor and felt "picked on." He also relates that, at the time of his absence, he was working "undercover" with the Naval Investigative Service and the ship's Master-at-Arms force in identifying drug abusers on board the Naval Station. He states that a fellow petty officer (whom he identified as a drug abuser) found out that YN3 Typist was the one responsible for a "bust" in which this petty officer had threatened YN3 Typist with bodily harm. Apparently becoming scared, Petty Officer Typist fled.

Appendix III-a(1)

Subj: PRETRIAL CONFINEMENT ICO YN3 DAVID L. TYPIST, USN, 222-22-2222

(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.

(3) Petty Officer Typist was apprehended by Shore Patrol at 1300, 2 January 20CY, 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 20CY(-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 20CY(-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 20CY(-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 musters). Charges have been preferred to trial by special court-martial, and no unusual delays are expected in this case. Given the nature of the offense charged and the sentence which could be imposed by court-martial for this offense, it is felt YN3 Typist would again flee to avoid prosecution.

//S//
ROBERT R. ROBERTS

Appendix III-a(2)

4 Jan CY

From: Initial Review Officer, Naval Station, Rota, Spain
To: Commanding Officer, USS Puget Sound (AD 38)

Subj: PRETRIAL CONFINEMENT ICO YN3 DAVID L. TYPIST, USN, 222-22-2222

Ref: (a) R.C.M. 305, MCM
(b) SECNAVINST 1640.10
(c) CO, USS Puget Sound (AD 38) ltr 1640 Ser 00/ dtd 3 Jan CY

1. In accordance with the provisions of references (a) and (b), a hearing concerning the pretrial confinement of YN3 Typist was conducted on 4 January 20CY. All information available at the time of the hearing, in addition to the comments and recommendations set forth in reference (c), have been reviewed.

2. At the hearing, YN3 Typist was afforded all rights set forth in reference (a). Petty Officer Typist was represented by LT P. T. Pertee, JAGC, USNR, Naval Legal Service Office Detachment, Rota, Spain, who was detailed pursuant to the confinee's request for military counsel. Lieutenant I. O. Ewe, USN, Legal Officer, USS Puget Sound (AD 38) was present, acting in the capacity of command representative.

3. Having waived his right to remain silent, YN3 Typist was willing to discuss his absence with me. His reasons for going UA, as stated in reference (c), remain basically the same. Petty Officer Typist stands firm on his story concerning his involvement with the Naval Criminal Investigative Service. However, upon advisement of his counsel, YN3 Typist terminated the questioning. Lieutenant Ewe, command representative, had nothing further to offer except to reconfirm the command's position that continued confinement is warranted.

4. I find there is probable cause to believe the confinee committed the offense, and that court-martial jurisdiction does exist over the confinee and the offense charged. I find no cause to extend the time limit for completion of this review.

5. Subject to the foregoing, I find continued pretrial confinement appropriate in this case. The confinee should be brought to trial as soon hereafter as practicable, barring any unforeseen delays.

6. Pursuant to paragraphs (i)(7) and (j) of reference (a), reconsideration of this decision may be appropriate at a later date.

//S//
I. C. LIGHT
CDR, USN

Appendix III-b

CHAPTER XIII

PRETRIAL ASPECTS OF GENERAL COURTS-MARTIAL

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CHAPTER XIII

PRETRIAL ASPECTS OF GENERAL COURTS-MARTIAL

A. ***Introduction.*** The general court-martial is the highest level of court-martial in the military justice system. Such a court-martial may impose the maximum penalties provided by law for any offense. The general court-martial is composed of a minimum of five court members, a military judge, and lawyer counsel for the government and the accused. At the accused's request, the court can be composed of a military judge alone and counsel. The general court-martial is created by the order of a flag or general officer in command in much the same manner as the special court-martial is created by subordinate commanders. Before trial by general court-martial may lawfully occur, a formal investigation of the alleged offenses must be conducted and a report forwarded to the general court-martial convening authority. This pretrial investigation (often referred to as an Article 32 investigation) is normally convened by a summary court-martial convening authority. This chapter will discuss the legal requisites of the pretrial investigation.

B. ***Nature of the pretrial investigation***

1. ***Scope.*** The formal pretrial investigation (Art. 32, UCMJ) is the military equivalent of the grand jury proceeding in civilian criminal procedure. The purpose of this investigation is to inquire formally into the truth of allegations contained in the 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 she must defend herself. Basically, this investigation is a protection for the accused. It is a shield which protects her from trial on baseless but infamous charges, the very existence of which are detrimental to the accused's reputation and respectability. The investigation is also a sword for the prosecutor who may test the case for its strength in such a proceeding and seek its dismissal if too frail or if groundless. Such an investigation can be a proving ground for witnesses who, for the first time, are subject to cross-examination. By affording the accused and the prosecutor the opportunity to protect their own interests, the government usually can be certain that only the truly serious and meritorious cases are referred to trial by general court-martial.

2. ***Authority to direct.*** An Article 32, UCMJ, investigation may be directed by one authorized by law to convene summary courts-martial or some higher level of court-martial. Article 24, UCMJ, and JAGMAN, § 0120, indicate that commanding officers of naval vessels, bases, stations, units, or activities and commanding officers of Marine Corps battalions, regiments, aircraft squadrons, and similar-sized or higher-level commands have summary court-martial convening authority and, by virtue of R.C.M. 405(c), the authority to

direct an Article 32, UCMJ, investigation. As is true of all other forms of convening authority, the power to order the Article 32, UCMJ, investigation [hereinafter pretrial investigation] vests in the ***office*** of the commander. *See* Chapter X, Section B.1., ***Authority to convene***.

3. ***Mechanics of directing***. When the summary court-martial or higher convening authority receives charges against an accused that are serious enough to warrant trial by general court-martial, the convening authority directs a pretrial investigation. This is done by a written order of the convening authority that assigns personnel to participate in the proceedings. At the time the investigation is ordered, the charge sheet will have been completed up to, but not including, the referral block on page 2. Unlike courts-martial, pretrial investigations are directed as required, and standing orders for such proceedings are inappropriate. Also unlike courts-martial, there is no separate referral of a case to a pretrial investigation since the order creating the investigation also amounts to a referral of the case to the pretrial investigation. The original appointing order is forwarded to the assigned investigating officer along with the charge sheet, allied papers, and a blank investigating officer's report form (DD Form 457; *see also* MCM, app. 5, and app. II and III of this chapter).

4. ***Investigating officer***. The pretrial investigation is a formal one-officer investigation into alleged criminal misconduct. The investigating officer must be a commissioned officer who should be a major / lieutenant commander or above or an officer with legal training. R.C.M. 405(d)(1). Although it is not required that a judge advocate be the investigating officer, the advantages of appointing a judge advocate to act as the investigating officer are substantial, especially in view of the increasingly complex nature of the military judicial process. Neither an accuser, prospective military judge, nor prospective trial or defense counsel for the same case may act as investigating officer. Further, the investigating officer must be impartial and cannot previously have had a role in inquiring into the offenses involved (e.g., as provost marshal, public affairs officer, etc.). Mere prior knowledge of the facts of the case will not, alone, disqualify a prospective investigating officer. If such knowledge imparts a bias to the investigating officer, then she obviously is not the impartial investigator required by law. The law contemplates an investigating officer who is fair, impartial, mature, and with a judicial temperament. It is the responsibility of the convening authority to see that such an officer is appointed to pretrial investigations.

Case law has reemphasized that the duty of the investigator is to perform a quasi-judicial function. This means that she must be neutral, detached, and independent in conducting the investigation. The U.S. Court of Appeals for the Armed Forces has specifically condemned the practice of the pretrial investigating officer engaging in private conversations about the case with the military lawyer who the investigator knew would ultimately prosecute the case. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977). This case demonstrates the importance of selecting an individual who is capable of conducting the investigation without excessive, and perhaps impermissible, assistance from other advisors.

The investigating officer may seek legal advice concerning the investigating officer's responsibilities. If it is necessary for a nonlawyer investigating officer to obtain

advice regarding the investigation, that advice should not be sought from one who is likely to prosecute the case. (R.C.M. 405 (d)(1)).

5. ***Counsel for the government.*** While the pretrial investigation need not be an adversarial proceeding, current practice favors having the convening authority detail a lawyer to represent the interests of the government, especially where the investigating officer is not a lawyer. The assignment of a counsel for the government does not lessen the obligation of the investigating officer to investigate the alleged offenses thoroughly and impartially. As a practical matter, however, the presence of lawyers representing the government and the accused make the pretrial investigation an adversarial proceeding. Counsel for the government functions much as a prosecutor does at trial and presents evidence supporting the allegations contained on the charge sheet.

6. ***Defense counsel.*** The accused's rights to counsel are as extensive at the pretrial investigation as at the general court-martial. More specifically, an accused is entitled to be represented by civilian counsel, if provided by the accused at no expense to the government, and by a detailed military lawyer, certified in accordance with Article 27(b), UCMJ, or by a military lawyer of his own choice at no cost to the accused if such counsel is reasonably available. *See* Chapter XI, regarding an accused's right to defense counsel. ***Detailed*** defense counsel at a pretrial investigation must be a certified (Art. 27(b), UCMJ) lawyer and should be designated by the appointing order. ***Individual*** counsel, military or civilian, is normally not detailed on the appointing order. An accused is not entitled to more than one military counsel in the same case.

7. ***Reporter.*** There is no requirement that a record of the pretrial investigation proceedings be made other than the completion of the investigating officer's report. Accordingly, a reporter need not be detailed. It is common practice, however, to assign a reporter to prepare a verbatim record of all proceedings. The purposes of such a record are to preserve the testimony of prospective trial witnesses in the event they should not be available to testify at trial and to accurately record conflicting factual testimony for use in determining the truth of the allegations in a complex case. When such a record is desired, the convening authority (or a subordinate) may detail a reporter, but such assignment is usually made orally and is not part of the appointing order.

8. ***Appointing order.*** The order directing a pretrial investigation may be drafted in any acceptable form so long as an investigation is ordered and an investigating officer and counsel are detailed. A suggested format appears in App. II of this chapter.

C. ***The hearing procedure***

1. ***Prehearing preparation.*** When the pretrial investigation officer (PTIO) receives the order of appointment, she should first study the charge sheet and allied papers to become thoroughly familiar with the case. The charge sheet should be reviewed for errors and any needed corrections should be noted. If counsel for the government has been appointed, the investigating officer should contact her to determine what additional information, if any, is available. The PTIO should then deliver a copy of the charge sheet to

the accused and his counsel. No attempt should be made to interrogate the accused at this time. Prospective witnesses should then be interviewed and items of physical or documentary evidence located and either obtained by the PTIO or properly preserved in order to protect the chain of custody or unique identifying features. Once the PTIO is satisfied that she has obtained all available relevant evidence, she should consult with accused, counsel, witnesses, and the legal officer of the convening authority to set up a specific hearing date. It is ***not*** the duty of the PTIO to "build a case" against the accused, but rather to impartially investigate the alleged offense with a view toward discovering the truth.

2. ***Witnesses***. All reasonably available witnesses who appear necessary for a thorough and impartial investigation are required to be called before the Article 32 investigation. Transportation and per diem expenses are provided for both military and civilian witnesses. *See* R.C.M. 405(g). Witnesses are "reasonably available," and therefore subject to production, when the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay and effect on military operations of obtaining the witness's appearance. R.C.M. 405(g)(1)(A). This balancing test means that the more important the expected testimony of the witness, the greater the difficulty, expense, delay, and effect on military operations must be to permit nonproduction. Similar considerations apply to the production of documentary and real evidence.

For both military and civilian witnesses, the PTIO makes the initial determination concerning availability. For military witnesses, the immediate commanding officer of the witness may overrule the PTIO's determination. The decision not to make a witness available is subject to review by the military judge at trial.

Civilian witnesses whose testimony is material must be invited to testify, although they cannot be subpoenaed or otherwise compelled to appear at the investigation. Thus, the PTIO should make a bona fide effort to have such civilian witnesses appear voluntarily, offering transportation expenses and a per diem allowance if necessary. R.C.M.405(g)(3).

3. ***Statements***. The PTIO has a number of alternatives to live testimony. When a witness is not reasonably available, even if the defense objects, the PTIO may consider that witness's ***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 by the accused, only sworn statements may be considered. Since objections to unsworn statements are generally made, every effort should be made to get sworn statements. All statements considered by the PTIO should be shown to the accused and counsel. The same procedure should be followed with respect to documentary and real evidence.

4. ***Testimony***. All testimony given at the pretrial investigation must be given under oath and is subject to cross-examination by the accused and counsel for the

government. The accused has the right to offer either sworn or unsworn testimony. If undue delay will not result, the statements of the witnesses who testified at the hearing should be obtained under oath. In this connection, the PTIO is authorized to administer oaths in connection with the performance of her duties. JAGMAN, § 0902a(2)(d).

5. ***Rules of evidence.*** The rules of evidence applicable to trial by court-martial do not strictly apply at the pretrial investigation, and the PTIO need not rule on objections raised by counsel except where the procedural requisites of the investigation itself are concerned. This normally means that counsels' objections are merely noted on the record. Care should be taken to insure that evidence relating to any search and seizure authorizations, Article 31 warnings, or similar legal issues is fully developed at the investigation. Since the rules of evidence do not strictly apply, cross-examination of witnesses may be very broad and searching and should not be unduly restricted. However, beyond rules of privileges, M.R.E. 412 ("Rape Shield") does apply to Article 32 investigations. This precludes unnecessary prying into the victim's past sexual history.

6. ***Hearing date.*** Once the prehearing preparation has been completed, the PTIO should convene the hearing. The pretrial investigation is a public hearing and should be held in a place suitable for a quasi-judicial proceeding. Accused, counsel, reporter (if one is used), and witnesses should be present. Witnesses must be examined one-by-one, and no witness should be permitted to hear another testify.

D. ***Posthearing procedures.*** After the hearing is completed, the investigating officer prepares her report pursuant to R.C.M. 405(j) and submits it to the commanding officer who directed the investigation. The commanding officer should consider the investigating officer's recommendation as to disposition, but she need not follow it. The commanding officer may dispose of the charges as she sees fit pursuant to R.C.M. 401. In Navy commands, if she deems a general court-martial appropriate, but lacks the authority to convene such a court-martial, she must forward the report to the area coordinator, absent direction to the contrary from the general court-martial convening authority in her chain of command, pursuant to JAGMAN, § 0128a(1). In Marine commands, the charges are forwarded to the general court-martial convening authority in the chain of command, pursuant to JAGMAN, § 0128b.

This is accomplished by means of an endorsement that includes the recommendations of the officer directing the pretrial investigation, the recommendations of the investigating officer, a detailed and explanatory chronology of events in the case, and any comments deemed appropriate. A sample endorsement can be found as the last appendix to this chapter. Endorsements should comment on the facts of the case, but should not include personal opinion of the endorsers.

If the commander who ordered the investigation is also a general court-martial convening authority, she may refer the case to trial by general court-martial if she believes the charges are warranted by the evidence and such disposition is appropriate.

Before a case is referred to a general court-martial, the convening authority's staff judge advocate (SJA) must review the case and prepare a written legal opinion on the sufficiency of the evidence and advisability of trial. This written legal opinion is referred to as the Article 34 pretrial advice.

The advice of the SJA shall include a written and signed statement which sets forth that person's:

1. Conclusion whether each specification on the charge sheet alleges an offense under the UCMJ;

2. conclusion whether each allegation is substantiated by the evidence indicated in the Article 32 report of investigation;

3. conclusion whether a court-martial would have jurisdiction over the accused and the offense(s); and

4. recommendation of the action to be taken by the convening authority.

The 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.

PROCEDURAL GUIDE FOR FORMAL PRETRIAL INVESTIGATIONS UNDER ARTICLE 32, UCMJ AND R.C.M. 405

The investigating officer should have the original appointing order from the convening authority, a copy of the charge sheet, and a DD Form 457 (Investigating Officer's Report). Samples of these documents appear at the end of this guide. Prior to the hearing, the investigating officer should review Article 32 of the Uniform Code of Military Justice ("UCMJ"), Rules for Courts-Martial ("R.C.M.") 405, and the article(s) of the UCMJ under which the accused is charged. The investigating officer will also find it useful to review Part IV of the Manual for Courts-Martial (1998 ed.) which describes the elements of the offense with which the accused is charged, in order to be familiar with what the Government must show.

It is often worthwhile for the investigating officer to meet with the government counsel and defense counsel together, to ascertain any unusual legal issues which might arise during the course of the hearing, as well as the names of the witnesses who are expected to testify, and to identify and mark the exhibits which Government and defense counsel intend to introduce.[1]

When the accused, Government counsel, defense counsel, the witnesses and the reporter are all assembled, the investigating officer proceeds as follows:

I.O.: "This hearing will come to order. This hearing is convened by order of (grade and name), Commanding Officer, (organization)[2], to inquire into the truth of the allegations set forth on the charge sheet dated (date of charge sheet) in the case of (grade and name of the accused), to inquire into the truth of the matters set forth on the charge sheet, examine the form of the charges, and secure information which will be helpful in determining the disposition of this case. Copies of the charge sheet and convening order have been furnished to the accused, defense counsel, government counsel and the reporter."

"Present at this hearing are myself (grade and name), the detailed investigating officer; the accused (grade and name); defense counsel (grade and name, if military; Mr. / Ms. and name, if civilian)[3]; counsel for the Government (grade and name)[4], and (grade and name of

1 Although the investigating officer may not demand that Government and defense counsel furnish the investigating officer with a list of their proposed exhibits prior to the hearing, the investigating officer may wish to request that they do so since marking the exhibits in advance saves considerable time at the hearing-especially if there are a large number of exhibits.

2 The identity and organization of the appointing authority may be ascertained from the appointing order.

3 Any assistant defense counsel should be similarly identified.

reporter), who has been detailed as the reporter for this hearing."

"I will now swear the detailed reporter."

The investigating officer and the reporter will rise, face each other, and raise their right arms in the manner customary for taking an oath. The format for the oath should be as follows:

I.O.: "Do you swear (or affirm) to faithfully perform the duties of reporter for this investigation, so help you God?"

REP: "I do."

If an interpreter has been detailed to the hearing, the investigating officer should also swear in that individual.

The investigating officer should now formally double-check the appointing order's recital of the qualifications of counsel. See UCMJ, Arts. 32(b) and 38. If it appears that the accused is not represented by counsel, or intends to act as his own counsel, the investigating officer should inquire further and, if necessary, give appropriate warnings to the accused. *See infra.*

I.O.: "(Grade and name of Defense counsel), do you confirm that you are qualified to serve as defense counsel in accordance with Article 27 (b) and have been previously sworn under Article 42 (a) of the Uniform Code of Military Justice?"

D.C.: "Yes, sir."

If the accused is represented by a civilian lawyer, the investigating officer should ascertain by inquiry whether such lawyer is a member of the bar of a Federal court or the highest court of a state, and that he / she is currently licensed to practice (i.e., not under suspension).

The investigating officer should next ascertain whether there is any issue concerning the mental condition of the accused.

I.O.: "(Grade and name of defense counsel), are there grounds to assert that the accused was not mentally responsible for his / her actions at the time of the offense(s) charged or that

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[4] Any assistant Government counsel should be similarly identified.

the accused is mentally incompetent to participate in the defense of his / her case?"

An affirmative answer to this question may not necessarily furnish a basis for recommending the accused be referred to a psychiatric board (R.C.M. 706) and thereby delaying the investigation. There must be some reasonable grounds for the answer other than a bare assertion, by the accused or counsel, of lack of mental responsibility or incompetency to participate in the hearing. Such grounds might include a preliminary diagnosis by a medical officer, coupled with a recommendation for a psychiatric evaluation. If the investigating officer finds that such grounds exist, based on appropriate evidence, such officer should mark the "Yes" box in block 14, explain the reasons therefore in block 21, adjourn (no! close) the hearing and refer the matter to the appointing authority. If the investigating officer receives a written medical report into evidence on the issue of mental responsibility or competency to participate in the hearing, that report should be attached to the referral letter.

On receipt of a negative answer, the investigating officer should mark the "No" box in block 14 and explain the reasons therefore in block 21. The investigating officer may now proceed through the checklist in block 10 of the DD Form 457 and advise the accused of all the rights available to the accused under UCMJ, Art. 32.

I.O.: "(Grade and name of accused), I am going to explain to you the purpose of the hearing and the rights which you have at this hearing. If you do not understand what I am telling you, let me know and I will explain it again until you and I are both satisfied that you understand."

"The purpose of this hearing is to investigate the charges and against you and to recommend to (grade and name of appointing authority) what action should be taken. I know nothing at all about your case except for the information contained in the charge sheet and in the order which appointed me to investigate these charges[5], and I have formed no opinion as to what I will recommend. I will make my recommendation to (grade and name of appointing authority) solely on the basis of the evidence which I receive during this hearing."

"I can make any one of a number of recommendations. I can recommend that you be tried by general court-martial; by special court-martial; by summary court-martial; that these charges be referred for disposition at a hearing convened under Article 15 of the Uniform Code of Military Justice-that is, Captain's Mast—I can recommend that all of the charges, or some of them, be dismissed and that you not undergo a trial or a mast at all."

"(Grade and name of appointing authority) is not bound by my recommendation. For

5 If the investigating officer has had pre-hearing discussions with counsel, the investigating officer should add: "except that I have met with your counsel and with Government counsel to discuss some of the legal issues which may arise during this hearing, to identify the witnesses who are expected to testify, id to mark the exhibits which may be offered. . . ."

example, if I recommend that a charge against you should be dismissed, he / she may still decide to send that charge to a court-martial."

"Do you have any questions about what I have just told you?"

ACC:" No, sir."

I.O.: "I will now advise you of the nature of the charges against you as set forth on the charge sheet. They are (describe charges in plain language which the accused will understand). The charges were preferred by (grade, name and organization of the accuser), a person subject to the Uniform Code of Military Justice."

"Do you have any questions about what I have just told you?"

ACC: "No, sir."

I.O.: "One of the rights you have at this hearing is the right to be represented, at no cost to you, by a military lawyer who has been detailed to represent you. (Grade and name of appointing authority) has detailed (grade and name of detailed defense counsel) to represent you at this hearing."

"You also have the right to ask for another free military lawyer, either to work with (grade and name of detailed defense counsel), or to represent you instead of (grade and name of detailed defense counsel). However, that other military lawyer must be reasonably available, and the determination of availability will be made by (grade and name of appointing authority), and the commanding officer of that other military lawyer."

"Finally, you have the right to be represented by a civilian lawyer, at your own expense. This civilian lawyer may work with (grade and name of detailed defense counsel) or represent you instead of (grade and name of detailed defense counsel)."

"Do you have any questions about what I have just told you?"

ACC: "No, sir."

I.O.: "By whom do you want to be represented at this hearing?"

ACC: "(Grade and name of detailed defense counsel), sir."

If the accused desires civilian counsel and has not yet been able to secure such counsel, or if the accused desires a military lawyer other than the one who has been detailed to represent the accused at the Article 32 hearing, the investigating officer should adjourn the hearing for a reasonable time in order for the accused to retain civilian counsel or for the accused or his detailed counsel to submit the request for individual military counsel through the trial counsel to the appointing authority[6]. If the accused is not represented by counsel or insists on proceeding *pro se*, the investigating officer should caution the accused as follows:

I.O.: "(Grade and name of accused) I caution you that the charge(s) against you are very serious and it is important that you understand all of your rights as well as the procedures which control this hearing. I suggest to you that you need the assistance of a lawyer to properly protect your rights and to otherwise help you. As I explained earlier, you have an absolute right to a qualified, free military lawyer who will provide that assistance. You are, of course, completely free to give up this right and to decide that you do not want a lawyer to assist you. But I again warn you that if you decide to proceed in this hearing without a lawyer, you do so at your peril and may, without meaning to do so, jeopardize your case."

"Do you understand what I have just told you?"

ACC: "Yes, sir."

I.O.: "Do you wish to have a lawyer to represent you, or not?"

ACC: "I don't want a lawyer."

If the investigating officer is satisfied that the accused has made a knowing and intelligent waiver of the right to counsel, the officer should complete blocks 9(a) and 9(b) of the DD Form 457, and ask the accused to sign the form in block 9(c), indicating the fact of the waiver. If the accused refuses to sign, the investigating officer will explain the refusal in block 21 of the form.

If the investigating officer is not satisfied that the accused has knowingly and intelligently waived the right to counsel, the officer should proceed as follows:

I.O.: "(Grade and name of accused) I am not satisfied that you fully appreciate the consequences of not having a lawyer at this hearing. Therefore, I will direct (grade and name of detailed defense counsel) to continue to act as your counsel."

Once the issue of counsel is resolved, the investigating officer should advise the

6 *See* Article 38(b)(3), UCMJ and R.C.M. 506(b)(2).

accused of his other rights.

I.O.: "You also have the right to remain silent at this hearing and to say nothing at all about the charge(s) against you. If you decide not to make any statement, I will not hold that against you in any way."

"If you wish, you may make a statement. You may make that statement orally—that is, by taking the witness stand or you may write it out and give it to me, or you may do both."

"You may make any such statement under oath, but you do not have to do so. If you make it under oath, then Government counsel, (name and grade of Government counsel), may cross-examine you on its contents, and I may ask you questions about its contents. If you make an unsworn statement, then neither Government counsel nor I can question you concerning its contents."

"Do you have any questions about what I have just told you?"

ACC: "No, sir."

I.O.: "You may, in any such statement, present facts which you believe constitute a defense to the charge(s), or you may present facts in what we call "extenuation" or "mitigation." By "extenuation," I mean circumstances which might explain why the charged offense(s) happened and furnish a partial excuse. By "mitigation," I mean circumstances which indicate that the charged offense(s) ought not to be treated as seriously as they might be under normal circumstances."

"However, if you make any statement—sworn, unsworn, written or oral—the contents of that statement may lawfully be used against you in any court-martial or mast proceeding. Before you make any statement, you may consult with your counsel."

"Do you have any questions about what I have just told you?"

ACC: "No, sir."

I.O.: "As I understand, the persons who will testify at this hearing are (identify all witnesses of whom the investigating officer is aware). Other evidence may be presented in the form of exhibits. You have the right to examine all of these exhibits and make appropriate objections, through your defense counsel, as to my consideration of any of these exhibits."

"You have the right to be present throughout the hearing unless you decide not to bed "here or if I decide that your conduct is disruptive. You have the right to cross-examine all witnesses who testify for the Government, and that right will be exercised for you by (name and grade of detailed defense counsel)."

"Do you have any questions about what I have just told you?"

ACC: "No, sir."

I.O.: "You have the right to call any reasonably available witnesses whom you think may have anything relevant to say with respect to these charges, and to offer any other reasonably available evidence which you think may be relevant. I will determine whether any witness you wish to call, or other evidence which you wish to offer, is reasonably available or not.[7]

"Do you have any questions about what I have just told you?"

ACC: "No, sir."

I.O.: "Do you have any questions at all about your rights at this hearing, or about anything which I have said so far?"

ACC: "No, sir."

The investigating officer has now completed his required advice to the accused and may check all the "Yes" boxes in block 10 of the DD Form 457.

The investigating officer may now direct the Government counsel to proceed and call the first witness for the Government. The investigating officer and witness will face each other, raise their right hands, and the investigating officer will administer the oath as follows:

I.O.: "Do you swear (or affirm) that the evidence which you are about to give in the case now in hearing will be the truth, the whole truth and nothing but the truth, so help you God?"

WIT: "I do."

It is customary for the Government counsel to conduct the initial examination of all

[7] If the accused objects to the investigating officer's determination that a witness is unavailable, the investigating officer must give the reasons for determining unavailability in the report to the appointing authority. R.C.M. 5(g)(2)(D).

Government witnesses. The investigating officer may conduct the initial examination and must do so in the unusual circumstance where no Government counsel has been detailed. The defense counsel may then cross-examine (if more than one defense counsel appears, the investigating officer should permit only one to conduct the cross-examination)[8], and the investigating officer may then pose questions. The usual rules apply to redirect and recross examination.

The investigating officer may, but is not required to, rule on objections. However, the investigating officer shall note the objection in the report of investigation if a party so requests.

Counsel should ask each witness to identity himself or herself by name, rate and duty station (or, in the case of civilian witnesses, address and occupation).

Documentary evidence, and real evidence (e.g., guns, knives, drugs), should be marked for identification. The investigating officer should ensure that counsel give copies of documents, offered in evidence, to opposing counsel.

If Government counsel offers a confession or admission of the accused, the investigating officer must look into the circumstances to determine whether the accused received proper Miranda-Tempia warnings and knowingly and intelligently waived his or her rights against self-incrimination prior to making the confession or admission.[9]

After all available Government witnesses have testified, the investigating officer should then consider any sworn statements of witnesses who have been determined to be not reasonably available. If such a determination has been made with respect to a Government witness, the investigating officer should proceed as follows[10]:

I.O.: "I do not intend to call (grade, if applicable, and name of witness) because (I have) or (his / her commanding officer has) determined that he / she is not reasonably available due to (describe circumstances, e.g., illness, deployment). However, I will consider the (UNSWORN statement of) (grade, if applicable, and name of witness) but only with the consent of the accused. ***SWORN statements may be considered over the objection of accused if witness is not reasonably available*** ** (Grade and name of Government counsel), please show a copy of this statement to the accused and his / her counsel. (After the accused and counsel have had the opportunity to examine the statement, then inquire:) Do you consent to my consideration of this statement as an alternative to the testimony in person of

8 R.C.M. 405(h)(1)(A) requires that the investigating officer afford the defense "wide latitude" in cross-examination during article 32 hearings.

9 For a guide to the scope of the inquiry, the questions which the investigating officer should ask, and the standards for determining admissibility of a confession or other pretrial statement of an accused when the Government offers such a statement to prove an element of the offense charged, see Military Judges Benchbook (DA Pam 27-9), chapter 4; see also Military Rules of Evidence 304.

10 See R.C.M. 5(g)(4)(A) and 5(g)(4)(B).

(grade, if applicable, and name of witness)?"

If the accused presents witnesses, the investigating officer will swear each of them. Defense counsel (or one of them, if more than one defense counsel) will examine each witness and the Government counsel (or one of them, if more than one Government counsel) will cross-examine. The investigating officer may then inquire of the witness.

If a defense witness has been determined to be not reasonably available, the investigating officer should put the following statement on the record:

I.O.: "(Grade and name of accused), you requested that (grade, if applicable, and name of witness) be called as a witness in your behalf. Despite your request, I do not intend to call this individual as a witness because (I have) (his / her commanding officer has) determined that he / she is not reasonably available due to (state reasons for determining unavailability)[11]. Do you wish to present any alternative to the live testimony of this witness?"

ACC: "(Yes, sir.)(No, sir.)"

I.O.: "Do you desire that any witnesses—other than those whom you previously requested—or other evidence be produced at this time? If so, I will adjourn this hearing in order to determine whether they are reasonably available and, if they are, I will arrange for their appearance."

ACC: "(Yes, sir.)(No, sir.)"

If the accused requests the production of additional witnesses or other evidence, the investigating officer should adjourn the hearing for a reasonable time to make availability determinations and assemble the witnesses and evidence requested.

After Government counsel and defense counsel have rested, the investigating officer should inquire whether the accused desires to exercise his or her right to make a statement.

I.O.: "(Grade and name of accused), I previously advised you that, while you cannot be compel to make any statement, you have the right to make a statement in any form you desire. Bearing that advice in mind, consult with your counsel and advise me whether you wish to make a statement at this time or not."

ACC: "I do / do not desire to make a statement."

---

11 See endnote 8, supra.

If the accused makes an oral statement, the investigating officer should summarize it (if there is no reporter detailed to the hearing) and append it to the DD Form 457 as an exhibit. Any written statement by the accused should be similarly appended.

If the accused makes no statement, the investigating officer should make the following inquiry of Government and defense counsel:

I.O.: "Does the Government wish to comment on the evidence?"

C.C.: "(Comments or declines to comment.)"

I.O.: "Does the defense wish to comment on the evidence?"

D.C.: "(Comments or declines to comment.)"

Following any comment on the evidence by Government and defense counsel, the investigating officer should make the following inquiry of them:

I.O.: "Counsel, do you anticipate that all of your witnesses will be available in the event of trial?"

In the event of a negative response from counsel, the investigating officer should inquire further into the circumstances and report the results of the inquiry to the appointing authority (see blocks 16 and 21 on the DD Form 457) so the appointing authority may arrange to depose, if possible, those witnesses expected to be absent at the time of trial due to (for example) impending transfer or separation from the service.

The investigating officer may now close the hearing.

I.O.: "This investigation is closed."

If a reporter will prepare a verbatim or summarized transcript of the hearing (which is the usual practice), the investigating officer should await a copy of such transcript and review it, together with any notes which the officer may have taken during the hearing, before completing the DD Form 457. In the unusual circumstance where no reporter is detailed to the hearing, the investigating officer should, using his notes, summarize in writing the testimony of each witness and, unless it would unduly delay the investigation, have each witness sign and swear to the truth of the respective summaries. Such summaries should be attached to the DD 457 as exhibits of the investigating officer.

After completing the DD Form 457, the investigating officer should forward it, together with a copy of the transcript (or the summaries of testimony prepared by the officer) and all documentary exhibits, to the appointing authority via the appointing authority's staff judge advocate. Although it is the appointing authority's responsibility to furnish a complete copy of the report to the accused [see R.C.M., 405(j)(3)], the local practice may be for the investigating officer to furnish such copies to both Government counsel and to defense counsel.

SUGGESTED COLLATERAL READING

Schlueter, Military Criminal Justice (3d. ed.), ch. 7, The Article 32 Investigation and the Pretrial Advice.

Gaydos, A Comprehensive Guide to the Military Pretrial Investigation, 111 Mil. L. Rev. 49(1986).

FORMS

DEPARTMENT OF THE NAVY
PATROL SQUADRON NINETY-NINE
U.S. NAVAL AIR STATION
BRUNSWICK, ME 04011-5000

IN REPLY REFER

5800
00:jh
22 Jun 94

From: Commanding Officer, Patrol Squadron NINETY-NINE
To: CDR Judy Shainotis, JAGC, USN

Subj: APPOINTMENT OF ARTICLE 32 INVESTIGATING OFFICER ICO AA RAY PANPILLAGE, U.S. NAVY

Ref: (a) Article 32, Uniform Code of Military Justice
(b) Rule for Courts-Martial (Manual for Courts-Martial (1998 ed.)

Encl: (1) Charge sheet (DD 458) ICO AA Panpillage

1. Pursuant to references (a) and (b),you are hereby appointed Investigating Officer to conduct an investigation into the charges preferred against AA Ray Panpillage, U.S. Navy.

2. You will conduct a thorough and impartial investigation which shall include an inquiry into the truth of the matters set forth in the charges, consideration of the form of the charges and specifications thereunder, and a recommendation as to disposition which should be made in the interest of justice and discipline. In conducting your investigation and in making your report, you will be guided by the provisions of references (a) and (b) and by such other legal authorities as may be applicable.

3. Lieutenant Les McAdeal, JAGC, USNR, certified in accordance with Article 27(b), UCMJ, and previously sworn in accordance with Article 42(a), UCMJ, has been appointed Government Counsel. Lieutenant Ken E. Gettimoff, JAGC, USNR, certified in accordance with Article 27(b), UCMJ, and previously sworn in accordance with Article 42(a), UCMJ, has been detailed as counsel for AA Ray Panpillage, U. S. Navy.

4. You will notify the accused and respective counsels of the time and place of the convening of this investigation.

PHILIP N. BRIGGS

Copy to:
COMPATWINGSLANT (Staff Judge Advocate)
Government counsel
Defense counsel

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (*Last, First, MI*)	2. SSN	3. GRADE OR RANK	4. PAY GRADE
PANPILLAGE, RAY	000-00-0000	AA	E-2

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
PATROL SQUADRON NINETY-NINE	a. INITIAL DATE	b. TERM
	CY-4 Oct 10	CY Oct 09

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$880.50	N/A	$880.50	NONE	N/A

II. CHARGES AND SPECIFICATIONS

10. **CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 92**

SPECIFICATION: In that Airman Apprentice Ray Panpillage, U.S. Navy, Patrol Squadron NINETY-NINE, on active duty, did, at Naval Air Station, Brunswick, Maine, on or about 20 May 19CY, violate a lawful general regulation, to wit: Article 1159, U.S. Navy Regulations, dated 14 September 1990, by wrongfully possessing a dangerous weapon, to wit: a hunting knife, while on board a naval base.

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 128

SPECIFICATION: In that Airman Apprentice Ray Panpillage, U.S. Navy, Patrol Squadron NINETY-NINE, on active duty, did, on or about 20 May 20CY, at Naval Air Station, Brunswick, Maine, in the parking lot outside the Night Flight, assault and intentionally inflict grievous bodily harm upon Operations Specialist Third Class Vic Tim, U.S. Navy, by cutting his face with a switchblade knife, a dangerous weapon.

III. PREFERRAL

11a. NAME OF ACCUSER (*Last, First, MI*)	b. GRADE	c. ORGANIZATION OF ACCUSER
RYAN O. DRIVER	LT/USN	PATROL SQUADRON NINETY - NINE

d. SIGNATURE OF ACCUSER	e. DATE
Ryan O. Driver	18 JUNE CY

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 18 day of June, 20CY, and signed the foregoing charges and specifications under oath that he/~~she~~ is a person subject to the Uniform Code of Military Justice and that he/~~she~~ either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/~~her~~ knowledge and belief.

MILRINDE, Ivana — *Typed Name of Officer*

Patrol Squadron NINETY-NINE — *Organization of Officer*

Lieutenant — *Grade*

Legal Officer — *Official Capacity to Administer Oath (See R.C.M. 30~(b) - must be commissioned officer)*

Ivana Milrinde — *Signature*

DD FORM 458 84 AUG **EDITION OF OCT 69 IS OBSOLETE** **S/N 0102-LF-000-4580**

12.

On 18 June, 20 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.)*

PHILIP D. BRIGGS — *Typed Name of Immediate Commander*

Patrol Squadron NINETY-NINE — *Organization of Immediate Commander*

Commander, U.S. Navy — *Grade*

Philip D. Briggs — *Signature*

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.
The sworn charges were received at 1600 hours, 18 June 20 CY at PATROL SQUADRON NINETY-NINE, NAVAL AIR STATION, BRUNSWICK, MAINE

Designation of Command or

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

~~FOR THE~~ [1]

PHILIP D. BRIGGS — *Typed Name of Officer*

Commanding Officer — *Official Capacity of Officer Signing*

Commander, U.S. Navy — *Grade*

Philip D. Briggs — *Signature*

V. REFERRAL : SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE

Referred for trial to the _____ court-martial convened by _____

_____, _____ 19 __,

subject to the following instructions: [2] _____

_____ By _____ of _____

_____

Command or Order

_____ — *Typed Name of Officer*

_____ — *Official Capacity of Officer Signing*

_____ — *Grade*

_____ — *Signature*

15. On _____, 19 ___, I (caused to be) served a copy hereof on (each of) the above named accused.

_____ — *Typed Name of Trial Counsel*

_____ — *Grade or Rank of Trial Counsel*

_____ — *Signature*

FOOTNOTES: 1 - *When an appropriate commander signs personally, inapplicable words are stricken*
2 - *See R.C.M. 601(e) concerning instructions. If none, so state.*

DD Form 458 Reverse, 84 AUG

INVESTIGATING OFFICER'S REPORT

(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)

1a. FROM: *(Name of Investigating Officer -- Last, First, MI)*	b. GRADE	c. ORGANIZATION	d. DATE OF REPORT
SHALNOTIS, JUDY	0-5	NR VTU LAW 0000	30 July 20CY

2a. TO: *(Name of Officer who directed the investigation -- Last, First, MI)*	b. TITLE	c. ORGANIZATION
BRIGGS, PHILIP D.	CO	VP-99

3a. NAME OF ACCUSED *(Last, First, MI)*	b. GRADE	c. SSN	d. ORGANIZATION	e. DATE OF CHARGES
PANPILLAGE, RAY	AA	000-00-0000	VP-99	9 Jun 20CY

(Check appropriate answer)	Yes	No
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)	X	
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)	X	
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d)(2), 502(d)	X	

7a. NAME OF DEFENSE COUNSEL *(Last, First, MI)*	b. GRADE	8a. NAME OF ASSISTANT DEFENSE COUNSEL *(If any)*	b. GRADE
GETTIMOFF, KEN E.	LT	BILLHAM, DEWEY	CIV

c. ORGANIZATION *(If appropriate)*	c. ORGANIZATION *(If appropriate)*
BrOff NavLegSvcOff Groton CT	Billham & Howe
d. ADDRESS *(If appropriate)*	d. ADDRESS *(If appropriate)*
Naval Air Station, Brunswick, ME	1 Main Street, Brunswick, ME 04011

9. *(To be signed by accused if accused waives counsel. If accused does not sign, investigating officer will explain in detail in Item 21.)*

a. PLACE	b. DATE

I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.

c. SIGNATURE OF ACCUSED

10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: *(Check appropriate answer)*	Yes	No
a. THE CHARGE(S) UNDER INVESTIGATION	X	
b. THE IDENTITY OF THE ACCUSER	X	
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31	X	
d. THE PURPOSE OF THE INVESTIGATION	X	
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE	X	
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT	X	
g. THE RIGHT TO CROSS EXAMINE WITNESSES	X	
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED	X	
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION OR MITIGATION	X	
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING	X	
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE *(If the accused or counsel were absent during any part of the presentation of evidence, complete (b) below.)*	X	

b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL
Not Applicable

NOTE: If additional space is required for any item, enter the additional material in Item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading *(Example: "7e".)* Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: *(Check appropriate answer)*

NAME *(Last, First, MI)*	GRADE *(If any)*	ORGANIZATION / ADDRESS *(Whichever is appropriate)*	Yes
TIMM, VIC	OS2	VP-99	X
YUSZA, ALEXIS	LN2	SJA Office, NAS Brunswick, ME	X
STITCHAM, HOWELL I., M.D.	CIV	Parkview Memorial Hospital, Brunswick, ME	X
BELLO, BOYKIN E.	BMC	USS NEVERSAIL (DDG-99)	X
SAWITALL, SHIRLEY	CIV	Mill View Trailer Park, Lisbon Falls, ME	X
REXIC, ANNA	MS3	NAS Brunswick, ME	X

b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES HAS BEEN REDUCED TO WRITING AND IS ATTACHED. X

13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED. THE ACCUSED WAS PERMITTED TO EXAMINE EACH.

DESCRIPTION OF ITEM	LOCATION OF ORIGINAL *(If not attached)*	
Accused's enlistment contract	Accused's service record	X
Accused's History of Assignments	Accused's service record	X
Hunting knife	NIS Regional Agency, Brunswick, ME	X

b. EACH ITEM CONSIDERED, OR A COPY OF THE RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED.

14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOT COMPETENT TO PARTICIPATE IN THE DEFENSE. [*See* R.C.M. 909, 916(k).]

15. THE DEFENSE DID REQUEST OBJECTIONS TO BE NOTED IN THIS REPORT. *(If Yes, specify in Item 21, below.)*

16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL. X

17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM. X

18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED. X

19. I AM NOT AWARE OF ANY GROUNDS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. [See R.C.M. 405(d)(1).] X

20. I RECOMMEND:

a. TRIAL BY SUMMARY SPECIAL X GENERAL COURT-MARTIAL

b. OTHER *(Specify in Item 21 below)*

21. REMARKS *(Include, as necessary, explanation for any delays in the investigation, and explanation for any "No" answers above.)*

See additional sheets.

22a. TYPED NAME OF INVESTIGATING OFFICER	b. GRADE	c. ORGANIZATION
JUDY SHALNOTIS	CDR	NR VTU LAW 0000

d. SIGNATURE OF INVESTIGATING OFFICER

e. DATE 30 July 20CY

ATTACHMENT TO DD FORM 457
INVESTIGATING OFFICER'S REPORT ICO AA RAY PANPILLAGE, USN
30 JULY 20CY
PAGE 34

Block 13a, evidence considered:

I received the following items into evidence as Investigating Officer (IO), exhibits:

IO-1: DD 458 (Charge Sheet) dated 18 June 20CY ICO AA Ray Panpillage, USN (the "accused");

IO-2: CO, VP-99 letter dated 22 June 20CYappointing Article 32 investigating officer; and

IO-3: CO, VP-99 letter dated 22 June 20CY detailing Government and defense counsel for Article 32 investigation ICO accused.

I received the following items into evidence, which were offered by counsel for the Government, as Government exhibits (GE):

GE-1: Copy of accused's enlistment contract (NAVPERS 1020/600);

GE-2: Copy of History of Assignments from accused's service record (NAVPERS 1070/65);

GE-3: Hunting knife, approximately ten inches long, with the initials "R.P." carved on wooden portion of handle.

Block 14:

In response to my question, defense counsel raised no issue during the hearing concerning either the accused's mental responsibility at the time of the alleged commission of the offense charged or of the accused's competency to participate in his own defense.

Block 21:

The military justice system has subject matter jurisdiction over the offenses alleged to have been committed by the accused. *See* Articles 92 and 128 of the *Uniform Code of Military Justice* (hereinafter cited as "UCMJ"); *see also Manual for Courts-Martial (1998 ed.)* IV-29 and IV-93. Since the accused was serving on active duty at the time he allegedly committed the offense and is still so serving, as shown by exhibits GE-1 and GE-2, the military justice system has personal jurisdiction over him. *See Solorio v. United States*, 483 U.S. 435, 107 S. Ct. 2924, 97 L.Ed. 2d 364 (1987).

ATTACHMENT TO DD FORM 457
INVESTIGATING OFFICER'S REPORT ICO AA RAY PANPILLAGE, USN
30 JULY 20CY
PAGE 34

The accused is charged with the offense of aggravated assault and with possession of a dangerous weapon on board a Naval installation in violation of a lawful general regulation. These charges are in proper form and adequately state offenses under Articles 92 and 128 of the UCMJ.

The Government's principal witness, OS2 Vic Timm, testified that he and the accused got into a fight in the parking lot of the Night Flight, a club on board the U.S. Naval Air Station at Brunswick, ME, at around 2300 on 20 May 20CY, during the course of which the accused cut him with a knife. BMC Bello, stationed on board the USS Neversail (DDG-99) (presently in overhaul at Bath Iron Works), who was working as a bouncer at the Night Flight, witnessed the fight and broke it up. OS2 Timm was transported to a local civilian hospital where he required a number of stitches to stanch the bleeding and to close his wounds.

The testimony of OS2 Timm tended to show that about 0930 on the night in question he went to the Night Flight, escorting a female companion, LN2 Yusza. They had a couple of beers and conversed with two female friends of LN2 Yusza, Ms. Sawitall and MS3 Rexic. The accused arrived later. At some point, the accused engaged Ms. Sawitall in conversation and danced with her. He then attempted to induce LN2 Yusza to dance, but she declined. Somewhat later, he became more aggressive in his advances toward LN2 Yusza and he and OS2 Timm had words. OS2 Timm and LN2 Yusza decided to leave the Night Flight and, in company with Ms. Sawitall and MS3 Rexic, did so. The accused followed them and, as OS2 Timm was opening his car door, the accused hit him. OS2 Timm defended himself with his fists. The accused drew a knife and slashed OS2 Timm several times across the forearms as he backed away with his arms up to protect himself. OS2 Timms' female companions witnessed the fight and testified to its origins, nature, and duration. BMC Bello testified that the screams of these companions attracted his attention at his station in the club's doorway about 35 feet away. Because the parking lot was well lit, he could see the fight in progress and that the accused had some sort of a weapon in his hand which he was swinging at OS2 Timm as the latter was backing away with his forearms up around his face and upper body. Bello ran across the parking lot, tackled the accused from behind, subdued and disarmed him. BMC Bello identified GE-3 as the weapon which he took from the accused. Another club employee called the security force and an ambulance. OS2 Timm was transported to Parkview Memorial Hospital and was seen in the emergency room by Dr. Sticham, who testified to the nature and extent of OS2 Timm's wounds and his treatment of those wounds.

Based on the testimony of the witnesses and the exhibits offered by the Government, I find probable cause to believe that the offenses charged were committed by the accused. I recommend that you refer these charges for trial by ***General Court-Martial***.

Note: After the hearing has been completed, the IO should complete block 14 of DD Form 457 regarding his mental condition of the accused (*see* R.C.M. 908 and 915(k) for a

discussion of mental responsibility or capacity and how to deal with this issue). It is important to note, however, that a mere assertion of insanity by accused or her counsel is not necessarily a basis for referring the accused to a psychiatric board and thereby delaying the investigation. There should exist some tangible evidence of a lack of mental responsibility or capacity. If such grounds do exist, then the matter should be referred to the convening authority. If a medical report is thereafter received on the issue, it should be attached as an exhibit to the report (DD Form 457).

Although the IO is not required to rule on defense objections during the proceedings, the defense may properly request that such objections be noted in the investigating report. *See* block 15 of DD Form 457.

Next, the IO completes block 16 of DD Form 457, indicating whether essential witnesses—government or defense—will be available. Matters such as impending transfer, separation from service, death, etc. should be noted as appropriate opposite the name of the witness involved.

In block 17, the IO indicates whether the charges and specifications are in proper form. If not, the IO should specify any deficiencies. In addition, based on the evidence disclosed at the hearing, the IO may believe that other charges should be preferred, either against the accused or against other persons.

In block 18, the IO finally has an opportunity to indicate her overall assessment of the charges. If "reasonable grounds" do not exist to show that the accused committed the offense(s) alleged, the IO should explain that conclusion.

In block 19, the IO should affirm that she is not aware of any grounds which would disqualify him / her from acting as IO.

Finally, in block 20, the IO should indicate what court-martial, if any, the case should be tried.

Block 21 is a general remarks section for explaining any "no" answers on the rest of the form. In addition, the IO should account for any delays in the investigation. As a matter of routine practice, most IOs keep a detailed chronology of the investigation in the event that a speedy trial issue is litigated later.

DEPARTMENT OF THE NAVY
Patrol Squadron NINETY-NINE
Brunswick, ME 04001-5000

15 Aug CY

FIRST ENDORSEMENT on CDR Judy Shalnotis, JAGC, USN, Investigating Officer's Report of 30 Jul CY

From: Commanding Officer, Patrol Squadron NINETY-NINE
To: Commander, Submarine Group 2

Subj: ARTICLE 32 INVESTIGATION ICO AIRMAN APPRENTICE RAY PANPILLAGE, USN, 000-00-0000

1. Forwarded.

2. Recommend trial by general court-martial.

//S//
PHILIP N. BRIGGS

CHAPTER XIV

REVIEW OF COURTS-MARTIAL

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CHAPTER XIV

REVIEW OF COURTS-MARTIAL

A. ***Introduction.*** This chapter describes the review of trials by summary, special, and general courts-martial. A summary of the chapter follows.

Upon completion of every trial by court-martial, a written record is prepared. This record is forwarded to the convening authority with a copy to the accused. Within certain time constraints, depending upon the type of court-martial and sentence adjudged, the accused may submit written "matters" which could affect the convening authority's decision whether to approve or disapprove the trial results. In a general court-martial or a special court-martial case involving a bad-conduct discharge, the convening authority's decision must also await the written recommendation of the staff judge advocate (SJA) or legal officer (LO). With the benefit of these inputs, the convening authority determines, within his sole discretion, whether to approve or disapprove the sentence adjudged. This determination is in the form of a written legal document called the convening authority's action.

After the convening authority has taken his action, the record of trial will be forwarded for further review. Summary courts-martial, special courts-martial not involving a bad-conduct discharge, and all other noncapital courts-martial in which appellate review has been waived will be reviewed by a judge advocate assigned, in most cases, to the staff of an officer exercising general court-martial jurisdiction. This written review will generally terminate the mandatory review process although, in certain cases, the officer exercising general court-martial jurisdiction himself will have to take final action.

General courts-martial and those special courts-martial which include a bad-conduct discharge, after initial review by the convening authority, will normally be reviewed further by the Navy-Marine Corps Court of Criminal Appeals (C.C.A.). Under certain circumstances, the case will thereafter be considered by the Court of Appeal for the Armed Forces (C.A.A.F.) and, possibly, the United States Supreme Court.

B. ***Sequence of review***

1. ***Report of results of trial.*** Immediately following the final adjournment of a court-martial, the trial counsel (TC) has an obligation to notify the convening authority and the accused's commanding officer of the results of trial. JAGMAN, § 0149. Additionally, if the sentence includes confinement, the notification must be in writing with a copy forwarded to the commanding officer or officer in charge of the brig or confinement facility concerned.

See JAGMAN A-1-j and the end of this chapter for a recommended form.

2. ***The record of a trial by court-martial***

a. When proceedings at the trial court level have been completed, a record of trial must be prepared. If the accused has been acquitted by withdrawal or dismissal of the charges prior to findings, the record of trial consists only of the original charge sheet, a copy of the convening order (amending order), and sufficient information to establish jurisdiction over the person and the offense(s)—if not shown on the charge sheet. R.C.M. 1103(e), Manual for Courts-Martial (1998 ed.) [hereinafter R.C.M.____]. When the trial has resulted in conviction, the contents of the record of trial are dictated by the type of court-martial and the adjudged sentence. R.C.M. 1103; JAGMAN, § 0150. (*See* Chapter X, *supra*, for the contents of a record of trial by SCM). The record of trial by a SPCM which did not adjudge a bad-conduct discharge need contain only a summarized report of the proceedings and testimony. *See* Manual for Courts-Martial (1998 ed.), app. 13. The record of trial for all other courts-martial must be verbatim if, in the case of a general court-martial, the sentence exceeds that which could be adjudged at a special court-martial or if, in the case of either a general or special court-martial, the sentence includes a bad-conduct discharge. *See* Manual for Courts-Martial (1998 ed.), app. 14. Once prepared, the record of trial will be authenticated by the signature of a person who thereby declares that the record accurately reports the proceedings. Except in unusual circumstances, this person will be the military judge or summary court-martial officer. R.C.M. 1104(a).

b. R.C.M. 1104 requires that a copy of the record of trial be served on the accused as soon as the record has been authenticated. This is to provide the accused with the opportunity to submit any written "matters" which may reasonably tend to affect the convening authority's decision whether or not to approve the trial results. R.C.M. 1105. The content of such "matters" is not subject to the Military Rules of Evidence and could include:

(1) Allegations of error affecting the legality of the findings of sentence;

(2) matters in mitigation which were not available for consideration at the trial; and

(3) clemency recommendations. The defense may ask any person for such a recommendation (including the members, military judge, or trial counsel).

c. Except in a summary court-martial case, submission of matters by the accused in accordance with R.C.M. 1105 shall be made within 10 days after the accused has been served with an authenticated record of trial and, if applicable, the service on the accused of the recommendation of the SJA or LO under R.C.M. 1106. In a summary court-martial case, such submission shall be made within 7 days after the sentence is announced.

– If the accused shows that additional time is required to submit

such matters, the convening authority may, for good cause shown, extend the applicable period stated above for not more than an additional 20 days.

d. In addition to the input from the accused, the convening authority must receive a written recommendation from his SJA or LO before taking action on a general court-martial or a special court-martial case involving a bad-conduct discharge. R.C.M. 1106. Legal officer means a ***commissioned officer*** of the Navy, Marine Corps, or Coast Guard designated to perform legal duties for a command. Article 1(12), UCMJ; 10 U.S.C. § 801(12). Care must be taken, however, to ensure that this SJA or LO is not disqualified from submitting this recommendation. Disqualification will result when the SJA or LO acted as a member, military judge, trial counsel, assistant trial counsel, or, more commonly, the investigating officer in the same case. If the SJA or LO is disqualified or if the convening authority, in his discretion, would prefer an SJA recommendation rather than one from his staff LO, the convening authority may request that another SJA be designated to prepare the recommendation.

The purpose of the recommendation is simply to assist the convening authority in deciding what action to take on the case. The recommendation is intended to be a concise written communication summarizing:

(1) The findings and sentence adjudged;

(2) the accused's service record, including length and character of service, awards and decorations, and any records of NJP and previous convictions;

(3) the nature of pretrial restraint, if any;

(4) obligations imposed upon the convening authority because of a pretrial agreement; and

(5) a specific recommendation as to the action to be taken by the convening authority on the sentence.

Identifying legal error is not one of the required goals of this recommendation. The only time when possible legal error must be discussed is in response to an allegation of legal error by the accused under paragraph 2 above, and then, only if the recommendation is prepared by an SJA. The response may consist of a statement of agreement or disagreement and need not be accompanied by a written analysis or rationale. None of the above comments, however, should be interpreted so as to prohibit the SJA / LO from including any additional matters deemed appropriate under the circumstances.

To assist the SJA / LO in preparing the recommendation, JAGMAN A-1-k provides a sample form. A sample SJA / LO recommendation appears at the end of this

chapter.

In cases of acquittal of all charges and specifications and cases where the proceedings were terminated prior to findings with no further action contemplated, the SJA or LO recommendation is not required. R.C.M. 1106(a).

e. Before forwarding the record of trial and recommendation to the convening authority for action under R.C.M. 1107, the SJA or LO shall cause a copy of the recommendation to be served on counsel for the accused. Such counsel shall have 10 days to submit written comments on the recommendation, pursuant to R.C.M. 1106(f), for consideration by the convening authority.

3. ***Responsibility for convening authority's action.*** The first official action to be taken with respect to the results of a trial is the convening authority's action (CA's action). All materials submitted by the accused, SJA / LO, and defense counsel are preparatory to this official review.

Article 60, UCMJ, and JAGMAN, § 0151a, place the responsibility for this initial review and action on the convening authority. This is true even when the accused is no longer assigned to the convening authority's command. Although responsibility for a CA's action is nondelegable, R.C.M. 1107 and JAGMAN, § 0151b, acknowledge the fact that circumstances may exist making it impracticable for the convening authority to act. Situations of impracticability would arise, for example, when the command has been decommissioned or inactivated before the convening authority could act; when the command has been alerted for immediate overseas movement; when the convening authority is disqualified because he has other than an official interest in the case; or because a member of the court-martial which tried the accused has become the convening authority. If any of these situations exist, the convening authority must forward the case to an officer exercising general court-martial jurisdiction with a statement of the reasons why the convening authority did not act. A Navy command should send the case to the area coordinator or his designee, unless a general court-martial convening authority in the convening authority's chain of command has directed otherwise. A Marine command should send the case to an officer exercising general court-martial jurisdiction over the command.

4. ***Convening authority's action in general.*** The CA's action is a legal document attached to the record of trial setting forth, in prescribed language, the convening authority's decisions and orders with respect to the sentence, the confinement of the accused, and further disposition. The action taken with respect to the sentence is a matter falling within the convening authority's sole discretion. He may for any reason or no reason disapprove a legal sentence in whole or in part, mitigate it, suspend it, or change a punishment to one of a different nature as long as the severity of sentence is not increased. His decision is a matter of command prerogative and is to be made in the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons. ***It should be noted that no action is required with respect to findings of guilty.*** This is because, unlike the procedure which

existed before the Military Justice Act of 1983, the convening authority is no longer required to review the case for legal error or factual sufficiency. He is required to act on the sentence only. In his discretion, however, the convening authority may take action disapproving a finding of guilty or approving a finding of guilty to a lesser included offense.

In cases of acquittal, or rulings tantamount to findings of not guilty, the convening authority may not take any action of approval or disapproval.

In taking his action, the convening authority is ***required*** to consider the ***results*** of trial, the SJA / LO recommendation when required, and any matter submitted by the accused as previously discussed. Additionally, the convening authority ***may*** consider the ***record*** of trial, personnel records of the accused, and such other matters deemed appropriate by the convening authority. Any matters considered outside of the record, of which the accused is not reasonably aware, should be disclosed to the accused to provide an opportunity for his rebuttal.

The SJA or LO, who usually drafts the CA's action pursuant to the convening authority's wishes, must take care to ensure that it expresses the convening authority's intent and complies with applicable R.C.M.'s and *JAG Manual* provisions. Incompleteness or ambiguity will result in higher reviewing authorities returning the record for completion or clarification or simply construing the ambiguous action in favor of the accused.

Appendix 16, Manual for Courts-Martial (1998 ed.) contains sample forms of actions for summary, special, and general courts-martial. One or more of these forms is appropriate to implement the decisions of the convening authority in virtually every case. ***Deviation from the forms is risky and usually leads to trouble unless the draftsman is experienced.*** If there is any question as to the form of action necessary to effectuate the convening authority's decisions, assistance should be obtained from the nearest law center.

After taking his action, the convening authority will publish the results of trial and the CA's action in a legal document called a promulgating order.

Specific guidance concerning the responsibilities of the convening authority in reviewing records of trial, drafting CA's actions in particular classes of cases, and publishing the results in the promulgating order is provided later in this chapter.

5. ***Subsequent review***

a. ***Mandatory review.*** The CA's action for every trial by court-martial is reviewed by higher authority. Certain reviews are mandatory; once these mandatory reviews are completed, the case is "final." Other reviews are discretionary (for example, the accused and his counsel must decide whether to petition the C.A.A.F. for review of the case, whether to petition for review by the Judge Advocate General, or whether to petition for a new trial).

The terms "mandatory" and "discretionary review" imply opposite

concepts: in the former case, the review will happen regardless of the accused's wishes; in the latter case, further review will happen only if the accused or some other person takes some positive action. The mutually exclusive nature of these two concepts has been diluted somewhat by the Military Justice Act of 1983. By adding the concepts of waiver and withdrawal, the Act gives an accused the option, except in a case involving the death penalty, to avoid what was formerly mandatory appellate review in all general courts-martial and special courts-martial involving a bad-conduct discharge.

R.C.M. 1110 governs waiver and withdrawal: "After any general court-martial, except one in which the approved sentence includes death, and after any special court-martial in which the approved sentence includes a bad-conduct discharge the accused may waive or withdraw appellate review." According to the Rule, the waiver or withdrawal must be a written document establishing that the accused and defense counsel have discussed the accused's right to appellate review; that they have discussed the effect that waiver or withdrawal will have on that review; that the accused understands these matters; and that the waiver or withdrawal is submitted voluntarily. An accused must file a waiver within 10 days after being served a copy of the CA's action unless an extension is granted. A withdrawal may be submitted any time before appellate review is completed. In either case, however, once appellate review is waived or withdrawn, it is irrevocable and the case will thereafter be reviewed locally in the same manner as a summary court-martial or a special court-martial not involving a bad-conduct discharge.

b. ***Summary courts-martial, special courts-martial not involving a bad-conduct discharge, and all other noncapital courts-martial where appellate review has been waived.***

(1) Article 64, UCMJ, and R.C.M. 1112 require that all summary courts-martial, non-BCD special courts-martial, and all other noncapital courts-martial where appellate review has been waived or withdrawn by the accused be reviewed by a judge advocate who has not been disqualified by acting in the same case as an accuser, investigating officer, member of the court-martial, military judge, or counsel, or has otherwise acted on behalf of the prosecution or defense. JAGMAN, § 0153a(1), further requires this officer to be the SJA of an officer who exercises general court-martial jurisdiction and who, at the time of trial, could have exercised such jurisdiction over the accused. For Navy commands, this would be the SJA of the area coordinator (or the area coordinator's qualified designee) unless otherwise directed by an officer exercising general court-martial jurisdiction superior in the convening authority's chain of command. For Marine Corps commands, this would be the SJA of the officer exercising general court-martial jurisdiction next in the chain of command. In all cases, the action of the convening authority will identify the officer to whom the record is forwarded by stating his official title. R.C.M. 1112 states, however, that no review under this section is required if the accused has not been found guilty of an offense or if the convening authority disapproved all findings of guilty.

(2) The judge advocate's review is a written document containing the following:

(a) A conclusion as to whether the court-martial had jurisdiction over the accused and over each offense for which there is a finding of guilty which has not been disapproved by the convening authority;

(b) a conclusion as to whether each specification, for which there is a finding of guilty which has not been disapproved by the convening authority, stated an offense;

(c) a conclusion as to whether the sentence was legal;

(d) a response to each allegation of error made in writing by the accused; and

(e) in cases requiring action by the officer exercising general court-martial jurisdiction, as noted below, a recommendation as to appropriate action and an opinion as to whether corrective action is required as a matter of law.

(3) After the judge advocate has completed the review, most cases will have reached the end of mandatory review and will be considered final within the meaning of Article 76, UCMJ. If this is the case, the judge advocate review will be attached to the original record of trial and a copy forwarded to the accused. The review is not final, however, and a further step is required in the following two situations:

(a) The judge advocate recommends corrective action; or

(b) the sentence as approved by the convening authority includes a dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.

The existence of either of these two situations will require the SJA to forward the record of trial to the officer exercising general court-martial jurisdiction.

With the SJA's review in hand, the officer exercising general court-martial jurisdiction will take action on the record of trial in a document similar to CA's action. He will promulgate it in a similar fashion as well. He may disapprove or approve the findings or sentence in whole or in part; remit, commute, or suspend the sentence in whole or in part; order a rehearing on the findings or sentence or both; or dismiss the charges.

If, in his review, the judge advocate stated that corrective action was required as a matter of law, and the officer exercising general court-martial jurisdiction (OEGCMJ) did not take action that was at least as favorable to the accused as that recommended by the judge advocate, the record of trial must be sent to the Judge Advocate General of the Navy (JAG) for resolution. In all other cases, however, the review is now final within the meaning of Article 76, UCMJ.

c. ***Special courts-martial involving a bad-conduct discharge***

(1) Assuming that appellate review has not been waived or withdrawn by the accused, a special court-martial involving a bad-conduct discharge, whether or not suspended, will be sent directly to the Office of the Judge Advocate General of the Navy. R.C.M. 1111. After detailing appellate defense and government counsel, the case will then be forwarded to the Navy-Marine Corps C.C.A. R.C.M. 1201, 1202. The C.C.A. has review authority similar to that of the convening authority, except that it may not suspend any part of the sentence. It is also limited to reviewing only those findings and sentence which have been approved by the convening authority. In other words, it may not increase the sentence approved by the convening authority, nor may it approve findings of guilty already disapproved by the convening authority. In considering the record of trial, the C.C.A. may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact—giving due weight, of course, to the fact that the trial court saw and heard the witnesses. Finally, the C.C.A. may affirm only those findings of guilty and the sentence which it finds correct in law and fact, and which the C.C.A. concludes should be approved on the basis of the entire record. A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused. Article 59, UCMJ.

(2) After review by the C.C.A., the case will go to the C.A.A.F. for review in the following two instances:

(a) If certified to the C.A.A.F. by JAG; and

(b) if the C.A.A.F. grants the accused's petition for review. R.C.M. 1204.

In any case reviewed by it, the C.A.A.F. may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by C.C.A.

(3) Finally, review by the United States Supreme Court is possible under 28 U.S.C. § 1259 and Article 67(h), UCMJ.

d. ***General court-martial.*** All general court-martial cases in which the sentence, as approved, includes dismissal, punitive discharge, or confinement of at least one year will be reviewed in precisely the same way as a special court-martial involving a bad-conduct discharge. *See* paragraph c, above. Cases involving death are reviewed in a similar fashion, except that review by the C.A.A.F. is mandatory. Other general court-martial cases—those not involving death, dismissal, punitive discharge, or confinement of one year or more where appellate review has not been waived or withdrawn—care reviewed in the Office of the Judge Advocate General under Article 69(a), UCMJ, and R.C.M. 1201(b). The JAG may modify or set aside the findings or sentence—or both—if he finds any part of the

findings or sentence to be unsupportable in law or if reassessment of the sentence is appropriate. As an alternative measure, the JAG may forward the case for review to the C.C.A. In this latter case, however, no further review by the C.A.A.F. is possible unless the JAG so directs.

e. ***Review in the Office of the Judge Advocate General.*** Article 69(b), UCMJ, provides that certain cases may be reviewed in the Office of the Judge Advocate General and that the findings or sentence—or both—may be vacated or modified by the JAG on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction, or error prejudicial to the substantial rights of the accused. Review under this article may only be granted in a case which has been "finally" reviewed but has not been reviewed by the C.C.A. Even then, such review by the JAG is not automatic. The accused must petition JAG to review the case and JAG may or may not agree to review it. If the case is reviewed, the JAG may or may not grant relief.

f. ***New trial***

(1) Article 73, UCMJ, provides that, under certain limited conditions, an accused can petition the JAG to have his case tried again even after his conviction has become final by completion of appellate review. The trial authorized by Article 73 is not a rehearing such as is ordered where prejudicial error has occurred. It is not another trial such as that ordered to cure jurisdictional defects. It is a trial de novo—a brand new trial—as if the accused had never been tried at all.

(2) There are only two grounds for petition:

(a) Newly discovered evidence; and

(b) fraud on the court.

(3) Sufficient grounds will be found to exist only if it is established that an injustice has resulted from the findings or sentence and that a new trial would probably produce a substantially more favorable result. R.C.M. 1210.

C. ***Issues and options for the reviewing authority.*** The reviewing authority has many options available upon taking action on review. As an example, the convening authority may approve, substantially reduce, or ***outright*** disapprove the sentence of a court-martial as a matter of command prerogative. Though no action on findings of guilty is required, the convening authority may, as a matter within his discretion, disapprove such findings or approve a lesser included offense. These actions may be taken for many reasons (including considerations of command morale, clemency for the accused, or error in the record of trial). As far as error is concerned, it must be remembered that the convening authority is not required to search for legal error or factual sufficiency. He may, on the other hand, determine that time and money may be saved by correcting error at his level of review rather than waiting for some other authority to return the record.

What follows is a discussion of the various issues and options which face the reviewing authority when he takes his action on review. The primary emphasis will be upon the action of the convening authority.

1. ***Findings***

a. ***Generally***. It merits repeating that the convening authority is not required to take action with respect to findings of guilty. On the other hand, issues of legal error or factual sufficiency may have to be considered by subsequent reviewing authorities. For example, the CCA may affirm only such findings of guilty as it finds correct in law and fact and determines, on the basis of the entire record, warrant approval. R.C.M. 1203. Occasionally, the court may discover error and order corrective action or dismissal of the charges. In order to avoid this from happening after a lengthy passage of time, a convening authority may choose, in his discretion, to review the findings with the intention of correcting discovered errors at an early stage. R.C.M. 1107.

b. ***Reviewing findings of guilty***

(1) In acting upon findings of guilty, a convening / reviewing authority would consider a number of issues:

(a) Did the court have jurisdiction in all respects?

(b) Did the accused have:

-1- Mental responsibility (i.e., was sane at the time of the offense); and

-2- mental capacity (i.e., was sane at the time of trial)?

-3- ***Note***: If the issue of insanity is not raised at the trial, the presumption of sanity satisfies both questions.

(c) Did the specifications of which the accused has been found guilty state offenses under the UCMJ?

(d) Is there competent evidence of record which is factually sufficient to support each element of the offense(s) of which the accused has been found guilty? In this regard, it should be noted that the convening authority has the same power to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact as the court. If the evidence is not sufficient to support a finding of guilty to a charged offense, but is sufficient to support a finding of guilty to a lesser included offense (LIO), the convening authority may approve a finding of the LIO.

(e) Are there any errors which materially prejudice the substantial rights of the accused as to offenses of which the accused was convicted?

(2) ***Note***: The record of trial is reviewed for error in the order given above because, if found, an error may in turn preclude the necessity of further review. For example, if the evidence shows the accused lacked mental responsibility, it would be a futile effort to search the record for sufficient competent evidence to establish each element of the offense.

2. ***Sentence***

a. ***Generally***. As long as the sentence is within the jurisdiction of the court-martial and does not exceed the maximum limitations prescribed for each offense in Part IV (Punitive Articles), Manual for Courts-Martial (1998 ed.), it is a legal sentence and may be approved by the convening authority. Considerable discretion is given to the convening authority in acting on the sentence. R.C.M. 1107 states that "[t]he convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused." It also states, however, that he "may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased." These issues are discussed below.

b. ***Determining the appropriateness of the sentence***. In determining what sentence should be approved or disapproved, the convening authority should consider all relevant factors including the possibility of rehabilitation, the deterrent effect of the sentence, matters relating to clemency, and requirements of a pretrial agreement. He may also, when certain findings of guilty have been disapproved, reassess the sentence to determine its appropriateness for the remaining offenses. In his reassessment, he may determine that all—or any part—of the sentence should be approved.

c. ***Reducing and changing the nature of the sentence***

(1) ***Mitigation***. When a sentence is reduced in quantity (e.g., 4 months confinement to 2 months confinement) or reduced in quality (e.g., 30 days confinement to 30 days restriction), the sentence is said to have been mitigated.

(2) ***Commutation***. When a sentence is changed to a punishment of a different nature (e.g., bad-conduct discharge to confinement), the sentence is said to have been commuted.

(3) ***General rules***. In taking action on the sentence, the convening authority must observe certain rules.

(a) When mitigating forfeitures, the duration and amounts of

forfeiture may be changed as long as the total amount forfeited is not increased and neither the amount nor duration of the forfeitures exceeds the jurisdiction of the court-martial.

(b) When mitigating confinement on bread and water or diminished rations, confinement, or hard labor without confinement, the convening authority should use the equivalencies at R.C.M 1003(b)(6), (7), and (9) as appropriate. For example, confinement on bread and water may be changed to confinement at the rate of 1 day of confinement on bread and water equaling 2 days of confinement.

(c) The sentence may not be increased in severity or duration.

(d) No part of the sentence may be changed to a punishment of a more severe type.

(e) The sentence as approved must be one which the court-martial could have adjudged.

(4) ***Application***

(a) A punitive discharge cannot be commuted to an administrative discharge, as the latter could not have been adjudged by the court-martial.

(b) ***Example***: A special court-martial adjudges a bad-conduct discharge, confinement for 6 months, forfeiture of $68 / month for 6 months. The convening authority commutes the bad-conduct discharge to confinement for 5 months and forfeitures of $68 / month for 5 months; then he approves confinement for 11 months and forfeiture of $68 / month for 11 months. Result: convening authority's action is illegal; the approved confinement and forfeiture for 11 months is beyond the jurisdiction of SPCM. *United States v. Hodges*, 22 M.J. 260 (C.M.A. 1986).

(c) Confinement and forfeitures for 1 year cannot be commuted to a bad-conduct discharge, even with accused's consent. A bad-conduct discharge is a more severe punishment and can only be approved when included in the sentence of the court-martial.

(d) A bad-conduct discharge can be commuted to confinement and forfeitures for 6 months. The latter is a less severe penalty. Confinement begins to run on the date the original sentence was imposed by the court-martial, rather than the date of the commutation.

(e) An unsuspended reduction in rate can be commuted to a suspended reduction and an unsuspended forfeiture of pay.

(f) It is often difficult to compare two authorized

punishments of different types and decide which is less severe. For example, is the loss of 500 lineal numbers more or less severe than forfeiture of $25 per month for 12 months? The C.A.A.F. has opted for ". . . affirmance of [the CA's] judgment on appeal, unless it can be said that, as a matter of law, he has increased the severity of the sentence."

d. ***Suspending the sentence***

(1) ***When used***

(a) R.C.M. 1108 states: "Suspension of a sentence grants the accused a probationary period during which the suspended part of an approved sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence shall be remitted." Simply stated, the accused is being given an opportunity to show, by his good conduct during the probationary period, that he is entitled to have the suspended portion of his sentence remitted. In this context:

- ***Suspend*** means to withhold conditionally the execution.

- ***Remit*** means to cancel the unexecuted sentence.

(b) Convening authorities and officers exercising general court-martial jurisdiction are encouraged to suspend all or any part of a sentence when such action would promote discipline and when the accused's prospects for rehabilitation would more likely be enhanced by probation than by the execution of all or any part of the sentence adjudged. JAGMAN, § 0151.

(2) ***Automatic reduction to paygrade E-1***. In accordance with the power granted in Art. 58a(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Article 58a(a), UCMJ, shall be effected in the Navy and Marine Corps in accordance with JAGMAN, § 0152. Under the provisions of JAGMAN, § 0152, a court-martial sentence of an enlisted member in a paygrade above E-1, as approved by the convening authority, that includes a punitive discharge, whether or not suspended, or confinement in excess of 90 days (if the sentence is stated in days) or 3 months (if stated in other than days), automatically reduces the member to the paygrade E-1 as of the date the sentence is approved. As a matter within his sole discretion, the convening authority may retain the accused in the paygrade held at the time of sentence or at an intermediate paygrade and suspend the automatic reduction to paygrade E-1 which would otherwise be in effect. Additionally, the convening authority may direct that the accused serve in paygrade E-1 while in confinement, but be returned to the paygrade held at the time of sentence or an intermediate paygrade upon release from confinement. Failure of the convening authority to address automatic reduction will result in the automatic reduction to paygrade E-1 on the date of the CA's action. The convening authority may, in a pretrial agreement, agree to suspend or disapprove automatic reduction to paygrade E-1.

(3) ***Requirements for a valid suspension of a sentence***

(a) The conditions of the suspension must be in writing and served on the accused in accordance with R.C.M. 1108. Unless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the UCMJ.

(b) The suspension period must be for a definite period of time which is not unreasonably long. This period shall be stated in the CA's action.

(c) A provision must be made for the punishment to be remitted at the end of the suspension period, without further action. This provision shall be included in the CA's action.

(d) A provision must be made permitting the CA to vacate the punishment 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 of the punishment. *See* ***Proceedings to vacate suspension***, section d(5), *infra*.

(4) ***Who has the power to suspend***? The convening authority, after approving the sentence, has the power to suspend any sentence except the death penalty. The military judge or members of a court-martial may recommend suspension of part or all of the sentence, but these recommendations are not binding on the convening authority or other higher authorities. The following additional authorities may suspend:

(a) The officer exercising general court-martial jurisdiction who takes action under R.C.M. 1112 (*see* ***Subsequent review***, section B.5, *supra*);

(b) for unexecuted portions of the sentence, the Secretary of the Navy, the Assistant Secretaries of the Navy, the Judge Advocate General, and all officers exercising general court-martial jurisdiction over the command to which the accused is attached (Art. 74(a), UCMJ; JAGMAN, § 0158); and

(c) in the case of a summary court-martial or a special court-martial not involving a bad-conduct discharge, the commander of the accused who has immediate authority to convene a court of the kind that adjudged the sentence. As in subparagraph (b) above, this power only extends to unexecuted portions of the sentence. JAGMAN, § 0158.

(5) ***Proceedings to vacate suspension***

(a) ***General requirements***. An act of misconduct, to serve as the basis for vacation of the suspension of a sentence, must occur within the period of suspension. The order vacating the suspension must be issued prior to the expiration of the period of suspension. The running of the period of suspension is interrupted by the unauthorized absence of the probationer or by commencement of proceedings to vacate the suspension. R.C.M. 1109 indicates that vacation of a suspended sentence may be based on a violation of the UCMJ (although it is unclear as to whether such misconduct must also be service connected). Furthermore, when all or part of the sentence has been suspended as a result of a pretrial agreement, case law indicates that the suspension may be vacated for violation of any of the lawful requirements of the probation—including the duty to obey the local civilian law (as well as military law), to refrain from associating with known drug users / dealers, and to consent to searches of his person, quarters, and vehicle at any time.

(b) ***Hearing requirements***. Procedural rules for hearing requirements depend on the type of suspended sentence being vacated.

-1- ***Sentence of any GCM or an SPCM including approved BCD***. If the suspended sentence was adjudged by any GCM, or by a SPCM which included an approved BCD, the following rules apply. After giving notice to the accused in accordance with R.C.M. 1109(d), the officer having SPCM jurisdiction over the probationer holds a hearing to inquire into the alleged violation of probation. The procedure for the hearing is similar to that prescribed for a formal pretrial investigation (Art. 32, UCMJ), and the accused has the right to detailed and / or civilian counsel at the hearing. The record of the hearing and the recommendations of the SPCM authority are forwarded to the officer exercising GCM jurisdiction who may vacate the suspension. Art. 72, UCMJ; R.C.M. 1109.

-2- ***Sentence of SPCM not including BCD or sentence of SCM***. If the suspended sentence was adjudged by a SPCM and does not include a BCD, or if the sentence was adjudged by a SCM, the following rules apply. The officer having SPCM jurisdiction over the probationer holds a hearing to inquire into the alleged violation of probation. The procedure for the hearing is similar to that prescribed for a formal pretrial investigation. The probationer must be accorded the same right to counsel at the hearing that he was entitled to at the court-martial which imposed the sentence, except there is no right to request individual military counsel. Such counsel need not be the same counsel who originally represented the probationer. If the officer having SPCM jurisdiction over the probationer decides to vacate all or a portion of the suspended sentence, he must record the evidence upon which he relied and the reasons for vacating the suspension in his action. Art. 72, UCMJ; R.C.M. 1109.

-3- ***Who must hold the hearing***? When the accused is entitled to a formal hearing [see -1- and -2- above], R.C.M. 1109 clearly indicates that the officer exercising special court-martial jurisdiction over the accused must personally conduct the hearing. He may not appoint another officer to hold the hearing for him.

-4- The officer who actually vacates the suspension must execute a written statement of the evidence he is relying on and his reasons for vacating the suspension.

-5- If, based on an act of misconduct in violation of the terms of suspension, the accused is confined prior to the actual vacation of the suspended sentence, a preliminary hearing must be held before a neutral and detached officer to determine whether there is probable cause to believe the accused has violated the terms of his suspension. R.C.M. 1109. JAGMAN, § 0160, indicates that this officer should be one who is appointed to review pretrial confinement under R.C.M. 305.

3. ***Post-trial restraint pending completion of appellate review***

a. ***Status of the accused.*** The accused's immediate commander must initially determine whether the accused will be placed in post-trial restraint pending review of the case. Specifically, he must decide whether he will confine, restrict, place in arrest, or set free the accused pending appellate review. This decision is necessary because an accused, who has been sentenced to confinement by court-martial, for example, is not automatically confined as a result of the sentence announcement. Even though the sentence of confinement runs from the date it is adjudged by the court, the sentence will not be executed until the convening authority takes his action. Thus, an accused cannot be confined on the basis of his court-martial sentence alone. An order from the commanding officer is required. As a post-trial confinee, he is referred to as an adjudged prisoner. Later, when his sentence is executed, his status will change to that of a sentenced prisoner. R.C.M. 1101.

b. ***Criteria.*** Since the sentence of confinement runs from the date adjudged, whether or not the accused is confined, a commanding officer will usually take prompt action with respect to restraint. R.C.M. 1101(b) indicates that post-trial confinement is authorized when the sentence includes confinement or death. The commanding officer may delegate the authority under this rule to the trial counsel.

c. ***The nature of post-trial restraint.*** The *Navy Corrections Manual* (SECNAVINST 1640.9 series) has been amended to eliminate the distinction between post-conviction prisoners whose sentences have not been ordered executed (adjudged prisoners) and those whose sentences to confinement have been ordered executed (sentenced prisoners). The result of these amendments is that, under the provisions of Article 404.30D of the *Navy Corrections Manual*, personnel sentenced to confinement by court-martial may be assigned to work (i.e., to perform hard labor) and to participate in other aspects of the corrections program on an unrestricted basis.

4. ***Deferment of the confinement portion of the sentence***

a. ***Definition.*** As indicated in the previous section, the confinement portion of a sentence runs from the date the sentence is adjudged. Art. 57(b), UCMJ. Deferment of a sentence to confinement is a postponement of the running and service of the confinement portion of the sentence. It is not a form of clemency. R.C.M. 1101(c).

b. ***Who may defer?*** Only the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial authority over the command to which the accused is attached can defer the sentence. R.C.M. 1001(c).

c. ***When deferment may be ordered.*** Deferment may be considered only upon written application of the accused. If the accused has requested deferment, it may be granted anytime after the adjournment of the court-martial, as long as the sentence has not been executed. R.C.M. 1101(c).

d. ***Action on the deferment request.*** The decision to defer is a matter of command discretion. As stated in R.C.M. 1101(c)(3), "the accused shall have the burden to show that the interests of the accused and the community in release outweigh the community's interest in confinement." Some of the factors the convening authority may consider include:

(1) The probability of the accused's flight to avoid service of the sentence;

(2) the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice;

(3) the nature of the offenses (including the effect on the victim) of which the accused was convicted;

(4) the sentence adjudged;

(5) the effect of deferment on good order and discipline in the command; and

(6) the accused's character, mental condition, family situation, and service record.

Although the decision to grant or deny the deferment request falls within the convening authority's sole discretion, that decision can be tested on review for abuse of discretion. In a C.A.A.F. case, the court held that the CA abused his discretion by denying deferment where the accused (an Air Force captain who was a physician) showed that he had no prior record, that his conviction was not based on any act of violence, that he had made no previous attempt to flee, that he had custody of a minor child, and that he had substantial personal property in the area.

e. ***Imposition of restraint during deferment.*** No restrictions on the accused's liberty may be ordered as a substitute for the confinement deferred. An accused may, however, be restrained for an independent reason (e.g., pretrial restraint resulting from a different set of facts). R.C.M. 1101(c)(5).

f. ***Termination of deferment.*** Deferment is terminated when:

(1) The CA takes action, unless the CA specifies in the action that service of the confinement after the action is deferred (in this case, deferment terminates when the conviction is final);

(2) the sentence to confinement is suspended;

(3) the deferment expires by its own terms; or

(4) the deferment is rescinded by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial authority over the accused's command. R.C.M. 1101(c)(7). Deferment may be rescinded when additional information comes to the authority's attention which, in his discretion, presents grounds for denial of deferment under paragraph 4, above. The accused must be given notice of the intended rescission and of his right to submit written matters. He may, however, be required to serve the sentence to confinement pending this action. R.C.M. 1107(c)(7).

g. ***Procedure.*** Applications must be in writing and may be made by the accused at any time after adjournment of the court. The granting or denying of the application is likewise in writing. If the deferment request is used to effectuate the intent of a pretrial agreement term suspending all confinement, it may be submitted, along with the pretrial agreement by the defense counsel, and the convening authority may sign both documents at once—well before trial.

h. ***Record of proceedings.*** Any document relating to deferment or rescission of deferment must be made a part of the record of trial. The dates of any periods of deferment and the date of any rescission are stated in the convening authority or supplementary actions.

5. ***Execution of the sentence.*** An order executing the sentence directs that the sentence be carried out. In the case of confinement, it directs that it be served; in the case of a punitive discharge, that it be delivered. The decision as to execution of the sentence is closely related to other post-trial decisions involving suspension, deferment of confinement, and imposition of post-trial restraint.

a. ***Execution authorities***

(1) No sentence may be executed by the convening authority unless and until it is approved by him. R.C.M. 1113(a). Once approved, every part of the sentence, except for a punitive discharge, dismissal, or death, may be executed by the convening authority in his initial action. R.C.M. 1113(b). Of course, a suspended sentence is approved, but not executed.

(2) A punitive discharge may only be executed by:

(a) The officer exercising general court-martial jurisdiction who reviews a case when appellate review has been waived under R.C.M. 1112(f); or

(b) the officer then exercising general court-martial jurisdiction over the accused after appellate review is final under R.C.M. 1209. If more than 6 months has passed since the approval of the sentence by the convening authority, the officer exercising general court-martial jurisdiction over the accused shall consider the advice of that officer's SJA as to whether retention of the accused would be in the best interest of the service. The advice shall include:

-1- The findings and sentence as finally approved;

-2- an indication as to whether the service member has been on active duty since the trial and, if so, the nature of that duty; and

-3- a recommendation whether the discharge should be executed. R.C.M. 1113(c)(1).

(3) Dismissal may be ordered executed only by the Secretary of the Navy or by such Under Secretary or Assistant Secretary as the Secretary may designate. R.C.M. 1113(c)(2).

(4) Death may be ordered executed only by the President. R.C.M. 1113(c)(3).

(5) Though a punitive discharge may have been ordered executed, it shall not in fact be executed until all provisions of SECNAVINST 5815.3 series, concerning Naval Clemency and Parole Board action, have been complied with. JAGMAN, § 0157.

b. ***Appellate leave***. Under the provisions of Art. 76(a), UCMJ, the Secretary of the Navy may prescribe regulations which require that an accused take leave pending completion of the appellate review process if the sentence, as approved by the convening authority, includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct discharge. The secretarial regulations concerning appellate leave are contained in Article 3420280 of the MILPERSMAN for Navy personnel and paragraph 3025 of MCO P1050.3G, *Regulations for Leave, Liberty and Administrative Absence*, for Marine Corps

personnel. Stated very simply, procedures applicable to Navy and Marine Corps personnel have been revised to provide authority to place a member on mandatory appellate leave.

c. ***Automatic reduction to paygrade E-1.*** In accordance with the power granted in Art. 58a(a), UCMJ, the Secretary of the Navy has determined that automatic reduction under Art. 58a(a), UCMJ, shall be effected in the Navy and Marine Corps in accordance with JAGMAN, § 0152d. Under the provisions of JAGMAN, § 0152d, a court-martial sentence of an enlisted member in a paygrade above E-1, as approved by the convening authority, that includes a punitive discharge or confinement in excess of 90 days (if the sentence is stated in days) or 3 months (if stated in other than days), automatically reduces the member to the paygrade E-1 as of the date the sentence is approved. As a matter within his sole discretion, the convening authority may retain the accused in the paygrade held at the time of sentence or at an intermediate paygrade and suspend the automatic reduction to paygrade E-1 which would otherwise be in effect. Additionally, the convening authority may direct that the accused serve in paygrade E-1 while in confinement, but be returned to the paygrade held at the time of sentence or an intermediate paygrade upon release from confinement. Failure of the convening authority to address automatic reduction will result in the automatic reduction to paygrade E-1 on the date of the CA's action.

d. ***Execution of confinement***

(1) The convening authority designates the place of confinement in his CA's action. R.C.M. 1113.

(2) Though confinement begins to run from the date the sentence is adjudged by the court-martial, the following periods are excluded in computing the service of the term of confinement:

(a) Periods in which the confinement is suspended or deferred;

(b) periods during which the accused is in custody of civilian authorities under Art. 14, UCMJ, if the accused was convicted in the civilian court;

(c) periods of unauthorized absence, escape, or release through fraudulent misrepresentation;

(d) periods of absence under parole which is later revoked or a period of erroneous release from confinement through a writ of *habeas corpus* which is later reversed; and

(e) periods in which another sentence of confinement by court-martial is being served. This happens when a later court-martial adjudges confinement. The later sentence of confinement interrupts the running of the earlier sentence. (Only restraint-type punishments interrupt an earlier sentence.) Once the later sentence is served,

the remaining portion of the earlier sentence begins again. R.C.M. 1113.

6. ***Speedy review***

a. The accused has a right to have his case reviewed promptly and without unnecessary delay. The C.A.A.F. 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 officer exercising government court-martial jurisdiction taking action. The presumption placed a heavy burden on the government to show due diligence and, in the absence of such a showing, the charges were dismissed. *Dunlap v. Convening Authority*, 23 C.M.A. 135, 48 C.M.R. 751 (1974). Later, in *United States v. Banks*, 7 M.J. 92 (C.M.A. 1979), the court softened its stance, rejecting the rule of presumed prejudice in post-trial confinement cases. For cases after 18 June 1979, the court has required a showing of specific prejudice to the accused, a rule which now applies regardless of his post-trial confinement status. In the absence of any articulated prejudice to the accused caused by delay, no corrective action will be required.

b. The C.A.A.F. appears to be aware, however, of the need to be vigilant in finding prejudice whenever lengthy post-trial delay in review occurs. Consider, for example, the case of *United States v. Clevidence*, 14 M.J. 17 (C.M.A. 1982). In this case, the accused was sentenced to a bad-conduct discharge, confinement at hard labor, and forfeitures for 3 months for two specifications of failing to go to his appointed place of duty, one specification of disrespect, and four specifications of failure to obey lawful orders. The accused spent 77 days in post-trial confinement and thereafter was given appellate leave. The record of trial was not authenticated by the military judge, however, until 200 days after the sentence had been adjudged. Moreover, the supervisory authority's action was not accomplished for an additional 113 days. In reversing the accused's conviction, the C.A.A.F. held that:

> [w]e are reluctant to dismiss charges because of errors on the Government's part and we would especially hesitate to do so if the case involved more serious offenses. However, it seems clear that unless we register our emphatic disapproval of such "inordinate and unexplained" delay in a case like this, we would be faced in the near future with a situation that would induce a return to the draconian rule of *Dunlap*.
>
> Since it appears that under the circumstances of this case, the delay in post-trial review was prejudicial to Clevidence and since we are sure that, in the exercise of our supervisory authority over military justice, we must halt the erosion in prompt post-trial review of courts-martial, we reverse the decision, . . ., set aside the findings and sentence, and dismiss the charges against appellant.

In *United States v. Gentry*, 14 M.J. 209 (C.M.A. 1982), the court set aside findings of guilty and dismissed two charges involving the use of marijuana by a lieutenant junior grade when the convening authority did not take his post-trial action in the case until 490 days after sentence was announced. The court noted:

> That no reason appears in the record—nor is any alleged—explaining the inordinate delay in the post-trial processing of this routine case . . . .
>
> It further appearing that appellant—a lieutenant (junior grade)—was not confined after trial and remained on active duty; that he was shunned by his commander and ordered by him to stay off station and to maintain a low profile; that he was not promoted due to the pendency of the convening authority's action, notwithstanding that he was selected for promotion one and one-half years before that action and was selected each year thereafter; and
>
> That appellant, anticipating prompt action by the convening authority and early dismissal, nevertheless had to reject two civilian job offers only after withholding decision on each for as long as possible;
>
> [T]his case is another example of the "erosion of prompt post-trial review of courts-martial" which must be halted. *United States v. Clevidence*, 14 M.J. 17, 19 (C.M.A. 1982) . . . .

D. *Composition of convening authority's action and promulgating order*

1. *Convening authority's action*

a. ***Overview***. In cases resulting in conviction, the document known as the convening authority's action (CA's action) is made up of various parts, a list of which follows. Those marked with an asterisk (*) are always included in cases of conviction; the others are used only when appropriate. The format of the CA's action is specified in Appendix 16 of the *Manual for Courts-Martial, 1995*.

(1) Statement of disapproval or modification of findings;

* (2) statement of approval, modification or disapproval of sentence;

(3) declaration of invalidity of proceedings;

(4) order of rehearing or dismissal of charges or order of another trial;

(5) statement of reasons for disapproval, if a rehearing or another trial is ordered;

(6) order of execution or suspension of sentence;

(7) statement concerning automatic administrative reduction to E-1;

(8) order of deferment of confinement or rescission of deferment;

(9) designation of place of confinement;

(10) credit for illegal pretrial confinement or confinement served at a former trial;

(11) reprimand;

(12) statement regarding companion case;

(13) statement of facts in aggravation, extenuation, and mitigation;

(14) statement as to accused's opportunity to rebut adverse matter;

(15) statement forwarding record of trial; and

* (16) signature and authority to act.

The following is a discussion of these individual parts of the CA's action and some suggested language for each.

b. ***Statement of disapproval or modification of findings***

(1) This statement is not required in the CA's action; however, as previously discussed, the convening authority may, in his discretion, act with respect to the findings. If so, they are addressed in the action only when findings of guilty are disapproved in whole or in part.

(2) ***Examples***:

(a) ***Some findings disapproved***: "In the case of _____, the finding of guilty to Specification 2, Charge II is disapproved . . . ." Manual for Courts-Martial (1998 ed.), app. 16, form 15.

(b) ***Approval of a lesser included offense***: "In the case of

_____, the finding of guilty of Specification 1, Charge II is changed to a finding of guilty of (assault with a means likely to produce grievous bodily harm, to wit: a knife) (absence without authority from (unit) alleged from 1 January 19CY to 3 March 19CY, in violation of Article 86)." Manual for Courts-Martial (1998 ed.), app. 16, form 16.

c. ***Statement of approval, modification or disapproval of sentence***

(1) The CA's action must state whether the sentence adjudged is approved or disapproved. If only part of the sentence is approved, the action shall state which parts are approved. Though the action to be taken on the sentence is a matter of command discretion, a pretrial agreement may require the convening authority to take a particular action.

(2) ***Examples***:

(a) "In the case of _____, the sentence is approved . . . ." Manual for Courts-Martial (1998 ed.), app. 16, form 1.

(b) "In the case of _____, only so much of the sentence as provides for _____ is approved . . . ." Manual for Courts-Martial (1998 ed.), app. 16, form 2.

(c) "In the case of _____, the sentence is approved but _____ months of the approved period of confinement is changed to forfeiture of $_____ pay per month for _____ months . . . ." Manual for Courts-Martial (1998 ed.), app. 16, form 3.

(d) "In the case of _____, it appears that the following error was committed: (evidence of a previous conviction of the accused was erroneously admitted) ( ). This error was prejudicial as to the sentence. The sentence is disapproved . . . ." Manual for Courts-Martial (1998 ed.), app. 16, form 10.

d. ***Declaration of invalidity of proceedings***

(1) This action is used in any case in which the court lacked jurisdiction or where one or more specifications fail to state an offense. A statement of disapproval is not proper in these cases because such a statement implies validity of the proceedings.

(2) ***Examples***:

(a) ***Lack of jurisdiction***: "In the case of _____, it appears that the (members were not detailed to the court-martial by the convening authority) ( ). The proceedings, findings, and sentence are invalid . . . ." Manual for Courts-Martial (1998 ed.), app. 16, form 19.

(b) ***One charge fails to state an offense***: "The findings and proceedings as to Charge I and its Specification are invalid . . . ." (No form)

e. ***Order of rehearing or dismissal of charge or order of another trial***

(1) If the CA's action disapproves any findings of guilty, the action must state either:

(a) That the charge and the specification(s) therender are dismissed; ***or***

(b) that a rehearing or other trial is ordered with respect to that charge and specification. R.C.M. 1107(f)(3).

In the first instance, the sentence may be modified if it is no longer appropriate in light of the dismissed specification. When a rehearing is ordered with respect to a disapproved specification, as in the second instance, the entire sentence must be disapproved. R.C.M. 1107(f)(4). The accused will be sentenced at the rehearing, if convicted.

(2) A rehearing on sentencing alone is possible only after the entire sentence has been disapproved. R.C.M. 1107(f)(4).

(3) "Another trial" may be ordered when the findings of guilty are declared invalid. Otherwise, the charges should be dismissed. *See* ***Declaration of invalidity of proceedings***, para. d, above.

(4) ***Examples***:

(a) ***Charges dismissed***: "In the case of _____, the findings of guilty and the sentence are disapproved. The charges are dismissed." Manual for Courts-Martial (1998 ed.), app. 16, form 20.

(b) ***Some findings disapproved; sentence approved or reassessed***: "In the case of _____, the finding of guilty of Specification 2, Charge I is disapproved. Specification 2, Charge I is dismissed. (The sentence is approved . . . .) (Only so much of the sentence as provides for _____ is approved . . . .)" Manual for Courts-Martial (1998 ed.), app. 15, forms 15 and 16.

(c) ***Rehearing with respect to disapproved findings***: "The findings of guilty as to Specifications 1 and 2 of Charge II and the sentence are disapproved. A combined rehearing is ordered before a court-martial to be designated." Manual for Courts-Martial (1998 ed.), app. 16, form 17.

(d) ***Sentence disapproved***: "This error was prejudicial as to the sentence. The sentence is disapproved. A rehearing is ordered before a ( ) court-martial to be designated." Manual for Courts-Martial (1998 ed.), app. 16, form 10.

(e) ***Jurisdictional error***: "In the case of _____, it appears (that the members were not detailed to the court-martial by the convening authority) ( ). The proceedings, findings, and sentence are invalid. Another trial is ordered before a court-martial to be designated." Manual for Courts-Martial (1998 ed.), app. 16, form 19.

f. ***Statement of reason for disapproval if a rehearing or another trial is ordered***. In certain situations, the convening authority should state his reasons for disapproving the findings or sentence.

(1) ***Rehearing***. If a rehearing of any type is ordered, the convening authority must state the reason for disapproval of findings or sentence. R.C.M. 1107(f)(3). In such a statement, if the entire case is not affected, the drafter must specify what parts of the case are affected by the error causing disapproval (e.g., entire sentence but only some findings, sentence only, etc.). The purpose of this statement is to guide the court's actions in the rehearing so that the same error does not occur again.

(2) ***Examples***:

(a) ***Disapproval of sentence***: "In the case of _____, it appears that the following error was committed: (evidence of a previous conviction of the accused was erroneously admitted) ( ). This error was prejudicial as to the sentence. The sentence is disapproved. A rehearing is ordered before a ( ) court-martial to be designated." Manual for Courts-Martial (1998 ed.), app. 16, form 10.

(b) ***Some findings disapproved***: "In the case of _____, it appears that the following error was committed: (Exhibit 1, a laboratory report, was not properly authenticated and was admitted over the objection of the defense) ( ). This error was prejudicial as to Specifications 1 and 2 of Charge II, and the sentence is disapproved. A combined rehearing is ordered before a court-martial to be designated." Manual for Courts-Martial (1998 ed.), app. 16, form 17.

(c) ***All findings disapproved***: "In the case of _____, it appears that the following error was committed: (evidence offered by the defense to establish duress was improperly excluded) ( ). This error was prejudicial to the rights of the accused as to all findings of guilty. The findings of guilty and the sentence are disapproved. A rehearing is ordered before a court-martial to be designated." Manual for Courts-Martial (1998 ed.), app. 16, form 18.

(2) ***Another trial***. Where the proceedings are declared invalid because of the failure of the specification to state an offense or because of a correctable jurisdictional defect (e.g., the court was not sworn), the convening authority must state the

reason for the declaration of invalidity when he orders another trial. R.C.M. 1107(e)(2). For an example, see the previous section.

(3) ***Subsequent administrative action.*** Even if a rehearing is not ordered, the reason for disapproval might aid in determining the effect of the proceedings upon future administrative disposition of the accused. In those cases, the reasons for disapproval should be set forth in the action. R.C.M. 1107(f)(3), Discussion.

(4) ***For information of higher reviewing authorities.*** In the convening authority's review of the case, it is often desirable for him to state the reason for his action. For example, in a case where the convening authority finds prejudicial error in the admission of a previous conviction in the sentencing portion of the trial, he may choose to reassess the sentence to cure the effect of the error rather than ordering a rehearing. It would be advisable to state the reason for any reduction in the sentence (e.g., reassessment as opposed to clemency) for the information of higher reviewing authorities. If the reason for reduction of the sentence is not apparent from the record of trial, higher reviewing authorities might view the reduction as an exercise of clemency and further reduce the sentence to cure the effect of the erroneously admitted evidence.

g. ***Order of execution or suspension of sentence***

(1) If the convening authority decides to suspend part or all of a sentence, he must state his decision in the CA's action. If he is authorized to execute any part of the sentence and he desires to do so, he should so state in the action. R.C.M. 1107(f)(4). No part of a sentence may be suspended unless it has been approved first. Language should be included in the CA's action providing that, unless the suspension is sooner vacated, the suspended portion of the sentence shall be remitted at the end of the suspension period. R.C.M. 1108.

(2) ***Examples:***

(a) ***Entire sentence executed:*** "In the case of _____, the sentence is approved and will be executed." Manual for Courts-Martial (1998 ed.), app. 16, form 1.

(b) ***Part of sentence executed:*** "In the case of _____, only so much of the sentence as provides for _____ is approved and will be executed." Manual for Courts-Martial (1998 ed.), app. 16, form 12.

(c) ***Entire sentence suspended:*** "In the case of _____, the sentence is approved. Execution of the sentence is suspended for ____ months, at which time, unless the sentence is sooner vacated, the sentence will be remitted without further action." Manual for Courts-Martial (1998 ed.), app. 16, form 5.

(d) ***Part of sentence suspended:*** "In the case of ____, the

sentence is approved and will be executed, but the execution of that part of the sentence extending to (confinement) ( ) is suspended for ____ months, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action." Manual for Courts-Martial (1998 ed.), app. 16, form 6.

(e) ***Cases of discharge, dismissal, or death***: "In the case of _____, the sentence is approved and, except for the (part of the sentence extending to death) (dismissal) (dishonorable discharge) (bad-conduct discharge), will be executed." Manual for Courts-Martial (1998 ed.) app. 16, form 11.

h. ***Statement concerning automatic administrative reduction to E-1***

(1) In his sole discretion, the convening authority may retain the accused at his present paygrade and suspend the automatic reduction. Additionally, the convening authority may direct that the accused serve in paygrade E-1 while in confinement but be returned to the paygrade held at the time of sentencing, or an intermediate paygrade, when released from confinement. Failure to address automatic reduction will result in the reduction taking place automatically on the date of the CA's action.

(2) ***Examples***:

(a) "In the foregoing case of _____, the sentence is approved (and will be duly executed) but (the execution of so much thereof as provides for reduction to paygrade _____ and) automatic reduction to paygrade E-1 is suspended until _____, at which time, unless the suspension is sooner vacated, the suspended portions will be remitted without further action. The accused will (continue to) serve in paygrade _____ unless the suspension of the (reduction to paygrade _____ and) automatic reduction is vacated, in which event the accused at that time will be reduced to the paygrade of E-1." JAGMAN, § 0152d(3)(a).

(b) "In the foregoing case of _____, the sentence is approved (and will be duly executed). The accused will serve in paygrade E-1 from this date until released from confinement at which time he / she will be returned to paygrade _____." JAGMAN, § 0152d(3)(b).

i. ***Order of deferral of confinement or rescission of deferral***

(1) In those cases in which the granting of an application for deferral of confinement takes place prior to, or concurrently with, the CA's action, the convening authority must state the date upon which the sentence was (or is) deferred in his action. If rescission takes place prior to, or concurrently with, the CA's action, the dates of deferment and rescission of deferment must be included in the action. In the event that deferment or rescission of deferment takes place after the CA's action, a supplementary order to that effect will be issued and forwarded for inclusion in the record of trial. R.C.M. 1101, 1107(f)(4)(E).

(2) ***Examples***:

(a) ***Confinement deferred pending final review***: "In the case of _____, the sentence is approved and, except for that portion extending to confinement, will be executed. Service of the sentence to confinement (is) (was) deferred effective _____ 19__, and will not begin until (the conviction is final) ( ), unless sooner rescinded by competent authority." Manual for Courts-Martial (1998 ed.), app. 16, form 7.

(b) ***Deferment of confinement terminated***: "In the case of _____, the sentence is approved and will be executed. The service of the sentence to confinement was deferred on _____ 19__." Manual for Courts-Martial (1998 ed.), app. 16, form 8.

(c) ***Deferment of confinement terminated previously***: "In the case of _____, the sentence is approved and will be executed. The service of the sentence to confinement was deferred on _____ 19__, and the deferment ended on _____ 19__." Manual for Courts-Martial (1998 ed.), app. 16, form 9.

j. ***Designation of place of confinement***

(1) In any case in which the convening authority orders confinement executed or imposes post-trial confinement pending final review, he must designate the place of such confinement in his action. R.C.M. 1107(f)(4)(D).

(2) ***Examples***:

(a) "_____ is designated as the place of confinement." Manual for Courts-Martial (1998 ed.), app. 16, form 1.

(b) "Pending completion of appellate review, the accused will be confined in _____"; or "The place of temporary confinement will be _____" (No form).

k. ***Credit for illegal pretrial confinement or confinement served from a former trial***

(1) When there has been illegal pretrial confinement, or confinement served from a former trial in the case of action on a rehearing, the entire sentence to confinement may be approved. Credit is then applied as a separate statement in the CA's action.

(2) ***Examples***:

(a) ***Credit for illegal pretrial confinement***: "In the case of _____, the sentence is approved and will be executed. The accused will be credited with ____ days of confinement against the sentence to confinement." Manual for Courts-Martial (1998 ed.), app. 16, form 4.

(b) ***Credit for previously executed or served punishment***: "In the case of _____, the sentence is approved and will be executed. The accused will be credited with any portion of the punishment served from _____ 19__ to _____ 19__ under the sentence adjudged at the former trial of this case." Manual for Courts-Martial (1998 ed.), app. 16, form 21.

l. ***Reprimand***. Where the convening authority executes a sentence including a reprimand, he must include the reprimand in his action. R.C.M. 1107(f)(4)(G); JAGMAN, § 0152.

m. ***Statement regarding companion case***

(1) In cases in which a separate trial was ordered for a companion case, the convening authority must so indicate in his action on each record of trial. JAGMAN, § 0151. This statement alerts reviewing authorities to look for the companion case and enables them to evaluate the relative appropriateness of the sentences.

(2) ***Example***: "This is a companion case to that of BMSN Mark Fortenberry, USN, 999-99-9999, tried by special court-martial by this command on 5 March 19CY."

n. ***Statement of facts in aggravation, extenuation, and mitigation not in record of trial***

(1) In his action, the convening authority must include a statement of any facts which tend to extenuate, mitigate, or aggravate the offense if:

(a) The convening authority approves a punitive discharge, whether or not he suspends it; and

(b) the case involves a conviction of larceny or other offense involving moral turpitude; and

(c) they do not otherwise appear in the record of trial.

(2) If the information set forth is not exclusively extenuating or mitigating, the convening authority shall refer a copy of the information to the accused before acting on the case and shall afford the accused an opportunity to rebut any portion of the information. JAGMAN, § 0151.

(3) ***Example***: "A synopsis of the facts tending to extenuate, mitigate, or aggravate the offense of the accused, not otherwise appearing in the record of trial or in the papers accompanying same, is as follows: (State fully but concisely). Prior to taking my action on this case, the foregoing synopsis was referred to the accused for any rebuttal, explanation, or comment he might care to make. (The accused's statement, which is appended to the record of trial, was carefully considered by me before taking my action on this case.) or (The accused did not desire to make any statement.)"

o. ***Statement as to accused's opportunity to rebut adverse matter***

(1) In any case where the convening authority considers matter adverse to the accused, which does not appear in the record of trial and is not properly included in the accused's service record, he should state in his action:

(a) The information which was considered; and

(b) that the accused was afforded an opportunity to rebut such matter; and

(c) that the accused did or did not make such a rebuttal statement.

(2) If the accused makes a statement in rebuttal, a copy of it should be appended to the CA's action. JAGMAN, § 0151.

(3) ***Example***: "Prior to taking any action on this case, the foregoing information was referred to the accused for any rebuttal, explanation, or comment he might care to make. (The accused's statement, which was carefully considered by me before taking my action on this case, is appended to the record of trial.) or (The accused did not desire to make any statement.)"

p. ***Statement forwarding the record of trial***

(1) When a record of trial is forwarded to a judge advocate for review under R.C.M. 1112, the convening authority should include a statement in his action indicating to whom he is forwarding the record of trial. JAGMAN, § 0153.

(2) ***Example***: "The record of trial is forwarded to the Staff Judge Advocate, Commander, Naval Base, Norfolk, for review under Article 64(a), UCMJ."

q. ***Signature and authority***. The CA's action must be signed personally by the convening authority. Below his signature he must indicate his grade and authority to take action (e.g., commanding officer). R.C.M. 1107(f).

r. ***Censure***. No action may be taken by the convening authority in his

action or otherwise that would amount to censure of the court or member, military judge, or counsel thereof. Art. 37, UCMJ.

s. ***Action on rehearing***

(1) The action on a rehearing is the same as an action on an original court-martial in most respects. It differs first in that, as to any sentence approved following the hearing, the accused must be credited with those parts of the sentence previously executed or otherwise served. Second, in certain cases, the convening authority must provide for the restoration of certain rights, privileges, and property. *See* R.C.M. 1107(f)(5)(A).

(2) ***Examples***

(a) ***Credit for previously executed or served punishment***: "In the case of _____, the sentence is approved and will be executed. The accused will be credited with any portion of the punishment served from _____ 19__ to _____ 19__ under the sentence adjudged at the former trial of this case." Manual for Courts-Martial (1998 ed.), app. 16, form 21.

(b) ***Restoration of rights***: "In the case of _____, the findings of guilty and the sentence are disapproved and the charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the execution of the sentence adjudged at the former trial of this case on _____ 19__ will be restored." Manual for Courts-Martial (1998 ed.), app. 16, form 22.

Restoration of rights would also be required when the accused is acquitted at the rehearing or if the proceedings are declared invalid because of jurisdictional error.

t. ***Withdrawal of previous action***

(1) R.C.M. 1107(f)(2) authorizes the convening authority to withdraw a previous action and modify it under certain conditions.

(2) ***Example***: "In the case of _____, this action taken by (me) (my predecessor in command) on _____ 19__ is withdrawn and the following substituted therefor: _____." Manual for Courts-Martial (1998 ed.), app. 16, form 24.

2. ***Promulgating orders (i.e., court-martial orders)***

a. ***In general.*** A promulgating order publishes the results of the court-martial, the CA's action, and any subsequent action with regard to the case. It is a method of recordkeeping and informing all those officially interested in the progress of the case. R.C.M.

1114; JAGMAN, § 0155.

b. ***When used***

(1) A promulgating order is ***not*** issued for summary courts-martial.

(2) A promulgating order is issued for every special court-martial and general court-martial, including those resulting in acquittal.

c. ***Who issues***? The convening authority normally issues a promulgating order to publish the results of trial and his action on the case. Any action taken on the case subsequent to the initial action, such as to execute a discharge, shall be promulgated in supplementary orders by the authority authorized to take such action. R.C.M. 1114; JAGMAN, § 0155. Where the findings and sentence set forth in the initial promulgating order are affirmed without modification upon subsequent review, no further order need be issued. JAGMAN, § 0155.

d. ***Form and content of the order***. The form for promulgating orders is set out in Appendix 17 of the *Manual for Courts-Martial, 1995*.

Each promulgating order published by a command during the calendar year is numbered consecutively, with the year following the number of the order. For example, the 10th special court-martial published by a command during 19CY would be "Special Court-Martial Order No. 10-19CY." In the center of the page, the title of the command issuing the order is set forth along with the date of the order—which is the date of the action of the authority issuing the order. For example, if the date of the CA's action is 15 March 19CY, the date of the court-martial order would also be 15 March 19CY.

The next section of the court-martial order is called the "authority" section. It indicates the place where the trial was held, the command and organization of the convening authority, and the serial number and date of the convening order. For example:

> Before a special court-martial which convened at Naval Justice School, Newport, Rhode Island, pursuant to Commanding Officer, Naval Justice School, Special Court-Martial Convening Order 3-CY of 1 March 19CY . . . .

The authority section is followed by the "arraignment and the accused" section of the order. The arraignment section simply contains a statement that the accused was arraigned and tried. The accused section contains the grade, name, social security number, branch of service, and unit of the accused. When added to the authority section, this section looks like this:

> Before a special court-martial which convened at Naval Justice School, Newport, Rhode Island, pursuant to Commanding Officer, Naval Justice School Special Court-Martial Convening Order 3-CY of 1 March 19CY, was arraigned and tried: BOATSWAIN'S MATE SEAMAN MARK FORTENBERRY, U.S. NAVY, 999-99-9999, NAVAL JUSTICE SCHOOL, NEWPORT, RHODE ISLAND.

The court-martial order next sets forth the charge(s) and specification(s) upon which the accused was arraigned. The specifications should be summarized indicating specific factors such as value, amount, duration, and other circumstances which affect the maximum punishment. The specification may be reproduced verbatim if necessary. Findings should be indicated in parentheses after each charge and specification. For example:

> The accused was arraigned on the following offenses and the following findings or other dispositions were reached:
>
> Charge I: Article 86. Plea: G. Finding: G.
>
> Specification 1: Unauthorized absence from unit from 1 January 19CY to 15 February 19CY. Plea: G. Finding: G.
>
> Specification 2: Failure to repair 18 February 19CY (dismissed on motion of defense for failure to state an offense).
>
> Charge II: Article 121 Plea: NG. Finding: NG.
>
> Specification: Larceny of property of a value of $150.00 on 27 January 19CY.
> Plea: NG. Finding: NG.

The plea(s) section follows the charge(s) and specification(s) section of the court-martial order. For example:

> The finding of guilty as to Charge I, Specification 1, was based on the accused's plea of guilty. The accused pleaded not guilty to the remaining charge and specification.

If the accused was acquitted of all charges and specifications, the date of the acquittal should be shown: "The findings were announced on _____ 19__."

If the accused was convicted of one or more specifications, it is necessary to include the sentence in the court-martial order.

The (military judge) (members) adjudged the following sentence on _____ 19__:

Forfeitures of $100.00 pay per month for 6 months, confinement for 6 months, and reduction to paygrade E-1.

The "action" section is next. It contains the CA's action verbatim (including the heading, date, and signature or evidence of signature).

ACTION

NAVAL JUSTICE SCHOOL
NEWPORT, RHODE ISLAND 02841-5030

15 Mar CY

In the case of Boatswain's Mate Seaman Mark Fortenberry, U.S. Navy, Naval Justice School, Newport, Rhode Island, the sentence is approved and will be executed. The Navy Brig, Newport, Rhode Island, is designated as the place of confinement.

The record of trial is forwarded to the Staff Judge Advocate, Commander, Naval Education and Training Center, Newport, Rhode Island, for action under Article 64(a), UCMJ.

/s/ I. M. Law
I. M. LAW
Captain, JAGC, U.S. Navy
Commanding Officer
Naval Justice School
Newport, Rhode Island

At the end of the court-martial order is the "authentication" section. This section simply contains the signature of the authority issuing the court-martial order or the signature of a subordinate officer designated by him to sign "by direction." The name, grade, title, and organization of the officer actually signing the court-martial order must be shown. If signed "by direction," such fact must be shown—together with the name, grade, title, and organization of the officer issuing the order.

e. ***Distribution of the order***

(1) The ***original*** goes in the record of trial.

(2) A ***duplicate original*** is placed in the accused's service record only if the accused has been convicted.

(3) ***Certified*** or ***plain copies*** go to many places. *See* JAGMAN § 0155.

f. ***Supplemental orders***. Action on the case occurring after the initial promulgating order has been published will be published by issuing a supplementary promulgating order. *See* JAGMAN, § 0155. Appendix 17 of the *Manual for Courts-Martial, 1995*, provides the necessary forms.

REPORT OF RESULTS OF TRIAL
{From JAGMAN Ch. 3}

From:

Subj: REPORT OF RESULTS OF TRIAL

1. Pursuant to R.C.M. 1101(a) and 1304(b)(2)(f)(v), MCM, notification is hereby given in the case of United States v. _____, a trial by _____ court-martial occurring at _____, convened by _____.

2. Offenses, pleas, and findings:

Charges & Specifications Pleas Findings
(with description of offense(s))

3. Forum:

Judge alone _____ Members _____ Enlisted members _____

4. Sentence adjudged:

5. Date sentence adjudged: _____. Adjudged forfeitures, adjudged reduction in grade, and automatic forfeitures, if any, become effective _____ (14 days after date sentence was announced) unless indicated otherwise in paragraph 8, below, or unless written notice of deferment by the convening authority is received by authorities with responsibility for the accused's service and pay records. Absent pertinent direction to the contrary in paragraph 8, below, or such written notice of deferment, action by those authorities in this case giving effect to the adjudged and automatic sentence, when applicable, must occur by the second date in this paragraph. Trial counsel must be provided the originals of such written approved deferments for inclusion in the record of trial (R.C.M. 1103).

6. Automatic forfeitures apply: Yes _____ No _____
See paragraph 8, below, for the specific sentence to be given effect in this case, consistent with paragraph 5, above.

a. GCM _____ (forfeiture of all pay and allowances while confined)

b. SPCM _____ (2/3 pay while confined)

7. Credits to be applied to confinement, if any:

a. Pretrial Confinement: _____ days (see note)

b. Judicially-ordered credits: _____ days

Total credits: _____ days

8. Terms of pretrial agreement concerning sentence, if any:

_____

_____

_____

_____

_____

_____
Trial Counsel/Summary Court-Martial

Distribution:
Convening Authority
Commanding officer of accused
CO/OIC of brig (if confinement adjudged)
PDS/Unit Diary Clerk
Disbursing Office
Record of trial
Officer exercising general court-martial jurisdiction

[Note: Each day of pretrial confinement shall be counted as a day of pretrial confinement, except that, if the sentence includes confinement, the day on which sentence is announced shall not be counted as a day of pretrial confinement. Notwithstanding the foregoing, authorities responsible for sentence computation will count the day of sentencing as a day of pretrial confinement, when the accused was in pretrial confinement on the day that a sentence including confinement was announced and, for any reason (e.g., immediate deferment), that day does not count towards service of the sentence to confinement.]

7 Jul CY

From: Staff Judge Advocate, Naval Surface Group FOUR
To: Commander, Naval Surface Group FOUR

Subj: RECOMMENDATION IN THE SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

Ref: (a) R.C.M. 1106, Manual for Courts-Martial (1998 ed.)
(b) JAGMAN, § 0151c

Encl: (1) Record of trial ICO YNSN John Q. Public, USN

1. Pursuant to references (a) and (b), the following information is provided:

a. Offenses, pleas, and findings:

Charges and specifications	Pleas	Findings
Charge I: Violation of Article 86, UCMJ	Guilty	Guilty
Specification: Unauthorized absence from his unit, USS Edson, from 13 July 20CY(-1) to his surrender on 5 January 20CY.	Guilty	Guilty
Charge II: Violation of Article 121, UCMJ	Guilty	Guilty
Specification: Larceny of a radio of a value of about $125.00, the property of Fireman Stoke T. Coals, U.S. Navy.	Guilty	Guilty

b. Sentence adjudged: On 15 June 20CY, the accused was sentenced to reduction to the grade of paygrade E-2, confinement for a period of 120 days, forfeiture of $200.00 pay per month for 4 months, and to be discharged from the naval service with a bad-conduct discharge.

c. Clemency recommendation by court or military judge: None.

d. Summary of accused's service record:

(1) Length of service: 3 years 2 months.

(2) Character of service: 3.4 average of evaluation traits.

Appendix II-a(1)

Subj: RECOMMENDATION IN THE SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

(3) Awards and decorations: The accused is not entitled to any awards, medals, or commendations, except the Sea Service Deployment Ribbon.

(4) Records of prior nonjudicial punishment: CO's NJP on 1 September CY(-2) for a violation of Article 86, UCMJ, for missing morning muster. Awarded 15 days restriction to the limits.

(5) Previous convictions: Conviction by summary court-martial at which he was represented by lawyer counsel on 8 October CY(-2) for a violation of Article 121, UCMJ, wrongful appropriation of government property, for which a sentence of 1 month confinement and reduction to the grade of paygrade E-1 was finally approved. Conviction by special court-martial on 17 February CY(-1) for a violation of Article 86, UCMJ, unauthorized absence for a period of 27 days, for which a sentence of confinement for 1 month and forfeiture of $50.00 pay per month for 2 months was finally approved.

(6) Other matters of significance: None.

e. Nature and duration of pretrial restraint: The accused was in pretrial confinement from 29 May to 4 June CY, a period of 7 days. In accordance with the decision rendered in *United States v. Allen*, 17 M.J. 126, the accused will be credited with 7 days of confinement against the sentence to confinement adjudged.

f. Judicially ordered credit to be applied to confinement, if any: None.

g. Terms and conditions of pretrial agreement, if any, which the convening authority is obligated to honor or reasons why the convening authority is not obligated to take specific action under the agreement: A pretrial agreement was submitted in this case and approved on 12 June 19CY. In return for the accused's provident guilty plea to all charges and specifications, the terms of this agreement called for a limitation on the punishment as follows:

Confinement:	If adjudged, confinement in excess of 4 months will be disapproved.
Restriction:	As adjudged.
Forfeitures:	If adjudged, forfeitures in excess of $300.00 pay per month for a period of 4 months will be disapproved.
Fine:	As adjudged.

Subj: RECOMMENDATION IN THE SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

Reduction: As adjudged.

Punitive discharge: As adjudged.

Your obligations concerning the terms of the pretrial agreement in this case are as follows: Since the confinement and forfeitures awarded are less than that provided for in the agreement, you are not obligated to suspend or disapprove any portion. The confinement, forfeitures, and bad-conduct discharge may be approved as adjudged.

h. The record of trial was served on the accused on 5 July 20CY. On behalf of the accused, the detailed defense counsel, LCDR I. Freeum, JAGC, USNR, has submitted a request for clemency in the form of reduction in confinement to be approved. Additionally, letters from the accused's parents and other family members and friends are attached for your review and consideration.

2. In my opinion, the court was properly constituted and had jurisdiction over the accused and the offense. The accused was found guilty in accordance with his plea. The proceedings were conducted in substantial compliance with current regulation and policy. The offenses of which the accused was found guilty are described as offenses under the UCMJ. There is no error noted nor any issues of error raised by the accused or counsel. The sentence as adjudged is legal and appropriate.

3. I recommend that the sentence as adjudged be approved in accordance with the terms of the pretrial agreement. I further recommend that SN Public be reduced to the grade of paygrade E-1 as authorized by Article 58(a) of the Uniform Code of Military Justice.

//S//
R. U. GUILTY

9 Jul CY

From: Staff Judge Advocate, Commander Naval Surface Group FOUR
To: LT Dick E. Tracy, JAGC, USNR, Naval Legal Service Office, Newport

Subj: SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

Ref: (a) Art. 64, UCMJ
(b) R.C.M. 1106(f)(1)

Encl: (1) Copy of SJA post-trial review ICO YNSN John Q. Public, USN

1. Pursuant to reference (a), a review of the court-martial of YNSN Public has been conducted. Enclosure (1) is a copy of this review.

2. Pursuant to rules established by reference (b), you are hereby served with a copy of this review in order to afford you an opportunity to correct or challenge any matter therein which you may deem erroneous, inadequate or misleading, or upon which you may otherwise wish to comment. Proof of service of this review upon you, together with any such correction, challenge, or comment you may make, shall be made a part of the record of proceedings.

3. You are advised that your failure to take advantage of the aforementioned opportunity within 10 calendar days from the date of this service will normally be deemed a waiver of any error in the review.

4. You are requested to acknowledge receipt of this letter, with attached copy of review, by immediately completing the first endorsement.

//S//
MATT E. DILLON
CDR, JAGC, USN

Appendix II-b

11 Jul CY

FIRST ENDORSEMENT on COMNAVSURFGRU FOUR ltr of 9 Jul CY

From: LT Dick E. Tracy, JAGC, USNR, Naval Legal Service Office, Newport
To: Staff Judge Advocate, Commander Naval Surface Group FOUR

Subj: SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

1. I, the undersigned, counsel for the accused in the above-captioned proceedings, hereby acknowledge receipt of the aforementioned staff judge advocate review required by Article 64, UCMJ, for the subject case on this 11th day of July CY.

//S//
DICK E. TRACY

Appendix II-c

DEPARTMENT OF THE NAVY
Naval Legal Service Office
Newport, Rhode Island 02841-5032

13 Jul CY

From: LT Dick E. Tracy, JAGC, USNR, Naval Legal Service Office, Newport
To: Staff Judge Advocate, Commander Naval Surface Group FOUR

Subj: RECOMMENDATION IN THE SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

Ref: (a) SJA review ICO YNSN John Q. Public, USN
(b) R.C.M. 1106(f)(4)

1. Reference (a) was received by me on 11 July CY and has been reviewed pursuant to reference (b).

2. I do not desire to submit a correction, challenge, or comment to the attached review.

3. I have attached letters from the accused's parents and his wife, Mrs. Public, for the convening authority's consideration.

//S//
DICK E. TRACY

Appendix II-d

DEPARTMENT OF THE NAVY
Naval Justice School
Newport, Rhode Island 02841-5030

1 February CY

In the case of Boatswain's Mate Seaman Mickey E. Mouse, U.S. Navy, 123-45-6789, tried by special court-martial on 18 January CY, the court had jurisdiction over the accused and the offense(s) for which he was tried and the court was properly convened and constituted.

/s/ ***H. S. Law***
H. S. Law
Captain, JAGC, U. S. Navy
Commanding Officer
Naval Justice School
Newport, Rhode Island

DEPARTMENT OF THE NAVY
Naval Justice School
Newport, Rhode Island 02841-5030

1 February CY

In the case of Personnelman Third Class Mickey E. Mantel, U.S. Navy, 444-44-9944, the sentence is approved and will be executed. The Navy Brig, Submarine Base, Groton, Connecticut, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ and JAGMAN, Section 0152c, automatic reduction to the grade of paygrade E-1 is effected as of the date of this action.

In taking this action, the record of trial, the results of trial, and the letters of clemency submitted by the defense counsel on 31 January CY, have been considered.

The record of trial is forwarded to the Staff Judge Advocate, Commander Naval Education and Training Center, Newport, Rhode Island, for review under Article 64(a), UCMJ.

/s/ ***H. S. Law***
H. S. Law
Captain, JAGC, U. S. Navy
Commanding Officer
Naval Justice School
Newport, Rhode Island

DEPARTMENT OF THE NAVY
Naval Surface Group FOUR
Newport, Rhode Island 02841-5030

26 July CY

In the case of Yeoman Seaman John Q. Public, U.S. Navy, 111-22-3333, only so much of the sentence as provides for reduction to the grade of paygrade E-2, confinement for 90 days, forfeiture of $150.00 pay per month for 3 months, and a bad conduct discharge is approved and, except for the part of the sentence extending to bad conduct discharge, will be executed. The Naval Consolidated Brig, Charleston, South Carolina, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ and JAGMAN, Section 0152c, automatic reduction to the grade of paygrade E-1 is effected as of the date of this action.

A copy of the Staff Judge Advocate's recommendation was submitted to the accused's defense counsel on 11 July CY, in accordance with R.C.M. 1106(f), Manual for Courts-Martial (1998 ed.). The defense counsel submitted two requests for clemency on 13 July CY.

In taking this action, the record of trial, the results of trial, the recommendation of the Staff Judge Advocate, and the letters of clemency submitted by the defense counsel on 13 July CY, have been considered.

The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40.31), Office of the Judge Advocate General, Washington Navy Yard, Building 111, Washington, D.C. 20384-1111 for review under Article 66, UCMJ.

/s/ ***D. D. Duck***
D. D. Duck
Captain, U. S. Navy
Commander Naval Surface
Group FOUR
Newport, Rhode Island

DEPARTMENT OF THE NAVY
Naval Surface Group FOUR
Newport, Rhode Island 02841-5030

26 July CY

In the case of Yeoman Seaman John Q. Public, U.S. Navy, 111-22-3333, the sentence is approved and, except for the part of the sentence extending to bad conduct discharge, will be executed. The Navy Consolidated Brig, Charleston, South Carolina, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ and JAGMAN, Section 0152c, automatic reduction to the grade of paygrade E-1 is effected as of the date of this action.

A copy of the Staff Judge Advocate's recommendation was submitted to the accused's defense counsel on 11 July 19CY, in accordance with R.C.M. 1106(f), Manual for Courts-Martial (1998 ed.). The defense counsel submitted two requests for clemency on 13 July CY.

In taking this action, the record of trial, the results of trial, the recommendation of the Staff Judge Advocate, and the letters of clemency submitted by the defense counsel on 13 July CY, have been considered.

The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40.31), Office of the Judge Advocate General, Washington Navy Yard, Building 111, Washington, D.C. 20384-1111 for review under Article 66, UCMJ.

/s/ ***D. D. Duck***
D. D. Duck
Captain, U. S. Navy
Commander Naval Surface
Group FOUR
Newport, Rhode Island

DEPARTMENT OF THE NAVY
Naval Surface Group FOUR
Newport, Rhode Island 02841-5030

26 July CY

Special Court-Martial Order No. 2-CY

Yeoman Seaman John Q. Public, U.S. Navy, 111-22-3333, Naval Surface Group FOUR, Newport, Rhode Island, was arraigned at Naval Legal Service Office, Newport, Rhode Island, on the following offenses at a court-martial convened by this command.

CHARGE I: ARTICLE 86. Plea: Guilty Finding: Guilty

Specification: Unauthorized absence from his unit, USS Edson, from 13 July CY(-1) to his surrender on 5 March CY.
Plea: Guilty Finding: Guilty

CHARGE II: ARTICLE 121. Plea: Guilty Finding: Guilty

Specification: Larceny of a radio of a value of about $125.00., the property of Fireman Stoke T. Coals, U.S. Navy, on 10 April CY.
Plea: Guilty Finding: Guilty

SENTENCE

Sentence adjudged on 15 June CY: To be reduced to the grade of paygrade E-2, to be confined for 120 days, to forfeit $200.00 pay per month for 4 months, and to be discharged from the naval service with a bad conduct discharge.

ACTION

DEPARTMENT OF THE NAVY
Naval Surface Group FOUR
Newport, Rhode Island 02841-5061

26 July CY

In the case of Yeoman Seaman John Q. Public, U.S. Navy, 111-22-3333, only so much of the sentence as provides for reduction to the grade of paygrade E-2, confinement for 90 days, forfeiture of $150.00 pay per month for 3 months, and a bad conduct discharge is approved and, except for the part of the sentence extending to bad conduct discharge, will be executed. The Naval Consolidated Brig, Charleston, South Carolina, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ, and JAGMAN, Section 0152c, automatic reduction to the grade of paygrade E-1 is effected as of the date of this action.

A copy of the Staff Judge Advocate's recommendation was submitted to the accused's defense counsel on 11 July CY, in accordance with R.C.M. 1106(f), Manual for Courts-Martial (1998 ed.). The defense counsel submitted two requests for clemency on 13 July CY.

In taking this action, the record of trial, the results of trial, the recommendation of the Staff Judge Advocate, and the letters of clemency submitted by the defense counsel on 13 July CY, have been considered.

The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40.31), Office of the Judge Advocate General, Washington Navy Yard, Building 111, Washington, D.C. 20384-1111 for review under Article 66, UCMJ.

/s/ ***D. D. Duck***
D. D. Duck
Captain, U. S. Navy
Commander Naval Surface
Group FOUR
Newport, Rhode Island

/s/***R. U. Guilty***
R. U. Guilty
Lieutenant Commander
JAGC, U.S. Navy
Staff Judge Advocate
Naval Surface Group FOUR
Newport, Rhode Island
By direction of D. D. Duck
Captain, U.S. Navy
Commander, Naval Surface
Group FOUR
Newport, Rhode Island

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1 to USS Samuel B. Roberts (FFG 58)
1 to USS Simpson (FFG 56)

DEPARTMENT OF THE NAVY
Naval Surface Group FOUR
Newport, Rhode Island 02841-5030

15 May CY(+1)

Supplemental Court-Martial Order No. 1-CY(+1)

In the special court-martial case of Yeoman Seaman John Q. Public, U.S. Navy, 111-22-3333, the sentence to bad conduct discharge, as promulgated in Special Court-Martial Order No. 2-CY, Commander, Naval Surface Group FOUR, Newport, Rhode Island, dated 26 July CY, has been affirmed by the Navy-Marine Corps Court of Military Review, NMCM CY(+1) 5464, dated 23 April CY(+1). Article 71(c) having been complied with, the bad conduct discharge will be executed.

/s/***T. H. Judge***
T. H. Judge
Lieutenant Commander
JAGC, U.S. Navy
Staff Judge Advocate
Naval Surface Group FOUR
Newport, Rhode Island
By direction of D. D. Duck
Captain, U.S. Navy
Commander, Naval Surface
Group FOUR
Newport, Rhode Island

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1 to USS Samuel B. Roberts (FFG 58)
1 to USS Simpson (FFG 56)

The next page shows the ***approval of part of the sentence and partial order of execution*** of the sentence awarded at trial. The convening authority only approved part of the sentence ajudged by the court. The court sentenced the accused to reduction to the grade of paygrade E-2, confinement for 120 days, forfeiture of $200.00 pay per month for 4 months, and a bad-conduct discharge. The convening authority approved the reduction to E-2 and the bad-conduct discharge, but approved only 90 days of confinement and forfeitures of only $150.00 pay per month for 3 months.

The provisions of Article 58a(a), automatic reduction, are included in this case only because the reduction awarded by the court was from E-3 to E-2. Had the court reduced the accused to E-1, and that portion of the sentence been approved and ordered executed, Article 58a(a) would no longer have been applicable.

CA's action - Sentence adjudged by the court approved by the convening authority and all but the bad-conduct discharge ordered executed.

The following are completed samples of forms contained in Appendix 16, *Manual for Courts-Martial*:

The court adjudged a sentence of confinement for 6 months, forfeiture of $200.00 pay per month for 6 months, and reduction to the grade of paygrade E-1.

Form 1. Adjudged sentence approved and ordered into execution without modifications.

In the case of Yeoman Seaman John Q. Public, U.S. Navy, the sentence is approved and will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

Form 2. Adjudged sentence approved in part (modified) and ordered executed.

In the case of Yeoman Seaman John Q. Public, U.S. Navy, only so much of the sentence as provides for confinement for 3 months and reduction to the grade of paygrade E-1 is approved and will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

NOTE: Since there is no mention of the forfeiture, it was not approved and SN Public will not forfeit his money. Also, the period of confinement was reduced from 6 months to 3 months.

Form 5. Adjudged sentence approved and entire sentence suspended.

In the case of Yeoman Seaman John Q. Public, U.S. Navy, the sentence is approved. Execution of the sentence is suspended for 6 months, at which time, unless the suspension is sooner vacated, the sentence will be remitted without further action.

Form 6. Adjudged sentence approved with part of the sentence suspended.

In the case of Yeoman Seaman John Q. Public, U.S. Navy, the sentence is approved and will be executed, however, the execution of that part of the sentence extending to confinement is suspended for 6 months, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action.

PROCEDURES FOR VACATION OF SUSPENDED SENTENCES

References:

Art. 72, UCMJ
R.C.M. 1109

COURT-MARTIAL	ANY GCM,	Punishments other than BCD's adjudged at SPCM,
SENTENCE:	BCD adjudge data 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.

SECTION THREE

FOREWORD

CHAPTER XV

BASIC CONCEPTS OF CRIMINAL LIABILITY

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CHAPTER XV

BASIC CONCEPTS OF CRIMINAL LIABILITY

A. ***Introduction***. Although this section of the *Military Justice Study Guide* is intended to be a practical guide to military / criminal law, certain basic theoretical concepts are important to an understanding of the various military offenses. Criminal law defines criminal liability. The purpose of criminal law is to define under what circumstances an individual's actions result in a criminal penalty (such as a fine, imprisonment, or even death). To convict an accused of a crime, the prosecution, representing the government, must prove beyond a reasonable doubt that the accused committed certain specific acts which constitute an offense. Many offenses also require the prosecution prove that the accused had a specific intent or state of mind when committing the required acts. Therefore, underlying each offense are two specific concepts that together constitute criminal liability: (1) specific acts, and (2) the accused's state of mind. In every case, the question of whether the accused committed a crime will turn upon these two concepts.

B. ***Elements of the offense***. Each specific offense (e.g., larceny, assault, or unauthorized absence) is defined in terms of specific facts that the prosecution must prove in order to convict the accused. Such specific facts are called the elements of the offense.

This text lists the elements of each offense discussed. Another generally reliable source of the elements of offenses is Part IV of MCM, which provides a discussion of most of the offenses under the UCMJ and contains a listing of elements for each offense discussed. Caution is required when using Part IV of the *Manual*. The *Manual* does not discuss all possible UCMJ offenses. Also, the *Manual* may not reflect recent judicial interpretations of certain offenses, which would take precedence over the *Manual*'s provisions. A second generally reliable reference on the elements of the various offenses is the *Military Judges' Benchbook* (DA Pam No. 27-9, 1996).

C. ***State of mind***. In addition to the accused's acts, the concept of criminal liability also involves the accused's state of mind or intent. This mental element of criminal liability is often referred to as *mens rea*, or "mind at fault." Criminal offenses may be classified according to the type of intent or state of mind required for conviction. Among the states of mind or intents recognized by military law are: (1) general intent, (2) specific intent, (3) negligence, (4) knowledge, and (5) willfulness.

1. ***General intent offenses***. In order to convict an accused of a general intent offense, the prosecution need not prove that the accused entertained any specific intent or state of mind. The fact that the accused committed a prohibited act will give rise to an

inference that the accused intended to commit the offense. The law recognizes that people usually intend the natural and probable consequences of their actions. This inference, however, may be rejected by the court where the evidence suggests that the accused's actions were accidental. Thus, where the accused threw a ball and hit a child who suddenly walked out onto the playing field, the accused intended to throw the ball but did not intend to hit the victim. It was an accident that the victim was hit; therefore, the accused is not guilty of assault and battery.

2. ***Specific intent offenses***. Specific intent offenses are those which require that the accused have a specific intent or state of mind. Specific intent involves a further purpose than mere commission of the act. For example, the intentional taking of property from another represents only a general intent. Such an act, however, could be accompanied by a further purpose, or specific intent, to deprive that person of the property permanently. Such a taking with that specific intent constitutes larceny, a specific intent offense.

3. ***Negligence offenses***. Under certain circumstances, a person may be criminally liable for unintentional conduct. Negligence is unintentional conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It can also be defined as the failure of a person to exercise the care that a reasonably prudent person would exercise under similar circumstances. The UCMJ recognizes a number of negligence offenses. The degree of negligence required for conviction varies depending upon the offense. There are three degrees of negligence: simple negligence, culpable negligence, and wantonness.

a. ***Simple negligence***. Simple negligence is the least severe form of negligence. All that is required to convict an accused of such an offense is proof beyond a reasonable doubt that the accused failed to recognize a substantial unreasonable risk that a reasonably prudent person in similar circumstances would have recognized. For example, a person who is involved in an accident while operating a military vehicle while drunk may be guilty of damaging government property through neglect. Negligent homicide and dereliction of duty are two other examples of offenses that require only simple negligence.

b. ***Culpable negligence***. Culpable negligence is a degree of negligence greater than simple negligence. Another term used for culpable negligence is recklessness. This form of negligence exists where an accused recognizes a substantial unreasonable risk yet consciously disregards that foreseeable risk. Thus, a person who practices fast draws with a loaded .45 pistol and, as a result, unintentionally shoots a bystander, has acted in a culpably negligent manner. It is reasonably foreseeable that the bystander would be hit by an accidental discharge of the weapon; therefore, the would-be fast-draw artist is guilty of aggravated assault.

c. ***Wanton offenses***. Wantonness is an act or omission done with a heedless disregard or indifference for known, probable, serious consequences. For example, throwing a live grenade into a group as a joke to watch everyone scatter shows a wanton disregard for human life. It is highly probable that, when the grenade goes off, people might

be injured or killed. Should death result, even though "unintended," the accused would be guilty of murder because of his disregard for the probable consequences of his actions.

4. ***Knowledge offenses.*** Closely related to the concept of specific intent is knowledge. Some offenses require that the accused possess certain knowledge when committing or omitting to do certain acts. For example, to be guilty of disrespect to a superior, the accused must have known that the victim was superior. Or, before an accused can be found guilty of failure to go to an appointed place of duty, the prosecution must prove that the accused knew where the appointed place of duty was and knew the time required to be there.

5. ***Willfulness offenses.*** Also closely related to the concept of specific intent is willfulness. In fact, willfulness has been recognized by the courts as being the equivalent of specific intent. Therefore, in offenses such as willful disobedience of orders of superiors or willful destruction of property, proof that the accused intended to disobey or destroy is sufficient to fulfill the required element of willfulness. In some instances, it may merely mean the mere willingness to do or not do an act. In other instances, it may mean to do or not to do an act voluntarily with a bad purpose.

D. ***Motive.*** A popular misconception is that, in order to convict an accused of a crime, the prosecution must establish that the accused had a motive for committing the offense. Motive is not intent, and it is not an element of an offense. The prosecution's failure to prove a motive will not, by itself, result in an acquittal. (Of course, proof of a motive can be helpful circumstantial evidence that it was the accused who committed the offense.) Nor will an evil motive be a substitute for a required specific intent in the prosecution of a specific intent offense. The concepts of motive and intent should not be confused. For instance, if an accused takes another's radio for the purpose of teaching the owner a lesson (not to leave gear unsecured), the motive may be noble, but the intent is still to at least temporarily deprive the owner of his / her property. This is sufficient for a finding of guilty to wrongful appropriation.

CHAPTER XVI

PARTIES TO CRIME: PRINCIPALS AND ACCESSORIES AFTER THE FACT

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CHAPTER XVI

PARTIES TO CRIME: PRINCIPALS AND ACCESSORIES AFTER THE FACT

A. ***Introduction***. A party to a crime is one who, because of the involvement in a criminal act, is liable for punishment. The UCMJ classifies parties to crimes into two major groups: (1) principals, and (2) accessories after the fact. Principals include the perpetrator of the crime, any aiders and abettors, and any accessories before the fact. All principals are treated as if each had committed the crime and are subject to the same punishment. Accessories after the fact are subject to lesser punishment than the principals.

B. ***Types of principals***. Under Article 77, UCMJ, the following three types of parties to a crime are considered principals:

1. ***Perpetrator***: A perpetrator of a crime is one who actually commits the crime, either personally or by causing the crime to be done through an animate / inanimate agency or innocent human agent.

2. ***Aider and abettor***. An aider and abettor does not actually commit the crime but is ***present*** at the crime, ***participates*** in its commission, and shares in the criminal ***purpose***. A person is present for purposes of being an aider and abettor when in a position to aid the perpetrator to complete the crime. Thus, the getaway car driver who waits outside the bank is present for purposes of being an aider and abettor. Likewise, a lookout who is stationed down the street to watch for police while the perpetrator breaks into a jewelry store is also "present." Participation for purposes of being an aider and abettor requires that the aider and abettor ***actively*** participate in the crime by assisting the perpetrator. A mere bystander who doesn't try to stop the perpetrator is not an aider and abettor. Generally, a private citizen has no legal duty to attempt to stop a crime from being committed. A person such as a guard or night watchman, however, who has a special legal duty to prevent or stop a crime, may become an aider and abettor by failing to take action. Finally, the aider and abettor must act with the specific purpose of assisting the perpetrator. A person who innocently assists a perpetrator, not knowing that the perpetrator is committing a crime, would not be an aider and abettor.

3. ***Accessory before the fact***. An accessory before the fact is one who counsels, commands, procures, or causes another to commit an offense. The advice must be given with the intent to encourage and promote the crime. He need not be present at the crime, nor participate in the actual commission of the offense. Thus, the husband who hires a "hit

man" to kill his wife would be an accessory before the fact. The woman who encourages her friend to solve his financial problems by robbing a bank would also be an accessory before the fact, even though she may not share the loot.

C. ***Scope of criminal liability of principals***. A principal is criminally liable for all crimes committed by another principal if those crimes are the natural and probable consequences of the common design.

1. ***Example***: Rollo, the mastermind, plans a burglary and remains in the hideout waiting to count the loot. Rollo is guilty of murder if Willy, the perpetrator, kills the homeowner while carrying out the burglary. A natural and probable consequence of burglary is violence, which may result in death. Burglary involves an invasion of another's "castle." Even though the conspirators had agreed not to resort to violence in any event, if violence incidentally results, all principals are responsible therefor because it can be reasonably expected to occur, in spite of the "agreement."

2. ***Contra-example***: Rollo and Willy enter into a common purpose for a purse snatching, to be accomplished in the middle of Grand Central Station at midnight. Willy waits outside in a get-away car while Rollo enters to do the job. After snatching the purse, monetary greed gives way to a strong urge and Rollo attempts to rape the victim. Willy may be convicted of larceny, but not of attempted rape. The rape was not an incidental result of the commission of the crime of larceny, nor could it reasonably be expected to occur. In short, it was not a natural and probable consequence.

There is no requirement that the perpetrator be convicted, or even tried, before trying the other principals. In fact, if the perpetrator is tried and acquitted, both the aider and abettor or accessory before the fact can be convicted. What is required at the trial of the aider or accessory before the fact is proof that the crime was committed. This may be established by using the same proof the government presented at the perpetrator's trial. If the perpetrator is tried first, and convicted, the government may not introduce evidence of that conviction as proof of the crime.

D. ***Withdrawal by accessory before the fact and aider and abettor***. An accessory before the fact and an aider and abettor may escape criminal liability by unequivocally disassociating themselves from the crime before the perpetrator commits the offense. For the withdrawal to be effective, three requirements must be met. First, the accused must effectively countermand or negate any assistance previously given. Second, the accessory and aider and abettor must communicate their withdrawal in unequivocal terms to all the perpetrators or to appropriate law enforcement authorities in time for the perpetrators to abandon the plan or for the authorities to prevent the offense. Finally, the communication must be made before the perpetrator commits the offense. Once the offense is committed, it is too late to withdraw.

Example*: *Withdrawal by accessory before the fact. ***A*** hires ***B*** to murder her husband. She then has a change of heart and calls ***B*** and informs ***B*** that the deal is off, that she doesn't want ***B*** to kill her husband, and that she will not pay any hit money. ***B*** then goes ahead and kills Mr. ***A*** for practice. ***A*** is not an accessory before the fact because she effectively withdrew her request. Suppose, however, that when ***A*** tells ***B*** that the deal's off, ***B*** informs ***A*** that it's too late because ***B*** has already killed Mr. ***A***. ***A*** is guilty of murder as an accessory before the fact, even though she didn't know that the crime had already been committed.

Example*: *Withdrawal by aider and abettor. ***A*** and ***B*** agree to rob a liquor store. ***A*** will actually go into the store, while ***B*** waits outside as a lookout. Before ***A*** enters the store, ***B*** says, "***A***, I want no part of this. I'm not going to help you." ***B*** drives home, but ***A*** stays and robs the store. ***B*** is not guilty as an aider and abettor to the robbery. He communicated his unequivocal withdrawal before the robbery was committed and effectively countermanded his previous assistance.

E. ***Accessory after the fact***

1. ***Elements of the offense***. Article 78, UCMJ, provides that one who is an accessory after the fact to a crime has committed a separate and distinct offense. Therefore, in order to convict an accused of being an accessory after the fact, the prosecution must prove beyond reasonable doubt that:

a. An offense punishable by the UCMJ was committed by a certain principal at the designated time and place;

b. the accused (the alleged accessory after the fact) knew that the principal had committed the offense;

c. the accused thereafter received, comforted, or assisted the principal in some manner; and

d. the accused so acted in order to hinder or prevent the principal's apprehension, trial, or punishment.

2. ***The principal's offense***. In reality, two crimes must be proven in every accessory after the fact prosecution: (1) the principal's crime, and (2) the accessory's crime of illegally assisting the principal to escape apprehension, trial, or punishment. The principal need not be a person subject to the UCMJ, but the crime must be one that is recognized by it. There is no requirement that the principal be prosecuted and convicted before the accessory after the fact is prosecuted. Although the principal is usually prosecuted first, in some cases the principal may be dead or still at large. The fact that the principal has been

convicted of the crime cannot be used at the accessory's trial to prove that the principal committed an offense. Conversely, the fact that the principal has been tried and acquitted of the offense does not prevent prosecution and conviction of the accessory after the fact.

> ***For example***: ***A*** shoots ***B***. ***C*** knows ***A*** shot ***B*** and helps ***A*** conceal the weapon. ***B*** dies shortly thereafter. ***A*** is guilty of murder; ***C*** is guilty of accessory after the fact to assault with the intent to commit murder. ***C*** is not guilty of being an accessory after the fact to murder because ***B*** had not yet died at the time ***C*** rendered ***A*** assistance. *See United States v. Wilson*, 7 M.J. 997 (A.C.M.R.), *petition denied*, 8 M.J. 181 (1979).

3. ***The accessory's knowledge***. The prosecution must prove beyond a reasonable doubt that the accessory knew that the principal had committed the offense. Knowledge, for purposes of Article 78, must be actual knowledge that the principal had committed the offense. The accessory, however, need not have actually witnessed the commission of the crime, but may have learned about it from third parties. The accessory is liable ***only*** for those crimes that he has knowledge of.

4. ***The accessory's assistance***. Article 78, UCMJ, defines an accessory after the fact as one who "receives, comforts, or assists" the principal. "Receives" refers to harboring, sheltering, or concealing the principal. "Comforts" includes providing food, clothing, transportation, and money to the principal. "Assists" includes any act which aids the principal's efforts to avoid detection, apprehension, prosecution, conviction, or punishment. Such assistance would include acts such as concealing the fact that the crime had been committed, destroying evidence, making false reports to the police, or helping the principal escape. Mere failure to report a known offense, by itself, does not make one an accessory after the fact. There must be some active assistance rendered to the perpetrator. (Failure to report an offense may be a violation of Article 1137, *U.S. Navy Regulations, 1990*, chargeable under Article 92, UCMJ, or Misprision of a Felony under Article 134, UCMJ.)

5. ***The accessory's intent***. The offense of being an accessory after the fact is a specific intent offense. The prosecution must prove beyond reasonable doubt that the accused assisted the principal in order to help the principal avoid apprehension, trial, or punishment. The type of assistance given may be strong circumstantial evidence of the accused's criminal intent. It is almost impossible, for example, to infer any innocent intent on the part of a person who helps a principal dismember a corpse with a chainsaw. On the other hand, the principal's wife, who washes his shirt, thereby destroying traces of the victim's blood which would be important evidence, may have done so for perfectly innocent reasons.

6. ***Reduced punishment.*** Although a party to the crime, an accessory after the fact's involvement is considered less serious than that of the principal. Therefore, the maximum confinement for an accessory after the fact is one-half that authorized for the principle offense, but not more than 10 years. The death penalty may not be imposed. The accessory is subject to the same maximum sentence with respect to punitive discharge, forfeitures, and reduction in pay grade as the principal.

F. ***Pleading offenses by principals and by accessories after the fact***

1. ***Principals.*** An offense by any type of principal is pleaded as though done by the perpetrator. Thus, in a specification alleging an offense by an aider and abettor, it is unnecessary to indicate that the accused was an aider and abettor. The specification is worded as if the aider and abettor committed the offense himself. Article 77 itself is a nonpunitive descriptive article and is ***never*** charged as the basis of any substantive offense. Sample specifications for each offense are produced in Part IV, MCM.

a. ***Example***: ***A*** and ***B*** get into an argument with ***V***. ***A*** and ***B*** together produce knives and make jabbing motions at ***V***, resulting in two wounds—one of which proves fatal. Under these circumstances, it will not be necessary to determine who actually delivered the fatal blow. If it were ***A***, his guilt as a principal would be clear; and, if it were ***B***, the evidence is sufficient to show ***A***'s guilt as an aider and abettor. *United States v. Crocker*, 35 C.M.R. 725 (A.F.B.R. 1964), *petition denied*, 15 U.S.C.M.A 677 (1965).

b. ***Sample pleading.*** In the stabbing example discussed immediately above, both ***A*** and ***B*** would be charged as follows:

Charge: Violation of the UCMJ, Article 118.

Specification: In that (***A or B***), did, at (***place***), on or about (***date***), murder ***V*** by stabbing him in the back with a knife.

2. ***Accessories after the fact***

a. ***General guidelines.*** Follow the format of the sample specification in Part IV, para. 3f, MCM. Note that the specification must state the specific offense committed by the principal as well as the specific acts by the accused that assisted the principal.

b. ***Sample pleading***

Charge: Violation of the UCMJ, Article 78.

Specification: In that Seaman John Doe, U.S. Navy, Naval Education and Training Center, Newport, Rhode Island, on active duty, knowing that, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 19CY, Fireman William K. Felonious, U.S. Navy, had committed an offense punishable by the Uniform Code of Military Justice, to wit: larceny of a radio, of a value of about $52.00, the property of Jonas Panasonic, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 19CY, in order to prevent the apprehension of the said Fireman Felonious, assist the said Fireman Felonious by hiding him under a lifeboat cover.

CHAPTER XVII

SOLICITATION, CONSPIRACY, AND ATTEMPTS

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CHAPTER XVII

SOLICITATION, CONSPIRACY, AND ATTEMPTS

A. ***Introduction.*** The UCMJ prohibits a range of various types of criminal conduct. Not only is a completed crime punishable, but certain acts short of a completed crime, if done with criminal intent, are also prohibited. The concepts of principals to a completed crime and accessories after the fact were discussed in chapter XVI. This chapter will discuss the three distinct types of criminal acts that fall short of the completed crime and that occur chronologically before the completed crime: solicitation, conspiracy, and attempts.

B. ***Solicitation***

1. ***Concept of criminal solicitation.*** A criminal solicitation is any statement or conduct that constitutes a serious request or advice to another to commit an offense. The gravamen of the offense is the "corruption" caused by "planting the seed" or idea to commit a crime. This is a specific intent offense that requires that the accused actually intended that the act solicited be carried out. The offense of solicitation, however, is completed as soon as the advice or request is made. The fact that the solicited crime was not attempted or completed is no defense.

2. ***Prosecution under Articles 82 and 134.*** Two separate articles of the UCMJ prohibit solicitation. Article 82 is limited to solicitations to commit one of four specific crimes: desertion, mutiny, misbehavior before the enemy, and sedition. Solicitation to commit ***any other offense*** against the Code is prosecuted under Article 134.

3. ***Elements of solicitation.*** Although solicitation is prosecuted under both Article 82 and Article 134, the elements of solicitation under each article are substantially similar. In order to convict the accused of solicitation, the prosecution must prove beyond reasonable doubt that:

a. At the designated time and place, the accused made certain statements, did certain acts, or exhibited conduct that constituted a request, advice, or counsel to another person;

b. such statements, acts, or conduct constituted a solicitation or advice to commit:

(1) [Article 82 solicitations] the offense of desertion, mutiny, misbehavior before the enemy, or sedition; or

(2) [Article 134 solicitations] an offense against the UCMJ;

c. that the accused did so with the intent that the offense actually be committed; and

d. [Article 134 solicitations only] under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces.

4. ***Relationship to completed crime.*** The fact that the person solicited did not act on the advice or request is not a defense. On the other hand, when the person solicited completes the crime that the solicitor requested or advised, the solicitor should be charged with the completed crime because he / she is now an accessory before the fact. The maximum punishment for solicitation is also related to the completed or intended offense. Solicitations under Article 134 are subject to the same maximum punishment as the intended offense, except that neither the death penalty nor confinement in excess of five years may be imposed. (There is one exception to this rule: solicitation to commit espionage does carry a life sentence under Article 134.) For the various maximum punishments under Article 82 (which may include the death penalty in certain cases), see Part IV, para. 6e, MCM.

5. ***Pleading.*** Pleading formats under Articles 82 and 134 are essentially similar. See Part IV, para. 6f, MCM, for Article 82 solicitations. See Part IV, para. 105f, MCM, for solicitations under Article 134. In Article 82 pleadings, the intended offense is merely referred to by name and Code article. In Article 134 pleadings, the intended offense is described more specifically. The following sample pleading for an Article 134 solicitation demonstrates the general format for pleading both Article 134 and Article 82 solicitations.

> Charge: Violation of the UCMJ, Article 134.
>
> Specification: In that Seaman Apprentice Roger Seeker, U.S. Navy, USS Plankton, on active duty, did, on board USS Plankton, located at San Diego, California, on or about 6 July 19CY, wrongfully solicit Seaman Innocent Dupe, U.S. Navy, to steal one 1971 Chevy sedan—an automobile, of a value of about $200, the property of Ensign Andrew Teek, U.S. Navy, by saying to said Seaman Dupe, "If you'll steal Teek's old Chevy for me, I'll give you fifty bucks," or words to that effect.

C. ***Conspiracy***

1. ***Concept of conspiracy.*** A conspiracy is an agreement by two or more persons to commit an offense against the UCMJ, accompanied by the performance of an act by at least one of the conspirators to accomplish the criminal object of the conspiracy. Conspiracy is a separate and distinct offense from the intended crime. Thus, the fact that the intended crime was never committed is no defense. On the other hand, if the intended crime is completed, the conspirators are criminally liable for both the intended crime and for the separate offense of conspiracy in violation of Article 81 of the Code. The maximum authorized punishment for conspiracy is the same as for the intended crime, except that the death penalty may not be imposed for conspiracy.

2. ***Elements of the offense.*** In order to convict an accused of conspiracy, in violation of Article 81, the prosecution must prove beyond reasonable doubt that:

a. At the designated time and place, the accused entered into an agreement with a certain named person or persons to commit an offense under the UCMJ; and

b. while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or a coconspirator performed one or more overt acts, as alleged in the specification, with the purpose of effecting the criminal object of the agreement.

3. ***Form of the agreement.*** The required agreement need not be a detailed "master plan." No specific form of agreement is required. The agreement to commit a crime need not specify the means to be used nor the part each conspirator is to play. All that is required to satisfy the agreement requirement is that the conspirators agree to commit an offense against the Code. Thus, if ***A*** says to ***B***, "Let's rob the liquor store tonight," and ***B*** says "Okay," ***A*** and ***B*** have entered into an agreement within the meaning of Article 81. However, mere idle talk about committing some indefinite crime in the future is not, under most circumstances, a sufficient agreement. Whether or not the alleged conspirators actually entered into an agreement to commit an offense is a factual question to be decided by the members of the court or, in a judge-alone trial, by the military judge.

4. ***Parties to the agreement.*** At least two persons are required for a conspiracy. None of the accused's fellow conspirators need be persons subject to the UCMJ. Thus, Seaman ***A*** can be convicted of conspiracy even though all his coconspirators were civilians. (Of course, all the requirements for subject-matter jurisdiction over the conspiracy must be met.) If the only other member of a conspiracy is a government agent or informant, however, there could charged with attempted conspiracy. *United States v. Anzalone,* 43 M.J. 322 (1995) .

5. ***The overt act.*** The second element of conspiracy requires that one of the

conspirators must commit an overt act in furtherance of the conspiracy. The overt act must be something other than the mere act of agreeing to commit the crime. Any act in preparation for the crime is sufficient. Also, any attempt to commit the intended crime, or the commission of the crime itself, will likewise satisfy the requirement for an overt act. The overt act need not be one committed by the accused: an overt act by any of the alleged members of the conspiracy will suffice. The law considers the act of one conspirator in furtherance of the conspiracy to be the act of all the conspirators. Suppose, therefore, that ***A*** and ***B*** agree to burn down the Naval Justice School. ***B*** buys a gallon of gasoline to start the fire. Both ***A*** and ***B*** are guilty of conspiracy to commit arson. Even though ***A*** may have committed no overt act himself, ***B***'s act in furtherance of the conspiracy will be imputed to ***A***.

6. ***Relationship to intended crime***

a. ***Criminal liability of conspirators.*** Conspiracy is a separate offense from the intended crime. The fact that the intended crime was never attempted or completed is no defense to a conspiracy charge. If the intended crime is committed, however, all conspirators will be criminally liable not only for the conspiracy, but also as principals for the completed crime. Suppose, therefore, that ***A***, ***B***, and ***C*** conspire to murder ***D***. ***A*** and ***B*** provide ***C*** with the pistol, a disguise, and a stolen getaway car. ***C*** goes off by herself and kills ***D***. ***A***, ***B***, and ***C*** will all be guilty of both conspiracy to commit murder and murder itself, even though only ***C*** did the actual killing. Thus, all conspirators are accessories before the fact to the completed crime, and are considered principals. Moreover, all conspirators are liable as principals for any other crime committed by any conspirator acting in furtherance of the conspiracy.

b. ***Intended offenses requiring concert of action.*** Some offenses (such as adultery, consensual sodomy, bigamy, and dueling) require a concert of action by at least two guilty people. Suppose that ***A*** and ***B*** agree to commit adultery with each other. By legal (and physiological) definition, the offense of adultery requires a concert of action by at least two persons. Therefore, ***A*** and ***B*** cannot be prosecuted for conspiracy to commit adultery. These situations are uncommon, however, since most offenses can be completed by one person.

7. ***Withdrawal.*** A conspirator may withdraw from the conspiracy and escape criminal liability for the conspiracy and for the intended crime. An effective withdrawal must consist of affirmative conduct which is ***wholly*** inconsistent with adherence to the unlawful agreement and which shows that the withdrawer has severed all connection with the conspiracy. (This may be by unequivocally communicating one's desire to get out of the conspiracy to the other conspirators in time for them to abandon the plan. This requirement is also satisfied when a conspirator reveals the plan to the police and is instructed to carry out a part in order to assist the authorities.) The withdrawal must be made before any conspirator commits an overt act in furtherance of the conspiracy. If the withdrawing conspirator makes an unequivocal, communicated, timely withdrawal, he will escape criminal liability for the conspiracy and for the completed crime. As a practical matter, however, conspirators seldom withdraw in time to avoid liability for the conspiracy charge. Since the overt act required for

conspiracy need only be a preliminary preparation, and since it may be committed by any conspirator, the withdrawing conspirator's communication of the withdrawal usually occurs after the overt act. Under such circumstances, the conspirator is guilty of conspiracy, but will not be criminally liable for the completed crime.

8. ***Pleading***. *See* Part IV, para. 5f, MCM.

> Charge: Violation of the UCMJ, Article 81.
>
> Specification: In that Fireman Apprentice Slip R. Finger, U.S. Navy, USS Danger, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 5 November 19CY, conspire with Seaman Constantine Spirator, U.S. Navy, to commit an offense under the Uniform Code of Military Justice, to wit: larceny of one rubber duck, of a value of about $3.00, the property of Commander Tyrus Phoon, U.S. Navy, and, in order to effect the object of the conspiracy, the said Seaman Spirator did make a wax impression of the key to said Commander Phoon's quarters.

D. ***Attempts***

1. ***Concept of criminal attempts***. Article 80, UCMJ, defines a criminal attempt as an act, done with the specific intent to commit an offense against the Code, which amounts to more than mere preparation and which would tend to result in the intended crime being completed. The maximum authorized punishment for an attempt is the same punishment authorized for the intended crime; however, confinement may not exceed 20 years and the death penalty may not be imposed.

2. ***Elements of the offense***. In order to convict an accused of an attempt, the prosecution must prove beyond reasonable doubt that:

a. The accused did a certain overt act;

b. the act was done with the specific intent to commit a certain offense under the UCMJ;

c. the act amounted to more than mere preparation (i.e., it was a direct movement toward the commission of the intended offense); and

d. the act apparently tended to result in the commission of the intended offense (i.e., the act would have resulted in the actual commission of the intended offense except for a circumstance unknown to the accused or the unexpected intervention of a circumstance which prevented completion of the offense).

3. ***Specific intent to commit an offense***. The accused must have intended to

commit an offense against the Code. Proof of this specific intent poses several problems.

a. ***Proof of intent.*** Proof of the accused's intent to commit an offense may be accomplished by direct or circumstantial evidence. (*See* chapter I of this text for a detailed discussion of direct and circumstantial evidence.) Very seldom is direct evidence available. Therefore, attempt prosecutions usually rely on circumstantial evidence. The overt act that the accused performed may itself be strong circumstantial evidence of the necessary criminal intent. The law assumes that people normally intend the natural and probable consequences of their acts. When the accused engages in conduct that normally leads to the commission of an offense, the intent to commit a crime may be inferred from his actions. Such an inference is not absolute or mandatory and can be accepted or rejected by the trier of fact.

b. ***Factual impossibility.*** Suppose that ***A*** intends to murder ***B***. ***A*** enters ***B***'s room at night and shoots at what appears to be ***B***'s sleeping form. In fact, the "victim" turns out to be a dummy that ***B*** placed in his bed in order to fool ***A***. ***A*** has committed attempted murder. He intended to commit murder. His overt act, shooting the gun, was more than mere preparation and would normally result in the murder being completed. Even though one cannot murder a dummy, a crime has been committed because ***A*** reasonably believed he was shooting ***B***. The law recognizes that one is guilty of a criminal attempt if he purposely engages in conduct that would constitute the intended crime if the attendant circumstances were as he mistakenly believed them to be. Another common example of factual impossibility is the attempted drug sale. Suppose ***A*** sells ***B*** a substance that ***A*** reasonably believes is heroin, but it turns out to be a mixture of sugar and talc. ***A*** is not guilty of an actual distribution of heroin, because the substance wasn't actually heroin. Because ***A*** reasonably believed it was heroin, however, she will be guilty of attempted distribution of heroin.

4. ***The overt act.*** The overt act required for an attempt must be more than mere preparation. Distinguish, therefore, the overt act required for a conspiracy, an act which can be merely preparatory, and that required for attempts. The overt act in an attempt must be one which would normally result in the completion of the crime. In other words, the act sets in motion a sequence of events that will result in the completion of the crime, unless someone or something unexpectedly intervenes. Whether the required overt act has been committed is often a close question. For example, suppose that ***B*** wants to blow up a commercial airliner on which ***A*** is to travel. ***B*** obtains plans for an altitude-triggered bomb. He purchases the necessary supplies and constructs the bomb. He places the bomb in a suitcase and takes it to the airport. When ***B*** arrives at the airport, he checks the suitcase aboard the flight ***A*** is going to take. At what point did ***B***'s acts rise to the level of an attempt? Certainly, obtaining the plans and supplies and constructing the bomb would be merely preparatory acts. Checking the suitcase aboard the flight would obviously be more than mere preparation. However, intelligent arguments can be made for either side about the act of taking the suitcase to the airport. The question will be decided by the members of the court or, in a judge-alone trial, by the military judge.

5. ***Relationship to completed offense.*** An attempt is usually a lesser included offense of a completed crime. (For a detailed discussion of lesser included offenses, see chapter XVIII of this section of this text.) Therefore, when charging an accused with a completed crime, there is no need to separately charge the attempt to commit that crime. Suppose, for example, that ***A*** is charged with larceny. At trial, the evidence shows that ***A*** never completed the intended larceny; but she did perform the necessary overt act with the requisite intent for an attempt. She could be found guilty of the lesser included offense of attempted larceny. Like solicitation, but distinct from conspiracy, attempt merges with the completed offense to which it relates.

6. ***Pleading***

a. ***Charge under the correct article.*** Like solicitations, attempts may be charged under several articles of the Code. Article 80, UCMJ, covers all criminal attempts except those which are specifically prohibited by another article. These specific attempts include: attempted desertion (Article 85), attempted mutiny or sedition (Article 94), attempt by subordinate to compel surrender (Article 100), attempt to aid the enemy (Article 104), attempted espionage (Article 106a), and attempt-type assault (Article 128).

b. ***Sample specification***

> Charge: Violation of the UCMJ, Article 80.
>
> Specification: In that Hull Technician Third Class Jacob Want, U.S. Navy, USS Weakfish, on active duty, did, on board USS Weakfish, located at Norfolk, Virginia, on or about 1 August 19CY, attempt to steal a Little Giant vacuum cleaner, of a value of about $65.00, the property of Seaman Kirby Hoover, U.S. Navy.

E. ***The spectrum of crime.*** This chapter has discussed the legal principles that make it a crime for a servicemember to solicit another to commit an offense under the Code, to conspire with another to commit an offense under the Code, and to attempt to commit an offense under the Code. One who solicits, conspires, or attempts is criminally liable even though the intended crime is never completed. Then, again, if the crime is completed, the accused will be guilty of the completed crime and, usually, the conspiracy. Finally, as discussed in chapter XVI, one may commit the crime of accessory after the fact after the object crime is completed. The spectrum of crime may be visualized as follows.

Solicitation: Conspiracy : Attempt : Completed Crime: Accessory After the Fact

(***Note***: Not every crime may possess all of these attributes.)

F. ***The spectrum of criminals.*** The spectrum of crime outlined above can be applied to the parties of crime discussed in chapter XVI. The spectrum of criminals may be visualized as follows.

Accessory Before the Fact	: Conspirator :	Aider and Abettor	: Perpetrator	: Accessory After the Fact

Generally, a person who counsels, procures, commands, or causes another to commit an offense becomes an accessory before the fact and is guilty of the crime of solicitation if the crime is not completed. Upon completion of the crime, the accessory before the fact becomes liable as a principal for the completed crime, the crime of solicitation, absent a separate time-and-place factor, merging with the completed crime. An accessory before the fact who goes to the scene of the crime and participates in the commission of the crime also becomes an aider and abettor, and is guilty of the crime completed. If the crime is not completed, but an act beyond mere preparation has been committed, the accessory before the fact / aider and abettor is guilty of solicitation ***and*** attempt. On the other hand, because conspiracy and the completed crime never merge, the conspirator is always guilty of conspiracy, and, depending upon whether the crime is completed or not, may also be guilty of solicitation, attempt, and the completed crime.

CHAPTER XVIII

LESSER INCLUDED OFFENSES

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CHAPTER XVIII

LESSER INCLUDED OFFENSES

A. ***Basic concept.*** If the evidence introduced at trial fails to prove the offense charged, but does prove beyond a reasonable doubt another offense that is included in the one charged, the accused may be convicted of that lesser included offense. For example, suppose that ***A*** is charged with robbery. Robbery is defined as the larceny of property from the person or presence of another person, through the use of force, violence, or threat of violence. At ***A***'s trial, the evidence shows that ***A*** stole ***B***'s property, but she didn't use any force, violence, or threat. In fact, she took the property from ***B***'s parked car while ***B*** was in the liquor store. ***A*** is not guilty of robbery, but she can be convicted of the included offense of larceny. The offense of larceny is included in the legal definition of robbery.

B. ***Patterns of lesser included offenses.*** Lesser included offenses fall into three general patterns.

1. ***Missing element(s).*** All of the elements of the lesser offense are included and necessary parts of the greater offense, but the lesser included offense lacks at least one element contained in the greater offense. For example:

	DESERTION		UNAUTHORIZED ABSENCE
a.	Absence from unit, organization, place of duty	a.	Same
b.	Without proper authority	b.	Same
c.	With intent to remain away therefrom permanently		

2. ***One element factually less serious.*** All of the elements of the lesser offense are included and necessary parts of the greater offense, but at least one element of the lesser offense is factually less serious. For example:

BURGLARY	HOUSEBREAKING
a. Breaking and entering	a. Unlawfully entering (no breaking, hence, factually less serious)
b. Dwelling house in nighttime	b. Building or structure (does not have to be a dwelling house and can be at any time, night or day)
c. With intent to commit a serious offense (Art. 118 through 128) therein	c. With intent to commit any criminal offense (other than a purely military offense)

3. ***Mental element lesser in degree***. All of the elements of the lesser offense are included and necessary parts of the greater offense, but the mental element in the lesser offense is lesser in degree. For example:

LARCENY	WRONGFUL APPROPRIATION
a. Wrongfully taking, obtaining, or withholding personal property of another	a. Same
b. Of some value	b. Same
c. With intent to deprive the owner permanently thereof	c. With intent to deprive the owner temporarily thereof

C. ***Attempts as lesser included offenses***. An attempt to commit an offense is usually a lesser included offense. Likewise, an attempt to commit a lesser included offense is itself a lesser included offense of the charged offense.

D. ***Commonly included offenses***. In the discussion paragraphs of each offense listed in Part IV, MCM, there is a mention of commonly included offenses of the offense under discussion. The particular facts of a given case may, however, negate the existence of one or more of the listed lesser included offenses.

E. ***Pleading***. As a general rule, lesser included offenses are not separately pleaded in addition to the greater offense. The specification alleging the greater offense normally alleges all lesser included offenses. However, based on recent case law, it may be necessary to

plead separate specifications alleging the lesser included offenses in situations where the elements are not a subset of the elements of the charged offense. Additionally, pleading separately may be necessary in order to facilitate announcing guilty findings. Such separate pleadings would be advisable only when there is a fair risk that the court members might become unduly confused despite the military judge's instructions on findings by exceptions and substitutions.

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PLEADING

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CHAPTER XIX

PLEADING

A. ***The purpose of pleading***. In its legal context, the term "pleading" refers to the drafting of formal written accusations against an accused. Such formal written accusations, or pleadings, are known in civilian criminal justice systems as "indictments" or "informations." Pleadings have a threefold purpose. First, they formally notify the accused of the nature of the accusations. Second, pleadings provide specific information about the alleged offense so that the accused and the accused's attorney may prepare a defense. Finally, because they specify a particular offense, pleadings protect the accused against double jeopardy (i.e., being tried twice for the same offense).

B. ***The charge and specification***. Military pleadings are drafted in the format of a charge and a specification. Together, the charge and specification provide specific information about the alleged offense and also about the factual basis for court-martial jurisdiction over the accused and over the alleged offense.

1. ***The charge***. The charge merely cites a specific article of the UCMJ which the accused allegedly violated.

> ***Example***:
> Charge: Violation of the UCMJ, Article 121.
>
> With the exception of Articles 106a, 112a, and 123a, the various subdivisions of a charge are not listed. Thus, "Article 86(1)" is improper; simply write "Article 86."

2. ***The specification***. The specification contains two types of information. First, it contains the specific facts that constitute the alleged offense. As a general rule, the specification must allege all the elements of the offense. The specification also contains jurisdictional allegations (i.e., the facts which give rise to court-martial jurisdiction over the accused and over the offense). Sample pleadings are provided throughout this section. Each specification relates to one separate offense. Therefore, if the accused committed five

separate larcenies, the pleading would contain one charge ("Violation of the Uniform Code of Military Justice, Article 121.") and five specifications, numbered one through five, under the one charge.

3. ***Numbering of charges and specifications.*** If there is only one charge, or only one specification under a charge, that single charge or single specification is not numbered. When there are multiple charges, they are numbered with Roman numerals (Charge I, Charge II, etc.), and are usually listed in the order of articles of the Code violated. For example, a violation of Article 86 would be listed before a violation of Article 87, even though the latter may have occurred first. Specifications are numbered with Arabic numerals (Specification 1, Specification 2, etc.), and are also listed in the chronological order in which they occurred.

4. ***Additional charges and specifications.*** After the charges and specifications have been drafted and preferred, it may be necessary to add additional, newly discovered charges and specifications. Such additional pleadings are designated "Additional Charge ___." If there is more than one such additional charge, they are numbered as explained above; however, the sequence begins anew. (Additional Charge I, Additional Charge II). Specifications under additional charges are ***not*** identified as "Additional Specifications," but merely as "Specifications."

5. ***Other matters of style and format.*** Traditionally, abbreviations have been deemed improper in military pleadings. Change 3 to the MCM, however, allows for the use of commonly understood abbreviations, particularly for ranks, grades, units and organizations, components, and geographic or political entities. *See* R.C.M. 307(c)(3).

C. ***Contents of specifications.*** Specifications contain two types of information: (1) facts concerning the alleged offense; and (2) facts showing why a court-martial has jurisdiction over the accused and over the offense.

1. ***Information about the offense***

a. ***General considerations.*** A specification must include a simple, concise statement of the facts constituting the offense. These facts must include, either expressly or by reasonable implication, all elements of the offense charged. In other words, when the specification is read, it must describe acts that are clearly and unequivocally an offense.

(1) ***Use of Part IV form specifications.*** Part IV, MCM, contains sample formats for specifications for the commonly encountered offenses under the UCMJ. These samples should be used as a basic guide for drafting specifications. The form specifications must be used with care, however. Each specification must be tailored to fit the facts of each case. Thus, some of the language in a Part IV form may not be appropriate. Finally, it is possible that future appellate decisions will find some of the Part IV forms to be incomplete or insufficient. It is therefore important to seek periodic updates from a judge advocate.

(2) ***Elements of the offense.*** The specifications must include a simple, concise statement of the basic facts that are the elements of the offense. As a general rule, all of the elements must be pleaded, either expressly or by reasonable implication. Part IV form specifications are ***generally*** reliable guides. Where a specific intent or state of mind is an essential element of the offense, it must be included in the specification.

(3) ***Words importing criminality.*** Words such as "wrongfully," "unlawfully," "without authority," and "dishonorably" are words importing criminality because they describe the circumstances under which an otherwise innocent act is considered criminal. For example, see Part IV, para. 54f(2), MCM. This sample assault specification contains the language ". . . did . . . unlawfully strike." "Unlawfully" is a word importing criminality. If "unlawfully" were deleted, the remaining language would describe an act that might or might not be criminal:did strike." (Not all strikings of another person are criminal. The accused may have acted in lawful self-defense, or the alleged victim may have lawfully consented to the striking.) The importance of words importing criminality is self-evident. Without words importing criminality, the specification fails to state an offense and is fatally defective. Careful use of Part IV form specifications is the best way to ensure that all the necessary words importing criminality are included.

(4) ***Aggravating facts and circumstances.*** For many offenses, the maximum authorized punishment is determined by the circumstances under which the offense occurred. Such circumstances are known as matters in aggravation. For example, the maximum punishment for simple assault is forfeiture of two-thirds pay per month for three months and confinement for three months. If the assault is aggravated by the use of a dangerous weapon (other than a loaded firearm), the maximum punishment is increased to a dishonorable discharge, total forfeitures, and confinement for three years. For the increased punishment to be applicable, however, the aggravating facts or circumstances that trigger the increased punishment must be pleaded in the specification.

> ***Example***: Petty Officer Remington shoots her .45 pistol at another person. The specification, however, alleges only simple assault and omits the fact that the assault was with a dangerous weapon. Because of this omission, the maximum punishment that can be imposed on Remington is only that authorized for the simple assault.

Remember, the aggravating circumstances ***must be pleaded*** in order to trigger the increased maximum punishment.

b. ***Specific contents of the specification***

(1) ***Description of the accused.*** The accused should be clearly identified by grade / rank, name, armed force, and unit or organization. The social security number is not included. The specification should also indicate that the accused is on active duty.

> ***Example***:
>
> Specification: In that Seaman Rue D. Toot, U.S. Naval Reserve, USS Bagnarol, on active duty. . . .

(2) ***Description of time and place of offense.*** The time and place of the offense should be stated with sufficient precision to clearly identify the specific offense charged and to enable the accused to prepare a defense.

(a) ***Use of "on or about."*** "On or about" is usually used before the date of the alleged offense. The exact date of the offense is seldom an important issue in a case; therefore, an approximate date is usually sufficient, so long as it is not so vague or inaccurate as to mislead the accused in preparing a defense. The facts and circumstances of each case will determine how much latitude is reasonable in pleading the date. Nonetheless, the allegation of the date of the offense should be as specific and accurate as possible. The exact hour of the offense is seldom pleaded, except in short absence offenses, failure to go offenses, or some dereliction of duty offenses, when the 24-hour clock is used.

(b) ***Offenses over a period of time.*** When the alleged acts extend over a prolonged period, or when the exact date of the offense is uncertain, it is proper to allege a period of time rather than a single date.

> ***Example***: The accused embezzled, bit-by-bit, Navy Exchange funds from 26 December 19CY-1 to 5 May 19CY. This was essentially one continuing offense. Therefore, it is proper to allege the date as "during the period of 26 December 19CY-1 to 5 May 19CY."

Where there is simply a single act involved, and the precise date is uncertain, it may be necessary to allege the offense as having occurred during a period of time.

> ***Example***: Sometime between 1 January 19CY and 30 June 19CY, the accused stole government property from a ship. There was only one act involved, and it must have occurred during this period. It would be proper to allege the date as "from about 1 January 19CY to about 30 June 19CY."

The better practice, however, is to use "on or about" pleading whenever it is possible to make a reasonable approximation of the date of the offense.

(c) Ordinarily, the place of the offense need only be pleaded as a general location, such as "on board USS Woonsocket, located at Newport, Rhode Island" or "at Naval Air Station, Jacksonville, Florida." Greater detail, such as a street number or building number, is seldom advisable. (There are rare instances where the accused's act is an offense only if committed in a particular place. In such a case, an attorney should be consulted for advice on how much more detail is necessary.) Two common exceptions are "failure to go" and "going from" offenses in violation of Article 86, both of which require the accused's specific place of duty to be alleged.

(3) ***Description of accused's role as a principal.*** If the accused is a principal to the offense, the specification does not have to specify whether the accused was the perpetrator, an aider and abettor, or an accessory before the fact. The specification is written as if the accused committed the crime personally.

> ***Example***: Seaman Smith induced Seaman Jones to steal a car for him. The larceny specification against Smith would read: "In that Seaman Smith did steal an automobile."

(4) ***Description of victim.*** If the offense is a crime against the person or property of another, the victim should be clearly identified. The victim's full name and any aliases should be used. If the victim is a military person, rank and branch of service should be included. A full, complete identification of the victim will protect against possible unforeseen developments at trial.

(a) ***Victim's rank and military status.*** The victim's rank and status as a person subject to the UCMJ may be critical in some cases. For example, disrespect to and willful disobedience of commissioned officers require that the victim was a superior. The victim's rank is essential to establish this element. Other offenses, such as use of provoking words, require that the victim be a person subject to the UCMJ. Therefore, pleading the victim's rank and branch of service is necessary to allege the victim's status properly. If the victim of provoking words was a reservist, the specification should also allege that he / she was on active duty.

(b) ***The unknown victim***. Occasionally, the exact identity of the victim may be uncertain. For example, an assault specification which identifies the accused's victim only as "a military policeman" is sufficient because of the other specific information in the specification about the time, date, place, and manner of commission of the offense. Nonetheless, vague descriptions of the victim are unwise. It becomes easier for the accused to assert that the pleading is defective because he / she has been misled in preparing a defense. When the exact identity of the victim is unknown, he / she should be described by alias, if any, or by a general physical description.

> ***Example***: Private Slugworthy assaults an unidentified person. The assault specification may describe the victim as "a Caucasian adult male of unknown identity."

(5) ***Description of property***.Usually, generic terms such as "a knife" or "a typewriter" are sufficient. Sometimes, however, greater detail is advisable. Common sense is the pleader's best guide.

> ***Example***: Corporal "Hot" Carr steals five different automobiles on five different occasions. Each of the five larceny specifications should avoid confusion by describing the stolen car by year, make, and model: "a 1987 Ford Taurus sedan."
>
> ***Example***: A general order prohibits possession of a pocket or sheath knife with a blade longer than four inches aboard naval vessels. Seaman MacNife is caught with a "South Philly slicer" with a six-inch blade. His orders violation specification should describe the knife as "a pocket knife with a six-inch blade."

(6) ***Description of value***. In property offenses, such as larceny, the value of the property determines the maximum authorized punishment; therefore, whenever value determines the maximum punishment, value must be alleged. Exact values should be used whenever possible. However, if only an approximate value is known, it may be described as "of a value of about $500.00." For ease of proof, value may be alleged as "not less than" a certain amount. If several items of different kinds are the subject of the offense, the value of each item should be stated, followed by a statement of aggregate value.

> ***Example***: Private Lightfinger goes on a shoplifting spree at the Navy Exchange. Her larceny specification should describe her booty as ". . . one shirt, value $3.50; one pair of shoes, value $14.00; one camera, value $220.00; one package of chewing gum, value $0.20; of a total value of $237.70. . . ."

(7) ***Description of written instruments, orders, and oral expressions***

(a) ***Written instrument.*** When a written instrument (such as a check, or a part of it) forms the gist of the offense, the specification should set forth the writing, preferably verbatim.

> ***Example***: Private Badpaper is charged with forgery of a check. A verbatim copy of the check (photocopy recommended) should be inserted in the specification after "to wit: . . . ."
>
> *See* Part IV, para. 48f(1), MCM.
>
> ***Example***: Seaman Bogus is charged with wrongful possession of a pass. A photocopy of the pass should be inserted in the specification.
>
> *See* Part IV, para. 77f(3), MCM.

(b) ***General orders.*** When the offense alleged constitutes a violation of a general order or regulation (Article 92(1), UCMJ), the specification should clearly identify the particular directive and indicate clearly the part of it which the accused allegedly violated. This may be done by referring to it by its title, article, section or paragraph, and date of the directive. For example, ". . . Article 1165, *U.S. Navy Regulations*, dated 14 September 1990. . . ." It is not necessary to quote the general order verbatim.

(c) ***Other lawful orders*** (Article 92(2), UCMJ). When the order violated is an "other lawful order" under Article 92(2), that order, or the specific part of it the accused allegedly violated, should be stated in the specification. If there is more than one way to violate the order, the specific misconduct constituting the violation must be alleged. An example would read something like ". . . issued by the commanding officer, USS Caine, to wit: Ship's Organization and Regulation Manual, Article 2222, dated 24 May 1985, an order. . . ." If the order is an oral one, it should be quoted verbatim, but the phrase "or words to that effect" should be added at the end of the quotation. This provides for the possibility that the evidence at trial might establish minor variances in the oral order's exact wording.

(d) ***Oral statements.*** Some offenses, such as disrespect and use of provoking words, involve unlawful oral statements by the accused. The statement that constitutes the offense should be quoted verbatim in the specification with the phrase "or words to that effect" added at the end of the quotation.

2. ***Information about jurisdiction***

a. ***General considerations***. In its 1987 decision in *Solorio v. United States*, the Supreme Court stated that the only prerequisite for military jurisdiction is that the accused be subject to trial by court-martial. Whether or not an offense occurred off-base or had significant "service connection" are no longer important factors in determining the issue of court-martial jurisdiction.

b. ***Jurisdiction over the accused***. Generally speaking, a court-martial has jurisdiction to try only military members on active duty. Therefore, each specification must clearly indicate that the accused is on active duty. In addition to reciting the accused's rank and branch of service, the words "on active duty" should be added.

> ***Example***: "In that Seaman Bertha D. Blooze, U.S. Navy, USS Marshgas, on active duty, did. . . ."

Sometimes more than "on active duty" may be necessary. When, for example, the offense resulted from the failure of a reservist to report for active duty for training, the specification should indicate his activation.

> ***Example***:
>
> Specification: In that Seaman Jake D. Snake, U.S. Naval Reserve, Naval Station, Philadelphia, Pennsylvania, on active duty, who was lawfully ordered on 11 January 19CY to a period of forty-five days active duty for training to commence on 2 February 19CY, did. . . .

D. ***Demonstration: Drafting a charge and specification***

1. ***The facts***. You cannot begin to draft the charges and specifications until you know the facts. Review all of the available evidence, including reports of investigation, report chits, etc. Then, and only then, begin to draft. In this example, the facts are as follows: Seaman Ben Z. Drine, USN, attached to USS Angeldust, meets with his shipmate, Seaman Ben Gay, USN, on 6 November 19CY aboard their ship during duty hours. Drine and Gay conspire to rob a military supply van which is supposed to be carrying the civilian payroll. They agree to "hit" the van in Middletown, Rhode Island, near the intersection at "Chicken City," the next day at 1300. The van is military property and is driven by a civilian military employee with a military police escort. In order to hide the loot until "the heat is off," they agree to bring their spoils back to the ship. The robbery takes place as planned.

2. ***Step One: Draft the information about the offense.*** This offense will be prosecuted as a violation of Article 122, UCMJ (robbery). The form found in Part IV, para. 47f, MCM, will be used for the basic format. At this point, the charge and specification should look like this:

> Charge: Violation of the UCMJ, Article 122
>
> Specification: In that Seaman Ben Z. Drine, U.S. Navy, USS Angeldust, did, at Middletown, Rhode Island, on or about 7 November 19CY, by means of force and violence, steal from the persons of James E. Sandcrab and Yeoman Second Class Iam Victimized, U.S. Navy, against their will, $10,000.00 in U.S. currency, the property of the U.S. Navy.

3. ***Step Two: Add information about jurisdiction over the persons***

As noted earlier, adding the words "on active duty" is usually sufficient to allege jurisdiction over an accused. The pleading would look like the following, once this is accomplished:

> Charge: Violation of the UCMJ, Article 122
>
> Specification: In that Seaman Ben Z. Drine, U.S. Navy, USS Angeldust, on active duty, did, at Middletown, Rhode Island, on or about 7 November 19CY, by means of force and violence, steal from the persons of James E. Sandcrab and Yeoman Second Class Iam Victimized, U.S. Navy, against their will, $10,000.00 in U.S. currency, the property of the U.S. Navy.

4. ***A word about style.*** The examples in this text are drafted using the accepted style and language generally used in military pleadings. Never be intimidated by "saids" and "to wits." The purpose of pleading is to draft a legally sufficient, understandable accusation that will inform the accused of the charges, allow for preparation of the defense, and protect against double jeopardy. It is the substance of the pleading, not its literary style, that determines its quality.

E. ***Amendments to pleadings.*** Once a charge and specification have been preferred, relatively minor amendments may be made. Pen-and-ink changes to specifications, even at the last minute before trial, are not uncommon. There are, however, several limitations placed on amendments to pleadings.

1. The amendment must not change a specification that fails to allege an offense into one that does.

> ***Example***: An unauthorized absence specification fails to allege that the absence was "without authority." "Without authority" cannot be added to the specification; a new specification must be preferred, referred for trial, and served on the accused.

2. The amendment must not change the offense alleged into a different offense other than a lesser included offense.

> ***Example***: An assault specification cannot be changed into a murder specification by deleting the word "assault" and substituting "murder." A new specification must be preferred, referred, and served on the accused. Murder is a greater offense.
>
> ***Example***: A larceny specification can be amended to become a specification alleging the lesser included offense of wrongful appropriation. The word "steal" can be deleted and "wrongfully appropriate" can be substituted. Wrongful appropriation is a lesser offense.

3. The amendment cannot change the date of the offense in order to correct a problem with the statute of limitations.

4. The amendment must not mislead the accused to the extent that he / she is unable to prepare a defense.

> ***Example***: A larceny specification alleges that the accused stole "a wristwatch of a value of $75.00, the property of Harry Smith." If the specification were amended to allege the theft of "$75.00 in currency, the property of Sidney Jones," such a change would be so substantial that the accused would probably be misled. A new specification should be preferred, referred, and served on the accused. The test is whether the accused has actually been misled.

F. *Common defects in pleading*

1. ***Fatal and nonfatal defects***. Pleading defects fall into two general categories: fatal and nonfatal defects. A fatally defective pleading cannot be used at trial. If the accused is convicted on a fatally defective pleading, the conviction will usually be overturned. A nonfatal defect in a pleading will not result in such a drastic result. Most nonfatal defects are

cured by amendment or by exceptions and substitutions, and the trial continues. For a more technical discussion of the remedies for fatal and nonfatal defects in pleading, see R.C.M. 907.

2. ***Misdesignation.*** Misdesignation occurs when the article number cited in the charge does not conform to the specification. For example, a larceny specification is incorrectly charged under Article 122 instead of Article 121. This is a nonfatal defect, which can be remedied by merely making the appropriate correction to the charge.

3. ***Failure to allege an offense.*** When a specification omits a necessary element of the offense or omits necessary words importing criminality, it fails to allege any offense at all. Failure to state an offense is a fatal defect. The specification will usually be dismissed at trial. If the defect is not detected and the accused is convicted, the conviction will often be overturned on appeal.

4. ***Lack of specificity.*** If a specification properly alleges an offense, but is vague or ambiguous in its factual allegations, it lacks specificity. Lack of specificity is fatal only when the specification is so vague that the accused is unable to prepare a defense, and the lack of specificity cannot reasonably be corrected by amendment. In most cases, however, the military judge will merely order the specification be amended to make it more definite and the trial will continue. Even though it is seldom a fatal defect, lack of specificity is serious. It can result in substantial delay because the defense will be entitled to a continuance if additional time is needed to prepare in light of the changes in the specification.

5. ***Duplicity.*** Each specification should allege only one offense. Duplicity occurs when two or more separate offenses are combined in one specification. For example, Smith assaults Jones and Baker on separate days. If there is only one assault specification alleging an assault against both victims together, it is duplicitous. Two separate crimes have been committed: an assault against Jones and an assault against Baker. Two assault specifications should be pleaded. Duplicity is not fatal, unless the specification is so convoluted and confusing that the accused is unable to prepare a defense.

6. ***Unreasonable multiplication.*** One transaction or event, or what is substantially one transaction, should not be made the basis for an unreasonable number of charges. What is reasonable or unreasonable depends on the particular facts of each case and is largely a matter of judgment. Unreasonable multiplication is pleading run rampant: alleging so many charges and specifications, both serious and trivial, that the accused is unable to prepare a proper defense against the serious ones. The accused in such a case may be entitled to some form of relief, such as severance (referral of some of the charges to a different court) or even outright dismissal of some of the charges. This problem can be avoided by charging the accused with the most serious offenses only. On the other hand, if the minor charges serve to explain the major offenses, they should be added to the charge sheet.

Example: Seaman Grabb goes on a shoplifting spree at the Navy Exchange one Saturday afternoon. In the course of an hour he steals six watches, seven cameras, and three shirts. To charge Grabb with sixteen separate specifications of larceny (one for each item) would be unreasonable multiplication, because what is involved is essentially one transaction, one criminal impulse. He should be charged with only one specification.

Example: One Saturday afternoon, Seaman Grabb goes on a shoplifting spree at the Navy Exchange, the Commissary, the MiniMart, and the Automobile Accessories Store of the Navy Exchange, all located at various points on the base. In the course of the afternoon, he steals six watches, seven cameras, and three shirts, two quarts of milk, five steaks, a case of beer, and two tires. To charge Grabb with 26 separate specifications of larceny (one for each item) would be unreasonable multiplication, but to charge him with four specifications of larceny (one for larceny of the six watches, seven cameras, and three shirts; one for the two quarts of milk and five steaks; one for the case of beer; and another for the two tires) may not be unnecessary multiplication because, though occurring during the same afternoon, there are sufficient time and place differences to constitute four different transactions. He should be charged with four specifications of larceny.

Sometimes the line between unreasonable multiplication and duplicity is hard to distinguish. Once again, common sense and professional legal advice will be the pleader's best guide in avoiding unreasonable multiplication.

G. ***Conclusion***. Military pleading has traditionally been the task of the nonlawyer. The pleader's goal should be to draft a legally sufficient charge and specification that adequately informs the accused of the accusation, enables the accused to prepare a defense, and offers double jeopardy protection. Common sense, attention to detail, and an appreciation of clear, concise language will help the pleader achieve this goal and avoid the occasional legal pitfalls in pleading.

CHAPTER XX
ORDERS, OFFENSES, AND DERELICTION OF DUTY

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CHAPTER XX

ORDERS, OFFENSES, AND DERELICTION OF DUTY

A. ***Overview***. Three types of orders offenses are proscribed under the UCMJ:

1. Violations of general orders and regulations [Article 92(1)];

2. violations of other lawful orders [Article 92(2)]; and

3. willful disobedience of the lawful orders of superiors and / or of petty officers, noncommissioned officers, and warrant officers [Articles 90(2)) and 91(2)].

Closely related to orders offenses is the offense of dereliction of duty [Article 92(3)]. Both orders offenses and dereliction of duty involve the accused's failure to perform a military duty. In an orders violation, the duty is imposed by a lawful order. In dereliction of duty, the duty may be imposed by a lawful order, regulation, or standard operating procedure, or by the custom of the service.

B. ***The lawful order***. Before an accused can be convicted of an orders offense, that particular order must be proven to be lawful. General orders and regulations, other orders requiring the performance of a military duty, and orders from superiors may be inferred to be lawful. This inference of lawfulness merely means that the prosecution need not introduce specific evidence to prove that the order is lawful. If the defense contests the lawfulness of the order, however, the prosecution must prove beyond reasonable doubt that the order was lawful. The concept of lawfulness involves several issues, which are discussed below.

1. ***Punitive orders and regulations***. Before violation of an order or regulation can be a basis for prosecution (other than for dereliction of duty), the order or regulation must be punitive; that is, it must subject the violator to the criminal penalties of the UCMJ. Therefore, the order or regulation must be more than a mere policy statement or administrative guideline. It must impose a specific duty on the accused to perform or refrain from certain acts. The order may be oral or written, or a combination of both. It cannot require further implementation by subordinates.

a. ***Nonpunitive orders and regulations.*** The armed forces have published millions of pages of technical and administrative instructions, regulations, directives, and manuals. Their purpose is to standardize operations, especially in administrative areas. Some of these regulations are merely policy statements; others detail rather complicated, specific procedures. Nonpunitive regulations are not intended to define individual conduct which will be considered criminal and which will result in prosecution under the UCMJ.

b. ***Punitive or nonpunitive?*** A frequent issue especially in cases involving written orders—is whether the alleged order was a specific mandate or merely a nonpunitive regulation. The issue is always decided on a case-by-case basis. The court will examine the purported order and the context in which it was issued. No single factor is decisive, but the issue will be determined by considering the following factors:

(1) ***Purpose.*** If the stated purpose of the directive uses language such as "provide guidance," "establish policy," or "promulgate guidelines and procedures," the directive is most likely nonpunitive. If the stated purpose uses language such as "establish individual duties and responsibilities," the directive is most likely punitive.

(2) ***Specificity.*** If the directive expressly commands or forbids specific acts, it is probably punitive. If it promulgates only general procedures or guidelines, it is probably nonpunitive. If the directive expressly or impliedly allows individual discretion in its implementation, it is probably nonpunitive. Specificity of language is an extremely important factor.

(3) ***Sanctions.*** A nonpunitive directive will seldom provide sanctions for violations. If the directive indicates that violators will be subject to disciplinary action, the directive is probably punitive.

(4) ***Implementation.*** If the directive provides that its provisions shall be implemented by subordinates, it is probably not punitive. Language such as "subordinate commanders will ensure compliance" or "as implemented by subordinate commanders" indicates that the directive is probably nonpunitive.

(5) ***Intent.*** Sometimes it will be necessary to produce evidence of the intentions of the authority promulgating the directive. For example, if the directive in question is a ship's instruction, the commanding officer who promulgated the instruction may have to testify about whether the directive was intended to be a punitive order. Any notes or memoranda that were written while the directive was being drafted may also be helpful. Intent is not a decisive factor by itself; but it permits the court to look behind the sometimes ambiguous language of a directive. Evidence of the original intent of the directive allows the court to make a more accurate determination of whether it is punitive.

2. ***Was the order issued by a proper authority?*** The person issuing the order must have legal authority to do so. The authority to issue orders may arise by law,

regulation, or custom of the service. Generally, a superior has authority to issue orders to a subordinate. A commanding officer has authority to issue orders to all persons subordinate in the chain of command, even those who may hold a higher military rank. Therefore, a rear admiral (O-8), temporarily attached to Naval Justice School while attending a Senior Officer Course, is subordinate in the chain of command to the Justice School's commanding officer, a captain (O-6). The captain would have authority to issue orders (very politely!) to the rear admiral. A person in the execution of military police or shore patrol duties may issue orders related to law enforcement duties to all personnel, regardless of rank. Circumstances may control whether or not the person has the authority to give an order. In the case of an emergency, such as the loss of engine power, the pilot of a plane may order all baggage jettisoned. He would not have the authority to order the discarding of baggage just to get home faster.

3. ***Did the order relate to a military duty***? In order to be a lawful order under the Code, the order must relate to a military duty. Military duties include all activities reasonably necessary to safeguard or promote the morale, discipline, readiness, and mission of a command. For example, the commanding officer, desiring to raise the morale of his troops, may set aside a building to be turned into an auto-hobby shop. He may order servicemembers to build racks and tables, see that an officer procures automotive tools, and get someone to maintain the place. All these orders relate to a military need. The commanding officer may not order work to be done on his personal automobile.

4. ***Is the order contrary to superior law***? An order is unlawful if it is contrary to the Constitution or to the UCMJ. For example, an officer orders a subordinate to discuss an offense with which the subordinate is charged. The officer's order is unlawful because it violates an accused's right to silence under Article 31, UCMJ. In combat, an order to commit a violation of the law of armed conflict is unlawful. An order is also unlawful when it conflicts with the lawful order of an authority superior to the person issuing it.

5. ***Is the order an arbitrary infringement on individual rights***? Military orders frequently limit the free exercise of the servicemember's individual rights and liberties. Such an order will be unlawful, however, only if it arbitrarily or unreasonably interferes with individual rights. An infringement on individual rights is arbitrary when it bears no reasonable relationship to a legitimate military mission or interest. It will also be unlawful if it imposes a greater interference with individual rights than is reasonably necessary. For example, an order forbidding any member of a command to read comic books is unlawful because it unreasonably interferes with the individual's right to select one's own reading material. However, an order forbidding the reading of any book or magazine other than official publications while acting as a sentinel would be entirely reasonable. The order promotes the very important military interest in ensuring that all sentinels are alert.

Conscience, ethical standards, religion, or personal philosophy must not be confused with the concept of arbitrary infringement of individual rights. The fact that an

order may be contrary to an individual's morals is not, by itself, a defense. "Immorality" alone does not make an order unlawful.

6. ***Does the order unlawfully impose punishment?*** Punishment in the military may be lawfully imposed only as a result of nonjudicial punishment or a court-martial sentence. Any other order that either expressly or impliedly imposes punishment is unlawful. The critical issue, however, is the definition of punishment. Whether an order is punishment or is merely designed to correct a performance deficiency depends on the facts of each case. An order to perform extra work as a result of a deficiency must be reasonably related to correcting the deficiency. It would be unreasonable, for example, to order a Marine who fails a locker inspection to run ten miles. Running ten miles will not correct slovenly habits. Such an order would be unlawful. It would be reasonable, however, to require an additional inspection after working hours, provided the inspection is conducted at a reasonable time. Remedial orders, often styled as "extra military instruction" (EMI), are common in the military. To be lawful, however, they must order the servicemember to perform duties reasonably related to correcting deficient performance. Moreover, the remedial duties must not be performed at unreasonable times or under clearly unreasonable conditions. For a more detailed discussion of extra military instruction and other nonpunitive measures, see chapter I of this Handbook.

7. ***Is the order unreasonably redundant?*** An order cannot merely restate a preexisting duty nor repeat another order already in effect. For example, if a servicemember is already in a restricted status and fails to muster as the restriction orders require, the ultimate offense is failure to go in violation of Article 86 and not violation of the written order in violation of Article 92.

8. ***Is the order specific?*** The exact language of an order is insignificant, so long as it amounts to a positive mandate and is so understood by the subordinate. Expressing an order in courteous language, rather than in a peremptory form, does not alter the order's legal effect. Thus, "Jones, please file these before you go" is just as much an order as "Jones, file these before you go." Moreover, the order must direct the accused to perform a specific act whether it is to do or refrain from doing something. Vague orders, such as "go train," would be hard to successfully prosecute.

C. ***Violation of general orders or regulations*** [Article 92(1)]

1. ***General order.*** Part IV, para. 16c(1)(a), MCM, defines general orders or general regulations as those orders or regulations generally applicable to an armed force. General orders or regulations may be promulgated by the following authorities:

a. President of the United States;

b. Secretary of Defense (Secretary of Transportation for the U.S. Coast Guard);

c. Secretary of a military department (e.g., Secretary of the Navy);

d. flag or general officers in command, and their superior commanders; and

e. officers possessing general court-martial convening powers and their superior commanders. (Not every such commander has such authority. For example, the UCMJ gives commanders of overseas naval bases GCM authority; however, some cases have held that this grant alone is insufficient authority to issue general orders. Other factors, such as the rank of the commander and the position of the base in the echelon of command, must also be considered.)

2. ***Elements of the offense.*** The prosecution must prove beyond reasonable doubt that:

a. A certain lawful general order or regulation was in effect;

b. the accused had a duty to obey the order; and

c. at the time and place alleged, the accused failed to obey the order.

3. ***Discussion***

a. ***The order was in effect.*** Normally, an order is effective when published. Sometimes, however, an order may provide that its provisions will not go into effect until a certain date after publication. Also, an order may be later superseded, amended, or canceled. The specification should, therefore, clearly allege that the general order was in effect at the time of the offense. Usually, merely indicating the effective date of the order will be sufficient.

b. ***The accused had a duty to obey.*** Not only must the general order be lawful (as discussed in part B of this chapter), but the accused must also have had a duty to obey the order. Thus, the order must have been applicable to the accused. Although many general orders, such as many of the provisions of *U.S. Navy Regulations*, apply to all members within a branch of service, some may apply only to commanding officers or commissioned officers. A general order which commands certain conduct from a commissioned officer would not be applicable to an enlisted person. An enlisted accused would have no duty to obey such an order. Careful analysis of the language of the order will determine whether it was applicable to the accused.

c. ***The accused failed to obey or violated the order.*** If the order commands certain specific acts, the accused disobeys the order by failing to perform those acts. If the order forbids acts, the accused's commission of those acts will constitute a

violation. Sometimes, however, an order or regulation may prohibit certain acts, but will provide for specific exceptions under specified conditions. If the facts of the case raise any issue of whether the accused's conduct was covered by one of the exceptions, the burden will be on the prosecution to prove beyond reasonable doubt that the accused's acts did not fall within an exception. The prosecution need not prove that the accused knew about the general order that was violated. The accused's ignorance of the general order's provisions—or even of its existence—is no defense. Nor must the prosecution prove that the accused intended to violate the order; a negligent violation is sufficient to convict the accused.

4. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 16f(1), MCM, 1995. A written general order or regulation should not be quoted, but must be clearly identified by citations such as serial number, article number, paragraph, or subject. The effective date must be included. The order ***must*** be described as a "***general*** order" or "***general*** regulation." The accused's conduct which violated the order should be described clearly and concisely. If the order provides for exceptions under specified conditions, it is unnecessary to allege that the accused's conduct did not come within the terms of one of the exceptions.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 92.
>
> Specification: In that Seaman Eye W. Harper, U.S. Navy, USS Seagram, on active duty, did, on board USS Seagram, at sea, on or about 15 July 19CY, violate a lawful general regulation, to wit: Article 1162, *U.S. Navy Regulations*, dated 14 September 1990, by wrongfully possessing alcoholic liquors for beverage purposes aboard a United States Navy ship, to wit: USS Seagram.

D. ***Violation of other lawful orders*** [Article (92(2)]

1. ***Other lawful orders***. Violations of lawful orders other than general orders (and other than willful violations of orders of superiors and / or noncommissioned officers, petty officers, and warrant officers) are prosecuted under Article 92(2), UCMJ. The fundamental legal principles applicable to general orders violations also apply to Article 92(2) cases, with a few exceptions which will be noted below.

2. ***Elements of the offense***. The prosecution must prove beyond reasonable doubt that:

a. A member of the armed forces issued a certain lawful order; and

b. the accused had knowledge of the order; and

c. the accused had a duty to obey the order; and

d. at the time and place alleged, the accused failed to obey the order.

3. ***Discussion***

a. ***The accused had knowledge of the order.*** Unlike general orders offenses, the prosecution in an Article 92(2) case must prove beyond a reasonable doubt that the accused had actual knowledge of the order. Merely establishing that the accused should have known of the order is not enough. Actual knowledge may be proven by either direct or circumstantial evidence. A statement by the accused admitting knowledge of the order would be direct evidence of the accused's knowledge. Circumstantial evidence would include facts such as the order being announced. The accused's lack of knowledge of the order is a complete defense to prosecution under Article 92(2).

b. ***The accused failed to obey.*** The accused's failure to obey the order may be willful or the result of forgetfulness or negligence. If the order requires instant compliance, any delay results in a violation. If no specific time for compliance is given (either expressly or implicitly), then the order must be complied with within a time reasonable under the circumstances. If the order calls for performance of an act at a later time, or no later than a specified time, the order is not violated until that time has passed. If the order does not state exactly how the duty is to be performed, the accused will not be guilty of an orders violation if the acts are performed in a reasonable manner, even though the accused's performance may not be exactly what was intended by the person giving the order. Whether the accused reasonably complied with the order is determined by examining all the facts and circumstances of the case.

4. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 16f(2) and (3), MCM. A written order must be clearly identified, but need not be quoted. If the order was oral, the exact language of the order should be quoted and the phrase "or words to that effect" should be added at the end of the quotation. The specification must allege that the accused knew of the order and that the accused had a duty to obey. If the exact language of the order is quoted, then usually it is unnecessary to describe the specific acts which constituted a violation of the order. The phrase "fail to obey the same" will usually suffice because the verbatim quotation of the order should indicate exactly what the accused was required to do. On the other hand, if the order could have been violated in more than one way, the specification should describe exactly how the accused violated it. The first sample pleading involves an order which could be violated in more than one way. The accused's specific

mode of violating the order is described.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 92.
>
> Specification 1: In that Seaman Eaton E. Ternally, U.S. Navy, USS Tubb, on active duty, having knowledge of a lawful order issued by the Commanding Officer, USS Tubb, to wit: Paragraph 3d(3), USS Tubb Instruction 1020.3E, dated 5 June 1981, an order it was her duty to obey, did, on board USS Tubb, at sea, on or about 8 August 19CY, fail to obey the same by wrongfully possessing food in her berthing space.
>
> Specification 2: In that Seaman Eaton E. Ternally, U.S. Navy, USS Tubb, on active duty, having knowledge of a lawful order issued by Lieutenant Commander Bugs Bunny, MC, U.S. Navy, to submit to medical treatment for weight reduction, an order which it was her duty to obey, did, on board USS Tubb, on or about 8 August 19CY, fail to obey the same.

E. ***Willful disobedience of certain lawful orders*** [Articles 90(2) and 91(2)]

1. ***Willful disobedience.*** Willful disobedience is more than just an orders violation. The willful disobedience offenses involve an intentional defiance of authority. Other orders offenses may be the result of either a willful or merely negligent failure to obey. Thus, willful disobedience is the most serious of the orders offenses. (Willful disobedience of a superior commissioned officer in time of declared war is a capital offense.) Article 90(2), UCMJ, prohibits willful disobedience of a superior commissioned officer. Article 91(2), UCMJ, forbids willful disobedience of a warrant (W-1), noncommissioned, or petty officer.

2. ***Elements of the offenses.*** Although willful disobedience of a superior commissioned officer and willful disobedience of a warrant, noncommissioned, or petty officer are prosecuted under different articles of the Code, the elements are similar. The key difference is that, while Article 90 requires that the victim be a ***superior*** commissioned officer, orders violations under Article 91 involve no requirement of superiority (although in most cases, of course, a superior will have no "duty to obey" orders from juniors). Another difference is that Article 91 cannot be violated by a commissioned officer. To establish these offenses, the prosecution must prove beyond reasonable doubt that:

a. (For Article 91 offenses only) the accused was an enlisted person or a warrant officer (W-1); and

b. the accused received a lawful order; and

c. the order was issued by (for Article 90(2)) a superior commissioned officer, or (for Article 91(2)) a warrant (W-1) officer, noncommissioned officer, or petty officer; and

d. the accused knew that the order was issued by his / her superior commissioned officer, or by a warrant (W-1) officer, noncommissioned officer, or petty officer; and

e. (for Article 91(2) only) the accused had a duty to obey the order; and

f. the accused willfully disobeyed the order.

3. ***Discussion***

a. ***The accused received a lawful order*** (see part B of this chapter for a discussion of the lawfulness of orders). The order must be directed to the accused personally. For example, "Seaman Jones, report to the OOD at once" is directed to Jones personally. "Jones, Smith, and Brown will report to the executive officer immediately" is also directed to Jones personally (as well as to Smith and Brown). "All nonrated personnel will muster at 0900" is not directed personally to any specific individual. However, he can be convicted of violating Article 92(2), failing to obey "an other lawful order."

The order may be passed through an intermediary and still be directed personally to the recipient. Suppose the commanding officer tells Seaman Smith to inform Seaman Jones that Jones must report to the commanding officer's stateroom immediately. The order is considered to have been directed personally to Jones. If Jones intentionally fails to report, she may be guilty of willful disobedience of the commanding officer.

b. ***The ultimate offense."*** This doctrine specifies that an accused should not be punished for violating an order which merely restated an existing order or commanded the accused to perform an existing duty. In such cases, the accused should be punished for the ultimate offense (the preexisting duty). For example, a Marine returns from leave sporting a beard, which is forbidden by Marine Corps grooming regulations. His superior commissioned officer ***reminds*** him of the regulation, to which he refuses to conform. The Marine should not be punished for willful disobedience if the officer's efforts merely constituted counseling to obey the existing grooming regulations. If so, the ultimate offense was violation of the grooming regulation, not the officer's command. Thus, the ultimate offense was an Article 92(1) general order violation, and, while the accused may be convicted of willful disobedience of a superior commissioned officer, he will only be

punished for violating the regulation. If, however, the officer had clearly invoked his own authority as a commissioned officer to direct the Marine to get a haircut (independent of the grooming regulation), the ultimate offense would then be the affront to the officer's authority in violation of Article 90(2).

c. *Error! Bookmark not defined.**Superiority***. For Article 90(2) violations, the order must be issued by the accused's superior commissioned officer. In its legal context, "superior" has a special, limited meaning. A superior is one who is superior to the accused either in rank or in the chain of command.

(1) ***Superior in rank***. A superior in rank is at least one paygrade senior to the accused and is a member of accused's branch of service. The Navy and Marine Corps are considered the same branch of service, since both are part of the Department of the Navy. Therefore, a Navy ensign is superior in rank to a Marine corporal. But, an Air Force general is ***not*** superior in rank to a Navy seaman recruit (for the purposes of offenses involving superiority as an element), because they belong to different branches of the armed forces.

(2) ***Superior in chain of command***. Regardless of rank, one who is superior to the accused in the chain of command is the accused's superior. Thus, a Navy lieutenant commander who is commanding officer of a ship is superior to a Navy commander (or Army colonel) who is temporarily assigned to the ship as medical officer. Superiority in chain of command takes precedence over superiority in rank.

d. ***Knowledge***. The prosecution must prove beyond a reasonable doubt that the accused actually knew that the person issuing the order was a superior commissioned officer or a petty officer, noncommissioned officer, or warrant officer. Knowledge may be proven by direct evidence. For example, when Seaman Jones refused Ensign Smith's order, Jones stated "Ensign Smith, I won't do it." Circumstantial evidence, such as the fact that the superior was in uniform, may also be used.

e. ***The accused*** *Error! Bookmark not defined.**willfully disobeyed***. The accused's failure to comply with the order must show an intentional defiance of the victim's authority. Failure to comply with an order because of forgetfulness or carelessness is not willful disobedience, although it may constitute an Article 92(2) other-lawful-orders violation. Willful disobedience connotes an intentional flouting of the authority to issue an order to the accused. Thus, there is necessarily a close relationship between the issuing of the order and the accused's refusal. More is required, however, than the accused merely stating, no matter how emphatically, that the order will not be obeyed. Willful disobedience occurs only when the accused actually fails to obey.

4. ***Pleading***

a. ***General considerations***. *See* Part IV, paras. 14f(4) and 15f(2), MCM.

b. ***Sample pleadings***

(1) ***Willful disobedience of superior commissioned officer***

> Charge: Violation of the UCMJ, Article 90.
>
> Specification: In that First Lieutenant Real E. Tough, U.S. Marine Corps, Naval Justice School, Newport, Rhode Island, on active duty, having received a lawful command from Captain Kill R. Instinct, U.S. Marine Corps, his superior commissioned officer, then known by the said Tough to be his superior commissioned officer, to "get into the truck," or words to that effect, did, at the Naval Education and Training Center, Newport, Rhode Island, on or about 3 April 19CY, willfully disobey the same.

(2) ***Willful disobedience of warrant, noncommissioned, or petty officer***

> Charge: Violation of the UCMJ, Article 91.
>
> Specification: In that Seaman Simone N. Sezz, U.S. Navy, USS Tubb, on active duty, having received a lawful order from Yeoman First Class Roger Dodger, U.S. Navy, a petty officer, then known by the said Seaman Jones to be a petty officer, to "empty the wastebasket" or words to that effect, an order which it was her duty to obey, did, on board the USS Tubb, at sea, on or about 13 May 19CY, willfully disobey the same.

F. ***Dereliction of duty*** [Article 92(3)]

1. ***Dereliction distinguished from orders offenses.*** Dereliction of duty, under Article 92(3), UCMJ, is closely related to the three types of orders offenses discussed previously in this chapter. It is also distinguishable, however, from orders violations. The term "dereliction" covers a much wider spectrum of infractions in the performance of duties. Not only is failure to perform a duty prohibited, but also performing one's duty in a culpably inefficient manner. The accused's duty may be one imposed by statute, regulation, order, or merely by the custom of the service. *See* Part IV, para. 16c(3), MCM, for a more detailed discussion.

2. ***Elements of the offense.*** The prosecution must prove beyond reasonable doubt that:

a. The accused had a certain prescribed duty; and

b. the accused knew, or reasonably should have known, of the duty; and

c. the accused was derelict in the performance of that duty (either willfully, through neglect, or culpable inefficiency).

3. ***Discussion***

a. ***The accused's duty.*** The duty contemplated by Article 92(3) is any military duty either specifically assigned to the accused or incidental to the accused's military assignment. The duty may be imposed by statute, regulation, order, or custom of the service.

b. ***Knowledge.*** Actual knowledge of duties may be proved by uncircumstantial evidence. Actual knowledge need not be shown if the individual reasonably should have known of the duty. The knowledge can be established by custom, manuals, regulations, literature, past behavior, testimony of witnesses, or other ways.

c. ***The accused was derelict.*** Dereliction of duty encompasses three specific types of failure to perform: willful, negligent, and culpably inefficient.

(1) ***Willful dereliction.*** The accused has full knowledge of the duty and deliberately fails to perform it.

(2) ***Negligent dereliction.*** The accused has full knowledge of the duty, but fails to exercise ordinary care, skill, or diligence in performing it. As a result of the accused's negligence, the duty is not performed or is performed incorrectly. Ordinary care, skill, and diligence is that which a reasonably prudent person would exercise in similar circumstances. Whether the accused failed to meet this standard is a factual issue for the court-martial members, or military judge in a judge-alone trial, to determine.

(3) ***Dereliction through culpable inefficiency.*** Culpable inefficiency is inefficient or inadequate performance for which there is no reasonable excuse. If the accused has the ability and opportunity to perform the required duty efficiently, but performs it in a sloppy or substandard manner, the accused is culpably inefficient. However, if the accused's failure is due to ineptitude, the poor performance is not the result of culpable inefficiency. Ineptitude is a genuine lack of ability to perform properly despite diligent efforts. Whether the accused's poor performance was the result of culpable inefficiency or merely ineptitude is a factual issue to be resolved at trial. The prosecution must prove beyond a reasonable doubt that the accused was culpably inefficient, not just inept.

4. ***Pleading***

a. ***General considerations***. Dereliction of duty specifications are often difficult to draft. Moreover, no single sample or form can adequately provide for all the factual variations that arise in dereliction cases. A dereliction specification should include specific details describing the conduct which constituted the dereliction, the accused's knowledge of the duty (or that he should have known), and whether the accused's dereliction was willful, negligent, or culpably inefficient.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 92.
>
> Specification: In that Private First Class Lute N. Pillage, U.S. Marine Corps, Company A, 1st Battalion, 9th Marines, 3d Marine Division, Fleet Marine Force Pacific, on active duty, who knew of his duties at Camp Fuji, Japan, on or about 20 November 19CY, was derelict in the performance of those duties, in that he negligently failed to perform routine inspection and cleaning on the M-16 rifle in his custody, as it was his duty to do.

G. ***Common*** *Error! Bookmark not defined.****defenses to orders offenses and dereliction of duty***. Three defenses which are especially applicable to orders violations and dereliction are illegality, impossibility, and conflicting orders. Other defenses, discussed elsewhere in this text, may also be relevant in certain factual situations, but these three defenses are among the most common.

1. ***Illegality***. The accused contends that the order violated was unlawful. The defense may be based on any of the specific issues discussed in part B of this chapter. The most common attacks on the alleged lawfulness of an order will be in the areas of the order not relating to a military duty, the order being contrary to superior law, and the order unlawfully infringing on individual rights. Whenever the defense raises any issue about the order's lawfulness, the prosecution must prove beyond reasonable doubt that the order was lawful. The accused's erroneous belief that the order was unlawful will not be a defense (i.e., an accused disobeys at his / her own risk).

2. ***Impossibility***. Impossibility (also referred to as "inability") may be a defense to orders violations and dereliction of duty when a physical or financial inability prevented the accused from complying with an order or properly performing a duty. For example, suppose that Jones is ordered to drive the command vehicle to the airport to meet a visiting dignitary. The car breaks down on the way, making it impossible for Jones to comply with the order. Jones is not guilty of an orders violation nor of dereliction of duty because of the impossibility.

Impossibility is not a defense to Article 92(1) and 92(2) orders violations or to dereliction of duty if the impossibility was the accused's own fault. Thus, in the example above, if it was impossible to comply with the order to drive to the airport because Jones carelessly lost the key, Jones will be unable to defend on the grounds of impossibility. In willful disobedience cases, however, impossibility will be a defense regardless of whether the accused was at fault. Willful disobedience requires a willful noncompliance. Nothing less, not even gross negligence, will suffice. Of course, if the "impossibility" is deliberately created by the accused for the specific purpose of avoiding compliance with an order, this contrived impossibility will not be a defense.

3. ***Subsequent conflicting orders.*** When a subordinate receives an order from a superior, and that order is subsequently countermanded or modified by an order from another superior, the accused is not guilty of a violation of the original order. This is so whether or not the officer who issued the second order is superior to the officer who issued the first order or was authorized to countermand the first order. *See* Article 0124, *U.S. Navy Regulations, 1990,* for specific guidance.

CHAPTER XXI

DISRESPECT

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CHAPTER XXI

DISRESPECT

A. ***Overview.*** The Uniform Code of Military Justice prohibits two distinct disrespect offenses. Article 89 prohibits disrespect toward a superior commissioned officer. Article 91(3) prohibits disrespect toward a warrant (W-1), noncommissioned, or petty officer—whether or not the victim is the superior—who is in the execution of office. (Note also that only warrant officers (W-1) and enlisted persons can violate Article 91.) The concept of superiority is identical to that in willful disobedience, as discussed in chapter XX of this text: superior in rank or superior in chain of command.

B. ***What is disrespect?*** A common element of the two disrespect offenses is that the accused's language or conduct was, under the circumstances, disrespectful to the victim. Whether the accused's behavior was disrespectful is a factual question to be determined by evaluating all the facts and circumstances of each case.

1. ***The accused's behavior.*** Disrespect may consist of words, acts, failures to act respectfully, or any combination of the three. Disrespect connotes contempt. The accused's disrespectful behavior detracts from the respect and authority rightfully due the position and person of a victim. The accused's disrespectful language may attack the victim's military performance (e.g., "Colonel, you're a nice woman, but you couldn't lead a regiment out of a paper bag."). It may also be a personal insult, unrelated to military matters (e.g., "Commander, you're an outstanding officer, but a mindless buffoon at poker."). The fact that the accused's statement is true is no defense. Disrespect may also consist of contemptuous behavior, such as deliberately refusing to render military courtesies, or turning and walking away from a superior who's talking to you.

2. ***The circumstances.*** Although the accused's language or conduct is the most important factor in determining whether the accused's behavior was disrespectful, the circumstances of the alleged disrespect are also important. Social engagements may allow greater familiarity than would be permitted during the regular performance of military duties. On the other hand, a social function is not a license for disrespect. The prior relationship between the victim and the subordinate may be considered. Greater liberty may be allowed a close personal friend or relative of the victim, especially if the alleged disrespect occurred

when no other military members were present. The accused's intent and the victim's understanding of the behavior is important. If the accused meant no disrespect, and if the victim took no offense, the accused's behavior may not have been disrespectful under the circumstances. On the other hand, if other military members witnessed the encounter, the fact that the accused meant no disrespect may be outweighed by the potential impact on military discipline.

a. ***Abandonment of rank.*** Sometimes a victim may provoke the disrespectful behavior by his or her own outrageous conduct. When a victim's conduct is so demeaning as to be undeserving of respect, the victim is considered to have abandoned his or her rank. Such a person no longer deserves the respect which the UCMJ protects. An accused who is provoked to disrespectful behavior by the victim's abandonment of rank will not be guilty of disrespect.

b. ***Private conversations.*** Part IV, para. 13c(4), MCM, counsels that ". . . ordinarily one should not be held accountable under this article for what was said or done in a purely private conversation." A private conversation is one conducted outside the course of government business and not in public. The victim concerned must not be party to the conversation. If the conversation is loud enough that others can overhear, the conversation is usually not a private one. For example, two sailors on liberty are conducting a gripe session in a bar. They are talking in a very low voice. One sailor says, "Ensign Smeen is such a turkey that he has to hide every Thanksgiving." This would be a purely private conversation. If, however, the sailor shouts her statement, the conversation would not be a purely private one.

c. ***Directed toward the victim?*** The disrespectful language or conduct must be "directed towards" the victim. Contemptible language or gestures that are not directed towards the "victim" may not be disrespectful, even if said or done in the victim's presence. However, a superior commissioned officer need not be present for disrespectful language to be "directed toward" him or her.

C. ***Disrespect toward a superior commissioned officer*** (Article 89)

1. ***Elements of the offense.*** The prosecution must prove beyond reasonable doubt that:

a. At the alleged time and place, the accused did, or failed to do, certain acts, or used certain language;

b. the accused's behavior was directed toward a superior commissioned officer of the accused;

c. the accused knew that the superior commissioned officer was his or her superior commissioned officer; and

d. the accused's behavior, under the circumstances, was disrespectful to the superior commissioned officer.

2. ***Discussion.*** There are three significant distinctions between disrespect to a superior commissioned officer and disrespect to a warrant, noncommissioned, or petty officer. First, the commissioned officer must be the accused's superior. Second, the alleged disrespect to the superior commissioned officer need not occur in the presence of the commissioned officer. Third, the superior commissioned officer need not be in the performance of official duties when the disrespect occurs. Thus, if Seaman Smith makes a disrespectful remark about Commander Jones, Smith will be guilty of disrespect even though the remark was made out of the presence of Jones and while the two were both on liberty.

3. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 13f, MCM. The specification should include a clear, concise description of the accused's behavior. If the disrespect consisted of a statement, the statement should be quoted verbatim. If the statement was oral, the phrase "or words to that effect" should be added at the end of the quotation. If the disrespect included conduct, the accused's actions should be described with enough specificity to indicate that they were disrespectful.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 89.
>
> Specification: In that Private Mel Content, U.S. Marine Corps, Marine Barracks, Charleston, South Carolina, on active duty, did, at Naval Base, Charleston, South Carolina, on or about 10 December 19CY, behave himself with disrespect toward Rear Admiral I. M. Comsix, U.S. Navy, his superior commissioned officer, then known by said Private Content to be his superior commissioned officer, by saying to her, "Hey, stupid, can't you read? I don't care if you are some big-shot admiral. That stop sign at the gate applies to you, too, dummy," or words to that effect.

D. ***Disrespect toward warrant (W-1), noncommissioned, or petty officer*** [Article 91(3)]

1. ***Elements of the offense.*** The prosecution must prove beyond a reasonable doubt that:

a. The accused was a warrant officer (W-1) or enlisted person;

b. at the alleged time and place, the accused did, or failed to do, certain acts, or used certain language;

c. the accused's behavior was directed toward a warrant (W-1), noncommissioned, or petty officer of the accused;

d. the accused's behavior was within the sight or hearing of the warrant, noncommissioned, or petty officer to whom it was directed;

e. the accused then knew that the victim was a warrant, noncommissioned, or petty officer;

f. the warrant, noncommissioned, or petty officer was in the execution of his or her office at the time; and

g. the accused's behavior, under the circumstances, was disrespectful to the superior warrant, noncommissioned, or petty officer.

(***Note***: If the victim was the superior of the accused, add the following elements):

h. That the victim was the superior noncommissioned or petty officer of the accused; and

i. that the accused then knew that the victim was the accused's superior noncommissioned or petty officer.

2. ***Discussion***. Unlike disrespect to a superior commissioned officer, disrespect to a warrant, noncommissioned, or petty officer must occur within the sight or hearing of the victim of the disrespect. The warrant, noncommissioned, or petty officer must also be in the execution of office at the time. "Execution of office" means that the person is on duty or is performing some military function. Most examples of execution of office are obvious, but some require careful analysis. For example, a petty officer who is drinking at a bar after working hours is certainly not in the execution of office. Such a petty officer cannot be the subject of an unlawful disrespect. However, if the petty officer acts to quell a disturbance in the bar that involves military members, he or she would assume a status of being in the execution of office. (***Note***: Article 7, UCMJ, authorizes a warrant, noncommissioned, or petty officer to quell such disturbances.) The victim need not be the accused's superior. If it is alleged and proved that the victim was the accused's superior noncommissioned or petty officer, however (superiority being irrelevant when the victim is a warrant officer (W-1)), the maximum punishment is increased.

3. ***Commissioned warrant officers***. Disrespect to superior commissioned warrant officers (W-2 through W-4) must be charged under Article 89.

4. ***Pleading***

a. ***General considerations.*** See Part IV, para. 15f(3), MCM. The guidelines applicable to Article 89 disrespects also apply to disrespect to a warrant, noncommissioned, or petty officer. Differences between the terms "behave himself / herself with disrespect," "treat with contempt," and "disrespectful in language and deportment," have no legal significance.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 91.
>
> Specification: In that Yeoman Third Class Brigrat Striker, U.S. Navy, USS Little Compton, on active duty, on board USS Little Compton, at sea, on or about 15 November 19CY, was disrespectful in language and deportment toward Chief Yeoman Dirk T. Oldman, U.S. Navy, a superior chief petty officer, then known by said Yeoman Third Class Striker to be a superior chief petty officer, who was then in the execution of his office, by saying to him, "Chief, you're an overbearing, obnoxious, stupid Nazi" or words to that effect, and by contemptuously turning away from and leaving said Chief Yeoman Oldman's presence without his consent.

OFFENSES AGAINST AUTHORITY

		Article	Offense	Perpetrator	Victim	Knowledge
DISRESPECT		89	Disrespect to superior comm'd off'r	Anyone junior to the victim	Need not be present nor in execution of office	Of superior status
		91(3) (superior = aggravation)	Disrespect to WO, NCO, PO	Enlisted or WO	Must be present and in execution of office	Of status
ORDERS	VIOLATIONS	92(1)	General order	Anyone		Need not be pleaded nor proved
		92(2)	Other lawful order	Anyone		Must be pleaded and proved
		92(3)	Dereliction of duty	Anyone		Must plead and prove that accused knew of duty
WILLFUL	DISOBEDIENCE	90(2)	Willful disobedience of superior comm'd off'r	Anyone junior to the victim	comm'd off'r	Of superior status of victim and of order
		91(2)	Willful disobedience of WO, NCO, PO	Enlisted or WO	WO, NCO, PO	Of status of victim and of order
ASSAULT		90(1)	Assault on superior comm'd off'r	Anyone junior to the victim	Must be in execution of office	Of superior status
		91(1) (superior = aggravation)	Assault on WO, NCO, PO	Enlisted or WO	Must be in execution of office	Of status
		128	Assault on comm'd, WO, PO	Anyone	Need not be in execution of office or superior	Of comm'd, WO, NCO, PO status

(*See* discussion in chapter XXV, part F)

CHAPTER XXII

ABSENCE OFFENSES

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CHAPTER XXII

ABSENCE OFFENSES

A. ***Overview***. The UCMJ prohibits four major types of absence offenses. Despite the factual variations among the offenses, all absence offenses are based on one common fact: the accused, without proper authority from anyone competent to grant leave or liberty, was absent from a place where the accused was required to be in the course of his / her military duty. The four basic types of absence offenses are:

1. Failure to go to, or going from, an appointed place of duty [Articles 86(1) and 86(2)];

2. unauthorized absence from unit or organization [Article 86(3)];

3. missing movement (Article 87); and

4. desertion (Article 85).

B. ***Failure to go to, or going from, an appointed place of duty*** [Articles 86(1) and 86(2)]

1. ***General concept***. The two least serious absence offenses are failure to go to an appointed place of duty [Article 86(1)] and going from an appointed place of duty [Article 86(2)]. Both offenses involve the accused's unauthorized failure to be at a specific location. Although each offense is separate and distinct from the other, the two offenses share common legal principles.

2. ***Elements of the offenses***. The prosecution must prove beyond a reasonable doubt that:

a. Lawful authority appointed a certain time and place of duty for the accused;

b. the accused knew that he or she was required to be present at the appointed time and place of duty; and

c. that, at the alleged time and place, the accused, without proper authority:

(1) [Article 86(1)] failed to go to the appointed place of duty; or

(2) [Article 86(2)] left the appointed place of duty ***after having reported to it***.

3. ***Discussion***

a. ***Lawful authority***. The accused must have been lawfully ordered to be at the appointed place of duty at the prescribed time. An order by a military superior may be inferred to be lawful, absent evidence to the contrary. The order may be directed to the accused individually or as a member of a group. See chapter XX of this text for a detailed discussion of the concept of lawfulness of orders.

b. ***Appointed place of duty***. The appointed place of duty must be a ***specific*** location to which the accused must report at a specific time. A location such as "USS Cambria County" or "Naval Station, Norfolk, Virginia" is too general to be an appointed place of duty. Articles 86(1) and 86(2) contemplate a specific location such as "the mess decks" or "Building 17" [therefore, when the accused fails to report to a command or leaves his / her unit, the absence should be prosecuted as unauthorized absence from the unit or organization, in violation of Article 86(3)]. The specific location must be alleged.

c. ***A precise time***. A precise time must be appointed for the accused to report. Thus, an order to "report to Building M-6 when your duties are finished" is too general as to time. "Report to Building M-6 at 1400" is specific. The precise time must also be alleged.

d. ***Knowledge***. The prosecution must prove beyond a reasonable doubt that the accused ***actually knew*** that he or she was required to be at the appointed place of duty at the time prescribed. Actual knowledge may be proven by either direct or circumstantial evidence.

e. ***Without authority***. The common element of all absence offenses is that the accused had no authority to be absent. In the offenses of failure to go to, or going from, appointed place of duty, the absence of authority is usually proven by the testimony of the accused's supervisor or of the superior who ordered the accused to report to the place of duty. The burden is always on the prosecution to prove beyond a reasonable doubt that the accused had no permission to be absent.

f. ***Failure to go***. Failure to go to an appointed place of duty may be either intentional or the result of negligence. Thus, one who is ordered to report to the wardroom at 1500, but forgets to do so, is guilty of failure to go. Failure to go to an appointed place of duty is an instantaneous offense. If the accused does not report to the appointed place of

duty at the prescribed time, the offense is completed. Reporting late is no defense unless the tardiness was caused by unforeseeable factors beyond the accused's control. The accused's failure to report is usually proven by the testimony of a witness or by an official logbook entry.

g. ***Going from appointed place of duty.*** The offense of going from an appointed place of duty involves two distinct acts. First, the accused must have reported to the place of duty. The accused's arrival may be proven by the testimony of witnesses or by official log entries. Second, the accused must leave the appointed place of duty without authority. The accused's departure also may be proven by the testimony of witnesses or by official logbook entries. Like failure to go, going from appointed place of duty is an instantaneous offense. Once the accused leaves without authority, the offense is completed. The accused's subsequent return is no defense. In some cases, there may be an issue of whether the accused actually went beyond the limits of the appointed place of duty. Usually, if the accused goes too far from the appointed place to be reasonably able to perform the assigned duty, the accused has left the place of duty. For example, a person standing a phone watch in an office probably has not left the appointed place of duty while visiting a nearby head, while a watchstander has certainly left the appointed place of duty while visiting a nearby tavern. Whether the accused went beyond the reasonable limits of the place of duty is an issue that must be decided after evaluating the facts and circumstances of each case.

4. ***Aggravated forms of absence from appointed place of duty.*** Part IV, para. 10e(3)-(5), MCM, authorizes substantially increased maximum punishments when the failure to go to, or going from, an appointed place of duty occurs under certain aggravating circumstances. These additional aggravating circumstances must be pleaded and proven beyond a reasonable doubt in order to trigger the greater maximum punishment.

a. ***Absence from watch or guard.*** If the accused's appointed place of duty is a watch, guard, or duty section, the maximum sentence to confinement and two-thirds forfeitures is increased from 1 month to 3 months. The fact that the accused's appointed place of duty was a watch, guard, or duty section must be clearly alleged in the specification.

b. ***Intentionally abandoning watch or guard or avoiding maneuvers or field exercises.*** If the accused fails to go to, or goes from, a watch, guard, or duty section with any such intent, the maximum punishment is increased to total forfeitures, 6 months' confinement, and a bad-conduct discharge. In addition to the elements of the offense, the prosecution must also prove beyond a reasonable doubt that the accused knew the absence would occur during the aggravating event, and that the accused intended to abandon or avoid the event. The accused's intent may be proven by either direct or circumstantial evidence.

5. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 10f(1), MCM. Note that the MCM form does not expressly allege that the accused had actual knowledge of the appointed place of duty. The military appellate courts have never ruled that the knowledge element must be expressly pleaded. This apparent exception to the rule that all elements must be pleaded may be explained by interpreting the language "his [her] appointed place of duty" as fairly implying that the accused had actual knowledge. The prescribed time at which the accused was to go to the appointed place of duty must be alleged in failure to go specifications, and the precise place of duty must be alleged in either case.

b. ***Sample pleadings***

(1) ***Failure to go to appointed place of duty*** [Article 86(1)]

> Charge: Violation of the UCMJ, Article 86.
>
> Specification: In that Seaman James J. Jones, U.S. Navy, USS POTTSYLVANIA, on active duty, did, on board USS POTTSYLVANIA, at sea, at or about 0600, 3 September 19CY, without authority, fail to go at the time prescribed to his appointed place of duty, to wit: the 0600 restricted mans's muster on the fantail.

(2) ***Going from appointed place of duty*** [article 86(2)]

> Charge: Violation of the UCMJ, Article 86.
>
> Specification: In that Seaman James J. Jones, U.S. Navy, USS MORDOR, on active duty, did, on board USS MORDOR, located at sea, at or about ___, 3 September 19CY, without authority, go from her appointed place of duty, to wit: the 0800 to 1200 signal bridge watch.

Note that, for article 86(2) offenses, it is ***not*** common practice to include the time the accused went from his duty since, usually, the exact time he / she left will be unknown.

C. ***Unauthorized absence from unit or organization*** [Article 86(3)]

1. ***General concept***. Article 86(3) prohibits the most commonly prosecuted absence offense, unauthorized absence from the servicemember's unit or organization. UA, as this offense is commonly called, is an instantaneous offense, complete the moment the accused becomes absent without authority. It is also an offense of duration because the

length of an absence is an important aggravating circumstance. The maximum punishment differs depending on whether the unauthorized absence is (1) 3 days or less, (2) more than 3 days but no more than 30 days, or (3) more than 30 days. While the maximum authorized punishment does not change where the unauthorized absence is in excess of 30 days, the length of the absence will serve, practically speaking, as an important factor in determining the amount of confinement to be imposed upon the accused. In addition, if an absence of over thirty days is terminated by apprehension, the maximum punishment is increased even further. Thus, the most important aspects of any unauthorized absence are its inception, termination, and how the absence ended.

2. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. At the alleged time and place, the accused was absent from his or her unit, organization, or place of duty;

b. this absence was without proper authority from anyone competent to grant the accused leave or liberty; and

c. the accused remained an unauthorized absentee until the alleged termination date;

(***Note***: If the absence was terminated by apprehension, add as an additional element)

d. that the absence was terminated by apprehension.

3. ***Discussion***

a. ***Absence from unit or organization***. "Unit" refers to a smaller command, such as a ship, air squadron, or company. "Organization" refers to a larger command, such as a large shore installation, base, or battalion. The terms may be used interchangeably. For purposes of Article 86(3) offenses, the accused's unit is usually the military activity that holds the accused's service record. It is the command having summary court-martial jurisdiction over the accused. When an accused is on temporary duty away from the permanent command, the accused is technically a member of both the permanent and the temporary unit. The accused's unauthorized absence from the temporary command could also be charged as an unauthorized absence from the permanent unit. When a servicemember, pursuant to permanent change-of-station orders, detaches from the old command, that person immediately becomes a member of the new command. Thus, should a person traveling under PCS orders fail to report to the new command, the unauthorized absence would be from the new unit or organization even though the accused was never actually there.

b. ***"Place of duty" under Article 86(3).*** The language of Article 86(3) also provides for an unauthorized absence from a "place of duty." "Place of duty" under Article 86(3) must not be confused with the "appointed place of duty" under Articles 86(1) and 86(2). The Article 86(3) "place of duty" refers to a general location to which the accused is assigned. For example, a sub-unit of a command located in a place other than the command headquarters would be a "place of duty" under Article 86(3). If the accused is regularly assigned to the detached sub-unit and becomes an unauthorized absentee, the offense may be charged as an unauthorized absence from either the accused's command or from the detached sub-unit. Because of the possible confusion that can arise from prosecuting an unauthorized absence from a "place of duty," an Article 86(3) offense should usually be charged as an absence from the unit or organization rather than the Article 86(3) "place of duty." The specification should allege the accused's unit or organization in terms of both the command and the detached sub-unit, e.g., "absent himself from his unit, to wit: Naval Legal Service Office, Newport, Rhode Island (Naval Air Station, Brunswick, Maine Detachment). . . ."

c. ***Commencement of the unauthorized absence.*** An unauthorized absence begins in one of three ways: The accused may leave the command without authority; the accused may fail to return to the command upon the expiration of leave or liberty; or the accused may fail to report to a permanent or temporary command pursuant to military orders. The inception of the accused's absence is usually proven through official military records such as muster reports or entries in the accused's service record.

d. ***Without authority.*** The accused's absence must be without authority from anyone competent to grant leave or liberty. Service record entries are routinely used to prove the absence of proper authority. The person preparing the service record entry should consult the accused's supervisor or commanding officer before preparing the entry to ensure that the absence was without authority.

e. ***Intent.*** The accused's unauthorized absence may be intentional or the result of negligence. If unforeseen factors beyond the accused's control made it impossible to return from leave or liberty or to report on time, the accused will have a defense to unauthorized absence. Also, if the accused honestly and reasonably believed that the absence was authorized, the accused will not be guilty of unauthorized absence. The defenses of impossibility and mistake of fact are discussed in greater detail later in this chapter.

f. ***Termination of the unauthorized absence.*** An unauthorized absence terminates when there is a bona fide return to military control. The absence may be terminated either by the accused's surrender to military authorities or by the accused's apprehension.

(1) ***Surrender.*** When the accused surrenders to military authorities, the unauthorized absence terminates. A surrender requires three things: first, the accused must appear in person before any military authority; second, the accused must disclose his or

her status as an unauthorized absentee; and, third, the accused must actually submit (or demonstrate a willingness to submit) to military control. If these requirements are met, the absence is terminated even if the accused surrenders to a unit or armed force other than his / her own. For example, if Seaman Jones is UA from NETC Newport, she may surrender to Fort Ord, California, to terminate her UA status.

(a) ***Physical presence.*** Merely writing or telephoning military authorities is not sufficient.

(b) ***Disclosure of status.*** In order to end the unauthorized absence, the absentee must disclose his or her status of unauthorized absence. Suppose that Seaman Jones is an unauthorized absentee. Jones visits his recruiter to ask about what will happen to "a friend" who is an absentee. Jones's visit will not be a surrender because Jones did not disclose his status, nor did he disclose enough facts to alert the recruiter to the fact that Jones might be an unauthorized absentee.

(c) ***Actual submission to military control.*** The absentee must actually submit (or demonstrate a willingness to submit) to military control. The surrender must constitute a present, physical submission to military control. "Casual presence" aboard a military installation will not end an unauthorized absence. Suppose that Corporal Smith is an unauthorized absentee. Smith returns to the base to patronize the liquor store, visit the enlisted club, and purchase cigarettes at the PX. This "casual presence" will not constitute a surrender; the unauthorized absence continues.

(2) ***Apprehension by military authorities.*** If military authorities apprehend someone they know to be an unauthorized absentee, the absence terminates. Even if the military authorities are unaware of the person's status, the absence will terminate if the authorities could have determined the person's unauthorized absence status by reasonable diligence. Usually, when military authorities apprehend a military member, they will be able to determine through reasonable inquiries and efforts if the person is an unauthorized absentee. If, however, the apprehended absentee deliberately conceals or misrepresents his or her status to the military authorities, and they reasonably rely on the absentee's statements and release the absentee, the absence will not usually be considered terminated.

(3) ***Apprehension by civilian authorities.*** An unauthorized absence often ends in an arrest by civilian police and subsequent delivery to military authorities. The point at which the unauthorized absence terminates depends upon the circumstances of the civilian arrest.

(a) ***General rule: Termination upon notification.*** As a general rule, the unauthorized absence terminates when the civilian authorities notify the military that the absentee is in custody and is available to be returned to military control. Suppose, therefore, that the civilian police arrest Private Smith on a civilian charge. Smith informs the police that he is an unauthorized absentee from the Marine Corps. Rather than prosecute Smith for the civilian charge, the police decide to return Smith to the Marines. The

unauthorized absence terminates when the police notify military authorities that Smith is in custody and is available for return to the military. Even if the Marines wait three weeks before taking custody of Smith, the unauthorized absence ends when they were notified that Smith was available to them.

(b) ***Exception: Civilian arrest pursuant to military request.*** When military authorities request civilian authorities to apprehend an unauthorized absentee, the unauthorized absence will terminate when the person is apprehended ***pursuant to the request***. After a servicemember has been an unauthorized absentee for a certain period of time, his or her command will issue a Form DD-553—"Absentee Wanted by Armed Forces"—to the Federal Bureau of Investigation and to state and local authorities near the absentee's home of record. This flyer requests (and authorizes) civilian authorities to apprehend the absentee. Whenever a military member is taken into civilian custody because of a Form DD-553, his or her unauthorized absence terminates immediately upon apprehension. By arresting the absentee, the civilian police have merely acted as agents of the military.

Whether the civilian arrest was pursuant to military request depends on the reason why the civilian police took the absentee into custody. Suppose, for example, that Seaman Jones is stopped by local police for a traffic offense. When the police officer checks Jones's license and registration with headquarters, a Form DD-553 is discovered. The officer takes Jones into custody. Seaman Jones's unauthorized absence has terminated because the arrest was the result of the DD-553 request. Had the police officer not discovered the DD-553 against Jones, Jones would not have been taken into custody for a traffic offense. On the other hand, suppose that Jones is arrested for armed robbery and the Form DD-553 against him is discovered. Seaman Jones's unauthorized absence is not terminated because the arrest was not pursuant to the DD-553. Jones was suspected of a serious crime. The arresting officer would have taken Jones into custody regardless of his absentee status.

(4) ***Apprehension or surrender?*** Sometimes it is difficult to determine whether an absence ended by apprehension or surrender. An unidentified military accused who is arrested for minor civilian offenses has nonetheless surrendered for military purposes if the accused freely and voluntarily discloses his / her military status. On the other hand, if the accused discloses military status only begrudgingly, or for an ulterior motive, or when faced with serious civilian charges, the absence is considered terminated by apprehension for military purposes as well.

Example: Suppose that Sergeant Johnson is an unauthorized absentee from the Marine Corps. Johnson is arrested by civilian police for burglary. The police do not know that Johnson is an

unauthorized absentee. Johnson calculates that one year in the brig is better than five-to-ten in the state penitentiary. Hoping that the civilians will merely turn her over to the Marine Corps, Johnson informs the police of her status and of her earnest desire to surrender. Johnson's actions do not constitute a surrender. Should Johnson ever be tried by the military, the maximum punishment will be higher because this absence was terminated by apprehension.

g. ***Delivery of military personnel to civilian authorities***. When military authorities deliver a military member to civilian authorities for prosecution of a civilian offense, the member is not in a status of unauthorized absence. The member's absence has been ordered by military authority. Even if the person is convicted of the civilian offense and sentenced to imprisonment, the entire period is not an authorized absence. (It may, however, still be "dead time" for which the member would not receive pay nor credit toward his / her service obligation.)

4. ***Variance***. Determination of unauthorized absence inception and termination dates is very important because "UA" is not a continuing offense. Remember, the length of the absence is only a matter in aggravation. Consequently, if the proof at trial varies from the inception and termination dates charged, the accused under some circumstances may not be convicted of anything other than a "one-day" absence. Suppose, for example, the accused is charged with being UA from 1 January 19CY until 1 December 19CY. If the proof adduced at trial only shows that the absence ended 1 December 19CY, the accused can be convicted only of a one-day UA on 1 December 19CY. Or, suppose the proof shows that the absence began when charged (1 January 19CY) but the proof fails to establish when the UA ended. The accused can be convicted for a one-day (1 January 19CY) UA only. If, however, there is proof that the accused went UA initially on 2 January 19CY, returned on 1 February 19CY, again went UA on 1 March 19CY, and remained absent until 1 December 19CY, the accused may properly be convicted of the two separate UA's, since the times in question were included within the one longer UA charged (1 January - 1 December 19CY).

5. ***Aggravating factors***. In addition to the length of absence and manner of termination, Article 86(3) cases may be aggravated by the same factors that aggravate Article 86(1) and (2) offenses. *See* discussion *supra*.

6. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 10f(2), MCM. Extra care must be taken to allege the accused's correct unit or organization ***at the time of absence*** and the exact inception and termination dates. Hours of the day should not be alleged unless it is

necessary to establish that the absence is more than 3 days (72 hours) or 30 days. *See* Part IV, para. 10e for a discussion of the duration of the absence and its effect on permissible punishment.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 86.
>
> Specification: In that Seaman Ovur D. Hill, U.S. Naval Reserve, Naval Education and Training Center, Newport, Rhode Island, on active duty, did, on or about 6 May 19CY, without authority, absent himself from his unit, to wit: USS DONORA, located at San Diego, California, and did remain so absent until he was apprehended on or about 6 August 19CY.

D. ***Missing movement*** (Article 87)

1. ***General concept***. Missing movement is an aggravated form of unauthorized absence from a unit or organization. The accused, while an unauthorized absentee, misses a significant movement of a ship, aircraft, or unit. The accused may have intended to miss the movement, or did so through carelessness or neglect.

2. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. The accused was required in the course of duty to move with a certain ship, aircraft, or unit;

b. the accused actually knew of the movement;

c. at the alleged time and place, the accused missed the movement; and

d. the accused missed the movement by design or through neglect.

3. ***Discussion***

a. ***What is a movement***? A movement under Article 87 is a significant move of a ship, aircraft, or unit. Whether a particular operation is a significant movement is a factual issue, to be decided by evaluating all the facts and circumstances of each case. A movement usually involves an operation over a substantial period of time. Under some circumstances, however, an important operation or mission of less than a day may be a movement under Article 87. Distance is also an important factor. Merely changing berthing space in a shipyard is not a movement. Under certain circumstances, however, local operations may be important enough to constitute a movement. The nature of the mission

and the existence of a combat environment must also be considered. Even personnel shortages and budgetary restraints may be relevant if these problems were such that the movement would not be made unless it was significant. All of the circumstances must be considered. A recent Navy and Marine Corps Court of Criminal Appeals decision held that an aircraft carrier's one-day dependents cruise ***was*** a significant movement for purposes of Article 87.

b. ***Individual or group travel.*** If the accused misses a significant movement of his or her command, Article 87 applies. Article 87 also applies, under certain circumstances, to other instances where the military member is required to perform individual or group travel. The term "unit" not only includes a permanent military component, such as a company, platoon, or squadron, but also a group organized solely for purposes of group travel. For example, 200 Marines, commanded by an officer, organized into a replacement company for transportation to Okinawa, constitute a unit under Article 87, even though the unit will be disbanded upon arrival in Okinawa and its members distributed among several commands. On the other hand, several enlisted members listed on a standard transfer order assigning them to a new permanent command do not constitute a unit because there is no organizational structure and the mode of travel for each individual may vary.

c. ***Military or commercial transportation?*** If the accused misses a movement, the mode of transportation used, military or commercial, is irrelevant. The mode of transportation may be important, however, when the accused is ordered to perform individual travel. If the individual travel was to be by military transportation (including civilian transportation leased by the military), the accused will usually be guilty of missing movement regardless of whether he or she was a crew member or merely a passenger. If the accused misses commercial transportation, however, the accused will not usually be guilty of missing movement.

d. ***Knowledge of the movement.*** The prosecution must prove beyond reasonable doubt that the accused actually knew the approximate time and date of the upcoming movement. This knowledge is usually proven by circumstantial evidence, such as the planned movement being announced at quarters or a formation at which the accused was present. Simply placing notice of the movement in the plan of the day (POD) is ***not*** enough to show actual knowledge, even if all hands are charged with reading the POD.

e. ***Missing movement by design.*** Missing movement by design is a specific intent offense: the accused missed movement because he or she specifically intended to do so. The accused's intent may be proven by direct evidence, such as the accused's statement to a shipmate that he or she won't make the movement. It can also be proven by circumstantial evidence, such as the accused having had severe family problems and the fact that the ship was about to deploy for eleven months. As a practical matter, unless there is direct evidence of the accused's intent, it is difficult to prove missing movement by design at trial.

f. ***Missing movement through neglect.*** Missing movement through neglect is the lesser included offense of missing movement by design. Neglect connotes a failure to make reasonable efforts to make the movement. It also includes careless actions undertaken without considering the reasonable possibility that they might prevent the accused from making the movement. In the typical missing movement case, proof beyond reasonable doubt that the accused knew about the scheduled movement, but was an unauthorized absentee when the movement occurred, will prove missing movement through neglect. Note that the government must prove knowledge of the scheduled movement—even for the offense of missing movement through neglect.

4. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 11f, MCM. The word "neglect" may be substituted for "design" where appropriate. Note that the sample form in the MCM does not expressly allege knowledge of the movement. The specification reasonably implies knowledge, however. "Through design" implies that the accused knew of the movement and intended to miss it. (If only "through neglect" were to be alleged, however, it would be prudent to also allege that the accused had knowledge of the movement—as this is a required element.)

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 87.
>
> Specification: In that Fireman Stokes D. Blaze, U.S. Navy, USS PUDDLESTOPPED, on active duty, did, at Mayport, Florida, on or about 12 November 19CY, through design, miss the movement of USS PUDDLESTOPPED with which he was required in the course of duty to move.

E. ***Desertion*** (Article 85)

1. ***General concept.*** Desertion is the most serious type of absence offense. Like missing movement, desertion is an aggravated form of unauthorized absence from the unit or organization. Article 85 provides for two types of desertion. Article 85a(a) prohibits unauthorized absence with the intent to remain away permanently from the unit or organization. Article 85a(2) prohibits unauthorized absence with the intent to avoid hazardous duty or to shirk important service. Of the two forms, Article 85a(1) desertion is the more commonly encountered.

2. ***Elements of Article 85a(1) desertion***. In order to convict the accused of desertion with the intent to remain away permanently in violation of Article 85a(1), UCMJ, the prosecution must prove beyond reasonable doubt that:

a. At the alleged time and place, the accused was absent from his or her unit, organization, or place of duty;

b. this absence was without proper authority from anyone competent to grant the accused leave or liberty;

c. the accused intended at the time the absence began, or at some time during the absence, to remain away permanently from his or her unit, organization, or place of duty; and

d. the accused remained an unauthorized absentee until the alleged termination date.

(***Note***: When the desertion was terminated by the accused's apprehension, add as a fifth element)

e. the accused's absence was terminated by apprehension.

3. ***Discussion of Article 85a(1) desertion***

a. ***Relationship to unauthorized absence***. Desertion with the intent to remain away permanently is merely an aggravated form of unauthorized absence from the unit or organization. The additional element in Article 85a(1) desertion is the intent to remain away permanently from the unit or organization. Thus, Article 85a(1) desertion is merely unauthorized absence plus specific intent.

b. ***Intent to remain away permanently***. The accused must specifically intend to remain away permanently from his or her unit or organization. This intent may exist when the unauthorized absence begins, or it may be formed at a later time. Once the intent is formed, the offense of desertion is complete. A change of heart is no defense. The fact that the accused always intended to return to military control is no defense if the accused nonetheless never intended to return to the unit or organization the accused left. An intent to return to the unit at some indefinite time in the future is a defense to Article 85a(1) desertion, as is an intent to return when a certain event occurs. Thus, the unauthorized absentee who always intends to return to his or her unit "someday" or "when things get better financially" is not guilty of desertion with the intent to remain away permanently.

Intent is sometimes proven by direct evidence, such as the accused's statement that "I'm glad they caught me because I never would have come back on my own." More frequently, however, the intent to remain away permanently is proven by circumstantial evidence. Length of absence is the most important fact, but, by itself, will not

be sufficient to convict an accused of desertion. Other important facts include: the fact that the accused destroyed his or her uniforms, ID card, or military gear; the fact that the accused's absence was terminated by apprehension; the fact that the accused left the country; the accused's use of an alias while an absentee; and the fact that, while an absentee, the accused stayed far away from any military installation. All the facts and circumstances surrounding the reasons for the accused's absence, as well as the accused's life while an absentee, must be considered.

c. ***Termination by apprehension.*** If the accused's absence is terminated by apprehension, the authorized maximum sentence to confinement is increased from 2 years to 3 years. The apprehension must be pleaded and proven beyond reasonable doubt. "Apprehension," as used in Article 85 cases, means that the accused's return to military control was involuntary, caused by events beyond the accused's control; that is, neither the accused nor persons acting at the accused's request voluntarily initiated the accused's return. Where an accused deserter is arrested by civil authorities for a civilian offense and makes his military status known when required to fully identify himself by the civilian police or to escape punishment at the hands of the civilian authorities, his absence is not terminated by surrender, but by apprehension. On the other hand, if the accused's disclosure of status was completely free and voluntary, the accused's absence was not terminated by apprehension. Whether the unauthorized absence was terminated by apprehension is a factual issue decided by the court-martial members or, in a judge-alone trial, by the military judge.

4. ***Desertion with intent to avoid hazardous duty or to shirk important service*** [Article 85a(2)]

a. ***General concept.*** Article 85a(2) desertion is merely unauthorized absence plus one of two specific intents: the intent to avoid hazardous duty or the intent to shirk important service. Article 85a(2) desertion also contains elements of knowledge not present in desertion with intent to remain away permanently.

b. ***Elements of the offense.*** In addition to the elements of the offense of unauthorized absence [Article 86(3)], the prosecution must also prove beyond reasonable doubt that the accused knew that he or she would be required to perform a hazardous duty or important service, and that the accused's unauthorized absence was with the specific intent to avoid such hazardous duty or important service.

c. ***Hazardous duty" and important service."*** "Hazardous duty" involves danger, risk, or peril to the individual performing the duty. Hazardous duty need not involve combat. Even some training exercises would qualify as hazardous duty. "Important service" denotes service that is of substantially greater consequence than ordinary everyday military service. Whether a given service is "important" depends upon all the facts and circumstances of each case.

5. ***Article 85a(3).*** Article 85a(3), UCMJ, provides that any member of the armed forces who:

> without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States . . . is guilty of desertion.

The U.S. Court of Military Appeals has held that Article 85a(3) does not create a third type of desertion offense. Article 85a(3) merely describes a specific factual situation which constitutes desertion with intent to remain away permanently.

6. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 9f, MCM. The specific intent to remain away permanently and, if applicable, termination by apprehension must be pleaded.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 85.
>
> Specification: In that Yeoman Second Class Runyon A. Way, U.S. Navy, Naval Station, Philadelphia, Pennsylvania, on active duty, did, on or about 1 January 19CY, without authority and with intent to remain away therefrom permanently, absent himself from his unit, to wit: Naval Station, located at Philadelphia, Pennsylvania and did remain so absent in desertion until he was apprehended on or about 9 October 19CY.

Note: In cases of desertion not terminated by apprehension, omit the words "he(she) was apprehended."

F. ***Common defenses to absence offenses***

1. ***Ignorance or*** *Error! Bookmark not defined.****mistake of fact.*** Ignorance or mistake of fact is a complete defense to the various absence offenses. The conditions under which ignorance or mistake of fact is available as a defense vary from one absence offense to another. To be a defense to a general intent offense, such as an Article 86(3) unauthorized absence, the ignorance or mistake of fact must be both honest and reasonable. An honest ignorance or mistake of fact is one occurring in good faith. It is not feigned ignorance, nor is it a mistaken belief that the accused knows is erroneous. A reasonable ignorance or mistake

of fact is one that a reasonable person would make under similar circumstances. Thus, in an unauthorized absence case, if the accused claims that he or she believed that someone in military authority had authorized or excused the absence, the prosecution need prove beyond reasonable doubt only either that the accused's mistake of fact was not honest or was not reasonable. Some other absence offenses are specific intent offenses. For example, in a "missing movement through design" case, the ignorance or mistake of fact need only be honest. It need not be reasonable. However, the fact that the accused's mistake of fact was wildly unreasonable may be relevant to show that there was no good faith, honest ignorance, or mistake.

To illustrate the operation of the defense of ignorance or mistake of fact, suppose that the accused is charged with desertion with intent to remain away permanently. The accused testifies that, at the beginning and all throughout the absence, the accused honestly believed that she had been discharged from the service. The evidence establishes, however, that this mistake of fact was unreasonable under the circumstances. The accused was informed of the "discharge" by a junior enlisted member, made no effort to verify the "discharge" before leaving the command, and never received a discharge certificate. Nonetheless, if the accused's testimony is believed, the accused is not guilty of the specific intent offense of desertion. The accused is, however, guilty of the lesser included offense of unauthorized absence because the mistake was not reasonable.

Mistake of fact must never be confused with ignorance or mistake of law. Ignorance of the law is no excuse. If the accused knew that the absence was without proper authority, but didn't know that unauthorized absence was an offense, the accused is nonetheless guilty.

2. ***Impossibility***. When unforeseen circumstances beyond the accused's control prevent the accused from being at the appointed place of duty, unit, or organization when required, the accused has a defense of impossibility. The accused must not be at fault, nor can the accused contribute to the creation of the circumstances that make it impossible to be at the appointed place of duty, unit, or organization.

a. ***Three requirements for impossibility***. In order to constitute a defense of impossibility, the circumstances must satisfy three requirements. These are factual issues to be decided by the court-martial members or, in a judge-alone case, by the military judge.

(1) ***Unforeseen circumstances***. The impossibility must result from circumstances or events that were not reasonably foreseeable. For example, if an accused leaves home to return from liberty at the last minute when a severe snowstorm has been predicted, it is not unforeseeable that the weather will make it impossible for the accused to return on time. Whether the circumstances were not reasonably foreseeable is decided by evaluating all the facts in each case.

(2) ***Beyond the accused's control.*** The accused cannot contribute to the creation of the circumstances which caused the impossibility to arise. For example, if an automobile breakdown occurs because the accused has been negligent in properly maintaining the car, the defense of impossibility will not be available. The ultimate issue is whether the accused was at fault.

(3) ***The circumstances must cause actual impossibility.*** In order to be a defense, it must be actually impossible for the accused to be at the appointed place of duty, unit, or organization—not just inconvenient. An accused whose car breaks down, and who fails to take other reasonably available forms of transportation, usually will not have a defense of impossibility. The inability must be the accused's own inability. Thus, the fact that the accused's absence was occasioned by a spouse's heart attack does not create impossibility, although it is a strong extenuating circumstance. Finally, the circumstances must have actually made it impossible for the accused to avoid unauthorized absence. Thus, if the accused is already an unauthorized absentee when the impossibility arises, impossibility will not be a defense. Impossibility is a defense only when the only reason why the accused was absent was the unforeseen circumstance or event.

b. ***Types of impossibility.*** Impossibility may be an unforeseen act of God, the accused's physical or financial inability, or the unforeseen acts of third persons. "Acts of God" include sudden, unexpected, unforeseen occurrences such as floods, blizzards, hurricanes, and other natural disasters. If the accused is injured, ill, or destitute, and such condition was not reasonably foreseeable and was not the accused's fault, the accused's condition will be a defense if it makes it impossible for the accused to avoid being an unauthorized absentee. Unforeseen acts of third persons that make it impossible for the accused to avoid unauthorized absence will also give rise to a defense if the acts were not caused or provoked by the accused's acts.

c. ***Impossibility caused by civilian arrest.*** A very common type of impossibility by acts of third persons arises when the accused is unable to return when required to the unit or organization because the accused has been arrested and is in the custody of civilian authorities. Such circumstances may be a defense, depending upon the time of the arrest and the reason for the arrest.

(1) ***Accused in status of unauthorized absence.*** If the civilian arrest occurs while the accused is already an unauthorized absentee, there is no defense. The arrest did not make it impossible for the accused to avoid unauthorized absence. The rule of "Once UA, always UA" governs. The accused's unauthorized absence will continue until the accused is made available to military authorities. This is the rule whether the arrest subsequently results in a conviction or the accused is acquitted.

(2) ***Accused on duty, leave, or liberty.*** An accused who is turned over to civilian authorities by the military is not UA while held by the civilians under that delivery. If a military turnover is not involved, and if the accused is on duty, leave, or liberty when the arrest occurs, the key issue is whether the accused was at fault.

(a) ***Accused convicted of civilian charge.*** If the accused is convicted of the civilian charge, the time in civilian custody is an unauthorized absence. If the arrest prevented the accused from returning from leave or liberty, the accused's unauthorized absence begins only at the time and date the leave or liberty was to expire. Impossibility is not a defense because the accused's arrest was his or her own fault, as evidenced by the conviction.

(b) ***Accused acquitted of civilian charges.*** If the accused is acquitted of all the civilian charges, the period in civilian custody is an excused absence. It was impossible for the accused to avoid the absence because of the civilian arrest. The fact that the accused was acquitted of all civilian charges is conclusive proof that the accused was not at fault. An acquittal is a not guilty verdict after a civilian trial, or judicial action which is tantamount to a not guilty verdict. Remember, this rule does not apply where the accused is an unauthorized absentee at the time of the civilian arrest.

(c) ***Accused returned to military without disposition of civilian charges.*** If the accused is returned to the military without having been tried for the civilian charges, the accused can be found guilty of the absence only if the prosecution, at the accused's court-martial, can prove beyond a reasonable doubt that the accused actually committed the civilian crimes. In other words, the prosecution must prove a crime within a crime. Because litigating the issue of the accused's guilt of the civilian crime can be expensive and complicated, such prosecutions are often impractical.

3. ***Duress.*** Duress may be raised when the accused, a family member, or an innocent third party is threatened with immediate bodily harm and there is no opportunity to prevent the danger. Duress is controlled by the actual facts and may be unavailable when the accused has a chance, but fails to seek assistance through the chain of command.

4. ***Condonation of desertion.*** Condonation applies to desertion cases only. Condonation occurs where the accused's commander, knowing about the accused's alleged desertion, unconditionally restores the accused to normal duty without taking any steps toward disciplinary action. Thus, whenever a desertion suspect is unconditionally restored to normal duties by a commander who knows of the alleged desertion, and is allowed to perform those duties over an extended period of time, condonation may arise. If a commander desires to restore a desertion suspect to normal duties, condonation can be avoided by ensuring that the suspect is placed in a legal hold status pending disposition of the alleged offense and that the accused realizes that, although he or she may be under no pretrial restraint, disciplinary action is pending.

WHEN UA TERMINATES

SITUATION	UA TERMINATES
Apprehension by the military	at the apprehension
Surrender to the military	at the surrender
Civilian apprehension for UA pursuant to DD 553	at the apprehension
Civilian apprehension for civilian crime, detained longer due to DD 553	when the accused is being held ***for the military***
Civilian apprehension for civilian crime, NO DD 553	when military informed that accused is available to it

RELATIONSHIP BETWEEN UA STATUS AND CIVILIAN CRIMINAL CHARGE

SITUATION	UA	NOT UA	DURATION
UA, civ. arrest; acquit	X		for the entire period
UA, civ. arrest; no trial	X		for the entire period
UA, civ. arrest; convict	X		for the entire period
On Leave; arrest; acquit		X	no "unauthorized" absence
On Leave; arrest; no trial	X *		* if trial counsel proves accused "at fault" (for all the time over leave)
Leave; arrest; convicted	X **		** all the time after leave expires
Military turnover to civilians	X		always "authorized" absences

THE USUAL RULE: ONCE UA, ALWAYS UA

CHAPTER XXIII

THE GENERAL ARTICLE: ARTICLE 134

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CHAPTER XXIII

THE GENERAL ARTICLE: ARTICLE 134

A. ***Overview.*** Unlike most of the other punitive articles of the UCMJ, Article 134 does not identify or define specific acts. Instead, its language is general and somewhat vague:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital . . . shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of that offense, and shall be punished at the discretion of that court.

This language has already resulted in more than 60 separate, specific offenses, each with its own elements of proof, substantive legal principles, and authorized maximum punishment. Article 134 offenses fall within three general categories of offenses: (1) conduct prejudicial to good order and discipline; (2) service-discrediting conduct; and (3) federal noncapital crimes. The concept of a general article such as Article 134 is an ancient one in military law. General articles appeared in military codes as early as the fourteenth century. Much of Article 134's language is substantially unchanged from the time of the American Revolution.

B. ***Limited scope of Article 134.*** Article 134 is not a legal "catch-all." Instead, it is limited to ***recognized*** offenses not specifically mentioned elsewhere in the UCMJ. Moreover, to be an offense under Article 134, the conduct must have been traditionally recognized in the military as criminal. As a general rule, the appellate courts are extremely reluctant to recognize specific offenses under Article 134 unless they are specifically mentioned in the MCM, or have been recognized by earlier case law. Prosecution under Article 134 for violation of a federal criminal statute is limited to noncapital crimes not specifically covered by the UCMJ.

C. ***Conduct prejudicial to good order and discipline* 134(1).** The first clause of Article 134 prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces." The accused's conduct must directly prejudice or tend to prejudice good order and discipline. The act must have a substantial relationship to military activity. Although every act of misconduct by a military member arguably affects military activity at least remotely, Article 134 requires direct, palpable impact.

D. ***Service-discrediting conduct.*** The second clause of Article 134 prohibits "all conduct of a nature to bring discredit upon the armed forces." "Discredit" means an injury to the

reputation of the armed forces. Actual discredit need not be proven. It is sufficient if the accused's conduct reasonably tends to injure the reputation of the armed forces.

E. ***Proof that conduct is prejudicial to good order and discipline or service-discrediting.*** Whether the accused's conduct was service-discrediting or prejudicial to good order and discipline is a factual issue. The prosecution seldom offers any special evidence on this issue. Expert witnesses, such as generals or admirals, are not called to testify about the effect of the accused's conduct on military discipline or reputation. Instead, the court considers all the facts of the case and decides whether the conduct was, under the circumstances, prejudicial or discrediting. The facts of the offense speak for themselves.

F. ***Conduct that is both prejudicial and discrediting.*** Many of the Article 134 offenses, such as graft, are both prejudicial to good order and discipline and service-discrediting. For this reason, Article 134 pleadings need not specifically state that the accused's conduct was prejudicial or of a service-discrediting nature. The prosecution does not have to elect which theory it will argue at trial. In a members trial, the members will be instructed that the accused is guilty of the Article 134 offense if they are satisfied beyond reasonable doubt that the accused's conduct was either prejudicial to good order and discipline or that it was service-discrediting.

G. ***Federal noncapital crimes.*** The third clause of Article 134 prohibits "crimes and offenses not capital." This phrase refers to federal, noncapital crimes, not specifically mentioned elsewhere in the UCMJ. Federal noncapital offenses may be prosecuted under one of two types of statutes: federal statutes with unlimited application or federal statutes of limited application or jurisdiction. One of these federal statutes of limited jurisdiction is the Federal Assimilative Crimes Act found at 18 U.S.C. § 13. Prosecution under the third clause of Article 134 is usually rather complicated, and an attorney should always be consulted.

H. ***Federal Assimilative Crimes Act.*** If conduct is not prohibited by a specific article of the UCMJ or by a federal statute, it still may be prosecuted under Article 134 if the state in which the "offense" occurred prohibits it. A court-martial cannot enforce state law; however, the state statute can be assimilated into the federal law by use of the Federal Assimilative Crimes Act. This act assimilates state law whenever there is no federal statute governing the accused's specific acts, provided that the acts occur in an area subject to either exclusive or concurrent federal jurisdiction. For example, suppose that neither the UCMJ nor any other federal statute requires drivers of motor vehicles to stop at stop signs. Seaman Driver is driving his car aboard a military base over which the federal government has exclusive jurisdiction. Driver drives his car through a stop sign without stopping. Although neither federal law nor the UCMJ cover this type of misconduct, the law of the state in which the base is located does prohibit such acts. The Federal Assimilative Crimes Act would therefore adopt the state law and make it federal law also. Driver could therefore be prosecuted under Article 134(3) for violation of a noncapital federal crime.

l. ***Pleading***. *See* Part IV, paras. 60-113, MCM. Note that none of the forms involve federal noncapital crimes. Pleading a violation of a federal noncapital crime, under the third clause of Article 134, is extremely technical. It usually requires research of civilian federal case law materials not normally available to the command without a lawyer. Specifications alleging a federal noncapital crime should be drafted only by an attorney. The following example illustrates how the state statute and the Federal Assimilative Crimes Act are referenced in the pleading:

– ***Sample specification***

Charge: Violation of UCMJ, Article 134

Specification: In that Staff Sergeant James T. Holman, U.S. Marine Corps, 1st Battalion, 8th Marines, 2d Marine Division, Fleet Marine Force, Atlantic, located at Camp Lejeune, North Carolina, on active duty, did, at Camp Lejeune, North Carolina, a place under the exclusive jurisdiction of the United States, on or about 12 March 19CY, wrongfully and knowingly possess an unauthorized machine gun, in violation of 18 North Carolina General Statutes, Section 195a, as assimilated into federal law by the provisions of the Federal Assimilative Crimes Act, 18 U.S.C. § 13.

CHAPTER XXIV
CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN

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CHAPTER XXIV

CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN

A. ***Overview.*** The offense of conduct unbecoming an officer and gentleman, under Article 133, is closely related to theories of prosecution under Article 134. Both Articles 133 and 134 prohibit general types of conduct rather than specifically defined acts. Like Article 134, Article 133 is the product of ancient traditions in military discipline. Unlike Article 134, however, Article 133 includes offenses specifically mentioned elsewhere in the UCMJ, as well as those unmentioned offenses which are nonetheless established in military tradition. Offenses listed elsewhere in the Code may be charged under Article 133, as long as the terminal element of conduct unbecoming an officer can also be proven beyond a reasonable doubt.

B. ***Elements of the offense.*** The prosecution must prove beyond reasonable doubt that:

1. The accused is a commissioned officer, cadet, or midshipman, and did, or failed to do, certain alleged acts; and

2. under the circumstances, the accused's acts or omissions constituted conduct unbecoming an officer and gentleman (or gentlewoman).

C. ***Discussion***

1. ***Status of the accused.*** Article 133 applies ***only*** to commissioned officers, cadets, and midshipmen.

2. ***Accused's conduct.*** To constitute an offense under Article 133, the accused's conduct must have a double significance. First, it must dishonor or disgrace the accused ***as an officer*** by compromising his / her standing in the military profession. Second, it must also dishonor or disgrace the accused ***as a gentleman*** by impugning his / her honor or integrity or otherwise subjecting the accused to social disgrace. Gentleman is a gender-neutral term. Article 133 does not address every departure from the moral attributes common to the ideal officer and perfect gentleman: while the conduct need not be criminal, only serious departures are covered. For example, ***A***, an officer, desiring time off from work for personal reasons, falsely tells his supervisor that he needs to go to the clinic. The resulting brief unauthorized absence, while clearly diminishing his standing as an officer, does not (in peacetime, at least) subject ***A*** to social disgrace and does not, therefore, constitute a violation of Article 133. Lying, however, epitomizes dishonor both in the military and in society. Accordingly, ***A***'s intentional deception of his superior does constitute a violation of Article 133. Similarly, conduct such as public association with known prostitutes or failure to support one's dependents—which might not otherwise be criminal—could nonetheless

violate Article 133 under circumstances evidencing substantial personal and professional discredit.

3. ***Relationship to other offenses***. Article 133 covers a wide range of acts and omissions, including acts that are themselves offenses under other articles of the Code. An accused should not, however, be charged with a violation of Article 133 as well as with a violation of the underlying offense. It is usually simpler to charge such offenses as violations of their respective articles, and not as Article 133 offenses. For example, if the unbecoming conduct was a theft, it should usually be charged as a violation of Article 121, not under Article 133. Little is gained, practically speaking, by charging the theft as unbecoming conduct, and the prosecution under Article 133 is somewhat complicated by the requirement to prove as an additional element the fact that the conduct was unbecoming. If both the underlying offense and conduct unbecoming are charged, they will be considered multiplicious for findings. The two specifications will be merged, requiring dismissal of the non-133 specification.

4. ***Punishment***. *See* Part IV, para. 59e, MCM. An officer tried by general court-martial for an Article 133 violation may be dismissed, forfeit all pay and allowances, and be confined for the amount of time authorized for the offense listed in the MCM, that is most analogous to the crime committed. If there is no listed analogous offense, confinement can be no more than one year, but dismissal is always authorized.

5. ***Pleading***. *See* Part IV, para. 59f, MCM. The MCM provides only two sample specifications for unbecoming conduct. Most Article 133 specifications must be custom-drafted to fit the facts and circumstances of each case. The specification need not expressly allege that the accused's conduct was unbecoming, unless the acts would also constitute a separate offense under another article of the Code. Then the specification should expressly state that the conduct was "unbecoming an officer and a gentleman. If the alleged unbecoming conduct was noncriminal in nature, such as publicly insulting another officer, the conduct should be described as dishonorable and wrongful.

CHAPTER XXV

ASSAULTS

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CHAPTER XXV

ASSAULTS

A. ***Overview***. Although the UCMJ provides for more than a dozen specific types of assault, the structure of the law of assaults is rather simple. All assaults are based on the simple assault, which is merely an unlawful offer or attempt to do bodily harm. All the other varieties of assaults are merely simple assaults plus additional aggravating facts.

B. ***Simple assault*** (Article 128)

1. ***General concept***. The simple assault occurs when an accused unlawfully attempts or offers to do bodily harm to another person. No actual harm or striking occurs. Simple assault is a relatively minor offense, but it is significant because it is the foundation upon which all the various types of assault offenses are constructed.

2. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. At the alleged time and place, the accused offered or attempted to do bodily harm to the alleged victim; and

b. the attempt or offer was done with unlawful force or violence.

3. ***Discussion***

a. ***Attempt-type assault***. The attempt-type simple assault occurs when the accused attempts to strike or do bodily harm to another person. Hence, there is no such crime as "attempted assault"; as soon as an attempt is made, an assault has been committed. The accused must specifically intend to strike or do bodily harm to the other person. The intended victim need not be aware of the attempt. Like any other attempt, the accused's act must be more than mere preparation. For example, if Smith picks up a railroad tie, intending to bash it over Jones' head, an attempt-type assault has not yet occurred. If Smith swings at Jones' head and misses, the attempt-type assault has been committed because Smith's act is now more than mere preparation. The accused must also have the ***apparent*** present ability

to strike or harm the intended victim. If Johnson fires a pistol with maximum range of 100 yards, intending to hit Baker who is standing on the next mountain six miles away, an attempt-type assault has not occurred. Johnson's act would not have normally resulted in a crime being completed because Baker was too far away.

b. ***Offer-type assault.*** An offer-type simple assault involves an unlawful demonstration of violence that causes another person to reasonably apprehend imminent bodily harm. The accused need not intend to actually harm anyone. The offer may merely be a culpably negligent act that appears menacing or threatening. A culpably negligent act is the result of more than ordinary carelessness or neglect; it involves a wrongful disregard for the foreseeable consequences of one's actions. Thus, waving a loaded pistol around in a crowded room would constitute culpable negligence. In the offer-type assault, it is the victim's state of mind that is important. The victim must reasonably anticipate that bodily harm is imminent. The victim need not actually be afraid. The test is whether a reasonable person, in the same circumstances, would believe that unlawful force or violence was about to be applied to his or her person. Thus, waving around an unloaded pistol could constitute an offer-type assault if the victim reasonably apprehends imminent bodily harm. The victim probably wouldn't know that the gun was empty. On the other hand, if the victim knows that the accused is waving only a toy pistol, there is no reasonable apprehension of harm. Menacing or threatening words, ***by themselves***, do not constitute an offer-type assault.

c. ***Conditional offers of violence.*** Sometimes the accused's apparently threatening gestures may be accompanied by statements that seem to negate any intent by the accused to actually carry out the threat. For example, suppose the accused raises his clenched fist towards another person and says, "Smith, if you weren't my brother-in-law, I'd slug you." This is a conditional offer of violence. Despite the accused's menacing gestures, the accused's language indicates that no harm is intended. Under such circumstances, a reasonable person will not usually expect to be struck or harmed. Therefore, no offer-type assault has occurred.

d. ***Unlawful force or violence.*** In the context of simple assaults, "force or violence" refers to actions that are of a violent nature or that threaten imminent violence. An act of force or violence is unlawful if it is done without legal justification or excuse. Examples of legal justification or excuse include situations such as the proper performance of a lawful military duty or self-defense.

4. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 54f(1), MCM. The specification need not indicate whether the simple assault was an offer-type or an attempt-type. The specific act that constituted the assault must be clearly and concisely alleged. The accused's actions must be expressly described as "unlawful."

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 128.
>
> Specification: In that Lance Corporal George D. Barwrecker, U.S. Marine Corps, Marine Barracks, New London, Connecticut, on active duty, did, on board Naval Education and Training Center, Newport, Rhode Island, on or about 10 July 19CY, assault Seaman Wimpy Squid, U.S. Navy, by throwing a beer bottle at him.

C. ***Assault consummated by a battery*** (Article 128)

1. ***General concept***. An assault consummated by a battery is merely a simple assault that results in bodily harm or a striking of the victim.

2. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. At the alleged time and place, the accused did bodily harm to the alleged victim; and

b. the bodily harm was done with unlawful force or violence.

3. ***Discussion***

a. ***Bodily harm***. A battery is the unlawful application of force or violence to another person. "Bodily harm" includes any physical injury to, or offensive touching of, another person—however slight. There is no requirement for bloodshed or pain.

b. ***Accused's state of mind***. A battery may be committed by the accused's intentional act or through culpable negligence. The accused need not intend to inflict any particular kind of bodily harm, nor does the accused's intent have to be directed toward any specific victim. The battery itself proves the assault, so no attempt-offer analysis is necessary. For example, if Smith intends to strike Jones, but misses and strikes Johnson instead, Smith is nonetheless guilty of an assault consummated by a battery. A battery may also be a result of culpable negligence. Culpable negligence is significantly more serious than simple negligence. Simple negligence, which is merely the failure to exercise ordinary care, is insufficient to result in a battery. Suppose the accused is shooting stones with his sling shot around a crowd of persons and accidently hits and injures a bystander. Even though the accused didn't intend to injure anyone, the accused's actions were at least culpably negligent. It was reasonably foreseeable that the stone might actually hit someone and injure that person.

4. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 54f(2), MCM. The specific act that constituted the battery must be clearly and concisely alleged. The accused's actions must be expressly described as "unlawful."

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 128
>
> Specification: In that Airman Recruit Boyle R. Maker, U.S. Navy, Naval Air Technical Training Center, Lakehurst, New Jersey, on active duty, did, on board USS Relic, located at Bayonne, New Jersey, on or about 22 February 19CY, unlawfully strike Seaman Ease Z. Targette, U.S. Navy, on the shoulders and arms with his fists.

D. ***Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm*** (Article 128)

1. ***General concept***. One of the most common aggravated forms of assault is assault with a dangerous weapon or means likely to produce death or grievous bodily harm. Like all other aggravated forms of assault, this offense is merely a simple assault plus the aggravating circumstance of the nature of the weapon, means, or force used in the assault. The assault need ***not*** be consummated by a battery, although many such assaults often do result in bodily harm.

2. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused attempted, offered to do, or actually did bodily harm to the alleged victim;

b. the accused did so with a certain alleged weapon, means, or force;

c. the attempt, offer, or bodily harm was done with unlawful force or violence; and

d. the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

(***Note***: When a loaded firearm was used, add as an additional element)

e. the weapon was a loaded firearm.

3. ***Discussion***

a. ***Bodily harm not required.*** Assault with a dangerous weapon or means likely to produce grievous bodily harm may arise from a simple offer-type or attempt-type assault, or it may involve an assault consummated by a battery. Bodily harm is ***not*** required. If an offer or attempt to do bodily harm is with a weapon, means, or force likely to produce grievous bodily harm, the offense is complete.

b. ***Weapon, means, or force.*** This aggravated form of assault involves the use of a deadly or dangerous weapon in fact, or the use of other instruments, devices, means, or forces that are dangerous when used in the way the accused used them. The weapon to be considered a dangerous weapon, must be dangerous in fact, i.e., a loaded firearm, knife, or bow and arrow. When the unloaded rifle is used as a club, it could be considered a means likely because of the way that it is used. A means or force is likely to produce grievous bodily harm when the natural and probable result of the accused's use of the means or force would be serious physical injury. The key is the way in which the accused used the means or force. Although each is relatively harmless in itself, a bottle, rock, boiling water, drug, can opener, fist, or foot could all be used in a way likely to produce grievous bodily harm. Whether the particular means used by the accused was likely to produce grievous bodily harm is a factual issue to be decided by the court-martial members or, in a judge-alone trial, by the military judge.

c. ***Grievous bodily harm.*** "Bodily harm" includes any physical injury to, or offensive touching of, another person. "Grievous" bodily harm is more than minor injuries, bruises, or cuts. It requires fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other grave physical injuries.

4. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 54f(8), MCM. The specification should expressly allege that the means used was a dangerous weapon or means likely to produce bodily harm. The weapon or means should be described with enough detail to identify it as dangerous. If it is a dangerous weapon in fact, it should be described as a dangerous weapon. If it is with a means likely, it should be described as such. If the instrument or means used by the accused was not in itself dangerous (e.g., a rock or bottle), the accused's actions should be described with enough detail to show that the way in which the means was used made it dangerous. If the dangerous weapon was a loaded firearm, this should be expressly alleged since it increases the maximum confinement by 5 years.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 128.
>
> Specification 1: In that Airman Recruit Boyle R. Maker, U.S. Navy, Naval Air Technical Training Center, Lakehurst, New Jersey, on active duty, did, on board Naval Air Station, Lakehurst, New Jersey, on or about 1 March 19CY, commit an assault upon Airman Apprentice Baer L. Alive, U.S. Navy, by pointing at him with a dangerous weapon, to wit: a loaded firearm.
>
> Specification 2: In that Airman Recruit Boyle R. Maker, U.S. Navy, Naval Air Technical Training Center, Lakehurst, New Jersey, on active duty, did, on board Naval Air Station, Lakehurst, New Jersey, on or about 1 March 19CY, commit an assault upon Airman Apprentice Baer L. Alive, U.S. Navy, by striking him on the head with a means likely to produce death or grievous bodily harm, to wit: a baseball bat.

E. ***Intentional infliction of grievous bodily harm*** (Article 128)

1. ***General concept***. The offense of intentional infliction of grievous bodily harm is one of three forms of assault that require that bodily harm actually be inflicted. (Assault consummated by a battery was the first.)

2. ***Elements of the offense***. The prosecution must prove beyond reasonable doubt that:

a. At the alleged time and place, the accused assaulted the alleged victim;

b. grievous bodily harm was thereby inflicted upon such person;

c. the grievous bodily harm was done with unlawful force or violence; and

d. the accused, at the time, had the specific intent to inflict grievous bodily harm.

(***Note***: When a loaded firearm was used, add as an additional element)

e. that the injury was inflicted with a loaded firearm.

3. ***Discussion***

a. ***Grievous bodily harm inflicted.*** The offense of intentional infliction of grievous bodily harm requires that grievous bodily harm, as defined earlier in this chapter, actually be inflicted.

b. ***The accused's intent.*** The accused must specifically intend to inflict harm. No degree of negligence, no matter how wanton or reckless, will suffice. Moreover, the accused must intend to inflict grievous harm, not just ordinary bodily harm. The accused's intent is usually proven by circumstantial evidence. If, for example, the accused uses a weapon that would normally cause grievous bodily harm, it may be inferred that the accused used the weapon with that intent. The law recognizes that persons normally intend the natural and probable consequences of their acts. If the accused repeatedly bludgeons the victim, this may also indicate that the accused intended grievous bodily harm. The accused's statements while committing the crime may also provide evidence of intent. If, for example, the accused screams, "Die, you bastard, die!" while repeatedly striking the accused, there is strong evidence that the accused intended grievous bodily harm.

4. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 54f(9), MCM. The specification must allege that the accused's acts were intentional and should describe the victim's injuries. If the grievous bodily harm is inflicted with a loaded firearm, this should be expressly alleged, since it increases the maximum confinement by 5 years.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 128.
>
> Specification: In that Lance Corporal Mame N. Dismember, U.S. Marine Corps, Marine Barracks, Charleston, South Carolina, on active duty, did, on board Air Force Base, Charleston, South Carolina, on or about 20 December 19CY, commit an assault upon Airman First Class Benton Broken, U.S. Air Force, by repeatedly striking him on the head and shoulders with a pinball machine, and thereby did intentionally inflict grievous bodily harm upon him, to wit: a fractured skull, six smashed vertebrae, a fractured clavicle, and two dislocated shoulders.

F. ***Assault upon certain officers*** [Articles 90(1) and 91(1)]

1. ***General concept***. Assault upon certain military authorities is one of several aggravated forms of assault where the principal aggravating circumstance is the status of the victim. Article 90(1) prohibits assaults upon superior commissioned officers in the execution of their office. Article 91(1) prohibits assaults upon warrant or noncommissioned and petty officers in the execution of office. Violation of Article 90(1) during time of declared war is a capital offense. (See chart "Offenses Against Authority," chapter XXI).

2. ***Elements of the offenses***. The elements of the two types of assaults are similar. Note, however, that only enlisted persons and warrant officers (W-1) can violate Article 91(1). Compare the differences in the following elements for Article 90(1), the prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused struck, drew, or lifted a weapon against, or offered violence against the alleged victim;

b. the alleged victim was the superior commissioned officer of the accused;

c. the accused knew that the officer was the accused's superior commissioned officer; and

d. at the time, the alleged victim was in the execution of his or her office.

For Article 91(1), the prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused struck or assaulted the alleged victim;

b. the accused was a warrant officer or enlisted member;

c. the alleged victim was a warrant, noncommissioned, or petty officer;

d. at the time, the alleged victim was in the execution of his or her office;

e. the accused knew that the alleged victim was a warrant, noncommissioned, or petty officer; and, if it exists,

f. the alleged victim was the superior noncommissioned, ***or*** petty officer of the accused.

3. ***Discussion***

a. ***Basic assault***. The assault may be either a simple assault, either offer-type or attempt-type, or an assault consummated by a battery.

b. ***Superiority***. The superiority concept is the same as is discussed with respect to willful disobedience in chapter XX and disrespect in chapter XXI of this section. Under Article 90(1), the victim must be the accused's superior commissioned officer, which includes commissioned warrant officers (W-2 and above). Under Article 91(1), however, superiority is irrelevant for warrant officer (W-1) victims, and is merely an optional, aggravating element for victims who are noncommissioned or petty officers.

c. ***Accused's knowledge***. The accused must have had actual knowledge that the victim was his or her warrant, superior commissioned, or (superior) noncommissioned or petty officer.

d. ***Execution of office***. The victim must be in the execution of his or her office. One is in the execution of office when engaged in any act or service required or authorized by statute, regulation, superior orders, or military custom. The victim must be performing a lawful duty in a lawful manner in order to be in the execution of office. Thus, one who is committing an illegal act is not in the execution of his or her office. Likewise, one who performs a lawful duty in an illegal manner is also not in the execution of office. In order to remove one from the status of being in the execution of office, his or her actions must be definitely criminal or illegal, and not just deviations from prescribed procedures.

4. ***Pleading***

a. ***General considerations***. *See* Part IV, paras. 15f(1), (2), (3) and 16f(1), MCM. Note the different language used in the various specifications. Assaults on superior commissioned officers are styled as "strike," "draw or lift up a weapon," or "offer violence against." Assaults on warrant, noncommissioned, and petty officers simply use the terms either "strike" or "assault." These differences merely reflect traditional language used in pleading these offenses, but have no legal significance. Be careful, however, in the use of the word "strike." If the words describing the assault do not import unlawful conduct on their face, it would be advisable to include a word importing criminality, such as "***unlawfully*** strike." If the victim was the superior NCO or PO of the accused, that element must be plead and proved to increase the maximum punishment.

b. ***Sample pleadings***

> Charge I: Violation of the UCMJ, Article 90.
>
> Specification: In that Seaman Runyon Amuck, U.S. Navy, USS Fall River, on active duty, did, on board USS Fall River, located at

Newport, Rhode Island, on or about 13 August 19CY, unlawfully strike Ensign Noah Count, U.S. Navy, his superior commissioned officer, then known by said Seaman Amuck to be his superior commissioned officer, who was then in the execution of his office, on the arm with a broom.

Charge II: Violation of the UCMJ, Article 91.

Specification: In that Seaman Runyon Amuck, U.S. Navy, USS Fall River, on active duty, did, on board USS Fall River, located at Newport, Rhode Island, on or about 13 August 19CY, assault Yeoman Second Class Penn N. Inque, U.S. Navy, a petty officer, then known to the said Seaman Amuck to be a superior petty officer, who was then in the execution of his office, by throwing a knife at him.

G. ***Assault consummated by a battery upon a child*** (Article 128)

1. ***General concept.*** A very serious aggravating circumstance arises when the victim is a child under age 16. This offense is the last of the three types of assaults under Article 128 that require that the assault be consummated by a battery. It should be noted that this is not a type of sex offense, and the fact that the assailant and the victim are of the same or different sexes is irrelevant to this charge.

2. ***Elements of the offense.*** The prosecution must prove beyond a reasonable doubt that:

a. At the alleged time and place, the accused did bodily harm to the alleged victim by certain alleged acts;

b. the bodily harm was done with unlawful force or violence; and

c. the alleged victim was then a child under the age of 16 years.

3. ***Discussion***

a. ***Bodily harm.*** This offense requires that bodily harm actually occur. Remember, however, that bodily harm includes any physical injury to or offensive touching of the victim—however slight.

b. ***Unlawful force or violence.*** This offense is commonly used to prosecute child-abuse cases. The bodily harm must be unlawful (i.e., without legal justification or excuse). A parent is authorized by law to administer corporal punishment to his or her child. The privilege to administer corporal punishment is limited, however, and does not include unreasonable physical abuse. Thus, a routine spanking, producing no

injury, would not be an offense; however, if the corporal punishment unreasonably results in physical injuries requiring medical attention or is unreasonably repeated, the parent may be guilty of assault.

c. ***Child under 16.*** At the time of the assault, the victim must be under age 16. The accused's knowledge or belief about the child's age is immaterial. Even if the accused reasonably believed that the victim was older than 16, the accused can be found guilty.

4. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 54f(7), MCM. The specification must allege an assault consummated by a battery. It must also specifically allege that the victim was under the age of 16 years.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 128.
>
> Specification: In that Chief Boatswain's Mate Steven A. Dore, U.S. Navy, USS Reluctant, on active duty, did, at Naval Base, Charleston, South Carolina, on or about 14 December 19CY, unlawfully strike Payne N. DeNeck, a child under the age of 16 years, in the face with his hand.

H. ***Other assaults aggravated by the victim's status*** (Article 128)

1. ***General concept.*** Part IV, para. 54e, MCM, provides for increased maximum punishments when the victim of the assault falls within one of several other classes. These other classes of victims are:

a. Commissioned officers (not in the execution of office);

b. warrant, noncommissioned, and petty officers (not in the execution of office);

c. persons in the execution of police duties; and

d. sentinels and lookouts.

Bodily harm need not be inflicted on any of the above individuals. A simple offer-type or attempt-type assault will suffice.

2. ***Elements of the offenses***. The elements of the assault offenses involving the above four categories of victims are the same. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused attempted, offered to do, or did bodily harm to the alleged victim;

b. the attempt, offer, or bodily harm, was done with unlawful force or violence;

c. the victim was a person who was:

(1) A commissioned officer;

(2) a warrant, noncommissioned, or petty officer;

(3) a person in the execution of police duties;

(4) a sentinel or lookout; and

d. the accused knew of the victim's status as one of the above.

3. ***Discussion***

a. ***Commissioned, warrant, noncommissioned, or petty officer***. Unlike the assaults prosecuted under Articles 90(1) and 91(1), assaults on commissioned, warrant, noncommissioned, or petty officers under Article 128 do not require that the victim be in the execution of office, and superiority is never an element. Thus, an admiral who assaults an ensign is guilty of an assault upon a commissioned officer. An ensign who assaults a chief petty officer is guilty of assault upon a petty officer. The Article 128 assault upon a commissioned, warrant, noncommissioned, or petty officer is a lesser included offense of assault upon a superior under Articles 90(1) or 91(1).

b. ***Person in the execution of police duties***. A person is in the execution of police duties whenever engaging in any law enforcement act or service authorized by statute, regulation, superior order, or military custom. The victim must perform the police duties in a lawful manner. Thus, a law enforcement officer who uses unreasonable, excessive force while apprehending an unresisting suspect is not in the execution of police duties.

c. ***Sentinel or lookout***. A sentinel or lookout is one who is assigned to a duty requiring extra alertness to constantly watch for the approach of an enemy, to look for danger, to maintain security of the perimeter of an area, or to guard stores.

d. ***Accused's knowledge***. The accused must actually know of the victim's status. Constructive knowledge (i.e., that the accused should have known) will not suffice.

4. ***Pleading***

a. ***General considerations***. *See* Part IV, paras. 54f(3), (4), (5) and (6), MCM.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 128.
>
> Specification: In that Lieutenant Gene N. Tonic, U.S. Navy, USS Plankton, on active duty, did, on board USS Plankton, at sea, on or about 1 December 19CY, assault Ensign Drew A. Blank, U.S. Navy, who then was and was then known by the accused to be a commissioned officer of the U.S. Navy, by throwing a clipboard at him.

I. ***Assault with intent to commit certain serious offenses*** (Article 134)

1. ***General concept***. Article 134 prohibits assaults committed with the intent to commit one of several serious crimes. Such assaults can also sometimes be charged as attempts to commit the intended crime. The Article 134 assault is charged to provide for the possibility that the alleged overt act in the assault charge might not be sufficient to constitute a criminal attempt (an act beyond mere preparation). Thus, if the court should find that the accused's actions didn't rise to the level of a criminal attempt, but did constitute an assault, the accused can still be held criminally liable for the acts.

2. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. At the alleged time and place, the accused assaulted the alleged victim;

b. at the time of the assault, the accused intended to commit one of the following crimes: murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking; and

c. under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces.

3. ***Discussion***. The accused must specifically intend to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking. The accused's intent is usually proven through circumstantial evidence involving all the accused's actions before, during, and after the assault. Thus, if an accused commits an assault immediately prior to or during the course of committing arson, it is usually reasonable to infer that the accused committed the assault with an intent to commit arson.

4. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 64(f), MCM. Notice that the terminal element of prejudicial or service-discrediting conduct need not be alleged. The specification must state the exact crime the accused intended. Do not allege the intended crime in the alternative (e.g., as "with intent to commit murder or sodomy"). If it is uncertain which of several crimes were intended by the accused, or if the evidence suggests that the accused intended to commit several crimes, separate specifications should be alleged for each intended crime.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 134.
>
> Specification: In that Seaman Brigrat Striker, U.S. Navy, Naval Justice School, Newport, Rhode Island, on active duty, did, at Naval Justice School, Newport, Rhode Island, on or about 1 July 19CY, with intent to commit rape, commit an assault upon Ensign Olivia O. Day, U.S. Navy, by striking her on the head with a telephone receiver.

J. ***Relationships among assault offenses***. Since the more complicated forms of assaults are based on a simple assault or an assault consummated by a battery, there will frequently be several possible lesser included offenses for any aggravated form of assault alleged. Part IV, MCM, discusses each of the assault offenses. In the discussion for each offense, there is a list of commonly included offenses. These lists are merely general guides; however, under certain circumstances, some of the listed included offenses may not be appropriate. In other situations, offenses other than those listed may be lesser included offenses. Whether or not a certain lesser included offense is raised by the evidence is a matter that the military judge must decide after reviewing all the evidence in the case.

K. ***Common defenses to assault offenses***

1. ***Legal justification.*** An act of force or violence committed during the proper performance of a lawful duty is legally justified. This defense of legal justification has two requirements. First, the accused must be performing a lawful duty, which may be imposed by a statute, regulation, superior order, or custom of the service. Thus, a marine who shoots an enemy during combat is not usually guilty of assault. The marine was merely performing a lawful military duty. Even when an order to commit an act of force or violence is not lawful, the accused has a defense if the accused honestly believed the order to be lawful, and if a person of ordinary understanding would not have known that the order was unlawful. Second, the duty must be performed in a proper manner. The accused may use only enough force reasonably necessary to carry out the duty. Thus, the marine who shoots an unresisting, unarmed prisoner of war is guilty of assault. The marine did not perform the lawful duty in a lawful manner.

2. ***Self-defense.*** One who is free from fault may use reasonable force, even deadly force if necessary, to defend against unlawful bodily harm. Self-defense will excuse an accused's acts only when both of the following questions are answered in the affirmative.

a. ***Was the accused free from fault?*** Self-defense will not excuse the accused's acts when the accused intentionally started the altercation. However, suppose that the accused provoked the other party's hostile actions and then withdrew, intending to avoid any further hostility. If the other party continues the attack, even after the accused's withdrawal, the accused may then act in self-defense. The other party has become the aggressor. Likewise, an accused who willingly engages in mutual combat, such as a barroom free-for-all, may not successfully claim self-defense. If the opponent should unexpectedly resort to deadly force (e.g., pulls a knife), thereby escalating the affray, the accused may be permitted to defend against the excessive force.

b. ***Did the accused use a reasonable degree of force?***

(1) ***In homicide or assault involving deadly force, or battery involving deadly force***

(a) ***The accused reasonably believed that death was about to be inflicted.*** Taking into account all the circumstances, the accused's apprehension of death or grievous bodily harm must have been one which a reasonable, prudent person would have held under the circumstances. Because this test is objective, such factors as intoxication or emotional instability of the accused are irrelevant. Relative height, weight, build, and the possibility of safe retreat are circumstances to be considered in determining the reasonableness of the apprehension.

(b) ***The accused honestly believed that the force used was necessary for protection against death or grievous bodily harm.*** This element is entirely subjective. The accused is not objectively limited to the use of reasonable force.

Accordingly, such matters as the accused's emotional control, education, and intelligence are relevant in determining the accused's actual belief as to the force necessary to repel the attack.

(2) ***In other assault cases***

(a) ***The accused reasonably believed that bodily harm was imminent***. Taking into account all the circumstances, the accused's apprehension of imminent bodily harm must have been reasonable. In other words, a reasonable person, under similar circumstances, would have concluded that he or she was about to suffer unlawful bodily harm. This is an objective test.

(b) ***The accused honestly believed that force used was necessary, providing it was less than force reasonably likely to result in death or grievous bodily harm***. A person who perceives imminent bodily harm does not have an unlimited right to resort to force. The accused must have had an honest, good-faith belief that force was actually necessary to defend against imminent bodily harm. The accused's belief need not be the belief that the so-called "reasonable person" would have held. Thus, factors such as the accused's intelligence, emotional state, and sobriety are relevant. There is no duty imposed on the accused to retreat in the face of attack. This is a subjective test. The type and amount of force used is limited to that reasonably necessary to protect oneself. The degree of force reasonably necessary to protect the accused is a factual issue, to be determined by the factfinder after analyzing all the circumstances of each case. There is no requirement that the accused meet force with exactly the same kind of force. For example, if the accused is kicked, (s)he may protect him or herself with his or her fists, but not with deadly force.

3. ***Threatened use of*** *Error! Bookmark not defined.****deadly force***. In order to deter an assailant, the accused may offer, but not actually apply or attempt, such means or force which might likely cause death or grievous bodily harm. Such deadly force may be threatened even though the accused only reasonably anticipated only minor bodily harm.

4. ***Defense of another***. One may lawfully use force in defense of another person under the same conditions that self-defense could be invoked. The person aided must not be the aggressor nor a willing mutual combatant. The accused is limited to the use of that degree of force reasonably necessary to protect the victim. Mistake of fact as to who was really the aggressor is not a defense.

5. ***Consent***. An accused is not guilty of an alleged assault consummated by a battery if the alleged victim lawfully consented to the battery. The victim's consent must be freely given before the striking or offensive touching. Consent obtained by threats, duress, or fraud is not lawful consent. Some individuals, such as infants and mental incompetents, are categorically unable to give lawful consent. No one can lawfully consent to a battery that is likely to produce death or serious physical injury, except where the act is necessary to save the victim's life. Thus, a person who is choking to death may lawfully consent to having an

opening cut into his or her windpipe. No one can lawfully consent to any act that constitutes an unlawful breach of the peace. Finally, the victim's consent may be limited. If the battery goes beyond the extent to which the victim consented, the battery will be unlawful. For example, a football player, by entering the game, consents to such physical contact as is customary in a football game. A football player doesn't consent, however, to being bashed over the head with a crowbar. Also, one cannot lawfully consent to unprotected sexual intercourse with a partner infected with HIV as such exchange of bodily fluids is likely to produce death or grievous bodily harm.

6. ***Duress***. Duress is available as a defense to any crime less serious than murder when the accused's acts were not voluntary, but the result of a reasonable, well-grounded fear that if he or she didn't commit the assault, the accused, a member of the accused's family, or any innocent person would be immediately killed or seriously injured.

7. ***Accident***. In an assault case, the accused will not be guilty if his or her acts were unintentional and not due to culpable negligence. An accident is an unintentional act which occurs while the accused is otherwise acting lawfully. It is not the unexpected consequence of a deliberate act. Suppose that Seaman Jones is roaring drunk, driving 80 mph in a 35 mph zone, and runs a red light, when a child suddenly darts out in front of him and is thereby run down by Seaman Jones. Seaman Jones' actions are at least culpably negligent and accident will not be a defense. But, if Seaman Jones is carefully driving within the speed limit, and a child suddenly darts in front of him and is hit, Seaman Jones is not guilty of assault. He was doing a lawful act in a lawful manner.

8. ***Special privilege***. The law recognizes certain other limited situations where one may rightfully use force against another, even without the other person's consent. A parent is privileged to use reasonable amounts and types of corporal punishment to discipline a minor child. A custodian or guardian of children or mentally incompetent persons may use limited, reasonable force to care for or control the persons in the custodian's charge. The rightful occupant of any premises, whether home or place of business, is privileged to use reasonable force to expel persons unlawfully on the premises.

CHAPTER XXVI

DISTURBANCE OFFENSES

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CHAPTER XXVI

DISTURBANCE OFFENSES

A. ***Overview***. The UCMJ prohibits five major offenses involving public disturbance or threats against the peace:

1. Riot (Article 116);

2. breach of peace (Article 116);

3. disorderly conduct (Article 134);

4. communicating a threat (Article 134); and

5. provoking words or gestures (Article 117).

B. ***Riot*** (Article 116)

1. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. The accused was a member of a group of three or more persons;

b. the accused and at least two others mutually intended to assist one another in carrying out a certain undertaking, plan, or enterprise against anyone who might oppose them;

c. the group, or some of its members, in furtherance of the group's common purpose, committed certain violent or turbulent acts which constituted an unlawful tumultuous disturbance of the peace; and

d. these acts terrorized the public in general by causing, or intending to cause, public alarm or terror.

2. ***Discussion***. A riot must consist of at least three persons. If fewer than three are involved, only breach of peace or disorderly conduct is committed. The "common purpose" is an intention, object, plan, or project shared by the group, and it is immaterial whether the act intended is unlawful. This common purpose need not exist before the violence begins. It can be formed even after the group begins the tumultuous acts. Thus, what started as merely disorderly conduct can escalate into a riot. Although "public alarm or terror" appears vague, it refers to a disturbance so violent or potentially disruptive that members of the community would have cause to be concerned for the safety of themselves or their property. The community may include a military community—such as a vessel or shore installation.

3. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 41f(1), MCM. When in doubt about whether the accused's acts constituted a riot or merely a breach of peace, charge the offense as riot. Breach of the peace and disorderly conduct are lesser included offenses of riot.

b. ***Sample pleading***

Charge: Violation of the UCMJ, Article 116.

Specification: In that Seaman Hugh N. Cry, U.S. Navy, USS Woonsocket, on active duty, did, at the Naval Correctional Center, Naval Education and Training Center, Newport, Rhode Island, on or about 15 June 19CY, participate in a riot by unlawfully assembling with Fireman Will N. Follower, U.S. Navy, and Yeoman Third Class Rab L. Rowser, U.S. Navy, for the purpose of resisting all military authority at said Correctional Center, and, in furtherance of said purpose, did wrongfully break and remain out of his own area of confinement in the said Correctional Center, tear down the inner fence to said Correctional Center, damage and destroy military property of the United States, and unlawfully brandish a weapon, to wit: a lead pipe, to the terror and disturbance of the staff and other inmates of said Correctional Center.

C. ***Breach of the peace*** (Article 116)

1. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused caused or participated in a certain violent or turbulent act; and

b. the peace of the community was thereby unlawfully disturbed.

2. ***Discussion***

a. ***Violent or turbulent act***. Examples include destroying or damaging property, discharging firearms, or public fighting, loud speech, or language which tends to induce or incite violence or unrest and a breach of the peace results.

b. ***The peace of the community***. A breach of the peace disturbs public tranquility or impinges upon the peace and order to which the community is entitled. Thus, the acts must disturb the public peace, not just the peace of the persons who witness the acts. For example, a fight in a bar would merely be disorderly conduct. Only the other patrons are disturbed. However, if the fight spills out into the parking lot, it may become a breach of peace if it is noisy enough to disturb the surrounding neighborhood.

c. ***Community***. Although "community" usually refers to the general public in the area, it also includes military communities such as a base, post, vessel, or confinement facility.

d. ***Unlawful disturbance***. A breach of peace is unlawful when committed without legal justification or excuse. Legal justification refers to the proper performance of a legal duty. Legal excuse includes defenses such as self-defense. Thus, if the shore patrol is required to use force to apprehend a group of drunken Sailors roaming the streets of the naval base, and violence ensues disturbing the peace of the military community, the shore patrol officers have not committed a breach of peace.

3. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 41f(2), MCM. Note that some of the examples of violent acts used in the sample specification may not be breaches of the peace under all circumstances. For example, "wrongfully engaging in a fistfight in the dayroom" would be a breach of the peace only under some circumstances. However, when in doubt about whether an accused's acts constituted breach of the peace or only disorderly conduct, plead the offense as breach of the peace.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 116.
>
> Specification: In that Fireman Wake D. Towne, U.S. Navy, USS John L. Sullivan, on active duty, did, on board Naval Education and Training Center, Newport, Rhode Island, on or about 15 June 19CY, participate in a breach of the peace by wrongfully engaging in a fistfight outside Bachelor Officers' Quarters, Room #442, with Airman Hire N. Kyte, U.S. Navy, Seaman Michael Maul, U.S. Navy, and Private Waldo D. Cokesnorter, U.S. Marine Corps.

D. ***Disorderly conduct*** (Article 134)

1. ***Elements of the offense***. The prosecution must prove beyond reasonable doubt that:

a. At the time and place alleged, the accused was disorderly; and

b. under the circumstances, the accused's conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. ***Discussion***. Disorderly conduct affects the peace and quiet of persons witnessing it. It need not be violent conduct, however. An act which outrages generally held standards of public decency, such as indecent exposure or window peeping, would also constitute disorderly conduct. Whether the accused's acts constituted disorderly conduct is a factual issue to be decided at trial by the court-martial members or, in a judge-alone trial, by the military judge.

3. ***Pleading***

a. ***General considerations***. Part IV, para. 73f, MCM, provides the general format for disorderly conduct specifications, but is insufficient in several respects. The form specification does not allege the specific acts which constituted the disorderly conduct. As a matter of good practice, these acts should be briefly described. If the accused was disorderly under circumstances that would bring discredit upon the military, this is an aggravating fact which significantly increases the maximum authorized punishment ***providing*** it is alleged. The sample specification below illustrates a preferable method. The place where the accused was disorderly ("in quarters," "on station," "in camp," or "on board ship") is traditionally used in disorderly conduct pleadings.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 134.
>
> Specification: In that Staff Sergeant Gene N. Tonic, U.S. Marine Corps, Marine Corps Recruiting Station, Norfolk, Virginia, on active duty, was, at Marine Corps Recruiting Substation, Virginia Beach, Virginia, on or about 1 December 19CY, disorderly on station by urinating in public while in uniform, which conduct was of a nature to bring discredit upon the armed forces.

E. ***Communicating a threat*** (Article 134)

1. ***Elements of the offense.*** The prosecution must prove beyond a reasonable doubt that:

a. At the alleged time and place, the accused communicated certain language;

b. the communication was made to a certain other person;

c. the language used by the accused, under the circumstances, constituted a threat to injure the person, property, or reputation of another person;

d. the communication was wrongful, without justification or excuse; and

e. under the circumstances, the accused's conduct was prejudicial to good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces.

2. ***Discussion***

a. ***Threat.*** The threat may be to the person, property, or reputation of another. It must involve an avowed present intent to injure, either now or in the future. A conditional threat may not always be an offense. Thus, "If you weren't so old, I'd beat you to a pulp," is not a threat. The condition ("If you weren't so old . . .") negates any present intent to injure. On the other hand, "If you don't cooperate, we'll kill you," does constitute a threat. The condition ("If you don't cooperate . . .") is one the accused is not entitled to impose and doesn't negate the intent to injure, but merely explains the circumstances under which the threat will be carried out. A malicious bomb threat increases the maximum punishment by 2 years. Whether the accused's words constituted a threat is a factual issue, to be decided by analyzing all the facts and circumstances of each case. Thus, words which all parties understand to have been said in jest would not constitute a threat.

b. ***Communication***. The threat must be communicated to another person. The threat does not have to be communicated to the intended victim, however. Thus, if ***A*** tells ***B***, "I'm going to beat up ***C***," a threat has been communicated for purposes of this offense.

c. ***Intent***. The accused need not specifically intend to carry out the threat. The gist of the offense is communication of the threatening words, not the actual intent of the speaker. The fact that the accused said the words in jest is no defense if the person to whom they were communicated believed or understood the words to be an actual threat.

d. ***Wrongful***. The threat must be wrongful, without legal justification or excuse. Not all threats are wrongful. For example, if a witness to a crime threatens to report the perpetrator to the authorities, the threat is not wrongful, even though it will certainly injure the perpetrator's reputation if carried out. On the other hand, if the accused threatens to falsely report another person, the threat is wrongful. There is no legal justification for false accusations of crime. If a person mistakenly believes that another person has committed a crime, the threat to report the supposed criminal is not wrongful, provided the mistaken belief was both honest and reasonable.

3. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 110f, MCM. Note that the exact language constituting the threat need not be alleged. Under many circumstances, the threat will consist of more than just a sentence or two. It may involve the manifestation of the accused's intent during the course of a lengthy conversation. Therefore, only the nature of the threat need be alleged.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 134.
>
> Specification: In that Seaman Ratlin Sabres, U.S. Navy, USS Manayunk, on active duty, did, on board USS Manayunk, located at Newport, Rhode Island, on or about 7 September 19CY, wrongfully communicate to Yeoman Third Class Albert L. Ears, U.S. Navy, a threat to injure Ensign Strutt N. Martinet, U.S. Navy, by throwing said Ensign Martinet overboard.

F. ***Provoking speeches or gestures*** (Article 117)

1. ***Elements of the offense.*** The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused wrongfully used certain words or gestures toward a certain person;

b. the words or gestures were provoking or reproachful; and

c. the person to whom the words or gestures were used was a person subject to the UCMJ.

2. ***Discussion***

a. ***Provoking.*** Provoking words or gestures tend to induce breaches of the peace. They are "fighting words" or challenging gestures. It is not necessary, however, that a breach of the peace actually result. The person to whom the words or gestures were used need not have been actually provoked to violence. On the other hand, the victim's reaction to the words or gestures is a factor to be considered in determining whether, under the circumstances, the accused's conduct was provoking. Conditional threats may be provoking words. For instance, "If you weren't so ugly, I'd smack you," is not a threat—but is chargeable as provoking words.

b. ***Reproachful.*** Reproachful words or gestures are ones that censure, blame, discredit, or otherwise disgrace another person's life or character. They also must tend to induce breaches of the peace.

c. ***Accused's intent.*** The accused need not actually intend to provoke violence or a breach of the peace. The gist of the offense is the consequences of the provoking conduct, not the intent behind it. The accused's intent can be considered, however, along with all the other circumstances, to determine whether the conduct was provoking or reproachful.

d. ***Victim's status.*** The person to whom the provoking or reproachful words or gestures were used must be a person subject to the UCMJ. It is not necessary, however, that the accused be aware of the victim's status. Lack of knowledge of the victim's status is not a defense.

e. ***Wrongful use.*** Provoking or reproachful words or gestures do not include reprimands, censures, reproofs, and other admonitions which may be properly administered in the furtherance of military training, efficiency, or discipline.

f. ***The person to whom directed.*** Unlike communicating a threat, provoking words must be communicated directly to the victim, not a third party.

3. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 42f, MCM. The words or gestures used should be clearly described in the specification.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 117.
>
> Specification: In that Ensign Rude N. Boorish, U.S. Navy, USS Mooseburger, on active duty, did, on board USS Mooseburger, at sea, on or about 31 October 19CY, wrongfully use provoking words, to wit: "If you're so tough, come on and try to prove it, you coward," or words to that effect, towards Chief Boatswain's Mate Decker Ape, U.S. Navy.

Provoking words is a lesser included offense of indecent language. *See* Change 3 to MCM.

CHAPTER XXVII

CRIMES AGAINST PROPERTY

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CHAPTER XXVII

CRIMES AGAINST PROPERTY

A. ***Overview.*** The UCMJ prohibits a broad range of crimes against property. This chapter will discuss the more common property offenses:

1. Larceny and wrongful appropriation (Article 121);

2. receiving stolen property (Article 134);

3. robbery (Article 122);

4. burglary, housebreaking, and unlawful entry (Articles 129, 130, 134);

5. offenses against military property (Article 108);

6. damage or destruction of nonmilitary property (Article 109); and

7. bad check offenses (Articles 123a and 134).

B. ***Larceny and wrongful appropriation*** (Article 121)

1. ***General concept.*** Article 121 prohibits larceny and its lesser included offense of wrongful appropriation. The only difference between the two crimes is the required intent. Both crimes are specific intent offenses. In larceny, the accused specifically intends to deprive the owner permanently of the property stolen. In wrongful appropriation, the accused intends to deprive the owner of the property only temporarily.

2. ***Elements of the offenses.*** The elements of larceny and wrongful appropriation are identical, except for the required intent. The prosecution must prove beyond reasonable doubt that:

a. At the time and place alleged, the accused wrongfully took, obtained, or withheld certain property;

b. the property belonged to, or was in the lawful possession of, another person;

c. the property was of a certain value; and

d. the taking, obtaining, or withholding by the accused was with the intent to permanently (or temporarily, in the case of wrongful appropriation) deprive the other person of the use and benefit of the property.

3. ***Discussion***

a. ***Wrongfulness***. Article 121 does not prohibit all takings, obtainings, or withholdings of another's property—only wrongful ones. The accused's act is wrongful if it is without the lawful consent of the owner, or without legal justification or excuse. A police seizure of evidence is an example of legal justification. Legal excuse would include situations such as the accused's taking property he / she honestly believes to be his / her own.

b. ***Taking***. Article 121 describes three types of larceny: wrongful taking, wrongful obtaining, and wrongful withholding. A "taking" requires two acts by the thief. First, the thief must exercise physical dominion so as to impair the owner's control over the property. This usually occurs when the thief picks up the property. Second, the thief must remove the property. Any movement, however slight, will usually suffice. Both dominion and removal are necessary.

Suppose a thief wants to steal a radio from the Navy Exchange. The thief picks up the radio from the shelf. The thief has moved the property but, as she starts for the door, she is stopped by the chain securing the radio to the shelf. The thief has been unable to gain dominion over the property so as to impair the Exchange's control of the radio. Therefore, no larceny has been committed, only attempted larceny. Suppose, however, that the radio isn't chained and the thief starts for the door with it. If, before she leaves the Exchange, the thief conceals the radio under her coat, the crime of larceny will be complete. The act of concealment will be dominion sufficient to impair the owner's right to control the radio.

c. ***Obtaining***. Wrongful obtaining is larceny by fraud. The thief makes a deliberate misrepresentation which induces the owner to give the property voluntarily to the thief. The misrepresentation must have all of the following characteristics.

(1) ***It must be a material misrepresentation.*** The thief's misrepresentation must concern an important matter in the relationship or dealings between the thief and the victim. It must relate directly to the transaction and not involve some incidental or tangential matter. The misrepresentation is material if a reasonable person would rely upon it, at least in part, in deciding whether to give the property to the thief.

(2) ***It must be a misrepresentation of present or past fact.*** A statement such as "This watch lists for $500," or "This bridge coat was worn by Admiral Nimitz" could form the basis for a wrongful obtaining. On the other hand, a statement such as "This coin isn't worth much now, but will be worth a fortune someday" is not a statement of present or past fact. The statement that "This is the most beautiful picture in the world" is merely a statement of opinion. If, however, the thief says, "The art critic for the New York Times says that this is the most beautiful painting in the world," the thief has made a representation of fact (i.e., the fact that the art critic has expressed that opinion). A present fact includes the thief's present intentions. Thus, if the thief states, "I will gladly pay you Tuesday for a hamburger today," the thief has stated the fact of his or her present intention to pay for the hamburger in the future.

(3) ***The representation must be false***

(4) ***The accused must not believe that the misrepresentation is true.*** Any one of three possible states of mind will satisfy this requirement. First, the accused may know that the representation is untrue. Second, the accused may believe that it is untrue, without actually knowing whether it is untrue. Third, the accused may have no actual knowledge or belief about whether the statement is true or false.

Under certain circumstances, silence can constitute a misrepresentation. Suppose that the accused makes a misrepresentation of fact to the victim, but believes that the statement is true. Later, before the victim gives the property to the accused, the accused learns that the statement is actually false. The accused will be under a legal obligation to retract or correct his or her prior statement. The accused's silence, once it is known that the representation is untrue, will be considered as a misrepresentation.

(5) ***The misrepresentation must induce the victim's transfer of the property to the thief.*** The victim must actually rely on the thief's misrepresentation as a basis for giving the property to the thief or to the thief's agent. The misrepresentation usually must be made before, or simultaneously with, the transfer. Although the misrepresentation must induce the transfer, it need not be the only reason why the victim parted with the property.

(6) ***Monetary loss irrelevant.*** There is no requirement that the victim suffer a monetary loss as a result of the transaction. Suppose, for example, that a person uses a forged prescription to buy drugs. By presenting the prescription, the accused represents that the drugs have been lawfully prescribed. Relying on this representation, the pharmacist transfers the drugs to the accused. Without the prescription, the pharmacist

would not have parted with the drugs. Therefore, the accused has committed a wrongful obtaining-type larceny. The fact that the accused paid full value for the drugs is immaterial.

d. ***Withholding.*** In taking and obtaining types of larceny, the thief unlawfully comes into possession of the property. In wrongful withholding, however, the thief's initial possession of the property is usually lawful. For example, the thief may be a renter, borrower, or custodian of the property. The larceny occurs when the thief wrongfully withholds the property from its rightful owner. The act of withholding may take several forms. The thief may fail to return borrowed or rented property when lawfully required to do so. The thief may be a custodian, who fails to account for, or deliver, the property to its owner when legally required to do so. Still another example of wrongful withholding would be the custodian of property who converts the property to his or her own use or benefit, or who uses it in an unauthorized manner to the detriment of the owner's rights. Acts which constitute the offense of unlawfully receiving, buying, or concealing stolen property or of being an accessory after the fact, however, are not included within the meaning of "withhold." Because what is a withholding can often be a very complicated legal question, it will often be wise to consult an attorney before prosecuting a wrongful withholding form of larceny.

e. ***Property.*** The law divides property into two general classes: real property and personal property. Real property includes land, buildings, and permanent fixtures attached to the land. Real property ***cannot*** be the subject of a larceny. Personal property may be defined as any property that is not real property. Personal property includes tangible property, which has a physical existence, and intangible property, such as contract rights, patents, and rights to services.

"Property" for purposes of Article 121 is limited to tangible personal property, money, and negotiable instruments such as checks. Services, such as telephone services or labor, cannot be the subject of larceny. Theft of services may be prosecuted under Article 134 when the accused wrongfully obtained the services. [*See also* Part IV, para. 93, MCM, 1995 (theft of mail).]

The fact that the subject of a larceny is military property is an element in aggravation. Larceny of military property of a value of $100 or less carries a BCD, total forfeitures, and one year confinement, while property in excess of $100 carries a DD, total forfeitures, and ten years confinement. It should be noted that this change did not create a comparable offense under wrongful appropriation.

f. ***Ownership.*** "Ownership" merely describes a person's right to possess, use, and dispose of property. The law identifies two types of owners of property: general owners and special owners. Owners include not only people, but also corporations, associations, governmental agencies, and partnerships.

(1) ***General owners.*** The general owner has the greatest right to possess, use, and dispose of property. The general owner's rights are generally superior to

those of anyone else. The general owner is often said to have "title" to the property, or to be its "legal owner" or "true owner."

(2) ***Special owners***. The special owner has ownership rights that are superior to the rights of anyone else except the general owner. Thus, a renter, borrower, or custodian of property would be a special owner. Even a thief may be a special owner. The thief's rights in the stolen property are greater than those of anyone else, except the general owner or another special owner. Thus, if one thief steals stolen property from another thief, a larceny has been committed. On the other hand, there is no larceny when the general owner retrieves the property from a thief.

(3) ***Relationship to larceny***. A larceny may be either from a general owner or from a special owner. If the larceny is from a special owner, there is usually no need to plead or prove the general owner's identity or interest. Larcenies may occur between general and special owners. A special owner commits larceny against the general owner when the special owner wrongfully withholds the general owner's property. Under certain circumstances, a general owner may commit a larceny against the special owner, if the special owner has the right to exclusive possession of the property.

g. ***Value***. Value has a twofold importance in larceny cases. First, one of the elements of the offense is that the property had at least some value. This is seldom an issue because most property has at least nominal value. Second, the property's value determines the authorized maximum punishment. (Note, however, that the maximum punishment is increased regardless of value in the case of motor vehicles, aircraft, vessels, firearms, or explosives.) A property's value for purposes of Article 121 is its fair market value at the time and place of the theft. Fair market value usually equals the replacement cost of the property, less deductions for condition and depreciation. The concept of value may present several problems.

(1) ***Proof of value***. Value may be proven in several ways. First, the larceny victim may testify to the property's value, specifically in terms of what he or she paid for it or what it costs to replace the property. Second, evidence of the prevailing retail price in the community for the same or similar items may be introduced through testimony or authenticated advertisements. Third, if the property was government property, official price lists are admissible to prove value. However, if the official price list conflicts with other evidence of fair market value, the fair market value governs. Finally, when as a matter of common knowledge the property is obviously of some value or of a value substantially in excess of $100.00, its value may be inferred by the fact-finder.

(2) ***Unique property***. Rare or one-of-a-kind items such as antiques or paintings usually have no prevailing retail price in the community. Their value may be established by the expert testimony of an appraiser or other authority on that kind of property, who may give his or her opinion about the price the item would command if offered for sale at the time and place of the theft. Note, however, that value need not be monetary. It is sufficient if the property has value to someone. For example, body fluids

generally do not have a fair market value, yet the courts have held that the theft of a urine sample is properly charged under Article 121 because the sample has value to the military even though it may be subjective and extrinsic. The specification would simply state ". did steal one urine sample, of some value."

(3) ***Value of negotiable instruments.*** Negotiable instruments are writings which represent money value and which can be converted to cash. Examples of negotiable instruments include checks, bank drafts, and money orders. The value of a negotiable instrument depends upon whether the document is in a negotiable form (i.e., whether it can be cashed). Thus, the thief who steals a currently dated, properly signed check for one million dollars has committed a million-dollar larceny. However, if the check is unsigned or has some other defect that renders it nonnegotiable, the accused has stolen only a piece of paper of nominal value.

(4) ***Deductions for condition and depreciation.*** Fair market value reflects the property's condition and any appropriate depreciation. Deteriorated or damaged property would, of course, have a lower fair market value than if in perfect condition. Some types of property may be subject to commonly recognized depreciation. There is no need for depreciation or deteriorated condition to be considered when drafting a larceny pleading; nor does the prosecution have to introduce any evidence about the property's condition or any applicable depreciation. If they become issues, such matters are usually presented by the defense and decided by the fact-finder.

h. ***Intent.*** Larceny and wrongful appropriation are specific intent offenses. In larceny, the accused must specifically intend to deprive the owner of the property permanently. Wrongful appropriation requires the specific intent to deprive temporarily. Like all other matters of intent in criminal law, the requisite intents in larceny and wrongful appropriation may be proven by direct or circumstantial evidence.

i. ***Unexplained possession of recently stolen property.*** Thefts are seldom committed in public. In most trials, there will be no witness who can testify to seeing the accused steal the property; therefore, the law recognizes a permissive inference arising from the accused's unexplained possession of recently stolen property. If, shortly after the property was stolen, the accused was found in unexplained, knowing, exclusive possession of the stolen property, one may infer that the accused was the thief. This is only a permissive inference which may be completely rejected by the fact-finder. For the inference to operate, not only must the accused's possession be unexplained, but it must also satisfy three other conditions.

(1) ***Conscious possession.*** The evidence must show that the accused knew that he or she possessed the property. It is not necessary to prove that the accused knew the property was stolen. For example, if the prosecution can merely prove that the accused held the property in his or her hand, the requirement of conscious possession will usually be satisfied.

(2) ***Exclusive possession.*** The evidence must show that the accused exercised exclusive control or dominion over the property.

(3) ***Recently stolen property.*** "Recent" is a relative concept. A practical test for determining if the property was "recently" stolen is as follows: Was it reasonably possible for the accused to have innocently acquired the property in the time between its theft and its discovery? If it is unlikely that the accused could have acquired the property in that time without being the thief, the condition will be satisfied.

j. ***Found property.*** Found property is property which has been inadvertently lost or mislaid by its owner and which is found by the accused. The old maxim of "finders keepers, losers weepers" has little legal authority. The law imposes certain duties on a finder of property. If the finder fails to make reasonable efforts to locate the property's owner, the finder may be criminally liable for larceny of the found property.

(1) ***Clues to ownership.*** The extent to which the finder will be legally required to try to locate the property's owner will be determined by the clues to ownership. Clues to ownership include identifying marks, the nature of the property, where it was found, when it was found, its apparent value, and how long it had apparently been located where it was found. Sometimes there may be no clues to ownership. For example, there will be almost no clues to ownership when a dollar bill is found on a busy street corner, and it would be nearly impossible to find the rightful owner. On the other hand, a roll of $100 bills found on the floor of a bank will present many clues to ownership. Given the nature of the property and where it was found, it is reasonable to surmise that the owner's identity could be determined. Likewise, an unmarked suitcase found in an alley will have virtually no clues to ownership. An unmarked suitcase packed with clothing and personal items and found on a bench in a railroad station will present many clues to ownership. It is reasonable to surmise that a passenger mislaid the suitcase and still may be in the station or may be located through the railroad's lost-and-found department. Whether the property presented clues to ownership must be determined by analyzing all the facts and circumstances surrounding the finding of the property.

(2) ***Finder's duty to make reasonable efforts.*** The finder has a legal duty to make reasonable efforts to find the property's owner. What constitutes reasonable efforts is determined by the kind and quality of the clues to ownership. If the finder takes the found property and makes no reasonable efforts to return it to its owner, the finder commits a taking-type larceny. Whether the finder made reasonable efforts is a factual question to be decided by the court-martial members or, in a judge-alone trial, by the military judge. Suppose that, when the property is found, there were no clues to ownership. The finder therefore lawfully takes the property. Later, however, the finder learns of clues to ownership, such as an advertisement in the lost-and-found column of a newspaper. The finder then has a duty to make reasonable efforts to return the property to its owner. If the finder learns of

subsequent clues to ownership, but makes no reasonable efforts to return the property, the finder commits a withholding-type larceny. The finder's initial possession was lawful, but the finder failed to return the property when legally required to do so.

k. ***Abandoned property.*** Abandoned property is property in which the owner has relinquished all title, rights, and possession. Anyone may lawfully take possession of abandoned property. Whether certain property was abandoned will be determined by the type of property, its condition, its location, and whether the prior owner actually abandoned the property. Moreover, even if the property was not in fact abandoned, the accused will not be guilty of larceny or wrongful appropriation if the accused honestly believed that the property was abandoned.

4. ***Common defenses to larceny.*** The following are the most frequently encountered defenses in larceny cases. Many are also applicable to other types of property crimes.

a. ***Lack of criminal intent.*** The accused claims that the alleged taking, obtaining, or withholding was not wrongful. Suppose, for instance, that the accused and victim are friends who often borrow from each other. They may even borrow from each other without obtaining the other person's express consent. At trial, the accused claims that the property was merely "borrowed" and that the accused believed that the victim would not object. The accused's claim of "borrowing," if believed, will constitute a defense to both larceny and wrongful appropriation. The accused's state of mind was such that the taking of the victim's property was not wrongful.

b. ***Intoxication.*** Although voluntary intoxication is not usually a complete defense, it may become a defense to larceny or wrongful appropriation when the accused was so intoxicated as to be unable to form the required intent. As a practical matter, such intoxication would have to be extremely severe, to the extent that the accused did not really know what he or she was doing.

c. ***Honest mistake of fact.*** If the accused honestly believed that the property was his or her own, such a mistake of fact will constitute a complete defense to larceny and wrongful appropriation. The accused's mistake need not be reasonable, only honest. Thus, the key issue is the accused's worthiness of belief. The accused's character and reputation for truthfulness and the extent to which the accused's claim is corroborated or contradicted by other evidence will be important.

d. ***Return of similar property.*** After wrongfully taking / obtaining / withholding property, the accused's intent to return similar property is not a defense. For example, if Seaman Smith steals $100 worth of food from the commissary and consumes it, but later leaves $100 in cash in the register, it is still larceny. The rightful owner has still been deprived permanently of the original property. The exception is when cash or a check is taken and an equivalent amount of currency is later returned. Because of the fungible nature of money, this return is usually a defense to larceny, but not wrongful appropriation.

5. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 46f, MCM, 1995. For suggestions on pleading value and describing property, see chapter XIX of this text.

b. ***Pleading multiple larcenies***. One of the most puzzling pleading problems in larceny cases is whether the theft of several items should be pleaded in one or several specifications. Unreasonable multiplication must be avoided. What is essentially one continuing theft, arising from one single criminal impulse, must not be broken down into an unreasonable number of specifications. On the other hand, several different larcenies should not be aggregated into a single specification.

Common sense, not abstract legal rules, is the pleader's best guide. If the evidence suggests that the accused committed several distinct thefts, each motivated by its own criminal impulse, separate specifications should be pleaded. Separate specifications should also be pleaded when the stolen items belonged to different persons. However, if the evidence suggests that the accused's acts were really part of one continuing criminal enterprise, a single specification will be appropriate. Common-sense analysis of the facts of each case is necessary before drafting the pleadings because, at trial, the sufficiency of the pleadings will be decided by the same analysis.

c. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 121.
>
> Specification: In that Seaman Clarence C. Stickyfingers, U.S. Navy, USS Valentine, on active duty, did, on board USS Valentine, at sea, on or about 25 September 19CY, steal a toy rubber duck, of a value of $5.00, the property of Commander Bertram N. Erny, U.S. Navy.

C. ***Receiving, buying, or concealing stolen property*** (Article 134)

1. ***General concept***. Although closely related to larceny, receiving stolen property is ***not*** a lesser included offense of larceny. Thus, whenever there is doubt about whether the accused was the thief, or merely a receiver of stolen property, a receiving stolen property charge should be preferred in addition to the larceny charge.

2. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. The accused unlawfully received, bought, or concealed certain

property;

b. the property belonged to another person;

c. the property had been stolen by someone other than the accused;

d. the accused knew the property was stolen at the time he / she received, bought, or concealed the property;

e. the property had a certain value; and

f. under the circumstances, the conduct was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces.

3. ***Discussion***

a. ***Unlawfully received, bought, or concealed.*** The accused must have received, bought, or concealed the goods without the rightful owner's consent and without legal justification or excuse. One who buys stolen goods in order to return them to their rightful owner has not unlawfully bought stolen property. Any control over the property is sufficient to constitute receipt of the property. Property is therefore "received" if it is delivered personally to the accused, the accused's agent, or the accused's residence. An accused who steals from a thief is not guilty of receiving stolen property, but is guilty of larceny.

b. ***Stolen property.*** The property must actually be stolen property. Thus, a person who receives property, erroneously believing that it is stolen, is not guilty of receiving stolen property. He or she may be guilty of an attempt to receive stolen property, however. The property must have been stolen by someone other than the receiver. A thief cannot receive stolen property he or she has stolen.

c. ***Knowledge.*** At the time the accused receives the property, the accused must actually know that the property is stolen.

4. ***Relationship to larceny.*** Although closely related to larceny and wrongful appropriation, receiving stolen property is not a lesser included offense of either crime. Nor does receiving stolen property merge into a wrongful withholding type of larceny when the receiver fails to return the property to its owner. Acts which constitute the offense of unlawfully receiving, buying, or concealing stolen property or of being an accessory after the fact are not included within the meaning of "withhold." Therefore, neither a receiver of stolen property nor an accessory after the fact can be convicted of larceny on that basis alone.

5. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 106f, MCM, 1995.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 134.
>
> Specification: In that Seaman Recruit Aloysius F. Fagin, U.S. Navy, USS Fencehaven, on active duty, did, at Naval Justice School, Newport, Rhode Island, on or about 25 December 19CY, wrongfully receive a wristwatch, of a value of $150.00, the property of Ensign I. Ben Robbed, U.S. Navy, which property, as he, the said Seaman Fagin, then knew, had been stolen.

D. ***Robbery*** (Article 122)

1. ***General concept***. Robbery is essentially a larceny committed by means of an assault upon the victim. Both larceny and assault are lesser included offenses of robbery.

2. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused wrongfully took certain property from the victim's person or presence;

b. the taking was against the victim's will;

c. the taking was accomplished by force, violence, or threat of force or violence;

d. the property belonged to the victim;

e. the property was of a certain value; and

f. the accused took the property with the intent to deprive the victim permanently of its use and benefit.

(***Note***: If the robbery was committed with a firearm, add as an additional element)

g. that the means of force or violence, or of putting the person in fear, was a firearm.

3. ***Discussion***. Many of the concepts of larceny law also apply to robbery. Robbery has several other distinct principles which are discussed below.

a. ***From the victim's person or presence***. The robber must take the property from the victim's person or must take property in the victim's presence. Property is in the victim's presence when the victim has immediate control over it. Suppose, for example, the robber ties up the victim in the kitchen and then steals property from the victim's bedroom. The stolen property would be in the victim's presence for purposes of the offense of robbery.

b. ***Against the victim's will***. The taking must be without the victim's freely given consent. Acquiescence at gunpoint is not consent.

c. ***Force and violence***. The wrongful taking must be accomplished by force, violence, or threat of force or violence. This is the assault component of robbery. The accused's force or violence need only be enough to overcome the victim's resistance. The force or violence may precede or accompany the taking. Thus, a robber, who hits the victim with a club and then takes the victim's wallet, has committed robbery. Likewise, the purse snatcher who suddenly grabs the victim's purse, pushes the victim to the ground and runs away, also commits robbery. There is no requirement that the victim offer resistance.

d. ***Threats of force or violence***. Robbery may also be accomplished by putting the victim in fear of force or violence. The threat may be to the victim's person or property. The threat may also be one which places the victim in fear of force or violence to the person or property of a relative or of another person in the victim's company. For purposes of robbery, "fear" means a reasonably well-founded apprehension of immediate or future injury. While there need not be any actual force or violence, the threat must include demonstrations of force or menacing acts which reasonably raise an apprehension of impending harm.

4. ***Lesser included offenses***. Both larceny and assault are listed as lesser included offenses of robbery. Suppose, for example, that the accused is charged with robbery. The evidence clearly establishes that the accused stole the victim's property, but it fails to prove that the accused did so through force, violence, or threats. The accused could be found not guilty of robbery, but guilty of the lesser included offense of larceny under Article 121. In another robbery prosecution, suppose that there is no evidence that the accused intended to steal property. The accused could be found not guilty of robbery, but guilty of the lesser included offense of assault under Article 128.

5. ***Pleading***

a. ***General considerations***. See Part IV, para. 47f, MCM, 1995. Be sure

to allege that the taking was by force, violence, or threats. Also, be sure to include that the theft was from the victim's person or presence and against the victim's will. These allegations are necessary to state the offenses of robbery. Note that pleading (and proving) use of a firearm increases the maximum authorized punishment by five years.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 122.
>
> Specification: In that Seaman Apprentice Muggs D. Victim, U.S. Navy, USS Skullsmasher, on active duty, did, at Naval Air Station, Fly, Ohio, on or about 30 September 19CY, by means of force and violence, with a firearm, steal from the person of Airman Walker N. Darkalleys, U.S. Navy, against his will, a watch, of a value of $200.00, the property of the said Airman Darkalleys.

E. ***Burglary*** (Article 129), ***housebreaking*** (Article 130), ***and unlawful entry*** (Article 134)

1. ***Introduction***. Burglary, housebreaking, and unlawful entry are closely related offenses, all involving illegal entries into buildings or structures. Burglary is the most serious of the three offenses, and unlawful entry the least serious. Since the three offenses are similar, it would be unnecessarily repetitive to recite the elements for each. Therefore, each of these three offenses will be discussed generally and will be distinguished from the other two related offenses.

2. ***Burglary*** (Article 129)

a. ***General concept***. Burglary is the unlawful breaking and entering of another person's dwelling, at night, with the specific intent to commit any of certain specified serious offenses. It is immaterial whether the intended serious offense is actually committed. The offense is complete when the burglar breaks and enters the dwelling at night with the requisite intent.

b. ***Unlawful breaking and entering***. The burglar must break into the victim's dwelling. This may be done by an actual breaking such as forcing a lock, breaking a window, or even opening a closed door. There may also be a constructive breaking, which occurs when the burglar gains entry to the dwelling by trick (e.g., hiding in a box), by fraud (e.g., claiming to be from the telephone company), or by threats. The slightest entry into the dwelling, even if by only part of the body, will suffice. A breaking and entry is unlawful when done without lawful consent or legal justification.

c. ***Dwelling***. The burglar must break into and enter the victim's dwelling. This ancient term refers to any building occupied as a place of residence. It also usually includes apartments. The dwelling must be occupied, but there is no requirement that the

occupant actually be on the premises.

d. ***At night.*** The burglary must occur at night (i.e., between sunset and sunrise). The offense of burglary has remained substantially unchanged since the Middle Ages. Medieval law viewed nocturnal crimes as especially heinous. The UCMJ preserves this remnant of medieval society.

e. ***Intent to commit certain specified serious offenses.*** The burglar must enter the dwelling with the intent to commit a serious crime. These include: murder, manslaughter, rape and carnal knowledge, larceny and wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, and assault. It is immaterial that the intended crime was not actually committed.

f. ***Lesser included offenses.*** Housebreaking (Article 130) and unlawful entry (Article 134) are lesser included offenses of burglary.

g. ***Pleading***

(1) ***General considerations.*** *See* Part IV, para. 55f, MCM, 1995. The elements of (a) unlawfully breaking and entering, (b) the dwelling house, (c) at night, and (d) the intended offense, must be expressly pleaded.

(2) ***Sample pleading***

> Charge: Violation of the UCMJ, Article 129.
>
> Specification: In that Seaman Morris D. Katz, U.S. Navy, USS Hohokus, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 December 19CY, in the nighttime, unlawfully break and enter the dwelling house of Captain Hugh N. Crigh, U.S. Navy, with intent to commit larceny therein.

3. ***Housebreaking*** (Article 130)

a. ***General concept.*** Housebreaking is the unlawful entry of another person's building or structure with the intent to commit a criminal offense inside. Housebreaking is less serious than burglary. The premises need not be a dwelling, but can be any building, room, shop, store, office, structure, houseboat, house trailer, railroad car, or tent. Automobiles, airplanes, footlockers, or wall lockers, however, cannot be the subject of housebreaking. For a breaking into one of those areas, consider charging under Article 134 using the Federal Assimilative Crimes Act. The premises need not be occupied or in use at the time of the housebreaking. The unlawful entry can occur at any time, not just at night.

Finally, the accused may intend to commit any crime except strictly military offenses.

b. ***Lesser included offense.*** Housebreaking's principal lesser included offense is unlawful entry under Article 134.

c. ***Pleading***

(1) ***General considerations.*** *See* Part IV, para. 56f, MCM, 1995. The intended crime must be alleged in the specification.

(2) ***Sample pleading***

> Charge: Violation of the UCMJ, Article 130.
>
> Specification: In that Corporal Wiley N. Slighe, U.S. Marine Corps, Marine Barracks, Norfolk, Virginia, on active duty, did, on board USS Easypickens, located at Norfolk, Virginia, on or about 15 December 19CY, unlawfully enter the Ship's Post Office, the property of the United States Government, with intent to commit a criminal offense, to wit: larceny therein.

4. ***Unlawful entry*** (Article 134)

a. ***General concept.*** Unlawful entry occurs when the accused, without lawful consent or legal justification, enters a building or structure of another person. All those types of structures previously discussed with respect to burglary and housebreaking may be the subject of an unlawful entry. The "building / structure" element of unlawful entry has a broader application than either burglary or house-breaking. It may include some types of restricted or fenced-in enclosures. For example: an open storage area surrounded by a chain-link fence. However, it still does not include cars, aircraft, or lockers under most circumstances. Since unlawful entry is an Article 134 offense, the accused's actions must also be prejudicial to good order and discipline or service-discrediting. Note that the offense of unlawful entry does not require proof of an intent to commit any other offense once inside.

b. ***Pleading***

(1) ***General considerations.*** *See* Part IV, para. 111f, MCM, 1995. Orchards and vegetable gardens, two examples in the form, may be the subject of an unlawful entry. Take special care in pleading when dealing with unfenced orchards, vegetable gardens, and similar types of real property. Under such circumstances, such unfenced property might not be the subject of an unlawful entry.

(2) ***Sample pleading***

> Charge: Violation of the UCMJ, Article 134.
>
> Specification: In that Yeoman Third Class Lester Baggadonutz, U.S. Navy, USS Charleroi, on active duty, did, on board USS Charleroi, at sea, on or about 7 May 19CY, unlawfully enter the stateroom of Commander Phillip R. Delphia, U.S. Navy.

F. ***Offenses against military property*** (Article 108)

1. ***General concept.*** Article 108 prohibits the unauthorized sale, disposition, damage, destruction, or loss of military property of the United States. Not only does Article 108 prohibit these specific acts, it also prohibits allowing someone else to commit the unauthorized sale, disposition, damage, destruction, or loss of military property. Article 108 can be distinguished from larceny in that larceny is concerned with how the accused came into possession of the property. Article 108 deals with how the accused handled or disposed of the property.

2. ***Elements of the offense.*** The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused either:

(1) Sold, disposed of, damaged, destroyed, or lost certain property; or

(2) allowed someone else to sell, dispose of, damage, destroy, or lose certain property;

b. the accused's act was done without proper authority;

c. the property was military property of the United States; and

d. the property was of a certain value.

3. ***Discussion***

a. ***Military property of the United States.*** Military property is all property, real or personal, that is owned, held, leased, or used by one of the armed forces of the U.S. Government. Thus, all property owned or used by the Department of the Navy, from paper clips to aircraft carriers, is covered by Article 108. The appellate military courts have held that retail exchange merchandise owned or used by a nonappropriated fund activity, such as the Navy Exchange, is not military property of the United States; however,

merchandise in a ship's store is military property.

b. ***Wrongful sale or disposition.*** "Sale" of military property means a sale in the usual commercial sense. "Disposition" may include abandonment, loan, lease, or surrender of military property. Sale of military property is usually permanent. Disposition, however, need only be temporary. The prosecution need not prove that the accused actually knew that the sale or disposition was unauthorized. If the accused honestly and reasonably believed that the sale or disposition was authorized, however, the accused will not be guilty of an Article 108 violation.

c. ***Damage, destruction, or loss.*** The accused's damaging, destruction, or loss of the military property may be intentional or negligent. Thus, whether the military property was damaged, destroyed, or lost because the accused failed to exercise reasonable care for the property or because he intentionally damaged, destroyed, or lost it, the accused would be guilty of an Article 108 violation.

d. ***Allowing another to sell, dispose of, damage, destroy, or lose.*** The accused may be guilty of an Article 108 violation even if he or she merely allowed another person to wrongfully sell, dispose of, damage, destroy, or lose military property if the prosecution can prove that the accused had a duty to protect the property and that the accused either intentionally or negligently failed to perform that duty, thereby permitting another person to commit the offense against military property.

e. ***Value.*** Because the property's value determines the authorized maximum punishment, the value should be pleaded and proven. Value is also one of the elements of the offense. (Note, however, that value is immaterial in determining maximum punishment if the property sold or disposed of was a firearm or explosive.)

4. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 32f, MCM, 1995. Note that the three types of Article 108 pleadings vary. Each type of pleading will require careful tailoring to the facts of each case. Because of the differences among the various types of Article 108 offenses, four sample pleadings are provided below. They illustrate the major patterns in Article 108 pleading.

b. ***Sample pleadings***

Charge: Violation of the UCMJ, Article 108.

(1) ***Wrongful sale or disposition***

Specification 1: In that Seaman Roland R. Redeye, U.S. Navy, USS Fogbound, on active duty, did, on board USS Fogbound, at sea, on or about 20 November 19CY, without proper authority, sell to Seaman Wilbur R. Weakeyes, U.S. Navy, one pair of binoculars, of a value of $135.00, military property of the United States.

(2) ***Damage***

Specification 2: In that Seaman Roland R. Redeye, U.S. Navy, USS Fogbound, on active duty, did, on board USS Fogbound, at sea, on or about 2 December 19CY, without proper authority, through neglect, damage, by dropping on the deck, one electric typewriter, of a value of about $2,000.00, military property of the United States, the amount of said damage being in the sum of $108.16.

(3) ***Destruction (similar pattern for loss)***

Specification 3: In that Seaman Roland R. Redeye, U.S. Navy, USS Fogbound, on active duty, did, on board USS Fogbound, at sea, on or about 4 December 19CY, without proper authority, willfully destroy, by burning, one mattress, of a value of $63.00, military property of the United States.

(4) ***Allowing another to commit an offense against property***

Specification 4: In that Seaman Roland R. Redeye, U.S. Navy, USS Fogbound, on active duty, did, on board USS Fogbound, at sea, on or about 10 December 19CY, without proper authority, through neglect, suffer a sextant, of a value of $145.00, military property of the United States, to be damaged by Seaman Recruit Clum Z. Goof, U.S. Navy, the amount of said damage being in the sum of $45.00.

G. ***Damage or destruction of nonmilitary property*** (Article 109)

1. ***General concept***. Article 109 prohibits certain types of damage or destruction to property other than military property of the United States. Wrongful sale or disposition of nonmilitary property is ***not*** covered by Article 109.

2. ***Elements of the offense.*** The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused either:

(1) Willfully or recklessly wasted or spoiled real property by committing certain acts; or

(2) willfully damaged or destroyed personal property by committing certain acts;

b. the property belonged to another person; and

c. the amount of damage was of a certain value.

3. ***Discussion***

a. ***Nonmilitary property.*** Article 109 covers any property, whether real property or personal property, that is owned by someone other than a military department of the U.S. Government. Article 109 property would therefore include nonmilitary government property, private property, and property owned by corporations and associations, and military exchange inventory.

b. ***Wasting or spoiling real property.*** Damage to real property may be either intentional or the result of the accused's recklessness. More than simple negligence is required, however.

c. ***Damaging or destroying personal property.*** Damage or destruction of personal property must be intentional. ***No*** form of negligence will suffice.

d. ***Value.*** As in Article 108 offenses, one of the elements of an Article 109 offense is that the property had a certain value. Value is also an aggravating factor for purposes of increasing the authorized maximum punishment.

4. ***Relationship of Article 109 to Article 108.*** The offenses in Articles 108 and 109 are often confused. Actually, the distinctions between the two types of offenses are rather simple. The following checklist will be helpful.

a. ***Is the property military property of the United States?***

(1) ***If yes***, the accused may be convicted for either intentional or negligent sale, disposition, damage, destruction, or loss under Article 108 (UCMJ). The accused may also be prosecuted for allowing someone else to commit an offense against the military property. The property may be either real or personal property.

(2) ***If no***, the type of the nonmilitary property must be determined.

b. ***Is the nonmilitary property real property or personal property?***

(1) ***If real property***, the wasting or spoiling may be caused either intentionally or through recklessness and is chargeable under Article 108(1) (UCMJ).

(2) ***If personal property***, the damage or destruction must be intentional, and, if so, is chargeable under Article 109(2) (UCMJ).

5. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 33f, MCM, 1995. "Waste" and "spoil" refer to damage to real property. "Destroy" and "damage" describe injury to personal property.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 109.
>
> Specification: In that Seaman Runyona Muck, U.S. Navy, USS Reluctant, on active duty, did, on board USS Reluctant, at sea, on or about 22 August 19CY, willfully and wrongfully destroy, by smashing with a sledgehammer, one wristwatch, of a value of $75.00, the property of Lieutenant Hubert C. Slowwrist, U.S. Navy.

6. *See* chart on following page "*Article 108 vs. Article 109*."

If an accused damages or destroys		and the damage or destruction was done	then the accused is
Military Property		Willfully	Guilty of Violating Art. 108
		Recklessly	
		Negligently	
Non-Military Property	and the Property is Realty	Willfully	Guilty of Violating Art. 109
		Recklessly	
		Negligently	Not Guilty
	and the Property is Personalty	Willfully	Guilty of Violating Art. 109
		Recklessly	Not Guilty
		Negligently	

PERTINENT DEFINITIONS

1. "Military property" is ***all*** property owned, held, or used by one of the armed forces of the United States.

2. "Nonmilitary property" means ***any*** property not embraced in definition 1 above.

3. "Realty" means land, buildings, and any fixtures attached thereto such as piers, fences, trees.

4. "Personalty" means ***any*** property not embraced in definition 3 above.

5. "Willfully" means intentionally, i.e., the accused actually ***intended*** to cause the damage or destruction which resulted.

6. "Recklessly" means that the accused damaged or destroyed the property through a culpable disregard for the foreseeable consequences of his acts.

7. "Negligently" means that the accused failed to exercise the due care which a reasonably prudent man would have exercised under the circumstances.

H. ***Bad check law*** (Articles 123a and 134)

1. ***Overview***. The UCMJ prohibits three types of bad check offenses. Article 123a prohibits using a bad check to procure something of value with the intent to defraud, and using a bad check to pay a past-due obligation with the intent to deceive. Article 134 is used to prosecute dishonorable failure to maintain sufficient funds in an account. [Note that certain situations involving bad checks might also constitute violations of Article 121 (larceny), but Article 123a should be used when bad checks are involved.] Although bad check offenses are common in military society, enforcement is often difficult. Civilian authorities are often reluctant to prosecute such offenses unless large sums of money or a significant number of bad checks are involved.

2. ***Using a bad check with intent to defraud*** [Article 123a(1)]

a. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

(1) The accused made, drew, uttered, or delivered a check, draft, or money order;

(2) at the time, the accused knew that there was not or would not be sufficient funds in the account to pay in full the check, draft, or money order when it was presented for payment;

(3) the accused made, drew, uttered, or delivered the check, draft, or money order to procure an article of value; and

(4) the making, drawing, uttering, or delivery was with the intent to defraud.

b. ***Discussion***

(1) ***Make, draw, utter, deliver***. "Make" and "draw" are synonymous and constitute the acts of writing and signing the instrument. "Deliver" means to transfer the instrument to another person. Delivery also includes endorsing an instrument over to another person or depositing it in one's own account. "Utter" has a somewhat broader meaning than "deliver." "Utter" also includes an offer to transfer the instrument, with a representation that it will be paid when presented. The person who writes and signs the instrument usually also utters and delivers it.

(2) ***Procurement of an article of value***. The instrument must be used to procure an article or thing of value. An article or thing of value includes every kind of right or interest in property, or derived from contract, including interests and rights which are intangible or contingent or which mature in the future. Payment of a past-due debt is ***not***

a thing of value. It is not necessary that the article actually be procured, only that the accused used the instrument in an attempt to procure the item.

(3) ***Knowledge***. The accused must actually know that there is not or will not be sufficient funds to pay the instrument in full upon presentment at the time the instrument was made, drawn, uttered, or delivered. Presentment is the act of delivering the instrument and demanding payment.

(4) ***Intent to defraud***. The accused must intend to defraud. One must be very careful not to confuse the intent to defraud, under Article 123a(1), with the intent to deceive, under Article 123a(2). They are separate, noninterchangeable intents. Intent to defraud denotes an intent to obtain an article or thing of value through a misrepresentation. For example, when one gives another person a check, there is an implied representation that the check will be paid upon presentment.

(5) ***Five-day rule***. Actual knowledge and intent are often difficult to prove. Thus, if the maker or drawer of the instrument is notified that it has been dishonored, but fails to redeem it in full within five days of the notification, the court may infer both that the accused knew that there would be insufficient funds upon presentment and that the accused had an intent to defraud. The five-day rule does not apply to persons other than the maker or drawer of the instrument. Notification of dishonor can be oral or written, and can be given by a bank or any other person.

(6) ***Value***. Although the value of the instrument is not an element of the offense, it is the principal factor aggravating the authorized maximum punishment.

c. ***Pleading***

(1) ***General considerations***. *See* Part IV, para. 49f(1), MCM, 1995. The specification should contain a photocopy of the check, draft, or money order. Be certain to allege that the instrument was used to procure an article of value and that it was with the intent to defraud. The two Article 123a check offenses are not lesser included offenses of each other.

(2) ***Sample pleading***

Charge: Violation of the UCMJ, Article 123a.

Specification: In that Seaman Claude D. Paperhanger, U.S. Navy, USS Trenton, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 16 October 19CY, with intent to defraud and for the procurement of lawful currency, wrongfully and unlawfully make a certain check upon the Bank of America, in words and figures as follows, to wit:

Claude D. Paperhanger No. 667
Irma A. Paperhanger
123 Fonebone Street *16 October* 19 *CY*
Oakland, CA 98901

Pay to
the order of *Navy Exchange* $ *100.00*

One hundred and 00/100 Dollars
Bank of America
San Francisco, CA

[BACK OF CHECK]

then knowing that he, the maker thereof, did not or would not have sufficient funds in or credit with such bank for the payment of the said check in full upon its presentment.

3. ***Using a bad check with intent to deceive*** [Article 123a(2)]

a. ***Elements of the offense***. The elements of this offense are similar to those of using a worthless instrument with intent to defraud under Article 123a(1). The differences deal with the purpose of the instrument and the accused's intent. Under Article 123a(2), the instrument is used to pay a past-due obligation or for any other purpose, other than one covered by Article 123a(1). The accused's intent is an intent to deceive, not defraud.

b. ***Discussion***

(1) ***Past-due obligation***. Under Article 123a(2), the instrument is used to pay a past-due obligation [or for any other purpose not covered under Article

123a(1)]. A past-due obligation is a legal obligation to pay a debt which has matured prior to the use of the instrument.

(2) ***Intent to deceive***. An intent to deceive is an intent to cheat, trick, or mislead. It involves a desire to gain an advantage for oneself, or to cause disadvantage to another person, through a misrepresentation. Every check, draft, or money order carries with it an implied representation that it will be paid on presentment. Article 123a(2) requires an intent to deceive, not defraud. The two intents are separate, noninterchangeable states of mind.

(3) ***Five-day rule***. The five-day rule, discussed above, also applies to this offense for makers and drawers.

(4) ***Value***. The value of the instrument is not an element of the offense, but is an aggravating factor which must be pleaded and proven.

c. ***Pleading***

(1) ***General considerations***. *See* Part IV, para. 49f(2), MCM, 1995. As with Article 123a(1) pleadings, a photocopy of the instrument should be incorporated into the specification.

(2) ***Sample pleading***

Charge: Violation of the UCMJ, Article 123a.

Specification: In that Commander Ruth Badcheck, U.S. Navy, USS Scuttlefast, on active duty, did, at Naval Air Station, Jacksonville, Florida, on or about 1 December 19CY, with intent to deceive and for the payment of a past-due obligation, to wit: an overdue balance on a uniform charge account, wrongfully and unlawfully utter to the Navy Exchange, Naval Air Station, Jacksonville, Florida, a certain check for the payment of money upon Oil City Farmers National Bank, Oil City, Pennsylvania, in words and figures as follows, to wit:

Ruth Badcheck No. 1988
P.O. Box 6169
Titusville, PA 15088 *1 December* 19 *CY*

Pay to
the order of *Navy Exchange* $ *39.50*

Thirty-nine dollars and 50/100 Dollars
Oil City Farmers'
National Bank
Oil City, PA

[BACK OF CHECK]

then knowing that she, the maker thereof, did not, or would not, have sufficient funds in, or credit with, such bank for the payment of the said check in full upon its presentment.

4. ***Dishonorable failure to maintain funds*** (Article 134)

a. ***General concept***. Dishonorable failure to maintain sufficient funds for the payment of checks differs from Article 123a offenses in that there need be no intent to defraud or deceive at the time of making and uttering, and that the accused need not know at that time that he / she did not or would not have sufficient funds for payment. The gist of the offense is the accused's conduct after uttering the instrument. Dishonorable failure to maintain sufficient funds is a lesser included offense of both Article 123a check offenses.

b. ***Elements of the offense***. The elements of this offense are substantially similar to those under Article 123(a). The accused must both make and utter the instrument. The elements of knowledge and intent are not required. The check may be used for any purpose. The actions of the accused must be dishonorable. Because this is an Article 134 offense, the prosecution must also prove beyond a reasonable doubt that the accused's conduct was prejudicial to good order and discipline or was service-discrediting.

c. ***Dishonorable failure.*** A dishonorable state of mind is one characterized by fraud, deceit, deliberate misrepresentation, evasion, bad faith, or a grossly indifferent attitude toward one's obligations. Simple mistakes in bookkeeping or oversights are insufficient. However, if the accused overdraws the account because he or she is grossly indifferent to the account's balance, such indifference is sufficiently dishonorable. Dishonorable failure to maintain funds also occurs when the accused innocently overdraws the account, but thereafter wrongfully fails to deposit enough money to cover the overdraft.

d. ***Pleading***

(1) ***General considerations.*** *See* Part IV, paras. 68f or 71f, MCM, 1995. A copy of the check should be incorporated into the specification for para. 68f.

(2) ***Sample pleading***

Charge: Violation of the UCMJ, Article 134.

Specification: In that Ensign Larsen E. Pettifogger, U.S. Navy, USS Minnow, on active duty, did, at Naval Base, Charleston, South Carolina, on or about 1 May 19CY, make and utter to the Navy Exchange, Charleston, South Carolina, a certain check, in words and figures as follows, to wit:

Larsem E. Pettifogger
404 Swampsmell Street
Charleston, SC

No. 98

1 May 19 *CY*

Pay to
the order of *Navy Exchange* $ *329.00*

Three hundred twenty-nine and 00/100 Dollars

South Carolina National Bank
Charleston, SC

[BACK OF CHECK]

for the purchase of a wristwatch, and did thereafter dishonorably fail to maintain sufficient funds in the South Carolina National Bank, Charleston, South Carolina, for payment of such check in full upon its presentment for payment.

CHAPTER XXVIII

DRUG OFFENSES

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CHAPTER XXVIII

DRUG OFFENSES

A. *Overview*

1. ***Background.*** By Executive Order No. 12,383 of 23 September 1982, the President provided for a single, comprehensive treatment of drug offenses to be followed by all services beginning 1 October 1982. The Executive Order amended the MCM, 1969 (Rev.) by adding a new paragraph, 213g, which established under Article 134 the offenses of "possession, use, introduction into a military unit, base, station, post, ship, or aircraft, manufacture, distribution, and possession, manufacture or introduction with intent to distribute, of a controlled substance." The Table of Maximum Punishments was substantially modified to provide for a wider range of standardized punishments based upon the relative severity of each offense. A corresponding change to Article 1151, *U.S. Navy Regulations, 1973*, confirmed that the Navy Department would rely exclusively on Article 134 to prosecute drug offenses addressed therein.

2. ***From 1 August 1984.*** In the Military Justice Act of 1983, Congress enacted a new punitive article of the UCMJ, Article 112a, effective 1 August 1984, which superseded Article 134 as the sole vehicle for prosecuting applicable drug offenses. Article 112a did little more than provide a statutory basis for the offenses previously identified by Executive Order No. 12,383. (Article 112a eliminated the need to prove in each case that drug abuse is either prejudicial to good order and discipline or service-discrediting. This was a necessary element under Article 134; although, in practice, this additional element was virtually self-proving.) Thus, Article 112a has not significantly altered the military law of drugs which immediately preceded it.

B. ***Article 112a.*** Article 112a, as implemented in Part IV, para. 37, MCM, 1995, prohibits the wrongful use, possession, manufacture, distribution, importing, exporting, introduction into a military installation, vessel, vehicle, or aircraft, or possession, manufacture, or introduction with intent to distribute, of any controlled substance. Punishment is increased if these acts occur on a ship, aircraft, or missile launch facility, or are done by persons performing certain duties.

1. ***Definitions***

a. ***Wrongfulness.*** To be punishable under Article 112a, acts involving drugs must be wrongful. Such acts are wrongful if done without legal justification or excuse. Such acts would ***not*** be wrongful if done pursuant to legitimate law enforcement activities, or pursuant to authorized medical duties, or without knowledge of the contraband nature of the substance. Possession, use, distribution, introduction, or manufacture of a substance may be inferred to be wrongful in the absence of evidence to the contrary.

b. ***Marijuana.*** Marijuana is defined as all parts of the plant *cannabis sativa L.* (except mature stalks). It would also include derivatives such as hashish and any other species of the plant.

c. ***Controlled substance.*** A "controlled substance" is any substance listed in Schedules I through V as established by the Controlled Substances Act of 1970 [21 U.S.C. § 812 (1982)] as updated and republished under the provisions of that Act (or by the President for purposes of Article 112a). These five schedules are periodically updated by the Attorney General. These schedules classify drugs according to their recognized medical use, potential for abuse, and potential danger:

(1) Schedule I substances are drugs that have no recognized medical use in the United States, are dangerous even if used under medical supervision, and have the highest potential for physical or psychological dependence. Marijuana, heroin, and lysergic acid diethylamide (LSD), are examples of substances currently on Schedule I. The status of heroin and marijuana as Schedule I substances may change in the future due to growing medical acceptability of those substances in treating terminal cancer patients and glaucoma cases, respectively.

(2) Schedule II substances also have a high abuse potential, and are highly likely to result in physical or psychological dependence, but they do have a recognized medical use in the United States. Opium, amphetamine, cocaine, and opiate derivatives are examples of Schedule II substances.

(3) Schedules III, IV, and V are characterized by decreasing abuse potentials, medical acceptability, and relatively limited potential for dependence. Steroids is an example of a Schedule III substance. Phenobarbital is an example of a Schedule IV substance. Codeine is an example of a Schedule V substance.

d. ***Possession.*** "Possession" is the knowing exercise of control. Possession of a drug can be either direct physical custody, such as holding a drug in one's hand, or constructive, as in storing the drug in a locker in a bus terminal while keeping the key. Possession must be "exclusive" in the sense of having the authority to preclude control by others, but more than one person may possess a drug simultaneously. Possession does ***not*** require ownership (title).

e. ***Use***. "Use" includes smoking, ingesting, injecting, swallowing, or any other act with the drug which introduces it into the body for the purpose of obtaining the substances chemical effect.

f. ***Distribution***. "Distribution" is the delivery of possession to another. Distribution replaces the previously defined drug offenses of sale and transfer. As such, the agency principle (in which an accused charged with sale might establish a defense by showing he acted only as the buyer's agent) has, for all practical purposes, been eliminated and encompasses both acts.

g. ***Manufacture***. "Manufacture" is the production, preparation, and processing of a drug. Manufacture can be accomplished either directly or indirectly. It can be effected by extraction from a substance of natural origin or independently by chemical synthesis. "Manufacture" also includes the packaging or repackaging of a substance and the labeling or relabeling of a container. "Production" includes planting, cultivating, growing, or harvesting.

h. ***Introduction***. "Introduction" is the act of bringing a drug or causing a drug to be brought into or onto a military unit, base, station, post, ship, or aircraft. Introduction is more serious than simple possession.

i. ***Intent to distribute***. The presence of an intent to distribute increases the severity of possession, manufacture, or introduction. An intent to distribute is generally inferred from circumstantial evidence. Indicia supporting such an intent would be the possession of a quantity of drugs in excess of a normal quantity for personal use; the market value of a substance; the manner in which a substance was packaged; and the fact that an accused was not normally a user. The fact that an accused was addicted to or was a heavy user of a substance ***may*** negate an inference of an intent to distribute.

j. ***Certain amount***. When a specific amount of a controlled substance is believed to have been possessed, distributed, introduced, or manufactured by an accused, the specific amount should ordinarily be alleged in the specification. This ensures that the accused's record will reflect the relative seriousness of the offense, and is a mandatory prerequisite to invoking any increased punishments for marijuana offenses based on quantity (e.g., possession of 30 grams or more of marijuana). For negligible amounts, however, it is not necessary to allege the specific amount, and a specification is sufficient if it alleges "some," "traces of," or "an unknown quantity of" a controlled substance. The practice is not to allege an amount in use specifications.

2. ***Relationships among the prohibited acts***

a. Under the previous drug law, transfer and possession were ***not*** lesser included offenses of sale. In addition, possession was not a lesser included offense of transfer because one could transfer custody of drugs without having possession; that is, exclusive control of the drugs. Under Article 112a, possession is a lesser included offense of use, possession with intent to distribute, and introduction, but not distribution. Therefore, it is

normally not necessary to plead use and possession in separate specifications, although possession and distribution should be plead as separate specifications. They may be multiplicious for findings, and one specification might be dismissed before findings, but they should at least be pled in the alternative. Recent case law also suggests that, if the accused possesses a separate "stash" of drugs which is kept hidden and remote from the drugs which are distributed, the accused is guilty of both specifications of possession and distribution.

b. The courts have indicated that introduction and distribution offenses are separate and are not multiplicious with each other or use.

3. ***Proof of the substance's identity***. At trial, the prosecution must prove beyond a reasonable doubt that the substance the accused distributed, used, possessed, manufactured, imported, exported, or introduced was marijuana or a controlled substance. Of course, the most reliable evidence of the substance's identity and composition will be the results of chemical analysis. Nonexpert testimony may also be admissible sometimes to prove the substance's identity. A person who has used the same substance on previous occasions and is familiar with its appearance and effects may give his or her opinion about the substance's identity. Such testimony is rather common in marijuana cases. Where the substance is less common, it may be less likely that a nonexpert witness could accurately identify the substance merely by its appearance and effects. Many drugs look and act alike. In such a case, nonexpert identification will usually be inadmissible, and expert testimony or scientific evidence will be required.

4. ***Punishments***. The maximum punishments prescribed by Part IV, para. 37e, MCM, 1995, are as follows:

a. Wrongful use, possession, manufacture, or introduction of amphetamine, cocaine, heroin, LSD, marijuana (except possession of less than 30 grams or use of marijuana), methamphetamines, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: Dishonorable discharge; forfeiture of all pay and allowances; and confinement not to exceed five years.

b. Wrongful possession of less than 30 grams or use of marijuana and wrongful use, possession, manufacture, or introduction of phenobarbital and Schedule IV and V controlled substances: Dishonorable discharge; forfeiture of all pay and allowances; and confinement not to exceed two years.

c. Wrongful distribution, possession, manufacture, or introduction with intent to distribute, or wrongful importation or exportation of amphetamine, cocaine, heroin, LSD, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances: Dishonorable discharge; forfeiture of all pay and allowances; and confinement not to exceed fifteen years.

d. Wrongful distribution of, or with intent to distribute, wrongful possession, manufacture, or introduction of phenobarbital and Schedule IV and V controlled substances: Dishonorable discharge; forfeiture of all pay and allowances; and confinement not to exceed ten years.

e. When any of the above offenses is committed while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under control of the armed forces; in or at a missile launch facility or in a confinement facility used by or under the control of the armed forces; used by or under the control of the armed forces; while receiving special pay under 37 U.S.C. § 310 in time of war, the maximum period of confinement and forfeiture of pay and allowances authorized for such offense shall be increased by five years.

5. ***Elements***

a. That the accused possessed, used, distributed, imported, exported, introduced, or manufactured a controlled substance; or wrongfully possessed, manufactured, or introduced a controlled substance, with intent to distribute; and

b. that such conduct was wrongful.

In addition to the listed elements, the Court of Appeals of the Armed Forces has stated that two types of knowledge are necessary to establish the offenses of use and possession: knowledge of the presence of the substance and knowledge of its contraband nature. A change to the *Manual for Courts-Martial* incorporates deliberate ignorance as knowledge. Therefore, an accused who consciously avoids knowledge of the presence of a controlled substance or its contraband nature is subject to the same criminal liability as one who has actual knowledge.

6. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 37f, MCM, 1995. If possible, the quantity of drugs should be alleged, except for "use" specifications. If the quantity is not known, such terms as "some," "traces of," or "an unknown quantity of" may be utilized. If the offense involves distribution, the specification should identify the person who received or purchased the drugs. The identity of the receiver / purchaser is particularly useful in cases involving more than one distribution because it will make it easier for the factfinder to relate a witness' testimony to a specific alleged distribution. The amount of money paid for the drugs need not be pleaded. The accused's acts ***must*** be alleged to be "wrongful." The schedule to which a controlled substance belongs should be alleged, unless, the drug is one of the nine actually named in Article 112a, the schedule does not have to be charged. If the aggravating circumstances of sentinel / lookout, in time of war, etc., are applicable, allege the circumstances.

b. ***Sample pleadings***

Charge: Violation of the UCMJ, Article 112a

(1) ***Possession***

Specification 1: In that Seaman Pushin D. Snow, U.S. Navy, USS Angeldust, on active duty, did, on board USS Angeldust, at sea, on or about 15 December 19CY, wrongfully possess 50 grams, more or less, of marijuana, while on board a vessel used by the armed forces, to wit: USS Angeldust.

(2) ***Use***

Specification 2: In that Seaman Pushin D. Snow, U.S. Navy, USS Angeldust, on active duty, did, on board USS Angeldust, at sea, on or about 15 December 19CY, wrongfully use cocaine , while on board a vessel used by the armed forces, to wit: USS Angeldust.

(3) ***Distribution***

Specification 3: In that Seaman Pushin D. Snow, U.S. Navy, USS Angeldust, on active duty, did, on board USS Angeldust, at sea, on or about 15 December 19CY, wrongfully distribute 50 grams, more or less, of morphine, a Schedule II controlled substance, to Seaman Ida Snort, U.S. Navy , while on board a vessel used by the armed forces, to wit: USS Angeldust.

(4) ***Manufacture***

Specification 4: In that Seaman Pushin D. Snow, U.S. Navy, USS Angeldust, on active duty, did, on board USS Angeldust, at sea, on or about 15 December 19CY, wrongfully manufacture 50 grams, more or less, of marijuana, while on board a vessel used by the armed forces, to wit: USS Angeldust.

(5) ***Introduction***

Specification 5: In that Seaman Pushin D. Snow, U.S. Navy, USS Angeldust, on active duty, did, on board USS Angeldust, at sea, on or about 15 December 19CY, wrongfully introduce 50 grams, more or less, of marijuana onto a vessel used by the armed forces, to wit: USS Angeldust.

(6) ***Introduction with the intent to distribute***

Specification 6: In that Seaman Pushin D. Snow, U.S. Navy, USS Angeldust, on active duty, did, on or about 15 December 19CY, on board USS Angeldust, at sea, on or about 15 December 19CY, wrongfully introduce 450 grams, more or less, of marijuana, onto a vessel used by the armed forces, to wit: USS Angeldust, with the intent to distribute the said controlled substance.

C. ***Drug paraphernalia.*** Article 112a does not address drug paraphernalia; however, a service-wide drug paraphernalia regulation has been promulgated for the Navy and Marine Corps by SECNAVINST 5300.28B dated 11 July 1990.

1. The relevant text of this instruction provides: "[e]xcept for authorized medicinal purposes, the use, possession, or distribution of drug abuse paraphernalia by persons in the Naval Service is hereby prohibited. . . ."

The definition provides:

> Drug abuse paraphernalia includes all equipment, products, and materials of any kind that are used, intended for use, or designed for use in injecting, ingesting, inhaling, or otherwise introducing into the human body in any manner drugs, chemicals, or other controlled substances in violation of law.

2. ***Analysis.*** Although the instruction uses somewhat broad language to define drug abuse paraphernalia, enclosure (1) to the instruction contains a nonexclusive list of common forms of property that can fall within the definition. It is also clear that nothing can be considered paraphernalia unless it is used, possessed, sold, or transferred with the intent that it be used as a medium through which illegal drugs are to be introduced into the body. Hence, the intent of an accused determines whether any given form of property is drug abuse paraphernalia. Factors tending to prove the intent of the accused might include statements concerning the use of the objects by a person in possession of drugs; proximity of the paraphernalia, in time and space, to the unlawful use of drugs; instructions provided with an object concerning its use; descriptive materials with the object explaining its use; and the existence or scope of legitimate uses for the object. Consequently, an item as innocuous as a government issue ballpoint pen may be paraphernalia if an accused uses it to smoke marijuana. On the other hand, possession of an item commonly associated with drug abuse, such as a water pipe, may not be banned if it is possessed for an innocent purpose. The regulation also contains an exception for "authorized medicinal purposes." Hence, if an accused possesses a syringe with the purpose of injecting a controlled substance into his body, he is not guilty of an offense if his possession was incident to an authorized medicinal

purpose. Violations of this SECNAV instruction should be enforced by disciplinary or punitive action as may be appropriate under Article 92 (violation of a lawful general order).

D. ***Failure to report drug offenses***

1. ***Basis for prosecution***

A. Article 1137, *U.S. Navy Regulations, 1990*, states:

> Persons in the naval service shall report as soon as possible to superior authority all offenses under the UCMJ which come under their observation, except when such persons are themselves already criminally involved in such offenses at the time such offenses first come under their observation.

Navy and Marine Corps personnel who fail to report drug offenses committed by fellow servicemembers could be charged under Article 92(1), UCMJ, with failure to obey a lawful general regulation. (Note that whether or not the accused was aware of the existence of Article 1137 would be irrelevant in any such prosecution. Part IV, para. 16c(1)(d), MCM, 1995.)

E. ***Article 134.*** Drug violations which are not addressed by Article 112a nor by applicable regulations might potentially be prosecuted under clause 3 of Article 134, "crimes or offenses not capital." A clause 3 prosecution could be accomplished under two theories. First, another federal criminal statute could be the basis for prosecution. Second, state criminal statutes might be assimilated into federal law through the use of the Federal Assimilative Crimes Act (provided the offense occurs in an area subject to exclusive or concurrent federal jurisdiction).

Designer drugs. Designer drugs such as "Ecstacy" and "China White" are synthetic substitutes for existing drugs. The concept has been called "diabolically simple." Illegal drugs are defined and classified in the United States by their precise molecular structure. By making simple molecular alterations an underground chemist can create a new chemical cousin, or analog, that produces the same effects as a "controlled substance" yet is completely legal. As soon as one version is discovered and added to the controlled substances list, the chemist goes back to the lab, makes a few changes, and stays one step ahead of the law.

To combat this problem, Congress passed the Controlled Substance Analogue Enforcement Act of 1986, 21 U.S.C. § 813, which prohibits all permutations of existing illegal drugs, whether known or unknown. Thus, the approach to take when faced with offenses involving designer drugs is to check if the substance appears on Schedules I through V. If so, charge it under Article 112a. If the substance is not listed in any of the five schedules, charge it under Article 134, clause 3.

G. ***Common defenses in drug cases.*** Three defenses commonly arise in drug cases: lack

of knowledge, entrapment, and lack of wrongfulness.

1. ***Lack of knowledge***. Three types of lack of knowledge on the part of the accused may be pertinent in drug possession cases. First, the accused may claim a lack of knowledge that he or she possessed the substance. Second, the accused may claim lack of knowledge regarding the substance's true identity. Third, the accused may claim a lack of knowledge that possession of the substance was illegal.

The accused's possession must be knowing and conscious. Therefore, if the accused didn't know he or she possessed the substance, the accused has a complete defense. Likewise, if the accused knew he or she possessed the substance, but honestly didn't know the substance's true identity, the accused also has a complete defense. Ignorance of the fact that possession of the substance is illegal is no defense.

2. ***Entrapment***. Entrapment may be a defense to any crime, but it often arises in prosecutions for distribution of drugs. Entrapment exists when the police or an undercover agent deliberately coerce the accused to commit a crime, even though the accused had no predisposition to do so. Entrapment involves overcoming the accused's desire to be a law-abiding person. It is not merely affording the accused an opportunity to commit a crime that the accused already was predisposed to commit; instead, the accused must have had ***no*** predisposition to commit the crime. For entrapment to lie, therefore, the accused must have committed the crime only because of overbearing, insistent coercion by the police or an undercover agent.

3. ***Lack of wrongfulness***. Another defense that may be raised on drug use is the "authorized medicinal purposes" exception. Article 1138, *U.S. Navy Regulations, 1990,* permits handling of an otherwise illegal drug or controlled substance if such handling is for authorized medicinal purposes. Because the general rule prohibits the handling of illegal drugs, however, the burden is placed on the accused to produce some evidence to show that he / she falls within the exception to that rule. Once the evidence produced by the defense indicates that the accused's acts were for authorized medicinal purposes, the burden then shifts to the prosecution to prove beyond a reasonable doubt that there was no such medicinal authorization.

CHAPTER XXIX

DRUNKENNESS

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CHAPTER XXIX

DRUNKENNESS

A. ***Overview***. The UCMJ prohibits four major types of drunkenness offenses:

1. Drunk on ship, on station, in camp, or in quarters (Article 134);

2. drunk on duty (Article 112);

3. incapacitation for duty (Article 134); and

4. drunken or reckless operation of a vehicle, aircraft, or vessel (Article 111).

B. ***"Drunk" defined***. Part IV, para. 35c(3), MCM, 1995, defines "drunkenness" as "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties." Drunkenness may therefore be measured in terms of the impairment of physical abilities, such as vision, speech, balance, coordination, and reaction time. Drunkenness may also be 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. The accused's intoxication must be voluntary. Therefore, if ruffians pin the accused to the floor and force the accused to drink, the accused's resulting intoxication will not be voluntary.

C. ***Proof of drunkenness***. Intoxication can be proven in several ways. The results of scientific tests, such as blood-alcohol or breathalyzer tests, are the most reliable proof of intoxication when they are properly performed. Such tests are sufficient to prove drunkenness for Article 111 (drunken or reckless operation of a vehicle, aircraft, or vessel). Another way to prove drunkenness is by physical coordination test. Tests of physical coordination, such as walking a straight line or balancing on one leg, are frequently administered when the accused is apprehended. These tests do ***not*** require Article 31 warnings. Nonexpert opinion is also admissible to prove intoxication. Any witness who observed the accused can testify regarding his or her observations of the accused's behavior. The witness will describe the condition of the accused's eyes, the smell of the accused's breath, the extent to which the accused's speech was slurred, and any apparent difficulty the accused had with balance or coordination. After testifying about these basic facts, the

witness may then state an opinion about the state of the accused's sobriety. The court may give the witness' opinion as much weight as the court believes it deserves under the circumstances.

D. ***Drunk on ship, on station, in camp, or in quarters*** (Article 134)

1. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused was drunk on station, on ship, in camp, or in quarters; and

b. under the circumstances, the accused's conduct was prejudicial to good order and discipline in the armed forces or was service-discrediting.

2. ***Discussion***. The accused must have been drunk while voluntarily present on a military installation or in military quarters. If the accused was brought aboard the installation against his or her will, the accused is not guilty of this offense. Not all instances of drunkenness on a military installation or in quarters are offenses against the Code. Drunkenness will be criminal only if the accused's behavior was directly prejudicial to good order and discipline or was service-discrediting. This is a factual issue for the court to decide after considering all the evidence in the case.

3. ***Drunk and disorderly***. The offense of drunk and disorderly is an aggravated form of drunk on ship, on station, in camp, or in quarters. This offense is also prosecuted under Article 134. To be found guilty of drunk and disorderly, the accused must be drunk aboard a military installation or in quarters and must be engaged in disorderly conduct. *See* chapter XXVI of this text for a discussion of disorderly conduct.

4. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 73f, MCM, 1995. If the accused was drunk and disorderly, the specification should allege "drunk and disorderly" rather than just "drunk." Higher punishment is authorized if the conduct is ***pled*** and ***proved*** to be "conduct of a nature to bring discredit upon the armed forces."

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 134.
>
> Specification: In that Chief Boatswain's Mate John E. Walker, U.S. Navy, USS BEERKEG, on active duty, was, on board USS BEERKEG, located at New London, Connecticut, on or about 14 December 19CY, drunk and disorderly on board ship.

E. ***Drunk on duty*** (Article 112)

1. ***Elements of the offense.*** The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused was on duty in a certain capacity; and

b. the accused was found drunk while on that duty.

2. ***Discussion.*** The term "duty" includes all types of military duties, ***except*** for those of a sentinel or lookout. Drunkenness by a sentinel or lookout is prosecuted under Article 113. "Duty" includes standby duty, such as for flight crews, but it does not include liberty or leave. In order to be drunk on duty, the accused must first assume the duty and then be found drunk while still on duty. In many cases, this requirement will be satisfied by the accused's coming to work drunk. Where formal posting or assumption of duty is required, however, the accused will not be on duty until he or she properly assumes the duty. The duty status is terminated by relief, dismissal, end of the working day, or abandonment of the duty. Thus, a person who leaves his or her appointed place of duty without proper authority and goes to a tavern and gets drunk during working hours will not be drunk on duty, although he or she may be guilty of a violation of Article 86, or incapacitation for duty under Article 134. Merely being hung-over is not sufficient for this offense.

3. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 36f, MCM, 1995. The specification should allege the accused's duty.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 112.
>
> Specification: In that Yeoman Third Class Susan S. Barandgrill, U.S. Navy, USS RUMRUN, on active duty, was, on board USS RUMRUN, located at Perth Amboy, New Jersey, on or about 1 December 19CY, found drunk while on duty as a master-at-arms.

F. ***Incapacitation for duty through prior wrongful indulgence in intoxicating liquor or any drug*** (Article 134)

1. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. The accused was assigned certain duties;

b. the accused was incapacitated for the proper performance of those duties;

c. the accused's incapacitation was caused by his or her prior wrongful indulgence in intoxicating liquor or any drug; and

d. under the circumstances, the accused's conduct was prejudicial to good order and discipline in the armed forces or was service-discrediting.

2. ***Discussion***. "Incapacitation" occurs when the accused is unable to perform assigned duties in a proper manner. Drunkenness is not required, and incapacitation can result from a bad hangover. As a practical matter, if the accused is drunk when he or she is to assume the duties, the accused will usually be considered to be incapacitated. This is not a lesser included offense of drunk on duty. What if he assumes the duty while incapacitated? Although the law is unclear on this area, it is believed that assumption of the duty does not create a defense. To be safe, the accused should also be charged with dereliction of duty in violation of Article 92.

3. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 76f, MCM, 1995. The accused's duty should be alleged.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 134.
>
> Specification: In that Chief Yeoman Gus L. Turpentine, U.S. Navy, Service School Command, Naval Training Center, San Diego, California, on active duty, was, at Service School Command, Naval Training Center, San Diego, California, on or about 10 December 19CY, as a result of wrongful previous overindulgence in intoxicating liquor or drugs, incapacitated for the proper performance of his duties as an instructor at Yeoman "A" School.

G. ***Drunken or reckless driving*** (Article 111)

1. ***Elements of the offense***. The prosecution must prove beyond reasonable doubt that:

a. At the time and place alleged, the accused operated or physically controlled a vehicle, aircraft, or vessel; and

b. the accused was either:

(1) impaired by a substance listed under Article 112(a) (drug); or

(2) drunk; or

(3) the alcohol concentration in the accused's blood or breath was 0.10 grams of alcohol per 100 milliliters of blood or 0.10 grams of alcohol per 210 liters of breath as shown by chemical analysis; or

(4) operating the vehicle in a reckless or wanton manner.

(***Note***: If injury resulted, add as an element)

c. that the accused thereby caused the vehicle to injure a person.

2. ***Discussion***

a. ***Vehicle***. "Vehicle" includes any mechanical conveyance for land transportation, whether or not motor-driven or passenger-carrying. One operates a vehicle when one guides the vehicle while in motion, sets the vehicle in motion, or manipulates the vehicle's controls so as to cause the vehicle to move. Water or air transportation is not included.

b. ***Drunk or reckless***. The accused must either be drunk while driving or driving in a reckless manner. Note that for this article, drunkenness may be proven either through scientific tests, physical coordination tests, non-expert witnesses or any combination of the above. "Reckless" involves a culpable disregard of the foreseeable consequences of one's actions. It is a significantly greater degree of carelessness than simple negligence. "Wanton" involves an even greater degree of negligence than recklessness. Wantonness involves an utter disregard of the probable consequences of one's actions. A person who acts wantonly behaves as if he or she doesn't care about what happens as a result of his or her actions.

Drunken driving is not always reckless driving. Drunkenness is a factor which, along with all the other evidence, may prove recklessness or wantonness. Thus, a drunk driver, who nonetheless obeys the speed limit and is careful of the safety of others, is

not guilty of reckless driving—only drunken driving. A drunk driver who drives 20 mph over the speed limit, weaving from one lane to another, may also be reckless. A drunk driver who drives down a narrow, crooked residential street at 90 mph, driving up over the sidewalk, running all stop lights, and hitting parked cars is acting wantonly. There is no such offense as drunk ***and*** reckless driving.

3. ***Drunken or reckless driving resulting in personal injury.*** If the accused's drunken or reckless driving results in personal injury to a person, including the accused, this fact increases the maximum authorized punishment. The fact that a personal injury resulted must be pleaded and proven beyond reasonable doubt at trial. A personal injury is any injury serious enough to warrant medical attention.

4. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 35f, MCM, 1995. If the accused's driving results in personal injury, that fact must be alleged, but the nature of the injury need not be pleaded.

b. ***Sample pleadings***

Charge: Violation of the UCMJ, Article 111.

(1) ***Drunken driving***

Specification 1: In that Seaman Recruit Desmond C. Crazydriver, U.S. Navy, USS CRUNCH, on active duty, did, at Naval Air Station, Jacksonville, Florida, on or about 5 August 19CY, on Yorktown Avenue, between Saratoga and Allegheny Avenues, operate a vehicle, to wit: a passenger car, while drunk.

(2) ***Reckless driving***

Specification 2: In that Seaman Recruit Desmond C. Crazydriver, U.S. Navy, USS CRUNCH, on active duty, did, at Naval Station, Philadelphia, Pennsylvania, on or about 3 September 19CY, on Broad Street, between Porter Avenue and the Delaware River, operate a vehicle, to wit: a passenger car, in a reckless manner by driving on the sidewalk at a speed in excess of 50 miles per hour.

(3) ***Drunken driving resulting in personal injury***

Specification 3: In that Seaman Recruit Desmond C. Crazydriver, U.S. Navy, USS Crunch, on active duty, did, at Naval Air Station, **Error! Bookmark not defined.**Fly, Ohio, on or about 6 October 19CY, on Second Street, between the Main Gate and Exhaustfume Road, operate a vehicle, to wit: a passenger car, while drunk, and did thereby cause said vehicle to strike and injure Airman Apprentice Flattern A. Pancake, U.S. Navy.

CHAPTER XXX

MISCONDUCT BY A SENTINEL OR LOOKOUT

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CHAPTER XXX

MISCONDUCT BY A SENTINEL OR LOOKOUT

A. ***Overview.*** Article 113 makes it a criminal offense for a sentinel or lookout to be drunk on post, to sleep on post, or to leave the post before being properly relieved. Article 134 prohibits sitting or loitering on post. Sentinel and lookout offenses involve the accused's failure to remain vigilant and alert. They constitute a distinct group of serious military offenses, some of which are punishable by death if committed during time of declared war.

B. ***Elements of the offenses.*** The five major sentinel and lookout offenses have similar elements. The prosecution must prove beyond a reasonable doubt that:

1. The accused was posted as a sentinel or lookout; and

2. at the time and place alleged, the accused:

   a. was found drunk on post (Article 113); or

   b. was found asleep on post (Article 113); or

   c. left his or her post before being properly relieved (Article 113); or

   d. wrongfully sat down on post (Article 134); or

   e. loitered on post (Article 134); and

   f. (for sitting down or loitering on post only—Article 134) under the circumstances, the accused's conduct was prejudicial to good order and discipline in the armed forces or was service-discrediting.

(***Note***: If the offense was committed in time of war or while the accused was receiving hostile fire pay, add as an element)

g. that the offense was committed (in time of war) (while the accused was receiving special pay under 37 U.S.C. § 310).

C. ***Who is a sentinel or lookout?*** A sentinel or lookout is one whose military duty requires constant vigilance and alertness. Part IV, para. 38c(4), MCM, 1995, describes a sentinel or lookout as one whose duties include the requirement to "maintain constant alertness, be vigilant, and remain awake, in order to observe for the possible approach of an enemy, or to guard persons, property, or a place, and to sound the alert, if necessary." The terms include one who is detailed to use any equipment designed to locate friend, foe, or possible danger, or at a designated place to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work. Whether the accused was a sentinel or lookout, within the meaning of Articles 113 and 134, is a factual issue to be decided at trial. The most important factor will be whether the accused's duties required constant vigilance. Therefore, the instruction or orders that describe the accused's duties will be very important evidence, especially if those orders mandate an extraordinary degree of alertness. Misbehavior by watchstanders who do not fit the definitions of "sentinel" or "lookout" may fall under Articles 86, 92, 112, 133, and 134 depending on the facts.

D. ***Drunk on post.*** "Drunk" has the same meaning under Article 113 as it does for other drunkenness offenses under the Code. *See* chapter XXIX of this text for a detailed discussion of drunkenness.

E. ***Sleeping on post.*** Sleeping on post is perhaps the most common sentinel or lookout offense. Although sleeping on post may sometimes appear to be a minor infraction, it is nonetheless a capital offense if committed during time of declared war. Sleep is a condition of ***insentience*** sufficient to impair the full exercise of mental and physical faculties. It is more than a dulling of the senses or drowsiness, but it is not necessary that the accused be wholly comatose. Proof that the accused was asleep always involves circumstantial evidence, such as the fact that the accused was snoring, was in a reclining position, did not respond to questions, or did not respond to shaking. The accused is guilty of sleeping on post if he or she either intentionally went to sleep or accidentally fell asleep. If the accused falls asleep due to factors beyond his or her control—such as illness or unexpected effects of prescribed medication—the accused will not be criminally liable. If the accused could have prevented falling asleep by getting proper rest before assuming his or her post, however, the accused may be found guilty of this offense.

F. ***Leaving post before relief.*** The accused has left the post when he or she goes far enough away to impair the maintenance of constant alertness. Thus, a sentinel at the gate to a military installation may walk several yards from the guard box and not leave the post. On the other hand, a radar observer may leave the post by going only a few inches away.

G. ***Loitering on post.*** Loitering connotes idle behavior and inattention by the sentinel or lookout. It includes sauntering, idling, lingering, reading unauthorized material, or other acts that detract from the maintenance of vigilance.

H. ***Wrongful sitting***. Sitting on post must be unauthorized sitting which detracts from the proper maintenance of vigilance. Therefore, not all sitting on post is wrongful.

I. ***Pleading***

1. ***General considerations***. *See* Part IV, paras. 38f and 104f, MCM, 1995. The format for specifications under Article 113 and Article 134 are substantially similar. Under Article 113, if the drunkenness on post, sleeping on post, leaving the post occurred in an area designated as authorizing combat pay, this is an aggravating fact which significantly increases the authorized maximum punishment. Since the Article 113 sentinel offenses are capital offenses in time of declared war, the phrase "during time of declared war" should be added after the date of the offense when appropriate.

2. ***Sample pleadings***

a. ***Sleeping on post*** (for drunk on post, substitute "drunk" for "sleeping")

Charge: Violation of the UCMJ, Article 113.

Specification: In that Private First Class Ima Z. Rack, U.S. Marine Corps, Marine Barracks, Charleston, South Carolina, on active duty, on or about 18 July 19CY, at Naval Base, Charleston, South Carolina, being on post as a sentinel at Gate No. 1, was found sleeping upon her post.

b. ***Leaving post before proper relief***

Charge: Violation of the UCMJ, Article 113.

Specification: In that Private First Class Harry N. Van Ish, U.S. Marine Corps, Marine Barracks, Charleston, South Carolina, on active duty, on or about 20 August 19CY, at Naval Base, Charleston, South Carolina, being posted as a sentinel at Gate No. 1, did leave his post before he was regularly relieved.

c. ***Loitering on post*** (for sitting down, substitute "wrongfully sit down" for "loiter")

Charge: Violation of the UCMJ, Article 134.

Specification: In that Seaman Apprentice Ida G. Brick, U.S. Navy, Naval Education and Training Center, Newport, Rhode Island, on

active duty, while posted as a sentinel, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 16 June 19CY, loiter on her post.

CHAPTER XXXI

BREACHES OF RESTRAINT

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CHAPTER XXXI

BREACHES OF RESTRAINT

A. ***Overview***. Articles 95 and 134 prohibit five major offenses involving breaches of lawful restraint. Article 95 prohibits resisting apprehension, escape from confinement, escape from custody, and breaking arrest. Breaking restriction is prosecuted under Article 134.

B. ***Resisting apprehension*** (Article 95)

1. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, a certain person attempted to apprehend the accused;

b. the person attempting to apprehend the accused was a person lawfully authorized to apprehend the accused; and

c. the accused actively resisted the apprehension by committing certain acts.

2. ***Discussion***

a. ***Apprehension***. Article 7(a), UCMJ, defines apprehension as the act of taking a person into custody. Apprehension equates to a civilian arrest. In the military justice system, the terms "apprehension" and "arrest" must not be confused. They are not synonymous.

b. ***The attempt to apprehend***. Someone must have made an overt effort to apprehend the accused. This attempt must include clear notice to the accused that he or she was being placed in custody. While words such as "You are under apprehension" are the clearest notification to the accused, the accused may be notified by other words importing the same meaning. Notification may also occur through acts, or a combination of

words and acts, which clearly communicate to the accused the fact that he or she is being apprehended.

c. ***Authority to apprehend.*** Article 7 of the Code and R.C.M. 302(b), MCM, 1995, authorize the following persons to conduct military apprehensions:

(1) commissioned officers;

(2) warrant officers;

(3) noncommissioned officers and petty officers; and

(4) other persons in the execution of law enforcement duties.

R.C.M. 302(b) also states a policy that an enlisted member should apprehend a warrant or commissioned officer only when ordered to do so by another commissioned officer, when necessary to prevent disgrace to the service, or to prevent the escape of one who has committed a serious crime.

d. ***Resistance.*** Words, by themselves, are insufficient to constitute resisting apprehension. Some degree of physical resistance is also required, such as assaulting the apprehending officer. Flight alone, however, is not adequate to establish the third element of the offense that the accused "actively resisted" the apprehension. The Court held in the case of *United States v. Malone*, 34 M.J. 213 (C.M.A. 1992) that such actions as: accelerating a vehicle, driving around a police barricade, swerving to avoid a police vehicle placed in his path and scattering sentries posted at a gate, were sufficient to satisfy the third element of the offense. Contrast that with "mere flight" where an accused flees from an arrest order and sirens. However, flight from an arresting officer may be charged as a failure to obey the lawful order of one not a superior under Article 92(2) provided the accused had a duty to obey the order, such as one issued by a sentinel or a member of the armed forces police.

e. ***Knowledge.*** The "clear notification" requirement for the attempt to apprehend implies that the accused must have knowledge that an apprehension is being attempted. There is apparently no requirement that the accused actually know that the person attempting the apprehension is lawfully empowered to apprehend. Part IV, para. 19c(1)(d), MCM, 1995, however, provides: "It is a defense that the accused held a reasonable belief that the person attempting to apprehend him did not have authority to do so." Therefore, a reasonable belief that the apprehending person was acting without ***authority*** to apprehend is a complete defense. This same analysis applies to the probable cause to apprehend. The *Manual* discussion indicates that the existence of probable cause is presumed. Lack of probable cause would be an affirmative defense to be raised by the accused. Part IV, para. 19c(1), MCM, 1995, and analysis.

f. ***Alternate offenses.*** An accused, who ***forcibly*** resists apprehension, may be convicted of assault even if the apprehending officers lacked probable cause, provided the officers were acting in good faith and do not use extreme force themselves. Part IV, para. 19c(1)(e), MCM, 1995.

3. ***Attempt not lesser included offense.*** Resisting apprehension is one of the few offenses for which attempt is not a lesser included offense. If the accused attempts to resist apprehension, the accused has, in fact, resisted apprehension. If it is uncertain whether the resistance occurred before or after the accused submitted to the apprehension, a specification alleging escape from custody should also be pleaded in order to provide for the contingencies of proof at trial.

4. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 19f(1), MCM, 1995. While not included in the *Manual* sample specification, the specific acts which constituted the resistance should be pleaded. The identity of the person attempting the apprehension should be pleaded.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 95.
>
> Specification: In that Fireman Neville B. Kaught, U.S. Navy, USS ELUSIVE, on active duty, did, on board USS ELUSIVE, located at Mayport, Florida, on or about 19 May 19CY, resist being apprehended by Lieutenant Will I. Ketchum, U.S. Navy, a person authorized to apprehend the accused, by running away from the said Lieutenant Ketchum.

C. ***Escape from confinement and escape from custody*** (Article 95)

1. ***General concept.*** Although escape from confinement and escape from custody are two separate, distinct offenses, they share many common legal principles which permit them to be discussed together in this text. Both offenses involve an escape from restraint. Confinement implies physical restraint, while custody need only be moral restraint (but may be physical restraint).

2. ***Elements of the offenses.*** The prosecution must prove beyond a reasonable doubt that:

a. The accused was lawfully placed in confinement or in custody;

b. that the person who placed the accused in custody or confinement was authorized to do so; and

c. at the time and place alleged, the accused freed himself or herself from the restraint of the confinement or custody before being released therefrom by proper authority.

3. ***Discussion***

a. ***Confinement***. Confinement is the physical restraint of the person. One is in confinement if his or her freedom of movement is restrained by physical devices, such as leg irons, handcuffs, or a jail cell. A person, however, must ***first*** be delivered to and placed in a confinement facility prior to confinement status occurring. Thus, one who is in handcuffs is still only in custody if he or she has not yet been placed in a confinement facility or delivered to brig personnel.

A person may pass in and out of a status of confinement depending upon the existence or absence of physical restraint at a given moment. Thus, a prisoner at a brig is in a status of confinement while inside the brig. Suppose, however, that the prisoner is permitted to leave the brig on a work-release program. The prisoner is accompanied by an unarmed escort, who is instructed not to attempt to stop a fleeing prisoner. When the prisoner leaves the brig with the escort, the prisoner passes from a status of confinement to one of custody. At the end of the day, the prisoner will return to confinement. If, however, the prisoner is accompanied by a guard who has the ***duty and*** the ***means*** to exercise physical restraint, confinement continues outside the brig. Dereliction in the execution of the brig guard's duty to exercise physical restraint does not terminate the confinement status.

b. ***Custody***. Custody may only involve moral, rather than physical, restraint of freedom of movement. As noted above, it can also involve physical restraint. Custody is usually imposed by lawful apprehension. Custody also may be imposed by lawful orders restricting the individual's freedom of movement to extremely limited confines. For example, an accused, who has just been sentenced to confinement by a court-martial, is ordered by the trial counsel to remain in an office and await transportation to the brig. There is no restraint other than the legal and moral force of the trial counsel's order. If the accused runs away, the accused has escaped from custody. Another example of custody not imposed by apprehension would be the status of the work-release prisoner who is accompanied by a guard with no duty to personally restrain or stop escape.

c. ***Lawfully placed in restraint***. The accused must have been lawfully placed in confinement or custody. This merely means that the legal procedures for placing the accused in confinement or in custody must be substantially followed.

d. ***Freed before being properly released.*** The accused's escape from the restraint need only be temporary or momentary. If the accused is stopped before completely throwing off the physical or moral restraint, the accused may be found guilty of attempted escape from confinement or custody.

4. ***Separate offenses.*** Escape from confinement and escape from custody are entirely separate, distinct offenses. Custody and confinement are separate statuses. Therefore, escape from custody is not a lesser included offense of escape from confinement, even though custody would appear to be a factually less serious status. Likewise, escape from confinement is not a lesser included offense of escape from custody. If it is uncertain whether the accused escaped from confinement or from custody, both offenses should be charged in separate specifications. After considering all the evidence and applicable law, the court can decide which offense the accused committed. (Note, however, that attempted escape ***is*** a lesser included offense of each escape offense.)

5. ***Pleading***

a. ***General considerations.*** See Part IV, para. 19f(3) and (4), MCM, 1995. The sample pleading below alleges escape from confinement. An escape from custody pleading would follow the same format, but would substitute "custody of [person's name] a person authorized to apprehend the accused" for "confinement in [place]."

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 95.
>
> Specification: In that Private Duck N. Runn, U.S. Marine Corps, Headquarters and Service Squadron, Marine Corps Air Station, Cherry Point, North Carolina, on active duty, having been placed in confinement in the Marine Corps Air Station Brig, Cherry Point, North Carolina, by a person authorized to order the accused into confinement, did, at Marine Corps Air Station, Cherry Point, North Carolina, on or about 17 May 19CY, escape from confinement.

D. ***Breaking arrest*** (Article 95) ***and breaking restriction*** (Article 134)

1. ***General concept.*** Breaking arrest, under Article 95, and breaking restriction, under Article 134, are closely related offenses. Both involve the accused going beyond certain geographical limits imposed by superior authority.

2. ***Elements of the offenses.*** The prosecution must prove beyond a reasonable doubt that:

a. The accused was lawfully placed in arrest, or was lawfully restricted to certain limits, by proper authority;

b. the accused knew of the limits of the arrest or restriction;

c. at the time and place alleged, the accused, without proper authority, went beyond the limits of the arrest or restriction; (and)

d. (for breaking restriction only) under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was service-discrediting.

3. ***Discussion***

a. ***Arrest and restriction.*** Arrest and restriction are closely related forms of restraint. Both are imposed by superior authority and prescribe certain geographical limits, such as a ship or base, beyond which the accused may not go. As a practical matter, arrest often involves closer geographical limits than restriction. A person in arrest cannot be required to perform military duties. "Arrest" under Article 95 also includes arrest in quarters, which is a status of restraint which may be imposed as nonjudicial punishment only on an officer.

b. ***Proper authority.*** The person who placed the accused in arrest or restriction must have been legally authorized to do so.

c. ***Breaking arrest or restriction.*** The breach occurs when the accused goes ***beyond*** the limits of the arrest or restriction. Merely failing to comply with some other condition of the arrest or restriction, such as wearing a certain uniform, refraining from use of alcoholic beverages, or failing to muster at a specified time is not breaking arrest or restriction, although other violations of the Code may have been committed (e.g., Articles 92 or 86, respectively). (One decision from the Navy-Marine Corps Court of Military Review, that drinking alcohol while in a restricted status is properly charged as breaking restriction, appears to be a clear departure from the traditional law. It is recommended that the safe course to pursue would be to continue charging violation of the terms of a restriction order under Article 92 and to disregard this case.) Once the accused goes beyond the limits of the arrest or restriction, the offense is complete. The accused's return is no defense.

4. ***Lesser included offenses.*** Breaking restriction is a lesser included offense of breaking arrest. Attempts are lesser included offenses of both breaking arrest and breaking restriction.

5. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 19f(2) and 102f, MCM, 1995. The formats for pleading each offense are similar. Note that the accused's knowledge of the limits of the restriction or arrest are not expressly pleaded.

b. ***Sample pleadings***

(1) ***Breaking arrest***

Charge: Violation of the UCMJ, Article 95.

Specification: In that Ensign Busta Out, U.S. Navy, USS CAMDEN, on active duty, having been placed in arrest in the Bachelor Officers' Quarters, Naval Station, Philadelphia, Pennsylvania, by a person authorized to order the accused into arrest, did, at Naval Station, Philadelphia, Pennsylvania, on or about 24 October 19CY, break said arrest.

(2) ***Breaking restriction***

Charge: Violation of the UCMJ, Article 134.

Specification: In that Radioman Third Class Atwater Kent, U.S. Navy, USS ASHTABULA, on active duty, having been restricted to the limits of the USS ASHIABULA, by a person authorized to do so, did, on board USS ASHIABULA, located at Norfolk, Virginia, on or about 22 September 19CY, break said restriction.

CHAPTER XXXII

FALSIFICATION OFFENSES

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CHAPTER XXXII

FALSIFICATION OFFENSES

A. ***Overview***. The UCMJ prohibits five types of falsification offenses:

1. False official statements (Article 107);

2. forgery (Article 123);

3. perjury (Article 131);

4. frauds against the United States (Article 132); and

5. false swearing (Article 134).

Although serious offenses, forgery, perjury, and frauds against the United States are not frequently encountered by most commands. Therefore, this chapter will only briefly discuss these offenses. The major emphasis of this chapter will be on false official statements and false swearing, which are more common.

B. ***False official statement*** (Article 107)

1. ***Elements of the offense***. The prosecution must prove beyond reasonable doubt that:

a. At the time and place alleged, the accused signed a certain document or made a certain statement;

b. the statement or document was an official statement or document;

c. the statement or document was false;

d. the accused knew the statement or document was false when it was made or signed; and

e. the accused made the statement or signed the document with the intent to deceive.

2. ***Discussion***

a. ***Official statement***

(1) The statement may be oral or written. An official statement is one made in the line of duty. Line of duty has essentially been interpreted by our courts very broadly. For example, the Court of Military Appeals has recently held that signing false PCS orders to deceive a civilian landlord into believing that an accused was in receipt of transfer orders (in order to terminate a lease agreement early) was an official statement.

(2) ***Suspect's statement***

(a) A suspect who is being interrogated normally has no duty to make a statement. However, if warnings under Article 31, UCMJ, are given to a criminal suspect, the suspect's duty to respond truthfully to criminal investigators, if he responds at all, is sufficient to impute officiality to his statements for purposes of Article 107. Therefore, if a suspect elects to waive his / her rights under Article 31, UCMJ, the suspect must tell the truth or be submitted to prosecution under Article 107, UCMJ.

(b) On the other hand, if the suspect has an independent duty to make a statement or report, such statement is inherently official for the purposes of Article 107. This is true regardless of whether the suspect has been warned under Article 31, UCMJ. For example, an enlisted club manager has an independent duty to account for club funds. The manager's duty to account is separate from the right to remain silent under Article 31.

(c) The "Exculpatory No" doctrine provides that when a suspect merely states a negative response to a law enforcement agent's question the suspect should not be prosecuted under Article 107, UCMJ, even if the suspect knows that such a response is false. Recently our courts have totally eliminated the ability of an accused to seek refuge under the exculpatory no doctrine. The exculpatory no doctrine does not also apply to the offense of false swearing discussed below.

(d) Proceed cautiously when drafting charges in cases where the false statement was made by a suspect to a criminal investigator. Careful consideration should be given to possible alternative charges such as false swearing.

b. ***Accused's knowledge***. The accused must have actually known, at the time the official statement was made, that the statement was false. This element is established if the accused had no belief that the statement was true.

c. ***Intent***. The accused must make the false statement with an intent to deceive. This denotes an intent to mislead, trick, cheat, or induce someone to believe as true something that is false. No one actually need be deceived, nor any material benefit be obtained. If the accused knew that the official statement was false, the law will permit the court to infer that the accused intended to deceive.

3. ***Pleading***

a. ***General considerations***. *See* Part IV, para. 31f, MCM, 1995. Note that the false statement must be summarized or quoted verbatim. If the statement was entirely untrue, an allegation that it was wholly false will suffice. If the statement was only partially untrue, the specification must explain the way in which it was partially false.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 107.
>
> Specification: In that Chief Yeoman Wylie Slighe, U.S. Navy, USS Dubious, on active duty, did, on board USS Dubious, located at San Diego, California, on or about 15 May 19CY, with intent to deceive, make to Lieutenant Sherlock Holmes, U.S. Navy, an official statement, to wit: "Sir, I counted the money in the ship's post office cash drawer, and all $250.00 of it is there," or words to that effect, which statement was false in that said ship's post office cash drawer contained at that time only $106.00, more or less, in cash, and was then known by the said Chief Yeoman Slighe to be so false.

C. ***Forgery*** (Article 123). Forgery is the false making or alteration of a signature or writing. The accused's acts must affect the document in such a way that, if genuine, it would impose a legal liability on another person or would adversely change another person's legal rights or liabilities. Forgery requires the specific intent to defraud. There is no requirement, however, that anyone actually suffer financial loss or legal detriment from the accused's acts. Forgery most frequently involves unlawfully signing another's signature, or unlawfully altering a check or document. *See* Part IV, para. 48c, MCM, 1995, for an extensive discussion of forgery.

D. ***Perjury*** (Article 131). Perjury occurs when a witness gives sworn testimony in a judicial proceeding, and the witness knows at the time that the testimony is false. The perjured testimony must concern a material fact or issue in the trial. Judicial proceedings include courts-martial and Article 32 pretrial investigations. False sworn statements in other hearings, proceedings, or situations are prosecuted as false swearing in violation of Article 134. Closely related to perjury is the Article 134 offense of subornation of perjury, which occurs when the accused induces a witness in a judicial proceeding to give sworn testimony that the accused knows is untrue. *See* Part IV, para. 57c, MCM, 1995, for an extensive discussion of perjury.

E. ***Frauds against the United States*** (Article 132). Article 132 prohibits seven offenses which constitute, or relate to, frauds against the U.S. Government. These fraudulent offenses include:

1. Making a false or fraudulent claim against the United States;

2. presenting a false or fraudulent claim against the United States for approval or payment;

3. making or using a false writing or other paper in connection with a claim against the United States;

4. false oath in connection with claims against the United States;

5. forgery of a signature in connection with claims against the United States;

6. delivering less than the amount called for on a receipt; and

7. making or delivering a receipt without having full knowledge that it is true.

See Part IV, para. 58c, MCM, 1995, for an extensive discussion of the various types of frauds against the United States.

F. ***False swearing*** (Article 134)

1. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. At the time and place alleged, the accused took an oath or made an affirmation;

b. the oath or affirmation was lawfully administered to the accused by a person having authority to do so;

c. upon the oath or affirmation, the accused made a statement;

d. the statement was false;

e. the accused did not then believe that the statement was true; and

f. under the circumstances, the accused's conduct was prejudicial to good order and discipline in the armed forces, or was service-discrediting.

2. ***Discussion***

a. ***Lawfully administered oath or affirmation.*** The accused must make a statement under a lawfully administered oath or affirmation. Article 136, UCMJ, and Section 0902 of the *Manual of the Judge Advocate General* list the persons authorized to administer oaths and affirmations in the Department of the Navy. The oath or affirmation must actually be administered. Asking the accused questions such as "Is all of this true?" does not constitute the administration of an oath or affirmation.

b. ***False statement.*** The accused's statement under oath or affirmation must be false in fact. Moreover, the accused must not have believed that the statement was true when it was made. False swearing covers both official and unofficial statements.

3. ***Pleading***

a. ***General considerations.*** *See* Part IV, para. 79f, MCM, 1995. The statement must be summarized or quoted verbatim.

b. ***Sample pleading***

> Charge: Violation of the UCMJ, Article 134.
>
> Specification: In that Airman Apprentice Lyon Thrue Histeeth, U.S. Navy, Naval Station, Long Beach, California, on active duty, did, at Naval Station, Long Beach, California, on or about 1 July 19CY, in an affidavit, wrongfully and unlawfully made under lawful oath a false statement in substance as follows: "Mad Dog Kowalski couldn't have killed Sheldon the Fink, because he was with me all afternoon," which statement he did not then believe to be true.

CHAPTER XXXIII

DEFENSES

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CHAPTER XXXIII

DEFENSES

A. ***Overview***. Previous chapters of this section have discussed the common defenses to the crimes described in each chapter. This chapter will briefly outline the various defenses recognized in military criminal law which typically confront the legal officer in the drafting of charges. This chapter will also discuss the defense of insanity, which is not presented elsewhere in this text.

Defenses may be grouped into two categories: defenses in bar of trial and defenses on the merits. Defenses on the merits can be subdivided into general defenses and affirmative defenses. Insanity can be both a defense in bar of trial and a defense on the merits.

B. ***Defenses in bar of trial***. Defenses in bar of trial are matters which do not directly relate to the accused's guilt or innocence. They present legal grounds for preventing the trial from proceeding. Defenses in bar of trial are decided by the military judge alone. A successful defense in bar of trial will usually result in a dismissal of the charges without any determination of the accused's guilt or innocence of those charges.

1. ***Lack of jurisdiction***. *See* R.C.M. 201-203, MCM, 1995, and section two (Procedure) of this text for a discussion of jurisdictional matters.

2. ***Statute of Limitations***. The Statute of Limitations under the UCMJ is Article 43. As to all offenses committed ***on or after*** 14 November 1986, the accused may not be tried unless sworn charges are received by the officer exercising summary court-martial jurisdiction over the accused within five years after the commission of the offense. No time limit exists, however, for capital offenses, UA in time of war, or missing movement in time of war. Any period during which the accused is in a status of unauthorized absence is excluded from the computation of the five-year period. Contact a judge advocate regarding offenses committed before 14 November 1986.

3. ***Former jeopardy***. *See* R.C.M. 907(b)(2)(C), MCM, 1995. Article 44(a) of the Code provides that no person may be tried, without his or her consent, a second time for the same offense. Former jeopardy does not apply to a rehearing which has been ordered to

correct errors in a previous trial of the same charges, nor does former jeopardy preclude a trial by court-martial when the previous trial was by a state court or foreign court. *But see* JAGMAN, § 0124 (prior approval of the Judge Advocate General required in order to court-martial one convicted by civilian court for same offense). Neither does former jeopardy apply when the former adjudication of the offense was at office hours or captain's mast.

4. ***Former punishment***. *See* R.C.M. 907(b)(2)(D)(iv), MCM, 1995. When punishment has been imposed under Article 15 for a ***minor*** offense, that offense cannot be tried at a subsequent court-martial. An offense is minor if its maximum authorized punishment—as set forth in Part IV, MCM, 1995—does ***not*** provide for confinement in excess of 1 year and / or a dishonorable discharge. Former punishment also applies to Article 13 punishments for minor disciplinary infractions by a person in pretrial restraint.

5. ***Denial of speedy trial***. *See* R.C.M. 707, MCM, 1995, and section two (Procedure) of this text.

6. ***Constructive condonation of desertion***. *See* chapter XXII ("Absence Offenses") of this section and R.C.M. 907(b)(2)(D)(iii), MCM, 1995.

7. ***Grant or promise of immunity***. *See* R.C.M. 704 and R.C.M. 907(b)(2)(D)(ii), MCM, 1995. If the accused has been previously promised or granted immunity from prosecution in return for his or her testimony at another proceeding, the accused may not be prosecuted for any offenses covered by the grant or promise of immunity. *See* JAGMAN, § 0138 for procedures for granting immunity.

8. ***Insanity***. The accused's lack of mental capacity to stand trial may be interposed as a defense preventing trial. If the prosecution fails to prove that the accused is mentally competent to stand trial, the trial will adjourn until such time as the accused is capable of standing trial, if ever. *See* part D of this chapter for a more complete analysis of the insanity defense.

C. ***Defenses on the merits***. Defenses on the merits directly relate to the issue of guilt or innocence. They are presented during the trial on guilt or innocence and are decided by the triers of fact (i.e. the members or, in a judge-alone trial, the military judge). A successful defense on the merits will usually result in a finding of not guilty to the charges and specifications to which the defense relates. Defenses on the merits may be subdivided into two categories: general defenses and affirmative—or special—defenses.

1. ***General defenses***. A general defense denies that the accused committed any or all of the acts that constitute elements of the offense charged. A general defense may arise merely by the inability of the prosecution, by its own evidence alone, to prove the accused's guilt beyond a reasonable doubt. A general defense may also negate one specific element of the offense. The following are the most common general defenses:

a. ***Lack of requisite criminal intent.*** The defense offers evidence that the accused committed some of the alleged acts, but that these acts were done without the required criminal intent. For example, an accused admits that he absented himself without authority, but the accused denies that he ever formed any intent to remain away permanently from his unit. Mistake of fact, discussed as an affirmative defense below, may also act as a general defense when the mistake prevented the accused from forming a required intent or state of mind. Diminished mental responsibility, discussed in part D of this chapter, also functions as a general defense when, because of mental disease or defect, or because of intoxication, the accused was unable to form a required specific intent.

b. ***Alibi.*** Under the alibi defense, the defense contends that the accused could not have committed the alleged offense because the accused was elsewhere when it occurred. It is the accused's responsibility to present evidence that he or she was elsewhere. Once such evidence is presented, the prosecution must prove beyond reasonable doubt that the accused was not elsewhere, but in fact committed the crime.

c. ***Illegality of orders.*** *See* chapter XX ("Orders Offenses and Dereliction of Duty") of this text.

d. ***Good character.*** Under recent military justice case law, evidence of good military character may act as a defense to the crime charged. Good military character is admissible in a drug prosecution to show the accused was not involved. Evidence of the character trait of honesty is admissible in a larceny trial. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders to show that the accused was less likely to have committed the offense. When admissible, it is the responsibility of the trier of fact to evaluate character evidence and to give it only so much weight as they deem appropriate under the circumstances. *See* Mil.R.Evid. 404 and 405 for further discussion.

2. ***Affirmative defenses.*** Affirmative defenses are also known as special defenses. The accused contends that his or her conduct was not criminal. In essence, the accused says, "I did it, but. . . ." It is the accused's responsibility to present evidence that raises the affirmative defense. Once such evidence is presented, the prosecution must prove beyond a reasonable doubt that the asserted affirmative defense does not apply. The following are the common affirmative defenses, most of which have been discussed elsewhere in this text.

a. ***Legal justification.*** *See* R.C.M. 916(c), MCM, 1995. Legal justification is the lawful performance of a lawful duty which results in the accused committing acts that otherwise would constitute a crime. The accused must be performing a lawful duty which may be imposed by statute, regulation, orders, or custom of the service. Furthermore, the accused must be performing the duty in a lawful manner, although not necessarily in exact compliance with precise procedural regulations.

b. ***Obedience to apparently lawful orders***. *See* R.C.M. 916(d), MCM, 1995. If the accused commits acts that would otherwise constitute a crime because he or she was ordered by competent authority to perform those acts, the accused will not be guilty of a crime if the orders were apparently lawful. An order is apparently lawful if a person of ordinary sense and understanding would know or believe it to be legal.

c. ***Accident or misadventure***. *See* chapter XXV ("Assaults") of this text, and R.C.M. 916(f), MCM, 1995.

d. ***Self-defense or defense of another***. *See* chapter XXV ("Assaults") of this text, and R.C.M. 916(e), MCM, 1995.

e. ***Duress***. *See* chapter XXV ("Assaults") of this text, and R.C.M. 916(h), MCM, 1094.

f. ***Entrapment***. *See* chapter XXVIII ("Drug Offenses") of this text, and R.C.M. 916(g), MCM, 1995.

g. ***Physical or financial inability***. *See* chapters XX ("Orders Offenses") and XXII ("Absence Offenses") of this text, and R.C.M. 916(i), MCM, 1995.

h. ***Lawful consent***. *See* chapter XXV ("Assaults") of this text. A person cannot usually give lawful consent to an act likely to result in grievous bodily harm or death.

i. ***Special privilege***. *See* chapter XXV ("Assaults") of this text.

j. ***Mistake of fact***. *See* chapters XXII ("Absence Offenses") and XXVIII ("Drug Offenses") of this text, and R.C.M. 916(j), MCM, 1995. When the accused's mistake of fact negates a required specific intent, mistake of fact is a general defense.

k. ***Insanity***. The accused's lack of mental responsibility at the time of the offense is a complete defense. Insanity is discussed in part D of this chapter and in R.C.M. 916(k), MCM, 1995.

D. ***Insanity***. In 1986, Congress enacted a new insanity standard under military law which applies to all offenses committed on or after 14 November 1986.

1. ***General concepts***. Insanity is a legal concept, not a medical or psychological one. Insanity involves two distinct phenomena:

a. Lack of mental responsibility at the time of the offense; and

b. lack of mental capacity to stand trial.

These two concepts focus more on the effects of the accused's mental condition on his or her actions, rather than on the precise psychological nature of the accused's mental disorder. Thus, the law is more concerned with "How did this mental condition affect the accused?" than with "What type of mental disorder did the accused suffer?" Although medical and psychological concepts are an important part of resolving issues of insanity, the ultimate decision is reserved for the trier of fact at trial (i.e. the court-martial members or, in a judge-alone trial, the military judge).

2. ***Lack of mental responsibility***

a. ***Statement of the rule***. A person is not responsible for criminal conduct if, at the time of such conduct, as a result of a severe mental disease or defect, the person was unable to appreciate the nature and quality or the wrongfulness of the acts.

b. "***Mental disease or defect***." A mental disease or defect, although not clearly defined in case law, appears to be an irrational state of mind which may be caused by physical or psychological factors. These may include brain damage, pathological deterioration of the brain, mental retardation, or psychiatric disorders. Personality disorders not rising to the level of mental illness do not constitute mental diseases or defects. An irrational state of mind caused by voluntary intoxication by liquor or drugs also is not a mental disease or defect. Voluntary intoxication may, however, be a general defense if the accused is unable to possess certain required knowledge or to form a required specific intent that is an element of the offense. *See* paragraph C.1 of this chapter. Repeated criminal or antisocial behavior would not meet the required state of mind.

c. ***Working of the rule***. In sum, therefore, in order for the insanity defense to be available to an accused, the accused must demonstrate the presence of a severe mental disease or defect ***and*** a lack of cognition. The burden of proving this defense is on the ***accused***. The standard is clear and convincing evidence.

3. ***Lack of mental capacity to stand trial***. An accused may not be tried if lacking sufficient mental capacity either:

a. To understand the nature of the proceedings; or

b. to cooperate intelligently in his or her own defense.

The lack of mental capacity may result from mental illness, mental retardation, brain damage, or any other neurological disorder which results in the lack of either of the mental capacities set forth above. If the accused lacks mental capacity to stand trial, court-martial proceedings will be held in abeyance until such time, if ever, that the accused is mentally capable of standing trial. The focus is on the accused's mental status on the day of trial rather than on the day the crime was committed.

4. ***Deciding insanity issues.*** The accused's insanity may be raised either before trial or during trial. It may even be raised after trial, but only under limited conditions.

a. ***Inquiry.*** R.C.M. 706, MCM, 1995, outlines procedures for inquiry into the accused's sanity. The issue of insanity may be raised by the accused's commanding officer, the defense counsel, the trial counsel, or the Article 32 investigating officer. If the accused's commanding officer has reason to believe that the accused is insane, or was insane at the time of the offense, the commanding officer will refer the accused to a sanity board. It is wise to refer the accused to the sanity board whenever the issue is raised in order to avoid later delays in disciplinary proceedings. The sanity board consists of one or more physicians. At least one member of the board should be a psychiatrist. Although sanity boards without a psychiatrist are permissible when a psychiatrist is not reasonably available, they are definitely unwise, as the findings of such a board would be subject to a strong attack at trial. The sanity board will evaluate, examine, and observe the accused. The sanity board is required to report findings about whether the accused was free enough from mental disease or defect to:

(1) Appreciate the criminality of his or her conduct;

(2) understand the nature of the proceedings; and

(3) cooperate intelligently in his or her own defense.

b. ***Commanding officer's options***

After receiving the board's report, the accused's commanding officer may take one of four actions:

(1) Dismiss the charges (if the commanding officer is competent to convene "a court-martial appropriate to try the offense charged");

(2) suspend disciplinary proceedings if the accused lacks mental capacity to stand trial;

(3) institute an administrative separation proceeding; or

(4) refer the charges for trial by court-martial.

5. ***Litigation at trial.*** R.C.M. 916(k)(3)(C), MCM, 1995, provides a detailed, extensive discussion of litigation of insanity at trial. Before the accused may raise an insanity defense at trial, he or she must submit to a sanity board evaluation if one has not been previously conducted. The military judge may enter any orders necessary to protect the accused's Article 31 or other substantive rights. The issue of mental capacity is an interlocutory question for a judge. The issue of mental responsibility has special voting procedures in a trial with members. The members must first vote (2/3 majority) on whether the government proved the elements of the offense beyond a reasonable doubt. If so, then

the members vote on whether the accused has proven lack of mental responsibility by clear and convincing evidence. If a majority believe the burden was met, the accused is not guilty by reason of lack of mental responsibility. Otherwise, the finding of guilty stands.

CHAPTER XXXIV

SEX OFFENSES

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CHAPTER XXXIV

SEX OFFENSES

A. ***Rape***. Article 120, UCMJ. Part IV, para. 45, MCM, 1995. Any person who commits an act of sexual intercourse, by force and without consent, is guilty of rape.

1. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt that:

a. That the accused committed an act of sexual intercourse; and

b. That the act of sexual intercourse was done by force and without consent.

2. ***Discussion***

a. This offense is gender neutral. A woman could theoretically rape a man. However, rape as defined in the UCMJ does not include same sex situations. A husband could also theoretically rape his wife.

b. Under the UCMJ's definition of rape, a spouse could be found guilty of raping his / her spouse.

c. Any penetration is sufficient to constitute the offense ("penetration however slight"), but the penetration must be that of the penis in the vagina. Other objects, such as fingers or beer bottles, would not amount to rape, but would certainly be chargeable under other articles in the UCMJ (i.e. Indecent assault).

d. No specific intent is required by article 120. An intoxication defense (i.e. the accused could not form the requisite specific intent due to intoxication) would not be legally sufficient because this is a general intent crime.

e. Lack of consent and force as elements:

(1) "Without one's consent" is equivalent to "against one's will."

(2) The force required to commit the offense of rape need only be more than the incidental force involved in penetration. In other words, the penetration itself is not enough to satisfy the element of force. The element of force contemplates an

application of force to overcome the victim's will and capacity to resist, ***unless*** any resistance is futile or the victim fears death or grievous bodily harm.

(3) A child under the age of 16 is incapable of giving valid consent.

(4) No consent exists where victim is incompetent, unconscious, or sleeping.

(5) Because both force and lack of consent must be shown to prove rape, the question of the degree of resistance may become a central issue. Part IV, para. 45c(1)(b), MCM, 1995. The amount of resistance required is that degree appropriate to the circumstances. This does not require the victim to risk her life to fend off her attacker. In some circumstances, no resistance at all is required. When a victim fails to take measures required under the circumstances, however, it opens the door for a permissible inference that she did consent. For example, a failure to communicate lack of consent may raise an inference that the victim consented; however, this is a permissive inference only, and may be rebutted by the prosecution.

(6) A victim's cooperation with her assailant after her resistance is overcome by numbers, threats, or fear of great bodily harm is not consent.

(7) Consent cannot be given retroactively. A rape has occurred immediately upon penetration when a victim has not given consent. Likewise, evidence that the victim ceased resisting after accused began engaging in sexual intercourse does not negate the crime of rape.

(8) There are two types of ***fraud*** that impact on the issue of consent:

(a) Sexual intercourse resulting from fraud in the ***factum*** is rape because there is no legally recognizable consent. For example, if a victim consents to and engages in sexual intercourse with ***A***, but then ***B*** replaces ***A***, and ***B*** then engages in sexual intercourse with the victim while the victim believes she is still with ***A***, her original partner. ***B*** would be guilty of rape.

(b) Consensual intercourse resulting from fraud in the inducement is not rape. Fraud in the inducement includes such general knavery as: "No, I'm not married"; "Of course I'll respect you in the morning"; "We'll get married as soon as ..."; "I'll pay you ___ dollars"; "I'll take you to the land of the BIG PX"; and so on. Here, the victim consents to penetration by a particular ***membrum virile***.

f. Mistake of fact as a defense:

(1) Honest and reasonable mistake of fact as to the victim's consent is an affirmative defense to rape. With regard to most general intent crimes, an honest and reasonable mistake of fact as to any element of the offense constitutes an affirmative defense.

(2) "Implied" consent is communicated through the victim's conduct; "express" consent is communicated through "words or affirmative acts manifesting agreement." Both "implied" and "express" consent can be actual consent. Mistake of fact will arise most often in "implied" consent cases. Here, the accused mistakenly infers consent from the victim's conduct when the victim did not actually consent.

(3) Although the accused's mistaken belief was honest, the real issue is: Would a reasonable person under the circumstances have inferred consent from the victim's behavior? If the answer is yes, then the accused's mistake of fact was both honest and reasonable, and the affirmative defense should prevail.

g. Maximum punishment. The ***Manual*** authorizes "death or such other punishment as a court-martial may direct" at Part IV, para. 45(e)(1), Article 120. It is unlikely that an accused would be sentenced to death unless the victim is under 12 years of age, the victim is maimed, or is the victim of attempted murder.

h. Lesser Included Offenses (LIOs):

(1) Article 134 - assault with intent to commit rape

(2) Article 134 - indecent assault

(3) Article 120 - carnal knowledge. Change 6 to the MCM makes carnal knowledge an LIO of rape; however, it is necessary that the age of the victim be alleged in the rape specification.

3. ***Pleading***

a. ***General considerations.*** See Part IV, para. 45f(1), MCM, 1995.

b. ***Sample pleading***

Charge: Violation of the Uniform Code of Military Justice, Article 120. Specification: In that Seaman Eddie Shore, U.S. Navy, USS BRUIN, Charlestown, Massachusetts, on active duty, did, at Boston, Massachusetts, on or about 19 May 19CY, rape Petty Officer Kristina Beach.

B. ***Carnal Knowledge***. Article 120, UCMJ. Part IV, para. 45, MCM, 1995. An act of sexual intercourse under circumstances not amounting to rape by a man, with a female not his wife who has not attained the age of 16 years, constitutes the offense of carnal knowledge.

1. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt:

a. That the accused committed an act of sexual intercourse with a certain female;

b. That the female was not the accused's wife; and

c. That at the time of the sexual intercourse, the female was under 16 years of age.

2. ***Discussion***

a. An honest and reasonable mistake of fact of the victim's age is an affirmative defense. The victim, however, must have been at least 12 years old at the time of the intercourse, and the accused must have reasonably believed the person was at least 16, to use this defense.

b. In the past, statutory rape laws came under attack as being unconstitutional by being violative of equal protection in that only men can be prosecuted under them. The accused has the burden of proving this defense by a preponderance of the evidence. The Supreme Court settled the issue in *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464 (1981). Justice Rehnquist, writing for the majority, emphasized the state's legitimate concern over teenage pregnancies as a valid state interest. The legislative desires to protect women from unwanted pregnancies and to encourage reporting were held to be both necessary and permissible. The Court noted that it did not take a medical degree to realize that only women get pregnant.

c. Maximum punishment. Change 7 to the MCM (effective 15 November 1994), increased the maximum punishments for carnal knowledge. For carnal knowledge with a child who, at the time of the offense, has attained the age of 12 years; the maximum punishment is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years. The maximum punishment for carnal knowledge with a child under the age of 12 years at the time of the offense is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for life. Part IV, para. 45(e)(2) and (3), Article 120.

d. Lesser Included Offenses (LIOs): Article 134 - indecent acts or liberties with a person under the age of 16 years.

3. ***Pleading***

a. ***General considerations.*** See Part IV, para. 45f(2), MCM, 1995.

b. ***Sample pleading***

Charge: Violation of the Uniform Code of Military Justice, Article 120. Specification: In that Seaman Roger Williams, U.S. Navy, USS TOLERANCE, Newport, Rhode Island, on active duty, did, at Providence, Rhode Island, on or about 22 November 19CY, commit the offense of carnal knowledge with Mary Dyer.

C. ***Sodomy***. Article 125, UCMJ. Part IV, para. 51, MCM, 1995.

– The engaging in unnatural carnal copulation (the placing of the sex organ in one's mouth or anus), either with another person of the same or opposite sex or with an animal, constitutes the offense of sodomy.

1. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt:

a. That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.

(***Note***: Add either or both of the following elements, if applicable)

b. That the act was done with a child under the age of 16.

c. That the act was done by force and without the consent of the other person.

2. ***Discussion***

a. The Supreme Court rejected the notion that consensual homosexual sodomy is protected under the Constitution. Citing this case as precedent, the Court of Military Appeals (now named the United States Court of Appeals for the Armed Forces) made it abundantly clear that a private, heterosexual, noncommercial, consensual oral sex act (sodomy) is prohibited by the UCMJ. *See United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992) and *United States v. Fagg*, 34 M.J. 179 (C.M.A. 1992).

b. Unnatural carnal copulation" includes both fellatio (oral stimulation of the penis) and cunnilingus (oral stimulation of the vulva).

c. Attempted rape and forcible sodomy arising out of the same transaction are separately punishable. Burglary, rape, and sodomy are separately punishable offenses since different societal norms are violated in each instance. Burglary is a crime against the habitation, rape an offense against the person, and sodomy an offense against morals.

d. Maximum confinement penalties:

(1) Consenting adult (over the age of 16 years) victim: 5 years; or,

(2) by force and without consent: life; or,

(3) with a child who, at the time of the offense, has attained the age of 12 years, but is under the age of 16 years: 20 years; or,

(4) with a child under the age of 12 at the time of the offense: life.

e. The above maximum confinement penalties are also coupled with a dishonorable discharge, and forfeiture of all pay and allowances as part of the overall maximum punishment. Part IV, para. 51e(1), (2), (3), and (4), Article 125.

f. Lesser Included Offenses (LIOs):

(1) With a child under the age of 16.

(a) Article 125—forcible sodomy (and offenses included therein; *see* subparagraph (2) below)

(b) Article 134—indecent acts with a child under 16

(c) Article 80—attempts.

(2) Forcible sodomy

(a) Article 125—sodomy (and offenses included therein; *see* subparagraph (3) below)

(b) Article 134—assault with intent to commit sodomy

(c) Article 134—indecent assault

(d) Article 80—attempts.

(3) Sodomy

(a) Article 134—indecent acts with another

(b) Article 80—attempts.

3. ***Pleading***

a. ***General considerations.*** See Part IV, para. 51f, MCM, 1995.

b. ***Sample pleading***

Charge: Violation of the Uniform Code of Military Justice, Article 125.

Specification: In that Disbursing Clerk Second Class Blarney Stone, U.S. Navy, USS THE SULLIVANS, Naval Weapons Station Earle, Colts Neck, New Jersey, on active duty, did, at Governor's Island, New York, on or about 17 March 19CY, commit sodomy with Colleen S. Toonie by force and without consent of the said Colleen S. Toonie.

D. ***Indecent assault***. Article 134, UCMJ. Part IV, para. 63, MCM, 1995. The taking of indecent, lewd, or lascivious liberties with a person not the spouse of the accused, without consent and against the will, with intent to gratify lust or sexual desires, constitutes the offense of indecent assault.

1. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt:

a. That the accused assaulted a certain person not the spouse of the accused in a certain manner;

b. That the acts were done with the intent to gratify the lust or sexual desires of the accused; and

c. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. ***Discussion***

a. The offense is not limited to male accused or to female victims.

b. It is a nonconsensual offense, requiring assault or battery.

c. It requires accused's specific intent to gratify lust or sexual desires.

d. Lesser Included Offenses (LIOs):

(1) Indecent assault is an LIO of rape.
(2) Indecent acts is an LIO of indecent assault.

e. Maximum confinement penalty: 5 years.

3. ***Pleading***

a. ***General considerations.*** See Part IV, para. 63f, MCM, 1995.

b. ***Sample pleading***

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Boatswain's Mate Third Class Rutherford B. Hayes, U.S. Navy, USS GEORGE WASHINGTON, Norfolk, Virginia, on active duty, did, at Virginia Beach, Virginia, on or about 22 February 19CY, commit an indecent assault upon Seaman Martina Van Buren a person not his wife by grabbing her breasts and crotch area, with intent to gratify his lust and sexual desires.

E. ***Assault with intent to commit rape, sodomy, or other specified felony.*** Article 134, UCMJ. Part IV, para. 64, MCM, 1995.

1. ***Elements of the offense.*** The prosecution must prove beyond a reasonable doubt:

a. That the accused assaulted a certain person;

b. That, at the time of the assault, the accused intended to kill (as required for murder or voluntary manslaughter) or intended to commit rape, robbery, sodomy, arson, burglary, or housebreaking; and

c. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. ***Discussion***

a. These are all specific intent offenses.

b. *See* discussion on article 134 assaults.

3. ***Pleading***

a. ***General considerations.*** See Part IV, para. 64f, MCM, 1995.

b. ***Sample pleading***

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Dental Technician First Class Samuel Jones, U.S. Navy, USS CELTIC, San Diego, California, on active duty, did, at Malibu Beach, California, on or about 19 January 19CY, with intent to commit rape, commit an assault upon Hospitalman Eve Johnson by holding her down, grabbing her breasts, and trying to spread her legs.

F. ***Adultery***. Article 134, UCMJ. Part IV, para. 62, MCM, 1995. Sexual intercourse with a person not the spouse of the accused (accused or the sex partner must be married to someone else).

1. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt:

a. That the accused wrongfully had sexual intercourse with a certain person;

b. That, at the time, the accused or the other person was married to someone else; and

c. That, under the circumstances, the conduct of the accused was to the prejudice of good order and the discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. ***Discussion***

a. Both individuals are guilty of adultery if either party is married to someone else, but purely private sexual intercourse by unmarried persons is not punishable under this article.

b. Adultery is still an offense under military law, regardless of whether or not it is an offense under the law of the state where the act occurred.

c. Adultery is ***not*** an LIO of rape.

d. It might be multiplicious for findings with rape if it arises out of a single act.

3. ***Pleading***

a. ***General considerations.*** See Part IV, para. 62f, MCM, 1995.

b. ***Sample pleading***

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Mineman Third Class Sam Malone, U.S. Navy, USS BULL AND FINCH, San Francisco, California, on active duty, did, at Canaan Valley, West Virginia, on or about 9 December 19CY, wrongfully have sexual intercourse with Dianne Chambers, a married woman not his wife.

G. ***Indecent acts with another***. Article 134, UCMJ. Part IV, para. 90, MCM, 1995.

1. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt:

a. That the accused committed a certain wrongful act with a certain person;

b. That the act was indecent; and

c. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. ***Discussion***

a. Indecent acts are defined as that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but which tends to excite lust and deprave the morals with respect to sexual relations. Part IV, para. 90c, MCM, 1995.

b. Some examples of indecent acts with another:

(1) Consensual homosexual acts may constitute the offense of indecent acts with another.

(2) Dancing naked in front of minor children constitutes indecent acts with another.

c. No specific intent to commit acts is required.

d. Consensual or nonconsensual offense.

e. The accused wrongful act does not have to be a significant physical act. Example: an accused's instructions to female recruits to disrobe, change positions, and bounce up and down was sufficient participation by him for finding that he committed indecent acts with recruits by videotaping them without their permission.

f. Lesser included offenses:

(1) Article 134 - Indecent assault.

(2) Article 80 - Attempted rape.

3. ***Pleading***

a. ***General considerations.*** See Part IV, para. 90f, MCM, 1995.

b. ***Sample pleading***

Charge: Violation of the Uniform Code of Military Justice, Article 134. Specification: In that Airman Peter T. Casserly, U.S. Navy, USS PAYNAY, Norfolk, Virginia, on active duty, did, at Virginia Beach, Virginia, on or about 4 August 19CY, wrongfully commit an indecent act with Seaman Larry Hayes by masturbating in his presence.

H. ***Indecent acts or liberties with a child under 16.*** Article 134, UCMJ. Part IV, para. 87, MCM, 1995. There are two theories of misconduct described in Part IV, para. 87b, MCM, 1995:

a. Indecent acts involving physical contact; and

b. Indecent liberties involving no physical contact, but the act must be taken within the physical presence of the child.

1. ***Indecent acts involving physical contact.*** The physical contact need not be directly on the victim's genitals. Touching an area in close proximity or the immediate area around the genitals is sufficient to allege this offense. (Example: accused placed hand between child's legs).

a. Elements of the offense for ***physical contact.*** The prosecution must prove beyond a reasonable doubt:

(1) That the accused committed a certain act upon or with the body of a certain person;

(2) That the person was under 16 years of age and not the spouse of the accused;

(3) That the act of the accused was indecent;

(4) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. ***Indecent liberties with no physical contact, but the act must be taken within the physical presence of the child.*** Examples include:

– accused's exposure of his penis to two young girls;

– masturbation in presence of 9- and 10-year-old children;

– display of picture of nude persons to young people may constitute taking indecent liberties if prohibited intent exists.

a. Elements of the offense for ***no physical contact***. The prosecution must prove beyond a reasonable doubt:

(1) That the accused committed a certain act;

(2) That the act amounted to the taking of indecent liberties with a certain person;

(3) That the accused committed the act in the presence of this person;

(4) That this person was under 16 years of age and not the spouse of the accused;

(5) That the accused committed the act with the intent to arouse, appeal to, gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

(6) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

3. ***Discussion***

a. Consent is no defense.

b. Consensual or nonconsensual offense.

c. There must be evidence of a specific intent to gratify the lust or sexual desires of the accused ***or*** the victim.

d. There must be evidence of victim's age and marital status.

4. ***Pleading***

a. ***General considerations.*** See Part IV, para. 87f, MCM, 1995.

b. ***Sample pleading***

Indecent acts with a child:

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Lithographer Second Class Robert E. Lee, U.S. Navy, USS VILLANOVA, Philadelphia, Pennsylvania, on active duty, did, at Ocean City, Maryland, on or about 15 July 19CY, commit an indecent act upon the body of Unis Grant, a female under 16 years of age, not the wife of the said Lithographer Second Class Robert E. Lee, by placing his hands upon her buttocks, with the intent to arouse and gratify the sexual desires of the said Lithographer Second Class Robert E. Lee.

Indecent liberties with a child:

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Lithographer Second Class Robert E. Lee, U.S. Navy, USS VILLANOVA, Philadelphia, Pennsylvania, on active duty, did, at Ocean City, Maryland, on or about 15 July 19CY, take indecent liberties with Unis Grant, a female under 16 years of age, not the wife of the said Lithographer Second Class Robert E. Lee, by repeatedly asking Unis Grant to engage in sexual intercourse, and by exposing his penis to her, with the intent to arouse and gratify the sexual desires of the said Lithographer Second Class Robert E. Lee.

I. ***Indecent exposure***. Article 134, UCMJ. Part IV, para. 88, MCM, 1995.

1. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt:

a. That the accused exposed a certain part of the accused's body to public view in an indecent manner;

b. That the exposure was willful and wrongful; and

c. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. ***Discussion***

a. Exposure must be in "Public" view. To be criminal the exposure need not occur in a public place, but only be in public view. Example: accused who exposes his penis and makes provocative gestures while joking with fellow seamen on board ship is guilty of indecent exposure.

b. Exposure must be "indecent." Nudity per se is not indecent; there is nothing lewd or morally offensive about an unclothed male among others of the same sex. Example: accused's conduct in removing all his clothing in the semiprivacy of an office and in the presence of other males, including his military superiors, may have been contemptuous and disrespectful, but did not constitute the offense of indecent exposure.

c. Exposure must be willful. Negligent exposure is insufficient. Example of negligent exposure: Innocently drying oneself after getting out of the shower, and being seen by a passer-byer. The offense requires a ***willful*** exposure to public view. Part IV, para. 88c, MCM, 1995.

3. ***Pleading***

a. ***General considerations.*** See Part IV, para. 88f, MCM, 1995.

b. ***Sample pleading***

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Lieutenant James Faffuffnik, U.S. Navy, USS SUFFOLK, Boston, Massachusetts, on active duty, did, at Wellfleet, Massachusetts, on or about 4 July 19CY, while at the parking lot of the Cahoon Hollow Beach Bar, Wellfleet, Massachusetts, willfully and wrongfully expose in an indecent manner to public view his penis and buttocks.

J. ***Wrongful cohabitation***. Article 134, UCMJ. Part IV, para. 69, MCM, 1995.

1. ***Elements of the offense***. The prosecution must prove beyond a reasonable doubt:

a. That, during a certain period of time, the accused and another person openly and publicly lived together as husband and wife, holding themselves out as such;

b. That the other person was not the spouse of the accused;

c. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

2. ***Discussion***

a. The evidence must show that the accused is openly and publicly living with another as husband and wife, but they are not married.

b. The partners must behave in a manner, as exhibited by conduct or language, that leads others to believe that a marital relationship exists.

c. No requirement that either person be married to a third party.

d. It is not necessary to prove sexual intercourse.

3. ***Pleading***

a. ***General considerations***. See Part IV, para. 69f, MCM, 1995.

b. ***Sample pleading***

Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Legalman Second Class Francis Doyle, U.S. Navy, USS SAIPAN, Norfolk, Virginia, on active duty, did, at Virginia Beach, Virginia, from on or about 15 April 19CY-3, to on or about 12 November 19CY, wrongfully cohabit with Seaman Martha Walker, a woman not his wife.

K. ***Fornication***. Not a per se UCMJ violation. However, context in which the sex act is committed may constitute an offense (e.g., public fornication, fraternization, etc.). Example: the court upheld a conviction under article 134 of two soldiers who took two German girls to a Berlin hotel room where each soldier had intercourse with each of the girls in open view of one another. The court found such "open and notorious" conduct to be service-discrediting.

L. ***Voyeurism***. Not a sex crime, but rather an aggravated form of disorderly conduct punishable under article 134.

M. ***Other sexual assaults and orders violations.***

1. Aggravated assault based on medical condition of accused. Article 128, UCMJ. Part IV, para. 54, MCM, 1995. *See* Chapter XXV on assault.

a. *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993): Accused's engaging in sexual intercourse with the knowledge that he was HIV positive, without first informing sexual partner of his condition, satisfied offensive touching element, regardless of whether protective measures were utilized.

b. *United States v. Schoolfield*, 36 M.J. 545 (A.C.M.R. 1992), *aff'd*, 40 M.J. 132 (C.M.A. 1994): Failure of HIV positive soldier to ejaculate during unwarned and unprotected intercourse does not affect finding of aggravated assault.

c. *United States v. Stewart*, 29 M.J. 92 (C.M.A. 1989): Accused committed aggravated assault by exposing the victim to HIV. Testimony that there was a 30-50 percent chance of death resulting from exposure to the virus was sufficient to infer that the means used was likely to produce death or grievous bodily harm.

d. *United States v. Reister*, 40 M.J. 666 (N.M.C.M.R. 1994): Unwarned and unprotected intercourse by individual with genital herpes may constitute an assault with a means likely to inflict grievous bodily harm.

2. Violation of a safe sex order. Most likely to charge this under Article 92, as an orders violation, but could possibly be charged under Article 90, or 91. A safe sex order issued by commander to servicemember infected with AIDS did not violate any constitutionally protected rights (i.e. privacy interest). *See* Chapter XX on orders violations.

CHAPTER XXXV

FRATERNIZATION

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CHAPTER XXXV

FRATERNIZATION

A. *Traditional fraternization*

1. Historically, the armed forces have concluded that some forms of association between members of different rank, specifically those between officer and enlisted are punishable by court-martial. The common name coined for this relationship is fraternization. Initially founded upon a philosophical belief of social superiority, officers were court-martialed for wrongfully fraternizing by fishing, drinking, or hunting with enlisted. However, this traditional and elitist approach was fairly discredited and the focus on relationship involving wrongful fraternization shifted from social equality questions to questions of whether the relationship undermines the demands of good order and discipline in a unit.

2. The offense of fraternization stems from long established custom in the military prohibiting undue familiarity between superior and subordinate and is determined by all the circumstances surrounding the relationship. As stated by the Court of Military Appeals in *United States v. Free*, 14 C.M.R. 466 (N.B.R. 1953):

> It is not the fact of eating together or sleeping together in the same place which is the offense against discipline, but the appropriateness of the time, place, and circumstances which dictate the proprieties.

Indeed, the services have encouraged some relationships that lead to socializing and even drinking alcoholic beverages between superiors and subordinates. Such occasions as USMC Boss' Night and unit parties purportedly foster good morale and discipline. Further, they are designed to establish and bolster *esprit de corps*—circumstances that certainly enhance good order and discipline in the unit.

3. Thus, wrongful fraternization is more describable than definable. Generally, it is an after the fact, eyes of the beholder determination. Whatever the circumstances, each case must be decided upon its own merits with a searching examination of the surrounding circumstances than the act itself.

B. ***Recognizing fraternization***

1. OPNAVINST 5370.2A, dated 14 March 1994 and Article 1165, *U.S. Navy Regulations*, 1990 (as amended 25 January 1993) define fraternization generally as follows:

a. Any personal relationship between an officer and an enlisted member which is unduly familiar and does not respect differences in rank and grade.

b. Personal relationships between officer members or between enlisted members that are unduly familiar and that do not respect differences in rank and grade that are prejudicial to good order and discipline or of a nature to bring discredit on the naval service.

c. Prejudice to good order and discipline or discredit to the naval service may result from, *but are not limited to*, circumstances which:

(1) call into question a senior's objectivity;

(2) result in actual or apparent preferential treatment;

(3) undermine the authority of a senior; or

(4) compromise the chain of command.

2. One of the most important changes OPNAVINST 5370.2A and Article 1165 implemented is the listing of "apparent" preferential treatment (as well as actual preferential treatment) as a circumstance which may result in prejudice to good order and discipline. Another important change included in the OPNAVINST is the distinction made for chief petty officers, as follows:

> 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 are 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. ***Other important factors***

1. ***Senior-subordinate relationships are <u>not required</u>.*** While the existence of a direct senior-subordinate supervisory relationship is not a prerequisite for a relationship between juniors and seniors to constitute fraternization, the fact that individuals are in the same chain of command increases the likelihood that an unduly familiar relationship between senior and junior officers or between senior and junior enlisted members will result in prejudice to good order and discipline or discredit to the naval service.

2. ***Improper personal relationships.*** The Court of Military Appeals stated, "fraternization is any, nonprofessional, social relationship of a personal nature between two or more persons." This means fraternization is a ***gender-neutral concept.*** Sexual behavior is not required for a relationship to be personal and unduly familiar. Included in this definition are unduly familiar personal relationships between permanent staff personnel and student trainees, Chief Petty Officers (E-7 and above) and junior enlisted personnel, or officer and enlisted personnel of all grades. Suggestive (but not exhaustive) of the types of conduct addressed by the term fraternization are: drinking alcoholic beverages together, financial dealings (i.e. engaging in a business together), playing cards or gambling together, going to private homes or clubs together, and dating or engaging in sexual activities.

3. ***Proper social interaction.*** Not every interaction between officers and enlisted is wrongful. Proper social interaction among officer and enlisted members has always been encouraged as it enhances unit morale and esprit de corps. Proper interaction would include, but would not be limited to: unit sports teams, command picnics and command parties (and other command sponsored events), and carpooling (as long as each participant pays their fair share of expenses).

4. ***Familial relationships.*** Service members who are married or otherwise related (father / son, etc.) to other service members must maintain the requisite respect and decorum attending the official relationship while either is on duty or in uniform in public. However, conduct which constitutes fraternization is not excused or mitigated by a subsequent marriage between the offending parties. For example, female officer who begins to date a male enlisted sailor in secret is committing a violation of the fraternization regulations. Even if these parties marry each other before anyone discovers their dating, the subsequent marriage will not excuse the violation.

D. ***Charging fraternization***. Until the implementation of punitive regulations governing inappropriate relationships between servicemembers, wrongful fraternization was charged as a violation of Article 133 or 134 UCMJ. With the introduction of the punitive regulations (OPNAVINST 5370.2A and Article 1165, *U.S. Navy Regulations, 1990* (as amended 25 January 1993) wrongful fraternization may be charged also as a violation of a lawful general order or regulation under Article 92(1).

E. ***Officer-enlisted fraternization.*** Part IV, paragraph 83, Article 134, MCM, 1995, 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 service wide custom, it is not unlawful. In the past, the government has relied on written documents (such as the *Marine Corps Manual,* para. 1100.4 or NAVMC 2767 of 12 March 1984 *User's Guide to Marine Corps Leadership Training*) to prove a custom. Arguably, today the custom of the service is prescribed in OPNAVINST 5370.2A and Article 1165, *U.S. Navy Regulations, 1990* (as amended 25 January 1993).

1. The legal test for determining whether the conduct violates Articles 133 or 134 is found in the combined analysis of the regulatory definition and in *United States v. Free,* 14 C.M.R. 466 (N.C.M.R. 1953).

> Because of the many situations which might arise, it would be a practical impossibility to lay down a measuring rod of particularities to determine in advance what acts are prejudicial to good order and discipline and what are not. Suffice it to say, then, that each case must be determined on its own merits. ***Where its shown that the acts and circumstances are such as to lead a reasonably prudent person, experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by the compromising of an enlisted person's respect for the integrity and gentlemanly obligations of an officer, there has been an offense under Article 134.*** (Emphasis supplied.)

2. Since the offense of fraternization ***is not specifically listed*** in the Uniform Code of Military Justice, specifications under the general article must be artfully drawn. One example of specification withstanding judicial scrutiny is:

> Specification: In that Chief Warrant Officer _____, U.S. Navy, on active duty, did, on board USS Essex, located at Norfolk, VA, on or about 6 November 1979, willfully and wrongfully in the stateroom assigned to the said Chief Warrant Officer, fraternize and associate with Seaman E2 _____ an enlisted woman on active duty with the U.S. Navy, then assigned to the said Chief Warrant Officer _____'s unit and to a position directly under his supervision, on terms of military equality, by having the said

> Seaman E2 in said room as his guest, by lying nude next to her in a bed, and by trying to persuade her to engage in sexual intercourse, these actions constituting an improper use of rank and involving or giving the appearance of partiality contrary to U.S. Navy command policy and prejudicial to good order, discipline, and high morale in the Armed Forces of the United States.

For 133 and 134 offenses, the key is to ensure that sufficient facts are alleged describing the circumstances that violate the long established custom.

3. Wrongful fraternization between officers and enlisted personnel should also be charged as a violation of a general lawful regulation under Article 92(1), UCMJ. Both Article 1165, *U.S. Navy Regulations, 1990* (as amended 25 January 1993), prohibits officer-enlisted fraternization in those instances where an unduly familiar relationship exists that does not respect differences in grade or rank. Where those factors exist, wrongful fraternization should be charged under Article 92(1). Here is an example of a specification alleging a violation of Article 92(1):

> Charge: Violation of the UCMJ, Article 92
>
> Specification: In that Captain Walter W. Whitman, U.S. Navy, Naval Air Station, Barbers Point, Hawaii, on active duty, did, at Naval Air Station, Barbers Point, Hawaii, on the island of Oahu, Hawaii, and at Anaheim, California, from about 1 September 19CY to 20 November 19CY, on diverse occasions, violate a lawful general regulation, to wit: OPNAVINST 5370.2A, dated 14 March 1994, by wrongfully engaging in an unduly familiar personal relationship not respecting differences in rank and grade with a junior enlisted member of said Captain Whitman, to wit: flirting with and spending an inappropriate amount of time with Disbursing Clerk Third Class Judy Junior, U.S. Navy, Naval Air Station, Barbers Point, Hawaii, during normal working hours at Naval Air Station, Barbers Point, Hawaii; dating said Disbursing Clerk Third Class Junior at Naval Air Station, Barbers Point, Hawaii, and on the island of Oahu, Hawaii; and inappropriately vacationing with said Disbursing Clerk Third Class Junior at Anaheim, California.

4. The conduct may also violate Article 92(2), UCMJ. Overfamiliarity between officers and enlisted have a detrimental effect on morale and discipline in certain circumstances. 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.

5. The underlying conduct might itself constitute a separate crime (such as adultery, sodomy, drug abuse, or even dereliction).

F. ***Officer-officer / enlisted-enlisted fraternization.*** Although cases of overfamiliarity between senior and junior officers, or between noncommissioned or petty officers and their subordinates, do not appear to fit the elements described in Part IV, paragraph 83, Article 134, MCM, 1995, it is clear from a reading of subsequent cases, as well as the analysis of Part IV, paragraph 83, Article 134, MCM, 1995 (Appendix A21-101), that Part IV, paragraph 83, Article 134, MCM, 1995, is not intended to preclude prosecution for such offenses. However, the best practice would be to charge this type of wrongful fraternization under Article 92(1), UCMJ.

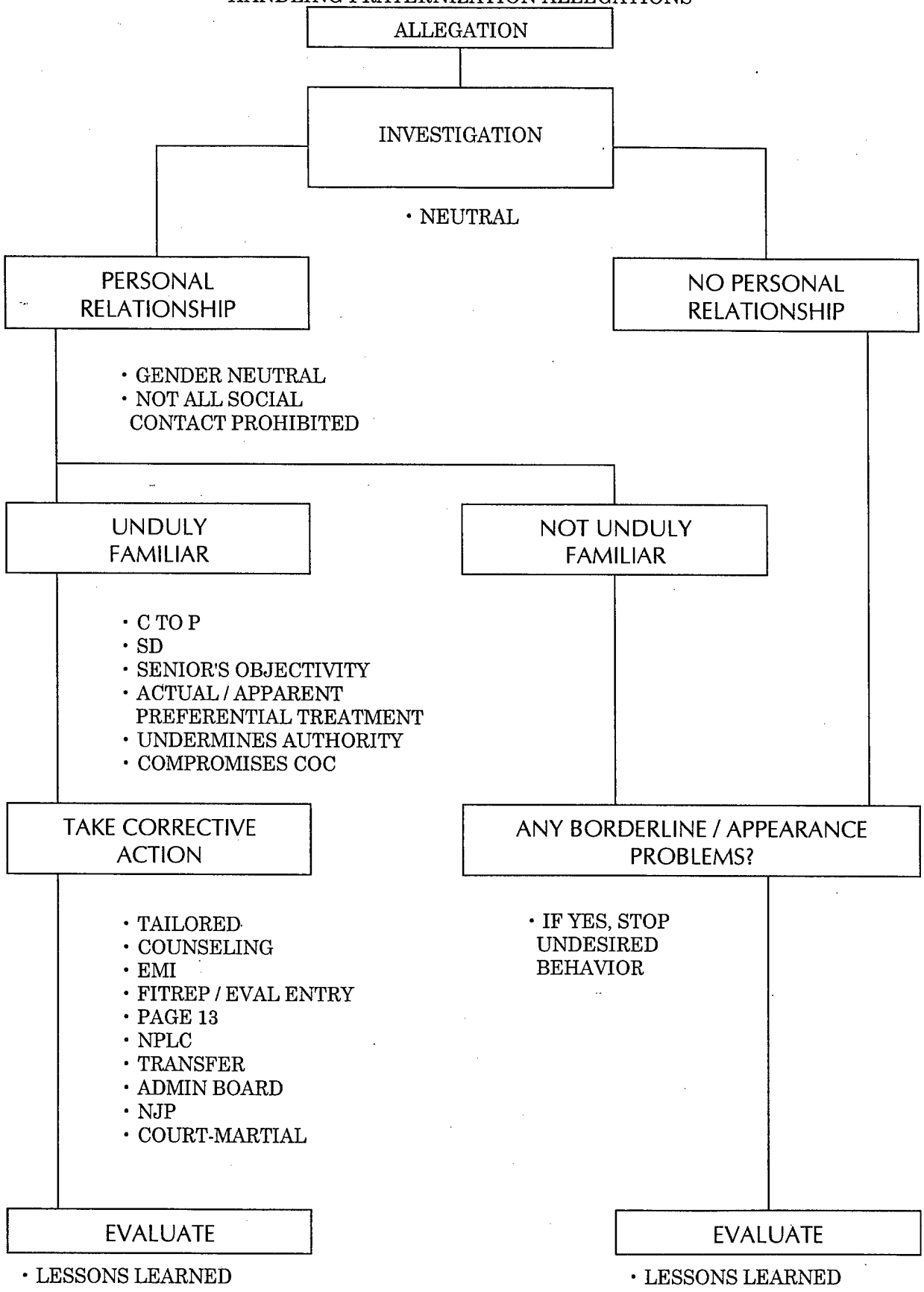
1. As stated above, Article 1165, *U.S. Naval Regulations, 1990* (as amended 25 January 1993) and OPNAVINST 5370.2A prohibit unduly familiar relationships between officers and between enlisted that do not respect the differences in rank or grade and that are prejudicial to good order and discipline or of a nature to bring discredit upon the Naval service. Accordingly, relationships that meet this definition should be charged as violations of general lawful regulations.

2. The conduct may violate another 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 as well.

3. The underlying conduct might itself constitute a separate crime (such as adultery, sodomy, drug abuse, or even dereliction).

G. ***Handling fraternization allegations.*** The chart at the end of this chapter provides a flowchart for handling fraternization allegations. The key points are to investigate fully any and all allegations that come to light, and, if substantiated, take corrective action to rectify the problem. Generally, the least intrusive means of corrective action is preferred. Options available for the commands include, but are not limited to, counseling, extra-military instructions, comments in fitness reports, nonpunitive letters of caution, transfer, and in severe or persistent cases, administrative discharge boards, nonjudicial punishment, and courts-martial.

HANDLING FRATERNIZATION ALLEGATIONS



CIVIL LAW

ADMINISTRATIVE INVESTIGATIONS

CHAPTER XXXVI

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SECTION SIX

CIVIL LAW

CHAPTER XXXVI

ADMINISTRATIVE INVESTIGATIONS

PART A -INVESTIGATIONS - GENERALLY

3601 BACKGROUND.

Almost every naval servicemember will have some type of contact with an administrative investigation (commonly referred to as a "JAGMAN" investigation) during their military career, either as an investigating officer or as a conveningauthority. The basic regulations governing such investigations are contained in the Manual of the Judge Advocate General JAGMAN). The primary purpose of an administrative investigation is to provide the convening authority and reviewing authorities with adequate information regarding a specific incident which occurs in the Department of the navy. These officials will then make decisions and take appropriate action based upon the information developed. As the name denotes, these investigations are purely administrative in nature-not judicial. The investigation is advisory only; the opinions are not final determinations or legal judgments, nor are the recommendations made by the investigating officer binding upon the convening or reviewing authorities.

3602 FUNCTION.

The primary function of an administrative investigation is to search out, develop, assemble, analyze, and record all available information relative to the incident under Investigation. The findings of fact, opinions and recommendations developed through the investigatory process may provide the basis for various actions designed to improve command management and administration, resolve claims for or against the government, publish "lessons learned" to the fleet (particularly pertaining to safety), and allow for fully informed administrative determinations concerning personnel (i.e., whether a servicemember's injury was incurred. while in the "line of duty"). There are tour types of administrative investigations described in Chapter II of the JAGMAN: courts of inquiry, boards of inquiry, command investigations, and litigation report investigations.

3603 COURT OF INQUIRY.

The court of inquiry is the traditional means by which the most serious military incidents are investigated. Originally, adopted by the British Army,it has remained in its present form with only slight modifications since the adoption of the articles of War-of 1786. A court of

inquiry is not a court in the sense the term is used today; rather, it is a board of senior officers charged with searching out, developing, assembling, analyzing, and recording all available information concerning the incident under investigation. When directed by the convening authority, the court will offer opinions and recommendations about an incident. JAGINST 5830.1.

A. **Principal characteristics.** The principal characteristics of a court of inquiry are listed below.

1. The court is convened by any person authorized to convene a general court-martial or by any person designated by the Secretary of the Navy. JAGMAN, § 0211b(1); Art. 135(a), UCMJ; JAGINST 5830.1, encl. (1), para. 2.

2. It consists of three or more commissioned officers. When practicable, the senior member, who is the president of the court, should be at least an '0-4. All members should also be senior to any person whose conduct is subject to inquiry. JAGMAN, § 021 1 b(2); Art. 135(b), UCMJ; JAGINST 5830.1, encl. (1), para. 3a.

3. Legal counsel, certified under article 27(b) and sworn under article -12(a), UCMJ, is appointed for the court and such counsel acts under the direct supervision of the president of the court, assisting in all matters of law, presenting evidence, and in keeping and preparing the record. Counsel does not perform as a prosecutor, but must ensure that all the evidence is presented to the court. JAGNIAN, § 021 1 b(2); JAGINST 5830.1, encl. (1), para. 2b(3).

4. The court is convened by written appointing order. The required contents, along with an example, can be found in JAGINST 5830.1, encl. (1), para. 4, and encl. (3).

5. The court must designate as a "party" to the investigation any person(s) subject to the UCMJ whose conduct is "subject to inquiry" and / or any other Department of Defense employee(s) who has a "direct interest" in the subject under inquiry where such an employee has requested to be so designated. Designation as a "party" affords that individual an opportunity to participate in the hearing as to possible adverse information concerning him or her. JAGMAN, 0211b(5),(b); JAGINST 5830.1 .

a. **Subject to inquiry**. A person's conduct or performance is "subject to inquiry" when that person is involved in the incident under investigation in such away that disciplinary action may follow, that rights or privileges may be adversely affected, or that personal reputation or professional standing may be jeopardized. JAGMAN, Appendix A-2-b.

b. **Direct interest**. A person has a "direct interest" in the subject of inquiry when:

(1) the findings, opinions, or recommendations may, in view of the person's relation to the incident or circumstances under investigation, reflect questionable or unsatisfactory conduct or performance of duty; or

(2) the findings, opinions, or recommendations may relate to a matter over which the person has a duty or right to exercise control. JAGMAN, Appendix A-2-b.

6. The court uses a formal hearing procedure.

a. All testimony is under oath (except for a person designated as a party who may make an unsworn statement) and transcribed verbatim (except arguments of counsel). JAGMAN, § 021 1 b(4); Art. 1 35(0, UCMJ; JAGINST 5830.1, encl. (1), paras. 1Oe(1) and 14.

b. Witnesses and evidence are presented in the following order after opening statements are made: counsel for the court; a party; counsel for the court in rebuttal; and, subsequently, as requested by the court. After testimony and statements by the parties, if any, counsel for the court and counsel for the parties may present argument. JAGINST 5830.1, encl. (1), para. 10.

c. **Rights of a party**. A person designated as a party has the following rights (JAGMAN, appendix A-2-b):

(1) to be given due notice of such designation;

(2) to be present during the proceedings, except when the investigation is cleared for deliberations;

(3) to be represented by counsel;

-Only a "party" is entitled to be represented by counsel. Military parties and, in very limited circumstances, civilians who are designated as parties will be appointed Art. 27(b), UCM), certified military counsel; however, any party may be represented by civilian counsel at his/her own expense.

(4) to be informed of the purpose of the investigation and be provided with a copy of the appointing order. JAGINST 5830.1, encl. (1), para. 9d(4); encl. (2), para. 9d(4);

(5) to examine and object to the introduction of physical and documentary evidence and written statements;

(6) to object to the testimony of witnesses and to cross examine adverse witnesses;

(7) to request that the court of inquiry or investigation obtain documents and testimony of witnesses, or pursue additional areas of inquiry. JAGINST 5830.1, encl. (1), para. 9d(7); encl. (2), para. 9d(7);

(8) to introduce evidence;

(9) to testify at his / her own request, but not be called as a witness. JAGINST 5830.1, encl. (1), para. 9d(9); encl. (2), para. 9d(9);

(10) to refuse to incriminate oneself and, if accused or suspected of an offense, to be informed of the nature of the accusation and advised that no statement regarding the offense of which he is accused or suspected is required, and that any statement made by him may be used as evidence against him in a trial by court-martial;

(11) to make a voluntary statement, oral or written, sworn or unsworn, to be included in the record of proceedings. JAGINST 5830.1, encl. (1), para. 9d(11); encl. (2), para. 9d(11);

(12) to make an argument at the conclusion of presentation of evidence;

(13) to be properly advised concerning the Privacy, Act of 1974; and

(14) to challenge members.

d. Although a court of inquiry uses a formal hearing procedure, it is administrative not judicial. Therefore, as in any other administrative investigation, the Military Rules of Evidence (Mil. R. Evid.) not be followed, except for:

(1) Mil. R. Evid. 301, self-incrimination;
(2) Mil. R. Evid. 302, mental exam inatl0rl;
(3) Mil. R. Evid. 303, degrading-questions;
(4) Mil. R. Evid. 301-501, dealing; with privileges;
(5) Mil. R. Evid. 505, classified information;
(6) Mil. R. E'vid 506, government information other than classified information;

(7) Mil. R. Evid. 507, informants. JAGINST 5830.1, encl. (1), para. 11.

7. A court of inquiry has the power to subpoena civilian witnesses, who may be summoned to appear and testify before the court the same as at trial by court martial. JAGMAN, § 0211b(7); R.C.M. 703(e)(2); JAGINST 5830.1, encl. (1), para. 12.

B. **Use of the Record of the Court of Inquiry**

1. **Nonjudicial punishment (NJP)**

a. If an individual is accorded the rights of a party with respect to the act or omission under investigation, punishment may be imposed without further proceedings. The individual may, however, submit any matter in defense, extenuation, or mitigation. JAGNIAN, §§ 01lOd; JAGINST 5830.1, encl. (1), para. 9d(1).

b. If an individual has not been accorded the rights of a party, a hearing conducted in accordance with paragraph 4 of Part V, MCM, 1984, must be conducted before punishment is imposed. JAGMAN, §§ 011Od; JAGINST 5830.1, encl. (1), para. 9d(1).

2. **General court-martial (GCM).** In cases where a GCM is contemplated, it is sometimes possible to use the record of a court of inquiry in lieu of a formal pretrial investigation of the offenses. As a practical matter, it is difficult to substitute a court of inquiry for an article 32 pretrial investigation because of article 32(c) of the UCMJ; if a court of inquiry is used in place of an article 3? Investigation, the accused is given additional rights to demand recall of witnesses for further cross-examination and to otter new evidence. Normally, the convening of a separate article 32 investigation is the most efficient method for bringing an accused before a GCM. JAGINST .5830.1, encl. (1), para. 9d(3); art. 32(c), UCMJ; R.C.M.405(b).

3. **Use of testimony.** Sworn testimony contained in the record of proceedings of a court of inquiry before which all accused was not designated as a party may not be received in evidence against the accused unless that testimony is admissible independently of the provisions of Art. 50, UCMJ, and Mil. R. Evid. 804. JAGINST 5830.1, encl. (1), para. 9d(4).

4. **Right to copy of the record.** A party is entitled to a copy of the record of an article 32 pretrial investigation where trial by GCM has been ordered, subject to the regulations applicable to classified material. R.C.M. 405(p)(3). The same right may presume to exist as to a court of Inquiry record where so used in place of the article 32 investigation. If a letter of censure or other NJP is imposed, the party upon whom it was imposed has a right to have access to a copy of the record in order to appeal.

3604 BOARD OF INQUIRY.

A board of inquiry is intended to be an intermediate step between a court of inquiry and a command investigation. Such investigations are used, for example, when a hearing with sworn testimony is desired or designation of parties may be required, but only a single investigating officer is necessary to conduct the hearing. JAGINST 5830.1.

A. Principal characteristics. The principal characteristics of a board of inquiry are listed below:

1. The board is convened by any person authorized to convene a general court-martial. JAGMAN, § 0211c(1); JAGINST 5830.1, encl. (2), para. 2.

2. It consists of one or, more commissioned officers. JAGMAN, § 021 1 c(2).

a. The board should normally be composed of a single officer; however, if multiple members are considered desirable, a court of inquiry should be considered. JAGINST 5830.1, encl. (2), para. 3. ,

(1) **One-officer board.** Normally, it consists of one commissioned officer, but a Department of the Navy, (DON) civilian employee may be used if appropriate. The investigating officer (10) should be senior to any designated party and at least an 0-4 or GS-13. JAGINST 5830.1, encl. (2), para. 3a.

(2) **Multiple membership.** A board may consist of two or more commissioned officers with the senior member, who will he the president of the board, at least an 0-4. If appropriate, warrant officers, senior enlisted, or DON civilian employees may be assigned as members, in addition to at least one commissioned officer. No member of the board should be junior in rank to any person whose conduct or performance of duty is subject to inquiry. JAGI\ST 5830.1 , any person 1 (2), para. 3b.

3. Legal counsel should be appointed for the proceedings, with duties and requirements identical to those for a court of inquiry see sec. 3603 A.3, above). JAGMAN, 0 0211c(2); JAGINST 5830.1, encl. (2), para. 3c.

4. The investigation is convened by written appointing order. The required contents, along with an example, can be found in JAGINST 5830.1, encl. (2), para. 4, and encl. (4).

5. The convening authority may designate any persons) whose conduct is subject to inquiry, or who has a direct interest in the subject of inquiry a "party" in the convening order. The convening authority may also authorize the board to designate parties during the proceedings. JAGMAN, §§ 0211c(3), 0205; JAGINST 5830.1, encl. (2), para. 3d(6), 9.

a. The definitions and rights afforded a "party" at a Board are identical to that applied to a Court of Inquiry (see sec. 3603, P,.S, above).

6. A formal hearing procedure, similar to the court of inquiry, is used (see sec. 3603, A.6, above). JAGMAN, § 0211c(4); JAGINST 5830.1, encl. (1), para. 10.

7. Unless convened to investigate a claim under Art. 139, UCMJ, and JAGMAN, Chapter IV, the board **does not** possess the power to subpoena civilian witnesses. JAGMAN, § 0211c(5); JAGINST 5830.1, encl. (2), para. 12(a).

B. **Use of the Record of the Board of Inquiry**. The record of the Board of Inquiry may be used in ways similar to that of Courts of Inquiry (see sec. 3603, B, above; JAGINST 5830.1, encl. (2), para. 9).

3605 COMMAND INVESTIGATION.

By far the most common administrative fact finding body is the command investigation (known under previous versions of the JAGMAN as "informal investigations," or "investigations not requiring a hearing.") As with the court or board of inquiry, the primary function of the command investigation is to gather information. In contrast to the court or board of inquiry, the command investigation does **not** utilize a hearing procedure and thus is much more flexible in the manner in which information is collected and recorded. Because the command investigation does not perform the collateral function of providing a hearing, there is no authority to designate "parties" to the investigation.

A. **Principle characteristics**. The principle characteristics of o command investigation are listed Below.

1. Such an investigation may be convened by any officer in command (including an officer-in-charge). JAGMAN, § 0209c (1).

2. The investigation is conducted by one or more persons assigned from within the Department of the Navy. Most command investigations will be conducted by a commissioned officer, although warrant officers, senior enlisted personnel, or civilian employees may also be used when considered appropriate. JAGMAN, §§ 0209e(1)(b), 0213a.

3. Legal counsel is not normally assigned to assist in the investigation, although legal assistance or other forms of administrative and / or technical support may be assigned in the discretion of the convening authority and as resources allow. JAGMAN, § 0213b.

4. The investigation is convened by written appointing order (oral or message orders initiating command investigations must be followed up with written and signed confirmation). JAGMAN, §§ 0209e(1)(a), 0212a.

5. The investigation does not involve formal hearings. JAGMAN, § 0209e(1)(e).

6. The investigating officer collects evidence by personal interview, written correspondence, telephone inquiry, or other means deemed appropriate, and may, but is not required to, obtain sworn statements signed by witnesses. JAGMAN, §§ 0209e(1)(c), 0209e(1)(f), 0209e(2).

7. The investigative report is documented in writing in the manner prescribed by the convening authority in the convening order. JAGMAN, § 0209e(1)(d).

B. **Method of investigation and format of report.** Further guidance on conducting a command investigation, and a sample report, is contained in Chapter XXXVII.

3606 LITIGATION REPORT INVESTIGATION.

The fourth, and most recently created, JAGMAN administrative investigation is the litigation-report investigation. Such a fact-finding body is appropriate whenever the primary purpose of the investigation is to prepare and defend the legal interests of the Navy in claims proceedings or civil litigation. While closely resembling the command investigation in method of evidence collection and report preparation, there are special rules for the litigation-report investigation, the most important being that a judge advocate must be personally involved in directing and supervising the Investigatory effort. With such involvement, the Navy may more forcefully assert the attorney work product privilege in trying to prevent unnecessary disclosure of the investigation, or certain portions thereof, to individua1s whose litigation interests may, he adverse to the interests of the United States.

A. **Principal characteristics.** The principle characteristics of a litigation-report investigation are listed below.

1. The investigation may be convened by an officer in command **but only after** the officer in command has consulted with the "cognizant" judge advocate. JAGMAN, §§ 0 2101(1)(a), 021Oe(1), appendix A-2-a, para. 3.

The "cognizant judge advocate" is that individual who is responsible for providing legal advice to the convening authority. This will often be a station or staff judge advocate, but may also include a command services or claims officer at the servicing Naval Legal Services Office. JAGMAN, appendix A-2-a.

2. The investigation is conducted by one or more persons assigned from within the Department of the Navy, under the direction and supervision of the cognizant judge advocate. While responsible for supervising the investigation, this does not mean the cognizant judge advocate necessarily becomes the investigating officer. Most litigation report investigations will be conducted by a commissioned officer, however, when considered appropriate, warrant officers, senior enlisted personnel, or civilian employees may also be used. JAGMAN, §§ 0210b(1)(b), 0210c(1), 0210e(1)(b), 0213a.

3. The investigation is convened by written appointing order that is specifically tailored to ensure appropriate procedure. JAGMAN, §§ 0210d, 0210e(1)(a), appendix A-2-d.

4. The investigation does not involve formal hearings, but instead collects evidence by personal. interview, written correspondence, telephone inquiry, or other means deemed appropriate. Signed witness statements shall not normally be obtained. JAGMAN, §§ 0210e(1)(d).

5. The investigative report is documented in writing in the manner prescribed by the cognizant judge advocate. JAGMAN, : 0210e(1)(d).

B. **Method of investigation and format of report.** Further guidance on conducting a litigation-report investigation is contained ire Chapter XXXVII.

PART B - DECIDING WHEN ADN11NISTRATIVE

INVESTIGATIONS ARE REQUIRED

3607 INVESTIGATIONS REQUIRED BY THE JAGMAN

A. **General.** Whenever an officer in command, desires to obtain additiona1 information regarding any incident occurring within, or involving personnel of his ,' her. command, an administrative investigation may be convened. However, as a matter of practice, administrative fact-finding bodies are typically reserved for only those incidents which are **required** to be formally investigated as directed by the JAGMAN or other Navy or Marine Corps instructions. This approach is due, it most in part, to the significant amount of time and effort required of both the investigation officer and the command in ensuring the administrative investigation is **properly** conducted, formatted, and endorsed.

B. **Incidents which require JAGMAN investigations.** The following are examples of incidents for which administrative investigations governed by the JAGMAN are required:

1. **Aircraft accidents.** Serious aircraft mishaps, those resulting in death or serious injury, extensive damage to government property, or where the possibility of a claim exists for or against the Government, require a JAGMAN investigation. JAGMAN, § 0242.

2. **Motor vehicle accidents.** Except for the most minor of accidents ($5,000.00 or less of property damage, and / or involving only minor personal injury, in which case completion of a SF 91 may be satisfactory), all accidents involving government motor vehicles must be investigated with a JAGMAN administrative investigation. JAGMAN, § 0243.

3. **Explosions.** JAGMAN, § 0245.

4. **Ship stranding.** JAGMAN, § 0246.

5. **Collisions**. Collision cases, including collisions with another vessel or any shore structure, fish net or trap, buoy or similar foreign object, where property damage or personal injury results, require an investigation. Be aware of the claims aspect in any such cases-consult Chapter XII of the JAGNIAN regarding "admiralty claims" and the OJAG notification requirement. JAGMAN, §§ 0247, 1201 et seq.

6. **Flooding of a ship**. Whether intentional or accidental, "significant" flooding incidents require an administrative investigation. JAGMAN, § 0248.

7. Fires. Where "significant," a JAGMAN investigation is required. JAGMAN, 0249.

8. **Loss of excess of government funds or property**. Except for minor losses, which can be adequately investigated and documented through use of supply reporting procedures, JAGNIAN investigations are required for losses of public funds and public property. JAGMAN, § 0250.

9. **Claims for or against the government**. JAGMAN, §0251 ;JAGMAN, Chapter IV; JAGINST 5890.1 .

10. **Health care incidents**. Where claims are filed as a result of a health care incident, or when there is a death or potentially compensable event potentially attributable to inadequate health care rendered by Government employees or provided in a military treatment facility, a JAGMAN investigation is required. JAGMAN § 0252.

11. **Reservists**. An investigation is required if a reservist is injured or killed while performing active duty or training for a period of 30 days or less, or while performing inactive-duty training (drill), or while traveling directly to or from such duty. JAGMAN, § 0253.

12. **Firearm accidents**. Incidents involving accidental or apparently self inflicted gunshot wounds must be documented in an administrative investigation. JAGMAN, § 0254.

13. **Pollution incidents**. Significant incidents of pollution, such as oil or hazardous material / waste spills, may require the convening of an administrative investigation, particularly where assessment of a fine or penalty from a regulatory agency may be anticipated. JAGMAN, § 0255a; OPNAVINST 5090.1.

14. **Security violations** Where there has been a compromise of classified information and either: (1) the probability of harm to national security cannot be discounted; (2) significant command security weaknesses have been revealed; or (3) punitive disciplinary action is contemplated, a JAGMAN investigation must be convened. JAGMAN, 0255c; OPNAVINST 5510.1.

15. **Postal violations.** JAGMAN, § 02554; OPNAVINST 5112.6.

16. **Injuries or .diseases** incurred by servicemembers. Administrative investigations will normally be convened whenever there is evidence to suggest that an injury or disease sustained by a servicemember may have been incurred while "not in the line of duty." JAGMAN, § 0230; see a/so Chapter XXXVIII, infra.

C. **Death Cases.** JAGMAN investigations are not normally conducted where the death of a servicemember was the result of a previously known medical condition or the result of enemy action. JAGMAN, § 02351).

1. **Investigations must he conducted where:**

(a) Civilian or other non-naval personnel are found dead on a naval installation under peculiar or doubtful Circumstances;

(b) the circumstance Surrounding the death places the adequacy of military medical care reasonably at Issue;

(c) a probable nexus between the naval service anti the circumstances of the death of a servicemember exists (other- than as a result of enemy action); or

(d) the death resulted from a possible "friendly-fire" incident' JAGMAN, § 0235c.

2. **Limited Investigations.** Where the death of a servicemember occurred at a location within the U.S. and not under military control, while the member was off-duty, and there is no discernable nexus between the circumstances of the death and the naval service, the command need only obtain a copy of the police investigation and retain it as an internal report. JAGMAN, § 0235d.

Additional rules and considerations in death cases are discussed in Chapter XXXVII, Part C, infra.

3608 INVESTIGATIONS REQUIRED BY OTHER DIRECTIVES

A. **General.** The JAGMAN does not govern the entire universe of administrative investigations. Fact-finding bodies may be required by other instructions, directives, or regulations, which in turn describe and control the purpose, method, and reporting of the investigation, separate and apart from the JAGMAN. Some incidents involve conducting an inquiry for several different purposes which can be handled by one administrative investigation; others may not. Perhaps the best example of the latter situation involves aircraft mishaps. When an aircraft mishap results in death or serious injury, extensive damage to government property, or when the possibility of a claim exists, one of the administrative investigations described in the JAGMAN is required. In addition, an "aircraft

accident safety investigation" will be conducted, separate and apart from the JAGMAN investigation, for the independent purpose of safety and accident prevention analysis. One must be careful to determine why an administrative investigation is being conducted, under what authority, what instructions pertain, and whether the investigation will satisfy all Nary informational, requirements or only a portion of then. Examples of investigations required by other authorities include:

1. **Situation reports (SITREPs / OPREPs).** L.S. Navy Regulations, 1990, articles 0831 and 0831; OPNAVINST 3100.6.

2. **Inspector General (IG) investigations.** SECNAVINST 5430.57.

3. **Aircraft mishaps.** For the sole purpose of safety and accident prevention, OPNAVINST 3750.6 provides specific direction for the conduct, analysis, and review of aircraft mishaps. Such tact-finding bodies are known a) "aircraft accident safety investigations," and their conclusions are contained within "aircraft mishap investigation reports" (AMIRs). To encourage complete, open, anti forthright information, opinions, and recommendations regarding a mishap, much of the AMIR is privileged information. Assurances of confidentiality allow personnel to be as honest as possible when providing statements, thus ensuring complete and candid information which is vital for safety purposes: OPNAVINST 3750.6; MCO 3750.1.

4. **Safety and mishap investigations.** The same principles discussed above as to AMIR's apply to safety investigations into non-aviation mishaps. OPNAVINST 5100.19, 5102.1; MCO 5101.8, P5102.1.

5. **Security violations.** There are instances of loss or compromise of classified information that do not rise to the level where a JAGMAN investigation is required; however, other reporting requirements may still apply. OPNAVINST 5510.1.

6. **Naval Criminal Investigative Service investigations.** SECNAVINST 5520.3.

7. **Investigations against senior DON officials.** SECNAVINST 5800..12.

8. **UCMJ investigations.** R.C.M. 303, MCM, 1984; Article 32, UCMJ, R.C.M. 405, MCN, 1984.

9. **Admiralty incidents.** JAGMAN, Chapter XII; JAGINST 5880.1.

10. **Missing, lost, stolen, or recovered** (MLSR) property reports. SECNAVINST 5500.4.

B. **Coordination of different investigations.** Incidents may occur within the Navy ,which require the convening of two different tact-finding bodies (For example, with

a significant aircraft mishap, both a JAGMAN investigation and an aircraft accident safety investigation will be ordered). When the investigations have different purposes, conducting both may be appropriate. There are special consideration, however.

1. If the only basis for an investigation is to determine whether disciplinary action is appropriate, inquiries under R.C.M. 303, MCM, 1984, or investigations under Article 32, UCMJ, and R.C.M. 405, MCM, 1984, should be conducted without separate investigations under the JAGMAN. JAGMAN, § 0202b).

2. To avoid interfering with law enforcement, a JAGMAN investigation should not normally proceed if the same incident is under investigation by NCIS, the FBI, or local civilian law enforcement agencies, unless concurrence of that agency is first obtained. It NCIS objects to a concurrent JAGMAN investigation, the investigation should be suspended and the matter referred to the chain-of-command for resolution. JAGMAN, § 0204c.

3. In all Incidents where concurrent safety investigations are being conducted, including aircraft accident safety Investigations, there are specific limitations which restrict the interaction and integration between JAGMAN and mishap investigations. While both investigative bodies have equal access to evidence and witnesses, the privileges and assurances of confidentiality associated with safety investigations prevent cooperative investigatory efforts or the sharing of information. This relationship between the JAG MAN investigation and safety investigations must be thoroughly understood by all persons involved with investigating any accident or mishap. JAGMAN, §§ 0242b; 0244b; OPNAVINST 3750.6, 5102.1.

PART C - SELECTING THE APPROPRIATE TYPE OF ADMINISTRATIVE INVESTIGATION

3609 BASIC CONSIDERATIONS.

The type of tact-finding body to be convened is determined by the purposes) of the investigation, the seriousness of the issues involved, the resources available and time allotted for completion of the investigation, and the nature and extent of the powers required to conduct a thorough investigation. The most common administrative tact-finding body will be the command investigation; however, "major incidents" will require a more formal investigation which affords hearings or possess subpoena power. Litigation-report investigations will be reserved for those incidents where the primary purpose of the investigation revolves around the claims issue. Incidents which require investigation often possess a claims element (in our litigious society, claims may be reasonably anticipated for most incidents where injury is incurred). Just because a claim may be anticipated does not automatically mean a Litigation-Report Investigation must result; where there are also significant command interests to be addressed (i.e., causes of an aircraft crash, injury determinations, etc.), Command Investigations will likely remain the most appropriate investigating body.

3610 PRELIMINARY INQUIRIES. The preliminary inquiry (PI) is a quick and

somewhat informal investigative tool that can be used to determine initially whether a particular incident is serious enough to warrant some form of JAGMAN investigation. A PI is not necessarily required, however, it is "advised" for all incidents potentially warranting an investigation.

A. **Method of inquiry**. A convening authority may conduct a PI personally or appoint a member of tire command to do so. The PI is strictly informal; there are no requirements nor restrictions governing how the inquiry is to fee accomplished. Generally, the PI should not take any longer than three (3) working cloys. If more tine is required, it means that the inquiry officer is attempting to do too much or has not been sufficiently instructed as to what issues) is to W addressed. Lyon completion of the PI, a report is tendered to the convening authority. The PI report need not be in writing, but some form of limited documentation is advisable (see JAGMAN, appendix A-2h). JAGMAN, § 0204.

B. **Command options**. Upon reviewing the results of the PI, a convening authority may take one of the following actions:

1. Take no further action. Where further investigation would serve no useful purpose, a decision may be made not to convene a JAGMAN investigation. This is especially appropriate where the PI reveals that the incident is likely to be of little interest to anyone outside the immediate command or that the event will be adequately investigated under some other procedure (i.e., NCIS investigation, MLSR / survey procedure, etc.). JAGMAN, §§ 0205a(2)(a), 0207. As a matter of practice, documentation of the PI and command decision is advisable.

2. **Conduct a command investigation**. JAGMAN, § 0205a(2)(b). See section 3605, supra.

3. **Convene a litigation-report** investigation., Consultation with the cognizant judge advocate is required. JAGMAN, § 0205a(2)(c). See section 3606, supra.

4. **Convene a court onboard of inquiry**. If the convening authority is not a GCMCA, and therefore not empowered to,convene a court or board, the convening authority may request, via the chain-of-command, that an officer with such authority convene the court or board. JAGMAN, S 0205a(2)(d). See sections 3603 and 3604, supra.

It is always appropriate for a convening authority to consult with a cognizant judge advocate before deciding on how to proceed. JAGMAN, S 0206.

C. **Reporting the results of PIs**. After deciding which of the command options to exercise, the convening authority is to report that decision to his / her immediate superior in the chain-of-command. This does not require a special, stand-alone report; command decisions on *PIs* are relayed in the context of existing situational reporting systems.

D. **Review of command decision.** The initial determination of which option to exercise is a matter of command discretion. Superiors in the chain-of-command may direct that an option be reconsidered or that a particular course of action be taken. For example, a superior may feel that a litigation-report investigation may be the preferred method of investigating and documenting a particular incident anti direct that a subordinate convene such an investigation rather than a command investigation. JAGMAN, 5 0 20-ti anti 0 2051).

3611 "MAJOR INCIDENTS." For those situations determined to he "major incidents," a court of inquiry shall be convened unless [lie convening authority determines such type of administrative investigation is otherwise unwarranted and the next superior in the chain-of-command concurs in the decision not to convene a court.

A. **Major incidents defined.** Appendix A-2-a of the JAGMAN-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:

1. Multiple deaths

Note: "If at any time during the course of a court or board of inquiry, 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, § 0238b.

2. Substantial property loss

-Substantial property loss is that which greatly exceeds what is normally encountered in the course of day-to-day operations.

3. Substantial harm to the environment

-Substantial harm is that which greatly exceeds what is normally encountered in the course of day-to-day operations.

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.

B. **Death cases.** Not withstanding the fact that a death case may not be a major

Indent as defined, the circumstances surrounding the death or resulting media attention may warrant the convening of a court or board of inquiry as the appropriate means of investigating the incident. JAGMAN, 0238a.

C. **Cognizance over major incidents.** The first flag or general officer exercising general court-martial convening authority over the command involved, or the first flag or general officer in the chain-of-command, or any superior flag or general officer, will take immediate control over the case as the convening authority. JAGMAN, §§ 0204d(2), 0211e.

D. **Preliminary investigation of major incidents.** While the Flag or General officer is required to assume investigative responsibility as the convening, authority in any event that appears to meet tile "major incident" criteria, that does not mean a court of inquiry is immediately appointed. Investigation of major Incidents is sometimes complicated by premature appointment of a court of inquiry. Normally, It Is advisable for the flag or

General officer to appoint an officer to immediately conduct a PI. The information developed and evidence prepared through the PI can then be used by the Flag or General officer to decide the appropriate type of administrative investigation and assist the court of inquiry, if one is convened. JAGMAN, § 0204g.

E. **Reporting the results of PIs.** If the Flag or General officer who has assumed cognizance of the "major incident" determines that the incident does fit within the definition of that term, or concludes that a court of inquiry is not warranted by the circumstances, those conclusions must be reported to the next superior in the chain-of-command before any other type of investigation is convened. JAGMAN, § 0204h(1).

PART D RULES ON WHO CONVENES ADMINISTRATIVE INVESTIGATIONS

3612 AUTHORITY TO CONVENE.

Any officer in command (including officer-in charge) may convene a command investigation or litigation report investigation. Courts and boards of inquiry may only be convened by those authorized to convene general courts martial. As discussed in section 3611, supra, only Flag or General officers may act as convening authorities in "major incidents," regardless of which type of administrative
investigation ultimately results.

3613 RESPONSIBILITY TO CONVENE.

An officer in command is responsible for initiating investigations of incidents occurring within his / her command or involving his / her personnel. If an officer in command feels that investigation of an incident by the command is impracticable, another command can be requested to conduct an investigation. JAGMAN, § 0209((1).

A. **Incidents distant from location of command.** If an incident requiring the convening of an investigation occurs at a place geographically distant from the command, or if pending deployment or other military exigency will prevent the command from conducting a thorough investigation, another command can be requested to conduct the investigation. Such requests should be directed to the superiors in the chain-of-command JAGMAN, § 0209(2), 0210((2).

B. **Incidents involving more than one command.** A single investigation should be conducted into an incident involving more than one command. Such an investigation may be convened by an officer in command of any of the activities involved. If difficulties arise in reaching agreement over who shall convene the investigation, the common superior of all commands involve will determine who the convening authority will be. It tile conduct or performance of one of the officers in command may be subject to inquiry (as in the case of a collision between ships), the area coordinator or common superior shall convene the investigation. JAGMAN, §§ 0209c(3), 0210c(3).

C. **Incidents involving Marine Corps personnel**

1. Where a Marine(s) suffers serious injury or death as a result of a training or operational incident, the senior commander in the chain-of-command to the organization involved will consider convening the investigation at that level. No member of the organization suffering the incident, nor any member of the staff of a range or other training facility involved in the incident, shall be appointed to conduct the investigation without the concurrence of the next senior command. JAGMAN, § 0208c(5)(a).

2. If an investigation is required into an incident involving Marine Corps personnel occurring in an area geographically removed from the Marine's parent command, the commanding officer shall request investigative assistance from a Marine commander authorized to convene general courts-martial in the immediate area where the incident occurred or, if no such officer is present, from Commanding General of the Marine Corps Reserve (b).

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CONDUCTING A COMMAND INVESTIGATION OR LITIGATION-REPORT INVESTIGATION

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CHAPTER XXXVII

CONDUCTING A COMMAND INVESTIGATION OR LITIGATION-REPORT INVESTIGATION

PART A - COMMAND INVESTIGATIONS

3701 THE INVESTIGATORY BODY

A. ***Composition.*** A command investigation is most frequently composed of a single investigator. JAGMAN, § 0209e.

1. The investigating officer should normally be a commissioned officer, but may be a warrant officer, senior enlisted, or a civilian employee, when appropriate. JAGMAN, § 0213a.

2. Investigating officers must be those who are best qualified for the duty by reason of age, education, training, experience, length of service, and temperament. JAGMAN, § 0213a.

B. ***Seniority principle.*** Whenever practicable, the investigating officer should be senior to any person whose conduct or performance of duty will be subject to inquiry. JAGMAN, § 0213a.

C. ***Assistance and technical support.*** Experts, reporters, interpreters, or other assistants may be appointed to assist the investigating officer in timely completion of the report. The report should make clear any such participation. JAGMAN, § 0213b.

D. ***Counsel.*** Ordinarily, counsel is not appointed for a command investigation, although a judge advocate is often available to assist the investigating officer with any legal problems or questions that may arise.

3702 CONVENING ORDER

A. ***General***

1. A command investigation is initiated by a written order called a convening order. The "officer in command" responsible for convening the investigation issues this order. Section 0209d requires the Convening Authority to include, in applicable cases, language directing the investigator to coordinate with NCIS and other law enforcement agencies. JAGMAN § 0204c.

2. A convening order must be in official letter form, addressed to the investigating officer. See JAGMAN, Appendix A-2-c for a sample convening order. When circumstances warrant, an investigation may be convened on oral or message orders. The investigating officer must include signed, written confirmation of oral or message orders in the investigative report. JAGMAN, § 0212a.

3. A convening authority may amend a convening order at any time to change the investigating officer or to enlarge, restrict, or otherwise modify the scope of the investigation. JAGMAN, § 0212b.

B. ***Contents***. The written convening order for a command investigation will contain:

1. Example 1 - subject line:

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-1111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 20CY-1.

a. The subject line must be done in accordance with Appendix A-2-c of the JAGMAN, as in example 1.

b. Command investigations are likely to be archived by calendar year groupings, by surname of individual, bureau number of aircraft, name of ship, hull number of unnamed water craft, or vehicle number of Government vehicle.

2. Example 2 - appointment statement, purpose and scope of the investigation, direction to pertinent portions of the JAGMAN:

1. Pursuant to reference (a), and under Chapter II, Part C of reference (b), you are appointed to inquire, as soon as practical, into the circumstances surrounding the motor vehicle accident and injuries sustained by YNSN Jane E. Doe, which occurred in Westminster, Massachusetts, on 28 December 20CY-1.

2. You are to investigate all facts and circumstances surrounding the motor vehicle accident. You must investigate the cause of the motor vehicle accident, resulting injuries and damages, potential claims for or against the government, and any fault, neglect, or responsibility therefore. You must express your opinion of the line of duty and misconduct status of any injured naval member. You should recommend appropriate administrative or disciplinary action. Report your findings of fact, opinions, and recommendations within 15 days from the date of this letter, unless an extension is granted. In particular, your attention is directed to sections 0209, 0215-0217, 0221-0227, 0233, 0243, and

appendixes A-2-c, A-2-e, and A-2-g.

a. The paragraphs in example 2 serve several purposes: they recite the specific purpose(s) of the investigation, give explicit instructions as to the scope of the inquiry, and direct the investigating officer to the required witness warnings and checklists of information that are required for a proper and thorough investigation.

(1) These instructions help the investigating officer accomplish all of the objectives of the investigation, not just the convening authority's immediate objectives. For example, the following case of a vehicle accident involving a member of the naval service may give rise to various concerns:

(a) The convening authority who orders the investigation may be concerned whether local procedures regarding the use of government vehicles should be changed and whether disciplinary action may be warranted;

(b) The physical evaluation board reviewing the service-member's injury may be concerned with the line of duty / misconduct determination; and,

(c) the cognizant NLSO claims office will be concerned with potential claims for or against the Government.

(2) A properly completed investigation requires the investigating officer to satisfy the special requirements for each of these different determinations..

b. All fact-finding bodies are required, as directed in paragraph 2 of example 2, to make findings of fact.

– In the typical command investigation, the convening order directs the investigating officer to conduct a thorough investigation into all the circumstances connected with the subject incident and to report findings of fact, opinions, and recommendations as to any:

(a) Resulting damage;

(b) injuries to members of the naval service and their line-of-duty and misconduct status;

(c) circumstances attending the death of members of the naval service;

(d) responsibility for the incident under investigation,

including recommended administrative or disciplinary action;

(e) claims for and against the government; and / or

(f) other specific investigative requirements that are relevant, such as those contained in JAGMAN, Chapter II, Part G: Investigations of Specific Types of Incidents.

c. Paragraph 2 of example 2 also directs the investigating officer to report opinions and recommendations. Unless specifically directed by the convening order, opinions or recommendations are not made. The convening authority may require recommendations in general, or in limited subject areas. JAGMAN, §§ 0209d, 0217e, 0217f.

d. The convening order may direct that testimony or statements of some or all witnesses be taken under oath, and may direct that testimony of some or all witnesses be recorded verbatim. When a fact-finding body takes testimony or statements of witnesses under oath, it should use the oaths prescribed in JAGMAN, § 0214b(3).

3. ***Witness warnings***. Paragraph 2 of example 2 directs compliance with the Privacy Act [JAGMAN, § 0216], Article 31(b) of the UCMJ [JAGMAN, § 0215d(2)], and injury / disease warning [JAGMAN, § 0215d(4)]. It also directs the investigating officer to other applicable JAGMAN sections.

a. Witness warnings:

(1) ***Privacy Act***. The Privacy Act of 1974 (5 U.S.C. § 552a) requires that a Privacy Act statement be given to anyone who is requested to supply "personal information" (as defined in JAGMAN, appendix A-2-a) in the course of a command investigation when that information will be included in a "system of records" (as defined in JAGMAN, appendix A-2-a). Note that witnesses will rarely provide personal information that will be retrievable by the witness' name or other personal identifier. Since such "retrievability" is the cornerstone of the definition of "system of records," in most cases, the Privacy Act will not require warning anyone unless the investigation may eventually be filed under that individual's name. JAGMAN, § 0216a.

– Social security numbers should ***not*** be included in command investigation reports unless they are necessary to precisely identify the individuals involved, such as in death or serious injury cases. If a service-member or civilian employee is asked to voluntarily provide social security numbers for the investigation, a Privacy Act statement ***must*** be provided. If the number is obtained from other sources (alpha rosters, etc. . .), the individual does not need to be provided with a Privacy Act statement. The fact that social security numbers were obtained from other sources should be noted in the preliminary statement of the investigation. JAGMAN, § 0216b.

(2) ***Article 31, UCMJ.*** A service-member suspected of an offense must first be warned under Article 31(b), UCMJ, before a statement is taken. If prosecution for the suspected offense appears likely, refer to JAGMAN, § 0215d(2) and appendix A-1-m of the JAGMAN. Ordinarily, the investigating officer should collect all relevant information from all available sources—other than from those persons suspected of offenses, misconduct, or improper performance of duty—before interviewing the suspect.

(3) ***Injury / disease warning.*** A member of the armed forces, prior to being asked to sign any statement relating to the origin, incidence, or aggravation of any disease or injury suffered, shall be advised of his / her statutory right (10 U.S.C. § 1219) not to sign such a statement and, therefore, the member is not required to do so. The spirit of this section is violated if, in the course of a command investigation, an investigating officer obtains the injured member's oral statements and reduces them to writing without the above advice having first been given. JAGMAN, § 0221b. Compliance with the injury-disease warning notification requirement must be documented. Appendix A-2-g of the JAGMAN contains a proper warning form.

b. As example 2 illustrates, all sections of the JAGMAN which may apply to the particular incident under investigation should be listed, along with any applicable chain of command directives. It is particularly important that information checklists be referenced for the investigating officer.

4. ***Time limits.*** Paragraph 2 of example 2 directs completion of the investigating officer's report within fifteen days of the date of the convening order. JAGMAN, § 0209 establishes the following time limits:

a. The convening authority prescribes the time limit the investigating officer has to submit the investigation. ***This period should not normally exceed 30 days from the date of the convening order***; however, this period may be extended for good cause. Requests and authorizations for extensions must be memorialized in the preliminary statement. JAGMAN, § 0209f.

b. Giving the investigating officer a shorter time period, such as fifteen days (as in paragraph 2 of example 2), allows the convening authority to review the investigation, return it to the investigating officer for further work if needed, and still comply with the thirty-day time goal.

5. Example 3 - administrative support:

3. By copy of this appointing order, Administrative Officer, Naval Justice School, is directed to furnish any necessary clerical assistance. Social security numbers of military personnel should be obtained through PSD or other official channels.

a. Example 3 directs the administrative officer of the command to

provide clerical support to the investigating officer although, in most cases, it will be the command's legal officer who will be tasked with providing support. It is extremely important to designate who provides that support in order for the investigating officer to obtain assistance in typing the investigation and producing the necessary number of copies.

b. Example 3 also addresses the issue of social security numbers. As discussed in section 3702B.3.a(1), above, social security numbers should ***not*** be solicited from a witness, but should be obtained from official sources.

6. Example 4 - the following combines examples 1-3 into the required letter format and is the typical convening order:

DEPARTMENT OF THE NAVY
Naval Justice School
Newport, Rhode Island 02841-1523

5830
Ser OO/333
1 Jan 20CY

From: Commanding Officer, Naval Justice School
To: Lieutenant L. O. Neophyte, USNR, 000-00-0000/1105

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-1111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 20CY-1.

Ref: (a) Oral appointing order at 0500 hours, 29 December 20CY-1
(b) JAG Manual

1. Pursuant to reference (a), and under Chapter II, Part C of reference (b), you are appointed to inquire, as soon as practical, into the circumstances surrounding the motor vehicle accident and injuries sustained by YNSN Jane E. Doe, which occurred in Westminster, Massachusetts, on 28 December 20CY-1.

2. You are to investigate all facts and circumstances surrounding the motor vehicle accident. You must investigate the cause of the motor vehicle accident, resulting injuries and damages, potential claims for or against the government, and any fault, neglect, or responsibility therefore. You must express your opinion of the line of duty and misconduct status of any injured naval member. You should recommend appropriate administrative or disciplinary action. Report your findings of fact, opinions, and recommendations within 15 days from the date of this letter, unless an extension is granted. In particular, your attention is directed to sections 0209, 0215-0217, 0221-0227, 0233, 0243, and appendixes A-2-c, A-2-e, and A-2-g.

3. By copy of this appointing order, Administrative Officer, Naval Justice School, is directed to furnish any necessary clerical assistance. Social security numbers of military personnel should be obtained through PSD or other official channels.

B. R. SIMPSON

Copy to:
Administrative Officer, NJS

7. *See* JAGMAN, § 0212 and appendix A-2-c for assistance with convening orders.

3703 THE INVESTIGATION

A. ***Preliminary steps.*** Upon first appointment as an investigating officer, the universal question is, "Where do I begin?" The officer should examine the convening order to determine the specific purpose and scope of the inquiry, remembering that the general goal is to find out who, what, when, where, how, and why an incident occurred. The officer should decide exactly which procedures to follow and become fully acquainted with the specific sections of the JAGMAN listed in the convening order. Most importantly, however, the investigating officer should begin work on the investigation immediately upon notification of appointment, whether or not a formal convening order has been received. The investigation should commence as soon as possible after the incident has occurred, since:

1. Witnesses may be required to leave the scene;

2. a ship's operating schedule may require leaving the area of the incident;

3. events will be fresh in the minds of witnesses; and,

4. damaged equipment / materials are more apt to be in the same relative position / condition as a result of the incident.

B. ***Conducting the investigation.*** The circumstances surrounding the particular incident under investigation will dictate the most effective method of conducting the investigation. For example, an investigation of an automobile accident, in which injuries were incurred, would involve: interviews at the hospital with the injured persons; collection of hospital records and police records; eyewitness accounts; vehicle damage estimates; mechanical evaluation; inspection of the scene; and other matters required by JAGMAN §§ 0221-0228, 0233, & 0243. On the other hand, an investigation of a shipboard casualty or the loss of a piece of equipment could involve merely the calling and examination of

material witnesses. Checklists of possible sources of information, depending on the nature of the incident, are contained in the appendix to this chapter.

C. ***Investigative method.*** The officer appointed to conduct the investigation may use any method of investigation he / she finds most efficient and effective. Relevant information may be obtained from witnesses by personal interview, correspondence, telephone inquiry, or other means. One of the principal advantages of the command investigation is that the interviewing of witnesses may be done at different times and places, rather than at a formal hearing. JAGMAN, § 0209.

D. ***Rules of evidence.*** The investigating officer is ***not*** bound by formal rules of evidence and may collect, consider, and include in the record any matter relevant to the inquiry that a person of average caution would consider to be believable or authentic. Authenticate real and documentary items and enclose legible reproductions in the investigative report, with certification of correctness of copies or statements of authenticity. The investigating officer ***may not speculate on the causes*** of an incident; however, inferences may be drawn from the evidence gathered to determine the likely course of conduct or chain of events that occurred. In most cases, it is ***inappropriate for the investigating officer to speculate on the thought processes of an individual*** that resulted in a certain course of conduct. JAGMAN, §§ 0215a & 0215b(3).

– ***Combinability***: As stated above, the investigating officer is not bound by the formal rules of evidence; however, there are certain things that ***cannot*** be combined with an investigative report.

a. ***NCIS investigations.*** An NCIS investigation consists of a narrative summary portion (called the Report of Investigation, where the participating agents detail the steps taken in the investigation) and enclosures. The investigating officer is forbidden from including the narrative summary portion of the NCIS investigation in the command investigation; however, the enclosures, which frequently comprise the bulk of an NCIS investigation, can be used. The command investigation should not interfere with the completion of the NCIS investigation; therefore, it is advisable that the investigating officer work closely and coordinate with the NCIS agent as to obtaining a copy of statements gathered by NCIS. JAGMAN, § 0217h(2).

b. ***Aircraft mishap investigation reports (AMIR).*** As noted in section 0108, *supra*, much of the AMIR, including statements provided to the Aircraft Mishap Board, is privileged information and may only be used for safety purposes. Therefore, information contained within the AMIR will not be available to the JAGMAN investigating officer. The JAGMAN investigating officer will be afforded equal access to all real evidence and have separate opportunities to question and obtain statements from all witnesses. JAGMAN, § 0242b; OPNAVINST 3750.16b.

c. ***Other mishap investigation reports.*** For the reasons enumerated above, these mishap investigation reports also cannot be included in JAGMAN

investigations. OPNAVINST 5102.1C.

d. ***Inspector General reports*** (cannot be included).

e. ***Polygraph examinations***. Neither polygraph reports nor their results should be included in the investigative report; however, if essential for a complete understanding of the incident, the location of the polygraph report may be cross-referenced in the report. JAGMAN, § 0217h(2).

f. ***Medical quality assurance investigations***. A Naval Hospital will conduct its own investigation of incidents where the sufficiency of medical service is called into question (much the same as the AMIR). Confidentiality is essential here also; therefore, statements obtained in a medical quality assurance investigation cannot be used in a command investigation. JAGMAN, § 0252b; NAVMEDCOMINST 6320.

E. ***Types of evidence***. Photographs, records, operating logs, pertinent directives, watch lists, and pieces of damaged equipment are examples of evidence which the investigating officer may have to identify, accumulate, and evaluate. To the extent consistent with mission requirements, the convening authority must ensure that all evidence is properly preserved and safeguarded until the investigation is complete and all relevant actions have been taken. JAGMAN § 0215c(1).

1. ***Photographs and videotapes***. Photographs and videotapes which have sufficient clarity to depict actual conditions are invaluable as evidence. Color photos may present the best pictorial description, but they are more difficult to reproduce and normally require more time to develop; therefore, it may be more prudent to utilize black-and-white film. Polaroid prints offer instant review to ensure that the desired picture is obtained, but are difficult to reproduce or enlarge. Photographs and videos should be taken from two or more angles, using a scale or ruler to show dimensions. The investigative report must include the negatives plus complete technical details relating to the camera used (e.g., type, settings, film, lighting conditions, time of day, persons depicted, and name and address of photographer). In cases of personal injury or death, photographs and videos that portray the results of bodily injury should be included only if they contribute to the usefulness of the investigation. Graphic or gory photographs and videos that serve no useful purpose should not be taken. JAGMAN, §§ 0215c(2), 0215c(4), 0217h(4).

2. ***Sketches***. Sketches in lieu of, or in conjunction with, photographs or videos provide valuable additional information. Insignificant items can be omitted in sketching, providing a more uncluttered view of the scene. Where dimensions are critical but may be distorted by camera perspective (e.g., portraying skid marks or other phenomenon), accurate sketches can be more valuable. Sketches should be drawn to scale, preferably on graph paper. They can also be used as a layout to orient numerous photos and measurements.

3. ***Real evidence***. Carefully handle pieces or parts of equipment and

material to ensure that this physical evidence is not destroyed. If attaching real evidence to the report is inappropriate, preserve it in a safe place under proper chain of custody—reflecting its location in the report of investigation. Tag each item with a full description of its relationship to the accident. If it is to be sent to a laboratory for analysis, package it with care. Accompany the item(s) with a photo or sketch depicting the "as found" location and condition.

4. ***Documents, logs, and records.*** Make verbatim copies of relevant operating logs, records, directives, memos, medical reports, police or shore patrol reports, motor vehicle accident reports, and other similar documents. To ensure exactness, reproduce by mechanical or photographic means if at all possible. Check copies for clarity and legibility, and examine closely for obvious erasures and mark-overs which might not show up when reproduced.

5. ***Personal observations.*** If the investigating officer observes an item and gains relevant sense impressions (e.g., noise, texture, smells, or any other impression not adequately portrayed by photograph, sketch, map, etc.), those impressions should be recorded and included as an enclosure to the report. JAGMAN § 0215c(2).

F. ***Witnesses.*** The best method for examining a witness depends on the witness and the complexity of the incident. The most common method used by investigating officers is the informal interview. Whatever method is employed, however, the witness' statement should be reduced to writing and signed by the witness wherever possible. Sworn statements may be taken, unless the convening order directs otherwise. A sworn statement is considered more desirable than an unsworn statement since it adds to the reliability of the statement and can expedite subsequent action (***caution***: sworn statements are ***not*** to be collected in litigation-report investigations; *see* section 0209, *infra*). The statement should be dated and should properly identify the person making the statement: a service-member by full name, grade, service, and duty station; a civilian by full name, title, business or profession, and residence. If necessary, the investigating officer can certify that the statement is an accurate summary, or verbatim transcript, of oral statements made by the witness.

1. To ensure all relevant information is obtained when examining a witness, the investigating officer should use the convening order and the requirements in the JAGMAN, Chapter II, Part G, Investigations of Specific Types of Incidents, as a checklist. In addition to covering the full scope of the investigative requirements, witness statements should be as factual in content as possible. Vague opinions (such as "pretty drunk," "a few beers," and "pretty fast") are of little value to the reviewing authority who is trying to evaluate the record. The investigating officer should be able to separate conclusions from observations; therefore, when a witness makes a vague statement, try to pin down the actual facts. For example, instead of accepting the witness' opinion that a person was "pretty drunk," the investigating officer should ask the kind of questions that go to supporting that kind of opinion. For example:

a. How long did you observe the person?

b. Describe the clarity of speech.
c. Did you observe him walk?

d. What was the condition of his eyes, etc.?

e. What was he drinking?

f. How much?

g. Over what period of time?

2. In many instances, limitations on availability of witnesses will prevent the investigating officer from obtaining a written, signed statement in the above manner. When this happens, an investigating officer may take testimony or collect evidence in any fair manner he chooses. Unavailable witnesses may be examined by mail or by telephone. If the telephone inquiry method is used, the investigating officer should prepare a written memorandum of the call, identifying the person by name, rank, armed force, and duty station (if a service-member) or by name, address, and occupation (if a civilian). The memorandum should set forth the substance of the conversation, the time and date it took place, and any rights or warnings provided.

3. Witnesses suspected of an offense, misconduct or improper performance of duty should be interviewed after the investigating officer has collected all relevant evidence. The investigating officer should consult the appropriate staff judge advocate to insure that the liaison with law enforcement officials. JAGMAN § 0215d (2).

3704 COMMUNICATIONS WITH THE CONVENING AUTHORITY. If at any time during the investigation it should appear, from the evidence adduced or otherwise, that the convening authority might consider it advisable to enlarge, restrict, or otherwise modify the scope of the inquiry or to change in any respect any instruction provided in the convening order, an oral or written report should be made to the convening authority. The convening authority may take any action on this report deemed appropriate. There is no requirement that such communications with the convening authority be included in the report or the record of the investigation. JAGMAN, § 0212b.

3705 INVESTIGATIVE REPORT

A. ***General***. JAGMAN, § 0217. The investigative report, submitted in letter form, shall typically consist of:

1. A list of enclosures;

2. a preliminary statement;

3. findings of fact;

4. opinions;

5. recommendations; and

6. enclosures.

B. Example 5 - list of enclosures:

Encl: (1)CO, Naval Justice School, appointing order, ltr 5830 Ser 00/333 dtd 1 Jan 20CY (2)Commonwealth of Massachusetts police report dtd 28 Dec 20CY-1 (3) Statement of YNSN Jane E. Doe, USN, 111-11-1111, Naval Justice School, Newport, RI, dtd 7 Jan 20CY, with signed Privacy Act statement and JAGMAN § 0221.b warning attached (4)Chronological record of medical care with medical board attached (5)NAVCOMPT 3065 (Leave Authorization) ICO SNM

1. ***List of enclosures.*** As in example 5, the first enclosure is the signed, written appointing order and any modifications, or the signed, written confirmation of an oral or message appointing order. JAGMAN, § 0217h(1).

2. JAGMAN, § 0233a requires the investigating officer to properly identify all persons involved in the incident under investigation (complete name, grade or title, service or occupation, and station or residence). The list of enclosures is a suggested place for ensuring compliance with that section (e.g., encl. (3) in example 5).

3. Enclosures should be listed in the order in which they are cited in the investigation. JAGMAN, § 0217h(1).

4. Separately number and completely identify each enclosure (make each statement, affidavit, transcript of testimony, photograph, map, chart, document, or other exhibit a separate enclosure).

5. If the investigating officer's personal observations provide the basis for any finding of fact, a signed memorandum detailing those observations must be attached as an enclosure.

6. Enclose a Privacy Act statement for each party or witness from whom personal information was obtained as an attachment to the individual's statement.

7. The signature of the investigating officer on the investigative report letter serves to authenticate all of the enclosures. JAGMAN, § 0217h(3).

C. Example 6 - preliminary statement:

PRELIMINARY STATEMENT

1. Pursuant to enclosure (1), and in accordance with reference (a), a command investigation was conducted to inquire into the circumstances surrounding the motor vehicle accident involving, and the injuries suffered by, YNSN Jane E. Doe, which occurred on 28 December 20CY-1 in Westminster, Massachusetts. All reasonably available relevant evidence was collected. There were no difficulties encountered during the conduct of this investigation.

a. While certain minor conflicts appear in the evidence, none was of sufficient degree or materiality to warrant comment.

2. All documentary evidence included herein is certified to be either the original or a copy which is a true and accurate representation of the original document represented.

3. All social security numbers were obtained from official sources and not solicited from individual servicemembers.

4. LCDR Al Bundy, JAGC, USN, was consulted on the possibility of claims for or against the government as a result of the vehicle accident.

1. ***Preliminary statement***. JAGMAN, § 0217c.

a. The purpose of the preliminary statement is to inform the convening and reviewing authorities that all reasonably available evidence was collected and that the directives of the convening authority have been met.

b. The preliminary statement should refer to the convening order and set forth:

(1) The nature of the investigation;

(2) any limited participation by a member and / or the name of any individual who assisted and the name and organization of any judge advocate consulted;

(3) any difficulties encountered in the investigation;

(4) any requests and authorizations for extensions;

(5) if the evidence in the enclosures is in any way contradictory, notation of such in the preliminary statement and a factual determination in the findings-of-fact section (notation and explanation should be reserved for material conflicts);

(6) any failure to advise individuals of their rights;

(7) the fact that all social security numbers were obtained from official sources;

(8) any other information necessary for a complete understanding of the case.

c. Do not include a synopsis of facts, recommendations, or opinions in the preliminary statement. These should appear in the pertinent sections of the investigative report.

d. It is ***not necessary*** for the investigating officer to provide an outline of the method used to obtain the evidence contained in the report. JAGMAN, § 0217c(1).

e. A preliminary statement does not eliminate the necessity for making findings of fact. Even though the subject line and preliminary statement may talk about the death of a person in an aircraft mishap, findings of fact must describe the aircraft, time, place of accident, identity of the person, and other relevant information. JAGMAN, § 0217c(3).

D. ***The "ROYAL RUMBLE."*** The investigating officer must be able to distinguish the difference between the terms "fact," "opinion," and "recommendation." The following may be helpful in making that distinction:

1. A "fact" is ***something that is or happens*** (e.g., "the truck's brakes were nonfunctional at the time of the accident");

2. an "opinion" is a ***value judgment on a fact*** (e.g., "the nonfunctioning of the truck's brakes was the primary cause of the accident"); and

3. a "recommendation" is a ***proposal*** made on the basis of an opinion (e.g., "the command should issue an instruction to ensure that no truck be allowed to operate without functional brakes").

E. Example 7 - findings of fact:

FINDINGS OF FACT

1. On 28 December 20CY-1, YNSN Jane E. Doe, USN, 111-11-1111, age 21, was on authorized annual leave from the Naval Justice School, Newport, Rhode Island, where she was assigned [encl. (5)].

2. At approximately 0015, 28 December 20CY-1, a motor vehicle accident occurred on Common Road, Westminster, Massachusetts [encl. (2)].

3. At the time of the motor vehicle accident, the vehicles involved were being driven by Ms. Paula Roche of 165 Center Lane, South Ashburnham, Massachusetts, and Mr. Gary S. Driggs of Vino Street, New Braintree, Massachusetts [encl. (2)].

4. The vehicle driven by Ms. Roche was a 1999 Chevrolet pickup truck, Massachusetts registration #A/D 22-222 [encl. (2)].

1. ***Findings of fact***. Findings of fact must be as specific as possible as to times, places, persons, and events. ***Each fact shall be made a separate finding***. JAGMAN, § 0217d.

2. Each fact must be supported by testimony of a witness, statement of the investigating officer, documentary evidence, or real evidence attached to the investigative report as an enclosure and ***each enclosure on which it is based must be referenced***. For example, the investigating officer may not state: "The car ran over Seaman Smith's foot," without a supporting enclosure. He may, however, have Smith execute a statement stating: "The car ran over my foot." Include this statement as encl. (10) and, in the findings of fact, state: "The car ran over Seaman Smith's foot," referencing encl. (10) as in example 7. When read together, the findings of fact should tell the whole story of the incident without requiring reference back to the enclosures. Thus, organization of the findings of fact is imperative if the story is to be readable. Telling the story chronologically is often the best method.

3. ***Standards of proof***

a. ***Preponderance of the evidence***. The investigating officer may only make findings of fact that are supported by a preponderance of the evidence. A preponderance is created when the evidence as a whole shows that the fact sought to be proved is more probable than not. Weight of evidence in establishing a particular fact is not to be determined by the sheer number of witnesses or volume of evidence, but depends upon the effect of the evidence in inducing belief that a particular fact is true. JAGMAN, § 0215b.

b. ***Clear and convincing***. In certain instances, findings of fact may only be based upon a showing of clear and convincing evidence.

(1) Where line of duty / misconduct determinations must be made (*see* Chapter III), the service-member is entitled to several presumptions: that the injury or disease was incurred while in the line of duty; that the service-member is mentally responsible for his / her actions, and; if the injury or disease was incurred while the service-member was in a period of unauthorized absence which is less than 24 hours, it is presumed that such absence did not materially interfere with the member's military duty. These presumptions may be rebutted. To make findings of fact contrary to the initial presumption, clear and convincing proof is required. JAGMAN, § 0215b(2).

(2) In order to find that the acts of a deceased member may have caused harm and / or loss of life, including his / her own life, through intentional acts, findings of fact relating to those issues must be established by clear and convincing evidence. JAGMAN, § 0215b(2)(d).

"Clear and convincing" means a degree of proof which should leave no serious or substantial doubt as to the correctness of the conclusion in the mind of objective persons after considering all the facts. It is a degree of proof that is intermediate, being more than a preponderance, but not reaching the extent of certainty as beyond any reasonable doubt. JAGMAN, appendix A-2-a.

4. ***Checklists***. To ensure complete findings of fact, the investigating officer should use the convening order and the specific requirements set out in the JAGMAN as checklists. If the investigation covers more than one area, the investigation must satisfy the requirements for each separate area. For example, an investigation of an automobile accident between a Navy vehicle and a civilian vehicle, resulting in injury to the Navy driver, would involve the following sections of the JAGMAN and the special requirements of each would have to be satisfied:

a. Section 0233, injuries to service-members;

b. section 0243, motor vehicle accidents; and

c. section 0251 and Chapter VIII, claims for or against the government.

5. ***Evidentiary conflicts***. If the evidence is in any way contradictory, the investigating officer still must make a factual determination in the findings of fact section. The following problem should make this clear:

a. ***Problem***. The enclosures in an investigation reveal the following information. Mr. ***A*** states: he had seen a vehicle speeding by him at 90 mph; he was almost hit by the car; he does not own a car, is 80 years old, and has not driven since

1945 [encl. (4)]. Mr. ***B***, an off-duty police officer, states that, as the car passed him, he glanced at his speedometer and he was traveling 35 mph; he estimates the speed of the other car at 45 mph [encl. (5)]. The police report reveals that the car left only seven (7) feet of skid marks on dry, smooth, asphalt pavement before stopping [encl. (6)]. How should the investigating officer record this information?

b. ***Solution***. The investigating officer should note the conflicting accounts in the preliminary statement as follows: "Two conflicting accounts of the speed of the vehicle in question appear in witness statements [encls. (4) and (5)], but only encl. (5), the statement of Mr. ***B***, is accepted as fact below because of his experience, ability to observe, and emotional detachment from the situation." Findings of fact should reflect only the investigating officer's ***evaluation*** of the facts: "that the vehicle left skid marks of seven (7) feet in length in an attempt to avoid the collision [encl. (6)]"; "that the skid marks were made on a dry, smooth, asphalt surface [encl. (6)]"; and "that the speed of the vehicle was 45 mph at the time brakes were applied [encl. (5)]."

c. In some situations, it may not be necessary to reflect a discrepancy in the preliminary statement. In other situations, it may be impossible to ascertain a particular fact. If, in the opinion of the investigating officer, the evidence does not support any particular fact, this difficulty should be properly noted in the preliminary statement: "The evidence gathered in the forms on encls. (4) and (7) does not support a finding of fact as to the . . ., and, hence, none is expressed."

d. ***Only rarely*** will the conflict in evidence or the absence of it prevent the investigating officer from making a finding of fact in a particular area. Thus, this should not be used as a way for the investigating officer—who is either unwilling to evaluate the facts or too lazy to gather the necessary evidence—to avoid making the required findings of fact.

F. Example 8 - opinions:

OPINIONS

1. The voluntary intoxication of Ms. Roche was the proximate cause of the accident [FOF (11), (15), and (17)].

2. Excessive speed played a significant role in causing the accident [FOF (15), (16), (17), and (20)].

3. YNSN Doe used poor judgment in allowing Ms. Roche to drive from the VFW Club, but available evidence indicates that YNSN Doe attempted to get Ms. Roche to stop and allow her to drive—or, in the very least, to slow down—and was unsuccessful [FOF (11), (14), (15), and (16)].

4. YNSN Jane E. Doe's personal injuries were incurred in the line of duty and not due

to her own misconduct [FOF (1), (7), (8), (16), (19), (20), (21), (22), and (30)].

– ***Opinions.*** Opinions are reasonable evaluations, inferences, or conclusions based on the facts. ***Each opinion must reference the findings of fact supporting it.*** In certain types of investigations, the convening authority will require the investigating officer to make certain opinions. Opinion 4 in example 8 is an illustration of a specific opinion required to be made in investigations concerning injuries to service-members. This line of duty / misconduct opinion will be discussed in Chapter III. JAGMAN, § 0217e.

G. Example 9 - recommendations:

RECOMMENDATIONS

1. That a claim be pursued for the injuries sustained by YNSN Doe under the Medical Care Recovery Act.

2. That no administrative or disciplinary action be taken against YNSN Doe.

1. ***Recommendations.*** Recommendations are proposals derived from the opinions expressed, made when directed by the convening authority, and may be specific or general in nature. If corrective action is recommended, the recommendation should be as specific as possible. JAGMAN, § 0217f.

2. Disciplinary action is an area commonly addressed by the recommendations.

a. Unless specifically directed by proper authority, an investigating officer should not prefer or notify an accused of recommended charges. JAGMAN, § 0217f.

b. If a punitive letter of reprimand or admonition is recommended, prepare a draft of the recommended letter and submit it as an endorsement to the investigative report. JAGMAN, § 0218.

c. If a nonpunitive letter is recommended, a draft is ***not*** included in the investigation, but should be forwarded to the appropriate commander for issuance. JAGMAN, § 0218.

H. Example 10, following, is an example of a completed command investigative report (without enclosures). JAGMAN, app. A-2-c also contains a sample report.

5830
[Code]
12 Jan 20CY

From: Lieutenant L. O. Neophyte, USNR, 000-00-0000/1105
To: Commanding Officer, Naval Justice School, Newport, RI 02841-1523

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-1111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 20CY-1

Ref: (a)JAG Manual

Encl: (1)CO, NJS, appointing order, ltr 5830 Ser 00/333 dtd 1 Jan 20CY
(2)Commonwealth of Massachusetts police report dtd 28 Dec 20CY-1_
(3)Statement of YNSN Jane E. Doe, USN, 111-11-1111, Naval Justice School, Newport, RI, dtd 7 Jan 20CY, with signed Privacy Act statement and JAGMAN, § 0221 warning attached
(4)Chronological record of medical care with medical board attached
(5)NAVCOMPT 3065 (Leave Authorization) ICO SNM

PRELIMINARY STATEMENT

1. Pursuant to enclosure (1), and in accordance with reference (a), a command investigation was conducted to inquire into the circumstances surrounding the motor vehicle accident involving, and the injuries suffered by, YNSN Jane E. Doe which occurred on 28 December 20CY-1 in Westminster, Massachusetts. All reasonably available relevant evidence was collected. There were no difficulties encountered during the conduct of this investigation.

a. While certain minor conflicts appear in the evidence, none was of sufficient degree or materiality to warrant comment.

2. All documentary evidence included herein is certified to be either the original or a copy which is a true and accurate representation of the original document represented.

3. All social security numbers were obtained from official sources and not solicited from individual servicemembers.

4. LCDR Al Bundy, JAGC, USN, was consulted on the possibility of claims for or against the government as a result of the vehicle accident.

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-1111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 20CY-1

FINDINGS OF FACT

1. On 28 December 20CY-1, YNSN Jane E. Doe, USN, 111-11-1111, age 21, was on authorized annual leave from the Naval Justice School, Newport, Rhode Island, where she was assigned [encl. (5)].

2. At approximately 0015, 28 December 20CY-1, a motor vehicle accident occurred on Common Road, Westminster, Massachusetts [encl. (2)].

3. At the time of the motor vehicle accident, the vehicles involved were being driven by Ms. Paula Roche of 165 Center Lane, South Ashburnham, Massachusetts, and Mr. Gary S. Driggs of Vino Street, New Braintree, Massachusetts [encl. (2)].

4. The vehicle driven by Ms. Roche was a 1999 Chevrolet pickup truck, Massachusetts registration #A/D 22-222 [encl. (2)].

5. The vehicle driven by Ms. Roche was registered to Mr. Yves G. Doe of 3 Oak Road, Westminster, Massachusetts [encl. (2)].

6. The vehicle driven by Ms. Roche was the property of Mr. Yves G. Doe, YNSN Doe's father [encls. (2) and (3)].

7. YNSN Jane E. Doe, USN, was a passenger in the vehicle driven by Ms. Roche [encls. (2) and (3)].

8. YNSN Jane E. Doe, USN, and Ms. Roche were both wearing seatbelts at the time of the accident [encls. (2) and (3)].

9. The vehicle driven by Mr. Driggs was a 1996 Chrysler sedan, Massachusetts registration #999-ACI [encl. (2)].

10. Early in the evening of 27 December 20CY-1, YNSN Doe and Ms. Roche went to the VFW Club in Westminster, Massachusetts [encl. (2)].

11. Over the course of several hours at the VFW Club, Ms. Roche consumed approximately seven beers and YNSN Doe drank one mixed drink and several sodas [encls. (2) and (3)].

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-1111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 20CY-1

12. Ms. Roche and YNSN Doe left the VFW Club at approximately 1150 on 27 December 20CY-1 [encls. (2) and (3)].

13. Upon leaving the VFW Club, Ms. Roche drove the truck away from the Club [encl. (3)].

14. Upon entering her father's truck, and "without thinking," YNSN Doe permitted Ms. Roche to drive the truck [encl. (3)].

15. After leaving the Club, entering the truck, and driving away, Ms. Roche proceeded down the road at an "excessively high speed" for the road conditions [encl. (3)].

16. YNSN Doe attempted to get Ms. Roche to pull over and allow her to drive, or to at least slow down, but Ms. Roche failed to comply with the request [encls. (2) and (3)].

17. The roads were covered with ice and packed snow [encls. (2) and (3)].

18. Ms. Roche turned north onto Common Road and began to slide into the southbound lane of Common Road, Westminster, Massachusetts [encls. (2) and (3)].

19. Upon going into the southbound lane of Common Road, Ms. Roche lost control of the vehicle and struck the oncoming vehicle driven by Mr. Driggs [encls. (2) and (3)].

20. The speed of Ms. Roche's vehicle at the time of the accident was 40-50 mph [encls. (2) and (3)].

21. As a result of the collision, YNSN Doe sustained injuries to her pelvic area and right sacroiliac (lower back) and suffered a mild concussion [encl. (4)].

22. As a result of YNSN Doe's injuries, she was transported to the Henry Heygood Memorial Hospital, Gardner, Massachusetts, on 28 December 20CY-1 [encls. (2) and (4)].

23. On 28 December 20CY-1, after admission to the hospital, YNSN Doe underwent surgery to remove her spleen [encl. (4)].

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-1111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 20CY-1

24. YNSN Doe was transferred to the Naval Hospital, Newport, Rhode Island, on 8 January 20CY [encl. (4)].

25. YNSN Doe was hospitalized from 28 December 20CY-1 to 8 January 20CY, a period of 12 days [encl. (4)].

26. The cost of civilian hospitalization was $10,345.00 [encl. (4)].

27. The attending physicians were Dr. S. T. Bones, of Henry Heygood Memorial Hospital, Gardner, Massachusetts, and LCDR M. D. Slasher, MC, USNR, Naval Hospital, Newport, Rhode Island [encl. (4)].

28. YNSN Doe's prognosis is permanent disability, and no outpatient treatment is expected [encl. (4)].

29. YNSN Doe is presently on limited duty attached to the Naval Justice School, Newport, Rhode Island, subsequent to the findings rendered by a medical board convened at Naval Hospital, Newport, Rhode Island [encl. (4)].

30. Ms. Roche was arrested and cited for driving under the influence on 28 December 20CY-1 [encl. (2)].

OPINIONS

1. The voluntary intoxication of Ms. Roche was the proximate cause of the accident. [FOF (11), (15), and (17)].

2. Excessive speed played a significant role in causing the accident [FOF (15), (16), (17), and (20)].

3. YNSN Doe used poor judgment in allowing Ms. Roche to drive from the VFW Club, but available evidence indicates that YNSN Doe attempted to get Ms. Roche to stop and allow her to drive—or, in the very least, to slow down—and was unsuccessful [FOF (11), (14), (15), and (16)].

4. YNSN Jane E. Doe's personal injuries were incurred in the line of duty and not due to her own misconduct [FOF (1), (7), (8), (16), (19), (20), (21), (22), and (30)].

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 20CY-1

RECOMMENDATIONS

1. That a claim be pursued for the injuries sustained by YNSN Doe under the Medical Care Recovery Act.

2. That no administrative or disciplinary action be taken against YNSN Doe.

/s/ L. O. Neophyte

I. ***Classification of report.*** Because of the wide circulation of JAGMAN investigative reports, classified information should be omitted unless inclusion is essential. When included, however, the investigative report is assigned the classification of the highest subject matter contained therein. Encrypted versions of messages are not included or attached to investigative reports where the content or substance of such message is divulged. To facilitate the processing of requests for release of investigations (such as Freedom of Information Act requests which require "declassification" review) and to simplify handling and storage, declassify enclosures whenever possible. If the information in question cannot be declassified, but contributes nothing to the report, consider removing the enclosure from the investigation with notification in the forwarding endorsement. JAGMAN, § 0217b.

3706 ACTION BY CONVENING AND REVIEWING AUTHORITIES

A. ***Review and forwarding.*** JAGMAN, §§ 0209, 0219. Upon completing the investigative report, the investigating officer submits the report to the convening authority, who reviews it and takes one of the following actions:

1. Returns the report for further inquiry or corrective action, noting any incomplete, ambiguous, or erroneous action of the investigating officer;

2. Determines that the investigation is of no interest to anyone outside the command and chooses to file the investigation, without further forwarding, as an internal report;

3. Transmits the report by endorsement to the next appropriate superior

officer, typically to the officer exercising general court-martial convening authority (GCMCA) over the convening authority. The convening authority's endorsement will set forth appropriate comments, recording approval or disapproval in whole or in part, of the investigation's proceedings, findings, opinions, and recommendations. In line of duty / misconduct investigations, the convening authority is required to specifically approve or disapprove the line of duty / misconduct opinion. This is accomplished in paragraph 2 of the following example.

B. Example 11 - first endorsement on a command investigation:

DEPARTMENT OF THE NAVY
NAVAL JUSTICE SCHOOL
NEWPORT, RI 02841-5030

5830
Ser 00/357
14 Jan 20CY

FIRST ENDORSEMENT on LT L. O. Neophyte, USNR, 000-00-0000/1105,
5800 [Code] ltr of 12 Jan 20CY

From: Commanding Officer, Naval Justice School
To: Commander, Naval Education and Training Center, Newport

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-1111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 20CY-1

1. Readdressed and forwarded.

2. The opinion that YNSN Doe's injuries were incurred in the line of duty and not as a result of her misconduct is approved.

3. By copy of this endorsement, the Commanding Officer, Naval Legal Service Office, Newport, Rhode Island, is requested to assert the claim against Ms. Paula Roche, to recover the reasonable costs of medical care provided by the Navy to YNSN Doe.

4. The basic proceedings, findings of fact, opinions and recommendations of the investigating officer are approved.

/s/B. R. SIMPSON

Copy to:
CO NAVLEGSVCOFF Newport
LT Neophyte

1. If the convening authority corrects, adds, or disapproves findings of fact, opinions, or recommendations, the following language would be added in the endorsement;

Example 12 - sample endorsement language:

* The findings of fact are hereby modified as follows: * The following additional findings of fact are added: (numbers start after the last findings of fact in the basic investigation). * Opinion ___ in the basic correspondence is not substantiated by the findings of fact because _____ and is therefore disapproved (modified to read as follows: _____). * The following additional opinions are added: (numbers start after the last opinions in the basic investigation). * Recommendation ___ is not appropriate for action at this command; however, a copy of this investigation is being furnished to _____ for such action as deemed appropriate. * Additional recommendations: (numbers start after the last recommendation in the basic investigation). * The action recommended in recommendation ___ has been accomplished by _____ (has been forwarded to _____ for action; etc.).

2. If corrective action had been taken on the investigation, paragraph 4 in example 11 would read:

Example 13 - corrective action taken endorsement:

4. Subject to the foregoing remarks, the basic proceedings, findings of fact, opinions, and recommendations of the investigating officer are approved.

3. The endorsement must also state where original evidence, if any, is preserved, what arrangements have been made for its safekeeping, and provide the name and telephone number of the responsible official. JAGMAN, §§ 0209g(1), 0215c(1)(b).

C. ***Corrective action.*** The convening authority's endorsement must specifically indicate what corrective action, if any, is warranted and has been or will be taken. Whenever punitive or nonpunitive disciplinary action is contemplated or taken as the result

of the incident under inquiry, such action should be noted in the endorsement. JAGMAN, §§ 0209g(1), 0218. Convening authorities can expect superior commanders to require subsequent reports on how lessons learned have been implemented; if administrative investigations are to be effective tools, "tenacious follow-up action is required." JAGMAN, § 0203.

1. Punitive letters, or copies of recommended drafts, shall be included as enclosures. Nonpunitive letters are ***not*** to be mentioned in endorsements or included as enclosures. JAGMAN, § 0218.

D. ***Routing the investigation***

1. Upon completion of the endorsement, the convening authority forwards the original investigative report through the chain-of-command, to the GCMCA over the convening authority. ***It is no longer appropriate to list the Judge Advocate General as the ultimate addressee; command investigations are not routinely forwarded to JAG.*** JAGMAN, § 0209h(1). The subject matter and facts found will dictate the exact routing of the report; for example, area coordinators may be included as via addresses if the investigation relates to an issue affecting their area coordination responsibilities.

2. One complete copy of the investigation should be forwarded with the original for each intermediate reviewing authority (additional copies are required in death cases). JAGMAN, § 0219a.

3. Advance copies of the report of investigation shall be forwarded by the convening authority in the following cases:

(a) For command investigations involving injuries and deaths of naval personnel, or material damage to a ship, submarine, or Government property (excluding aircraft), advance copies are sent to Commander, Naval Safety Center. In aircraft mishap cases, copies of investigations are sent to the Naval Safety Center only upon request. JAGMAN, § 0219b.

(b) Where the adequacy of medical care is reasonably in issue and which involve significant potential claims, permanent disability, or death, advance copies are sent to the Naval Inspector General, Chief, Bureau of Medicine and Surgery (two copies); and the local NLSO. JAGMAN, §§ 0209g(2)(a), 0219c.

(c) Advance copies are to be provided to servicing NLSOs in cases involving potential claims or civil lawsuits. JAGMAN, § 0219b.

E. ***Review of command investigations***

1. ***General.*** Any command investigation that is forwarded must ultimately be reviewed by at least one GCMCA superior to the convening authority. There may be

situations where the first reviewer in the chain-of-command is not a GCMCA (i.e., where a command investigation is convened by an officer in charge, then forwarded to the unit commanding officer). Such intermediate reviewing authorities endorse the report similar to the original convening authority, including any information known—or reasonably ascertainable—at the time of the review concerning action taken or being taken in the case, but not already contained in the record or previous endorsement. Upon the GCMCA's receipt of the investigation, the report and endorsements will be reviewed and either retained at that level or endorsed and forwarded up the chain-of-command if higher review is deemed necessary (thus, even though a Carrier Group Commander may be a GCMCA, he / she may elect to forward a command investigation to the Fleet Commander where the report is thought to be of particular interest). The command investigation is deemed "final" when the last reviewing authority determines that further endorsement is not necessary. JAGMAN, § 0209h.

2. ***Copies***. Separate from the endorsement review process, copies of the investigation report should be made available to all superior commanders who have a direct official interest in the incident. Copies need not be provided to CNO or to CMC ***unless*** involving:

a. Incidents that may result in extensive media exposure;

b. training incidents causing death or serious injury;

c. operational incidents causing death or serious injury;

d. incidents involving significant fraud, waste, abuse, or significant shortages of public funds;

e. incidents involving lost, missing, damaged, or destroyed property of significant value;

f. incidents involving officer misconduct;

g. incidents required to be reported to headquarters under other directives or regulations;

h. incidents that may require action by CNO or CMC; and

i. cases involving significant postal losses or offenses.

JAGMAN, § 0209h(4).

F. ***Retention of command investigations***. The original convening authority is required to maintain a copy of all command investigations for a minimum of two years. Further, the GCMCA or the last commander to whom a command investigation is routed for

review must retain such records for a period of two years from the time they area received. After two years, the records should be archived in accordance with SECNAVINST 5212.5 series. JAGMAN, §§ 0209g(2), 0209h(5).

G. ***Release of command investigations.*** Persons outside of the Department of the Navy may seek release of command investigations, typically under the Freedom of Information Act (*see* SECNAVINST 5720.4) and / or the Privacy Act (*see* SECNAVINST 5211.5). Release may only be made by the proper releasing authority. JAGMAN, § 0220.

1. As a general rule, no command investigation may be released until it is deemed "final"—all endorsements and review is complete.

2. CNO (N09N) retains release authority for command investigations involving actual or possible loss or compromise of classified information.

3. For all other command investigations, the GCMCA to whom the report is ultimately forwarded is the proper release authority.

PART B - LITIGATION-REPORT INVESTIGATIONS

3707 THE INVESTIGATORY BODY. Like a command investigation, a litigation-report investigation is most frequently composed of a single investigator (officer, senior enlisted, or civilian employee) who is best qualified for the assignment and, where practical, senior to any individual whose conduct is subject to inquiry. JAGMAN, § 0213. Litigation-report investigations are unique in one significant aspect: the investigating officer ***must*** conduct his / her investigation under the direction and supervision of a judge advocate. JAGMAN, § 0210c(1).

3708 CONVENING ORDER

A. ***General***

1. A litigation-report investigation may be convened ***only after*** the convening authority has consulted with the "cognizant judge advocate." JAGMAN, § 0210b(1)(a).

a. The "cognizant judge advocate" is that individual who is responsible for providing legal advice to the convening authority. This will often be a station or staff judge advocate, but may also include a command services or claims officer at the servicing Naval Legal Service Office. JAGMAN, appendix A-2-a.

2. A litigation-report investigation must be convened in writing. JAGMAN, § 0210e(1)(a).

3. While resembling the convening order used for command investigations, a litigation-report investigation convening order differs as follows:

(a) The convening order must specifically identify by name the judge advocate under whose direction and supervision the investigation is to be conducted;

(b) opinions and recommendations will ***not*** normally be requested;

(c) the convening order ***must*** include an attorney work product statement;

(d) the investigating officer will be cautioned to discuss the conduct and results of the investigation only with those personnel who have an official need to know. JAGMAN, § 0210d.

B. ***Contents***

1. Example 14

DEPARTMENT OF THE NAVY
NAVAL HOSPITAL
NEWPORT, RI 02841

5830
Ser 00/334
2 Jan 20CY

From: Commanding Officer, Naval Hospital, Newport
To: LCDR M. P. Neoplasm, MSC, USN, 000-01-0000/0000

Subj: LITIGATION-REPORT INVESTIGATION OF THE COMPLICATIONS IN TREATMENT, WITH RESULTING BRAIN DAMAGE, IN THE CASE OF MARY THUMBTACK, DEPENDENT SPOUSE, WHICH OCCURRED AT NAVAL HOSPITAL, NEWPORT, ON OR ABOUT 30 DECEMBER 20CY-1.

Ref: (a)JAG MANUAL

1. Per reference (a), you are hereby appointed to investigate the circumstances surrounding the complications in treatment in the case involving Mary Thumbtack, dependent spouse, which occurred at Naval Hospital, Newport, on or about December 30, 20CY-1, and to prepare the related litigation-report.

2. During the investigation, you will be under the direction and supervision of LCDR Al Bundy, JAGC, USN. Consult LCDR Bundy before beginning your inquiry or collecting any evidence. If you have not already done so, you should read Chapter II of reference (a), paying particular attention to section 0252, before consulting LCDR Bundy.

3. This investigation is being convened and your report is being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter. As such it is privileged and should be discussed only with personnel who have an official need to know of its progress or results. If you have any doubt about the propriety of discussing the investigation with any particular individual, then you should seek guidance from LCDR Bundy before doing so.

4. Investigate all facts and circumstances surrounding the complications in treatment, including the potential or probable causes, resulting injuries and damages, and any fault, neglect, or responsibility therefore. Report your findings to LCDR Bundy by 20 January 19 _, unless an extension of time is granted. Do not express any opinions or recommendations unless LCDR Bundy directs you to do so. Label your report "FOR OFFICIAL USE ONLY: ATTORNEY WORKPRODUCT," and take appropriate measures to safeguard it.

/s/R. U. SMITHERS

2. *See* JAGMAN, § 0212 and appendix A-2-d for assistance with convening orders for litigation-report investigations.

3709 THE INVESTIGATION

A. ***General.*** In conducting the investigation, the rules and considerations set forth for command investigations in section 0203, above, apply generally to litigation-report investigations.

B. ***Considerations unique to litigation-report investigations***

1. While free to collect, consider and include any relevant evidence regarding the incident under investigation, the investigating officer ***must*** ensure that the supervising judge advocate is kept informed, and approves, of the method and nature of evidence collected.

2. When deemed necessary to obtain evidence such as expert analyses, outside consultant reports, and so forth, the supervisory judge advocate should sign the necessary requests. JAGMAN, § 0210e(2).

3. With regard to witnesses, in most cases the investigating officer will summarize the results of interviews rather than take written and / or signed statements from the witness. If there is reason why a witness should be asked to sign a statement (i.e., a witness with adverse interests to the Government is willing to provide a statement clearly beneficial to the Government's interest), the supervisory judge advocate should be consulted first. JAGMAN, § 0215d(1)(b).

3710 INVESTIGATIVE REPORT

A. ***General.*** In writing the investigation report, the rules and considerations set forth for command investigations in section 0205, above, apply generally to litigation-report investigations.

B. ***Considerations unique to litigation-report investigations***

1. The preliminary statement must contain an attorney work product statement. JAGMAN, §§ 0210d(2), 0217c(2).

2. Opinions and recommendations will ***not*** be made by the investigating officer unless directed by the supervisory judge advocate. The supervisory judge advocate may choose to write the opinions and / or recommendations. JAGMAN, §§ 0210d(1), 0217e,f.

3. The report should be signed by both the investigating officer and the supervisory judge advocate. JAGMAN, §§ 0210e(3), 0217g.

4. The report shall be marked "FOR OFFICIAL USE ONLY: LITIGATION / ATTORNEY WORK PRODUCT." JAGMAN, § 0210e(3).

3711 ACTION BY CONVENING AND REVIEWING AUTHORITIES

A. ***Review and forwarding.*** Upon receiving the litigation-report investigation, the convening authority reviews the document and takes one of the following actions:

1. Return the investigation to the supervisory judge advocate for further inquiry;

2. Endorse and forward the report in writing.

JAGMAN, § 0210g(1).

B. ***First endorsement on a litigation-report investigation.*** Unlike the endorsement of a command investigation, the convening authority may only make limited comments in endorsing litigation-report investigations.

1. The convening authority may comment on those aspects of the report which bear on the administration or management of the command, including any corrective action taken. JAGMAN, § 0210g(1).

2. The convening authority shall ***not*** normally approve or disapprove of the findings of fact. JAGMAN, § 0210g(1).

3. The convening authorities endorsement must be marked "FOR OFFICIAL USE ONLY: LITIGATION / ATTORNEY WORK PRODUCT."

C. ***Routing the investigation***

1. Upon completion of the endorsement, the convening authority forwards the original investigative report to the Judge Advocate General (Code 15) (previously Code 35), via the Staff Judge Advocate of the GCMCA in the chain of command. JAGMAN, § 0210g(2).

2. One complete copy of the investigation should be forwarded with the original for the GCMCA. JAGMAN, § 0219a.

3. Copies of the report are to be provided to superiors in the chain of command and to other commands which have a direct need to know, including the servicing Naval Legal Service Office. Dissemination of the report ***shall not*** otherwise be made without first consulting a judge advocate. JAGMAN, § 0210g(2).

D. ***Review of litigation-report investigations***

1. Superiors in the chain of command who receive a copy of the litigation-report may, but are not required to, comment on the investigation. They will ***not*** normally approve or disapprove findings of fact. JAGMAN, § 0210h(1).

2. The Staff Judge Advocate to whom the litigation-report investigation is sent is to review the investigation for accuracy and thoroughness. The report is then forwarded to JAG. Formal endorsement is not required. JAGMAN, § 0210h(2).

E. ***Retention of litigation-report investigations***

1. The original convening authority is required to retain a copy of the litigation-report investigation, kept in a file marked "FOR OFFICIAL USE ONLY: LITIGATION / ATTORNEY WORK PRODUCT" and safeguarded against improper disclosure. JAGMAN, § 0210g(2). The JAGMAN does not prescribe a time period for retention; before

destroying, consultation with a judge advocate or OJAG (Code 15) is advisable.

2. Any copies of litigation-report investigations maintained by superiors, including the reviewing GCMCA, must be filed in specially marked files and safeguarded against improper disclosure. Consultation with a judge advocate or OJAG (Code 15) is advisable before ordering destruction of a litigation-report investigation.

F. ***Release of litigation-report investigation.*** For all litigation-report investigations, the Judge Advocate General retains release authority. Convening and reviewing authorities are ***not authorized*** to release litigation-report investigations or their contents. JAGMAN, § 0220c.

PART C - SPECIAL CONSIDERATIONS IN DEATH CASES

3712 SPECIAL NATURE OF DEATH CASES

A. ***Release of death investigations to family members.*** By law, reports pertaining to the death of military members are released to family members. Since the deceased cannot contribute to the investigative process, special considerations and sensitivity must prevail. JAGMAN, § 0234d.

B. ***Status reports.*** To ensure proper and timely investigation, Navy commands must submit investigation progress reports every 14 days. The requirement for this status report ceases once the investigation has been forwarded to the next higher level of review. MILPERSMAN, Section 1770.

1. Completion of a death investigation should not be delayed pending completion of associated documents (i.e., autopsy reports, death certificates), unless inclusion of such documents is absolutely essential. JAGMAN, § 0236b.

2. Unavailability of documents should simply be noted in the investigation and endorsement, and supplemented by separate correspondence as such documents are obtained. JAGMAN, § 0236b.

3713 SPECIAL RULES IN DEATH CASES

A. **NCIS notification.** NCIS must be notified, per SECNAVINST 5520.3 series, of any death occurring on a Navy vessel or Navy / Marine Corps aircraft or installation (except when the cause of death is medically attributable to disease or natural causes). JAGMAN, § 0234b.

B. **Time Limitations**. The period for completing the administrative investigation report / record into a death shall not normally exceed 20 days from the date of the death or its discovery. For good cause, however, the CA may extend the period. JAGMAN, § 0234c.

C. ***Line of duty / misconduct determinations prohibited***

1. No survivor benefits administered by the Navy are conditioned upon a line of duty / misconduct determination. The Veteran's Administration also does not desire such an opinion. JAGMAN, § 0237b.

2. Administrative investigations shall ***not***, therefore, contain the ultimate, written opinion concerning a deceased member's line of duty status, nor shall misconduct be attributed. JAGMAN, § 0237a.

3. Where such an opinion is mistakenly recorded, the reviewing authorities may correct such by noting the error and its lack of validity in the endorsement. JAGMAN, § 0237a.

D. ***Independent reviews***

1. Even though prohibited from rendering the ultimate line of duty / misconduct opinion, an investigation may uncover evidence which calls into question the propriety of a deceased individual's conduct. In a fair and impartial manner, such facts must be documented in the investigation.

– To find that the acts of a deceased service-member may have caused harm or loss of life, including the member's own, through intentional acts, findings of fact must be established through clear and convincing evidence. JAGMAN, § 0240.

2. Prior to endorsement of an investigation which calls into question the deceased's conduct, the convening authority may wish the report to be reviewed to ensure thoroughness, accuracy of the findings, and fairness to the deceased member. JAGMAN, § 0239a

3. The individual selected to conduct this review shall have no previous connection to the investigative process and must be outside the convening authorities immediate chain of command. To the extent possible, the reviewer should possess training, experience, and background sufficient to allow critical analysis of the factual circumstances. JAGMAN, § 0239b.

4. The reviewer is not to act as the deceased's representative, but rather provide critical analysis from the perspective of the deceased, tempered by the reviewer's

own experience, training, and education. JAGMAN, § 0239c.

5. If the reviewer believes comments are warranted, such comments shall be completed and provided to the convening authority within 10 working days of the report's delivery to the reviewer. JAGMAN, § 0239c.

6. The convening authority is to consider any comments submitted by the reviewer and take any action deemed appropriate. The comments shall be appended to the investigative report. JAGMAN, § 0239d.

E. ***Routing instructions***

1. The GCMCA shall provide the Echelon II Commander with an advance copy of all death investigations (excepting limited investigations). Such action is to be noted in any forwarding endorsement. JAGMAN, § 0241a.

2. Graphic photographs should only be included in investigative reports where necessary. Special handling for such materials is required. JAGMAN, § 0241b.

APPENDIX A

CHECKLIST FOR INVESTIGATING OFFICERS CONDUCTING COMMAND INVESTIGATIONS*

I. INITIAL ACTION

___ A. Begin work on the investigation immediately upon hearing that you are to be appointed investigating officer, whether or not you have received a formal convening order.

___ B. Examine the convening order carefully to determine the scope of your investigation.

___ C. Review all relevant instructions on your investigation, including:

___ 1. The convening order.

___ – Is the scope of inquiry defined, including sections in the JAGMAN outlining special investigative requirements? Are there any special chain of command requirements?

___ 2. Chapters II and VIII of the JAGMAN.

___ D. Decide when your investigation must be completed and submitted to the convening authority.

___ E. Decide the exact purpose and methodology of your investigation.

___ F. Contact command being investigated and ask that all relevant logs, documents and other evidence be safeguarded.

* ***For litigation-report investigations, ensure the supervising judge advocate is informed of your proposed method and actions.***

II. GATHERING AND RECORDING OF INFORMATION

A. Interviewing Witnesses

___ 1. Draw up a list of all possible witnesses, to be supplemented as the investigation proceeds;

___ 2. Determine if witnesses are transferring, going on leave, hospitalized, or otherwise subject to circumstances which might make them inaccessible before review of the investigation is completed; and

___ 3. Inform the convening authority, orally, with confirmation in writing, immediately upon learning that a material witness might leave the area or otherwise become inaccessible before review of the investigation is completed.

Note: In some cases, the convening authority may wish to take appropriate action to prevent the witness from leaving pending review of the investigation.

___ 4. Determine which witnesses may be suspected of an offense under the UCMJ and advise them of their rights against self-incrimination and the right to counsel, using the form found in Appendix A-1-m of the JAGMAN.

___ 5. Advise each witness, who may have been injured as a result of the incident being investigated, of the right not to make a statement with regard to the injury in accordance with JAGMAN, § 0221.

___ 6. Conduct an intensive interview of each witness on the incident being investigated, covering full knowledge of:

___ a. Names, places, dates, and events relevant to the incident investigated; and

___ b. other sources of information on the incident investigated.

___ 7. Obtain an appropriate, signed Privacy Act statement from the individuals named in the subject line of the appointing order. (***Note***: ***Do not*** ask witnesses for their social security number. The SSN should be obtained from official records, if needed. The source of the SSN should be stated in the preliminary statement.)

___ 8. Record the interview of each witness with detailed notes or by mechanical means.

___ 9. Reduce each witness' statement to a complete and accurate narrative statement.

___ 10. Obtain the signature of each witness, under oath and witnessed, on the narrative statement of the interview (but ***not*** for litigation-report investigations).

___ 11. Review your list of possible witnesses carefully, as supplemented, to ensure that you have interviewed all who are personally available to you.

___ 12. Attempt to obtain statements from possible witnesses who are not personally available by message, mail, telephone interview, or other means.

B. Collection of Documents

___ 1. Draw up a list, to be supplemented as the investigation proceeds, of all possible documents, including as applicable:

___ a. Copies of relevant rules and regulations;

___ b. relevant correspondence and messages;

___ c. personnel records;

___ d. medical records (clinical and hospital records, death certificates, etc. . .);

___ e. official reports (investigative reports, military police reports, etc. . .); and

___ f. required forms, such as:

___ (1) Personnel injury forms for persons injured, obviously not as a result of their own misconduct;

___ (2) vehicle accident report forms; and

___ (3) personnel claims forms.

___ 2. Examine your list of possible documents carefully, as supplemented, to ensure that you have personally obtained all that are available.

___ 3. Attempt to obtain documents which are not personally available to you by other means (e.g., by requesting that they be supplied to you by message, telephone, fax, or mail).

___ 4. Obtain originals or certified true copies of all documents to the maximum extent possible.

C. Collection of other Information

___ 1. Draw up a list, to be supplemented as the investigation proceeds, of any other information which may be of assistance to reviewing authorities in understanding the incident investigated. For example:

___ a. Real objects (firearms, bullets, etc. . .); and

___ b. physical locations (accident sites, etc. . .).

___ 2. Examine your list of such information, as supplemented, to ensure that you have obtained all such information, personally available to you.

___ 3. Attempt to obtain information not personally available to you in other ways (e.g., by requesting that it be supplied to you by message, phone, fax, or mail).

___ 4. Reduce all such information to a form which can be conveniently included in your investigative report (e.g., photographs or sketches).

___ 5. Ensure that any evidence gathered, but not used as an enclosure to the investigative report, is kept in an identified place – safe from tampering, loss, theft, and damage—pending review of the investigation.

III. PREPARATION OF THE INVESTIGATIVE REPORT

A. Preliminary Statement

1. Include statements detailing:

___ a. The purpose of your investigation;

___ b. difficulties encountered in the investigation;

___ c. conflicts in the evidence and reasons for reliance on particular information, if any;

___ d. reasons and authorization for any delays;

___ e. failure to advise individuals of Article 31(b), Privacy Act, injury / disease rights;

___ f. assistance received in conducting the investigation;

___ g. efforts to obtain possible statements of witnesses, documents, and other evidence which you were unable to obtain;

___ h. efforts to preserve evidence pending review of the investigation; and

___ i. methods of obtaining social security numbers contained in the report.

B. Findings of Fact

___ 1. Distinguish in your own mind the differences among the terms "fact," "opinion," and "recommendation."

Note: The following may be helpful:

a. A "fact" is ***something that is or happens*** (e.g., "the truck's brakes were nonfunctional at the time of the accident").

b. An "opinion" is a ***value judgment on a fact*** (e.g., "the nonfunctioning of the truck's brakes was the primary cause of the accident").

c. A "recommendation" is a ***proposal*** made on the basis of an opinion (e.g., "that the command issue an instruction to ensure that no truck be allowed to operate without functional brakes").

___ 2. Conduct an evaluation of evidence or lack of evidence (negative finding of fact).

___ 3. Compare with the special fact-finding requirements pertaining to specific incidents addressed in the JAGMAN.

___ 4. Be specific as to times, places, and events.

___ 5. Identify person(s) connected with the incident by grade or rate, service number, organization, occupation or business, and residence.

___ 6. Make appropriate findings of fact for all relevant facts considered when preparing the report.

Note: Your personal observations are not, in and of themselves, sufficient to support a finding of fact. If you have made relevant "personal observations," reduce them to a statement signed and sworn to by yourself and include the statement as an enclosure.

___ 7. After each finding of fact, reference the enclosures to the report which support the finding of fact.

___ 8. Ensure that every enclosure is used in support of at least one finding of fact. (Delete any enclosure which is not.)

___ 9. Ensure that, when read together, the findings of fact ***tell the whole story*** of the incident investigated without a reading of the enclosures.

C. Opinions

___ 1. Ensure that each of your opinions is an opinion and not a finding of fact or recommendation.

___ 2. Ensure that each opinion references the finding(s) of fact that support it.

___ 3. Ensure that you have rendered those opinions required by the convening order or the JAGMAN as well as any others you might feel are appropriate.

Note: In cases involving the death of a service-member, it is forbidden to render any opinion concerning line of duty. Also, misconduct (as defined in the JAGMAN) shall not be attributed to the deceased service-member.

In litigation-report investigations, opinions and recommendations may only be made when directed by the supervising judge advocate.

D. Recommendations

___ 1. Ensure that each of your recommendations is a recommendation and not a finding of fact or opinion.

___ 2. Ensure that each recommendation is logical and consistent with the findings of fact and opinions.

___ 3. Address those recommendations specifically required by the convening order or the JAGMAN and any others considered appropriate.

___ 4. Recommend any appropriate corrective, disciplinary, or administrative action.

E. Enclosures

– Include the following documents as enclosures to the investigative report:

___ a. Convening order;

___ b. doctor's statement and/or copies of medical records as to the extent of the injuries;

___ c. copies of private medical bills, if reimbursement may be claimed;

___ d. autopsy report and, where available, autopsy protocol (in death cases);

___ e. report of coroner's inquest or medical examiner's report (in death cases);

___ f. laboratory reports, if any;

___ g. reservists' orders, if applicable;

___ h. statements or affidavits of witnesses or others;

___ i. statement of investigating officer, if applicable;

___ j. necessary photographs and / or diagrams, properly identified and labeled;

___ k. local regulations, if applicable;

___ l. exhibit material to support investigating officer's findings and opinions; and

___ m. signed original Privacy Act statements.

IV. CONCLUDING ACTION

___ A. Have you stretched your imagination to the utmost in gathering and recording all possible information on the incident investigated?

___ B. Have you checked and double-checked to ensure that your findings of fact, opinions, recommendations, and enclosures are in proper order?

___ C. Have you carefully proofread your investigative report to guard against embarrassing clerical errors?

CHAPTER XXXVIII

LINE OF DUTY / MISCONDUCT DETERMINATIONS

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CHAPTER XXXVIII

LINE OF DUTY / MISCONDUCT DETERMINATIONS

3801 GENERAL. To assist in the administration of naval personnel issues, the commanding officer is required to inquire into certain cases of injury, disease, or death incurred by members of his or her command. When these inquiries are conducted, the commanding officer is required to make what are referred to as line of duty (LOD) / misconduct determinations. As in most matters, the type of inquiry and the degree of formality of the report will depend upon the circumstances of each case.

3802 WHY LOD / MISCONDUCT DETERMINATIONS ARE REQUIRED. Assume the following scenario:

> Fireman Sam Speed has been drinking beer at a local tavern for several hours; he has imbibed to the point where he is now legally intoxicated. Fireman Speed leaves the bar, starts his car, and drives onto the public road. In a hurry to get home, our hero exceeds the posted speed limit by over 30 mph, despite the fact that the weather conditions have made the roads wet and blanketed the area in fog. Fireman Speed passes several other motorists, who are both shocked and scared by his driving. As he rounds a corner, Speed loses control of the vehicle and, because he did not secure his seat belt (contrary to both state law and Navy regulation), is thrown from the vehicle. Speed is lucky to be alive; he suffered significant injury that caused him to miss three (3) months of military duty and may have incurred a permanent disability.
>
> Assume that Fireman Speed is physically able to return to duty: should the three months he was absent from duty count towards fulfillment of his four (4) year enlistment contract? Should the missed time count for retirement purposes, or longevity pay purposes?
>
> Assume that Fireman Speed is *not* physically able to return to duty and will be medically discharged: should the Navy provide Speed with either severance pay and / or a disability retirement?

As implied in the above hypothetical, the results of the inquiry and the subsequent LOD / misconduct determination can affect several benefits and / or rights administered by the Department of the Navy to which the injured party may be entitled, including, inter alia:

1. extension of enlistment;

2. longevity and retirement multiplier;

3. forfeiture of pay; and

4. disability retirement and severance pay.

This report may also be made available to the Department of Veterans' Affairs to assist them in making determinations concerning Veterans' Administration benefits.

3803 WHEN LOD / MISCONDUCT DETERMINATIONS ARE REQUIRED

A. ***Injury or disease***. Findings concerning LOD / misconduct must be made in every case in which a member of the naval service incurs a ***disease or injury*** that:

1. ***Might*** result in permanent disability; ***or***

2. results in the physical inability to perform duty for a period ***exceeding*** 24 hours (as distinguished from a period of hospitalization for evaluation or observation). JAGMAN, § 0221.

B. ***Death***. Opinions concerning line of duty ***are prohibited*** in death cases. Misconduct, as defined in JAGMAN, § 0224, shall not be attributed to a deceased member. If such an opinion has been made or recorded after the incidence of an injury, but before death, the convening or reviewing authority will note the error and its lack of validity in the endorsement. JAGMAN, § 0237a.

C. ***Reservists***. Incidents involving an incapacitating injury or illness occurring during a period of annual training or inactive duty training (drill), or those occurring while traveling directly to or from places where members are performing or have performed such duty, require an interim line of duty determination within seven days. JAGMAN, § 0232.

3804 GENERAL TERMS

A. ***"Active service"***. This term, as it is used in the general rules concerning LOD / misconduct below, includes "full-time duty in the naval service, extended active duty, active duty for training, leave or liberty from any of the foregoing, and inactive duty training." JAGMAN, § 0223b.

B. ***Burden of proof***

1. ***Preponderance.*** Findings of fact must be supported by a preponderance of the evidence which is created when there is more credible and convincing evidence offered in support of a proposition than opposed to it. JAGMAN, § 0213b(1).

2. ***Clear and convincing.*** To rebut either the presumption that an injury or disease was incurred in the line of duty or the presumption of mental responsibility, clear and convincing evidence is required. Clear and convincing means a degree of proof beyond the preponderance of evidence discussed above, that should leave no serious or substantial doubt in the minds of objective persons considering the facts. It is an intermediate degree of proof, being more than a preponderance, but not reaching the extent of certainty as beyond any reasonable doubt. JAGMAN, §§ 0224b, 0226b, appendix A-2-a.

3805 WHAT CONSTITUTES LINE OF DUTY

A. ***Presumption.*** Sections 0221a and 0223a of the ***JAG Manual*** state that an injury or disease incurred by naval personnel while in active service is presumed to have been incurred "in line of duty" ***unless*** there is clear and convincing evidence that it was incurred:

1. as a result of the member's own misconduct, as defined in JAGMAN, § 0224;

2. while avoiding duty by deserting the service;

3. while absent without leave, and such absence materially interfered with the performance of required military duties;

a. ***Special unauthorized absence (UA) rule.*** Whether absence without leave "materially interferes" with the performance of required military duties necessarily depends upon the facts of each situation applying a standard of reality and common sense. No definite rule can be formulated as to what constitutes "material interference."

(1) Generally speaking, absence ***in excess of twentyfour hours*** constitutes a material interference unless there is evidence to establish the contrary.

(2) An absence ***less than twenty-four hours*** will not be considered a material interference without clear and convincing evidence to establish the contrary.

A statement of the individual's commanding officer, division officer, or other responsible official, and any other available evidence to indicate whether the absence constituted a material interference with the performance of required military duties, should be included in the record whenever appropriate. JAGMAN, § 0223c(1).

b. It should be noted that, under 10 U.S.C. § 1207 (1982), a member is ineligible for physical-disability retirement or severance benefits from the armed forces if disability was incurred during a UA period, regardless of the length of such absence and regardless of whether such absence constituted a material interference with the performance of his required military duties. JAGMAN, § 0223c(2).

4. while confined under sentence of a court-martial that included an unremitted dishonorable discharge; or

5. while confined under sentence of a civil court following conviction of an offense that is defined as a felony by the law of the jurisdiction where convicted.

3806 WHAT CONSTITUTES MISCONDUCT

A. ***Presumption***. Sections 0221a and 0224b of the ***JAG Manual*** state that an injury or disease suffered by a member of the naval service is presumed not to be the result of misconduct ***unless*** there is clear and convincing evidence that:

1. The injury was intentionally incurred; or

2. the injury was the result of willful neglect which demonstrates a reckless disregard for the foreseeable and likely consequences.

a. Foreseeability: A person of ordinary intelligence and prudence should reasonably have anticipated the danger created by the negligent act. Injury or disease from a course of conduct is foreseeable if, according to ordinary and usual experience, injury or disease is the probable result of that conduct.

b. Willful neglect: A conscious and voluntary act, or omission, which is likely to result in grave injury of which the member is aware. It involves a willful, wanton, or reckless disregard for the life, safety, and well-being of self or others. Simple or ordinary negligence, or carelessness, standing alone, does not constitute misconduct.

c. The fact that the conduct violated a law, regulation, or order, or was engaged in while intoxicated, does not, of itself, constitute a basis for a determination of misconduct. JAGMAN, § 0224a.

B. ***Military duty and misconduct.*** "Misconduct" can never be "in line of duty." Thus, a finding that an injury was the result of the member's own "misconduct" must be accompanied by a finding that the injury was incurred "not in line of duty." Accordingly, if a servicemember is properly performing his military duty and is injured as a result of that duty, a "misconduct" finding would be erroneous since no military duty can require a servicemember to commit an act which would constitute "misconduct."

C. ***Special rules***

1. ***Intoxication*** - JAGMAN, § 0227. Intoxication (impairment) is a factor in many of the injuries in which misconduct is found and is often coupled with evidence of recklessness or disorderly conduct.

a. Intoxication may be produced by alcohol, drugs, or inhalation of fumes, gas, or vapor.

b. In order for intoxication alone to be the basis for a misconduct finding, there must be a showing, by clear and convincing evidence, that:

(1) The member's physical or mental faculties were impaired due to intoxication at the time of the injury; and

(2) the impairment was the proximate cause of the injury.

– Proximate cause is that conduct which, in a natural and continuous sequence unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred.

c. ***Presumption.*** Where a member has a blood-alcohol content (BAC) of .10 percent by volume or greater, it is presumed that mental or physical faculties are impaired. This presumption is rebuttable; even where not rebutted, the proximate cause issue must be addressed. Intoxication may also be found where no BAC is available or it measures less than .10. In such cases, the investigation should include a description of the servicemember's general appearance, along with information regarding whether the member staggered or otherwise displayed a lack of coordination, was belligerent or incoherent, or displayed slow reflexes or slurred speech. JAGMAN, § 0227b.

2. ***Alcohol and drug-induced disease.*** Inability to perform duty resulting from a disease that is directly attributable to a specific, prior, proximate, and related intemperate use of alcohol or habit-forming drugs is the result of misconduct and, therefore, not in the line of duty. JAGMAN, § 0227c.

3. ***Refusal of medical or dental treatment.*** If a member unreasonably refuses to submit to medical, surgical, or dental treatment, any disability that proximately results from such refusal shall be deemed to have been incurred as a result of the member's own misconduct. JAGMAN, § 0228.

D. ***Mental responsibility.*** A member may not be held responsible for acts and their foreseeable consequences if, as the result of a mental defect, disease, or derangement, the member was unable to comprehend the nature of such acts or to control his or her actions. In the absence of evidence to the contrary, it is presumed that all persons are mentally responsible for their acts. JAGMAN, §§ 0226 a and b.

1. Because of this presumption, it is not necessary to present evidence of mental responsibility unless:

a. The question is raised by the facts developed by the investigation; or

b. the question is raised by the nature of the incident itself.

2. If either (a) or (b) above is present, the presumption of mental responsibility ceases to exist and the investigation must clearly and convincingly establish the member's mental responsibility before an adverse determination can be made.

3. Where an act resulting in injury or disease is committed by a mentally incompetent person, that person is not responsible for that act and the injury or disease incurred as the result of such an act is "not due to misconduct."

– The term "mentally incompetent" means that, as a result of mental defect, disease, or derangement, the person involved was, at the time of the act, unable to comprehend the nature of such act or to control his actions. Also covered is the concept that a person may not be held responsible for his acts or their foreseeable consequences if, as the result of a mental condition not amounting to a defect, disease, or derangement—and not itself the result of prior misconduct—he was, at the time, unable to comprehend the nature of such acts and to control his actions. However, where the impairment of mental faculties is the result of the servicemember's misconduct (e.g., the voluntary and unlawful ingestion of a hallucinogenic drug), the injuries would be deemed to have been incurred as a result of the person's misconduct.

4. ***Suicide attempts.*** Because of the strong instinct for self-preservation, an unsuccessful, but bona fide, attempt to kill oneself creates a strong inference of lack of mental responsibility. JAGMAN, § 0226c.

– In all cases of attempted suicide, evidence bearing on the

mental condition of the injured person shall be obtained. This includes all available evidence as to social background, actions, and moods immediately prior to the attempt, any troubles that might have motivated the incident, and any pertinent examination or counseling session. JAGMAN, § 0233i.

5. ***Suicidal gestures and malingering.*** Self-inflicted injury not prompted by a serious intent to die is, at most, a suicidal gesture and such injury, unless lack of mental responsibility is otherwise shown, is deemed to be incurred as a result of the member's own misconduct. The mere act alone does not raise a question of mental responsibility because there is no intent to take one's own life, the intent was to achieve some secondary gain (e.g., a Marine cutting off his trigger finger to avoid combat). JAGMAN, § 0226c.

3807 RELATIONSHIP BETWEEN MISCONDUCT AND LINE OF DUTY

A. ***Determinations.*** There are ***only three*** possible determinations. JAGMAN, § 0225b.

1. ***In line of duty, not due to member's own misconduct (LOD / NDOM).***

2. ***Not in line of duty, not due to member's own misconduct (NLOD / NDOM).***

a. This determination would occur when misconduct is not involved, but an injury or disease is contracted by a servicemember which falls within one of four other exceptions to the LOD presumption (desertion; UA; confinement as a result of a civilian conviction; or confinement pursuant to sentence by a general court-martial that included an unremitted dishonorable discharge).

b. ***Example***: A servicemember has been UA for 8 months and is injured while lawfully crossing a street. The injuries were not the result of negligence.

3. ***Not in line of duty, due to member's own misconduct (NLOD/DQM).*** A determination of "misconduct" always requires a determination of "not in the line of duty."

B. ***Disciplinary action.*** An adverse determination as to misconduct or line of duty is not a punitive measure. Disciplinary action, if warranted, shall be taken independently of any such determination. A favorable determination as to LOD / misconduct does not preclude separate disciplinary action, nor is such a finding binding on any issue of guilt or innocence in any disciplinary proceeding. The loss of rights or benefits resulting from an adverse determination may be relevant and, at the request of the accused, admissible as a matter in extenuation and mitigation in a disciplinary proceeding. JAGMAN, § 0229.

3808 RECORDING LOD / MISCONDUCT DETERMINATIONS

A. ***General.***

1. Each inquiry or disease requiring LOD / Misconduct determinations ***must*** be reviewed through use of a preliminary inquiry (*see* Chapter 36, section 3610). JAGMAN, § 0230a.

2. Upon completion of the preliminary inquiry, the command is to report the results to the GCMCA through use of the Personnel Casualty Report system. JAGMAN, § 0230b, MILPERSMAN 1770. A copy of the preliminary inquiry report is delivered to the appropriate medical department for inclusion in the health or dental record.

3. If the medical officer and the commanding officer are of the opinion that the inquiry or disease was incurred "in line of duty" and "not as a result of the member's own misconduct," then appropriate entries stating such are entered in the health record. ***No further investigation*** is required, unless directed by the GCMCA. JAGMAN, § 0230c.

B. ***Command Investigations.***

1. As noted above, use of the preliminary inquiry and health record entries will provide sufficient documentation where injuries or disease are found to have occurred while in the line of duty, not due to misconduct.

2. Command investigations are only required when:

a. the injury or disease was incurred in such a way that suggests a finding of "misconduct" or "not in line of duty" might result (JAGMAN, §§ 0230d(1), (2));

b. there is a reasonable chance of permanent disability and the convening authority considers an investigation essential to ensuring an adequate official record;

c. the injury involves a Naval or Marine Reservist and the convening authority considers an investigation essential to ensuring an adequate official record.

3. In endorsing a command investigation, the convening authority must specifically comment on the LOD / misconduct opinion and take one of the following actions:

a. If the convening authority concludes that the injury or disease

was incurred "in line of duty" and "not due to member's own misconduct", that shall be expressed (regardless of whether it differs from or concurs with the investigating officer's opinion). JAGMAN, § 0231a(1).

b. If, upon review of the report or record, the convening (or higher) authority believes the injury or disease was incurred ***not*** "in line of duty" or due to the member's own misconduct, the member ***must*** be informed of the preliminary determination and afforded an opportunity, not to exceed 10 days, to submit any desired information. JAGMAN, § 0231a(2).

(1). The member shall be advised that:

(a) No statement relating to the origin, occurrence, or aggravation of any disease or injury suffered need be made (JAGMAN, § 0221); and

(b) if the member is suspected of having committed an offense, the member shall be so advised, as required by Art. 31(b), UCMJ JAGMAN, § 0231a(2)(b).

(2) The member may be permitted to review the investigation report before providing any desired information. JAGMAN, § 0231a(2)(c).

(3) If the member decides to present information, it shall be considered by the convening authority and appended to the record. If the member elects not to provide information, or the 10 day period lapses without submission, then such shall be noted in the endorsement. JAGMAN, §§ 0231a(2)(d) & (e).

4. The command investigation is forwarded to a GCMCA with an assigned judge advocate. The GCMCA may take any action that could have been taken by the convening authority. JAGMAN, § 0231b(1).

5. The GCMCA shall indicate approval, disapproval or modification of conclusions concerning misconduct and line of duty. A copy of such action will be returned to the convening authority so that appropriate entries may be made in the member's service and medical records. JAGMAN, § 0231b(1).

6. The original convening authority must ensure that appropriate service and medical record entries are made. JAGMAN, § 0231c.

3809 INVESTIGATIVE REQUIREMENTS FOR SPECIFIC INCIDENTS. The investigating officer should be aware of particular problem areas in LOD/ misconduct investigations. Examples of situations commonly encountered are listed below, along with a

listing of various factors that should be included in investigative reports. The examples are not intended to be comprehensive, nor do the listed factors purport to cover every fact situation that may arise.

A. ***Speeding.*** It is impossible to state categorically when excessive speed becomes willful neglect and requires a finding of misconduct. The investigative report should contain information concerning the type and condition of the road; the number and width of the lanes; the type of area (densely populated or rural); any hills or curves that played a part in the accident; the traffic conditions; the time of day and weather conditions; the posted speed limit in the area; the mechanical condition of the car (particularly the brakes and tires); and the prior driving experience of the member. The speed of the vehicle is also important; however, estimates of speed based solely upon physical evidence at the scene of the crash, such as skid marks and damage to the vehicle, are somewhat conjectural unless corroborated by other evidence. Therefore, attempts should be made to secure estimates of speed from witnesses, passengers, and drivers. In this way, the post-accident estimates of the police may be corroborated.

B. ***Falling asleep at the wheel.*** Falling asleep at the wheel is one of the most common causes of accidents, but is one of the most difficult situations in which to establish misconduct. The act of falling asleep, in itself, does not constitute willful neglect; however, the act of driving while in a condition of such extreme fatigue or drowsiness that the driver must have been aware of the danger of falling asleep at the wheel may amount to such a reckless disregard of the consequences as to warrant a finding of misconduct. Before a finding of misconduct can be made, there must be clear and convincing evidence showing that the servicemember experienced premonitory symptoms of drowsiness that should have put the driver on notice of the imminent danger of falling asleep. This information should include how long the servicemember had been driving and how many miles the member had driven prior to the accident; the amount of sleep had by the member before commencing the trip; the member's activities for the 24 hours prior to the injury; whether any momentary periods of drowsiness were experienced before finally falling asleep; and any evidence of drinking or intoxication.

C. ***Passenger misconduct.*** If a passenger knows or should know that the driver is unlikely to drive safely because of negligence, lack of sleep, recklessness, or intoxication, the passenger is guilty of misconduct upon voluntarily exposing himself or herself to the danger. The investigation should contain information showing whether the servicemember had an opportunity to leave the vehicle after the driver's condition became apparent; whether the driver and passenger had been drinking together and how much each had to drink; and what action, if any, was taken by the passenger to have the driver drive more carefully. Also determine the operator's driving experience; any signs of intoxication; whether the passenger noticed the driver was tired or exhibited any other symptoms; whether the passenger took any action to have the driver rest or to personally assume the driving responsibilities.

D. ***Disorderly conduct and fighting***. Injuries incurred by a servicemember while voluntarily and wrongfully engaged in a fight or similar encounter, whether or not weapons were involved, are due to misconduct where they might reasonably have been expected to result directly from the affray and the servicemember is at least equally culpable with the adversary in starting or continuing the affair.

1. Not all injuries resulting from fighting necessarily must be determined to have resulted from the member's misconduct. For example, if an adversary employs unexpectedly violent methods or means, such as a dangerous weapon, a conclusion that the resulting injuries were not due to the member's own misconduct could be appropriate.

2. In investigating such incidents, determine:

a Who instigated or provoked the fight and/or struck the first blow;

b. any history of prior altercations between the participants;

c. whether either participant was armed (gun, knife, blow gun, club, bottles, etc. . .);

d. whether either participant attempted to terminate the affray;

e. the relative sizes and capabilities of the participants; and

f. the part that drinking, if any, played in the altercation.

3. If there are inconsistent statements from witnesses about the incident, the investigating officer should indicate in the report which witnesses the officer chooses to believe in making the findings of fact and opinions.

E. ***Intentionally self-inflicted injuries***. Include any medical reports and opinions in the investigation report when the investigation concerns an intentionally self-inflicted injury. In these cases, the investigating officer should primarily look for evidence, or lack thereof, of a bona fide suicide intent. The investigative report should contain information concerning:

1. Whether the methods used to cause injury were likely to cause death under the circumstances;

2. the servicemember's expressed reasons for attempting suicide;

3. whether the servicemember took action to avoid being found prior to the injury as opposed to being certain he would be discovered and treated quickly;

4. whether the servicemember had threatened suicide prior to the incident under investigation; and

5. statements of shipmates and friends concerning the member's apparent state of mind on the date of the act.

F. ***Accidentally self-inflicted injuries; gunshot wounds.*** A health record entry should not be used when an injury results from an accidental self-inflicted gunshot wound because of the strict, high standard of care required in the use of firearms or other dangerous weapons. In cases of this kind, mere failure to take proper precautions to prevent a casualty normally constitutes simple negligence or carelessness and, therefore, does not justify a finding of misconduct. However, in the event the record clearly and convincingly shows that the servicemember has displayed a lack of care that amounts to willful neglect, taking into account the higher standard of care required of persons using and handling dangerous weapons, a finding of misconduct is appropriate. The investigating officer's report should include information concerning:

1. Whether the subject member was familiar with guns in general and with the gun in question (or other dangerous weapons, as appropriate);

2. whether the member was aware of the weapon's safety features;

3. whether there were any defects in the weapon and whether the member knew of such defects;

4. whether the member knew the gun was loaded or had checked the chamber for its possible loaded condition;

5. whether the member had cocked the weapon;

6. how the weapon was positioned in relation to the servicemember's body and why it was placed in that position;

7. the possible cause of the weapon's discharge;

8. the mental attitude of the handler, including any alcohol or drug involvement; and

9. any intervening factors.

G. ***Checklist for Line of Duty/Misconduct Determinations.*** The following is a checklist of important information that should be included, as applicable, in any investigation convened to inquire into misconduct and line of duty. JAGMAN §0233.

1.	***Identifying Information.***	JAGMAN §0233a.
2.	***Facts.***	JAGMAN §0233b.
3.	***Records.***	JAGMAN §0233c.
4.	***Site of Incident.***	JAGMAN §0233d.
5.	***Duty Status.***	JAGMAN §0233e.
6.	***Reserves.***	JAGMAN §0233f.
7.	***Injuries.***	JAGMAN §0233g.
8.	***Impairment.***	JAGMAN §0233h.
9.	***Mental Competence.***	JAGMAN §0233i.
10.	***Privacy Act.***	JAGMAN §0233j.
11.	***Warnings About Injury/Disease.***	JAGMAN§0233k.

CHAPTER XXXIX

CLAIMS

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CHAPTER XXXIX

CLAIMS

3901 CHAPTER OVERVIEW

A. ***Purpose of the chapter.*** Claims involving the United States Government and its military activities are governed by a complex system of statutes, regulations, and procedures. This chapter is not a substitute for the official departmental claims regulations published in the *JAG Manual* and JAGINST 5890.1, Subj: ADMINISTRATIVE PROCESSING AND CONSIDERATION OF CLAIMS ON BEHALF OF AND AGAINST THE UNITED STATES. It is, however, a useful starting point for research into claims problems.

B. ***Summary of chapter contents.*** This chapter is organized to reflect the various claims statutes and their respective functions in the claims system. Claims involving the Federal Government are of two types:

1. Claims in which the Federal Government is a claimant seeking compensation; or

2. claims against the government for which a claimant seeks compensation. These can be further divided into two functional categories:

a. General claims statutes, such as the Federal Tort Claims Act and Military Claims Act, which provide for payment of claims arising out of a broad range of incidents and situations; and

b. specialized claims statutes, such as the Military Personnel and Civilian Employees' Claims Act and the Foreign Claims Act, which provide for payment of claims arising out of specific types of incidents or to only specific classes of claimants.

PART A - CLAIMS AGAINST THE GOVERNMENT: GENERAL CLAIMS STATUTES

3902 FEDERAL TORT CLAIMS ACT

A. ***Overview.*** The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, 2672 and 2674-2680 (1982) (FTCA) was a product of many years of congressional deliberations

and considerations. Before 1946, if a person was wrongfully injured by a Federal employee who had acted within the scope of his Federal employment, the doctrine of "sovereign immunity" barred that injured party from suing the government for compensation. This doctrine often had the effect of denying fair compensation to persons with meritorious claims. At that time, the only available form of redress was the "private bill"—a system whereby the injured party could be compensated for his injury by a special act of Congress. This system was cumbersome and resulted in thousands of private bills annually. The system was also unfair to those who lacked sufficient influence to have a representative introduce a private bill on their behalf. The FTCA was enacted with the intent of providing a more equitable, comprehensive system. The Act provides for compensation for personal injury, death, and property damage caused by the negligent or wrongful act or omission of Federal employees acting within the scope of Federal employment. It also covers certain intentional, wrongful acts. There are, however, three general types of exceptions from government liability under FTCA. First, the government is protected from liability arising out of certain types of governmental actions. Second, FTCA will not provide compensation when one of the specialized claims statutes (discussed in part B of this chapter) covers the claim. Third, certain classes of claimants, such as active-duty military personnel, are precluded from recovering under FTCA, although they may be compensated under other statutes.

B. ***Statutory authority***. The scope of the government's liability under FTCA is limited to money damages for injury, death, or property damage caused by the negligent or wrongful act or omission of any government employee while acting within the scope of his office or employment. Specifically, governmental liability is described in the following two statutes:

> Section 1346. United States as defendant.
>
> . . . .
>
> (b) . . . [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. . . .

> Section 2674. Liability of the United States.
>
> The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not

> be liable for interest prior to judgment or for punitive damages. . . .

Historically, guidance regarding claims adjudication was contained in the *JAG Manual*. In the 1990 revision, however, only generic comments were included in Chapter VIII. Detailed explanations concerning most claims are now in JAGINST 5890.1; however, admiralty Claims (Chapter XII), Foreign Claims Act (Chapter VIII), and Article 139 claims (Chapter IV) are still in the *JAG Manual*.

C. ***Scope of liability***

1. ***Negligent conduct***

a. ***"Negligence" defined.*** The law defines "negligence" as the failure to exercise the degree of care, skill, or diligence that a reasonable person would exercise under the same circumstances. Negligent conduct can arise either from an act or a failure to act. It can be either acting in a careless manner or failing to do those things that a reasonable person would do in the same situation. Jurisdiction over claims that have as their basis a theory of liability other than negligence (implied warranty or strict liability) does not lie under the FTCA. *Laird v. Nelms*, 406 U.S. 797 (1972); *Dalehite v. United States*, 346 U.S. 15 (1952).

b. ***Applicable law.*** Whether certain conduct was negligent—and, therefore, whether the government is liable—will be determined by the tort law of the place where the conduct occurred. Questions such as whether the violation of a local law, by itself, constitutes negligence will be answered by applying local tort law.

(1) ***Example***: Seaman Jones, while performing his duties in Virginia, injures Mr. Smith. Under Virginia law, Jones' conduct is not negligence. Therefore, Mr. Smith's FTCA claim will be denied.

(2) ***Example***: Seaman Jones, while performing his duties in North Carolina, engages in ***exactly the same conduct*** that injured Mr. Smith in the previous example. This time, Jones injures Mr. Johnson. Under North Carolina law, Jones' acts constitute negligence. Mr. Johnson's FTCA claim will be paid.

2. ***Limited range of intentional torts.*** The FTCA will compensate for intentional wrongful acts under very limited circumstances. On or after 16 March 1974, FTCA applies to any claim arising out of the following intentional torts committed by Federal law enforcement officers: assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution. A Federal law enforcement officer, for purposes of the FTCA, is any officer of the United States empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. Since Article 7, UCMJ, extends the authority to apprehend to commissioned officers and petty officers, these officers would be considered

law enforcement officers for FTCA purposes when they are actually engaged in law enforcement duties. No other intentional tort claims are payable under FTCA. Federal employees have been held ***individually*** liable to the injured party for intentional torts committed while the employees are acting beyond the proper limits of their authority. *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Military personnel are restricted from using the *Bivens* remedy against either their superiors or civilian personnel for violations of constitutional rights arising out of, or in the course of, activity incident to service. In *United States v. Stanley*, 483 U.S. 669 (1987), the Supreme Court turned down a damages action brought by an Army sergeant who was given lysergic acid diethylamide, without his knowledge, as part of a military experiment. The court applied the same rationale expressed in *Chappell v. Wallace*, 462 U.S. 296 (1983), stating that the unique disciplinary structure of the military and congressional action in this area (barring military causes of action) dictates against the claim.

3. ***Government employees***

a. ***Definitions***. Under the FTCA, the government is liable only for the wrongful acts of its employees. The term "government employee" is defined to include the following:

(1) Officers or employees of any Federal agency; or

(2) members of the military or naval forces of the United States; or

(3) persons acting on behalf of a Federal agency in an official capacity, either temporarily or permanently, and either with or without compensation.

The term "Federal agency" includes not only the departments and agencies of the executive, legislative, and judicial branches of the Federal Government, but also independent entities that function primarily as Federal agencies (e.g., U.S. Postal Service, Commodity Credit Corporation).

b. ***Government contractors***. A government contractor and its employees are not usually considered government employees under the FTCA. When, however, the government exercises a high degree of control over the details of the contractor's activities, the courts may find that the government contractor is, in fact, a government employee. The standard personnel qualification and safety standards provisions in government contracts are not enough to turn a government contractor into a government employee. Where the contract requires the contractor to follow extensive, detailed instructions in performing the work, the contractor will usually be considered a government employee and the contractor's employees who work on the Federal job will likewise be treated as government employees for FTCA purposes. *See, Logue v. United States*, 412 U.S. 521 (1973).

c. ***Nonappropriated fund activities***

(1) ***Defined.*** A nonappropriated fund activity is one that, while operating as part of a military installation, does not depend upon, and is not supported by, funds appropriated by Congress. Examples of nonappropriated fund activities include the Navy Exchange and officers' clubs.

(2) ***Liability.*** A claim arising out of the act or omission of an employee of a nonappropriated fund activity not located in a foreign country acting within the scope of employment is an act or omission committed by a federal employee and will be handled in accordance with FTCA.

4. ***Scope of employment.*** The government is liable under the FTCA for its employees' conduct only when the employees are acting within the scope of their employment. The scope-of-employment requirement is viewed by the courts as "the very heart and substance" of the Act. While scope-of-employment rules vary from state to state, the issue usually turns on the following factors:

a. The degree of control the government exercises over the employee's activities on the job; and

b. the degree to which the government's interests were being served by the employee at the time of the incident.

Whether or not a government employee's acts were within the scope of employment will be determined by the law, including principles of ***respondeat superior***, of the state where the incident occurred. This has led to many different results on the question of applicability of the FTCA involving permanent change of station (PCS) moves and temporary duty (TDY). One must look to state law to determine the proper test or criteria for determining scope of employment based upon the principles of ***respondeat superior***.

(1) ***Example***: Consider the following hypothetical situation. Seaman Baker, the command duty driver, is making an authorized run in the command vehicle. On the way back to the base, he stops at a local bar and drinks himself into a stupor. Barely able to stand, he gets back into the command vehicle and continues on toward the base. In his drunken state, he fails to see a stop sign and crashes into an automobile driven by a civilian. Both Baker and the civilian are seriously injured. For the purposes of the FTCA, Baker could be considered, in at least some jurisdictions, to have been acting within the "scope of his employment" (i.e., he was completing an authorized run when he was involved in the accident).

Accordingly, the claim of the civilian would be cognizable under the FTCA. (Baker's injuries, however, would almost certainly be determined to be the result of his own "misconduct" and, therefore, would not be in the line of duty.)

(2) ***Example***: Seaman Baker, the command duty driver, is making an authorized run in the command sedan. While daydreaming, he becomes inattentive, fails to keep a lookout for pedestrians, and hits Mr. Jones. Seaman Baker's negligence occurred within the scope of his employment.

(3) ***Example***: Seaman Baker, the command duty driver, takes the command sedan after hours on an unauthorized trip to the ball game. After the game, he and some buddies stop at several taverns and all become roaring drunk. Because of his drunken condition, while driving back to the base Baker runs over Mr. Smith. In this case, Baker's negligence occurred outside the scope of his employment. He and his friends were off on a frolic of their own, and their activities were entirely unrelated to the performance of a governmental or military function. Therefore, Mr. Smith will not be able to recover under the FTCA. Since a government vehicle is involved, however, Smith may be entitled to limited compensation under the "nonscope" claims procedures discussed in section 0408, below.

5. ***Territorial limitations***. FTCA applies only to claims arising in the United States or in its territories or possessions (i.e., where a U.S. district court has jurisdiction). Any lawsuit under the FTCA must be brought in the U.S. district court in the district where the claimant resides or where the incident giving rise to the claim occurred.

D. ***Exclusions from liability***. Statutes and case law have established three general categories of exclusions from FTCA liability. The following specific exclusions are encountered frequently in claims practice in the military. A complete list of FTCA exclusions is set forth in JAGINST 5890.1. In each of the following situations, the government will not be liable under FTCA, although it may be liable under some other claims statute.

1. ***Exempted governmental activities***

a. ***Execution of statute or regulation***. The FTCA does not apply to

any claim based on an act or omission of a Federal employee who exercises due care while in the performance of a duty or function required by statute or regulation.

b. ***Discretionary governmental function.*** The FTCA does not apply to any claim based upon the exercise or performance of, or the failure to exercise or perform, a discretionary governmental function. 28 U.S.C. 2680(a) (1982). The FTCA does not define "discretionary function," and perhaps no single exclusion has generated as much litigation. The key issue will usually be whether the governmental activity involved in the claim involves an exercise of judgement or choice based on considerations of public policy. *See, Gaubert v. United State,* 499 U.S. 315 (1991); *Berkovitz v. United States,* 486 U.S. 531 (1988). Each case must be decided upon its own set of facts, however, and the discretionary function exception should not be raised in defense of any claim without prior approval of the Judge Advocate General (Code15).

c. ***Postal claims.*** The FTCA does not apply to claims for the loss, miscarriage, or negligent transmission of letters or postal matters. 28 U.S.C. § 2680(b) (1982). Such claims, under limited circumstances, may be payable under the Military Claims Act.

d. ***Detention of goods.*** The FTCA does not apply to claims arising out of the detention of any goods or merchandise by a Federal law enforcement officer, including customs officials. 28 U.S.C. § 2680(c) (1982). This exception is commonly applied in situations where the claimant seeks compensation for property seized during a search for evidence. This exclusion also prevents compensation under the FTCA for alleged contraband seized by law enforcement officers.

e. ***Combatant activities in time of war.*** 28 U.S.C. § 2680(j) (1982).

(1) The "combatant activities" exclusion has three requirements:

(a) The claim must arise from activities directly involving engagement with the enemy;

(b) conducted by the armed forces; and

(c) during time of war (declared and undeclared). *Rotko v. Abrams,* 338 F. Supp. 46 (D.Conn. 1971); *Morrison v. United States,* 316 F. Supp. 78 (M.D. Ga. 1970).

(2) "Combatant activities" is given a very strict meaning by the courts. It does not include practice or training maneuvers, nor any operations not directly involving engagement with an enemy. *See Johnson v. United States,* 170 F.2d 767, 769-70 (9th Cir. 1948).

f. ***Intentional torts.*** The government is not liable under the FTCA for the following intentional torts: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. § 2680(h) (1982). This exclusion will not protect the government from liability for assaults, batteries, false imprisonments, false arrests, abuse of process, or malicious prosecution committed by Federal law enforcement officers.

2. ***Claims cognizable under other claims statutes.*** Certain claims cannot be paid under the FTCA because they are cognizable under some other claims statute. Although the claimant may still recover under another statute, the amount may be significantly less than under the FTCA. Also, the claimant may not have the right under the other claims statute to sue the government if the claim is denied. Examples of claims cognizable under other statutes—and therefore not payable under the FTCA—include the following:

a. ***Personnel claims.*** Claims by military personnel or civilian Federal employees for damage or loss of personal property incident to service are cognizable under the Military Personnel and Civilian Employees' Claims Act.

b. ***Admiralty claims.*** Admiralty claims, arising from incidents such as ship collisions, are usually governed by the Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1994) and the Public Vessels Act, 46 U.S.C. §§ 781-790 (1994). Admiralty claims against the Navy shall be processed under Chapter XII of the JAGMAN.

c. ***Overseas claims.*** Claims arising in a foreign country are not cognizable under the FTCA, but may be allowed under either the Military Claims Act, the Foreign Claims Act or possibly NATO SOFA claims. *But see, In Re Paris Air Crash,* 399 F. Supp. 732 (CD CAL 1975) (court allowed an FTCA claim for wrongful death of civilian passengers killed in Turkish airline crash in Paris based upon wrongful certification and inspection by US of the doomed McDonnell Douglas DC-10).

d. ***Injury or death to civilian Federal employees.*** Claims arising out of personal injury or death of a civilian Federal employee, while on the job, are usually covered by the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 7901-7903, 8101-8193 (1982). Nonappropriated fund activity employees are compensated under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1982).

3. ***Excluded claimants***

a. ***Military personnel - The Feres Doctrine***

(1) In *Feres v. United States,* 340 U.S. 135 (1950), the U.S. Supreme Court held that military personnel cannot sue the Federal Government for personal injury or death occurring incident to military service. The Supreme Court reasoned that

Congress did not intend the FTCA to apply to military personnel because it had already provided medical care, rehabilitation, and disability benefits for them. Since 1950, the *Feres* Doctrine has been applied consistently by Federal courts at all levels and was reaffirmed by the Supreme Court in *United States v. Johnson*, 481 U.S. 681 (1987). In *Johnson*, the widow of a deceased Coast Guard helicopter pilot was precluded from bringing a wrongful death action under the FTCA. The Supreme Court held that the death of a Coast Guard officer during a rescue mission on the high seas was incident to service and that a suit based on the alleged negligent action of a civilian Federal air traffic controller was precluded by the *Feres* Doctrine. The Court thereby extended the *Feres* Doctrine to encompass negligent actions on the part of civilian employees of the Federal Government. *See Aviles v. United States*, 696 F. Supp. 217 (E.D.La. 1988), a case in which the *Feres* Doctrine was held to bar an action by a former Coast Guard member who sought to recover damages due to his forced retirement following a positive HIV test. The Court found that *Feres* prohibited judicial inquiry and that the Court therefore lacked subject-matter jurisdiction because the injuries were incident to service. *Feres* was expanded by case law to bar FTCA claims by military personnel for property damage occurring incident to service. *See, e.g., Preferred Insurance Co. v. United States*, 222 F.2d 942 (9th Cir. 1955); *Flowers v. United States*, 764 F.2d 759 (11th Cir. 1985); *United States v. United Services Auto. Ass'n*, 238 F.2d 364 (8th Cir. 1956). Such claims may be payable under the Military Claims Act, the Military Personnel and Civilian Employees' Claims Act, or the nonscope claims statute. A third-party plaintiff may not implead the government in a suit by a *Feres* disqualified plaintiff. The third-party plaintiff gains no additional rights beyond those available if the plaintiff had brought a direct action against the government. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977).

(a) For an overview on the Feres Doctrine and an in-depth analysis of recent landmark *Feres* cases, see Darpino, "Eroding the *Feres* Doctrine - A Critical Analysis of Three Decisions," *The Army Lawyer*, April, 1996.

(2) ***Rationale for Feres.*** The *Feres* Doctrine is supported by:

(a) ***Effect on military discipline.*** The Court noted that there is a special relationship of "soldier to his superiors." Granting to him the right to bring an action would have an adverse effect upon discipline and would result in a judicial intrusion into the general area of military performance.

(b) ***Other available statutory compensation.*** Congress has established a system of uniform compensation for injuries or death of those in the armed services. This system provides adequate and comprehensive benefits for service personnel and compares favorably with workmen's compensation statutes. Individual suits circumvent the statutory veterans' benefits system.

(c) ***No private liability in like circumstances.*** The FTCA makes the United States liable in the same circumstances "as a private person." Under workmen's compensation schemes, a private person does not have a cause of action against an employer; thus, the FTCA does not remove the sovereign immunity bar for active-duty

personnel seeking to bring an action under the FTCA.

(d) ***Lack of continuity of local law***. The Court in *Feres* recognized the relationship existing between the United States and its military personnel as distinctively federal in character, so that it would be inappropriate to apply local law to that relationship by way of the FTCA. Applying the state law of the area where the injury took place, given the wide variety of local laws, would be unfair to the military member who has no choice as to his or her duty station.

(3) ***The "not incident to service" exception***. A major exception to the *Feres* Doctrine exists when the injury, death, or loss of the military member did ***not*** occur incident to military service. *See, e.g. Brooks v. United States*, 337 U.S. 49 (1949); *Taber v. United States*, 45 F.3d 598 (2nd Cir. 1995). Under such circumstances, the *Feres* Doctrine will not prevent FTCA recovery by a military claimant. The value of benefits received from the government, such as medical care, rehabilitation, and disability payments, however, will be deducted from the compensation paid to the claimant.

(4) ***"Incident to military service" defined***. The central issue in determining whether the *Feres* Doctrine will prevent a military member from recovering under FTCA is whether the injury or loss occurred incident to military service. Courts decide this issue only after considering all the facts and circumstances of each case. As a general rule, however, ***all*** of the following factors must be present for an injury, death, or loss of a military member to be held "***not*** incident to military service":

(a) The member must have been off duty;

(b) the member must not have been aboard a military installation;

(c) the member must not have been engaged in any military duty or mission; and

(d) the member must not have been directly subject to military orders or discipline.

If any of the above four factors are absent, the claim usually will be held by the courts to be incident to military service. *See* 1 L. Jayson, *Handling Federal Tort Claims* 155.02, 155.03, and 155.07 (1979) (extensive discussion of the principles and case law on this point); *But see, Elliot v. United States*, 13 F.3d 1555 (11th Cir. 1994). (Injuries sustained in base housing due to government's negligent maintenance of water heater and vent pipe ***were not*** incident to service while in leave status).

(5) ***Claims by representatives***. The *Feres* Doctrine does not apply to claims by military members who are acting solely in a representative capacity (e.g., guardian, executor of an estate). It will bar FTCA claims by nonmilitary persons acting as

legal representatives of injured or deceased military members. The following examples demonstrate these principles:

(a) ***Example***: Johnny Smith, the minor child of LTJG Smith, was the victim of medical malpractice at a military hospital. LTJG Smith presents a $100,000 claim on behalf of Johnny. The *Feres* Doctrine will not apply. LTJG Smith is presenting the claim solely as the parent and legal representative of his minor son and the *Feres* Doctrine does not apply to injuries, death, or loss suffered by a military dependent— only to military members themselves.

(b) ***Example***: While on duty, LTJG Smith was negligently killed by a Marine Corps officer acting within the scope of Federal employment. The executor of LTJG Smith's estate, Mr. Jones, presents an FTCA claim for wrongful death. The *Feres* Doctrine will bar this claim. Although Mr. Jones is a civilian, he is claiming only in his capacity as LTJG Smith's legal representative. Because LTJG Smith's death occurred incident to service the claim will be denied, just as if LTJG Smith had presented it himself.

(6) ***Claims by foreign servicemembers.*** The *Feres* doctrine applies to claims by foreign servicemembers or the representatives of their estates who are injured or killed while conducting multi-national training missions. *See, e.g. Daberkow v. United States*, 581 F.2d 785 (9th Cir. 1978) (West German Air Force pilot killed while conducting joint training mission with U.S. Air Force barred by *Feres* from suing US Government for USAF negligence); *AHMET AKTEPE V. United States*, 725 F.Supp 731 (MDFLA 1996) (during a combined naval forces exercise of NATO countries, the USS SARATOGA inadvertently fired two live missiles at a TURKISH destroyer killing and injuring several Turkish sailors. Lawsuit was dismissed on the grounds that the matter involved non-justiciable political questions as well as *Feres* doctrine principles).

(7) ***The "Genesis Test" and claims by family members.*** Most genesis cases involve claims by family members for injuries resulting from their service member spouse or parent's exposure to adverse conditions while on active duty, i.e. radiation exposure, medical malpractice, etc. The genesis test's intention was to bar dependents "injury" claims that derived from a service-related injury to a service member. Therefore, if the family member's injury has its genesis in an act directed toward the service member, the case is barred because the civilian (spouse / child's) "injury" is derivative of the service-related injury to the service member. Such a bar prohibits a "back door" approach to FTCA litigation. Loss of consortium, wrongful death, and medical malpractice are examples of cases fitting into this category. *See generally, U.S. v. Persons*, 925 F.2d 292 (9th Cir. 1991) (wrongful death action for service member father due to medical malpractice barred and derivative claims of mother and son are *Feres* barred); Estate of *McAllister v. United States*, 942 F.2d 1473 (9th Cir. 1991) (wrongful death action for servicemember father due to negligence of military hospital in treating another service member's mental disorder that

resulted in the death of first service member).

(a) Exceptions: ***Prenatal care***. Some courts have rejected the traditional analysis of the genesis test and held that the FTCA claim was not barred. In *Romero v. United States*, 954 F.2d 223 (4th Cir. 1992), both service member parents successfully brought a FTCA claim for improper prenatal treatment resulting in the premature birth and injuries to their infant son, Joshua. The issue was whether Joshua's claim for alleged negligent prenatal care provided to his active duty mother was *Feres* barred. The court found that the genesis test did not apply because the mother suffered no physical injury. The court rejects the proposition that the failure to provide proper care was a breach of care owed to the mother, the health care recipient, and not the child. The court reasoned that the proper treatment would have been directed at preventing injury to Joshua, and concluded that because the purpose of the treatment was to insure the health of a civilian, not a service member, *Feres* does not apply.

(1) *But see, Irwin v. United States*, 845 F.2d 126 (6th Cir. 1988) *cert. denied*, 488 U.S. 975 (1989) (derivative claim barred as child's cause of action arises from negligent prenatal care provided to service member mother; *West v. United States*, 744 F.2d 1317 (7th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1053 (1985) (claim barred as child's cause of action arose from negligent mistyping of service member's blood); and *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, 460 U.S. 1062 (1983) (FTCA claim barred as child's cause of action was due to negligent act administered to service member mother during prenatal care).

(b) Exceptions: ***Legal Malpractice***. In *Mossow v. United States*, 987 F.2d 1365 (8th Cir. 1993), the child of two service members was born with severe neonatal birth injuries (cerebral palsy, mental retardation, and blindness). The father sought advice from a staff attorney at base legal. The military attorney negligently advised him that his child's medical malpractice claim was *Feres* barred. The improper advice caused the Mossows to exceed the statute of limitations. The Mossows then filed a FTCA claim for damages on behalf of the child, alleging medical and legal malpractice. The court did not *Feres* bar the claim because they found the bad legal advice to the service member regarding the child's cause of action was an *independent* and direct injury to the child, and was not the result of an injury to the service member parents.

(c) Exceptions: ***Independent torts***. In the case of *M.M.H. v. United States*, 966 F.2d 285 (7th Cir. 1992), an active duty soldier tested positive for the HIV virus. M.M.H. subsequently suffered from a variety of aliments, and the Army honorably discharged her. After discharge, she became severely depressed and attempted suicide. However, only six days after M.M.H.'s discharge, the Army learned that the initial blood test was incorrect. Moreover, the Army failed to inform her of the negative result. M.M.H. alleged that the Army negligently inflicted severe emotional distress when it failed to notify her of the second result, and argued that this failure was an "independent" tort. The Government asserted that this was a continuation of the original tort (misdiagnosis). The court held that because the second test result was received ***after*** discharge, the government's

failure to notify was a "separate, independent" post-discharge negligent act. M.M.H. was a civilian at the time of the act, therefore her claim was not *Feres* barred.

(8) ***Legislation.*** Both the House and the Senate continue to introduce bills that would amend Chapter 171 of Title 28, United States Code, and allow active-duty members to sue for injuries or death caused by negligent medical care during peacetime. Both the Department of Defense and the Department of Justice oppose the bills based on the impact to discipline and the existing compensation system.

b. ***Civilian Federal employees.*** Civilian Federal employees usually cannot recover under the FTCA for injury or death that occurs on the job because of FECA (5 USC 8101 et seq.) compensation benefits.

c. ***Intra-agency claims.*** One Federal agency usually may not assert an FTCA claim against another Federal agency. Government property is not owned, for FTCA purposes, by any specific agency of the government. The Federal Government will not normally reimburse itself for the loss of its own property.

E. ***Measure of damages***

1. ***How the amount of compensation is determined.*** The phrase "measure of damages" refers to the method by which the amount of a claimant's recovery is determined. In FTCA cases, the measure of damages will be determined by the law of the jurisdiction where the incident occurred. For example, the measure of damages for a claim arising out of a tort that occurred in Maryland will be determined by Maryland law. When the local law conflicts with applicable Federal law, however, the Federal statute will govern.

2. ***Exclusion from claimant's recovery.*** The following amounts will be excluded from a claimant's recovery under the FTCA:

a. ***Punitive damages.*** Many states permit the plaintiff in a tort action to recover additional money from the defendant beyond the amount required to compensate the plaintiff for his or her loss. Such damages are known as "punitive damages" because they are awarded to punish a defendant who has engaged in conduct that is wanton, malicious, outrageous, or shocking to the court's conscience. Under the FTCA, the government is not liable for any punitive damages which might otherwise be permitted by state law.

b. ***Interest prior to judgment***

c. ***Value of government benefits.*** When the government is liable to pay an FTCA claim by a military member, and the claim is not barred by the *Feres* Doctrine, the value of government benefits (such as medical care, rehabilitation, and disability benefits) will be deducted from the military member's recovery.

3. ***No dollar limit on recovery under the FTCA.*** While there is no maximum to the amount of recovery permitted under the FTCA, any FTCA payment in excess of $200,000 requires the prior written approval of the Attorney General of the United States or his or her designee.

F. ***Statute of limitations.*** The FTCA contains several strict time limits.

1. ***Two-year statute of limitations.*** The claimant has two years from the date the claim against the government accrued in which to present a written claim. If the claimant fails to present his or her claim within two years, it will be barred forever. A claim accrues when the act or incident giving rise to the claim occurs, or when the claimant learns or reasonably should have learned about the wrongful nature of the government employee's conduct. Thus, a claim arising out of an automobile accident would normally accrue when the accident occurred. A claim arising out of medical malpractice will not accrue, however, until the claimant learns or reasonably should have learned about the malpractice. *United States v. Kubrick*, 444 U.S. 111 (1979). The fact that the injured person is an infant or incompetent does not toll the running of the statute of limitations.

2. ***Six-month waiting period.*** When a claimant presents an FTCA claim to a Federal agency, the agency has six months in which to act on the claim. During this waiting period, unless the agency has made a final denial, the claimant may not file suit on the claim in Federal court. If, after six months, the agency has not taken final action on the claim, the claimant may then file suit under the FTCA in Federal district court. 28 U.S.C. § 2401(b) (1982).

3. ***Six-month time limit for filing suit.*** After the Federal agency mails written notice of its final denial of the claim, the claimant has six months in which to file suit on the claim in Federal district court. If suit is not filed within six months, the claim will be barred forever. 28 U.S.C. § 2401(b) (1982). However, before this six-month time limit expires, the claimant may request reconsideration of the denial of his or her claim. The agency then has six months in which to reconsider the claim. If the claim is again denied, the claimant has another six months in which to file suit.

G. ***Procedures.*** The procedures discussed below apply not only to FTCA claims, but also, in large part, to claims cognizable under other claims statutes. Significant variations in procedures under other claims acts will be noted in the sections of this chapter dealing with those other statutes.

1. ***Presentment of the claim.*** The first step is usually the "presentment" of the claim to a Federal agency. When a claim is properly presented, the statute of limitations is tolled.

a. ***Defined.*** A claim against the government is "presented" when a Federal agency receives a written claim for money damages.

b. ***Who may present a claim***? A claim may be presented by:

(1) The injured party for personal injury;

(2) the owner of damaged or lost property;

(3) the claimant's personal or legal representative (e.g., parents or guardians of minors; executors or administrators of a deceased person's estate; authorized agents or attorneys-in-fact, such as officers of corporations and persons holding a power of attorney from the claimant); or

(4) a subrogee who assumed the legal rights of another person. (E.g., an insurance company that compensates its policyholder for damages caused by a government employee becomes subrogated to—or assumes—the policyholder's claim against the government. Therefore, the insurer can present a claim against the government to recover the amount it paid its insured.)

c. ***Contents of the claim***

(1) ***Requirements for presentment***. As discussed above, when a claim is properly presented, the statute of limitations stops running. To be properly presented, the claim must satisfy the following requirements:

(a) ***In writing***. The claim must be in writing. Standard Form 95, Claim for Damage or Injury, should be used whenever practicable.

(b) ***Signed***. The claim must be signed by a proper claimant.

(c) ***Claims money damages "in a sum certain***." The claim must demand a specific dollar amount. The courts have consistently held that a claim is not presented until it states "a sum certain." If the claimant fails to state a "sum certain," the claim does not constitute a claim for purposes of complying with the jurisdictional prerequisites of the FTCA. *See, e.g., Kokaras v. United States*, 980 F.2d 20 (1st Cir. 1992); *Bailey v. United States*, 642 F.2d 344 (9th Cir. 1981); *Allen v. United States*, 517 F.2d 1328 (6th Cir. 1975). Observance of the "sum certain" requirement does not prevent the claimant from recovering more than the amount originally claimed. The claimant may amend the claim at any time prior to final agency action on the claim. Once an action is initiated under the FTCA, the plaintiff is limited to the damage amount specified in the claim presented "except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the agency, or upon allegation and proof of intervening facts, relating to the amount of the claim." 28 U.S.C. § 2675(b) (1982). The plaintiff has the burden of proving the existence of the "newly discovered evidence" or "intervening facts." 28 U.S.C. § 2675(b) (1982).

(d) ***Describe the factual circumstances giving rise to***

the claim. To the maximum extent possible, the claimant must detail the facts and circumstances precipitating the claim.

(e) ***Submitted to a Federal agency***. The claim is not properly presented until it is submitted to a Federal agency. *See, e.g., Kielwien v. United States*, 540 F.2d 676 (4th Cir. 1976); *Hejl v. United States*, 449 F.2d 124 (5th Cir. 1971). The claim should be submitted to the agency whose activities gave rise to the claim. If the claim is submitted to the wrong Federal agency, that agency must promptly transfer it to the appropriate one. Although submission to any Federal agency will stop the running of the statute of limitations, the six-month waiting period does not begin until the claim is received by the appropriate agency. That the United States is aware of the potential claim or has actual notice does not relieve the claimant of the requirement of presenting the claim to a Federal agency; failure to formally present the claim can result in the dismissal of an action in court. *Avril v. United States*, 461 F.2d 1090 (9th Cir. 1972). Some courts have indicated that they will not allow a "technical defect" in form to defeat the substantive rights of a claimant where the defect does not bear upon the ability of the agency to adjudicate the claim. *Hunter v. United States*, 417 F. Supp. 272 (N.D. Cal. 1976).

(2) ***Information and supporting documentation***. Although the FTCA itself does not specify what information and supporting documentation are required for validating the claim, administrative regulations promulgated by the Attorney General of the United States and the Judge Advocate General of the Navy require that the claim include information such as:

(a) A reasonably detailed description of the incident on which the claim is based;

(b) the identity of the Federal agencies, employees, or property involved;

(c) a description of the nature and extent of personal injury or property damage; and

(d) documentation of the loss (such as physicians' reports, repair estimates, and receipts).

In some instances, failure to provide the required information may result in a court ruling that the claim was never properly presented. *See, e.g., Corte-Real v. United States*, 949 F.2d 484 (1st Cir. 1991); *Transco Leasing Corp., et al. v. United States*, 896 F.2d 1435 (5th Cir. 1990); *Conn v. United States*, 867 F.2d 916 (6th Cir. 1989); *Bembenista, et al. v. United States*, 866 F.2d 493 (D.C. Cir. 1989).

d. ***Command responsibility when claim presented***. Prompt action is necessary when a command receives a claim. The following steps must be taken:

(1) Record date of receipt on the claim;

(2) determine which military activity is most directly involved;

(3) when the receiving command is the activity most directly involved, immediately convene an investigation in accordance with chapter II of the *JAG Manual* and, when the investigation is complete, promptly forward the report and the claim to the appropriate claims adjudicating authority;

(4) when the receiving command is not the activity most directly involved, immediately forward the claim to the activity that is most directly involved; and

(5) report to the Judge Advocate General of the Navy if required by the *JAG Manual* or JAGINST 5890.1.

2. ***Investigation***

a. ***When required.*** A *JAG Manual* investigation is required whenever a claim against the Navy is filed or is likely to be filed. Generally, the appropriate type of investigation is a litigation-report investigation. Responsibility for convening and conducting the investigation usually lies with the command most directly involved in the incident upon which the claim is based. When circumstances make it impractical for the most directly involved command to conduct the investigation, responsibility may be assigned to some other command.

b. ***Importance of prompt action.*** A claim involving a command may involve substantial amounts of money. Because the government usually will have only six months in which to investigate and take final action on the claim, the investigation must be done promptly. Witnesses' memories fade quickly and evidence can be lost. Failure to investigate promptly could prejudice the government's ability to defend against the claim. Therefore, when a person is appointed to investigate a claim, the investigation ordinarily shall take priority over all other duties.

c. ***Scope and contents of the investigation.*** The general duties of the claims investigating officer include the following:

(1) Consider all information and evidence already compiled about the incident;

(2) conduct a thorough investigation of all aspects of the incident in a fair, impartial manner (the investigation must not be merely a whitewash job intended to protect the government from paying a just claim.);

(3) interview all witnesses as soon as possible;

(4) inspect property damage and interview injured persons; and

(5) determine the nature, extent, and amount of property damage or personal injury and obtain supporting documentation.

In addition to these general duties, the investigating officer also must make specific findings of fact. Great care must be used to ensure that all relevant, required findings of fact are made. A major purpose of the claims investigation is to preserve evidence for use months, and even years, in the future.

d. ***Action on the report***. The commanding officer or officer in charge will take action upon completion of the report of investigation. Depending on the circumstances, either the original report or a complete copy, together with all claims received, must be promptly forwarded to the appropriate claims adjudicating authority.

3. ***Adjudication***

a. ***Adjudicating authority***. An adjudicating authority is an officer designated by the Judge Advocate General to take administrative action (i.e., pay or deny) on a claim. In the Navy and Marine Corps, adjudicating authorities include certain senior officers in the Office of the Judge Advocate General and commanding officers of naval legal service offices.

(1) ***Geographic responsibility***. Naval legal service offices and certain other commands have been assigned responsibility for adjudicating claims in their respective geographic areas. Claims usually will be forwarded by the command to the adjudicating authority serving the territory in which the claim arose. For example, the Naval Legal Services Office in Groton, Connecticut, is the adjudicating authority for claims arising in the Northeastern United States.

(2) ***Dollar limits on adjudicating authority***. There is no maximum limit on the amount that can be paid under an FTCA claim. Payments in excess of certain amounts may require prior written approval by the Attorney General or his or her designee. Adjudicating authorities may deny FTCA claims in any amount. Commanding Officers of naval legal service offices may delegate their denial authority to an officer in their command, except this authority may be limited to $100,000 for some bases of denial. Even though a claim may demand more than the payment limits of an adjudicating authority serving a particular area, the command receiving the claim should forward it to the appropriate local adjudicating authority, who can attempt to compromise the claim for an amount within payment limits.

b. ***Adjudicating authority action.*** The adjudicating authority can take the following actions:

(1) Approve the claim, if within the payment limits;

(2) deny the claim;

(3) compromise the claim for an amount within payment limits; or

(4) refer the claim to the Office of the Judge Advocate General if payment is recommended in an amount above the adjudicating authority's payment limits.

c. ***Effect of accepting payment.*** When a claimant accepts a payment in settlement of an FTCA claim, the acceptance releases the Federal Government from all further liability to the claimant arising out of the incident on which the claim is based. Any Federal employees who were involved must also be released from any further liability to the claimant. Therefore, if a claimant is not satisfied with the amount the adjudicating authority is willing to pay on an FTCA claim, the entire claim will be denied. The claimant then will have to bring suit in Federal district court to recover on the claim. The courts have held that acceptance of payment for property damage does not preclude a subsequent action for personal injury unless the government can demonstrate that a settlement of all claims was contemplated by the parties. *Macy v. United States*, 557 F.2d 391 (3d Cir. 1977).

4. ***Reconsideration.*** Within six months of a final denial of an FTCA claim by an adjudicating authority, the claimant may request reconsideration of the denial.

5. ***Claimant's right to sue.*** Within six months after final denial of an FTCA claim by the adjudicating authority, the claimant may bring suit in Federal district court. There is no right to a jury trial in an FTCA case. 28 U.S.C. § 2402 (1982). Although the Department of Justice will represent the Department of the Navy in court, naval judge advocates will assist by preparing litigation reports summarizing the pertinent facts in the case.

a. ***Removal.*** Actions under the FTCA may be brought only in Federal district courts and not state courts. If suits are brought personally against a Federal employee in state court, consideration should be given to removing the action to Federal district court. Removal is controlled by statute and is a matter of Federal law. The general removal statutes are found in 28 U.S.C. §§ 1441-1451 (1982). Section 1442a gives members of the armed forces a right to remove either a civil or a criminal action from state to Federal court if being sued for acting under the "color of such office." Section 1442a has been liberally construed in favor of allowing Federal officer removal. *Willingham v. Morgan*, 395 U.S. 402 (1976). Venue for all removal actions is the Federal district court and division

wherein the state action is pending. If the United States is sued in state court, with jurisdiction resting on the FTCA, the action may be removed and dismissed. On removal, the Federal district court acquires only that jurisdiction possessed by the state court. Since the state court has no jurisdiction under FTCA, the Federal district court acquires none.

b. ***The Federal Employees Liability Reform and Tort Compensation Act.*** The Federal Employees Liability Reform and Tort Compensation Act of 1988, amending 28 U.S.C. sections 2679(b) & (d), provides that the exclusive remedy against a federal employee based on a claim arising out of the employee's negligent or wrongful acts or omissions within the scope of employment is an action against the United States under the FTCA. If a federal employee is served with process from a federal or state court, he shall immediately deliver all process and papers to his commanding officer who will promptly notify the Judge Advocate General (Code 15). The Navy will then forward all papers to the U.S. Attorney, where the decision will be made whether to certify that the employee was acting within the scope of his or her employment at the time of the incident out of which the suit arose. The case will then be removed to federal district court if it was brought in state court. Immunity from personal liability does not extend to allegations of constitutional torts nor to allegations of violations of statues specifically authorizing suits against individuals.

c. ***Medical Personnel.*** 10 U.S.C. section 1089 provides that the exclusive remedy for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, paramedic, or other assisting personnel of the armed forces, acting within the scope of employment is against the United States under the FTCA.

d. ***Legal Personnel.*** 10 U.S.C. section 1054 provides that the exclusive remedy for injury or loss of property caused by the negligent or wrongful act or omission of any attorney, paralegal, or other member of a legal staff within the armed forces, acting within the scope of employment is against the United States under the FTCA.

e. ***Venue.*** The term "venue" refers to the place where the judicial power to adjudicate may be exercised. 28 U.S.C. § 1402(b) (1988) provides that an action may be brought only in the "judicial district where the plaintiff resides or wherein the act or omission complained of occurred."

H. ***Examples.*** The following examples demonstrate the operation of legal principles governing FTCA claims.

1. ***Example***

a. ***Facts.*** YN3 Daytona, the command's duty driver, was on an authorized run in Honolulu, Hawaii, when he was involved in an auto accident with Mr. DeStroyd, a civilian. The police report clearly indicates that the accident was caused by

Daytona's negligent failure to stop at a red light and that there was nothing Mr. DeStroyd could have done to avoid the collision. Mr. DeStroyd has filed, within two years of the accident, an FTCA claim for $75,000 damage— including property damage to his automobile, medical expenses, and punitive damages. Can he collect?

b. ***Solution***. YES (except for the punitive damages). The accident was caused by the negligence of a government employee, YN3 Daytona, who was acting within the scope of his Federal employment. None of the exclusions from liability discussed in section 0402D above, apply. The claim does not arise out of an excluded governmental activity. It is not cognizable under any other claims statute and the claimant is not a member of any excluded class of claimants. Therefore, this claim is cognizable under the FTCA. Punitive damages are excluded from FTCA compensation. Because the claim is for $75,000, it can be paid by a local adjudicating authority (such as a naval legal service office) only if Mr. DeStroyd is willing to accept $50,000 or less in full settlement of his claim. Otherwise, the Office of the Judge Advocate General will adjudicate the claim.

2. ***Example***

a. ***Facts***. Mrs. Smith, the dependent wife of an active-duty naval officer, underwent surgery at Naval Regional Medical Center, San Diego, California. The surgeon, CDR Badknife, negligently severed a nerve in her neck. At first, Mrs. Smith was paralyzed from the neck down but, after five months' treatment and rehabilitation at the NRMC, she regained complete use of her arms, legs, and trunk. She has lost five months' wages from her civilian job, for which she was ineligible for state disability compensation. Also, she suffers from slight residual neurological damage which causes her shoulders to twitch involuntarily. This twitching is permanent. Mrs. Smith has presented an FTCA claim. Can she collect?

b. ***Solution***. YES (from the U.S., but not from Dr. Badknife). The paralysis and lasting damage were caused by the negligent acts of CDR Badknife, a Federal employee acting in the scope of his employment. None of the three general types of exclusions from FTCA liability apply. The *Feres* Doctrine does not apply to this claim because it involves personal injury to a military dependent, not to active-duty military personnel. Therefore, this claim is payable under the FTCA. The value of medical care and rehabilitation services Mrs. Smith received at the NRMC will be deducted from her compensation; however, she will be compensated for all other nongovernmental medical services as well as for the pain and suffering she endured, the wages she has lost already (and likely will lose in the future), and the permanent nature and disfigurement of her injury. Because of 10 U.S.C. § 1089 (1988), no claim will lie against Dr. Badknife individually.

0403 MILITARY CLAIMS ACT

A. *Overview*

1. ***Similarities to FTCA***. Like the FTCA, the Military Claims Act, 10 U.S.C.

§ 2733 (1982) (MCA) compensates for personal injury, death, or property damage caused by activities of the Federal Government. MCA claims are limited to two general types:

a. Injury, death, or property damage caused by military personnel or civilian employees acting within the scope of their employment; and

b. injury, death, or property damage caused by noncombat activities of a peculiarly military nature.

2. ***Differences from FTCA***. The MCA provides compensation for certain claims that are not payable under the FTCA. First, its application is worldwide. Second, the claimant has no right to sue the government if his or her MCA claim is denied by the adjudicating authority. Finally, unlike the FTCA, which creates statutory rights for claimants, the MCA is operative only "under such regulations as the Secretary of a military department may prescribe." 10 U.S.C. § 2733(a) (1988). Each service Secretary is required to promulgate regulations stating under what circumstances claims will be paid by his or her department under the MCA. A claimant has no greater rights than what is prescribed by each service's regulations.

B. ***Statutory authority***. The MCA provides in pertinent part:

> a. Under such regulations as the Secretary concerned may prescribe, he, or subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, or the Chief Counsel of the Coast Guard, as appropriate, if designated by him, may settle, and pay in an amount not more than $100,000, a claim against the United States for
>
> (1) Damage to or loss of real property, including damage or loss incident to use and occupancy;
>
> (2) Damage to or loss of personal property, including property mailed to the United States and including registered or insured mail damaged, lost or destroyed even if by a criminal act while in the possession of the Army, Navy, Air Force, Marine Corps or Coast Guard, as the case may be; or
>
> (3) Personal injury or death; either caused by a civilian official or employee of that department, or the Coast Guard or a member of the Army, Navy, Air Force, Marine

Corps, or Coast Guard, as the case may be, acting within the scope of his employment, or otherwise incident to noncombat activities of that department, or the Coast Guard.

b. The Secretary shall certify amounts in excess of $100,000 to the Department of Treasury.

C. ***Scope of liability.*** The MCA is limited to two rather broad categories of claims: those arising from the acts of military employees in the scope of their employment and those incident to noncombat activities of a peculiarly military nature.

1. ***Caused by military member or employee acting within scope of employment.*** The Department of the Navy is liable under the MCA for injury, death, or property damage "caused by" its military members or civilian employees acting within the scope of their employment. Although MCA regulations do not specifically require the claimant to establish governmental negligence to be able to recover damages under the MCA, the Office of the Judge Advocate General has opined informally that the term "caused by" means "***negligently*** caused by." The concept, then, of causation under the MCA is the same as that required under the FTCA. Also, the scope-of-employment concept under MCA is identical to that required under the FTCA claims.

2. ***Noncombat activities of a peculiarly military nature.*** The Department of the Navy also is liable under the MCA for injury, death, or property damage incident to noncombat activities of a peculiarly military nature. Examples include claims such as those arising out of maneuvers, artillery and bombing exercises, naval exhibitions, aircraft and missile operations, and sonic booms. Such activities have little parallel in civilian society or they involve incidents for which the government has traditionally assumed liability for resulting losses. Under this second theory of MCA liability, the claimant need not show that the activities were negligently conducted. In fact, the claimant's losses need not be traced to the conduct of any specific Federal employees. The scope-of-employment concept does not apply.

3. ***No territorial limitations.*** The MCA applies worldwide. If a claim arising in a foreign country is cognizable under the Foreign Claims Act, however, it shall be processed under that statute and not as an MCA claim.

4. If the claim is denied, the claimant does not have the right to sue.

D. ***Exclusions from liability.*** As with FTCA claims, there are three general categories of exclusions from liability under the MCA: certain exempted activities; claims

cognizable under other claims statutes; and certain excluded classes of claimants.

1. ***Exempted governmental activities.*** A claim will not be payable under the MCA if it involves an exempted governmental activity. The most frequent examples include the following:

a. Combat activities or enemy action;

b. certain postal activities; and

c. property damage claims based on alleged contract violations by the government.

2. ***Claims cognizable under other claims statutes.*** Claims that are governed by one of the following claims statutes are not payable under the MCA:

a. Federal Tort Claims Act;

b. Military Personnel and Civilian Employees' Claims Act;

c. Foreign Claims Act; and

d. certain admiralty claims.

3. ***Excluded classes of claimants***

a. ***Naval personnel.*** Military members and civilian employees of the Department of the Navy may not recover under the MCA for personal injury or death occurring incident to service or employment. Compensation may be recovered for property damage under MCA if it is not covered by another claims statute. As a practical matter, however, when a military member suffers property damage incident to service, it will usually be compensated under the Military Personnel and Civilian Employees' Claims Act.

b. ***Foreign nationals of a country at war with the United States.*** Nationals of an ally of a country at war with the United States, unless the individual claimant is determined to be friendly to the United States, are excluded from MCA coverage.

c. ***Negligent claimants.*** Generally, a claim will not be paid under the MCA if the injury, death, or property damage was caused in whole or in part by the claimant's own negligence or wrongful acts. This "contributory negligence" is a complete

bar to tort recovery in many states. However, if the law of the jurisdiction where the claim arose would allow recovery in a lawsuit, even though the claimant was negligent, the MCA claim can be paid. Under such circumstances, the negligent claimant will only recover that amount that local law would permit a negligent claimant to recover in its courts. This partial recovery concept is known as the "comparative negligence" doctrine.

E. ***Measure of damages.*** The rules for determining the amount of a claimant's recovery under the MCA are similar to those governing other claims.

1. ***General rules***

a. ***Property damage.*** The amount of compensation for property damage is based on the estimated cost of restoring the property to its condition before the incident. If the property cannot be repaired economically, the measure of damage will be the replacement cost of the property minus any salvage value. The claimant also may recover compensation for loss of use of the property (e.g., cost of a rental car while the damaged vehicle is being repaired).

b. ***Personal injury or death.*** Compensation under the MCA for personal injury or death will include items such as medical expenses, lost earnings, diminished earning capacity, pain and suffering, and permanent disability. Usually, local standards are applied.

2. ***Amount of recovery.*** The Department of the Navy may pay MCA claims up to $100,000. If the Secretary of the Navy considers that a claim in excess of $100,000 is meritorious, a partial payment of $100,000 may be made with the balance referred to the Comptroller General for payment from appropriations provided therefore. 10 U.S.C. § 2733 (1988).

F. ***Statute of limitations.*** A claim under the MCA may not be paid unless it is presented in writing within two years after it accrues. The statute of limitations may be suspended during time of armed conflict. The rules governing presentment of the claim are substantially similar to those under the FTCA.

G. ***Procedures.*** The investigation and adjudication procedures for MCA claims are substantially similar to those for FTCA claims. In fact, many claims paid under the MCA were initially presented as FTCA claims. The significant procedural differences under MCA are as follows:

1. ***Advance payments.*** In limited circumstances, pursuant to 10 U.S.C.

§ 2736 (1988), the Secretary of the Navy, or a designee, is authorized to make an advance payment not to exceed $100,000 to, or on behalf of, any person suffering injury, death, or property damage resulting from an incident covered by the Military Claims Act. This payment may be made before the claimant presents a written claim. Advance payments may be made only when the claimant or the claimant's family is in immediate need of funds for necessities (such as shelter, clothing, medical care, or burial expenses). Other resources must not be available. An advance payment is not an admission of government liability. The amount of the advance payment shall be deducted from any settlement subsequently authorized.

2. ***Dollar limits on adjudicating authorities.*** FTCA adjudicating authorities also adjudicate MCA claims. Dollar limitations are set forth in para. 9, enclosure (2) of JAGINST 5890.1. All adjudicating authorities may make advance payments.

3. ***Claimant's right to appeal.*** There is no right to sue under the MCA after an administrative denial of an MCA claim. If an MCA claim is denied, in whole or in part, the claimant may appeal to the next higher adjudicating authority within 30 days after the denial.

H. ***Examples***

1. ***Example***

a. ***Facts.*** A Navy aircraft crashed, utterly demolishing an automobile owned by Mr. Rubble, a civilian. Mr. Rubble has presented an MCA claim for the fair market value of his car. Can he recover?

b. ***Solution.*** YES. This claim falls under the second theory of MCA liability—an incident arising out of noncombat activities of a peculiarly military nature. None of the exclusions from liability applies. This incident does not involve an exempted governmental activity. It is not covered by any other claims statute. The FTCA would not apply because the facts do not indicate any negligence by any Federal employee. (If the crash had been caused by the Navy pilot's negligence, it would be compensable under the FTCA.) Mr. Rubble does not belong to an excluded class of claimants. There is no evidence that his actions in any way caused the incident; therefore, Mr. Rubble can recover the value of his car— less any salvage value.

2. ***Example***

a. ***Facts***. While conducting gunnery exercises aboard USS SHOTINTHEDARK, naval personnel miscalculated and accidentally shot a shell into the fleet parking lot. The shell completely destroyed an automobile owned by ENS DeMolish, who was on duty aboard one of the ships tied up at a nearby pier. ENS DeMolish has filed an MCA claim. Is this claim payable under the MCA?

b. ***Solution***. NO. Although this incident involves noncombat activities of a peculiarly military nature ***and*** was also caused by naval personnel acting within the scope of employment, the MCA does not apply. A claim which is "cognizable" under the Military Personnel and Civilian Employees' Claims Act is not payable under the MCA. Because compensation for this motor vehicle loss is available as a "personnel claim," it is not payable under the MCA. Alas, ENS DeMolish's recovery will be limited to the $2000 amount prescribed under the personnel claims regulations and not the greater amounts payable under the MCA.

c. ***Special point***. Perhaps you were thinking that, since the Military Personnel and Civilian Employees' Claims Act limits payments for automobile claims to $2000, the MCA could be used to pay the amount of ENS DeMolish's loss which is in excess of the $2000 limit. No such luck. JAG has interpreted the phrase "***cognizable*** under the Military Personnel and Civilian Employees' Claims Act" to mean "***payable*** under the Military Personnel and Civilian Employees' Claim Act." Accordingly, in this particular situation, the Military Personnel and Civilian Employees' Claims Act is considered to be the exclusive remedy available to pay for the damage

PART B - CLAIMS AGAINST THE GOVERNMENT: SPECIALIZED CLAIMS STATUTES

3904 FUNCTION. The general claims statutes discussed in part A of this chapter cover a broad range of losses and incidents. The specialized claims statutes discussed in part B are limited to certain types of losses suffered by specific classes of claimants occurring under certain specific circumstances. The specialized claims statutes interact with the general claims statutes in two ways. First, they may permit compensation for certain losses, claimants, or incidents not covered by one of the general claims statutes. Some of the specialized statutes were enacted in order to plug "gaps" in the general claims statutes. Second, the specialized claims statutes often act as exclusions from liability under general statutes. For example, a claim that otherwise would be payable under the Federal Tort Claims Act or the Military Claims Act cannot be paid under those statutes if it is also cognizable under the Military Personnel and Civilian Employees' Claims Act.

3905 MILITARY PERSONNEL AND CIVILIAN EMPLOYEES' CLAIMS ACT

A. ***Overview***. The Military Personnel and Civilian Employees' Claims Act of

1964, 31 U.S.C. § 3721 (1988) [hereinafter Personnel Claims Act (PCA)], is intended to maintain morale by compensating servicemembers and other Federal employees for personal property which is lost, damaged, or destroyed incident to service.

B. ***Statutory authority.*** Like the Military Claims Act, the Personnel Claims Act contemplates payment of claims "under such regulations as the head of an agency may prescribe." 31 U.S.C. § 241 (1982). Personnel claims regulations in other services are similar to the Department of the Navy's, but are not identical.

C. ***Scope of liability***

1. ***Limited to personal property damage.*** The Personnel Claims Act is limited to recovery for personal property damage—including loss, destruction, capture, or abandonment of personal property. Damage to real property (e.g., land, buildings, and permanent fixtures) is not covered, but may be compensable under the Military Claims Act.

2. ***Limited to military personnel and civilian employees.*** Only military personnel and civilian employees of the Department of Defense may recover compensation. Military personnel include commissioned officers, warrant officers, enlisted personnel, and other appointed or enrolled military members. Civilian employees include those paid by the Department of the Navy on a contract basis.

3. ***Loss incident to service.*** To be payable under the Personnel Claims Act, the claimant's loss must have occurred incident to military service or employment. Eleven general categories of losses incident to service exist:

a. Property losses in quarters or other authorized places designated by superior authority for storage of the claimant's personal property;

b. transportation losses, such as damage to household goods shipped pursuant to PCS orders;

c. losses caused by marine or aircraft disasters;

d. losses incident to combat or other enemy action;

e. property damaged by being subjected to extraordinary risks;

f. property used for the benefit of the U.S. Government;

g. losses caused by the negligence of a Federal employee acting within the scope of employment;

h. money deposited with authorized personnel for safekeeping, deposit, transmittal, or other authorized disposition;

i. certain noncollision damage to motor vehicles (limited to $2,000, not including the contents of the vehicles);

j. damage to house trailers and contents while on Federal property or while shipped under government contract; and

k. certain thefts aboard military installations from the possession of the claimant.

NOTE: Within each of these eleven categories are numerous specific types of incidents and circumstances. The rules governing each of these eleven areas can be complex and detailed. Therefore, it is absolutely necessary to refer to JAGINST 5890.1 to determine whether a particular personnel claim is covered by one of the eleven categories.

4. ***The "reasonable, useful, or proper" test***. Not only must the property damage or loss occur incident to service, the claimant's possession and use of the damaged property must have been reasonable, useful, or proper under the circumstances. While the Personnel Claims Act provides broad protection for the military member's personal property, the government has not undertaken to insure all property against any risk. A personnel claim will usually be denied if the claimant's possession or use of damaged property was unreasonable under the circumstances. Thus, while possession of an inexpensive radio in a locker in the barracks is reasonable under most circumstances, keeping a $5,000 stereo system in the locker usually is not. Whether the possession or use of the property was reasonable, useful, or proper is largely a matter of judgment by the adjudicating authority. Factors that are considered include, but are not limited to, the claimant's living conditions, reasons for possessing or using the property, efforts to safeguard the property, and the foreseeability of the loss or damage that occurred.

5. ***Territorial applicability***. The Personnel Claims Act applies worldwide.

6. ***Other meritorious claims***. The Secretary of the Navy and Judge Advocate General may approve meritorious claims within the scope of the Personnel Claims Act that are not specifically designated as payable.

D. ***Exclusions from liability***. Exclusions from personnel claims liability fall into three general categories:

1. ***Circumstances of loss***. The two most common examples are:

a. ***Caused by claimant's negligence***. If the property damage was caused, either in whole or in part, by the claimant's negligence or wrongful acts— or by such conduct by the claimant's agent or employee acting in the scope of employment— the personnel claim will be denied. Such contributory negligence is a complete bar to recovery.

b. ***Collision damage to motor vehicles***. Damage to motor vehicles

is not payable as a personnel claim when it was caused by collision with another motor vehicle. "Motor vehicle" includes automobiles, motorcycles, trucks, recreational vehicles, and any other self-propelled military, industrial, construction, or agricultural equipment. Collision claims may be paid under other claims statutes— most frequently the Federal Tort Claims Act or Military Claims Act— depending on the circumstances.

2. ***Excluded types of property.*** JAGINST 5890.1 limits or prohibits recovery for certain types of property damage. The most common examples are:

a. Currency or jewelry shipped or stored in baggage;

b. losses in unassigned quarters in the United States;

c. enemy property or war trophies;

d. unserviceable or worn-out property;

e. inconvenience or loss of use expenses;

f. items of speculative value;

g. business property;

h. sales tax;

i. appraisal fees;

j. quantities of property not reasonable or useful under the circumstances;

k. intangible property representing ownership or interest in other property (such as bank books, checks, stock certificates, and insurance policies);

l. government property; and

m. contraband (i.e., property acquired, possessed, or transported in violation of law or regulations).

E. ***Measure of damages***

1. ***General rules.*** The rules for calculating the amount the claimant can recover on a personnel claim are not complicated. The provisions of JAGINST 5890.1, encl. (5), for computing the amount of award may be summarized as follows:

a. If the property can be repaired, the claimant will receive

reasonable repair costs established either by a paid bill or an estimate from a person in the business of repairing that type of property. Estimate fees may also be recovered under certain circumstances. Deductions may be made for any preexisting damage (i.e., damage or defects which existed prior to the incident which gave rise to the personnel claim) that also would be repaired. If the cost of repairing the property exceeds its depreciated replacement cost, however, the property will be considered not economically repairable.

b. If the property cannot be economically repaired or is destroyed or missing, the claimant will recover the fair market value (FMV) of the item as the measure of the loss. The FMV is equal to the replacement cost minus depreciation. The Judge Advocate General periodically publishes an Allowance List-Depreciation Guide (AL-DG) specifying depreciation rates and maximum payments applicable to categories of property.

c. ***Depreciation.*** A used item that has been lost or destroyed is worth less than a new item of the same type. The price of a new replacement item must be depreciated to award the claimant the FMV of the lost or destroyed item. Replacement costs on items are depreciated by applying either:

1) A set percentage for each year the claimant owned the property, or

2) By using a flat rate percentage.

The AL-DG specifies which method of depreciation to apply to each category of property. However, ***no depreciation of any kind will be applied to an item***:

1) Less than six months old, or

2) During periods of Government authorized storage either for the PCS move which generated the current claim, or for previous periods of Government authorized storage.

Depreciation is not taken for certain expensive items that appreciate in value (e.g., antiques, crystal, fine china, and sterling silver), or for unique items such as original works of art. (To compute the yearly depreciation, use the following rule: 6-17 months old = 1 year, 18-29 months old = 2 years, etc. Do not count the purchase month and the pick-up month in calculating the age of the property). Depreciation is not taken on repair estimates.

2. ***Dollar limits on recovery.*** The maximum amount payable for most claims under the Personnel Claims Act is $40,000. Section 1088 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1088, 110 Stat. 186, 458-459 (1996) (to be codified at 31 U.S.C. § 3721(b) (1)) [hereinafter 1996 Amendment] amended the Personnel Claims Act and allows payments of up to $100,000 if the claim arose from an emergency evacuation or from extraordinary circumstances. The 1996 Amendment applies to claims arising before, on, or after the date of its enactment, which was 10 February 1996.

a. ***Claims previously presented.*** The 1996 Amendment covers losses which occurred at any time in the past and were not fully compensated. However, the stature requires that the claimant:

1) Present the claim within two years of the enactment of the legislation, ***and***

2) Prove that they have been paid the maximum amount authorized under the Personnel Claims Act and can substantiate an adjudicated value in excess of the maximum amount payable at the time the claim was filed (e.g., prior to 1988 the maximum amount payable was $25,000; prior to 1982 the maximum was $15,000, and prior to 1974 the maximum was $10,000).

As note above, the maximum amount payable is currently $40,000.

b. ***Extraordinary circumstances.*** The Judge Advocate General has not formally published any guidance on what qualifies as an extraordinary circumstance. However, unusual and / or infrequent occurrences involving total or catastrophic loss of property (e.g. earthquake, volcano, fire, flood) are the types of situations envisioned by the 1996 Amendment.

3. ***"Per item, per claim" recovery limitations.*** In addition to the overall payment cap of $40,000 / $100,000, the Personnel Claims Act further limits the amounts awarded for certain types of property. These limits are published in the AL-DG and will either be a maximum amount per item, and / or a maximum amount per claim, depending on the type of property (e.g., bicycles = $750 per item; telephones and answering machines = $500 per claim; rugs = $2,000 per item / $4,000 per claim; jewelry = $1,000 per item / $4,000 per claim). Waivers of the maximum payment of per claim / per item may be granted or denied ***only*** by the Head, Affirmative and Personnel Claims Branch, Claims and Tort Litigation, Office of the Judge Advocate General (Code 35).

F. ***Statute of limitations.*** The statute of limitations for personnel claims is two years, although it can be suspended during time of armed conflict. In household goods claims, however, the claimant must act relatively promptly. Failure to take exceptions when the goods are delivered by the carrier, or within 70 days, may result in reduced payment. Also, failure to file the claim in time for the Federal Government to recover compensation from the carrier under the carrier's contract with the government may also result in reduced payment. JAGINST 5890.1, encl. (5), para. 8.

G. ***Procedures.*** Personnel claims procedures follow the same general pattern of presentment, investigation, and adjudication discussed with respect to FTCA claims. There are, however, some significant differences. Procedures in household goods shipment claims, which constitute the largest portion of personnel claims, can be complicated. The most notable differences and distinctions are as follows:

1. ***Claim forms.*** Personnel claims are presented on DD Form 1842 (Claim for Personal Property Against the United States), a copy of which is reproduced in appendix 5-1 of JAGINST 5890.1, encl. (5).

2. ***Supporting documentation.*** Supporting documentation in personnel claims can be rather extensive. DD Form 1844 (List of Property) usually is required. A sample DD-1844 is reproduced in appendix 5-2 of JAGINST 5890.1, encl. (5). Also, other documentation (such as copies of orders, bills of lading, inventories, copies of demands on carriers, and written repair estimates) may be required. JAGINST 5890.1 sets forth the extent and type of documentation and supporting evidence required. DD 1840 / 1840R (Notice of Loss / Damage) must be submitted to a personal property office within 70 days of the delivery. Failure to furnish it means the military member will not recover anything for lost or damaged articles (because the government must file with the carrier by 75 days).

3. ***Investigation.*** The commanding officer of the military organization responsible for processing the claim will refer the claim to a claims investigating officer. At large commands, the claims investigating officer is often a full-time civilian employee. The claims investigating officer's duties include reviewing the claim and its supporting documentation for completeness and, if necessary, examining the property damage. The claims investigating officer will also prepare and present a concurrent claim on behalf of the Federal Government against any carriers liable for the damage under their government contract.

4. ***Adjudication***

a. ***Adjudicating authorities.*** Personnel claims adjudicating authorities and their respective payment limits are listed in paragraph 7 of JAGINST 5890.1, encl. (5). For Marine Corps personnel, personnel claims are adjudicated at Headquarters, Marine Corps.

b. ***Advance payments.*** When the claimant's loss is so great that the claimant immediately needs funds to provide fundamental necessities of life, the adjudicating authority may make an advance partial payment—normally one-half of the estimated total payment.

c. ***Reconsideration.*** The claimant may request reconsideration of the claim, even though he or she has accepted payment, if the claim was not paid in full. If the adjudicating authority does not resolve the claim to the claimant's satisfaction, the request for reconsideration is forwarded to the next higher adjudicating authority. There is no right under the Personnel Claims Act to sue the government.

5. ***Effect of claimant's insurance***

a. ***Duty to claim against insurance policy.*** If the claimant's property is insured in whole or in part, the claimant must file a claim with the insurer as a

precondition to recovery under the Personnel Claims Act. The Personnel Claims Act is intended to supplement any insurance the claimant has; it is not intended to be an alternative to that insurance or to allow double recovery. JAGINST 5890.1. encl. (5), para. 19(d).

b. ***Effect of compensation from insurer.*** If the claimant receives payment under his or her insurance policy for the claimed property damage, the amount of such payment will be deducted from any payment authorized on the Personnel Claims Act claim. Likewise, if the claimant receives payment on his or her personnel claim, and then is paid for the same loss by an insurance company, the claimant must refund the amount of the insurance payment to the Federal government.

H. ***Examples***

1. ***Example***

a. ***Facts.*** Airman Singe was standing near the hanger when an aircraft crashed while landing. An officer told Singe to jump into a vehicle and go to the crash scene to help out in any way he could. Singe immediately complied. At the scene, Singe assisted an injured crewmember from the wreckage. In doing so, Singe badly ripped his uniform pants on a jagged piece of debris, and the intense heat melted the plastic case of his watch. Singe has presented a personnel claim for his pants and watch. Will he collect?

b. ***Solution.*** YES. Although damage to articles being worn is not usually payable under the Personnel Claims Act, an exception exists when the loss is caused by fire, flood, hurricane, theft or vandalism, or other unusual occurrence. In this case, Airman Singe was performing an official duty in response to an aircraft disaster and suffered property damage while trying to save lives. This situation meets the requirements of unusual occurrence and, therefore, the claim is payable.

2. ***Example***

a. ***Facts.*** While parked in an authorized parking space during working hours, Private Crusht's automobile was destroyed by a runaway government steamroller operated by Mr. Pancake, a civilian Navy employee acting in the scope of his employment. The car, presently valued at $3,800, is a total loss. Alas, Crusht's insurance policy does not cover steamroller accidents, so Crusht has filed a personnel claim for $3,800. Can she collect?

b. ***Solution.*** YES (but not under the Personnel Claims Act). Although this loss appears to be incident to service, collision damage to automobiles is specifically excluded from payment under the Personnel Claims Act. Like many other vehicle collision claims, Crusht's claim is payable under the Military Claims Act because her loss was caused by a Federal employee acting in the scope of employment. This claim

in not payable under the FTCA because the *Feres* Doctrine effectively precludes such claims by military members; but, where one act does not cover Crusht's loss, another statute may. The fact that this claim is not payable under the Personnel Claims Act may allow her to recover the entire $3,800. Under the Personnel Claims Act, the maximum amount payable for noncollision vehicle damage is only $2,000.

3906 FOREIGN CLAIMS ACT

A. *Overview*

1. ***Purpose***. The Foreign Claims Act (FCA), 10 U.S.C. §§ 2734-2736 (1988) (FCA) provides compensation to inhabitants of foreign countries for personal injury, death, or property damage caused by, or incident to noncombat activities of military personnel overseas. Although the U.S. Government's scope of liability under FCA is broad, certain classes of claimants and certain types of claims are excluded from the statute's coverage. Procedures for adjudicating an FCA claim are substantially different from the general procedural pattern for other types of claims against the government.

2. Chapter VIII, Part B, of the *JAG Manual* prescribes the requirements for the investigation and adjudication of FCA claims.

B. ***Statutory authority***. The FCA provides in pertinent part:

> (a) To promote and maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned, or an officer or employee designated by the Secretary, may appoint, under such regulations as the Secretary may prescribe, one or more claims commissions, each composed of one or more officers or employees or combination of officers or employees of the armed forces to settle and pay in an amount not more than $100,000.00, a claim against the United States for -
>
> (1) damage to, or loss of, real property of any foreign country or of any political subdivision or inhabitant of a foreign country, including damage or loss incident to use and occupancy;
>
> (2) damage to, or loss of, personal property of any foreign country or of any political subdivision or inhabitant of a foreign country, including property bailed to the United States; or
>
> (3) personal injury to, or death of, any

> inhabitant of a foreign country; if the damage, loss, personal injury, or death occurs outside the United States, or the Territories, Commonwealths, or possessions, and is caused by, or is otherwise incident to noncombat activities of, the armed forces under his jurisdiction, or is caused by a member thereof or by a civilian employee of the military department concerned or the Coast Guard. . . .

C. ***Scope of liability.*** The government's liability under the FCA is somewhat parallel to that under the MCA. Liability is based on two general theories: loss caused by military personnel and loss incident to noncombat military activities. The government's liability under the FCA is generally greater than under the MCA. On the other hand, the FCA is more limited than the MCA in terms of eligible claimants and territorial application.

1. ***Loss caused by military personnel.*** Under the FCA, the government is liable for personal injury, death, and property damage, including both real and personal property, caused by military members or civilian military employees. Unlike the FTCA and the MCA, the scope-of-employment doctrine does not apply except when the civilian employee is a native foreign national (e.g., a Spanish citizen employed by the U.S. Government in Spain who must be acting within the scope of employment for a possible recovery under the FCA). Also, unlike FTCA claims, the acts that caused the loss need not be wrongful or negligent. The government assumes liability for virtually all acts ranging from mere errors in judgment to malicious criminal acts.

2. ***Loss incident to noncombat military activities.*** The second theory of FCA liability is virtually identical to the second basis for liability under the MCA. The government assumes liability for personal injury, death, or property damage, both real and personal property, caused by, or incident to, noncombat military activities. Such activities are peculiarly military, having little parallel in civilian life, and involve situations in which the Federal Government historically has assumed liability. If such a loss incident to noncombat military activities is payable both under the FCA and also under the MCA, it will be paid under the FCA.

3. ***Effect of claimant's negligence.*** A claimant whose negligent or wrongful conduct partially or entirely caused the loss might be precluded from recovery under the FCA. The effect, if any, of the claimant's contributory or comparative negligence will be determined by applying the law of the country where the claim arose. Under such circumstances, the claimant will recover under the FCA only to the extent that his or her own courts would have permitted compensation.

4. ***Territorial application.*** The FCA applies to claims arising outside the United States, its territories, commonwealths, and possessions. The fact that the claim arises in a foreign country, but in an area that is under the temporary or permanent jurisdiction of the United States (e.g., an overseas military base), does not prevent recovery under the FCA.

5. ***Relationship to claims under treaty or executive agreement.*** Certain

treaties and executive agreements, such as Article VIII of the NATO Status of Forces Agreement, contain claims provisions that may be inconsistent with the FCA principles and procedures. When such treaty or executive agreement claims provisions conflict with FCA, the treaty or the executive agreement usually governs. In countries where such treaty or executive agreement provisions are in effect, directives of the cognizant area coordinator should be consulted before processing any claims by foreign nationals.

D. ***Exclusions from liability***. There are two general categories of exclusions from FCA liability: excluded types of claims and excluded classes of claimants.

1. ***Excluded types of claims***. The following types of claims are not payable under FCA:

a. Claims that are based solely on contract rights or breach of contract;

b. private contractual and domestic obligations of individual military personnel or civilian employees (e.g., private debt owed to foreign merchant);

c. claims based solely on compassionate grounds;

d. claims for support of children born out of wedlock where paternity is alleged against a servicemember;

e. claims for patent infringements;

f. claims arising directly or indirectly from combat activities; and

g. admiralty claims unless otherwise authorized by the Judge Advocate General.

2. ***Excluded classes of claimants***. The following types of classes of claimants are excluded from recovering under FCA:

a. Inhabitants of the United States, including military members and dependents stationed in a foreign country and U.S. citizens and resident aliens temporarily visiting the foreign country;

b. enemy aliens, unless the claimant is determined to be friendly to the United States; and

c. insurers and subrogees.

E. ***Measure of damages***

1. ***General rule***. Damages under the FCA are determined by applying the law and local standards of recovery of the country where the incident occurred.

2. ***Dollar limit on recovery***. The maximum amount payable under the FCA is $100,000. In the case of a meritorious claim above that amount, the Secretary of the Navy may pay up to $100,000 and certify the excess to the Comptroller General for payment. 10 U.S.C. § 2734 (1988).

F. ***Statute of limitations***. The claim must be presented within two years after the claim accrues. If the claim is presented to a foreign government within this period, pursuant to treaty or executive agreement provisions, the statute-of-limitations requirement will be satisfied.

G. ***Procedures***. Under the FCA, the investigation and adjudication functions are merged in a foreign claims commission which the commanding officer appoints. The foreign claims commission not only conducts an investigation similar to *JAG Manual* a command investigation, but also is empowered to settle the claim within certain dollar limits.

H. ***Example***

1. ***Facts***: USS EXTREMIS was making a goodwill visit to Bug, Yugoslavia. BM3 Wildman went on liberty. Wanting to see as much of the countryside as he could, he hot-wired a car parked near the pier. Later that night, while driving extremely fast, high on marijuana, and being careful not to spill any of his martini, Wildman smashed the car into a tree. The owner, Mr. Bagadonutz, a Yugoslavian citizen, wants to file a claim. Can he collect?

2. ***Solution***: YES. Even though Wildman's acts were not in the scope of his employment, were highly negligent, and involved criminal acts, the claim is payable under the FCA.

3907 ADMIRALTY CLAIMS

A. ***Overview***

1. ***Purpose***. Admiralty is a vast, highly specialized area of law. The purpose of this section is merely to provide a brief introduction to admiralty claims, with specific focus on the command's responsibilities.

2. ***Admiralty law defined***. Admiralty law involves liability arising out of maritime incidents such as collisions, groundings, and spills. Admiralty claims may be asserted either against, or in favor of, the Federal Government. The Navy's admiralty claims

are handled by attorneys in the Admiralty Division of the Office of the Judge Advocate General (Code 31). Other judge advocates with specialized admiralty training are located in larger naval legal service offices and at certain overseas commands. When admiralty claims result in litigation, attorneys with the Department of Justice, in cooperation with the Admiralty Division, represent the Navy in court. Thus, while the command has little involvement in the adjudication or litigation of admiralty claims, it often has critical investigative responsibilities.

B. ***Statutory authority and references***

1. ***Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1994).*** The Suits in Admiralty Act provides that a suit in admiralty may be brought against the Federal Government in all circumstances under which an admiralty suit could be brought against a private party or vessel.

2. ***Public Vessels Act, 46 U.S.C. §§ 781-790 (1994).*** The Public Vessels Act supplements the Suits in Admiralty Act and provides for admiralty remedies in cases involving naval or other government owned or controlled vessels.

3. ***10 U.S.C. § 7622 (1994).*** Section 7622 provides for settlement of claims by the government against private parties and vessels.

4. ***JAG Manual.*** Chapter XII of the *JAG Manual* provides guidance regarding the reporting, investigating and adjudicating admiralty claims for and against the federal government.

5. **32 CFR § 752 (1996).** This section provides notice to the public regarding the admiralty - tort claims process for admiralty - tort claims for and against the government.

Scope of liability. The Federal Government has assumed extensive liability for personal injuries, death, and property damage caused by naval or other government owned or controlled vessels incident to governmental maritime activities. Examples of the specific types of losses that give rise to admiralty claims include incidents such as:

1. Collisions;

2. swell wash and wake damage;

3. damage to commercial fishing equipment, beds, or vessels;

4. damage resulting from oil spills, paint spray, or blowing tubes;

5. damages or injuries to third parties resulting from a fire or explosion aboard a naval vessel;

6. damage to commercial cargo carried in a Navy bottom;

7. damage caused by improperly lighted, marked, or placed buoys or navigational aids for which the federal government is responsible; and

8. property damage, personal injury or death of civilians caused by naval or other government owned or controlled vessels.

9. property damage, personal injury or death of federal government employees not in the performance of duties caused by naval or other government owned or controlled vessels.

10. property damage, personal injury or death of military personnel not incident to service while aboard a privately owned vessel caused by naval or other government owned or controlled vessels. (OJAG Code 31 will review all claims filed by military members to determine applicablity of Feres doctrine).

D. ***Exclusions from liability***. Certain categories of persons are precluded from recovering under an admiralty claim for personal injury or death incurred incident to maritime activities. Such potential claimants maybe compensated under other statutes. For example:

Civil Service employees and seamen aboard Military Sealift Command vessels are limited to compensation under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8150 (1982), for personal injury or death.

E. ***Measure of damages***

1. ***Surveys***. A survey of damaged property is required in all collisions and any other maritime incidents involving potential liability for property damage. Surveys have been customary in admiralty law and are intended to eliminate burdensome and difficult questions concerning proof of damages. Section 1206 of the *JAG Manual* has an extensive discussion of survey procedures.

2. ***Medical examinations***. In personal injury cases, medical examinations are required for all injured persons. The function of the medical examination is similar to that of the property damage survey.

3. ***Dollar limits on recovery***. There is no limit to liability. The Deputy Assistant Judge Advocate General of the Navy (Admiralty) has been delegated settlement authority up to $100,000. The Secretary will certify amounts in excess of $100,000 to the Department of Treasury.

F. ***Statute of limitations***. Suits in admiralty must be filed within two years after

the incident on which the suit is based. Unlike the statute-of-limitations rule under the FTCA, filing an admiralty claim with the Department of the Navy does ***not*** toll the running of this two-year period. Nor can the government administratively waive the statute of limitations in admiralty cases. If the admiralty claim cannot be administratively settled within two years after the incident, the claimant ***must*** file suit against the government in order to prevent the statute of limitations from running.

G. ***Procedures.*** The procedures for investigating and adjudicating admiralty claims are explained in sections 1204-1216 of the *JAG Manual*. Significant aspects include:

1. ***Immediate preliminary report.*** The most critical command responsibility in admiralty cases is to ***immediately*** notify the Judge Advocate General and an appropriate local judge advocate of ***any*** maritime incident which ***might*** result in an admiralty claim for or against the government. Section 1204 of the *JAG Manual* gives details concerning the requirement for immediate reports. Because of the highly technical factual and legal issues that may be involved in an admiralty case, it is absolutely vital that the Admiralty Division of the Office of the Judge Advocate General be involved in the case from the earliest possible moment.

2. ***Subsequent investigative report.*** After initially notifying the Judge Advocate General, the command must promptly begin an investigation of the incident. A *JAG Manual* investigation will usually be required although, in some circumstances, a letter report will be appropriate. Section 1205 of the *JAG Manual* provides guidance for determining the type of investigation that is most appropriate. Chapter II of the *JAG Manual* provides specific investigatory requirements for certain maritime incidents. Also, sections 1207 and 1210 of the *JAG Manual* prescribe requirements and procedures concerning witnesses and documents in admiralty investigations.

H. ***Bibliography***

1. Baer, *Admiralty Law of the Supreme Court* (3d ed. 1978).

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3. M. Norris, *The Law of Maritime Personnel Injuries* (3d ed. 1975).

4. *Knauth's Benedict on Admiralty* (A. Knauth & C. Knauth ed. 7th ed. rev. 1973).

5. M. Norris, *The Law of Seamen* (3d ed. 1970).

0408 NONSCOPE CLAIMS

A. ***Overview.*** 10 U.S.C. § 2737 (1988) and enclosure (4) of JAGINST 5890.1 provide for payment of certain types of claims not cognizable under any other provisions of

law. Such claims are known as "nonscope claims" and arise out of either the use of a government vehicle anywhere or the use of government property aboard a Federal installation. The personal injury, death, or property damage must be caused by a Federal military employee, but there is no requirement that the acts be negligent or in the scope of Federal employment (hence the term "nonscope claim").

B. ***Statutory authority***. The statutory authority for payment of nonscope claims is based on 10 U.S.C. § 2737 (1988), which reads in pertinent part:

> (a) Under such regulations as the Secretary concerned may prescribe, he or his designee may settle and pay, in an amount not more than $1,000, a claim against the United States, not cognizable under any other provision of law, for -
>
> (1) damage to, or loss of, property; or
>
> (2) personal injury or death;
>
> caused by a civilian official or employee of a military department or the Coast Guard, or a member of the armed forces, incident to the use of a vehicle of the United States at any place, or any other property of the United States on a Government installation.

C. ***Scope of liability***

1. ***Claims not cognizable under any other provision of law***. As a precondition to payment under the nonscope claims provisions, the claim must not be cognizable under some other claims statute.

2. ***Caused by a Federal military employee***. The resulting personal injury, death, or property damage must be caused by a Federal military employee (either military member or civilian employee of the armed forces or Coast Guard). Acts by employees of nonappropriated fund activities are not covered by the nonscope claims statute.

a. ***Negligence not required***. Neither the nonscope claims statute nor the Navy's regulations require that the Federal military employee's conduct causing the loss be negligent or otherwise wrongful.

b. ***Scope of employment immaterial***. The scope-of-employment concept, which is required under the FTCA and for some MCA claims, does not apply to nonscope claims.

3. ***Circumstances giving rise to nonscope claims***. Nonscope claims are limited to injury, death, or property damage arising out of either of the following circumstances:

a. Incident to the use of a government vehicle anywhere; or

b. incident to use of government property aboard a government installation. ("Government installation" means any Federal Government facility having fixed boundaries and owned or controlled by the Federal Government. It includes both military bases and nonmilitary installations.)

4. ***Worldwide application***. There are no territorial limitations on nonscope claims.

D. ***Exclusions from liability***

1. ***Effect of claimant's negligence***. If the loss was caused, in whole or in part, by the claimant's negligence or wrongful acts, or by negligence or wrongful acts by the claimant's agent or employee, the claimant is barred from any recovery under the nonscope claims statute.

2. ***Excluded claimants***. Subrogees and insurers may not recover subrogated nonscope claims.

E. ***Measure of damages***

1. ***Limitations on recovery***

a. ***Personal injury and death cases***. For personal injury or death, the claimant may recover no more than actual medical, hospital, or burial expenses not paid or furnished by the Federal Government.

b. ***Indemnifiable claims***. The claimant may not recover any amount that he or she can recover under an indemnifying law or indemnity contract.

c. ***Dollar limit on recovery***. The maximum payable as a nonscope claim is $1,000.

F. ***Statute of limitations***. A nonscope claim must be presented within two years after the claim accrues or it will be forever barred.

G. ***Procedures***. Notable procedural aspects of nonscope claims include the following:

1. ***Automatic consideration of other claims***. Claims submitted pursuant to the FTCA or MCA, but which are not payable under those Acts because of scope-of-employment requirements, automatically will be considered for payment as a nonscope claim.

2. ***Adjudicating authority***. All adjudicating authorities listed in JAGINST 5890.1 are authorized to adjudicate nonscope claims.

3. ***Claimant's rights after denial.*** If a claim submitted solely as a nonscope claim is denied, the claimant may appeal to the Secretary of the Navy (Judge Advocate General) within 30 days of the notice of denial. There is no right to sue under the nonscope claims statute.

H. ***Example***

1. ***Facts.*** BM2 Knasty resolved to kill his archenemy ENS Knice, but he planned to make it look like an accident. He stole a government sedan, drove it off base, and rode around town looking for Knice. When he spotted Knice standing on a corner, Knasty aimed the car at Knice and bore down on him at a high speed. Knice tried to jump out of the way, but not quickly enough to avoid being struck a glancing blow. As a result, Knice suffered extensive injuries which were treated at a military hospital. Also, the clothes he was wearing and the radio he was carrying were destroyed. ENS Knice has filed an FTCA claim for $15,000 ($600 for property damage and $14,400 for personal injury, pain and suffering, and lost wages from his part-time job). How much, if anything, will ENS Knice collect?

2. ***Solution.*** This claim is not payable under the FTCA for several reasons, not counting any possible *Feres* Doctrine problem caused by the claimant being a military member. First, FTCA does not provide compensation for losses caused by intentional torts such as assault and battery. Moreover, BM2 Knasty's act was not within the scope of his Federal employment. Under the FTCA, the government is liable only for acts within the scope of Federal employment. The fact that Knasty's acts were outside the scope of his Federal employment also prevent paying this claim under the MCA. However, under the automatic consideration provisions, this claim may be considered as a nonscope claim. It is not cognizable under another claims statute and the injuries and damage were caused by a Federal employee. Neither negligence nor scope of employment is required. The claim involves the use of a government vehicle. Therefore, Knice can recover under the nonscope claims statute. He will not be compensated for medical expenses which were provided by the U.S. Government. Pain and suffering and lost wages are likewise not compensable under the nonscope claims statute. Therefore, Knice will recover only the $600 property damage loss.

3909 ARTICLE 139, UCMJ, CLAIMS

A. ***Overview.*** Article 139 of the Uniform Code of Military Justice provides compensation for private property damage caused by riotous, willful, or wanton acts of members of the naval service not within the scope of their employment or the wrongful taking of property by a member of the naval service. Article 139 claims are unique in that they provide for the checkage of the military pay of members responsible for the property damage. Overseas, these types of damages may be paid for under the Foreign Claims Act. Private citizens in the United States, however, would not otherwise have an effective means by which to be reimbursed for property damage or loss in these situations. Although the individual member, not the Federal Government, is liable for the damage claimed under Article 139, the member's command has significant procedural responsibilities which can be found in Chapter IV of the *JAG Manual*.

B. ***Statutory authority.*** Article 139 of the Uniform Code of Military Justice provides:

> (a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces, he may, under such regulations as the Secretary concerned may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three commissioned officers and, for the purpose of that investigation, it has power to summon witnesses and examine them upon oath, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The orders of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages so assessed and approved.
>
> (b) If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportions as may be considered just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.

C. ***Scope of liability***

1. ***Limited to property damage***. Article 139 claims are limited to damage, loss, or destruction of real or personal property.

2. ***Willful damage***. The property damage, loss, or destruction must be caused by acts of military members which involve riotous or willful conduct, or demonstrate such a reckless and wanton disregard for the property rights of other persons that willful damage or destruction is implied. Only damage that is directly caused by the conduct will be compensated.

a. A claim that a Marine accidentally bumped into and broke a mirror in the course of a drunken brawl with a Navy SEAL would be cognizable. Even though the Marine did not specifically intend to break the mirror and you could characterize the act as simple negligence, the Marine's conduct was riotous and damage resulted from it.

b. A claim that a sailor drove a car at 90-miles an hour down the highway and drifted over the center line into an oncoming car would not be cognizable.

3. ***Wrongful taking***. A wrongful taking is essentially theft. Claims for property that was taken through larceny, forgery, embezzlement, misappropriation, fraud, or similar theft offenses will normally be payable. Loss of property that involves a dispute over the terms of a contract, or over ownership of property, are ***not*** normally payable unless the dispute is merely a cover for an intent to steal. Article 139 ***is not*** a way in which an individual can have his debts collected, nor is it to be used to mediate business disputes.

a. A claim that a sailor issues a worthless check would be cognizable if evidence establishes an intent to defraud. Such intent may be inferred when the sailor fails to make good on a bad check within 5 working days of receiving notice of insufficient funds, in the same way that a criminal intent to defraud may be inferred under Article 123a, UCMJ.

b. A claim that a sailor stole a check or credit card and used it to obtain items of value would be cognizable.

D. ***Exclusions from liability***. The following types of claims are not payable under Article 139:

1. Claims resulting from conduct that involves only simple negligence (i.e., failure to act with the same care that a reasonable person would use under the circumstances);

2. subrogated claims (e.g., by insurers);

3. claims for personal injury or death;

4. claims arising from conduct occurring within the scope of employment;

and

5. claims for reimbursement for damage, loss, or destruction of government property;

E. ***Proper claimants***. Any individual (including both civilians and servicemembers), business entity, state or local government, or charity may submit a claim.

F. ***Measure of damages***

1. ***General rule***. The amount of recovery is limited to only the direct physical damage caused by the servicemember.

– Servicemembers will not be assessed for damage or property loss due to the acts or omissions of the property owner, his lessee, or agent that were a proximate contributing factor to the loss or damage of said property. In these cases, the standard for determining responsibility will be one of comparative responsibility.

2. ***Charge against pay***. The maximum amount that may be approved by an officer exercising general court-martial jurisdiction (OEGCMJ) under Article 139 is $5,000 per offender, per incident. Where there is a valid claim for over $5,000, the claim, investigation into the claim, and the commanding officer's recommendation shall be forwarded to the Judge Advocate General (Code 35) or to Headquarters, U.S. Marine Corps (Code JAR), as appropriate, before checkage against the offender can begin. The amount that can be charged against an offender in any single month cannot exceed one-half of the member's basic pay.

G. ***Statute of limitations***. The claim must be submitted within 90 days of the incident upon which the claim is based.

H. ***Procedures***. Article 139 claims involve certain unique procedures:

1. The claimant may make an oral claim, but it must be reduced to a personally signed writing that sets forth the specific amount of the claim, the facts and circumstances surrounding the claim, and any other matters that will assist in the investigation.

– If there is more than one complainant from a single incident, each claimant must submit a separate and individual claim.

2. ***Investigation***. Claims cognizable under Article 139 must be investigated by the alleged offender's command. There is ***no requirement*** that the alleged offender be designated as a party to the investigation and afforded the rights of a party. The investigation inquires into the circumstances surrounding the claim, gathering all relevant information about the claim. ***Under no circumstances should the investigation of a claim be***

delayed because criminal charges are pending.

a. The investigation will make findings of fact and opinions on whether:

(1) The claim is by a proper claimant (in writing and for a definite sum);

(2) the claim is made within 90 days of the incident that gave rise to it;

(3) the claim is for property belonging to the claimant that was the subject of damage, loss, or destruction by a member or members of the naval service;

(4) the claim specifies the amount of damage suffered by the claimant; and

(5) the claim is meritorious.

b. The investigation shall also make recommendations about the amount to be assessed against the responsible parties. If more than one servicemember is responsible, the investigation must make recommendations concerning the amount to be assessed against each individual.

c. ***Standard of proof.*** A preponderance of the evidence is necessary for pecuniary liability under Article 139.

d. ***Valuation of claimant's loss.*** Normally, the measure of a loss is either the repair cost or the depreciated replacement cost for the same or similar item. Depreciation for most items depends on the age and condition of the item. The Military Allowance List-Depreciation Guide should be used in determining depreciated replacement cost.

3. ***Subsequent action***

a. ***Offenders attached to same command***

(1) If all offenders are attached to the command convening the investigation, the commanding officer shall ensure that the offenders have an opportunity to see the investigative report and are advised that they have 20 days in which to submit a statement or additional information. If the member declines to submit further information, he shall so state, in writing, during the 20-day period.

(2) The commanding officer reviews the investigation and

determines whether the claim is in proper form, conforms to Article 139, and whether the facts indicate responsibility for the damage by members of the command. If the commanding officer finds that the claim is payable, he shall fix the amount to be assessed against the offender(s).

(3) ***Review.*** The commanding officer's action on the investigation is then forwarded to the OEGCMJ over the command for review and action on the claim. The OEGCMJ will then notify the commanding officer of his determinations, and the commanding officer will take action consistent with that determination.

b. ***Offenders are members of different commands***

(1) ***Action by common superior.*** If the offenders are members of different commands, the investigation will be forwarded to the OEGCMJ over the commands to which the alleged offenders are assigned. The OEGCMJ will ensure that the alleged offenders are shown the investigative report and are permitted to comment on it before action is taken on the claim.

(2) The OEGCMJ will review the investigation to determine whether the claim is properly within Article 139 and whether the facts indicate responsibility for the damage on members of his command. If the OEGCMJ determines that the claim is payable, he will fix the amount to be assessed against the offenders and direct their commanding officers to take action accordingly.

4. ***Reconsideration.*** The OEGCMJ may, upon request by either the claimant or the member assessed for the damage, reopen the investigation or take other action he believes is in the interest of justice. If the OEGCMJ anticipates acting favorably on the request, he will give all interested parties notice and an opportunity to respond.

5. ***Appeal.*** If the claim is for $5,000 or less, the claimant or the member against whom pecuniary responsibility has been assessed may appeal the decision to the OEGCMJ within 5 days of receipt of the OEGCMJ's decision. If good cause is shown, the OEGCMJ may extend the appeal time. The appeal is submitted via the OEGCMJ to the Judge Advocate General for review and final action. Imposition of the OEGCMJ's decision will be held in abeyance pending final action by the Judge Advocate General.

l. ***Relationship to court-martial proceedings.*** Article 139 claims procedures are entirely independent of any court-martial or nonjudicial punishment proceedings based on the same incident. Acquittal or conviction at a court-martial may be considered by an Article 139 investigation, but it is not controlling on determining whether a member should be assessed for damages. The Article 139 investigation is required to make its own independent findings.

PART C - CLAIMS ON BEHALF OF THE GOVERNMENT

3910 FEDERAL CLAIMS COLLECTION ACT

A. ***Overview.*** Under the Federal Claims Collection Act, 31 U.S.C. § 3711 (1982) (FCCA), the Federal Government may recover compensation for claims on behalf of the United States for damage to or loss or destruction of government property through negligence or wrongful acts.

B. ***Statutory authority.*** The FCCA provides in pertinent part:

(a) The head of an executive or legislative agency -

(1) shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency;

(2) may compromise a claim of the Government of not more than $20,000 (excluding interest) that has not been referred to another executive or legislative agency for further collection action; and

(3) may suspend or end collection action on a claim referred to in clause (2) of this subsection when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered.

C. ***Government's rights***

1. ***Determined by local law.*** The extent of any FCCA recovery by the Federal Government is determined by the law where the damage occurred. As a general rule, if a private person would be entitled to compensation under the same circumstances, the Federal Government may recover under the FCCA.

2. ***Liable parties.*** FCCA claims may be pursued against private persons, corporations, associations, and nonfederal governmental entities. An FCCA claim also can be asserted against any Federal employee responsible for the damage and, if the responsible party is insured, the claim may be presented to the insurer. *See* Federal Drivers' Act, 28 U.S.C. § 2679(b) (1982) (prescribing immunity for Federal drivers). Generally, the government does not seek payment from servicemembers and government employees for damages caused by their simple negligence.

D. ***Measure of damages.*** The amount of the government's recovery for an FCCA claim is determined by the measure-of-damages rules of the law where the damage occurred. There is no maximum limit to recovery.

E. ***Statute of limitations.*** The government has three years after the damage occurs in which to make a written demand on the responsible party. 28 U.S.C. § 2415(b) (1988).

F. ***Procedures.*** Specific procedures and collection policies are promulgated in JAGINST 5890.1. Notable features of FCCA procedures include:

1. ***Authority to handle FCCA claims.*** JAGINST 5890.1 lists the officers authorized to pursue, collect, compromise, and terminate action on FCCA claims. These include certain officers in the Office of the Judge Advocate General of the Navy and commanding officers of Naval Legal Service Offices, except NLSO's in countries where another service has single service responsibility in accordance with DOD Directive 5515.8. Claims over $20,000 can be terminated or compromised only with permission of the Department of Justice.

2. ***Repair or replacement in kind.*** In some cases, the party responsible for the damage, or that party's insurer, may offer to repair or replace the damaged property. If such a settlement is in the government's best interest, the commanding officer of the property may accept repair or replacement under conditions described in JAGINST 5890.1.

3. ***Collection problems.*** Collecting the full amount claimed under an FCCA claim can often be difficult for a number of reasons. Therefore, the Joint Regulations authorize specific procedures to resolve or overcome collection problems:

a. ***Collection by offset.*** The U.S. Government may deduct the amount of the FCCA claim from any pay, compensation, or payment it owes the responsible party.

b. ***Suspension or revocation of Federal license or eligibility.*** This can be a strong incentive for an entity desiring to do business with the government to pay a claim.

c. ***Collection in installments.*** In cases where the responsible party is unable to make a lump-sum payment, an installment payment schedule may be used. Terms, conditions, and limitations on installment payment plans are set forth in JAGINST 5890.1. A substantial portion of FCCA claims against individuals are liquidated through installment payments.

d. ***Compromise.*** When the responsible party is unable to pay the full amount of the claim within a reasonable time (usually three years), or when the responsible party refuses to pay and the government is unable to enforce collection within a reasonable time the claim may be compromised.

4. ***Referral to Department of Justice.*** Unsettled claims may be referred to the Department of Justice for litigation. The referral is made by the Office of the Judge

Advocate General and not by the local authority directly.

3911 MEDICAL CARE RECOVERY ACT

A. ***Overview***. The Medical Care Recovery Act (MCRA) provides that, when the government treats or pays for the treatment of a military member, retiree, or dependent, it may recover its expenses from any third party legally liable for the injury or disease. The key to understanding the complexities of the MCRA is to realize that the Federal Government operates one of the largest health-care systems in the world.

B. ***Statutory authority***

1. ***Statutes authorizing medical care by the Federal Government***

a. Active-duty personnel

(1) Military facilities: 10 U.S.C. § 1074 (1982).

(2) Emergency care: 10 U.S.C. § 5203 (1982).

b. Dependents: 10 U.S.C. §§ 1076-1078 (1982).

c. Retirees: 10 U.S.C. § 1074 (1982).

d. CHAMPUS payments: 10 U.S.C. § 1079ff (1982).

2. ***Medical Care Recovery Act***. The MCRA, 42 U.S.C. § 2651 (1982), provides in part:

> (a) In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so

furnished or to be furnished. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim.

C. ***The government's rights***

1. ***Independent cause of action.*** The MCRA created an independent cause of action for the United States. Its right of recovery ***is not*** dependent upon a third party. The requirement that the United States furnish care to an injured party is merely a condition precedent to the government's independent right of recovery. If the tortfeasor has a procedural attack or defense against the injured party, it will not serve as a bar to a possible recovery by the government.

2. ***Determined by local law.*** The extent of any MCRA recovery by the Federal Government is determined by the law where the injury occurred. The Federal Government enjoys no greater legal rights or remedies than the injured person would under the same circumstances. Thus, if the injured person would be legally entitled to compensation for injuries from the responsible party under the law where the injury occurred, the Federal Government may recover its expenses in treating the injured person.

3. ***Liable parties.*** MCRA claims may be asserted against private individuals, corporations, associations, and nonfederal governmental agencies. They also may be asserted against a Federal employee responsible for the injuries, except that no such claim may be asserted against a servicemember injured as a result of his / her own willful or negligent acts for two reasons. First, the wording of the MCRA, 42 U.S.C. §§ 2651-2653 (1982), is explicit in providing a right of action against third parties. The injured member does not qualify as a third party. Second, to allow such a claim would violate the provisions and spirit of 10 U.S.C. § 1074 (1982), which provides the entitlement of active-duty servicemembers to medical care free of charge (save for certain subsistence costs chargeable to officers). However, the United States can subrogate against any insurance coverage which the member may have that might cover medical care and treatment as a result of the self-injury.

4. ***Claims against insurers.*** If the party responsible for the injuries is insured, an MCRA claim may be asserted against the insurer. Since a large portion of injuries resulting in MCRA claims involve automobile accidents, assertions against insurance companies are commonplace.

D. ***Measure of damages.*** The Federal Government may recover the reasonable value of medical services it provided, either directly at a U.S. Government hospital or indirectly through the CHAMPUS program.

1. ***Treatment at Federal Government facility.*** The value of treatment at

Federal Government facilities is computed on a flat-rate ***per diem*** basis for in-patient care and a per-visit charge for out-patient treatment, rather than the itemized charges used by most civilian hospitals. These rates are promulgated by the Office of Management and Budget (OMB).

2. ***CHAMPUS payments.*** The Federal Government may recover the amount actually paid to, or on behalf of, a military dependent under the CHAMPUS program.

3. ***Other payments.*** The Federal Government may recover amounts it paid to civilian facilities for emergency medical treatment provided active-duty personnel.

E. ***Statute of limitations.*** MCRA claims must be asserted within three years after the injury occurs. 28 U.S.C. § 2451(b).

F. ***Procedures.*** MCRA procedures are governed by JAGINST 5890.1, enclosure (6), section B. Notable aspects of MCRA procedures include the following:

1. ***"JAG designees."*** Primary responsibility for assertion and collection of MCRA claims rests with "JAG designees" (i.e., officers delegated MCRA responsibilities by the Judge Advocate General). JAG designees include certain officers in the Office of the Judge Advocate General and commanding officers of most Naval Legal Service Offices. Designees outside of the Office of the Judge Advocate General have been assigned geographic responsibility. JAG designees may assert and receive full payment of MCRA claims in any amount, but they may compromise, settle, or waive claims up to $40,000. Claims in excess of $40,000 may be compromised, settled, or waived only with the approval of the Department of Justice.

2. ***Initial action.*** JAG designees learn of potential MCRA claims from several sources:

a. ***Investigations***

(1) ***When required.*** When a military member, retiree, or dependent receives, either directly or indirectly, Federal medical care for injuries or disease for which another party may be legally responsible, an investigation will be required. One exception to this requirement is when the in-patient care does not exceed three days or out-patient care does not exceed ten visits.

(2) ***Responsibility for conducting investigation.*** The responsibility for conducting the investigation of a possible MCRA claim normally lies with the commanding officer of the local naval activity most directly concerned, usually the commanding officer of the personnel involved in the incident or of the activity where the incident took place.

(3) ***Scope and contents of investigation.*** An investigation into a possible MCRA claim will be conducted in accordance with the *JAG Manual* and JAGINST 5890.1. An investigation of the same incident that was convened for some other purpose may be used to determine MCRA liability.

(4) ***Copy to JAG designee.*** If any investigation (regardless of its origin or initial purpose) involves a potential MCRA claim, a copy should be forwarded to the cognizant JAG designee.

b. ***Reports of care and treatment.*** The second major way in which the JAG designee learns of a possible MCRA claim is by a report from the facility providing medical care.

(1) ***Military facilities.*** Military health-care facilities are required to report medical treatment they provide when it appears that a third party is legally responsible for the injuries or disease. In the Navy, this reporting requirement is satisfied by submission of NAVJAG Form 5890/12 (Hospital and Medical Care - Third Party Liability Case) to the cognizant JAG designee. A NAVJAG 5890/12 is submitted when it appears that the patient will require more than three days' in-patient care or more than ten out-patient visits. Preliminary, interim, and final reports are prepared as the patient progresses through the treatment. This report is, in essence, a hospital bill because it will reflect the value of the medical care provided to date, computed in accordance with OMB rates. Military health-care facilities in other services use forms similar to NAVJAG 5890/12.

(2) ***CHAMPUS cases.*** Statements of CHAMPUS payments on behalf of the injured person are available from the local CHAMPUS carrier (usually a civilian health-care insurance company that administers the CHAMPUS program under a government contract). Statements are to be forwarded to JAG designees in cases involving potential third-party liability.

(3) ***Civilian medical care reports.*** District medical officers are required to submit reports to cognizant JAG designees whenever they pay emergency medical expenses incurred by active-duty personnel at a civilian facility and the circumstances indicate possible MCRA liability.

3. ***Injured person's responsibilities.*** The JAG designee will advise the injured person of his / her legal obligations under MCRA. These responsibilities are to:

a. Furnish the JAG designee with any pertinent information concerning the incident;

b. notify the JAG designee of any settlement offer from the liable party or that party's insurers;

c. cooperate in the prosecution of the government's claim against

the liable party;

d. give the JAG designee the name and address of any civilian attorney representing the injured party since the civilian attorney may represent the government as well as the injured person if the claim is litigated in court;

e. refuse to execute a release or settle any claim concerning the injury without the prior approval of the JAG designee; and

f. refuse to provide any information to the liable party, that party's insurer, or attorney without prior approval of the JAG designee.

These restrictions and obligations are necessary because the government's rights under the MCRA are largely derivative from the injured person's legal rights. If the injured person makes an independent settlement with the liable party, the government's rights could be prejudiced. Also, if the injured person settles the claim independently and receives compensation for medical expenses, the government is entitled to recover its MCRA claim from the injured person directly—out of the proceeds of the settlement.

4. ***JAG designee action.*** The JAG designee formally asserts the government's MCRA claim by mailing a "notice of claim" to the liable party or insurer with the following information:

a. Reference to the statutory right to collect;

b. a demand for payment or restoration;

c. a description of damage;

d. the date and place of the incident; and

e. the name, phone number, and office address of the claims personnel to contact.

The JAG designee may accept full payment of the claim or may establish an installment payment plan with the liable party. Under appropriate circumstances, the JAG designee may waive or compromise the claim. Waivers or compromises of claims in excess of $40,000 require prior Department of Justice approval. If the claim cannot be collected locally, referral to the Department of Justice for litigation is possible, but this must be done by the Judge Advocate General.

G. ***Medical payments insurance coverage.*** Government claims for medical care normally are directed against the tortfeasor, and recovery is obtained either directly from him or his insurance carrier. There are, however, other potential sources for recovery of medical

care expenditures, depending upon the circumstances involved. One such potential source is "medical payments" insurance coverage. Under the provisions of certain automobile insurance policies, an insurer may be obligated to pay the cost of medical care for injuries incurred by the policyholder, his passengers who are riding in the insured vehicle, or a pedestrian who is struck by the insured vehicle. Assuming such coverage exists (and it is the claims officer's responsibility to determine if it does), medical payments clauses apply regardless of who was at fault and the United States may be entitled to recover as the provider of medical care. Recovery has been allowed, based on one of two theories: that the United States is insured under the medical pay provisions of the insurance policy, or that the United States is a third-party beneficiary of the insurance contract. Recovery is not based upon the MCRA, but under the terms of the individual insurance policy. The language of the contract is critical in determining whether the United States is a proper third-party beneficiary. State law controls the status of the United States as a third-party beneficiary. *See, e.g., United States v. Cal. State Auto. Ass'n*, 385 F. Supp. 669 (E.D. Cal. 1974), *aff'd*, 530 F.2d 850 (9th Cir. 1976); *United States v. United States Auto. Ass'n*, 431 F.2d 735 (5th Cir. 1970).

H. ***Uninsured motorist coverage.*** Another potential source of recovery of medical care costs is the "uninsured motorist" coverage provisions of the typical automobile insurance policy. If an injured servicemember has obtained such coverage, and the tortfeasor is uninsured, the typical uninsured motorist coverage clause provides for payment to the policyholder of these sums which he would have been able to recover from the tortfeasor, but for the fact that the tortfeasor was uninsured. Like medical payments insurance coverage, the right of the United States to recover is based upon the terms of the insurance contract and not upon the MCRA. If the term "insured" includes "any person," then the courts have generally held that the United States is entitled to recover. *United States v. Geico*, 440 F.2d 1338 (5th Cir. 1971).

I. ***No-fault statutes.*** The recovery of the United States under the MCRA in states that have enacted no-fault statutes will be determined by the language of the statute. It is necessary to determine if the United States is within the terms of the statute so as to be entitled to recover for medical care provided. If the state statute eliminates a cause of action against the tortfeasor, the only probable source of recovery is under the injured party's no-fault insurance. If the United States is excluded and has no cause of action, then there may be no recovery in the particular case. *Hohman v. United States*, 628 F.2d 832 (3d Cir. 1980); *United States v. Gov't Employment Ins. Co.*, 605 F.2d 669 (2d Cir. 1979).

J. ***Bibliography.*** The following references are helpful in working with MCRA claims:

1. Bernzweig, *Pub. L. No. 87-693: An Analysis and Interpretation of the Federal Medical Care Recovery Act*, 64 Colum. L. Rev. 1257 (1964).

2. Turner, *Hospital Recovery Claims (42 U.S.C. § 2651): The United States as a Subrogee*, 12 A.F. JAG L. Rev. 44, 51 (1970).

3. Long, *Administration of the Federal Medical Care Recovery Act*, 46 Notre Dame L. Rev. 253 (1971).

4. Long, *The Federal Medical Care Recovery Act: A Case Study*, 18 Vill. L. Rev. 353 (1973).

5. SECNAVINST 6320.8, Subj: Uniformed Services Health Benefits Program.

6. BUMEDINST 6320.32, Subj: Non-Naval Medical and Dental Care.

3912 AFFIRMATIVE CLAIMS AGAINST SERVICEMEMBER TORTFEASORS. The United States may not assert an affirmative claim against a servicemember / employee who, ***while in the scope of employment***, damages government property or causes damage or injury for which the United States must pay. *See United States v. Gilman*, 347 U.S. 507 (1953). Consideration, in the case of gross negligence or willful and wanton acts, should be given to whether such actions took the servicemember / employee outside the scope of employment.

CHAPTER XL

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CHAPTER XL

RELATIONS WITH CIVIL AUTHORITIES

4001 CRIMINAL JURISDICTION OVER SERVICEMEMBERS IN U.S.

A. ***Delivery of personnel.*** Chapter VI, Part A, of the *JAG Manual* and Chapter 8 of the Coast Guard Military Justice Manual deal 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 a Federal agent. The only requirements that must be met by the requesting agent are that the agent display both proper credentials and a Federal warrant issued for the arrest of the servicemember. A judge advocate of the Navy or Marine Corps should be consulted before delivery is effected, if reasonably practicable. JAGMAN, § 0608, MJM 8-G-1.

2. ***State civil authorities.*** Procedures that are to be followed when custody of a member of the naval service is sought by state, local, or U.S. territorial officials depend on whether the servicemember is within the geographical jurisdiction of the requesting authority. As when custody is requested by Federal authorities, the requesting agent must not only identify himself through proper credentials but must also display the actual warrant for the servicemember's arrest. Additionally, state, local, and U.S. territory officials must sign a delivery agreement providing for the no-cost return of the servicemember after civilian proceedings have terminated. JAGMAN, §§ 0603, 604 and 607. The state official completing the agreement must show that he is authorized to bind the state to the terms of the agreement. Coast Guard-When delivery of any person in the Coast Guard is requested by a state's civil authorities and such person is within the requesting authorities territorial limits (including waters), COs are authorized to deliver such persons when a proper warrant is presented and the approval of COMDT (G-LMJ), if necessary has been obtained. CG MJM 8-D. 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 at a command ***within*** the geographical territory of the requesting authority. Generally, after the state official has displayed proper credentials and an arrest warrant and a delivery agreement has been signed, the request will be complied with by the commanding officer. JAGMAN, § 0603, CG MJM 8-D.

b. E-3 Jones is stationed ashore or afloat ***outside*** of the territorial jurisdiction of the requesting authority, ***but not overseas***. The servicemember must be informed of his right to require extradition. If he does not waive extradition, the requesting authority must complete extradition proceedings before the Navy will release the individual.

In any event, release under these conditions can be made by an officer exercising general court-martial jurisdiction (OEGCMJ), someone designated by him, or any commanding officer after consultation with a judge advocate of the Navy or Marine Corps. JAGMAN, § 0604. If (after consultation with military or civilian legal counsel) the servicemember waives extradition in writing, the servicemember may be released without an extradition order. 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 (or other commanding officer discussed above) is authorized to release Jones to the local authorities and normally will do so; however, absent waiver by Jones, he will then have the opportunity to contest extradition within the courts of the local state. JAGMAN, § 0604, CG MJM 8-E.

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 be allege that the man is charged, or is a fugitive from that state, for an extraditable crime. When all the requirements are met, the Secretary will issue the authorization to transfer the servicemember to the military installation in the United States most convenient to the Department of the Navy, where he will be held until the requesting authority is notified and complies with the provisions of JAGMAN, § 0605.

3. ***Deliveries requiring advance approval of COMDT (G-L)***: The advance approval of COMDT (G-L) is required prior to the delivery of persons in the Coast Guard to federal or state authorities, when:

a. Disciplinary/judicial proceedings involving offenses of the UCMJ are pending.

b. The member is undergoing a court-martial sentence.

c. In the opinion of the CO, it is in the best interest of the CO to refuse delivery, CG MJM 8-H.

d. When making delivery to a state other than the one where the member is located, the member's CO shall, before making such delivery, obtain a written agreement providing for the following:

(1) That the CO will be informed of the outcome of the trial.

(2) That the member will be transported to the requesting state without expense to the member or the U.S.

(3) That the member will be returned to the place of delivery or such place as is mutually agreeable to the COMDT (G-L) and the requesting state, upon disposition of the case, provided the CG shall then desire the member's return. Only the Governor or authorized agent of the requesting state is required to complete the agreement, CG MJM 8-P. A sample agreement appears in enclosure 36 of the MJM.

4. ***Restraint of military offenders for civilian authorities***. R.C.M. 106, MCM (1998) 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 (under the circumstances). Such restraint may continue only for such time as is reasonably necessary to effect the delivery. For delivery of a servicemember to foreign authorities, the applicable treaty or status of forces agreement should be consulted. The provision does not allow the military to restrain a servicemember on behalf of civilian authorities pending trial or other disposition. The nature and extent of restraint imposed is strictly limited to that reasonably necessary to effect the delivery. Thus, if the civilian authorities are slow 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, pending delivery to, or receipt by, military authorities.

5. ***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—and delivery is requested, the military offenses may be investigated and the accused servicemember retained for prosecution by the military. Refusal of delivery must be reported immediately to the Judge Advocate General or COMDT (G-L) and to the cognizant OEGCMJ. JAGMAN, §§ 0125 and 0610, MJM 8-H. 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.

b. Where a servicemember is serving the sentence of a court-martial, the delivery of the servicemember to civil law enforcement authorities is governed by JAGMAN, § 0613. If a request for delivery from civil authorities properly invokes the Interstate Agreement on Detainers Act, the Department of the Navy, as an agency of the Federal Government, shall comply with the Act. The Act is designed to avoid speedy-trial issues and to aid in rehabilitation efforts by securing a greater degree of certainty about a prisoner's future. The Act provides a way for a prisoner to be tried on charges pending before state courts, either at the request of the prisoner or the state where the charges are pending. When refusal of delivery under Article 14, UCMJ, is intended, comply with JAGMAN, § 0610d.

c. If a commanding officer considers that extraordinary circumstances exist which indicate that delivery should be denied, then such denial is authorized by JAGMAN, § 0610b(2), MJM 8-H. This provision is rarely invoked.

d. In any case where it is intended that delivery will be refused, the commanding officer shall report the circumstances to the Judge Advocate General and the area coordinator by message (or by telephone if circumstances warrant). The initial report shall be confirmed by letter setting forth a full statement of the facts. JAGMAN, § 0610d, app. A-6-c.

e. Coast Guard reporting requirements: The Commanding Officer concerned shall upon delivery or refusal, forward a letter report - setting for the full statement of the facts to COMDT (G-LMJ), via the chain of command, in the following areas:

(1) when delivery is refused

(2) when personnel are delivered from beyond the territorial limits of the requesting state or,

(3) when the advance approval of COMDT (G-L) was required.

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.

a. ***Official duty exception***. The one exception to the general rule is that no state authority may arrest or detain for trial a member of the armed forces for a

violation of state law done necessarily in the performance of official duties. This exception arises from the concept that, where the Federal Government is acting within an area of power granted to it by the Constitution, no state government has the right to interfere with the proper exercise of the Federal Government's authority. It follows that members of the armed forces acting pursuant to lawful orders or otherwise within the scope of their official duties are not subject to state authority. This freedom from interference by the state applies only when the proper performance of a military duty ***requires*** violation of a state law—so that if one is driving a Navy vehicle on state highways on normal government business, the driver ***is*** subject to state traffic laws.

b. 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.

c. 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 the Judge Advocate General.

d. Where the U.S. attorney declines or is unable to provide legal services, the Judge Advocate General shall be advised in writing of the circumstances. In those cases in which the date set by the court for answer or appearance is such that time does not permit this communication through the usual methods, the Judge Advocate General shall be contacted immediately by telephone.

2. ***Local agreements***. In many areas where major naval installations are located, arrangements have been made between naval commands and the local civilian officials regarding the release of servicemembers to the military before trial. These agreements are local and informal. There is no established Navy-wide procedure, and their success depends solely upon the practical relationships in the particular area. All commands within the area must 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.

3. ***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. This representative may provide information to the court, prosecutor, or defense counsel concerning the accused's military status, the quality of his service, and any special circumstances that may aid the civil authorities in reaching a just and proper result; however, care must be taken not to violate the Privacy Act. Although

more complete guidance is given in chapter 42 of this text, 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.

4. ***Conditions on release of accused to military authorities***

a. If the member is released on his personal recognizance or on bail to guarantee his return for trial, the command may receive 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. JAGMAN, § 0611. CGPERSMAN 7-A22- Personal recognizance is an obligation of record entered into before a court by an accused in which he promises to return to the court at a designated time to answer the charge against him. Bail involves the accused's providing some security beyond his mere promise to appear at the time and place designated and submit himself to the jurisdiction of the court. Service in the armed forces does not release an accused of the duty to conform to the requirements of release on bond or recognizance.

b. 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. JAGMAN, § 0611. Further, military authorities are without power to place an accused in any sort of pretrial restraint based on the civilian charges.

c. An accused should not be accepted from civil authorities on the condition that disciplinary action will be taken against him. Issues such as accuser concepts or selective prosecutions could stop a command from acting. Evidentiary problems may exist. These matters could prevent disciplinary action, subsequently hurting command / community relationships. If a case is taken, the staff judge advocate and the trial counsel must work closely with the local prosecutor's office.

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 promptly honored. Any refusal and the reasons therefor must be reported immediately to the Judge Advocate General. JAGMAN, § 0612 or COMDT (G-L).

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 immediately

notified 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) or COMDT (G-L) and confirmed by speed letter. *See* Appendix 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 the Judge Advocate General.

3. ***Consular notification.*** Within the territory of the United States, whenever a foreign national who is a member of the U.S. armed forces is apprehended under circumstances likely to result in confinement or trial by court-martial, or is ordered into arrest or confinement, or is held for trial by court-martial with or without any form of restraint, or when court-martial charges against him are referred for trial, notification to his nearest consular office may be required. When any of the above circumstances occur, the foreign national shall be advised that notification will be given to his consul unless he objects and, in case he does object, the Judge Advocate General will determine whether an applicable international agreement requires notification irrespective of his wishes. SECNAVINST 5820.6 provides guidance and details on consular notification, including specifically the contents of the notice.

4002 FOREIGN CRIMINAL JURISDICTION OVER U.S. SERVICEMEMBERS

A. ***Aboard U.S. warships.*** A warship is considered an instrumentality of a nation in the exercise of its sovereign power. Therefore, a U.S. warship is considered to be an extension of U.S. territory. As such, it is under the exclusive jurisdiction of the United States, and is thus immune from any other nation's jurisdiction during its entry and stay in foreign ports and territorial waters as well as on the high seas. Attachment or libel in admiralty may not be taken or effected against a warship for recovery of possession, for collision damage, or for salvage charges. The commanding officer of a ship shall not permit his ship to be searched by foreign authorities nor shall he allow personnel to be removed from the ship by foreign authorities. If the foreign authorities use force to compel submission, the commanding officer should resist with the utmost of his power. Except as provided by international agreement, the rules for a shore activity are the same. *U.S. Navy Regulations*, 1990, Articles 0822, 0828. In addition, the laws, regulations, and discipline of the United States may be enforced on board a U.S. warship 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***

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 by U.S. authorities or by foreign authorities for crimes committed 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, but this exercise will usually be 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 be made for all serious offenses committed by servicemembers regardless of the claims of exclusive jurisdiction by the host country or the lack of a status of forces agreement.

D. ***Reporting***. Whenever a servicemember is involved in a serious or unusual incident outside of the United States, it will be reported to the Judge Advocate General, COMDT (G-L). 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.

E. ***Custody rules***. When a servicemember is arrested and accused of a crime, the existing SOFA with the host country determines which country retains custody of the individual. 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

F. ***Authority to deliver.*** Except when provided by agreement between the United States and the foreign nation concerned, there is no authority to deliver persons in the Department of the Navy 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 the Judge Advocate General, COMDT (G-L) and other higher authorities for guidance. Since expeditious release from foreign incarceration is a matter of utmost interest, delay should be avoided at all cost. To secure the release of U.S. military personnel held by foreign authorities, U.S. military authorities may give assurances that the servicemember will not be removed from the host country except on due notice and adequate opportunity by the foreign authorities to object to that action. In appropriate cases, military authorities may order pretrial restraint of the servicemember in a U.S. facility to ensure his or her presence at trial on foreign charges.

G. ***Procedural safeguards.*** If a servicemember is to be tried for an offense in a foreign court, he is entitled to certain safeguards. The rights guaranteed under the NATO SOFA include the following:

1. A prompt and speedy trial;

2. to be informed in advance of trial of the specific charge or charges made against him;

3. to be confronted with the witnesses against him;

4. to compel the appearance of witnesses in his favor if they are within the jurisdiction of the state;

5. to have legal representation of his own choice;

6. to have the services of a competent interpreter if necessary; and

7. to communicate with representatives of the U.S. Government and, when the rules permit, to have such representatives present at his trial.

These rights are also provided for in most nations where status agreements exist. The in-court observer, a judge advocate, 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.

4003 GRANTING OF ASYLUM AND TEMPORARY REFUGE

A. *References*

1. *U.S. Navy Regulations, 1990*, Article 0939

2. SECNAVINST 5710.22, Subj: PROCEDURES FOR HANDLING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE

3. NWP 1-14M / MCWP 5-2.1 / COMDTPUB P5800.1, paragraph 3.3

B. *Definitions*

1. ***Asylum***: Protection and sanctuary granted to a foreign national who applies for protection because of persecution or fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

2. ***Temporary refuge***: Protection afforded for humanitarian reasons to a foreign national under conditions of urgency to secure the life or safety of that person against imminent danger.

C. *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 aboard the naval installation, aircraft, or vessel where he seeks asylum. If a request for asylum or refuge is made in territory or territorial seas under foreign jurisdiction, the applicant normally will not be received aboard and should be advised to apply in person at the nearest American consulate or Embassy. Under these circumstances, an applicant may be received aboard and given temporary refuge only under extreme or exceptional circumstances where his life or safety is in imminent danger (e.g., where he is being pursued by a mob).

2. Regardless of the location of the unit involved, any action taken upon a request for asylum or refuge must be reported to CNO or CMC, as appropriate, by the fastest available means. Telephone or other voice communication is preferred but, in any case, an immediate precedence message (info: SECSTATE) must be sent confirming the telephone or voice radio report. All requests from foreign governments for release of the applicant will be referred to CNO / CMC and the requesting authorities shall be advised of the referral.

3. In any case, once an applicant has been received aboard an installation, aircraft, or vessel, he will not be turned over to foreign officials without personal permission from the Secretary of the Navy or higher authority, regardless of where the accepting unit is located.

4. Personnel of the Department of the Navy are prohibited from directly or indirectly inviting persons to seek asylum or temporary refuge. No information concerning a request for political asylum or temporary refuge will be released to the public or media without the prior approval of the Assistant Secretary of Defense for Public Affairs.

4004 SERVICE OF PROCESS AND SUBPOENAS

A. ***Service of process***: Chapter 6, Part B of the *JAG Manual* deals with service of process and subpoenas on personnel. Service of process establishes a court's jurisdiction over a person by the delivery of a court order to that person advising him of the subject of the litigation and ordering him to appear or answer the plaintiff's allegations within a specified period of time or else be in default. Properly served, the process makes 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 the Judge Advocate General. JAGMAN, § 0616c). *See* appendix A-5-a.

2. ***Within the United States***

a. ***Within the jurisdiction of the issuing court***. The commanding

officer shall permit the service except in unusual cases where he concludes that compliance with the mandate of the process would seriously prejudice the public interest. Personnel serving on a vessel within the territorial waters of a state are considered within the jurisdiction of that state for the purpose of service of process. Process should not be allowed within the confines of the command until permission of the commanding officer has been obtained. Where practicable, the commanding officer shall require that process be served in his or her presence or in the presence of an officer designated by the commanding officer. Commanding officers are required to ensure that the nature of the process is explained to the member. This can be accomplished by a legal assistance officer. JAGMAN, § 0616a.

b. ***Beyond the jurisdiction of the issuing court.*** Commanding officers will permit the service under the same conditions as within the jurisdiction, but shall ensure that the member is advised that he need not indicate acceptance of service. Furthermore, in most cases, the commanding officer should advise the person concerned to seek legal counsel. When a commanding officer has been forwarded process with the request that it be delivered to a person within the command, it may be delivered if the servicemember voluntarily agrees to accept it. When the servicemember does not voluntarily accept the service, it should be returned with a notation that the named person has refused to accept it. JAGMAN, § 0616a(2).

c. ***Arising from official duties.*** Whenever a servicemember or civilian employee is served with Federal or state court civil or criminal process arising from activities performed in the course of official duties, the commanding officer should be notified and provided copies of the process and pleadings. The command shall ascertain the pertinent facts, coordinate with the local NLSO to notify the General Litigation Division of the Office of the Judge Advocate General (Code 14) immediately by telephone, and forward the pleadings and process to that office. JAGMAN, § 0616b.

(1) A military member or civilian employee will be advised of the right to remove civil or criminal prosecutions from state court to Federal court when the action stems from 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.

(2) If a military member or civilian employee is sued in his or her individual capacity, that person may be represented by Justice Department attorneys in state criminal proceedings and in civil and congressional proceedings.

(3) When an military member or civilian employee believes he or she is entitled to representation, a request— together with pleadings and process— must be submitted to the Judge Advocate General via the individual's commanding officer. The commanding officer shall endorse the request and submit all pertinent data as to whether the

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) 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 member's command will issue orders and the Navy will be reimbursed by the Federal agency concerned. 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. In those cases where fees and mileage are not tendered as required by the Federal Rules of Criminal Procedure, but the person subpoenaed still desires to attend, the commanding officer is authorized to issue permissive orders at no cost to the government. The individual should be advised that an agreement as to reimbursement for any expenses should be effected with the party desiring their attendance and that no reimbursement should be expected from the government. 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. When practicable, arrangements will be made to have all such individuals interviewed at one time by all interested parties. 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. These requests will not be granted where the United States is a party to any related litigation or where its interests are involved, including cases where U.S. interests are represented by private counsel by reason of insurance or subrogation arrangements. Where U.S. interests are involved, records and witnesses shall be made available only to Federal Government agencies. JAGMAN, § 0620.

6. ***Release of official information for litigation purposes and testimony by Department of Navy personnel.*** SECNAVINST 5820.8 prescribes what information—testimonial and documentary— is releasable to courts and other government proceedings and the means of obtaining approval for the release of such information.

C. ***Jury duty.*** Active-duty servicemembers are exempted by 28 U.S.C. § 1863(b)(6) (1982) from service on Federal 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 if mission readiness is affected by the absence or if the absence unreasonably interferes with military job performance. SECNAVINST 5822.2, Subj: SERVICE ON STATE AND LOCAL JURIES BY MEMBERS OF THE NAVAL SERVICE, gives all commanders the authority to invoke the exemption for their personnel. If members do serve on a jury, they shall not be charged leave or lose pay. All fees, with the exception of actual expenses, will be turned over to the U.S. Treasury.

4005 JURISDICTION

A. ***Sovereignty defined.*** Relations between the United and a foreign government are governed by the concept of "sovereignty." Sovereignty is the exercise of governmental power over all persons and things within a defined area. A sovereign nation has the capacity to conduct its relations with other sovereign nations independent of external control (subject to certain rules imposed by international law). In this regard, all sovereign nations are considered to be equals.

B. ***Jurisdiction defined.*** The exercise of this sovereign power is usually expressed in the term "jurisdiction." Jurisdiction may be either territorial or personal. Territorial jurisdiction is that governmental control exercised over all persons and things in a specific geographical area, while personal jurisdiction is that governmental control exercised over certain persons (usually citizens) regardless of their physical location.

C. ***State and Federal Governments.*** Within the United States, there is a system of dual sovereignty where both the state and Federal Governments exercise a certain degree of sovereignty. The Federal Government has the greater authority in most areas in the event of conflict between the two sovereigns. In some areas, the Federal Government is granted exclusive jurisdiction (e.g., matters affecting interstate commerce).

D. ***Federal supremacy.*** As a result of this supremacy of Federal over state law, the armed forces are not subject to many of the restraints imposed by state laws. Likewise, when acting in the performance of official duties, a member of the armed forces may also be free of restraints which would otherwise be imposed by state law. For example, state law has no power to regulate the type of weapons which may be carried by military members while on duty. Military personnel in their private capacity, on the other hand, are generally subject to the laws of the state in which they are located— except for legislatively created exceptions such as the Soldiers' and Sailors' Civil Relief Act.

E. ***International law.*** Since relations with foreign countries is one of the areas reserved for the Federal Government, it follows that relations between U.S. military personnel and foreign governments or authorities are regulated completely between the Federal Government in this country and the authorities in the other countries. These relations are usually in the form of customary relationships or written treaties. Regardless of form, these relations are considered binding on the sovereign states and are known as international law. Since the armed forces are part of the Federal Government, they are subject to this international law as well as Federal and state law.

F. ***Federal jurisdiction over land in the United States***

1. References

a. *U.S. Const.*, Article I, § 8, cl. 17

b. Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, *The Facts and Committee Recommendations*, in Jurisdiction over Federal Areas within the States (Part I 1956)

c. Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, *A Text of the Law of Legislative Jurisdiction*, in Jurisdiction over Federal Areas within the States (Part II 1957)

d. 40 U.S.C. § 255 (1982)

e. Dept. of the Army Pamphlet 27-21, *Military Administrative Law*, ch. 6

2. ***Federal legislative jurisdiction.*** Areas of land originally acquired by the United States or, if subsequently acquired, to which a state has made a complete cession of sovereignty to the Federal Government are known as exclusive Federal reservations. As to this land, the Federal Government possesses the exclusive right to ***legislate*** with respect to the particular land area and may enact general municipal laws applying within that area. This "area" concept of Federal jurisdiction must be distinguished from other legislative authority possessed by Congress which is dependent not upon "area" but upon "subject matter" and "purpose" and is predicated upon a specific grant of power to the Federal Government by the Constitution. Federal jurisdiction should be distinguished from Federal ownership of land. Federal jurisdiction is a sovereign power, whereas the ownership of land is a proprietorial action. Thus, it is possible for the United States to exercise jurisdiction over land it does not own.

3. ***Acquisition of jurisdiction.*** There are three methods whereby the Federal Government may acquire legislative jurisdiction over land areas within a state. The first is by purchase of the land with the consent of the state. This is specifically provided for in the U.S. Constitution, Article I, § 8, cl. 17. Condemnations by the Federal Government are included in the term "purchase," but land leased by the Federal Government is not. The second method is cession by the state. This method, while not specifically provided for by the Constitution, developed by means of case law. The third method of Federal acquisition occurs when the Federal Government reserves to itself certain jurisdiction when the State is admitted to the union. The Federal Government, in effect, maintains the legislative jurisdiction it held when the state was a territory.

– ***Federal policy.*** As a general rule, the Federal Government will not seek Federal jurisdiction over land. Concurrent jurisdiction may only be accepted where it is found necessary that the Federal Government furnish or augment the law enforcement otherwise provided by a state or local government. Exclusive jurisdiction may be accepted

in those few instances where the peculiar nature of the military operation necessitates greater freedom from the state and local law, or where the operation of state or local laws may unduly interfere with the mission of the installation.

G. ***Concurrent, partial, and proprietary jurisdiction.*** There are three forms of jurisdiction, other than exclusive Federal jurisdiction, that the Federal Government may exercise over land area: concurrent legislative jurisdiction, partial legislative jurisdiction, and proprietary interest. The type of jurisdiction the Federal Government maintains determines the legislative authority that is exercised over the land area. Concurrent legislative jurisdiction exists when the state grants to the Federal Government the rights of exclusive jurisdiction over the land area, while reserving to itself the same authority it granted to the Federal Government. Due to the supremacy clause of the Constitution, the Federal Government has the superior right to carry out Federal functions without state interference. Nevertheless, state laws may be applicable within a concurrent jurisdiction area. Partial legislative jurisdiction refers to the situation where the state grants a certain measure of legislative authority over the area to the Federal Government, but reserves to itself the right to exercise—either alone or concurrently with the Federal Government—other authority constituting more than the right to serve civil or criminal process in the area. In this instance, each sovereign maintains partial legislative authority. The Federal Government has proprietary interest only in land when it acquires the degree of ownership similar to that of a landowner, but has not attained any portion of the state legislative authority over the area.

1. ***State criminal laws.*** State criminal law normally extends throughout land areas in which the United States has only a proprietorial interest, throughout areas under concurrent jurisdiction, and in areas under partial jurisdiction to the extent covered by the retention of state authority under its grant of power.

2. ***Federal criminal laws.*** Congress has enacted a comprehensive body of Federal criminal law applicable to lands within the exclusive or concurrent jurisdiction of the United States or the partial jurisdiction of the United States to the extent not precluded by the reservation of state authority. Most major crimes within such areas are covered by individual provisions of title 18, *United States Code*. (Note, however, that many offenses under title 18 are not dependent upon "legislative" jurisdiction.) In addition, the Uniform Code of Military Justice is applicable to military personnel wherever they may be. Many minor Federal offenses are not provided for in specific terms through Federal legislation. Instead, Congress has adopted the provisions of state law as Federal substantive law through the Assimilative Crimes Act, 18 U.S.C. § 13 (1982), *as amended by* 18 U.S.C. 3013 (1987). The overwhelming majority of offenses committed by civilians (employees and dependents) in areas under the exclusive criminal jurisdiction of the United States are misdemeanors (e.g., traffic violations, drunkenness). Since these offenses are not specifically covered by Federal statutory law, the civilian offender can usually be punished by a Federal magistrate or Federal district court under the Assimilative Crimes Act. In the case of civilian employees, applicable civilian personnel regulations should also be consulted. Prosecutions under the Assimilative

Crimes Act do not enforce state law as such, but enforce Federal criminal law, the substance of which has been adopted from state law. With respect to military personnel, the third clause of Article 134, UCMJ, assimilates state criminal law and permits prosecution by court-martial for violations to the extent that state law becomes Federal law of local application to the area under Federal legislative jurisdiction. Inasmuch as it is Federal law which is being enforced within an exclusive Federal reservation, state and municipal police authorities and other local law-enforcement officials generally have no jurisdiction within the particular exclusive Federal reservation. Thus, on such a military base, it is the base police and Federal marshals who have power to arrest offenders. Prosecution of a civilian for any offense is within the cognizance of the United States attorney acting before a United States magistrate or a United States district court. The Assimilative Crimes Act adopts state legislation only where there is no Federal statute defining a certain offense or providing for its punishment. Furthermore, when an offense has been defined and prohibited by Federal law, the Assimilative Crimes Act cannot be applied to redefine and enlarge or narrow the scope of the Federal offense. In general, a state criminal law which is contrary to Federal policy and regulation is not adopted under the Assimilative Crimes Act. Not all Federal regulations, of whatever type, however, will prevent the assimilation of state criminal law. On the other hand, the Assimilative Crimes Act may not necessarily adopt those state administrative or regulatory requirements that are legislative in nature (i.e., a regulatory commission making it a crime to pass a stop sign).

H. ***Federal Magistrates Act.*** Minor offenses committed by individuals within Federal reservations may be tried by Federal magistrates. The Department of Justice is primarily responsible for the prosecution of such offenses. When no representation of that Department is available, qualified Navy and Marine Corps judge advocates—with the approval of the cognizant U.S. Attorney—may serve as Special Assistant U.S. Attorneys and conduct prosecutions of minor offenses committed aboard Navy or Marine Corps installations. SECNAVINST 5822.1(A) addresses the implementation of the Federal Magistrates Act by the Department of the Navy.

4006 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. §§ 371-380 (1982), as amended.

3. DOD Dir. 5525.5 of 15 Jan 1986, DOD Cooperation with Civilian Law Enforcement Officials.

4. SECNAVINST 5820.7(B), Subj: COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS.

B. ***Statutory authority.*** The Posse Comitatus Act, 18 U.S.C. § 1385 (1982), 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 by the Department of the Navy in SECNAVINST 5820.7(B).

D. ***Direct participation.*** Military personnel are prohibited from providing 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 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 performing assigned duties under SECNAVINST 5520.3 (series).

F. ***Exceptions***

1. ***Use of information collected during military operations.*** All information collected during the normal course of military operations which may be relevant to a violation of Federal or state law shall be forwarded to the local Naval Investigative Service field office or other authorized activity for dissemination to appropriate civilian law-enforcement officials pursuant to SECNAVINST 5520.3. The planning and execution of compatible military training and operations may take into account the needs of civilian law-enforcement officials for information when the collection of information is an incidental aspect of training performed for a military purpose. 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(B).

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. Any vehicle or aircraft used for transport of drugs and seized for a legitimate military purpose is subject to forfeiture by the Drug Enforcement Administration under 21 U.S.C. § 881(a)(4) (1982).

b. ***Express statutory authority.*** Laws that permit direct military participation in civilian law enforcement include, inter alia, suppression of insurrection or domestic violence [10 U.S.C. §§ 331-334 (1982)], protection of the President, Vice President, and other designated dignitaries [18 U.S.C. § 1751 (1982)], assistance in the case of crimes against members of Congress [18 U.S.C. § 351 (1982)], and foreign officials and other internationally protected persons [18 U.S.C. §§ 112, 1116 (1982)].

c. ***Operation and maintenance of equipment.*** Where the training of non-DOD personnel is infeasible or impractical, Department of the Navy personnel may operate or maintain, or assist in operating or maintaining, equipment made available to civilian law-enforcement authorities. The request for assistance must come from agencies such as the Drug Enforcement Administration, Customs Service, or Immigration and Naturalization Service. Those agencies, in an emergency situation— determined to exist by

the Secretary of Defense and the Attorney General—may use Department of the Navy vessels and aircraft outside the land area of the United States as a base of operations to facilitate the enforcement of laws administered by those agencies, so long as such equipment is not used to interdict or interrupt the passage of vessels or aircraft.

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.

4007 TERRORISM

A. ***References***

1. Memorandum of Understanding Between Department of Defense, Department of Justice, and the Federal Bureau of Investigation, Subj: USE OF FEDERAL MILITARY FORCE IN DOMESTIC TERRORIST INCIDENTS.

2. DOD Dir. 2000.12 of 13 April 1999, DOD Antiterrorism/Force Protection (AT/FP) Program

B. ***Background.*** History is replete with examples of individuals, groups, and other national leaders who have employed terror tactics for one reason or another. Intimidation is not a new phenomenon. Robespierre used terror tactics to destroy the French aristocracy in the eighteenth century when an estimated 40,000 people were put to death by one means or another. The Russian Socialist Revolutionaries attempted to use terror tactics to overthrow the Tzar at the beginning of this century only to be thwarted by the Bolsheviks who combined the strategy of mass with terror to succeed where pure terrorism had failed. But pure terrorism has been remarkably successful in the twentieth century. The exploits of the Irgun Zvai Leumi and the Stern Gang in Palestine, the Eoka B Group in Cyprus, and the FLM in Algeria are only some examples of that success. In recent years, terrorism has become a worldwide phenomenon. In international terrorist incidents, the principal target has been the United States, with over one-third of all incidents directed at Americans (both

domestically and overseas), including a significant and growing percentage of attacks on American military personnel. Such acts of terrorism directed at naval personnel, activities, or installations have the potential to destroy critical facilities, injure or kill personnel, and impair and delay accomplishment of a command's mission. Significantly, the fact that acts of terrorism may claim innocent bystanders or victims is of little consequence to the pure terrorist who is ideologically or politically motivated and employs violence or force for effect; in essence, for its dramatic impact on the audience. The phenomenon of terrorism today has been influenced to a large degree by a number of factors, such as: (1) Highly efficient newsprint media and prime-time television; (2) modern global transportation; and (3) technological advances in weaponry. Terrorist tactics include, primarily, bombing (67% of all terrorist incidents) and, secondarily, arson, hijacking, ambush, assassination, kidnapping, and hostage-taking. One Rand Corporation survey shows that terrorists, who use kidnapping and hostage-taking for ransom or political bargaining purposes, have:

1. An 87% probability of seizing hostages;

2. a 79% chance that all members of the terrorist team will escape punishment or death, whether successful in their endeavors or not;

3. a 40% chance that all or some of their demands would be met in operations when something more than just safe passage or exit permission was demanded;

4. a 29% chance of compliance with such demands;

5. an 83% chance of success where safe passage or exit for terrorists or others was the sole demand;

6. a 67% probability that, if the principal demand were rejected, all or nearly all of the terrorist team could still escape by going underground, accepting safe passage in place of their original demands, or surrendering to a sympathetic government; and

7. virtually a 100% probability of gaining major publicity.

The terrorist, then, must be considered a formidable adversary.

C. ***"Terrorism" and "terrorists" defined.*** Terrorism is defined in DOD Dir. 2000.12 of 13 Apr 1999 as the "[t]he calculated use of violence or threat of violence to inculcate fear; intended to coerce or intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological." Among these "crusaders," there are today minority nationalist groups, Marxist revolutionary groups, anarchist groups, and neo-Fascist and extreme right-wing groups, many of whose operations transcend national boundaries in the carrying out of their acts, the purposes of their acts, or the nationalities of their victims. Frederick J. Hacker, in his book, *Crusaders, Criminals and Crazies,* has

grouped terrorists into three distinct groups: (1) The politically or ideologically motivated crusader; (2) the criminal who commits terrorist acts for personal, rather than ideological, gain; and (3) crazies or mentally ill people who commit terrorist acts during a period of psychiatric disturbance. Only the first group falls clearly within the DOD definition of terrorism.

D. ***U.S. policy.*** U.S. policy on terrorism is clear: All terrorist acts are criminal. The U.S. Government will make no concessions to terrorists. Ransom will not be paid, and nations fostering terrorism will be identified and isolated. Defensive measures taken to combat terrorism are referred to as antiterrorism and are used by DOD to reduce the vulnerability of DOD personnel, their dependents, facilities, and equipment to terrorist acts. Counterterrorism, meanwhile, refers to offensive measures taken to respond to a terrorist act, including the gathering of information and threat analysis in support of those measures. Since a consistent objective of terrorists is to achieve maximum publicity, a principal objective of the U.S. Government is to thwart the efforts of terrorists to gain favorable public attention and, in doing so, to clearly identify all terrorist acts as criminal and totally without justification for public support. Further, when U.S. military personnel are identified as victims of terrorism, it is DOD policy to limit release of information concerning the victim, his or her biography, photographs, lists of family members or family friends, or anything else which might create a problem for the victim while in captivity. Withholding such information, which will be made public at a later date, may well be the action that saves the victim from additional abuse or even death. It is a case where protection of the potential victims, operational security considerations, and counterterrorism efforts override standard public affairs procedures.

E. ***Agency responsibilities***

1. ***General.*** In responding to terrorist incidents, the lead agency in the Department of Defense is the Department of the Army. Within the United States, the Department of Justice (FBI) is assigned the role of lead agency for the Federal Government—with the exception of acts that threaten the safety of persons aboard aircraft in flight, which are the responsibility of the Federal Aviation Administration.

2. ***Outside military installations in U.S.*** The use of DOD equipment and personnel to respond to terrorist acts outside military installations is governed generally by the legal restrictions of the Posse Comitatus Act, discussed above. The direct involvement of military personnel in support of disaster relief operations or explosive ordnance disposal is permissible. Moreover, the loan of military equipment, including arms and ammunition, to civilian law-enforcement officials responding to terrorist acts viewed as a form of civil disturbance is also considered permissible, subject to the approval of proper military authority. Under the Memorandum of Understanding (MOU) Between Department of Defense, Department of Justice, and the Federal Bureau of Investigation concerning the use of Federal military forces in domestic terrorist incidents, the use of DOD personnel to

respond to terrorist acts outside military installations in the United States is authorized only when directed by the President of the United States. One organization available for such action is the Counter Terrorism Joint Task Force, composed of selected units from all of the armed forces.

3. ***On military installations in U.S.*** When terrorist activities occur on a military installation within the United States, its territories and possessions, the FBI's Senior Agent in Charge (SAC) for the appropriate region must be promptly notified of the incident. The SAC will exercise jurisdiction if the Attorney General or his designee determines that such an incident is a matter of significant Federal interest. Military assistance in such an event may be requested without Presidential approval, but such assistance must be provided in a manner consistent with the provisions of the MOU, including the requirement that military personnel remain under military command. If the FBI declines to exercise its jurisdiction, the military commander must take appropriate action to protect and maintain security of his command as required by Articles 0802, 0809, and 0826 of *U.S. Navy Regulations*, 1990. Regardless of whether or not the FBI assumes jurisdiction, the base commander may take such immediate action in response to a fast-breaking terrorist incident (such as utilizing a Crisis Response Force (OPNAVINST 5530.14)] as may be necessary to protect life or property.

4. ***Outside U.S.*** Outside the United States, its territories and possessions, where U.S. military installations are located, the host country has the overall responsibility for combating and investigating terrorism. Within the U.S. Government, the Department of State has the primary responsibility for dealing with terrorism involving Americans abroad and for handling foreign relations aspects of domestic terrorist incidents. The planning, coordination, and implementation of precautionary measures to protect against, and respond to, terrorist acts on U.S. military installations remains a local command responsibility. Contingency plans will necessarily have to address the use of installation security forces, other military forces, and host nation resources and must be coordinated with both host country and State Department officials. Outside U.S. military installations located in a foreign country, U.S. military assistance, if any, may be rendered only in accordance with the applicable SOFA after coordination with State Department officials. Applicable international law in this area, in addition to the SOFA and other memorandums of understanding or agreement, include the Tokyo, Hague, and Montreal Conventions on aircraft hijacking, the 1977 European Convention on the Suppression of Terrorism, the U.N. Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, the OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That are of International Significance, and customary international-law norms such as self-help.

F. ***Judge advocate's role.*** The judge advocate's role in combating terrorism is severalfold. First, he may get involved in the proactive phase of reviewing contingency plans. For example, each command—under physical security regulations—is required to

publish an instruction dealing with hostage situation procedures. Second, when a potential terrorist incident arises, the judge advocate may become involved in the reactive phase by providing advice on issues (such as when the FBI must be called in) or "negotiating" with the terrorists or civil law-enforcement authorities in the United States, or the State Department and host country representatives abroad.

CHAPTER XLI

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CHAPTER XLI

STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

PART A: INTRODUCTION

4101 STANDARDS OF CONDUCT REFERENCES

A. 18 U.S.C. 201, 203, 205, 208, 209

B. 5 C.F.R. Parts 2634, 2635, 2636, 2639, 2640

C. DoD 5500.7-R; Joint Ethics Regulation (JER)

4102 PURPOSE AND SCOPE

A. ***Why do we need "Standards of Conduct"?***

1. The principle purpose of the Standards of Conduct is to ensure that federal employees serve the public good, rather than private or personal interests. The rules we have imposed upon ourselves result from a recognition that the Department of the Navy must have the full faith and confidence of the American public if we are to best carry out the national defense mission. To maintain public support, the American citizen must believe in our institutional integrity. To maintain the institutional integrity of the Navy and Marine Corps, there must be individual integrity at every level in the chain of command.

2. To deter unethical conduct, our ethical rules bar specific wrongful acts, such as bribery. Such rules also prescribe behavior with regard to a broad range of general situations that pose the potential to develop into, or could lead a reasonable person to perceive, either wrongful acts or an abuse of the public trust. At the same time, the rules seek to balance the idea of conflict-free government with the reality of complex human situations, relationships and interactions. This is why the rules seem so detailed and full of exceptions; we attempt to tailor the rules to permit actions that do not seriously implicate the concerns behind the rules.

B. ***Office of Government Ethics (OGE) Regulations.*** Prior to February 1993, each agency within the Executive Branch had its own separate ethical code. In signing Executive Order 12674 (as amended by Executive Order 12731), President Bush directed that the OGE promulgate a "single, comprehensive, and clear set of executive branch standards of conduct that shall be objective, reasonable and enforceable." These regulations are codified at 5 C.F.R. Part 2635 and went into effect on February 3, 1993.

C. ***DoD's Joint Ethics Regulation (JER).*** DoD 5500.7-R was published on August 30, 1993. It implements, and ***further supplements***, the OGE regulations for the military services. The JER should be the starting point for any question or issue regarding governmental ethics and is a ***must*** reference for every Legal Office in the fleet.

4103 APPLICATION. Although the OGE regulations are generally only applicable to commissioned officers and civilian employees, the JER has made the standards of conduct contained in 5 C.F.R. Part 2635 applicable to enlisted personnel, subject to minor exceptions. See JER 1-300. Reservists performing official duties, including while on inactive duty for training or while engaged in any activity related to the performance of official duties, are also considered "DoD Employees" for purposes of the JER. See JER 1-211. Post-government employment restrictions may apply to former or retired officers.

4104 ENFORCEMENT. Supervisors may sanction violations of the Standards of Conduct in a number of ways.

A. ***Administrative sanctions.*** The most common remedy is some form of administrative action such as letters of reprimand, poor evaluation marks, or removal from positions of trust. Those administrative tools provide an immediate means of correcting developing ethics problems.

B. ***Criminal sanctions.*** Although the OGE regulations themselves do not establish criminal sanctions, the underlying statutes do. For example, a person who accepts outside compensation for performing official duties not only violates the Standards of Conduct, but also violates 18 U.S.C. 209 and may be subject to prosecution in federal court.

C. ***Uniform Code of Military Justice.*** Violations of the Standards of Conduct by military personnel may be punishable under the Uniform Code of Military Justice. The JER is a punitive general regulation and applies to all military members without further implementation. DOD Directive 5500.7 § B.2.a. Potential UCMJ violations include:

1. Failure to obey order or regulation (Art. 92)

2. Bribery and graft (Art. 134)

3. Wrongful disposition of government property (Art. 108, 109)

4. Conduct unbecoming an officer (Art. 133)

4105 GENERAL PRINCIPLES

A. The General Principles of the Standards of Conduct, originally declared in Executive Order 12674, 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. Specific ethical rules may be interpreted and applied to permit a wide range of conduct, provided that the activity 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:

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 personal interests in conflict with their official duties.

4. Employees must act impartially in the performance of official duties.

5. Employees must protect and conserve the property and resources entrusted to the federal government by the taxpayers.

6. Employees must disclose fraud, waste, abuse, and corruption to appropriate authorities.

C. ***Catch-All.*** Employees are also required to "avoid any actions creating the appearance that they are violating the law or the ethical standards." This is a test that says "if it looks bad, it is bad." Such a subjective standard may be extremely difficult to apply; the OGE regulations state that in judging an appearance problem, one must use "the perspective of a reasonable person with knowledge of the relevant facts." The rules require an employee, when faced with an ethical conflict, even if only one of appearance, to always err on the side of the public interest.

4106 ETHICS COUNSELORS

A. Because of the complexity of the rules regarding the Standards of Conduct, the regulations establish Ethics Officials in each agency. These Designated Agency Ethics Officials (DAEO's) have established a number of "Ethics Counselors" throughout each agency to provide advice and assistance to employees regarding Standards of Conduct issues.

B. Ethics Counselors for the Department of the Navy include: General Counsel for major Navy activities; Commanding Officers of Navy Legal Service Offices (NLSO's); OIC's of NLSO Detachments, if serving in grade O-4 and above, and; Staff Judge Advocates for officers exercising general court-martial authority. See, DoN General Counsel memorandum, "Designation of Deputy Designated Agency Ethics officials (DAEO's) and Ethics Counselors," dated 25 Jan 96, for a complete listing.

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 counselor, provided the employee made full disclosure of all relevant facts to the counselor. 5 C.F.R. 2635.107(b). This provision does not insulate a person from liability for violations of Title 18, United States Code, but reliance upon the advice of an ethics official is a factor considered by the Department of Justice in deciding whether to prosecute.

D. Disclosures made to an ethics official are **not** protected by the attorney-client privilege. 5 C.F.R. 2635.107; 28 U.S.C. 535. Persons acting as an ethics counselor 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.

4107 TRAINING REQUIREMENTS.

A. **Initial Ethics Orientation (IEO).** Within 90 days of entering on duty (180 for enlisted), all DoD employees shall receive an IEO. JER 11-300. Members are to be provided with a copy of the JER, the names, titles, addresses and phone numbers of the DEAO and other agency ethics officials available to answer questions, and a minimum of one (1) hour of official duty time to review the materials. Any verbal training provided (optional) may reduce the time made available for review. If a JER is readily available in the employee's workspaces, she does not have to be provided with one to keep. In the alternative, an employee may be provided (for keeping) with materials that adequately summarize the JER. Official review time is still required and a copy of the JER must be readily available. 5 CFR 2638.703.

B. **Annual Ethics Briefings (AEB).** Some employees are required to receive an AEB every calendar year. Generally, they are those who must file public or confidential

financial disclosure reports, contracting officers, and others so designated because of the nature of their official duties. 5 CFR 2638.704. While we are encouraged to vary the emphasis and content based on particular needs, such briefing must contain, at a minimum, a reminder of the employee's duties and responsibilities under the JER and the conflicts of interest statutes (18 U.S.C., Ch. 11), and must include the names, titles, addresses and phone numbers of the DAEO and other available ethics officials. A "qualified individual" (5 CFR 2638.702b) shall present the briefing (if presented in-person), prepare the recorded materials or presentation (if telecommunications, computer based means or recorded means are used), or prepare the written ethics briefing (if written materials will be utilized). Excepting SF-278 filers, for all who require an AEB, in-person briefings are only required every three years (vice every year under old rule). On the off years, written materials may suffice. SF-278 filers must receive verbal training every year from a "qualified individual." While that instructor need not be physically present at the training session, the instructor must be available during and after the verbal training.

PART B: GIFTS

4108 GIFTS FROM OUTSIDE SOURCES (5 C.F.R. 2635, Part B)

A. ***General rule***. Federal employees are forbidden from soliciting or coercing gifts, or accepting gifts given because of the employee's official position. This would be using public office for private gain. Further, employees may not accept gifts given by a "**prohibited source**," is defined as a person or entity that seeks action or does business with the agency, or is affected by the performance of official duties (5 C.F.R. § 2635.20(d)). This limitation as to "prohibited sources," most likely to be defense contractors or those who wish to become defense contractors, is based on concerns over "quid pro quo" – that gifts will be given with the expectation that the employee will remember such kindness at a later time. Even if such conduct does not actually occur, there is a significant appearance problem when federal officials take gifts from those doing business with the government.

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 are specifically excluded from the definition of "gift":

1. *Snacks*: modest items of food (coffee, donuts, etc.), offered other than as part of a meal.

2. *Trinkets*: items with little intrinsic value such as cards, trophies, or plaques.

3. *Widely available benefits*: loans, benefits or discounts generally available to public or all military personnel (e.g., military discounts at local stores,

restaurants, apartment complexes).

4. *Prizes*: awards from contests open to the public, unless entry was part of one's official duty.

5. *Government-provided*: items paid for by the government or accepted by the government; see also 41 C.F.R. Part 304-1.

6. *Market value*: anything for which the employee paid market value.

See, 5 C.F.R. 2635.203(b).

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. See, 5 C.F.R. 2635.204. Some of the exceptions include:

1. *De Minimis Exception*: Most employees may accept unsolicited gifts worth $20 or less; procurement officials may accept gifts worth $10.00 or less (FAR 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 a calendar year.

2. *Personal Relationship Exception*: Employees may accept gifts that are in fact based on a personal, unofficial relationship rather than the official position of employee. The exception is very fact-specific; factors such as who paid for the gift and the nature and history of the personal relationship are of particular relevance.

3. *Group Benefits and Discounts*: Non-discriminatory benefits that are available to all employees may be accepted if they are: reduced fees for joining a professional organization; offered to broad segment of population in addition to the government employees, or; offered by a non-prohibited source.

4. *Awards*: Awards of $200 or less may be accepted if they are received subject to an established recognition program for meritorious service, and given by a person or entity other than a prohibited source. An agency ethics official may approve a greater award under certain circumstances.

5. *Employee Moonlighting or Working Spouse Exception*: Federal employees may accept gifts arising from their outside employment activities, or the business activities of their spouses. The gifts must not be related to the Federal employee's official duties, or offered because of one's government status. Any gift must also be of a type customarily provided by employers or prospective employers. With respect to

prospective employer gifts, the employee must be disqualified from any future actions involving the outside employer before accepting any gift.

6. *Widely Attended Gathering Exception*: Employees may accept an offer of "free attendance" at a gathering or event from the sponsor of the event, under two circumstances.

a. Speaking. If the employee is assigned to participate or speak at the event as an agency representative; or

b. Agency Interest. If the event will be widely attended by persons throughout an industry, or representing a range of interests, the employee's supervisor may permit attendance based on a determination that the attendance will further agency programs or operations.

c. Non-sponsor. Employees may also accept such offers from persons other than the event sponsor if (1) more than 100 persons are expected to attend, and (2) the gift of free attendance has market value of $250.00 or less.

"Free attendance" includes items such as food, entertainment and instruction, or materials furnished to all attendees as an integral part of the event, but does not include transportation, lodging or collateral entertainment.

7. *Social Exception*: Employees may freely attend parties and enjoy food and entertainment provided, so 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 a 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. *Foreign Gifts Exception*: Employees may accept and keep (but never solicit) 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 (currently $245). Even if greater than $245, gifts may be accepted on behalf of the Department of the Navy, if done in compliance with SECNAVINST 4001.2F. All decorations, awards, and gifts from foreign governments to U.S. naval military and civilian personnel, and their spouses and dependents, must be processed under the procedures outlined in chapter 7 of SECNAVINST 1650.1E, Navy and Marine Corps Awards Manual.

10. *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 justified by community relations and approved by one's supervisor.

D. Notwithstanding the foregoing exceptions, federal employees may not accept any gifts in the following specific circumstances (5 C.F.R. 2635.202(c)):

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 Department of the Navy.*** The Department of the Navy may accept gifts given to the Department or to certain commands under specific circumstances outlined in the SECNAVINST 4001.2 series. 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, and will likely decline a gift offered by a prohibited source involved in claims, procurement actions, litigation, or other matters involving the Department. In any event, employees may not solicit gifts, even if for the Navy.

F. ***Disposition of gifts received.*** 5 C.F.R. 2635.205.

1. In some instances, an employee may receive a gift that can't be accepted. In those cases, the employee must either return it, pay for it, or accept it on behalf of the agency (where authorized). If the gift is perishable, 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 can't 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.

4109 GIFTS BETWEEN EMPLOYEES (5 C.F.R. 2635, Part C)

A. ***General.*** The Standards of Conduct generally prohibit employees from giving gifts to superiors or their families, and bar superiors from accepting gifts from subordinates, unless specifically permitted under narrowly defined exceptions.

B. ***Exceptions.*** The exceptions to the general prohibition on gifts between

employees of different grades 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. The analysis of whether the exception applies is necessarily fact-specific and may pose additional concerns (i.e., fraternization).

2. *Tokens.* On an occasional basis, employees may give token gifts (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. The exception would not permit such gifts to become routine. Even the giving of token gifts, if made on a frequent, non-occasional basis, would violate the regulations.

3. *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. This exception permits employees to invite the Boss to dinner without forcing service of low-cost fare. It also permits employees to bring traditional gifts, such as a bottle of wine, if invited to their supervisor's residence. The meals and guest gift, however, must be reasonable and commensurate to the occasion. Extravagant gifts or meals would be viewed as an attempt to give an illegal gift.

4. *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). It is common practice in the Department of the Navy to present departing superiors with a gift given from a collective group (e.g., the wardroom, the chief's mess). Employees are permitted to solicit other employees for **voluntary** contributions of **nominal** amounts) for an appropriate gift to be presented to an official superior. Solicitations may not exceed $10, although employees may give voluntary contributions greater than $10. However, the senior generally may not accept any gift from a "donating unit" where the market value of the gift exceeds $300 unless the gift meets the limited circumstances of JER 2-203 (a) (3) for appropriate gifts commemorating infrequent occasions that terminate the superior-subordinate relationship and that are uniquely linked to the superior's position or tour of duty. JER 2-203. This dollar limitation applies regardless of the size of the group. Attempts to circumvent the $300 limit by subdividing the command into separate donating groups (i.e., offices, departments, division, etc.) will in all likelihood fail the reasonableness test. While the intention may be to show a departing senior how much he or she is respected, to interpret these rules "loosely" places the senior in a very awkward and potentially career-degrading position.

PART C: CONFLICTS OF INTEREST

4110 CONFLICTING FINANCIAL INTERESTS (5 C.F.R. 2635, Part D)

A. ***Disqualifying financial matters.*** Employees are prohibited by criminal law from personally and substantially participating in official matters in which they have a private financial interest, actual or imputed, if the official action will have a direct and predictable effect on the private interest. 18 U.S.C. 208(a); 5 C.F.R. 2635.402. Conflicting financial interests are of particular concern to those employees in procurement and contracting functions.

B. ***Definitions.*** Actual definitions, always important in regulations, are particularly important in the ethics area. 5 C.F.R. 2635.402(b).

1. *Personal and substantial.* Direct and significant involvement is required. It includes active supervision of the participation of a subordinate in the particular matter.

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 prospective employment.

3. *Direct and predictable.* Actions have a "direct and predictable effect," for purposes of the regulation, when the effect is closely linked, not based on unrelated matters and not speculative. The actual amount of the direct effect is irrelevant.

C. ***Disqualification.*** Employees faced with a conflict of interest must disqualify themselves from further participation in the matter and provide **written notice of their disqualification** to the appropriate supervisor. JER 2-204. Superiors may remediate conflicts of interest by issuing waivers, reassigning tasks or placing limitations on duties, or by ordering divestiture of the conflicting private interest. 5 C.F.R. 2635.402(d) and (e).

D. ***Financial Disclosure Reports (5 C.F.R. 2634)***

1. *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.

a. Only senior personnel are required to file the public financial disclosure report. Specifically, officers in paygrade O-7 or above, (>60 days of AD for Reserves), civilian presidential appointees, members of the Senior Executive Service, and persons who are GS-15 or above need file a public disclosure report. JER 7-200.a.; 5 C.F.R. 2634.202.

b. Filing deadline. The report must be filed within thirty days of assuming the covered position. If the report is late, the employee may be required to pay a late filing fee of $200. JER 7-203; 5 C.F.R. 2634.201.

c. Contents. In the report, the employees must generally list their financial interests and holdings over $1000. 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.

d. 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 Ethics Counselor detects conflicts, the employee is notified. The employee may respond by challenging the determination of conflict, or may apply the Ethics Counselor's advice to resolve the conflict of interest. The report is then forwarded to the Agency Ethics Official for review. The report remains 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 - 2634.605.

2. *Confidential Financial Disclosure Reports (SF-450).* The purpose of the confidential financial disclosure report is to uncover actual or potential conflicts of interest involving 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.

a. Those who must file the confidential report include commanding officers/executive officers of Navy shore installations with 500 or more military or DoD civilian personnel, and commanding officers/executive officers of all Marine Corps installations, bases, air stations, or activities. In addition, the report must be filed by other employees who participate personally and substantially in contracting or procurement, auditing 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.

b. Exclusions. Any DoD employee may be excluded from all or a portion of the reporting requirements when the Component Head or designee determines that the report is unnecessary because of the remoteness of any impairment to the integrity of the Federal Government, because of the degree of supervision and review of the employee's work, or because the use of an alternative procedure is adequate to prevent possible conflicts of interest. Additionally, DoD employees who are not employed

in contracting or procurement and who have decision making responsibilities regarding expenditures of less than $2,500 per purchase and less than $25,000 cumulatively may be excluded. Finally, OGE has determined that the use of the new OGE Optional Form 450-A (Confidential Certificate of No New Interests) is adequate to prevent possible conflicts of interest. 5 CFR 2634.905 (d). Generally, the optional form may be used by those who can certify that they (and those imputed to them) have acquired no new financial interests required to be reported, and that they have not changed jobs since filing the last report. In each year divisible by four, beginning in the year 2000, all incumbent filers must file an OGE Form 450.

c. *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.

d. *Contents*. In the report, the employees must list their financial interests and holdings over $1000. JER 7-304; 5 C.F.R. 2634.907.

e. *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.

f. *Status reports*. Ethics Counselors are required to file a status report with the Agency Ethics Official not later than 15 December 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. JER 7-309.

4111 IMPARTIALITY IN OFFICIAL DUTIES (5 C.F.R. 2635.502). In order to foster public confidence in the government, the Standards of Conduct prohibit employees from acting in matters where a reasonable person would question the employee's impartiality. Where an employee believes there may be impartiality concerns raised, she must so inform her supervisor and wait until the supervisor has authorized further participation in the matter. Note that this section might prohibit some actions that would not otherwise constitute a "conflict of interest" under 18 U.S.C. 208 for lack of either financial motive or imputed interest.

4112 SEEKING OTHER EMPLOYMENT (5 C.F.R. 2635, Part F)

A. ***General***. A federal official is not permitted to take any official action with regard to a prospective employer with whom the federal employee is seeking employment. 5 C.F.R. 2635.604. It is assumed that there will be at the very least an appearance problem over whether a federal employee may maintain impartiality with regard to a prospective civilian employer.

B. ***Definitions.***

1. "*Seeking Employment.*" An employee becomes subject to this rule where he/she has: directly or indirectly engaged in employment negotiations; made an unsolicited communication to any person regarding possible employment, such as sending a resume to a particular employer (as opposed to a mass resume mailing); or, made a response, other than an outright rejection, to an unsolicited communication from any person regarding employment.

2. An employee is no longer "seeking employment" when either party to the negotiations makes a rejection and discussions have terminated, or when two months after dispatch of a resume there is no sign of interest on the employer's part.

C. ***Disqualification.*** When faced with this potential conflict, the member must give the supervisor a **written notice of disqualification.** JER 2-204. As long as the employee provides timely notice and recusal, the employee may accept the interviews, including associated travel, lodging and meals, even if given from a prohibited source. 5 C.F.R. 2635.204(e)(3).

D. ***Additional reporting requirements.*** With the National Defense Authorization Act for FY-96, Congress repealed 10 U.S.C. Sec 2397a (which required certain procurement officials to report employment contacts) and amended the Procurement Integrity Act. 41 U.S.C. 423(c) now requires employees involved in procurement actions to report employment contacts with any bidder/offeror in that procurement action. This report must be made in writing to the employee's supervisor, along with disqualification from further personal or substantial participation (unless employment is rejected). Civil penalties for failure to report are expressly provided for.

4113 ASSIGNMENT OF RESERVISTS (JER 5-408). Commanding officers must ensure that reservists performing training are not assigned duties which may give rise to actual or apparent conflicts of interest. Reservists have affirmative obligations to disclose any potential conflicts to superiors and assignment personnel.

PART D: MISUSE OF POSITION

4114 USE OF OFFICIAL POSITION (5 C.F.R. 2635.702. Federal employees may not use public office for private gain. Therefore, employees may not use their official positions to endorse products or services, coerce benefits, help friends, or give any appearance of official "approval" of activities.

4115 MISUSE OF NON-PUBLIC INFORMATION (5 C.F.R. 2635.703. Employees may not use "non-public information" for personal benefit, or allow its improper use by others. "Non-public information" includes: information exempt from release under 5

U.S.C. 552 (FOIA), or otherwise protected by statute, Executive Order or regulation; information designated as confidential; and, information not released to the general public nor authorized for release.

4116 MISUSE OF GOVERNMENT RESOURCES (5 C.F.R. 2635.704, 705)

A. ***General.*** Federal employees shall not misuse government property. Nothing will outrage the taxpayers more than seeing employees utilizing public property for private purposes. 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 or aircraft are clearly improper.

1. One of the most recent cases of the American people perceiving an abuse of government resources involves DoD's use of military aircraft (MILAIR) in support of official travel. After several highly critical media reports intimated that senior military personnel used MILAIR as a means of personal convenience in their official travels, at great expense to the taxpayer, Congressional interest was piqued. After numerous investigations, the end result was a Deputy SECDEF memo, "DoD Policy on the Use of Government Aircraft and Air Travel," dated 01 Oct 95, that specifically addressed the need to "prevent misuse of transportation resources ***as well as the perception*** of their misuse" (emphasis added). In general, MILAIR may not be used if commercial airline or aircraft service is reasonably available, absent highly unusual circumstances.

2. The controversy involving MILAIR is not unique -- similar concerns are periodically raised regarding use of government vehicles and gigs/barges. Anything that can be viewed as a "perk" of federal employment is fair game.

3. Government communication systems (telephones, FAX's, e-mail, etc.) are for official use and authorized purposes only, although no-cost, no-interference-with-duty use for minor, necessary personal business is authorized. JER 2-301 (Note: this section was significantly expanded in Change 2 to the JER).

4. The OGE regulations provides little concrete guidance in what is and what is not misuse of government resources. Much is left to the discretion of command authorities in defining what are appropriate uses for the resource involved. For example, commanding officers can allow certain property to be used in support of non-Federal entities and in support of employee professional development (see, JER 3-211 and 2-301). Care and sound judgment must be exercised to ensure that public confidence is maintained.

B. ***Use of official time.*** Federal officials must 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. This rule bars such misuse as ordering junior personnel to trim the lawn of a superior or to

provide off-duty taxi service.

PART E: OUTSIDE ACTIVITIES

4117 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 does not conflict with the General Principles (*See 0605*). Specifically, personnel may not engage in outside employment that interferes with official time or duties, involves conflicts of interest, violates regulations, or creates an appearance of impropriety. In addition, military members may be required to obtain 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. 18 U.S.C. 209, JER 5-404 & 405. Second, employees may not act as agents for anyone other than family members, in any matter in which the U.S. government has an substantial interest or is a party. 18 U.S.C. 205, JER 5-403. Certain employees, such as attorneys and physicians, have additional professional restrictions on moonlighting activities.

4118 COMMERCIAL DEALINGS BETWEEN DOD PERSONNEL (JER 5-409). Because of the potential for coercion inherent in the military rank system, seniors shall not solicit or make any sales, either on-duty or off-duty, to personnel who are junior to them. This prohibition includes the solicited selling of insurance, stocks, mutual funds, real estate, cosmetics, household supplies, vitamins or other goods or services. The effect of this rule is that officers and senior enlisted involved in selling networks (e.g., AMWAY distributors) have a very limited audience which they can legally solicit or sell to. There are two narrow exceptions to this rule. First, where absent of coercion or intimidation, seniors may sell or lease non-commercial personal or real property to junior personnel. Second, they may make sales in a retail store during off-duty employment. Where the spouse or other household member of a DoD employee engages in commercial solicitation of junior personnel or their families, the employee's supervisor **must** consult an Ethics Counselor and advise the employee to avoid such activity where prejudicial to good order, discipline, or morale. Recently, a very ugly issue involving such commercial dealings resulted in great embarrassment and significant restrictions on some of the operations of a very well respected (and Federally chartered) organization made up of senior non-commissioned officers (the "NCOA"). In short, some members of this organization (primarily retired senior enlisted) were networking with / through senior enlisted (active duty) personnel in an effort to solicit life insurance products (of an affiliated company) to junior enlisted personnel. The marketing tactics were so inappropriate and deceptive, the bargaining positions so unfair, and the potential conflicts of interest so great that the SECDEF recently banned members of this organization from soliciting such products on federal installations for a period of three years. See, Acting Secretary of Defense (Force Management Policy) Memorandum, dtd September 14, 1998.

4119 TEACHING, SPEAKING, AND WRITING (5 C.F.R. 2635.807)

A. ***Related to official duties.*** 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 non-public information, the subject deals with the employee's official ongoing duties or those within past year, or the subject relates to any ongoing or announced policy, program, or operation of the agency.[+] A narrow exception has recently been carved out of this general rule by a federal court when the court sustained a Federal employee's First Amendment challenge to the prohibition against accepting compensation (in this case travel benefits) for teaching, speaking, or writing that falls within the scope of section C.F.R. 2635.807 (a) (2) (i) (E) (2). As such, an employee may now accept travel benefits for unofficial teaching, speaking, or writing on a matter covered under the circumstances of the above-indicated subsection. All other applications of the section remain enforceable as written. Separate and apart from compensation is the issue of whether policy and security reviews may be required before dissemination is made. See SECNAVINST 5720.44 series (Public Affairs Manual).

B. ***Exception for certain courses.*** The rules provide an exception to the foregoing compensation prohibition for persons who engage in teaching at an approved school. Employees may be paid for teaching, even if it relates to official duties, if the course is part of 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 local, state, or Federal government.

C. ***Use of official title.*** 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. ***Honoraria.*** The JER still contains a section regarding the so called "Honoraria Ban" (5 C.F.R. Part 2636). This regulation was initiated in 1989 as a reaction to excessive speaking and writing fees received by some highly placed government officials. The rule sought to prohibit the collection of **any** fee for speaking, appearing, or writing articles **regardless** of the topic.

duties) on a matter covered under the above-indicated subsection. All other applications of the section remain

[+] [1] But see, Sanjour v. United States, 56 F.3rd 85 (D.C. Cir. 1995) (en banc), where the court sustained a Federal employee's First Amendment challenge to the prohibition against accepting compensation (in this case travel benefits) for teaching, speaking, or writing that falls within the scope of section 2635.807 (a) (2) (i) (E) (2). As such, an employee may now accept travel benefits for teaching, speaking, or writing (related to official

enforceable as written.

An example of the rule's effect was that it denied the right of a low-level postal worker to collect a fee for a speech or article totally unrelated to his official position (i.e., the Quaker religion). The Honoraria Ban was challenged on First Amendment grounds in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995). The Supreme Court struck down the ban as it applied to Executive Branch employees in paygrades GS-15 and below (military personnel below flag/general rank), but invited Congress to revisit the issue and set a Constitutionally supportable nexus requirement, if so inclined. Since the ban still applies to high-level employees, this is an area that should be specifically noted and monitored. Note: restrictions on receiving compensation for teaching, speaking, or writing related to one's official duties remain in effect (see paragraph A of this section).

4120 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 Department of Justice and the agency most closely involved in the litigation. If subpoenaed, though, employees are permitted to testify as fact witnesses. *See,* SECNAVINST 5820.8A, concerning the release of information for litigation purposes and testimony by government personnel.

PART F: FUNDRAISING (5 C.F.R. 2635.808)

4121 OFFICIAL SUPPORT. There are so many worthy charitable organizations that it would be impossible for the Department of the Navy to support each one equally. Therefore, the Navy will only officially support those funding drives which are specifically authorized. These typically include the Combined Federal Campaign, Navy-Marine Corps Relief Society, and emergency and disaster appeals approved by the Office of Personnel Management. JER 3-210.

A. Where support for such charities is authorized, on-the-job solicitations of employees may be made. Such solicitation **must** be conducted in such a way that contributions are made **voluntarily**. 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. Coercive practices specifically prohibited include:

1. Solicitation by supervisors;

2. Setting 100 percent participation goals, mandatory personal dollar goals, or quotas;

3. 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

4. Counseling or grading individual service personnel or civilian employees about their failure to contribute or about the size of their donation.

See 5 C.F.R. 950.108.

B. Unless authorized by the Secretary of the Navy, employees may not solicit contributions for Department of the Navy organizations or augment appropriated funds through outside resources. SECNAVINST 4001.2 series. For example, commands are not permitted to seek donations from local merchants for a command holiday party.

4122 PERSONAL SUPPORT. Employees may engage in fundraising in their private, personal capacity provided that there is no solicitation of subordinates or prohibited sources, and no use of official title, position, or authority is made.

4123 MWR FUNDRAISERS. Fundraising events for specific recreational programs may be supported provided that solicitations: do not conflict with the Combined Federal Campaign or Navy Relief; are not conducted on the job, and; are not performed as an official duty. BUPERSINST 1710.11 series.

PART G: SUPPORT FOR NON-FEDERAL ENTITIES (JER Chapter 3)

4124 NON-FEDERAL ENTITIES. Non-Federal entities include a wide range of organizations that provide charitable, morale, civic, entertainment, and recreation support to servicemembers or the public. Examples include military spouse clubs, the Red Cross, the American Bar Association, Scouting organizations, the Reserve Officer's Association.

4125 OFFICIAL PARTICIPATION. A. DoD employees may be permitted to attend meetings or other functions of non-Federal entities 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, however, no remuneration is allowed for performance of official duties. In addition, DoD members may be detailed to serve as official liaisons where DoD has a significant and continuing interest that may be served. Liaisons may not serve in a management position with the non-Federal entity and must make clear that any opinions expressed do not bind DoD or DON to any course of action. JER 3-201 and 202. Finally, when the non-Federal entity is also a defense contractor, the DoD General Counsel has opined that the regulations do not permit such liaison positions, and as a result, has cautioned against it.

B. In 1996, the DoD General Counsel opined that service by Government employees in an official capacity on the boards of non-Federal entities (NFE) is not consistent with the obligations imposed by 18 U.S.C. 208 unless such service is expressly authorized by law, or the NFE has made an unambiguous, statutorily permissible repudiation of all claims of a fiduciary duty owed by the official to the NFE. Thus, we have

the basic rule of JER 3-202: "DoD employees may not participate in their official DoD capacities in the management or control of NFEs without authorization from the DoD DAEO."

1. The effect of this ruling was that Navy and Marine Corps officials (including the CNO and CMC) could no longer serve as ex officio members on the Board of the Navy-Marine Corps Relief Society or other organizations linked to official Navy programs (e.g., the boards of athletic conferences regulating and supporting athletic programs of the service academies).

2. Contained in the National Defense Authorization Act for FY-98 was a statutory "fix' for this issue. New 10 U.S.C. 1033 provides that the Secretary concerned may authorize a member of the armed forces to serve without compensation as a director, officer, trustee, or otherwise participate in the limited management of certain, very limited NFEs. Such authorization may be made "only for the purpose of providing oversight and advice to, and coordination with, the designated entity, and participation may not extend to participation in the day-today operation of the entity." The legislation required SECDEF to prescribe regulations to implement this section. Change 4 to the JER (August 1998) was such implementation. Bottom line - this change will have little effect on local Ethics Counselors field judge advocates. Read this new statutory authority as intended, that is, very narrowly. Anyone interested in serving, in his/her official capacity, in a management position of a NFE requires SECNAV and DOD General Counsel blessing.

4126 PRIVATE 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 which may effect the non-Federal entity (no conflicts of interest or impartiality problems are permitted).

4127 OFFICIAL SUPPORT OF NON-FEDERAL ENTITIES

A. Commands may support non-Federal organizations for a number of proper and ethical reasons, such as supporting the local community, maintaining good public relations, enhancing morale, or assisting worthy charities. There are restrictions imposed on providing support to outside organizations, which are intended to ensure that support is provided in an impartial, equitable and non-discriminatory manner. While the JER contains various rules, those researching issues in this area would be wise to consult public affairs manuals and any specific instructions which may pertain to individual non-federal entities (e.g., BUPERSINST 5760.1, "Navy Wives Club of America"; OPNAVINST 5760.5B, "Navy Support and Assistance to Nationally Organized Youth Groups" - NAVCOMPTMAN 5261, and DoD Inst 1000.15).

1. Actual or implied endorsements of non-Federal entities are prohibited. JER 3-209.

2. A command may co-sponsor a civic or community event only when the activity is not related to a business function of the co-sponsoring non-Federal entity. JER 3-206. Under certain conditions, co-sponsorship of conferences or seminars relevant to the DoN is authorized.

3. The JER authorizes commanding officers to permit use of some Federal resources in support of non-Federal entities. Commands may support, through assignment of speakers, panel participants or, on a limited basis, through use of government facilities or equipment, the events of a non-Federal entity 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. JER 3-211. In no event, however, may Federal employees use clerical or staff personnel to support a non-Federal entity, nor may they allow use of copiers. JER 3-305.

4. Preferential Treatment. Command support must not involve, or create an appearance of, preferential treatment for any non-Federal entity. If one organization is afforded support, the command must be prepared to give similar support to similarly situated organizations.

B. Requests to support fund-raising and membership drives for non-Federal entities must be carefully researched and considered. JER 3-210.

1. Generally, DON cannot officially endorse or appear to endorse membership or fundraising drives for any non-Federal entity.

2. Special exceptions to the above general rule are recognized for the Combined Federal Campaign and Navy-Marine Corps Relief.

3. A further exception provided for in the JER involves supporting fund-raising drives for organizations composed primarily of employees or their dependents, when such fundraising is conducted among their own members for the benefit of welfare funds (i.e., spouse clubs, MWR programs, etc.). Such fundraising activity must be approved by the commanding officer, after consultation with the Ethics Counselor. JER 3-210..

4. Public affairs manuals also authorize official support for limited fundraising events by local, community-wide programs (e.g., volunteer fire departments, rescue units or youth activity funds). See SECNAVINST 5720.44 series.

5. There was one additional change regarding support to NFEs found in Change 4. OPM regulations prohibit solicitation on behalf of charitable organizations (fundraising) in the "federal workplace," unless done in conjunction with the CFC. 5 C.F.R. 950. The JER, section 3-211b, had defined the "federal workplace" as including the entire DoD installation. The recent Change 4 eliminated this expansive definition and now allows the Installation Commander to determine what the "federal workplace" on his/her installation constitutes. Bottom line – this provision will have great effect on local Ethics Counselor and field judge advocates. The change clarifies policy and specifically allows a Commander to provide logistical support for a charitable fundraising event onboard the installation. Note, however, that the basic precepts of 3-211 (a)(1) – (6) still apply.

PART H: MISCELLANEOUS RULES

4128 TRAVEL BENEFITS (JER, Chapter 4)

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 and the Joint Federal Travel Regulations (JFTR's) U7900. Before accepting, an employee is required to receive authorization from the travel approving authority and an Ethics Counselor. Under no circumstances may the employee accept cash payments. JER 4-100.

B. ***Acceptance of incidental benefits***

1. Any benefit, such as frequent flyer miles, that a federal employee receives as a result of official travel becomes government property and may not be used for personal purposes. 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 first class (presumably because of the appearance of impropriety). JFTR U2010.

2. If travel benefits received 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 departed member without violating the regulations. Therefore, the mileage must be declined.

3. Many airlines provide free tickets to persons "bumped" from overbooked flights or who voluntarily surrender their tickets for later, less crowded flights. When a member on official travel receives free tickets for voluntarily 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 any delay is paid for by the member (i.e., the time may **not** be added to the travel claim). If involuntarily delayed, then the

tickets become the property of the U.S. government, but the additional time may be added to the employee's final travel claim. JER 4-202, JFTR U2010.

4129 GAMBLING (JER 2-302). Gambling is prohibited for DoD employees on duty or while on federal property. The rule makes an exception for private wagers made in living quarters, based on personal relationships, provided that the wagers don't violate local law. Remember, gambling with subordinates may violate Articles 133 or 134 of the UCMJ (fraternization). In the Navy, the playing of Bingo is specifically authorized where operated by and for a Navy club or recreation program. See, BUPERINST 1710.11 series.

4130 POST-GOVERNMENT EMPLOYMENT RESTRICTIONS (JER, Chapter 9)

A. ***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.

B. ***Restrictions on post-government employment***

1. No former employee may act as an agent for another person or entity and attempt to influence the government with regard to any matter in which the employee participated ***personally*** and ***substantially*** as a government employee. This is a lifetime restriction. 18 U.S.C. 207(a)(1).

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. 18 U.S.C. 207(a)(2).

3. 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. 18 U.S.C. 207(c).

4. For certain former personnel previously engaged in procurement functions, 41 U.S.C. 423 contains restrictions on accepting compensation from certain defense contractors.

5. With the National Defense Authorization Act for FY-96, Congress repealed 10 U.S.C. Sections 2397, 2397a, 2397b, 2397c, and 18 U.S.C. 281. See Public Law 104-106, Section 4304. Additional regulations and restrictions applicable to certain personnel previously engaged in procurement functions are anticipated.

C. This is an area fraught with statutory "traps," particularly for high-ranking officers who have participated in procurement and contracting activities. Many of the restrictions are summarized in Chapter 9 of the JER but, as noted above, there have been significant changes in this area. It is advisable that any DoD employee with questions be referred to the appropriate Ethics Counselor for a formal opinion.

PART I: POLITICAL ACTIVITIES (JER, Chapter 6)

4131 GENERAL RESTRICTIONS. Limitations on the political activities of Executive Branch employees have been in existence since the time of Jefferson. It is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service. It has long been deemed improper for federal employees to try and influence the votes of others or to take part in the business of electioneering.

4132 ACTIVITIES BY CIVIL SERVANTS (5 C.F.R. 734). The Hatch Act Reform Amendments of 1993 liberalized the extent to which civil servants are permitted to engage in off-duty partisan political activities. Chapter 6 of the JER contains the regulations now in effect, which provide a laundry list of permitted and prohibited activities. Even though the new regulations generally allow employees to take a more active part in political activities, including political management and political campaigns, it is advised that an Ethics Counselor be consulted before undertaking involvement in partisan politics.

4133 ACTIVITIES BY SERVICEMEMBERS (DOD DIR 1344.10. While rules regarding civil servant's political activities have been liberalized, the regulations applicable to military members have not. While free to register, vote, make monetary contributions to political organizations, express personal opinions, and attend political meetings as a spectator (not in uniform), military members may not otherwise become involved in partisan politics. Chapter 6 of the JER contains DoD Dir 1344.10, which provides a laundry list of permitted and prohibited activities. As with civil servants, it is advisable that service members consult with their Ethics Counselor before becoming involved in political activity.

4134 LOGISTICAL SUPPORT FOR POLITICAL ACTIVITIES. In general, commanders may not permit use of DoD facilities to support political activities. This prohibition includes: use of installation facilities for political assemblies, media events or fundraisers; community relations support (bands, color guards, personnel) for political meetings or ceremonies; taping of campaign commercials in front of military equipment on military property; and, inclusion of campaign news, partisan discussions, cartoons,

editorials or commentaries regarding political campaigns, candidates or issues in DoD newspapers. See SECDEF WASHINGTON DC 222009Z FEB 96, "Public Affairs Policy Guidance – Election Year 1996."

4135 HELPFUL WORLD WIDE WEB SITES.

DOD Standards of Conduct Office: www.defenselink.mil/dodge/defense_ethics (JER, Ethics Advance Sheets, Informal Opinions, Training Materials, Ethics Deskbook, etc...)

Office of Government Ethics:
www.usoge.gov (previous OGE opinions, great training materials, OGE-450 Forms and OGE 450 Review Guides)

Office of the Comptroller General:
www.gao.gov/decisions (decisions of the CG)

Defense Technical Information Center:
www.dtic.mil/perdiem (JTR & JFTR)

Office of Special Counsel:
www.access.gpo.gov/osc (information on political activities)

Department of Defense:
www.defenselink.mil (DoD Regulation 4500.36-R "Management, Acquisition and Use of Motor Vehicles")

CHAPTER XLII

THE FREEDOM OF INFORMATION AND PRIVACY ACTS AND RELEASE OF OFFICIAL INFORMATION AND TESTIMONY FOR LITIGATION PURPOSES

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Chapter 42, Sections 4202-4206

Freedom of Information Act (FOIA)

Editor's note for 9/00 edition

Effective 6 January 1999, SECNAV Instruction 5720.42F replaced the prior DON FOIA Program instruction. Due to substantive changes, this chapter is currently undergoing major revision. Accordingly, the main text of the 5720.42f (including enclosure 2, "FOIA Definitions and Terms, and enclosure 4, "FOIA Exemptions") is reproduced here, in part. A complete copy of the new instruction should be obtained by downloading the file from the DON FOIA website, (http://www.ogc.secnav. hq.navy.mil/foia/index.)

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CHAPTER XLII

THE FREEDOM OF INFORMATION AND PRIVACY ACTS AND RELEASE OF OFFICIAL INFORMATION AND TESTIMONY FOR LITIGATION PURPOSES

4201 GENERAL. The purpose of this chapter is to discuss the basic provisions and policy considerations of the Freedom of Information Act and the Privacy Act. These discussions are of a general nature. Reference to the basic source material is essential to acquire a thorough understanding of these Acts.

A. ***Freedom of Information Act references***

1. ***Statute***. Freedom of Information Act, 5 U.S.C. § 552 (1996).

2. ***Regulations***

a. DOD Directive 5400.7-R, Subj: DOD FREEDOM OF INFORMATION ACT PROGRAM, 4 SEP 98

b. SECNAVINST 5720.42F, Subj: DEPARTMENT OF THE NAVY FREEDOM OF INFORMATION ACT (FOIA) PROGRAM

c. JAGMAN, Chapter V, part A

d. USMC - MCO 5720.56

e. USCG - COMDTINST M5260.2

f. SECNAVINST 5720.45, Subj: INDEXING, PUBLIC INSPECTION, AND FEDERAL REGISTER PUBLICATION OF DEPARTMENT OF THE NAVY DIRECTIVES AND OTHER DOCUMENTS AFFECTING THE PUBLIC

g. *Federal Personnel Manual*, chs. 293, 294, 297, 335, 339, and 713

h. U.S. Navy, *Manual of the Medical Department*, ch. 23-70 through 23-79

i. OPNAVINST 5510.161, Subj: WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA FROM PUBLIC DISCLOSURE

j. SECNAVINST 5720.44, Subj: DEPARTMENT OF THE NAVY PUBLIC AFFAIRS POLICY AND REGULATIONS

k. OPNAVINST 5510.48, Subj: MANUAL FOR THE DISCLOSURE OF CLASSIFIED MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

3. FOIA Information - DSN 224-2004 / 2817

B. ***Privacy Act references***

1. ***Statute***. Privacy Act of 1975, 5 U.S.C. § 552a (1982).

2. ***Regulations***

a. DOD Directive 5400.11, Subj: DEPARTMENT OF DEFENSE PRIVACY PROGRAM

b. SECNAVINST 5211.5, Subj: DEPARTMENT OF THE NAVY PRIVACY (PA) PROGRAM. This instruction explains the provisions of the Privacy Act of 1974 and assigns responsibility for consideration of Privacy Act requests for records and petitions for amending records. It also contains sample letters for responding to Privacy Act requests and lists exempted records that cannot be inspected by individuals.

c. JAGMAN, Chapter V, part B

d. MCO P5211.2, Subj: THE PRIVACY ACT OF 1974

e. COMDTINST M5260.2

f. OPNAVNOTE 5211, Current Privacy Act issuances as published in the *Federal Register*. It provides an up-to-date listing, as published in the *Federal Register*, concerning:

(1) Specific single systems, "umbrella-type systems," and subsystems of personnel records which have been authorized to be maintained under the Privacy Act;

(2) the Office of Personnel Management's government-wide

system of records; and

(3) a directory of naval activities maintaining these systems.

g. MCBUL 5211, Subj: CURRENT PRIVACY ACT SYSTEM NOTICES PUBLISHED IN THE FEDERAL REGISTER. The information describes specific single systems, "umbrella-type systems," and subsystems that contain information authorized to be maintained under the Privacy Act.

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

SECNAVINST 5720.42F
N09B30
6 January 1999

SECNAV INSTRUCTION 5720.42F

From: Secretary of the Navy
To: All Ships and Stations

Subj: DEPARTMENT OF THE NAVY FREEDOM OF INFORMATION ACT (FOIA) PROGRAM

Ref:
(a) 5 U.S.C. 552, "Freedom of Information Act," as amended on 2 Oct 96
(b) DoD Directive 5400.7, "DoD Freedom of Information Act (FOIA) Program," of 29 Sep 97 (NOTAL)
(c) DoD 5400.7-R, "DoD Freedom of Information Act Program," of 4 Sep 98 (NOTAL)
(d) DoD Directive 5100.3, "Support of the Headquarters of Unified, Specified, and Subordinate Commands," of 1 Nov 88 (NOTAL)
(e) SECNAVINST 5820.8A, "Release of Official Information for Litigation Purposes and Testimony by DON Personnel" of 27 Aug 91
(f) SECNAVINST 5211.5D, "Department of the Navy Privacy Act (PA) Program," of 17 Jul 92
(g) SECNAVINST 5212.5D, "Navy and Marine Corps Records Disposal Manual" of 22 Apr 98

Encl:
(1) Table of Contents
(2) FOIA Definitions and Terms
(3) FOIA Fees
(4) FOIA Exemptions
(5) Form DD 2086, Record of Freedom of Information (FOI) Processing Cost, Jul 1997
(6) Form DD 2086-1, Record of Freedom of Information (FOI) Processing Cost for Technical Data, Jul 1997
(7) Form DD 2564, Annual Report Freedom of Information Act, Aug 1998
(8) Annual FOIA Report Instructions
(9) FOIA Case Worksheet
(10) Annual Report Compilation Worksheet

1. **Purpose**. To issue Department of the Navy (DON) policies and procedures for implementing references (a), (b) and (c) and

promote uniformity in the DON Freedom of Information Act (FOIA) Program. Enclosure (1) is a Table of Contents.

2. **Cancellation**. SECNAVINST 5720.42E. This instruction implements Electronic FOIA (E-FOIA) and should be read in its entirety.

3. **Summary of Changes**. Time limits for responding to FOIA requests changed from 10 to 20 working days; appeals must be "postmarked" (vice received) within 60 calendar days; activities unable to respond to requests within the time limits of the FOIA must enter requests into a multitrack processing system (i.e., simple, complex, expedited); activities may no longer use exemption "low (b)(2)" to withhold information from disclosure; activities must adjudicate "foreseeable harm" before claiming exemption (b)(5); activities may choose to make "discretionary" disclosures of information; non-exempt information may be released to a requester, without the requester having to cite FOIA as a means to access the information; Annual FOIA Report has been expanded and is reported by fiscal year with new reporting dates; guidance on establishing electronic reading rooms and websites is addressed; the DON Chief Information Officer (DONCIO) has responsibility for preparing and making publicly available an index of all DON major information systems; the appellate authorities have new addresses; removed resource materials such as sample training package, sample letters, etc., from the instruction and placed on the Navy FOIA website; expanded the list of "Other Reasons" for not responding to a request; redefined FOIA training requirements; removed guidance on For Official Use Only (FOUO) since cognizance has been transferred to the Assistant Secretary of Defense for Command, Control, Communications and Intelligence [Note: activities shall follow reference (c) pending issuance of separate guidance]; and expanded "FOIA Definitions and Terms" [see enclosure (2)].

4. **Navy FOIA Website/FOIA Handbook**

a. The Navy FOIA website (http://www.ogc.secnav.hq.navy.mil/foia/index) is an excellent resource for requesters and FOIA coordinators. It provides connectivity to the Navy's official website, to other FOIA and non/FOIA websites, and to the Navy's electronic reading rooms.

b. FOIA requesters are encouraged to visit the Navy FOIA website prior to filing a request. It features a FOIA Handbook which provides: guidance on how and where to submit requests;

what's releasable/what's not; addresses for frequently requested information; time limits and addresses for filing appeals, etc. FOIA requesters may also use the electronic FOIA request form on the website to seek access to records originated by the Secretary of the Navy (SECNAV) or the Chief of Naval Operations (CNO).

c. A copy of this instruction and its references are downloadable from the Navy FOIA website. This instruction is also codified at 32 Code of Federal Regulations (CFR) Part 701.

5. Applicability

a. The policies and procedures contained in this instruction apply throughout the DON and take precedence over other DON instructions, which may serve to supplement it [i.e., Public Affairs Regulations, Security Classification Regulations, Navy Regulations, Marine Corps Orders, etc.]. Further, issuance of supplementary instructions by DON activities, deemed essential to the accommodation of perceived requirements peculiar to those activities, may not conflict.

b. The FOIA applies to "records" maintained by "agencies" within the Executive Branch of the Federal government, including the Executive Office of the President and independent regulatory agencies. It states that "any person" (U.S. citizen; foreigner, whether living inside or outside the United States; partnerships; corporations; associations; and foreign and domestic governments) has the right enforceable by law, to access Federal agency records, except to the extent that such records (or portions thereof) are protected from disclosure by one or more of the nine FOIA exemptions or one of three special law enforcement exclusions.

c. Neither Federal agencies nor fugitives from justice may use the FOIA to access agency records.

d. Reference (c) directs that the FOIA programs of the U.S. Atlantic Command (USACOM) and the U.S. Pacific Command (USCINCPAC) fall under the jurisdiction of the Department of Defense (DoD) not DON. This policy represents an exception to the policies directed under reference (d).

6. Responsibility and Authority

a. The Head, DON PA/FOIA Policy Branch [CNO (N09B30)] has been delegated the responsibility for managing the DON's FOIA

program, which includes setting FOIA policy and administering, supervising, and overseeing the execution of references (a), (b), and (c).

(1) As principal DON FOIA policy official, CNO (N09B30) issues SECNAVINST 5720.42; oversees the administration of the DON FOIA program; issues and disseminates FOIA policy; oversees the Navy FOIA website; represents the DON at all meetings, symposiums, and conferences that address FOIA matters; writes the Navy's FOIA Handbook; serves on FOIA boards and committees; serves as principal policy advisor and oversight official on all FOIA matters; prepares the DON Annual FOIA Report for submission to the Attorney General; reviews all FOIA appeals to determine trends that impact on DON; reviews all FOIA litigation matters involving the DON and apprises the Director, Freedom of Information and Security Review (DFOISR), DoD of same; responds to depositions and litigation regarding DON FOIA policy under reference (e); reviews/analyzes all proposed FOIA legislation to determine its impact on the DON; develops a Navy-wide FOIA training program and serves as training oversight manager; conducts staff assistance visits/reviews within DON to ensure compliance with reference (a) and this instruction; reviews all SECNAV and OPNAV instructions/forms that address FOIA; and oversees the processing of FOIA requests received by the Secretary of the Navy (SECNAV) and Chief of Naval Operations (CNO), to ensure responses are complete, timely, and accurate. Additionally, N09B30 works closely with other DoD and DON officials to ensure they are aware of highly visible and/or sensitive FOIA requests being processed by the DON.

(2) SECNAV has delegated Initial Denial Authority (IDA) to CNO (N09B30) for requests at the Secretariat and OPNAV level.

b. CMC is delegated responsibility for administering and supervising the execution of this instruction within the Marine Corps. To accomplish this task, the Director of Administrative Resource Management (Code ARAD) serves as the FOIA Coordinator for Headquarters, U.S. Marine Corps, and assists CNO (N09B30) in promoting the DON FOIA Program by issuing a CMC FOIA Handbook; utilizing the CMC FOIA website to disseminate FOIA information; consolidating its activities Annual FOIA Reports and submitting it to CNO (N09B30); maintaining a current list of CMC FOIA coordinators, etc.

c. DONCIO is responsible for preparing and making publicly available upon request an index of all DON major information systems and a description of major information and record

locator systems maintained by the DON as required by references (a) and (c).

d. FOIA coordinators will:

(1) Implement and administer a local FOIA program under this instruction; serve as principal point of contact on FOIA matters; issue a command/activity instruction that implements SECNAVINST 5740.42F by reference and highlights only those areas unique to the command/activity (i.e., designate the command/activity's FOIA Coordinator and IDA; address internal FOIA processing procedures; and address command/activity level FOIA reporting requirements); receive and track FOIA requests to ensure responses are made in compliance with references (a), (b), (c) and this instruction; provide general awareness training to command/activity personnel on the provisions of reference (a) and this instruction; collect and compile FOIA statistics and submit a consolidated Annual FOIA Report to Echelon 2 FOIA coordinator for consolidation; provide guidance on how to process FOIA requests; and provide guidance on the scope of FOIA exemptions.

(2) Additionally, CMC (ARAD) and Echelon 2 FOIA coordinators will:

(a) Ensure that reading room materials are placed in the activity's electronic reading room and that the activity's website is linked to the Navy FOIA website and the activity's reading room is linked to the Navy's FOIA reading room lobby. Documents placed in the reading room shall also be indexed as a Government Information Locator Service (GILS) record, as this will serve as an index of available records.

(b) Review proposed legislation and policy recommendations that impact the FOIA and provide comments to CNO (N09B30).

(c) Review SECNAVINST 5720.42F and provide recommended changes/comments to CNO (N09B30).

(d) Routinely conduct random staff assistance visits/reviews/self-evaluations within the command and lower echelon commands to ensure compliance with FOIA.

(e) Collect and compile command and feeder reports for the Annual FOIA Report and provide a consolidated report to CNO (N09B30).

(f) Maintain a listing of their subordinate activities' FOIA coordinators to include full name, address, and telephone (office and fax) and place on their website. [Note: Do not place names of FOIA coordinators who are overseas, routinely deployable or in sensitive units on the website. Instead just list "FOIA Coordinator"].

(g) Notify CNO (N09B30) of any change of name, address, office code and zip code, telephone and facsimile number, and/or e-mail address of Echelon 2 FOIA Coordinators.

(h) Conduct overview training to ensure all personnel are knowledgeable of the FOIA and its requirements. See paragraph 15.

(i) Work closely with the activity webmaster to ensure that information placed on the activity's website does not violate references (a), (c) and (f).

e. Initial Denial Authorities (IDAs). The following officials are delegated to serve as Initial Denial Authorities, on behalf of SECNAV [see enclosure (2) for definition]:

(1) Under Secretary of the Navy; Deputy Under Secretary of the Navy; Assistant Secretaries of the Navy (ASNs) and their principal deputy assistants; Assistant for Administration (SECNAV); Director, Administrative Division (SECNAV); Special Assistant for Legal and Legislative Affairs (SECNAV); Director, Office of Program Appraisal (SECNAV); DONCIO; Director, Small and Disadvantaged Business Utilization (SECNAV); Chief of Information (CHINFO); Director, Navy International Programs Office; Chief of Legislative Affairs; CNO; Vice CNO; Director, Naval Nuclear Propulsion Program (NOON); Director, Navy Staff (N09B); Head, DON PA/FOIA Policy Branch (N09B30); Director of Naval Intelligence (N2); Director of Space, Information Warfare, Command and Control (N6); Director of Navy Test & Evaluation & Technology Requirements (N091); Surgeon General of the Navy (N093); Director of Naval Reserve (N095); Oceanographer of the Navy (N096); Director of Religious Ministries/Chief of Chaplains of the Navy (N097); all Deputy Chiefs of Naval Operations; Chief of Naval Personnel; Director, Strategic Systems Programs; Chief, Bureau of Medicine and Surgery; Director, Office of Naval Intelligence; Naval Inspector General; Auditor General of the Navy; Commanders of the Naval Systems Commands; Chief of Naval Education and Training; Commander, Naval Reserve Force; Chief of Naval Research; Director, Naval Criminal Investigative Service; Deputy

Commander, Naval Legal Service Command; Commander, Navy Personnel Command; Director, Naval Center of Cost Analysis; Commander, Naval Meterology and Oceanography Command; Director, Naval Historical Center; heads of DON staff offices, boards, and councils; Program Executive Officers; and all general officers.

(2) Within the Marine Corps: CMC and his Assistant, Chief of Staff, Deputy Chiefs of Staff; Director, Personnel Management Division; Fiscal Director of the Marine Corps; Counsel for the Commandant; Director of Intelligence; Director, Command, Communications and Computer Systems Division; Legislative Assistant to the Commandant; Director, Judge Advocate Division; Inspector General of the Marine Corps; Director, Manpower, Plans, and Policy Division; Head, Freedom of Information and Privacy Acts Section, HQMC; Director of Public Affairs; Director of Marine Corps History and Museums; Director, Personnel Procurement Division; Director, Morale Support Division; Director, Human Resources Division; Director of Headquarters Support; commanding generals; directors, Marine Corps districts; commanding officers, not in the administrative chain of command of a commanding general or district director. For each official listed above, the deputy or principal assistant is also authorized denial authority.

(3) JAG and his Deputy and the DON General Counsel (DONGC) and his deputies are excluded from this grant of authorization, since SECNAV has delegated them to serve as his appellate authorities. However, they are authorized to designate IDA responsibilities to other senior officers/ officials within JAG and DONGC. DONGC has delegated IDA responsibilities to the Assistant General Counsels and the Associate General Counsel (Litigation).

(4) For the shore establishment and operating forces: All officers authorized by Article 22, Uniform Code of Military Justice (UCMJ) or designated in section 0120, Manual of the Judge Advocate General (JAGINST 5800.7C) to convene general courts-martial.

(5) IDAs must balance their decision to centralize denials for the purpose of promoting uniform decisions against decentralizing denials to respond to requests within the FOIA time limits. Accordingly, the above listed IDAs are authorized to delegate initial denial authority to subordinate activities for the purpose of streamlining FOIA processing. They may also delegate authority to a specific staff member, assistant, or individuals acting during their absence if this serves the

purpose of streamlining and/or complying with the time limits of FOIA. [Note: Such delegations shall be limited to comply with reference (b).]

(6) Delegations of IDA authority should be reflected in the activity's supplementing FOIA instruction or by letter, with a copy to CNO (N09B30) or CMC (ARAD), as appropriate.

f. Release Authorities. Release authorities are authorized to grant requests on behalf of the Office of the Secretary of the Navy for agency records under their possession and control for which no FOIA exemption applies; to respond to requesters concerning refinement of their requests; to provide fee estimates; and to offer appeal rights for adequacy of search or fee estimates to the requester.

g. Appellate authorities are addressed in paragraph 15.

7. **FOIA Definitions and Terms**. An comprehensive list of FOIA definitions and terms is provided at enclosure (2).

8. **Policy**

a. Compliance with the FOIA. DON policy is to comply with references (a) through (c) and this instruction in both letter and spirit; conduct its activities in an open manner consistent with the need for security and adherence to other requirements of law and regulation; and provide the public with the maximum amount of accurate and timely information concerning its activities.

b. Prompt Action. DON activities shall act promptly on requests when a member of the public complies with the procedures established in this instruction [i.e., files a "perfected request"] and the request is received by the official designated to respond. See paragraph 11 for minimum requirements of the FOIA.

c. Provide Assistance. DON activities shall assist requesters in understanding and complying with the procedures established by this instruction, ensuring that procedural matters do not unnecessarily impede a requester from obtaining DON records promptly.

d. Grant Access

(1) DON activities shall grant access to agency records when a member of the public complies with the provisions of this instruction and there is no FOIA exemption available to withhold the requested information [see enclosure (4)].

(2) In those instances where the requester has not cited FOIA, but the records are determined to be releasable in their entirety, the request shall be honored without requiring the requester to invoke FOIA.

e. Create a Record

(1) A record must exist and be in the possession and control of the DON at the time of the request to be considered subject to this instruction and the FOIA. Accordingly, DON activities need not process requests for records which are not in existence at the time the request is received. In other words, requesters may not have a "standing FOIA request" for release of future records.

(2) There is no obligation to create, compile, or obtain a record to satisfy a FOIA request. However, this is not to be confused with honoring form or format requests (see paragraph 8h). A DON activity, however, may compile a new record when so doing would result in a more useful response to the requester, or be less burdensome to the agency than providing existing records, and the requester does not object. Cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee which would be charged for providing the existing record. Fee assessments shall be in accordance with enclosure (3).

(3) With respect to electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creation of a record, programming, or particular format are questionable, DON activities should apply a standard of reasonableness. In other words, if the capability exists to respond to the request, and the effort would be a business as usual approach, then the request should be processed. However, the request need not be processed when the capability to respond does not exist without a significant expenditure of resources, thus not being a normal business as usual approach. As used in

this sense, a significant interference with the operation of the DON activity's automated information system would not be a business as usual approach.

f. Disclosures

(1) Discretionary Disclosures. DON activities shall make discretionary disclosures whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption. A discretionary disclosure is normally not appropriate for records clearly exempt under exemptions (b)(1), (b)(3), (b)(4), (b)(6), (b)(7)(C) and (b)(7)(F). Exemptions (b)(2), (b)(5), and (b)(7)(A), (b)(7)(B), (b)(7)(D) and (b)(7)(E) are discretionary in nature and DON activities are encouraged to exercise discretion whenever possible. Exemptions (b)(4),.(b)(6), and (b)(7)(C) cannot be claimed when the requester is the "submitter" of the information. While discretionary disclosures to FOIA requesters constitute a waiver of the FOIA exemption that may otherwise apply, this policy does not create any legally enforceable right.

(2) Public Domain. Non-exempt records released under FOIA to a member of the public are considered to be in the public domain. Accordingly, such records may also be made available in reading rooms, in paper form, as well as electronically to facilitate public access.

(3) Limited Disclosures. Disclosure of records to a properly constituted advisory committee, to Congress, or to other Federal agencies does not waive a FOIA exemption.

(4) Unauthorized Disclosures. Exempt records disclosed without authorization by the appropriate DON official do not lose their exempt status.

(5) Official versus Personal Disclosures. While authority may exist to disclose records to individuals in their official capacity, the provisions of this instruction apply if the same individual seeks the records in a private or personal capacity.

(6) Distributing Information. DON activities are encouraged to enhance access to information by distributing information on their own initiative through the use of electronic information systems, such as the Government Information Locator Service (GILS).

g. Honor Form or Format Requests. DON activities shall provide the record in any form or format requested by the requester, if the record is readily reproducible in that form or format. DON activities shall make reasonable efforts to maintain their records in forms or formats that are reproducible. In responding to requests for records, DON activities shall make reasonable efforts to search for records in electronic form or format, except when such efforts would significantly interfere with the operation of the DON activities' automated information system. Such determinations shall be made on a case-by-case basis.

h. Authenticate Documents. Records provided under this instruction shall be authenticated with an appropriate seal, whenever necessary, to fulfill an official Government or other legal function. This service, however, is in addition to that required under the FOIA and is not included in the FOIA fee schedule. DON activities may charge for the service at a rate of $5.20 for each authentication.

9. **Reading Rooms**. The FOIA requires that (a)(2) records created on or after 1 November 1996, be made available electronically (starting 1 November 1997) as well as in hard copy, in the FOIA reading room for inspection and copying, unless such records are published and copies are offered for sale. Reference (c) requires that each DoD Component provide an appropriate facility or facilities where the public may inspect and copy or have copied the records held in their reading rooms. To comply, the Navy FOIA website includes links that assist members of the public in locating Navy libraries, online documents, and Navy electronic reading rooms maintained by SECNAV/CNO, CMC, OGC, JAG and Echelon 2 commands. Although each of these activities will maintain their own document collections on their own servers, the Navy FOIA website provides a common gateway for all Navy online resources. To this end, DON activities shall:

a. Establish their reading rooms and link them to the Navy FOIA Reading Room Lobby which is found on the Navy FOIA website.

b. Ensure that responsive documents held by their subordinate activities are also placed in the reading room. [Note: SECNAV/ASN and OPNAV offices shall ensure that responsive documents are provided to CNO (N09B30) for placement in the reading room.]

c. Ensure that documents placed in a reading room are properly excised to preclude the release of personal or contractor-submitted information prior to being made available to the public. In every case, justification for the deletion must be fully explained in writing, and the extent of such deletion shall be indicated on the record which is made publicly available, unless such indication would harm an interest protected by an exemption under which the deletion was made. If technically feasible, the extent of the deletion in electronic records or any other form of record shall be indicated at the place in the record where the deletion was made. However, a DON activity may publish in the Federal Register a description of the basis upon which it will delete identifying details of particular types of records to avoid clearly unwarranted invasions of privacy, or competitive harm to business submitters. In appropriate cases, the DON activity may refer to this description rather than write a separate justification for each deletion. DON activities may remove (a)(2)(D) records from their electronic reading room when the appropriate officials determine that access is no longer necessary.

d. Should a requester submit a FOIA request for FOIA-processed (a)(2) records, and insist that the request be processed, DON activities shall process the FOIA request. However, DON activities have no obligation to process a FOIA request for 5 U.S.C. 552(a)(2)(A), (B), and (C) [reference (a)] records because these records are required to be made public and not FOIA-processed under paragraph (a)(3) of the FOIA.

e. DON activities may share reading room facilities if the public is not unduly inconvenienced. When appropriate, the cost of copying may be imposed on the person requesting the material in accordance with FOIA fee guidelines [see enclosure (3)].

f. DON activities shall maintain an index of all available documents. A general index of FOIA-processed (a)(2) records shall be made available to the public, both in hard copy and electronically by 31 December 1999. To comply with this requirement, DON activities shall establish a GILS record for each document it places in a reading room. No "(a)(2)" materials issued or adopted after 4 July 1967, that are not indexed and either made available or published may be relied upon, used or cited as precedent against any individual unless such individual has actual and timely notice of the contents of such materials. Such materials issued or adopted before 4 July

1967, need not be indexed, but must be made available upon request if not exempted under this instruction.

g. An index and copies of unclassified Navy instructions, forms, and addresses for DON activities (i.e., the Standard Navy Distribution List (SNDL) are located on the Navy Electronics Directives System (http://neds.nebt.daps.mil/).

h. DON material published in the Federal Register, such as material required to be published by Section 552(a)(1) of the FOIA, shall be made available by JAG in their FOIA reading room and electronically to the public.

i. Although not required to be made available in response to FOIA requests or made available in FOIA Reading Rooms, "(a)(1)" materials may, when feasible, be made available to the public in FOIA reading rooms for inspection and copying, and by electronic means. Examples of "(a)(1)" materials are: descriptions of an agency's central and field organization, and to the extent they affect the public, rules of procedures, descriptions of forms available, instruction as to the scope and contents of papers, reports, or examinations, and any amendment, revision, or report of the aforementioned.

10. **Relationship Between the FOIA and PA**. Not all requesters are knowledgeable of the appropriate statutory authority to cite when requesting records. In some instances, they may cite neither Act, but will imply one or both Acts. For these reasons, the following guidelines are provided to ensure requesters receive the greatest amount of access rights under both Acts:

a. If the record is required to be released under the FOIA, the PA does not bar its disclosure. Unlike the FOIA, the PA applies only to U.S. citizens and aliens admitted for permanent residence. Reference (f) implements the DON's Privacy Act Program.

b. Requesters who seek records about themselves contained in a PA system of records and who cite or imply only the PA, will have their requests processed under the provisions of both the PA and the FOIA. If the PA system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1) and the records, or any portion thereof are exempt under the FOIA, the requester shall be so advised with the appropriate PA and FOIA exemption. Appeals shall be processed under both Acts.

c. Requesters who seek records about themselves that are not contained in a PA system of records and who cite or imply the PA will have their requests processed under the provisions of the FOIA, since the PA does not apply to these records. Appeals shall be processed under the FOIA.

d. Requesters who seek records about themselves that are contained in a PA system of records and who cite or imply the FOIA or both Acts will have their requests processed under the provisions of both the PA and the FOIA. If the PA system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1), and the records, or any portion thereof are exempt under the FOIA, the requester shall be so advised with the appropriate PA and FOIA exemption. Appeals shall be processed under both Acts.

e. Requesters who seek access to agency records that are not part of a PA system of records, and who cite or imply the PA and FOIA, will have their requests processed under FOIA, since the PA does not apply to these records. Appeals shall be processed under the FOIA.

f. Requesters who seek access to agency records and who cite or imply the FOIA will have their requests and appeals processed under the FOIA.

g. Requesters shall be advised in final responses which Act(s) was (were) used, inclusive of appeal rights.

h. The time limits for responding to the request will be determined based on the Act cited. For example, if a requester seeks access under the FOIA for his or her personal records which are contained in a PA system of records, the time limits of the FOIA apply.

i. Fees will be charged based on the kind of records being requested (i.e., FOIA fees if agency records are requested; PA fees for requesters who are seeking access to information contained in a PA system of record which is retrieved by their name and/or personal identifier).

11. Processing FOIA Requests. Upon receipt of a FOIA request, DON activities shall:

a. Review the request to ensure it meets the minimum requirements of the FOIA to be processed.

(1) Minimum Requirements of a FOIA Request. A request must be in writing; cite or imply FOIA; reasonably describe the records being sought so that a knowledgeable official of the agency can conduct a search with reasonable effort; and if fees are applicable, the requester should include a statement regarding willingness to pay all fees or those up to a specified amount or request a waiver or reduction of fees.

(2) If a request does not meet the minimum requirements of the FOIA, DON activities shall apprise the requester of the defect and assist him/her in perfecting the request. [Note: The statutory 20 working day time limit applies upon receipt of a "perfected" FOIA request.]

b. When a requester or his/her attorney requests personally identifiable information in a record, the request may require a notarized signature or a statement certifying under the penalty of perjury that their identity is true and correct. Additionally, written consent of the subject of the record is required for disclosure from a Privacy Act System of records, even to the subject's attorney.

c. Review Description of Requested Record(s)

(1) The FOIA requester is responsible for describing the record he/she seeks so that a knowledgeable official of the activity can locate the record with a reasonable amount of effort. In order to assist DON activities in conducting more timely searches, a requester should endeavor to provide as much identifying information as possible. When a DON activity receives a request that does not reasonably describe the requested record, it shall notify the requester of the defect in writing. The requester should be asked to provide the type of information outlined below. DON activities are not obligated to act on the request until the requester responds to the specificity letter. When practicable, DON activities shall offer assistance to the requester in identifying the records sought and in reformulating the request to reduce the burden on the agency in complying with the FOIA. The following guidelines are provided to deal with generalized requests and are based on the principle of reasonable effort. Descriptive information about a record may be divided into two broad categories.

(a) Category I is file-related and includes information such as type of record (for example, memorandum), title, index citation, subject area, date the record was created, and originator.

(b) Category II is event-related and includes the circumstances that resulted in the record being created or the date and circumstances surrounding the event the record covers.

(2) Generally, a record is not reasonably described unless the description contains sufficient Category I information to permit the conduct of an organized, non random search based on the DON activity's filing arrangements and existing retrieval systems, or unless the record contains sufficient Category II information to permit inference of the Category I elements needed to conduct such a search.

(3) The following guidelines deal with requests for personal records: Ordinarily, when personal identifiers are provided solely in connection with a request for records concerning the requester, only records in Privacy Act system of records that can be retrieved by personal identifiers need be searched. However, if a DON activity has reason to believe that records on the requester may exist in a record system other than a PA system, the DON activity shall search the system under the provisions of the FOIA. In either case, DON activities may request a reasonable description of the records desired before searching for such records under the provisions of the FOIA and the PA. If the records are required to be released under the FOIA, the PA does not bar its disclosure.

(4) The previous guidelines notwithstanding, the decision of the DON activity concerning reasonableness of description must be based on the knowledge of its files. If the description enables the DON activity personnel to locate the record with reasonable effort, the description is adequate. The fact that a FOIA request is broad or burdensome in its magnitude does not, in and of itself, entitle a DON activity to deny the request on the ground that it does not reasonably describe the records sought. The key factor is the ability of the staff to reasonably ascertain and locate which records are being requested.

d. Review Request to Determine if FOIA Fees May Be Applicable

(1) FOIA fee issues shall be resolved before a DON activity begins processing a FOIA request.

(2) FOIA fees shall be at the rates prescribed at enclosure (3).

(3) If fees are applicable, a requester shall be apprised of what category of requester he/she has been placed and provided a complete breakout of fees to include any and all information provided before fees are assessed [e.g., first two hours of search and first 100 pages of reproduction have been provided without charge.]

(4) Forms DD 2086 [for FOIA requests] and 2086-1 [for FOIA requests for technical data] serve as an administrative record of all costs incurred to process a request; actual costs charged to a requester [i.e., search, review, and/or duplication and at what salary level and the actual time expended]; and as input to the Annual FOIA Report. Requesters may request a copy of the applicable form to review the time and costs associated with the processing of a request.

(5) Final response letters shall address whether or not fees are applicable or have been waived. A detailed explanation of FOIA fees is provided at enclosure (3).

e. Control FOIA Request. Each FOIA request should be date stamped upon receipt; given a case number; and entered into a formal control system to track the request from receipt to response. Coordinators may wish to conspicuously stamp, label, and/or place the request into a brightly colored folder/cover sheet to ensure it receives immediate attention by the action officer.

f. Enter Request into Multitrack Processing System. When a DON activity has a significant number of pending requests that prevents a response determination being made within 20 working days, the requests shall be processed in a multitrack processing system, based on the date of receipt, the amount of work and time involved in processing the requests, and whether the request qualifies for expedited processing.

(1) DON activities may establish as many queues as they wish, however, at a minimum three processing tracks shall be established, all based on a first-in, first-out concept, and rank ordered by the date of receipt of the request: one track for simple requests, one track for complex requests, and one track for expedited processing. Determinations as to whether a request is simple or complex shall be made by each DON activity.

(2) DON activities shall provide a requester whose request does not qualify for the fastest queue (except for expedited processing), an opportunity to limit in writing by

hard copy, facsimile, or electronically the scope of the request in order to qualify for the fastest queue.

(3) This multitrack processing system does not obviate the activity's responsibility to exercise due diligence in processing requests in the most expeditious manner possible.

(4) Referred requests shall be processed according to the original date received by the initial activity and then placed in the appropriate queue.

(5) Establish a separate queue for expedited processing. A separate queue shall be established for requests meeting the test for expedited processing. Expedited processing shall be granted to a requester after the requester requests such and demonstrates a compelling need for the information. Notice of the determination as to whether to grant expedited processing in response to a requester's compelling need shall be provided to the requester within 10 calendar days after receipt of the request in the office which will determine whether to grant expedited access. Once the determination has been made to grant expedited processing, DON activities shall process the request as soon as practicable. Actions by DON activities to initially deny or affirm the initial denial on appeal of a request for expedited processing, and failure to respond in a timely manner shall be subject to judicial review.

(a) *Compelling need* means that the failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

(b) Compelling need also means that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. An individual primarily engaged in disseminating information means a person whose primary activity involves publishing or otherwise disseminating information to the public. Representatives of the news media would normally qualify as individuals primarily engaged in disseminating information. Other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public.

(c) *Urgently needed* means that the information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public

interest. However, information of historical interest only, or information sought for litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the news breaking nature of the information.

(d) A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of his/her knowledge. This statement must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access.

(e) Other reasons that merit expedited processing by DON activities are an imminent loss of substantial due process rights and humanitarian need. A demonstration of imminent loss of substantial due process rights shall be made by a statement certified by the requester to be true and correct to the best of his/her knowledge. Humanitarian need means that disclosing the information will promote the welfare and interests of mankind. A demonstration of humanitarian need shall also be made by a statement certified by the requester to be true and correct to the best of his/her knowledge. Both statements mentioned above must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access. Once the decision has been made to expedite the request for either of these reasons, the request may be processed in the expedited processing queue behind those requests qualifying for compelling need.

(7) These same procedures also apply to requests for expedited processing of administrative appeals.

g. Respond to Request within FOIA Time Limits. Once an activity receives a "perfected" FOIA request, it shall inform the requester of its decision to grant or deny access to the requested records within 20 working days. Activities are not necessarily required to release records within the 20 working days, but access to releasable records should be granted promptly thereafter and the requester apprised of when he/she may expect to receive a final response to his/her request. Naturally, interim releases of documents are encouraged if appropriate. Sample response letters are provided on the Navy FOIA website.

(1) If a significant number of requests, or the complexity of the requests prevents a final response

determination within the statutory time period, DON activities shall advise the requester of this fact, and explain how the request will be responded to within its multitrack processing system. A final response determination is notification to the requester that the records are released, or will be released by a certain date, or the records are denied under the appropriate FOIA exemption(s) or the records cannot be provided for one or more of the "other reasons" (see paragraph 10m). Interim responses acknowledging receipt of the request, negotiations with the requester concerning the scope of the request, the response timeframe, and fee agreements are encouraged; however, such actions do not constitute a final response determination under FOIA.

(2) Formal Extension. In those instances where a DON activity cannot respond within the 20 working day time limit, the FOIA provides for extension of initial time limits for an additional 10 working days for three specific situations: the need to search for and collect records from separate offices; the need to examine a voluminous amount of records required by the request; and the need to consult with another agency or agency component. In such instances, naval activities shall apprise requesters in writing of their inability to respond within 20 working days and advise them of their right to appeal to the appellate authority. [Note: Formal extension letters require IDA signature.]

(3) Informal Extension. A recommended alternative to taking a formal extension is to call the requester and negotiate an informal extension of time with the requester. The advantages include the ability to agree on a mutually acceptable date to respond that exceeds a formal extension of an additional 10 working days, and the letter of confirmation does not require the signature of an IDA. Additionally, it does not impact on the additional days the appellate authority may take when responding to a FOIA appeal.

h. Conduct a Search for Responsive Records

(1) Conduct a search for responsive records, keeping in mind a test for reasonableness [i.e., file disposition requirements set forth in reference (g)]. This includes making a manual search for records as well as an electronic search for records. Do not assume that because a document is old, it does not exist. Rather, ensure that all possible avenues are considered before making a determination that no record could be

found [i.e., such as determining if the record was transferred to a federal records center for holding].

(2) Requesters Can Appeal "Adequacy of Search." To preclude unnecessary appeals, you are encouraged to detail your response letter to reflect the search undertaken so the requester understands the process. It is particularly helpful to address the records disposal requirements set forth in reference (g) for the records being sought.

i. Review Documents for Release. Once documents have been located, the originator or activity having possession and control is responsible for reviewing them for release and coordinating with other activities/agencies having an interest. The following procedures should be followed:

(1) Sort documents by originator and make necessary referrals [see paragraph 12].

(2) Documents for which the activity has possession and control should be reviewed for release. If the review official determines that all or part of the documents requested require denial, and the head of the activity is an IDA, he/she shall respond directly to the requester. If, however, the activity head is not an IDA, then the request, a copy of the respponsive documents (unexcised), proposed redacted copy of the documents, and a detailed explanation regarding their release must be referred to the IDA for a final release determination and the requester shall be notified in writing of the transfer.

(3) Documents for which the activity does not have possession and control, but has an interest, should be referred to the originator along with any recommendations regarding release [see paragraph 12].

j. Process Non-Responsive Information in Responsive Documents. DON activities shall interpret FOIA requests liberally when determining which records are responsive to the requests, and may release non-responsive information. However, should DON activities desire to withhold non-responsive information, the following steps shall be accomplished:

(1) Consult with the requester, and ask if the requester views the information as responsive, and if not, seek the requester's concurrence to deletion of non-responsive information without a FOIA exemption. Reflect this concurrence in the response letter.

(2) If the responsive record is unclassified and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all non-responsive and responsive information which is not exempt. For non-responsive information that is exempt, notify the requester that even if the information were determined responsive, it would likely be exempted [state the appropriate exemption(s).] Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

(3) If the responsive record is classified, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all unclassified responsive and non-responsive information which is not exempt. If the non-responsive information is exempt, follow the procedures provided above. The classified, non-responsive information need not be reviewed for declassification at this point. Advise the requester than even if the classified information were determined responsive, it would likely be exempt under 5 U.S.C. 552 (b)(1) and other exemptions if appropriate. Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

k. Withholding/Excising Information

(1) DON records may only be withheld if they qualify for exemption under one or more of the nine FOIA exemptions/three exclusions and it is determined that a foreseeable harm to an interest protected by those exemptions would result if the information is released. There are nine FOIA exemptions. See enclosure (4) for the scope of each exemption.

(2) Although a FOIA exemption may apply, DON activities are encouraged to consider discretionary disclosures of information when an exemption permits such disclosure [see paragraph 8f(1).]

(3) Excising Documents. The excision of information within a document should be made so that the requester can readily identify the amount of information being withheld and the reason for the withholding. Accordingly, ensure that any deletion of information is bracketed and all applicable exemptions listed. In those instances, where multiple pages of

documents are determined to be exempt from disclosure in their entirety, indicate the number of pages being denied and the basis for the denial.

1. Reasonably Segregable Information. DON activities must release all "reasonably segregable information" when the meaning of these portions is not distorted by deletion of the denied portions, and when it reasonably can be assumed that a skillful and knowledgeable person could not reasonably reconstruct excised information. When a record is denied in whole, the response to the requester will specifically state that it is not reasonable to segregate portions of the record for release.

m. Making a Discretionary Disclosure. A discretionary disclosure to one requester may preclude the withholding of similar information under a FOIA exemption if subsequently requested by the same individual or someone else [see paragraph 8f(1).] The following suggested language should be included with the discretionary disclosure of any record that could be subject to withholding: "The information you requested is subject to being withheld under section (b)(_) of the FOIA. The disclosure of this material to you by the DON is discretionary and does not constitute a waiver of our right to claim this exemption for similar records in the future."

n. Other Reasons. There are 10 reasons for not complying with a request for a record under FOIA:

(1) No Record. The DON activity conducts a reasonable search of files and fails to identify records responsive to the request. [Note: Requester must be advised that he/she may appeal the adequacy of search and provided appeal rights. Response letter does not require signature by IDA.]

(2) Referral. The request is referred to another DoD/DON activity or to another executive branch agency for their action. [Note: Referral does not need to be signed by IDA.]

(3) Request Withdrawn. The requester withdraws request. [Note: Response letter does not require signature by IDA.]

(4) Fee-Related Reason. Requester is unwilling to pay fees associated with the request; is past due in payment of fees from a previous request; or disagrees with the fee estimate. [Note: Requester must be advised that he/she may appeal the fee estimate. Response letter does not require signature by IDA.]

(5) Records Not Reasonably Described. A record has not been described with sufficient particularity to enable the DON activity to locate it by conducting a reasonable search. [Note: Response letter does not require signature by IDA.]

(6) Not a Proper FOIA Request for Some Other Reason. When the requester fails unreasonably to comply with procedural requirements, other than those fee-related issues described above, imposed by this instruction and/or other published rules or directives. [Note: Response letter does not require signature by IDA.]

(7) Not an Agency Record. When the requester is provided a response indicating that the requested information was "not an agency record" within the meaning of the FOIA and this instruction. [Note: Response letter does not require signature by IDA.]

(8) Duplicate Request. When a request is duplicative of another request which has already been completed or currently in process from the same requester. [Note: Response letter does not require signature by IDA.]

(9) Other (Specify). When a FOIA request cannot be processed because the requester does not comply with published rules, other than for those reasons described above. DON activities must document the specific discrepancy. [Note: Response letter does not require signature by IDA.]

(10) Denial of Request. The record is denied in whole or in part in accordance with procedures set forth in references (a) and (c) and this instruction. [Note: The requester is advised that he/she may appeal the determination and response letter must be signed by IDA.]

o. Writing a Response Letter. FOIA response letters should contain the following information:

(1) The date of the request; when it was received; if records were not located, where the search was conducted and what the records disposal requirements are for those records.

(2) Cut-off Dates. Normally, DON activities shall consider the date of receipt of a FOIA request as the cut-off date for a records search. Where a DON activity employs a particular cut-off date, however, it should give notice of that date in the response letter to the requester.

(3) If a request is denied in whole or in part, the denial response letter should cite the exemption(s) claimed; if possible, delineate the kinds of information withheld (i.e., social security numbers, date of birth, home addresses, etc.) as this may satisfy the requester and thus eliminate an appeal; provide appeal rights, and be signed by an IDA. However, there is no requirement that the response contain the same documentation necessary for litigation (i.e., FOIA requesters are not entitled to a Vaughn index [see definition at enclosure (2)] during the administrative process.

(4) The fees charged or waived; if fees were charged, what category was the requester placed in and provide a breakout of the fees charged (i.e., the first 2 hours of search were waived and so you are being charged for the remaining 4 hours of search at $25 per hour, or $100; the first 100 pages of reproduction were waived and the remaining 400 pages being provided were charged at $.15 per page, resulting in $60 in reproduction fees, for a total of $160). These figures are derived from Form DD 2086 (FOIA Fees) or Form DD 2086-1 (Technical Data Fees).

(5) Sample response letters are provided on the Navy FOIA website.

p. Press Responses. Ensure responses being made to the press are cleared through public affairs channels.

q. Special Mail Services. DON activities are authorized to use registered mail, certified mail, certificates of mailing and return receipts. However, their use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence.

12. Referrals

a. The DoD/DON FOIA referral policy is based upon the concept of the originator of a record making a release determination on its information. If a DON activity receives a request for records originated by another DoD/DON activity, it should contact the activity to determine if it also received the request, and if not, obtain concurrence to refer the request. In either situation, the requester shall be advised of the action taken, unless exempt information would be revealed.

b. While referrals to originators of information result in obtaining the best possible decision on release of the information, the policy does not relieve DON activities from the responsibility of making a release decision on a record should the requester object to referral of the request and the record. Should this situation occur, DON activities should coordinate with the originator of the information prior to making a release determination.

c. A request received by a DON activity having no records responsive to a request shall be referred routinely to another DoD/DON activity, if the other activity has reason to believe it has the requested record. Prior to notifying a requester of a referral to another DoD/DON activity, the DON activity receiving the initial request shall consult with the other DoD/DON activity to determine if that activity's association with the material is exempt. If the association is exempt, the activity receiving the initial request will protect the association and any exempt information without revealing the identity of the protected activity. The protected activity shall be responsible for submitting the justifications required in any litigation.

d. Any DON activity receiving a request that has been misaddressed shall refer the request to the proper address and advise the requester. DON activities making referrals of requests or records shall include with the referral, a point of contact by name, a telephone number (commercial and DSN), and an e-mail address (if available).

e. A DON activity shall refer a FOIA request for a record that it holds but was originated by another Executive Branch agency, to them for a release determination and direct response to the requester. The requester shall be informed of the referral, unless it has been determined that notification would reveal exempt information. Referred records shall only be identified to the extent consistent with security requirements.

f. A DON activity may refer a request for a record that it originated to another activity or agency when the activity or agency has a valid interest in the record, or the record was created for the use of the other agency or activity. In such situations, provide the record and a release recommendation on the record with the referral action. DON activities should include a point of contact and telephone number in the referral letter. If that organization is to respond directly to the requester, apprise the requester of the referral.

g. Within the DON/DoD, a DON activity shall ordinarily refer a FOIA request and a copy of the record it holds, but that was originated by another DON/DoD activity or that contains substantial information obtained from that activity, to that activity for direct response, after direct coordination and obtaining concurrence from the activity. The requester shall be notified of such referral. In any case, DON activities shall not release or deny such records without prior consultation with the activity, except as provided in paragraph 12c.

h. Activities receiving a referred request shall place it in the appropriate processing queue based on the date it was initially received by the referring activity/agency.

i. Agencies outside the DON that are subject to the FOIA

(1) A DON activity may refer a FOIA request for any record that originated in an agency outside the DON or that is based on information obtained from an outside agency to the agency for direct response to the requester after coordination with the outside agency, if that agency is subject to FOIA. Otherwise, the DON activity must respond to the request. (Note: DON activities shall not refer documents originated by entities outside the Executive Branch of Government (e.g., Congress, State and local government agencies, police departments, private citizen correspondence, etc.), to them for action and direct response to the requester, since they are not subject to the FOIA).

(2) A DON activity shall refer to the agency that provided the record any FOIA request for investigative, intelligence, or any other type of records that are on loan to the DON for a specific purpose, if the records are restricted from further release and so marked. However, if for investigative or intelligence purposes, the outside agency desires anonymity, a DON activity may only respond directly to the requester after coordination with the outside agency.

13. Processing Requests Received from Governmental Officials

a. Members of Congress. Many constituents seek access to information through their Member of Congress. Members of Congress who seek access to records on behalf of their constituent are provided the same information that the constituent would be entitled to receive. There is no need to verify that the individual has authorized the release of his/her

record to the Congressional member, since the Privacy Act's "blanket routine use" for Congressional inquiries applies.

b. Privileged Release to U.S. Government Officials. DON records may be authenticated and released to U.S. Government officials if they are requesting them in their official capacity on behalf of Federal governmental bodies, whether legislative, executive, administrative, or judicial. To ensure adequate protection of these documents, DON activities shall inform officials receiving records under the provisions of this subparagraph that those records are exempt from public release under FOIA. DON activities shall also mark the records as "Privileged" and "Exempt from Public Disclosure" and annotate any special handling instructions on the records. Because such releases are not made under the provisions of the FOIA, they do not impact on future decisions to release/deny requests for the same records to other requesters. Examples of privileged releases are:

(1) In response to a request from a Committee or Subcommittee of Congress, or to either House sitting as a whole.

(2) To the Federal Courts, whenever ordered by officers of the court as necessary for the proper administration of justice.

(3) To other Federal agencies, both executive and administrative, as determined by the head of a DON activity or designee.

c. State or Local Government Officials. Requests from State or local government officials for DON records are treated the same as any other requester.

d. Non-FOIA Requests from Foreign Governments. Requests from foreign governments that do not invoke the FOIA shall be referred to the appropriate foreign disclosure channels and the requester so notified. See paragraph 14c regarding processing FOIA requests from foreign governments and/or their officials.

14. <u>Processing Specific Kinds of Records</u>. DON activities that possess copies or receive requests for the following kinds of records shall promptly forward the requests to the officials named below and if appropriate apprise the requester of the referral:

a. Classified Records. Executive Order 12,958 governs the classification of records.

(1) Glomar Response. In the instance where a DON activity receives a request for records whose existence or nonexistence is itself classifiable, the DON activity shall refuse to confirm or deny the existence or non-existence of the records. This response is only effective as long as it is given consistently. If it were to be known that an agency gave a "Glomar" response only when records do exist and gave a "no records" response otherwise, then the purpose of this approach would be defeated. A Glomar response is a denial and exemption (b)(1) is cited and appeal rights are provided to the requester.

(2) Processing classified documents originated by another activity. DON activities shall refer the request and copies of the classified documents to the originating activity for processing. If the originating activity simply compiled the classified portions of the document from other sources, it shall refer, as necessary, those portions to the original classifying authority for their review and release determination and apprise that authority of any recommendations they have regarding release. If the classification authority for the information cannot be determined, then the originator of the compiled document has the responsibility for making the final determination. Records shall be identified consistent with security requirements. Only after consultation and approval from the originating activity, shall the requester be apprised of the referral. In most cases, the originating activity will make a determination and respond directly to the requester. In those instances where the originating activity determines a Glomar response is appropriate, the referring agency shall deny the request.

b. Courts-Martial Records of Trial. The release/denial authority for these records is the Office of the Judge Advocate General (Code 20), Washington Navy Yard, Building 111, Washington, DC 20374-1111. Promptly refer the request and/or documents to this activity and apprise the requester of the referral.

c. Foreign Requests/Information

(1) FOIA requests received from foreign governments/ foreign government officials should be processed as follows:

(a) When a DON activity receives a FOIA request for a record in which an affected DoD/DON activity has a substantial interest in the subject matter, or the DON activity receives a FOIA request from a foreign government, a foreign citizen, or an individual or entity with a foreign address, the DON activity receiving the request shall provide a copy of the request to the affected DON activity.

(b) Upon receiving the request, the affected activity shall review the request for host nation relations, coordinate with Department of State as appropriate, and if necessary, provide a copy of the request to the appropriate foreign disclosure office for review. Upon request by the affected activity, the DON activity receiving the initial request shall provide a copy of releasable records to the affected activity. The affected activity may further release the records to its host nation after coordination with Department of State if release is in the best interest of the United States Government. If the record is released to the host nation government, the affected DON activity shall notify the DON activity which initially received the request of the release to the host nation.

(c) Such processing must be done expeditiously so as not to impede the processing of the FOIA request by the DON activity that initially received the request.

(2) Non-U.S. Government Records (i.e., records originated by multinational organizations such as the North Atlantic Treaty Organization (NATO), the North American Air Defense (NORAD) and foreign governments which are under the possession and control of DON shall be coordinated prior to a final release determination being made. Coordination with foreign governments shall be made through the Department of State.

d. Government Accounting Office (GAO) Documents

(1) On occasion, the DON receives FOIA requests for GAO documents containing DON information, either directly from requesters or as referrals from GAO. Since the GAO is outside of the Executive Branch and therefore not subject to FOIA, all FOIA requests for GAO documents containing DON information will be processed by the DON under the provisions of the FOIA.

(2) In those instances when a requester seeks a copy of an unclassified GAO report, DON activities may apprise the requester of its availability from the Director, GAO Distribution Center, ATTN: DHISF, P.O. Box 6015, Gaithersburg, MD 20877-1450 under the cash sales program.

e. Judge Advocate General Manual (JAGMAN) Investigative Records. These records are no longer centrally processed. Accordingly, requests for investigations should be directed to the following officials:

(1) JAGMAN Investigations conducted prior to 1 Jul 95 - to the Judge Advocate General (Code 35), Washington Navy Yard, Suite 3000, 1322 Patterson Avenue, SE, Washington, DC 20374-5066.

(2) Command Investigation - to the command that conducted the investigation.

(3) Litigation-Report Investigation - to the Judge Advocate General (Code 35), Washington Navy Yard, Suite 3000, 1322 Patterson Avenue, SE, Washington, DC 20374-5066.

(4) Court or Board of Inquiry - to the Echelon 2 commander over the command that convened the investigation.

f. Mailing Lists. Numerous FOIA requests are received for mailing lists of home addresses or duty addresses of DON personnel. Processing of such requests is as follows:

(1) Home addresses are normally not releasable without the consent of the individuals concerned. This includes lists of home addresses and military quarters' addresses without the occupant's name [i.e., exemption (b)(6) applies].

(2) Disclosure of lists of names and duty addresses or duty telephone numbers of persons assigned to units that are stationed in foreign territories, routinely deployable, or sensitive, has also been held by the courts to constitute a clearly unwarranted invasion of personal privacy and must be withheld from disclosure under 5 U.S.C. 552(b)(6). General officers and public affairs officers information is releasable. Specifically, disclosure of such information poses a security threat to those service members because it reveals information about their degree of involvement in military actions in support of national policy, the type of Navy and/or Marine Corps units to which they are attached, and their presence or absence from

households. Release of such information aids in the targeting of service members and their families by terrorists or other persons opposed to implementation of national policy. Only an extraordinary public interest in disclosure of this information can outweigh the need and responsibility of the DON to protect the tranquility and safety of service members and their families who repeatedly have been subjected to harassment, threats, and physical injury. Units covered by this policy are:

(a) Those located outside of the 50 States, District of Columbia, Commonwealth of Puerto Rico, Guam, U.S. Virgin Islands, and American Samoa.

(b) Routinely deployable units - Those units that normally deploy from homeport or permanent station on a periodic or rotating basis to meet operational requirements or participate in scheduled exercises. This includes routinely deployable ships, aviation squadrons, operational staffs, and all units of the Fleet Marine Force (FMF). Routinely deployable units do not include ships undergoing extensive yard work or those whose primary mission is support of training, e.g., yard craft and auxiliary aircraft landing training ships.

(c) Units engaged in sensitive operations. Those primarily involved in training for or conduct of covert, clandestine, or classified missions, including units primarily involved in collecting, handling, disposing, or storing of classified information and materials. This also includes units engaged in training or advising foreign personnel. Examples of units covered by this exemption are nuclear power training facilities, SEAL Teams, Security Group Commands, Weapons Stations, and Communications Stations.

(3) Except as otherwise provided, lists containing names and duty addresses of DON personnel, both military and civilian, who are assigned to units in the Continental United States (CONUS) and U.S. territories shall be released regardless of who has initiated the request.

(4) Exceptions to this policy must be coordinated with CNO (N09B30) or CMC (ARAD) prior to responding to requests, including those from Members of Congress. The foregoing policy should be considered when weighing the releasability of the address or telephone number of a specifically named individual.

(5) DON activities are reminded that e-mail addresses that identify an individual who is routinely deployable,

overseas, or assigned to a sensitive unit should not be made available. Additionally, organizational charts for these kinds of units and activities that identify specific members should not be placed on the Internet.

g. Medical Quality Assurance Documents. The Chief, Bureau of Medicine and Surgery (BUMED) is the release/denial authority for all naval medical quality assurance documents as defined by Title 10, United States Code, Section 1102. Requests for medical quality assurance documents shall be promptly referred to BUMED and the requester notified of the referral.

h. Mishap Investigation Reports (MIRs). The Commander, Naval Safety Center (NAVSAFECEN) is the release/denial authority for all requests for mishap investigations or documents which contain mishap information. All requests or documents located which apply shall be promptly referred to the Commander, Naval Safety Center, Code 503, 375 A Street, Norfolk, VA 23511-4399 for action. Telephonic liaison with NAVSAFECEN is encouraged. The requester shall be notified of the referral.

i. National Security Council (NSC)/White House

(1) DON activities that receive requests for records of NSC, the White House, or the White House/Military Office (WHMO) shall process the requests.

(2) DON records in which the NSC or the White House has a concurrent reviewing interest, and NSC, White House, or WHMO records discovered in DON activity files, shall be forwarded to CNO (N09B30), 2000 Navy Pentagon, Washington, DC 20350-2000. N09B30, in turn, will coordinate the request directly with DFOISR, so DFOISR can coordinate the request with NSC, White House, or WHMO. After coordination, the records will be returned to the DON activity for their direct response to the requester. During the interim, DON activities should notify the requester that they are coordinating their request and a response will therefore be delayed.

j. Naval Attache Documents/Information. The Director, Defense Intelligence Agency (DIA) has the responsibility for reviewing for release/denial any naval attache-originated documents/information. Accordingly, FOIA requests for naval attache documents or copies of the documents located in DON files or referred in error to a DON activity shall be promptly referred to the Chief, Freedom of Information Act Staff, Defense Intelligence Agency (SVI-1), Washington, DC 20340-5100 for

action and direct response to the requester. Please ensure that the requester is notified in writing of the transfer to DIA.

k. Naval Audit Service Reports. The Director, Naval Audit Service is the release/denial authority for their reports. All requests or documents located which apply shall be promptly referred to the Director, Naval Audit Service, 5611 Columbia Pike, NASSIF Building, Falls Church, VA 22041-5080 for action. The requester shall be notified of the referral.

l. Naval Criminal Investigative Service (NCIS) Reports. The Director, NCIS is the release/denial authority for all NCIS reports/information. All requests for and copies of NCIS reports located in DON activity files shall be promptly referred to the Director, NCIS (Code OOJF), Washington Navy Yard, Building 111, 716 Sicard Street, SE, Washington, DC 20388-5380 for action and, if appropriate, the requester so notified. Telephonic liaison with NCIS Headquarters is strongly encouraged.

m. Naval Inspector General (NAVINSGEN) Reports

(1) NAVINSGEN is the release/denial authority for all investigations and inspections conducted by or at the direction of NAVINSGEN and for any records held by any command that relate to Navy hotline complaints that have been referred to the NAVINSGEN. Accordingly, such actions shall be promptly referred to the Naval Inspector General (Code OOL), Building 200, Room 100, Washington Navy Yard, 901 M Street, SE, Washington, DC 20374-5006 for action and, if appropriate, the requester so notified.

(2) Requests for local command inspector general reports which have not been referred to NAVINSGEN should be processed by the command that conducted the investigation and NAVINSGEN advised as necessary.

(3) The Deputy Naval Inspector General for Marine Corps Matters (DNIGMC) is the release/denial authority for all investigations conducted by the DNIGMC. Requests for local Marine Corps command Inspector General reports shall be coordinated with the DNIGMC.

n. Naval Nuclear Propulsion Information (NNPI). The Director, Naval Nuclear Propulsion Program [CNO (NOONB)/NAVSEA (08)] is the release/denial authority for all information and requests concerning NNPI. Naval activities receiving such

requests are responsible for searching their files for responsive records. If no documents are located, the naval activity shall respond to the requester and provide CNO (NOONB) with a copy of the request and response. If documents are located, the naval activity shall refer the request, responsive documents, and a recommendation regarding release to the Director, Naval Nuclear Propulsion Program (NOONB), 2000 Navy Pentagon, Washington, DC 20350-2000, who will make the final release determination to the requester, after coordinating the release through DoD activities.

o. Naval Telecommunications Procedures (NTP) Publications. The Commander, Naval Computer and Telecommunications Command is the release/denial authority for NTP publications. All requests or documents located which apply shall be promptly referred to the Commander, Naval Computer and Telecommunications Command (Code NOOJ), 4401 Massachusetts Avenue, NW, Washington, DC 20394-5460 for action and direct response to the requester.

p. News Media Requests

(1) Respond promptly to requests received from news media representatives through public information channels, if the information is releasable under FOIA. This eliminates the requirement to invoke FOIA and may result in timely information being made available to the public.

(2) In those instances where records/information are not releasable, either in whole or in part, or are not currently available for a release consideration, Public Affairs Officers shall promptly advise the requester of where and how to submit a FOIA request.

(3) DON activities receiving and processing requests from members of the press shall ensure that responses are cleared through their public affairs channels.

q. Records Originated by Other Government Agencies

(1) A DON activity may refer a FOIA request for any record that originated in an agency outside the DON or that is based on information obtained from an outside agency to the cognizant agency for direct response to the requester after coordination with the outside agency, if that agency is subject to FOIA. Otherwise, the DON activity must respond to the request.

(2) A DON activity shall refer to the agency that provided the record any FOIA request for investigative, intelligence, or any other type of records that are on loan to the DON for a specific purpose, if the records are restricted from further release and so marked. However, if for investigative or intelligence purposes, the outside agency desires anonymity, a DON activity may only respond directly to the requester after coordination with the outside agency.

r. Submitter Documents

(1) When a request is received for a record containing confidential commercial information that was submitted to the Government, the requirements of E.O. 12600 shall apply. Specifically, the submitter shall be notified of the request (telephonically, by letter, or by facsimile) and afforded a reasonable amount of time (anywhere from 2 weeks to a month depending on the circumstances) to present any objections concerning release, unless it is clear there can be no valid basis for objection. For example, the record was provided with actual or presumptive knowledge of the submitter that it would be made available to the public upon request.

(2) The DON activity will evaluate any objections and negotiate with the submitter as necessary. When a substantial issue has been raised, the DON activity may seek additional information from the submitter and afford the submitter and requester reasonable opportunities to present their arguments in legal and substantive issues prior to making an agency determination.

(3) The final decision to disclose information claimed to be exempt under exemption (b)(4) shall be made by an official at least equivalent in rank to the IDA and the submitter advised that he or she may seek a restraining order or take court action to prevent the release. The submitter is given 10 days to take action.

(4) Should the submitter take such action, the requester will be notified and no action will be taken on the request until the outcome of the court action is known.

s. Technical Documents Controlled by Distribution Statements B, C, D, E, F, or X shall be referred to the controlling DoD office for review and release determination.

15. FOIA Appeals/Litigation

a. Appellate Authorities. SECNAV has delegated his appellate authority to the JAG and the DONGC to act on matters under their cognizance. Their responsibilities include adjudicating appeals made to SECNAV on: denials of requests for copies of DON records or portions thereof; disapproval of a fee category claim by a requester; disapproval of a request to waive or reduce fees; disputes regarding fee estimates; reviewing determinations not to grant expedited access to agency records, and reviewing "no record" determinations when the requester considers such responses adverse in nature. They have the authority to release or withhold records, or portions thereof; to waive or reduce fees; and to act as required by SECNAV for appeals under reference (a) and this instruction. The JAG has further delegated this appellate authority to the Assistant Judge Advocate General (Civil Law). The DONGC has further delegated this appellate authority to the Principal Deputy General Counsel, the Deputy General Counsel, and the Associate General Counsel (Management).

(1) In their capacity, appellate authorities will serve as principal points of contact on DON FOIA appeals and litigation; receive and track FOIA appeals and ensure responses are made in compliance with references (a), (b), (c) and this instruction; complete responsive portions of the Annual FOIA Report that addresses actions on appeals and litigation costs during the fiscal year and submit to CNO (N09B30); provide CNO (N09B30) with a copy of all appeal determinations as they are issued; and keep CNO (N09B30) informed in writing of all FOIA lawsuits as they are filed against the DON. Appellate authorities shall facsimile a copy of the complaint to CNO (N09B30) for review and provide updates to CNO (N09B30) to review and disseminate to DFOISR.

(2) OGC's cognizance: Legal advice and services to SECNAV and the Civilian Executive Assistants on all matters affecting DON; legal services in subordinate commands, organizations, and activities in the areas of business and commercial law, real and personal property law, intellectual property law, fiscal law, civilian personnel and labor law, environmental law, and in coordination with the JAG, such other legal services as may be required to support the mission of the Navy and the Marine Corps, or the discharge of the General Counsel's responsibilities; and conducting litigation involving the areas enumerated above and oversight of all litigation affecting the DON.

(3) JAG's cognizance: In addition to military law, all matters except those falling under the cognizance of the DONGC.

b. Appellants may file an appeal if they have been denied information in whole or in part; have been denied a waiver or reduction of fees; have been denied/have not received a response within 20 working days; or received a "no record" response or wish to challenge the "adequacy of a search" that was made. Appeal procedures also apply to the disapproval of a fee category claim by a requester, disputes regarding fee estimates, review of an expedited basis determination not to grant expedited access to agency records, or any determination found to be adverse in nature by the requester.

c. Action by the Appellate Authority

(1) Upon receipt, JAG (34) or Assistant to the General Counsel (FOIA) will promptly notify the IDA of the appeal. In turn, the IDA will provide the appellate authority with the following documents so that a determination can be made: a copy of the request, responsive documents both excised and unexcised, a copy of the denial letter, and supporting rationale for continued withholding. IDAs shall respond to the appellate authority within 10 working days.

(2) Final determinations on appeals normally shall be made within 20 working days after receipt. When the appellate authority has a significant number of appeals preventing a response determination within 20 working days, the appeals shall be processed in a multitrack processing system based, at a minimum, on the three processing tracks established for initial requests.

(3) If tne appeal is received by the wrong appellate authority, the time limits do not take effect until it is received by the right one. If, however, the time limit for responding cannot be met, the appellate authority shall advise the appellant that he/she may consider his/her administrative remedies exhausted. However, he/she may await a substantive response without prejudicing his/her right of judicial remedy. Nonetheless, the appellate authority will continue to process the case expeditiously, whether or not the appellant seeks a court order for release of records. In such cases, to copy of the response will be provided to the Department of Justice (DOJ).

d. Addresses for Filing Appeals:

(1) General Counsel of the Navy, Bldg 36, Washington Navy Yard, 901 M Street SE, Washington, DC 20374-5012, or

(2) Judge Advocate General, Washington Navy Yard, 1322 Patterson Avenue, SE, Suite 3000, Washington, DC 20374-5066.

e. Appeal Letter Requirements. The appellant shall file a written appeal with the cognizant appellate authority (i.e., DONGC or JAG). The appeal should include a copy of the DON response letter and supporting rationale on why the appeal should be granted.

f. Consultation/Coordination

(1) The Special Assistant for Naval Investigative Matters and Security [CNO (N09N)] may be consulted to resolve inconsistencies or disputes involving classified records.

(2) Direct liaison with officials within DON and other interested Federal agencies is authorized at the discretion of the appellate authority, who also coordinates with appropriate DoD and DOJ officials.

(3) SECNAV, appropriate Assistant or Deputy Assistant Secretaries, and CNO (N09B30) shall be consulted and kept advised of cases with unusual implications. CHINFO shall be consulted and kept advised on cases involving public affairs implications.

(4) Final refusal involving issues not previously resolved or that the DON appellate authority knows to be inconsistent with rulings of other DoD components ordinarily should not be made before consultation with the DoD Office of General Counsel (OGC).

(5) Tentative decisions to deny records that raise new and significant legal issues of potential significance to other agencies of the Government shall be provided to the DoD OGC.

g. Copies of Final Appeal Determinations. Appellate authorities shall provide copies of final appeal determinations to the activity affected and to CNO (N09B30) as appeals are decided.

h. Denying an Appeal. The appellate authority must render his/her decision in writing with a full explanation as to why the appeal is being denied along with a detailed explanation of the basis for refusal with regard to the applicable statutory exemption(s) invoked. With regard to denials involving classified information, the final refusal should explain that a declassification review was undertaken and based on the governing Executive Order and implementing security classification guides (identify the guides), the information cannot be released and that information being denied does not contain meaningful portions that are reasonably segregable. In all instances, the final denial letter shall contain the name and position title of the official responsible for the denial and advise the requester of the right to seek judicial review.

i. Granting an Appeal. The appellate authority must render his/her decision in writing. When an appellate authority makes a determination to release all or a portion of records withheld by an IDA, a copy of the releasable records should be promptly forwarded to the requester after compliance with any procedural requirements, such as payment of fees.

j. Processing Appeals Made Under PA and FOIA. When denials have been made under the provisions of PA and FOIA, and the denied information is contained in a PA system of records, the appeal shall be processed under both PA and FOIA. If the denied information is not maintained in a PA system of records, the appeal shall be processed under FOIA.

k. Response Letters

(1) When an appellate authority makes a final determination to release all or a portion of records withheld by an IDA, a written response and a copy of the records so released should be forwarded promptly to the requester after compliance with any preliminary procedural requirements, such as payment of fees.

(2) Final refusal of an appeal must be made in writing by the appellate authority or by a designated representative. The response at a minimum shall include the following:

(a) The basis for the refusal shall be explained to the requester in writing, both with regard to the applicable statutory exemption or exemptions invoked under the provisions of the FOIA, and with respect to other issues appealed for which an adverse determination was made.

(b) When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive Order, and that this determination is based on a declassification review, with the explanation of how that review confirmed the continuing validity of the security classification.

(c) The final denial shall include the name and title or position of the official responsible for the denial.

(d) In the case of appeals for total denial of records, the response shall advise the requester that the information being denied does not contain meaningful portions that are reasonably segregable.

(e) When the denial is based upon an exemption (b)(3) statute, the response, in addition to citing the statute relied upon to deny the information, shall state whether a court has upheld the decision to withhold the information under the statute, and shall contain a concise description of the scope of the information withheld.

(f) The response shall advise the requester of the right to judicial review.

1. Time Limits/Requirements

(1) A FOIA appeal has been received by a DON activity when it reaches the appellate authority having jurisdiction. Misdirected appeals should be referred expeditiously to the proper appellate authority.

(2) The requester shall be advised to file an appeal so that it is postmarked no later than 60 calendar days after the date of the initial denial letter. If no appeal is received, or if the appeal is postmarked after the conclusion of the 60 day period, the case may be considered closed. However, exceptions may be considered on a case-by-case basis.

(3) In cases where the requester is provided several incremental determinations for a single request, the time for the appeal shall not begin until the date of the final response. Requests and responsive records that are denied shall be retained for a period of 6 years to meet the statute of limitations requirement.

(4) Final determinations on appeals normally shall be made within 20 working days after receipt. When a DON appellate authority has a significant number of appeals preventing a response determination within 20 working days, the appeals shall be processed in a multitrack processing system, based at a minimum on the three processing tracks established for initial requests. [See paragraph 11f(2)].

(5) If additional time is needed due to unusual circumstances, the final decision may be delayed for the number of working days (not to exceed 10) that were not used as additional time for responding to the initial request.

(6) If a determination cannot be made and the requester notified within 20 working days, the appellate authority shall acknowledge to the requester, in writing, the date of receipt of the appeal, the circumstances surrounding the delay, and the anticipated date for substantive response. Requesters shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances, they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of judicial remedy, await a substantive response. The appellate authority shall continue to process the case expeditiously.

(m) FOIA litigation: The appellate authority is responsible for providing CNO (N09B30) with a copy of any FOIA litigation filed against the DON and any subsequent status of the case. CNO (N09B30) will, in turn, forward a copy of the complaint to DFOISR for their review.

16. Annual FOIA Report

a. Background. The Annual FOIA Report is compiled on a fiscal year basis (1 October through 30 September).

b. DON activities shall use enclosure (5) for FOIA fee/time computations and enclosure (6) for technical data fee/time computations.

c. The Report Control System (RCS) for this report is DD-DA&M(A)1365(5720). A copy of DD 2564 and the Annual FOIA Report Instructions are provided at enclosures (7) and (8).

d. Enclosures (9) and (10) are provided for use in compiling the Annual FOIA Report. The DoD Composite Rate Schedule, which is used to compute military personnel costs, is

published annually and will be posted on the Navy FOIA website for use in compiling statistics.

e. Report dates. CNO (N09B30) is required to submit the consolidated DON report to DFOISR by 30 November of each year. To facilitate the compilation and analysis of the DON feeder reports, the following schedule is established:

(1) By 25 October of each year: IDAs subordinate to CMC and Echelon 2 commands will submit their feeder reports on DD 2564 to CMC or the Echelon 2 command (as applicable). The report may be faxed. At the discretion of the Echelon 2 command, negative responses may be submitted verbally, by fax, or e-mail.

(2) By 10 November of each year: CMC (ARAD), Echelon 2, JAG, and OGC will submit their consolidated reports on DD 2564 for their headquarters and subordinate activities to CNO (N09B30). The report may be faxed. (NOTE: items 3 and 4 will be responded to by the appellate authorities: JAG and DONGC.)

(3) Exempt from reporting. Units afloat and aviation squadrons who have not received or responded to any FOIA requests during the reporting period are exempt from reporting. Negative reports are not required.

f. Electronic Publication. The consolidated DON Annual FOIA Report will be made available to the public in either paper or electronic format. The electronic format will be posted on the Navy FOIA website. DON activities may place their individual FOIA report submission on their website.

17. Education and Training

a. CNO (N09B30), CMC (ARAD), JAG, OGC, and Echelon 2 FOIA coordinators are responsible for ensuring their personnel have a general understanding and appreciation of the DON FOIA Program. The purpose of educational and training programs is to promote a positive attitude among DON personnel and raise the level of understanding and appreciation of the DON FOIA Program, thereby improving the interaction with members of the public and improving the public trust in DON. Training programs should be designed to fit the particular requirements of personnel and dependent upon their degree of involvement in the implementation of this instruction. The program should be designed to accomplish the following objectives:

(1) Familiarize personnel with the requirements of the FOIA and its implementation by this instruction;

(2) Instruct personnel who act in FOIA matters concerning the provisions of this instruction, advising them of the legal hazards involved and the strict prohibition against arbitrary and capricious withholding of information;

(3) Provide for the procedural and legal guidance and instruction, as may be required, in the discharge of the responsibilities of initial denial and appellate authorities; and,

(4) Apprise personnel of the penalties of noncompliance with the FOIA.

b. FOIA coordinators must initially receive specialized training on the FOIA. Thereafter, it is recommended they attend yearly updates to keep abreast of the changes to the FOIA program. Training is available from both government and non-governmental sources. Consult the Navy FOIA website for a current schedule of available training, training sources, yearly updates, and sample training packages.

c. Coordinate with CNO (N09B30) and CMC (ARAD), as appropriate, to avoid duplication and to obtain maximum distribution and effectiveness. CNO (N09B30) and CMC (ARAD) are available to assist in coordinating, formulating, providing, or identifying FOIA training sources.

d. Resource materials

(1) The Navy FOIA website has downloadable training materials.

(2) "Freedom of Information Act Guide and Privacy Act Overview" published annually by DOJ, provides an in-depth analysis of the FOIA supported by case law. See Navy FOIA website.

(3) "FOIA Update" is a quarterly newsletter published by the DOJ which addresses major FOIA issues, has a "Questions and Answers" column, and highlights upcoming training. This publication is available on the DOJ FOIA website, which is linked from the Navy FOIA website.

18. **Records Retention**. FOIA records are maintained by fiscal year and are not permanent records. Reference (g) [See Standard Subject Identification Code (SSIC) 5720] sets forth the approved records disposal schedule for FOIA records.

19. **Action**

a. Echelon 2 Commands and Headquarters Marine Corps: Within 180 days, issue a supplementing instruction that implements this instruction. The supplementing instruction need not duplicate the SECNAVINST, but rather highlight those matters unique to the activity (i.e., designate the activity's FOIA Coordinator, highlight activity processing procedures and reporting requirements, address FOIA fee remittance and receipt procedures, etc.).

b. All Addressees: Designate a FOIA coordinator who has responsibility for the FOIA program. Ensure his/her name, complete mailing address, telephone and fax numbers (commercial and DSN) are provided to the Echelon 2 or CMC (ARAD) FOIA manager. Echelon 2 and CMC (ARAD) shall ensure that addresses for their FOIA offices are posted on their FOIA websites. [Note: For individuals overseas, routinely deployable, or in sensitive units, list "FOIA Coordinator" in place of the name.]

20. **Report and Forms**

a. The Annual FOIA Report is assigned report control symbol DD-PA(A)1365 (5720) and is approved per SECNAVINST 5214.2B. Because the report is mandated by statute, DON activities shall continue collecting statistics until notification that the report has been eliminated.

b. DD 2086, Record of Freedom of Information (FOI) Processing Cost, Jul 1997, enclosure (5); DD 2086-1, Record of Freedom of Information Act (FOI) Processing Cost for Technical Data, Jul 1997, enclosure (6); DD 2564, Annual Report Freedom of Information Act, Aug 1998, enclosure (7); FOIA Case Worksheet, enclosure (9); and Annual Report Compilation Worksheet,

enclosure (10) are downloadable from the Navy FOIA website and may be locally reproduced.

Richard Danzig
Secretary of the Navy

Distribution:
SNDL Parts 1 and 2
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FOIA DEFINITIONS AND TERMS

1. **(a)(1) Materials.** Section (a)(1) of the FOIA requires publication in the Federal Register of descriptions of agency organizations, functions, substantive rules, and statements of general policy.

2. **(a)(2) Materials.** Section (a)(2) of the FOIA requires that certain materials routinely be made available for public inspection and copying. The (a)(2) materials are commonly referred to as "reading room" materials and are required to be indexed to facilitate public inspection. (a)(2) materials consist of:

a. (a)(2)(A) records. Final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases, as defined in 5 U.S.C. 551, that may be cited, used, or relied upon as precedents in future adjudications.

b. (a)(2)(B) records. Statements of policy and interpretations that have been adopted by the agency and **are not** published in the Federal Register.

c. (a)(2)(C) records. Administrative staff manuals and instructions, or portions thereof, that establish DON policy or interpretations of policy that affect a member of the public. This provision does not apply to instructions for employees on tactics and techniques to be used in performing their duties, or to instructions relating only to the internal management of the DON activity. Examples of manuals and instructions not normally made available are:

(1) Those issued for audit, investigation, and inspection purposes, or those that prescribe operational tactics, standards of performance, or criteria for defense, prosecution, or settlement of cases.

(2) Operations and maintenance manuals and technical information concerning munitions, equipment, systems, and foreign intelligence operations.

d. (a)(2)(D) records. Those (a)(3) records, which because of the nature of the subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records. These records are referred to as FOIA-processed (a)(2) records. DON activities shall decide on a case-by-case basis whether records fall into this category based

on the following factors: previous experience of the DON activity with similar records; particular circumstances of the records involved, including their nature and the type of information contained in them; and/or the identity and number of requesters and whether there is widespread press, historic, or commercial interest in the records.

(1) This provision is intended for situations where public access in a timely manner is important and it is not intended to apply where there may be a limited number of requests over a short period of time from a few requesters. DON activities may remove the records from this access medium when the appropriate officials determine that access is no longer necessary.

(2) Should a requester submit a FOIA request for FOIA-processed (a)(2) records and insist that the request be processed under FOIA, DON activities shall process the FOIA request. However, DON activities have no obligation to process a FOIA request for (a)(2)(A), (B) and (C) records because these records are required to be made public and not FOIA-processed under paragraph (a)(3) of the FOIA.

e. However, agency records that are withheld under FOIA from public disclosure, based on one or more of the FOIA exemptions, do not qualify as (a)(2) materials and need not be published in the Federal Register or made available in a library reading room.

3. **(a)(3) Materials.** Agency records which are processed for release under the provisions of the FOIA.

4. **Administrative Appeal.** A request made by a FOIA requester asking the appellate authority (JAG or OGC) to reverse a decision to: withhold all or part of a requested record; deny a fee category claim by a requester; deny a request for expedited processing due to demonstrated compelling need under paragraph 6g of this instruction; deny a request for a waiver or reduction of fees; deny a request to review an initial fee estimate; and confirm that no records were located during the initial search. FOIA requesters may also appeal a non-response to a FOIA request within the statutory time limits.

5. **Affirmative Information Disclosure.** This is where a DON activity makes records available to the public on its own initiative. In such instance, the DON activity has determined in advance that a certain type of records or information is

likely to be of such interest to members of the public, and that it can be disclosed without concern for any FOIA exemption sensitivity. Affirmative disclosures can be of mutual benefit to both the DON and the members of the public who are interested in obtaining access to such information.

6. **Agency Record.** Agency records are either created or obtained by an agency and under agency control at the time of the FOIA request. Agency records are stored as various kinds of media, such as:

a. Products of data compilation (all books, maps, photographs, machine readable materials, inclusive of those in electronic form or format, or other documentary materials), regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law in connection with the transaction of public business and in Department of the Navy possession and control at the time the FOIA request is made.

b. Care should be taken not to exclude records from being considered agency records, unless they fall within one of the following categories:

(1) Objects or articles, such as structures, furniture, paintings, three-dimensional models, vehicles, equipment, parts of aircraft, ships, etc., whatever their historical value or value as evidence.

(2) Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

(3) Personal records of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use. Personal papers fall into three categories. those created before entering Government service; private materials brought into, created, or received in the office that were not created or received in the course of transacting Government business, and work-related personal papers that are not used in the transaction of Government business.

(4) A record must exist and be in the possession and control of the DON at the time of the request to be considered subject to this instruction and the FOIA. There is no

obligation to create, compile, or obtain a record to satisfy a FOIA request.

(5) Hard copy or electronic records, which are subject to FOIA requests under 5 U.S.C. 552(a)(3), and which are available to the public through an established distribution system, or through the Federal Register, the National Technical Information Service, or the Internet, normally need not be processed under the provisions of the FOIA. If a request is received for such information, DON activities shall provide the requester with guidance, inclusive of any written notice to the public, on how to obtain the information. However, if the requester insists that the request be processed under the FOIA, then process the request under FOIA.

7. Appellate Authority. SECNAV has delegated the OGC and JAG to review administrative appeals of denials of FOIA requests on his behalf and prepare agency paperwork for use by the DOJ in defending a FOIA lawsuit. JAG is further authorized to delegate this authority to a designated Assistant JAG. The authority of OGC is further delegated to the Principal Deputy General Counsel, the Deputy General Counsel, and the Associate General Counsel (Management).

8. Discretionary Disclosure. The decision to release information that could qualify for withholding under a FOIA exemption, but upon review the determination has been made that there is no foreseeable harm to the Government for releasing such information. Discretionary disclosures do not apply to exemptions (b)(1), (b)(3), (b)(4), (b)(6) and (b)(7)(C).

9. Electronic Record. Records (including e-mail) which are created, stored, and retrieved by electronic means.

10. Exclusions. The FOIA contains three exclusions (c)(1), (c)(2) and (c)(3) which expressly authorize Federal law enforcement agencies for especially sensitive records under certain specified circumstances to treat the records as not subject to the requirements of the FOIA.

11. Executive Order (E.O.) 12,958. Replaced E.O. 12,356 on October 14, 1995 and is the basis for claiming that information is currently and properly classified under (b)(1) exemption of the FOIA. It sets forth new requirements for classifying and declassifying documents. It recognizes both the right of the public to be informed about the activities of its government and the need to protect national security information from unauthorized or untimely disclosure.

12. **Federal Agency**. A Federal agency is any executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

13. **5 U.S.C. 552, Freedom of Information Act (FOIA)**. An access statute that pertains to agency records of the Executive Branch of the Federal Government, including the Executive Office of the President and independent regulatory agencies. (Note: Records maintained by State governments, municipal corporations, by the courts, by Congress, or by companies and private citizens do not fall under this Federal statute).

14. **FOIA Exemptions**. There are nine exemptions that identify certain kinds of records/information that qualify for withholding under FOIA. See enclosure (4) for a detailed explanation of each exemption.

15. **FOIA Fee Definitions**. See enclosure (3).

16. **FOIA Request**. A written request for DON records, made by "any person" including a member of the public (U.S. or foreign citizen/entity), an organization, or a business, but not including a Federal agency or a fugitive from the law that either explicitly or implicitly invokes references (a), (b), (c), and/or this instruction. FOIA requests can be made for any purpose whatsoever, with no showing of relevancy required. Because the purpose for which records are sought has no bearing on the merits of the request, FOIA requesters do not have to explain or justify their requests. Written requests may be received by postal service or other commercial delivery means, by facsimile or electronically.

17. **Glomar Response**. Refusal by the agency to either confirm or deny the existence or non-existence of records responsive to a FOIA request. See exemptions (b)(1), (b)(6), and (b)(7)(C) at enclosure (4).

18. **Initial Denial Authority (IDA)**. SECNAV has delegated authority to a limited number of officials to act on his behalf to withhold records under their cognizance that are requested under the FOIA for one or more of the nine categories of records exempt from mandatory disclosure; to deny a fee category claim by a requester; to deny a request for expedited processing due to demonstrated compelling need; to deny or grant a request for

waiver or reduction of fees when the information sought relates to matters within their respective geographical areas of responsibility or chain of command; fees; to review a fee estimate; and to confirm that no records were located in response to a request. IDAs may also grant access to requests.

19. **Mosaic or Compilation Response.** The concept that apparently harmless pieces of information when assembled together could reveal a damaging picture. See exemption (b)(1) at enclosure (4).

20. **Perfected Request.** A request which meets the minimum requirements of the FOIA to be processed and is received by the DON activity having possession and control over the documents/information.

21. **Public Domain.** Agency records released under the provisions of FOIA and this instruction to a member of the public.

22. **Public Interest.** The interest in obtaining official information that sheds light on a DON activity's performance of its statutory duties because the information falls within the statutory purpose of the FOIA to inform citizens what their government is doing. That statutory purpose, however, is not fostered by disclosure of information about private citizens accumulated in various governmental files that reveals nothing about an agency's or official's own conduct.

23. **Reading Room.** Location where (a)(2) materials are made available for public inspection and copying.

24. **Release Authorities.** Commanding officers and heads of Navy and Marine Corps shore activities or their designees are authorized to grant requests on behalf of SECNAV for agency records under their possession and control for which no FOIA exemption applies. As necessary, they will coordinate releases with other officials who may have an interest in the releasability of the record.

25. **Reverse FOIA.** When the "submitter" of information, usually a corporation or other business entity, that has supplied the agency with data on its policies, operations and products, seeks to prevent the agency that collected the information from revealing the data to a third party in response to the latter's FOIA request.

26. **Technical Data.** Recorded information, regardless of form or method of the recording, of a scientific or technical nature (including computer software documentation).

27. **Vaughn Index.** Itemized index, correlating each withheld document (or portion) with a specific FOIA exemption(s) and the relevant part of the agency's nondisclosure justification. The index may contain such information as: date of document; originator; subject/title of document; total number of pages reviewed; number of pages of reasonably segregable information released; number of pages denied; exemption(s) claimed; justification for withholding; etc. FOIA requesters are not entitled to a Vaughn index during the administrative process.

FOIA EXEMPTIONS

1. **Background:** The FOIA is a disclosure statute whose goal is an informed citizenry. Accordingly, records are considered to be releasable, unless they contain information that qualifies for withholding under one or more of the nine FOIA exemptions, and there would be no foreseeable harm to an interest provided by one or more of these exemptions. The exemptions are identified as 5 U.S.C. 552 (b)(1) through (b)(9).

2. **Ground Rules**

a. **Identity of Requester:** In applying exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester's interest. However, if the subject of the record is the requester for the record and the record is contained in a Privacy Act system of records, it may only be denied to the requester if withholding is both authorized in systems notice and by a FOIA exemption.

b. **Reasonably Segregable:** Even though a document may contain information which qualifies for withholding under one or more FOIA exemptions, FOIA requires that all "reasonably segregable" information be provided to the requester, unless the segregated information would have no meaning. In other words, redaction is not required when it would reduce the balance of the text to "unintelligible gibberish."

c. **Discretionary Release:** A discretionary release of a record to one requester may prevent the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else. However, a FOIA exemption may be invoked to withhold information that is similar or related that has been the subject of a discretionary release.

d. **Initial Denial Authority (IDA) Actions:** The decision to withhold information in whole or in part based on one or more of the FOIA exemptions requires the signature of an IDA. See listing of IDAs in basic instruction.

3. **In-depth Analysis of FOIA Exemptions:** An in-depth analysis of the FOIA exemptions is addressed in the DOJ's annual publication, "Freedom of Information Act Guide & Privacy Act Overview." A copy is available on the DOJ's FOIA website (see Navy FOIA website at http://www.ogc.secnav.hq.navy.mil/foia/index.html for easy access).

4. A brief explanation of the meaning and scope of the nine FOIA exemptions follows:

a. 5 U.S.C. 552 (b)(1): Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations.

(1) Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified based on the Executive Order on classification (i.e., E.O. 12,958) and/or a security classification guide. The procedures for reclassification are addressed in the Executive Order.

(2) If the information qualifies as exemption (b)(1) information, there is no discretion regarding its release. In addition, this exemption shall be invoked when the following situations are apparent:

(a) Glomar Response: The fact of the existence or nonexistence of a record would itself reveal classified information. In this situation, DON activities shall neither confirm nor deny the existence or nonexistence of the record being requested. A "refusal to confirm or deny" response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a "no record" response when a record does not exist, and a "refusal to confirm or deny" when a record does exist will itself disclose national security information.

(b) Compilation: Compilations of items of information that are individually unclassified may be classified if the compiled information reveals additional association or relationship that meets the standard for classification under an existing executive order for classification and is not otherwise revealed in the individual items of information.

b. 5 U.S.C. 552 (b)(2): Those related solely to the internal personnel rules and practices of the DON and its activities. This exemption is entirely discretionary and has two profiles, high (b)(2) and low (b)(2):

(1) High (b)(2) are records containing or constituting statutes, rules, regulations, orders, manuals, directives, instructions, and security classification guides, the release of which would allow circumvention of these records

thereby substantially hindering the effective performance of a significant function of the DON. For example:

(a) those operating rules, guidelines, and manuals for DON investigators, inspectors, auditors, or examiners that must remain privileged in order for the DON activity fulfill a legal requirement;

(b) personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, entrance on duty, advancement, or promotion;

(c) computer software, the release of which would allow circumvention of a statute or DON rules, regulations, orders, manuals, directives, or instructions. In this situation, the use of the software must be closely examined to ensure a circumvention possibility exists.

(2) Discussion of low (b)(2) is provided for information only, as DON activities may not invoke the low (b)(2). Low (b)(2) records are those matters which are trivial and housekeeping in nature for which there is no legitimate public interest or benefit to be gained by release, and it would constitute an administrative burden to process the request in order to disclose the records. Examples include rules of personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings.

c. 5 U.S.C. 552 (b)(3): Those concerning matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. A few examples of (b)(3) statutes are:

(1) 10 U.S.C. 128, Physical Protection of Special Nuclear Material, Limitation on Dissemination of Unclassified Information

(2) 10 U.S.C. 130, Authority to Withhold From Public Disclosure Certain Technical Data

(3) 10 U.S.C. 1102, Confidentiality of Medical Quality Assurance Records

(4) 10 U.S.C. 2305(g), Protection of Contractor Submitted Proposals

(5) 12 U.S.C. 3403, Confidentiality of Financial Records.

(6) 18 U.S.C. 798, Communication Intelligence

(7) 35 U.S.C. 181-188, Patent Secrecy - any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

(8) 35 U.S.C. 205, Confidentiality of Inventions Information.

(9) 41 U.S.C. 423, Procurement Integrity

(10) 42 U.S.C. 2162, Restricted Data and Formerly Restricted Data

(11) 50 U.S.C. 403 (d)(3), Protection of Intelligence Sources and Methods

d. 5 U.S.C. 552 (b)(4): Those containing trade secrets or commercial or financial information that a DON activity receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the Government's ability to obtain necessary information in the future; or impair some other legitimate Government interest. Commercial or financial information submitted on a voluntary basis, absent any exercised authority prescribing criteria for submission is protected without any requirement to show competitive harm. If the information qualifies as exemption (b)(4) information, there is no discretion in its release. Examples include:

(1) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals set forth in or incorporated by reference in a contract entered into between the DON activity and the offeror that submitted the proposal, as well as other information received in confidence or privileged, such as trade secrets, inventions,

discoveries, or other proprietary data. Additionally, when the provisions of 10 U.S.C. 2305(g) and 41 U.S.C. 423 are met, certain proprietary and source selection information may be withheld under exemption (b)(3).

(2) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

(3) Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

(4) Financial data provided in confidence by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to the prevailing wage rate of employees within the DON.

(5) Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

(6) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, and technical or scientific data developed in part with Federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interests in such data in accordance with 10 U.S.C. 2320-2321 and DoD Federal Acquisition Regulation Supplement (DFARS), chapter 2 of 48 C.F.R., subpart 227.71-227.72. Technical data developed exclusively with Federal funds may be withheld under Exemption (b)(3) if it meets the criteria of 10 U.S.C. 130 and DoD Directive 5230.25 of 6 November 1984.

(7) Computer software which is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

(8) Proprietary information submitted strictly on a voluntary basis, absent any exercised authority prescribing criteria for submission. Examples of exercised authorities prescribing criteria for submission are statutes, Executive

Orders, regulations, invitations for bids, requests for proposals, and contracts. Submission of information under these authorities is not voluntary.

e. 5 U.S.C. 552 (b)(5): Those containing information considered privileged in litigation, primarily under the deliberative process privilege. For example: internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in deliberative records pertaining to the decision-making process of an agency, whether within or among agencies or within or among DON activities. In order to meet the test of this exemption, the record must be both deliberative in nature, as well as part of a decision-making process. Merely being an internal record is insufficient basis for withholding under this exemption. Also potentially exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege. This exemption is entirely discretionary. Examples of the deliberative process include:

(1) The nonfactual portions of staff papers, to include after-action reports, lessons learned, and situation reports containing staff evaluations, advice, opinions, or suggestions.

(2) Advice, suggestions, or evaluations prepared on behalf of the DON by individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose of obtaining advice and recommendations.

(3) Those non-factual portions of evaluations by DON personnel of contractors and their products.

(4) Information of a speculative, tentative, or evaluative nature or such matters as proposed plans to procure, lease or otherwise acquire and dispose of materials, real estate, facilities or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate government functions.

(5) Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interest.

(6) Those portions of official reports of inspection, reports of the Inspector Generals, audits, investigations, or surveys pertaining to safety, security, or the internal

management, administration, or operation of one or more DON activities, when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

(7) Planning, programming, and budgetary information that is involved in the defense planning and resource allocation process.

(8) If any such intra- or inter-agency record or reasonably segregable portion of such record hypothetically would be made available routinely through the discovery process in the course of litigation with the agency, then it should not be withheld under the FOIA. If, however, the information hypothetically would not be released at all, or would only be released in a particular case during civil discovery where a party's particularized showing of need might override a privilege, then the record may be withheld. Discovery is the formal process by which litigants obtain information from each other for use in the litigation. Consult with legal counsel to determine whether exemption 5 material would be routinely made available through the discovery process.

(9) Intra- or inter-agency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely made available through discovery, and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

(10) A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

(11) An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

f. 5 U.S.C. 552 (b)(6): Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to a requester, other than the person about whom the information is about, would result in a clearly

unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act System of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties. If the information qualifies as exemption (b)(6) information, there is no discretion in its release. Examples of other files containing personal information similar to that contained in personnel and medical files include:

(1) Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

(2) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

(3) Home addresses, including private e-mail addresses, are normally not releasable without the consent of the individuals concerned. This includes lists of home addressees and military quarters' addressees without the occupant's name. Additionally, the names and duty addresses (postal and/or e-mail) of DON/DoD military and civilian personnel who are assigned *to units that are sensitive, routinely deployable, or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy.

(4) Privacy Interest. A privacy interest may exist in personal information even though the information has been disclosed at some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure. The fact that the Federal Government expended funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicates the information is not freely available.

(5) Names and duty addresses (postal and/or e-mail) published in telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under this exemption.

(6) This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to

protect the privacy of the deceased person's family if disclosure would rekindle grief, anguish, pain, embarrassment, or even disruption of peace of mind of surviving family members. In such situations, balance the surviving family members' privacy against the public's right to know to determine if disclosure is in the public interest. Additionally, the deceased's social security number should be withheld since it is used by the next of kin to receive benefits. Disclosures may be made to the immediate next of kin as defined in DoD Directive 5154.24 of 28 October 1996 (NOTAL).

(7) A clearly unwarranted invasion of the privacy of third parties identified in a personnel, medical or similar record constitutes a basis for deleting those reasonably segregable portions of that record. When withholding third party personal information from the subject of the record and the record is contained in a Privacy Act system of records, consult with legal counsel.

(8) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, DON activities shall neither confirm nor deny the existence or nonexistence of the record being requested. This is a Glomar response, and exemption (b)(6) must be cited in the response. Additionally, in order to insure personal privacy is not violated during referrals, DON activities shall coordinate with other DON activities or Federal agencies before referring a record that is exempt under the Glomar concept.

(a) A "refusal to confirm or deny" response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a "no records" response when a record does not exist and a "refusal to confirm or deny" when a record does exist will itself disclose personally private information.

(b) Refusal to confirm or deny should not be used when the person whose personal privacy is in jeopardy has provided the requester a waiver of his or her privacy rights; the person initiated or directly participated in an investigation that led to the creation of an agency record seeks access to that record; or the person whose personal privacy is in jeopardy is deceased, the Agency is aware of that fact, and disclosure would not invade the privacy of the deceased's family.

f. 5 U.S.C. 552(b)(7). Records or information compiled for law enforcement purposes; i.e., civil, criminal, or military law, including the implementation of Executive Orders or regulations

issued under law. This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for law enforcement purposes. With the exception of (b)(7) (C) and (b)(7)(F), this exemption is discretionary. This exemption applies, however, only to the extent that production of such law enforcement records or information could result in the following:

(1) **5 U.S.C. 552(b)(7)(A):** Could reasonably be expected to interfere with enforcement proceedings;.

(2) **5 U.S.C. 552(b)(7)(B):** Would deprive a person of the right to a fair trial or to an impartial adjudication;

(3) **5 U.S.C. 552(b)(7)(C):** Could reasonably be expected to constitute an unwarranted invasion of personal privacy of a living person, including surviving family members of an individual identified in such a record.

(a) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, Components shall neither confirm nor deny the existence or nonexistence of the record being requested. This is a Glomar response, and exemption (b)(7)(C) must be cited in the response. Additionally, in order to insure personal privacy is not violated during referrals, DON activities shall coordinate with other DON/DoD activities or Federal Agencies before referring a record that is exempt under the Glomar concept. A "refusal to confirm or deny" response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a "no records" response when a record does not exist and a "refusal to confirm or deny" when a record does exist will itself disclose personally private information.

(b) Refusal to confirm or deny should not be used when the person whose personal privacy is in jeopardy has provided the requester with a waiver of his or her privacy rights; or the person whose personal privacy is in jeopardy is deceased, and the activity is aware of that fact.

(4) **5 U.S.C.552 (b)(7)(D):** Could reasonably be expected to disclose the identity of a confidential source, including a source within the DON; a State, local, or foreign agency or authority; or any private institution that furnishes the information on a confidential basis; and could disclose

information furnished from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation.

(5) **5 U.S.C. 552(b)(7)(E):** Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

(6) **5 U.S.C. 552(b)(7)(F):** Could reasonably be expected to endanger the life or physical safety of any individual.

(7) Some examples of exemption 7 are: Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related Government litigation or adjudicative proceedings; the identity of firms or individuals being investigated for alleged irregularities involving contracting with the DoD when no indictment has been obtained nor any civil action filed against them by the United States; information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within a DON activity or a lawful national security intelligence investigation conducted by an authorized agency or office within the DON; national security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

(8) The right of individual litigants to investigative records currently available by law (such as, the Jencks Act, 18 U.S.C. 3500, is not diminished.

(9) **Exclusions**. Excluded from the above exemption are the below two situations applicable to the DON:

(a) Whenever a request is made that involves access to records or information compiled for law enforcement purposes, and the investigation or proceeding involves a possible violation of criminal law where there is reason to believe that the subject of the investigation or proceeding is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, DON activities may, during only such times as that circumstance continues, treat the records or information as not subject to the FOIA. In such situation, the response to the requester will state that no records were found.

(b) Whenever informant records maintained by a criminal law enforcement organization within a DON activities under the informant's name or personal identifier are requested by a third party using the informant's name or personal identifier, the DON activity may treat the records as not subject to the FOIA, unless the informant's status as an informant has been officially confirmed. If it is determined that the records are not subject to 5 U.S.C. 552(b)(7), the response to the requester will state that no records were found.

(c) DON activities considering invoking an exclusion should first consult with the DOJ's Office of Information and Privacy.

g. 5 U.S.C. 552 (b)(8): Those contained in or related to examination, operation or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

h. 5 U.S.C. 552 (b)(9): Those containing geological and geophysical information and data (including maps) concerning wells.

PART B - PRIVACY ACT

4207 BACKGROUND. The wave of openness regarding the government's recordkeeping systems gradually matured during the 1960's and culminated in the 1974 amendments to the Freedom of Information Act. This wave of openness, however, was found to be lacking in one important particular—namely, protection of the individual's personal right to privacy in matters concerning the individual. Partly in response to the desire to counter the open flow of information to the detriment of individual rights to privacy, the Privacy Act of 1974 was signed into law by President Ford on 31 December 1974, and was codified as section 552a of title 5, *United States Code*, immediately following the Freedom of Information Act. The Act was subsequently amended in 1982. SECNAVINST 5211.5D contains Department of the Navy policy guidance on the Privacy Act.

4208 SYNOPSIS OF ACT

A. ***Purposes.*** The Act set up safeguards concerning the right to privacy by regulating the collection, maintenance, use, and dissemination of personal information by Federal agencies where the information is maintained in records retrievable by the name of the individual or some other personal identifier. Federal agencies, with certain exceptions as noted later in this chapter, are required by the Act to:

1. Permit an individual to determine what records pertaining to him or her are collected, maintained, used, or disseminated;

2. permit an individual to prevent records pertaining to him or her, that were obtained by such agencies for a particular purpose, from being used or made available for another purpose without his or her consent;

3. permit an individual to gain access to information pertaining to him or her in a Federal agency's records, to have a copy made of all or any portion thereof, and to correct or amend such records;

4. collect, maintain, use, or disseminate any record of identifiable personal information in a manner that ensures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

5. permit exemptions from the requirements with respect to records provided in the Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and

6. be subject to civil suit for any damages which occur as a result of acts or omissions that violate any individual's rights under the Act.

B. ***Definitions***

1. ***Record***. Any item, collection, or grouping of information about an individual that is maintained by the Federal Government and contains personal information and either the individual's name, symbol, or another identifying particular assigned to the individual (e.g., social security number).

2. ***System of records***. A group of records from which information is retrieved by the name of the individual or by some identifying number, symbol, or other personal identifiers assigned to that individual.

3. ***Personal information***. Any information about an individual that is intimate or private to the individual, as distinguished from information related solely to the individual's official functions. This ordinarily includes information pertaining to an individual's financial, family, social, and recreational affairs; medical, educational, employment, or criminal history; or information that identifies, describes, or affords a basis for inferring personal characteristics. It ordinarily does not include such information as time, place, and manner of, or authority for, an individual's execution of, or omission of, acts directly related to the duties of his / her Federal employment or military assignment.

4. ***Individual***. A living citizen of the United States, an alien lawfully admitted for permanent residence, or a member of the naval service (including a minor). Additionally, the legal guardian of an individual or a parent of a minor has the same rights as the individual and may act on behalf of the individual concerned. Emancipation of a minor occurs upon enlistment in an armed force, marriage, court order, reaching the age of majority in the state in which located, reaching age 18 (if residing overseas), or reaching age 15 (if residing overseas) for medical records compiled under a program of confidentiality which the individual specifically requested.

5. ***Routine use***. A normal, authorized use made of records within a system of records, but only if that use is published as a part of the public notification appearing in the *Federal Register* for the particular system of records.

4209 COLLECTION OF INFORMATION

A. ***Policy.*** It is the policy of the naval service to collect personal information, to the greatest extent practicable, directly from the individual—particularly when the information may adversely affect an individual's rights, benefits, and privileges. "Personal information" is any information about an individual that is intimate or private to the individual, as distinguished from information related solely to the individual's official functions. The following examples (although not exhaustive) illustrate when exceptions to the general policy are applicable:

1. When there is a need to verify information through a third party (e.g., verifying information for a security clearance);

2. when it would present an exceptional practical difficulty or result in unreasonable cost to obtain the information directly from the individual; or

3. when the information can be obtained only from a third party (e.g., a supervisor's evaluation of an individual).

B. ***Privacy Act statement contents.*** When the Navy or Marine Corps requests information that is personal and is for inclusion in a system of records (a group of records from which information is retrieved by name or other personal identifier), the individual from whom the information is solicited must be informed of the following:

1. The authority for solicitation of that information (i.e., the statute or Executive order);

2. the principle purposes for which the relevant agency uses the information (e.g., pay entitlement, retirement eligibility, or security clearances);

3. the routine uses to be made of the information as published in the *Federal Register*;

4. whether disclosure is mandatory or voluntary; and

5. the possible consequences for failing to provide the requested information.

C. ***Use of the Privacy Act statement.*** The above information will be provided to the individual via the "Privacy Act Statement."

1. There is nothing contained in the basic legislation or in SECNAVINST 5211.5 which formally requires that the subject be given a written Privacy Act statement or that he / she sign the statement. In order to ensure that an individual fully understands the Privacy Act statement, however, it is strongly recommended that he / she be given a copy of the statement and requested to sign an original of the statement, and that the signed original be attached to the particular record involved.

2. If an individual refuses to sign an original Privacy Act statement, the refusal should be noted on the original statement (with an indication that he / she was provided with a copy) and the document should then be attached to the collected record of information.

3. If oral advice concerning the provisions mentioned above is required to be administered for any reason, a note of the fact that information concerning the Privacy Act requirements was furnished to the individual should be made and attached to the collected information and, if at all possible, a copy of the note should be forwarded to the individual involved.

D. ***Exceptions***. There is no requirement for use of the Privacy Act statement in:

1. Processes relating to the enforcement of criminal laws (including criminal investigations by NCIS, base police, and master at arms); or

2. courts-martial and the personnel thereof (i.e., military judge, trial counsel, defense counsel, article 32 investigating officer, and government counsel for the article 32 investigation).

E. ***Requesting an individual's social security number (SSN)***3. Department of the Navy activities may not deny an individual any right, benefit, or privilege provided by law because the individual refuses to disclose his SSN unless such disclosure is required by Federal statute or, in the case of systems of records in existence and operating before 1 January 1975, such disclosure was required under statute or regulation adopted prior to 1 January 1975 to verify the identity of an individual.

1. When an individual is requested to disclose his / her SSN, he / she must be informed:

a. Whether such disclosure is mandatory or voluntary;

b. by what statutory or other authority the SSN is solicited; and

c. what uses will be made of it.

2. An activity may request an individual's SSN, even though it is not required by Federal statute or is not for a system of records in existence and operating prior to 1 January 1975. The separate Privacy Act statement for the SSN alone, or a merged Privacy Act statement covering both the SSN and other items of personal information, however, must make clear that disclosure of the number is voluntary. If the individual refuses to disclose his SSN, the activity must be prepared to identify the individual by alternate means.

3. Once a military member or civilian employee of the Department of the Navy has disclosed his / her SSN for purposes of establishing personnel, financial, or medical records upon entry into naval service or employment, the SSN becomes his / her service or employment identification number. Subsequent provision or verification of this identification number in connection with those records does not require an additional Privacy Act statement.

F. ***Administrative procedures***. Appropriate administrative, technical, and physical safeguards must be established to ensure the security and confidentiality of records in order to protect any individual on whom information is maintained against substantial harm, embarrassment, inconvenience, or unfairness. Such information should be afforded at least the protection required for information designated as "For Official Use Only."

G. ***Exemptions***. Exemptions from disclosure are provided by the Privacy Act. Exemptions are not automatic and must be invoked by the Secretary of the Navy who has delegated CNO (OP-09B30) to make the determination. No system of records within DON shall be considered exempt until the CNO has approved the exemption and an exemption rule has been published as a final rule in the *Federal Register*. Exemptions are either general or specific.

1. ***General exemptions***. To be eligible for a general exemption, the system of records must be maintained by the CIA or an activity whose ***principle function*** involves the enforcement of criminal laws and must consist of:

a. Data compiled to identify individual criminals and alleged criminals which consists only of identifying data and arrest records, type and disposition of charges, sentencing / confinement / release records, and parole and probation status;

b. data that supports criminal investigations (including efforts to prevent, reduce, or control crime) and reports of informants and investigators that identify an individual; or

c. reports on a person, compiled at any stage of the process of law enforcement, from arrest or indictment through release from supervision.

2. ***Specific exemptions.*** The Privacy Act also lists seven specific exemptions:

a. Classified information that is exempt from release under FOIA;

b. investigatory material compiled for law enforcement purposes, but beyond the scope of the general exemption mentioned above;

c. records maintained in connection with providing protective service to the President and others under section 3056 of title 18, *United States Code*;

d. records required by statute to be maintained and used solely as statistical records;

e. investigatory material compiled solely to determine suitability, eligibility, or qualification for Federal employment or military service, but only to the extent that disclosure would reveal the identity of a confidential source;

f. testing and examination material used solely to determine individual qualification for appointment or promotion in the Federal or military service, the disclosure of which would compromise the objectivity or fairness of the testing or examination process; and

g. evaluation material used to determine potential for promotion in the armed forces, but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

4210 PUBLIC NOTICE AND SYSTEMS MANAGEMENT

A. ***General provisions / purposes.*** The purposes of the Privacy Act regarding the management of record systems and public notification concerning such record systems are as follows:

1. To allow the public to be informed as to the existence of a system of records, its purposes, and routine uses;

2. to delineate procedures for allowing individuals to gain access to their own personal information; and

3. to prevent misuse of, or improper access to, personal information

contained within systems of records.

B. ***Contents of public notice.*** In the above regard, no Federal agency may maintain a system of records without public disclosure of the existence of that system. Maintaining an unpublished system of records is a criminal violation. To ensure public knowledge, the Privacy Act requires that a catalog of all such systems of records be published in the *Federal Register*, and that such publication be updated at least annually. Such public notice must include, in an understandable form:

1. The name and location of the system;

2. the categories of individuals covered by the system;

3. the types of records in the system;

4. the routine uses of the information in the system;

5. policies and practices for maintenance of the system;

6. the media in which records are maintained (e.g., file folders, magnetic tape, computer cards, etc.);

7. the manner in which retrieval is accomplished (e.g., name, social security number, fingerprint classification, etc.);

8. general safeguards to prevent unauthorized access;

9. retention and disposal policies;

10. the title and duty address of the official responsible for the system of records (system manager);

11. the agency procedures for individual notification;

12. the agency procedures for granting individual access to, and for requesting amendment to, or contesting the content of, those records;

13. the sources of information in the system; and

14. exemptions claimed.

4211 DISCLOSURE OF PERSONAL INFORMATION TO THIRD PERSONS

A. ***General provisions / purposes.*** The Privacy Act carefully limits those situations in which the information gathered by a Federal agency may be disclosed to third persons. As a general rule, no personal information from a record or record system shall be disclosed to third parties without the prior written request or consent of the individual about whom the information pertains.

B. ***Exceptions.*** The prior written consent or request of the individual concerned is ***not*** required if the disclosure of information is authorized under one of the exceptions discussed below.

1. ***Personnel within the Department of the Navy or the Department of Defense.*** Disclosure is authorized without the consent of the individual concerned, provided that the requesting member has an official need to know the information in the performance of duty and the contemplated use of the information is compatible with the purposes for which the record is maintained. No disclosure accounting is required when information is released pursuant to this exception. Under this exception, the name, rate, offense(s), and disposition of an offender at captain's mast/ office hours may be published in the plan of the day or on the command bulletin board within a month of the imposition of nonjudicial punishment, or at daily formations or morning quarters. JAGMAN, § 0509.

2. ***FOIA.*** If the information is of the type that is required to be released pursuant to the FOIA as implemented by SECNAVINST 5720.42E, it may be released.

– Recall that personal information from personnel, medical, and similar files may be exempt from release under the FOIA when the release would cause a clearly unwarranted invasion of personal privacy. Therefore, the responsible officer must weigh the public's right to know the information against the right to privacy of the individual. Sound, intelligent discretion is obviously necessary in such situations.

3. ***Routine use.*** Disclosure may be made for a routine use and declared and published in the system notice in the *Federal Register* and complementary Privacy Act statement. For example, a routine use for the home address information maintained in the Navy Personnel Records System is the disclosure of such information to the duly appointed command family ombudsman in the performance of their duties.

4. ***Civil and criminal law enforcement agencies of governmental units in the United States.*** The head of the agency making the request must do so in writing to the activity maintaining the record indicating the particular record desired and the law enforcement purpose for which the record is sought. Blanket requests will not be honored. A record may also be disclosed to a law enforcement activity, provided that such disclosure has been established as a "routine use" in the published record-systems notice. Disclosure to foreign law enforcement agencies is ***not*** authorized under this section.

5. ***Emergency conditions.*** Disclosure may be made if the health or safety of a person is imperiled. The individual whose record was disclosed must be notified of such disclosure.

6. ***Congress.*** Disclosure is permitted if information is requested by either House of Congress or any committee or subcommittee thereof to the extent of matters within its jurisdiction. Disclosure may also be made to an individual Member of Congress when the request for information was prompted by an oral or written request for assistance by the individual to whom the record pertains, or when the congressional office, after requesting information, subsequently states that it has received a request for assistance from the individual or has obtained written consent for the disclosure of the information.

7. ***Courts of competent jurisdiction.*** When complying with an order from a court of competent jurisdiction signed by a state, Federal, or local court judge to furnish information, if the issuance of the order is made public by the court which issued it, reasonable efforts will be made to notify the individual to whom the record pertains of the disclosure and the nature of the information provided. If the court order itself is not a matter of public record, the concerned activity shall seek to learn when it will be made public. In this situation, an accounting for the disclosure shall be made at the time the activity complies with the order, but neither the identity of the party to whom the disclosure was made nor the purpose of the disclosure shall be made available to the concerned individual unless the court order has become a matter of public record.

8. ***Consumer reporting agency.*** Certain information may be disclosed to consumer reporting agencies as defined by the Federal Claims Collection Act of 1966 [31 U.S.C. § 952(d)].

9. ***Bureau of the Census***

10. ***Statistics.*** Disclosure may be made for purposes of statistical research or reporting if the individual's identity will be held private by the recipient and that identity will be lost in the published statistics.

11. ***National Archives***

12. ***Comptroller General***. For the General Accounting Office.

C. ***Disclosure accounting***. The Privacy Act and implementing instructions require each command to maintain an accounting record of all disclosures, including those requested or consented to by the individual. This allows individuals to discover what disclosures of information concerning them have been made, and to provide a system whereby prior recipients of information may be notified of disputed or corrected information. There is no uniform method for keeping disclosure accountings; the primary criteria are that the selected method be one which will:

1. Enable an individual to ascertain what person or agencies have received disclosures pertaining to him / her;

2. provide a basis for informing recipients of subsequent amendments or statements of dispute; and

3. provide a means to prove that the activity has complied with the requirements of the Privacy Act.

D. ***Retention of disclosure accounting***. Commands should maintain a disclosure accounting of the life of the record to which disclosure pertains or 5 years after the date of disclosure—whichever is longer.

4212 PERSONAL NOTIFICATION, ACCESS, AND AMENDMENT

A. ***General provisions / purposes***

1. ***Personal notification***. Because one of the underlying purposes of the Privacy Act is to allow the individual, upon his / her request, to discover whether records pertaining to him / her are maintained by Federal agencies, the system manager must notify a requesting individual whether or not the system of records under his management contains a record pertaining to that individual. All properly submitted requests for personal notification will be honored, except in cases where exemption is authorized by law, claimed by the Secretary of the Navy [SECNAVINST 5211.5D, enclosure (11)], and exercised by the denial authority.

2. ***Personal access.*** Hand-in-hand with the provisions concerning personal notification of records is the Privacy Act's mandate that an individual will be allowed to inspect and have copies of records pertaining to him / her that are maintained by Federal agencies. Upon receiving a request from an individual, the systems manager shall permit that individual to review records pertaining to him / her from the system of records in a form that is comprehensible to the individual. The individual to whom the record pertains may authorize a third party to accompany him / her when seeking access.

– ***Note***: 5 U.S.C. § 552a(d)(5) provides that: "Nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding."

3. ***Amendment.*** The Privacy Act permits the individual to ensure that the records maintained about him / her are as accurate as possible by allowing him / her to amend information that is inaccurate, to appeal a refusal to amend, and to file a statement of dispute in the record should an appeal be denied. Exceptions to this rule permitting amendment of personal records may only be exercised in accordance with published notice where authorized by law, claimed by the Federal agency head, and exercised by the denial authority.

B. ***Administrative procedures***

1. ***Individual's action.*** An individual requesting notification concerning records about him / herself must:

a. Accurately identify him / herself;

b. identify the system of records from which the information is requested;

c. provide the information or personal identifiers needed to locate records in that particular system; and

d. request notification of personal records within the system from the system manager; or

e. request access from the system manager; or

f. request amendment in writing from the system manager; and

g. state reasons for requesting amendment and provide information to support such request.

2. ***Command action***

a. ***Denials / deficient requests***. Denials of initial requests for notification may only be made by denial authorities. If the request is deficient, the command should inform the individual of the correct means, or additional information needed, for obtaining consideration of his / her request for notification. A request may not be rejected, nor may the individual be required to resubmit the request, unless essential for processing the request.

b. ***Notification***. Requests for personal notification may be granted by officials who have custody of the records, even if they are not the system manager or denial authority.

c. ***Access***. If it is determined that the individual should be granted access to the entire record requested, the official should inform the individual, in writing, that access is granted and furnish a copy of the record, or advise when and where it is available. Fee schedules for duplication costs are contained in SECNAVINST 5211.5.

d. ***Amendments***. If an available exemption is not exercised, an individual's request for amendment of a record pertaining to him / her shall be granted if it is determined, on the basis of the information presented by the requester and all other reasonably available related records, that the requested amendment is warranted in order to make the record sufficiently accurate, relevant, timely, and complete as to ensure fairness in any determination which may be made about the individual on the basis of record. Other agencies holding copies of the record must be notified of the amendment. These provisions are not designed to permit collateral attack upon that which has already been the subject of a judicial or quasi-judicial action. For example, an individual would not be permitted to challenge a court-martial conviction under this instruction, but the individual would be able to challenge the accuracy with which a conviction has been recorded in a record. If amendment is made, all prior recipients of the record must be notified of the amended information.

3. ***Time limits***. A request for notification shall be acknowledged in writing within 10 working days after receipt, and the requester must be advised of the decision to grant / deny access within 30 working days.

C. ***Denial authority***. Denial authorities include all officers authorized to convene general courts-martial and the heads of designated Navy Department activities as indicated in paragraph 6(e) of SECNAVINST 5211.5D.

1. ***Notification.*** Denial authorities are authorized to deny requests for notification when an exemption is applicable and denial of the notification would serve a significant and legitimate governmental purpose (e.g., avoid interfering with an ongoing law enforcement investigation). The denial letter shall inform the individual of his / her right to request further administrative review of the matter with the Judge Advocate General within 60 days from the date of the denial letter.

2. ***Access.*** To deny the individual access to all or part of the requested record, the denial authority shall send an expurgated copy of the record available, where appropriate. When none of the record is releasable, the denial authority shall inform the individual of the denial of access and the reasons therefor (including citation of any applicable exemptions, a brief discussion of the significant and legitimate governmental purposes served by denial of the access, and an advisement of the right to seek further administrative review within 60 days of the date of the denial).

3. ***Amendment.*** If the request to amend is denied, in whole or in part, the denial authority must notify the individual of the basis for denial and advise him / her that he / she may request review of the denial within 60 days and the means of exercising that right.

D. ***Reviewing authority.*** Upon receipt of a request for review of a determination denying an individual's initial request for notification, access, or amendment, the Judge Advocate General (or the General Counsel, depending on the subject matter) shall obtain a copy of the case file from the denial authority, review the matter, and make a final determination. Any final denial letter should cite the exemptions exercised and the legitimate governmental purposes served and inform the individual of the right to seek judicial review. If the official who reviews the denial also refuses to amend the record as requested, that official must notify the individual of his / her right to file a statement of dispute annotated to the disputed record, the purpose and effect of a statement of dispute, and the individual's right to request judicial review of the refusal to amend the record.

E. ***Privacy Act / Board for Correction of Naval Records (BCNR) interface.*** While factual amendments may be sought under both the Privacy Act and the procedures of BCNR, attempts to correct other than factual matters (such as judgmental decisions in efficiency reports or promotion board reports) fall outside the purview of the Privacy Act and under the purview of BCNR. If a factual matter is corrected under the Privacy Act procedures, any subsequent judgmental decisions that may have been affected by the factual correction, if contested, should be submitted by petition to BCNR for corrective action.

4213 REPORTING. SECNAVINST 5211.5 requires the Chief of Naval Operations to annually submit a consolidated Department of the Navy report to the Secretary of Defense. The report involves information on records systems maintained, systems exempted, and other information concerning administration of the Privacy Act. Denial authorities are required to submit similar reports to the Chief of Naval Operations through the appropriate chain of command. All activities subordinate to denial authorities are required to submit feeder reports to the denial authority in their chain of command by 1 March of each year. Units afloat and operational aviation squadrons are exempt from the reporting requirements described above unless they have received Privacy Act requests.

4214 CIVIL AND CRIMINAL SANCTIONS FOR VIOLATIONS OF THE PRIVACY ACT

A. ***Civil sanctions.*** Civil sanctions apply to the agency (e.g., the Navy) involved in violations—as opposed to individuals. Civil actions may be brought by individuals in cases where the Federal agency:

1. Wrongfully refuses to amend the individual's record or wrongfully refused to review the initial denial of a requested amendment;

2. wrongfully refuses to allow the individual to review or copy his / her record;

3. fails to maintain any record accurately, relevantly, completely, and currently and an adverse determination is made based on that record; or

4. fails to comply with any other provision of the Privacy Act or any rule promulgated thereunder in such a way to adversely affect the individual (e.g., unauthorized posting of names on a bulletin board).

With regard to these civil sanctions, if the plaintiff's suit is upheld, the agency can expect to be directed to take the necessary corrective actions and pay court costs and attorney fees. In addition, where the plaintiff can show that he suffered damage under paragraph A3 or A4 immediately above because the agency acted in a manner which was intentional or willful, the agency will be assessed actual damages sustained by the individual—but not less than $1,000. The courts are divided as to whether actual damages may include mental injuries. *Compare Johnson v. Commissioner*, 700 F.2d 971 (5th Cir. 1983) (finding physical injury and mental anxiety, neither of which resulted in increased out-of-pocket medical expenses, compensable as actual damages) *and Fitzpatrick v. Commissioner*, 665 F.2d 327 (11th Cir. 1982) (finding only proven pecuniary losses, not general mental injury, loss of reputation, embarrassment, or other nonquantifiable injuries, compensable as actual damages). The statute of limitations for filing suit is two years from

the occurrence of the violation of the Act.

B. ***Criminal sanctions.*** Criminal sanctions apply to any officer or employee within the Federal agency who misuses a system of records in the following ways:

1. Knowingly and willfully discloses information protected by the Privacy Act to a person or agency not entitled to receive it;

2. willfully maintains a system of records without meeting the public notice requirements of the Privacy Act; or

3. knowingly and willfully requests, obtains, or discloses any record concerning personal information about another individual from an agency under false pretenses.

The above violations are misdemeanors, and the individual is subject to a fine of up to $5,000 for each file or name disclosed illegally. With regard to the criminal sanctions, all pertain to intentional misdeeds. Therefore, if an individual makes a good faith and honest effort to comply with the provisions of the Privacy Act, he should be protected from criminal liability. Criminal violations of the Privacy Act are ***not*** punishable by incarceration.

4215 FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT OVERLAP. There is a very narrow area of overlap between FOIA and Privacy Act that may arise when an individual requests documents or records pertaining to him/ herself. As a general rule, the request will be processed under whichever Act cited in the request; however, special cases arise where the requester cites both Acts or where neither Act is cited.

A. ***Both Acts cited.*** Since one's own request for access to agency records concerning oneself is subject to both Acts, the requester who has cited both Acts is entitled to the most beneficial features of each Act. Thus:

1. ***Exemptions***: Apply Privacy Act exemptions, as they are narrower and generally provide greater access.

2. ***Fees***: Privacy Act fees cover only the cost of duplication and the requester is not charged for search time; accordingly, Privacy Act fees are generally less and should be charged.

3. ***Time limits***: In this area, FOIA provides the shortest response time (10 days vice 30 days).

4. ***Appellate rights***: FOIA appellate procedures.

5. ***Reporting requirements***: Report under FOIA.

B. ***Neither Act cited.*** When an individual's request for access to records concerning him / herself cites neither FOIA nor Privacy Act, materials properly releasable under the Privacy Act (greatest access) should be provided and standard Privacy Act fees (usually cheaper) charged for duplication. All other requirements (time limits, denial authority, appellate rights, judicial review, annual reporting, etc.) may be ignored and the response need not cite either Act.

C. ***All other requests***

1. FOIA and Privacy Act do not overlap in any area other than—as stated—the individual's request for access to records and documents concerning him / herself. All other requests for documents or records are subject only to FOIA and the FOIA requirements. Citation of the Privacy Act for such other requests is irrelevant, confers no additional rights upon the requester, and may therefore be ignored.

2. If such a request does not cite or refer to FOIA (regardless of whether it mentions the Privacy Act), the request is not a true FOIA request and may be handled as a public affairs matter. In this case, the response should provide all records that are releasable under FOIA and the requester should be charged for costs incurred; however, all other requirements of FOIA (time limits, denial authority, appellate rights, judicial review, annual reporting, etc.) may be ignored.

PART C - RELEASE OF OFFICIAL INFORMATION AND TESTIMONY FOR LITIGATION PURPOSES

4216 OBJECTIVES. The purpose of the Part C of the *JAG Manual* and the instructions are to make ***factual*** official information, both testimonial and documentary, reasonably available for use in Federal courts, state courts, foreign courts, and other governmental proceedings unless that information is classified, privileged, or otherwise protected from public disclosure.

DON personnel shall not provide, with or without compensation, opinion or expert testimony concerning official DOD information, subjects, personnel, or activities, except on behalf of the United States or a party represented by the Department of Justice or with the written special authorization required by SECNAVINST 5820.8A, Subj: RELEASE

OF OFFICIAL INFORMATION FOR LITIGATION PURPOSES AND TESTIMONY BY DEPARTMENT OF THE NAVY (DON) PERSONNEL.

DON policy favors disclosure of factual matters and does not favor disclosure on expert or opinion matters.

4217 DEFINITIONS

A. ***Determining authority***: the cognizant DON or DOD official designated to grant or deny a litigation request. In all cases in which the United States is, or might reasonable become, a party or in which expert testimony is requested, the Judge Advocate General or the General Counsel of the Navy will act as the determining authority. In all other cases, the general court-martial convening authorities and those commands and activities with a judge advocate assigned will act as the determining authorities.

B. ***DON personnel***: active-duty or former military personnel of the naval service (including retirees); civilian personnel of DON; personnel of other DOD components serving with a DON component; nonappropriated fund activity employees; non-U.S. nationals performing services overseas for DON under status of forces agreements (SOFA's); and other specific individuals or entities hired through contractual agreements by, or on behalf of, DON.

C. ***Official information***: all information of any kind, however stored, in the custody and control of the DOD or its components.

D. ***Request or demand (legal process)***: subpoena, order, or other request by a Federal, state, or foreign court of competent jurisdiction, by any administrative agency thereof, or by any party or other person.

4218 AUTHORITY TO DETERMINE AND RESPOND

A. ***Matters proprietary to DON.*** For a litigation request or demand made upon DON personnel for official DON or DOD information, or for testimony concerning such information, the cognizant DON official will determine availability and respond to the request or demand.

B. ***Matters proprietary to another DOD component.*** If a DON activity receives a litigation request or demand for official information originated by another DOD component or for non-DON personnel, the DON activity will forward appropriate portions to the originating DOD component and notify the requester of its transfer.

C. ***Litigation matters to which the United States is, or might reasonably become, a party***. The cognizant DON official is either the Judge Advocate General or the General Counsel of the Navy.

1. Examples of such instances:

a. Suits under the Federal Tort Claims Act;

b. suits under the FOIA;

c. suits under the Medical Care Recovery Act; or

d. suits against a government contractor where the contractor may interplead the United States.

D. ***Litigation matters in which the United States is not, and is reasonably not expected to become, a party***.

1. ***Fact witnesses***: Purely factual matters shall be forwarded to the Navy or Marine Corps officer exercising general court-martial jurisdiction in whose chain of command the prospective witness or requested documents lie.

2. ***Visits and views***: A request to visit a DON activity, ship, or unit—or to inspect material or spaces located there—will be forwarded to the officer exercising general court-martial jurisdiction (OEGCMJ).

3. ***Documents***: 10 U.S.C. § 7861 provides that the Secretary of the Navy has custody and charge of all DON books, records, and property. Under DOD Directive 5530.1 of 22 August 1983 (NOTAL), the Secretary of the Navy's sole delegate for service of process is the General Counsel of the Navy. Process not properly served on the General Counsel is insufficient to constitute a legal demand and shall be processed as a request by counsel.

4. ***Expert or opinion requests***: Any request for expert or opinion consultations, interviews, depositions, or testimony shall be forwarded to the Deputy Assistant Judge Advocate General for General Litigation.

5. ***Matters not involving issues of Navy policy***: Such matters shall be forwarded to the respective counsel of the activities listed in paragraph 4 b.(1) in enclosure (3) of SECNAVINST 5820.8A (depending upon who has cognizance over the information or

personnel at issue).

6. ***Matters involving issues of Navy policy***: Such matters shall be forwarded to the General Counsel of the Navy via the Associate General Counsel (Litigation).

7. ***Matters involving asbestos litigation***: Such matters shall be forwarded to the Office of Counsel, Naval Sea Systems Command Headquarters, Personnel and Labor Law Section (Code OOLD).

8. ***Matters not clearly within the cognizance of any DON official***: Such matters may be sent to the Deputy Assistant Judge Advocate General for General Litigation or the Associate General Counsel (Litigation).

4219 CONTENTS OF A PROPER REQUEST OR DEMAND

A. ***General policy***. If official information is sought, through testimony or otherwise, a detailed written request must be submitted to the appropriate determining authority far enough in advance to assure an informed and timely evaluation of the request. The determining authority shall decide whether sufficient information has been provided by the requester.

B. ***The following information is necessary to assess a request***:

1. ***Identification of parties, their counsel and the nature of the litigation***:

a. Caption of case, docket number, court;

b. name, address, and telephone number of all counsel; and

c. the date and time on which the information sought must be produced; the requested location for production; and, if applicable, the length of time that attendance of the DON personnel will be required.

2. ***Identification of information or documents requested***:

a. Detailed description of information sought;

b. location of the information sought; and

c. a statement whether factual, opinion, or expert testimony is

requested.

3. ***Description of why the information is needed***:

a. A brief summary of the facts of the case and the present posture of the case;

b. a statement of the relevance of the matters sought to the proceedings at issue; and

c. if expert or opinion testimony is sought, an explanation of why exceptional need or unique circumstances exist justifying such testimony, including why it is not reasonably available from any other source.

C. ***Additional information***: The circumstances surrounding the underlying litigation, including whether the United States is a party, and nature and expense of the requests made by a party may require additional information before a determination can be made.

1. A statement of the requester's willingness to pay in advance all reasonable expenses for searching, producing information, including travel expenses and accommodations;

2. in cases in which deposition testimony is sought, a statement of whether attendance at trial or later deposition testimony is anticipated and requested;

3. agreement to notify the determining authority at least 10 working days in advance of all interviews, depositions, or testimony;

4. an agreement to conduct the deposition at the location of the witness, unless agreed to otherwise;

5. in the case of former DON personnel, a brief description of the length and nature of their duties and whether such duties involve directly or indirectly the testimony sought;

6. an agreement to provide free of charge to any witness a signed copy of any written statement made or, in the case of an oral deposition, a copy of that deposition transcript;

7. if court procedures allow, an agreement granting the opportunity for the witness to read, sign, and correct the deposition at no cost to the witness or the government;

8. a statement of understanding that the United States reserves the right to have a representative present at any interview or deposition; and

9. a statement that counsel for other parties to the case will be provided with a copy of all correspondence originated by the determining authority.

D. ***Deficient requests***. A letter request that is deficient in providing necessary information may be returned to the requester by the determining authority with an explanation of the deficiencies and a statement that no further action will be taken until they are corrected. If a subpoena has been received for official information that is deficient, the determining authority must promptly notify the General Litigation Division of the Office of the Judge Advocate General or the Navy Litigation Office of the Office of General Counsel. Timely notice is essential.

E. ***Emergency requests***. The determining authority has discretion to waive the requirement that the request be made in writing in the event of a bona fide emergency. An emergency is when factual matters are sought, and compliance with the requirements of a proper written request would result in the effective denial of the request and cause an injustice in the outcome of the litigation for which the information is sought. If the determining authority concludes that a bona fide emergency exists, he / she will require the requester to agree to the conditions set forth above.

4220 CONSIDERATIONS IN DETERMINING TO GRANT OR DENY A REQUEST

A. ***General considerations***: In deciding whether to authorize release of official information, or testimony of DON personnel concerning official information, under a request conforming with the requirements as stated above and in SECNAVINST 5820.8A enclosure (4), the determining authority shall consider the following factors:

1. The DON policy concerning factual information or expert or opinion information;

2. whether the request or demand is unduly burdensome or otherwise inappropriate under applicable court rules;

3. whether disclosure, including release ***in camera*** is appropriate under procedural rules governing the case or matter in which the request or demand arose;

4. whether disclosure would violate or conflict with a statute, Executive order, regulation, directive, instruction, or notice;

5. whether disclosure in the absence of a court order or written consent would violate 5 U.S.C. §§ 552, 552a (1988);

6. whether disclosure, including release ***in camera***, is appropriate or necessary under the relevant substantive law concerning privilege;

7. whether disclosure, except when ***in camera*** and necessary to assert a claim of privilege, would reveal information properly classified under the DOD Information Security Program; withholding of unclassified technical data from public disclosure following OPNAVINST 5510.161; privileged Naval Aviation Safety Program information; or other matters exempt from unrestricted disclosure under 5 U.S.C. §§ 552, 552a (1988);

8. whether disclosure would unduly interfere with ongoing law enforcement proceedings, violate constitutional rights, reveal the identity of an intelligence source or source of confidential information, conflict with U.S. obligations under international agreement, or otherwise be inappropriate under the circumstances;

9. whether attendance of the requested witness at deposition or trial will unduly interfere with the military mission of the command; and

10. in a criminal case, whether requiring disclosure by a defendant of detailed information about the relevance of documents or testimony as a condition for release would conflict with the defendant's constitutional rights.

B. ***Specific considerations***

1. Requests for documents, interviews, depositions, testimony, and views where the United States is, or may become, a party shall be forwarded to the Judge Advocate General or the General Counsel.

2. Requests for unclassified documents where the United States is not, and is reasonably not expected to become, a party will be served upon the General Counsel of the Navy—along with the written requests complying with SECNAVINST 5820.8A, enclosure (4). For release of classified information, coordination must be made with the Chief of Naval Operations (OP-09N).

3. Generally, a record in a Privacy Act "system of records" may not be released under a litigation request except with the written consent of the person to whom the record pertains or in response to a court order signed by a judge.

4. For requests for records held by a specific agency, refer to SECNAVINST 5820.8A, enclosure (5).

5. Requests for interviews, depositions, and testimony where the United States is not, and is reasonably not expected to become, a party:

a. Factual matters: DON policy favors disclosure of factual matters when disclosure does not violate the criteria stated in SECNAVINST 5820.8A, enclosure (5).

b. Expert, opinion, or policy matters: DON policy does not favor disclosure of this information. The cognizant official—either DAJAG or the General Counsel—will determine whether the information will be released. The requester must show exceptional need or unique circumstances, and also that the anticipated testimony will not be adverse to the interests of the DOD or the United States.

6. Visits and views where the United States is not, and is reasonably not expected to become, a party are normally factual in nature and should be granted.

7. Requests for disclosure of non-DOD information. The requester must still comply with SECNAVINST 5820.8A to support the contention they are requesting non-DOD information. Determining whether or not official information is at issue is within the purview of the determining authority, not the requester.

4221 ACTION TO GRANT OR DENY A REQUEST

– ***General policy***. A determination to grant or deny a request should be made as expeditiously as possible to provide the requester and the court with the matter at issue or with a statement of the reasons for denial. The decisional period should not exceed 10 working days from receipt of a completed request complying with the requirements set out in SECNAVINST 5820.8A, enclosure (4).

In cases in which a subpoena has been received and the requester refuses to pay fees, or if the determining authority declines to make some or all the material available or has insufficient time to complete the determination as to how to respond to the request, the determining authority must promptly notify OJAG, General Litigation Division (Code 34) or the Litigation Office of the General Counsel.

4222 RESPONSE TO REQUESTS OR DEMANDS IN CONFLICT WITH DON POLICY. If a court of competent jurisdiction or other appropriate authority declines to stay the effect of the request or demand in response to action taken by a determining authority, or orders that the request must be complied with, DAJAG or the Associate General Counsel (Litigation) must be notified. After consultation with the Department of Justice, DAJAG or the Associate General Counsel will determine whether to comply with the request or demand and will notify the requester, the court, or other authority accordingly. Generally, DON personnel will be instructed to decline to comply with a court order only if the Department of Justice commits to represent the DON personnel in question.

4223 FEES AND EXPENSES

– ***General policy***. Except as provided below, determining authorities shall charge reasonable fees and expenses to parties seeking official DON information or testimony. Under 32 C.F.R. 288.10, the fees should include all costs of processing a request for information, including time and material expended.

1. ***When DON is a party***. No fees normally shall be charged when DON is a party to the proceedings.

2. ***When another Federal agency is a party***. No fees shall be charged to the requesting agency.

3. ***When neither DON nor another Federal agency is a party***. Fees shall be charged to the requester for time taken from official duties by DON personnel who are authorized to be interviewed, give testimony, or escort persons on views and visits of installations. Fees are payable to the Treasurer of the United States for deposit in the Treasury's miscellaneous receipts.

CHAPTER XLIII

LEGAL ASSISTANCE

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CHAPTER XLIII

LEGAL ASSISTANCE

PART A - LEGAL ASSISTANCE PROGRAM

4301 GENERAL. Few problems are as frustrating for military members as unresolved legal difficulties. Since World War II, the military services have sought to maintain a legal assistance program to assist military personnel, their dependents, and other authorized persons in obtaining adequate legal advice and services regarding personal legal matters from military sources. Assets devoted to legal assistance by Navy, Marine, or Coast Guard law centers necessarily vary with available manpower assets and fleet demand. The legal assistance program is authorized but not mandated by Congress. The *JAG Manual* (Chapter 7) and the *Legal Assistance Manual* (JAGINST 5801.2) authorize the legal assistance program to provide in-office attorney advice, aid, and referral. Two related programs provide additional services. The preventive law program promotes "legal readiness" and education to help avoid legal problems. The expanded legal assistance program provides in-court representation in certain geographic areas for selected legal issues.

4302 PERSONS ELIGIBLE FOR LEGAL ASSISTANCE. Legal assistance is a service that is primarily intended to benefit active-duty servicemembers. The scope of legal assistance services is left to individual command discretion as dictated by the workload of the office. The following persons are eligible for legal assistance, in order of priority:

A. Active-duty personnel including reservists on active duty for 30 days or more;

B. Dependents of active-duty personnel (including dependents of those who died on active duty);

C. Retired military personnel and their dependents;

D. Reservists on active duty for single periods of 29 days or less and their dependents as authorized by the legal assistance area coordinator in emergency cases;

E. Civilians, other than local-hire employees, who are in the employ of, serving with, or accompanying the U.S. forces in overseas areas and their dependents.

F. Member of allied forces and their dependents in the United States, serving with the Armed Forces of the United States; and

G. Other persons authorized by the Judge Advocate General. JAGMAN § 0706.

4303 LEGAL ASSISTANCE PROVIDERS. Legal Assistance is generally provided by legal assistance attorneys (LAAs) at the Navy, Marine, and Coast Guard legal centers. All information and files pertaining to clients are confidential and privileged under law. These matters may not be discussed with anyone except upon specific permission of the client or when the responsible attorney determines it is required or authorized.

A. If requested by the client's command, information on whether the client reported to legal assistance will generally be provided. Information will not be disclosed if doing so would reveal the nature of the assistance. The nature or substance of the assistance will not be provided without the client's consent.

4304 LEGAL ASSISTANCE SERVICES. Legal assistance offices provide assistance with personal legal problems including:

A. ***Powers of Attorney***. General, special, health-care, medical, *in loco parentis*, household goods shipment, powers of attorney are commonly prepared and provided to personnel.

B. ***Basic wills, trusts, and estate planning***. Complex estate planning and drafting is not routinely provided in the legal assistance program.

C. ***Domestic Relations***. Advice concerning the legal and practical implications of divorce, legal separation, annulment, custody, and paternity will be provided. Assistance in domestic violence cases will be consistent with the service's family advocacy program.

D. ***Adoptions and name changes***

E. ***Nonsupport and indebtedness matters.***

F. ***Taxes***. General advice on personal (not business) Federal, State and local taxes. Most legal assistance offices participate in the Internal Revenue Services' Voluntary Individual Tax Assistance program (VITA). The IRS trains volunteers, who are seldom lawyers, to assist service members and dependents in filing their tax returns. Electronic tax filing is available at almost all bases and is expected to be available on board many vessels in 1999.

G. ***Civil Suits.*** Advice and appropriate assistance will be given. LAAs cannot represent individuals in court, with the exception of the Expanded Legal Assistance Program. See Section 4305. In ***no*** case, can LAAs provide advice to anyone seeking to bring or involved in a lawsuit or claim against the government.

H. ***Soldiers' and Sailors' Civil Relief Act.*** Advice on protections and effect of the act on the servicemember or dependent.

I. ***Consumer Law problems.*** Problems concerning review of leases, advice and assistance on rights, liabilities and obligations; evictions; security deposits; time-share agreements; door-to-door sales; mail-order offers; used cars; "free gifts;" home improvement sales, debt collection, billing errors, and other sale scams.

4305 EXPANDED LEGAL ASSISTANCE PROGRAM. Section 0711 of the JAGMAN provides for the Expanded Legal Assistance Program (ELAP), which allows legal assistance attorneys to represent certain military personnel in civilian court at no expense to the member. Personnel eligible for this program include E-3s or below, E-4s with dependents, or any member that cannot afford the services of a civilian attorney without substantial financial hardship. The ELAP is not intended to deprive civilian attorneys of sources of income. To the contrary, it is intended to provide needed legal services for eligible personnel who cannot afford to hire a civilian attorney.

PART B - DOMESTIC RELATIONS

4306 NONSUPPORT OR INSUFFICIENT SUPPORT OF DEPENDENTS. Nonsupport complaints are among the most common problems handled by the Navy and Marine Corps legal assistance program. The typical case involves an accusation by a servicemember's spouse, made either in person or by letter, that the servicemember has neglected legal and/or moral obligations to the spouse and children. Other instances concern an allegation by the member's former spouse of failure to make child support payments as ordered by the divorce decree. In still other circumstances, the servicemember may require assistance to handle a spendthrift spouse or one who insists that family support payments must be increased. The services recognize that every servicemember has a moral and legal obligation to support dependents and that failure to provide adequate support brings discredit upon the service. Moreover, persistent support difficulties divert a servicemember's attention from military duties thereby decreasing job performance. Support obligations apply to all members, regardless of gender. The obligations discussed here refer only to those expected of a member by the military, which may not necessarily coincide with a member's moral obligations or the legal obligations which may be imposed by the laws of any particular state.

4307 POLICY. No service will act as a haven for personnel who disregard or evade obligations to their legal family members. All members are expected to provide adequate and continuous support for their lawful family members. Any failure to do so which brings discredit upon the service may be cause for administrative action which may include separation. MILPERSMAN, art. 6210120.1. LEGADMINMAN, para. 8001. COMDTINST M1000.6A, PERSONNEL MANUAL, Chapter 8.G.

4308 OBLIGATIONS

A. ***Spouse.*** The member has a continuing obligation to provide ***adequate and continuous*** support to a dependent spouse unless:

1. A court order relieves the member of the obligation;

2. The dependent spouse relinquishes the support, preferably in writing;

3. There is mutual agreement of the parties that no support will be paid (e.g., separation agreements); or

4. A ***waiver*** is granted by the Director, Defense Finance and Accounting Service-Cleveland Center (DFAS) Code DG for naval personnel, Commandant of the Marine Corps (MPH-20) for Marines, or COMDT (G-WPM) for the Coast Guard

B. ***Waiver of military obligation to support spouse.*** (MILPERSMAN, art. 6210120.4; LEGADMINMAN, para. 8004.4; COMDTINST M1000.6A, PERSONNEL MANUAL, Chapter 8.G)

1. ***Grounds.*** The servicemember's obligation to support a dependent spouse may be waived, at the request of the servicemember, for desertion without cause, infidelity, or physical abuse by the dependent spouse.

2. ***Procedure.*** The servicemember must submit a written request for waiver - including substantiating evidence, such as:

a. Affidavit of disinterested person based on personal knowledge;

b. Affidavit of the servicemember or relative based on personal knowledge and supported by corroborating evidence;

c. written admissions made by the spouse contained in letters written by him / her to the servicemember or other persons; or

d. affidavit of physical abuse corroborated by medical or police reports, eyewitness accounts, counselors, chaplain, or social workers.

3. ***Effect.*** The support obligation does not terminate until the waiver has been granted. Such a waiver does ***not*** relieve the member of any court-ordered obligation to the spouse. As a general rule, the member must always follow a court order. If the amount of support ordered by the court is excessive, the remedy for the member is to seek modification of the court order; ***not*** a waiver.

C. ***Children.*** The obligation of a parent to support minor children, whether natural or adopted can never be waived by the military finance offices. Child support is unaffected by desertion or other misconduct on the part of the spouse. In the event of divorce, the support obligation continues unless the court decree specifically negates the parent's obligation to provide child support. A decree silent as to child support does relieve the servicemember of the obligation. Only adoption terminates the natural parents' support obligation. Care of the child by someone under a custody agreement is not adoption and does not in itself relieve the natural parent of the duty to support. A court has the authority to release a parent of their child support obligation.

4309 AMOUNT OF SUPPORT

A. ***Significant factors.*** Factors that many courts consider in determining the amount of the support to be ordered are:

1. The member's pay;

2. other private income of the member;

3. income of the dependent(s);

4. cost for the necessities of life of the dependent(s); and

5. other financial obligations of the member and dependent(s) in relation to income.

B. ***Specific support guidelines.*** Support amounts acceptable to the naval service are determined according to one of the following:

1. ***Court order.*** A court order for support payments normally takes into account the factors listed in paragraph A above. Where such an order has fixed the amount of support due a spouse and / or children, the servicemember will be expected to comply with the order.

2. ***Mutual agreement.*** Preferably, any mutual agreement of the parties should be in writing.

3. ***Absence of court order or mutual agreement.*** In the absence of a court order or mutual agreement, each service provides guidelines that may be used until such time as an appropriate order or agreement is obtained. These guidelines are only interim measures and are not a permanent solution to nonsupport or insufficient support problems. The scale amounts are not intended as fixed standards, but may be increased or decreased as the factors of any particular case warrant.

a. ***Navy***

Relationship and number of dependents	**Support to be provided**
Spouse only	1/3 gross pay
Spouse and one minor child	1/2 gross pay
Spouse and two or more children	3/5 gross pay
One minor child	1/6 gross pay
Two minor children	1/4 gross pay
Three minor children	1/3 gross pay

For the purposes of this table, gross pay includes basic pay, BAH, but does not include hazardous duty pay, sea and foreign duty pay, incentive pay, or basic allowance for subsistence.

b. ***Marine Corps and Coast Guard***

Relationship and number of dependents	**Support to be provided**
Spouse only	BAH-VHA plus 20% of basic pay
Spouse and one minor child	BAH-VHA plus 25% of basic pay
Spouse and two or more minor children	BAH-VHA plus 30% of basic pay
One child	one-sixth of basic pay
Two minor children	one-fourth of basic pay
Three or more minor children	one-third of basic pay

In no event should the amount of support be less than the applicable rate of basic allowance for quarters.

4310 COMPLAINTS OF NONSUPPORT OR INSUFFICIENT SUPPORT

A. ***Interview.*** Upon receipt of a complaint alleging nonsupport or insufficient support of dependents, the command must interview the servicemember concerned. Normally, the member's division officer or command legal officer does this interview.

B. ***Action.***

1. ***Undisputed failure of support.*** If the member acknowledges the obligation and admits a support delinquency, he will be informed of the policy concerning

support of dependents, including the potentially adverse consequences an unsatisfactory response may have upon his service career. In the absence of a determination by a civil court or mutual agreement of the parties, the support guidelines illustrated above will be applied.

2. ***Disputes***. Disputed complaints should be referred to the nearest legal assistance office. In no case, will a service member be allowed to suspend support payments while resolution of a dispute is pending. If satisfactory evidence of an agreement or order substantiating a claim that some amount less than demanded is due cannot be produced, the support guidelines previously mentioned will be applied.

3. ***Command's response***. The command should notify the complainant that the matter has been referred to the servicemember and inform the complainant of any intended action by the servicemember.

4. ***Withholding action for child support***. Commanding officers have discretion to withhold acting on complaints for alleged failure to support to dependents:

a. When the location and welfare of the child(ren) is unknown. For example, the custodial parent removed the child(ren) from the state in violation of a court order; or

b. When it is apparent that the person requesting support does not have physical custody of the children.

In these cases, the service member should continue to pay support into a special bank account established for the benefit of the children, or directly to the state child support enforcement agency.

C. ***Repeated complaints***

1. ***Possible penalties and other action for noncompliance***. The member who refuses to carry out support obligations, or upon whom numerous justifiable complaints have been received, should be counseled that one or more of the following actions could occur:

a. Lower evaluations;

b. administrative separation for a pattern of misconduct;

c. nonjudicial punishment under Art. 134, UCMJ, dishonorable failure to support dependents:

d. BAH will be withheld and/or recouped;

e. loss of tax exemption for the dependent;

f. garnishment of pay;

g. removal from sensitive duties (e.g., PRP); and

h. involuntary allotment.

2. ***Administrative separation.*** MILPERSMAN 1910-140, MARCORSEPMAN, paragraph 6210.3, and PERSONNEL MANUAL, COMDTINST M1000.6A, Chapter 12 authorize administrative separation processing for misconduct by reason of, 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. Before processing, the member concerned must be counseled and given a reasonable opportunity to begin making adequate support payments. At the time such counseling is rendered, an appropriate warning entry should be made in the member's service record book.

Garnishment.

1. ***General.*** Garnishment is a legal proceeding by which a court orders the employer to withhold a portion of an individual's pay and to pay the withheld amount to the court to satisfy a court-ordered judgment. The wages of Federal employees including those of active duty military personnel, Reservists and retired military personnel, are subject to garnishment or wage assignment orders for the purpose of enforcing child support and alimony obligations.

2. ***References.*** 5 C.F.R. Part 581– Processing Garnishment Orders for Child Support and/or Alimony; Title 42 *United States Code* §§ 659-662 (Social Security Act).

3. ***Procedures.*** The spouse of the servicemember must first obtain a child support or alimony order from a court of competent jurisdiction. This will normally be a decree of divorce, although it does not necessarily need to be. If the servicemember fails to comply with this court order, the spouse then may go to the same or a different court seeking an order in garnishment to enforce the original order. Upon a showing of an order awarding support or alimony and a failure to comply, the second court will then issue an order garnishing the servicemember's pay.

4. ***Service of process.*** Pursuant to Executive Order 12953 27 February 1995, process affecting the military pay of Navy and Marine Corps active-duty, Reserve, Fleet Reserve, or retired members and Marine Corps members, wherever serving or residing, may be served personally or by registered or certified mail on the Director, DFAS, at the following address:

a. Director, Defense Finance and Accounting Service-
Cleveland Center (Code DG)
1240 East Ninth Street
Cleveland, OH 44199-2087
COMM 216-522-5301, DSN 580-5301
Email: dfas_cleveland@cleveland.dfas.mil
http://www.dfas.mil

5. ***Pay subject to garnishment.*** The ceiling on the amount subject to garnishment is the lower of state law or the limits stated in the Federal Consumer Credit Protection Act (CCPA). CCPA's maximum limit subject to garnishment is 50% of ***disposable earnings*** if the member is supporting other family members and 60% if he/she is not. An additional 5% can be garnished if the support obligation is more than 12 weeks in arrears. Disposable pay includes basic pay and bonus and special pay, but not BAH or BAS. Garnishment writs may supersede voluntary allotments. Attorney fees, interest, and court costs may be recovered by garnishment if the order specifically provides for such recovery.

6. ***Command responsibility.*** Upon receipt of a writ or order of garnishment (also called a wage assignment, an order to withhold and deliver, or a writ or order of attachment), the command will forward all correspondence to the action officer at DFAS. Simultaneously, the command receiving the request will send a letter to the requester advising of such forwarding action. The commanding officer of the member or employee shall ensure that the member or employee has written notice of the action and is afforded counseling. The command will then receive and comply with instructions from the cognizant finance activity.

7. ***Defenses to garnishment. NONE!*** DFAS will not entertain defenses raised by the service member. Any disputes must be litigated in the state court that issued the garnishment order.

E. ***Involuntary allotments.*** An involuntary allotment can be initiated against an active duty servicemember to pay for child support or a combination of spousal and child support, ***but not spousal support only.*** Under the Tax Equity and Fiscal Responsibility Act of 1982, § 172(a), codified at 42 U.S.C. § 665, if a member is two or more months in arrears on child support payments or child and spousal support payments (or the total amount owed is greater than or equal to two months of payments), the member's spouse / former spouse may seek an involuntary allotment. Upon notification by the state authorities, DFAS is required to notify the member to begin payments within 30 days or suffer automatic deductions of the payments from his/her pay.

1. ***Amount of Allotment.*** The allotment shall be established in an amount necessary to comply with the support order, but not more than 60% of disposable earnings.

(50% if the service member is supporting others in addition to this court ordered support). 15 U.S.C. § 1673. Disposable earnings ***does*** include BAH for personnel in paygrades E-7 and above and BAS for officers and warrant officers.

2. ***Defenses to Involuntary Allotment.*** The service member may show that the information in the request itself is incorrect which renders the allotment request invalid. Proof of payment, compliance with a court order, documentation showing the order has been amended, superseded or set aside, or evidence establishing the arrearage does not equal or exceed 2 months of support will stop the involuntary allotment process. This evidence must be sent to DFAS within 30 days of receipt of the notice of the allotment request.

3. ***Preventing two allotments.*** The service member should be counselled not to start a voluntary allotment upon receiving notification of an involuntary allotment action; the result will be two allotments deducted from military pay for the same purpose.

F. ***Wage assignment orders.*** These are "involuntary allotments" created by state law that can be used to enforce support obligations against civilian and military parents. The trigger for a wage assignment generally is an arrearage of not more than 30 days. The Family Support Act of 1988 requires all states to implement automatic wage withholding in cases starting 1 January 1994. In cases involving contingent withholding provisions, the absent parent receives notice of intent to initiate a wage assignment and, if no defense is presented, a notice of assignment is sent to the employer. All employers must honor wage assignment orders. DOD agencies process them as if they were garnishment orders.

PART C - PATERNITY COMPLAINTS

4311 GENERAL

A. ***References.*** MILPERSMAN 5800-010; LEGADMINMAN, para. 8005; COMDTINST M1000.6A, CG PERSONNEL MANUAL, Chapter 8-G, 8-M; 32 C.F.R. Part 733.5; Subj: Determination of Paternity and Support of Illegitimate Children.

B. 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 illegitimate offspring. Navy, Marine Corps, and Coast Guard policy make no distinction between legitimate and illegitimate children.

C. 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.

4312 PROCEDURES

A. ***Interview and action.*** Upon receipt of a paternity complaint, the command concerned will interview the servicemember and take the following action:

1. ***Judicial order or decree of paternity or support.*** If a judicial order or decree of paternity or support is issued 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 where the servicemember was not present in court at the time the order or decree was rendered, should be referred to a legal assistance officer for ensuring compliance with the Soldiers' and Sailors' Civil Relief Act.

2. ***Acknowledgment of paternity.*** If a member admits paternity or the legal obligation to support the child, the military expects him to furnish support payments for the child and assist in the payment of prenatal expenses. The member should be advised that once support payments have begun the child qualifies for an armed forces dependents' identification card.

3. ***Disputed or questionable cases.*** In instances where no legal action has determined the paternity of the child and the servicemember questions paternity, a legal assistance attorney should immediately contact the clerk of the court issuing the complaint and arrange for a blood test. These tests cost nearly $100 per person; and, the results take 2-4 weeks. Blood tests are accurate enough to rule out or exclude 90-95% of falsely accused fathers. Since many states construe an offer of, or actual payment of, any support for the child as an admission of paternity, the servicemember should be advised not to make any payments or give ***any*** indication of intent to provide financial support before he has been advised to do so by his attorney.

4. ***Correspondence.*** Replies to individuals concerning paternity cases should be as kind and sympathetic as circumstances permit. LEGADMINMAN, para. 8005. MILPERSMAN 5800-010 provides a sample reply which may be appropriate in some cases.

B. ***Amount of support.*** MILPERSMAN 6210125; LEGADMINMAN, para. 8002.

1. ***Court decree.*** The service member will be expected to comply with amounts specified by courts.

2. ***Reasonable agreement with mother or legal guardian of child.*** If mutual agreement can be reached by the natural mother and father, that amount should be

paid. Service members should beware of agreeing to provide support below established state guidelines because the mother could always seek additional support by going to court, irrespective of what the parties agreed on.

3. ***Support guidelines***. The support guidelines for illegitimate children are identical to those discussed for legitimate and adopted children in section 4309 B.3 above.

4. ***Lump-sum settlements***. In many states, "paying off" the mother of the child – even where she agrees in writing to forego pursuing any claims of paternity or child support – is ineffective as being against public policy.

5. ***Basic allowance for housing (BAH)***. Note that support of an illegitimate child may entitle a member to BAH at the "with dependents" rate. A single member living in bachelor quarters will only rate the difference between single BAH and BAH "with dependents."

PART D - INDEBTEDNESS AND CONSUMER PROTECTION

4313 GENERAL. In this age of expanded credit opportunities, the servicemember's regular and relatively secure source of gradually increasing income has made him attractive to installment retailers, loan companies, and other consumer credit operations. Unfortunately, the ease with which credit is made available sometimes results in the tendency to overextend and, in some cases, the inability to pay. In cases of default, disappointed creditors frequently correspond with the commanding officer of the member concerned in hopes that official pressure will be exerted to make the debts good.

4314 POLICY

A. ***References***. MILPERSMAN 7000-020; LEGADMINMAN, para. 7001, COMDTINST M1000.6A, CG PERSONNEL MANUAL, Chapter 8-L.

B. From inception to final settlement, a monetary obligation is regarded as a private matter between the servicemember and his creditor. A member is expected to settle just financial obligations in a proper and timely manner.

C. The failure to pay just debts, or the repeated undertaking of obligations beyond one's ability to pay, is regarded as evidence of irresponsibility which will be considered in retaining security clearances, making advancements in rate or special duty assignments, recommending reenlistments, or authorizing extensions. In aggravated circumstances, indebtedness problems are grounds for disciplinary action or administrative separation. Accordingly, although the service has no authority to require a member to pay any private debt or to divert any portion of his salary in payment thereof, and no commanding officer

may adjudicate claims or arbitrate controversies respecting alleged financial defaults, all commanding officers should cooperate with creditors to the limited extent of referring "qualified correspondence" to the member concerned. Particular situations evidencing continued or consistent financial irresponsibility should be dealt with as outlined above and in section 4310 C.1 of this text.

4315 THE MILITARY AND CONSUMER CREDIT PROTECTION

A. *Truth in lending*

1. ***General.*** The Federal Truth in Lending Act (TILA), Title I, 15 U.S.C. §§ 1601-1677 and 12 C.F.R. Part 226 (1995), commonly referred to as "Regulation Z," is designed to assure "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various terms available to him and avoid the uninformed use of credit." To this end, TILA requires that credit terms and costs be explained to the consumer in a uniform manner by revealing "the annual percentage rate of the total finance charge." The Act is broadly construed in favor of consumers, with creditors who fail to comply with its terms, liable to consumers regardless of the nature of the violation of the creditor's intent.

2. ***Coverage.*** TILA applies to virtually everyone who extends consumer credit – including loan credit, credit extended by sellers, real estate credit, chattel credit, retail revolving credit, and bank and other credit card arrangements. It affects those individual purchase transactions undertaken "primarily for personal, family, household or agricultural purposes." It is ***not*** applicable to:

a. creditors who extend credit for business purposes;

b. Student loan programs; or

c. credit transactions over $25,000 except those involving security interests taken in real or personal property.

. ***Disclosure Requirements.*** TILA mandates that the creditor make certain disclosures to the consumer depending on the type of credit extended. Nearly all states have applicable disclosure requirements for consumer transactions. At a minimum, creditors must reveal:

a. amount financed;
b. annual percentage rate;
c. finance charge;
d. payment schedule; and
e. late or prepayment penalties.

4. ***Consumer Remedies***. Creditors are liable for failure to disclose such credit terms. Consumers may recover actual damages, attorney's fees and court costs, and statutory damages (individual actions: $100-$1000; class actions: 1% of creditor's net worth or $500,000 whichever is less). Willful violation may result in criminal penalties and sanctions against the creditor.

B. ***DOD Directive 1344.9***. In outlining service policies regarding indebtedness of military personnel, DOD Dir. 1344.9, Indebtedness of Military Personnel, provides that creditors seeking to have indebtedness complaints administratively referred to the allegedly defaulting servicemember must first demonstrate compliance with the disclosure requirements of the Truth in Lending Act and also show that the military "Standards of Fairness" have been applied to the transactions.

C. ***Standards of Fairness***. These "Standards of Fairness," include provisions ensuring that the nature and elements of a credit transaction will be fair, equitable, and ethical. For example:

1. ***Usury***. No finance charge contracted for, made, or received under any contract shall be in excess of the charge which could be made for such contract under the law of the state in which the contract is signed. In the event a contract is signed with a U.S. company in a foreign country, the lowest interest rate of the state or states in which the company is chartered or does business shall apply.

2. ***Attorney's fee***. No contract or loan agreement shall provide for an attorney's fee in the event of default unless suit is filed, in which event the fee provided in the contract shall not exceed 20 percent (20%) of the obligations found due.

3. ***Prepayment***. There shall be no "penalty charge" for prepayment of an installment obligation. Moreover, in the event of prepayment, the creditor may collect only a portion of the potential finance charges prorated to the date of prepayment.

4. ***Late payments***. No late charge shall be made in excess of 5 percent (5%) of the late payment, or $5.00, whichever amount is the lesser; and only one late charge may be made for any tardy installment. Late charges will not be levied where an allotment has been timely filed, but payment of the allotment has been delayed.

5. ***Assignment to escape defenses***. In loan transactions, defenses which the servicemember may have against the original lender may not be "cut off" through the assignment of the lender's obligation to a third party. As an example, consider the case of Rollo having purchased on credit a television set from Department Store ***M***. If ***M*** sells Rollo's agreement to pay for the television to collection agency ***B***, and the television breaks down, ***B*** may not insist upon the fact that the breakdown is ***M***'s responsibility and therefore has nothing to do with Rollo's obligation to pay ***B***.

D. ***Fair Debt Collection Practices Act.***

1. ***General.*** The Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, prohibits contact by a ***debt collector*** with third parties (such as commanding officers) for the purpose of aiding debt collection unless there has been prior consent by the debtor, or a court order has been obtained. The Act carefully defines a debt collector as those firms who are engaged in the collection of debts as their primary purpose; in other words, the original creditor has given up trying to collect and turned it over to a "professional." The Act does ***not prohibit the original creditor*** from contacting the command.

2. ***State law.*** Like the Federal government, many states have enacted laws covering debt collections. Some state statutes impose stricter provisions than the federal counterpart. If there is a conflict between state debt collection regulations and the Fair Debt Collection Practices Act, the law with the more stringent provisions apply and must be complied with by debt collectors.

3. ***Action.*** If it is determined that the debt collector is in violation of the Fair Debt Collection Practices Act or a state statute regulating debt collection practices, the correspondence will be returned to the sender, along with a letter similar to the sample letter No. 1 set forth in MILPERSMAN 7000-020 or fig 7-5, LEGADMINMAN. If a letter is in compliance with the appropriate Federal or state law in this regard, the indebtedness complaint will be processed as set forth in section 4316 below.

E. ***Door-to-door sales.*** The Federal Trade Commission (FTC) promulgated the home solicitations trade practices rule (16 C.F.R. Part 429) because it believed that door-to-door sales were especially prone to fraud and predatory practices. The rule permits a consumer to withdraw unilaterally from contracts resulting from door-to-door solicitations.

1. ***Definition.*** A "door-to-door" sale is a sale, lease, or rental of consumer goods or services with a purchase price of $25 or more in which the seller personally solicits the sale, including those in response to an invitation by the buyer, and the contract is made at a place other than the seller's place of business. 16 C.F.R. § 429.1, Note 1(a). Door-to-door sales under this section do ***not*** include phone transactions; transactions in which the buyer has initiated the contact and the goods or services are needed to meet a bona fide immediate personal emergency of the buyer (and the buyer furnishes the seller with a signed statement so stating); buyer requests seller conduct repair or maintenance work on the buyer's personal property; sales of automobiles at public auctions and tent sales if the seller has at least one permanent place of business; and sales of arts and crafts at fairs, shopping malls, civic centers, community centers, and schools [53 Fed. Reg. 45,455 (Nov. 10, 1988)].

2. ***Deceptive trade practices*** (16 C.F.R. § 429.1). The FTC has determined that it is a deceptive trade practice if a door-to-door sales representative:

a. fails to furnish a contract informing the buyer of the right to

cancel the transaction within ***three*** business days ("business day" includes Saturdays, excludes Sundays and most federal holidays);

b. fails to furnish two cancellation forms stating the seller's name and address and the date by which the transaction may be canceled (this can be a copy of the contract as long as it contains the cancellation language). The notice of cancellation must be in ***BOLD print,*** and in the same language used during the sales presentation (i.e. if sale done in Spanish, cancellation rights must be in Spanish);

c. fails to inform the buyer orally of the right to cancel or misrepresents the buyer's right to cancel; or

d. fails to honor a valid notice of cancellation and refund any payments made within 10 days of the cancellation.

3. ***Cancellation.*** The buyer must deliver to the seller a signed and dated copy of the notice of cancellation, or use any written form that communicates the intent to rescind the contract (including telegrams, faxes) within 3 business days of the transaction. After rescission the buyer must make any goods delivered by the seller available to the seller at the buyer's residence in substantially as good condition as when received, or comply with the seller's instructions regarding the return of the goods at the seller's risk and expense. If the buyer fails to make the goods available to the seller, the buyer remains liable for performance of all obligations under the contract. If the seller fails to collect any goods delivered to the buyer within 20 days of the date of the notice cancellation, the buyer may retain or dispose of the goods without any further obligation.

4316 PROCESSING OF INDEBTEDNESS COMPLAINTS

A. ***General.*** Members are expected to pay their just financial obligations in a proper and timely manner. A just obligation is one in which there is no dispute as to the fact or law, or one reduced to a judgment which conforms with the Soldiers' and Sailors' Civil Relief Act (SSCRA). See 4321 below. Complaints of indebtedness are referred to the servicemember when the creditor correspondence is accompanied by:

1. Evidence that the debt complained of has been reduced to judgment; or

2. a "Certificate of Compliance," or its equivalent, certifying that the credit transaction was made in accordance with the Truth in Lending Act and the DOD Standards of Fairness.

B. ***References.*** Fair Debt Collection Practices Act. 15 U.S.C. 1692-1692o; Truth in Lending Act, 15 U.S.C. § 1601-1667; DOD Policy: DOD Directive 1344.9, Subj: Indebtedness of Military Personnel; 32 C.F.R. Part 43a, Indebtedness of Military Personnel;

MILPERSMAN 7000-020; LEGADMINMAN Chapter 7.

C. ***Statement of Full Disclosure***. A nonjudgment creditor must also submit a statement of "Full Disclosure" showing the terms of the transaction were disclosed to the servicemember at the time the contract was executed. Marine Corps procedure for processing of indebtedness complaints, outlined in paragraph 7002 of the LEGADMINMAN, is essentially the same as that detailed in MILPERSMAN 7000-020. Significant variations will be discussed at the end of this section.

D. ***Qualified indebtedness complaints***.

1. ***Types***. The types of indebtedness complaints which qualify for referral to the servicemember include:

a. Creditor correspondence evidencing that the alleged debt has been reduced to judgment by a court of competent jurisdiction;

b. correspondence from a nonjudgment creditor that includes copies of the statement of Full Disclosure and the Certificate of Compliance showing execution by both parties prior to the consummation of the contract;

c. correspondence from a nonjudgment creditor who has not executed a Certificate of Compliance prior to the consummation of the contract, or who cannot produce the certification provided that such correspondence includes:

(1) certification by the creditor that the Standards of Fairness have been complied with and the unpaid balance adjusted accordingly, if necessary; and

(2) a statement of Full Disclosure.

d. correspondence from a creditor not subject to the Truth in Lending Act (e.g., a public utility company) that includes a certification that no interest, finance charge, or other fee is in excess of that permitted by the law of the state involved; and

e. correspondence from creditors declared ***exempt*** from certification of compliance with the Standards of Fairness and Full Disclosure by MILPERSMAN 7000-020. Examples include:

(1) Companies furnishing services such as milk, laundry, etc., in which credit is extended solely to facilitate the service, as distinguished from inducing the purchase of the product or service;

(2) contracts for the purchase, sale, or rental of real estate;

(3) claims in which the total unpaid amount does not exceed $50;

(4) claims for the support of dependents;

(5) purchase money mortgages on real property; and

(6) claims based on a revolving or open-end credit account, if the account shows the periodic rate and its annual equivalent and the balance to which it is applied to compute the charge (e.g., credit cards, department store charge accounts).

NOTE: Above exemptions do not apply in the Marine Corps.

2. ***Advising the command.***

a. ***Referral to debtor servicemember.*** Normally, referral of a qualified indebtedness complaint to the debtor servicemember is accomplished by a division officer or command legal officer, at which time the member is confronted with the allegation of default. If, after confrontation, the servicemember acknowledges the debt and the ability to pay, the member should be instructed to make good the debt as soon as possible. In the event the servicemember disputes the debt or indicates an inability to pay, the member should be referred to the nearest legal assistance officer. Such referral should also be made in the case of a judgment debt apparently obtained in violation of the Soldiers' and Sailors' Civil Relief Act. ***In all cases, the servicemember should be warned of the potential adverse consequences the continued nonpayment of a just debt may have upon service status.***

b. ***Correspondence with the creditor.*** In the case of a complaint referred to a servicemember-debtor, the command should notify the creditor in writing that the matter has been referred to the servicemember for resolution. Samples of such "referral" letters are found at MILPERSMAN 7000-020 Letter L-3 and LEGADMINMAN figure 7-4.

E. ***Unqualified or questionably qualified indebtedness complaints***

1. ***Initial reply*** If the creditor has no judgment, is subject to the Truth in Lending Act, is not exempt under MILPERSMAN 7000-020, and has not met the compliance-disclosure requirements discussed in paragraph 4316(C) above, the command shall return the letter to the creditor enclosing a copy of the Standards of Fairness and forms for Full Disclosure and the Certificate of Compliance. Samples are provided in MILPERSMAN 7000-020 letter number 2 and LEGADMINMAN figure 7-5. The command should take no action until the creditor submits a qualified complaint.

2. ***Action on reply from creditor.*** If the creditor resubmits his complaint and includes the completed, required forms, or their equivalent, the complaint will be considered qualified and processed accordingly. If the resubmitted complaint contains neither form, or a set incompletely or insufficiently accomplished, the command shall return the creditor's correspondence with a cover letter patterned on sample letter number 4 of MILPERSMAN 7000-020 and a copy thereof to the Chief of Naval Personnel.

3. ***Questionable qualified indebtedness complaints.*** Cases of questionable qualification should be referred to a staff judge advocate or legal officer for review and opinion. In such instances, correspondence to the creditor should be tailored appropriately.

4. ***Congressional inquiries.*** Occasionally, a disgruntled creditor who has failed to qualify his complaint for referral writes to his Congressman. In the event of a congressional inquiry based on such an event, consult MILPERSMAN 5216-010 and SECNAVINST 5216.5D.

F. ***Marine Corps variations.***

1. In the Marine Corps, complaints of indebtedness are processed under Chapter 7 of the LEGADMINMAN. The Marines consider qualified correspondence to be that which either certifies compliance with DOD Standards of Fairness, comes from creditors not subject to the Truth in Lending Act, or relates to indebtedness reduced to judgment in accordance with state law. The Marine Corps recognizes none of the exemptions from compliance with the DOD standards set forth in MILPERSMAN 7000-020 and discussed in section 4316 D.1.e above. These exemptions should be considered applicable to U.S. Navy personnel only.

2. Marine units receiving qualified correspondence should refer the correspondence to the Marine. The Marine should be counseled concerning his/her obligations and rights. If appropriate, referral may also be made to additional financial, legal, or credit counseling on base. *See* LEGADMINMAN, § 7002.5.

3. ***Special procedures for detached Marines.*** In cases where a commander receives an indebtedness complaint regarding a Marine no longer a member of the command, the letter is forwarded to the new command and the debtor's new duty station address is sent to the creditor (if available from local records). If the present location of the debtor is unknown, the commander will refer the creditor to the locator at CMC. If the complaint regarding a detached member has come from CMC rather than directly from the creditor, the commander will readdress and forward it or return it to CMC as appropriate. *See* fig. 7-6, LEGADMINMAN. (The Navy follows a similar procedure, although it is not specified in the MILPERSMAN.)

4317 ADMINISTRATIVE OR DISCIPLINARY ACTION BECAUSE OF INDEBTEDNESS

A. ***General.*** Actions discussed by this section are usually reserved for aggravated cases of servicemembers who persist in demonstrating no inclination to settle qualified obligations that have been referred to them through their commands. Such cases involve members who continually overextend themselves despite prior difficulties from, and warnings regarding, living beyond their means. Normal indications of these problems are repeated complaints from the same creditor or multiple complaints from different sources.

B. ***Administrative separations.*** MILPERSMAN, 1910-140; MARCORSEPMAN, para. 6210.3. Servicemembers may be separated for misconduct due to a pattern of misconduct when they exhibit an established pattern of dishonorable failure to pay just debts. Processing for misconduct could result in an other than honorable separation with attendant loss of service benefits. In each case, the member concerned must have received prior counseling and been afforded a reasonable opportunity to overcome his deficiencies. Following such counseling, an appropriate warning entry should be made on page 11 (USMC) / page 13 (USN) of the member's service record.

C. ***Disciplinary action.*** Article 134, UCMJ, includes the offense of "dishonorable failure to pay a just debt," which carries a maximum punishment of six months' confinement, forfeiture of all pay, and a bad-conduct discharge. Deceit, willful evasion, false promises, or other circumstances indicating gross indifference must be proved to establish the offense. Nonjudicial punishment or court-martial action may be initiated under article 134 at the discretion of the command. It should be remembered, however, that disciplinary action is never an appropriate vehicle for assisting creditors in the collection of debts. Moreover, disciplinary action not resulting in discharge is likely to produce financial hardship in the form of reduction or forfeiture, an end hardly likely to rehabilitate the debtor. Accordingly, in most cases, administrative actions, rather than disciplinary measures, offer more appropriate solutions to aggravated indebtedness situations.

4318 INVOLUNTARY ALLOTMENT FOR JUDGMENT CREDITORS

A. ***Generall.*** Effective 1 January 1995 the taxable military pay of personal became subject to involuntary allotment to satisfy court-ordered judgments in favor of creditors.

B. ***References***

1. Pub L. 103-94, 107 Stat. 1001 "Hatch Act Reform Amendments of 1993," (Oct 6, 1993), codified at 5 U.S.C. 5520a(k);

2. DOD Directive 1344.9, Subj: Indebtedness of Military Personnel;

3. DOD Instruction 1344.12 , Subj: Indebtedness Processing Procedures for Military Personnel;

4. NAVADMIN 249/94: DTG: 310100Z Dec 94.

C. ***Procedure***. The creditor initiates an action in court against a servicemember, successfully receives a judgment, and then seeks to satisfy that judgment by applying for an involuntary allotment of the servicemember's pay. The creditor then completes DD Form 2653, Nov 94, Involuntary Allotment Application attaching a certified copy of the final court order. The creditor must certify on the application the following:

1. Judgment not modified or set aside (i.e. still a valid judgment);

2. the judgment was not issued while the servicemember was on active duty. If the servicemember was on active duty, the SSCRA was followed fully (see Part E below; i.e. the member was present or represented by an attorney of the member's choosing in the proceedings; or that the judgment otherwise complies with the SSCRA.

3. the member's pay could be garnished under the applicable State law for 5 U.S.C. 5520a if the member is a civilian employee;

4. debt has not been discharged in bankruptcy;

5. the creditor will make prompt notification to DFAS when judgment satisfied by involuntary allotment;

6. the creditor agrees to repay servicemember within 30 days if payment to creditor is erroneous.

D. ***Amounts Available for Allotment***. DFAS is authorized only to take 25% of a member's disposable earnings by involuntary allotment, or a lesser amount if the applicable state law provides for a lower amount. Disposable earnings means taxable pay, including basic and special duty assignment pay. Retired and retainer pay, separation pay, and allowances (VHA, BAH, BAS) are not subject to allotment. Family support allotments / garnishments take precedence over any judgment creditor involuntary allotments.

E. ***DFAS Action***. Once DFAS receives the creditor's application, it is reviewed for completeness and accuracy. DFAS then completes the first part of DD FORM 2564, Nov 94, Commander's Notification and Member's Response. A copy of the application, DD FORM 2653, is mailed to the affected servicemember. Two more copies of the completed application and one copy of DD FORM 2564 is mailed to the servicemember's immediate

commanding officer.

F. ***Commanding Officer's Actions***. Upon receipt of DD FORM 2654 from DFAS, the commanding officer will counsel the servicemember on the process and provide him/her a copy of the application. (The member should now have two copies of the involuntary allotment application, one provided directly from DFAS, and the other by the CO). The CO must inform the member that he/she has 15 days to consent or contest the allotment. The CO may extend for an another 30 days if warranted. Additionally, the commanding officer must inform the servicemember that the following defenses are available:

1. SSCRA right not complied with during the judicial proceeding;

2. exigencies of military duties caused member's absence from judicial proceeding;

3. information contained in the application is false or erroneous in material part;

4. judgment has been satisfied, superseded, or set aside;

5. judgment has been partially satisfied or materially amended;

6. there is a legal impediment to establishment of involuntary allotment, e.g. judgment debt discharged in bankruptcy.

The servicemember must submit corroborating evidence supporting a defense if he/she contests the involuntary allotment. Commanding officers should also inform members that they may consult a legal assistance attorney or hire a civilian attorney at their own expense. A commanding officer is authorized to grant a member additional time to consult with a legal assistance attorney before deciding to contest the involuntary allotment.

G. ***Military Exigencies***. Commanding officers decide whether a member has established the grounds to contest an involuntary allotment on the basis of ***"exigencies"*** of military duty. If the CO decides the member has an exigency defense, this must be noted on DD Form 2654 and mailed to DFAS. Commanding officers may utilize their own experience, service records entries and any other information they deem relevant to decide by a preponderance of the evidence that:

1. military duties were of such paramount importance that it prevented making the member available to attend judicial proceedings; or

2. rendered the member unable to timely respond to process, motions, pleadings or orders of the court. DFAS is bound by the commanding officer's exigency determination. The creditor, however, may appeal to the General Court-Martial Convening

Authority who will be identified on DD FORM 2654.

H. ***DFAS Ruling is Final.*** Other than the military exigency defense, DFAS' rulings on the other defenses if submitted by the affected servicemember are final. Creditors, at this point, have no other recourse within the Department of Defense to get a DFAS ruling overturned. If there are several involuntary allotment applications against one servicemember, DFAS will process each application on a "first come, first serve" basis.

PART E - SOLDIERS' AND SAILORS' CIVIL RELIEF ACT (SSCRA)

REFERENCES.

A. 50 U.S.C. app. §§ 501-591 (1940)
B. SSCRA Guide JA260

4319 BACKGROUND. It has long been recognized that a person's entry into the armed services carries with it a potentially burdensome disruption to his/her personal affairs. Service in the armed forces means accepting orders to states other than the member's domicile and, potentially, deploying for several months to geographically isolated regions. Additionally, reservists who are recalled to active duty frequently experience substantial reductions in their income. Without the courts' and Congress' continued support of the Soldiers' and Sailors' Civil Relief Act (SSCRA), service members could be subjected to civil judgments without representation in court and multiple taxation of income and property. Most service members can, if given time and opportunity, attend to their affairs and meet their obligations. The SSCRA is an invaluable tool, when understood and used appropriately, to provide service members some relief for these potentially destructive burdens. During the Civil War period, many states enacted "stay" laws that imposed an absolute moratorium on enforcement of legal rights against service members. However, experience soon taught that such arbitrary and rigid prohibitions of suits against service members had a negative effect resulting in service members and military families being denied credit when it was most needed.

The first nationwide legislation designed to protect the service member, the Soldiers' and Sailors' Civil Relief Act of 1918, ch. 20, 40 Stat. 440 (1918), rejected the absolute prohibition approach of the early states' "stay" laws. The 1918 Act provided protection by ***suspending legal proceedings and transactions which might prejudice the "civil rights"*** of a service member during his military service when, and if, the opportunity and capacity to perform personal obligations were materially impaired by reason of his military service. The Soldiers' and Sailors' Civil Relief Act of 1918 expired six months after the conclusion of World War I. The general approach of suspending proceedings and transactions which are materially impaired by military service was carried forward into the Soldiers' and Sailors' Civil Relief Act of 1940, ch. 888, 54 Stat. 1178 (1940) (current version at 50 U.S.C. app. §§ 501-591) [SSCRA]. This act was largely a reenactment of the Soldiers' and Sailors' Civil

Relief Act of 1918. Additionally, criminal penalties have been added for actions evading or frustrating the relief provisions of the SSCRA. The focus on the 1940 act was relief for those drafted or "called to arms" during World War II. The SSCRA did not consider the "all volunteer force" of today. The SSCRA was amended March 18, 1991, in Pub. L. No. 102-12, §1, 105 Stat. 34 (1991), following the troop buildup for Operation Desert. These amendments addressed the problems encountered by recalled Reservists and National Guard personnel.

4320 ARTICLE I: GENERAL PROVISIONS

A. ***Purpose of the Act.*** The SSCRA is intended to enable persons on active duty and **activated** Reservists to devote their attention exclusively to the defense needs of the nation by providing for the ***temporary*** suspension of **civil** proceedings that might prejudice the civil rights of such persons. 50 U.S.C. app. § 511. SSCRA ***does not extinguish any liabilities or obligations***, but merely suspends action and enforcement until such time as the ability of the service member to answer or comply is no longer materially impaired by reason of military service.

B. ***Persons entitled to benefits and protections of the Act:***

1. ***Persons in the military service defined.*** Members of every branch of the U.S. military, whether officer or enlisted, volunteer or inductee (from the date of receipt of the induction order), who are on active duty or who are in training under the supervision of the United States just prior to induction are entitled to the protections and benefits of the SSCRA. 50 U.S.C. app. § 511. The Act does ***not*** provide protections to retired personnel not on active duty, Reserve personnel not on active duty, personnel in a unauthorized absence status for more than 29 days, deserters, those in civilian confinement, or personnel serving a court-martial sentence involving total forfeitures of pay and allowance. Service members declared "missing in action" are also afforded certain safeguards under the SSCRA. 50 U.S.C. app. § 581.

Public Health Service (PHS) officers qualify for SSCRA protections if they have been detailed by proper authority for duty with either the Army or the Navy, or if they are serving with an Armed Force during war or a national emergency.

Merchant seamen, civilian employees, contract surgeons, and employees of government contractors have been held **not** to be "persons in the military service" and hence **not** entitled to the benefits of the SSCRA. 50 U.S.C. app. § 511

National Guard personnel are covered only if ordered to federal service. Duty ordered by the state will not trigger SSCRA protection. However, some states, such as Louisiana and Pennsylvania, have created a statute similar to the SSCRA to cover state service.

2. ***Persons secondarily liable.*** The enforcement of any liability or obligation against any person primarily or secondarily liable with a service member may be subject to the same delays and vacations available to the service member. Courts enjoy considerable discretion in granting stays, postponements, or suspensions of suits or proceedings to sureties, guarantors, endorsers, co-makers, and others depending upon the contractual relationship between the service member and the civilian co-party. The SSCRA further provides that whenever the military service of a principal on a criminal bail bond prevents the sureties from enforcing the service member's attendance, the court shall not enforce the provisions of the bond during the principal's military service and may even, either during or after said service, discharge the sureties and exonerate the bail. 50 U.S.C. app. § 513(3). However, in the codefendant situation the SSCRA states "where the person in military service is a codefendant with others the plaintiff may nevertheless by leave of court proceed against the others." 50 U.S.C. app. § 524.

3. ***Dependents of service members.*** Dependents of military personnel may apply to a court for limited protections under the SSCRA concerning rent, installment contracts, mortgages, liens, assignments, and leases. 50 U.S.C. app. §§ 530-536.

4. ***U.S. citizens serving with allied forces.*** Persons serving with an allied force who were, prior to that service, citizens of the United States, are entitled to the benefits and protections of the SSCRA unless dishonorably discharged from the allied force. 50 U.S.C. app. § 572.

C. ***Scope and Operation.*** The Act applies within all states and territories subject to U.S. jurisdiction and to proceedings in all civil courts—Federal, state, and municipal. Except as discussed below concerning the statute of limitations, the SSCRA contains no reference to administrative proceedings. 50 U.S.C. app. § 525. This will have significant repercussions in the coming years as welfare reforms allow paternity, child support, and other related domestic matters to be settled during administrative hearings. Most significantly, the SSCRA has ***no effect in criminal cases***

D. ***What is material effect?*** Service members are required to demonstrate that their ability as a plaintiff to prosecute an action or as a defendant to conduct a defense is "materially affected" by reason of military service. There is no bright line standard. However, courts focus on two main concerns.

1. The first is the geographical inability to return to prosecute or defend the civil action because of deployments, field exercises, out of locale training, etc. Has the member suffered a geographic disadvantage due to military assignment or would the member's rights be adversely affected by his absence?

2. The second is the financial inability resulting from decreased standard of living and income compared to what the service member experienced prior to military

service. Many individuals experience a significant decrease in income when they enter the military. The courts examine whether the member has suffered economic impairment due to transition from civilian to military life.

4321 ARTICLE II: GENERAL RELIEF

A. *Stay of proceedings and executions*

When requested, courts will generally grant a **temporary** delay (a stay of proceedings) in **civil** actions where a member's military service has "materially affected" the member's ability to appear and "defend" or "prosecute" an action. The SSCRA was not meant to provide immunity from lawsuits or shield service members from civil action or provide them with otherwise unfair "breaks." The act will never relieve a member of the obligation to pay his or her just debts.

1. ***General.*** The general stay provision of the SSCRA declares that "[a]t any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not **materially affected** by reason of his military service." 50 U.S.C. app. § 521 (emphasis added).

2. ***Special provisions allowing for stays of specific proceedings.*** In actions on certain installment contracts, mortgages, trust deeds, and other secured obligations entered into by the service member prior to his entering the military service, the grant of a stay is discretionary with the court depending upon a finding that the service member's ability to comply with the terms of the transaction or obligation is materially affected by reason of military service. 50 U.S.C. app. §§ 531-532.

3. ***Stays or vacations of judgments, orders, etc.*** The execution of judgments or orders against a service member may be stayed, and attachments or garnishments against property, money, or debts may be vacated or stayed at the discretion of the court depending upon its opinion as to whether the service member's ability to comply with the judgment or order is materially affected by reason of military service. 50 U.S.C. app. § 523.

B ***Duration and terms of stays.*** Ideally, a service member can obtain a stay based on the foregoing provisions for the entire period of military service plus three months thereafter. 50 U.S.C. app. § 524. The actual duration of stays allowed, when less than this permissible maximum, may depend upon the equities of each case. In most cases, the stay granted may be only until such time as the service member is unhampered by military duties, e.g. conclusion of a deployment, return from field exercises. If a service member requests

leave to attend one or more hearings involving paternity or child support obligations, leave shall be granted unless: a) the member is serving in or with a unit deployed in a contingency operation, or b) exigencies of military service require a denial of such request. The leave shall be charged as ordinary leave. Commands failing to grant leave should be reminded of the 10 Sep 97 amendment to Department of Defense Directive 1327.5, "Leave and Liberty," which directs that leave be granted as noted herein.

When analyzing whether to request a stay, first determine if state law will consider a request to be an appearance. Additionally, examine the consequences if the member takes no action and a default judgment is entered. If a written request is appropriate, it should provide details understandable by a civilian explaining why the service member's ability to appear and defend in the action is materially effected by his or her military service, e.g. no leave available, leave denied, military duties prevent returning, or overseas duty with significant expenses to return to CONUS. The duration of the requested stay should be reasonable in length. A letter signed by someone in the chain of command, and not a judge advocate, provides the greatest protection against a claim of appearance through counsel. See *Cromer v. Cromer*, 278 S.E.2d 5518 (N.C. 1981). If opposing counsel is known, forward a copy of the requested stay to him or her. It may also be useful to send the letter only to opposing counsel instead of the court. Request that the opposing counsel notify the court in his or her capacity as an officer of the court.

C. **Default judgments**

General. In "any action or proceeding commenced in any court" where there is a "default of **any appearance** by the defendant, the plaintiff, before entering judgment, shall file in the court an affidavit setting forth facts showing that the defendant is not in military service." 50 U.S.C. app. § 520. "Any appearance" includes special as well as general appearances. The affidavit must state that either the defendant is not in the military service, the defendant is in the military service, or that the plaintiff is unable to determine whether or not the defendant is in the military service. Filing a false affidavit subjects the affiant to misdemeanor prosecution with a maximum punishment of one-year imprisonment, a fine of $1000, or both. An affidavit stating that the defendant is not in the military service, is required before a default judgment may be entered. If the affidavit states the defendant is a military member or that the plaintiff is unable to determine whether or not the defendant is in the military, the court will appoint an attorney to protect the rights of the absent service member. The attorney may not waive any of the service member's rights nor bind the member through the attorney's actions. The attorney is, in effect, appointed to locate and notify the service member of the action. This section protects service members from default judgments being entered against them without their knowledge. The SSCRA does not prevent entry of a default judgment when there has been notice of the action and adequate time and opportunity to appear and defend.

D. ***Reopening judgments.*** If a court enters a default judgment, a service member must move to reopen that judgment while on active duty or within 90 days after leaving

military service. 50 U.S.C. app. § 520 (4). Judgments will only be reopened if the service member has made **no appearance** and demonstrates that his or her:

a. military service materially affected the ability to appear and defend the action (or prejudiced his or her rights); and

b. there is a meritorious defense to part or all of the underlying action.

When originally drafted in 1917, the default judgment provision was designed to protect service members from no-notice actions. Today, if the service member does receive notice then the appropriate course of action would be to inform the plaintiff's attorney that the defendant is a military member. Notification forces the plaintiff's attorney to inform the court that the defendant is a military member and request either a court appointed attorney to represent the defendant or a stay of the proceedings. An application for a stay made by the court appointed attorney has the potential to be considered an appearance depending on how much contact the attorney had with the service member.

4322 SPECIFIED TRANSACTIONS AND OBLIGATIONS

A. ***Generally***. Articles III, IV, and V of the 1940 Act, 50 U.S.C. app. §§ 530-574, contain extensive provisions conferring certain benefits, protections, and status for enumerated specific transactions and both private and governmental (tax) obligations.

B. ***Article III: Lease termination and rental eviction***

1. ***Lease termination***. Individuals called to or entering upon active duty have the right to terminate a lease for a family dwelling, business or agricultural purposes, provided the lease was entered into prior to entry upon active duty and the leased premises were occupied by the service member or the service member's ***dependents***. Written notice must be provided to the landlord along with a copy of the service member's induction orders. Generally, a monthly lease will terminate 30 days after the first date on which the next payment is owed, after notice is delivered (i.e. notice given 10 August, next payment due, 1 September, lease terminates 1 October –30 days after 1 September). All other leases terminate on the last day of the month following the month in which notice is given. The service member is entitled to return of any security deposit and prorated refund of any advanced rent. 50 U.S.C. app. §§ 534, 536.

2. ***Prohibition against eviction***. A service member's dependents may not be evicted from a dwelling the rent for which does not exceed $1200 per month, except upon a court order. 50 U.S.C. app. § 530. This provision does not apply to business premises. Courts must order a stay of eviction for a period of 3 months if the tenant's ability to pay rent is materially affected by military service. The Secretary of Defense or Secretary of Transportation is also empowered "to order allotments in reasonable proportion to discharge the rent of premises occupied for dwelling purposes" by the dependents of a service

member. 50 U.S.C. app. § 530(d).

C. ***Article III: Mortgage Foreclosure Protection.*** The SSCRA protects service members and dependents against foreclosures of mortgages, trust deeds or similar security if the four following conditions are met:

a. the relief is sought on financial obligations secured by real or personal property, examples - security agreements on automobiles or mortgages on real estate;

b. the obligation originated before active duty by the service member **or dependents**;

c. the property is still owned by the service member **or dependents**; and

d. the member's / dependents' ability to make the loan payment is "materially affected" by member's military service. 50 U.S.C. app. § 532.

In foreclosure actions where the service member's ability to pay is "materially affected", the court shall either stay the foreclosure proceedings or order other equitable relief; (e.g. extension of the loan maturity date, decreased payments).

D. ***Article III: Installment Contracts.*** 50 U.S.C. app. § 531 also protects service members from creditors repossessing property, rescinding contracts, or imposing penalties absent a court order for members who signed an installment contract for the purchase of real or personal property if the following three conditions are met:

a. the installment contract originated **prior to** active duty;

b. the service member paid a deposit or installment payment **prior to** service; and,

c. the member's ability to make payments is "materially affected" by the member's military service.

Courts will stay repossession or rescission, or provide other equitable relief where ability to make installment payments is "materially affected" by military service. The measure of "materially affected" is judged by the member's earnings prior to and after entering military service. For example, the Marine Corps issues no pay to recruits during the first 74 days of boot camp.

E. ***Article IV: Insurance.*** Service members may have certain types of commercial life insurance contracts guaranteed by the Veteran's Administration. There is no need to demonstrate that the member's ability to pay is materially affected by service. 50 U.S.C. app. §§ 540-548. A service member may apply to the Department of Veterans

Affairs for a government guarantee of premium and interest payments on life insurance policies for a total not to exceed $10,000 face value in order to prevent lapse or forfeiture. This protection covers the duration of the service member's military service and two years beyond termination of that military service. During the effective period of the protection, unpaid premiums are treated as policy loans. If, at the expiration of the time allowed, the unpaid amount of the policy exceeds the cash surrender value of the policy, the policy lapses and the government pays the difference to the insurer, collecting in turn from the insured. 50 U.S.C. app. §§ 540-548.

50 U.S.C. app. § 593 protects health insurance in a manner similar to professional liability insurance discussed below. In short, a service member's health insurance which (1) was in effect on the day before such service commenced, and (2) was terminated effective on a date during the period of such service must be reinstated under the original terms and conditions. An exclusion or a waiting period may not be imposed unless certain exceptions apply.

F. ***Article V: Taxes.*** Military income and a service member's personal property will only be taxed by the member's state of domicile. For personal property taxation, the property will be deemed to be located in the member's state of domicile. 50 U.S.C. app. §§ 513, 574. Payments of Federal income taxes may be deferred if the member's ability to pay such tax is "materially impaired" by such service. 50 U.S.C. app. § 573. Additionally, the sale of property owned by the service member ***prior*** to military service for the purpose of enforcing the collection of unpaid taxes or assessments is restricted by 50 U.S.C. app. § 560. The above protections do not apply to nonmilitary income earned in the nondomiciliary state, for example, teaching, craft sales, etc. Also, the protections do not apply to family members. Moreover, several states have used the service member's military income to increase the tax liability of the nonmilitary spouse. See *U.S. v. Kansas*, 580 F. Supp. 512 (D. Kansas 1984) *aff'd* 810 F. 2d 935 (10th Cir. 1987) where Kansas devised a state tax scheme that calculated the tax bracket of the nonmilitary spouse who earned income in state by adding the service member's military income if the couple filed a joint federal return. Even though this increased the couple's tax burden, the appellate court held it did not violate SSCRA protection.

G. ***Maximum rate of interest protection.*** Individuals entering active duty are entitled to invoke the 6% maximum interest rate per year for debts and obligations incurred **prior to** military service. It is the Department of Defense's [DoD] position that any interest exceeding 6% is forgiven and the loss incurred by the creditor and not the service member. This protection applies to interest on mortgages, car loans, and credit cards. It does not apply, pursuant to 20 U.S.C. §1078(d), to federally Guaranteed Student Loans.

The DoD recommended procedure during Desert Shield/Storm for service members to invoke the interest cap was to write a letter to the creditor claiming protection under § 526 of the SSCRA and include a copy of military orders showing entry date and period of service and legal authority for call-up. Creditors who resist granting the interest rate cap should be

reported to the member's service legal assistance division. Additionally, the local installation Armed Forces Disciplinary Control Board has authority to place the business off-limits to military personnel. And, the Department of Justice is authorized to represent individuals when such representation is in the interests of the United States.

H. ***Future financial transactions.*** 50 U.S.C. app. § 518. Retaliatory action against those who invoke the SSCRA is prohibited. An application under the provisions of the SSCRA for a stay, postponement, or suspension of any tax, fine, penalty, insurance premium, or other ***civil obligation or liability*** cannot be the basis for lenders then determining that the service member is unable to pay an obligation or liability. With respect to a credit transaction between service members and creditors, creditors cannot then deny or revoke credit, change the terms of an existing credit arrangement, refuse to grant credit in the terms requested, submit adverse credit reports to credit reporting agencies, or, if an insurer, refuse to insure a service member. This section does not prevent an institution from reporting a failure to comply with the underlying obligation.

What may a service member do if he wrongly receives an adverse credit report because he asserted the SSCRA stay or 6% interest cap provisions? Enforcement is through the Fair Credit Reporting Act (FCRA) provisions for "adverse actions", handling disputed information involving "adverse actions", and consumer remedies for "wilful or negligent noncompliance by credit reporting agencies upon consumer showing of casual connection between inaccurate credit report and denial of credit or other consumer benefit." A service member who is refused further credit by the lending institution, or has his credit limit downgraded because of asserting the SSCRA 6% interest cap on a loan, may also seek relief under this section. A failure of a lender to forgive interest above 6% may be the basis for a private cause of action against the lender, pursuant to 50 U.S.C app. § 518(2)(b).

PART F - OATHS, NOTARIZATIONS, AND POWERS OF ATTORNEY

4323 GENERAL. Notarial powers today are governed by both federal and state law. Chapter 9 of the JAGMAN is the main reference source in the Navy and Marine Corps for notarial powers. 10 U.S.C. § 936 (Article 136, UCMJ) governs notarial acts for purposes of military justice and administration. Section 1044a of the same title authorizes judge advocates, adjutants, and 0-4's and above to perform any notarial act necessary for legal assistance purposes.

4324 AUTHORITY TO ADMINISTER OATH AND PERFORM NOTARIAL ACTS

A. ***Oaths.*** An oath is a pledge whereby the individual taking the oath swears or affirms the truth of the statements made by them. Oaths and affirmations are used when

taking affidavits or sworn instruments.

1. ***Military Justice Oaths***: Under JAGMAN § 0902, those members authorized to administer oaths under 10 U.S.C. § 936(a) for military administration and military justice are:

a. Judge Advocates
b. Summary courts-martial officer
c. Adjutants, assistant adjutants, acting adjutants,
d. Commanding officers of the Navy, Marine, and Coast Guard;
e. Staff judge advocate and ***legal officers***;
f. Officers of the grades O-4 and above;
g. Executive and administrative officers;
h. All limited duty officers, all legalmen E-7 and above, all independent duty legalmen, and all legalmen assigned to Legal Assistance Offices;
i. Marine Corps officers with a Military Occupational Specialty of 4430, while assigned as legal administrative officer; and
j. Persons empowered to authorize searches for any purpose relating to search authorization.

2. ***Oaths Incident to Performing Military Duties***: 10 U.S.C. § 936(b) authorizes the following persons on active duty or performing inactive duty training to administer oaths necessary in the performance of their duties:

a. President, military judge, trial counsel, for all general and special courts-martial;
b. President and counsel for Courts of Inquiry;
c. Officers designated to take depositions;
d. Persons designated to conduct investigations;
e. Recruiting officer;
f. Officers designated and acting as Casualty Assistance Calls Programs Officers (CACO);
g. President and recorder of personnel selection boards.

3. ***Commissioning and Enlistment Oaths***. Under the authority of 10 U.S.C. §§ 502 and 1031 any U.S. Armed Forces commissioned officer of any Regular or Reserve component may administer an oath of enlistment or oath requirement for enlistment, appointment or commission of any person in the Armed Forces.

4. ***How to Administer the Oath***. Persons administering an oath should tell the affiant to raise his/her right hand and say the following:

"Do you swear (or affirm) that the information

contained in this document is the truth to the best of your knowledge, so help you God?"

B. ***Acknowledgments***. An acknowledgment is a formal declaration to an authorized official that a certain act or deed was the free and knowing act of the declarant. Primarily used in relation to deeds of real property, the acknowledgment affirms the genuineness of the owner's intent to convey title to property and that the execution of the deed is the free and knowing act of the owner. Acknowledgments entitle the instrument to be recorded or authorize its introduction into evidence without further proof of its execution. JAGMAN, § 0906.

C. ***Sworn instruments***. Sworn instruments are written declarations signed by a person who declared under oath before a properly authorized official that the facts set forth in the document are true to the best of the affiant's knowledge and belief. Sworn instruments normally include affidavits, sworn statements, and depositions. The purpose of sworn instruments is to make a formal statement under oath of certain facts which are known to the person making the statement. The notary should then sign his/her name, rank, office, title and name of command. JAGMAN § 0907.

D. ***Venue***. The location of the place where the document is notarized should be indicated on the document.

1. The notary should cite the state, county or other territorial subdivision in which the document was executed, e.g. ORANGE COUNTY, CALIFORNIA.

2. Notarizations overseas should include the city and country, e.g. NAPLES, ITALY.

3. Notarizations performed onboard naval vessels should state "ONBOARD USS NEVERSAIL AT (PLACE) OR (AT SEA)."

4325 NOTARY AUTHORITY AND DUTIES

A. ***Notary Public***. A person legally authorized to administer oaths, take depositions, take and certify acknowledgments, and perform other similar services which can expedite the handling of an individual's legal affairs. The notary's signature and seal on a document give assurance to the person examining the document that it really is what it appears to be.

B. ***Authority to perform***. The authority granted under 10 U.S.C. § 1044a is separate and apart from any authority provided by state law. Persons performing notarial acts under 10 U.S.C. § 1044a derive their authority from Federal law which may be exercised without regard to geographic limitation.

C. ***Identity***. Before witnessing or attesting a signature, notaries must determine that the person appearing before them is the person named in the document. This may be done by checking the military identification card or other identification documents.

D. ***Effectiveness of the notarial acts***. Notarial acts performed under the authority of 10 U.S.C. § 1044a are ***legally effective for all purposes***. Oaths administered under the authority of 10 U.S.C. § 936 are legally effective for the purposes for which the oath is administered. Federal notarial authority may be exercised without regard to geographic limitations and is not dependent on any state or local law. If the somewhat ritualistic procedure is meticulously followed for each notarial act, the document or oath should be legally effective in the vast majority of cases.

E. ***Proof of authority***. The signature of any person administering an oath or acting as a notary under the authority of 10 U.S.C. §§ 936 or 1044a, together with the title of his or her office, is prima facie evidence that the signature is genuine, that the person holds the office designated, and that he or she has the authority to so act. No seal is required.

F. ***Duties and Responsibilities of the Notary***. Notaries may not engage in the practice of law, and accordingly, may not prepare legal documents such as wills and contracts. Additionally, notaries may ***not***:

1. sign their names to blank instruments;

2. certify the authenticity of public, register or court records, or issue certified copies of such documents

3. take an affidavit or acknowledgment unless the person who signed the instrument is actually in their presence,

4. falsely execute certificates such as predating or postdating the document; and

5. delegate their notarial authority to another.

4326 MILITARY POWERS OF ATTORNEY

A. ***General***. 10 U.S.C. § 1044(b) states that a military power of attorney is any general or special power of attorney that is notarized in accordance with section 1044a of this title or other applicable State or Federal law. Section 574 of the Defense Authorization Act added this provision in order to enhance the acceptability of general and special powers of attorney prepared by a legal assistance attorney or a legal officer on behalf of military personnel or dependents. These powers of attorney are exempt from the formality, substance

or recording under the laws of the state wherein the document was prepared and are to be given the same legal effect as powers of attorney prepared and executed in accordance with applicable state law.

B. ***Preamble***. The following preamble should be inserted at the beginning of each power of attorney in CAPITAL letters:

THIS IS A MILITARY POWER OF ATTORNEY PREPARED PURSUANT TO TITLE 10, UNITED STATES CODE, SECTION 1044B AND EXECUTED BY A PERSON AUTHORIZED TO RECEIVE LEGAL ASSISTANCE FROM THE MILITARY SERVICES. FEDERAL LAW EXEMPTS THIS POWER OF ATTORNEY FROM ANY REQUIREMENT OF FORM, SUBSTANCE, FORMALITY OR RECORDING THAT IS PRESCRIBED FOR POWERS OF ATTORNEY UNDER THE LAWS OF A STATE, THE DISTRICT OF COLUMBIA, OR A TERRITORY, COMMONWEALTH, OR POSSESSION OF THE UNITED STATES. FEDERAL LAW SPECIFIES THAT THIS POWER OF ATTORNEY SHALL BE GIVEN THE SAME LEGAL EFFECT AS A POWER OF ATTORNEY PREPARED AND EXECUTED IN ACCORDANCE WITH THE LAWS OF THE JURISDICTION WHERE IT IS PRESENTED.

CHAPTER XLIV

FAMILY ADVOCACY PROGRAM

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CHAPTER XLIV

FAMILY ADVOCACY PROGRAM

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G. MCO 1752.3B, Subj: MARINE CORPS FAMILY ADVOCACY PROGRAM

H. MCO 1710.30, Subj: CHILD CARE CENTER POLICY AND OPERATIONAL GUIDELINES

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J. COMDTINST 1750.7, Subj: COAST GUARD FAMILY ADVOCACY PROGRAM

K. NAVMEDCOMINST 6320.22, Subj: FAMILY ADVOCACY PROGRAM

4402 INTRODUCTION

A. ***Extent.*** Family violence is a significant social problem in American society and the number of reported cases is continuing to increase. The sea services are not immune from the problems of spouse abuse and child maltreatment.

B. ***Causes.*** Family maltreatment is a complex and multidimensional problem. There are many factors that contribute to the incidence of violence and neglect in families, for example, experiencing or witnessing abuse as a child, the stress that 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.

C. ***Costs.*** The costs of family maltreatment 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 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, intervention strategies must be varied and flexible.

D. ***History.*** Like the civilian community, the military began to specifically address the problem of family maltreatment 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, Department of Defense Directive 6400.1 established guidelines for the "Family Advocacy" program for all military services.

E. ***DOD policy.*** . The Department of Defense (DOD) Family Advocacy Program (FAP) has the goal of improving the quality of life for all military families. DOD policy is to:

1. Develop programs to promote healthy family life;

2. identify incidents of family violence and neglect so that further injury can be prevented and therapy for dysfunctional families provided;

3. cooperate with civilian authorities and report cases of child maltreatment as required by state laws;

4. make specific efforts to fully serve families living on and off installations; and

5. combine the management of the FAP with similar medical and social programs.

4403 OVERVIEW OF THE FAMILY ADVOCACY PROGRAM

A. ***Goals of DON FAP.*** . SECNAVINST 1752.3A outlines the five primary goals of the DON FAP:

1. prevention;

2. victim safety and protection;

3. offender accountability;

4. rehabilitative education and counseling; and

5. community accountability / responsibility for a consistent, appropriate response.

B. ***DON Directives.*** Responsibility for achieving these goals lies throughout the chain of command. The DON in SECNAVINST 1752.3A established the following directives to achieve these goals Navy wide:

1. Conduct programs and activities that contribute to a healthy family life, prevent the occurrence of abuse and neglect, and seek to restore affected families to a healthy, non-violent status.

2. Identify cases of child and spouse abuse promptly and provide early intervention to break patterns of abusive behaviors.

3. Ensure that all victims and witnesses of child and spouse abuse in DON families have access to appropriate protection, safety, care, support, case management and educational rehabilitation services as needed, to the extent allowable by law and resources.

4. Ensure victims of abuse are not re-victimized through actions such as unnecessary removal from housing, repeated or coercive interviews, or other negative interventions.

5. Ensure all commands hold military offenders accountable by applying a range of disciplinary or administrative sanctions, as appropriate, for acts or omissions constituting child or spouse abuse.

6. Provide rehabilitation and behavioral education and counseling to offenders as appropriate to stop child and spouse abuse in DON families, recognizing that offenders can be both service members and family members.

7. Ensure community responders (e.g., medical, legal, base security, and law enforcement, educators, counselors, advocates, chaplains, etc) are trained in family violence risk factors and dynamics, basic community information and referral, safety planning, and appropriate responses for their discipline.

C. ***Players in FAP***

1. ***The commanding officer.*** While supported by the Medical Treatment Facility (MTF), FAP remains a line-managed program. The Family Advocacy Officer (FAO), and Family Advocacy Representative (FAR) report to the installation commander. Additionally, the final decision making authority on treatment recommendations and disciplinary or administrative action towards suspected offenders is the cognizant commanding officer. Thus, the installation commander and the cognizant unit commanding officer remain the most important individuals in deciding the course and outcome of family advocacy cases.

2. ***Family advocacy officer (FAO) / FAP officer (FAPO) (USN / USMC).*** The FAO / FAPO is appointed by the installation commander and charged with overall coordination of the local FAP. In the Navy the FAO ***must*** be a line officer, 0-4 or above. In the Marine Corps, the FAPO ***must*** be a senior field grade officer who has access to the installation commander. The FAO / FAPO:

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 designated to achieve FAP objectives; and

d. monitors and provides staff support for the program.

3. ***Family advocacy representative (FAR) / FAP manager (FAPM) (USN / USMC.*** The FAR / FAPM is a trained social worker whose primary duties involve implementation and management of the medical component of the FAP. The installation commander is responsible for ensuring a properly trained FAR/FAPM is recruited and maintained. Specific responsibilities of the FAR / FAPM include:

a. Receiving all reports of maltreatment and referring them to the civilian authorities (as appropriate);

b. notifying the servicemember's commanding officer of all alleged cases of abuse;

c. ensuring protection of victims when civilian authorities are unavailable;

d. reporting cases to the Family Advocacy Case Review Committee (CRC);

e. making clinical assessments, providing treatment, referring for treatment / action, and coordinating all aspects of case management; and

f. notifying BUPERS / CMC via DD Form 2486.

4. ***Family advocacy committee (FAC).*** Each installation commander is responsible for establishing a multidisciplinary FAC. The FAC functions as a policy advisory group: it ensures proper planning, resource management, monitoring, problem-solving, and advocacy (marketing) of the FAP. The FAC does ***not*** become involved in individual case management; this is delegated to a specialized committee (to be discussed *infra*). FAC membership will usually include the FAO / FAPO (chairman), FAR / FAPM (in the USN, typically the co-chairman) tenant command representatives, medical and / or dental officers, staff or command judge advocate, base security personnel, NCIS, chaplain, drug / alcohol counsellors (CAAC / SACC), public affairs officer, housing officer, MWR and ombudsman. Off-base representation may include child protective services, shelters, and other similar entities.

5. ***Case review committee (CRC) (USN / USMC).*** The CRC is responsible for the review and oversight of individual cases where family maltreatment is alleged. The CRC makes a determination as to whether a particular case is substantiated or unsubstantiated and will make recommendations on whether treatment and rehabilitation is appropriate. The composition and responsibilities of the CRC are discussed *infra*.

6. ***Judge advocate.*** As noted above, effective prevention and intervention in family violence requires a cooperative and collaborative effort on the part of all command professionals. Attorneys in the military have a key role in the program. It is ***mandatory*** that a Judge Advocate act as recorder for all administrative separation boards for child sexual abuse, and strongly encouraged that they act as recorders for all other types of child and spouse abuse cases when available. Additionally, attorneys are often called upon to:

a. Recommend action that will insure the safety of the victims;

b. recommend and support the use of legal action against perpetrators;

c. balance punishment of the perpetrator with the needs of the children and families (determine the impact of a punitive discharge, forfeitures, or confinement on the family unit);

d. provide legal advice to other command personnel involved with the FAP (enclosure (6) of NAVMEDCOMINST 6320.22 provides guidance in the area of self-incrimination and when warnings should be given);

e. participate actively as a member of the FAC and in the CRS / CRC;

f. employ special procedures to protect child victims during the legal process; or

g. be involved in the development, review, and revision of memorandums of understanding (MOUs) with civilian authorities.

D. ***Prevention of Family Maltreatment***

1. ***Definitions***. FAP concerns itself with a broad range of harmful activity that may occur within the family unit, including physical abuse, emotional injury, sexual offenses, and / or neglect. For purposes of FAP, the following definitions pertain:

a. ***Physical abuse of children*** includes any ***major injury*** (brain damage, skull or bone fracture, subdural hematoma, sprain, internal injury, poisoning, scalding, severe cut, laceration, bruise, or any combination constituting a substantial risk to the life or well-being of the child) and ***minor injuries*** (twisting or shaking) intentionally inflicted by the child's parent or caretaker.

b. ***Sexual abuse of a child*** includes the involvement of a child in any sex act or situation that is for the sexual or financial gratification of the perpetrator. All sexual activity between a child and caretaker is considered sexual abuse.

c. ***Emotional maltreatment of children*** is an act of ***commission*** (intentional berating or disparaging a child) or ***omission*** (passive / aggressive inattention to a child's emotional needs) by the caretaker which causes injury to the child as evidenced by low self-esteem, undue fear or anxiety, or other damage to the child's emotional well-being.

d. ***Child*** is defined as an unmarried person (whether natural, adopted, foster, stepchild, or ward) who is a dependent of the military member or spouse and is either under the age of 18 or is incapable of self-support due to a mental or physical incapacity for which treatment is authorized in a medical treatment facility (MTF).

e. ***Spouse abuse*** includes physical abuse, sexual abuse, property violence as a means to scare or intimidate, or psychological violence inflicted on a partner in a lawful marriage.

(1) Under the UCMJ and some state laws, nonconsensual

coitus with one's spouse is considered rape.

f. ***Neglect*** is defined as deprivation of necessities when the caretaker is able to provide them (including the failure to provide a spouse or child with support, nourishment, shelter, clothing, health care, education, and supervision). This can occur regardless of whether the family is living together as a unit.

2. Family Service Centers

a. It is incumbent upon every commander to develop programs and activities that contribute to a healthy family life. Providing a reasonable quality of life for military personnel and their families is both ethical and pragmatic—ethical because it is the moral thing to do and pragmatic because the health of Navy families directly impacts job performance, retention, and readiness. It is far preferable to alleviate the stresses of military life through support and educational programs in building healthy families than it is to treat or rebuild families that have experienced maltreatment.

b. A major function of the FCC is the prevention of problems and the enhancement of family life. Services that the FCC typically offer include:

(1) Informational and educational programs;

(2) short-term non-medical counselling for problems such as: adult anti-social behavior; child and adolescent anti-social behavior; academic, occupational, or parent-child problems; marital problems; and non-medical interventions commonly recommended for family violence, e.g., support groups, violence containment groups, and parent education groups;

(3) identification, intervention, and referral of families in need of FAP services; and

(4) coordination among existing Navy and civilian family support services.

E. ***Identification and Intervention***

1. ***Identification.*** All personnel have a duty to report suspected or known cases of abuse and neglect. U.S. Navy regulations, article 1137; SECNAVINST 1752.3, paragraph 7.f(2). Military personnel will report such matters to the FAR / FAPM, who in turn will report the incident to the appropriate civilian agencies—usually child protective services (CPS). If the FAR / FAPM is not available, the report should be made directly to the CPS. MTF's must also report the abuse to the sponsor's CO within 48 hours. The FAR / FAPM serves as the point of contact between the command and local agencies. Each installation must have a written Memorandum of Understanding (MOU) with the local CPS agency

defining investigative responsibilities. All state child abuse reporting laws require the local CPS agency to receive and investigate reports of suspected child maltreatment and offer rehabilitation services to CPS families. State law specifies who is required to report suspected maltreatment, who is exempt from reporting and / or testifying, and the penalties for not reporting. The military is required to comply with these laws when such abuse is discovered in the course of performance of duties. Reporting shall normally be done via the FAR. Even voluntary self-referrals must be reported by the FAR if the state so requires.

2. ***Voluntary self-referral***. Such referral is encouraged since the goal of FAP is to prevent or break the cycle of abuse. An admission of abuse is sufficient to substantiate a FAP case and requires notification of the member's CO and the FAR / FAPM, unless the admission is made as a privileged communication to an attorney or clergyman. Self-referral for abusive behavior ***does not insulate a member from the initiation of disciplinary and administrative action and does not limit the use of a member's statements in such proceedings***. Statements made by a member pursuant to self-referral are not privileged or protected from use as evidence except when made to a chaplain (as an act of conscience) or attorney (where an attorney-client privilege applies). Self-referrals should be made to the FAR, CAAC / DAPA, FCC counselor, CO, or XO. Unfortunately, few cases of abuse are self-referrals. A majority of cases come to the CO's attention through police or hospital reports.

3. ***Intervention***. A servicemember's CO has many intervention options in family violence cases. Since each case is unique, intervention action (if taken) needs to be tailored to each case. Prior to intervention, if time permits, coordination with the legal officer, the FAR / FAPM, and the appropriate subcommittee are encouraged. Some of the options are:

a. ***Military Protective Orders***. A Military Protective Order (MPO) is similar to a Temporary Restraining Order issued by a civilian court. It can be issued after hearing only one side of the story, or ***ex parte***, when the issuing authority determines that it is necessary to ensure safety and protection of the persons for whom it is issued. MPO's are lawful orders for purposes of the UCMJ, but should not contain overly harsh provisions that could be construed as the imposition of pre-trial restraint and start a speedy trial clock. The order should be in writing, specifically state how long it will remain in effect (i.e. 10 days), what areas are restricted, and have provisions for emergency situations. The order should come from a senior officer in the command, but it is best to not have the commanding officer issue the order. Having the commanding officer issue the order could preclude him/her from conducting NJP if the order is subsequently violated. Sample MPO's can be found in OPNAVINST 1752.2A and MCOP1752.3B with changes 1 and 2. In general MPO's should:

(1) state their military purpose (i.e. safety of victims and good order and discipline);

(2) be specific in controlling certain behaviors; and

(3) be comprehensive to prevent misunderstanding.

b. through MOU's with civilian agencies, establish cooperative intervention along with a safe house or other overnight accommodations in order to protect the victims and provide shelter;

c. in the case of a nonmilitary abuser (since items 1 and 2 are not available), bar the person from the base / base housing area or seek (through the FAR / FAPM) a protective order from a civilian court; and

d. in overseas areas or isolated CONUS sites where there are no state agencies to assist in providing social services, various remedies can be fashioned by appropriate military authority. In foreign countries, insure that the remedy does not conflict with the SOFA. If no local court is willing to take jurisdiction, and the immediate transfer of the family to CONUS is not possible, the following actions may be taken:

(1) in child maltreatment incidents, have an emergency FAC subcommittee review the situation and recommend appropriate action (such actions may include having NCIS or medical personnel interview the child without parental consent, temporarily removing the child from the home, or admitting the child to the MTF without parental approval);

(2) in family violence situations that require critical medical care not locally available, the member or family may be transported to a location that can provide the care if recommended by the FAC subcommittee; or

(3) in some cases, it may be appropriate to withdraw overseas command-sponsorship and / or arrange for early return of dependents and / or members. In situations where the abuse has been substantiated by the subcommittee and the CO recommends the family be returned to CONUS, a message must be sent to the appropriate service headquarters—BUPERS-4 or USMC HQ (MMOS)—in Washington for authorization with an information copy provided to BUMED. In the Navy, BUPERS-661 and BUMED-343 make recommendations to BUPERS-40 as to where the servicemember should be assigned in the United States.

4. ***Treatment and rehabilitation***

a. The MTF is responsible for determining the need for treatment and for the referral to other professional resources as needed. The Marine Corps implements this through the FCC. The ***primary*** goal of the FAP is to protect the victim and provide treatment for ***all*** involved family members. Treatment is generally subject to a one-year limitation.

b. Some cases are not amenable to treatment (such as extra familial

pedophiles, who are considered far less capable of rehabilitation). In these cases, discipline or ADSEP processing is mandatory.

c. Counseling / treatment is recommended when the member has a positive record of performance and good potential for treatment. At the same time, appropriate disciplinary action is an important part of treatment and should be considered unless there is a "bona fide" voluntary self-referral or, based on the facts of the case, it is determined that only therapy is needed to stop the abuse / neglect, protect the victim, and improve family function or, as mentioned earlier, disciplinary action may be taken—but may be appropriately suspended conditioned on rehabilitation.

d. If the member repeats the offense, fails to cooperate, fails to progress or satisfactorily complete treatment, disciplinary or administrative action should be taken (including the vacating of any previously suspended punishments).

e. Upon successful completion of treatment, a member's case will be considered closed. Treatment is considered successful when the abuse or neglect has stopped, the problems contributing to the maltreatment have been remedied, and it is determined that no further maltreatment will occur.

f. Dependents and retirees who are victims or perpetrators should be offered appropriate intervention and encouraged to participate voluntarily. Victims must be informed of their rights and provided counseling pursuant to DODINST 1030.2 and SECNAVINST 5800.11A. Victims of abuse may also qualify for state victim compensation funds and / or DOD retirement funds (10 U.S.C. § 1408) or DOD transitional assistance.

F. ***Deterrence***

1. It is DON policy that offenders must be held accountable for their actions. The prospect of disciplinary action is often a strong and necessary motivating factor for offenders to complete rehabilitation and counseling. ***The decision to proceed with disciplinary action is solely at the discretion of the member's commanding officer.*** FAP does not have disciplinary authority over members of other commands and does not make such recommendations. Providing assistance to maltreators under the FAP shall not, in and of itself, be the basis for adverse actions—such as punitive action; removal from base housing; revoking or removing security clearances, Personnel Reliability Program (PRP), enlisted classification code, or warfare specialty. Swift intervention and disciplinary action is an effective deterrent to family violence. It is important to remember that treatment and rehabilitation and disciplinary options are not mutually exclusive; often a combination proves most effective.

a. When the member is judged treatable and has potential for further effective service, the Navy's interests, justice, and the family / victim may be better served by taking disciplinary action and then suspending the sentence while the member is

being treated.

b. Disciplinary / administrative action is ***most*** appropriate when:

(1) The member does not acknowledge his / her behavior and assume responsibility for it;

(2) the behavior is compulsive;

(3) the victim is seriously injured;

(4) there is sufficient evidence for a conviction; and

(5) testifying in court would be in the best interest of the victim.

c. If there are indications of substance abuse, the member should be referred for screening and possible treatment.

d. Often disciplinary actions are taken, but the punishment may be wholly or partially suspended to encourage rehabilitation and deter further maltreatment offenses.

2. ***Incest cases***. Only those child sexual abuse offenders retained on active duty at the conclusion of ***all appropriate disciplinary/administrative action*** shall be eligible for long term rehabilitation, education, and counseling. Child sex abuse is mandatory processing. (See MILPERSMAN 1910-233 and 1910-162).

a. ***Coast Guard***. Coast Guard policy on processing and retention is similar to the Navy and USMC. If the CO wants to retain and place the member into long-term treatment, however, the case must be forwarded to Commander, (MPC-EPM) or (MPC-OPM) who will review the matter and consider the recommendations of Commandant (CG-WPM). The Coast Guard requires this review in ***all*** abuse cases.

4404 CASE REVIEW COMMITTEE

A. ***Function***. All incidents of child and spouse abuse that result in the initiation of a FAP case will be reviewed by a local multi-disciplinary CRC. The CRC will initially make a determination of the status of the case (i.e., substantiated, unsubstantiated) and identify the abuser. If abuse is substantiated, the CRC will develop an intervention plan for the individual offender. Along with the case manager, the CRC will also assist the command with victim safety planning and victim protection. Lastly, the CRC will forward reports on the CRC's findings to the command . The contents and routing of the report are discussed *infra*.

B. ***Composition***. The CRC is made up of no more that eight voting members, with special non-voting consultants brought in for particular cases as needed. Permanent members are appointed in writing by the installation Commanding General or Commanding Officer. All CRC members must attend annual training on issues relating to domestic violence and child abuse. Determinations of the committee are decided by a majority vote. During the course of the CRC meeting, the members will review old and pending cases, and seek information in the form of written and live statements, and a review of all available records. After all available and needed information has been considered, the committee members will debate and vote on a particular case.

1. In order to conduct a Navy CRC meeting, the following members or their alternates must be present:

a. A line officer, 0-4 or above, who is not the FAO or the reporting senior of any other CRC member;

b. Physician;

c. FAR;

d. Mental Health Provider; and

e. Judge Advocate.

2. Additional voting members can be appointed to the CRC, as long as the total number of voting members does not exceed eight. Additional voting members can be one of the following:

a. MTF Social Worker;

b. FSC Social Worker;

c. Representatives from state child protective services;

d. Pediatrician;

e. Pediatric or Emergency Room Nurse;

f. NCIS (may participate in debate on case determination but does not vote); or

g. Base Security or Law Enforcement representative.

3. Special consultants can be brought in on a particular case if the need for their

specialty or information arises. For example it may be necessary to speak with a child's school teacher in a child abuse case, or with a drug and alcohol counselor in a case of spouse abuse involving alcohol. Additionally, a representative from a member's command can provide invaluable information on a member's work performance and any stress that may be existing in the work place. All of these consultants are brought in to ensure that the CRC has enough information to make a case determination. Special consultants do not vote on the case determination, nor do they sit in during debate. Examples of special consultants include:

a. Community Health Nurse;

b. Installation Security Officer;

c. Drug and Alcohol Program Advisor (DAPA) or Counseling and Assistance Center representative (CAAC);

d. Chaplain;

e. School counselor or nurse; and

f. Representative from alleged offender's or victim's command.

D. ***Case determinations***. When cases are brought before a CRC, the most important decisions facing the CRC are whether the reported abuse occurred and who was the perpetrator. These findings are determined by a majority vote of the members based upon a preponderance of the evidence standard. If abuse is determined to have occurred, the case will be "substantiated." A determination of "substantiated" will also trigger the requirement for the committee to formulate an intervention plan for the offender, along with treatment recommendations if appropriate. CRC's do not make recommendations on issues involving disciplinary or administrative actions, which are the sole province of the unit commanding officer. Additional findings that the CRC can make are "unsubstantiated" and "suspected." Unsubstantiated is further broken down to either "did not occur", or "unresolved" which is an indication that there was insufficient evidence for a complete determination. "Suspected" is a temporary determination that can only be used for 60 days.

1. All findings and recommendations made by the CRC should be made in a timely manner, normally not to exceed 90 days from receipt of the allegation, unless unusual circumstances exist such as complicated child sex abuse allegations or if a member or victim is deployed.

2. Alleged offenders are entitled to at least seven days notice before the committee meets to review their case. They are notified in writing and have the right to submit a written statement to the CRC. Alleged offenders and victims do not have the right to speak before the CRC, although they will have been questioned by the FAR when the case

was first reported.

4405 REVIEW OF CASE REVIEW COMMITTEE DECISIONS

A. ***General***. Subject to the review process set out below, CRC decisions are final in regards to the FAP. In order to add integrity to the system, CRC determinations are now subject to a formal review process. SECNAVINST 1752.3A directed the Chief of Naval Operations and the Commandant of the Marine Corps to: "Establish a review process for cases of child and spouse abuse that will assure fair treatment and observance of the applicable rights of victims and alleged offender." The Navy has developed two avenues of review: review by the local CRC, and review by a Headquarters Review Team (HRT) located at BUPERS. MCO P1752.3B is presently under revision, but it is anticipated that the review process for Marine cases will be solely before the local CRC, and can be based upon two grounds: new information available or violation of CRC procedures. Navy Review procedures are outlined below.

B. ***Headquarters review team***. The HRT is chaired by a representative from Pers-6, and is made up of representatives of various disciplines using the prescribed membership of a local CRC as a model. At a minimum, a law enforcement officer, legal representative, psychologist or psychiatrist, pediatrician, social worker, and an 0-4 line officer will be present.

C. **Review of child sex abuse cases**. When a CRC determines that allegations of incest and / or extra-familial child sexual abuse are unsubstantiated, normally the case will be closed and the temporary flag will be removed from the member's record. If either Pers-8 or Pers-661 believes that the local CRC reached an incorrect decision and the case should be substantiated, then either Pers-8 or Pers-6 may refer the case to the Navy HRT for a clinical opinion. In determining whether the CRC decision was incorrect, the issue is not whether other reviewers may disagree with its conclusions, but whether all relevant information has been considered.

D. ***Report of CRC decision***. Once the CRC has made a determination as to whether the allegations are substantiated or unsubstantiated, the FAR will forward a report of the CRC's decision to the alleged military offender and/or victim's commanding officer. In addition, commands will take appropriate steps to ensure the CRC report is forwarded to alleged civilian offenders and victims and military offenders and victims. Upon receipt of the CRC report, the commanding officer, or designee, shall review and discuss the case summary with the alleged offender, victim or sponsor as appropriate. The commanding officer will exercise his discretion as to whether the command's intended response to the CRC's recommendations are to be discussed. A signed "rights advisement" will be obtained from all military offenders and victims, and from civilian offenders and victims where possible. The report contains the following information:

1. The names of the parties involved in the case;

2. the CRC decision and recommendation;

3. the positions / disciplines that were present and participated in the decision and recommendations;

4. a synopsis of the information / documents considered;

5. a statement of rights letter for the alleged offender or victim, as appropriate.

E. ***Who can request review.*** The following individuals may request review of the CRC determination to substantiate / unsubstantiate the allegations of abuse:

1. ***Alleged Offender (military or civilian).*** The CRC must have found substantiated abuse on the part of the military offender who is requesting review.

2. ***Alleged Victim (military or civilian).*** The CRC must have found unsubstantiated abuse in an incident involving the alleged victim. If the victim is a minor child, his or her non-offending parent may request review.

3. ***Commanding Officer.*** The commanding officer of the alleged offender or victim, or the commanding officer of the sponsor of the alleged offender or victim, may request the local CRC to reconsider its decision in an individual case.

F. ***Procedures and grounds for review.*** Requests for review of CRC decisions must be in writing, although there is no prescribed format for the request. They should normally be forwarded within 30 days of receipt of the CRC decision, absent unusual circumstances. Requests for review can be filed with either the local CRC that made the determination or to the HRT. It is not required that review be requested by the local CRC before a request is made to the HRT. Review can be requested by the local CRC and then by the HRT if a petitioner is dissatisfied with the decision of the local CRC. Requests can be based upon the following grounds:

1. ***Newly discovered information.*** The petitioner must demonstrate that:

(a) The information was discovered within 30 days of the date the petitioner was notified of the CRC's decision;

(b) The new information is not such that it would have been discovered by the petitioner at the time of CRC case disposition in the exercise of due diligence; and

(c) The newly discovered information, if considered by the CRC, would probably produce a substantially more favorable result for the petitioner.

2. ***Fraud on the installation CRC.*** The petitioner must demonstrate that the fraud substantially influenced the CRC decision. Examples of such fraud would include:

(a) Confessed or proved perjury in statements or forgery of documentary evidence which substantially influenced the CRC decision;

(b) Willful concealment of information by one or more of the CRC members that was favorable to the petitioner and had a substantial likelihood to result in a different decision by the CRC.

3. ***Voting member was absent.*** The petitioner must show that a voting member was absent ***and*** such absence negatively impacted the outcome of the CRC determination. The absent member must be one of the prescribed members of the CRC discussed above, and the petitioner must affirmatively demonstrate a substantial likelihood that the voting member's presence may have changed the outcome of the CRC determination. If a designated CRC member's alternate was present, this will negate HRT review on this ground.

4. ***Not guilty / guilty finding after a military or civilian trial on the merits.*** The petitioner must demonstrate that new or additional evidence was considered during the trial. The following limitations apply:

(a) The charge(s) decided upon during the trial on the merits must be directly related to the incident which formed the basis of substantiated or unsubstantiated abuse findings by the CRC; and

(b) The petitioner demonstrates a substantial likelihood that the new evidence in question, if considered by the CRC, may have produced a substantially more favorable result for the petitioner, or the evidence in question directly impacted upon the finding of guilty / not guilty.

5. ***Plain legal or factual error.*** The petitioner must demonstrate that an examination of the record establishes that the decision of the CRC was based upon plain error. For example, the alleged offender was TAD out of the area on the date the alleged assault took place.

4406 REPORTING REQUIREMENTS

A. ***Spouse Abuse.*** Spouse abuse is the most frequently reported type of family abuse within the Navy, and frequently co-exists with child abuse.

1. ***Law enforcement.*** If a spouse abuse report involving physical injury or the use of a dangerous weapon is received by law enforcement officials, verbal notification must be made to the FAR / FAPM and the member's command immediately. A written report shall be issued within 24 hours to the FAR / FAPM as well as the member's command.

2. ***Medical Treatment Facility.*** If a victim of alleged spouse abuse comes to a MTF for treatment of injuries relating to abuse, the case is referred to the FAR/FAPM immediately. If there is major physical injury or the indication of a propensity or intent to inflict such injury by the alleged offender, the case must be referred to law enforcement officials.

B. ***Child Abuse.*** All DON personnel must report any incident or suspected incident of child abuse occurring on a military installation or involving military persons to the local FAR / FAPM. Depending on the outcome of the initial assessment, the FAR/FAPM will notify the member's command and appropriate civilian agencies. In all cases of major injury or the offender's propensity to inflict such injury, the FAR / FAPM must report the case to law enforcement officials. For overseas locations, notification will be made in accordance with applicable Status of Forces Agreements (SOFA).

1. ***Child Sex Abuse.*** In addition to the above, all incidents or suspected incidents of child sexual abuse must be reported to the Naval Criminal Investigative Service (NCIS). Reports must also be made to BUPERS and CMC.

C. All cases must have a completed DD 2486 (Child / Spouse Abuse Incident Report) forwarded to the Commanding Officer, Naval Medical Data Services Center (Code 42) within 15 days of the date that CRC makes a status determination or closes, transfers, or reopens the case. Enclosure (9) of NAVMEDCOMINST 6320.22, Subj: FAMILY ADVOCACY PROGRAM, provides directions for completion of the form.

4407 FLAGGING OF PERSONNEL RECORDS

A. ***Overview.*** The term "flag" refers to the indicator placed in a member's file letting detailing personnel know that they will have to get clearance before issuing permanent change of station orders for an individual. The flagging process is intended to prevent further stress on the service member and family members, to prevent re-abuse, and to ensure assignment to a geographic location which has adequate services available. Flagging is also used to ensure the availability of the service member or family members for case disposition, rehabilitation, education and counseling.

1. ***BUMED Assignment Control Flag.*** (Navy Only) Placed on recommendation of the CRC on spouse abuse and child physical abuse and neglect cases. This is a temporary flag which is normally removed within a year.

2. ***BUPERS Assignment Control Flag.*** (Navy Only) Placed into the personnel data system by Pers-8 for all suspected child sexual abuse cases. This flag restricts transfers, reenlistments, advancements and / or promotions until case resolution. A member is notified of these restrictions by BUPERS via his / her commanding officer after the case has been reported. It is lifted at case resolution.

4408 PROGRAM SPONSORS

A. ***Navy sponsor***:

Bureau of Naval Personnel (BUPERS 661)
Commercial (703) 614-5892 / 5893
DSN 224-5892

B. ***Marine sponsor***:

Marine Family Programs (Code MFP)
Commercial (703) 696-1188
DSN 426-1188

C. ***Coast Guard sponsor***:

Individual & Family Support Programs Branch – (202) 267-6199

CHAPTER XLV

FREEDOM OF EXPRESSION IN THE MILITARY

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CHAPTER XLV

FREEDOM OF EXPRESSION IN THE MILITARY

4501 INTRODUCTION. The purpose of this chapter is to discuss the right of active-duty servicemembers to exercise first amendment freedoms and the extent to which a military commander may limit civilians who seek to exercise their freedom of expression in areas over which the military has jurisdiction. We will first briefly consider the constitutional basis for freedom of expression and several doctrines fashioned by the Supreme Court to test the validity of limitations on the exercise of freedom of expression. An appreciation of these doctrines is necessary since the courts will use them as a starting point in reviewing military regulations that limit expression. We will then consider freedom of expression as it is uniquely applied to the armed forces.

PART A - CONSTITUTIONAL BASIS AND SUPREME COURT DOCTRINES

4502 FIRST AMENDMENT

– ***Specific freedoms.*** The first amendment to the U.S. Constitution 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.

There are five freedoms explicitly listed: (1) religion, (2) speech, (3) press, (4) assembly, and (5) petition for redress of grievances. In addition to these five freedoms, other provisions of the Bill of Rights (such as the requirement for due process, the privilege against self-incrimination, and the prohibition against unreasonable search and seizures) are significant elements in maintaining a system of freedom of expression. Nevertheless, the first amendment is considered the main source of constitutional protection in this area.

4503 LIMITATION OF FREEDOM OF EXPRESSION

A. ***General.*** Freedom of expression is not an unlimited right. The Supreme Court has said that the first amendment embraces two concepts: freedom to believe and freedom to act. The first is absolute; the second cannot be since society must regulate conduct for its own protection. There are at least two ways in which constitutionally protected freedom of expression is narrower than a totally unlimited license to talk. First, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. Second, general regulatory statutes not intended to control the content of expression, but incidentally limiting its unfettered exercise, have been found to be justified by valid governmental interests.

B. ***Unprotected speech.*** Examples of types of speech which are not constitutionally protected are:

1. Libelous utterances or "fighting" words;

2. obscenity; and

3. incitement to commit. Such language is a crime if the speech is in fact directed to inciting or producing imminent lawless action and is likely to incite or produce such action, as opposed to an abstract teaching of the moral propriety or even necessity for resorting to force and violence.

C. ***Lawful regulation of free speech.*** Distinguish between expression by pure speech and expression by conduct (such as patrolling, picketing, and marching on streets and highways). Constitutional protection is greater for the former.

1. ***Trespassing.*** The first amendment will not protect someone who trespasses on another person's property to exercise free speech.

2. ***Administration of justice.*** Freedom of speech does not include the right to picket a courthouse for the purpose of interfering with judicial action.

3. ***Televising and broadcasting of trials.*** Freedom of the press may be limited where it conflicts with the maintenance of absolute fairness in the judicial process.

4. ***Public employment.*** Public employment may properly encompass limitations on persons that would not survive constitutional challenge if directed at a private citizen.

5. ***Draft cards.*** Freedom of speech does not include the right to burn government property. When both "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the

nonspeech element can justify an incidental limitation on the speech element. To justify such incidental limitation on the freedom of expression, it is necessary that an important and substantial government interest be involved which is unrelated to the suppression of free expression, and that the incidental limitation on free expression be no greater than absolutely essential in furtherance of the legitimate governmental interest.

4504 PRESUMPTION IN FAVOR OF RIGHTS GUARANTEED BY THE FIRST AMENDMENT. In striking a balance between freedom of expression on the one hand and justifiable governmental limitations on the other, the Supreme Court has stated that first amendment rights are "preferred freedoms" which should be given "the broadest scope that could be construed in an orderly society."

PART B - FREEDOM OF EXPRESSION

4505 INTRODUCTION

A. ***The courts.*** The United States Court of Military Appeals has stated on several occasions that military personnel are entitled to first amendment protections. But the protection afforded is not absolute. It must accommodate the requirement for an effective military force. This latter requirement creates substantial legitimate government interests that are not present in the civilian context for, as the Supreme Court has stated, there are: "inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be on the security and order of the group rather than on the value and integrity of the individual."

B. ***Department of Defense.*** The balance between the servicemember's right of expression and the needs of national security is the subject of DOD Directive 1325.6 of 12 September 1969, Subj: Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces (transmitted by OPNAVINST 1620.1 and MCO 5370.4) [hereinafter DOD Directive 1325.6], which 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 proceed 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.

C. ***Criminal sanctions***. A particular exercise of expression could bring a servicemember within the prohibition of a criminal statute. Statutory provisions that could apply include:

1. Uniform Code of Military Justice [10 U.S.C. §§ 877-934]:

a. Attempt to commit an offense (UCMJ, art. 80);

b. conspiracy to commit an offense (UCMJ, art. 81);

c. soliciting desertion, mutiny, sedition, etc. (UCMJ, art. 82);

d. any commissioned officer using contemptuous words against the President, Vice President, Congress, Secretary of Defense, Secretary of a military department, Secretary of the Treasury, or the governor or legislature of the state, territory, commonwealth, or possession in which the officer is present (UCMJ, art. 88);

e. disrespect toward a superior commissioned officer (UCMJ, art. 89);

f. willfully disobeying a lawful command of a superior commissioned officer (UCMJ, art. 90);

g. disrespect toward a warrant officer, noncommissioned officer, or petty officer (UCMJ, art. 91);

h. failure to obey a lawful order or regulation (UCMJ, art. 92);

i. mutiny or sedition (UCMJ, art. 94);

j. betrayal of a countersign (UCMJ, art. 101);

k. corresponding with the enemy (UCMJ, art. 104);

l. causing or participating in a riot or breach of peace (UCMJ, art. 116);

m. provoking speeches or gestures (UCMJ, art. 117);

n. extortion (UCMJ, art. 127);

o. use of writing knowing it to contain false statements (UCMJ, art. 132);

p. conduct unbecoming an officer (UCMJ, art. 133); and

q. conduct undermining good order, discipline, and loyalty (e.g., criminal libel, disloyal statements) (UCMJ, art. 134).

2. Federal criminal code (18 U.S.C.):

a. Polling armed forces in connection with political activities (§ 596);

b. enticing desertion or harboring deserters (§ 1381);

c. assisting or engaging in rebellion or insurrection (§ 2383);

d. two or more persons engaging in seditious conspiracy (§ 2384);

e. advocating overthrow of the government by force or violence (§ 2385);

f. interference with morale, discipline, or loyalty of the armed forces (§ 2387);

g. interference with armed forces during war (§ 2388);

h. counseling evasion of the draft [50 U.S.C. app. 462];

i. mailing writings or other publications containing matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States (§ 1717); and

j. organizing a "military labor organization" or participating as part of such an organization in a strike or other concerted labor activity against the Federal Government [10 U.S.C. § 976].

4506 FREEDOM OF SPEECH AND PRESS

A. ***Speech*** .

1. ***Prior restraints.*** The prior restraint of speech is not provided for in DOD Directive 1325.6; however, sections 401 and 404 of SECNAVINST 5720.44, Subj: DEPARTMENT OF THE NAVY PUBLIC AFFAIRS POLICY AND REGULATIONS, provide for "policy review" of certain public statements, whether oral or written, pertaining to foreign or military policy. For example, an order not to talk to or speak with any men in a company concerning an investigation has been held to be an impermissible prior restraint on the

freedom of speech.

2. ***Subsequent punishment.*** The Court of Military Appeals, like the Supreme Court, prefers subsequent punishment over prior restraints. It is far easier for the Court to scrutinize a case dealing with a subsequent criminal prosecution with the facts, circumstances, and effects of the free expression clearly defined.

3. ***Example.*** One evening a marine absented himself without authority, after first writing the following message in the "rough" log kept in the Crash Crew office:

> Dear fellow member's of crash crew
>
> As I write this I have but a few hours left on this island. Surely you know why, but where did I go? I'm not to [sic] sure right now but I have hopes of Canada, then on to Sweden, Turkey, or India.
>
> It sounds silly to you? Let me ask you this: do you like the Marine Corps? The American policy or foreign affairs. [sic]
>
> Have you ever read the constitution of the United States? IT'S A FARCE. Everything that is printed there is contradicted by 'amendments'. is [sic] this fair [to] the U.S. people? I believe not. Why sit [sic] back and take these unjust Rules and do nothing about it. If you do nothing will change.
>
> This is what I'm doing, *A Struggle for Humanity*. But it takes more than myself. We must all fight.
>
> /s/ Mr. Gray

The Marine later surfaced at a church near the University of Hawaii, where he and ten others made speeches and handed out a leaflet generally derogatory of the Marine Corps and the war in Vietnam. The accused was thereafter convicted under Article 134 of the Uniform Code of Military Justice of having made statements disloyal to the United States. The Court of Military Appeals upheld the conviction insofar as it pertained to the entry in the Crash Crew log, but set aside the conviction based on the leaflet handed out at the church.

B. ***Possession of printed materials.***

1. ***Prior restraints.*** Paragraph III.A.2. of DOD Directive 1325.6 states: "[T]he mere possession of unauthorized printed material may ***not*** be prohibited. . ." (emphasis added). The term "unauthorized" as used in the above provision could be

misleading. A reasonable reading of the provision is considered to be that it was not intended to apply to classified security material since unauthorized possession of such material is prohibited by other regulations. This provision parallels the rule of *Stanley v. Georgia*, 394 U.S. 557 (1969), where the Supreme Court held constitutionally invalid a criminal statute prohibiting mere possession of obscene material in one's own home based on the rationale that a man has a right to be left alone and to read what he wants without being subject to criminal sanctions. Article 510.68 of OPNAVINST 3120.32, Subj: STANDARD ORGANIZATION AND REGULATIONS OF THE U.S. NAVY no longer prohibits the ***possession*** of pornography on board a naval unit. If one displays material or possesses it for the purpose of making an illegal distribution, however, it may be seized. DOD Directive 1325.6, para. III.A.2., states that: "[P]rinted material which is prohibited from distribution shall be impounded if the Commander determines that an attempt will be made to distribute." Since a seizure of material would constitute a prior restraint, a commanding officer should be prepared to justify such action by pointing to the facts that led him to conclude that there was a clear danger that an unauthorized distribution would occur. Such a determination would be made in the same manner that a commanding officer decides there is probable cause to order a search. One relevant factor would be how many copies of a particular publication were involved since it is reasonable to assume that an individual is not going to read multiple copies of the same material himself. Another factor would be whether the material is addressed to any particular group.

2. ***Subsequent punishment.*** Since mere possession of unauthorized material may not be prohibited, an individual may also not be successfully prosecuted for mere possession under Article 134, UCMJ as prejudicial to good order and discipline.

C. ***Distribution of printed material.***

1. ***Prior restraints.*** DOD Directive 1325.6 distinguishes between distribution through official channels (such as base exchanges or libraries) and "other" channels (such as handing out materials on the sidewalks).

a. ***Official outlets.*** Paragraph III.A.1. of DOD Directive 1325.6 states: "A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post exchanges and military libraries." This provision is designed to preclude the possibility of a commander becoming embroiled in a controversy over supposed censorship of materials that have been accepted for distribution through official outlets. Article 4314f of the *Navy Exchange Manual* contains very broad guidelines for screening pornographic or other offensive materials not acceptable for sale within the military establishment. The DOD Directive does not prohibit the commander from completely removing a publication from an outlet as opposed to censuring a specific issue. However, a commander is required to apply with equality a constant standard to all publications.

b. ***Unofficial outlets.*** Paragraph III.A.1. of DOD Directive 1325.6 provides for a prior restraint and specifies the standard to be used in imposing such prior restraint:

> In the case of distribution of publications through other than official outlets, a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a ***clear danger*** to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would ***materially interfere*** with the accomplishment of a military mission. When he makes such a determination, the distribution will be prohibited. (Emphasis added).

These guidelines are designed to preclude condemnation of the regulation as being too broad. Local regulations that are promulgated to implement DOD Directive 1325.6 should themselves be carefully drafted, incorporating the above language.

(1) ***Regulatory specificity*** A base regulation prohibiting "picketing, demonstrations, sit-ins, protest marches, and political speeches, and similar activities" without prior approval was not sufficiently broad to cover handbilling.

(2) ***Protected interests*** A commanding officer should be prepared to point to facts in support of his determination that a clear danger to the loyalty, discipline, or morale of military personnel would result or that the distribution would materially interfere with the accomplishment of a military mission. An unsupported conclusion may not be sufficient to withstand challenge in Federal court. The fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited.

(3) ***Case-by-case decisionmaking.*** The decision whether to permit distribution of a publication must be made on a case-by-case basis; the June issue of a publication could not be prohibited solely because the March issue was objectionable. Some grounds upon which distribution might be prohibited are the contents of the publication may be unlawful (e.g., enticing desertion, violating security regulations, containing disloyal statements); or the particular state of events at the command may make distribution objectionable, for example, a history of violence.

(4) ***Adequate procedural safeguards.*** DOD Directive 1325.6 is silent as to any procedures to be followed in deciding whether or not to permit distribution of a publication via unofficial sources. The Supreme Court, however, attaches great importance to the procedure employed in making an administrative determination to impose a prior restraint. Procedural safeguards should provide for a hearing to afford the persons desiring to distribute the material an opportunity to present their material for review

and state how they wish to distribute the material. Such a hearing could be informal in nature and could be conducted by anyone designated by the commanding officer. The local regulation should then provide for a speedy review of the hearing by the commanding officer who would be well advised to seek the advice of his staff judge advocate as to the legal sufficiency of the record for making a determination whether or not to permit distribution. Reasonable speed in these procedures is essential, for unwarranted delay on the part of the command in replying to a request for permission to distribute could itself result in successful recourse to the Federal courts. The commanding officer should then inform the applicants of his decision. Applicants could then be informed that they are free to forward an appeal through the chain of command. By having had a hearing at the outset, the commanding officer now has a record he can forward to explain his decision. Further, if the applicants decide to seek relief in the Federal courts, a record again is available to support the decision. The above procedure is only suggested, as the only absolute requirements are: (1) a consideration of the request; and (2) a statement of reasons for denial.

(5) ***What constitutes "distribution."*** Questions will inevitably arise concerning the fringe area of "distribution." While each case must be considered on its own facts, the following cases have been deemed distribution:

(a) Showing an obscene photograph to a friend in the privacy of the accused's house did not constitute distribution; however, loaning a lewd and lascivious book to another did.

(b) Permitting and assisting in the showing of an obscene film to officers and senior noncommissioned officers.

2. ***Subsequent punishment.*** Written materials could violate any of the criminal statutes listed above. In this connection, if a commander permits distribution of a publication on base, he should advise the person making the distribution, in writing, that he does not in any way condone any material in the publication and that the persons making the distribution could be subject to prosecution for any criminal violations resulting from the distribution.

D. ***Writing or publishing materials.***

1. ***Prior restraints.***

a. Paragraph III.C of DOD Directive 1325.6 prohibits the use of duty time or government property for personal vice official writing. Such a restriction is clearly valid. The same provision notes that publication of "underground newspapers" by military personnel off base, on their own time and with their own money and equipment, is not in itself prohibited.

b. Sections 401.2 and 403.4 of SECNAVINST 5720.44, Subj: DEPARTMENT OF THE NAVY PUBLIC AFFAIRS POLICY AND REGULATIONS, provide for prior security and policy review of certain materials originated by naval personnel. The case of *United States v. Voorhees*, 4 C.M.A. 509, 16 C.M.R. 83 (1954) dealt with an Army regulation which the court construed to provide for censorship of material for reasons of national security. The accused was a lieutenant colonel in the Army who wrote a book about the Korean conflict. He submitted the book for review in accordance with regulations, and soon became embroiled with the reviewing authorities over some parts of the book. While this was happening, a newspaper (which planned a series of articles on the book) asked the accused to write some articles for the newspaper's series. The accused wrote two such articles and submitted them to the newspaper without first obtaining clearance. The accused did inform the newspaper that clearance would have to be obtained before publication of the articles. Clearance was never obtained, and the articles were never published. The Court of Military Appeals held that the accused had been properly convicted of failure to obey the Army regulation requiring clearance of the material before it was submitted to the newspaper. The court was willing to assume that there was nothing in the articles that violated national security. That, however, did not relieve the accused of the obligation to comply with the censorship regulation. No case has been found which deals with the requirement of censorship of materials on the grounds of possible conflict with established governmental policy as compared to national security grounds.

2. ***Subsequent punishment.*** Depending on the content of a writing, publication could violate any of the criminal statutes listed above, as well as security regulations. Article 1121.2 of *U.S. Navy Regulations, 1990*, prohibits: "any public speech or . . . publication of an article . . . which is prejudicial to the interests of the United States."

4507 RIGHT TO PEACEABLE ASSEMBLY

A. ***Demonstrations.*** DOD Directive 1325.6 distinguishes between on-base and off-base demonstrations:

1. ***On base.***

a. ***Prior restraint.*** A commanding officer should prohibit an on-base demonstration which "could result in interference with or prevention of orderly accomplishment of the mission of the installation, or present a clear danger to loyalty, discipline, or morale of the troops." DOD Directive 1325.6, para. III.D.

b. ***Subsequent punishment.*** As with other forms of expression, persons participating in a demonstration on base may violate any number of the criminal statutes set above.

2. ***Off base.***

a. ***Prior restraints.*** Paragraph III.E. of DOD Directive 1325.6, prohibits participation by servicemembers in off-base demonstrations in the five following situations:

(1) ***On duty.*** The phrase "on duty" in this context refers to actual working hours, as opposed to authorized leave or liberty. A servicemember attending an off-base demonstration during working hours would therefore most likely be in an unauthorized absence status.

(2) ***In a foreign country.*** The justification here is to avoid incidents embarrassing to the U.S. Government that could result from servicemembers becoming embroiled in local disputes in a foreign country. In some instances (such as article II of the NATO Status of Forces Agreement), regulations implementing international agreements forbid servicemembers from becoming so involved.

(3) ***Activities constitute a breach of law and orde.*** Effectively, this directs servicemembers not to break the law. Thus, if a servicemember did participate in a demonstration which somehow violated the law, he should be prosecuted for the underlying violation committed rather than a violation of the regulation implementing DOD Directive 1325.6. Further, the maximum authorized punishment for a particular offense cannot be increased by ordering someone not to commit the offense and then prosecuting him for violation of both a lawful order and the particular criminal misconduct. *See* Part IV, para. 16e(2) Note, MCM, 1995.

(4) ***Violence is likely to result.*** This reflects the traditional responsibility of the commander to preserve the health and welfare of his troops. The commander who invokes his authority should be prepared to cite the factual basis for his determination that violence is likely to result.

(5) ***Overtly discriminatory organizations.*** Paragraph III.G. of DOD Directive 1325.6 prohibits participation (defined as taking part in public demonstrations, recruiting or training members, or organizing or leading such organizations) in organizations that overtly discriminate on the basis of race, creed, color, sex, religion, or national origin (such as Neo-Nazi or whitesupremacy groups).

b. ***In uniform.*** DOD Directive 1334.1, Subj: WEARING OF THE UNIFORM, prohibits wearing the uniform:

(1) At any subversive-oriented meeting or demonstration;

(2) in connection with political activities;

(3) when service sanction could be implied from such conduct;

(4) when wearing the uniform would tend to bring discredit to the armed forces; or

(5) when specifically prohibited by the regulations of the department concerned.

B. ***Off-base gathering places.***

1. ***Prior restraint.*** Paragraph III.B. of DOD Directive 1325.6 states:

> ***Off-Post Gathering Places.*** Commanders have the authority to place establishments " off-limits", in accordance with established procedures, when, for example, the activities taking place there, including counseling members to refuse to perform duty or to desert, involve acts with a significant adverse effect on members' health, morale or welfare.

Under OPNAVINST 1620.2, Subj: ARMED FORCES DISCIPLINARY CONTROL BOARDS / OFF BASE MILITARY LAW ENFORCEMENT ACTIVITIES / JOINT LAW ENFORCEMENT OPERATIONS, and MCO 1620.2, Subj: ARMED FORCES DISCIPLINARY CONTROL BOARDS AND OFF-INSTALLATION MILITARY ENFORCEMENT, armed forces disciplinary control boards, operating under the cognizance of the area coordinator, have the authority to declare places "off-limits" where conditions exist that are detrimental to the good discipline, health, morals, welfare, safety, and morale of armed forces personnel. The commanding officer also has authority to act independently in emergency situations. The Federal courts will consider the decision to declare an establishment "off-limits" as final and not subject to review by the courts, providing the command has followed the procedures established in the regulations.

2. ***Subsequent punishment.*** Servicemembers frequenting an establishment duly declared "off-limits" would be subject to prosecution for violation of a lawful order.

C. ***Membership in organizations.***

1. ***General rule.*** Passive membership in any organization by servicemembers cannot be prohibited. Organizational activities (such as distributing materials, recruiting new members, or on-base meetings) may, however, be proscribed by a commanding officer when they present a clear danger to security of the installation, orderly accomplishment of the command's mission, or preservation of morale, discipline, and readiness. Organizations which actively advocate racially discriminatory policies with respect to their membership (such as the Ku Klux Klan) may be restricted by the commanding

officer from the formation of affiliations aboard a naval ship or shore facility and the attendant solicitation of members.

2. ***Servicemembers' unions.*** Membership in, organizing of, and recognition of military unions is criminally proscribed by section 976 of title 10, *United States Code*, and SECNAVINST 1600.1, Subj: RELATIONSHIPS WITH ORGANIZATIONS WHICH SEEK TO REPRESENT MEMBERS OF THE ARMED FORCES IN NEGOTIATION OR COLLECTIVE BARGAINING.

a. ***Military labor organization.*** A military labor organization that engages, or attempts to engage, in:

(1) Negotiating or bargaining with any military member or civilian employee on behalf of military members concerning the terms or conditions of service;

(2) representing military members before a civilian employee, or any military member, concerning a military member's grievances or complaints arising out of terms or conditions of military service; or

(3) striking, picketing, marching, demonstrating, or taking similar action intended to induce military members or civilian employees to participate in military union activity.

b. ***Prohibited activities.*** Activities now ***prohibited*** in the military include:

(1) Military members knowingly joining or maintaining membership in a military labor organization;

(2) military members and civilian employees of the military negotiating or bargaining ***on behalf of the United States*** concerning terms or conditions of military service with person(s) representing or purporting to represent military members;

(3) anyone enrolling a military member in a military labor organization or soliciting or accepting dues / fees for such organization from any military member;

(4) military members and civilian employees attempting to organize, organizing, or participating in strikes or similar job-related actions that concern the terms or conditions of military service; and

(5) anyone using military facilities for military labor union activities.

c. ***Permissible activities.*** Activities ***permitted*** in the military include:

(1) Request mast;

(2) participation in command-sponsored or command-authorized counsels, committees, or organizations;

(3) seeking relief in Federal court;

(4) joining or maintaining in any lawful organization or association not constituting a military labor organization;

(5) filing a complaint of wrongs as discussed below; and

(6) seeking or receiving information or counseling from any source.

4508 RIGHT TO PETITION FOR REDRESS OF GRIEVANCES

A. ***Request mast.*** Article 0820.c of *U.S. Navy Regulations, 1990,* provides that the commanding officer shall: "afford an opportunity, with reasonable restrictions as to time and place, for the personnel under his or her command to make requests, reports or statements to the commanding officer, and shall ensure that they understand the procedures for making such requests, reports or statements." Article 1151.1 states: "The right of any person in the naval service to communicate with the commanding officer in a proper manner, and at a proper time and place, is not to be denied or restricted."

B. ***Complaint of wrongs.***

1. ***Against the commanding officer.*** Article 138, Uniform Code of Military Justice, states:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with

the proceedings had thereon.

Proceedings on the complaint held by the officer exercising general court-martial jurisdiction will depend on the seriousness of the allegations; the whereabouts of the complainant, the respondent, and witnesses; the available time; and the exigencies of the service. Implementing instructions are set forth in chapter III of the *JAG Manual*.

2. ***Against another superior***. Article 1150 of *U.S. Navy Regulations, 1990*, provides that a servicemember who considers himself wronged by a person superior in rank or command, not his commanding officer, may report the wrong to the proper authority for redress. The officer exercising general court-martial jurisdiction shall inquire into the matter and take such action as may be warranted, including generally adhering to chapter III of the *JAG Manual*.

C. ***Relief in Federal court***. A servicemember may seek relief from a Federal court if he believes his constitutional or statutory rights have been infringed by the military.

D. ***Right to petition any Member of Congress or the Inspector General***.

1. ***Congressional correspondence***. Section 1034 of title 10, *United States Code (1993)*, entitled "Communicating with a Member of Congress or Inspector General," provides: "No person may restrict a member of the armed forces in communicating with a member of Congress or an Inspector General," unless the communication is unlawful or violates a regulation necessary to the security of the United States. This provision is repeated in Articles 1154 and 1155 of *U.S. Navy Regulations, 1990*. Section 1034 also mandates specific "whistleblower" protections for servicemembers who contact either Congressmen or an Inspector General. *See* DOD Directive 7050.6, Subj: MILITARY WHISTLEBLOWER PROTECTION.

2. ***Group petitions***. Local regulations requiring servicemembers to obtain the base commander's approval before circulating on-base petitions addressed to members of Congress have been upheld.

E. ***Preferring charges***. If the circumstances warranted, a servicemember could voice a grievance by swearing out charges against another servicemember. UCMJ, art. 30.

4509 CIVILIAN ACCESS TO MILITARY INSTALLATIONS

A. ***Regulatory authority***. Article 0802.1 of *U.S. Navy Regulations, 1990*, provides: "The responsibility of the commanding officer for his or her command is absolute. . . ." Authority commensurate with that responsibility has been widely recognized. Section 765.4 of title 32, *Code of Federal Regulations*, reads:

Visitor Control

> Access to any naval activity afloat or ashore is subject to (a) the authorization and control of the officer or person in command or charge and (b) restrictions prescribed by law or cognizant authority to safeguard (1) the maximum effectiveness of the activity, (2) classified information (E.O. 10501, 18 F.R. 7049, as amended, 50 U.S.C. § 401 note), (3) national defense or security, and (4) the person and property of visitors as well as members of the Department of Defense, and Government property.

The Department of the Navy Information Security Program Regulation and the Navy's ***Physical Security and Loss Prevention Manual*** should also be consulted for provisions dealing with the responsibility of the commanding officer for maintaining security.

B. ***Visitors.*** It is a Federal offense for any person to enter a military reservation for any purpose prohibited by law or lawful regulations, or for any person to enter or reenter an installation after having been barred by order of the commanding officer. 18 U.S.C. § 1382.

C. ***Dependents / retirees / civilian employees.*** Civilian dependents of active-duty personnel are allowed by statute to receive certain medical care in military facilities. 10 U.S.C. §§ 1071-1085. Similarly, certain disabled veterans are allowed by statute to use commissaries and exchanges. 10 U.S.C. § 7603. Civilian employees have a vested interest in their jobs and cannot be denied access to their jobs without due process of law. What requirements exist for commanding officer's debarment orders? Are hearings and appeal rights guaranteed? Due process in most situations of this type requires only a consideration of the reasons services were refused and a response to the individual. Absent entitlement by statute or regulation, persons have no constitutionally protected interest in entering military installations and are not constitutionally entitled to any procedural, due process protections.

4510 POLITICAL ACTIVITIES BY SERVICEMEMBERS

A. ***General.*** A member of the armed forces is expected and encouraged to carry out his obligation as a citizen but, while on active duty, his participation in partisan political activity is subject to limitation.

B. ***References.***

1. DOD Directive 1344.10, Subj: POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY.

2. MILPERSMAN, art. 6210240.

3. MCO 5370.7, Subj: POLITICAL ACTIVITIES.

C. ***Definitions.***

1. ***Partisan political activity.*** Partisan political activity is activity in support of, or related to, candidates representing, or issues specifically identified, with national or state political parties and associated or ancillary organizations.

2. ***Active duty.*** Active duty is full-time duty in the active military service of the United States for a period of more than 30 days.

3. ***Civil office.*** Civil office is an office, not military in nature, that involves the exercise of the powers or authority of civil government. It may include either an elective office or an office that requires an appointment by the President, by and with the advice and consent of the Senate, that is a position in the Executive Schedule.

D. ***Permissible activities.*** A member on active duty may engage in the following types of political activity:

1. Register, vote, and express a personal opinion on political candidates and issues, but not as a representative of the armed forces;

2. promote and encourage other military personnel to exercise their franchise, provided such promotion does not constitute an attempt to influence or interfere with the outcome of an election;

3. join a political club and attend its meetings when not in uniform;

4. serve as a nonpartisan election official out of uniform with the approval of the Secretary of the Navy;

5. sign a petition for specific legislative action, provided the signing thereof does not obligate the member to engage in partisan political activity and is taken as a private citizen;

6. write a nonpartisan letter to the editor of a newspaper expressing the member's personal views concerning public issues;

7. write a personal letter, not for publication, expressing preference for a specific political candidate or cause;

8. make monetary contributions to a political party or committee, subject to the limitations of paragraph E below; and

9. display a political sticker on his / her private automobile.

E. ***Prohibited activities***. A member on active duty may ***not*** engage in the following types of political activity:

1. Use official authority or influence for the purpose of interfering with an election, affecting the outcome thereof, soliciting votes for a particular candidate or issue, or requiring or soliciting political contributions from others;

2. campaigning as nonpartisan (as well as partisan) candidate or nominee;

3. participate in a partisan campaign or make public speeches in the cause thereof;

4. make, solicit, or receive a campaign contribution for another member of the armed forces or for a civilian officer or employee of the United States promoting a political cause;

5. allow or cause to be published political articles signed or authored by the member for partisan purposes;

6. serve in any official capacity or be listed as a sponsor of a partisan political club;

7. speak before a partisan political gathering of any kind to promote a partisan political party or candidate;

8. participate in any radio, television, or other program or group discussion as an advocate of a partisan political party or candidate;

9. conduct a partisan political opinion survey or distribute partisan political literature;

10. perform clerical or other duties for a partisan political committee during a campaign or an election day;

11. solicit or otherwise engage in fund-raising activities in Federal offices or facilities for a partisan political cause or candidate;

12. march or ride in a partisan political parade;

13. display a large political sign on top of his / her private automobile, as distinguished from a political sticker;

14. participate in any organized effort to provide voters with transportation to the polls;

15. sell tickets for or otherwise actively promote political dinners;

16. be a partisan candidate for civil office during initial active-duty tours or tours extended in exchange for schools;

17. for a Regular officer on active duty, or retired Regular officer or Reserve officer on active duty for over 180 days, hold or exercise the functions of any civil office in any Federal, state, or local civil office—unless assigned in a military status or otherwise authorized by law;

18. hold U.S. Government elective office, Executive schedule position, or position requiring Presidential appointment with the advice and consent of Congress; or

19. serve as civilian law enforcement officers or members of a reserve civilian police organization.

4511 FREEDOM OF RELIGION

A. ***References.***

1. 10 U.S.C. § 6031

2. 10 U.S.C. § 774

3. *U.S. Navy Regulations, 1990,* article 0817

4. SECNAVINST 1730.8, Subj: ACCOMMODATION OF RELIGIOUS PRACTICES

5. DOD Dir 1300.17, Subj: ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES

B. ***General.*** Notwithstanding the "establishment clause" of the first amendment, which has been interpreted as preventing Congress from enacting any law intended to promote religion, or which might unduly "entangle" the government with religious practices, Federal law not only provides for the existence of a Navy Chaplain's Corps, but requires commanding officers to "cause divine services to be conducted on Sunday." 10 U.S.C. § 6031(b). The statute also permits a chaplain to conduct divine services according to the manner and form of his own church. Thus, for example, a Catholic

chaplain presiding at divine services may offer Mass; an Episcopal chaplain would be free to conduct Morning Prayer; a Jewish chaplain may conduct Jewish religious services.

C. ***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.

1. For example, if a servicemember who is scheduled to stand duty on Friday evening requests, based on his religious principles, that he not be directed to stand duty between sundown Friday and sundown Saturday, the commanding officer should carefully consider granting that accommodation request if others are available to stand duty during those hours. However, if no other person is reasonably available to stand duty at that time, the commanding officer could order that member to stand duty based on his determination of military necessity.

2. SECNAVINST 1730.8 provides guidelines to be used by the naval service, 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.

3. 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 a basis for determining a member's entitlement to wear religious apparel with the uniform. It 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.

4. For example, within the guidelines given above, a skullcap (yarmulke) may be worn:

a. whenever a military cap, hat, or other headgear is not prescribed; or

b. underneath military headgear as long as it does not interfere with the proper wearing, function, or appearance of the prescribed headgear.

5. The genesis of congressional action in this area is the 1986 Supreme Court decision which addressed a conflict between Air Force dress regulations concerning the visible wearing of religious apparel with the uniform, and the wearing of a yarmulke, without a service cap, by an Air Force officer. *Goldman v. Weinberger*, 475 U.S. 503 (1986). In that case, the Court held that the first amendment does not require the military to accommodate the wearing of religious apparel such as a yarmulke if it would detract from the uniformity sought by the service dress regulations. Section 747 of 10 United States Code was enacted as a reaction against the *Goldman* decision.

6. Under SECNAVINST 1730.8, commanding officers may consider the following when examining requests for religious accommodations:

a. The importance of military requirements, including individual readiness, unit cohesion, health, safety, morale, and discipline;

b. the religious importance of the accommodation by the requester;

c. the cumulative impact of repeated accommodations of a similar nature;

d. alternative means available to meet the requested accommodation; and

e. previous treatment of the same or similar requests made for other than religious reasons.

7. SECNAVINST 1730.8 also provides that any visible item or article of religious apparel may not be worn with the uniform until approved, and that, in any case in

which a commanding officer denies a request to wear an item or article of religious apparel with the uniform, the member must be advised that he has a right to request a review of the 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 all other cases.

8. Administrative action, including reassignment, reclassification, or separation, consistent with SECNAV and service regulations, is authorized by this SECNAVINST if:

a. Requests for accommodation are not in the best interests of the unit; and

b. continued tension is apparent between the unit's requirements and the individual's religious beliefs.

CHAPTER XLVI

ENLISTED ADMINISTRATIVE SEPARATIONS

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CHAPTER XLVI

ENLISTED ADMINISTRATIVE SEPARATIONS

4601 INTRODUCTION. A service-member's obligation to his armed service continues until terminated. Generally, this time period is determined by the terms of the enlistment contract, but earlier termination may result due to administrative or disciplinary separation based upon specifically identified conduct on the part of the service-member. The primary reference for enlisted administrative separations is SECNAVINST 1910.4, Subj: ENLISTED ADMINISTRATIVE SEPARATIONS, which implemented DOD Directive 1332.14, Subj: ENLISTED ADMINISTRATIVE SEPARATIONS. Chapters 1900 and 1910 of the MILPERSMAN (Navy) and Chapter 6 of the MARCORSEPMAN (Marine Corps) and Chapter 12-B of the CGPERSMAN provide policy guidance and procedure pertaining to enlisted administrative separations and serve as the basis for the material in this chapter.

4602 TYPES OF SEPARATIONS. There are two types of separations given by the armed forces of the United States to enlisted service-members: punitive discharges and administrative separations.

4603 PUNITIVE DISCHARGES. Punitive discharges are authorized punishments of courts-martial and can only be awarded as an approved court-martial sentence pursuant to a conviction for a violation of the UCMJ. There are two types of punitive discharges:

A. ***Dishonorable Discharge (DD)***—which can only be adjudged by a general court-martial and is a separation under dishonorable conditions; and

B. ***Bad-Conduct Discharge (BCD)***—which can be adjudged by either a general court-martial or a special court-martial and is a separation under conditions other than honorable.

4604 ADMINISTRATIVE SEPARATIONS

A. ***General***. Administrative separations cannot be awarded by a court-martial and are not punitive in nature. Enlisted personnel may be administratively separated with a characterization of service (characterized separation) or description of separation (uncharacterized separation) as warranted by the facts of the particular case.

B. ***Definitions***. Some basic concepts that are important for understanding the

administrative separation system are:

1. ***Basis for separation***. "Basis" is the reason for which the person is being administratively separated (e.g., pattern of misconduct, convenience of the government for parenthood, weight control failure, etc.).

2. ***Characterization of service***. This term refers to the quality of the individual's military service (e.g., honorable, general, or OTH).

3. ***Uncharacterized separations***. This term refers to descriptions of separation, such as entry level separation (ELS) or order of release (OOR) from custody and control of the armed forces. These are used in cases when the member's service does not qualify for either favorable or unfavorable characterization.

4. ***Entry level status***. A member qualifies for entry level status during the first 180 days of continuous active military service or the first 180 days of continuous active service after a break of more than 92 days of active service.

-- A member of a Reserve component who is not on active duty, or who is serving under a call or order to active duty for 180 days or less, begins entry level status upon enlistment in a Reserve component. Entry level status for such a member of a Reserve component terminates as follows:

(1) 180 days after beginning training if the member is ordered to active duty for training for one continuous period of 180 days or more; or

(2) 90 days after the beginning of the second period of active duty for training under a program that splits the training into two or more separate periods of active duty.

5. ***Processing for separation***. "Processing for separation" means that the administrative separation machinery is being set in motion and not that the member will necessarily be separated. Processing is not equal to separation.

6. ***Execution of the separation***. A term that means the processing for separation has been completed, the actual separation has been approved, and it can be executed; that is, the separation papers can be delivered to the individual who can then return to civilian life in most cases.

7. ***Convening authority (CA)***. The "convening authority" is the commanding officer (with power to convene a special court-martial) responsible for beginning the appropriate administrative separation processing and submitting the documentation to the separation authority when necessary. Under some circumstances, it is mandatory that an individual's commanding officer process said individual for separation. Under most circumstances, however, the commanding officer will be permitted to exercise discretion. (***Note***: This may include a

commanding officer for a member who is also TEMDU to a command, but not for one who is TAD.)

8. ***Separation authority (SA)***. The "separation authority" is the officer in the chain of command who decides, based on the documentation presented, whether any recommended separation should be approved or disapproved and, if a separation is approved, what type of separation and whether it should be executed or suspended. In the Navy, the CA is sometimes the same as the SA. MILPERSMAN, Section 1910-704 sets forth the Separation Authority for each basis. In the Marine Corps, the GCMCA is usually the SA. In the Coast Guard, Commandant is usually the Discharge Authority. CGPERSMAN 12-B-1-a sets forth the Discharge Authority for each basis.

9. ***Respondent***. The "respondent" is a member who has been notified by his / her command that action has been initiated to separate him / her.

C. ***Characterized separations***. Separations are characterized as either honorable, general (under honorable conditions), or under other than honorable conditions (OTH). The reason for separation and the specific circumstances that form the basis of the separation, as well as the military record, shall be considered on the issue of characterization.

1. ***Honorable***. MILPERSMAN Section 1910-304 defines an honorable discharge as follows: the quality of the member's service generally met the standard of acceptable conduct and performance for Naval personnel; resulted in a final individual trait average of 2.00 or higher in the current enlistment; and, is otherwise so meritorious that any other characterization of service would be clearly inappropriate. Previous versions of the MILPERSMAN stated that a member could be awarded an honorable characterization of service even if they had not met the minimum standards if their service was otherwise so meritorious that any other characterization would be clearly inappropriate (e.g. Medal of Honor, Navy Cross, etc.).

a. ***Marine Corps***:

(1) For pay-grades E-4 and below, overall conduct marks for the current enlistment averaging 4.0 and proficiency marks averaging 3.0 are prima facie qualifications for an honorable separation. (The Marine Corps places great weight on the commanding officer's recommendation of appropriate characterization and a strong recommendation can turn what would otherwise be a general discharge into an honorable discharge and vice versa.) MARCORSEPMAN, paras. 6107, 6305, and 1004.3c.

(2) For pay-grades 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.

b. ***Coast Guard***:

(1) Personnel must have a minimum characteristic average of 2.5

in each factor for the period of service.

(2) A member whose marks do not otherwise qualify for an honorable separation may nevertheless receive an honorable separation if he/she has received a Coast Guard Commendation or higher personal decoration, been disabled by enemy action, or if the Commandant otherwise directs CGPERSMAN 12-B-2-f(1)-(d).

2. ***General (under honorable conditions)***. MILPERSMAN, Article 1910-304, CGPERSMAN 12-B-2-f-(2) and MARCORSEPMAN, para. 1004.3b. This type of separation (discharge) is issued to service-members whose military service has been honest and faithful; however, significant aspects of the member's conduct or performance of duty outweigh positive aspects of the member's service record. It is a separation under honorable conditions and entitles the individual to most veterans' benefits. A General (under honorable conditions) characterization of discharge may jeopardize a member's ability to benefit from the Montgomery G.I. Bill if they, in fact, had contributed. Moreover, the member will not normally be allowed to reenlist. Navy commanding officers must award a General characterization of service to enlisted members who have received a final individual trait average of 1.99 or below during the current enlistment unless the member's conduct has been so meritorious that an Honorable would be appropriate. The same is true for the Marine Corps except that the proficiency / conduct standards are 4.0 / 3.0 respectively.

-- For Coast Guard personnel, a general discharge is authorized when the final average marks are less than those required for an honorable discharge. A member being discharged for a drug incident ordinarily receives a general discharge unless there are aggravating circumstances that warrant an Other Than Honorable characterization or when directed by the Commandant on the basis of the member's overall record.

-- In accordance with MILPERSMAN 1910-306, conduct in the civilian community of a member of a Naval Reserve component who is not on active duty may not be used when characterizing service except when the conduct: directly affects the performance of the member's military duties; or, has an adverse impact on the overall effectiveness of the Naval Service, including good order, discipline, morale, and unit efficiency. Section 1004.4d of the MARCORSEPMAN states that conduct in the civilian community of a member of a Marine Corps Reserve component may form the basis of characterization as General (under honorable conditions) only if such conduct adversely affects the overall effectiveness of the Marine Corps including military morale and efficiency.

3. ***Under other than honorable conditions (OTH)***. This characterization is appropriate when the reason for separation is based upon one or more acts or omissions that constitute a significant departure from the conduct expected from members of the naval service. MILPERSMAN 1910-304; MARCORSEPMAN 1004.3c. For Coast Guard this characterization may only be issued if the reason for discharge is either misconduct, security, or requested by the member in lieu of court-martial for the good of the service. CGPERSMAN 12-B-2-F(3) or due to a homosexual act accompanied by aggravating circumstances, CGPERSMAN 12-D-4-d.

a. Persons awarded an OTH characterization of service: are not entitled to retain their uniforms or wear them home (although they may be furnished civilian clothing at a cost of not more than $50); 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. In accordance with MARCORSEPMAN 1004.4d, conduct in the civilian community of a member of a Marine Corps Reserve component may form the basis for characterization under Other Than Honorable (OTH) conditions only if such conduct directly affects the performance of military duties (service related).

c. The Department of Veterans Affairs will make its own determination with respect as to whether the OTH was based on conditions which would forfeit any or all VA benefits. Most veterans' benefits will be forfeited if that determination is adverse to the former service-member, such as when based on the following circumstances:

(1) Desertion;

(2) escape prior to trial by general court-martial;

(3) conscientious objector who refuses to perform military duties, wear the uniform, or comply with lawful orders of competent military authorities;

(4) willful or persistent misconduct;

(5) offense(s) involving moral turpitude;

(6) mutiny or spying; or

(7) homosexual acts involving aggravating circumstances.

(d) Commanding officers are to periodically explain 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 effects they may have upon: (1) employment in the civilian community, (2) veterans' benefits, and (3) 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; 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, Section 1910-010; MARCORSEPMAN, para. 6103, CGPERSMAN 12-B-3.

(e) 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. Under 10 U.S.C. § 1046, service-members 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. The advice includes a warning that an OTH based on a 180-day or more UA 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. MILPERSMAN, Section 1910-010; MARCORSEPMAN 6104.

(f) 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 afforded the opportunity to present his or her case in person before an administrative board with the advice and assistance of lawyer counsel. Exceptions to the foregoing are as follows:

(a) The service-member may request an OTH in lieu of trial by court-martial if charges have been referred to a court-martial authorized to adjudge a punitive discharge; in which case, the member will not be entitled to an administrative board. MILPERSMAN, Section 1910-106; MARCORSEPMAN, para. 6419; CGPERSMAN 12-B-21.

(b) A member may ***unconditionally*** waive rights to a board and counsel, as well as any other right. Such waiver will usually be accomplished in writing and the member will generally receive an OTH if he / she waives the board. For a Coast Guard member who is being considered for an OTH discharge by reason of misconduct, the member may ***conditionally*** or unconditionally waive rights to a board and counsel. Such waiver must be in writing after the member has been fully counseled regarding the matter by legal counsel. The Commandant is the approval authority for a member's waiver to a board. CGPERSMAN 12-B-32-b.

(c) A member of the naval service may be separated while absent without authority after receiving notice of separation processing. In addition, a member may be separated while on unauthorized absence when prosecution of the member appears to be barred by the statute of limitations (which has not been tolled). Separation in absentia of a Navy member is not authorized if the member is incarcerated by foreign authorities or military authorities outside the jurisdiction of the United States. The MARCORSEPMAN authorizes separation in absentia of a member who is an alien and who is absent without leave and appears to have gone to a foreign country where the United States has no authority to apprehend the member. MILPERSMAN, Section 1910-230; MARCORSEPMAN, para. 6312. A Coast Guard member (except reservists) beyond military control by reason of unauthorized absence of more than 1 year may be issued OTH discharge in absentia. Notification of the imminent discharge action and the effect date thereof will be sent by registered mail to the record address of the member or the next of kin. CGPERSMAN 12-B-32-a-(1); 12-B-32-b-(6).

(d) If a member is out of military control because of civil

confinement, the case may be heard by the board in the member's absence (following appropriate notice to the confined service-member) and the case may be presented on respondent's behalf by counsel for the respondent. MILPERSMAN, Section 1910-230; MARCORSEPMAN, para. 6303.4a; CGPERSMAN 12-B-32-b-(5).

D. ***Uncharacterized separations***

1. ***Entry level separation (ELS)***. A member in an entry level status (as defined in section 0904.B.4 above) will ordinarily be separated with an ELS. A member in an entry level status may also be separated under OTH conditions if warranted by the facts of the case (e.g., separation processing for misconduct or aggravated cases of homosexuality). CGPERSMAN 12-B-20-d. By the same token, a member in entry level status is not precluded from receiving an honorable discharge when clearly warranted by unusual circumstances and approved on a case-by-case basis by the Secretary of the Navy. MILPERSMAN, Section 1910-308; MARCORSEPMAN, para. 1004.5a.

-- For Coast Guard, Commanding Officer, Recruit Training Center Cape May and Commandant (G-MPC) may authorize an uncharacterized separation for poor performance or conduct during recruit training. The member must have less than 180 days of active service on the date of discharge to qualify. Prior to processing for entry level separation, a member shall be given formal counseling concerning his/her deficiencies and a reasonable opportunity to overcome them.

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. For example, a member would receive this type of uncharacterized separation if the member: (1) was insane at the time of enlistment, (2) was a deserter from another service, (3) was under age 17 when processed for a minority separation, or (4) tested positive on an entrant urinalysis test. MILPERSMAN, Section 1910-308; MARCORSEPMAN, para. 1004.5b. For Coast Guard personnel, a void enlistment includes those entered into:

a. When the person is intoxicated

b. When the person is insane

c. When the person is a deserter from the Armed Forces.

d. When the person is enlisted after receiving orders for induction.

e. When the person is coerced into an enlistment.

f. When the person is enlisted as a result of recruiter misconduct CGPERSMAN 12-B-22-b.

After confirmation of a void enlistment, COMDT-MPC-EPM will direct the action to be taken and the disposition of the person concerned. CGPERSMAN 12-B-22-e.

4605 COUNSELING

A. In many cases, before a member may be processed for separation, the member must first be formally counseled concerning his / her behavior. The formal counseling record involved must be entered into the service record via a page 13 (page 7 for Coast Guard) or 6105 entry. The Division Officer Notebook written counseling sheet will ***not*** suffice. Formal counseling is intended to give the member an opportunity to improve by identifying specific, undesirable behavior which the member has the ability to correct, alter, or cease. The written counseling warning informs the member that his / her potential for further service is recognized and correction of identified deficiencies will result in continuation on active duty. The member, however, must be ***clearly*** informed of what is undesirable. MILPERSMAN Section 1910-202; MARCORSEPMAN para. 6105; CGPERSMAN 12-B-9.

B. Once counseled, the member may not be processed for separation without first violating the counseling warning. The counseling document is tantamount to a binding contract. 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 inviolate counseling warning shall / must be rejected by the separation authority.

1. ***Navy***: For Navy personnel, the counseling is documented by a NAVPERS 1070/613 Administrative Remarks (Page 13) entry form. The counseling may be accomplished by any command to which the Sailor was assigned within the current enlistment. (The old rule required a Page 13 from the *parent* command.)

2. ***Marine Corps***: For Marine Corps personnel, the counseling is documented by a MARCORSEPMAN, para. 6105 letter or (page 11) entry. Paragraph 6105.5, MARCORSEPMAN states that a Marine being processed for separation under one of the bases requiring counseling under paragraph 6105 may only be processed if the counseling entry reasonably relates to the specific basis for separation ultimately recommended. There is no requirement that the counseling be recorded during the current enlistment. There must be some evidence in the administrative separation proceedings, however, indicating the Marine has not overcome the noted deficiencies.

3. ***Coast Guard***: For Coast Guard personnel, the counseling is documented by a CG - 3307 (page 7) administrative remarks entry form or by letter notification for unsatisfactory performance. CGPERSMAN 12-B-9.

C. Counseling and rehabilitation efforts ***are required*** before the initiation of separation processing for the following:

1. Convenience of the government due to parenthood and personality disorder (MILPERSMAN, Sections 1910-124 and 1910-122; MARCORSEPMAN, para. 6203);

CGPERSMAN 12-B-12 and 12-D-3 for dependency/hardship; 12-B-16 for personality disorder.

2. entry level performance and conduct (MILPERSMAN, Section 1910-154; MARCORSEPMAN, para. 6205); CGPERSMAN 12-B-20.

3. unsatisfactory performance (MILPERSMAN, Section 1910-156; MARCORSEPMAN, para. 6206); CGPERSMAN 12-B-9.

4. misconduct due to minor disciplinary infractions or misconduct due to pattern of misconduct (MILPERSMAN, Section 1910-138 and 1910-140; MARCORSEPMAN, para. 6210.2 and 6210.3); and

5. weight control failure - MARCORSEPMAN, para. 6215; CGPERSMAN 12-B-12-a-(6).

6. For Coast Guard - Unsuitability due to inaptitude, apathy, defective attitude, unsanitary habits or financial irresponsibility. CGPERSMAN 12-B-16.

7. For Coast Guard - Misconduct due to frequent involvement of a discreditable nature with civil or military authorities, abuse of a family member, shirking, failure to pay just debts, failure to contribute adequate support to dependents or failure to comply with valid orders of civil courts regarding support to dependents. CGPERSMAN 12-B-18.

D. ***Content and form of counseling warnings***. 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. signature and date of signing of the member and a witness; and

5. reasonable opportunity for the member to undertake the recommended corrective action.

6. The counseling warning must be dated and signed by the member and witnessed. If the member refuses to sign, a notation to that effect should be made on the counseling form, which is then signed and dated by an officer.

7. ***Counseling formats***

a. Marine Corps: sample form in MARCORSEPMAN, para. 6105.3

__Date__. Counseled this date concerning deficiencies ***(list deficiencies)***; specific recommendations for corrective action; assistance available; and advised that failure to take corrective action may result in administrative separation or judicial proceedings. I have been afforded the opportunity to make a statement IAW U.S. Navy Regs, Art. 1110, and if I make a written statement it will be forwarded to CMC (Code MSRB-20) for inclusion in my Official Military Personnel File. I (do) (do not) desire to make a statement. (Statement (if any) is filed on the document side of the service record.)

_____ _____

(Signature of Marine) (Signature of Commanding Officer)

b. *Navy*: MILPERSMAN, Section 1910-204

Date: ADMINISTRATIVE COUNSELING / WARNING

1. You are being retained in the naval service, however, the following deficiencies in your performance and / or conduct are identified: _____ _____.

2. The following are recommendations for corrective action: _____ _____.

3. Assistance is available through: _____ _____.

4. Any further deficiencies in your performance and / or conduct will terminate the reasonable period of time for rehabilitation that this counseling / warning entry implies and may result in disciplinary action and in processing for administrative separation. All deficiencies and / or misconduct during your current enlistment, both prior to and subsequent to the date of this action, will be considered. Subsequent violation(s) of the UCMJ or conduct resulting in civilian convictions could result in an administrative separation under Other Than Honorable Conditions.

5. This counseling / warning entry is made to afford you an opportunity to undertake the recommended corrective action. Any failure to adhere to the guidelines cited above, which is reflected in your future performance and / or conduct, will make you eligible for administrative action.

6. This counseling and warning is based upon known deficiencies or misconduct. If any misconduct unknown to the Navy is discovered after this counseling and warning is executed, this letter of counseling and warning is null and void.

(Date): I hereby acknowledge the above NAVPERS 1070/613 entry and desire to (make a statement / not make a statement.)

_____ _____

(Signature of Sailor) (Signature of Witness)* / (Date)

* Person who actually counseled the member.

c. ***Coast Guard***: Sample form in CGPERSMAN 12-B-9-d

From: Commanding Officer, (Unit)
To: (Individual concerned)

Subj: Unsatisfactory Performance
Ref: (a) Article 12-B-9 Personnel Manual COMDTINST M10006

1. This is to inform you that for the previous (as applicable) months your performance has been unsatisfactory when compared to your peers in your pay grade. You are considered to be on performance probation. You must take stock of your actions that have caused this situation to develop and take corrective action. Your performance must improve over the next 6 months or you will be considered for discharge.

2. The reasons for being placed on performance probation are: (state specific facts, incidents, unheeded corrective performance guidance and any other documentation which supports the unsatisfactory performance evaluation(s)).

4606 BASES FOR SEPARATING ENLISTED PERSONNEL

A. ***General.*** "Bases" for separating enlisted personnel are the reasons for processing members for separation. All involuntary and some voluntary separations require the use of either the notification procedure or administrative board procedure. These procedures are discussed in detail in the following section. The primary distinction between the two separation procedures is:

1. Under the notification procedure, the respondent (the service-member being processed) does not have a right to any type of hearing and cannot receive an OTH. This process is essentially a paperwork drill.

a. The member still has the right to submit a statement objecting to the separation.

b. If a member is being processed for more than one basis, the administrative board procedure will be used if applicable to any one of the bases used in the case.

c. When no entitlement to an administrative discharge board exists, a member may request review by the General Court-Martial Convening Authority.

2. Under the administrative board procedure the respondent ***always*** has the right to request that a hearing (administrative board) be held, but may waive it and receive an OTH (most likely) or whatever discharge the separation authority awards.

3. For Coast Guard, a member has an absolute right to have his/her case heard by an administrative discharge board whenever:

a. The member has been recommended for an OTH characterization;

b. regardless of the characterization recommended, the member has 8 or more years of total service and the reason for discharge is either security, unsuitability, misconduct or unsatisfactory performance; or

c. the member has 8 or more years of total service and is denied reenlistment.

d. a board is not required in the event of a prolonged absence without authority, acceptance of a conditional or unconditional written waiver of such right or when the member requests an OTH in lieu of court-martial.

B. This subsection describes the various bases, lists the characterizations (quality of service) available for the particular basis, states whether counseling is required, and lists the applicable separation procedure (notification or administrative board). Several of the specific bases are grouped in subcategories. The bases are:

1. ***Expiration of enlistment or fulfillment of service obligation.*** MILPERSMAN, Section 1910-104; MARCORSEPMAN, para. 1005; CGPERSMAN 12-B-11.

-- Honorable, general, or ELS.

2. ***Selected change in service obligation.*** MILPERSMAN, Section 1910-102; MARCORSEPMAN, para. 6202.

a. Honorable, general, or ELS.

b. General demobilization, reduction in strength, and other "early-outs."

3. ***Convenience of the government*** (MILPERSMAN Sections 1910-108 to 1910-126; MARCORSEPMAN para. 6203; and, CGPERSMAN 12-B-12).

a. Honorable, general, or ELS.

b. Notification procedure generally utilized.

c. There are two categories of convenience of the government separations:

(1) ***Voluntary.*** Requires application for separation by the member. While there may exist a right to request separation, there is no right to be separated.

(2) ***Involuntary.*** Separation processing is initiated by the commanding officer.

d. ***Voluntary convenience of the government subcategories.*** Counseling is not required in these areas.

(1) ***Hardship.*** (CGPERSMAN 12-D-3; MILPERSMAN, Section 1910-110; MARCORSEPMAN, para. 6407.) Some members will encounter hardships while on active duty that are not normally encountered by naval personnel. The member who faces these difficulties may request a separation if he or she can show the following:

(a) The hardship affects the service-member's immediate family;

(b) hardship is not temporary in nature;

(c) hardship arose or was aggravated since the member's entry into service;

(d) every reasonable effort has been made to eliminate the hardship;

(e) no other member of the family can alleviate the hardship and a discharge will materially alleviate the hardship; and

(f) no other means of alleviation are available.

Unlike the Navy, the Marine Corps provides for a three-member ***advisory*** board to be convened by the Marine commander exercising special court-martial jurisdiction over the service-member to hear the member's case. MARCORSEPMAN, para. 6407.6. The CGPERSMAN and Navy MILPERSMAN provide a format to be used in drafting the application for hardship discharge. The Coast Guard also requires the member to submit at least two affidavits substantiating the dependency or hardship claim. CGPERSMAN 12-D-3-d.

(2) ***Pregnancy or childbirth.*** This is a voluntary separation initiated upon written request by the female service-member and must be completed prior to the child's birth. The MILPERSMAN states that such requests are normally denied unless it is determined to be in the best interest of the Navy or if the member demonstrates overriding and compelling factors of personal need which warrant separation. Factors to be considered when denying such a request are: 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. Marine Corps policy states that such requests will not normally be approved unless there are extenuating circumstances. MILPERSMAN, Section 1910-112; MARCORSEPMAN, para. 6408. *See also* CNO NAVADMIN 012323Z, SUBJ: DON POLICY ON PREGNANCY, for an excellent statement of such issues as pregnant women and shipboard billets, etc.

-- For Coast Guard: Service-women who become pregnant while on active duty may be discharged for convenience of the government as per CGPERSMAN 12-B-12 or dependency/hardship as per CGPERSMAN 12-D-3. Requests for voluntary separation are handled on a case by case basis. Parenthood or pregnancy is normally not considered sufficient for discharge. See COMDTINST 1900.9 and CGPERSMAN Chapter 4-A-10 for policy on pregnant service-members. See also 12-D-5 regarding separation for care of newborn child which provides for a one time leave of absence up to 24 months.

(3) ***Conscientious objection.*** Persons who, by reason of religious training or belief, have a firm, fixed, and sincere objection to participate in war in any form or in the bearing of arms may claim conscientious objector status. This is a lengthy process and usually can be alleviated by moving the member to a non-combat position; however, conscientious objector status is different than objecting to the bearing of arms and the original request for conscientious objector status must be resolved. DOD Directive 1300.6; MILPERSMAN, Section 1900-020; MARCORSEPMAN, para. 6409 and MCO 1306.16; COMDTINST 1900.8; CGPERSMAN 12-B-12.

(4) ***Surviving family member (vice sole surviving family member).*** DOD Directive 1315.5; MILPERSMAN, Section 1900-030. The MARCORSEPMAN, para. 6410 directs that the member be processed in accordance with DOD Directive 1315.15. For Coast Guard, see CGPERSMAN 4-A-3 regarding separation of sole survivors. This policy applies to cases in which the father/mother or one or more children of a family, while on active military service has been killed, captured or has been permanently 100% physically or mentally disabled. Upon request of the member, the surviving family member will not be assigned to duty in a combat area.

e. ***Involuntary convenience of the government.*** The government informs the members of processing by the notification procedure.

(1) ***Parenthood.*** MILPERSMAN, Section 1910-124; MARCORSEPMAN, para. 6203.1, and CGPERSMAN 12-B-12a(7). Members must be available for worldwide assignment at any time. When a member's parental responsibilities interfere with the member's present or future availability for worldwide assignment, cause repeated absenteeism, or interfere with the member's effective performance of duties, separation is required unless the member can resolve the problem to the CO's satisfaction.

a. As a preventive measure to avoid the problem, all single- and dual-family military members must have a realistic alternative care plan entered into their service record books. Navy personnel must complete a NAVPERS 1740/6, Navy Dependent

Care Certificate and the Marines follow MCO 1740.13A to draft a power of attorney.

b. Honorable, General, or ELS characterization.

c. Counseling is required.

d. Notification procedure is utilized.

(2) ***Personality disorder.*** CGPERSMAN 12-B-16b(2), MILPERSMAN, Section 1910-122; MARCORSEPMAN, para. 6203.3. Separation processing is discretionary with the member's commanding officer. In order for this to be a proper basis for separation, a two-part test must be satisfied.

(a) 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.

(b) After the required counseling, there must be documented interference with the member's performance of duty. [***Note***: Counseling is generally required, but may be waived if it is clear the member may be an immediate danger to him / herself or others.]

(3) ***Other designated physical or mental conditions*** . The following are physical conditions that may not amount to a disability, but affect the member's potential for continued active duty or interfere with the member's ability to perform duties:

(a) Motion / airsickness, when verified by medical opinion.

(b) Enuresis (bed-wetting).
(c) Somnambulism (sleepwalking).
(c) Allergies (e.g., uniform material, bee stings).
(d) Excessive height.
(e) Anorexia nervosa (Navy).
(f) Bulimia nervosa (Navy)
(g) Non-resolving physical or medical problems which regularly prevent PRT participation. *See,* MILPERSMAN, Section 1910-120; MARCORSEPMAN para. 6203; and, CGPERSMAN 12-B-12.

4. ***Weight control failure.*** MARCORSEPMAN, para. 6215; MCO 6100.10; CGPERSMAN 12-B-12-a(6); and COMDTINST 1020.8.

a. Members who continually fail to meet the standard for weight and height or body fat limits, and / or fail to meet physical readiness test (PRT) standards may be separated for weight control failure. Counseling and an opportunity to resolve the failures are required.

b. In the Navy, PRT failures and out of standard Sailors are handled through the Physical Readiness Instruction.

c. In the Marine Corps, in order to separate a Marine for weight control failure, the Marine must have made a reasonable effort to conform to Marine Corps height and weight standards by adhering to the regimen prescribed by the appropriately credentialed health care provider (ACHCP).

d. In the Coast Guard, a member is weighed within 30 days of his/her birthday, when selected for urinalysis and at every physical. If a member exceeds the maximum allowable weight for his/her frame size, the member is given a probationary period of one week for every pound over. There are exceptions for those exceeding the standards solely due to muscle mass.

5. ***Physical disability.*** MILPERSMAN, Section 1910-168; MARCORSEPMAN, Chapter 8; CGPERSMAN 12-B-15; and COMDTINST M1850.2.

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 his / her rate in such a manner as to reasonably fulfill the purpose of his / her employment on active duty. For Coast Guard members, the Commandant may direct or authorize an honorable or general discharge for physical disability through final action on a physical evaluation board. Members who are unfit for service may not remain on active duty except IAW CGPERSMAN 17-B.

c. ***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.

(1) 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 and attempts should be made to encourage members to report and receive care for AIDS.

(2) 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).

(3) Adverse action

(a) Service-members may not be processed for separation nor have UCMJ action taken based solely on an HIV-positive blood test or the epidemiological assessment interview conducted by the medical treatment facility. To establish drug abuse or homosexuality for processing or UCMJ action, independent evidence must be obtained. This cannot be reflected in fitness reports or enlisted evaluations and is without effect on promotions.

(b) Exceptions—members who are HIV-positive may be ordered not to have unprotected sex and to inform future sex partners of their condition, and may be prosecuted for violating such orders.

6. ***Defective enlistment and induction***

a. ***Minority***. A 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. *See,* MILPERSMAN, Section 1910-128; MARCORSEPMAN, para. 6204.1; CGPERSMAN 12-B-14.

(1) If member is under age 17, 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. Processing is mandatory.

(2) If the member is 17, the member will be separated with an entry level separation (ELS) only upon the request of the member's parent or guardian within 90 days of the member's enlistment.

(3) If the member has attained the age of 18, separation is not warranted under this article since the member has effected a constructive enlistment.

b. ***Erroneous enlistment***. A member may be separated for erroneous enlistment if the enlistment would not have occurred had certain facts been known, there was no fraudulent conduct on the part of the member, and the defect is unchanged in material respects. The member may receive an honorable, ELS, or order of release (OOR) by reason of void enlistment. MILPERSMAN, Section 1910-130; MARCORSEPMAN, para. 6204.2; and CGPERSMAN 12-B-12a(5). Coast Guard members undergoing recruit training in an original enlistment who have less than 60 days active service that have a physical disability that was not incurred in or aggravated by military service may be processed for erroneous enlistment under 12-B-12-a(5)(c).

(a) Navy and Marine Corps - If a member is diagnosed as drug or alcohol dependent within the first 180 days of active duty service, processing for erroneous enlistment is appropriate.

(b) Coast Guard members will be processed for fraudulent enlistment as per PERSMAN 12-B-18-b(2)b, if the member deliberately concealed a current or past medical condition or problem that is discovered during recruit training and which would have precluded enlistment had the condition been known.

c. ***New entrant drug and alcohol testing.*** After reporting to boot camp, new entrants are required to provide a urine sample. They are then requested during a "moment of truth" to tell if the sample will come up positive. If they tell the truth and it comes up positive they will be separated, but will be given a Reenlistment Code (RE Code) that may allow them to reenlist with a waiver. If they do not tell the truth and they come up positive, they are separated and given an RE Code that does not allow them to reenlist. The same policy is used regarding alcohol. OPNAVINST 5350.4; MILPERSMAN 1910-134; MARCORSEPMAN, para. 6211.1. These cases may be processed as a fraudulent enlistment using the notification procedure. Note: A Coast Guard member involved in drug use either prior to enlistment (as evidenced by a positive urinalysis shortly after training) or during recruit training will be processed for discharge by reason of misconduct as per CGPERSMAN 12-B-18-(4)-(a).

d. ***Defective enlistment.*** MILPERSMAN, Section 1910-132; Article 3620283; MARCORSEPMAN, para. 6402; CGPERSMAN 12-B-22-b-(5).

(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.

e. ***Fraudulent entry into naval service.*** MILPERSMAN, Section 1910-134; MARCORSEPMAN, para. 6204.3. For Coast Guard, see Misconduct due to Fraudulent Enlistment 12-B-18-b-(2).

(1) Honorable, general, OTH or ELS, or OOR.

(2) Notification procedure utilized unless issuance of OTH is desired or misrepresentation includes pre-service homosexuality—in which case, the administrative

board procedure must be utilized. A General Court-Martial Convening Authority or higher may grant a processing waiver when: the commanding officer desires that the member be retained; and, the defect is no longer present; or, the defect is waiveable.

(3) A member may be separated for fraudulent entry for any knowingly false representation or deliberate concealment pertaining to a qualification of military service. This may become another basis for processing in addition to defective enlistment or other reasons; members must be processed for all known bases. For Coast Guard, a member may be separated for fraudulent enlistment for any knowingly false representation or deliberate concealment which, if known at the time, might have resulted in rejection. The enlistment of a minor with false representation as to age or without proper consent will not in itself be considered as a fraudulent enlistment.

(4) An OTH is possible and the administrative board procedure is required if the fraud involves concealment of a prior separation in which service was not characterized as honorable or the concealed offense(s) would warrant an OTH if they had occurred on active duty or an OTH is appropriate.

(5) For Coast Guard, IAW CGPERSMAN 12-b-18-b-(2) Commanding Officer TRACEN Cape May is the final discharge authority in the following specific cases for members assigned to recruit training:

(a) Deliberate concealment of criminal records or cases of enlistment solely to avoid prosecution.

(b) Any current or past medical conditions or problems discovered during recruit training which would have precluded enlistment had they been known.

7. ***Entry level performance and conduct.*** MILPERSMAN, Section 1910-154; MARCORSEPMAN, para. 6205; and CGPERSMAN 12-B-20.

a. ELS.

b. Notification procedure utilized.

c. Counseling required.

d. This basis for separation is only applicable to members in an entry level status (i.e., the first 180 days of continuous, active military service). A member may be separated if it is determined that he or she is unqualified for further military service by reason of unsatisfactory performance or conduct, or both, as evidenced by incapability, lack of reasonable effort, failure to adapt to the naval environment, or minor disciplinary infractions. Nothing in this provision precludes separation of a member in an entry level status under another basis for separation discussed in this chapter.

8. ***Unsatisfactory performance.*** MILPERSMAN, Section 1910-156; MARCORSEPMAN, para. 6206; and, CGPERSMAN 12-B-9.

a. Honorable or general.

b. Notification procedure utilized.

c. Counseling required.

d. A member may be separated for unsatisfactory performance if:

(1) USN: (a) one or more enlisted performance evaluations with 1.0 marks for any performance trait, and (2) violating a NAVPERS 1070/613, Administrative Remarks counseling / warning that specifically addresses these deficiencies.

(2) USMC: unsatisfactory performance is characterized by

(a) performance of assigned tasks and duties in a manner that is not contributory to unit readiness and/or mission accomplishment as documented in the service record; or,

(b) failure to maintain required proficiency in grade as demonstrated by below numerical scores or adverse fitness report markings or comments accumulated in the Enlisted Performance Evaluation System.

(c) a Marine may be separated under this basis as follows: (1) for unsanitary habits; or, (2) unsatisfactory performance of duties.

(3) USCG: a member at a unit for more that 180 days - - with marks in the 1-3 range, steady or declining performance for two or more marking periods where improvement is unlikely. The unsatisfactory performance must be thoroughly documented and it must be clearly shown that the member has been given adequate guidance and opportunity to improve. A member must first be given written notice of the specific deficiencies and a 6 month probationary period to overcome them. A sample notification is contained in CGPERSMAN 12-B-9d. A member with 8 or more years of total service is entitled to a board.

e. 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.

9. ***Homosexual conduct.*** 10 USC 654; SECNAVICNT 1910.4B; USD (P&R) Report Apr 98; OSD Memo 12 Aug 99; ASN (M&RA) Memo 21 Sep 99, 16 Dec 99, 16 Feb 2000; NAVADMIN 291/99; MILPERSMAN, Section 1910-148; MARCORSEPMAN, para. 6207; and, CGPERSMAN 12-D-4.

a. ***Policy.*** The policy of the Navy is to judge the suitability of persons to serve in the Navy on the basis of conduct and their ability to meet required standards of duty, performance, and discipline; to distinguish sexual orientation, which is personal and private, from homosexual conduct; and to make clear the procedural rights of a service member. Definitions as used in the MPM article are:

(1) Homosexual - a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(2) Bisexual - a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) Homosexual act:

(a) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(b) any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act as described above.

(4) Homosexual conduct - 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.

(5) Statement that a member is a homosexual or bisexual, or words to that effect - language or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

(6) Sexual orientation - an abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

(7) Homosexual marriage or attempted marriage - marriage or attempted marriage to a person known to be of the same biological sex.

(8) Propensity to engage in homosexual acts - more than an abstract preference or desire to engage in homosexual acts; indicate a likelihood that a person engages in or will engage in homosexual acts.

(9) Commander - a commissioned or warrant officer who, by

virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directive is recognized as a "command".

b. ***Basis for separation***: Homosexual conduct is grounds for separation from the naval service. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is a ground for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. Sexual orientation is considered a personal and private matter, and is not a bar to continued service unless manifested by homosexual conduct as defined above. Therefore, separation processing is mandatory, if the commanding officer believes that, by a preponderance of the evidence, homosexual conduct as defined above has occurred.

c. ***Separation findings***. A member ***shall*** be separated by reason of homosexual conduct if one or more of the following approved findings is made:

(1) The member has committed homosexual acts, unless there are further approved findings that:

(a) such acts are a departure from the member's usual and customary behavior;

(b) such acts, are unlikely to recur;

(c) such acts were 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.

(2) The member has made a statement that he or she is a homosexual or bisexual, or words to that effect. A statement by a member that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the member engages in, attempts to engage in, has a propensity to engage in or intends to engage in homosexual acts. The member shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual

acts. In determining whether a member has successfully rebutted the presumption that he or she engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, some or all of the following may be considered:

(a) whether the member has engaged in homosexual acts;

(b) the member's credibility;

(c) testimony from others about the member's past conduct, character, and credibility;

(d) the nature and circumstances of the member's statement; and

(e) any other evidence relevant to whether the member is likely to engage in homosexual acts.

The member may be retained if he/she successfully rebuts the presumption.

(3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved).

d. ***Characterization of service or description of separation***. Will be type warranted by service record (Honorable or General) or entry level separation. Separation may be characterized as under Other Than Honorable ***(OTH)*** conditions if there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act under any of the following circumstances:

(1) by using force, coercion, or intimidation;

(2) with a person under 16 years of age;

(3) with a subordinate in circumstances that violate customary naval superior-subordinate relationships;

(4) openly in public view;

(5) for compensation;

(6) aboard a naval vessel or aircraft; or

(7) in another location subject to naval control under aggravating circumstances that have an adverse impact on discipline, good order, or morale comparable to the impact created by such activity aboard a vessel or aircraft. (e.g. BEQ, BOQ).

e. ***Procedures***

(1) ***The administrative board procedure shall be used in all cases***. The member may waive the administrative separation board, but they must be given the option of choosing a board procedure.

(2) ***Dual processing***. Members being processed for homosexual conduct must be dual or multiple processed for all reasons for which minimum criteria are met.

(3) ***Burden of proof***. The member shall bear the burden of proving throughout the proceeding by a preponderance of the evidence that retention is warranted.

f. ***Fact-finding inquiries***. There are 3 types of possible investigations involving these cases. First, is an investigation into alleged homosexual conduct. Second, is an investigation into the veracity of a statement made to the chain of command by a member that they are homosexual. Third, is an investigation into alleged threats or harassment of a member because they are perceived or suspected of being a homosexual. The first type of investigation will be addressed below. Several recent changes have been made to provisions dealing with the second 2 types of investigations and it is absolutely essential to consult the primary references at the beginning of this section before advising a Commander on these matters. Also, it is the absolute responsibility of the Commanding Officer to ensure the safety of any member of their Command who is being harassed or threatened because they are suspected of being homosexual. Once again, the references listed above give clear guidance in how to handle cases of alleged harassment and direct the Commander to ensure immediately the safety of the victim.

(1) ***Responsibility***

(a) 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 he or she 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. Any investigation should be handled discreetly and involve the minimum number of people possible.

(b) In most cases, no investigation is necessary before the member may be processed. Usually the member makes a credible statement to their chain of command and does not object to being separated.

(2) A commander will initiate an inquiry only if he or she has credible information that there is a basis for discharge. A basis for discharge exists if:

(a) the member has engaged in a homosexual act;

(b) the member has said that he or she is a homosexual

or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts; or

(c) the member has married or attempted to marry a person of the same sex.

(3) ***Examples of credible information***:

(a) a reliable person states that he or she observed or heard a service member engaging in homosexual acts, or saying that he or she is homosexual or bisexual or is married to a member of the same sex;

(b) a reliable person states that he or she 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 he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts; or

(c) a reliable person states that he or she observed behavior that amounts to a non-verbal statement by a member that he or she 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.

(4) ***Not credible information***:

(a) the only information is the opinion of others that a member is homosexual; or

(b) information is based on rumor, suspicion, or capricious claims concerning a member's sexual orientation; or,

(c) the only information known is an association activity such as frequenting homosexual bars, possessing/reading homosexual publications, associating with known homosexuals, or marching in a homosexual rights rally in civilian clothes. (Such activity, in and of itself, does not provide evidence of homosexual conduct), or

(d) a report from a service member that they have been subjected to harassment based on suspicions or allegations that they engage in homosexual conduct.

(5) ***Procedures for fact-finding inquiries***

(a) To determine if separation processing is appropriate, an administrative fact-finding inquiry may be conducted. This does not prevent disciplinary action or trial by courts-martial when appropriate.

(b) Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken.

(c) Members shall not be asked nor required to reveal their sexual orientation. However, when credible information indicates homosexual conduct, members may be asked if they engaged in such conduct. Prior to any questioning, members suspected of homosexual conduct must be advised of the Department of Defense policy (DOD Directive 1332.14) on homosexual conduct and advised of their Article 31b, UCMJ rights, if necessary. MILPERSMAN, Section 1910-148.

(d) At any given point of the inquiry, the commander or appointed inquiry official must be able to clearly and specifically explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific grounds.

10. ***Drug Abuse Rehabilitation Failure***. MILPERSMAN, Section 1910-150. The Navy rarely uses this category as a basis for separation. It may be used for members who become addicted to prescription drugs while under a physician's care. Recreational drug users who are offered rehabilitation treatment will normally be discharged (typically under Misconduct Due to Drug Abuse) upon completion or termination of treatment. The Marine Corps has deleted this as a basis for separation. The Coast Guard does not separate or process for this basis. Members who have been identified as being drug dependent will be offered treatment prior to discharge. Immediately upon completion of this treatment, if accepted, the member will be discharged. CGPERSMAN 12-C-4.

a. Honorable unless general or ELS is warranted.

b. Notice of Notification procedure.

c. A member may be separated when they lack potential for future naval service, and:

(1) demonstrate an inability or refusal to participate in, cooperate in, or successfully complete a formal inpatient rehabilitation treatment program;

(2) have completed a formal inpatient rehabilitation program any time in their career, and subsequently had in their current enlistment a drug-related incident; or,

(3) fails to follow a directed aftercare program.

11. ***Alcohol abuse rehabilitation failure.*** MILPERSMAN, Section 1910-152; MARCORSEPMAN, para. 6209; CGPERSMAN 20-B-2-K.

a. Honorable, general, or ELS.

b. Notice of Notification Procedure.

c. Commands shall process all members considered to be treatment failures unless a written waiver is obtained. Request waiver will be submitted to COMNAVPERSCOM (PERS-832) via PERS –602.

d. Treatment failure is:

(1) Any serious incident after treatment that was precipitated by a previous incident.
(2) Willful failure to complete medically prescribed treatment or failure to complete medically prescribed treatment due to a subsequent alcohol incident.
(3) Any member who fails to participate in, or fails to successfully complete the medically prescribed and command-approved aftercare program.
(4) Any member who returns to alcohol abuse at any time during his or her career following treatment, and is determined to be a treatment failure by an appropriate LIP or MO.

g. Coast Guard members who have been involved in an alcohol incident (defined as any violation of law or an act which brings discredit upon the uniformed services or results in the member's loss of ability to perform assigned duties where alcohol is a causative or significant factor), written counseling must be provided to the member as well as referral for medical screening. Commanding Officer's shall reflect counseling on form CG-3307 for enlisted personnel, a copy of which is to be forwarded to G-MPC-EPM. Commanding Officer's may request treatment for alcohol abusers through G-KOM. Members involved in a second alcohol incident are normally processed for separation, but may be recommended for retention and rehabilitation by the Commanding Officer in exceptional cases. Members, E-2 and below, who have more than 2 years of service are normally processed for separation after one alcohol incident. Enlisted members involved in a third alcohol incident shall be processed for separation.

h. Failure of After-Care Program: When a recovering member (after successful completion of an After-Care Program) is consuming alcohol again, the member will be referred for alcohol screening. An aftercare plan will be reinstituted IAW COMDTINST M6330.1. Counseling, referral and aftercare program shall be recorded in the member's personnel record using a CG-3307. The Commanding Officer shall make recommendations to MPC-EPM regarding separation, retention and further therapy. A second episode of alcohol consumption after completion of an aftercare program will result in separation. Final retention or separation authority

rests with Commander (MPC-SEP-2) or Commander, MPC for those members with 8 or more years of service and subject to an Admin Discharge Board.

12. ***Misconduct.*** MILPERSMAN, Sections 1910-138 to 1910-146; MARCORSEPMAN, para. 6210; and, CGPERSMAN 12-B-18.

a. Honorable, general, OTH, or ELS.

b. Administrative board procedure will be utilized in all cases involving mandatory processing. See discussion of mandatory processing under Commission of a Serious Offense, Civilian Conviction, and Misconduct Due to Drug Abuse.

c. For Coast Guard personnel, all cases where a discharge under OTH conditions by reason of misconduct is sought shall be processed using administrative board procedures. In addition, administrative board procedures shall also be followed in the case of any member with 8 or more years of total active or inactive service even if an honorable or general discharge is contemplated.

d. Formal counseling required only for the subcategories of minor disciplinary infractions and pattern of misconduct.

e. ***Subcategories*** under Misconduct include: Minor Disciplinary Infractions; Pattern of Misconduct; Commission of a Serious Offense; Civilian Convictions; and, Drug Abuse. For Coast Guard, subcategories include: conviction by civil authorities of an offense for which the maximum penalty under the UCMJ is confinement in excess of one year; procurement of a fraudulent enlistment through a deliberate, material misrepresentation; involvement with drugs; obstruction of drug urinalysis testing; frequent involvement of a discreditable nature with civil or military authorities*; sexual perversion, abuse of a family member*; established pattern of shirking*; failure to pay just debts*; failure to adequately support dependents*; failure to comply with court orders concerning support of dependents*; sexual harassment and absenteeism of the following durations:

-1- One year or more.

-2- 3 or more UAs within 6 months, totaling 30 days or more; or

-3- 6 or more UAs within 6 months, totaling 60 days or more.

* Administrative discharge action in these cases will not be initiated until the member has been afforded a probationary period to overcome their deficiencies. CGPERSMAN 12-B-18-c.

(1) Minor disciplinary infractions. MILPERSMAN, Section 1910-138; and, MARCORSEPMAN paragraph 6210.2.

(a) Navy. Defined as a series of at least three, but not more than eight minor violations of the UCMJ, provided none of the reasons could have resulted in a punitive discharge. The offenses must be documented in the service record, be in the current enlistment, and the member has violated a counseling/warning. The MILPERSMAN is silent on what happens if a member commits more than 8 minor violations and does not meet any other basis for separation.

(a) ***Coast Guard.*** Not applicable.

(c) ***Marine Corps.*** The Marine Corps requires a documented (in the SRB) series of at least three minor disciplinary infractions that have been or could have been appropriately disciplined under Article 15. The member must have been counseled per paragraph 6105 of the MARCORSEPMAN.

(d) An under Other Than Honorable (OTH) conditions discharge is not authorized in the Navy, but is authorized in the Marine Corps. The notification procedure is always utilized in the Navy and in the Marine Corps when an OTH is not warranted.

(2) ***Pattern of Misconduct.*** MILPERSMAN, Section 1910-140; MARCORSEPMAN, para. 6210.3. A pattern of misconduct includes the following:

(a) ***Navy.*** Members may be separated when during the current enlistment they have: (1) two or more nonjudicial punishments, courts-martial, or civil convictions (or combination thereof); (2) three or more unauthorized absences each of which is more than three days but less than 30 days; (3) a set pattern of failure to pay just debts; (4) a set pattern of failure to pay adequate support to dependents; and, (5) violated a NAVPERS 1070/613 counseling/warning (which can come from any command).

(b) ***Marine Corps.*** A Marine may be separated where there is an established pattern of more serious infractions than in paragraph 6210.2 which include: (1) two or more discreditable involvements with civil/military authorities; or, (2) two or more instances of conduct prejudicial to good order and discipline within one enlistment. Also, an established pattern of dishonorable failure to pay just debts and/or contribute adequate supports to dependents.

(3) ***Commission of a Serious Offense*** --

(a) A member of the Navy or Marine Corps may be separated based upon commission of a serious military or civilian offense under the following circumstances:

-1- A punitive discharge would be authorized for the same, or a closely related, offense under the UCMJ; and,

-2- the specific circumstances of the offense

warrant separation.

(b) Processing is ***mandatory*** (MILPERSMAN, Section 1910-142) for:

-1- Violent misconduct which resulted in, or had the potential to result in, death or serious bodily injury, (e.g., homicide, arson, armed robbery, assault with a deadly weapon, etc.);

-2- deviant sexual behavior (lewd and lascivious acts; sodomy – forcible heterosexual or child molestation; indecent assault, acts, and/or exposure; or incestuous relationships);

-3- the first substantiated incident of aggravated sexual harassment involving any of the following circumstances: (a) threats or attempts to influence another's career or job in exchange for sexual favors; (b) rewards in exchange for sexual favors; or, (c) unwanted physical contact of a sexual nature which, if charged as a violation of the UCMJ, could result in a punitive discharge. The Marine Corps also requires mandatory processing in these circumstances (MARCORSEPMAN, para. 6210.8).

(c) An incident is considered "substantiated" when there has been an NJP or court-martial conviction, or the CO is convinced by a preponderance of the evidence that sexual harassment occurred. (SECNAVINST 5300.26C; MARCORSEPMAN, 6210.8; and, COMDTINST 5350.30A).

(d) All court-martial convictions (SCM, SPCM, GCM), and civilian convictions are binding upon the administrative board as to the issue of whether misconduct occurred. MILPERSMAN, Section 1910-514; CGPERSMAN 12-B-31-f.

(e) A member may not be separated on the basis of conduct that has been the subject of judicial proceedings resulting in an acquittal or its equivalent, except when such finding is based on a judicial determination not going to the merits of the factual issue of guilt, or when the proceeding was conducted in a state or foreign court and the separation is in the best interest of the service. MILPERSMAN, Section 1910-220; MARCORSEPMAN, para. 6106.

(f) Neither a military or civilian conviction is required to process for commission of a serious offense.

(4) ***Civilian conviction***

(a) A member may be separated upon conviction by civilian authorities, foreign or domestic, or action taken which is tantamount to a finding of guilty (including similar adjudications in juvenile proceedings) when:

-1- the offense would warrant a punitive discharge for the same, or a closely related, offense under the *Manual for Courts-Martial*, 1995;

-2- the specific circumstances of the offense warrant separation; or,

-3- the civilian sentence includes confinement for 6 months or more without regard to suspension, probation, or early release.

(b) ***Coast Guard***: any disposition tantamount to a finding of guilty for an offense where the maximum UCMJ penalty would be greater than one year's confinement or where the offense involves moral turpitude, CGPERSMAN 12-b-18-b-1.

(c) In the Navy, processing is mandatory for: (1) violent misconduct which results in, or had the potential to result in, death or serious bodily injury; or, (2) deviant sexual behavior.

(d) 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, or until the time for appeal has passed, unless the member has requested separation or the member's separation has been requested by CMC and such requests have been approved by the Secretary of the Navy who may direct that the member be separated prior to final action on the appeal. MARCORSEPMAN, para. 6210.7.

(d) For separation of reservists for a civilian conviction, *see* MILPERSMAN, Section 1910-306 and MARCORSEPMAN, now para. 1004.4d.

(5) ***Preservice - prior enlistment misconduct.*** Members may be processed for separation by reason of misconduct for offenses which occurred pre-service or in a prior enlistment, provided the misconduct was unknown to the Navy at the time of enlistment or reenlistment and processing for fraudulent enlistment / reenlistment is inappropriate. Coast Guard members will be processed for misconduct due to procurement of a fraudulent enlistment. MILPERSMAN, Section 1910-214; CGPERSMAN 12-B-18-b-(2).

(a) Notification procedure.

(b) Characterization: Honorable, General.

13. ***Misconduct due to drug abuse.*** MILPERSMAN, Section 1910-146; MARCORSEPMAN, para. 6210.5; CGPERSMAN 12-B-18-b-(4) and 20-C-4.

a. Processing is mandatory for one or more drug-related offenses to include: illegal or wrongful use or possession of drugs or drug paraphernalia; or, the sale, transfer,

or possession with the intent to sell or transfer controlled substances. OPNAVINST 5350.4; MCO P5300.12; CGPERSMAN 12-B-18-b-(4).

d. 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. This is for the purpose of determining VA treatment.

e. ***Characterization of discharge.*** Under most circumstances involving possession, use, and / or trafficking, the member will receive an OTH discharge. For Coast Guard, any member involved in a drug incident (involving possession, use and/or trafficking) will be processed for separation with no higher than a general discharge. CGPERSMAN 12-B-18-b-(4). Only those cases in which an OTH discharge is sought or in which the member has served a total of 8 or more years will require an administrative discharge board. CGPERSMAN 20-C-4.

(1) 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 result could be used in disciplinary proceedings, it can be used to characterize an administrative discharge as less than honorable. Some reasons for ordering urinalysis tests which yield results that can be used in disciplinary proceedings, and therefore can be utilized to characterize a discharge as OTH, include:

(a) Search or seizure (member's consent or probable cause);

(b) inspections [random samples, unit sweeps, service-directed samples, rehabilitation facility staff (military only)]; and ,

(c) medical tests for general diagnostic purposes.

(2) 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:

(a) Command-directed tests;

(a) competence-for-duty;

(c) aftercare testing;

(d) mishap / safety investigation tests; and

(e) evaluation.

(f) Example:

SN Jones has an NJP for wrongful use of marijuana (the results of a random urinalysis ordered by higher authority). After the NJP, his CO ordered him to submit to a urinalysis screening to determine fitness-for-duty purposes. SN Brown is SN Jones' roommate; he is a 4.0 sailor with no prior indication of drug use. The CO ordered a fitness-for-duty urinalysis screening for SN Brown also. The results of both tests were positive for THC (marijuana). The CO convened an administrative discharge board for each sailor; the grounds for processing were misconduct due to drug abuse. What evidence can each board consider?

SN Jones: In determining whether to retain or separate SN Jones, the board may consider the NJP and the positive urinalysis result of the fitness-for-duty test. When determining the characterization of discharge, however, the board may only consider the drug use leading to NJP. Since the second urinalysis was ordered for the purpose of determining fitness for duty only, it cannot be used by the board in arriving at the proper characterization of Jones' service only for the determination of separation or retention. He still could receive an OTH because of the NJP.

SN Brown: It is mandatory to process SN Brown, however, the fitness-for-duty urinalysis result could not be used for disciplinary purposes, so it can only be used by the board in determining whether to retain or separate SN Brown. It cannot be used to characterize a discharge as OTH; therefore, if the board recommends separation, it would be characterized as type warranted by service record (i.e., honorable in Brown's

Error! Bookmark not defined.case). It is important to note that, since Brown could not have received an OTH discharge, the CO could have elected to process under the notification procedure instead of the administrative board procedure and could act as the separation authority if SN Brown did not object to separation.

NOTE: For Coast Guard purposes, both SN Jones and SN Brown would be processed for separation with no higher than a general discharge. In addition, neither would be eligible for an administrative discharge board unless each had 8 or more years of total service or an OTH discharge is sought for SN Jones. SN Brown could not have received an OTH discharge since his positive urinalysis was the result of a fitness (competence) for duty test.

(g) ***Portable urinalysis kits***

-1- These kits are designed for initial screening of certain urine samples. Samples screened positive by the portable kits should be forwarded for confirmation to the designated drug screening lab. Local requirements should be followed in this regard. Portable kit results may also be confirmed by the member's admission or confession.

-2- Use of unconfirmed portable kit results are very limited. Unconfirmed results may not be used in any disciplinary proceeding (including NJP),

administrative separation proceeding, or other adverse administration action (such as change of rate due to loss of security clearance). Pending confirmation, portable kit results can be used by the CO to temporarily suspend the member from sensitive duties. He may also order the member to initiate counseling, evaluation, and / or rehabilitation. In some cases, the portable kit results may be used for separation but not adverse characterization.

(3) If the urinalysis result is not usable to characterize the discharge as OTH, the commanding officer may elect to use the notification procedure vice the administrative board procedure.

For Coast Guard personnel, all urine specimens shall be collected and processed IAW COMDTINST 5355.1 with the exception of those collected for a valid medical purpose or as part of after-mishap testing in which urine specimens, along with blood or breath specimens will be collected from all personnel involved in a mishap IAW COMDTINST M5100.47. When practical, the provisions of COMDTINST 5355.1 shall be followed during after-mishap testing. CGPERSMAN 20-C-2-b.

14. ***Separation in lieu of trial by court-martial.*** MILPERSMAN, Section 1910-106; MARCORSEPMAN, para. 6419; CGPERSMAN 12-B-21-d. The Navy, Marine Corps and Coast Guard permit a member to submit a written request to be discharged to avoid trial by general or special court-martial, provided that a punitive discharge is authorized for the offense(s) preferred. The escalator clause at R.C.M. 1003(d), MCM, 1995, may be used to determine if a punitive discharge is authorized, provided the charges have been referred to a court-martial authorized to adjudge a punitive discharge. The written request ***shall include***:

a. A ***statement*** by the member that the elements of the offense(s) charged are understood;

b. a ***statement*** that the member understands that characterization of service as under other than honorable conditions is authorized, the adverse nature of such a characterization of service, and the possible consequences thereof;

-- Characterization of service will ordinarily be OTH, but a higher characterization may be warranted in some circumstances.

c. an ***acknowledgement*** of guilt of one or more offense(s) charged (or of any lesser included offense(s)) for which a punitive discharge is authorized;

d. 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;

e. for Marine Corps members, as a condition precedent to approval of the request, the member (if serving in paygrade E-4 or above) must also request administrative reduction to paygrade E-3 (MARCORSEPMAN, para. 6419).

g. The format in the MILPERSMAN and CGPERSMAN 12-B-21-d must be used.

h. The general court-martial convening authority may approve or disapprove such requests and direct reduction to paygrade E-3 where applicable (Marine Corps). The GCMCA is the only Convening Authority who may ***disapprove*** an OTH in lieu of court-martial request. In the Navy, a SPCMCA may approve an OTH discharge for enlisted members if the request is based solely on an absence without leave of more than 30 days. BUPERS is the SA if the request is based solely on homosexual conduct referred to a court-martial.

i. For Coast Guard, all requests for discharge under OTH conditions shall be forwarded through the GCMCA for personal review and comment. Commandant-MPC-EPM is the separation authority. CGPERSMAN 12-B-21-e.

15. ***Security***. MARCORSEPMAN, para. 6212 and CGPERSMAN 12-B-17.

a. Honorable, general, OTH, or ELS.

b. The notification procedure is utilized, except when an OTH discharge is warranted—in which case, the administrative board procedure is utilized.

c. A member may be separated by reason of security when retention is clearly inconsistent with interests of national security.

d. For Coast Guard members - an OTH discharge is normally awarded in cases involving security.

16. ***Unsatisfactory participation in the Ready Reserve***. MILPERSMAN, Section 1910-158; BUPERS 1001.39A; MARCORSEPMAN, para. 6213.

a. Coast Guard - not applicable.

b. Honorable, general, or OTH.

c. The notification procedure is utilized, except when an OTH discharge is warranted -- in which case, the administrative board procedure is utilized.

d. A member may be separated by reason of unsatisfactory performance under criteria established in BUPERSINST 1001.39A, BUPERSINST 5400.42, or MCO P1001R.1, as applicable. In the Navy, unsatisfactory participation includes the member's failure to maintain 90% drill attendance; satisfactorily complete required annual training; comply with involuntary recall to active duty; report for physical examination; or, failure to submit additional information in connection therewith as directed.

17. ***Separation in the Best Interest of the Service ("BIOTS").*** MILPERSMAN, section 1910-164; MARCORSEPMAN, para. 6214.

a. Coast Guard - not applicable.

b. Honorable, general, or ELS.

c. The notification procedure is utilized, and the member has ***no*** right to an administrative board regardless of time on active duty.

d. The Secretary of the Navy is the only authority to direct the separation of any member in those cases where ***none*** of the previous reasons for separation apply, or where retention is recommended following separation processing under any other bases for separation discussed above, and separation of the member is considered in the best interest of the service by the Secretary. It has been used in cases of cross-dressers and in those cases where members have excessive tattoos in visible areas depicting hate groups.

4607 MANDATORY PROCESSING. The decision whether or not to process an enlisted member for administrative separation is normally a matter within the discretion of the commanding officer. The following bases, however, ***mandate*** separation processing:

A. Homosexual conduct;

B. Misconduct - commission of a serious offense or a civilian conviction when:

1. Misconduct results in, or has the potential to result in, death or serious bodily injury;

2. Misconduct involves sexual perversion;

3. Misconduct involves aggravated sexual harassment; or,

4. Drug abuse.

C. Defective enlistment - minority or fraudulent; and

Mandatory processing requires only that the case be forwarded to the separation authority for review and final action. In exceptional circumstances, the separation authority may still retain the service-member. Remember: ***Mandatory processing ≠ mandatory separation. Do not confuse this point.***

4608 **THIS CHART SHOWS THE ELIGIBILITY FOR BENEFITS BASED ON THE TYPE OF DISCHARGE A MEMBER IS AWARDED. IT DOES NOT INDICATE ANY OTHER CRITERIA THAT MAY ALSO BE REQUIRED FOR AN INDIVIDUAL TO BE ELIGIBLE FOR THE BENEFITS INDICATED.**

DD -- **Dishonorable Discharge**
BCD GCM -- **Bad-Conduct Discharge awarded at a General Court-Martial**
BCD SPCM -- **Bad-Conduct Discharge awarded at a Special Court-Martial**
OTH -- **Other than Honorable**
GEN -- **General (under honorable conditions)**
HON -- **Honorable Discharge**
E -- **Eligible**
NE -- **Not Eligible**
A -- **Eligible only if the administering agency determines that, for its purposes, the discharge was not under dishonorable conditions.**

		DD	BCD GCM	BCD SPCM	OTH	GEN	HON
VA Benefits							
Wartime disability compensation		NE	NE	A	A	E	E
Wartime death compensation	NE	NE	A	A	E	E	
Peacetime disability compensation	NE	NE	A	A	E	E	
Peacetime death compensation		NE	NE	A	A	E	E
Dependency and indemnity compensation to survivors	NE	NE	A	A	E	E	
Education assistance	NE	NE	NE	NE	NE	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

NAVY AND MARINE CORPS
ENLISTED ADMINISTRATIVE SEPARATIONS

REASON FOR SEPARATION	CHARACTERIZATION OF SERVICE	MILPERSMAN/ MARCORSEPMAN	ADMIN BOARD (A)/ NOTIFICATION (N)
1. EXPIRATION OF SERVICE OBLIGATION	HON/GEN/ELS	1910-102 / 1910-104 6202 / 6403 / 6404 CGPERSMAN 12-B-11	
2. CONVENIENCE OF GOVERNMENT	HON/GEN/ELS	1910-108 to 1910-126 CGPERSMAN 12-B-12 MARCORSEPMAN 6203	(N);(A)
Hardship		1910-110 / 6407 / CG-12-D-3	
Parenthood		1910-124 / 6203.1 / CG-12-D-3	
Pregnancy or Childbirth		1910-112 / 6408 / None	
Personality Disorder		1910-122 / 6203.3 / CG-12-B-16	
Further Education		1910-108 / 6405 / CG-12-B-8	
Surviving Family Member		1900-030 / 6410 / CG-4-A-3	
Physical Disability		1910-120 / 6203.2 / CG-12-B-15	
Conscientious Objection		1900-020 / 6409 / CG-12-B-12 [MCO 1306.16 DOD Dir 1300.6] / COMDTINST 1900.8	
Alien		1910-127 / None	
3. DEFECTIVE ENLISTMENTS			
Minority		1910-128 / 6204.1 / CG-12-B-14	
Under 17	OOR		(N)
Age 17 (N)	ELS		
Defective Enlistment	HON/ELS/OOR	1910-132 / 6204 / None	(N)
Erroneous Enlistment	HON/ELS/OOR	1910-130 / 6204.2 / CG-12-B-12	(N);(A) if 6 yrs/8 yrs (CG)
Fraudulent Enlistment*	HON/GEN/ELS OTH/OOR OTH;	1910-134 / 6204.3 / CG-12-B-18	(N);(A) if 6/8 yrs or
New Entrant Drug / Alcohol Testing	OOR	OPNAVINST 5350.4 / 6211 / CG-12-B-18	(N)

REASON FOR SEPARATION	CHARACTERIZATION OF SERVICE	MILPERSMAN/ MARCORSEPMAN	ADMIN BOARD (A)/ NOTIFICATION (N)
4. WEIGHT CONTROL FAILURE	HON/GEN	1910-170 / 6215 / CG-12-B-12-b-(6)	
5. ENTRY LEVEL PERFORMANCE AND CONDUCT	ELS	1910-154 / 6205 / CG-12-B-20 if 6 yrs;	(N);(A) 8 yrs for CG
6. UNSATISFACTORY PERFORMANCE	HON/GEN	1910-156 / 6206 / CG-12-B-9	(N);(A) if 6 yrs; 8 yrs for CG
7. HOMOSEXUAL CONDUCT or [Mandatory Processing]	HON/GEN/OTH ELS	1910-148 / 6207 / CG-12-D-4	(A) (N) if 180 days less for CG
8. SECURITY	HON/GEN/OTH ELS	6212 / CG-12-B-17	(N);(A) if 6 years or OTH; 8 yrs for CG or OTH
9. DRUG / ALCOHOL ABUSE REHAB (CG) FAILURE	HON/GEN/ELS	1910-150 & 1910-152 /6209 CG-20-B-2 for alcohol only	(N);(A) if 6 yrs; 8 yrs
10. MISCONDUCT	HON/GEN/ELS OTH		
Minor Disciplinary Infractions		1910-138 / 6210.2 / None	(N);(A) if 6 yrs or OTH
Pattern of Misconduct		1910-140 / 6210.3 / None	(N);(A) if 6 yrs; 8 yrs (CG)
Frequent Involvement of a Discreditable Nature		CG-12-B-18-b-(5)	or OTH
Commission of Serious Offense*		1910-142 / 6210.6 / None	(N); (A) if 6 yrs or OTH
Civilian Conviction*		1910-144 / 6210.7 / CG 12-B-18-b-(1)	(A); (N) if less 6/8 yrs
Misconduct due to Drug Abuse*		1910-146 / 6210.5 / CG-12-B-18-b-(4)	(N);(A) if 6 yrs/8 yrs or OTH;
Supremacist / Extremist		1910-160 / None	

REASON FOR SEPARATION	CHARACTERIZATION OF SERVICE	MILPERSMAN/ MARCORSEPMAN	ADMIN BOARD (A)/ NOTIFICATION (N)
11. SEPARATION IN LIEU OF COURT-MARTIAL	GEN/ELS/OTH	1910-106 / 6419 / CG-12-B-21	(N);(A) if 6 yrs/8 yrs or OTH
12. SEPARATION IN BEST INTEREST OF SERVICE	HON/GEN/ELS	1910-164 / 6214 / None	(N)
13. UNSATISFACTORY PERFORMANCE IN READY RESERVE	HON/GEN/ELS OTH	1910-158 / 6213 / None	(N);(A) if 6 yrs or OTH
14. DISABILITY	HON/GEN/ELS	1910-168 / 8401-8512 SECNAVINST 1850.4C / CGPERSMAN 12-B-15	(N)
HIV INFECTION (AIDS): *See* SECNAVINST 5300.30C			

* MANDATORY PROCESSING IN CERTAIN CASES

NAVY AND MARINES
USE OF DRUG URINALYSIS RESULTS
(That have been confirmed by a DOD lab)

	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, "A" school	YES	YES	YES
- Accession (entrance test)	NO	YES	NO

CHAPTER XLVII

ENLISTED ADMINISTRATIVE SEPARATION PROCESSING AND REVIEW

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CHAPTER XLVII

ENLISTED ADMINISTRATIVE SEPARATION PROCESSING AND REVIEW

4701 NOTIFICATION AND ADMINISTRATIVE BOARD PROCEDURES. The primary references for administrative separation processing are the MILPERSMAN (for the Navy), the MARCORSEPMAN (for the Marine Corps), and the CGPERSMAN (for the Coast Guard).

A. ***General.*** All involuntary enlisted separations require the use of either the notification procedure or administrative board procedure. If a member is processed for separation for more than one reason (the processing of a member on more than one basis is called dual processing), the administrative board procedure will be utilized if applicable to any one of the reasons for separation used in the case. The primary distinctions between the two separation procedures are as follows:

1. The notification procedure is used unless (a) the member has over 6 years of service; (b) the member is being processed for homosexual conduct; or (c) an other than honorable (OTH) discharge is possible.

a. ***Coast Guard***: The notification procedure is used unless (a) the member has over 8 years of service; (b) the member is being processed for homosexual conduct and has over 180 days of service and (c) an OTH discharge is desired regardless of the number of years the member has in the service.

b. ***Navy***: Per MILPERSMAN, Section 1910-704, if an offense or the circumstances surrounding it are such that an OTH is not warranted, the special court-martial convening authority is authorized to use notification procedures. This authority is limited to separation processing based on certain types of misconduct, security, or unsatisfactory participation in the Ready Reserves.

2. Under the notification procedure, the respondent has the right to request an administrative board ***only*** if the member has six or more years of total active and / or Reserve naval

service.

3. Under the administrative board procedure, the respondent ***always*** has the right to request an administrative board.

B. ***Notification procedure***

1. ***Notice.*** MILPERSMAN, Section 1910-402 and MARCORSEPMAN, para. 6303.3a require the commanding officer to notify the member being processed (the respondent), in writing, of the following:

a. Each of the specific reasons for separation that form the basis of the proposed separation including, for each of the specified reasons, the circumstances upon which the action is based 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 will be summarized in unclassified form.);

e. the respondent's right to submit statements;

f. the respondent's right to consult with counsel;

g. a statement of the right to request an administrative board—if the respondent has six or more years of total active and Reserve naval service—and to be represented by qualified counsel if the member elects an administrative board;

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 a statement that failure to respond shall constitute a waiver of these rights;

i. if eligible, a statement that the proposed separation could result in a reduction in pay-grade prior to transfer to the Fleet Reserve / retired list; and

j. in the Navy, a statement that the respondent's proposed separation

will continue to be processed in the event that, after receiving notice of separation, the respondent commences a period of unauthorized absence.

k. ***New Change***. Per MILPERSMAN, Section 1910-402 members may request general court-martial convening authority (GCMCA) review when there is no entitlement to an administrative discharge board. New policy:

> In order to give members who are not entitled to an administrative discharge board (i.e., members processed under the notification procedure who have under six years total active and / or reserve military service) the opportunity to have their case reviewed, the Notice of Notification Procedure was amended as follows:
>
> "To general court-martial convening authority review if you have six (6) or less years total active and / or reserve military service."
>
> If the member elects the right to GCMCA review, the processing activity will forward the member's request and all supporting documents to the GCMCA for review. When the review is complete, the GCMCA will return the case for action as directed.

The Notice of Notification Procedure format can be found MILPERSMAN, Section 1910-402 (Navy) and in MARCORSEPMAN, fig. 6-2 (for the Marine Corps). If the respondent is in civil confinement, absent without authority, in a Reserve component not on active duty, or transferred to the IRR, the relevant additional notification procedures in paragraph B.4 below apply.

l. For Coast Guard members, CGPERSMAN requires the Commanding Officer to notify the member being processed, in writing, of the following:

(1) The specific reason(s) and factual basis for the recommended discharge;

(2) The right to submit a statement; and

(3) If recommended for a general discharge, the right to consult with a lawyer and that prejudice may be encountered in civilian life in circumstances where the type of discharge award has a bearing. The member must acknowledge the above in writing and state whether he/she wishes to submit a statement in rebuttal or otherwise object to the discharge. The notice and acknowledgement are then sent as enclosures to a letter that requests discharge authority. All other supporting documentation must also be included e.g., required counseling entries, performance evaluations, required probationary period notices, a summary of military and civilian offenses and any other pertinent documents.

2. ***Counsel.*** MILPERSMAN, Section 1910-406; MARCORSEPMAN, para. 6303.3b.

a. A respondent has the right to consult with qualified counsel—Art. 27(b) certified counsel not having 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, away from its overseas homeport, or to a shore activity remote from judge advocate resources;

(2) no qualified counsel is assigned and present at the vessel, unit, or activity;

(3) the commanding officer does not anticipate having access to qualified counsel from another vessel, unit, or activity for at least the next five days; and

(4) the commanding officer determines that the needs of the naval service require processing before qualified counsel will be available.

b. A Coast Guard member's right to consult with military counsel only applies in those instances when a general discharge is indicated by PERSMAN 12-B-2-f. A member will be appointed counsel in all cases in which an OTH discharge is desired or the member has 8 or more years of total service. Civilian counsel of choice may be used by the individual at no expense to the government.

c. Non-lawyer counsel shall be appointed, in writing, whenever qualified counsel is not available under paragraph B.2.a above. Any appointed non-lawyer counsel shall be a commissioned officer with no prior involvement in the circumstances forming the basis of the proposed separation or in the separation process itself. The appointing letter shall state that qualified counsel is unavailable for the applicable reasons in paragraph B.2.a above and that the needs of the naval service warrant processing before qualified counsel will be available, as well as encouraging non-lawyer counsel to seek advice by telephone or other means from any judge advocate on any legal issue relevant to the case whenever practicable. A copy of the appointing letter will be attached to each copy of the written notice of separation processing.

d. The respondent may also consult with civilian counsel at the respondent's own expense. Retention of civilian counsel, however, does not eliminate the command's requirement to furnish counsel as outlined above. Moreover, consultation with civilian counsel shall not delay orderly processing in accordance with this instruction.

3. ***Response.*** MILPERSMAN, Section 1910-408; MARCORSEPMAN, para. 6303.3c. The respondent shall be provided a reasonable period of time—not less than two working

days—to respond to the notice. 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 in paragraph B.1 above shall be recorded on the Notice of Notification Procedure (Navy) or on the Acknowledgement of Rights form (Marine Corps) provided by the command. This statement is signed by the respondent and witnessed by respondent's counsel, if available locally, subject to the following limitations:

a. If the respondent fails to respond to the notification of separation in a timely manner, this failure constitutes a waiver of rights and an appropriate notation will be made on the retained copy of Notification or Acknowledgement. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate form, the election of rights will be noted and an appropriate notation as to the failure to sign will be made.

b. If notice by mail is authorized (*see* B.4 below), and the respondent fails to acknowledge receipt or submit a timely reply, that failure constitutes a waiver of rights and a notation shall be recorded on a retained copy of the Statement of Awareness.

c. The respondent's commanding officer shall forward a copy of the Notification and/or the Acknowledgement, along with all relevant supporting documents, to the separation authority. The forms to be utilized may be found in MILPERSMAN, Section 1910-402 or MARCORSEPMAN, fig. 6-3.

d. Additionally, the member may respond by submitting a statement in rebuttal to the proposed discharge action or may decline to make a statement. For Coast Guard, a member must be "afforded an opportunity" to make a statement in writing. If the member does not desire to make a statement, such fact shall be set forth in writing over the member's signature on the letter of notification. If the member refuses to sign a command's statement, the member's commanding officer will so state in writing.

4. ***Additional notification requirements***

a. ***Member confined by civil authorities.*** MILPERSMAN, Section 1910-402; MARCORSEPMAN, para. 6303.4a. If separation proceedings have been initiated against a respondent confined by civil authorities, the case may be processed in the absence of the respondent. Even if a board is required, there is no requirement that the respondent be present at the board hearing. Rights of the respondent before the board can be exercised on his behalf by counsel. The following additional requirements apply:

(1) Notice shall be in the same fashion as set forth in sections 1001B or 1001C of this chapter, as appropriate. It shall be delivered personally to the respondent or sent by mail or certified mail, return receipt requested (or by an equivalent form of notice if such service is not available for delivery by U.S. mail at an address outside the United States). If the member refuses to acknowledge receipt of notice, the individual mailing the notification shall prepare a sworn affidavit of service by mail which will be inserted in the member's service record—together with PS Form 3800.

(2) If delivered personally, receipt shall be acknowledged in writing by the respondent. If the respondent refuses to acknowledge receipt, an appropriate notation will be made on the Notification.

(3) The notice shall state that no action will be taken until a specific date (not less then 30 days from the date of delivery) in order to give the respondent opportunity to exercise the rights set forth in the notice. Failure to respond shall be treated as a waiver of rights, and appropriate action should then be taken.

(4) The name and address of the military counsel appointed for consultation shall be specified in the notice.

(5) A Coast Guard member unable to appear in person before an administrative discharge board by reason of confinement by civil authorities will be advised by registered mail of the proposed discharge action, the type of discharge certificate that may be issued, and the fact that action has been suspended to give the member the opportunity to exercise the following rights:

(a) to request appointment of a military counsel as a representative to present the case before a board in the member's absence;

(b) to submit statements in own behalf; and

(c) to waive the foregoing rights, either in writing or by declining to reply to the letter of notification within 15 days from receipt of the registered letter. PERSMAN 12-B-32-b-(5).

b. ***Certain reservists***. MILPERSMAN, Section 1910-402; BUPERSINST 1001.39; and MARCORSEPMAN, para. 6303.4b.

(1) If separation proceedings have been initiated against a reservist not on active duty, the case may be processed in the absence of the member in the following circumstances:

(a) At the request of the member;

(b) if the member does not respond to the notice of proceedings on or before the suspense date provided therein; or

(c) if the member fails to appear at a hearing without good cause.

The notice shall contain the matter set forth in sections

1001B or 1001C of this chapter.

(2) If the action involves a transfer to the IRR, the member will be notified that the characterization of service upon transfer to the IRR also will constitute the characterization of service upon discharge at the completion of the military service obligation unless the following conditions are met:

(a) The member takes affirmative action to affiliate with a drilling unit of the Selected Reserve; and

(b) the member satisfactorily participates as a drilling member of the Selected Reserve for a period of time which, when added to any prior satisfactory service during this period of obligated service, equals the period of obligated service.

(3) The following requirements apply to the notice given to reservists not on active duty:

(a) Reasonable effort should be made to furnish copies of the notice to the member through personal contact by a representative of the command. In such a case, a written acknowledgement of the notice shall be obtained.

(b) If the member cannot be contacted or refuses to acknowledge receipt of the notice, the notice shall be sent by registered or certified mail—return receipt requested (or by equivalent form of notice if such a service by U.S. mail is not available for delivery at an address outside the United States)—to the most recent address furnished by the member for receipt or forwarding of official mail. The individual who mails the notification shall prepare a sworn affidavit of service by mail which will be inserted in the member's service record—together with PS Form 3800.

C. ***Administrative board procedure***

1. ***General.*** The administrative board procedures must be utilized:

a. If the proposed reason for separation is homosexual conduct; or

b. if the proposed characterization of service is under OTH conditions (except when the basis of separation is separation in lieu of trial by court-martial).

Note: A member with six or more years of total active and Reserve military service being processed under the notification procedure (except when the basis for separation is in the best interests of the service), will have the right to request an administrative board.

2. ***Notice.*** MILPERSMAN, Section 1910-404 and MARCORSEPMAN 6304 require the commanding officer to notify the respondent being processed under the administrative

board procedure of the following:

a. All bases of the proposed separation, including the circumstances upon which the action is based and the reference supporting the applicable reason for separation (it is mandatory that members be dual-processed for all applicable reasons);

b. whether the proposed separation could result in discharge, release from active duty to a Reserve component, transfer from the Selected Reserve to the IRR, transfer to the Fleet Reserve / retired list (if requested), release from the custody or control of the Department of the Navy, or other form of separation;

c. the least favorable characterization of service or description of separation authorized for the proposed separation;

d. the right to consult with counsel in accordance with paragraph 4 below;

e. the right to obtain copies of documents that will be forwarded to the separation authority supporting the basis of the proposed separation (Classified documents will be summarized in unclassified form.);

f. the right to an administrative board;

g. the right to present written statements to the administrative board or to the separation authority in lieu of the administrative board;

h. the right to representation before the administrative board by counsel as set forth in paragraph 4 below;

i. the right to representation at the administrative board by civilian counsel at the respondent's own expense;

j. the right to waive the rights in subparagraphs d through i above;

k. that failure to respond after being afforded a reasonable opportunity to consult with counsel constitutes a waiver of the rights in subparagraphs d through i above;

l. that failure to appear without good cause at a hearing constitutes waiver of the right to be present at the hearing;

m. for eligible members, a statement that the proposed separation could result in transfer to the Fleet Reserve / retired list, if requested; and

n. in the Navy, a statement that the respondent's proposed separation

may continue to be processed in the event that, after receiving notice, the respondent commences a period of unauthorized absence. Such absence may be considered a waiver of his / her right to be at the administrative board.

3. ***Additional notice requirements.*** MILPERSMAN, Section 1910-404; MARCORSEPMAN, para. 6304.2.

a. If the respondent is in civil confinement or in a Reserve component not on active duty, the relevant additional notification requirements set forth in section B.4 above apply.

b. If the respondent is Fleet Reserve / retired list eligible and is being processed for misconduct, security, or homosexual conduct, the respondent must be notified of the following:

(1) The right to request transfer to the Fleet Reserve / retired list within 30 days;

(2) the board may recommend that the respondent be reduced to the next inferior grade to that in which the respondent is currently serving before being transferred to the Fleet Reserve / retired list; and

(3) if the Chief of Naval Personnel approves the recommendation and the respondent is transferred to the Fleet Reserve / retired list, the respondent will be reduced to the next inferior pay-grade immediately prior to transfer.

4. ***Counsel.*** MILPERSMAN, Sections 1910-406 & 504; MARCORSEPMAN, para. 6304.3.

a. A respondent has the same right to consult with counsel as that prescribed for the notification procedure (prior to electing or waiving any rights under paras. C.2.d through i above).

b. 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. For the respondent to be represented by individual military counsel (IMC) of his own choice, the counsel must be determined to be reasonably available. The determination as to whether individual counsel is reasonably available shall be made in accordance with the procedures in section 0131 of the *JAG Manual* for determining the availability of IMC for courts-martial. Upon notice of IMC's availability, the respondent must elect between representation by appointed counsel and representation by IMC unless the convening authority, in his / her sole discretion, approves a written request from the respondent setting forth in detail why representation by both counsel is essential to ensure a fair hearing.

c. The respondent has the right to consult with civilian counsel, but

such consultation or representation will be at his own expense and shall not unduly delay the administrative board procedures. Exercise of this right shall not waive any other counsel rights. If exercise of the right to civilian counsel causes undue delay, the convening authority may direct the board to proceed without the desired civilian counsel after properly documenting the facts.

d. Non-lawyer counsel may represent a respondent before an administrative board if:

(1) The respondent expressly declines appointment of qualified counsel and requests a specific non-lawyer counsel; or

(2) the separation authority assigns non-lawyer counsel as assistant counsel.

5. ***Response***. MILPERSMAN, Section 1910-408; MARCORSEPMAN, para. 6304.4. The respondent shall be provided a reasonable period of time—but not less than two working days—to respond to the notice. An extension may be granted upon a timely showing of good cause. The election of the respondent as to each of the rights set forth in paragraphs C.2.d through 2.i, and applicable provisions referenced in paragraph C.3, shall be recorded and signed by the respondent and respondent's counsel (if he elects to consult with counsel)—subject to the following limitations:

a. Refusal by the respondent to respond to the notification shall constitute a waiver of rights and an appropriate notation will be made on the command's retained copy of the Statement of Awareness. If the respondent indicates that one or more of the rights will be exercised, but declines to sign, the selection of rights will be noted and an appropriate notation as to the failure to sign will be made on the Statement of Awareness.

b. Failure to acknowledge receipt of notice by mail when authorized, or to submit a timely reply to that mailed notification, constitutes a waiver of rights and an appropriate notation shall be recorded on a retained copy of the Statement of Awareness.

Notice of Administrative Board Procedure (Navy) and Acknowledgement of Rights (Marine Corps) may be found in MILPERSMAN, Section 1910-404 and MARCORSEPMAN, fig. 6-3, respectively.

6. ***Waiver***. MILPERSMAN, Section 1910-226; MARCORSEPMAN, para. 6304.5.

a. If the right to an administrative board is waived, the case shall be forwarded to the separation authority who will direct either retention, separation, or suspended separation.

b. If a respondent submits a conditional waiver the Commanding

Officer (Navy) has two options: favorably endorse the request and forward it to the GCMCA, or higher, who then serves as the Separation Authority; or, return the request with an appropriate endorsement indicating why the conditional waiver will not be approved and continue with AdSep processing.

c. ***Marine Corps***. A respondent entitled to an administrative board may submit a conditional waiver request, waiving his right to a board, contingent upon receiving a general discharge. The commanding officer shall forward the copy of the notification, the conditional waiver request, and a recommendation on the waiver to the separation authority unless he has been delegated authority by the separation authority to disapprove requests for conditional waivers and so elects. Upon receipt of a conditional waiver, the separation authority may either grant the waiver or deny it, depending upon the circumstances of the case. MARCORSEPMAN, para. 6304.5.

4702 ADMINISTRATIVE BOARDS

A. ***Convening authority***. MILPERSMAN, Section 1910-414; MARCORSEPMAN, para. 6314. An administrative board may 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 or when authorized by an officer who has GCM authority.

B. ***Composition***. Administrative boards are composed of three or more experienced Regular or Reserve officers or senior enlisted (E-7 or above), senior to the respondent, with a majority of the board commissioned or warrant officers (Marine Corps requirement). At least one board member must be an officer serving in the grade of O-4 (not frocked) or higher. Per NAVADMIN 140/96, the senior member of an administrative board may be either a line or staff corps officer and may be either an officer on the active duty list or a TAR (Training and Administration of Reserves) officer.

-- ***Reserve respondent***. At least one member of the board shall be a Reserve commissioned officer, and all members must be commissioned officers.

C. ***Recorder***. MARCORSEPMAN, para. 6315.3. Although there is no reference to the qualifications or duties of the recorder in the MILPERSMAN, the following should be considered when choosing the government's representative in an Administrative Separation Board Procedure. The convening authority details an individual, preferably a commissioned or warrant officer, who assumes overall nonvoting responsibility for ensuring the board is conducted properly and in a timely fashion as recorder. In the Marine Corps, the recorder should be an experienced

commissioned or warrant officer and may be a lawyer within the meaning of Article 27(b), UCMJ, but he may not possess any greater legal qualifications than respondent's counsel. The Navy frequently employs judge advocates in the role of the 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 convening authority may detail an assistant to the recorder. The recorder shall:

1. Conduct a preliminary review of available evidence;

2. interview prospective witnesses (determining whom to call);

3. arrange for the attendance of all witnesses for the government and witnesses for the respondent who are government employees (military or civilian);

4. arrange for the time and place of the hearing after consulting with the president of the board and respondent's counsel; and

5. prepare 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.*** MARCORSEPMAN, para. 6315.4. At the discretion of the convening authority, a nonvoting legal advisor who is a judge advocate certified in accordance with Article 27(b), UCMJ, may be appointed to the administrative board. If appointed, the legal advisor shall rule finally on all matters of procedure, evidence, and challenges—except challenges to himself. The appointment of a legal advisor is a rare occurrence in either the Navy or the Marine Corps.

F. ***Hearing procedure.*** MILPERSMAN, Section 1910-500; MARCORSEPMAN, paras. 6316, 6317.

1. ***Rules of evidence.*** An administrative board is 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, the board may consider any competent evidence relevant and material in the case, subject to its discretion; but, it should not exclude evidence simply because it could have been excluded at a trial by court-martial.

a. Witnesses are sworn and testify under oath or affirmation.

b. All witnesses are subject to cross-examination on their testimony and general credibility.

c. The respondent may be sworn and testify at his election, or he / she may make an unsworn statement.

(1) If ***testifying*** under oath, he / she may be cross-examined.

(2) If presenting an ***unsworn statement***, he / she may not be required to be cross-examined. MILPERSMAN, Section 1910-516; MARCORSEPMAN, para. 6317.2a.

d. The respondent must be provided a Privacy Act statement whenever personal information is solicited. If witnesses testify to their official duties, there is no need to use a Privacy Act statement.

2. ***Preliminaries***. MILPERSMAN, Section 1910-516; MARCORSEPMAN, para. 6316.2. At the outset of the hearing, the president of the board (senior member) should inquire into the respondent's knowledge of his rights, including the right:

a. To appear in person (with or without counsel) or, in his absence, have counsel represent him at all open board proceedings;

b. to challenge any voting member of the board for cause only (evidence that the member cannot render a fair and impartial decision):

(1) ***Navy***. If a member is challenged, the convening authority or the legal advisor (if one has been appointed) decides the challenge. MILPERSMAN 1910-516. The non-challenged members make recommendations on the record before the matter is brought to the CA for final resolution.

(2) ***Marine Corps***. The board (excluding the challenged member) or the legal advisor, if appointed, determines the propriety of a challenge to any member. A tie vote or a majority vote in favor of sustaining the challenge disqualifies that member from sitting. MARCORSEPMAN, para. 6316.7c.

c. to request the personal appearance of witnesses (*see* paragraph G below—there is no authority for subpoena of civilian witnesses);

d. to submit, either before the board convenes or during the proceedings, 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 documents, reports, statements, and evidence available to the board;

h. to be apprised 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 stop the board from proceeding.

3. ***Presentation of evidence.*** The recorder presents the case for the government, first introducing those documentary matters which support the basis for processing. The recorder then calls any relevant witnesses. After the recorder has finished, the respondent has the opportunity to present matters in his behalf. The board proceedings should be sufficiently formal so as to allow the respondent full opportunity to present his case and exercise his rights. Following any matter presented by the respondent, the recorder may, if appropriate, 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 request any other evidence it deems appropriate.

-- If the presentation by the recorder or the respondent includes the calling of witnesses, the procedure for examination of each witness will be: direct examination by the counsel calling the witness; cross-examination by the counsel for the other side; re-direct examination by the side calling the witness; recross-examination by the adversary; and, finally, questions posed by members of the board.

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 the evidence" test. MILPERSMAN, Section 1910-516; MARCORSEPMAN, paras. 6316.10 and 6316.11.

G. ***Witness requests.*** MILPERSMAN, Section 1910-508; MARCORSEPMAN, para. 6317.

1. ***General.*** The respondent may request the attendance of witnesses in his behalf at the hearing. The request shall be in writing, dated, signed by the respondent or his counsel, and submitted to the convening authority via the president of the board as soon as practicable after the need for the witness becomes known to the respondent or his counsel.

a. Failure to submit a request for witnesses in a timely fashion shall not automatically result in denial of the request but, if it would be necessary to delay the hearing in order to obtain a requested witness, lack of timeliness in submitting the witness request may be

considered along with other factors in deciding whether or not to provide the witness.

b. No authority exists for issuing subpoenas to civilian witnesses in connection with administrative proceedings. Appearances will be arranged on a voluntary basis only.

c. Military personnel who are not assigned locally, if their presence is deemed necessary, will be issued TAD orders.

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 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 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. (Factors to be considered in relation to the balancing test include, but are not limited to, the cost of producing the witness, the potential delay in the proceeding that may be caused by producing the witness, or the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.) Guidance for the funding of travel may be found in section 0145 of the *JAG Manual*.

f. 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.

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 to permit the attendance of the witness.

5. ***Witness unavailable.*** The hearing shall be continued or postponed to provide the respondent with a reasonable opportunity to obtain a written statement from the witness, if the witness requested by the respondent is unavailable, when:

a. The presiding officer determines that the personal testimony of the witness is not required;

b. the commanding officer of a military witness determines that military necessity precludes the witness' attendance at the hearing; or

c. a civilian witness declines to attend the hearing.

6. ***Civilian government employee.*** Paragraph G.5.c above does not authorize a federal employee to decline to appear as a witness if directed to do so in accordance with applicable procedures of the employing agency.

H. ***Board decisions.*** MILPERSMAN, Section 1910-518; MARCORSEPMAN, para. 6319. The board shall determine its findings and recommendations in closed session. A report of the board will be prepared and signed by all members and counsel for the respondent. Any dissent will be noted on the report; the specific reasons will be recorded separately. At a minimum, the report will include:

1. Findings of fact related to ***each*** of the reasons 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;

4. recommendations as to whether the respondent should be retained in the Ready Reserve as a mobilization asset to fulfill the respondent's total service obligation (except when the board has recommended separation on the basis of homosexual conduct, misconduct, drug trafficking, or defective enlistment and induction, or has recommended an OTH);

5. in homosexual cases, 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 which allow for retention; in which case, specific findings regarding those circumstances are required [MILPERSMAN, Section 1910-148; MARCORSEPMAN, para. 6207(2)];

-- ***Note***: There are no local separations for homosexual conduct; all cases must be forwarded to the Chief of Naval Personnel or the Commandant of the Marine Corps, with SECNAV acting as separating authority.

6. if separation is recommended and the member is eligible for transfer to the Fleet Reserve / retired list, a recommendation as to whether the member should be transferred in the current or the next inferior pay-grade must be made.

I. ***Record of proceedings***

1. ***General***. The record of proceedings shall be prepared in summarized form, unless the convening authority or separation authority directs that a verbatim transcript be kept. Following authentication of the record (by the president in the Navy; by the president and the recorder in the Marine Corps), the record of proceedings is forwarded to the convening authority.

2. ***Contents of the record of proceedings***

a. ***Navy***. IAW MILPERSMAN, Section 1910-516, the record of proceedings shall, at 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 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***;

(6) the ***authenticating signature of the president*** on the entire record of proceedings or, in his absence, any member of the board;

(7) signed, dissenting opinions of any member, if applicable, regarding findings and recommendations.

Note: It is unnecessary for counsel for respondent (or respondent, if not represented by counsel) to review the record of proceedings and all supporting documentation before the record is forwarded to the separation authority, as long as they are provided a copy prior to submission. A statement of deficiencies can be submitted separately ***via the convening authority*** to the separation authority. The Report of Administrative Board must still be signed by the board members and counsel for the respondent.

b. ***Marine Corps***. In accordance with MARCORSEPMAN, para. 6320, the record of proceedings shall, as a minimum, contain:

(1) An authenticated copy of the appointing order and any other communication from the convening authority;

(2) a summary of the testimony of all witnesses including the respondent when he / she testifies under oath or otherwise;

(3) a summary of any sworn or unsworn statements made by absent witnesses if considered by the board;

(4) acknowledgement that the respondent was advised of and fully understands all of the rights of the respondent before the board;

(5) the identity of the counsel for the respondent and the recorder with their legal qualifications, if any;

(6) copies of the letter of notification to the respondent, advisement of rights, and acknowledgement of rights;

(7) a complete statement of facts upon which the board's recommendation for discharge is based, accompanied by appropriate supporting documents;

(8) a summary of any unsworn statement submitted by the respondent or his counsel;

(9) the respondent's signed acknowledgement that he / she was advised of, and fully understood, all of his / her rights before the board; and,

(10) a majority board report signed by all concurring voting members.

J. ***Actions by the convening authority***

1. ***Navy***. MILPERSMAN, § 1910-506 – 1910-518.

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 which case, the matter must be referred to the separation authority for disposition.

b. If the commanding officer decides that separation is warranted or separation processing is mandatory, the report is forwarded in a letter of transmittal to the separation authority for action. At no time may the convening authority recommend a discharge characterization less favorable than the board's recommendation.

c. Special court-martial convening authorities are the separation authority when members are processed for separation by reason of:

(1) COG - dependency or hardship;
(2) COG - pregnancy or childbirth;
(3) COG - Surviving family member ;
(4) COG - Reservists becomes a minister;
(5) COG - other designated physical or mental conditions;
(6) COG - personality disorder;
(7) COG - parenthood;
(8) COG - review action;
(9) COG - early release to further education;
(10) Entry level performance and conduct;
(11) Unsatisfactory performance;
(12) Drug abuse rehabilitation failure;
(13) Alcohol abuse rehabilitation failure;
(14) Family Advocacy Program Rehabilitation Failure
(15) Defective enlistment - erroneous;
(16) Defective enlistment - minority;
(17) Defective enlistment - defective enlistment agreement;
(18) Defective enlistment - separation from delayed entry program; and,
(17) Separation in lieu of trial by court-martial when the request is based solely on an unauthorized absence of 30 days or more.

d. Special court-martial convening authorities may also serve as separation authority when a member is processed for separation for one of the following reasons:

(1) Defective enlistment - fraudulent;
(2) Misconduct - pattern of misconduct;
(3) Misconduct - commission of a serious offense;
(4) Misconduct - civilian conviction;
(5) Misconduct - drug abuse; or
(6) Unsatisfactory participation in the Ready Reserve

provided that either notification procedures are used or administrative board procedures are used and the administrative board recommends separation with an honorable, general, or entry level

separation.

e. General court-martial convening authorities are the separation authority for separation in lieu of trial by court-martial (except for homosexual conduct cases, which must be forwarded to CHNAVPERS; and, cases based solely on unauthorized absences of 30 days or more, which may be handled by SPCMCAs). GCMCAs also serve as the separation authority when members are processed for one of the following reasons:

(1) Defective enlistment - fraudulent;
(2) Misconduct - pattern of misconduct;
(3) Misconduct - commission of a serious offense;
(4) Misconduct - civilian conviction;
(5) Misconduct - drug abuse; or
(6) Unsatisfactory participation in the Ready Reserve

provided that the administrative board procedure was used and the board recommended either retention or separation with an OTH; or, the member waived the board conditionally or unconditionally.

f. CHNAVPERS is the separation authority when members are processed for separation by reason of:

(1) Selected changes in service obligations - general demobilization or reduction in strength;
(2) Selected changes in service obligations - acceptance of an active-duty commission or appointment;
(3) COG – Alien;
(4) Conscientious objection;
(5) Homosexual conduct; or,
(6) When the member has physical evaluation board action completed or pending and is being administratively processed for separation at the same time.

g. The Secretary of the Navy is the separation authority when members are processed by reason of:

(1) Best interest of the service; or,
(2) Disability.

h. Record-keeping. Regardless of separation authority, all cases will be forwarded to BUPERS after the separation authority's final action on the case for review and filing in the member's permanent record. A copy of the member's DD-214 (Record of Discharge) should accompany the administrative separation package if the member was separated locally.

2. ***Marine Corps***. MARCORSEPMAN, para. 6305.

a. If the convening authority is not the appropriate separation authority, the convening authority will forward the case with a recommendation in a letter of transmittal to the appropriate separation authority.

b. If the convening authority is the appropriate separation authority, before taking final action, he will refer the case to his staff judge advocate for a written review to determine the sufficiency in fact and law of the processing—including the board's proceedings, record, and report. MARCORSEPMAN, para. 6308.1c.

K. ***Action by the separation authority***

1. ***General rules (other than homosexual conduct cases)***. When the separation authority receives the record of the board's proceedings and report, his/her ability to act will depend on the findings of the board. The following are possible actions by the SA, but *see* MILPERSMAN, Section 1910-710; MARCORSEPMAN, para. 6309.2 for a fuller understanding:

a. Must approve the board's recommendation for retention if the board found that the basis is not supported by a preponderance of the evidence;

b. disagree with the administrative board's recommendation for retention and refer the entire case to the Secretary of the Navy for authority to direct a separation under honorable conditions with an honorable or general discharge or, if appropriate, entry level separation or, if eligible, transfer to the Fleet Reserve / retired list in the current or next inferior paygrade;

c. approve the board's recommendation for separation and direct execution of the recommended type 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 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;

j. (USN only) submit the case to SECNAV recommending separation when the findings of the board are contrary to the substantial weight of the evidence; or

k. 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.

Note: Both the Navy and Marine Corps provide a separation authority with power to send a case to a second board hearing. Neither the members nor the recorder from the first board may sit as voting members of the second board. Although the second board may consider the record of the first board's proceedings, less any prejudicial matter, it may neither see nor learn of the first board's findings, opinions, or recommendation. Additionally, the separation authority may not approve findings or recommendations of the subsequent board which are less favorable to the respondent than those ordered by the previous board—unless the separation authority finds that fraud or collusion in the previous board is attributable to the respondent or an individual acting on the respondent's behalf.

2. ***Suspension of separation***. MILPERSMAN, § 1910-222; MARCORSEPMAN, para. 6310.

a. Except when the bases for separation are fraudulent enlistment or homosexual conduct, a separation may be suspended by the separation authority or higher authority for a specified period of not more than 12 months if the circumstances of the case indicate a reasonable likelihood of rehabilitation. The administrative discharge board and the convening authority may both recommend suspension, and the separation authority may make its own determination of a suspension.

b. Unless sooner vacated or remitted, execution of the approved separation shall be remitted upon completion of the probationary period, upon termination of the member's enlistment or period of obligated service, or upon decision of the separation authority that the goal of rehabilitation has been achieved.

c. During the period of suspension, if further grounds for separation arise or if the member fails to meet appropriate standards of conduct and performance, one or more of the following actions may be taken:

(1) Disciplinary action;

(2) new administrative action; or

(3) vacation of the suspension and execution of the separation.

d. Prior to vacation of a suspension, the member shall be notified in writing of the basis for the action and shall be afforded the opportunity to consult with counsel and to submit a statement in writing to the separation authority. The respondent must be afforded at least two days to act on the notice.

4703 PROCESSING GOALS. Every effort should be taken to meet the Secretary of the Navy's processing time goals. MILPERSMAN, § 1910-010; MARCORSEPMAN, para. 6102.

A. ***Discharges without board action***. When board action is not required or is waived, then the member should be separated within 30 working days of notification.

B. ***Separations with board action***. When the member elects an Administrative Board, then the member should be separated within 60 working days of notification.

4704 NAVAL DISCHARGE REVIEW BOARD

A. ***General***. The Naval Discharge Review Board (NDRB) was established pursuant to 10 U.S.C. § 1553 (1982), and operates in accordance with SECNAVINST 5420.174, Subj: REVIEW AT THE LEVEL OF THE NAVY DEPARTMENT OF DISCHARGES FROM THE NAVAL SERVICE. The NDRB is composed of five-member panels of active-duty Navy and Marine Corps officers in grades O-4 or higher. The NDRB panels sit regularly in Washington, DC, and also travel periodically to other areas within the continental United States.

B. ***Petition***. The NDRB may begin its review process based on:

1. Its own motion;

2. the request of a surviving member; or

3. the request of a surviving spouse, next of kin, legal representative, or guardian (if the former member is deceased or incompetent).

C. ***Scope of review***. The NDRB is authorized to change, correct, or otherwise modify a discharge—except that, by statute, it may not review punitive discharges awarded as a result of general court-martial nor may it review a discharge executed more than 15 years before the application to NDRB. In addition, the NDRB is not authorized to do any of the following:

1. Change any document other than the discharge document;

2. revoke a discharge;

3. reinstate a person in the naval service;

4. recall a former member to active duty;

5. change reenlistment codes;

6. cancel reenlistment contracts;

7. change the reason for discharge from, or to, physical disability;

8. determine eligibility for veterans' benefits; or

9. review a release from active duty until a final discharge has been issued.

D. ***Modifications***. In order to change, correct, or otherwise modify a discharge certificate or issue a new certificate, the NDRB must be convinced that the original certificate was "improperly or inequitably" given. In making its determination, the board is usually confined to evidence in the former member's record during the particular period of naval service for which the discharge in question had been issued—including any information disclosed to, or discovered by, the naval service at the time of enlistment or other entry into the service. This evidence may, and indeed should, include facts "found" by a fact-finding body (such as a court-martial, a court of inquiry, or an investigation in which the former member was a defendant or interested party and which were properly approved either on appeal or during review). Unless this former member can show that coercion was exercised, the foregoing evidence should include charges and specifications to which guilty pleas were appropriately entered in court or which prompted the former member to request separation in lieu of trial by court-martial. A discharge is deemed to be improper when an error of fact, law, procedure, or discretion at the time of issuance prejudiced the applicant's rights or when a change in policy of the applicant's branch of service is made expressly retroactive to the type of discharge he was awarded. Like the Board for Correction of Naval Records, which will be discussed next, the NDRB is ***not*** empowered to change any discharge to one more favorable solely because the applicant has demonstrated exemplary conduct and character since the time of his / her discharge (which is the subject matter of the present application), regardless of the length of time that has elapsed since that discharge.

E. ***Secretarial review***. Action taken by the NDRB may only be reviewed administratively by the Secretary of the Navy. If newly discovered evidence is presented to the NDRB, it may recommend to the Secretary of the Navy reconsideration of a case formerly heard but may not reconsider a case without the prior approval of the Secretary.

F. ***Mailing address***. Applications and other information may be obtained from:

Naval Discharge Review Board
Department of the Navy
801 N. Randolph St.
Arlington, VA 22203

4705 THE BOARD FOR CORRECTION OF NAVAL RECORDS

A. ***General.*** The Board for Correction of Naval Records (BCNR) was established pursuant to 10 U.S.C. § 1552 (1982). It consists of at least three civilian members and considers all applications properly before it for the purpose of determining the existence of an error or an injustice and making appropriate recommendations to the Secretary of the Navy.

B. ***Petition.*** Application may be made by a former member or any other person considered by the board to be competent to make an application. When a "no change" decision has been rendered by the NDRB, and a request for reconsideration by that board has been denied, a petition may then be filed with the BCNR. The law requires that the application be filed with the BCNR within three years of the date of discovery of the error or injustice. The board is authorized to excuse the fact that the application was filed at a later date if it finds it to be in the interest of justice. The board is empowered to deny an application without a hearing if it determines that there is insufficient evidence to indicate the existence of probable material error or injustice.

C. ***Scope of review***

1. Applications to BCNR are subject to several qualifications which should be stressed in the advice given to members being processed for OTH discharges. First, in addition to its power to consider applications concerning discharges adjudged by GCM's—something the NDRB may not do—the BCNR may also review cases involving inter alia:

a. Requests for physical disability discharge and, in lieu thereof, retirement for disability;

b. requests to change character of discharge or eliminate discharge and restore to duty;

c. removal of derogatory materials from official records (such as fitness reports, performance evaluations, nonjudicial punishments, failures of selection, and marks of desertion);

d. changing dates of rank, effective dates of promotion or acceptance / commission, and position on the active-duty list for officers;

e. correction of "facts" and "conclusions" in official records (such as lost time entries or line of duty / misconduct findings);

f. restoration of rank; and

g. pay and allowances items (such as special pays, incentive pay, readjustment pay, severance pay, and basic allowance for quarters).

2. ***In no event will an application be considered before other administrative remedies have been exhausted.***

3. In determining whether or not material error or an injustice exists, the board will consider all evidence available—including, among other things:

a. All information contained in the application;

b. documentary evidence filed in support of the application;

c. briefs submitted by, or on behalf of, the applicant;

d. all available military records—including, of course, the applicant's service record.

D. ***Secretarial action***. Cases considered by the board are forwarded to, and reviewed by, the Secretary of the Navy for final action—except that, in the following ten categories, the board is empowered to take final action without referral of the matter to the Secretary of the Navy:

1. Leave adjustments;

2. retroactive advancements for enlisted personnel;

3. enlistment / reenlistment in higher grades;

4. entitlement to basic allowances for subsistence, family separation allowances, and travel allowances;

5. Survivor Benefit Plan / Retired Serviceman's Family Protection Plan election;

6. physical disability retirements / discharges;

7. service reenlistment / variable reenlistment and proficiency pay entitlements;

8. changes in home of record;

9. Reserve participation / retirement credits; and

10. changes in former members' reenlistment codes.

E. ***Mailing address***. The mailing address for filing applications or requesting other information is:

The Board for Correction of Naval Records
Department of the Navy
Washington, DC 20370

CHAPTER XLVIII

ADMINISTRATIVE SEPARATION OF OFFICERS

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ADMINISTRATIVE SEPARATION OF OFFICERS

4801 INTRODUCTION

A. ***General.*** The separation of an officer for cause by reason, inter alia, of misconduct, or moral or professional dereliction, may be effected by administrative action or by courts-martial. Dismissals of officers from the naval service are authorized punishments of general courts-martial. Administrative separation of officers for cause may be effected for a wide variety of reasons involving performance or conduct identified not more than 5 years prior to the initiation of processing using the notification procedure or administrative board procedure, as appropriate, with a characterization of service as discussed below. The analysis that follows is not exhaustive, and any questions that arise should be resolved by utilizing SECNAVINST 1920.6B, Subj: ADMINISTRATIVE SEPARATION OF OFFICERS; MILPERSMAN, Article 3830160; MARCORSEPMAN, ch. 4; and LEGADMINMAN, ch. 4.

B. ***Provision of information during separation processing.*** During separation processing, the purpose and authority of the Naval Discharge Review Board (NDRB) and the Board for Correction of Naval Records (BCNR) shall be explained in a fact sheet. It shall include an explanation that a discharge under other than honorable conditions, resulting from a period of continuous unauthorized absence of 180 days or more, is a conditional bar to benefits administered by the Department of Veteran's Affairs—notwithstanding any action by the NDRB. These requirements are a command responsibility and not a procedural entitlement. Failure on the part of a member to receive or to understand the explanation required by this paragraph does not create a bar to separation or characterization.

4802 DEFINITIONS

A. ***Active commissioned service.*** This term refers to service on active duty as a commissioned officer (including as a commissioned warrant officer).

B. ***Convening authority.*** The Secretary of the Navy or his delegates empowered to convene boards in conjunction with separation of officers for cause.

C. ***Continuous service.*** This term refers to military service unbroken by any period in excess of 24 hours.

D. ***Drop from the rolls.*** This refers to a complete severance of military status pursuant to specific statutory authority without characterization of service.

E. ***Nonprobationary commissioned officers.*** Commissioned officers other than probationary officers

F. ***Probationary commissioned officers.*** A regular or reserve commissioned officer on the active duty list with less than 5 years of active commissioned service. However, a reserve commissioned officer serving in an active statue before October 1, 1996, who was in a probationary status prior to that date, shall be a probationary commissioned officer for a period of 3 years from the date of his or her appointment as a Reserve commissioned officer. Regular warrant officers with less than 3 years and Reserve warrant officers with less than 5 years of service as warrant officers.

G. ***Retention on active duty.*** This refers to continuation of an individual in an active-duty status as a commissioned officer in the naval service.

4803 CHARACTERIZATION OF SERVICE. Separations are characterized as either honorable, general (under honorable conditions), or under other than honorable conditions. Characterization of service is determined based upon the following Secretarial guidelines:

A. ***Honorable.*** An officer whose quality of service has generally met the standards of acceptable conduct and performance of duty for officers of the naval service, or is otherwise so meritorious that any other characterization would be clearly inappropriate, shall have his / her service characterized as honorable. Service must be characterized as honorable when the grounds for separation are based solely on:

1. Preservice activities;

2. substandard performance of duty;

3. removal of ecclesiastical endorsement; or

4. personal abuse of drugs (the evidence of which was developed as a result of an officer's volunteering for treatment under the self-referral program).

B. ***General (under honorable conditions).*** Characterization of service as general (under honorable conditions) is warranted when significant negative aspects of the officer's conduct or performance of duty outweigh positive aspects of the officer's military record.

C. ***Other than honorable.*** This characterization is appropriate when the officer's conduct or performance of duty, particularly the acts or omissions that give rise to reasons for separation, constitute a significant departure from that required of an officer of the naval service. Examples of such conduct or performance include acts or omissions which under military law are punishable by confinement for six months or more; abuse of a special position of trust; an act or acts which bring discredit upon the armed services; disregard by a superior of customary superior-subordinate relationships; acts or omissions that adversely affect the ability of the military unit or the organization to maintain discipline, good order, and morale, or endanger the security of the United States or the health and welfare of other members of the armed forces; and deliberate acts or omissions that seriously endanger the capability, security, or safety of the military unit or health and safety of other persons.

D. ***Limitations***

1. ***Reserve officers***. Conduct in the civilian community of a member of a Reserve component, who is not on active duty or on active duty for training, may form the basis for characterization of service as other than honorable ***only*** if the conduct directly affects the performance of military duties.

2. ***Homosexuality***. The criteria for characterization of service for officers being separated by reason of homosexuality are identical to those for enlisted personnel. Service must be characterized as honorable or general consistent with the guidance in paragraphs A and B above, unless aggravating factors are included in the findings.

3. ***Preservice misconduct***. Whenever evidence of preservice misconduct is presented to a board, the board may consider it ***only*** for the purpose of deciding whether to recommend separation or retention of the respondent. Such evidence shall not be used in determining the recommendation for characterization of service. The board shall affirmatively state in its report that such evidence was considered only for purposes of determining whether it should recommend retention or separation of the officer.

4804 BASES FOR SEPARATION. This section lists the bases or specific reasons for involuntary separation of officers for cause as discussed in SECNAVINST 1920.6B.

A. ***Substandard performance of duty*** This ground for separation refers to an officer's inability to maintain adequate levels of performance or conduct, as evidenced by one or more of the following reasons:

1. Failure to demonstrate acceptable qualities of leadership required of an officer in the member's grade;

2. failure to achieve or maintain acceptable standards of proficiency required of an officer in the member's grade;

3. failure to properly discharge duties expected of officers of the member's grade and experience;

4. failure to satisfactorily complete any course of training, instruction, or indoctrination which the officer has been ordered to undergo;

5. a record of marginal service over an extended time as reflected in fitness reports covering two or more positions and signed by at least two reporting seniors;

6. personality disorders, when such disorders interfere with the officer's performance of duty and have been duly diagnosed by a physician or clinical psychologist;

7. failure, through inability or refusal, to participate in, or successfully complete, a program of rehabilitation for personal abuse of drugs or alcohol to which the officer was formally referred (nothing in this provision precludes separation of an officer, who has been referred to such a program, under any other provision of this instruction in appropriate cases);

8. failure to conform to prescribed standards of dress, weight, personal appearance, or military deportment; or

9. unsatisfactory performance of a warrant officer, not amounting to misconduct, or moral or professional dereliction.

B. ***Misconduct, or moral or professional dereliction.*** Performance or personal or professional conduct (including unfitness on the part of a warrant officer) which is unbecoming an officer as evidenced by one or more of the following reasons:

1. ***Commission of an offense.*** Processing may be undertaken for commission of a military or civilian offense which, if prosecuted under the UCMJ, could be punished by confinement of six months or more, and any other misconduct which would require specific intent for conviction.

2. ***Unlawful drug involvement.*** Processing for separation is mandatory. An officer shall be separated if an approved finding of unlawful drug involvement is made. Exception to mandatory processing or separation may be made on a case-by-case basis by the Secretary when the officer's involvement is limited to personal use of drugs and the officer is judged to have potential for future useful service as an officer and is entered into a formal program of drug rehabilitation.

3. ***Homosexuality.*** See section in enlisted administrative separations for further guidance on DoD and DoN homosexual conduct discharges.

4. Sexual perversion.

5. Intentional misrepresentation or omission of material fact in obtaining appointment.

6. Fraudulent entry into an armed force or the fraudulent procurement of commission or warrant as an officer in an armed force.

7. Intentional misrepresentation or omission of material fact in official written documents or official oral statements.

8. Failure to complete satisfactorily any course of training, instruction, or indoctrination which the officer has been ordered to undergo when such failure is willful or

the result of gross indifference.

9. Marginal or unsatisfactory performance of duty over an extended period, as reflected in successive periodic or special fitness reports, when such performance is willful or the result of gross indifference.

10. Intentional mismanagement or discreditable management of personal affairs, including financial affairs.

11. Misconduct or dereliction resulting in loss of professional status, including withdrawal, suspension, or abandonment of license, endorsement, certification, or clinical medical privileges necessary to perform military duties in the officer's competitive category of Marine Corps Occupational Field.

12. A pattern of discreditable involvement with military or civilian authorities, notwithstanding the fact that such misconduct has not resulted in judicial or nonjudicial punishment under the UCMJ.

13. Conviction by civilian authorities (foreign or domestic), or action taken which is tantamount to a finding of guilty, for an incident which would amount to an offense under the UCMJ.

14. One or more substantiated incidents of serious misconduct resulting from the officer's active participation in extremist or supremacist activities which, in the independent judgement of the convening authority, is more likely than not to undermine unit cohesion or to be detrimental to the good order, discipline, or mission accomplishment of the command. Such conduct must relate to: (1) illegal discrimination based on race, creed, color, sex, religion, or national origin; or (2) advocating the use of force against any Federal, state, or local government, or any agency thereof, in contravention of Federal, State, or local laws.

15. An officer who has been referred to a program of rehabilitation for sex offenders may be separated for failure, through inability or refusal, to participate in such a program.

C. ***Retention is not consistent with the interests of national security.*** An officer (except a retired officer) may be separated from the naval service when it is determined that the officer's retention is clearly inconsistent with the interests of national security. This provision applies when a determination has been made (under the provisions of SECNAVINST 5510.30A, Subj: DEPARTMENT OF THE NAVY PERSONNEL SECURITY PROGRAM) that administrative separation is appropriate. An officer considered for separation under the provisions of SECNAVINST 5510.30A will be afforded all the rights provided in this part.

D. ***Limitations on multiple processing***

1. An officer may be processed for separation for any combination of the reasons specified in paragraphs A-C above.

2. Subject to paragraph D.4 below, an officer who is processed for separation because of substandard performance of duty or parenthood, and who is determined to have established that he / she should be retained on active duty, may not again be processed for separation for the same reasons within the one-year period beginning on the date of that determination.

3. Subject to paragraph D.4 below, an officer who is processed for separation for misconduct, moral, or professional dereliction, homosexual conduct, or in the interest of national security, and who is determined to have established that he / she should be retained on active duty, may again be required to show cause for retention at any time.

4. An officer may not again be processed for separation under paragraphs D.2 or D.3 above solely because of performance or conduct which was the subject of previous proceedings, unless the findings and recommendations of the board that considered the case are determined to have been obtained by fraud or collusion.

E. ***Separation in lieu of trial by court-martial***

1. ***Basis.*** An officer may be separated in lieu of trial by court-martial upon the officer's request if charges have been preferred with respect to an offense for which a punitive discharge is authorized. This provision may not be used as a basis for separation when the escalator clause of R.C.M. 1003(d) of *Manual for Courts-Martial,* 1995, provides the sole basis for a punitive discharge, unless the charges have been referred to a court-martial authorized to adjudge a punitive discharge.

2. ***Characterization of service.*** The characterization of service is normally under other than honorable conditions, but a general discharge may be warranted in some cases. Characterization of service as honorable is not authorized, unless the respondent's record is otherwise so meritorious that any other characterization would be clearly inappropriate.

3. ***Procedures***

a. The request for discharge shall be submitted in writing and signed by the officer.

b. The officer shall be afforded an opportunity to consult with qualified counsel. If the member refuses to do so, the commanding officer shall prepare a statement to this effect which shall be attached to the file, and the officer shall state that the right to consult with counsel is waived.

c. Unless the officer has waived the right to counsel, the request shall also be signed by counsel.

d. In the written request, the officer shall state that he / she understands the following:

(1) The elements of the offense or offenses charged;

(2) that characterization of service under other than honorable conditions is authorized; and

(3) the adverse nature of such a characterization and possible consequences.

e. The request shall also include:

(1) An acknowledgement of guilt of one or more of the offenses charged, or of any lesser included offense, for which a punitive discharge is authorized; and

(2) a summary of the evidence or list of documents (or copies thereof) provided to the officer pertaining to the offenses for which a punitive discharge is authorized.

f. Statements by the officer or the officer's counsel submitted in connection with a request under this subsection are not admissible against the member in a court-martial except as provided by Military Rule of Evidence 410, *Manual for Courts-Martial*, 1995.

F. ***Removal of ecclesiastical endorsement.*** Officers on the active-duty list in the Chaplain Corps, who can no longer continue professional service as a chaplain because an ecclesiastical endorsing agency has withdrawn its endorsement of the officer's continuation on active duty as a chaplain, shall be processed for separation (in accordance with SECNAVINST 1900.10A, Subj: ADMINISTRATIVE SEPARATION OF CHAPLAINS UPON REMOVAL OF PROFESSIONAL QUALIFICATIONS) using the Notification Procedures contained in SECNAVINST 1900.10A. Processing solely under this paragraph is not authorized when there is reason to process for separation for cause under any other provision of this instruction, except when authorized by the Secretary in unusual circumstances based upon a recommendation by the Chief of Naval Personnel.

4805 NOTIFICATION PROCEDURES

A. ***When required.*** The notification procedure shall be used when:

1. A probationary Regular officer, a probationary Reserve officer above CWO-5 with less than 5 years of commissioned service, or a permanent Regular or Reserve warrant officer with less than 3 or 5 years of service, respectively, as a warrant officer, is processed for substandard performance of duty, misconduct, or moral or professional dereliction, homosexual conduct, national security, or in lieu of trial by court-martial.

2. Action is taken to terminate the appointment of a temporary LDO or temporary warrant officer for substandard performance of duty, misconduct, or moral or professional dereliction, homosexual conduct, national security, or in lieu of trial by court-martial.

3. Action is taken to remove a Reserve officer from an active status for lack of mobilization potential.

4. Action is taken to process a Regular or Reserve officer for separation for failure to accept appointment to O-2.

B. ***Letter of notification.*** The commanding officer shall notify the officer concerned in writing of the following:

1. The reason(s) for which the action was initiated (including the specific factual basis supporting the reason);

2. the recommended characterization of service is honorable (or general, if such a recommendation originated with CHNAVPERS or DC/C (M&RA));

3. that the officer may submit a rebuttal or decline to make a statement;

4. that the officer may tender a resignation in lieu of separation processing;

5. that the officer has the right to confer with appointed counsel;

6. that the officer, upon request, will be provided copies of the papers to be forwarded to the Secretary to support the proposed separation (Classified documents may be summarized.);

7. that the officer has the right to waive the rights enumerated in paragraphs 3, 4, 5, and 6 above, and that failure to respond shall constitute waiver of these rights; and

8. that the officer has a specified period of time (normally five working

days) to respond to the notification.

C. ***Right to counsel.*** A respondent has the right to consult with Article 27(b), UCMJ, certified, qualified counsel when the notification procedure is initiated, except when the commanding officer determines that the needs of the naval service require processing and access to qualified counsel is not anticipated for at least the next five days because the vessel, unit, or activity is overseas or remotely located relative to judge advocate resources. Non-lawyer counsel shall be appointed whenever qualified counsel is not available. The respondent may also consult with a civilian counsel at the respondent's own expense.

D. ***Response.*** The respondent shall be provided a reasonable period of time—normally five working days, but more if in the judgment of the commanding officer additional time is necessary—to act on the notice. An extension may be granted by the commanding officer upon a timely showing of good cause by the officer. If the respondent declines to respond as to the selection of rights, even if notice is provided by mail as authorized for the Reserves, such declination shall constitute a waiver of rights and an appropriate notation will be made in the case file. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate notification statement, the selection of rights will be noted and notation as to the failure to sign will be made.

E. ***Submission to the Secretary.*** The commanding officer shall forward the case file with the letter of notification and response, supporting documentation, and any tendered resignation via the Chief of Naval Personnel or the DC/S (M&RA), as appropriate, to the Secretary of the Navy.

F. ***Action of the Secretary.*** The Secretary shall determine whether there is sufficient evidence supporting the allegations set forth in the notification for each of the reasons for separation. The Secretary may then:

1. Retain the officer;

2. order the officer separated or retired, if eligible (if there is sufficient factual basis for separation);

3. accept or reject a tendered resignation; or

4. if the Secretary determines that an honorable or general characterization is not appropriate, he may then refer it directly to a board of inquiry.

4806 ADMINISTRATIVE BOARD PROCEDURES

A. See attached enclosure (8) to SECNAVINST 1920.

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ADMINISTRATIVE BOARD PROCEDURES

SHOW CAUSE AUTHORITY

a Purpose

(1) The purpose of the Show Cause Authority is to review and evaluate the record of any commissioned officer (other than a , commissioned warrant officer, retired officer, or temporary LDO) to determine whether the officer should be required because of substandard performance of duty, misconduct, professional or moral dereliction, or because retention is not clearly consistent with the interests of national security, to show cause for retention on active duty.

(2) The Show Cause Authority shall review and evaluate the records of officers referred under paragraph 2 of enclosure (4) or referred by the Secretary. In cases where processing is directed by the Secretary under paragraph 6c of enclosure (7), the Show Cause Authority shall direct that a BOI be convened.

b. Decision and Findings of the Show Cause Authority. The Show Cause Authority shall review and evaluate the record of the officer concerned and:

(1) Evaluate all information presented about the case under consideration.

12) Determine whether the record contains sufficient information as to one or more of the reasons specified in this instruction to require the officer to show cause for retention before a BOI.

(a) Cases supported by a preponderance of the evidence that involve unlawful drug involvement or homosexual conduct shall be referred to a BOI.

(b) No recommended characterization of service shall be made except when appropriate under paragraph 1b(4) of this enclosure.

(3) Close the case if the authority determines that the record does not contain sufficient information to require the officer concerned to show cause for retention or to warrant referral to a BOI.

Enclosure (8)

Appendix 1

(4) Determine whether, in the case of a probationary commissioned officer, the record supports separation but the **circumstances warrant characterization of honorable** or general per enclosure (5) {Guidelines on Characterization of Service}.

c. Action After Show Cause Authority Findings

(1) If the Show Cause Authority closes the case, all proceedings shall cease.

(2} If the Show Cause Authority determines that referral of the case to a BOI is appropriate, the Show Cause Authority shall convene, or direct to be convened, a BOI under this enclosure. A statement of the reason for making such a determination shall be provided to the officer in writing.

(3) If the Show Cause Authority recommends that a probationary commissioned officer be separated with an honorable or General (Under Honorable Conditions) discharge, the Show Cause Authority shall initiate or direct the initiation at the notification procedure outlined in enclosure (7).

2. BOI10

a. Purpose. The purpose of a BOI is to give an officer a full and impartial hearing at which he or she may respond to and rebut the allegations which form the basis for separation for cause and for retirement in the current grade or a lesser grade and present matters favorable to his or her case on the issues of separation and/or characterization of service.

b. Convening Authority. The Show Cause Authority shall convene, or direct to be convened, a BOI upon determination that an officer should be required to show cause for retention. A BOI shall also be convened by such authority when required under the provisions of enclosures (3), (4), or (6).

c. Active Duty Orders and Expenses. In no case shall the affording of a hearing to an officer, who is not otherwise on active duty at that time, place the officer on, ar return the officer to, active duty. There is no authority for the issuance of any form of initial orders to active duty for the sole purpose of facilitating appearance by an officer for a hearing. There is no authority for the payment or reimbursement of any expenses which may be incurred by an officer, or by any person in his or

her behalf, in connection with any administrative separation proceeding under these regulations.

d. Membership, Recorder, Legal Advisor. BOIs shall consist of not less than three officers in the same Armed Force as the respondent.

(1) In the case of Regular commissioned officers other than temporary LDOs and warrant officers, members shall be highly qualified and experienced officers in the grade of 0-5 or above, except that at least one member shall be in the grade of 0-6 or above. Each member shall be senior in grade to any officer to be considered by the board. They shall be Regular officers on the active duty list.

(2) In the case of Reserve commissioned officers other than warrant officers, members shall be highly qualified and experienced officers serving on active duty or in an active status in the grade of 0-5 or above, except that at least one member shall be in the grade of 0-6 or above. Each member shall be senior in grade to any officer to be considered by the board. At least one member must be a Reserve officer.

(3J A BOI must have at least one member from the same competitive category as the respondent, This is especially important when considering an officer for substandard performance. However, in cases involving small competitive categories, isolated geographic locations, or for reasons of operational necessity, competitive category membership may be waived by the convening authority if no suitable officer is reasonably available.

(4) In the case of temporary limited duty and warrant officers, the members comprising the board shall be senior to the respondent unless otherwise directed by the Secretary.

(5) At least one member shall be an unrestricted line officer. Such officers should have command experience, whenever possible.

(6) The convening authority is not limited to officers under his or her direct command in selecting qualified officers to sit on a BOI.

(7) When a sufficient number of highly qualified and experienced active duty officers are not available, the convening authority shall complete Board membership with available retired

Enclosure {8)

officers who meet the criteria of paragraph 2d(1) and (2) other than the active duty or active status list requirement, and who have been retired for fewer than 2 years.

(8) Officers with personal knowledge pertaining to the particular case shall not be appointed to the Board considering the case. No officer may be a member of more than one board convened under this instruction to consider the same officer.

(9) The senior member shall be the presiding officer, and rule on all matters of procedure and evidence' but may be overruled by a majority of the Board. Board members are subject to challenge for cause only. If appointed, the legal advisor shall rule finally on all matters of procedure, evidence and challenges except challenges to himself or herself. The convening authority will rule finally on all challenges for cause to the legal advisor.

(10) The convening authority shall appoint a nonvoting Recorder to perform such duties as appropriate. The recorder shall not participate in closed sessions of the Board.

(11) The convening authority may appoint a nonvoting legal advisor to perform such duties as the Board desires. The legal advisor shall not participate in closed sessions of the Board.

e. Notice to Respondent The respondent shall be notified in writing at least 30 days before the hearing of his or her case before a BOI, of each of the reasons for which he or she is being required to show cause for retention in the Naval Service, the least favorable characterization of service which may be recommended by the Board, and of the rights of a respondent. When the Board is required in the case of a retirement eligible officer to consider whether to recommend that the respondent be retired in the current grade or a lesser grade, the respondent shall be informed of all reasons therefor, and the right to present evidence that his or her service, in the grade currently held, has been satisfactory.

f. Rights of a Respondent. The respondent shall be given the following rights, which may be exercised or waived:

(1) Reasonable additional time, as determined necessary by the Board or the Convening Authority, to prepare his or her case In addition to the 30 days provided in paragraph 2e, the

respondent may, for good cause, further petition the convening authority in a timely manner, for a continuance. Requests for continuance will be decided by the convening authority if made prior to the convening of the BOI. Once convened, the senior member may rule on such requests or refer them to the convening authority for decision.

(2} The right to counsel, as provided in paragraph 2g.

(3) The opportunity to present matters in his or her own behalf. If suspected of an offense, the officer should be warned against self-incrimination under article 31, UC~J, before testifying as a witness. Failure to warn the officer shall not preclude consideration of the testimony of the officer by the BOI.

(4) Full access to, and copies of, records relevant to the case, except that information or material shall be withheld if the CHNAVPERS or DC/S (M&RA} determines that such information should be withheld in the interest of national security. When information or material is so withheld, a summary of the information or material will be provided to the extent that the interests of national security permit.

(5) The names of all witnesses in advance of BOI proceedings. Failure to provide any information or the name of a witness shall not preclude the board from considering the information or hearing the witness, provided the respondent has had the opportunity to examine any statement, or talk with any witness presented, prior to consideration by the Board.

(6) The right to challenge any member for cause. The respondent may submit to the convening authority for appropriate action, any relevant matter which, in his or her view, indicates that a particular member or members should not consider the case. A member shall be excused if found by the convening authority or the legal advisor to be unable to render a fair and impartial decision in the respondent's case. If such an excusal results in the membership of the Board falling below the number required in paragraph 2d of this enclosure, the convening authority shall appoint a new member who is qualified per that paragraph. Such new member may be challenged in the same manner as the member who was previously appointed and excused.

(7) The right to request from the Convening Authority or the BOI the appearance before the Board of any witness whose testimony is considered to be pertinent to the case' as provided in paragraph 2i.

(3) The right to submit, at any time before the board convenes or during the proceedings, any matter from the respondent's service record, letters, answers depositions, sworn or unsworn statements, affidavits, certificates, or stipulations.
This includes, but is not limited to, depositions of witnesses not deemed to be reasonably available or witnesses unwilling to appear voluntarily.

(g} The respondent and counsel may question any witness who appears before the BOI. Testimony of witnesses shall be under oath or affirmation.

(}0} The right to give sworn or unsworn testimony. The respondent may only be examined on sworn testimony. The respondent should be warned against self-incrimination as required by article 31, UCMJ. Failure to so warn the respondent shall not preclude consideration of the testimony by the BOI.

(11) The respondent or counsel may present oral or written argument, or both, on the matter to the Board.

(12) The respondent shall be provided with a copy of the record of the proceedings in the case and a copy of the findings and recommendations of the Board. In cases involving classified matter withheld in the interests of national security, any record or information to be provided the respondent will be edited prior : to delivery to him or her to remove classified material and preserve its integrity.

(13) The respondent may submit a statement in rebuttal to . the findings and recommendations of the BOI for consideration by CHNAVPERS and SECNAV.

(14) The respondent may appear in person, with or without counsel' at all open proceedings of the Board.

(15) Failure of the respondent to invoke any of these rights shall not be considered as a bar to the BOI proceedings, findings/ or recommendations.

g. Counsel

(1) Respondent is entitled to have appointed as counsel by the convening authority, a lawyer certified per article 27(b),UCMJ.

(2) Respondent may request military counsel of his or her choice provided the requested counsel is reasonably available.

(3) The determination as to whether individual counsel is reasonably available shall be made per the procedures set forth in section 0131 of JAGINST SS00.7C, "Manual of the Judge Advocate General" for determining the availability of Individual Military Counsel for courts-martial. Upon receipt at notice of the availability of the individual counsel, the respondent must elect between representation by appointed counsel and representation by individual counsel. A respondent may be represented in these proceedings by both appointed counsel and individual counsel only if the Convening Authority, in his or her sole discretion' approves a written request from the respondent for representation by both counsel; such written request must set forth in detail why representation by both counsel is essential to insure a fair hearing.

(4} Respondent may also engage civilian counsel at no expense to the government, in addition to, or in lieu of, military counsel. :

h. Waiver. Respondent may waive any of the aforementioned rights before the BOI convenes or during the proceedings. Failure, to appear, without good cause, at a hearing constitutes waiver of the right to be present at the hearing. Failure to respond after being afforded a reasonable opportunity to consult with counsel constitutes a waiver of the rights in paragraph 2f of this enclosure.

i. Witnesses

(1) witnesses whose testimony will add materially to the ,case shall be invited to appear to offer testimony before the Board f such witnesses are reasonably available.

(2) witnesses not within the immediate geographical area of the Board are considered not reasonably available, except as provided for in subparagraph (4).

(3) Statements or depositions shall be admitted and considered by BOI from witnesses not reasonably available to testify during a board proceeding.

(4) The convening authority shall request that a commanding officer make available, for personal appearance before a BOI, active duty or civilian witnesses under his or her jurisdiction whose personal appearance is essential to a fair determination, unless they:

(a) Are unavailable within the meaning of Military Rule of Evidence (M.R.E.) 804(a) or;

(b) Decline an invitation to testify before a Board. Civilian employees may be directed to appear by their supervisors. Military personnel can be ordered to appear by their commanding officer.

(5) Respondent will specify in his or her request for witnesses to the convening authority or, once proceedings have commenced, the BOI, the type of information the witness is expected to provide. Such a request shall contain the following matter

(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.

(c) An explanation as to why written or recorded testimony would not be sufficient to provide for a fair determination.

(6) Requests for witnesses may be denied if not requested in a timely manner.

(7) Witnesses not on active duty must appear voluntarily and at no expense to the government, except as provided for by subparagraph (9)

(8) The convening authority shall make all final decisions on the appearance of witnesses.

(9) If the convening authority determines that the personal appearance of a witness is necessary, he or she will authorize expenditure of funds for production of the witness only if the presiding officer after consultation with a judge advocate) or the lega1 advisor (if appointed) advises 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 the significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness, favors production of the witness. Factors to be considered in relation to the balancing test include but are not limited to, the cost of producing the witness the timing of the request for production of the witness, the potential delay in the proceeding that may be caused by producing the witness, or the likelihood of significant interference with military operational deployment, mission accomplishment' or essential training.

(10) If it is determined that the persona, testimony of a witness is required, the hearing will be postponed or continued, if necessary, to permit the attendance of the witness.

(11) The hearing shall be postponed or continued to provide the respondent with a reasonable opportunity to obtain a written statement from the witness if a witness requested by the respondent is unavailable in the following circumstances:

(a) When the presiding officer determines that the personal testimony of the witness is not required;

(b) When the commanding officer of a military witness determines that military necessity precludes the witness' attendance at the hearing; or

(c) When a civilian witness declines to attend the hearing.

j. Hearing. Hearings by BOIs must be conducted in a fair and impartial manner to ensure that the respondent has the opportunity to present his or her case. At the discretion of the convening authority, a BOI may be convened to hear the cases of multiple respondents.

(l) BOIs are not courts-martial and the rules of evidence do not apply.

12) Oral or written matter not admissible in a court of law may by accepted by BOIs,

(3) oral or written matter presented may be subject to reasonable restrictions as to authenticity, relevance, materiality, and competency as determined by the BOI.

(4) Except for closed sessions during which the board will deliberate on the evidence presented, the proceedings of the board should normally be open to the public at the discretion of. the convening authority. Once convened, the senior member may close the proceedings upon motion by either side upon good cause shown,

k. Decision of BOI. The hoard will make the following determination, by majority vote, based on the evidence presented at the hearing.

(1) A finding on each of the reasons for separation specified (note: where a reason for separation is based on an approved finding of guilty by a court-martial or a civilian criminal conviction, such a finding of guilty or criminal conviction shall be binding on the BOI; however, in all other cases, a finding on a reason for separation shall be based on a preponderance of the evidence, and

(2) One of the following:

(a) That the respondent is recommended for separation from the Naval Service for the specific reason or reasons provided in paragraph l (Separation for Cause) or paragraph 6 (Parenthood) of enclosure {3) supported by preponderance cf the evidence. Based on those reasons, the evidence presented, the overall record of service, and consistent with enclosure (5), the Board must ; recommend a characterization of service.

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(b) That none of the reasons specified are supported by sufficient evidence presented to warrant separation for cause and the case is, therefore, closed.

(3) The Board shall recommend separation by reason of unlawful drug involvement if it finds that preponderance of the evidence supports that finding under subparagraph 1b(2) of enclosure (3).

(4) The Board shall recommend separation for misconduct by reason of homosexual conduct if it finds that one or more of the circumstances requiring separation under subparagraph 1c of enclosure (3) is supported by a preponderance of the evidence.

(5) In the case of a retirement-eligible officer, if separation is recommended, the Board shall recommend whether the officer should be retired in the current grade or a lesser grade, The Board must recommend the grade in which the officer last served satisfactorily for a period of not less than 6 months.

l. Record of Proceedings. The Convening Authority shall make a separate record of proceedings for each respondent.

(l} It shall include: (l) a transcript of the BOI's proceedings, including the evidence of record, and (2) a report of the findings and recommendations of the Board. In all cases, the transcript shall be in summary form unless verbatim transcript is directed by the convening authority, CHNAVPERS or DC/S (M&RA).

(2) In addition, it shall include;

(a) The individual officer's service and background.

(b) Each of the specific reasons from enclosure (3) for which the officer is required to show cause for retention.

(c) Each of the acts, omissions, or traits alleged.

(d) The position taken by the respondent with respect to the allegations, reports, or other circumstances in question and the acts, omissions, or traits alleged.

(e) The findings on each of the reasons for separation specified.

Enclosure (8)

(b) That none of the reasons specified are supported by sufficient evidence presented to warrant separation for cause and the case is, therefore, closed.

(3) The Board shall recommend separation by reason of unlawful drug involvement if it finds that preponderance of the evidence supports that finding under subparagraph lbl2) of enclosure (3).

(4) The Board shall recommend separation for misconduct by reason of homosexual conduct if it finds that one or more of the circumstances requiring separation under subparagraph 1c of enclosure t31 is supported by a preponderance of the evidence.

(5) In the case of a retirement-eligible officer, if separation is recommended, the Board shall recommend whether the officer should be retired in the current grade or a lesser grade, The Board must recommend the grade in which the officer last served satisfactorily for a period of not less than 6 months.

1. Record of Proceedings. The Convening Authority shall make a separate record of proceedings for each respondent.

(l) It shall include: (l) a transcript of the BOI's proceedings, including the evidence of record, and (2) a report of the findings and recommendations of the Board. In all cases, the transcript shall be in summary form unless ˜ verbatim transcript is directed by the convening authority, CHNAVPERS or DCIS (M&RA).

(2) In addition, it shall include;

(a) The individual officer's service and background.

(b) Each of the specific reasons from enclosure (3) for which the officer is required to show cause for retention.

(c) Each of the acts, omissions, or traits alleged.

(d) The position taken by the respondent with respect to the allegations, reports, or other circumstances in question and the acts, omissions, or traits alleged.

(e) The findings on each of the reasons for separation specified.

Enclosure (8)

(f) The recommendations of the Board that the respondent be separated and receive a specific characterization of service, or, if retirement-eligible, that the officer be retired in the current grade or in a lesser grade per subparagraph 2k(5), or the finding of the Board that separation for cause is not warranted and that the case is closed.

(g) A copy of all documents and correspondence relating to the convening of the Board, e.g., witness requests.

(3) The BOT transcript shall be authenticated by the signature of the senior member of the board only, The report of the findings and recommendations shall be signed by all members of the board and by the counsel for respondent {or by the respondent himself or herself if counsel was not elected) immediately upon completion of the BOI.

(4) Any nonconcurring member(s) shall sign the report and submit separate minority report(s) which will include the extent of nonconcurrence with the Board report as to each finding and recommendation and the reasons therefor.

(5) The counsel for respondent (or respondent if no counsel was elected) shall be provided a copy of the record of proceedings and shall be provided an opportunity to submit written comments to CHNAVPERS or DC/S (M&RA) within 10 days of service. Such comments will be submitted via the respondent's chain of command, however, the respondent may submit a copy directly to CHNAVPERS or DC/S {M&RA). A certificate of service should be included with the record of proceedings verifying submission to respondent's counsel or respondent.

m. Action on the Record of Proceedings of the BOI. The record of proceedings shall be submitted via the convening authority to CHNAPERS or DC/S{M&RA), as appropriate, for termination of proceedings or review and endorsement prior to forwarding to the Secretary for final determination. This submission shall include any minority report and rebuttal or statement of the respondent. The record of proceedings of a BOI convened solely to determine the grade in which a retirement- eligible officer should be retired shall be forwarded directly to CHNAVPERS or DC/S(M&RA) for a forwarding endorsement to the Secretary, who will make the final determination of the grade in which an officer shall be retired. If a retirement-eligible officer who has not submitted a voluntary retirement request has

failed to show cause for retention, the BOI shall make recommendation concerning retirement grade as set forth in subparagraph 2k(5).

n. Action on the Report of the BOI

(1) The report of a BOI that recommends separation shall be delivered to the Secretary, with any desired recommendations of the CHNAVPERS or DC/S (M&RA), for final determination.

(2) If the BOI closes the case, all proceedings will be terminated.

(3) If the BOI recommends separation or retirement, SECNAV may:

(a) Direct retention;

(b) Direct separation of the respondent for the specified reasons, and a characterization of service not less favorable than that recommended by the BOI; or

(c) Direct retirement of the respondent in the highest grade satisfactorily held as determined by the Secretary.

SECTION FIVE

GLOSSARY OF WORDS AND PHRASES

The following words and phrases are frequently encountered and have special connotations in Military Law. This list is by no means complete and is designed solely as a ready reference for the meaning of certain words and phrases. Where it has been necessary to explain a word or phrase in the language of or in relation to a rule of law, no attempt has been made to set forth a definitive or comprehensive statement of such rule of law.

ABANDONED PROPERTY - property to which the owner has relinquished all right, title, claim, and possession with intention of not reclaiming it or resuming ownership, possession, or enjoyment.

ABET - to intentionally encourage or assist another in the commission of a crime.

ACCESSORY AFTER THE FACT - one who, knowing that an offense punishable by the UCMJ has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment.

ACCESSORY BEFORE THE FACT - one who counsels, commands, procures, or causes another to commit an offense – whether present or absent at the commission of the offense.

ACCUSED - one who is charged with an offense under the UCMJ.

ACCUSER - any person who signs and swears to charges; any person who directs that charges nominally be signed and sworn to by another; and any person who has an interest other than an official interest in the prosecution of the accused.

ACTIVE DUTY - the status of being in the active Federal service of any of the Armed Forces under a competent appointment or enlistment or pursuant to a competent muster, order, call, or induction.

ACTUAL KNOWLEDGE - a state wherein a person in fact knows of the existence of an order, regulation, fact, etc. in question.

ADDITIONAL CHARGES - new and separate charges preferred after others have been preferred against the same accused.

ADMISSION - a statement made by an accused which may admit part of an element, an element, or more than one element of an offense charged, but which falls short of a complete confession to every element of an offense charged.

AFFIDAVIT - a statement or declaration reduced to writing and confirmed by the party making it by an oath taken before a person who had authority to administer the oath.

AFFIRMATION - a solemn and formal external pledge, binding upon one's conscience, that the truth will be stated.

AIDER AND ABETTOR - one who shares the criminal intent or purpose of the perpetrator, and seeks to help him carry out his scheme, and, hence, is liable as a principal.

ALIBI - a defense that the accused could not have committed the offense alleged because he was somewhere else when the crime was committed.

ALLEGE - to assert or state in a pleading; to plead in a specification.

ALLEGATION - the assertion, declaration, or statement of a party to an action made in a pleading – setting out what he expects to prove.

ALL WRITS ACT - a Federal statute, 28 U.S.C. 1651(a) (1982), which empowers all courts established by Act of Congress, including the Court of Military Appeals, to issue such extraordinary writs as are necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

APPEAL - a complaint to a superior court of an injustice done or error committed by an inferior court whose judgment or decision the court above is called upon to correct or reverse.

APPELLATE REVIEW - the examination of the records of cases tried by courts-martial by proper reviewing authorities, including, in appropriate cases, the convening authority, GCMCA, the Court of Military Review, the Court of Military Appeals, the U.S. Supreme Court, and the Judge Advocate General.

APPREHENSION - the taking into custody of a person.

ARRAIGNMENT - the reading of the charges and specifications to the accused, or the waiver of their reading, coupled with the request that the accused plead thereto.

ARREST - a moral restraint, not intended as punishment, imposed upon a person by oral or written orders of competent authority limiting the person's liberty pending disposition of charges.

ARREST IN QUARTERS - a moral restraint limiting an officer's liberty, imposed as a nonjudicial punishment by a flag or general officer in command.

ARTICLE 39a SESSION - a session of a court-martial called by the military judge, either before or after assembly of the court, without the members of the court being present, to dispose of

matters not amounting to a trial of the accused's guilt or innocence.
ASPORTATION - a carrying away; felonious removal of goods.

ASSAULT - an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated.

ATTEMPT - an act, or acts, done with a specific intent to commit an offense under the UCMJ, amounting to more than mere preparation, and tending to effect the commission of such offense.

AUTHENTICITY - the quality of being genuine in character, which in the law of evidence refers to a piece of evidence actually being what it purports to be.

BAD-CONDUCT DISCHARGE - one of two types of punitive discharges that may be awarded an enlisted member; designed as a punishment for bad conduct; a separation under conditions other than honorable; may be awarded by a GCM or SPCM.

BATTERY - an unlawful, and intentional or culpably negligent application of bodily harm to the person of another by a material agency used directly or indirectly.

BEYOND A REASONABLE DOUBT - the degree of persuasion based upon proof such as to exclude not every hypothesis or possibility of innocence, but any fair and rational hypothesis except that of guilt; not an absolute or mathematical certainty but a moral certainty.

BODILY HARM - any physical injury to or offensive touching of the person of another, however slight.

BONA FIDE - in good faith.

BREACH OF THE PEACE - an unlawful disturbance of the public tranquility by an outward demonstration of a violent or turbulent nature.

BREAKING ARREST - going beyond the limits of arrest before being released by proper authority.

BURGLARY - the breaking and entering in the nighttime of the dwelling house of another with intent to commit murder, manslaughter, rape, carnal knowledge, larceny, wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, or assault.

BUSINESS ENTRY - any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, made in the regular course of any business, profession, occupation, or calling of any kind.

CAPTAIN'S MAST - the term applied, through tradition and usage in the Navy and Coast Guard, to nonjudicial punishment proceedings.

CAPITAL OFFENSE - an offense for which the maximum punishment includes the death penalty.

CARNAL KNOWLEDGE - an act of sexual intercourse with a female not the accused's wife and who has not attained the age of 16 years.

CHALLENGE - a formal objection to a member of a court or the military judge continuing as such in subsequent proceedings; either for cause, based on a fact or circumstance which has the effect of disqualifying the person challenged from further participation in the proceedings, or peremptorily, without grounds or basis. MJ cannot be preempted.

CHARGE - a formal statement of the article of the UCMJ which the accused is alleged to have violated.

CHARGE AND SPECIFICATION - a formal description in writing of the offense which the accused is alleged to have committed; each specification, together with the charge under which it is placed, constitutes a separate accusation.

CHIEF WARRANT OFFICER - a warrant officer of the Armed Forces who holds a commission or warrant in warrant officer grades W-2 through W-4.

CIRCUMSTANTIAL EVIDENCE - evidence which tends directly to prove or disprove not a fact in issue, but a fact or circumstance from which, either alone or in connection with other facts, a court may, according to the common experience of mankind, reasonably infer the existence or nonexistence of another fact which is in issue; sometimes called indirect evidence.

CLEMENCY - discretionary action by proper authority to reduce the severity of a punishment.

COLLATERAL ATTACK - an attempt to impeach or challenge the integrity of a court judgment in a proceeding other than that in which the judgment was rendered and outside the normal chain of appellate review.

COMMAND - (1) the authority which a commander in the military service lawfully exercises over his subordinates by virtue of rank or assignment; (2) a unit or units, an organization, or an area under the authority of one individual; (3) an order given by one person to another who, because of the relationship of the parties, is under an obligation or sense of duty to obey the order.

COMMANDING OFFICER - a commissioned officer in command of a unit or units, an organization, or an area of the Armed Forces.

COMMISSIONED OFFICER - an officer of the Naval Service or Coast Guard who holds a commission in an officer grade, Chief Warrant Officer (W-2) and above.

COMMON TRIAL - a trial in which two or more persons are charged with the commission of an offense which, although not jointly committed, was committed at the same time and place and is provable by the same evidence.

COMPETENCY - the presence of those characteristics, or the absence of those disabilities (i.e., exclusionary rules), which renders a particular item of evidence fit and qualified to be presented in court.

CONCURRENT JURISDICTION - jurisdiction which is possessed over the same parties or subject matter at the same time by two or more separate tribunals.

CONCURRENT SERVICE OF PUNISHMENTS - two or more punishments being served at the same time.

CONFESSION - a statement made by an accused which admits each and every element of an offense charged.

CONFINEMENT - physical restraint, imposed by either oral or written orders of competent authority, depriving a person of his freedom.

CONSECUTIVE SERVICE OF PUNISHMENTS - two or more punishments being served in series, one after the other.

CONSPIRACY - a combination of two or more persons who have agreed to accomplish, by concerted action, an unlawful purpose or some purpose not in itself unlawful by unlawful means, and the doing of some act by one or more of the conspirators to effect the object of that agreement.

CONSTRUCTIVE ENLISTMENT - a valid enlistment arising where the initial enlistment was void but the enlistee submits voluntarily to military authority, is mentally competent and at least 17 years old, receives pay, and performs duties.

CONSTRUCTIVE KNOWLEDGE - a state wherein a person is inferred to have knowledge of an order, regulation, fact, etc. as a result of having a reasonable opportunity to gain such knowledge (e.g., presence in an area where the relevant information was commonly available).

CONTEMPT - in Military Law, the use of any menacing word, sign, or gesture in the presence of the court, or the disturbance of its proceedings by any riot or disorder.

CONTRABAND - items, the possession of which is in and of itself illegal.

CONVENING AUTHORITY - the officer having authority to create a court-martial and who created the court-martial in question, or his successor in command.

CONVENING ORDER - the document by which a court-martial is created, which specifies the type of court, details the members, and, when appropriate, the specific authority by which the

court is created.

CORPUS DELICTI - the body of a crime; facts or circumstances showing that the crime alleged has been committed by someone.

COUNSELING - directly or indirectly recommending or advising another to commit an offense.

COURT-MARTIAL - a military court, convened under authority of government and the UCMJ for trying and punishing offenses committed by members of the Armed Forces and other persons subject to Military Law.

COURT OF INQUIRY - a formal administrative fact-finding body convened under the authority of Article 135, UCMJ, whose function it is to search out, develop, analyze, and record all available information relative to the matter under investigation.

COURT OF MILITARY APPEALS - the highest appellate court established under the UCMJ to review the records of certain trials by court-martial, consisting of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years.

COURT OF MILITARY REVIEW - an intermediate appellate court established by each Judge Advocate General to review the record of certain trials by court-martial – formerly known as Board of Review.

CREDIBILITY OF A WITNESS - his worthiness of belief.

CULPABLE - deserving blame; involving the breach of a legal duty or the commission of a fault.

CULPABLE NEGLIGENCE - Culpable negligence is a degree of negligence greater than simple negligence. This form of negligence is also referred to as recklessness and arises whenever an accused recognizes a substantial unreasonable risk yet consciously disregards that risk.

CUSTODIAL INTERROGATION - questioning initiated by law enforcement officers or others in authority after a suspect has been taken into custody or otherwise deprived of his freedom of action in any significant way.

CUSTODY - that restraint of free movement which is imposed by lawful apprehension.

CUSTOM - a practice which fulfills the following conditions: (a) it must be long continued; (b) it must be certain or uniform; (c) it must be compulsory; (d) it must be consistent; (e) it must be general; (f) it must be known; (g) it must not be in opposition to the terms and provisions of a statute or lawful regulation or order.

DAMAGE - any physical injury to property.

DANGEROUS WEAPON - a weapon used in such a manner that it is likely to produce death or grievous bodily harm.

DECEIVE - to mislead, trick, cheat, or to cause one to believe as true that which is false.

DEFERRAL - discretionary action by proper authority, postponing the running of the confinement portion of a sentence, together with a lack of any post-trial restraint.

DEFRAUD - to obtain, through a misrepresentation, an article or thing of value and to apply it to one's own benefit or to the use and benefit of another – either permanently or temporarily.

DEMONSTRATIVE EVIDENCE - anything (such as charts, maps, photographs, models, drawings, etc.) used to help construct a mental picture of a location or object which is not readily available for introduction into evidence.

DEPOSITION - the testimony of a witness taken out of court, reduced to writing, under oath or affirmation, before a person empowered to administer oaths, in answer to interrogatories (questions) and cross-interrogatories submitted by the parties desiring the deposition and the opposite party, or based on oral examination by counsel for accused and the prosecution.

DERELICTION IN THE PERFORMANCE OF DUTY - willfully or negligently failing to perform assigned duties or performing them in a culpably inefficient manner.

DESIGN - on purpose, intentionally, or according to plan and not merely through carelessness or by accident; specifically intended.

DESTROY - sufficient injury to render property useless for the purpose for which it was intended, not necessarily amounting to complete demolition or annihilation.

DIRECT EVIDENCE - evidence which tends directly to prove or disprove a fact in issue.

DISCOVERY - the right to examine information possessed by the opposing side before or during trial.

DISHONORABLE DISCHARGE - the most severe punitive discharge; reserved for those warrant officers (W-1) and enlisted members who should be separated under conditions of dishonor, after having been convicted of serious offenses of a civil or military nature warranting severe punishment; it may be awarded only by a GCM.

DISORDERLY CONDUCT - behavior of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby.

DISRESPECT - words, acts, or omissions that are synonymous with contempt and amount to behavior or language which detracts from the respect due the authority and person of a superior.

DOCUMENTARY EVIDENCE - evidence supplied by writings and documents.
DOMINION - control of property; possession of property with the ability to exercise control over it.

DRUNKENNESS - (1) as an offense under the UCMJ, intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties; (2) as a defense in rebuttal of the existence of a criminal element involving premeditation, specific intent, or knowledge, intoxication which amounts to a loss of reason preventing the accused from harboring the requisite premeditation, specific intent, or knowledge; (3) as a defense to general intent offenses, involuntary intoxication which amounts to a loss of reason preventing the accused from knowing the nature of his act or the natural and probable consequences thereof.

DUE PROCESS - a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights; such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe.

DURESS - unlawful constraint on a person whereby he is forced to do some act that he otherwise would not have done.

DYING DECLARATION - a statement by a victim, concerning the circumstances surrounding his death, made while in extremis and while under a sense of impending death and without hope of recovery.

ELEMENTS - the essential ingredients of an offense which are to be proved at the trial; the acts or omissions which form the basis of any particular offense.

ENTRAPMENT - a defense available when actions of an agent of the government intentionally instill in the mind of the accused a disposition to commit a criminal offense, when the accused has no notion, predisposition, or intent to commit the offense.

ERROR - a failure to comply with the law in some way at some stage of the proceedings.

EVIDENCE - any species of proof, or probative matter, legally presented at trial, through the medium of witnesses, records, documents, concrete objects, demonstrations, etc., for the purpose of inducing belief in the minds of the triers of fact.

EXCULPATORY - anything that would exonerate a person of wrongdoing.

EXECUTION OF HIS OFFICE - engaging in any act or service required or authorized to be done by statute, regulation, the order of a superior, or military usage.

EX POST FACTO LAW - a law passed after the occurrence of a fact or commission of an act which makes the act punishable, imposes additional punishment, or changes the rules of

evidence to the disadvantage of a party.

EXTRA MILITARY INSTRUCTION - extra tasks assigned to one exhibiting behavioral or performance deficiencies for the purpose of correcting those deficiencies through the performance of the assigned tasks; also known as Additional Military Duty or Additional Military Instruction.

FEIGN - to misrepresent by a false appearance or statement, to pretend, to simulate or to falsify.

FINE - a type of court-martial punishment in the nature of a pecuniary judgment against an accused, which, when ordered executed, makes him immediately liable to the United States for the entire amount of money specified.

FORMER JEOPARDY - a defense in bar of trial that no person shall be tried for the same offense by the same sovereign a second time without his consent; also known as Double Jeopardy.

FORMER PUNISHMENT - a defense in bar of trial that no person may be tried by court-martial for a minor offense for which punishment under Articles 13 or 15, UCMJ, has been imposed.

FORMER TESTIMONY - testimony of a witness given in a civil or military court at a former trial of the accused, or given at a formal pretrial investigation of an allegation against the accused, in which the issues were substantially the same.

FORFEITURE OF PAY - a type of punishment depriving the accused of all or part of his pay as it accrues.

GRIEVOUS BODILY HARM - a serious bodily injury; does not include minor injuries (such as a black eye or a bloody nose) but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs and other serious bodily injuries.

HABEAS CORPUS - "You have the body"; an order from a court of competent jurisdiction which requires the custodian of a prisoner to appear before the court to show cause why the prisoner is confined or detained.

HARMLESS- an error of law which does not materially prejudice the substantial rights of the accused.

HAZARD A VESSEL - to put a vessel in danger of damage or loss.

HEARSAY - an assertive statement, or conduct, which is offered in evidence to prove the truth of the assertion, but which was not made by the declarant while a witness before the court in the hearing in which it is offered.

IN CONCERT WITH - together with, in accordance with a design or plan, whether or not such design or plan was preconceived.

INCAPACITATION - the physical state of being unfit or unable to perform properly.

INCULPATORY - anything that implicates a person in a wrongdoing.

INDECENT - an offense to common propriety; offending against modesty or delicacy; grossly vulgar, or obscene.

INFERENCE - a fact deduced from another fact or facts shown by the state of the evidence.

INSANITY - *see* MENTAL CAPACITY and MENTAL RESPONSIBILITY, *infra*.

INSPECTION - an official examination of persons or property to determine the fitness or readiness of a person, organization, or equipment, not made with a view to any criminal action.

INTENTIONALLY - deliberately and on purpose; through design, or according to plan, and not merely through carelessness or by accident.

IPSO FACTO - by the very fact itself.

JOINT OFFENSE - an offense committed by two or more persons acting together in pursuance of a common intent.

JOINT TRIAL - the trial of two or more persons charged with committing a joint offense.

JURISDICTION - the power of a court to hear and decide a case and to award an appropriate punishment.

KNOWINGLY - having actual knowledge; consciously, intelligently.

LASCIVIOUS - tending to excite lust; obscene; relating to sexual impurity; tending to deprave the morals with respect to sexual relations.

LESSER INCLUDED OFFENSE - an offense necessarily included in the offense charged; an offense containing some but not all of the elements of the offense charged, so that if one or more of the elements of the offense charged is not proved, the evidence may still support a finding of guilty of the included offense.

LEWD - lustful or lecherous; incontinence carried on in a wanton manner.

LOST PROPERTY - property which the owner has involuntarily parted with by accident, neglect, or forgetfulness and does not know where to find or recover.

MATTER IN AGGRAVATION - any circumstances attending the commission of a crime which increases the enormity of the crime.

MATTER IN EXTENUATION - any circumstances serving to explain the commission of the offense, including the reasons that actuated the accused, but not extending to a legal justification.

MATTER IN MITIGATION - any circumstance having for its purpose the lessening of the punishment to be awarded by the court and the furnishing of grounds for a recommendation of clemency.

MENTAL CAPACITY - the ability of the accused at the time of trial to understand the nature of the proceedings against him and to conduct or cooperate intelligently in his defense.

MENTAL RESPONSIBILITY - the ability of the accused at the time of commission of an offense to appreciate the nature and quality or the wrongfulness of his or her acts.

MILITARY DUE PROCESS - due process under protections and rights granted military personnel by the Constitution or laws enacted by Congress.

MILITARY JUDGE - a commissioned officer, certified as such by the respective Judge Advocates General, who presides over all open sessions of the court-martial to which he is detailed.

MISLAID PROPERTY - property which the owner has voluntarily put, for temporary purposes, in a place afterwards forgotten or not easily found.

MISTRIAL - discretionary action of the military judge, or the president of a special court-martial without a military judge, in withdrawing the charges from the court where such action appears manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the trial.

MITIGATION - action by proper authority reducing punishment awarded at NJP or by court-martial.

MORAL TURPITUDE - an act of baseness, vileness, or depravity in private or social duties, which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

MOTION TO DISMISS - a motion raising any defense or objection in bar of trial.

MOTION FOR APPROPRIATE RELIEF - a motion to cure a defect of form or substance which impedes the accused in properly preparing for trial or conducting his defense.

MOTION TO SEVER - a motion by one or more of several co-accused that he be tried separately from the other or others.

NEGLIGENCE - unintentional conduct which falls below the standard established by law for the

protection of others against unreasonable risk of harm. The failure of a person to exercise the care that a reasonably prudent person would exercise under similar circumstances; something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would, or would not, do.

NONJUDICIAL PUNISHMENT - punishment imposed under Article 15, UCMJ, for minor offenses, without the intervention of a court-martial.

NONPUNITIVE MEASURES - those leadership techniques, not a form of informal punishment, which may be used to further the efficiency of a command.

OATH - a formal external pledge, coupled with an appeal to the Supreme Being, that the truth will be stated.

OBJECTION - a declaration to the effect that the particular matter or thing under consideration is not done or admitted with the consent of the opposing party, but is by him considered improper or illegal, and referring the question of its propriety or legality to the court.

OFFICE HOURS - the term applied, through tradition and usage in the Marine Corps, to nonjudicial punishment proceedings.

OFFICER - any commissioned or warrant officer of the Armed Forces, Warrant Officer (W-1) and above.

OFFICER IN CHARGE - a member of the Armed Forces designated as such by appropriate authority.

OFFICIAL RECORD - a writing made as a record of a fact or event, whether the writing is in a regular series of records or consists of a report, finding, or certificate and made by any person within the scope of his official duties provided those duties included a duty to know, or to ascertain through appropriate and trustworthy channels of information, the truth of the fact or event, and to record such fact or event.

ON DUTY - in the exercise of duties of routine or detail, in garrison, at a station, or in the field: does not relate to those periods when, no duty being required of them by order or regulations, military personnel occupy the status of leisure known as "off duty" or "on liberty."

OPERATING A VEHICLE - driving or guiding a vehicle while in motion, either in person or through the agency of another, or setting its motive power in action or the manipulation of the controls so as to cause the particular vehicle to move.

OPINION OF THE COURT - a statement by a court of the decision reached in a particular case, expounding the law as applied to the case, and detailing the reasons upon which the decision is based.

ORAL EVIDENCE - the sworn testimony of a witness received at trial.

OWNER - a person who has a right to possession of property which is superior to that of the accused, in the light of all conflicting interests therein.

PAST RECOLLECTION RECORDED - memoranda prepared by a witness, or read by him and found to be correct, reciting facts or events which represent his past knowledge possessed at a time when his recollection was reasonably fresh as to the facts or events recorded.

PER CURIAM - "by the court"; a phrase used in the report of the opinion of a court to distinguish an opinion of the whole court from an opinion written by any one judge.

PER SE - taken alone; in and of itself; inherently.

PERPETRATOR - one who actually commits the crime, either by his own hand, by an animate or inanimate agency, or by an innocent agent.

PLEADING - the written formal indictment by which an accused is charged with an offense; in Military Law, the charges and specifications.

POSSESSION - actual physical control and custody over an item of property.

PREFERRAL OF CHARGES - the formal accusation against an accused by an accuser signing and swearing to the charges and specifications.

PREJUDICIAL ERROR - an error of law which materially affects the substantial rights of the accused and requires corrective action.

PRESUMPTION - a fact which the law requires the court to deduce from another fact or facts shown by the state of the evidence unless that fact is overcome by other evidence before the court.

PRETRIAL INVESTIGATION - an investigation pursuant to Article 32, UCMJ, that is required before convening a GCM, unless waived by the accused.

PRIMA FACIE CASE - introduction of substantial evidence which, together with all proper inferences to be drawn therefrom and all applicable presumptions, reasonably tends to establish every essential element of an offense charged or included in any specification.

PRINCIPAL - (1) one who aids, abets, counsels, commands, or procures another to commit an offense which is subsequently perpetrated in consequence of such counsel, command or procuring, whether he is present or absent at the commission of the offense; (2) the perpetrator.

PROBABLE CAUSE - (1) for apprehension, a reasonable grounds for believing that an offense has been committed and that the person apprehended committed it; (2) for pretrial restraint, reasonable grounds for believing that an offense was committed by the person being restrained; and (3) for search, a reasonable grounds for believing that items connected with criminal activity are located in the place or on the person to be searched.

PROVOKING - tending to incite, irritate, or enrage another.

PROXIMATE CAUSE - that which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces a result, and without which the result would not have occurred.

PROXIMATE RESULT - a reasonably foreseeable result ordinarily following from the lack of care complained of, unbroken by any independent cause.

PUNITIVE ARTICLES - Articles 78 and 80 through 134, UCMJ, which generally describe various crimes and offenses and state how they may be punished.

PUNITIVE DISCHARGE - a discharge imposed as punishment by a court-martial, either a bad-conduct discharge or a dishonorable discharge.

RAPE - an act of sexual intercourse with a female, not the accused's wife, done by force and without her consent.

REAL EVIDENCE - any physical object offered into evidence at trial.

RECKLESSNESS - an act or omission exhibiting a culpable disregard for the foreseeable consequences of that act or omission; a degree of carelessness greater than simple negligence.

RECONSIDERATION - the action of the convening authority in returning the record of trial to the court for renewed consideration of a ruling of the court dismissing a specification on motion, where the ruling of the court does not amount to a finding of not guilty.

REFERRAL OF CHARGES - the action of a convening authority in directing that a particular case be tried by a particular court-martial previously created.

RELEVANCY - that quality of evidence which renders it properly applicable in proving or disproving any matter in issue; a tendency in logic to prove or disprove a fact which is in issue in the case.

REMEDIAL ACTION - action taken by proper reviewing authorities to correct an error or errors in the proceedings or to offset the adverse impact of an error.

REMISSION - action by proper authority interrupting the execution of a punishment and canceling out the punishment remaining to be served, while not restoring any right, privilege, or

property already affected by the executed portion of the punishment.

REPROACHFUL - censuring, blaming, discrediting, or disgracing of another's life or character.

RESISTING APPREHENSION - an active resistance to the restraint attempted to be imposed by the person apprehending.

RESTRICTION - moral restraint imposed as punishment, or pretrial restraint upon a person by oral or written orders limiting him to specified areas of a military command, with the further provision that he will participate in all military duties and activities of his organization while under such restriction.

REVISION - a procedure to correct an apparent error or omission or improper or inconsistent action of a court-martial with respect to a finding or a sentence.

SALE - an actual or constructive delivery of possession of property in return for a valuable consideration and the passing of such title as the seller may possess, whatever that title may be.

SEARCH - a quest for incriminating evidence.

SEIZURE - to take possession of forcibly, to grasp, to snatch, or to put into possession.

SELF-DEFENSE - the use of reasonable force to defend oneself against immediate bodily harm threatened by the unlawful act of another.

SELF-INCRIMINATION - the giving of evidence against oneself which tends to establish guilt of an offense.

SET ASIDE - action by proper authority voiding the proceedings and the punishment awarded and restoring all rights, privileges, and property lost by virtue of the punishment imposed.

SIMPLE NEGLIGENCE - the absence of due care (i.e., an act or omission by a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances).

SOLICITATION - any statement, oral or written, or any other act or conduct, either directly or through others, which may reasonably be construed as a serious request or advice to commit a criminal offense.

SPECIFICATION - a formal statement of specific acts and circumstances relied upon as constituting the offense charged.

SPONTANEOUS EXCLAMATION - an utterance concerning the circumstances of a startling event made by a person while he was in such a condition of excitement, shock, or surprise,

caused by his participation in or observation of the event, as to warrant a reasonable inference that he made the utterance as an impulsive and instinctive outcome of the event, and not as a result of deliberation or design.

STATUTE OF LIMITATIONS - the rule of law which, unless waived, establishes the time within which an accused must be charged with an offense to be tried successfully.

STRAGGLE - to wander away, to rove, to stray, to become separated from, or to lag or linger behind.

STRIKE - to deliver a blow with anything by which a blow can be given.

SUBPOENA - a formal written instrument or legal process that serves to summon a witness to appear before a certain tribunal and to give testimony.

SUBPOENA DUCES TECUM - a formal written instrument or legal process which commands a witness who has in his possession or control some document or evidentiary object that is pertinent to the issues of a pending controversy to produce it before a certain tribunal.

SUBSCRIBE - to write one's signature on a written instrument as an indication of consent, approval, or attestation.

SUPERIOR COMMISSIONED OFFICER - a commissioned officer who is superior in rank or command.

SUPERVISORY AUTHORITY - an officer exercising general court-martial jurisdiction who acts as reviewing authority for SCM and SPCM records after the convening authority has acted.

SUSPENSION - action by proper authority to withhold the execution of a punishment for a probationary period pending good behavior on the part of the accused.

THREAT - an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future.

TOLL - to suspend or interrupt the running of.

USAGE - a general habit, mode or course of procedure.

UTTER - to make any use of, or attempt to make any use of, an instrument known to be false by representing, by words or actions, that it is genuine.

VERBATIM - in the exact words; word-for-word.

WANTON - behavior of such a highly dangerous and inexcusable character as to exhibit a callous indifference or total disregard for the probable consequences to the personal safety or

property of other persons; heedlessness.

WARRANT OFFICER - an officer of the Armed Forces who holds a commission or warrant in a warrant officer grade, paygrades W-1 through W-4.

WILLFUL - deliberate, voluntary, and intentional, as distinguished from acts committed through inadvertence, accident, or ordinary negligence.

WRONGFUL - contrary to law, regulation, lawful order or custom.

SECTION SIX

COMMON ABBREVIATIONS USED IN MILITARY LAW

AAF	Accessory after the fact
ABA CPR	American Bar Association Code of Professional Responsibility
ABA Model Rules	American Bar Association Model Rules of Professional Conduct
ABF	Accessory before the fact
ACC	Accused
ADC	Assistant Defense Counsel
ALMAR	General message from the Commandant of the Marine Corps to all Marine Corps activities
ALNAV	General message from the Secretary of the Navy to all naval activities
ART.	Article, Uniform Code of Military Justice
ATC	Assistant Trial Counsel
BCD	Bad-Conduct Discharge
BOR	Board of Review
BW	Confinement on Bread and Water
CA	Convening Authority
CC	Correctional Custody
CDO	Command Duty Officer
CG	Commanding General; Coast Guard

CH	Charge
CHNAVPERS	Chief of Naval Personnel
CID	Criminal Investigations Division
CAAF	Court of Appeals for the Armed Forces
CMC	Commandant of the Marine Corps
CMO	Court-Martial Order
CMR	Court-Martial Reports
CNO	Chief of Naval Operations
CO	Commanding Officer
CONF	Confinement
CPO	Chief Petty Officer
CWO	Chief Warrant Officer
DA PAM	Department of the Army Pamphlet
DC	Defense Counsel
DD	Dishonorable Discharge
DIG. OPS.	Digest of Opinions of the Judge Advocates General of the Armed Forces
DIMRATS	Diminished Rations
DoD	Department of Defense
ED	Extra Duty
EMI	Extra Military Instruction
E & M	Extenuation and Mitigation

FACA	Federal Assimilative Crimes Act
FOIA	Freedom of Information Act
FORF; FF	Forfeiture
Fed.R.Crim.P.	Federal Rules of Criminal Procedure
GCM	General Court-Martial
HL w/o C	Hard Labor without Confinement
IC	Individual Counsel
IMC	Individual Military Counsel
INST	Instruction
IO	Investigation Officer
IRO	Initial Review Officer
JA	Judge Advocate
JAG	Judge Advocate General
JAGC	Judge Advocate General's Corps
JAG Manual; JAGMAN	Manual of the Judge Advocate General of the Navy
LIO	Lesser Included Offenses
LO	Legal Officer
LOAC	Law of Armed Conflict
LOD	Line of Duty
LSSO	Legal Services Support Office (Marine Corps)
MCM	Manual for Courts-Martial, United States, 1984

MFNG	Motion for a finding of not guilty
MILPERSMAN	Military Personnel Manual
MJ	Military Judge; Military Justice Reporter
MP	Military Police
MRE Mil.R.Evid.	Military Rules of Evidence
NAVY REGS	U.S. Naval Regulations, 1990
N/A	Not Applicable
NMPC	Naval Military Personnel Command
NCO	Noncommissioned Officer
NCIS	Naval Criminal Investigative Service
NG	Not Guilty
NMCCA	U.S. Navy-Marine Corps Court of Criminal Appeals
NPLOC	Nonpunitive Letter of Censure
NJP	Nonjudicial Punishment
NLSO	Naval Legal Service Office
NPM	Nonpunitive Measures
OEGCMJ	Officer Exercising General Court-Martial Jurisdiction
OESPCMJ	Officer Exercising Special Court-Martial Jurisdiction
OINC; OIC	Officer in Charge
OJAG	Office of the Judge Advocate General
OOD	Officer of the Deck/Day

OPNAV	Office of the Chief of Naval Operations
OTH	Discharge Under Other Than Honorable Conditions
PCS	Permanent Change of Station
PIO	Preliminary Inquiry Officer
PO	Petty Officer
PTA	Pretrial Agreement
PTI	Pretrial Investigation
PTIO	Pretrial Investigating Officer
R.C.M.	Rules for Court-Martial
REST	Restriction
RIR	Reduction in Rate
SCM	Summary Court-Martial
SECNAV	Secretary of the Navy
SJA	Staff Judge Advocate
S/L	Statute of Limitations
SLO	Staff Legal Officer
SOFA	Status of Forces Agreement
SNCO	Staff Noncommissioned Officer
SP	Shore Patrol
SPCM	Special Court-Martial
SPEC.	Specification
SRB	Service Record Book

TAD	Temporary Additional Duty
TC	Trial Counsel
UA	Unauthorized Absence
UCMJ	Uniform Code of Military Justice
UPB	Unit Punishment Book
USC	United States Code
USCA	United States Code Annotated
U.S.C.M.A.	United States Court of Military Appeals
VA	Veterans Administration
WO	Warrant Officer
XO	Executive Officer

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